APB Realty, Inc. v. Georgia-Pacific LLC et al Doc. 37 Att. 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

APB REALTY, INC.,	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
	)	NO. 15-13142-NMG
GEORGIA-PACIFIC LLC,	)	
LIQUIDITY SERVICES, INC., and	)	
BEASLEY FOREST PRODUCTS, INC.,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION ON BEASLEY FOREST PRODUCTS, INC.'S AND LIQUIDITY SERVICES, INC.'S MOTIONS TO DISMISS

August 19, 2016

DEIN, U.S.M.J.

I. INTRODUCTION

This action arises out of the efforts of the plaintiff, APB Realty, Inc. ("APB"), to purchase 88 railroad cars that were owned by the defendant, Georgia-Pacific LLC ("Georgia-Pacific"), and to resell them to the defendant, Beasley Forest Products, Inc. ("Beasley"). APB claims that on July 27, 2015, it reached an agreement with Georgia-Pacific's broker, defendant Liquidity Services, Inc. ("Liquidity"), to purchase the 88 railcars from Georgia-Pacific. It also claims that on the same day, it reached an agreement with Beasley under which Beasley confirmed its commitment to purchase the 88 railroad cars from APB. However, shortly thereafter, APB learned that Georgia-Pacific had accepted an offer from Beasley to purchase the railroad cars from Georgia-Pacific directly, for the same price that Beasley had promised to pay to purchase

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the cars through the plaintiff. APB claims that as a result, it was deprived of proceeds that it should have received from its work in brokering a deal. By its amended complaint, APB has asserted a separate claim against each of the defendants for breach of contract (Counts I, II and IV). It has also asserted a claim against Liquidity for misrepresentation (Count III), as well as a claim against Beasley for interference with APB's ongoing business relationships (Count V (mistakenly labeled Count IV)).

The matter is presently before the court on "Defendant Beasley Forest Products, Inc.'s Motion to Dismiss Counts IV and V of the Amended Complaint" (Docket No. 21) and on "Defendant Liquidity Services, Inc.'s Motion to Dismiss" (Docket No. 24). By its motion, Beasley is seeking dismissal of all the claims against it, pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6), for lack of personal jurisdiction and failure to state a claim. Liquidity, by its motion, contends that APB has failed to state a claim against it upon which relief may be granted. Accordingly, it is seeking dismissal of APB's claims against it pursuant to Rule 12(b)(6). For all the reasons described below, this court finds that the plaintiff cannot sustain a claim against either of these defendants. Therefore, this court recommends to the District Judge to whom this case is assigned that both motions be ALLOWED.

II. STATEMENT OF FACTS

Standard of Review of Record

"On a motion to dismiss for want of personal jurisdiction, the plaintiff ultimately bears the burden of persuading the court that jurisdiction exists." Astro-Med, Inc. v. Nihon Kohden Am., Inc., 591 F.3d 1, 8 (1st Cir. 2009), and cases cited. "When a district court rules on a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing, as in this

case, the 'prima facie' standard governs its determination." United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 618 (1st Cir. 2001). Thus, to meet its burden, the plaintiff must "demonstrate the existence of every fact required to satisfy both the forum's long-arm statute and the Due Process Clause of the Constitution." Id. (quotations and citation omitted). Under this standard, the court will look to the facts alleged in the pleadings and the parties' supplemental filings, including affidavits. Sawtelle v. Farrell, 70 F.3d 1381, 1385 (1st Cir. 1995). The court will accept the plaintiff's properly documented "facts as true (whether or not disputed) and construe them in the light most congenial to the plaintiff's jurisdictional claim." N. Laminate Sales, Inc. v. Davis, 403 F.3d 14, 24 (1st Cir. 2005) (quoting Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 51 (1st Cir. 2002)) (additional quotations and citations omitted). It will "then add to the mix facts put forward by the defendants, to the extent that they are uncontradicted." Id. (quoting Daynard, 290 F.3d at 51) (additional quotations and citation omitted). Notwithstanding the liberality of this approach, the court is not required to "credit bald allegations or unsupported conclusions." Carreras v. PMG Collins, LLC, 660 F.3d 549, 552 (1st Cir. 2011).

Similarly, when ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court must accept as true all well-pleaded facts and give the plaintiff the benefit of all reasonable inferences. See Cooperman v. Individual, Inc., 171 F.3d 43, 46 (1st Cir. 1999). In doing so, the court may consider "documents central to [the] plaintiff['s] claim" and "documents sufficiently referred to in the complaint" without converting the motion into one for summary judgment. Alt. Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001) (quoting Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993)). Moreover, "[w]hen 'a

complaint's factual allegations are expressly linked to – and admittedly dependent upon -- a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6).'" Tasiopoulos v. RBS Citizens, NA, C.A. No. 14-11486-MLW, 2016 WL 554776, at *3 (D. Mass. Feb. 10, 2016) (slip op.). To the extent any "such documents contradict an allegation in the complaint, the document trumps the allegation." Id. See also Clorox Co. P.R. v. Proctor & Gamble Commercial Co., 228 F.3d 24, 32 (1st Cir. 2000).

