STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: May 2, 2016]

In Re: Asbestos Litigation

KAY BAZOR, Administratrix of the Estate of ROBERT BAZOR, and Individually as Surviving Spouse	:	
Plaintiffs,	:	
	:	
v.	:	**C.A. No. PC-10-3965**
	:	
ABEX CORPORATION, et al.,	:	
Defendants.	:	

DECISION

GIBNEY, P.J. Before this Court is Defendant Dana Companies, LLC's (Dana or Defendant) Motion to Dismiss for Lack of Personal Jurisdiction (Motion to Dismiss) and Plaintiffs Robert T. and Kay Bazor's (Plaintiffs) Opposition.[1] These motions are made pursuant to Super. R. Civ. P. 12(b)(2). At issue is whether Dana has forfeited its defense of lack of personal jurisdiction asserted in its Answer by participating in the litigation. The Court exercises jurisdiction pursuant to G.L. 1956 § 8-2-14. After carefully considering the parties' arguments, the Court finds that, for the reasons set forth below, Dana's active conduct constitutes forfeiture of the defense of lack of personal jurisdiction.[2]

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[1] Plaintiffs' Opposition to Defendant's Motion to Dismiss is alternatively labeled as a Motion to Strike. For purposes of clarity and consistency, the Court will treat the matter as a motion to dismiss.

[2] The parties alternately use the terms "waiver," "forfeiture," and "consent" to describe Dana's failure to assert its defense of lack of personal jurisdiction until this point in the litigation. The Court notes that "[w]here a party fails to raise a jurisdictional defense, it properly may be said to have waived that defense. However, '[w]here a litigant's action or inaction is deemed to incur the consequence of a loss of a right, or, as here, a defense, the term 'forfeiture' is more appropriate.'" Am. Int'l Ins. Co. v. Robert Seuffer GMBH & Co. KG., 468 Mass. 109, 110 n.2, cert. denied, 135 S. Ct. 871 (2014) (quoting Hamilton v. Atlas Turner, Inc., 197 F.3d 58, 61 (2d

I

Facts

A recitation of the facts of this case was previously provided by the Court in its July 16, 2015 Decision regarding Plaintiffs' Motion to Compel.[3] The Court will add facts as necessary to decide the instant motion.

Plaintiffs filed a Complaint on July 8, 2010 naming among other defendants, Dana, for Plaintiffs' injuries related to exposure to asbestos, alleging negligence, breach of duty to warn, and breach of the warranties of merchantability and implied fitness. Plaintiff Robert T. Bazor was deposed several months later on September 21–23, 2010. Dana was present at the deposition and had opportunity to question Mr. Bazor.

On January 26, 2012, Dana and three of its codefendants jointly filed their Answer. The Answer listed fifty-four defenses, including lack of personal jurisdiction.

More than four years after filing the instant Complaint and more than two years and nine months after filing its Answer, Dana filed its Motion to Dismiss for Lack of Personal Jurisdiction on November 11, 2014. Following a discovery dispute, this Court entered an order on July 16, 2015, granting in part and denying in part Plaintiffs' Motion to Compel further jurisdictional discovery.[4]

Between filing its Answer on January 26, 2012 and filing its Motion to Dismiss on November 11, 2014, Dana actively participated in the litigation in a number of ways. On January 31, 2012, Dana and two codefendants filed an objection to the pending 2012 trial date. After a

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Cir. 1999), cert. denied, 530 U.S. 1244 (2000)). Because Defendant raised the jurisdictional defense in its answer and is purported to have relinquished that defense based on subsequent conduct, the Court will employ the term "forfeiture."

[3] Bazor v. Abex Corp., No. PC-2012-3965, 2015 WL 4487188, at *1–2 (R.I. Super. July 16, 2015).

[4] Bazor v. Abex Corp., No. PC-2012-3965, 2015 WL 4487188, at *7 (R.I. Super. July 16, 2015).

series of correspondence between Plaintiffs and Dana, Mr. Bazor's deposition was reopened and conducted on March 12, 2012. Counsel for Dana participated in the March 12, 2012 deposition which focused, in part, on product identification and exposure for a product for which Dana may be liable. Also on March 12, 2012, Dana offered a list of its witnesses for deposition.

