

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SAMANTHA A. DUNFEE, and)
CHRISTINA M. DUNFEE,)
Administrators of the Estate of)
CARL TIMOTHY DUNFEE,)
)
Plaintiffs,)

v.)

C.A. No. N16C-04-108 RRC
(Consolidated Case with Others for
Discovery Purposes Only)

KGL HOLDINGS RIVERFRONT, LLC,)
d/b/a EVERGREEN APARTMENTS)
RIVERFRONT HEIGHTS, a Delaware)
Limited Liability Company,)
EVERGREEN PROPERTIES)
MANAGEMENT, INC., a Delaware)
Corporation, and EVERGREEN)
APARTMENT GROUP, INC., a)
Delaware corporation,)
)
Defendants/Third Party Plaintiffs,)

v.)

ANTHONY FRAGALE,)
CONTINENTAL CASUALTY)
COMPANY, a foreign corporation,)
VILLAGE OF WINDHOVER, L.L.C.,)
a Delaware limited liability company,)
and GLOBAL REALTY SERVICES)
GROUP, LLC a/k/a GRS GROUP /)
CORTEQ, a foreign corporation,)
)

Defendants/Third Party Defendants.)

Submitted: September 8, 2017

Decided: November 29, 2017

On Defendant Global Realty Services Group, LLC's
Motion to Dismiss. **DENIED.**

MEMORANDUM OPINION

Gary S. Nitsche, Esquire and Joel H. Fredericks, Esquire, Weik, Nitsche & Dougherty, Wilmington, Delaware, Attorney for Plaintiffs Samantha Dunfee and Christina Dunfee.

Mary E. Sherlock, Esquire, Weber Gallagher Simpson Stapleton Fires & Newby LLP, Dover, Delaware, Attorney for Defendant/Third Party Plaintiff KGL Holdings Riverfront LLC d/b/a Evergreen Apartments at Riverfront Heights.

Michael J. Logullo, Esquire and Laura Bower Braunsberg, Esquire, Rawle & Henderson LLP, Wilmington, Delaware, Attorneys for Movant Defendant Global Realty Services Group, LLC a/k/a GRS Group/CORTEQ.

Paul Cottrell, Esquire and Patrick M. McGory, Esquire, Tighe & Cottrell, PA, Wilmington, Delaware, Attorneys for Third Party Defendants Continental Casualty Co. & Anthony Fragale.

Paul D. Sunshine, Esquire, McGivney & Kluger, PC, Wilmington, Delaware, Attorney for Third Party Defendant Village of Windover.

COOCH, R.J.

I. INTRODUCTION

Before this Court is the Motion to Dismiss of Defendant Global Realty Services Group, LLC a/k/a GRS Group/CORTEQ's ("Global").¹ This motion arises from the death of Carl Timothy Dunfee ("Mr. Dunfee") as a result of alleged carbon monoxide exposure on March 25, 2016 while visiting a friend at Evergreen Apartments in Wilmington, Delaware. Plaintiffs Samantha Dunfee and Christina Dunfee bring this action on behalf of the deceased claiming negligence on the parts of the current and previous apartment owners, the property managers, the insurance company and its employee, and Global. Plaintiffs allege that due to a defective boiler system in the apartment that he was visiting, Mr. Dunfee died from carbon monoxide exposure. Global had been hired by the apartment owner's mortgagee and lender, Keybank National Association ("Keybank"), to conduct a property valuation assessment—in which no recommendation as to the inadequacy of the boiler system was made.

In its motion to dismiss filed pursuant to Superior Court Rule 12(b)(2), Global contends that Plaintiffs have failed to assert a proper basis of personal jurisdiction to subject Global to jurisdiction in Delaware. Global claims that, in light of the United States Supreme Court decisions in *Daimler AG v. Bauman*² and *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*³ and also the Delaware Supreme Court decision in *Genuine Parts Co. v. Cepec*⁴, Delaware may not exercise personal jurisdiction over Global. Global's essential argument is that, because it is neither incorporated in Delaware, nor has its principal place of business in Delaware, it is not subject to Delaware jurisdiction simply by "doing business" here.

