

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

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CIVIL

PAUL PICHIERRI,)	
)	
Plaintiff,)	
)	
vs.)	CASE NO. ST-08-CV-340
)	
DENNIS CROWLEY,)	
)	
Defendant.)	
)	

MEMORANDUM OPINION

Pending before the Court are (1) Defendant Dennis Crowley’s January 7, 2010, Renewed Motion to Dismiss¹ and (2) Plaintiff Paul Pichierra’s December 29, 2009, Motion for Extension to Conduct Jurisdictional Discovery. For the following reasons, the Court will deny Plaintiff’s motion, will grant Defendant’s motion, and will dismiss this case with prejudice.

FACTUAL AND PROCEDURAL HISTORY

In June, 2005, Inter-Island Pharmacies, Inc. (“Inter-Island”), d/b/a Doctor’s Choice Pharmacy (“Doctor’s Choice”), hired Plaintiff to be its Director of Operations. Inter-Island is a corporation organized under the laws of the Virgin Islands. In November, 2005, Inter-Island was sold to PNC Capital Group Ltd. (“PNC”), which is incorporated under the laws of the state of Florida. As a result of the sale of Inter-Island to PNC, Defendant, a citizen and resident of Florida, became President of Doctor’s Choice. On April 5, 2006, Plaintiff tendered his resignation to his employer, Inter-Island. On July 9,

¹ Plaintiff filed an Opposition on February 4, 2010, and Defendant filed a Reply on February 22, 2010.

2008, Plaintiff filed a Complaint against Defendant alleging breach of contract, breach of the duty of good faith and fair dealing, and tortious interference with contract.

ANALYSIS

a) Plaintiff's Motion for Extension

In a June 29, 2009, Order, this Court granted Plaintiff's request for jurisdictional discovery and permitted Plaintiff ninety (90) days to conduct discovery on these issues. On November 17, 2009, the Court ordered Plaintiff to supplement his submission regarding Defendant's original motion to dismiss for lack of personal jurisdiction by November 30, 2009. On December 29, 2009, Plaintiff filed a motion for extension to conduct jurisdictional discovery until April 15, 2010, on the basis that Plaintiff was unaware of the June 29, 2009, Order. Plaintiff concedes, however, that his lack of notice of the June 29, 2009, Order was due to his own firm's technological error. (Affidavit of Ryan Green, Esq., at page 2).

Foremost, Plaintiff's counsel has a duty to keep himself apprised of the status of his client's case. See *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 357 (5th Cir. 1993); *Tartaglia v. Del Papa*, 48 F.R.D. 292, 293 (E.D. Pa. 1969); *Gibson-Michaels v. Bair*, 255 F.R.D. 306, 307 (D.C. Cir. 2009) (finding that failure to receive notice of filing did not absolve counsel of his "affirmative duty to stay apprised of the status of the case"); *Easley v. Kirmsee*, 382 F.3d 693, 698 (7th Cir. 2004) (noting that a attorney's "inattentiveness to litigation is not excusable, no matter what the resulting consequences the attorney's somnolent behavior may have on a litigant").

In addition, Plaintiff's counsel has demonstrated a pattern of dilatoriness through out this proceeding, failing to comply with this Court's November 17, 2009, Order; this

Court's October 27, 2008, Order;² and this Court's January 21, 2009, Order.³ Moreover, the record does not reveal that Plaintiff has conducted any jurisdictional discovery since the time he learned the initial extension was granted. The second discovery extension period requested by Plaintiff would have expired a month ago, and Plaintiff has still not provided additional evidence regarding jurisdiction. Under these circumstances, the Court can conclude only that the request for an additional extension was filed merely for the purpose of delay. As a result, this Court will deny Plaintiff's December 29, 2009, motion for extension as moot. Consequently, the Court will determine whether it may exercise jurisdiction over Defendant based on the previous submissions of the parties.

b) Defendant's Motion to Dismiss

Defendant submits a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2), 12(b)(4), 12(b)(5),⁴ and 12(b)(6).

