

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

**McALPINE, PC,
Plaintiff,**

v.

**Case No. 15-150746-CB
Hon. James M. Alexander**

**TIARA CONDOMINIUM ASSOCIATION, INC, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' motion for summary disposition. According to its Complaint, Plaintiff previously provided legal services to Defendant Tiara Condominium Association in connection with numerous lawsuits filed in the aftermath of hurricanes Francis and Jeanne, which struck Tiara three weeks apart in September 2004.

Plaintiff claims that Tiara first retained it in 2006 under an hourly fee arrangement. Each month, Plaintiff would bill Tiara, which would then pay said invoices. Then in mid-2007, Plaintiff claims that Tiara requested that Plaintiff deviate from said hourly fee arrangement to pursue various claims against its insurance risk advisor and broker, Marsh USA, on a contingent fee basis. The Marsh case was originally filed in federal court in New York before being transferred to the Southern District of Florida.

After traveling through the federal appellate system, including a certification to the Supreme Court of Florida to rule on an unsettled issue of Florida law, a jury ultimately found in Marsh's favor. At the same time, Tiara's board had changed. Plaintiff claims that the new Board decided to abandon a strong appeal and settle with Marsh using separate counsel.

Plaintiff then brought the present suit against Tiara and several individual board members – alleging breach of contract, fraud, promissory estoppel, unjust enrichment, conversion, and tortious interference against the various Defendants – seeking millions of dollars in attorney fees.

Defendants now move for summary disposition under MCR 2.116(C)(1) – arguing that Michigan lacks personal jurisdiction because Tiara is a Florida corporation that does not do any business in Michigan and 15 of the 16 individual Defendants are not Michigan residents.¹ In the alternative, Defendants request this case be dismissed under the doctrine of *forum non conveniens*.

A (C)(1) motion 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 178. 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 is present, domiciled, or consented to the court’s exercise of jurisdiction. MCL 600.701. The parties do not dispute that Michigan cannot exercise general personal jurisdiction over any of the Defendants except Defendant Dennis Bostick. Because Mr. Bostick is a Michigan resident, the Court may exercise personal jurisdiction over him.

¹ Plaintiff’s Complaint alleges that two individual Defendants are Michigan residents, Dennis Bostick and Lawrence Steng. But Mr. Steng submitted an undisputed affidavit that he is a Florida resident.

With respect to the other seventeen Defendants, however, this Court must analyze limited personal jurisdiction. To determine whether the Court may exercise limited person jurisdiction, 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.

I. Long-Arm Statute

First, the Court must determine whether Defendants’ activities fall within a provision of the long-arm statute, MCL 600.705,² 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.

Plaintiff argues that subsection (1) applies here. With respect to said subsection, our Court of Appeals has reasoned that “[a] single transaction may be sufficient to meet the ‘minimum contacts’ test,” and “[t]he word ‘any’ in MCL 600.705(1) means, according to the Supreme Court in *Sifers v Horen*, supra, just what it says. It includes each and every. It comprehends the slightest.” *Parish v Mertes*, 84 Mich App 336, 339-340; 188 NW2d 623 (1978), quoting *Sifers v Horen*, 385 Mich 195, 199 n 2; 188 NW2d 623 (1971).³

² MCL 600.705 concerns whether a court can exercise limited personal jurisdiction over an individual. MCL 600.715 concerns limited personal jurisdiction over a corporation. The language of these two statutes, however, is virtually identical for our purposes.

³ The *Oberlies* Court similarly reasoned when evaluating the equivalent statute pertaining to businesses, MCL 600.715(1): “Our 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 corporation within Michigan’s long-arm jurisdiction.” *Oberlies*, 246 Mich App at 430.

In their Motion, Defendants argue that none of the individual Defendants are Michigan residents or ever came to Michigan to meet with Plaintiff. In support, Defendants attach the Affidavits of each individual Defendant.

In response, Plaintiff fails to directly dispute any of these claims. Rather, Plaintiff simply claims that Tiara's "Board of Governors" directed it to do certain things. But Plaintiff only specifically alleges actions by Bostick and Defendant Norm Adams. Bostick is a Michigan resident, and therefore, already subject to Michigan jurisdiction. With respect to Adams, Plaintiff has attached multiple email exchanges with Norm Adams that appear to deal with the contingent fee agreement.

With respect to Tiara, Defendants claim that Tiara has no Michigan office, property, or employees. Defendants also claim that Tiara is not authorized to and does not conduct any business in Michigan.

