

STATE OF MAINE  
CUMBERLAND, ss

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. CV-09-547 ✓  
VM-CUM-11/30/2010

FORE, LLC,

Plaintiff

v.

ORDER ON DEFENDANTS'  
MOTION TO DISMISS

WILLAIM BENOIT and  
BENOIT ASSOCIATES,

Defendants

The defendants filed a motion to dismiss for lack of personal jurisdiction pursuant to M.R. Civ. P. 12(b)(2). For the following reasons, the motion is granted.

#### BACKGROUND

Plaintiff, Fore, LLC (Fore) is a Maine limited liability company and its managing members, Robert Adam and Judith Adam, are residents of Maine. (Adam Aff. ¶ 3.) Defendant William Benoit is a certified public accountant who resides in Brockton, Massachusetts. (Benoit Aff. ¶¶ 2-3.) Mr. Benoit is the managing partner of Defendant Benoit & Associates, LLC (Benoit Associates),<sup>1</sup> which has its office in Brockton. (Id. ¶ 3.)

Neither Mr. Benoit nor Benoit Associates has an office, post office box, or business address in Maine. (Id.) Neither defendant has ever been licensed, registered, or authorized to do business in Maine. (Id. ¶ 9.) Mr. Benoit and Benoit Associates have never provided accounting services to a business existing under the laws of Maine or

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<sup>1</sup> In the complaint, the plaintiff incorrectly names Benoit, Benoit & Associates, LLC as Benoit Associates. The plaintiff states that it intended to amend its complaint to name Benoit, Benoit & Associates, LLC, which it alleges is the successor of Benoit Associates. (Pl.'s Mem. at 2 n.1.) Benoit Associates was formed in 2006, after the sale of the golf course in 2003. (Benoit Aff. ¶ 16.)

solicited business from any person, firm, or entity located in Maine. (Benoit Aff. ¶¶ 10-11.)

In 2003, Fore entered into negotiations with Rivermeadow Management, LLC (Rivermeadow), a New Hampshire limited liability company, to purchase the Rivermeadow Golf Course (the golf course) in Westbrook, Maine. (Adam Aff. & 4.) Fore, through its managing member, Robert Adam, reviewed Rivermeadow's tax returns from 1999 to 2002. (Id. ¶ 5.) Mr. Benoit was the accountant for Rivermeadow and provided bookkeeping and accounting for the golf course. (Benoit Aff. ¶ 13.) According to Rivermeadow's tax returns, Rivermeadow does business entirely within Maine. (Pl.'s Exs. 1-3.) Mr. Benoit's accounting services were performed at his office in Massachusetts. (Benoit Aff. ¶ 15.)

Subsequent to the purchase, Fore alleges that it determined that the financial information for the golf course was significantly different than reflected in the tax returns provided by Mr. Benoit. (Compl. ¶¶ 22-24; Adam Aff. ¶¶ 7, 9-10.) Fore brought a successful claim against RJ Golf, LLC in 2008, alleging fraud in connection with the sale.<sup>2</sup> (Benoit Aff. ¶¶ 23-24.) During the course of the 2008 litigation,<sup>3</sup> Fore learned that Mr. Benoit allegedly prepared fraudulent tax returns, increased the amount of cash flow, and hid certain expenses from the years prior to 2003. (Compl. ¶¶ 30-40.) Mr. Benoit told Mr. Adam that the tax returns were accurate and that they reflected the financial condition of the golf course. (Adam Aff. ¶ 6.) Mr. Adam cannot remember whether he contacted Mr. Benoit or whether Mr. Benoit called him to discuss the tax returns prior to closing. (Id.) Mr. Benoit recalls that Mr. Adam placed the call. (Benoit

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<sup>2</sup> Under the settlement agreement, RJ Golf, LLC forgave the promissory note for \$416,000. The purchase price was \$350,000. (Benoit Aff. ¶ 24.)

<sup>3</sup> Mr. Benoit's only visit to Maine related to Rivermeadow occurred in connection with litigation and after the sale of the golf course. (Id. ¶ 6.)

Aff. ¶ 20.) Fore filed a complaint with this court against Mr. Benoit and Benoit Associates and alleges fraud, misrepresentation, and fraudulent concealment.