Applying these standards to the instant case, the relevant facts are as follows.[1]

The Parties

Plaintiff APB is a Massachusetts corporation that maintains its principal place of business in Cotuit, Massachusetts. (Compl. ¶ 1). Defendant Liquidity is a California corporation that maintains its principal place of business in Orange County, California. (Id. ¶ 3). Both Liquidity and defendant Georgia-Pacific conduct business in Massachusetts. (Id. ¶¶ 2-3). As described in further detail below, Georgia-Pacific was the owner of the 88 railroad cars at issue in this litigation. (See id. ¶ 6). Liquidity was appointed to broker a deal, on behalf of Georgia-Pacific, for the sale of the railroad cars. (Id. ¶ 9).

Defendant Beasley is a Georgia corporation with a principal place of business in Hazelhurst, Georgia. (Id. ¶ 4; Ferre Aff. ¶ 4). Beasley manufactures a variety of wood products,

[1] The facts are derived from the following materials: (1) the amended complaint ("Compl.") and the exhibits attached thereto ("Compl. Ex. __") (Docket No. 20); (2) the Affidavit of Paul D. Ferre in Support of Beasley Forest Products, Inc.'s Motion to Dismiss Count III of the Complaint ("Ferre Aff.") (Docket No. 17); and (3) the Affidavit of Ashley Tyree in Support of Beasley Forest Products, Inc.'s Motion to Dismiss Counts IV and V of the Amended Complaint ("Tyree Aff.") (Docket No. 23). Although Beasley filed Mr. Ferre's Affidavit in connection with its motion to dismiss APB's original complaint, it has relied on it to support its present motion to dismiss the claims asserted against it in the amended complaint.

including matting products for use in the energy transmission, utility and construction industries, crossties and switch ties for use in the railroad industry, pallets for use in the shipping industry, and premium grade lumber. (Ferre Aff. ¶ 3). Its products are made from hardwood, which is harvested throughout the State of Georgia, as well as in parts of Alabama, South Carolina and Florida. (Id.).

Beasley does not attempt to limit the market for its products so that they do not flow into Massachusetts, and the plaintiff alleges, upon information and belief, that some of Beasley's products do make their way into the Commonwealth. (Compl. ¶ 4). However, there is no dispute that Beasley is not registered to do business in Massachusetts, pays no taxes here, maintains no offices, bank accounts or other assets in Massachusetts, and has no employees or representatives who live or work in this state. (Ferre Aff. ¶¶ 5-6, 8-9). In addition, Beasley does not own, lease or use any real property in Massachusetts. (Id. ¶ 7). Nor has it ever attempted to avail itself of the Massachusetts legal system or directed any of its advertising toward this forum. (Id. ¶¶ 10-11).

Communications Regarding the Purchase of Railroad Cars from Georgia-Pacific

In or about the Spring of 2015, APB and Georgia-Pacific were involved in discussions concerning 88 railroad cars that Georgia-Pacific had available for sale. (See id. ¶¶ 6-8). On April 24, 2015, APB employee, Kirk Bryant, received an email from Georgia-Pacific asking whether APB had any interest in purchasing the railroad cars. (Id. ¶¶ 6-7; Compl. Ex. A). In its email, Georgia-Pacific also provided APB with information about the cars, including their age, size and location, and informed the plaintiff that any sale would be "a 'where is, as is' sale for these cars." (Compl. Ex. A). Subsequently, Georgia-Pacific appointed Liquidity as its broker for

purposes of negotiating a sale, and APB proceeded to communicate with Liquidity about the potential purchase of the railroad cars. (See Compl. ¶¶ 9-11). On June 24, 2015, Mr. Bryant received an email from Donny Martin, an employee of Liquidity, seeking to confirm the terms of an offer that APB had made earlier that day. (Compl. Ex. B). As Mr. Martin described in his email, APB was proposing to pay a total of $1,636,000, including a 16% Buyer's Premium, to purchase all of the railroad cars from Georgia-Pacific. (Compl. Ex. B).

On July 23, 2015, following further discussions between APB and Liquidity, Mr. Bryant received another email from Mr. Martin. (Compl. Ex. C). In that email, Mr. Martin stated in relevant part: "Our team has presented your offer to [Georgia-Pacific] for final approval, and should have an answer by close of business tomorrow. I'll let you know when the approval comes[.]" (Id.). He also informed APB that Liquidity would work with Georgia-Pacific to coordinate the transfer of the railroad cars to APB "upon completion of the sale." (Id.).

The next communication between the parties took place on the afternoon of July 24, 2015. (See Compl. Ex. D). At that time, Mr. Martin sent Mr. Bryant an email describing two options for the sale of the 88 railroad cars to the plaintiff. (Id.). Specifically, as Mr. Martin stated in substantive part:

> Here are the two options that [Georgia-Pacific] has brought back for us to close the deal on.
>
> Option 1, basically states that for $61K, you buy insurance that will replace as many Southern Wheels as needed to eliminate that problem. [Georgia-Pacific] will manage and take care of that issue. So after any real costs, you are paying a small percentage as insurance against the number being larger than 51 wheel sets. Option 2 is the deal with you taking responsibility for any Southern Wheels.
>
> Let me know which deal is best for you, and I'll get this closed out as early as possible next week.