In response, Plaintiff claims, via Affidavit, that it interacted with Tiara on a regular basis over the phone, through email, and visits to Plaintiff's Auburn Hills office.

Michigan caselaw has consistently held the slightest contact sufficient to exercise jurisdiction – including over parties who never even set foot in Michigan. See *Kiever v May*, 46 Mich App 566; 208 NW2d 539 (1973) (holding that defendant's advertisement in a national publication circulated in Michigan and a telephone call with Michigan was enough) and *Aaronson v Lindsay & Hauer Intern Ltd*, 235 Mich App 259; 597 NW2d 227 (1999) (holding that plaintiff's initiation of and subsequent contacts with a Canadian corporation and said corporation's shipment of goods to Michigan was enough).

As stated, Plaintiff only claims (with Affidavit support) specific contacts by Tiara and Adams. Based on the same, the Court finds that said contacts are sufficient to meet the

overwhelmingly broad transaction of “any” business in Michigan. As a result, the Court finds that Tiara’s and Adams alleged contacts with Michigan constitute actions sufficient to meet the “any transaction of any business” test for purposes of the present motion.

With respect to the remaining individual Defendants, however, the Court finds that Plaintiff has failed to establish even the slightest contact with Michigan such that the Court could exercise personal jurisdiction over them. As a result, Defendants’ motion for summary disposition with respect to Defendants Louis Brindisi, Liborio Gatto, John Benoit, Lawrence Streng, Jerry Powel, Robert Leavy, John Bade, Art Thomas, Edward Kisco, Ann Rettie, Joe Miller, Ronald Zdellar, Steve Mauro, Raymond Lowe, and Fred Goldberg is GRANTED, and said Defendants are DISMISSED from this case.

II. Comports with due process.

The next step in the analysis is determining whether Defendants Tiara and Adams had sufficient minimum contacts with Michigan such that exercising jurisdiction over them 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).

As stated, Plaintiff claims that Defendants Tiara and Adams contacted Plaintiff in Michigan for purposes of Plaintiff’s legal representation. And while Defendants dispute this characterization, claiming that Plaintiff first contacted Defendants, the Court is bound to resolve all factual disputes in the non-movant’s (Plaintiff’s) favor. *Jeffrey*, 448 Mich at 184.

In so doing, the Court must find that Defendants Tiara’s and Adams’ interactions with Plaintiff were a “deliberate undertaking” that was a “prime generating cause” of the allegations in the Complaint, such that Defendants could foresee being “haled before a Michigan court.” *Jeffrey*, 448 Mich at 188.

As a result, the Court concludes that Defendants Tiara and Adams purposefully availed themselves of the privilege of doing business in Michigan.

2. *Defendants’ Activities in the State*

Next, the Court considers whether the cause of action arises from the defendants’ activities in the state. 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.

In *International Shoe*, 326 US 310, the U.S. Supreme Court found that the presence of the defendant's sales person in the challenged state was sufficient to establish minimum contacts that comport with due process.

Again, Plaintiff claims that Defendants Tiara and Adams (1) sought out Plaintiff's legal representation in Michigan; (2) exchanged numerous telephone calls and emails to Plaintiff in Michigan; and (3) with respect to Tiara (through Bostick), came to Plaintiff's Michigan office for meetings. Plaintiff now alleges that Defendants failed to pay the fees in connection with its representation of Defendants. These allegations are sufficient to establish a natural and continuous sequence that proximately formed the basis for Plaintiff's Complaint. As a result, this second element is met.

3. *Is Jurisdiction Reasonable?*

Finally, the Court finds that Defendant's connections with Michigan meet the final part of the test – whether its activities are “substantially” connected with Michigan such that jurisdiction is “reasonable.” *Jeffrey*, 448 Mich at 186.

Accepting Plaintiff's allegations that Defendants sought out Plaintiff law firm and negotiated the scope of representation through emails and telephone contacts, along with Tiara's appearance in Plaintiff's Michigan law office (through Bostick), the Court finds no reason to conclude that the exercise of jurisdiction in Michigan is unreasonable, and as a result, this final element is met.

For all of the foregoing reasons, the Court finds that Defendants' motion for summary disposition based on lack of personal jurisdiction is DENIED as to Defendants Tiara, Bostick, and Adams.

