STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: October 13, 2016]

In Re: Asbestos Litigation	:	
	:	
HAROLD WAYNE MURRAY AND	:	
JANICE M. MURRAY	:	
Plaintiffs,	:	
	:	
v.	:	**C.A. No. PC-16-0151**
	:	
3M Company, *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 and Plaintiff's Objection and Opposition. Defendant argues that this Court lacks both general and specific jurisdiction over Dana and its predecessor, Dana Corporation. Alternatively, Plaintiff contends that the Defendant forfeited its defense of lack of personal jurisdiction after participating in discovery. The Court exercises jurisdiction pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

Harold Wayne Murray was diagnosed with mesothelioma in December of 2015 at the age of 71. On January 12, 2016, Harold Wayne Murray and his wife, Janice, filed the current suit against numerous defendants, including Dana. The Defendant was served on January 29, 2016, and it filed the present Motion to Dismiss for Lack of Personal Jurisdiction thirty (30) days later on February 29, 2016. In the interim, Defendant appeared at Mr. Murray's deposition for four

(4) days before filing the Motion to Dismiss and, subsequently, appeared at eleven (11) deposition days before requesting a hearing on the Motion.

Defendant is an active, limited liability company incorporated in Virginia with a principal place of business in Ohio. Defendant has no offices in Rhode Island, has no employees in Rhode Island, and conducts no business in Rhode Island. Defendant is being sued in the present matter based on the alleged liability of its predecessor, Dana Corporation. When Dana Corporation was operational—like the present Defendant—it was incorporated in Virginia and had its principal place of business in Ohio. Dana Corporation was never registered to do business in Rhode Island. Additionally, Dana Corporation did not own, operate, maintain, or lease any facilities in Rhode Island.

II

Parties' Arguments

Dana asserts that the Court lacks both general and specific jurisdiction. Defendant notes that Rhode Island's long-arm statute, G.L. 1956 § 9-5-33, provides for the exercise of personal jurisdiction over nonresident individuals and foreign corporations to the greatest extent under constitutional due process limits. Defendant further contends that this Court lacks specific jurisdiction because specific jurisdiction may only exist when a plaintiff's cause of action arises from a defendant's purposeful contacts with the forum. Defendant argues that the Plaintiff's claim does not relate to any specific contact with the State of Rhode Island; rather, all of Plaintiff's claims arise from alleged conduct that occurred outside Rhode Island with consequences transpiring outside Rhode Island.

Furthermore, Dana contends that the Court lacks general jurisdiction over the Defendant because the Defendant is not at home in the forum state. Defendant argues that Rhode Island is

neither its state of incorporation, nor its principal place of business. Additionally, Defendant contends that the same is true for its predecessor, Dana Corporation, which conducted no business in Rhode Island and was not registered to do business in the state.[1]

Alternatively, Plaintiff argues that there is general jurisdiction over Defendant in Rhode Island. Plaintiff contends that there is general jurisdiction over Defendant since its predecessor, Dana Corporation, included two Rhode Island businesses—Brown & Sharpe Manufacturing Co. and Exercycle Corp.—on its historical customer list. Plaintiff contends that Dana has forfeited its defense of lack of personal jurisdiction by participating in depositions before and after the filing of its Motion to Dismiss. Plaintiff notes that Dana participated in a total of fifteen (15) deposition days for Mr. Murray—four (4) occurring before the filing of the Motion to Dismiss and eleven (11) occurring afterward. Plaintiff contends that, through this involvement, Defendant has availed itself of the Rhode Island judicial system and, therefore, has forfeited its defense.

III

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 as true, and view[s] disputed facts in the light most favorable to the plaintiff." Cassidy v. Lonquist Mgmt. Co., 920

[1] Defendant does not directly address Plaintiff's forfeiture argument in its written memorandum. Defendant did, however, present an argument against forfeiture in the oral arguments held on September 7, 2016. In oral argument, Defendant asserted that it had only participated in four (4) days of depositions before submitting its Motion to Dismiss one (1) month later.

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." Cassidy, 920 A.2d 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 personal jurisdiction is established when the requirements of Rhode Island's long-arm statute—§ 9-5-33(a)—are satisfied. See Cassidy, 920 A.2d at 232.

