

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL LOSTEN,)
)
Plaintiff,)
)
v.) C.A. No. 09C-06-237 CLS
)
UKRAINIAN CATHOLIC)
DIOCESE OF PHILADELPHIA, a)
Pennsylvania corporation; THE)
ORDER OF THE SISTERS OF)
ST. BASIL THE GREAT, a)
Pennsylvania corporation; JESUS)
LOVER OF HUMANITY)
PROVINCE, a Pennsylvania)
corporation; ST. BASIL'S)
UKRAINIAN CATHOLIC)
CHURCH, a foreign corporation;)
CATHOLIC DIOCESE OF)
WILMINGTON, a Delaware)
corporation; and EDDI FALCONE)
individually and in his official)
capacity)
)
Defendants.)

On Defendants' Motion to Dismiss for
Lack of Personal Jurisdiction. **GRANTED.**

ORDER

Robert Jacobs, Esquire, Thomas. C. Crumplar, Esquire, and Jordan Ponzo,
Esquire, Jacobs & Crumplar, P.A., Wilmington, Delaware, Attorneys for
Plaintiff.

Thomas S. Neuberger, Esquire, Stephen J. Neuberger, Esquire, and Raeann Warner, Esquire, The Neuberger Firm, P.A., Wilmington, Delaware, Attorneys for Plaintiff.

Michael P. Migliore, Esquire, Mark E. Chopko, Esquire, and Antonia M. Pfeffer, Esquire, Stradley Ronon Stevens & Young, LLP, Wilmington, Delaware, Attorneys for Defendants, Sisters of St. Basil the Great, Inc. and Jesus Lover of Humanity Province.

Anthony G. Flynn, Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware, Attorney for Defendants The Diocese of Trenton and St. Theresa Parish.

SCOTT, J.

Introduction

Michael Losten (“Losten” or “Plaintiff”) filed suit against the Ukrainian Catholic Diocese of Philadelphia, The Order of the Sisters of St. Basil the Great (“St. Basil the Great”), Jesus Lover of Humanity Province (“Province”), St. Basil’s Ukrainian Catholic Church,¹ Catholic Diocese of Wilmington,² and Eddie Falcone (“Falcone”). Losten seeks monetary damages for personal injuries from childhood sexual abuse by Falcone. The Sisters of St. Basil the Great and Jesus, Lover of Humanity³ (“moving defendants”) now seek dismissal of the Complaint pursuant to Superior Court Civil Rule 12(b)(2) for lack of personal jurisdiction.

Background

Losten filed this suit after the passage of the Delaware Child Victim’s Act.⁴ Beginning around 1962, Losten lived at St. Basil’s Orphanage (“Orphanage”) located in Chesapeake City, Maryland.⁵ Allegedly, Falcone, the former caretaker of Orphanage, abused Losten hundreds of times

¹ The Ukrainian Catholic Archdiocese of Philadelphia, Inc. was incorrectly sued as the Ukrainian Catholic Diocese of Philadelphia and St. Basil’s Ukrainian Catholic Church was incorrectly sued as St. Basil’s Ukrainian Catholic Church.

² A Stipulation of Dismissal was filed on November 5, 2009 dismissing all claims against the Catholic Diocese of Wilmington.

³ In a footnote, the moving defendants claim that both the Order of the Sisters of St. Basil the Great and the Jesus Lover of Humanity Province are misnamed and mischaracterized. Def.’s Br. 2 n.1.

⁴ 10 *Del. C.* § 8145.

⁵ Am. Compl. ¶¶ 8, 18.

between 1962 and 1970 when plaintiff was approximately five years old until he was age thirteen.⁶ Most alleged acts of abuse occurred in Maryland, but Losten asserts that several occurred at Falcone's home in Delaware.⁷ Losten alleges that Falcone regularly took him on overnight trips to Falcone's home in Wilmington, Delaware where Falcone sexually assaulted, raped and/or molested Losten.⁸ Losten claims Falcone had permission from Orphanage authorities to take him on the trips to Delaware. According to the Complaint, the moving defendants or its predecessors owned, operated, staffed and otherwise controlled the Orphanage⁹ and that the Orphanage was staffed by nuns of the Province.¹⁰ When Losten was approximately eight years old he alleges that a nun caught Falcone molesting another child. Falcone was sent away, but was allowed to return to the Orphanage after a few months.¹¹

Losten currently resides in another state. According to the Complaint, St. Basil the Great and the Province are Pennsylvania corporations with

⁶ *Id.* at ¶¶ 1, 11.

⁷ *Id.*

⁸ *Id.* at ¶ 22.

⁹ *Id.* at ¶ 8.

¹⁰ *Id.* at ¶ 7. According to the Complaint, Falcone was employed by the Catholic Diocese of Wilmington and St. Basil the Great Ukrainian Catholic Church.

