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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DALE PIERSON,	)	
	)	
Plaintiff,	)	
	)	**No. 15 C 11049**
	)	
	)	**Chief Judge Rubén Castillo**
NATIONAL INSTITUTE FOR LABOR RELATIONS RESEARCH AND STAN GREER,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Dale D. Pierson ("Plaintiff") brings this diversity action against the National Institute for Labor Relations Research ("NILRR") and Stan Greer ("Greer") (collectively, "Defendants") alleging defamation under Illinois law. (R. 12, Second Am. Compl.) Defendants move to dismiss these claims pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). (R. 21, Mot.) For the reasons stated below, the Court grants Defendants' 12(b)(2) motion to dismiss and dismisses this lawsuit without prejudice to refiling in a court that has personal jurisdiction over Defendants.

RELEVANT FACTS

Plaintiff is a resident of Cook County, Illinois, and a licensed attorney currently employed as general counsel to Local 150 of the International Union of Operating Engineers, AFL-CIO, headquartered in Countryside, Illinois. (R. 12, Second Am. Compl. ¶ 2.) Defendant NILRR is "a non-profit research facility analyzing and exposing the inequities of compulsory unionism." (*Id.* ¶ 4.) NILRR's principal office is in Springfield, Virginia. (*Id.*) Defendant Stan Greer is a "Senior Research Associate" for NILRR and is a citizen of Virginia. (*Id.* ¶ 5; *see also* R. 22-1, Ex. A to Mem., Greer Dec. ¶¶ 2-3; R. 1, Notice of Removal ¶ 5.)

Plaintiff's claims arise out of remarks made during the course of a series of lawsuits challenging Indiana's "Right-to-Work" law. (R. 12, Second Am. Compl.) Shortly after the State of Indiana passed its Right-to-Work law in 2012, Plaintiff served as lead counsel in a lawsuit challenging the law. Chief Judge Philip Simon of the U.S. District Court for the Northern District of Indiana described Right-to-Work legislation as:

> The "Right to Work" label has a nice sound to it, but is misleading. What these types of laws actually prohibit are "union security clauses," which are provisions in collective bargaining agreements between labor unions and employers that condition employment on a worker joining the union. In addition, such clauses permit, as a substitute for union membership, requiring the payment of fees to the union or, in the case of religious objection, making a substitute payment to a charitable organization. So it's not as if prior to the law's enactment certain people in Indiana were prevented from working and the law suddenly gave them the "Right to Work." Rather, it simply prevents forced union membership.

Sweeney v. Daniels, 2:12CV-81-PPS/PRC, 2013 WL 209047, at *1 (N.D. Ind. Jan. 17, 2013). The district court dismissed the suit without prejudice because, among other determinations, it found that Indiana's Right-to-Work law is not preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(3), and the plaintiffs had failed to state a valid equal protection claim. *Sweeney*, 2013 WL 209047, at *6-12. The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's dismissal. *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014).

While the appeal was pending, the union plaintiffs refiled their claims in Lake County, Indiana. (R. 12, Second Am. Compl. ¶ 7.) On September 5, 2013, the Lake County Superior Court denied the State of Indiana's motion to dismiss and "found the Right-to-Work law unconstitutional under . . . the Indiana Constitution." (*Id.*) The Attorney General of Indiana appealed that decision to the Indiana Supreme Court. (*Id.*) On September 4, 2014, the Indiana Supreme Court heard oral argument in the aforementioned appeal. (*Id.* ¶ 11.) Plaintiff argued before the Indiana Supreme Court in opposition to the appeal. (*Id.* ¶¶ 6-11.) Ultimately, the

Indiana Supreme Court reversed the lower court and held that the Right-to-Work law did not violate the Indiana Constitution. *Zoeller v. Sweeney*, 19 N.E.3d 749 (Ind. 2014).

