

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

DLM MECHANICAL, INC., et al.	:	SEPTEMBER TERM 2006
	:	
Plaintiffs,	:	No. 1274
v.	:	
	:	Commerce Program
FLAMM, BOROFF & BACINE, P.C., et al.	:	
	:	Control No.: 010466
Defendants.	:	

ORDER

AND NOW, this 25th day of August, 2008, upon consideration of the Preliminary Objections of Defendants Gordon, Muir & Foley, LLP and Robert J. O'Brien, Esquire to the Cross-Claim of Defendants Flamm, Boroff & Bacine, P.C., Henry J. Costa, Jr., Esquire, and Robert R. Watson, Jr., Esquire, the response thereto, all other matters of record, and in accordance with the Opinion being contemporaneously filed with this Order, it hereby is **ORDERED** that said Preliminary Objections are **SUSTAINED** and the Cross-Claim is **DISMISSED** for lack of personal jurisdiction.

BY THE COURT:

HOWLAND W. ABRAMSON, J.

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OPINION

Plaintiffs DLM Mechanical, Inc. (“DLM”) and Lori Webster bring this legal malpractice action against its attorneys, Flamm, Boroff & Bacine, P.C., Henry J. Costa, Jr., Esquire, and Robert R. Watson, Jr., Esquire (collectively, “Flamm Boroff”), and Gordon, Muir & Foley, LLP and Robert J. O’Brien, Esquire (collectively, “Gordon Muir”). Presently before the Court are the Preliminary Objections of Gordon Muir to Flamm Boroff’s Cross-Claim. For the reasons set forth below, the Preliminary Objections are sustained and the Cross-Claim is dismissed for lack of personal jurisdiction.

Background

DLM is a Pennsylvania corporation that designs and installs HVAC systems for buildings.¹ In its Second Amended Complaint, DLM alleges that it entered into five subcontracts with a general contractor, Konover Construction Corporation (“Konover”), to provide HVAC work at various locations, including worksites in Connecticut (Subcontracts I, II, and II), Virginia (Subcontract IV), and Neshaminy, Pennsylvania

¹ Second Amended Complaint, at ¶¶ 1-2.

(Subcontract V).² Each of the five subcontracts contained a one-year limitation period for prosecution of any claims between the parties, starting from the time that DLM substantially completed its work.³ Further, the subcontracts specified that any suits against Konover had to be initiated in Maryland or Connecticut.⁴ DLM claimed that although it completed its work under all of the subcontracts, it was not fully paid by Konover.⁵

On or about April 1, 2005, DLM retained Flamm Boroff, a Pennsylvania law firm, to represent DLM in filing a claim against Konover for the unpaid balances due under the subcontracts.⁶ Thereafter, on or about November 15, 2005, Flamm Boroff “advised DLM to retain a Connecticut law firm to negotiate a settlement, or bring suit, on all five of DLM’s Subcontracts against Konover, because, [Flamm Boroff] advised, Connecticut was the specified jurisdiction and venue for suit in all five Subcontracts.”⁷ Gordon Muir, a Connecticut law firm, then received an unsolicited referral of business from Flamm Boroff to represent DLM in connection with the Konover matters in Connecticut.⁸ Gordon Muir contacted DLM and DLM retained Gordon Muir as Connecticut counsel to represent it in connection with all five of the subcontracts.⁹

DLM has now brought a legal malpractice action against both Flamm Boroff and Gordon Muir. With respect to Flamm Boroff, DLM alleges that Flamm Boroff failed to file any independent legal actions against Konover on DLM’s behalf before the

² Id. at ¶¶ 22-39.

³ Id. at ¶ 45.

⁴ Id. at ¶ 61.

⁵ Id. at ¶ 42.

⁶ Id. at ¶ 43.

⁷ Id. at ¶ 64.

⁸ See Affidavit of Robert J. O’Brien, Esquire.