On April 4, 2012, one of Plaintiffs' experts was deposed, and counsel for Dana participated in the deposition by telephone. In response to a notice for deposition of Dana's corporate representative, on April 13, 2012, Dana filed an Objection to Plaintiffs' Notice of 30(b)(6) Deposition, but only objected to the deposition as it related to specific topics and did not object on jurisdictional grounds. By letter dated April 17, 2012, Dana advised Plaintiffs that it intended to rely upon the testimony of a particular witness and offered deposition dates for that witness. On the same date, Dana and five of its codefendants filed an expert witness designation list that included eight experts. On April 19, 2012, Dana and one of its codefendants filed fifteen Motions in Limine which sought to limit evidence and testimony to be produced at trial. On April 20, 2012, Dana individually filed its Expert Witness Designations. By letter dated April 20, 2012, Dana offered two additional experts for deposition. On April 24, 2012, the deposition of one of Dana's experts took place.

By letter dated May 4, 2012, Dana and one of its codefendants offered another expert for deposition. On May 17, 2012, Dana produced two reports prepared by one of its experts. On May 18, 2012, an expert retained by Dana and one of its codefendants was deposed. On May 25, 2012, and July 12, 2012, Dana produced reports of two of its jointly retained experts. On October 24, 2012, Dana provided responses and objections to Plaintiffs' Master Interrogatories and Requests for Production Directed to Defendant. Importantly, in its responses Dana did not mention any preservation of the defense of lack of personal jurisdiction.

On June 16, 2014, Dana produced a supplemental report issued by one of its experts. On October 20, 2014, Dana filed a Motion to Compel Plaintiffs to Produce Bankruptcy Trust Documents. Additionally, during this time period, Dana participated in at least ten status/settlement conferences. Not once during this discovery process did Dana assert its defense of lack of personal jurisdiction until the filing of its Motion to Dismiss on November 11, 2014.

Plaintiffs filed their Motion to Strike on April 27, 2015. On November 24, 2015, Dana filed its Opposition to Plaintiffs' Motion to Strike and Reply in Support of [its] Motion to Dismiss. Plaintiffs replied on December 8, 2015. The Court heard oral arguments on December 9, 2015.

II

Standard of Review

"The sole function of a motion to dismiss is to test the sufficiency of the complaint." Palazzo v. Alves, 944 A.2d 144, 149 (R.I. 2008) (citations omitted). This Court is mindful of the policy to interpret the pleading rules liberally so that cases are not "disposed of summarily on arcane or technical grounds." Haley v. Town of Lincoln, 611 A.2d 845, 848 (R.I. 1992). The Court "examine[s] the pleadings, accept[s] the facts alleged by the plaintiff[s] as true, and view[s] disputed facts in the light most favorable to the plaintiff." Cassidy v. Lonquist Mgmt. Co., 920 A.2d 228, 232 (R.I. 2007) (citing Cerberus Partners, L.P. v. Gadsby & Hannah, LLP, 836 A.2d 1113, 1117 (R.I. 2003)).

"The question of personal jurisdiction is a mixed question of law and fact, in which the trial justice must first make 'a determination as to the minimum contacts that will satisfy the requirements of due process'—a finding that depends on the facts of each case." Id. at 232 (quoting Ben's Marine Sales v. Sleek Craft Boats, 502 A.2d 808, 810 (R.I. 1985)). A

plaintiff must allege sufficient facts to make out a prima facie case of jurisdiction in order to withstand a defendant's Rule 12(b)(2) motion to dismiss a complaint for lack of in personam jurisdiction. See Cerberus Partners, L.P., 836 A.2d at 1118. A prima facie case of jurisdiction is established when the requirements of Rhode Island's long-arm statute—G. L. 1956 § 9-5-33(a)—are satisfied. See Cassidy, 920 A.2d at 232.

III

Discussion

A

Parties' Arguments

Dana contends that by asserting the defense of lack of personal jurisdiction in its Answer, it has properly preserved the defense in perpetuity and can now move to dismiss on that ground. In support, Dana relies on two Rhode Island Supreme Court cases: Hall v. Kuzenka, 843 A.2d 474 (R.I. 2004) and Rotella v. Boca Raton Hotel & Club, 657 A.2d 1073 (R.I. 1995). Dana also points to R.I. Hosp. Trust Nat'l Bank v. De Beru, 553 A.2d 544 (R.I. 1989) as a source of authority. Dana further argues that its delay in asserting its jurisdictional defense is due to the recent United States Supreme Court decision in Daimler AG v. Bauman, 134 S. Ct. 746 (2014), which Dana claims effected a change in the law of personal jurisdiction. In the alternative, Dana maintains that it did not fully participate in litigation on the merits but instead merely participated in discovery, conduct that Dana contends does not amount to a forfeiture of its defense of lack of personal jurisdiction.