## DISCUSSION

### I. Standard of Review

Courts commonly rule on motions to dismiss for lack of personal jurisdiction prior to trial without resort to an evidentiary hearing. Dorf v. Complastik Corp., 1999 ME 133, ¶ 13, 735 A.2d 984, 988. A plaintiff opposing such a motion must base that opposition “on specific facts set forth in the record . . . .” Id. (quotations omitted). “This means that [the] plaintiff must go beyond the pleadings and make affirmative proof.” Id. (quotations omitted). “This showing may be made by affidavit or otherwise.” Id. When the court decides a motion to dismiss for lack of personal jurisdiction on the pleadings and affidavits of the parties, the plaintiff is required only to make a prima facie showing that the court has jurisdiction. Id., ¶ 14, 735 A.2d at 988-89. The plaintiff’s written allegations of jurisdictional facts are construed in its favor. Id., ¶ 14, 735 A.2d at 989. “When, however, the facts relating to personal jurisdiction are so intertwined with the facts relating to the merits of the case, that it would be difficult to decide jurisdiction prior to a full trial on the merits, a court may be forced to postpone resolving the issue of jurisdiction until trial.” Id., ¶ 15, 735 A.2d at 989.

### II. Personal Jurisdiction

Maine’s long-arm statute authorizes jurisdiction over nonresidents with “certain significant minimal contacts with this State . . . to the fullest extent permitted by the due process clause of the United States Constitution, 14<sup>th</sup> amendment.” 14 M.R.S.A. § 704-A(1).<sup>4</sup> The Law Court has interpreted this statute in light of the due process clause as

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<sup>4</sup> Maine’s “long-arm” statute states, in relevant part:

requiring the following three elements before Maine’s courts may assert personal jurisdiction over a nonresident defendant: “(1) Maine [must] have a legitimate interest in the subject matter of this litigation; (2) the defendant, by his conduct, reasonably could have anticipated litigation in Maine; and (3) the exercise of jurisdiction by Maine’s courts comports with traditional notions of fair play and substantial justice.” Murphy v. Keenan, 667 A.2d 591, 593 (Me. 1995). A plaintiff has the burden of satisfying the first two elements. Id. at 594. If a plaintiff meets its burden, the defendant must show that jurisdiction would not “comport with traditional notions of fair play and substantial justice.” Id.

A. Legitimate Interest in this Litigation

“Maine certainly has an interest in providing its citizens with a means of redress against nonresidents,” Interstate Food Processing Corp. v. Pellerito Foods, Inc., 622 A.2d 1189, 1192 (Me. 1993), but “an interest beyond mere citizenry is necessary” for Maine to assert jurisdiction over a nonresident defendant. Murphy, 667 A.2d at 594. Fore asserts that Maine has a legitimate interest in providing a forum for its citizens when an out-of-state defendant allegedly fraudulently causes injury within the state. Pl.’s Mem. at 5; see Bickford v. Onslow Mem’l Hosp. Found., Inc., 2004 ME 111, ¶ 11, 855 A.2d 1150, 1155 (holding that Maine has a legitimate interest in allowing residents a forum when out-of-state creditors refuse to correct false credit reports); Suttie v. Sloan

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Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated in this section, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:

A. The transaction of any business within this State;

B. Doing or causing a tortious act to be done, or causing the consequences of a tortious act to occur within this State; . . .

F. Contracting to supply services or things within this State; . . .

I. Maintain any other relation to the State or to persons or property which affords a basis for the exercise of jurisdiction by the courts of this State consistent with the Constitution of the United States.

14 M.R.S.A. § 704-A(2) (2010).

Sales, Inc., 1998 ME 121, ¶ 5, 711 A.2d 1285, 1286 (holding that “Maine has a legitimate interest in protecting its citizens from fraudulent employment practices and providing its citizens with a means of redress against nonresidents”); 14 M.R.S. § 704-A(2)(B).

In this case, Maine arguably has a legitimate interest in the litigation as one of its citizen companies, Fore, allegedly suffered economic consequences in Maine from Mr. Benoit’s alleged fraudulent conduct. See, e.g., Me. Helicopters, Inc. v. Lance Aviation, Inc., 563 F. Supp. 2d 292, 296 (D. Me. 2008) (citing Bickford, 2004 ME 111, ¶ 11, 855 A.2d at 1155).<sup>5</sup> The golf course that is the subject of the dispute is located in Maine, Fore is a Maine limited liability company, and Fore’s managing members are residents of Maine. Maine has a legitimate interest in protecting its citizens and industries from fraud.