> Option 1:
> Sale of railcars (78 ea. 50 yr. Cars, 10 ea. 40 yr. cars)
> As is, where is.
> Georgia-Pacific assumes responsibility for the replacement of all southern wheels if found.
> Customer retains responsibility for transportation to final destination.
> Proposed Offer: $1,697,000
>
> Option 2:
> Sale of the railcars (78 ea. 50 yr. Cars, 10 ea. 40 yr. cars)
> As is where is.
> Customer assumes responsibility for the replacement of all southern wheels if found.
> Customer retains responsibility for transportation to final destination.
> Proposed Offer: $1,636,000

(Id.). According to APB, this email confirmed Georgia-Pacific's acceptance of the plaintiff's offer to purchase the 88 railroad cars, and constituted an "assurance from Liquidity Services that the deal was done and APB could have the cars." (Compl. ¶¶ 11-12). However, the defendants contend that there was never a meeting of the minds between APB and Georgia-Pacific regarding the final terms of a deal, and that there was no a binding agreement for the purchase and sale of the railroad cars.

The plaintiff replied to the proposed options in an email to Mr. Martin dated July 27, 2015. (Compl. Ex. G). Therein, Mr. Bryant informed Liquidity that "we are leaning towards option 1, should know this afternoon." (Id.). He also asked Mr. Martin to confirm that "[t]he 45+/- cars still come with the free move as well[.]" (Id.). Within less than two hours after Mr. Bryant sent the email, Mr. Martin confirmed that "[t]hese cars still come with the free moves." (Compl. Ex. H). However, there is nothing in the amended complaint or in the record before this court which indicates that APB selected one of the two options or otherwise responded to Mr. Martin's email.

Communications Between APB and Beasley

In July 2015, during the course of APB's communications with Liquidity, Mr. Bryant made an unsolicited call to Ashley Tyree, Beasley's Procurement Manager, to ask whether Beasley would be interested in purchasing the 88 railroad cars from APB. (Tyree Aff. ¶¶ 1, 3). During the discussion, Ms. Tyree asked Mr. Bryant to provide Beasley with additional information. (Id. ¶ 3). On July 27, 2015, Mr. Bryant provided Beasley with a list describing each of the railroad cars that Georgia-Pacific had available for sale. (Compl. Ex. E). He also forwarded some schematics of the cars that APB had previously received from Georgia-Pacific. (Compl. Ex. F).

On July 27, 2015, following its receipt of the information from APB, Beasley submitted a bid to APB for the purchase of the 88 railroad cars. (Compl. ¶ 17; Compl. Ex. I). Specifically, Beasley sent a letter, both by email and by regular mail, addressed to Mr. Bryant at APB's office in Cotuit, Massachusetts. (Compl. Ex. I). Therein, Beasley proposed to pay $1,890,000 for the railcars. (Id.). It further explained that the proposal was a "gross bid[,]" which included any fees that were assessed by Liquidity Services and was "subject to any 'free moves' and wheel replacements that may be associated with [the] cars." (Id.). Additionally, Beasley stated that it would "close on these cars and take ownership within 5 days of the acceptance of this proposal." (Id.). APB does not allege, and there is nothing in the record to establish, that the parties discussed Beasley's bid or that APB ever responded to Beasley's proposal. Nevertheless, APB claims that "[t]here was a contract between APB and Beasley for Beasley to purchase the 88 rail cars from APB." (Compl. ¶ 35).

Beasley's Purchase of the Railroad Cars from Georgia-Pacific

One day later, on July 28, 2015, Mr. Bryant received an email from Mr. Martin at Liquidity informing APB that Georgia-Pacific had accepted an offer to sell the railroad cars to another buyer. (Compl. ¶ 18). As Mr. Martin stated in his communication:

> Yesterday we received and [Georgia-Pacific] accepted an offer to sell all 88 railcars, which was substantially higher than yours. This offer has been processed, and we expect to close on it shortly. If this high offer does not close we will come back to you and see if you have a further offer for these cars.

(Compl. Ex. J). APB later learned that the higher offer had come from Beasley, and that the purchase price was the same as the price that Beasley had been prepared to pay to purchase the railroad cars through APB. (Compl. ¶ 19). In this litigation, APB claims that the defendants' actions in completing the transaction without APB deprived it of proceeds that it should have received from its work in brokering a deal. (See id. ¶¶ 20, 22, 27, 39).

Additional factual details relevant to this court's analysis are provided below where appropriate.

III. ANALYSIS – BEASLEY'S MOTION TO DISMISS COUNTS IV AND V

The plaintiff claims, in Count IV of its amended complaint, that Beasley breached a contract under which it had agreed to purchase the 88 railroad cars from APB for $1,890,000. It also claims, in Count V (mistakenly labeled Count IV), that Beasley interfered with APB's ongoing business relationships by purchasing the railroad cars directly from Georgia-Pacific. Beasley argues that these claims must be dismissed because this court lacks personal jurisdiction over it and because APB has failed to state a claim against it on the merits. "[A] federal court generally may not rule on the merits of a case without first determining that it has

jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)." Sinochem Int'l Co., Ltd. V. Malaysia Int'l Shipping Corp., 549 U.S. 422, 430-31, 127 S. Ct. 1184, 1191, 167 L. Ed. 2d 15 (2007). Accordingly, it is appropriate to address the jurisdictional issue before reaching Beasley's motion to dismiss APB's claims on the merits. For the reasons that follow, this court finds that Beasley's contacts with Massachusetts are insufficient to support the assertion of personal jurisdiction over Beasley in this forum. Therefore, this court recommends that Beasley's motion to dismiss be allowed for lack of personal jurisdiction.

