

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**NEWPORT, SC.**

**SUPERIOR COURT**

**(FILED: May 29, 2015)**

**ANTHONY PULLAR**

v.

**LOUIS CAPPELLI**

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**C.A. No. NC 2011-0238**

**DECISION**

**STONE, J.** Before the Court is Defendant Louis Cappelli’s (Defendant) Motion for Summary Judgment on Plaintiff Anthony Pullar’s (Plaintiff) Complaint asserting lack of personal jurisdiction and failure to state a claim pursuant to Super. R. Civ. P. 56. For reasons set forth herein, this Court will treat the instant Motion as a motion to dismiss pursuant to Super. R. Civ. P. 12(b)(2). A hearing was held on February 27, 2015. Decision is herein rendered.

**I**

**Background**

Defendant was the officer and a principal shareholder of Helios Yachting Services, Ltd. (Helios). Plaintiff worked as captain of the S/Y Atlanta (the Atlanta), a 121-foot sailboat owned and operated by Helios. Plaintiff was paid \$12,500 per month for his services as captain. Plaintiff alleges the following: In August of 2006, Plaintiff and Defendant were negotiating Plaintiff’s one-year contract to work as captain of the sailboat in the State of New York. Defendant suggested that the contract be made for three years and that if Plaintiff accepted the position for three years he would be awarded a bonus of one additional year’s salary, totaling \$150,000. As part of this oral contract, Plaintiff’s employment could only be terminated with good cause. Plaintiff accepted these terms. At that time, the Atlanta was located in Rhode

Island. Plaintiff worked as captain of the Atlanta until he was terminated on August 1, 2009, one month shy of reaching the three years required for the bonus. Plaintiff alleges that he was terminated without cause and with the sole purpose of not having to pay him the bonus to which Defendant had agreed. In January of 2010, Plaintiff claims that the parties met and agreed that the outstanding \$150,000 bonus would be paid off at a rate of \$10,000 per month. However, Plaintiff asserts that Defendant has failed to make any bonus payments.

Consequently, on April 22, 2011, Plaintiff filed this seven-count Complaint against Defendant in Newport County Superior Court based on Defendant's refusal to pay the \$150,000 bonus. Plaintiff's Complaint includes counts for breach of contract, breach of the covenant of good faith and fair dealing, and fraud. He also seeks to recover on the theories of unjust enrichment, quantum meruit, and equitable estoppel. Moreover, he seeks specific performance from Defendant.

Defendant filed an Answer denying all the allegations in the Complaint and asserted several affirmative defenses, including lack of personal jurisdiction, insufficiency of service of process, statute of frauds, and failure to state a claim with respect to all Counts. Defendant filed the instant Motion claiming that this Court lacks personal jurisdiction over Defendant and that Defendant is entitled to judgment as a matter of law.

In support of his Motion, Defendant filed a sworn affidavit making several assertions, including that he is a resident of White Plains, New York who has never lived in Rhode Island. Defendant asserts that he has not transacted business in Rhode Island. Although the Defendant admits to visiting Rhode Island on several occasions, he claims that these visits were only for recreational purposes.

Moreover, Defendant attests that he never personally employed the Plaintiff, and that he did not own the sailboat in his individual capacity. Instead, not only was Plaintiff hired, paid and employed by Helios, but Helios also owned the sailboat. Although Defendant admits that he made the decision to hire Plaintiff in September of 2006 in his capacity as an officer and principal shareholder of Helios, Defendant insists that all crewmembers, including Plaintiff, were “at will” employees, who were compensated by Helios directly. He also maintains that there was never a discussion regarding a three-year contract or bonus. He also denies the January 2010 agreement to pay the bonus in monthly installments.

Defendant further contends that Helios was a Cayman Islands corporation and had offices at 115 Stevens Ave., Valhalla, New York. He asserts that Helios purchased the Atlanta before hiring Plaintiff and notes that the Atlanta required a full-time captain and approximately five crew members. Defendant claims that Helios paid for all costs and expenses for the ownership and operation of the Atlanta. All licenses and insurance pertaining to the Atlanta were obtained by, issued to, and held by Helios. Likewise, all maintenance and repair costs for the sailboat were paid by Helios. Additionally, the Atlanta was a British registered vessel that was kept in the Caribbean approximately six months of the year, and in Sag Harbor and Newport for parts of the year.