IV

Analysis

Rhode Island's long-arm statute, § 9-5-33, provides for the exercise of jurisdiction over nonresident individuals and corporations to the greatest extent as allowed by constitutional due process limits. Almeida v. Radovsky, 506 A.2d 1373, 1374 (R.I. 1986). Absent a finding of sufficient minimum contacts, the due process clause prohibits a state court from rendering a valid personal judgment against a nonresident defendant. Id. Central to the minimum contacts inquiry is whether a defendant's actions constitute purposeful availment of the benefits, privileges, and protections of the forum state. McKinney v. Kenyon Piece Dye Works, Inc., 582 A.2d 107 (R.I. 1990). With respect to specific jurisdiction, the Rhode Island Supreme Court employs a two-step analysis that asks: 1) whether the cause of action arises out of the defendant's contacts with Rhode Island; and if so, 2) whether any relationship among the defendant, the forum, and the

litigation exists. Nicholson v. Buehler, 612 A.2d 693, 696 (R.I. 1992). If specific jurisdiction fails, the Court must find that the defendant is essentially "at home" in the forum state to exert general jurisdiction over the defendant. Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014).

A

Specific Jurisdiction

When employing the two-step minimum contacts standard for specific jurisdiction, courts must examine the facts of each particular case. Nicholson, 612 A.2d at 696. To find specific jurisdiction in Rhode Island, the plaintiff's claim must "relate" to the defendant's specific contacts with the forum, and the defendant must have purposefully created those specific contacts between himself and the forum. Sawtelle v. Farrell, 70 F.3d 1381, 1389 (1st Cir. 1995). Additionally, "[t]he relatedness inquiry for tort claims focuses on whether the defendant's *in forum* conduct caused the injury or gave rise to the cause of action." United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 622 (1st Cir. 2001) (emphasis in original).

In the present matter, the cause of action does not arise out of Defendant's contacts with Rhode Island. See Nicholson, 612 A.2d at 696. The Plaintiff does not reside in Rhode Island, and the alleged conduct that gave rise to the suit did not occur in Rhode Island. Furthermore, Mr. Murray asserts that he was exposed to asbestos-containing products outside the state and that any consequences subsequently occurred outside Rhode Island. Id. Plaintiff argues that Dana Corporation, Defendant's predecessor, included two Rhode Island businesses on its historical customer list, but there is no indication or allegation that the present matter arises from interactions with those two historical customers. Therefore, there is no basis for specific jurisdiction over Defendant, or its predecessor Dana Corporation, in the instant case. See Anderson v. Metropolitan Life Ins. Co., 694 A.2d 701, 703 (R.I. 1997).

B

General Jurisdiction

When a court fails to find specific jurisdiction over a foreign defendant, the analysis then shifts to determine if—despite the cause of action not arising from any specific contact with the state—the defendant is so "at home" in the forum state that general jurisdiction is appropriate. Daimler, 134 S. Ct. at 754. "A court may assert general jurisdiction over foreign corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." Id. (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011); Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. and Placement, 326 U.S. 310, 317 (1945)).

With respect to foreign defendants, the Court in Daimler interpreted "at home" to suggest that, with very limited exceptions, a defendant can customarily be subject to general jurisdiction in the state of its incorporation and the state of its principal place of business. 134 S. Ct. at 760. Furthermore, the Court noted that general jurisdiction is not appropriate solely on a corporation's "substantial, continuous and systematic course of business" or other "continuous and systematic contacts." Id. at 761. Rather, the continuous and systematic contact analysis derived from Int'l Shoe Co. is only applicable to a Court's determination of *specific jurisdiction*, not general jurisdiction. Daimler, 134 S. Ct. at 760; 326 U.S. at 317 (emphasis added).

In the present matter, Dana is incorporated in Virginia, with its principal place of business in Ohio. Since its incorporation on January 31, 2008, its officers and executive employees have been located in Ohio. Def.'s Br. Ex. B. Defendant asserts that Dana has no offices in Rhode Island, no employees in Rhode Island, owns no property and leases no property

in Rhode Island, sells no products in Rhode Island, and is not registered or authorized to do business in the State of Rhode Island. Id. at 3.

Additionally, the Court finds that the same is true of Defendant's predecessor, Dana Corporation. While operational, Dana Corporation was incorporated in Virginia with its principal place of business in Ohio. Plaintiff argues that Defendant's predecessor, Dana Corporation, noted two Rhode Island businesses on its historical customer list—Brown & Sharpe Manufacturing Co., located in North Kingston, Rhode Island, and Exercycle Corp., located in Woonsocket, Rhode Island. However, from 1997-2006, as a percentage of Dana Corporation's annual net sales by state, Rhode Island accounted for less than one-tenth of one percent of Dana Corporation's total annual net sales. Id. at 2-3. Under the Court's analysis in Daimler, such contacts with the State of Rhode Island are insufficient to substantiate a finding of general jurisdiction over Dana. Daimler, 134 S. Ct. at 761. Such minimal contacts cannot suggest that Dana, or its predecessor Dana Corporation, is virtually "at home" in the forum state for the purposes of general jurisdiction. Id. Therefore, this Court lacks both general and specific jurisdiction over Defendant.