A. Personal Jurisdiction – Generally

In order to exercise personal jurisdiction over a defendant, the court must "find sufficient contacts between the defendant and the forum to satisfy both that state's long-arm statute and the Fourteenth Amendment's Due Process Clause." Sawtelle, 70 F.3d at 1387. "[T]he Supreme Judicial Court of Massachusetts has interpreted the state's long-arm statute as an assertion of jurisdiction over the person to the limits allowed by the Constitution of the United States." Phillips v. Prairie Eye Ctr., 530 F.3d 22, 26 (1st Cir. 2008) (quoting Daynard, 290 F.3d at 52) (additional quotations and citation omitted). "[W]hen a state's long-arm statute is coextensive with the outer limits of due process, the court's attention properly turns to the issue of whether the exercise of personal jurisdiction comports with federal constitutional standards."[2] Sawtelle, 70 F.3d at 1388. Therefore, it is appropriate for the court to "sidestep

[2] Recently, the First Circuit has "suggested that Massachusetts's long-arm statute might impose more restrictive limits on the exercise of personal jurisdiction than does the Constitution." Copia Commc'ns, LLC v. AMResorts, L.P., 812 F.3d 1, 4 (1st Cir. 2016). However, it is not necessary to resolve "this possible tension" in the case law because this court finds that record does not support a finding of personal jurisdiction over Beasley under the potentially less restrictive constitutional standard. See id.

the statutory inquiry and proceed directly to the constitutional analysis . . . ." Daynard, 290 F.3d at 52. That analysis requires the court to determine whether the defendant has maintained "certain minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 343, 85 L. Ed. 278 (1940)). Accordingly, "[t]he accepted mode of analysis for questions involving personal jurisdiction concentrates on the quality and quantity of the potential defendant's contacts with the forum." Phillips Exeter Acad. v. Howard Phillips Fund, Inc., 196 F.3d 284, 288 (1st Cir. 1999). "Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a substantial connection with the forum State." Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal., Solano Cty., 480 U.S. 102, 109, 107 S. Ct. 1026, 1030, 94 L. Ed. 2d 92 (1987) (punctuation in original, quotations and citation omitted).

"Personal jurisdiction may be either general or specific." Cossaboon v. Maine Med. Ctr., 600 F.3d 25, 31 (1st Cir. 2010). Specific jurisdiction exists "where the cause of action arises directly out of, or relates to, the defendant's forum-based contacts." Id. (quoting Pritzker v. Yari, 42 F.3d 53, 60 (1st Cir. 1994)). General jurisdiction arises when a defendant "corporation's 'continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.'" Daimler AG v. Bauman, 134 S. Ct. 746, 754, 187 L. Ed. 2d 624 (2014) (quoting Int'l Shoe Co., 326 U.S. at 318, 66 S. Ct. 154). Accordingly, a court may assert general jurisdiction over an out-of-state corporation "only when the corporation's affiliations with the State in

which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'" Id. at 751 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796 (2011)) (alteration in original). This court finds that Beasley lacks sufficient contacts with Massachusetts to satisfy either standard.

B. General Jurisdiction Analysis

The Supreme Court has "made clear that only a limited set of affiliations with a forum will render a defendant amenable to [general] jurisdiction there." Id. at 760. "With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction." Id. (quotations, punctuation and citations omitted). In addition, the Supreme Court has left open "the possibility that in an exceptional case, a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State." Id. at 761 n.19 (internal citation omitted). This is not such a case.

There is no dispute that Beasley is not incorporated under the laws of Massachusetts and does not have a principal place of business here. (See Ferre Aff. ¶ 4). Nor is there any evidence showing that Beasley conducts any continuous or substantial operations in Massachusetts. Additionally, the record establishes that Beasley engaged in fewer than five phone calls and had no more than six email communications with the plaintiff, and that all except one of those email communications were generated by Mr. Bryant at APB. (See id. ¶¶ 13-19; Tyree Aff. ¶¶ 3-8). Such slim contacts with Massachusetts cannot be deemed to render the defendant "at home" in this forum. Daimler, 134 S. Ct. at 760.

Beasley's only other contact with Massachusetts consists of the alleged flow of some of its products into the forum state. (See Compl. ¶ 4). APB contends that this is sufficient to establish personal jurisdiction over the defendant. (Pl. Opp. to Beasley Mot. (Docket No. 32) at 3). However, the Supreme Court has "concluded that 'mere purchases [made in the forum state], even if occurring at regular intervals, are not enough to warrant a State's assertion of [general] jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.'" Goodyear Dunlop Tires Operations, S.A., 564 U.S. at 929, 131 S. Ct. at 2856 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 418, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)) (alterations in original). As a result, the "[f]low of a manufacturer's products into the forum," without more, "do[es] not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant." Id. at 927, 131 S. Ct. at 2855 (emphasis in original). Because the plaintiff has not shown that Beasley has "affiliations 'so continuous and systematic as to render [it] essentially at home'" in Massachusetts, "*i.e.*, comparable to a domestic enterprise" in Massachusetts, this court finds that there is no general personal jurisdiction over that defendant in Massachusetts. Daimler, 134 S. Ct. at 758 n.11 (quoting Goodyear Dunlop Tires Operations, S.A., 564 U.S. at 919, 131 S. Ct. at 2851)) (internal quotations omitted).