This Court agrees with all parties that this Court lacks *general* personal jurisdiction over Global. However, Global's conduct in securing a property valuation assessment was sufficient to subject it to *specific* jurisdiction in Delaware. In keeping with both *Daimler* and *Genuine Parts*, and as explained *infra*, the securing by Global of an assessment of the apartments was conduct that "arises out of or relates to" Plaintiffs' negligence claims.⁵

¹ In all other related cases, Global is a Third Party Defendant brought in by Defendant/Third Party Plaintiff KGL Holdings Riverfront LLC d/b/a Evergreen Apartments at Riverfront Heights ("Evergreen").

² 134 S. Ct. 746 (2014).

³ 137 S. Ct. 1773 (2017).

⁴ 137 A.3d 123 (Del. 2016).

⁵ *Id.* at 130.

Global's conduct was targeted at Delaware because the property was located in the state. Global nonetheless argues that it is not subject to personal jurisdiction in Delaware by virtue of the property valuation assessment because the property valuation assessment was not conducted by a Global employee, but a third party, SAV Engineers ("SAV"). Global asserts that SAV is not an agent of Global, but rather an independent contractor, which, Global argues, precludes a finding that Global is subject to jurisdiction in Delaware for SAV's conduct.

This Court finds at this juncture that Delaware has specific jurisdiction over Global. The Court **DENIES** Global's motion to dismiss.

II. FACTS AND PROCEDURAL HISTORY

Plaintiffs, Samantha Dunfee and Christina Dunfee, brought this action on behalf of their decedent, Mr. Dunfee. On March 25, 2016, while visiting a friend who resided in the Evergreen Apartments at Riverfront Heights ("Evergreen Apartments"), Mr. Dunfee allegedly died from carbon monoxide exposure. Defendant Evergreen owned the apartment complex. The management companies of the apartment complex were Evergreen Properties Management, Inc. and Evergreen Apartment Group, Inc., also named as Defendants.

On March 12, 2015, prior to Evergreen's purchase of Evergreen Apartments, Global Realty Services Group a/k/a GRS Group/CORTEQ ("Global")—a company that is both incorporated and maintains its principal place of business in California—apparently engaged SAV to conduct a valuation assessment of the property on behalf of Evergreen's lender and mortgagee, Keybank.⁶ The assessment included an inspection of the boiler system.⁷ The assessment yielded no sign of a defective boiler system and Evergreen received no recommendation to replace the boiler or to install carbon monoxide detectors.⁸

Plaintiffs have alleged that, due to the negligence of the Defendants, the pipes of the boiler system that were intended to exhaust poisonous fumes out of the apartment failed to do so, which resulted in the death of Mr. Dunfee. Plaintiffs have

⁶ Def.'s (Evergreen) Answ. to the Compl. and Third Party Compl. at 12-13.

⁷ *Id.* at 12.

⁸ *Id.* at 12-13.

also asserted that the Defendants allowed the boiler system in the apartment building to rust, deteriorate, and fall into a state of disrepair.

Plaintiffs brought suit against six defendants. Plaintiffs first filed suit against the Evergreen entities on various negligence theories.⁹ Plaintiffs also brought suit against Anthony Fragale, who conducted the inspection on behalf of Continental Casualty Company, and against Continental Casualty Company, on the theory of *respondeat superior*.¹⁰ Plaintiffs sued Village of Windhover, L.L.C., who was the previous owner of Evergreen Apartments for failure to have properly inspected the boiler system, failure to warn, failure to arrange for re-inspection, and various other negligence claims.¹¹ Finally, Plaintiffs brought suit against Global claiming that Global failed to recommend that Evergreen install carbon monoxide detectors in the apartment, failed to properly inspect the boiler system, failed to warn of any defects in the boiler system, and failed to recommend that the boiler system be repaired or replaced.¹²

Defendant Evergreen filed a third party complaint against Global seeking indemnity in the event that Evergreen is found negligent alleging essentially the same claims against Global as Plaintiffs had alleged.¹³ Global then filed a motion to dismiss pursuant to Superior Court Civil Rule 12(b)(2) Evergreen's third party complaint and Plaintiff's complaint for lack of personal jurisdiction.¹⁴

III. THE PARTIES' CONTENTIONS

A. Global's Contentions

Global seeks dismissal of the Dunfee Plaintiffs' amended complaint and Evergreen's third party complaint "for lack of personal jurisdiction"¹⁵ over it because "a mere allegation of doing business in the State of Delaware or registration to conduct business are insufficient to permit the exercise of general jurisdiction."¹⁶

⁹ Pls.' Am. Compl. at 5.

¹⁰ *Id.* at 6-7.

¹¹ *Id.* at 7.

¹² *Id.* at 8.

