DOCKET NO: FST CV 24-5029813 S	: SUPERIOR COURT
LENZO, TORY	: JUDICIAL DISTRICT OF
V.	: STAMFORD-NORWALK
WALLER, KARL	: AT STAMFORD
	: MAY 14, 2024

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AT STAMFORD
123 HOYT STREET
STAMFORD, CT 06905

MEMORANDUM OF DECISION

Defendants Jessica and Karl Waller have moved to dismiss this action on the ground that there is no personal jurisdiction over them under the long arm statute, C.G.S. § 52-59b, that the exercise of personal jurisdiction would be unconstitutional and because plaintiff failed to timely return process to the court in accordance with C.G.S. § 52-46a. For the reasons stated below, the motion is granted.

Standards for Deciding a Motion to Dismiss

"'A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . .'" *Weiner v. Clinton*, 100 Conn. App. 753, 756-57 (2007), quoting *Filippi v. Sullivan*, 273 Conn. 1, 8, 866 A.2d 599 (2005).

"'Depending on the record before it, a ... court ruling on a motion to dismiss for lack of subject matter jurisdiction ... may decide that motion on the basis of: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. ... Different rules and

procedures will apply, depending on the state of the record at the time the motion is filed.'" *Fay v. Merrill*, 336 Conn. 432, 445 (2020) (citation omitted).

"In ruling on a motion to dismiss for lack of subject matter jurisdiction, the trial court 'must consider the allegations of the complaint in their most favorable light . . . including those facts necessarily implied from the allegations. . . .' . . . . A trial court considering a motion to dismiss may, however, 'encounter different situations, depending on the status of the record in the case. . . . '[I]f the complaint is supplemented by undisputed facts . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . Conversely, 'where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties. . . . The trial court 'may [also] in its discretion choose to postpone resolution of the jurisdictional question until the parties complete further discovery or, if necessary, a full trial on the merits has occurred.'" *Giannoni v. Commissioner of Transportation*, 322 Conn. 344, 349-50 (2016) (citations omitted).

In *Godbout v. Attanasio*, 199 Conn.App. 88, 95-97 (2020), the Appellate Court discussed the record on which a court may decide a motion to dismiss if the allegations in the complaint are supplemented by additional evidence:

"'In contrast, if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss ... other types of undisputed evidence ... and/or public records of which judicial notice may be taken ... the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. ... Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. ... If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits ... or other evidence, the trial court may dismiss the action without further proceedings. ... If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations ... or only evidence that fails to call those allegations into question ... the plaintiff need not supply counteraffidavits or other evidence to support the complaint but may rest on the jurisdictional allegations therein. ...

'Finally, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. ... In that situation, [a]n evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties.'" Id. quoting *Cuozzo v. Orange*, 315 Conn. 606, 615–17 (2015).

In *Young v. Hartford Hospital*, 196 Conn.App. 207, 211 (2020), the Appellate Court reiterated that plaintiff has the burden of proof to support jurisdiction: "When a motion to dismiss for lack of personal jurisdiction raises a factual question which is not determinable from the face of the record, the burden of proof is on the plaintiff to present evidence which will establish jurisdiction.... In order to sustain the plaintiff's burden, due process requires that a trial-like hearing be held, in which she has an opportunity to present evidence and to cross-examine adverse witnesses ...." (Citations omitted; internal quotation marks omitted.) Id. quoting *Kenny v. Banks*, 289 Conn. 529, 533, 958 A.2d 750 (2008).

The Court held a hearing at which the parties testified.

There is No Long-Arm Jurisdiction.

In *North Sales Group, LLC v. Boards and More GMBH*, 340 Conn. 266, 269-70 (2021), the Supreme Court reiterated the standards for deciding a motion to dismiss for lack of long-arm jurisdiction:

> "'A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction.' ... When, as in the present case, 'the defendant challenging the court's personal jurisdiction is a foreign corporation or a nonresident individual, it is the plaintiff's burden to prove the court's jurisdiction.' ..." (Citations omitted).

The *North Sales* Court held:

> "'When a defendant challenges personal jurisdiction in a motion to dismiss, the court must undertake a two part inquiry to determine the propriety of its exercising such jurisdiction over the defendant. The trial court must first decide whether the applicable state [long arm] statute authorizes the assertion of jurisdiction over the [defendant]. If the statutory requirements [are] met, its second obligation [is] then to decide whether the exercise of jurisdiction over the [defendant] would violate constitutional principles of due process.'" 340 Conn. at 273 (citation omitted). Accord, *Adams v. Aircraft Spruce & Specialty Co.*, 345 Conn. 312, 322 (2022).

Defendants are non-resident individuals sued in their individual capacities, so the applicable long arm statute is C.G.S. § 52-59b, which provides in pertinent part:

> "(a) As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident individual... who in person or through an agent: (1) Transacts any business within the state....
>
> (c) Any nonresident individual... over whom a court may exercise personal jurisdiction, as provided in subsection (a) of this section, shall be deemed to have appointed the Secretary of the State as its attorney and to have agreed that any process in any civil action brought against the nonresident individual... may be served upon the Secretary of the State and shall have the same validity as if served upon the nonresident individual, foreign partnership or foreign voluntary association personally. The process shall be served by the officer to whom the same is directed upon the Secretary of the State by leaving with or at the office of the Secretary of the State, at least twelve days before the return day of such process, a true and attested copy thereof, and by sending to the defendant at the defendant's last-known address, by registered or certified mail, postage prepaid, return receipt requested, a like true and attested copy with an endorsement thereon of the service upon the Secretary of the State."