C. Specific Jurisdiction Analysis

"Where the defendant is not subject to general jurisdiction, due process may still permit a district court to exercise specific jurisdiction." Venmill Indus., Inc. v. ELM, Inc., 100 F. Supp. 3d 59, 67 (D. Mass. 2015). For purposes of specific jurisdiction, "the constitutional analysis is

divided into three categories: relatedness, purposeful availment, and reasonableness." Phillips, 530 F.3d at 27. As the First Circuit has explained:

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

Id. (quoting Adelson v. Hananel, 510 F.3d 43, 49 (1st Cir. 2007)) (additional citation omitted). "An affirmative finding on each of the three elements of the test is required to support a finding of specific jurisdiction." Phillips Exeter Acad., 196 F.3d at 288. For the reasons that follow, this court finds that Beasley's contacts with the forum are insufficient to satisfy the purposeful availment prong of the jurisdictional analysis.

Relatedness

In evaluating relatedness, the court is mindful that "[q]uestions of specific jurisdiction are always tied to the particular claims asserted." Id. at 289. In the instant case, APB has asserted both a contract claim against Beasley for breach of an agreement to purchase the railroad cars from the plaintiff, and a tort claim for Beasley's alleged interference with APB's ongoing business relationship with Georgia-Pacific. "Ordinarily, the personal jurisdiction analysis for tort claims differs from that for contract claims." Jet Wine & Spirits, Inc. v. Barcardi & Co., Ltd., 298 F.3d 1, 10 (1st Cir. 2002). "When, however, the tort is intentional interference with a contractual or business relationship, the two inquiries begin to resemble each other" and the distinction is of little concern. Id. See also Phillips, 530 F.3d at 27 (evaluating relatedness using only standard applicable to contract claims where plaintiff asserted both a contract claim

for breach of the implied covenant of good faith and fair dealing, and a tort claim for breach of fiduciary duty). Therefore, this court must "look to whether 'the defendant's activity in the forum state was instrumental either in the formation of the contract or its breach.'" Phillips, 530 F.3d at 27 (quoting Adelson, 510 F.3d at 49) (additional quotations and citation omitted).

In the instant case, APB alleges that Beasley's July 27, 2015 bid for the purchase of the 88 railroad cars, which was directed to Mr. Bryant at APB's office in Massachusetts, created an enforceable contract between the parties. (See Compl. ¶¶ 17, 35-36; Compl. Ex. I). Therefore, this court will assume that the plaintiff has established sufficient relatedness. This court does recognize that under a more strict analysis, the mere transmission of a contract into the forum may not be enough to satisfy the relatedness requirement. See Phillips, 530 F.3d at 27 (noting that plaintiff's case lacked the "typical factors" which have led the First Circuit to find relatedness, such as evidence that the contract was "formalized and entered into in the forum state[,]" that contract created an ongoing relationship between the forum and the out-of-state party, and that contract negotiations took place in the forum). Nevertheless, because the First Circuit has emphasized that "the relatedness inquiry is to be resolved under 'a flexible, relaxed standard[,]'" and APB's contract claim against Beasley arises out of an alleged agreement that was provided to APB in the forum, this court finds it appropriate to assume that the requirement has been satisfied here. See Baskin-Robbins Franchising LLC v. Alpenrose Dairy, Inc., --- F.3d ---, 2016 WL 3147645, at *4 (1st Cir. Jun. 6, 2016) (quoting Pritzker, 42 F.3d at 61).

Purposeful Availment

In order to establish personal jurisdiction over Beasley, APB also must meet the "purposeful availment" prong of the jurisdictional analysis. "The baseline rule is that a

defendant is subject to jurisdiction only when it 'purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" Carreras, 660 F.3d at 555 (quoting J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880, 131 S. Ct. 2780, 2787, 180 L. Ed. 2d 765 (2011)). Accordingly, purposeful availment occurs "when a defendant deliberately targets its behavior toward the society or economy of a particular forum [such that] the forum should have the power to subject the defendant to judgment regarding that behavior." Id. This "requirement guarantees that a defendant will not be subjected to the exercise of jurisdiction based solely on 'random, isolated or fortuitous contacts with the forum state.'" Baskin-Robbins Franchising LLC, 2016 WL 3147645, at *5 (quoting Adelson, 510 F.3d at 50) (additional quotations and citation omitted). It further "ensures that a defendant will not be swept within a state's jurisdictional reach due solely to the 'unilateral activity of another party or a third person.'" Id. (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)) (additional citation omitted).