⁹ Second Amended Complaint, at ¶¶ 13(c), 70; Gordon Muir’s Memorandum of Law in Support of Preliminary Objections, at p. 12, n. 7.

expiration of the limitations period contained in all five subcontracts.¹⁰ DLM also alleges that Flamm Boroff failed to timely refer DLM to counsel in Maryland and Connecticut, where the subcontracts specified that suits against Konover had to be initiated.¹¹ With respect to Gordon Muir, DLM contends that by the time that DLM retained Gordon Muir, the limitations period for Subcontracts I and II had expired.¹² Further, Subcontracts IV and V specified Maryland, not Connecticut, as the venue for bringing suits.¹³ In its malpractice claim, DLM alleges that Gordon Muir failed to file a timely suit on Subcontract III, did not advise DLM of the expired limitations period on Subcontracts I and II, and failed to timely advise DLM that the terms of the Subcontracts IV and V provided that those disputes had to be litigated in Maryland, not Connecticut.¹⁴

Flamm Boroff asserted a Cross-Claim against Gordon Muir, alleging that Gordon Muir is liable to Flamm Boroff for contribution if DLM recovers damages against Flamm Boroff with respect to Subcontracts III, IV, or V.¹⁵ Before the Court are Gordon Muir's Preliminary Objections to Flamm Boroff's Cross-Claim. Gordon Muir asserts that Flamm Boroff's Cross-Claim should be dismissed because the Court lacks personal jurisdiction over Gordon Muir.

¹⁰ Id. at ¶ 60.

¹¹ Id. at ¶ 62.

¹² Id. at ¶ 65.

¹³ Id. at ¶ 66.

¹⁴ Id. at ¶ 72.

¹⁵ Gordon Muir filed preliminary objections to plaintiffs' Second Amended Complaint. By Order dated December 19, 2007, the Court sustained the preliminary objections and dismissed plaintiffs' action as against Gordon Muir. Since Gordon Muir is no longer a defendant in plaintiffs' case, Flamm Boroff's Cross-Claim against Gordon Muir is no longer viable. However, the Court will treat Flamm Boroff's Cross-Claim as a joinder claim since it is the functional equivalent. See Pa. R.C.P. 1031.1 (Cross-Claim) Explanatory Comment – 2007 (“Under new Rule 1031.1, the assertion of a claim by one party against another party is a matter of pleading rather than joinder of parties. The claim is to be pleaded as a cross-claim under the new rule. The claims which may be asserted in a cross-claim are identical to those which serve as bases for joining an additional defendant under revised Rule 2252(a)...”).

Discussion

A trial court may exercise personal jurisdiction over a non-resident defendant if either general or specific jurisdiction is found.¹⁶ General jurisdiction is based upon a defendant's general activities within a forum as evidenced by continuous and systematic contacts within the state.¹⁷ Specific jurisdiction is narrower in scope and is focused upon the particular acts of the defendant that gave rise to the underlying cause of action.¹⁸ Regardless of whether general or specific jurisdiction is found to exist, the propriety of submitting a defendant to Pennsylvania law "must be tested against the Pennsylvania long arm statute, 42 Pa. C.S.A. § 5322, and the due process clause of the Fourteenth Amendment."¹⁹

I. This Court Lacks General Personal Jurisdiction Over Gordon Muir.

Pennsylvania courts may exercise general personal jurisdiction over a corporation or partnership when the corporation or partnership carries on "a continuous and systematic part of its general business within" Pennsylvania.²⁰ Since there is no established legal test to determine whether a corporation or partnership's activities are sufficiently continuous and systematic to warrant the exercise of general jurisdiction, a court must proceed by evaluating the facts of each case.²¹

Flamm Boroff does not allege that Gordon Muir is incorporated in Pennsylvania, maintains offices in Pennsylvania, has agents or employees in Pennsylvania, pays taxes in Pennsylvania, is registered with the Commonwealth to conduct business in Pennsylvania,

¹⁶ Gen. Motors Acceptance Corp. v. Keller, 737 A.2d 279, 281 (Pa. Super. 1999).

