



SARAH ARCHBOLD, an individual, DONALD MARVIN, an individual, Plaintiffs, v. HAMPDEN BANCORP INC., HAMPDEN BANK, John Does 1-10, AND X, Y, Z CORPORATIONS, Defendants.

Civil Action No.: 12-CV-3873 ES-JAD

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2013 U.S. Dist. LEXIS 187552

September 9, 2013, Filed

NOTICE: NOT FOR PUBLICATION

COUNSEL: [*1] For SARAH ARCHBOLD, an individual, DONALD MARVIN, an individual, Plaintiffs: LEAH E. CAPECE, LEAD ATTORNEY, ELIZABETH, NJ.

For HAMPDEN BANCORP, INC, HAMPDEN BANK, Defendants: JOSEPH LLOYD BUCKLEY, WILLIAM ROBERT TELLADO, LEAD ATTORNEYS, SILLS CUMMIS EPSTEIN & GROSS, PC, NEWARK, NJ.

JUDGES: Joseph A. Dickson, U.S.M.J.

OPINION BY: Joseph A. Dickson

OPINION

REPORT AND RECOMMENDATION

[D.E. 8]

I. INTRODUCTION

This matter comes before the Court upon motion by defendants Hampden Bancorp, Inc. and Hampden Bank's (collectively, "Defendants") to dismiss the Complaint pursuant to *Fed. R. Civ. P. 12(b)* on the grounds that: (1) the Court lacks personal jurisdiction over Defendants; (2) venue is improper; or, alternatively, that the instant case should be transferred pursuant to *28 U.S.C. §§ 1404 and 1406*.

The instant Motion was referred to this Court for a Report and Recommendation by the Honorable Esther Salas, U.S.D.J. Pursuant to *Federal Rule of Civil Procedure 78(b)*, no oral argument was heard. After carefully

considering the submissions of the parties, and based upon the following, the undersigned hereby recommends that Defendants' motion to dismiss based on lack of personal jurisdiction be **Granted**.

II. BACKGROUND

On June 25, [*2] 2012, Plaintiffs Sarah Archbold ("Archbold") and Donald Marvin ("Marvin"), (together, "Plaintiffs"), filed this putative class action alleging that Defendants violated the Electronic Funds Transfer Act, *15 U.S.C. 1693 et seq.* ("EFTA"), and its implementing regulations *12 C.F.R. 205 et seq.*, by imposing a fee for completing an electronic funds transfer without providing statutorily required notice. (Plaintiff's Complaint "Compl." p. 6, ECF No. 1).

Plaintiffs claimed that they each withdrew cash from an automated teller machine ("ATM") in Springfield, Massachusetts, which was operated by Defendants. (Compl. ¶¶ 13, 14, ECF No. 1). Plaintiffs further alleged they were charged a transaction fee for the use of the ATM, but that no notice was displayed at or near the ATM that a fee would be charged . . ." (Id. at ¶ 18).¹ According to Plaintiffs, Defendants' failure to provided such notice constituted a violation of the EFTA, which requires ATM operators, such as Defendants, to inform consumers that it will impose a fee for certain transactions as follows:

"(1) On the machine. Post in a prominent and conspicuous location on or at the automated teller machine a notice that:

- (i) A fee will be imposed [*3] for providing electronic fund transfer services or for a balance inquiry; or
- (ii) A fee may

be imposed for providing electronic fund transfer services or for a balance inquiry, but the notice in this paragraph (c)(1)(ii) may be substituted for the notice in paragraph (c)(1)(i) only if there are circumstances under which a fee will not be imposed for such services; and

(2) *Screen or paper notice.* Provide the notice required by paragraphs (b)(1) and (b)(2) of this section either by showing it on the screen of the automated teller machine or by providing it on paper, before the consumer is committed to paying a fee."

12 C.F.R. § 205.16(c).

1 Plaintiffs are not regular customers of Defendant and neither of them held any accounts with the Defendant at the time of the alleged EFTA violation. (Compl. ¶ 15, ECF No. 1).

Plaintiffs initiated this action in the District of New Jersey; however, they did not allege that they are residents of New Jersey. In fact, in the Complaint, Plaintiffs did not provide their addresses at all, stating only that they are "citizen[s]" of the United States." (Compl. ¶ 1, ECF No. 1).