#### B. Reasonable Anticipation of Litigation

Although Fore met its burden on the first part of the test, to reasonably anticipate litigation, due process demands that “one must purposefully avail oneself of the privilege of conducting activities within the jurisdiction and benefit from the protection of its laws.” Commerce Bank & Trust Co. v. Dworman, 2004 ME 142, ¶ 16, 861 A.2d 662, 667. Such purposeful availment constitutes sufficient “minimum contacts” for a defendant to “have reasonably anticipated being haled into court in Maine.” Boit v. Gar-Tec Products, Inc., 967 F.2d 671, 681 (1<sup>st</sup> Cir. 1992). “A defendant’s activities are sufficient to establish minimum contacts when (1) the activities of the defendant have been directed at the forum’s residents; (2) the defendant deliberately engages in significant activities in the forum; or (3) the defendant creates continuing obligations between itself and residents of the forum.” Cavers v. Houston McLane Co., Inc., 2008

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<sup>5</sup> Maine also appears to have a legitimate interest in ensuring that tax returns filed in the state are accurate and provide a means of redress for its citizens who suffer from inaccurate financial information. Fore has the burden of establishing this prong of the test for personal jurisdiction and did not raise this claim.

ME 164, ¶ 24, 958 A.2d 905, 911; see also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76 (1985) (“contacts proximately result from actions by the defendant himself that create a ‘substantial connection’ with the forum State.”) (emphasis in original).

In Harriman v. Demoulas Supermarkets, Inc., the Law Court explained that a defendant must not be “unfairly surprised” by being brought to court and discussed the second prong of the test:

Whether the requisite minimum contacts are found “will vary with the quality and nature of the defendant’s activity, . . . it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” Burger King, 471 U.S. at 471-74 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). When a defendant “purposefully directs his activities at residents of a forum” by “deliberately engaging in significant activities” in that forum or by “creating continuing obligations between himself and residents” of the forum, that requirement is met. [(quoting Burger King v. Rudzewicz, 471 U.S. at 472-76)].

Harriman v. Demoulas Supermarkets, Inc., 518 A.2d 1035, 1037 (Me. 1986).

Based on the parties’ affidavits, Fore has not established that Mr. Benoit could reasonably anticipate litigation in Maine. First, Mr. Benoit did not direct his activities at Mr. Adam or Fore. Mr. Benoit’s contact with Maine was one or more phone call with Mr. Adam. (Adam Aff. ¶ 6; Benoit Aff. ¶ 20.) Mr. Adam “cannot recall whether I called Mr. Benoit, or he contacted me, but I believe he called me.” (Adam Aff. ¶ 6.) Mr. Benoit recalled that Mr. Adam placed the call. (Benoit Aff. ¶ 20.) It is undisputed, however, that Mr. Adam sought Mr. Benoit’s advice. (Adam Aff. ¶¶ 5-6.); see Electronic Media Int’l v. Pioneer Communications of Am., Inc., 586 A.2d 1256, 1259 (Me. 1991) (stating that the defendant’s contacts must result from something more than “the ‘unilateral activity of another party’”) (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984)).

Second, Mr. Benoit did not engage in significant activities in Maine. Mr. Benoit

did perform all of the accounting work for Rivermeadow, which operated the golf course. (Adam Aff. ¶ 13; Benoit Aff. ¶ 13.) Additionally, Mr. Benoit prepared the tax returns, including Maine Informational Returns. (Adam Aff. ¶ 14.) However, the mere preparation of tax returns filed in the state, without more, is not a significant activity that would cause a defendant to anticipate litigation in Maine. Compare Bickford, 2004 ME 111, ¶ 13, 855 A.2d at 1156 (finding that the defendant could reasonably anticipate litigation when it was “on notice that it was injuring a Maine resident by failing to take steps to eliminate the use of the allegedly libelous statement”). Preparing Maine tax returns annually, on behalf of a New Hampshire company, is minimal contact with the state that provides no reasonable anticipation of litigation.<sup>6</sup>

Finally, Mr. Benoit did not create continuing obligations between himself and the residents of Maine. Mr. Benoit provided accounting services exclusively in Massachusetts for Rivermeadow, a New Hampshire company. (Benoit Aff. ¶¶ 3, 13, 23.)