¹⁷ Fidelity Leasing Inc. v. Limestone County Bd. of Educ., 758 A.2d 1207, 1210 (Pa. Super. 2000).

¹⁸ Id.

¹⁹ Mar-Eco, Inc. v. T&R and Sons Towing and Recovery, 837 A.2d 512, 515 (Pa. Super. 2003).

²⁰ 42 Pa. C.S. §§ 5301(a)(2)(iii), 5301(a)(3)(iii).

²¹ Romann v. Geissenberger Mfg. Corp., 865 F. Supp. 255, 260 (E.D. Pa. 1994), citing Derman v. Wilair Services, Inc., 590 A.2d 317, 323 (Pa. Super 1991).

and/or owns or leases property in Pennsylvania, which are the traditional bases for finding general jurisdiction.²² Instead, Flamm Boroff contends that Gordon Muir is subject to general jurisdiction in Pennsylvania because (1) it has a website that may be accessed by Pennsylvanians and (2) it has represented five Pennsylvania corporations in matters unrelated to this litigation.

First, Flamm Boroff contends that Gordon Muir contemplates receiving business from Pennsylvania residents because its website contains a form that allows prospective clients to identify themselves as Pennsylvania residents. Pennsylvania state and federal courts “addressing the relationship between personal jurisdiction and the foreign [defendant’s] Internet web sites ha[ve] established a ‘sliding scale’ of jurisdiction based largely on the degree and type of interactivity on the web site.”²³ “A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of [general] personal jurisdiction.”²⁴ Gordon Muir’s website is such a passive website, available to all with internet access. Indeed, there is no evidence in the record that Gordon Muir targeted its website toward residents of the Commonwealth of Pennsylvania. Therefore, Gordon Muir’s website does not make it subject to general personal jurisdiction in Pennsylvania.

Next, Flamm Boroff contends that the Court has general jurisdiction over Gordon Muir because Gordon Muir represented five Pennsylvania corporations in matters unrelated to this litigation. Although Gordon Muir admits that it represented these

²² In fact, Gordon Muir avers that it does not have an agent, office, or mailing address in Pennsylvania, does not own, use, rent, or possess property located in Pennsylvania, does not actively solicit business or advertise in Pennsylvania, and does not pay taxes in Pennsylvania. It further avers that no attorney at Gordon Muir is authorized to practice law in Pennsylvania. See Affidavit of Robert J. O’Brien, Esquire.

²³ Efford v. Jockey Club, 796 A.2d 370, 374 (Pa. Super. 2002).

²⁴ Id. (citations omitted).

corporations in unrelated matters, it avers that it was retained by these companies to represent them in matters in Connecticut that applied Connecticut law.²⁵ Indeed, at no time did the representations of any of these companies take place in Pennsylvania.²⁶ Gordon Muir’s representation of these Pennsylvania corporations in matters that took place in Connecticut is not “systematic and continuous” enough to subject Gordon Muir to general jurisdiction in Pennsylvania.²⁷ Accordingly, this Court does not have general personal jurisdiction over Gordon Muir.

II. This Court Lacks Specific Personal Jurisdiction Over Gordon Muir.

For a court to exercise specific personal jurisdiction over a non-resident, “(1) the nonresident defendant must have sufficient minimum contacts with the forum state and (2) the assertion of in personam jurisdiction must comport with fair play and substantial justice.”²⁸ Whether sufficient minimum contacts exist for the assertion of in personam jurisdiction is based on a finding that the “defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.”²⁹

As the Pennsylvania Supreme Court articulated in Kubik:

Critical to the analysis of whether a defendant should reasonably anticipate being haled into court in the forum state is the determination that the defendant purposefully directed his activities at residents of the forum and purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. Contacts with the forum that are “random,” “fortuitous” or

²⁵ See Affidavit of R. Bradley Wolfe, Esquire.

²⁶ Id.