On January 7, 2013, Defendants filed the instant Motion to Dismiss for lack of personal [*4] jurisdiction and improper venue, or alternatively, to transfer this case to the proper district court. (Defendants' Moving Brief "Df. Mov. Br." P. 7, ECF No. 8-1). Defendants' principle place of business in Springfield, Massachusetts. (*Id.* at p. 10). Defendants argue that they have insufficient minimum contacts with New Jersey to establish personal jurisdiction, and, therefore, filed the Motion seeking to dismiss the Complaint. Specifically, Defendants assert that they: do not conduct, nor are they registered to conduct, business in New Jersey; own and operate ATMs only in Massachusetts; have never operated a branch or place of business in New Jersey; have no employees, personnel or agents in New Jersey; do not file New Jersey tax returns; does not own, lease or manage any real property in New Jersey; do not purposefully market, solicit or promote itself to customers in New Jersey; do not own any assets in New Jersey; and have only 20 or so customers out of approximately twenty-five thousands (25,000) that currently reside in New Jersey. (Df. Mov. Br. P. 10-11, ECF No. 8-1). Moreover, Defendants emphasized that "all relevant events" concerning the transactions at issue occurred in [*5] Massachusetts. (*Id.* at p. 11).

In their opposition brief, Plaintiffs do not set forth any substantive arguments in support of this Court maintaining personal jurisdiction over Defendants or in support of this district court being the proper venue for this action. (Plaintiffs' Opposition Brief "Pl. Opp. Br." p. 3, ECF No. 12). Plaintiffs request that if the Court finds that it lacks personal jurisdiction over Defendants that the instant action be transferred to the District Court in Massachusetts because dismissal of the Complaint will "obstruct the interest of justice and the Plaintiffs will be denied their claims." (*Id.*). Thus, this motion requires the Court to determine whether it has personal jurisdiction over Defendants and/or whether the instant action should be transferred to a district court in Massachusetts.²

2 Defendants also moved for dismissal based on improper venue. However, given the Court's decision to dismiss the action based on lack of personal jurisdiction, it shall not consider this theory for dismissal.

III. LEGAL STANDARD

To ascertain whether a court has personal jurisdiction over a defendant, a federal court sitting in diversity jurisdiction must conduct a two-step [*6] analysis. *Howard Johnson Int'l Inc. v. DKS, LLC*, No. 08-2316 (JAG), 2009 WL 2595685, *1, *3 (D.N.J. Aug. 20, 2009). First, the court must look to the forum state's long arm statute to determine if personal jurisdiction is permitted over the defendant. *Id.* Second, the court must determine whether the exercise of jurisdiction violates the *Due Process Clause of the Fourteenth Amendment to the United States Constitution*. *Id.* (citing *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 259 (3d Cir. 1998); *Vetrotex Certainteed Corp. v. Consol. Fiber Glass Products Co.*, 75 F.3d 147, 150 (3d Cir. 1996)). Because New Jersey's long arm statute permits the exercise of personal jurisdiction "coextensive with the due process requirements of the United States Constitution," the personal jurisdiction analysis collapses into the latter inquiry. *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 96 (3d Cir. 2004) (citing *N.J. Ct. R. 4:4-4(c)*).

The *Fourteenth Amendment of the United States Constitution* "limits the reach of long-arm statutes so that a court may not assert personal jurisdiction over a non-resident defendant who does not have certain minimum contacts with the forum such that the maintenance of the suit [*7] does not offend 'traditional notions of fair play and substantial justice'." *Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 436-37 (3d Cir. 1987) (citation and internal quotations omitted). Accordingly, this Court may exercise personal jurisdiction over a non-resident defendant if the defendant has "certain minimum contacts with [New Jersey] such that the

maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Henry Heide, Inc. v. WRH Products Co., Inc.*, 766 F.2d 105, 108 (3d Cir. 1985) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)).

