

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

PREFERRED CAPITAL, INC.,)	CASE NO.: 5:04CV2312
)	
Plaintiff,)	JUDGE JOHN ADAMS
)	
v.)	<u>ORDER AND DECISION</u>
)	
AEGIS RISK MANAGEMENT)	
INSURANCE SERVICES, INC., et al.,)	
)	
Defendants.)	
)	

This matter comes before the Court on Motion by the Defendants, Aegis Risk Management Insurance Services, Inc. and Yukiya Sato (collectively referred to as “Defendants”) to Dismiss the Complaint for lack of personal jurisdiction, improper venue, and insufficiency of service of process pursuant to Fed. R. Civ. P. 12(b)(2),(3), and (5). (Doc.#5) Plaintiff Preferred Capital, Inc. (“Plaintiff”) filed a Response in Opposition to the Motion. Thereafter Defendants filed a Reply in Support of their Motion. The Court has been advised, having reviewed the Motion, Response, Reply, pleadings and applicable law. It is hereby determined that Defendants’ Motion is GRANTED.

DISCUSSION

On May 27, 2004, Defendant Aegis Risk Management Services, Inc. entered into a rental lease agreement with NorVergence, Inc. (“NorVergence”) for telecommunication equipment. Defendant Yukiya Sato signed a personal guarantee on the Rental Agreement. On June 14, 2004, NorVergence assigned the lease to Plaintiff. Plaintiff sent Defendants notice of the assignment on June 15, 2004.

The Complaint alleges that Defendants defaulted on their obligations under the lease by failing to make the agreed monthly payment. Plaintiff has made a demand of judgment for the full amount due under the Rental Agreement including costs, interest, and attorney fees.

The action was filed in Summit County, Ohio, Court of Common Pleas on October 18, 2004. Defendants removed it to this Court under 28 U.S.C. §1332. Therefore, the Court has subject matter jurisdiction over this action based on diversity.

Defendants' Motion to Dismiss is based on Fed. R. Civ. P. 12(b)(2), (3), and (5). Rule 12 states in pertinent part, ". . . the following defenses may at the option of the pleader be made by motion: . . . (2) lack of jurisdiction over the person, (3) improper venue, . . . (5) insufficiency of service of process" Although Defendants appear to challenge venue, no arguments are made on this issue. Defendants state only the reasons why this venue would be inconvenient to them. Therefore, this Court will not evaluate whether a more proper venue may exist for this action. Additionally, Defendants challenge the service of process but make no further argument on this issue. If service of process is properly performed under Ohio Rule of Civil Procedure 4.3, such service is effective only when there is a valid basis for in personam jurisdiction over the out-of-state defendant. *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 224 n. 3 (6th Cir. 1972). Therefore, the Court will discuss the service of process only as it relates to Defendants' argument of lack of personal jurisdiction.

If a federal court's jurisdiction is based solely on diversity, that court may exercise personal jurisdiction over an out-of-state defendant only to the extent that a court in the forum state could. *Kerry Steel v. Paragon Indus., Inc.*, 106 F.3d 147, 148

(6th Cir. 1997). The district court must refer to the forum state's law to determine the "in personam jurisdictional reach." *LAK, Inc. v. Deer Creek Enterprises*, 885 F.2d 1293, 1298 (6th Cir. 1989) (quoting *Southern Machine Co. v. Mohasco Indus.*, 401 F.2d 374, 376 n.2 (6th Cir. 1968)).

Once a defendant has made a claim that the court lacks personal jurisdiction over him, it is the plaintiff's burden to establish such. *Nationwide Mut'l Ins. Co. v. Tryg, Int'l Ins. Co., Ltd.*, 91 F.3d 790, 793 (6th Cir. 1996). Additionally, because this Court has chosen not to conduct an evidentiary hearing on the issue of personal jurisdiction, the Plaintiff "need only make a prima facie showing of jurisdiction." *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996). "Dismissal in this procedural posture is proper only if *all* the specific facts which the plaintiff . . . alleges collectively fail to state a prima facie case for jurisdiction." *Id.* Therefore, the Court may not look to the evidence presented by the Defendants but can look only to the Complaint and any affidavits submitted by the Plaintiff to determine whether a prima facie case has been presented. *Kerry Steel, Inc. v. Paragon Industries, Inc.*, 106 F.3d 147, 149 (6th Cir. 1997).

I. Forum Selection Clause

Plaintiff asserts that Defendant voluntarily signed the Rental Agreement which contains a valid forum selection clause for contract disputes. Defendants claim the provision is invalid and unenforceable because it contains vague language which does not advise them that they may be haled into an Ohio court.