Plaintiff's amended complaint summarizes the arguments he made before the Indiana Supreme Court. (R. 12, Second Am. Compl. ¶¶ 6-11.) Specifically, he argued that Right-to-Work laws are "fundamentally unfair," that "[f]ederal law requires unions to represent fairly all employees in any given bargaining unit regardless of their membership in the union," and that the laws allow "individual employees to refuse to pay their fair share of the costs of representing them, allowing such employees to ride for free on the work of the union paid for by their coworkers." (*Id.* ¶ 8.)

Shortly after the oral arguments, Defendants posted an article on NILRR's website under the headline "Operating Engineers Union Lawyer Flat-Out Lies to Indiana Supreme Court," which reported on the oral argument. (R. 12-1, Ex. A to Second Am. Compl., Post.) The article was authored by Greer. (*Id.*) The article stated:

> How can it be, then, that Dale Pierson, the top lawyer for the other union seeking to overturn Indiana's Right to Work law judicially, told the Indiana Supreme Court on September 4 that union officials' representing only those who join and pay dues "is not a legal possibility"? . . .
>
> The answer is, quite simply, that *Pierson flat-out lied.*

(*Id.* (emphasis added).) The post also refers to "a petition filed with the National Labor Relations Board seven years ago." (*Id.*) The post asserts that in this petition, lawyers for the Steelworkers Union "acknowledged without qualification that, under . . . the [NLRA], in any workplace where no union is recognized as employees' exclusive bargaining agent, employees' right to bargain with their employer through a union remain[s] available and protected, though on a non-exclusive basis, thus applicable to union members only." (*Id.* (internal quotation marks

omitted).) According to Plaintiff, the preceding statement is false because it fails to acknowledge that the 2007 petition was denied by the NLRB. (R. 12, Second Am. Compl. ¶ 15.)

PROCEDURAL HISTORY

On September 11, 2015, Plaintiff filed his complaint in the Circuit Court of Cook County, Illinois. (R. 1, Notice of Removal ¶ 1.) Plaintiff alleges that NILRR's post contained false and defamatory statements and that Defendants published them knowing that they were false. (*Id.* ¶¶ 11, 14.) On December 9, 2015, Defendants timely filed their notice of removal in this Court pursuant to 28 U.S.C. §§ 1332, 1441(a), and 1446. (R. 1, Notice of Removal at 1.) On January 21, 2016, Plaintiff filed his amended complaint. (R. 12, Second Am. Compl.) Plaintiff's amended complaint contains one count alleging defamation *per se* against Defendants under Illinois law. (*Id.*)

Defendants filed their motion to dismiss on March 15, 2016, pursuant to Rules 12(b)(2) and 12(b)(6), arguing that the Court lacks personal jurisdiction over Defendants and that Plaintiff fails to state a claim for defamation. (R. 21, Mot.) The motion is now fully briefed. (R. 26, Resp.; R. 27, Reply.) As explained below, because the Court lacks personal jurisdiction over Defendants, it will not address whether Plaintiff has stated a claim for defamation *per se* under Rule 12(b)(6).

LEGAL STANDARD

Personal jurisdiction refers to a court's "power to bring a person into its adjudicative process." *N. Grain Mktg., LLC v. Greving*, 743 F.3d 487, 491 (7th Cir. 2014) (citation omitted). A district court exercising diversity jurisdiction applies the personal jurisdiction rules of the state in which it is located. *Philos Techs., Inc. v. Philos & D, Inc.*, 802 F.3d 905, 912 (7th Cir. 2015). This Court can thus exercise personal jurisdiction only to the extent that Illinois courts are

permitted to do so under the Illinois long-arm statute.[1] *Id.* at 912. A complaint does not need to include facts that allege personal jurisdiction. *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 782 (7th Cir. 2003). However, a defendant may move for dismissal for lack of personal jurisdiction pursuant to Rule 12(b)(2). FED. R. CIV. P. 12(b)(2).

