

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CITY OF BANGOR,)	
)	
Plaintiff,)	
v.)	Civil No. 02-183-B-S
)	
CITIZENS COMMUNICATIONS)	
COMPANY,)	
)	
Defendant/Third-party)	
Plaintiff,)	
v.)	
)	
NORTHWESTERN GROWTH)	
CORPORATION, et al.)	
)	
Third-party Defendants)	

**RECOMMENDED DECISION ON
MOTION TO DISMISS FILED BY THIRD-PARTY DEFENDANT
NORTHWESTERN GROWTH CORPORATION**

This is a civil action commenced by the City of Bangor against Citizens Communications Company to recover response costs and other relief related to the City’s environmental remediation effort at and in the vicinity of a city-owned parcel on which Citizens formerly operated a manufactured gas plant. In response to the City’s claims, Citizens filed numerous third-party complaints against certain predecessor operators of the gas plant and their successors in interest. According to Citizens’ third-party complaint, Northwestern Growth Corporation (NGC) is one such successor entity. NGC denies the allegation and moves to dismiss the third-party complaint on the basis of a lack of personal jurisdiction. **I RECOMMEND** that the Court **GRANT** the motion.

The Jurisdictional Standard

Congress has endowed the United States District Courts with jurisdiction over all controversies arising under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9613(b), without regard to the citizenship of the parties, *id.* § 9613(e). Congress did not provide, however, for private nationwide service of process except in CERCLA cases commenced by the United States. American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586, 589 (9th Cir. 1996) (“[Section] 9613(e) authorizes nationwide service of process only in actions by the United States; it does not apply in private actions.”); Steege Corp. v. Ravenal, 830 F.Supp. 42, 50 (D. Mass. 1993) (“As highlighted by [the existence of subsection (e)], CERCLA's provision for nationwide service is only made applicable to suits brought on behalf of the United States, and not on behalf of private litigants.”). Thus, in order for the District Court to properly exercise in personam jurisdiction over NGC, a citizen of South Dakota, Citizens must demonstrate that its service of NGC satisfied Rule 4(k) of the Federal Rules of Civil Procedure, a rule that sets territorial limits on effective service. Pursuant to Rule 4(k)(1)(A), service of a summons is effective to establish this Court’s jurisdiction over a party if service would have been sufficient to subject that party to the jurisdiction of a Maine court of general jurisdiction, which depends upon an application of Maine’s Long Arm Statute, 14 M.R.S.A. § 704-A(1). See Richards v. Tsunami Softgoods, Inc., 239 F. Supp. 2d 80, 82 (D. Me. 2003).

Maine’s Long-Arm Statute permits jurisdiction over non-resident defendants to the extent permitted by the due process clause of the United States Constitution. 14 M.R.S.A. § 704(A). When facing a motion to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2), the plaintiff bears the burden of establishing that personal jurisdiction is

proper. United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 618 (1st Cir. 2001). When an evidentiary hearing is not held to determine whether personal jurisdiction exists, the plaintiff must make a prima facie showing of jurisdiction by “citing to specific evidence in the record that, ‘if credited, is enough to support findings of all facts essential to personal jurisdiction.’” Snell v. Bob Fisher Enter., Inc., 115 F.Supp.2d 17, 20 (D. Me. 2000) (quoting Boit v. Gar-Tec Products, 967 F.2d 671, 675 (1st Cir. 1992)). “To defeat a motion to dismiss when the court uses this method the plaintiff must make the showing as to every fact required to satisfy ‘both the forum’s long-arm statute and the due process clause of the Constitution.’” Boit v. Gar-Tec Products, 967 F.2d 671, 675 (1st Cir. 1992) (quoting U.S.S. Yachts, Inc. v. Ocean Yachts, Inc., 894 F.2d 9, 11 (1st Cir.1990)). When determining whether the plaintiff has made the requisite prima facie showing, the court considers the pleadings, affidavits, and exhibits filed by the parties. Snell, 115 F.Supp.2d at 20. For the purposes of such a review, plaintiff’s properly supported proffers of evidence are accepted as true and disputed facts are viewed in a light favorable to the plaintiff, however unsupported allegations in the pleadings need not be credited. Id.

