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The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF WASHINGTON MUTUAL BANK,

Plaintiff,

v.

KERRY K. KILLINGER, STEPHEN J. ROTELLA, DAVID C. SCHNEIDER, LINDA C. KILLINGER, and ESTHER T. ROTELLA,

Defendants.

Case No. 2:11-cv-00459 MJP

ESTHER T. ROTELLA'S MOTION TO DISMISS AND JOINDER IN DEFENDANTS' MOTION TO DISMISS

NOTE ON MOTION CALENDAR:
September 15, 2011

ORAL ARGUMENT REQUESTED

1 Defendant Esther T. Rotella moves to dismiss the Complaint of the Federal Deposit
2 Insurance Corporation, as receiver of Washington Mutual Bank (“FDIC”) pursuant to Rule
3 12(b)(2) of the Federal Rules of Civil Procedure for lack of personal jurisdiction. Mrs. Rotella
4 also joins Stephen J. Rotella and David C. Schneider’s Motion to Dismiss, filed on July 1, 2011
5 [Dkt. No. 53] (the “Rotella/Schneider Motion”), and incorporates such motion herein by
6 reference.

7 INTRODUCTION

8 The FDIC elected to name Esther Rotella, the wife of former officer Stephen Rotella, as a
9 defendant in this action. The FDIC did so notwithstanding the complete absence of personal
10 jurisdiction over Mrs. Rotella and the lack of any substantive basis for a claim against her.
11 Indeed, the FDIC makes just one conclusory statement regarding this Court’s jurisdiction over
12 Mrs. Rotella: “[t]his Court has personal jurisdiction over . . . each of the defendants named in
13 this action pursuant to Revised Code of Washington § 4.28.185(1)(a), (b) and/or (c).” (Compl.
14 ¶ 20.) Apart from this statement, the FDIC fails to make any allegations as to where Mrs.
15 Rotella resides, where the purported fraudulent conveyance took place, or any other fact that
16 could possibly form a basis for the Court’s exercise of personal jurisdiction over Mrs. Rotella.
17 (See, e.g., Compl. ¶¶ 18, 203–215.) Moreover, the FDIC concedes the only real property at issue
18 in the Complaint is Mrs. Rotella’s residence located in Orient, New York—3,000 miles from
19 Seattle, Washington. (See *id.* ¶ 204.)

20 On the merits, the FDIC wholly fails to assert a cause of action against Mrs. Rotella, who
21 is identified as a defendant with regard to Count V (fraudulent conveyance) and Count VI (asset
22 freeze). As set forth in the Rotella/Schneider Motion, the truly ordinary financial planning
23 measures alleged in the Complaint do not and cannot rise to the level of a fraudulent conveyance
24 as a matter of law. (See Rotella/Schneider Motion, Section IV.) And, because that and the other
25 claims fail as a matter of law, there is no basis for granting the FDIC the onerous “asset freeze”
26 requested. (See Rotella/Schneider Motion, Section V.)

1 **LEGAL ARGUMENT**

2 **I. THE COMPLAINT FAILS TO ASSERT A BASIS FOR PERSONAL**
3 **JURISDICTION OVER ESTHER ROTELLA**

4 The FDIC has not alleged facts showing that the Court has personal jurisdiction over
5 Mrs. Rotella. To withstand a motion to dismiss, the FDIC bears the burden of showing that the
6 Court has personal jurisdiction over a defendant. *Lange v. Thompson*, No. C08-0271-MJP, 2008
7 U.S. Dist. Lexis 60731, at *4 (W.D. Wash. Aug. 6, 2008) (Pechman, J.) (granting motion to
8 dismiss for lack of personal jurisdiction) (citing *Harris Rutsky & Co. Ins. Servs. v. Bell &*
9 *Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003)); *see also Hamad v. Gates*, No. C10-591-
10 MJP, 2011 U.S. Dist. Lexis 57405, at *5 (W.D. Wash. May 27, 2011) (Pechman, J.) (granting
11 motion to dismiss for lack of personal jurisdiction). Additionally, as is the case here, if “there
12 are no allegations that the defendant has continuous and systematic contact with the forum state,
13 general jurisdiction is not applicable.” *Lange*, 2008 U.S. Dist. Lexis 60731, at *5 (citing
14 *Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000)).