¹³ Def.'s (Evergreen) Answer to the Compl. and Third Party Compl. at 12-15.

¹⁴ Del. Super. Ct. Civ. R. 12(b)(2); Third Party Def.'s (Global) Mot. to Dismiss; Def.'s (Global) Mot. to Dismiss. All cases have been consolidated for discovery purposes.

¹⁵ Def.'s (Global) Mot. to Dismiss at 4.

¹⁶ *Id.* at 2-3.

Global argues that, because Global is neither incorporated nor has its principal place of business in Delaware, it is not subject to general jurisdiction here.¹⁷ Global further asserts that “no act or omission by [Global] occurred in Delaware” with the exception of bank valuation assessments on Delaware properties that were conducted by what it characterizes as independent contractors, SAV.¹⁸ Global asserts that it “is not susceptible to general [] personal jurisdiction in the State of Delaware” as it “is a California corporation with its principal place of business in California.”¹⁹

B. Evergreen’s Contentions

Evergreen opposes Global’s motion to dismiss and argues in response that, irrespective of the general jurisdiction analysis, Delaware has “specific personal long-arm jurisdiction over [Global]” because Global did business and provided a service in Delaware.²⁰ Evergreen contends that because Global “purposefully directed its activities at residents of [Delaware] and the action arises from or is directly related to [Global’s] actions within [Delaware]” it is subject to specific jurisdiction here.²¹ Evergreen asserts that the assessment was conducted by a Global employee named Stephen A. Varitokias, who “presented himself . . . as being there on behalf of [Global].”²² Evergreen contends that as a result of the assessment, the allegedly faulty boiler systems were not replaced, thus resulting in the release of carbon monoxide.²³

C. Plaintiffs’ Contentions

Plaintiffs also oppose Global’s motion to dismiss and argue that Delaware has specific jurisdiction over Global because “[Global] contracted to perform a property assessment of a property located in Delaware . . . in a negligent manner which

¹⁷ *Id.* at 3-4 (citing *Genuine Parts*, 137 A.3d at 148). Global also relies on the United States Supreme Court decision in *Daimler* to reinforce that without being incorporated in Delaware or having its principal place of business in Delaware, the Delaware courts cannot assert general jurisdiction over Global. 134 S. Ct. at 749-50. No party in this action has taken the position that this Court has general jurisdiction over Global.

¹⁸ Third Party Def.’s (Global) Mot. to Dismiss at 4-5.

¹⁹ *Id.* at 4-5.

²⁰ Def./Third Party Pl.’s (Evergreen) Resp. to Global’s Mot. to Dismiss at 6.

²¹ *Id.* at 7-8.

²² Def./Third Party Pl.’s (Evergreen) Resp. to Global’s Mot. to Dismiss at 3; Aff. of Kevin Wolfgang, Ex. B of Def./Third Party Pl.’s (Evergreen) Resp. to Global’s Mot. to Dismiss [hereinafter “Wolfgang”].

²³ Def./Third Party Pl.’s (Evergreen) Resp. to Global’s Mot. to Dismiss at 6.

resulted in the death of Mr. Dunfee[.]”²⁴ Plaintiffs recognize that it is the plaintiff’s burden to show a basis for jurisdiction.²⁵ However, Plaintiffs argue that they have a lower burden in establishing when a motion is decided without an evidentiary hearing.²⁶ Plaintiffs contend that because there is at least some evidence to suggest that SAV was acting as Global’s agent, Global’s assertion that SAV was an independent contractor is “irrelevant.”²⁷

IV. STANDARD OF REVIEW

“When reviewing a motion to dismiss, the Court must view the record in a light most favorable to the nonmoving party. The allegations of the complaint are assumed to be true, and all reasonable inferences must be construed most strongly in favor of the plaintiff.”²⁸ When personal jurisdiction is contested and no evidentiary hearing is held, the plaintiff need only establish a prima facie case with the record viewed in the light most favorable to the plaintiff.²⁹ While plaintiffs carry the burden of demonstrating a basis for jurisdiction, they have a lower burden when a motion is decided without an evidentiary hearing.³⁰

V. DISCUSSION

Delaware May Exercise Specific Jurisdiction Over Global Because Plaintiffs’ Claim Arises Out of Global’s Business Activities in Delaware.

This Court may exercise specific jurisdiction over Global because Plaintiff’s claim arises out of or relates to Global’s property valuation assessment on the Evergreen Apartments.