In ruling on a Rule 12(b)(2) motion, the Court accepts all well-pleaded allegations in the complaint as true, but may also consider materials outside the pleadings such as affidavits. *Felland v. Clifton*, 682 F.3d 665, 672 (7th Cir. 2012). The plaintiff bears the burden of establishing personal jurisdiction when the defendant challenges it. *Kipp v. Ski Enter. Corp. of Wisc., Inc.*, 783 F.3d 695, 697 (7th Cir. 2015). If the Court rules on a defendant's motion to dismiss based on the submission of written materials without holding an evidentiary ruling, the plaintiff must only establish a *prima facie* case of personal jurisdiction to survive dismissal. *N. Grain Mktg., LLC*, 743 F.3d at 491. In determining whether a *prima facie* case has been established, the Court will resolve all factual disputes in the plaintiff's favor. *See N. Grain Mktg., LLC*, 743 F.3d at 491. Nevertheless, the Court will accept as true any fact in the defendant's affidavits that remains undisputed by the plaintiff. *GCIU-Empl' Ret. Fund v. Goldfarb Corp.*, 565 F.3d 1018, 1020 n.1 (7th Cir. 2009).

[1] The Illinois long-arm statute permits the exercise of jurisdiction over a nonresident defendant who, among other things, transacts business, commits a tortious act, or owns, uses, or possesses real estate in Illinois. 735 ILL. COMP. STAT. 5/2-209(a)(1)-(3). The statute contains a catch-all provision that allows a court to exercise personal jurisdiction for any reason, so long as doing so does not infringe upon due process protections guaranteed by either the Illinois or the U.S. Constitution. *See* 735 ILL. COMP. STAT. 5/2-209(c). For purposes of the catch-all provision, "it is enough to evaluate the limits that the Fourteenth Amendment due process places on state exercises of personal jurisdiction." *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 715-16 (7th Cir. 2002).

ANALYSIS

I. Waiver

As an initial matter, Plaintiff argues that Defendants have waived their right to raise a lack of personal jurisdiction defense under Rule 12(h)(1). (R. 26, Resp. at 4-6.) Specifically, Plaintiff argues that Defendants waived "any personal jurisdiction defense" and have "subjected them[selves] to this Court's adjudicative process" because they: 1) invoked the Court's jurisdiction when they removed the case to federal court; 2) have engaged in "subsequent litigation" in this Court; and 3) failed "to adhere to the requirements of Rule 81(c)." (*Id.* at 5-6.)

"[T]o waive or forfeit a personal jurisdiction defense, a defendant must give a plaintiff a reasonable expectation that it will defend the suit on the merits or must cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking." *H-D Mich., LLC v. Hellenic Duty Free Shops S.A.*, 694 F.3d 827, 848 (7th Cir. 2012) (citation omitted). In addition, the Seventh Circuit has recently held that a defendant does not waive its right to raise a personal jurisdiction defense by failing to assert the defense within the 21-day period for responding to a complaint under Rule 12(a)(1) because the Rules do not impose a strict time limit on a Rule 12(b)(2) motion. *Hedeen Int'l, LLC v. Zing Toys, Inc.*, 811 F.3d 904, 905-06 (7th Cir. 2016).

Plaintiff's argument that Defendants have waived the right to assert a personal-jurisdiction defense because they removed this case to federal court and therefore "invoked this Court's jurisdiction" fails as a matter of law. In petitioning for removal of a state-court action to federal district court, a defendant does not waive any objection he may have regarding personal jurisdiction. *Allen v. Ferguson*, 791 F.2d 611, 614 (7th Cir. 1986); *see also Benda v. Per-Se Techs., Inc.*, No. 04 C 952, 2004 WL 1375361, at *3 (N.D. Ill. June 17, 2004) ("Plaintiff has

suggested that Defendants waived the right to assert a personal jurisdiction defense under [Rule 12(h)(1)] by removing this case to federal court. This suggestion fails as a matter of law.").