15 “Where, as here, there is no applicable federal statute governing personal jurisdiction, the
16 law of the state in which the district court sits applies.” *Core-Vent Corp. v. Nobel Indus.*, 11
17 F.3d 1482, 1484 (9th Cir. 1993) (affirming dismissal for lack of personal jurisdiction).
18 Washington’s long arm statute provides: “(1) Any person, whether or not a citizen or resident of
19 this state . . . who does any of the acts in this section enumerated, thereby submits said person . . .
20 to the jurisdiction of the courts of this state as to any cause of action arising from the doing of
21 any of said acts: (a) The transaction of any business within this state; (b) The commission of a
22 tortious act within this state; (c) The ownership, use, or possession of any property whether real
23 or personal situated in this state . . .” RCW § 4.28.185.

24 The FDIC has not alleged that Mrs. Rotella transacted any business in Washington,
25 committed a tortious act in Washington, or owned property in Washington—much less alleged
26 causes of action arising out of those acts. Accordingly, the FDIC has not satisfied its burden of
27 alleging facts establishing personal jurisdiction. In *Gilbert v. DaGrossa*, for example, the Ninth

1 Circuit affirmed the district court’s dismissal of a complaint that failed to allege sufficient
2 grounds for personal jurisdiction over the defendants. 756 F.2d 1455, 1461 (9th Cir. 1985). The
3 court concluded that the allegations in the complaint failed to fall within Washington’s long arm
4 statute, RCW § 4.28.185, and the district court properly dismissed on this basis. *Id.* at 1459.
5 The court explained, “[t]he complaint states unequivocally that the appellees worked in New
6 York and New Jersey, and that the alleged tortious acts occurred in New York or New Jersey.
7 There is neither an allegation nor evidence that the appellees ever transacted any business, or
8 committed any tortious act or acts, within the state of Washington.” *Id.*

9 Similarly, instead of alleging facts establishing the Court has jurisdiction, the FDIC
10 merely makes a conclusory assertion that the Court has jurisdiction over each defendant under
11 Washington’s statute. (Compl. ¶ 20.) But as the court in *Swartz v. KPMG LLP* explained, “mere
12 ‘bare bones’ assertions of minimum contacts with the forum or legal conclusions unsupported by
13 specific factual allegations will not satisfy a plaintiff’s pleading burden.” 476 F.3d 756, 766 (9th
14 Cir. 2007) (citations omitted). *See also Butcher’s Union Local No. 498, United Food &*
15 *Commercial Workers v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) (affirming dismissal of
16 complaint where plaintiffs summarily contended “the claim arose in this district, and/or each
17 defendant resides, is found, has an agent and/or transacts his affairs in this district”);
18 *Cunningham Field & Research Serv., Inc. v. Johnston*, No. C05-1354-MJP, 2005 WL 2704510,
19 at *1-2 (W.D. Wash. Oct. 20, 2005) (Pechman, J.) (dismissing for lack of personal jurisdiction
20 where allegations were “impermissibly vague,” failed to allege that the defendant’s actions
21 occurred in or were directed at Washington State, and “[t]here is not a single allegation alleging
22 any contacts with this forum by [defendant]”); *Huff v. Liberty League Int’l, LLC*, No. EDCV08-
23 1010-VAP, 2009 WL 1033788, at *3 (C.D. Cal. Apr. 14, 2009) (failing to meet burden of
24 showing the Court has personal jurisdiction over defendants because “there is no allegation that
25 they purposefully availed themselves of conducting business in [the state]. . . that the claims
26 against them arise out of their contact with [the state], nor any other basis”); *Spacey v. Bugar*,
27 207 F. Supp. 2d 1037, 1049 (C.D. Cal. 2001) (granting motion to dismiss for lack of jurisdiction

1 where plaintiff's complaint made only conclusory allegations regarding personal jurisdiction);
2 *Fujitsu-ICL Sys., Inc. v. Efarm Serv. Co. of Ill., Inc.*, No. CV00-0777-W, 2000 WL 1409760, at
3 *4 (S.D. Cal. June 29, 2000) (same). Likewise, here, the FDIC's bare bones statement that the
4 Court has jurisdiction is insufficient to sustain the FDIC's burden and the Court should reject it.