A. Motion to Dismiss the Complaint for Lack of Personal Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(2).

Once a defendant files a motion to dismiss for lack of personal jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(2)*, the plaintiff bears the burden to establish sufficient facts to show that jurisdiction is proper. *Mellon Bank (East) PSFS, [Nat'l Ass'n v. Farino]*, 960 F.2d 1217, 1223 (3d Cir. 1992). While a court must accept the plaintiff's allegations as true and construe disputed facts in favor of the plaintiff, *Pinker v. Roche Holdings, Ltd.*, 292 F.3d 361, 368 (3d Cir. 2002) (quoting [*8] *Carteret Savings Bank, FA v. Shushan*, 954 F.2d 141, 142 n.1 (3d Cir. 1992)), the court must still examine any evidence presented with regard to disputed factual allegations. See, e.g., *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 155-56 (3d Cir. 2010) (examining the evidence supporting the plaintiff's allegations); *Patterson v. FBI*, 893 F.2d 595, 603-04 (3d Cir. 1990) ("A Rule 12(b)(2) motion, such as the motion made by the defendants here, is inherently a matter which requires resolution of factual issues outside the pleadings, i.e. whether *in personam* jurisdiction actually lies. Once the defense has been raised, then the plaintiff must sustain its burden of proof in establishing jurisdictional facts through sworn affidavits or other competent evidence."). The plaintiff "needs only establish a *prima facie* case of personal jurisdiction." *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 97 (3d Cir. 2004). However, a plaintiff may not "rely on the bare pleadings alone" in order to withstand a motion to dismiss for lack of personal jurisdiction; "[o]nce the motion is made, plaintiff must respond with actual proofs, not mere allegations." *Patterson*, 893 F.2d at 604 [*9] (internal citations omitted).

A district court can assert either specific or general jurisdiction over a non-resident defendant. See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-415, 104 S. Ct. 1868, 80 L. Ed. 2d 404 & 9 (1984). A court may exercise general jurisdiction when a defendant has "continuous and systematic contacts" with the forum state. *Id.* The defendant's "contacts need not relate to the subject matter of the litigation." However, the plaintiff must show more than mere minimum contacts with the forum state. *Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 437 (3d Cir. 1987). General jurisdiction requires a "very high threshold of business activity." *Ameripay, LLC v. Ameripay Payroll, Ltd.*, 334 F. Supp. 2d 629, 633 (quoting *Com-*

pagnie des Bauxites de Guinea v. Ins. Co. of N. America, 651 F.2d 877, 891 (3d Cir. 1981)). Moreover, the facts required to establish general jurisdiction must be extensive and persuasive. *Reliance Steel Prods. Co. v. Watson, Ess, Marshall & Enggas*, 675 F.2d 587, 589 (3d Cir. 1982).

On the other hand, specific jurisdiction arises where the claims arise out of the defendant's forum-related activities. See *Helicopteros*, 466 U.S. at 413-14. In order [*10] to establish specific jurisdiction, the relevant inquiry is: (1) whether the defendant purposefully directed its activities at the forum; (2) whether the litigation arises out of or relates to at least one of these activities; and (3) whether the exercise of jurisdiction otherwise comports with traditional notions of fair play and substantial justice. *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 317 (3d Cir. 2007). In establishing specific jurisdiction, it is not required that the defendant be physically located in the state while committing the alleged acts. *Burger King Co. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). Nor is specific jurisdiction defeated merely because the bulk of harm occurred outside the forum. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984). A single act may satisfy minimum contacts if it creates a substantial connection with the forum. *Burger King*, 471 U.S. at 476 n. 18.

IV. ANALYSIS

Upon review of Defendants' submission, the Court finds that Defendants' contacts with New Jersey are insufficient to establish specific jurisdiction in the District of New Jersey.³ Indeed, Plaintiff's opposition brief is completely devoid of any factual allegations that [*11] Defendants have any contacts with New Jersey that would support a finding of specific jurisdiction in this district.

3 Plaintiffs did not argue, and the Court does not find, that general jurisdiction existed over Defendants. Therefore, the Court's inquiry is limited to whether specific jurisdiction exists.

Regarding Plaintiff's request to deny Defendants' motion to dismiss and transfer this case to the District of Massachusetts if the Court determined that it lacked personal jurisdiction over Defendants, Plaintiff failed to establish that transfer is appropriate under the applicable legal standard. Pursuant to 28 U.S.C. § 1631:⁴

whenever a civil action is filed [in a district court] ...and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other

such [district] court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it is actually filed in or noticed for the court from which it is transferred.

Thus, transfer pursuant [*12] to § 1631 turns on whether it is in the interest of justice to transfer the instant action to the District of Massachusetts.