In addition, Defendants have not waived the personal-jurisdiction defense by engaging in litigation before this Court because this case is still in its early stages. On December 14, 2015, this Court dismissed Plaintiff's state-court complaint without prejudice to the filing of a timely motion to remand or the filing of a properly amended federal complaint. (R. 6, Min. Entry.) The Court also instructed the parties to exhaust all settlement possibilities prior to filing any other further pleadings. (*Id.*) Plaintiff filed a motion to remand on January 7, 2016, (R. 8, Mot. to Remand), which the Court subsequently denied, (R. 11, Min. Entry). Plaintiff was then granted leave to file an amended complaint, (*id.*), which he filed on January 21, 2016, (R. 12, Second Am. Compl.). Following an unopposed request for a brief extension of time to answer or otherwise plead, (R. 18, Min. Entry), Defendants sent Plaintiff a letter explaining the bases for their motion to dismiss, including that they plan to "seek dismissal for lack of personal jurisdiction under FRCP 12(b)(2)." (R. 21-1, Ex. A to Mot., Letter.) Defendants filed the present motion to dismiss challenging jurisdiction on March 15, 2016. (R. 21, Mot.) While the instant motion to dismiss was pending, and pursuant to the Court's directive, the parties filed a joint status report the following week. (R. 24, Report.) In the joint status report Defendants explicitly state that "[w]hether this Court has personal jurisdiction over the Defendants" is a "major legal issue." (*Id.* ¶ 4.)

The above actions do not constitute a waiver of personal jurisdiction. Defendants have raised their personal-jurisdiction defense on no fewer than three occasions—in a letter to counsel, a motion to dismiss, and a joint status report. *See, e.g.*, *Leibovitch v. Islamic Republic of Iran*, --- F. Supp. 3d ---, No. 08 C 1939, 2016 WL 2977273, at *4 n.4 (N.D. Ill. May 19, 2016)

("The banks have been steadfastly raising their personal jurisdiction defenses since the beginning of their involvement in this case. . . . By no means have they misled Plaintiffs, nor have they caused this Court to expend unnecessary resources resolving the merits."). It cannot reasonably be said that Defendants delayed in raising this defense. In addition, Defendants were not substantively engaging in litigation when they participated in preliminary settlement negotiations and filed a joint status report because they were simply following this Court's directives. *See IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 540 (7th Cir. 1998) ("There is no merit to the plaintiffs' argument that SunAmerica waived its defense to personal jurisdiction by participating in the litigation on the merits, since it did so at the direction of the district judge after having raised the defense in a timely fashion." (internal citation omitted)). Indeed, Plaintiff has even acknowledged that Defendants' limited participation in the litigation process was performed "consistent with the Court's directions." (R. 26, Resp. at 5.) Notably, Defendants have not yet engaged in discovery pertaining to the merits of the case nor have they filed their answer. Simply put, Defendants have not litigated the case on its merits nor have they failed to timely raise the personal jurisdiction defense. *Compare Blockowicz v. Williams*, 630 F.3d 563, 566 (7th Cir. 2010) (finding waiver when the defendants participated "in the district court proceedings, which included both briefing and oral arguments addressing the merits of the [plaintiffs'] claim"), *and Cont'l Bank, N.A. v. Meyer*, 10 F.3d 1293, 1296-97 (7th Cir. 1993) (finding waiver when the defendants "fully participated in litigation of the merits for over two-and-a-half years without actively contesting personal jurisdiction"), *with Swanson v. City of Hammond*, 411 F. App'x 913, 915 (7th Cir. 2011) ("[Plaintiff] also argues that the defendants waived their objections to personal jurisdiction when they moved for an extension of time to file their responsive pleading. Not so."), *and Mobile Anesthesiologists Chi., LLC v. Anesthesia Assoc. of*

Hous. Metroplex, P.A., 623 F.3d 440, 443 (7th Cir. 2010) (concluding that "preliminary actions do not come close to what is required for waiver" of the personal jurisdiction defense).