Mr. Benoit’s contacts with Maine are simply “random,” “fortuitous,” or attenuated.” Harriman, 518 A.2d at 1037 (citing Keeton v. Hustler Magazine, 465 U.S. 770, 773-74 (1984)). Accordingly, Fore failed to meet its burden of establishing that the defendants, by their conduct, should have reasonably anticipated litigation in Maine.

Fore asks this court to apply the “effects” test set forth in Calder v. Jones, 465 U.S. 783 (1984). (Pl.’s Mem. at 6-9.) Under this test, Maine has personal jurisdiction over those who cause tortious injury if the effects are felt in the state.<sup>7</sup> Calder, 465 U.S. at 789-90; Keeton, 465 U.S. at 776-77. The Law Court has held, however, that

[t]he commission outside the forum state of an act that has consequences in the forum state is by itself an insufficient contact where all the events

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necessary to give rise to a tort claim occurred outside the forum state.’ Rather, the effect of the out-of-state conduct in Maine ‘is merely a factor to be considered in light of the relevant facts that apply to the minimum contacts analysis.’

Bickford, 2004 ME 111, ¶ 12, 855 A.2d at 1155-1156 (quoting Murphy, 667 A.2d at 595) (emphasis in original). In light of the factors considered above, the claim that a Maine resident felt Mr. Benoit’s allegedly tortious conduct in Maine does not mean that Mr. Benoit “‘intentionally directed’ [his] conduct toward a Maine resident.” Bickford, 2004 ME 111, ¶ 13, 855 A.2d at 1156 (quoting Calder, 465 U.S. at 790). Even considering the “effects” of Mr. Benoit’s alleged conduct, Fore failed to meet its burden of establishing a reasonable expectation of litigation in Maine.

### C. Traditional Notions of Fair Play and Substantial Justice

Because the plaintiff has not satisfied the first two elements, the defendant is not required to show that jurisdiction would not “comport with traditional notions of fair play and substantial justice.” Murphy, 667 A.2d at 594. If that analysis were considered, under this third part of the due process test, “[t]he determination of fairness depends upon the facts of each case.” Harriman, 518 A.2d at 1038. Specifically,

‘the nature and purpose of defendant’s contacts with the forum state, the connection between the contacts and the cause of action, the number of contacts, the interest of the forum state in the controversy, and the convenience and fairness to both parties.’

Id. (quoting Labbe v. Nissen Corp., 404 A.2d 564, 570 (Me. 1979)). In general,

it is less unfair to require a non-resident defendant to try a case in a state in which he has voluntarily chosen to engage in business than to require a plaintiff to travel out of state and try his case in a jurisdiction which has no nexus whatsoever with the event which gave rise to the action.

Labbe, 404 A.2d at 573. As discussed above, the defendants did not voluntarily choose to engage in business in Maine. See Burger King, 471 U.S. at 477 (defendant that purposefully directed activities at forum residents must make compelling case that



other considerations make jurisdiction unreasonable); Commerce Bank, 2004 ME 142, ¶ 17, 861 A.2d at 667 (defendant benefited from state and municipal services by purchasing real estate in Maine, granting a mortgage on the property, obtaining building and occupancy permits, and using property to support applications for loans); Bickford, 2004 ME 111, ¶ 13, 855 A.2d at 1156 (by failing to eliminate the use of allegedly libelous statement, hospital "intentionally directed" its conduct toward a Maine resident); Electronic Media Int'l, 586 A.2d at 1260 (defendant entered contract with plaintiff, discussed and negotiated with plaintiff for five months, sold and delivered products to plaintiff, and assured plaintiff it would perform under the contract); Harriman, 518 A.2d at 1039 (defendant established extensive, long-term business relationships with Maine suppliers and advertised in Maine to attract Maine customers).

The entry is

The Defendants' Motion to Dismiss is GRANTED.

Dated: November 30, 2010

  
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Nancy Mills  
Justice, Superior Court

P - Thomas Hallett  
O - Ed MacColl