4 In addition to 28 U.S.C. § 1631, 28 U.S.C. § 1404(a) also governs transfers of civil actions providing that: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Section 1631's use of 'shall' (as opposed to § 1404(a)'s use of 'may') in describing the circumstances when transfer of an action is appropriate, indicates that transfer is mandatory when the court determines that it does not have personal jurisdiction over a defendant(s) and it is in the interest of justice to transfer the action. Therefore, this Court focuses its analysis on whether transfer is mandatory (in the interest of justice) pursuant to § 1631 as opposed to being permissive under § 1404(a).

There are three factors that courts look to in determining whether justice requires an action to be transferred, as opposed to being dismissed for lack of jurisdiction; those factors are: 1) whether a new action would be time barred; 2) whether the claim(s) are likely to [*13] have merit; and 3) whether the original action was filed in good faith or was the action filed after the plaintiff either realized or should have realized that the forum in which the action was filed was improper. *Orozco-Barajas v. Zickefoose*, Civil Action No. 11-3628, 2012 U.S. Dist. LEXIS 57778, at *16 (D.N.J. Apr. 24, 2012).

Defendants are correct in pointing out that Plaintiffs failed to argue and assert supporting facts in their opposition that the instant action would be time-barred if dismissed and then filed in the District of Massachusetts. However, this Court can and has ascertained by reference to the filing date of this action (June 25, 2012) [see ECF No. 1] and to the statute of limitations for actions filed pursuant to the EFTA, that the one year statute of limitations for the instant action has already elapsed. See 15 U.S.C. § 1693m(g) ("...any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year

from the date of the occurrence of the violation."). As such, this action would be time-barred if dismissed and later filed in a different court. Therefore, the first factor enumerated above [*14] militates in favor of transfer. Regarding the second factor, because neither Plaintiffs nor Defendants have addressed the viability of Plaintiffs substantive claims, this Court takes no position on this issue.

Turning its attention to the third factor, this Court is persuaded that Plaintiffs filed the instant action in this district despite knowing that Defendants had no contacts in New Jersey that would support personal jurisdiction in this forum. This fact is evinced by the fact that Plaintiffs' opposition papers to the instant motion are completely devoid of any factual averments in support of contacts by Defendants with this state. This Court is further persuaded that whatever good faith may have arguably existed when Plaintiffs filed this action is substantially undermined by Plaintiffs' failure to act appropriately when they were placed on notice about this Court's lack of personal jurisdiction over Defendants.⁵ After decisions in two separate actions were rendered on January 22, 2013 and June 10, 2013, respectively, in which courts in this district ruled that it does not have personal jurisdiction over Massachusetts companies who like Defendants, have no contacts with New Jersey, [*15] Plaintiffs were on notice that personal jurisdiction was likewise untenable in the instant action. However, rather than timely file this action in the District of Massachusetts or move to transfer the instant action to that district, Plaintiffs elected to do nothing.

5 Plaintiffs filed two virtually identical actions in this District Court against defendants who were also Massachusetts citizens and that were otherwise similarly situated to Defendants with respect to lack of contacts in this state. See *Sarah Archbold and Donald Marvin v. Mass Mutual Federal Credit Union, et al.*, Civ. Action No. 2:12-03874 (WHW)(SCM) (D.N.J. June 25, 2012); and *Sarah Archbold and Donald Marvin v. Grafton Suburban Credit Union, et al.*, Civ. Action No. 2:12-03872 (CCC)(JAD) (D.N.J. June 25, 2011).

In light of: 1) Plaintiffs' apparent knowledge of the lack of contacts Defendants have with this forum; 2) the fact that Plaintiffs were twice noticed by this district court as to the lack of personal jurisdiction over Defendants; and 3) Plaintiffs' subsequent failure to timely and appropriately address the obvious jurisdictional deficiency, this Court is of the opinion that the instant action was not filed in good [*16] faith and/or was filed knowing that the District of New Jersey was not the proper forum. Consequently, after balancing the factors

enumerated above, this Court is sufficiently convinced that justice does not require transfer of the instant action.

V. CONCLUSION

For the foregoing reasons, it is the recommendation of this Court that Defendants' motion to dismiss the

Complaint pursuant to *Fed. R. Civ. P. 12(b)* for lack of personal jurisdiction be **Granted**.

/s/ Joseph A. Dickson

Joseph A. Dickson, U.S.M.J.