5 **II. THE FDIC FAILS TO STATE A CLAIM AGAINST MRS. ROTELLA**

6 Mrs. Rotella joins in the Rotella/Schneider Motion's arguments concerning the FDIC's
7 failure to state a claim. In particular, the FDIC's allegations relating to the transfer of money to
8 Mrs. Rotella are pled "on information and belief" and do not satisfy Rule 8, much less Rule
9 9(b)'s heightened standards. (*See* Rotella/Schneider Motion, Section IV.) Additionally, the
10 FDIC's allegations with regard to the Rotellas' residence in Orient, New York are wholly
11 inadequate. The FDIC's allegation that Esther Rotella transferred her interest in the residence
12 into the Esther Rotella Trust has absolutely no implication under Washington's Uniform
13 Fraudulent Transfer Act because the FDIC does not allege that Esther Rotella is a "debtor" under
14 the statute or that the FDIC is a creditor of Esther Rotella. *See Premier Capital, Inc. v. Klein*,
15 776 N.Y.S.2d 74, 76 (N.Y. App. Div. 2004) (finding transfer of real property to defendant's wife
16 was not fraudulent as to defendant's wife because she was not alleged to be a debtor of the
17 plaintiff's assignor). As such, the Complaint provides no factual basis for the assertion that
18 Esther Rotella intended a transaction to "hinder, delay or defraud" creditors. *In re Daisy Sys.*
19 *Corp.*, No. C-92-1845-DLJ, 1993 WL 491309, *9 (N.D. Cal. Feb. 3, 1993). Further, nowhere in
20 the Complaint does the FDIC allege that Esther Rotella believed or should have reasonably
21 believed that she would incur debts beyond her ability to pay as they became due. Therefore, the
22 FDIC does not—and cannot—claim that it was injured by Esther Rotella's transfer to the Esther
23 Rotella Trust.

24 For these reasons, and those set forth in the Rotella/Schneider Motion, Counts V and
25 VI—the only two counts against Mrs. Rotella—must be dismissed.

1 **CONCLUSION**

2 The Court should dismiss the FDIC's Complaint as to Mrs. Rotella because it pleads no
3 facts that would establish the Court's jurisdiction. The FDIC's single conclusory statement that
4 "the Court has personal jurisdiction over . . . each of the defendants" and bald assertion that
5 Washington's long arm statute applies do not suffice to carry the FDIC's pleading burden and,
6 accordingly, its Complaint must be dismissed. The FDIC's suit must also be dismissed because
7 the Complaint fails under Rules 9(b) and 8(a).

8
9 Dated this 1st day of July, 2011.

10 SIMPSON THACHER & BARTLETT LLP
11 Barry R. Ostrager (*pro hac vice*)
12 Mary Kay Vyskocil (*pro hac vice*)
13 425 Lexington Avenue
14 New York, New York 10017
15 Tel.: (212) 455-2000
16 Fax: (212) 455-2502
17 Email: bostrager@stblaw.com
18 mvyskocil@stblaw.com

-and-

15 Deborah L. Stein (*pro hac vice*)
16 1999 Avenue of the Stars, 29th Floor
17 Los Angeles, California 90067
18 Tel.: (310) 407-7500
19 Fax: (310) 407-7502
20 Email: dstein@stblaw.com

DAVIS WRIGHT TREMAINE LLP

By: /s/ Stephen M. Rummage

Stephen M. Rummage, WSBA #11168
Steven P. Caplow, WSBA #19843
1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045
Tel.: (206) 622-3150
Fax: (206) 757-7700
Email: steverummage@dwt.com
stevencaplow@dwt.com

21 *Attorneys for Esther T. Rotella*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on July 1, 2011, the foregoing was electronically filed with the Clerk
3 of the Court using the CM/ECF system which will send notification of such filing to all counsel
4 of record who receive CM/ECF notification and that the remaining parties shall be served in
5 accordance with the Federal Rules of Civil Procedure.

6 DATED this 1st day of July, 2011.

7
8 DAVIS WRIGHT TREMAINE LLP

9 By: /s/ Stephen M. Rummage
10 Stephen M. Rummage, WSBA #11168
11 1201 Third Avenue, Suite 2200
12 Seattle, Washington 98101-3045
13 Tel.: (206) 757-8136
14 Fax: (206) 757-7136
15 Email: steverummage@dwt.com
16
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18
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21
22
23
24
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