Overview of Personal Jurisdiction

²⁴ Pls.’ (Dunfee) Resp. to Global’s Mot. to Dismiss at 6.

²⁵ *Id.* at 2.

²⁶ *Id.* at 2-3 (citing *Hedger v. Medline Industries, Inc.*, 2017 WL 396770 at *2 (Del. Super. Ct. Jan. 27, 2017)).

²⁷ *Id.* at 5 (citing Wolfgang).

²⁸ *Herman v. BRP, Inc.*, 2015 WL 1733805, at *3 (Del. Super. Ct. Apr. 13, 2015).

²⁹ *Applied Biosystems, Inc. v. Cruachem, Ltd.*, 772 F. Supp. 1458, 1462 (D. Del. 1991).

³⁰ *Hedger v. Medline Industries, Inc.*, 2017 WL 396770 at *2 (Del. Super. Ct. Jan. 27, 2017).

There are two ways in which a state may assert personal jurisdiction over a defendant.

The first way is through general jurisdiction—or “all-purpose jurisdiction”—that exists where a defendant’s contacts with the forum state are so “continuous and systematic” that they are essentially at home in the forum state.³¹ The Delaware Supreme Court recently held in *Genuine Parts Co. v. Cepec* that a foreign defendant is not subject to general jurisdiction in Delaware merely because it conducts business here where the claim has nothing to do with Delaware.³² Where the foreign defendant “does not have its principal place of business in Delaware”³³ it is not deemed “essentially at home” for purposes of general jurisdiction.³⁴

The second way that a state may assert jurisdiction is through specific jurisdiction.³⁵ Specific jurisdiction exists where the “suit arises out of or relates to the defendant’s contacts with the forum.”³⁶ The United States Supreme Court has defined specific jurisdiction as “an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.”³⁷

There are three requirements for the exercise of specific jurisdiction. First, the defendant must have “purposefully availed itself of the privilege of conducting activities within the forum State or have purposefully directed its conduct into the forum State.”³⁸ Second, the plaintiff’s claim must “arise out of or relate to” the defendant’s activities in the forum state.³⁹ Third, jurisdiction must be fair and reasonable so as to not offend tradition notions of fair play and substantial justice.⁴⁰

³¹ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (U.S. 2011); see also *Genuine Parts*, 137 A.3d at 130.

³² See 137 A.3d at 125-26 (following *Daimler*, 134 S. Ct. at 750).

³³ *Genuine Parts*, 137 A.3d at 127.

³⁴ *Goodyear*, 564 U.S. at 919.

³⁵ For a comprehensive overview of specific jurisdiction, see *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017).

³⁶ *Daimler*, 134 S. Ct. at 754 (internal brackets omitted); *Genuine Parts*, 137 A.3d at 130; see also *Bristol-Myers Squibb*, 137 S. Ct. at 1780; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464 (1985).

³⁷ *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (quoting *Goodyear*, 564 U.S. at 919).

³⁸ *Id.* at 1785 (internal brackets and quotation marks omitted) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

³⁹ *Id.* (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

⁴⁰ *Id.*; see also *Asahi Metal Indus. Co. v. Superior Court of California, Solano Cty.*, 480 U.S. 102, 105 (1987).

The fairness factors in the third requirement that a court will consider are “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.”⁴¹

As for specific jurisdiction in Delaware, the long-arm statute is the key point of evaluation.⁴² Under 10 *Del. C.* § 3104, Delaware “may 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; [or] (3) Causes tortious injury in the State by an act or omission in this State.”⁴³ “It is settled that Delaware law requires under section 3104(c)(1) that some act on the part of the defendant must have occurred in Delaware and also that plaintiff's claims arise out of that act.”⁴⁴

Delaware May Exercise Specific Jurisdiction Over Global

All parties agree that Delaware has no general jurisdiction over Global. This Court follows the Delaware Supreme Court holding in *Genuine Parts* that there can be no general jurisdiction where a foreign corporation does not have its principal place of business in Delaware, or where there is no nexus that deems the corporation “essentially at home.”⁴⁵ As Global is neither incorporated, nor has its principal place of business, in Delaware, there can no general jurisdiction in this case. However, specific jurisdiction exists in this case, at least at this juncture.

A Delaware court may exercise specific jurisdiction over Global because Plaintiffs' claim that the decedent died from exposure to carbon monoxide as a result of a defective boiler system arises out of or relates to Global's property valuation assessment in Delaware.