Plaintiff also argues that Defendants' motion to dismiss was filed well after any applicable deadline set forth in Rule 81(c) and, thus, that Defendants have waived their personal-jurisdiction defense. (R. 26, Resp. at 6.) Rule 81(c) states in relevant part:

> (2) *Further Pleading*. After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:
>
> > (A) 21 days after receiving—through service or otherwise—a copy of the initial pleading stating the claim for relief;
> >
> > (B) 21 days after being served with the summons for an initial pleading on file at the time of service; or
> >
> > (C) 7 days after the notice of removal is filed.

FED. R. CIV. P. 81(c).

Plaintiff's argument fails to recognize the actions taken by this Court. Five days after the removal of this lawsuit—and before the expiration of any deadline set forth under Rule 81(c)—the Court dismissed Plaintiff's complaint without prejudice and gave Plaintiff leave to file a motion to remand or an amended federal complaint. (R. 6, Min. Entry.) Thus, following the Court's dismissal order, there was no operative complaint for Defendants to respond to. Indeed, the burden was on Plaintiff to take the next step in this lawsuit. The Court subsequently denied Plaintiff's motion to remand, set a deadline for Plaintiff to file an amended complaint, and ordered Defendants to answer or otherwise plead to the amended complaint within 21 days of service. (R. 11, Min. Entry.) The Court's 21-day deadline for Defendants to serve a responsive pleading was in accord with Rule 12(a)(1). *See* FED. R. CIV. P. 12(a)(1)(A). Service of the amended complaint was completed on February 9, 2016, and, thus, Defendants' deadline to

answer or otherwise plead was 21 days later. (R. 20, Summons.) Before this deadline expired, Defendants filed an unopposed motion for an extension to answer or otherwise plead by March 16, 2016, (R. 16, Mot. for Extension of Time), and the Court granted the motion, (R. 18, Min. Entry). Indeed, pursuant to Rule 6(b), "the court may, for good cause, extend the time . . . with or without motion . . . before the original time . . . expires." FED. R. CIV. P. 6(b). Rule 6(b)(2) lists a series of rules that govern various deadlines that the Court is not permitted to extend but, this list of exclusions does not include the deadlines set forth in Rules 12(a)(1) or 81(c). (*Id.*) Defendants filed the instant motion to dismiss by the Court-ordered deadline. (R. 21, Mot.)

As the preceding recitation demonstrates, at no point during the course of this litigation have Defendants missed a deadline set by this Court. In addition, the Seventh Circuit has recently held that the Rules do not expressly provide a time period for filing a 12(b)(2) motion or for waiver of the defense for failure to file the Rule 12(b)(2) motion within the 21-day period to answer a complaint. *Hedeen Int'l*, 811 F.3d at 905-06. Plaintiff also does not cite to a single case to support his argument that Defendants' *timely* filings somehow operate as a waiver of their personal-jurisdiction defense. Therefore, any argument that Defendants have waived their personal-jurisdiction defense because they have missed a deadline, have not complied with Rule 81(c), or are acting in an untimely fashion, fails.[2] As such, the Court turns to the issue of personal jurisdiction.

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[2] Plaintiff also claims that "it was error for the court to assert diversity jurisdiction" and if the Court finds it has no personal jurisdiction "its only recourse is to remand the case to Cook County." (R. 26, Resp. at 5.) As a preliminary matter, diversity jurisdiction concerns the Court's subject matter jurisdiction which is an entirely separate consideration from personal jurisdiction. In support of his argument, Plaintiff relies on *Telemedicine Solutions LLC v. WoundRight Technologies, LLC*, 27 F. Supp. 3d 883, 901 (N.D. Ill. 2014). However, *Telemedicine* does not support Plaintiff's argument. The court in *Telemedicine* held that failure to address jurisdiction before addressing the merits of a claim constitutes error and that the court could not exercise personal jurisdiction over the defendants. *Id.* at 889. However, the court in *Telemedicine* did not address the issue of waiver, nor did the court remand the case to state court. Thus, *Telemedicine* does not demonstrate to this Court that remand to Cook County is the proper course.