

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**MONEY MACHINE, LLC,
Plaintiff,**

v.

**Case No. 14-141072-CK
Hon. James M. Alexander**

**THOMAS S. POTI,
Defendant.**

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OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant’s Motion for Summary Disposition. Under the terms of a July 6, 2000 employment agreement, Plaintiff employed Defendant as President of Money Machine, LLC (Money Machine) for over twelve years. Defendant also gained an ownership interest in Money Machine. This dispute arose after Defendant allegedly breached the terms of the employment agreement, which included breaches of the duty of loyalty and fiduciary duty as well as other torts against the Plaintiff. It is undisputed that Plaintiff is a Michigan limited liability company and Defendant is a resident of the State of Ohio.

Defendant now brings the present motion for summary disposition – claiming that he is entitled to summary disposition for two reasons. First, Michigan lacks jurisdiction over defendant. Second, the current cause of action is the same or substantially the same as the pending federal Ohio cause of action.

1. Jurisdiction

Defendant first moves for summary disposition under MCR 2.116(C)(1), which tests whether the Court has personal jurisdiction over a defendant. Plaintiff has the burden of

establishing a prima facie showing of jurisdiction to avoid summary disposition. *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995). A court reviewing a (C)(1) motion must examine the affidavits, pleadings, depositions, admissions as well as any other documentation submitted by the parties. MCR 2.116(G)(5); *Jeffrey*, 448 Mich at 183. All factual disputes are resolved in the non-movant's favor. *Id.* Whether a court has personal jurisdiction over a party is a question of law. *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 426; 633 NW2d 408 (2001).

Jurisdiction can be established by way of general personal jurisdiction or specific (limited) personal jurisdiction. *Oberlies*, 246 Mich App at 427. A court has general jurisdiction over a defendant if the defendant was present or domiciled in Michigan when process was served or if the defendant consented to the court's exercise of jurisdiction. MCL 600.701. In this case, both parties agree that general personal jurisdiction is not at issue and this Court cannot exercise general personal jurisdiction over the Defendant. As a result, this Court need only analyze limited personal jurisdiction. To determine whether the Court may exercise limited personal jurisdiction, it looks to a two-part inquiry where it "must determine whether the defendant's conduct falls within a provision of a Michigan long-arm statute and whether the exercise of jurisdiction comports with due process." *Oberlies*, 246 Mich App at 428.

A. Long-arm statute.

First, the Court must determine whether Defendant's activities fall within a provision of the long-arm statute, MCL 600.705, which provides in relevant part:

The existence of any of the following relationships between an individual or his agent and the state shall constitute a sufficient basis of jurisdiction to enable a court of record of this state to exercise limited personal jurisdiction over the individual and to enable the court to render personal judgments against the individual or his representative arising out of an act which creates any of the following relationships:

- (1) The transaction of any business within the state, or
- (6) Acting as a director, manager, trustee, or other officer of a corporation incorporated under the laws of, or having its principal place of business within Michigan.

Plaintiff argues both subsections (1) and (6) apply here as Defendant has “transacted any business in Michigan” and acted as an “officer of a limited liability company incorporated under the laws of Michigan and having its principal place of business within Michigan.”

1. Transaction of any business.

In support of its argument that Defendant transacted business in Michigan, Plaintiff cites to the complaint Defendant filed with the Ohio state court where Defendant admits he was hired by Money Machine in July 6, 2000 to serve as President of Money Machine and would travel to the State of Michigan in his capacity as President of Money Machine. Defendant further admitted that although his primary residence is in the State of Ohio, he did, in fact, travel to Michigan in his capacity as President, but only for brief periods of time.

Exhibit 1, which contains the employment terms of Plaintiff and Defendant’s business relationship, of Defendant’s complaint filed with the Ohio state court contains numerous references to Defendant’s involvement and systematic business presence in the State of Michigan. The relevant sections provide that Defendant was to serve as Money Machine’s President commencing in 2000 and that the position would require some travel to Troy, Michigan and other cities for scheduled business meetings.

Plaintiff also cites *Sifers v Horen*, 385 Mich 195, 199; 188 NW2d 623 (1975) in support of its argument. In *Sifers*, the Michigan Supreme Court held that the transaction of any business includes “contact with Michigan customers through the mail and the wires.” *Sifers*, 385 Mich App at 188. In our case, Plaintiff argues that Defendant had extensive contact with Plaintiff, a Michigan limited liability company, for several years and traveled to Michigan to conduct

business meetings numerous times while employed as President of Money Machine. Plaintiff argues that as a result of Defendant's involvement and systematic business presence in Michigan as President of Money Machine, the low standard for establishing limited personal jurisdiction has easily been met.