Plaintiffs argue that Dana forfeited its defense of lack of personal jurisdiction by actively participating in the litigation. Plaintiffs assert that the Rhode Island Supreme Court has not yet ruled on the issue, and additionally point to federal case law that clearly holds that a party may

forfeit its defense of lack of personal jurisdiction by its actively litigating the case. Finally, Plaintiffs contend that Dana's attested reason for waiting to file its Motion to Dismiss—the Daimler case—is a red herring and that Dana could have filed its Motion to Dismiss earlier based on pre-Daimler case law.

B

Forfeiture of Personal Jurisdiction in Rhode Island

Dana points to Hall and Rotella as binding authority upon this Court. See Hall, 843 A.2d at 474, Rotella, 657 A.2d at 1073. Dana's reliance on both of these cases is misplaced.

Hall concerned a defendant who asserted the defense of lack of personal jurisdiction in his answer and then filed a motion to dismiss on the basis of lack of personal jurisdiction pursuant to Rule 12(b)(2). Hall, 843 A.2d at 475. Read literally, Rule 12(b) appears to prohibit the filing of a motion to dismiss after asserting defenses in an answer. See Super. R. Civ. P. 12(b). Our Supreme Court declined to read Rule 12(b) mechanically and held that if a defense is set up in an answer, then a subsequent motion to dismiss on the same defense can be brought. Id. at 477. Hall's holding thus regards the permissibility of raising a motion to dismiss after filing an answer despite Rule 12(b)'s seemingly absolute language.

The Court then continued to address an alternative argument that plaintiffs appeared to raise:

> "[t]he plaintiffs imply that defendant wasted judicial resources because he filed his motion raising lack of personal jurisdiction approximately three and a half months after filing his answer, and after discovery already had commenced. In fact, by waiting to file his motion to dismiss for lack of personal jurisdiction, defendant was able to conduct discovery to perfect his argument. Without discovery on the jurisdictional issue, the motion justice would have had no basis upon which to decide whether to dismiss for lack of personal jurisdiction." Id. (emphasis added).

The Hall Court concluded that "few judicial resources were wasted by the discovery that occurred before defendant filed his motion to dismiss." Id.

Hall is distinguishable from the matter at hand. Hall concerned whether a motion to dismiss could be brought after filing an answer, not, as here, whether a party may forfeit the defense of lack of personal jurisdiction by subsequent active litigation. Additionally, Hall's dismissal of plaintiffs' alternative argument is characterized by two factors: (1) it was based on jurisdictional discovery, and (2) it was based on a finding that judicial resources had not been wasted. Here, Dana's participation extended beyond jurisdictional discovery and the two year and ninth month period of active litigation utilized considerable judicial resources. Thus, Hall is inapposite to the instant matter.

Rotella is similarly distinguishable. Rotella was a memorandum order by our Supreme Court concerning, inter alia, "plaintiff's argument that defendant acquiesced to the court's jurisdiction by filing discovery." Rotella, 657 A.2d at 1073. After being served with the Complaint, and without filing an answer, the Rotella defendant filed a motion to dismiss for lack of personal jurisdiction. Id. Without any reasoning or analysis, the Rotella Court noted that "we disagree with plaintiffs' contention that defendant acquiesced to the court's jurisdiction by filing discovery." Id. at 1074.

Unlike Dana, the Rotella defendant did not file an answer and did not engage in lengthy discovery or active litigation of the case. Rotella, 657 A.2d at 1073. The Rotella Court gave no basis for its conclusion and thus the decision in Rotella may fairly be confined to its particular facts.

The Court also addresses a third case mentioned by Dana, R.I. Hosp. Trust Nat'l Bank, 553 A.2d at 544, which expressly denies ruling on any personal jurisdiction question: "[w]e are

not able to consider that argument [of lack of personal jurisdiction] because it is raised in this court for the first time." Id. at 547.[5] The Court thus finds no binding authority in R.I. Hosp. Trust Nat'l Bank.