When reviewing a Fed. R. Civ. P. 12(b)(2) defense, a court may only exercise jurisdiction over a non-resident defendant in compliance the long-arm statute of the forum and the Due Process Clause of the U.S. Constitution. *Terranova, Inc., v. Zellner*, 2003 WL 1712516, at *1 (D.V.I. 2003). Due process requires that a defendant have "minimum contacts" with a forum state. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, (1945). "Minimum contacts" may be met if a plaintiff can demonstrate general or claim-specific jurisdiction. See *Remick v. Manfredy*, 238 F.3d 248, 255 (3d Cir. 2001). General

² Plaintiff failed to comply with this Court's October 27, 2008, Order, which had granted the parties' stipulation to extend this Court's deadline for Plaintiff to file a response to Defendant's motion to dismiss from October 27, 2008, to November 11, 2008. On November 21, 2008, Plaintiff requested ten (10) days to respond to Defendant's motion, which this Court granted on December 15, 2008.

³ On January 21, 2009, the Court ordered Plaintiff to respond to Defendant's motion within ten (10) days of the Order. On February 9, 2009, Plaintiff filed another request for an extension, requesting ten (10) days to respond to Defendant's motion, although Plaintiff filed his Opposition the same day.

jurisdiction is based upon “continuous and systematic contacts” with the forum and exists even if a plaintiff’s cause of action does not arise from the defendant’s forum related activities. *Metcalfe v. Renaissance Marine, Inc.*, 566 F.3d 324, 334 (3d Cir. 2009) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)). Specific jurisdiction exists if a plaintiff’s cause of action arises out of the defendant’s forum-related activities, such that the defendant would anticipate being subject to the laws of that forum. *Gerald Chamales Corp. v. Oki Data Americas, Inc.*, 557 F.Supp.2d 494, 498 (D.N.J. 2008).

Generally, a court does not have personal jurisdiction over an individual when his or her contacts with a forum are made only in his or her corporate capacity. *Urgent v. Technical Assistance Bureau, Inc.*, 255 F.Supp.2d 532, 538 (D.V.I. 2003). However, a corporate officer may be personally liable if he or she engages in tortious conduct in his or her corporate capacity. *Id*; see also 5 V.I.C. § 4903(a)(3)⁵ (the Virgin Islands long arm statute). Additionally, a court may “exercise personal jurisdiction over a corporate officer when there is a basis for piercing the corporate veil.” *Urgent, supra*, at 538 (citing *PSC Professional Services Group, Inc. v. American Digital Systems, Inc.*, 555 F.Supp. 788, 792 (E.D. Pa. 1983)). A plaintiff bears the burden of proving, by a preponderance of the evidence, facts that demonstrate that a court has personal jurisdiction over a defendant. *Horton v. Martin*, 133 Fed.Appx. 859, 860 (3d Cir. 2005).

⁴ For purposes of this Opinion, the Court will decline to address Defendant’s Fed. R. Civ. P. 12(b)(4) and 12(b)(5) arguments as this decision is based on Rules 12(b)(2) and 12(b)(6).

⁵ “A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person’s (sic) ... causing tortious injury by an act or omission in this territory.”

Here, Plaintiff has submitted an affidavit stating that Defendant “came to St. Thomas every month for at least a week, and sometimes more than once a month to further exercise control over the business operations.” (Pichierri Affidavit, at page 2). In addition, Plaintiff submits a series of emails Defendant sent to Plaintiff between November 7, 2005, and January 18, 2006, in which Defendant appears to be directing Plaintiff on certain issues. (Plaintiff’s Opposition, Exhibits 3-11). Plaintiff alleges that, through these contacts with the Virgin Islands, Defendant tortiously interfered with Plaintiff’s employment contract with Inter-Island.

In *Gehling v. St. George’s School of Medicine, Ltd.*, the Third Circuit found that a court had jurisdiction over a defendant that allegedly committed a tort in the forum state because defendant’s agent had traveled to the forum state, the defendant had availed itself of acting within the forum state, and the cause of action arose from defendant’s in-state activities. 773 F.2d 539, 544 (3d Cir. 1985). As a result, it would appear that this Court has personal jurisdiction over Defendant in this case as well.

Notwithstanding, in his original motion to dismiss,⁶ Defendant asserted a statute of limitations defense with respect to the tort claim.

FED. R. CIV. P. 12(b)(6), made applicable to the Superior Court through SUPER CT. R. 7, provides that upon motion by the pleader, a claim, counterclaim, cross-claim, or third party claim shall be dismissed when there is a “failure to state a claim upon which relief can be granted” to the claimant. Furthermore, FED. R. CIV. P. 12(d) states that “if, on a motion under Rule 12(b)(6) or 12(c) matters outside the pleading are presented and

⁶ Defendant filed this motion on October 2, 2008, and the motion was his first appearance in the case.

not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.”