C

Forfeiture of Defense

Our Supreme Court has not squarely addressed whether and under what circumstances a defendant may forfeit the defense of lack of personal jurisdiction. This Court has previously evaluated a similar question of forfeiture in Bazor v. Abex Corp., which involved the same Defendant as in the present matter, Dana. 2016 WL 2594665 (R.I. Super. May 2, 2016). The Court now turns to federal case law for guidance in order to address the question of forfeiture

presently before the Court.[2] See Heal v. Heal, 762 A.2d 463, 466–67 (R.I. 2000) (finding where federal and state rule are substantially similar, court will look to the Federal law for guidance).

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 his or her answer. See Marcial Ucin, S.A. v. SS Galicia, 723 F.2d 994, 996 (1st Cir. 1983). These Federal 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 v. Tutt, 913 F.2d 533, 539 (8th Cir. 1990). 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, when considering if a defendant has forfeited his or her defense of lack of personal jurisdiction, courts examine any delay in defendant's assertion and the nature of said delay. See, e.g., Hamilton v. Atlas Turner, Inc., 197 F.3d 58, 61 (2nd Cir. 1999) ("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 v. Taylor, 694 F.3d 650, 661 (6th Cir. 2012) (finding four month delay worked to constitute forfeiture of jurisdictional defense); see also Cont'l Bank, N.A. v. Meyer, 10 F.3d 1293, 1297 (7th Cir. 1993) (two-and-a-half 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.

[2] 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)(2) is nearly identical to its federal counterpart) (citing Hall v. Kuzenka, 843 A.2d 474 (R.I. 2004)).

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, cert. denied, 530 U.S. 1244 (2000) (denying a motion to dismiss for lack of personal jurisdiction in light of 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 v. Northern Dutchess Hosp., 106 F.R.D. 477, 481 (S.D.N.Y. 1985). For example, in Burton, the Court determined that defendant forfeited the defense of lack of personal jurisdiction by allowing the Court to set a schedule for pre-trial discovery over the course of four (4) years. 106 F.R.D. at 481. There, the Court found that defendant's actions were inconsistent with its assertion that the Court lacked jurisdiction over defendant, despite its earlier and proper assertion of the defense in its answer. Id. Crucial to any 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, 723 F.2d at 997.

In the present matter, Defendant was served on January 29, 2016 and participated in four (4) days of deposition before filing its Motion to Dismiss one (1) month later on February 29, 2016. Despite participation in four (4) deposition days of Mr. Murray, this Court finds that the Defendant has not forfeited its defense of lack of personal jurisdiction. Burton, 106 F.D.R. at 481. Furthermore, this Court finds that Defendant's participation in discovery was limited and reasonable. Hamilton, 197 F.3d at 61. While Federal courts have held that delays as short as four (4) months can constitute forfeiture, +that is not the case here. See King, 694 F.3d at 661. In the present case, Defendant participated in minimal discovery and subsequently made a timely Motion to Dismiss for Lack of Personal Jurisdiction. In Bazor, this Court held that the Dana had forfeited its defense after participating in two and a half years of substantial discovery and

litigation. 2016 WL 2594665, at *6. Alternatively, the within Defendant has not forfeited its right to assert a Motion to Dismiss after its limited and reasonable participation in discovery.[3] Hamilton, 197 F.3d at 61. Defendant, after attending only four (4) deposition days, timely asserted its Motion to Dismiss for Lack of Personal Jurisdiction and did not later forfeit that defense after participating in another eleven (11) deposition days in total. Id.

V

Conclusion

For the aforementioned reasons, this Court finds insufficient minimum contacts for personal jurisdiction—both general and specific—over Defendant. Additionally, as Defendant's limited participation in discovery does not constitute forfeiture of its defense, the Defendant's Motion to Dismiss for Lack of Personal Jurisdiction is granted. Counsel shall submit the appropriate judgment for entry.

[3] Plaintiff requests that, should the Court be inclined to grant Defendant's Motion to Dismiss, the Plaintiff should be allowed additional time to conduct jurisdictional discovery before any ruling on the Motion. The Court declines to extend additional time to the parties as both parties have participated in adequate discovery and have responded to sufficient interrogatories to determine jurisdiction. Smith v. Johns-Manville Corp., 489 A.2d 336, 338 (R.I. 1985) (permitting a trial justice to allow or deny additional time for jurisdictional discovery based on discovery needs of the parties).

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Harold Wayne Murray and Janice M. Murray v. 3M Company, et al.
CASE NO:	PC 16-0161
COURT:	Providence County Superior Court
DATE DECISION FILED:	October 13, 2016
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