"[P]urposeful availment involves both voluntariness and foreseeability." Phillips, 530 F.3d at 28. As the First Circuit has explained:

> Voluntariness requires that the defendant's contacts with the forum state "proximately result from actions by the defendant *himself*." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). The contacts must be deliberate, and "not based on the unilateral actions of another party." *Adelson,* 510 F.3d at 50 (citing *Burger King,* 471 U.S. at 475, 105 S.Ct. 2174). Foreseeability requires that the contacts also must be of a nature that the defendant could "reasonably anticipate being haled into court there." *Id.* (quoting *World–Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)) (internal quotation marks omitted).

Id. Neither of these requirements has been satisfied in this case.

The record establishes that Beasley's contacts with Massachusetts occurred as a result of APB's conduct, and not as a result of any effort on the part of the defendant. Thus, the evidence shows that the first contact between the parties occurred in July 2015, when APB made an unsolicited telephone call to Ms. Tyree in order to explore Beasley's potential interest in purchasing the 88 railroad cars from the plaintiff. (See Tyree Aff. ¶¶ 3-5; Ferre Aff. ¶ 13). While Beasley followed up by seeking additional information from APB and submitting a bid for the purchase of the cars, there is no indication that Beasley ever reached into Massachusetts for purposes of establishing a business relationship with APB, or that anyone from Beasley ever entered the forum in order to pursue the purchase and sale of the railroad cars from the plaintiff. "A company does not subject itself to jurisdiction in a forum simply by following up with forum residents who, without prior solicitation, have expressed an interest in [the sale of] the company's product." Carreras, 660 F.3d at 555-56. See also Phillips, 530 F.3d at 29 (no purposeful availment where "[d]efendant did not initiate the contact with plaintiff in Massachusetts; rather, it was the other way around"). Therefore, APB has not established that Beasley's contacts with the forum were voluntary.

Nor does the evidence show that Beasley could have foreseen that it would be haled into court in Massachusetts. It is firmly established in this circuit "that 'the mere existence of a contractual relationship between an out-of-state defendant and an in-state plaintiff does not suffice, in and of itself, to establish jurisdiction in the plaintiff's home state.'" Baskin-Robbins, 2016 WL 3147645, at *5 (quoting Phillips Exeter Acad., 196 F.3d at 290). Even if it is assumed, as APB alleges, that Beasley's bid to purchase the railroad cars from the plaintiff created an enforceable agreement between the parties, this would not be enough to satisfy the purposeful

availment requirement of the test for personal jurisdiction. The fact that Beasley mailed the bid to APB in Massachusetts is similarly insufficient to render suit against it in Massachusetts foreseeable. See Phillips, 530 F.3d at 29 ("It stretches too far to say that [defendant], by mailing a contract with full terms to Massachusetts for signature and following up with three e-mails concerning the logistics of signing the contract, should have known that it was rendering itself liable to suit in Massachusetts").

"A purpose of the foreseeability requirement is that 'personal jurisdiction over nonresidents . . . is a quid for a quo that consists of the state's extending protection or other services to the nonresident.'" Id. (quoting Sawtelle, 70 F.3d at 1392) (additional citations omitted). Here, there is no evidence that Beasley, in its contract-related dealings with APB, sought to conduct any activities in Massachusetts or did anything "to invoke the benefits and protections of Massachusetts's laws beyond implicitly relying on the state's laws in the way that any party to a contract relies on the laws of the jurisdiction in which his counter-party happens to reside." Copia Commc'ns, LLC v. AMResorts, L.P., 812 F.3d 1, 5 (1st Cir. 2016). For this reason as well, this court concludes that "[Beasley's] contacts with Massachusetts do not constitute sufficiently purposeful availment to allow for the exercise of jurisdiction."[3] Phillips, 530 F.3d at 29.

[3] To the extent APB relies on the alleged flow of Beasley's products into Massachusetts to support the exercise of specific jurisdiction over Beasley, its reliance is misplaced. Both of APB's claims against Beasley arise out of the defendant's conduct in purchasing the railroad cars from Georgia-Pacific rather than through APB. Because there is no claim that arises out of or relates directly to the flow of Beasley's products into the forum, those contacts have no relevance to the specific jurisdiction analysis. See Copia Commc'ns, LLC, 812 F.3d at 5 (explaining that only relevant contacts for purposes of specific jurisdiction analysis are those that relate directly to the claims asserted in the lawsuit).

In light of the plaintiff's failure to satisfy the purposeful availment prong of the test for specific jurisdiction, there is no need to consider whether it would be reasonable for this court to exercise personal jurisdiction over Beasley. Nor is it necessary for this court to address Beasley's argument for dismissal based on APB's failure to state a claim. See Copi Commc'ns, LLC, 812 F.3d at 6 n.5 (declining to consider whether Massachusetts court's exercise of personal jurisdiction over defendant would be reasonable, or whether matter should be dismissed on alternative grounds, where plaintiff failed to show purposeful availment). Accordingly, this court recommends, for the reasons set forth above, that Beasley's motion to dismiss be allowed due to lack of personal jurisdiction.

IV. ANALYSIS – LIQUIDITY'S MOTION TO DISMISS COUNTS II AND III

This court turns next to Liquidity's motion to dismiss Counts II and III of the plaintiff's amended complaint. Count II consists of a claim for breach of a contract in which APB alleges that it entered into a contract with Liquidity pursuant to which Liquidity allegedly agreed that its client, Georgia-Pacific, would sell the 88 railroad cars to or through APB. In Count III, APB is seeking to hold Liquidity liable for misrepresentation. Liquidity contends that APB has failed to state a claim against it under either theory, and that its claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). This court agrees, and recommends that Liquidity's motion to dismiss be allowed with respect to both Counts.