Defendant submitted matters outside the pleadings in support of its Motion. Plaintiff’s Opposition also contained matters outside the pleadings. Therefore, this Court must consider Defendant’s Motion under a summary judgment standard. Fed. R. Civ. P. 56(c)(2) requires that summary judgment may be granted only if the “pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”

The statutory period of limitations for a tort in the Virgin Islands is two years. 5 V.I.C. § 31. Pursuant to the doctrine of equitable tolling, however, the statutory limitations period:

for a second action may be equitably tolled by the filing of an earlier action dismissed for lack of personal jurisdiction if: (1) the first action gave the defendant timely notice of plaintiff’s claim; (2) the lapse of time between the first and second actions will not prejudice the defendant; and (3) the plaintiff prosecuted the first action in good faith and diligently filed the second action.

Island Insteel Systems, Inc. v. Waters, 296 F.3d 200, 204-205 (3d Cir. 2002). The doctrine “avoids the unfairness to plaintiffs that would occur if plaintiffs who diligently but mistakenly prosecute their claims in a court that lacks personal jurisdiction find their claims time-barred when they refile in a proper jurisdiction.” *Williams v. Government of Virgin Islands*, 2009 WL 1649752, at *9 (V.I. Super. Ct. 2009) (quoting *Waters, supra*, at 205). See also *Hypolite v. Marriott Ownership Resorts (St. Thomas), Inc.*, 2009 WL 3497119, at *4 (V.I. Super. Ct. 2009) (“equitable tolling not available if the claimant has

failed to exercise due diligence in preserving his or her legal right whether the delay is attributable to the plaintiff's attorney").

In Plaintiff's original opposition to Defendant's original motion to dismiss, Plaintiff concedes that the statutory limitations period for a tort claim lapsed in this case, given that Plaintiff tendered his resignation on April 5, 2006, and that the Complaint in this case was filed on July 9, 2008. (Original opposition, at pages 18 and 19). Nevertheless, Plaintiff argues the statutory limitations period should be tolled because Plaintiff effected service upon Defendant on March 15, 2008, in a related case, Case No. ST-06-CV-515, in which Defendant is a named Defendant. Although the complaints in ST-06-CV-515 and in this case are virtually identical, each including a claim of tortious inference with contract against Defendant Crowley, Plaintiff did not serve Defendant Crowley within 120 days of filing his complaint in the ST-06-CV-515 case as prescribed by Fed. R. Civ. P. 4(m). In fact, Plaintiff concedes that he "agreed to dismiss his claims against [Defendant Crowley in the ST-06-CV-515 case] based upon lack of timely service." (Plaintiff's April 2, 2009, Opposition to Proposed Order in the ST-06-CV-515 case).

Notwithstanding, Plaintiff argues that Defendant evaded service until March 15, 2008, and received notice of the claims against him personally when his company PNC was served with the complaint in the ST-06-CV-515 case. Plaintiff has provided no evidence justifying the late service upon Defendant or that Defendant actually or constructively received notice when PNC was served. See *Catalano v. T.W.A., Inc.*, 1978 WL 4970, at *2 (Del. Ch. 1978) (officer not deemed to be personally served simply because valid service was made upon the corporation). Plaintiff's failure to diligently

prosecute his claims against Defendant in Case No. ST-06-CV-515 makes the doctrine of equitable tolling inapplicable in this case. Accordingly, Plaintiff's claim against Defendant for any and all torts in this matter, including the claim of tortious inference with contract, will be dismissed.

In addition, Plaintiff also alleges claims of breach of contract and breach of the duty of good faith and fair dealing⁷ in his Complaint. Plaintiff asserts that this Court has jurisdiction over Defendant with respect to the contract claims because, although Plaintiff's contract is with Inter-Island, Defendant is allegedly the alter ego of Inter-Island and there is a basis to pierce the corporate veil to find Defendant liable on these claims.

When reviewing a request to pierce the corporate veil, the following factors are to be considered:

- (1) whether the corporation suffers from gross undercapitalization;
- (2) failure to observe corporate formalities;
- (3) non-payment of dividends;
- (4) insolvency of debtor corporation;
- (5) siphoning of funds from the debtor corporation by the dominant stockholder;
- (6) nonfunctioning officers;
- (7) absence of corporate records; and
- (8) whether the corporation is merely a facade for the operation of the dominant stockholder.

