

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

ALTI INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	APRIL TERM, 2002
	:	No. 002843
DALLAS EUROPEAN	:	
	:	
Defendant.	:	
	:	

MEMORANDUM

Factual and Procedural Background

Plaintiff is a Delaware Corporation with a Pennsylvania place of business. Complaint, ¶ 1. Defendant is a Texas Corporation, which allegedly conducts business in Pennsylvania. Id., ¶ 2, 4. The parties allegedly entered into a contract on November 2, 2002, whereby plaintiff would supply computer consulting services to defendant, at defendant’s offices in Texas. Id., ¶ 6, Id., Exh. A. Defendant accepted the services and failed to pay. Id., ¶¶ 9-11. Plaintiff’s Complaint embodies one count for breach of contract, or alternatively quantum meruit, and one for failure to pay book account. Id., ¶¶ 17-21.

There are two documents attached to the Complaint and alleged as “the contract.” Complaint, Exh. A. One of the documents is a purported general contract between the parties, entitled “Consulting Agreement,” that was only executed by plaintiff. Id. The other is a more specific one-page document

describing the assignment, entitled “Statement of Work,” and is executed by both parties. Id. The Statement of Work was executed on 11/02/2001 and refers to the Consulting Agreement “made on the 11/02/2001.” Id. The Statement of Work also shows at the top of the page the title “Exhibit A,” presumably to the Consulting Agreement, because the Consulting Agreement refers to it as such on its first page, sections 1(a) and 2 (a). Id. The Statement of Work also purports to be “attached to, and made part of, the Consulting Agreement. Id. The Consulting Agreement contains a forum selection clause whereby the parties agree to jurisdiction and venue exclusively in Philadelphia. Id.

On June 18, 2002, defendant raised Preliminary Objections and moved for a demurrer for lack of personal jurisdiction. Defendant argued that there is neither specific nor general jurisdiction because there are no allegations of any business conducted in Pennsylvania by defendants nor are there the necessary levels of contacts with Pennsylvania for any type of jurisdiction over defendant. Defendant also argued that it never consented to jurisdiction because the Consulting Agreement was not executed by them, thus they are not bound by it, nor by its forum selection clause. On July 15, 2002, plaintiff responded that defendant has numerous contacts in Pennsylvania and, along with the services rendered and subsequent breach and harm caused in Pennsylvania, they constitute sufficient contacts for both general and specific jurisdiction. Plaintiff further responded that the parties have a contract because the Statement of Work, which defendant executed, “incorporates” the Consulting Agreement.

On August 8, 2002, the Court Ordered the parties to take depositions to resolve the issue of personal jurisdiction pursuant to Pa. R.C.P. 4007.1. The parties filed supplementary briefs accordingly on September 13, 2002.

Analysis

1. Where a party objects to a court's exercise of personal jurisdiction, the non-moving party bears the burden of demonstrating contacts with the forum state sufficient to justify the assertion of personal jurisdiction. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Barr v. Barr, 749 A.2d 992 (Pa. Super. 2000).

2. Plaintiff only established that defendant had a few customers in Pennsylvania and that defendant's company had a website which plaintiff and other Pennsylvania residents could access but not interact with and that plaintiff was headquartered in Pennsylvania. Deposition of Mehdi Rowghani ("Rowghani"), Sept. 5, 2002, pp. 8-9, 15, 31; Deposition of Kevin Smith ("Smith"), Aug. 16, 2002, p. 45. Plaintiff did not refute defendant's testimony that Pennsylvania customers represented less than one percent of defendant's revenues, that defendant never sought out customers either directly through cold calls or through advertising in Pennsylvania, that defendant never had an office or employees in Pennsylvania, that defendant never paid taxes, owned property or maintained bank accounts in Pennsylvania, and that defendant's contacts with plaintiff relating to the subject-matter of the cause of action between them were limited to contacts with representatives of plaintiff's who did not even operate out of Pennsylvania. Rowghani, pp. 7-9, 14-15; Smith, pp. 10, 12-13, 15.

3. Plaintiff, thus, failed to show that defendant had sufficient minimum contacts with the Commonwealth of Pennsylvania to establish specific jurisdiction. See Kubic v. Letteri, 614 A.2d 1110, 1114 (Pa. 1992) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 485-86 (1985)). See also, Fidelity Leasing, Inc. v. Limestone County Board of Education, 758 A.2d 1207, 1121 (Pa. Super. 2000) (executing a contract alone is insufficient to give rise to personal jurisdiction); Lynch v. N.J. Auto Full Ins. Underwriting Ass'n, 726 F.Supp. 101, 104 ("The placing of telephone calls or the sending of

letters into the forum by a party to a contract is not sufficient”). Consequently, this court lacks specific jurisdiction over defendant.

4. Naturally, plaintiff also failed to pass the more stringent requirements of general jurisdiction where defendant must be shown to maintain a continuous, substantial, and systematic part of its business within the Commonwealth of Pennsylvania. See McCall v. Formu-3 Int’l, Inc., 650 A.2d 903, 904 (Pa. Super. 1994); Garzone v. Kelly, 593 A.2d 1292, 1296 (Pa. Super. 1991). This court, thus, lacks general jurisdiction over defendant.

5. Plaintiff also failed to show that defendant waived its objection to personal jurisdiction by agreeing to a forum selection clause. In Pennsylvania, a forum selection clause is not enforceable where the parties did not freely agree to the clause. Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 133, 209 A.2d 810, 816 (1965). A forum selection clause must meet the normal requirements of contract law. Churchill Corp. v. Third Century, Inc. 396 Pa. Super. 314, 578 A.2d 532 (1990). While the Statement of Work, which defendant executed, referred to the Consulting Agreement, defendant clearly did not agree to the Consulting Agreement which contains the forum selection clause. To wit, the only person who could have consented to it is the one person at defendant’s who saw the Consulting Agreement, namely Mr. Kevin Smith. Mr. Smith testified that he had no intention to sign it, indeed he did not. He further testified that he told defendant that he was only agreeing to the terms in the Statement of Work. See Defendant’s Supplementary Brief, Exh. B., pp. 25, 50. Thus, there was no meeting of the minds as to the forum selection clause and defendant did not chose to submit to the jurisdictions of the courts of the Commonwealth of Pennsylvania.

BY THE COURT,

GENE D. COHEN, J.

Dated: September 20, 2002