A. Motion to Dismiss Standard of Review

Motions to dismiss under Rule 12(b)(6) test the sufficiency of the pleadings. Thus, when confronted with a motion to dismiss, the court accepts as true all well-pleaded facts and draws all reasonable inferences in favor of the plaintiff. Cooperman, 171 F.3d at 46. Dismissal is only

appropriate if the complaint, so viewed, fails to allege a "plausible entitlement to relief." Rodriguez-Ortiz v. Margo Caribe, Inc., 490 F.3d 92, 95 (1st Cir. 2007) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559, 127 S. Ct. 1955, 1967, 167 L. Ed. 2d 929 (2007)).

"The plausibility inquiry necessitates a two-step pavane." Garcia-Catalan v. United States, 734 F.3d 100, 103 (1st Cir. 2013). "First, the court must distinguish 'the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited).'" Id. (quoting Morales-Cruz v. Univ. of P.R., 676 F.3d 220, 224 (1st Cir. 2012)). "Second, the court must determine whether the factual allegations are sufficient to support 'the reasonable inference that the defendant is liable for the misconduct alleged.'" Id. (quoting Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011)) (additional citation omitted). This second step requires the reviewing court to "draw on its judicial experience and common sense." Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)). "If the factual allegations in the complaint are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture, the complaint is open to dismissal." Morales-Cruz, 676 F.3d at 224 (quoting SEC v. Tambone, 597 F.3d 436, 442 (1st Cir. 2010)).

B. Count II: Claim for Breach of Contract

In Count II of its amended complaint, APB claims that "Liquidity agreed with APB that its client, Georgia Pacific, would sell the [88 rail]cars to or through APB[,]" and that "[t]he Plaintiff, APB, was harmed as a result of the Defendant, Liquidity Service's breach of its agreement to have the 88 Railcars sold to and/or through APB." (Compl. ¶¶ 26-27). Liquidity has moved to dismiss this claim on the grounds that it never entered into a binding contract with APB.

(Liquidity Mem. (Docket No. 25) at 5-10). The court recommends that Count II be dismissed because even viewing the facts most favorably to APB, Liquidity was merely serving as a broker for Georgia-Pacific, and was not a party to the alleged contract with APB.

"In order to plead a viable breach of contract claim under Massachusetts law, '[the] plaintiff[ ] must prove that a valid, binding contract existed, the defendant breached the terms of the contract, and the plaintiff[ ] sustained damages as a result of the breach.'" Vieira v. First Am. Title Ins. Co., 668 F. Supp. 2d 282, 288 (D. Mass. 2009) (quoting Brooks v. AIG SunAmerica Life Assur. Co., 480 F.3d 579, 586 (1st Cir. 2007)).[4] "It is not enough to allege, in a conclusory fashion, that the facts demonstrate a breach of contract. Rather, it is 'essential to state with substantial certainty the facts showing the existence of the contract and legal effect thereof.'" Id. at 288-89 (quoting Doyle v. Hasbro, Inc., 103 F.3d 186, 194-95 (1st Cir. 1996)) (internal quotations and citation omitted). In the instant case, Liquidity contends that no contract was ever formed between itself and the plaintiff because Liquidity was acting at all relevant times as an agent for Georgia-Pacific, and was never purporting to act on its own behalf. (Liquidity Mem. at 5-6). It also contends that no contract existed in any event because APB never reached a meeting of the minds with any party with respect to the essential terms of a purchase and sale agreement. (Id. at 7-10). This court finds that there is no need to reach the latter argument because Liquidity's alleged role as a broker for Georgia-Pacific defeats APB's breach of contract claim against Liquidity.

[4] There appears to be no dispute that Massachusetts law governs the plaintiff's state law claims.

It has long been "settled in Massachusetts that, '[u]nless otherwise agreed, a person making or purporting to make a contract for a disclosed principal does not become a party to the contract.'" Paterson-Leitch Co., Inc. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985, 993 (1st Cir. 1988) (quoting Porshin v. Snider, 349 Mass. 653, 655, 212 N.E. 2d 216, 217 (1965)). Here, APB alleges that "[t]he Defendant, Liquidity was acting as a seller's broker with regard to this transaction[,]" and that Liquidity's "client, Georgia Pacific," was responsible for selling the railroad cars "to or through APB." (Compl. ¶ 25; see also Compl. ¶ 9 (alleging that Liquidity had "been appointed to broker a deal, on behalf of the seller, Georgia Pacific")). As the agent for Georgia-Pacific, Liquidity cannot be held liable under a breach of contract theory for Georgia-Pacific's failure to sell the cars to APB. See Bratcher v. Moriarty, Donoghue & Leja, P.C., 54 Mass. App. Ct. 111, 116, 763 N.E.2d 556, 560 (2002) (holding that plaintiff could not state a viable claim against attorney for breach of contract because attorney was merely acting as an agent for his client).