Matheson v. V.I. Community Bank, Corp., 297 F.Supp.2d 819, 833 (D.V.I. 2003) (citing *Pearson v. Component Technology Corp.*, 247 F.3d 471, 484-85 (3d Cir. 2001)). Because piercing the corporate veil is an equitable remedy, it requires "clear and convincing evidence"⁸ that the corporate structure is being used to perpetuate fraud or similar injustice. *Wallace ex rel. Cencom Cable Income Partners II, L.P. v. Wood*, 752 A.2d 1175, 1184 (Del. Ch. 1999); see also *Carpenters Health & Welfare Fund v. Kenneth R.*

Ambrose, Inc., 727 F.2d 279, 284 (3d Cir. 1983) (alter ego concept is a tool of equity to be used to “prevent fraud, illegality or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from public liability for a crime”); *Anderson v. Lorck-Schierning*, 20 V.I. 200, 206-207 (D.V.I. 1983) (the corporate shield may not be used to evade a legal obligation or perpetuate an injustice). Mere conclusory allegations that a shareholder is the “alter ego” of a corporation, however, are insufficient to pierce the corporate veil. *Matheson, supra*, at 833.

Plaintiff argues that Defendant is the alter ego of PNC, and, by extension, of Inter-Island, which is owned by PNC. (Plaintiff’s Opposition, at page 3). As a consequence, to find Defendant liable under the contract claims, the Court would need to pierce the veils of both PNC and Inter-Island. Generally, “the local law of the state of incorporation will be applied to determine the existence and extent of a shareholder’s liability to the corporation ... and to its creditors for corporate debts.” *In re Tutu Wells Contamination Litigation*, 909 F.Supp. 1005, 1009 (D.V.I. 1995) (citing Restatement (Second) of Conflicts § 307). Considering that PNC is a Florida corporation, this Court would be required to apply the law of Florida to determine whether to pierce the corporate veil of PNC. Plaintiff, however, has neither provided the elements of law with respect to piercing the corporate veil in Florida, nor has Plaintiff presented the requisite facts to show that Plaintiff has met these elements to demonstrate that this Court should exercise jurisdiction over Defendant.

⁷ Considering these two claims are intertwined, the Court will treat these claims as one for the purposes of the jurisdictional inquiry.

⁸ *Matheson, supra*, at 833.

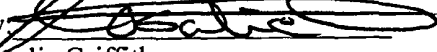
In addition, although Plaintiff cites case law concerning piercing the corporate veil in the Virgin Islands and has presented some evidence indicating Defendant's level of control over Inter-Island, Plaintiff has provided no evidence of the injustice that would arise if this Court declined to disregard Inter-Island's separate corporate existence. Nevertheless, it is incumbent upon Plaintiff to demonstrate a link between the abuse of the corporate form and the fraud or injustice to which he is subject. See *Fontaine Trust v. P & J Resources, Inc.*, 2010 WL 1529399, at *7 (E.D. Ky. 2010). "Absent evidence of some fraud or injustice resulting directly from the abuse of the corporate form, the specific, unusual circumstances necessary to justify piercing the corporate veil are lacking." *Hodak v. Madison Capital Mgmt., LLC*, 348 Fed.Appx. 83, 95 (6th Cir. 2009).

Here, Plaintiff has a suit against Inter-Island pending before another Superior Court judge for the same breach of contract claims. Considering Plaintiff is pursuing breach of contract claims against the corporation, there is no reason to pierce the corporate veil with respect to Inter-Island to determine whether this Court may exercise jurisdiction over Defendant in this case. As a consequence, this Court does not have jurisdiction over Defendant concerning Plaintiff's breach of contract and breach of the duty of good faith and fair dealing claims, and this case will be dismissed with prejudice.

An Order consistent with this Opinion shall follow.

Dated: May 18, 2010

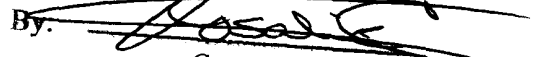
ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court / /

By: 
Rosalie Griffith
Court Clerk Supervisor 5/18/10


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

CERTIFIED A TRUE COPY

Date: June 22, 2010
Venetia H. Velazquez, Esq.
Clerk of the Court

By: 
Court Clerk