¹¹ *Id.* at ¶ 26.

principal offices in Pennsylvania.¹² St. Basil the Great is allegedly a religious order of nuns established by the Ukrainian Catholic Church.¹³

Losten contends that an agency relationship existed between Falcone and moving defendants. He claims that St. Basil the Great and the Province employed and supervised Falcone during the relevant time period and that Falcone was empowered by the moving defendants to perform duties and functions undertaken on its behalf.¹⁴ Losten alleges that any acts initially done outside the scope of consent were ratified, affirmed, adopted, acquiesced in, and not repudiated by St. Basil the Great and the Province and that such acts were enabled by the agency relationship.¹⁵ Losten contends that all contacts made between him and Falcone were pursuant to Falcone's routine and regular job duties.¹⁶

Furthermore, Losten asserts that from 1965 forward St. Basil the Great and the Province had actual or constructive knowledge that Falcone was sexually molesting young children.¹⁷ Moving defendants allegedly knew of the abuse and covered up Falcone's sexual abuse of young

¹² *Id.* at ¶¶ 4, 7.

¹³ *Id.* at ¶ 4.

¹⁴ *Id.* at ¶¶ 13, 31.

¹⁵ *Id.* at ¶ 32.

¹⁶ *Id.* at ¶ 34.

¹⁷ *Id.* at ¶ 17.

children.¹⁸ By failing to warn and protect Losten from the foreseeable criminal acts of Falcone, Losten claims that moving defendants breached its duty owed to Losten. As a result of the breach, Losten now claims damages, including depression, PTSD, sexual dysfunction, guilt, emotional pain, fear, fright, shame, anxiety, humiliation, anger, loss of enjoyment of life, lack of self-confidence, insomnia, embarrassment, substance abuse, economic loss, and other temporary or permanent personal injury.¹⁹

Moving defendants deny that Falcone was an employee of the Orphanage and that he had responsibilities that involved the care of children.²⁰ The moving defendants contend that any abuse that occurred in Delaware was purely coincidental and was not the result of any purposeful action directed by the moving defendants.²¹ St. Basil the Great and the Province deny directing, requesting, or assigning Falcone to perform services or duties, or any other business on behalf of the moving defendants in Delaware and, therefore, any acts of abuse were committed outside the scope of employment and cannot be a basis to assert jurisdiction over the moving defendants. Even assuming the moving defendants knew of Falcone's history of abuse and gave him permission to go to Delaware with

¹⁸ *Id.* at ¶¶ 26, 39-41.

¹⁹ *Id.* at ¶ 54.

²⁰ Def.'s Br. 4 ¶ 6.

²¹ *Id.* at 2.

children, moving defendants argue that none of the acts of abuse were for the benefit or to further the work of the defendants. Therefore, moving defendants allege Losten has failed to satisfy his burden under Delaware's long-arm statute.

Standard of Review

In a motion to dismiss for lack of *in personam* jurisdiction, the plaintiff bears the burden of making a prima facie case to establish the basis for jurisdiction.²² This burden is satisfied if Plaintiff shows that Delaware's long-arm statute confers jurisdiction.²³ The court first determines if jurisdiction is appropriate under the long-arm statute and, if it is, the court then determines if asserting such jurisdiction would offend the Due Process Clause of the Fourteenth Amendment.²⁴ In making its determination, the court must accept all factual allegations in the Complaint as true and must view all factual inferences in a light most favorable to the plaintiff.²⁵

Discussion

Analyzing personal jurisdiction over a defendant is a two-step process.²⁶ First, the court must determine whether the defendant's actions fall within any provisions of the long-arm statute and, second, the court must

²² *Greenly v. Davis*, 486 A.2d 669, 670 (Del. 1984).

²³ *Boone v. Oy partek Ab*, 724 A.2d 1150, 1154 (Del. Super. 1997).

²⁴ *Palmer v. Moffat*, 2001 WL 1221749, at *1 (Del. Super. Oct. 10, 2001).

²⁵ *Id.*

²⁶ *Wright v. Am. Home Prods. Corp.*, 768 A.2d 518, 527 (Del. Super. 2000).

determine whether exercising jurisdiction is constitutionally permissible.

Delaware's long-arm statute, 10 *Del. C.* § 3104, allows a court to exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent:

- (1) Transacts any business or performs any character of work or service in the State;
- (2) Contracts to supply services or things in this State;
- (3) Causes tortious injury in the State by an act or omission in this State;
- (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State;
- (5) Has an interest in, uses or possesses real property in the State; or
- (6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.²⁷

Delaware courts construe this statute liberally, favoring the exercise of jurisdiction.²⁸ Subsections (c)(1), (c)(2), (c)(3), (c)(5), and (c)(6) of the

²⁷ 10 *Del. C.* § 3104(c).

²⁸ *Daily Underwriters of Am. v. Md. Auto Ins. Fund*, 2008 WL 3485807, *3 (Del. Super. July 31, 2008).

statute require a showing of specific jurisdiction, where the cause of action arises from acts or omissions occurring in Delaware.²⁹ Subsection (c)(4), however, requires a showing of general jurisdiction, where Plaintiff's claims are unconnected with the nonresidents' activities.³⁰ General jurisdiction requires more than minimum contacts with the forum state and requires "a greater, more continuous pattern of contacts" with the forum state than required by specific jurisdiction.³¹

If Defendants are found to be within the reach of the long-arm statute, the court must determine whether exercising personal jurisdiction comports with due process. The Due Process clause of the Fourteenth Amendment requires that a nonresident defendant have such minimum contacts with the forum state so that "maintenance of the suit does not offend traditional notions of fair play and substantial justice."³² Defendants' conduct and connection with the forum state must be such that Defendants should "reasonably anticipate being haled into court there."³³

Losten argues that jurisdiction in Delaware is proper based on the agency relationship that existed between Falcone and moving defendants.

