IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FRANK H. COUNTESS and	:	
REBECCA K. COUNTESS,	:	
Plaintiffs	:	
	:	**Civil Action No. 1: CV-03-1481**
v.	:	
	:	**(Judge Kane)**
POOL FACT, INC.,	:	
Defendant	:	

MEMORANDUM AND ORDER

Before this Court is Defendant's motion to dismiss or, in the alternative, to stay proceedings (Doc. No. 3). The motion has been fully briefed and is ripe for disposition. The Court heard oral argument on November 5, 2003. For the reasons discussed below, the motion to dismiss will be granted and the claims against Pool Fact, Inc. will be dismissed for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2).

I. Background

Plaintiffs initiated this civil action with a complaint filed in the Court of Common Pleas of York County on August 4, 2003. Defendant removed to this Court on August 26, 2003.

According to Plaintiff's complaint, on December 7, 2001, Commerce Bank ("Commerce") lent PoolPak, Inc. ("PoolPak") $250,000. On December 24, 2001, Commerce lent PoolPak an additional $250,000. In exchange for these loans totaling $500,000, Commerce held a security interest in any and all outstanding accounts receivable due to PoolPak. On June 6, 2003, Commerce assigned its interest in PoolPak's accounts receivable to Plaintiffs Frank H. and Rebecca K. Countess. Plaintiffs claim they are entitled to recover $470,806.00 from Defendant Pool Fact, Inc. for goods PoolPak delivered to Defendant, for which Defendant refused to pay.

PoolPak, which is also known as Heat Recovery Techonologies or HRT, has had an on-

going business relationship with Defendant since the early 1990's. Defendant, which is in the business of selling swimming pool heating systems in Florida, bought heat pumps from PoolPak for use in the pool heating systems Defendant sold in Florida. The relationship between PoolPak and Defendant originated through an intermediary, a Fort Myers, Florida corporation known as Calorex Manufacturing Corporation ("Calorex"). At some point, Defendant and PoolPak began dealing with one another directly.

PoolPak and Defendant are currently involved in litigation pending before the Circuit Court for the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. Defendant filed that action on June 1, 2001, claiming that PoolPak supplied defective heat pumps which have caused him to sustain damages as high as $2.5 million.

Despite the allegedly defective heat pumps and litigation associated with them, Defendant maintained its business relationship with PoolPak. Michael Factor, Defendant's President and CEO, visited PoolPak in Pennsylvania on six to eight occasions in 2001 and 2002. Bill Spiegel, Defendant's operational chief, also visited PoolPak during that time. From January 4, 2002 to November 4, 2002, Defendant submitted Purchase Orders to PoolPak, which PoolPak fulfilled, but for which Defendant has not paid. It is payment for these orders which constitute the claim before this Court. Plaintiffs argue that, as the assignees of PoolPak's accounts receivable, they are entitled to recover the sum of $470,806.00 which Defendant owes PoolPak. On August 29, 2003, Defendant filed the present motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), (2), (3) and (6) or, in the alternative, to stay proceedings.

II. Discussion

There are two theories under which a federal court may normally exercise personal

jurisdiction over out-of-state residents in diversity cases. See Allied Leather Corp. v. Altama Delta Corp., 785 F. Supp. 494, 497 (M.D. Pa. 1992). If the plaintiff's cause of action is connected to a defendant's non-forum related activities, a defendant may be subject to the "general" jurisdiction of the court so long as it has "continuous and substantial" attachments with the forum state. Reliance Steel Prods. Co. v. Watson, Ess, Marshall & Enggas, 675 F.2d 587, 588 (3d Cir. 1982). If the claim arises from a defendant's forum-related activities, that defendant may be subject to the state's jurisdiction under "specific jurisdiction" so long as jurisdiction is authorized by a "long arm" statute and the defendant has sufficient minimum contacts with the state. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). Pennsylvania's long arm statute permits jurisdiction over out-of-state defendants "based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." 42 Pa. Cons. Stat. Ann. § 5322(b). Thus, the two-step process collapses into due process analysis.

The plaintiff bears the burden of proving that a federal court may properly exercise personal jurisdiction under either the general or specific jurisdiction theory. Mickleburgh Mach. Co. v. Pacific Economic Dev. Co., 738 F. Supp. 159 (E.D. Pa. 1990); 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1351 at 248 (1990). Plaintiffs admit that they are unable to show that this Court may properly exercise general jurisdiction. Therefore, this Court need only consider Plaintiffs' arguments that Defendant is subject to specific jurisdiction.

A court may exercise specific jurisdiction over a defendant where that defendant's activities within the forum satisfy the "minimum contacts" test. Transposed over the notion of minimum contacts are three general overriding concerns. First, the contacts should show that the defendant could "reasonably anticipate being haled into court" in the forum state. World-Wide

Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Second, there must exist some action through which "the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958). Last, hauling defendant into court in the forum state should not "offend traditional notions of fair play and substantial justice." Int'l Shoe, 326 U.S. at 316.