The forum selection clause is located on page 2 of the Rental Agreement, under the heading "APPLICABLE LAW." The provision states:

This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which Renter's principal offices are located or, if this Lease is assigned by Renter, the State in which the assignee's principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within that State, such court to be chosen at Renter or Renter's assignee's sole option.

Complaint, Exhibit A, p. 2. Additionally, the personal guaranty signed by Defendant Sato states, "The same state law as the rental will govern this guaranty. You agree to jurisdiction and venue as stated in the paragraph titled Applicable Law of the Rental." Complaint, Exhibit A, p.1 (capitalization omitted).

A forum selection clause is a recognized way for contracting parties to select an agreed jurisdiction to hear disputes regarding the contract. *M/S Bremen v. Zapata Off Shore Co.*, 407 U.S. 1 (1972). Generally, if the clause is contained in a freely bargained commercial contract it is considered valid and enforceable unless to enforce such a provision would be unreasonable and unjust, or the clause was a product of fraud or overreaching. *Id.* at 15. *Bremen* articulates that even if the designated forum would be inconvenient to the challenging party, if it was clearly foreseeable at the time of contracting, the challenger would have burden of demonstrating that the chosen forum would be "so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 17-18. The Supreme Court stated that absent such a showing, there would be no basis to find that enforcement of the forum selection clause would be unfair, unjust, or unreasonable. *Id.* at 18.

Plaintiff points out that Ohio courts have upheld forum selection clauses where the jurisdiction is not stated with particularity, citing to *Alpert v. Kodee Technologies*, 117 Ohio App.3d 796 (1997), *General Electric Co. v. G. Siempelkamp & Co.*, 29 F.3d

1095 (6th Cir. 1994), and *Bernath v. Potato Services of Michigan*, 2002 WL 31233240 (N.D.O.H. 2002). However, in *Alpert*, the appellate court did not review the clause under *Bremen*. *Id.* at 801. Additionally, the forum selection clause at issue in *Alpert* required any action for breach be filed in the Defendants' state of residence. *Id.* at 802. Therefore the forum was clearly foreseeable at the time the contract was entered into. *Id.* In *General Electric*, the forum was also reasonably foreseeable by the parties at the time the contract was entered into, as it stated that jurisdiction would exist at the principal place of business of the supplier, who was the defendant. *General Electric*, 29 F.3d at 1099. Finally, in *Bernath*, the forum selection clause required all disputes be resolved at the "Seed State of Origin" which the parties agreed was Maine. Therefore, in *Bernath*, it was also reasonably foreseeable at the time of contracting clear which forum an action would be filed in. The main theme among all of the above cases is that the forum was *reasonably foreseeable* at the time the parties entered into the contract.

In the case at bar, the Rental Agreement states, "all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within [the State in which the assignee's principal offices are located], such court to be chosen at Rentor or Rentor's assignee's sole option." Complaint, Exhibit A, p. 2. From the plain language of the Rental Agreement, the Defendants could be brought into any court across this country, state or federal, if, as occurred in this case, the contract is assigned. Based on this, at the time the contract was entered into, Defendants could **not** reasonably foresee what jurisdiction they may be brought into by an assignee. Therefore, to enforce this forum selection clause would be unreasonable and unjust. Additionally, based on the plain language of the contract, this clause appears to be a product of overreaching by

NorVergence in an attempt to accommodate future assignees. Because it is determined that the forum selection clause is invalid and unenforceable, the Court must determine whether it can exercise in personam jurisdiction over the Defendants.

II. Personal Jurisdiction

This Court's ability to exercise personal jurisdiction over a defendant must satisfy both the state's long-arm statute and the requirements of Due Process under the Fourteenth Amendment. *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1115 (6th Cir. 1994).

Ohio's long-arm statute is O.R.C. §2307.382, which states that a court may obtain personal jurisdiction by the defendant:

- (1) Transacting any business in this state;
- (2) Contracting to supply services or goods in this state;
- (3) Causing tortuous injury by an act or omission in this state;
- (4) Causing tortuous injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (6) Causing tortuous injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;
- (7) Causing tortuous injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity.
- (8) Having an interest in, using, or possessing real property in this state;
- (9) Contracting to insure any person, property, or risk located within this state at the time of contracting.

O.R.C. §2307.382(A). Additionally, Civ. R. 4.3(A)(1) allows for out-of-state service of process for a defendant who is “transacting any business in this state”.