In further support of his Motion, Defendant submitted portions of Plaintiff’s October 21, 2014 deposition. In the deposition, Plaintiff concedes that all payments he received during the time that he was employed were made by Helios and never by Defendant individually. He also acknowledges that all repairs and maintenance to the vessel were paid for by Helios. During the deposition, Plaintiff stated that he did not know of any other substantial business Defendant had in Rhode Island, besides for the Atlanta. He also admitted that because he was serving as captain

for the Atlanta, he was really working for Helios and that any compensation for that work would be owed to him by Helios.

## II

### Standard of Review

In support of his Motion for Summary Judgment, Defendant argues lack of personal jurisdiction. However, “[s]ummary judgment is a final judgment on the merits of the controversy as opposed to a dismissal pursuant to Rule 12(b)(2) of the Superior Court Rules of Civil Procedure.” Mitchell v. Burrillville Racing Ass’n, 673 A.2d 446, 448 (R.I. 1996). In the absence of personal jurisdiction, this Court “[is] not authorized to enter summary judgment on behalf of [the Defendant]. Id. Therefore, this Court will treat the motion for summary judgment as a motion to dismiss for want of personal jurisdiction pursuant to Super. R. Civ. P. 12(b)(2). See id. (treating a motion for summary judgment as a motion to dismiss pursuant to Super. R. Civ. P. 12(b)(2) where lack of personal jurisdiction over defendants rendered entry of summary judgment in regard to those defendants inappropriate).

“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.” Cassidy v. Lonquist Mgmt. Co., 920 A.2d 228, 232 (R.I. 2007) (citation omitted). It is well settled “that to withstand a defendant’s Rule 12(b)(2) motion to dismiss a complaint for lack of *in personam* jurisdiction, a plaintiff must allege sufficient facts to make out a *prima facie* case of jurisdiction.” Cerberus Partners, L.P. v. Gadsby & Hannah, LLP, 836 A.2d 1113, 1118 (R.I. 2003). To determine if a plaintiff has made a prima facie showing of jurisdiction, this Court must examine the pleadings, accepting all facts alleged in the complaint as true and resolving

factual conflicts in the plaintiff's favor. Id. at 1117. "A *prima facie* case of jurisdiction is established when the requirements of Rhode Island's long-arm statute[, General Laws 1956 § 9-5-33(a),] are satisfied." Id. at 1118.

### III

#### Analysis

Defendant argues that this Court has no personal jurisdiction over him because he, in his individual capacity, does not have sufficient contacts with Rhode Island. Defendant insists that the only contacts with Rhode Island relate to Helios as a corporation. However, since Helios is not a party to this suit, nor has an alter-ego form of liability been pled in the Complaint, the contacts of Helios with Rhode Island cannot be imputed to Defendant personally. Additionally, Defendant argues that Plaintiff cannot obtain personal jurisdiction over Defendant through invocation of the alter-ego doctrine when he has not named Helios as a defendant nor even alleged the existence of personal jurisdiction over Helios.

Plaintiff counters that the Defendant waived personal jurisdiction by failing to raise the issue in a timely manner, waiting until discovery was completed and Plaintiff had requested that the case be set down for a trial. Highlighting that the case was filed in 2011, Plaintiff argues that the issue of personal jurisdiction has been waived. Alternatively, Plaintiff argues that the contacts of Helios should be attributed to Defendant. Plaintiff insists that Helios was Defendant's alter-ego, justifying the piercing of its corporate veil and imputing the contacts of Helios with Rhode Island to Defendant. Neither party disputes that this Court does not have personal jurisdiction over Defendant as an individual.

## A

### Waiver of Personal Jurisdiction

Rule 12(h) of the Rhode Island Superior Court Rules of Civil Procedure provides in relevant part that “[a] party waives all defenses and objections which the party does not present either by motion as hereinbefore provided or, if the party has made no motion, in the party’s answer or reply. . . .” See Super. R. Civ. P. 12(h). The defenses enumerated in Super. R. Civ. P. 12(b)—including that of lack of jurisdiction over the person—“whether made in a pleading or by motion . . . shall be heard and determined before the trial on application of any party . . . .” See Super. R. Civ. P. 12(d); See also Super. R. Civ. P. 12(b). A defendant does not waive his right to challenge personal jurisdiction so long as he either raises it in an affirmative defense in his answer or files an appropriate motion. See Hall v. Kuzenka, 843 A.2d 474, 478 (R.I. 2004); see also R.I. Hosp. Trust Nat’l Bank v. de Beru, 553 A.2d 544, 547 (R.I. 1989) (to preserve objections to personal jurisdiction, a party must raise them by motion or in his answer).