When faced with a dispute arising from a transaction between an out-of-state corporation purchasing goods from a resident corporation, Pennsylvania federal courts often rely upon a four-prong analysis to determine whether in personam jurisdictional mandates have been met. See Renold Power Transmission Corp. v. Cunningham Bearing Co., 640 F. Supp. 24 (M.D. Pa. 1985 (Conaboy, J.)); Bellante, Clauss, Miller & Partners v. Alireza, 634 F. Supp. 519 (M.D. Pa. 1985 (Nealon, J.)); Freedom Forge Corp. v. Jersey Forging Works, Inc., 549 F. Supp. 99 (M.D. Pa. 1982 (Rambo, J.)); Strick Corp. v. A.J.F. Warehouse Distribs., Inc., 532 F. Supp. 951 (E.D. Pa. 1982). The Strick court recommends consideration of the following factors: 1) the character of the pre-execution negotiations; 2) the location of the negotiations; 3) the terms of the sales agreement; 4) the type of goods involved in the sale. Id. at 958.

A. Character of Negotiations

The Strick court envisioned this factor as looking to whether the defendant "initiated the deal, attempted to alter the terms of the contract, or conducted significant negotiations with plaintiff." Id. at 959. "In other words, did the out-of-state purchaser merely ratify the terms as presented, for instance, where one orders from the L.L. Bean catalogue, or were there vigorous negotiations-- a give and take, where each side haggles over the smallest terms of an intricate

agreement." Allied Leather Corp. v. Altama Delta Corp., 785 F. Supp. 494, 500 (M.D. Pa. 1992 (Rambo, J.)).

Because the relationship between Defendant and PoolPak began through Calorex, an intermediary between the companies, the Court cannot determine which company initiated the deal. However, Defendant's process of submitting purchase orders to PoolPak seems very similar to placing an order through any mail-order catalogue, which does not involve negotiation. Defendant used "form orders" and "did not involve itself in the production activities of PoolPak." (Doc. No. 3, Ex. B, Factor Aff. at ¶ 36). There is no indication that the heat pumps were specialized in any way for Defendant. Although Plaintiffs assert that Defendant was more than a mere passive purchaser of goods, they have not produced evidence of any "vigorous negotiations." Allied Leather, 785 F. Supp. at 500. Plaintiffs, therefore, fail to meet their burden of proving to this Court that Defendant actively "availed itself of the privilege of conducting activities" within Pennsylvania. Hanson, 357 U.S. at 253. Accordingly, the first Strick factor weighs strongly in Defendant's favor.

B. Place of Negotiations

The Strick court recommended considering the place of negotiations since a buyer's visits to the forum state or frequent phone calls or mailings into the forum during the negotiation stage is also "relevant to assessing whether the buyer has purposefully availed itself of the opportunity of conducting activities in the forum." Strick, 532 F. Supp. at 959. In Strick, the court placed a great deal of emphasis on the fact that officials of the out-of-state company traveled to Pennsylvania to inspect the types of truck they would later purchase. Strick, 532 F. Supp. at 960.

As explained above, the relationship between Defendant and PoolPak began in the early

1990's through Calorex, the Florida intermediary. Defendant, therefore, did not initiate a deal with a Pennsylvania company. Instead, it dealt solely with Calorex, another Florida-based corporation. At some point Calorex dropped out, and Defendant and PoolPak began dealing directly with one another, but it appears that these interactions consisted of PoolPak shipping products to Defendant in accordance with purchase orders Defendant sent to PoolPak. Without evidence that any negotiation took place, there is no support for finding that this factor weighs in favor of the Court exercising jurisdiction over Defendant.

Plaintiffs point out, however, that Defendant's representatives visited PoolPak in Pennsylvania and argue that those visits weigh in favor of this Court exercising jurisdiction. Defendant recognizes that such visits occurred, but emphasizes the timing and purpose of the visits. Although Defendant had purchased products from PoolPak for years, Defendant did not visit PoolPak in Pennsylvania until Defendant discovered problems with some of the heat pumps it purchased from PoolPak. The primary purpose of the visits were to check quality control. While Defendant visited Pennsylvania before ordering the products at issue in this case, Plaintiffs have not shown that the visits involved actual negotiation. Plaintiff has the burden of establishing that this Court has jurisdiction over the matter. Renold Power Transmission Corp. v. Cunningham Bearing Co., 640 F. Supp. 28 (M.D. Pa. 1985). "[A] plaintiff must shoulder the burden of alleging facts sufficient to support a finding of jurisdiction and of supporting such allegations with appropriate affidavits or documents if jurisdiction is challenged." Strick, 532 F. Supp. at 953. Plaintiff has neither alleged that these visits were for purposes of negotiation nor requested an opportunity to conduct discovery on this issue. Accordingly, the Court regards this factor as neutral.