A review of Rhode Island law therefore finds no clear authority that frames the precise issue before the Court. Our Supreme Court has not squarely addressed whether and under what circumstances a defendant may forfeit the defense of lack of personal jurisdiction. As such, the Court turns to federal case law for guidance. See Heal v. Heal, 762 A.2d 463, 466–67 (R.I. 2000) ("[W]here the Federal rule and our state rule are substantially similar, we will look to the Federal courts for guidance or interpretation of our own rule."); see also Chhun v. Mortg. Elec. Registration Sys., Inc., 84 A.3d 419, 422 (R.I. 2014) (noting that Rhode Island's Rule 12(b) is nearly identical to its federal counterpart) (citing Hall, 843 A.2d at 476–77).

C

Forfeiture of Personal Jurisdiction in Federal Case Law

Numerous Federal Circuit Courts have concluded that a defendant can forfeit the defense of lack of personal jurisdiction by conduct subsequent to asserting the defense in their answer. See Marcial Ucin, S.A. v. SS Galicia, 723 F.2d 994, 996 (1st Cir. 1983); see also Hamilton, 197 F.3d at 61; see also King v. Taylor, 694 F.3d 650, 658 (6th Cir. 2012); see also Cont'l Bank, N.A. v. Meyer, 10 F.3d 1293, 1296 (7th Cir. 1993); see also Yeldell v. Tutt, 913 F.2d 533, 539 (8th Cir. 1990). All of these circuit courts have recognized that simply listing a defense of lack of personal jurisdiction in a defendant's answer does not preserve the defense in perpetuity. See Yeldell, 913 F.2d at 539 (citing Burton v. N. Dutchess Hosp., 106 F.R.D. 477, 481 (S.D.N.Y.

[5] The R.I. Hosp. Trust Nat'l Bank Court continued: "Since our review of the pleadings in this case fails to disclose any reference to a lack of personal jurisdiction either directly or indirectly, we must conclude that it cannot be considered now on appeal." R.I. Hosp. Trust Nat'l Bank, 553 A.2d at 547.

1985)). This long line of case law firmly establishes that "[l]ack of personal jurisdiction is a privileged defense that can be [forfeited] 'by failure [to] assert [it] seasonably, by formal submission in a cause, or by submission through conduct.'" Marcial Ucin, S.A., 723 F.2d at 996 (quoting Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939)); see also 16 James Wm. Moore et. al., Moore's Federal Practice § 108.03[3] (3d ed. 2013) ("[T]he defendant may waive personal jurisdiction . . . impliedly, by failing to object in a timely manner, using the proper procedure.").

Although no particular element is dispositive, courts have found two factors that can collectively operate to contravene the traditional rule of preserving a defense by asserting it in one's answer. First, courts have emphasized a defendant's delay in asserting the jurisdictional defense. See, e.g., Hamilton, 197 F.3d at 61 ("We start with the considerable length of time—four years—between the assertion of the defense in the answer and the litigation of the defense in a motion."). Courts have found significant delays as short as four months and as long as four years. See King, 694 F.3d at 661 (finding four month delay worked to constitute forfeiture of jurisdictional defense); see also Cont'l Bank, N.A., 10 F.3d at 1297 (two-and-a-half year delay); see also Hamilton, 197 F.3d at 61 (four year delay). However, the "passage of time alone is generally not sufficient to indicate forfeiture of a procedural right . . . [but] the time period provides the context in which to assess the significance of the defendant's conduct . . . ." Hamilton, 197 F.3d at 61. Indeed, second, courts have emphasized the nature and extent of a defendant's conduct prior to raising the motion to dismiss. See, e.g., Hamilton, 197 F.3d at 61 (noting the "[c]onsiderable pretrial activity [that] occurred in this case"). This analysis requires proof that defendant's conduct was "inconsistent with defendant['s] assertion that the court lacks personal jurisdiction over them." Burton, 106 F.D.R. at 481. Conduct sufficient to constitute

forfeiture includes participating in "merits discovery and settlement conferences[,]" "filing an appearance and attending the taking of various depositions[,]" "voluntarily participating in full discovery on the merits[,]" "participat[ing] in lengthy discovery, fil[ing] various motions[,] and oppos[ing] a number of motions filed by [the plaintiff.]" Hamilton, 197 F.3d at 61; Marcial Ucin, S.A., 723 F.2d at 997; King, 694 F.3d at 660; Cont'l Bank, N.A., 10 F.3d at 1297. Crucial to this analysis is a determination of whether the underlying objective of Rule 12 has been met: the "eliminat[ion] [of] unnecessary delay at the pleading stage . . . ." Marcial Ucin, S.A., 723 F.2d at 997.