²⁷ See Crown Cork & Seal Co. v. Montgomery McCracken, 2004 Phila. Ct. Com. Pl. LEXIS 22, *5 (2004), citing McCall v. Formu-3 International, Inc., 437 Pa. Super. 575, 581, 650 A.2d 903, 906 (1994) (no jurisdiction over defendant who entered into joint venture (unrelated to cause of action) with Pennsylvania company and “engaged in a series of on-going contacts, meetings, and opportunities to exchange information with several Pennsylvania companies”).

²⁸ Kubik v. Letteri, 532 Pa. 10, 17, 614 A.2d 1110, 1114 (1992), citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 485-86 (1985).

²⁹ Id., citing Burger King, 471 U.S. at 474.

“attenuated” are not sufficient for the assertion of personal jurisdiction nor is unilateral activity in the forum by others who claim some relationship with the defendant.³⁰

Flamm Boroff contends that the Court has specific personal jurisdiction over Gordon Muir because Gordon Muir had contacts with Pennsylvania by way of correspondence and telephone calls. Gordon Muir concedes that the only contacts it had with Pennsylvania consisted of correspondence and telephone calls with DLM and/or Flamm Boroff while its attorneys were situated in Connecticut.³¹ Phone calls and/or correspondence into the forum are not sufficient to establish minimum contacts for jurisdictional purposes where, as here, the focus of the dispute is outside the forum.³²

Flamm Boroff further asserts that the Court has specific personal jurisdiction over Gordon Muir because Gordon Muir intentionally reached into Pennsylvania when it contacted DLM to represent it in the Konover matters. Although Gordon Muir admits that it contacted DLM, it did so while following up on an unsolicited referral that it received from Flamm Boroff.³³ An “unsolicited referral of business to a non-Pennsylvania lawyer from a Pennsylvania lawyer does not provide sufficient contacts to make the former amenable to suit in Pennsylvania.”³⁴

³⁰ Id., citing Burger King, 471 U.S. at 475.

³¹ See Affidavit of Robert J. O’Brien, Esquire.

³² See Nutrition Mgmt. Services Co. v. Hinchcliff, 926 A.2d 531, 538 (Pa. Super. 2007) (“the fact that Appellees made telephone calls and sent correspondence...does not lead to the conclusion that Appellees purposefully availed themselves of the privileges and benefits of our Commonwealth to the extent that they should have anticipated having to defend a lawsuit in Pennsylvania”); Triad ML Mktg. v. Clark & Trevithick, P.C., 76 Pa. D. & C.4th 418, 423 (Phila. 2005); Lynch v. New Jersey Auto. Full Ins. Underwriting Ass’n, 762 F. Supp. 101, 104 (E.D. Pa. 1991) (“The placing of telephone calls or the sending of letters into the forum by a party to a contract is not sufficient”).

³³ See Affidavit of Robert J. O’Brien, Esquire; Gordon Muir’s Memorandum of Law in Support of Preliminary Objections, at p. 12, n. 7.

³⁴ Jaffe v. Julien, 754 F. Supp. 49, 53 (E.D. Pa. 1991).

Furthermore, the fact that Gordon Muir contacted DLM, in and of itself, is not sufficient to subject Gordon Muir to specific jurisdiction in Pennsylvania. The operative facts that brought these parties together involved construction contracts that had to be litigated outside of Pennsylvania (in Connecticut or Maryland). DLM retained Gordon Muir to provide legal services in connection with litigation in Connecticut and all of the legal services were performed in Connecticut.³⁵ Thus, DLM's causes of action against Gordon Muir, as well as Flamm Boroff's Cross-Claim, arose from Gordon Muir's alleged malpractice that occurred while representing DLM in Connecticut. Based upon all of these facts, Flamm Boroff's Cross-Claim against Gordon Muir must be dismissed for lack of personal jurisdiction.

Conclusion

For the foregoing reasons, Gordon Muir's Preliminary Objections are sustained and Flamm Boroff's Cross-Claim is dismissed.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

³⁵ See Affidavit of Robert J. O'Brien, Esquire.