²⁹ *Boone*, 724 A.2d at 1155.

³⁰ *Id.*

³¹ *Computer People, Inc. v. Best Int'l Group, Inc.*, 1999 WL 288119, *5 (Del. Ch. Apr. 27, 1999).

³² *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945).

³³ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Losten asserts that St. Basil the Great and the Province are deemed to have acted within the forum state via its agent, Falcone, for purposes of the long-arm statute. Defendants dispute that any agency relationship existed and argue that even if such a relationship did exist, only acts that are directed by the principal may serve as a basis to assert jurisdiction over the principal. Because moving defendants allege they never directed, requested, or assigned Falcone to perform services, duties, or any other business on behalf of moving defendants in Delaware, jurisdiction in Delaware is improper. Furthermore, none of the alleged acts of abuse were to benefit or to further the work of the moving defendants and, therefore, the criminal acts of abuse did not fall within any agency relationship and were the acts of Falcone alone.

Recently, this Court granted a similar Motion that was based on similar facts.³⁴ In making its ruling, this Court followed the analysis of two recent cases decided by the District Court of Delaware that dealt with almost identical issues to the present case.³⁵ Pursuant to the agency theory of personal jurisdiction, “only acts of the agent that are directed by the

³⁴ *Naples v. The Diocese of Trenton*, No. 09C-04-048 (Del. Super. (Del. Super. Apr. 29, 2010)).

³⁵ See *Voe #2 v. Archdiocese of Milwaukee*, No. 09-532 (D. Del. Mar. 31, 2010); *Elliot v. The Marist Bros. of the Schools, Inc.*, No. 09-611, 10 (D. Del. Dec. 21, 2009).

principal may serve as a basis to assert jurisdiction over the principal.”³⁶ In this Court’s prior Opinion it held that Plaintiff failed to demonstrate that an agency relationship existed and, even if it did, Plaintiff failed to establish that Defendants knew of, directed, or authorized the travel to and/or through Delaware or knew of, directed, or authorized the alleged tortious conduct that occurred in Delaware. Therefore, the long-arm statute did not reach Defendants.

Similar to its previous holding, the Court finds that the long-arm statute does not reach the moving defendants in the current case. The record does not clearly indicate who employed and supervised Falcone.³⁷ Regardless of this, however, Losten has failed to indicate that Falcone’s alleged acts of sexual abuse occurred within the scope of his employment and that the moving defendants directed the acts. Losten asserts that moving defendants gave Falcone permission to take Losten on overnight trips, however, this does not satisfy Plaintiff’s burden to assert facts that demonstrate moving defendants knew of, directed, or authorized the tortious conduct that allegedly was committed by Falcone in Delaware. Because the

³⁶ *Computer People, Inc. v. Best Intern. Group, Inc.*, 1999 WL 288119, *8 (Del. Ch. Apr. 27, 1999).

³⁷ The Complaint alleges that Falcone was a caretaker employed by Diocese and Church and not moving defendants. Am. Compl. ¶ 29. In its Brief, moving defendants claim that Falcone was not an employee of the Orphanage and never had responsibilities that involved the care of children. Def.’s Br. 4.

burden is not satisfied, Delaware's long-arm statute does not reach moving defendants.

Even if the facts supported a finding that an agency relationship existed to satisfy the first part of the personal jurisdiction analysis, the Court finds that exercising personal jurisdiction over Defendants would not comport with due process. Losten has failed to assert facts supporting a finding that Defendants purposefully directed activities toward Delaware or engaged in conduct such that they would reasonably have anticipated being haled into court in Delaware. As noted in *Elliot* and *Naples*, the acts of the moving defendants, not the acts of the priest, are considered when deciding if the moving defendants purposefully availed itself of the protections of the forum state's laws or if it could reasonably anticipate being haled into court in the forum state.³⁸ Although the Complaint claims that some acts of abuse occurred in Delaware, the majority of acts occurred in Maryland where the Orphanage is located. The moving defendants are both Pennsylvania corporations. None of the facts alleged in the Complaint suggest that moving defendants could have reasonably anticipated being haled into court in Delaware or that suit in Delaware would be fair and reasonable.

³⁸ *Naples*, No. 09C-04-048, at 10; *Elliot*, No. 09-611, at 11 (citing *Doe v. Roman Catholic Diocese of Boise, Inc.*, 918 P.2d 17, 23 (N.M. App. 1996)).

Accordingly, the Court does not find that due process is satisfied and Defendants' Motion is granted.³⁹

IT IS SO ORDERED.

/S/ CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.

Dated: May 13, 2010

³⁹ Falcone still remains a defendant in this suit.