Defendants were served with the summons and complaint pursuant to C.G.S. § 52-59b at their residence out-of-state.[1] There is no personal jurisdiction over defendants because the transactions at issue occurred in New York, not in Connecticut.

[1] The marshal's return of service indicates defendant Jessica Waller was served at an address in Tennessee and defendant Karl Waller was served at an address in Utah. At the hearing defendant testified they both lived together in Utah when the action was commenced. Plaintiff testified he corresponded with defendants at the Utah address. The Tennessee address could be the last known address of their business but would not be proper for service on Jessica Waller if plaintiff knew about the defendants' Utah address, which is likely.

Moreover, even if one were to assume that the order was filled at the corporate headquarters in Connecticut, the invoice to defendants then located in Tennessee indicated a New York address used by plaintiff for transactions and the marketing likely occurred outside the state at a trade show.

The exercise of jurisdiction over defendants over the specific claims at issue also would not satisfy the Due Process Clause of the United States Constitution:

> "'Specific jurisdiction is different: It covers defendants less intimately connected with a [s]tate, but only as to a narrower class of claims. The contacts needed for this kind of jurisdiction often go by the name 'purposeful availment.' ... The defendant ... must take 'some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum [s]tate. ... The contacts must be the defendant's own choice and not 'random, isolated, or fortuitous.' ... They must show that the defendant deliberately 'reached out beyond' its home—by, for example, 'exploi[ting] a market' in the forum [s]tate or entering a contractual relationship centered there. ... Yet even then—because the defendant is not 'at home'—the forum [s]tate may exercise jurisdiction in only certain cases. The plaintiff's claims, we have often stated, 'must arise out of or relate to the defendant's contacts' with the forum. ... Or put just a bit differently, 'there must be' an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum [s]tate and is therefore subject to the [s]tate's regulation.' ...
>
> 'These rules derive from and reflect two sets of values—treating defendants fairly and protecting 'interstate federalism.' ... [The United States Supreme Court's] decision in *International Shoe [Co.]* founded specific jurisdiction on an idea of reciprocity between a defendant and a [s]tate: When (but only when) a company 'exercises the privilege of conducting activities within a state'—thus 'enjoy[ing] the benefits and protection of [its] laws'—the [s]tate may hold the company to account for related misconduct. ... Later decisions have added that [the] doctrine similarly provides defendants with 'fair warning'—knowledge that 'a particular activity may subject [it] to the jurisdiction of a foreign sovereign.' ... And [the] [c]ourt has considered alongside defendants' interests those of the [s]tates in relation to each other. One [s]tate's 'sovereign power to try' a suit, [it] ha[s] recognized,

may prevent 'sister [s]tates' from exercising their like authority. ... The law of specific jurisdiction thus seeks to ensure that [s]tates with 'little legitimate interest' in a suit do not encroach on [s]tates more affected by the controversy.' ....

In the context of specific jurisdiction then, the due process test can be said to have the following elements: (1) the defendant purposefully availed itself of the privilege of conducting activities within the forum, (2) the plaintiff's claim arises out of or relates to the defendant's forum related contacts, and (3) if the first two elements favor the plaintiff's choice of forum, the exercise of jurisdiction is ultimately fair and reasonable under the circumstances.9 See 4A C. Wright et al., Federal Practice and Procedure (4th Ed. 2022) § 1069. If the plaintiff cannot prove either of the first two elements, or the defendant prevails on the third element, the forum cannot exercise jurisdiction over the defendant.'" *Adams*, 345 Conn. at 323-25 (citations and footnote omitted).

Here, the evidence is that defendants did not personally avail themselves of the opportunity to do business in Connecticut.

The Process Was Not Timely Returned to Court.

The plaintiff failed to satisfy the requirement of C.G.S. § 52-46a that process be returned to court six days before the return date on the summons and no later than two months after the date of the process: the process was returned one day before the return date, which was never amended.

"Despite the remedial nature of § 52–72 and the fact that the statute is to be liberally construed, our Supreme Court has established boundaries to the statute's reach. '[T]he requirement of § 52–46a to return process in civil actions to the clerk of the Superior Court at least six days before the return date is mandatory and failure to comply with its requirements renders the proceeding voidable, rather than void, and subject to abatement.' ... 'A return date may be amended but it still must comply with the time limitations set forth in § 52–48(b). Section 52–48(b) requires that [a]ll process shall be made returnable not later than two months after the date of the process.... Section 52–48(b), therefore, with its two month time limit, circumscribes the extent

to which a return date may be amended.'" *Ribeiro v. Fasano, Ippolito and Lee, P.C.*, 157 Conn.App. 617, 621-22 (2015) (citations omitted). Compare, *Falcon-Blanco v. Courtney*, 2022 WL 17430905*3 (Conn.Super. 2022) (Krumeich, J.T.R.) (motion to amend return date filed within two-month period).

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Krumeich, J.T.R.

Decision entered in accordance with the foregoing. All counsel and Self Represented parties of record notified 5-14-24 SDNO notice sent.

Scott Adel
Assistant Clerk