Here, Defendant raised the defense of lack of subject matter jurisdiction in his Answer as an affirmative defense. Since Plaintiff initiated this action, Defendant has maintained that Rhode Island lacks personal jurisdiction over him. By raising this defense in his Answer, he has satisfied the requirements of Super. R. Civ. P. 12(h), and by filing a motion prior to trial, he has satisfied any timing requirements imposed by Super. R. Civ. P. 12(d). Therefore, Defendant did not waive his lack of personal jurisdiction defense.

## B

### Personal Jurisdiction

Rhode Island’s long-arm statute, G.L. 1956 § 9-5-33(a), provides in part that:

“[e]very foreign corporation, every individual not a resident of this state . . . and every partnership or association, composed of any

person or persons not such residents, that shall have the necessary minimum contacts with the state of Rhode Island, shall be subject to the jurisdiction of the state of Rhode Island . . . in every case not contrary to the provisions of the constitution or laws of the United States.”

As interpreted by the Rhode Island Supreme Court, “§ 9-5-33(a) permits the exercise of jurisdiction over nonresident defendants to the fullest extent allowed by the United States Constitution.” Rose v. Firststar Bank, 819 A.2d 1247, 1250 (R.I. 2003) (citing McKenney v. Kenyon Piece Dye Works, Inc., 582 A.2d 107, 108 (R.I. 1990)).

“To ensure constitutional due process to a nonresident defendant, certain minimum contacts with the forum state are required such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” Kalooski v. Albert-Frankenthal AG, 770 A.2d 831, 832-33 (R.I. 2001) (per curiam) (quoting Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)) (internal quotation and citation omitted). The minimum contacts requirement protects defendants from the burden of having to litigate in an inconvenient forum and it ensures that states “do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.” World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). “[A] determination as to the minimum contacts that will satisfy the requirements of due process will depend upon the facts of each particular case.” Ben’s Marine Sales v. Sleek Craft Boats, 502 A.2d 808, 810 (R.I. 1985). “The fundamental question here is, thus, whether ‘the [D]efendant’s conduct and connection with [Rhode Island] are such that he should reasonably anticipate being ha[u]led into court [here].’” See Bendick v. Picillo, 525 A.2d 1310, 1312 (R.I. 1987) (citation omitted).

This Court “possesses personal jurisdiction over a nonresident defendant when a plaintiff alleges and proves the existence of either general or specific personal jurisdiction.” Cerberus

Partners, 836 A.2d at 1118. Plaintiff has not alleged any connection between his breach of contract claim and the State of Rhode Island. This precludes a finding of specific jurisdiction. See id. Therefore, the Court’s analysis will focus on general jurisdiction. “To justify the exercise of general jurisdiction, (1) the defendant must have sufficient contacts with the forum state, (2) those contacts must be purposeful, and (3) the exercise of jurisdiction must be reasonable under the circumstances.” Cossaboon v. Me. Med. Ctr., 600 F.3d 25, 32 (1<sup>st</sup> Cir. 2010). A defendant’s contacts with the forum must be “continuous and systematic” and “purposeful” such that it will not offend the “traditional notions of fair play and substantial justice” to subject them to the forum’s jurisdiction. Id. The contacts must be purposeful, in that the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. Id. Lastly, the exercise of jurisdiction must be “reasonable under the circumstances.” Id. at 33.

“[T]he forum-state contacts of a corporation may be attributed to an individual who is an officer, director, or shareholder of the corporation when evidence is presented that shows that the corporation is the alter ego of the individual, or where other circumstances permit the court to pierce the corporate veil.” N. Laminate Sales, Inc. v. Matthews, 249 F. Supp. 2d 130, 139 (D.N.H. 2003). In Rhode Island, to invoke the equitable alter-ego doctrine “there must be a concurrence of two circumstances: (1) there must be such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals; and (2) the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow.” Heflin v. Koszela, 774 A.2d 25, 30 (R.I. 2001) (quoting Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc., 789 P.2d 24, 26 (Utah 1990)). The second prong of the alter-ego test

“is addressed to the conscience of the court, and the circumstances under which it will be met will vary with each case.” Id. However, to satisfy the second prong, “it must be shown that the corporation itself played a role in the inequitable conduct at issue.” Id.