First, Global purposefully availed itself of the privilege of conducting business in Delaware. By conducting the valuation assessment of Evergreen

⁴¹ *Id.* at 1786 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)).

⁴² *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 127 (Del. 2016); 10 *Del. C.* § 3104.

⁴³ 10 *Del. C.* § 3104.

⁴⁴ *Tell v. Roman Catholic Bishops of Diocese of Allentown*, 2010 WL 1691199, at *14 (Del. Super. Ct. Apr. 26, 2010) (quoting *Boone v. Oy Partek Ab*, 724 A.2d 1150, 1156 (Del. Super. Ct. 1997), *aff'd*, 707 A.2d 765 (Del. 1998)) (internal brackets and quotation marks omitted).

⁴⁵ 137 A.3d 123, 128 (Del. 2016).

apartments, whether by way of a Global employee or an agent of Global,⁴⁶ Global transacted business and performed a service in Delaware sufficient to fall within the Delaware long-arm statute.⁴⁷

Second, Plaintiffs' negligence claims for the death of Mr. Dunfee arise out of or relate to Global's valuation assessment, which included, among other things, no recommendation to install carbon monoxide detectors, no warning of the boiler system's hazardous condition, and no recommendation that repairs were necessary.⁴⁸

Finally, exercise of the suit in Delaware is fair and reasonable because it is not burdensome on Global. While the burden on Global is a primary concern, it will be weighed in light of the other factors enumerated above.⁴⁹ Here, "the abstract matter of submitting to the coercive power of [Delaware]" does not exist because Delaware has "legitimate interest in the claims in question."⁵⁰ The decedent lived in Delaware, was injured in Delaware, and died in Delaware as a result of alleged negligence related to a property that is located in Delaware. Thus, Delaware has a legitimate interest in adjudicating the matter.

Global relies on the United States Supreme Court 2014 decision in *Walden v. Fiore* for the proposition that "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction."⁵¹ This is technically correct as the crucial inquiry here is the defendant's conduct in relation to the underlying claim, not his/her relationship with another party. It is not Global's relationship with Plaintiffs or Evergreen alone that gives rise to specific jurisdiction, but the fact that Global's activities were targeted at Delaware and that Plaintiffs' claim arises out of or relates to Global's activities, even in the absence of a contract.

Thus, even in light of the Delaware Supreme Court's developed view of general jurisdiction in *Genuine Parts*, Delaware may exercise *specific* jurisdiction over Global because Plaintiffs' claims arise out of or relate to Global's property valuation assessment.

⁴⁶ The individual who conducted the valuation assessment, Stephen A. Varitokias, held himself out as a Global employee. As such, the agency question is discussed in further detail *infra*.

⁴⁷ 10 *Del. C.* § 3104(c)(1).

⁴⁸ Pls.' Am. Compl. at 8.

⁴⁹ *Bristol-Myers Squibb*, 137 S. Ct. at 1780; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

⁵⁰ *Bristol-Myers Squibb*, 137 S. Ct. at 1780.


⁵¹ Def.'s (Global) Reply to Pls.' (Dunfee) Resp. to Global's Mot. to Dismiss at 4 (quoting 134 S. Ct. 1115, 1123 (2014)).

Furthermore, despite conflicting factual contentions, the valuation assessment of Evergreen Apartments appears to have been conducted by Global, or an agent thereof. The Delaware long-arm statute states that the individual who conducts his/her activities in Delaware may be the nonresident or his/her agent.⁵²

Global contends that the property valuation assessment was conducted by an independent contractor, SAV.⁵³ However, Evergreen and Plaintiffs allege that a man named Stephen A. Varitokias, P.E. arrived at Evergreen Apartments to conduct the assessment and identified himself as a Global employee.⁵⁴ Given that the standard of review for a motion to dismiss requires that this Court view the record in the light most favorable to the nonmoving party, Stephen A. Varitokias, P.E. is an agent of Global for purposes of personal jurisdiction at this juncture.

V. CONCLUSION

Global's Motion to Dismiss Dunfee Plaintiffs' amended complaint and Evergreen's third party complaint is **DENIED**.


Richard R. Cooch, R.J.

cc: Prothonotary

⁵² 10 *Del. C.* § 3104(c).

⁵³ Aff. of Andrew Brownstein, Ex. B of Def.'s (Global) Mot. to Dismiss.

⁵⁴ Wolfgang at 1-2.