C. Terms of Contract

Strick envisioned this factor as providing some indication of whether a buyer could reasonably expect to be sued in the seller's home state. 532 F. Supp. at 959. Strick gives as examples instances where "the contract indicates that it is to be substantially performed in the forum, that the law of the forum will control any disputes arising from the agreement, or that payment is directed to the forum . . . ." Id. Courts are more likely to uphold jurisdiction where contract explicitly provided it should be construed in accordance with Pennsylvania law. See, e.g., Rosen v. Solomon, 374 F. Supp. 915, 919-20 (E.D. Pa. 1974), aff'd without opinion, 523 F.2d 1051 (3d Cir. 1975). No such contractual terms, however, apply here.

Here, purchase orders constitute the only contract or agreement between Defendant and PoolPak. "[T]he purchase orders contained no reference or commitment to jurisdiction in Pennsylvania." (Doc. No. 3, Ex. B, Factor Aff. at ¶ 36). Courts tend to refuse to extend jurisdiction over a non-Pennsylvania buyer when the buyer's sole contractual connection was to send purchase orders to plaintiff's headquarters in Pennsylvania. See Freedom Forge Corp. v. Jersey Forging Works, Inc., 549 F. Supp. 99, 101 (M.D. Pa. 1982) (finding no jurisdiction where "[a]ll control over the rolling of the steel, the transportation between rolling and machining, the machining of the steel and transportation of the finished product to New Jersey was controlled by [Pennsylvania plaintiff] Freedom Forge."). The court in Freedom Forge, therefore, did not put a great deal of weight on the fact that certain materials were to be manufactured in Pennsylvania when the totality of the manufacturing process, and, for that matter, the shipping of the goods, was under the control of the Pennsylvania party. "[T]he thin thread of the sending of six purchase orders into Pennsylvania is not sufficient to pull the defendant into the jurisdictional net

of this court." Freedom Forge, 549 F. Supp. at 101.

In the present matter, Defendant sent purchase orders to PoolPak in Pennsylvania. PoolPak then sent the goods and an invoice to Defendant in Florida. There is no indication that Defendant took title to the merchandise any time prior to its delivery in Florida. Thus, while it may be said that the greater amount of activity occurred in Pennsylvania, as the pumps were manufactured in York, it cannot be said that Plaintiff's conduct or the terms of the purchase orders support Plaintiff's claim of jurisdiction over this dispute. The Court finds that this Strick factor weighs strongly in the favor of Defendant.

D. Type of Goods

The Strick court saw this factor as taking into consideration the notion that "there is less justification for asserting jurisdiction over a non-resident purchaser of mail-order consumer goods than over a non-resident commercial purchaser of sophisticated, high-priced industrial equipment." 532 F. Supp. at 959.

The character of the equipment at issue here would appear to place it somewhere between those two poles. Whether the heat pumps are a consumer good is somewhat unclear. Defendant purchased heat pumps from PoolPak and installed them for Florida consumers as a component of a larger pool heating system. This Court has no evidence regarding whether consumers could purchase a heat pump directly, or install or replace one on their own, or whether the heat pumps at issue were ultimately installed in residential pools or larger, industrial, community swimming pools. Therefore, determining whether heat pumps should be placed closer on some hypothetical continuum to consumer goods or sophisticated, high-priced industrial equipment would be overly speculative on our part. Thus, the Court finds that this fourth factor is neutral.

III. Conclusion

Two of the four Strick factors weigh in favor of Defendant and two are neutral. Because none weigh in favor of Plaintiff, it is clear that Plaintiff has failed to meet its burden of establishing that this Court has in personam jurisdiction over Defendant. Accordingly, this Court cannot, given the constitutional requirements set out above, assert specific jurisdiction over Defendant.

Based on the conclusion that Defendant has insufficient contacts with Pennsylvania for this Court to exercise personal jurisdiction over it, the Court need not consider Defendant's other arguments in its motion to dismiss or, in the alternative, stay proceedings. The motion to dismiss will be granted pursuant to Federal Rule of Civil Procedure 12(b)(2).

IV. Order

AND NOW, for the above reasons, **IT IS ORDERED THAT** Defendant's motion to dismiss or, in the alternative, stay proceedings (Doc. No. 3) is **GRANTED**. The case is **DISMISSED** for lack of personal jurisdiction. The Clerk of Court is shall close the file.

S/ Yvette Kane
Yvette Kane
United States District Judge

Dated: November 7, 2003

Filed: November 7, 2003