“In determining whether a prima facie showing has been made, the district court is not acting as a factfinder. It accepts properly supported proffers of evidence by a plaintiff as true.” Boit, 967 F.2d at 675. In this instance, Citizens asserts that personal jurisdiction exists over NGC because NGC is a successor of another corporation over which jurisdiction would have existed and this successor status constitutes sufficient minimum contacts to support the exercise of jurisdiction because the jurisdictional contacts of the predecessor serve as the jurisdictional contacts of the successor. (Citizens’ Objection, Docket No. 112, at 3.) There is no dispute regarding the facts supporting jurisdiction over the original corporation, NAUCC. According to

the Courts of Appeals in the Fourth and Tenth Circuits, Citizens is correct that this Court can exercise personal jurisdiction over a corporate successor based exclusively on its predecessor's contacts with the forum, but only if the forum law provides that the successor would be held liable for the actions of its predecessor. Williams v. Bowman Livestock Equip. Co., 927 F.2d 1128, 1132 (10th Cir. 1991); City of Richmond v. Madison Mgmt. Group, Inc., 918 F.2d 438, 454 (4th Cir. 1990) (citing cases). This stands to reason, as we are concerned here with the reach of the Maine Long Arm Statute, which imposes the territorial limit on service of process for purposes of Citizens' third-party claim.

The Evidence

NGC does not dispute, and in some cases puts forth, the following facts concerning its successor status. NGC is a South Dakota corporation, first incorporated in 1994. NGC does not have any offices, employees, mailing addresses, bank accounts, telephone numbers, or real estate in Maine. NGC is not registered to do business in Maine and has never conducted or solicited business in Maine. In or about 1995 NGC acquired certain assets of Synergy Group, Inc. Those assets did not include any facilities, real estate, or other assets in Maine. Traveling backward through time, in or about 1986, Synergy Group, Inc., had acquired substantially all of the assets of North American Utility Construction Corp. (NAUCC). In or about 1978, NAUCC had sold the subject manufactured gas plant to the City of Bangor. NAUCC had purchased the plant in 1963 from Citizens. Between 1963 and 1978, NAUCC owned and/or operated the plant, which, according to the City of Bangor, caused the release and disposal of hazardous substances, including tar and tar-laden wastewater, at the plant site and into a sewer that drained into the Penobscot River. Based on these facts, Citizens contends that a prima facie showing is made out that NGC is a direct corporate successor of NAUCC.

Discussion

Citizens invokes the Court's jurisdiction over NGC based exclusively on the forum contacts of entities from which NGC purchased assets. Maine law does not subscribe to the theory that asset sales automatically convey liabilities. Dir. of Bureau of Labor Standards v. Diamond Brands, 588 A.2d 734, 736 (Me. 1991) (applying the "established common law rule [that] a corporation that purchases the assets of another corporation in a bona fide, arm's-length transaction is not liable for the debts or liabilities of the transferor corporation"). Because the facts presented by Citizens are not sufficient to support a finding that NGC is responsible for the liabilities of North American pursuant to Maine common law, the Maine Long Arm Statute does not reach NGC. Thus, regardless of the fact that this Court would have jurisdiction to resolve a CERCLA claim against a South Dakota resident and regardless of whether successor liability might extend to NGC under CERCLA, service of process has not complied with Maine's statutory requisites. NGC's motion to dismiss should be granted, without prejudice.¹

Conclusion

For the foregoing reasons, I recommend that the Court **GRANT** Northwestern Growth Corporation's Motion to Dismiss (Docket No. 86), without prejudice.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

¹ Citizens might bring a CERCLA claim against NGC in another federal district at a later date.

August 26, 2003

Margaret J. Kravchuk
United States Magistrate Judge

COMPLEX

**U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 1:02-cv-00183-GZS
Internal Use Only**

BANGOR, CITY OF v. CITIZENS COMMUNICA

Assigned to: Judge GEORGE Z. SINGAL

Referred to:

Demand: \$0

Lead Docket: None

Related Cases: None

Case in other court: None

Cause: 42:6901 Environmental Cleanup Expenses

Date Filed: 11/22/02

Jury Demand: Defendant

Nature of Suit: 893 Environmental
Matters

Jurisdiction: Federal Question

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V.

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V.

Counter Defendant

BANGOR, CITY OF

Counter Claimant

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ATTORNEY TO BE NOTICED

JAY VARON
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Counter Defendant

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Counter Claimant

**S E MACMILLAN COMPANY
INC**

V.

Counter Defendant

BANGOR, CITY OF

Counter Claimant

**HONEYWELL
INTERNATIONAL INC**

V.