This court is not required to credit the plaintiff's claim that the alleged agreement to sell the railroad cars "was by and between APB and Liquidity." (See Compl. ¶ 26). Such conclusory allegations "are not entitled to the assumption of truth" for purposes of a motion to dismiss. Ashcroft, 556 U.S. at 679, 129 S. Ct. at 1950. Nor does this court find persuasive APB's argument that Liquidity's motion should be denied because APB "does not allege that Liquidity was a disclosed agent" of Georgia-Pacific. (See Pl. Opp. to Liquidity Mot. (Docket No. 31) at 2). As demonstrated by the documents attached to the amended complaint, Liquidity repeatedly identified Georgia-Pacific as its principal and the seller of the railroad cars at issue. (See Compl. Exs. B-D). It also identified Georgia-Pacific as the party responsible for all decisions regarding

the terms of any sale. (See Compl. Ex. C ("Our team has presented your offer to [Georgia-Pacific] for final approval"); Ex. D ("Here are the two options that [Georgia-Pacific] has brought back for us to close the deal on")). Additionally, the record demonstrates that prior to Liquidity's involvement, APB was communicating directly with Georgia-Pacific, and was fully aware of that party's status as the owner and potential seller of the cars. (Compl. Exs. A & E). In short, APB's own allegations and communications belie any suggestion that Liquidity was acting in any capacity other than as a disclosed agent of Georgia-Pacific at all times relevant to this case. Because APB has failed to state a plausible breach of contract claim against Liquidity, this court recommends that Count II be dismissed.

C. Count III: Claim for Misrepresentation

In Count III of its amended complaint, APB claims that it was harmed as a result of Liquidity's "material misrepresentation to APB regarding a sale, and APB's reasonable reliance thereon." (Compl. ¶ 32). APB has not indicated whether it is seeking to hold Liquidity liable for fraudulent or negligent misrepresentation. Because the distinction between the two causes of action does not affect this court's analysis of the motion to dismiss, it will treat APB's claim as alleging both theories. For the reasons that follow, this court recommends that Liquidity's motion be allowed with respect to this claim as well.

In order to state a claim for fraudulent misrepresentation, the plaintiff must allege "that the defendant[ ] made a false representation of material fact, with knowledge of its falsity, for the purpose of inducing the plaintiff[ ] to act on this representation, that the plaintiff[ ] reasonably relied on the representation as true, and that [the plaintiff] acted upon it to [its] damage." Cumis Ins. Soc'y, Inc. v. BJ's Wholesale Club, Inc., 455 Mass. 458, 471, 918 N.E. 2d 36,

47 (2009). Similarly, in order to support a claim for negligent misrepresentation, the plaintiff must allege facts showing that the defendant supplied false information to others "without exercising reasonable care or competence in obtaining or communicating the information, that those others justifiably relied on the information, and that they suffered pecuniary loss caused by their justifiable reliance upon the information." Id. at 471-72, 918 N.E. 2d at 47-48 (quotations, citation and footnote omitted).

This court finds that the amended complaint does not support a plausible claim under either theory because the plaintiff has not alleged sufficient facts to show that Liquidity made a false representation of a material fact. According to the complaint, Liquidity falsely "represented to APB that the deal was done and that Georgia Pacific would sell the cars to APB." (Compl. ¶ 29). The plaintiff further alleges that the false representation was conveyed to APB in an email dated July 27, 2015. (See id. ¶ 15). However, the email, which is attached as an exhibit to the amended complaint, does not support the plaintiff's allegations. Rather, in the email, Liquidity's representative, Mr. Martin, presented "two options that [Georgia-Pacific] has brought back for us to close the deal on[,]" including one option with a "Proposed Offer" price of $1,697,000, and a second option with a "Proposed Offer" price of $1,636,000. (Compl. Ex. G). He also instructed APB: "Let me know which deal is best for you, and I'll get this closed out as early as possible next week." (Id.). Thus, the record establishes that Liquidity did not inform the plaintiff that a final deal had been reached, and that there was no misrepresentation. Accordingly, Count III fails to state a plausible claim for relief and should be dismissed as well.

V. CONCLUSION

For all the reasons set forth herein, this court recommends to the District Judge to whom this case is assigned that both "Defendant Beasley Forest Products, Inc.'s Motion to Dismiss Counts IV and V of the Amended Complaint" (Docket No. 21) and "Defendant Liquidity Services, Inc.'s Motion to Dismiss" (Docket No. 24) be ALLOWED.[5]

/ s / Judith Gail Dein
Judith Gail Dein
United States Magistrate Judge

[5] The parties are hereby advised that under the provisions of Fed. R. Civ. P. 72 any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with this Rule shall preclude further appellate review. See Keating v. Sec'y of Health & Human Servs., 848 F.2d 271, 275 (1st Cir. 1988); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 604-05 (1st Cir. 1980); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); see also Thomas v. Arn, 474 U.S. 140, 153-54, 106 S. Ct. 466, 474, 88 L. Ed. 2d 435 (1985). Accord Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, 3-4 (1st Cir. 1999); Henley Drilling Co. v. McGee, 36 F.3d 143, 150-51 (1st Cir. 1994); Santiago v. Canon U.S.A., Inc., 138 F.3d 1, 4 (1st Cir. 1998).