III. Forum Non Conveniens.

In the alternative, Defendants also move to dismiss based on the doctrine of forum non conveniens. “‘Forum non conveniens’ is defined as the ‘discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum.’” *Radeljak v Daimlerchrysler Corp*, 475 Mich 598, 604; 719 NW2d 40 (2006), quoting Black's Law Dictionary (6th ed.). The decision whether to grant or deny such a motion is within this Court's discretion. *Id.* But the plaintiff's choice of forum is accorded deference, and a party's residence in Michigan is not dispositive. *Id.*

“‘[T]he ultimate inquiry is where trial will best serve the convenience of the parties [and the ends] of justice.’” *Id.* at 605, quoting *Cray v General Motors Corp*, 389 Mich 382, 396; 207

NW2d 393 (1973), and *Koster v American Lumbermens Mutual Casualty Co*, 330 US 518, 527 (1947).

The Court should analyze this motion based on the factors set out in *Cray* and readopted in *Radeljak*:

1. The private interest of the litigant.
 - a. Availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses;
 - b. Ease of access to sources of proof;
 - c. Distance from the situs of the accident or incident which gave rise to the litigation;
 - d. Enforceability of any judgment obtained;
 - e. Possible harassment of either party;
 - f. Other practical problems which contribute to the ease, expense and expedition of the trial;
 - g. Possibility of viewing the premises.
2. Matters of public interest.
 - a. Administrative difficulties which may arise in an area which may not be present in the area of origin;
 - b. Consideration of the state law which must govern the case;
 - c. People who are concerned by the proceeding.
3. Reasonable promptness in raising the plea of *forum non conveniens*. *Radeljak, supra* at 605-606; *Cray, supra* at 396.

1. *Private Interest*

With regard to the first factor, “[t]he private interest of the litigant,” Defendants argue that almost all of the necessary witnesses reside in Florida, “whereas only Plaintiff and one Defendant [Bostick] reside in Michigan.” Defendants also argue that the majority of the physical and documentary evidence is located in Florida (including Tiara’s records, the original court records and filings, and the files of Tiara’s settlement counsel). And Defendants claim that the alleged actions giving rise to Plaintiff’s suit occurred in Florida. Finally, Defendants assert that the documents and witnesses in Florida may be out of reach of the subpoena power of the

Michigan Court.

Plaintiff responds that its records, employees, and work product are located in Michigan. And, Plaintiff argues, the majority of witnesses are actually located in Michigan.

2. *Public Interest*

With regard to the second factor, Defendants argue that “Michigan taxpayers and this Court should not be burdened with this litigation that has no rational connection to Michigan. Plaintiff represented a Florida corporation in a Florida case arising out of damage to a building in Florida.” Defendants claim that their alleged conduct “in no way implicates the people of Michigan.”

Plaintiff responds that “Michigan has substantial interest in litigating this matter, as [Plaintiff] is a Michigan law firm with its only office in Michigan.”

3. *Reasonable Promptness*

Finally, regarding the last factor, “Reasonable promptness in raising the plea of *forum non conveniens*,” Defendants raised lack of personal jurisdiction and *forum non conveniens* in the present motion (filed in lieu of an Answer).

Considering the *Cray* factors, the Court finds that this case is appropriately litigated in Florida. This case involves a Michigan law firm representing a Florida corporation in a Florida case arising out of damage to a Florida Building. The overwhelming majority of Defendants named by Plaintiff are Florida residents with no connection to Michigan. Plaintiff’s allegations primarily involve said Defendants’ actions in Florida by fraudulently squeezing Plaintiff out and

negotiating a settlement with new (Florida) counsel.⁴

For the above reasons, the Court GRANTS Defendants' motion and exercises its discretion to decline jurisdiction because the convenience of parties and ends of justice would be better served if this action were brought and tried in Florida.

IV. Conclusion

In sum, Defendants' motion is GRANTED IN PART.

Defendant's (C)(1) motion is GRANTED, but only with respect to Defendants Louis Brindisi, Liborio Gatto, John Benoit, Lawrence Streng, Jerry Powel, Robert Leavy, John Bade, Art Thomas, Edward Kisco, Ann Rettie, Joe Miller, Ronald Zdellar, Steve Mauro, Raymond Lowe, and Fred Goldberg – over whom, this Court lacks personal jurisdiction.

And Defendants' motion to dismiss the Complaint with respect to the remaining Defendants (Tiara, Bostick, and Adams) is GRANTED based on *forum non conveniens*.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

May 18, 2016
Date

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

⁴ Although not dispositive, it is worth noting that Defendants have filed a legal malpractice lawsuit against Plaintiff in Florida, which remains pending.