Counter Defendant

**CITIZENS COMMUNICATIONS
COMPANY**

V.

Cross Defendant

**HONEYWELL
INTERNATIONAL INC**

Counter Claimant

**BARRETT PAVING
MATERIALS INC**

V.

Counter Defendant

**CITIZENS COMMUNICATIONS
COMPANY**

Counter Claimant

**BARRETT PAVING
MATERIALS INC**

V.

Counter Defendant

BANGOR, CITY OF

V.

Cross Claimant

**BARRETT PAVING
MATERIALS INC**

V.

Cross Defendant

BEAZER EAST INC

**CENTERPOINT ENERGY
RESOURCES CORP**

DEAD RIVER COMPANY

**GUILFORD TRANSPORTATION
INDUSTRIES, INC**

**NORTH AMERICAN UTILITY
CONSTRUCTION CORP**

**NORTHWESTERN GROWTH
CORPORATION**

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ATTORNEY TO BE NOTICED

**S E MACMILLAN COMPANY
INC**

UGI UTILITIES INC

**UNITED STATES ARMY CORPS
OF ENGINEERS**

Cross Claimant

BEAZER EAST INC

V.

Cross Defendant

**BARRETT PAVING
MATERIALS INC**

**CENTERPOINT ENERGY
RESOURCES CORP**

DEAD RIVER COMPANY

**GUILFORD TRANSPORTATION
INDUSTRIES, INC**

**HONEYWELL
INTERNATIONAL INC**

**MAINE CENTRAL RAILROAD
COMPANY**

**NORTH AMERICAN UTILITY
CONSTRUCTION CORP**

**NORTHWESTERN GROWTH
CORPORATION**

**S E MACMILLAN COMPANY
INC**

UGI UTILITIES INC

**UNITED STATES ARMY CORPS
OF ENGINEERS**

Cross Claimant

UGI UTILITIES INC

V.

Cross Defendant

**BARRETT PAVING
MATERIALS INC**

BEAZER EAST INC

**CENTERPOINT ENERGY
RESOURCES CORP**

DEAD RIVER COMPANY

**GUILFORD TRANSPORTATION
INDUSTRIES, INC**

**HONEYWELL
INTERNATIONAL INC**

**MAINE CENTRAL RAILROAD
COMPANY**

**NORTH AMERICAN UTILITY
CONSTRUCTION CORP**

**NORTHWESTERN GROWTH
CORPORATION**

**S E MACMILLAN COMPANY
INC**

UNITED STATES ARMY CORPS

OF ENGINEERS

Cross Claimant

DEAD RIVER COMPANY

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Cross Defendant

**BARRETT PAVING
MATERIALS INC**

BEAZER EAST INC

**CENTERPOINT ENERGY
RESOURCES CORP**

**GUILFORD TRANSPORTATION
INDUSTRIES, INC**

**MAINE CENTRAL RAILROAD
COMPANY**

**NORTH AMERICAN UTILITY
CONSTRUCTION CORP**

**NORTHWESTERN GROWTH
CORPORATION**

**S E MACMILLAN COMPANY
INC**

UGI UTILITIES INC

UNITED STATES ARMY CORPS

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Cross Claimant

**HONEYWELL
INTERNATIONAL INC**

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**BARRETT PAVING
MATERIALS INC**

BEAZER EAST INC

**CENTERPOINT ENERGY
RESOURCES CORP**

DEAD RIVER COMPANY

**GUILFORD TRANSPORTATION
INDUSTRIES, INC**

**NORTH AMERICAN UTILITY
CONSTRUCTION CORP**

**NORTHWESTERN GROWTH
CORPORATION**

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UNITED STATES ARMY CORPS

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Counter Claimant

**HONEYWELL
INTERNATIONAL INC**

V.

Counter Defendant

**BARRETT PAVING
MATERIALS INC**

V.

Cross Claimant

**HONEYWELL
INTERNATIONAL INC**

V.

Cross Defendant

**BARRETT PAVING
MATERIALS INC**

BEAZER EAST INC

**CENTERPOINT ENERGY
RESOURCES CORP**

DEAD RIVER COMPANY

**GUILFORD TRANSPORTATION
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CONSTRUCTION CORP**

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**S E MACMILLAN COMPANY
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UGI UTILITIES INC

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**CITIZENS COMMUNICATIONS
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