Here, the Complaint fails to “properly allege a claim for alter ego liability.” See Chunghwa Telecom Global, Inc. v. Medcom, LLC, No. 5:13-CV-02104 HRL, 2013 WL 5688941, at \*4 (N.D. Cal. Oct. 16, 2013) (motion to dismiss for lack of personal jurisdiction appropriate where plaintiff did not properly allege a claim for alter-ego liability in complaint but sought to impute the contacts of the corporation on the individual). Plaintiff does not allege in the Complaint that Defendant should be held personally liable for the alleged breach of contract based on any alter-ego doctrine. Compare Skydive Ariz., Inc. v. Quattrochi, No. CV 05–2656–PHX–MHM, 2006 WL 2460595, at \*7–8 (D.Ariz. Aug. 22, 2006) (finding plaintiff failed to state a claim against defendants where complaint simply alleged the alter-ego theory with no factual basis), with Whitney v. Wurtz, No. C–04–5232 PVT, 2006 WL 83119, at \*2 (N.D. Cal. Jan. 11, 2006) (finding complaint established a cognizable alter-ego theory by alleging individual defendants “used assets of the corporation for their personal use,” “controlled, dominated and operated” corporation “as their individual business and alter ego” without “holding of director’s or shareholder’s meetings,” and “caused monies to be withdrawn from the funds of defendant corporation and distributed to themselves without any consideration to the corporation”).

Plaintiff cannot seek to establish jurisdiction over a non-resident defendant by arguing a theory—here alter-ego—that he has not pled in his Complaint. See Medcom, WL 5688941, at \*4. Furthermore, this Court cannot consider Helios, a foreign corporate entity which is not a party to this suit, as the alter-ego of Defendant for purposes of establishing jurisdiction over Defendant. See Wilson v. Metals USA, Inc., No. CIV. S-12-0568 LKK, 2013 WL 4586919, at

\*5 (E.D. Cal. Aug. 28, 2013) (court may not exercise personal jurisdiction over an individual shareholder and officer of a corporation under an alter-ego theory if the corporation itself is not a party to the action).

Therefore, this Court need not decide whether Helios' corporate veil should be pierced and its contacts with Rhode Island attributed to Defendant personally for purposes of establishing jurisdiction.<sup>1</sup> Without considering Helios' contacts with Rhode Island, it is clear and undisputed that Defendant's contacts alone are not "continuous and systematic" and "purposeful" to support Rhode Island's exercise of general personal jurisdiction over him. See Cossaboon, 600 F.3d at 32. In examining the pleadings, and accepting all facts alleged by Plaintiff as true, this Court finds that Plaintiff has failed to establish a prima facie showing of jurisdiction. Because this Court does not have personal jurisdiction over Defendant, it will not consider Defendant's arguments in support of his Motion for Summary Judgment relating to Plaintiff's alleged failure to state a claim pursuant to Super. R. Civ. P. 56. See Mitchell, 673 A.2d at 448.

#### IV

#### Conclusion

For the reasons set forth, Defendant's motion to dismiss is granted. Plaintiff has failed to establish a prima facie showing of this Court's jurisdiction over Defendant. Counsel shall submit an order for entry in accordance with this Decision.

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<sup>1</sup>Even if this Court were to impute Helios' contacts with Rhode Island to Defendant individually, the contacts are likely insufficient to subject Defendant to personal jurisdiction in Rhode Island, as the record before the Court indicates that the only contact Helios had with Rhode Island is the docking of the Atlanta in Rhode Island for a few months in the year and some maintenance work that was done to the sailboat in Rhode Island. See Daimler AG v. Bauman, 134 S. Ct. 746, 749 (2014) (even assuming, without deciding, that contacts of the subsidiary could be imputed to parent corporation, there were insufficient contacts of subsidiary to establish jurisdiction).



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** Pullar v. Cappelli

**CASE NO:** NC 2011-0238

**COURT:** Newport County Superior Court

**DATE DECISION FILED:** May 29, 2015

**JUSTICE/MAGISTRATE:** Stone, J.

**ATTORNEYS:**

**For Plaintiff:** Maurice J. Cusick, Esq.

**For Defendant:** Thomas C. Plunkett, Esq.