Defendant incorrectly interprets subsection (1) and argues it only applies when a defendant travels to Michigan and conducts business in a personal capacity. Defendant argues that while subsection (1) regarding the transaction of any business in the state "could apply" here, it does not because there is "no shred of evidence to suggest Defendant transacted business in Michigan in a personal capacity."

Although Defendant argues that his activities do not fall within any of these provisions, our courts have held that this statute is interpreted broadly. The *Oberlies* Court reasoned that "[o]ur Legislature's use of the word 'any' to define the amount of business that must be transacted establishes that even the slightest transaction is sufficient to bring a defendant within Michigan's long-arm jurisdiction." *Oberlies*, 246 Mich App at 430. The standard for deciding whether a party has transacted any business is a low threshold. *See id.*

This Court disagrees with Defendants' argument and finds that Defendant's contacts with Michigan are more extensive than those held to be sufficient by both the *Oberlies* and *Sifers* Courts. When deciding such a motion, the Court is bound to resolve factual disputes in the non-movants' (Plaintiff's) favor. *Jeffrey*, 448 Mich at 184. As a result, the Court finds that Defendant's contacts by coming to Michigan to attend scheduled business meetings throughout his tenure as President of Money Machine constitutes sufficient actions to meet the test of "transaction of any business." Since Plaintiff has successfully established a prima facie claim for limited personal jurisdiction over Defendant, the Court will not address jurisdiction under

subsection (6) because only one of the seven relationships is sufficient to find a limited personal jurisdiction over an individual. *See* MCL 600.705.

B. Comports with due process.

The next step in the analysis is determining whether Defendants had sufficient minimum contacts with Michigan such that exercising jurisdiction over it would comport with due process “traditional notions of fair play and substantial justice.” *Oberlies*, 246 Mich App at 432-433, quoting *Intl Shoe Co. v Washington*, 326 US 310, 316 (1945). This requires application of a three-part test:

First, the defendant must have purposefully availed himself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state’s laws. **Second**, the cause of action must arise from the defendant’s activities in the state. **Third**, the defendant’s activities must be substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable. *Jeffrey*, 448 Mich at 186, quoting *Mozdy v Lopez*, 197 Mich App 356, 359; 494 NW2d 866 (1992) (emphasis added).

1. Purposeful Availment

Our courts have held that “purposeful availment” is “akin either to a deliberate undertaking to do or cause an act or thing to be done in Michigan or conduct which can be properly regarded as a prime generating cause of the effects resulting in Michigan, something more than a passive availment of Michigan opportunities.” *Jeffrey*, 448 Mich at 187-188, quoting *Khalaf v Bankers & Shippers Ins Co*, 404 Mich 134, 153-154; 273 NW2d 811 (1978). Our courts have generally been liberal in finding purposeful availment. *See, e.g., Oberlies*, 246 Mich App at 434 (advertising in Michigan was sufficient for purposeful availment test). Plaintiff also cites to *Mad Hatter Inc* where a defendant’s actions need not be income generating to meet this requirement. *Mad Hatter Inc v Mad Hatters Night Club Co*, 399 F Supp 889, 891 (ED Mich 1975).

Plaintiff claims that Defendant purposefully availed himself of conducting activities in Michigan when the Defendant was employed as President of Money Machine, a Michigan limited liability company, for twelve years and by Defendant's ownership interests and distributions from Money Machine. Defendant disputes this claim arguing he never conducted activities in Michigan in a personal capacity. The Court is bound to resolve any factual disputes in the non-movants' favor. *Jeffrey*, 448 Mich at 184.

There is no question that Defendant has stipulated that he has visited Michigan for brief periods of time to conduct business in his capacity as President of Money Machine. Further, Defendant agreed to the employment terms of the July 6, 2000 agreement where it was understood that employment by Money Machine would require some travel to Michigan for scheduled business meetings. As such, Defendant's communications and interactions with Plaintiff were a "deliberate undertaking" that was a "prime generating cause" of the allegations in the complaint, such that Defendant could foresee being "haled before a Michigan court." *Jeffrey*, 448 Mich at 188. This Court concludes that Defendant purposefully availed himself of the privilege of doing business in Michigan.