D

Forfeiture of Personal Jurisdiction in the Instant Matter

The Court is satisfied that Dana's substantial delay and conduct in litigating the instant matter is sufficient to constitute forfeiture of the jurisdictional defense. More than two years and nine months passed between the filing of the answer asserting the jurisdictional defense and the filing of the Motion to Dismiss. This time span puts the instant matter on par with other instances in which the delay was substantial enough to constitute forfeiture. See King, 694 F.3d at 661; see also Cont'l Bank, N.A., 10 F.3d at 1297.

Relatedly, the Court is also satisfied that Dana did not have a sufficiently meritorious reason for delaying the assertion of the defense. Dana claims that it could not bring its Motion to Dismiss any earlier than it did because the argument against general jurisdiction was premised on the recent United States Supreme Court decision in Daimler AG, 134 S. Ct. at 746. However, the Motion to Dismiss also contained an argument against specific jurisdiction based on the fact that Dana is an "out-of-state resident[] whose claims do not arise from any conduct in Rhode Island. . . ." Def.'s Mot. to Dismiss at 7. Certainly Dana's argument with respect to specific jurisdiction

was available under pre-Daimler law. See, e.g., Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. and Placement, 326 U.S. 310, 319 (1945) ("[The Due Process] clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations."). And surely, Dana knew of its alleged lack of contact with Rhode Island well before Daimler was decided in 2014. It therefore strains credulity to maintain that Daimler is the only reason for delaying the assertion of the jurisdictional defense. The over two year and nine month delay thus factors squarely in this Court's analysis and weighs in favor of finding that Dana forfeited the jurisdictional defense.

Furthermore, Dana's conduct in litigating the matter puts a thumb on the scale. The two year and nine month delay was a period of great activity, during which Dana took a very active role. Dana participated extensively in the deposition of Mr. Bazor, as well as in the depositions of Plaintiffs' experts and Dana's experts. Dana also filed a number of reports produced by its experts. See King, 694 F.3d at 661 (finding forfeiture where defendant "voluntarily participat[ed] in full discovery on the merits . . . ."). Additionally, Dana corresponded numerous times with Plaintiffs, including some ten status conferences and ten settlement conferences. Dana also filed objections to Plaintiffs' Notice of Deposition and to Plaintiffs' Master Interrogatories and Requests for Production. Even more compromising are the fifteen motions in limine Dana filed which sought merits-based rulings. See Cont'l Bank, N.A., 10 F.3d at 1297 (finding forfeiture where defendant "participated in lengthy discovery, filed various motions[,] and opposed a number of motions filed by [the plaintiff.]"). The Court notes that not once throughout the two years and nine months of litigation did Dana purport to assert its languishing jurisdictional defense.

Overall, Dana's conduct in the instant matter corresponds with that of an active litigant in all respects. Dana actively engaged in the litigation process and accessed judicial resources during the process. Such conduct evinces intent to the Court that Dana was forfeiting its defense of lack of personal jurisdiction. See Marcial Ucin, S.A., 723 F.2d at 997 (finding that the defendant "is trying to obtain the very delay which Rule 12 was designed to prevent"). A finding that Dana forfeited its defense of lack of personal jurisdiction here comports with numerous other cases where courts have found forfeiture. See, e.g., id.; see also Hamilton, 197 F.3d at 61. The Court is therefore satisfied that the particular facts of this case evidence a forfeiture of the defense of lack of personal jurisdiction.

IV

Conclusion

For the aforementioned reasons, this Court denies Dana's Motion to Dismiss.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Kay Bazor, Administratrix of the Estate of Robert Bazor, and Individually as Surviving Spouse v. Abex Corporation, et al.
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COURT:	Providence County Superior Court
DATE DECISION FILED:	May 2, 2016
JUSTICE/MAGISTRATE:	Gibney, P.J.

ATTORNEYS:

For Plaintiff:	*SEE ATTACHED LIST
For Defendant:	*SEE ATTACHED LIST

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