The Ohio Revised Code describes “transacting any business” in O.R.C. §2307.382(B) as occurring when, “a person who enters into an agreement, as a principal, with a sales representative for the solicitation of orders in this state is transacting business in this state. . . .” The Ohio Supreme Court further describe the term “transact” to mean, “to prosecute negotiations; to carry on business; to have dealings...” *Kentucky Oats Mill Co.*, 53 Ohio St.3d 73, 75 (1990). Ohio Supreme Court rulings demonstrate that O.R.C. §2307.382 and Civ. R. 4.3 are to “reach to the full outer limits of litigation which is permissible consistent with federal due process of law limitations.” *Hammill Manufacturing Co. v. Quality Rubber Products, Inc.*, 82 Ohio App.3d 369, 374 (1992).

Under a Due Process analysis, the constitutional touchstone is “whether the nonresident defendant purposefully established “minimum contacts” in the forum state; purposeful establishment exists where, *inter alia*, the defendant has created continuing obligations between himself and residents of the forum.” *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 237 (1994) (internal quotations omitted). The United States Supreme Court has held that a state may assert personal jurisdiction over a nonresident defendant if that person has “certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

In determining whether finding jurisdiction offends due process, the Supreme Court found, in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), that a nonresident

defendant would receive notice of being subject to jurisdiction through “contract documents and the course of dealing” with the forum state. Justice Brennan stated in the majority opinion that “the constitutional touchstone remains whether the defendant purposely established ‘minimum contacts’ in the forum State.” *Burger King*, 471 U.S. at 475. The Supreme Court found that such minimum contacts could be found if the nonresident defendant purposely established such contacts, which created a “substantial connection” with the forum state, and “has ‘deliberately’ engaged in significant activities within a State ... or has created ‘continuing obligations’ between himself and residents of the forum, ... he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by ‘the benefits and protections’ of the forum’s laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.” *Id.* at 475-476.

The question of jurisdiction doesn’t end here though. Once it has been determined that the nonresident defendant purposely established minimum contacts with the forum state, the contacts,

may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with ‘fair play and substantial justice.’ ... Thus courts in ‘appropriate case[s]’ may evaluate ‘the burden on the defendant,’ ‘the forum State’s interest in adjudicating the dispute,’ ‘the plaintiff’s interest in obtaining convenient and effective relief,’ ‘the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,’ and the ‘shared interest of the several States in furthering fundamental substantive social policies.’ These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. ... On the other hand, where a defendant who purposely 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.

Id. at 475.

Defendants claim that neither has sufficient contacts with the State of Ohio to permit *in personam* jurisdiction under the Due Process Clause or Ohio's long-arm statute.

Plaintiff makes no argument that personal jurisdiction exists under a Due Process/minimum contacts analysis, stating "[b]ecause the contract at issue contains a valid forum-selection clause, any analysis of the Defendant's [sic] contacts to the state of Ohio is unnecessary and irrelevant. Plaintiff's Response in Opposition to Defendant's [sic] Motion to Dismiss, p. 10. Because the Court has determined that the forum selection clause at issue in this case is not valid, it must look to the Complaint and any affidavits Plaintiff submitted with its Opposition to the Motion to Dismiss.

Nowhere in the Complaint is it alleged that Defendants have any contact with the State of Ohio. There are also no allegations made by in the Complaint that the Defendants: transacted any business in this state; contracted to supply goods or services in this state; caused tortuous injury in this state; have any interest in, are using or possessing real property in this state; or contracted to insure any person, property or risk located within this state at the time of contracting. Additionally, Plaintiff submitted no affidavits or exhibits to demonstrate the above. Based on this, the Court finds no basis for it to exercise personal jurisdiction over the Defendants based on Due Process or Ohio's long-arm statute.

CONCLUSION

Based on the discussion contained herein, this Court finds the forum selection clause contained in the contract at issue to be invalid and unenforceable. Additionally, the Court finds no basis to exercise in personum jurisdiction over the Defendants based on Due Process under the Fourteenth Amendment or Ohio's long-arm statute. Plaintiff

has therefore failed to state a prima facie case for personal jurisdiction over the Defendants. As personal jurisdiction over the Defendants is lacking, under Ohio Rule of Civil Procedure, the service of process on the Defendants is also not effective. As such, Defendants' Motion is found to be well-taken and is therefore GRANTED. There is no just cause for delay.

So ordered.

s/ Judge John R. Adams
JUDGE JOHN R. ADAMS
UNITED STATES DISTRICT COURT