2. *Defendant's Activities in the State*

Although Defendant's conduct is sufficient to demonstrate the purposeful availment element, the second part of the test – whether this cause of action arises from Defendant's activities within Michigan – is a closer call. It is undisputed that Defendant does not reside in Michigan. Plaintiff's claims for breach of fiduciary duty and breach of the duty of loyalty are exclusively the result of Defendant's responsibilities as President of a Michigan limited liability company. Additionally the claims for misappropriation of trade secrets and unfair competition also arise from Defendant's responsibilities to Plaintiff. Defendant disagrees claiming this cause

of action arises out activities and business conducted in the State of Ohio where the employment agreement was made, signed, and primarily carried out.

In *Oberlies*, the Court of Appeals cautioned that claims that are too attenuated from the defendant's activities in Michigan will not support a finding that jurisdiction here would comport with due process. *Oberlies*, 246 Mich App at 435. Further, the U.S. Supreme Court instructs that entering into a contract with a resident of another jurisdiction is not sufficient by itself to meet the due process test. *Burger King Corp v Rudzewicz*, 471 US 462, 478 (1985). Rather, the defendant's activities in Michigan "must, in a natural and continuous sequence, have caused the alleged injuries forming the basis of the plaintiff's cause of action." *Oberlies*, 246 Mich App at 437. "Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King*, 471 US at 475.

While it is true the employment agreement was entered into in the State of Ohio, Defendant carried out business-related activities in Michigan continuously over a twelve-year period, which was related to his responsibilities and duties as President of Money Machine. Defendant's actions taken during his tenure as President of Money Machine are at issue in this cause of action. Therefore, the Court finds that Defendant's activities in Michigan are sufficient to not offend due process requirements.

3. *Is Jurisdiction Reasonable?*

Finally, the Court finds that Defendant's connections with Michigan meet the final part of the test – whether Defendant's activities are "substantially" connected with Michigan such that jurisdiction is "reasonable." *Jeffrey*, 448 Mich at 197.

In *Burger King*, the United States Supreme Court held, "where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must

present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” *Burger King*, 471 US at 477.

Defendant’s contacts with Michigan include traveling to Michigan to conduct business relationships with Plaintiff, a Michigan resident, over a twelve-year period. Defendant owned “interest” in Money Machine and was a “member” of the Michigan limited liability company. Defendant claims that his rare visits to Michigan do not constitute a “substantial” connection with Michigan. Defendant, however, has failed to present a compelling case that would render jurisdiction unreasonable.

In sum, the Court concludes that Plaintiff has made a prima facie showing of this Court’s jurisdiction over Defendant, and the Court DENIES Defendant’s Motion for Summary Disposition under MCR 2.116(C)(1).

2. Another Pending Claim

Defendant next moves for summary disposition under MCR 2.116(C)(6), which provides grounds for a Court to dismiss a claim where “[a]nother action has been initiated between the same parties involving the same claim.” MCR 2.116(C)(6). A MCR 2.116(C)(6) motion involves the same claim when two suits are based on the same or substantially the same cause of action. *Frohreip v Flanagan*, 275 Mich App 456, 464; 754 NW2d 912 (2007). The court rule is not limited those actions filed in this state or federal courts in the State of Michigan. *See Valeo Switches & Detection Sys, Inc v Emcom, Inc*, 272 Mich App 309, 319; 725 NW2d 364 (2006).

Plaintiff argues there is no “same claim” between this current action and the pending federal Ohio lawsuit relying on the fact that Money Machine is not the same plaintiff in both actions. Defendant disputes Plaintiff’s argument and claims the two causes of action in question

have indistinguishable subject matter and, therefore, should be considered the same or substantially the same cause of action for purposes of a MCR 2.116(C)(6) motion to dismiss.

Plaintiff incorrectly cites *Frohreip* as requiring the second suit be brought by the same plaintiff in order to qualify as the “same claim” as the previously filed action.

In *Frohreip*, the court held while the two lawsuits did arise out of the same operative facts, the claims did not involve the same parties. This is because one case involved a corporate entity suing another corporate entity and the other case involved one common party, but he was named only in his official capacity in the one suit and only in his individual capacity in the other suit.

Here, both parties in the present action and the pending federal Ohio court action are the same. Plaintiff is named in both actions as a corporate entity and Defendant is named in his individual capacity in both actions. Further, Plaintiff submitted to jurisdiction when it removed the Ohio case to the federal court. Therefore, Plaintiff could appropriately bring a counter-claim in the federal Ohio cause of action and would still have an opportunity to be heard.

For the foregoing reasons, the Court GRANTS without prejudice Defendant’s Motion for Summary Disposition under MCR 2.116(C)(6).

IT IS SO ORDERED

September 24, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge