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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL J. QUILLING, Receiver for ABC)	
VIATICALS, INC., and Related Entities,)	
)	
Plaintiff,)	Civil Action No.
)	3:07-CV-1153-P
)	
v.)	
)	ECF
ERWIN & JOHNSON, LLP, and)	
CHRISTOPHER R. ERWIN,)	
)	
Defendants.)	

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS PLAINTIFF’S COMPLAINT FOR
LACK OF PERSONAL JURISDICTION UNDER FEDERAL
RULE OF CIVIL PROCEDURE 12(b)(2) BY CHRISTOPHER R. ERWIN**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE JORGE A. SOLIS:

Pursuant to Federal Rule of Civil Procedure 12(b)(2), Christopher R. Erwin (“Mr. Erwin”) moves to dismiss the Complaint filed by Plaintiff Michael J. Quilling as Receiver (“Quilling”) for ABC Viaticals, Inc. and Related Entities (collectively, “ABC”), and in support thereof shows:

I. INTRODUCTION AND SUMMARY

Defendants are cognizant of the broad scope of federal *in personam* jurisdiction in receivership actions, but respectfully submit that such jurisdiction is not, and should not be, absolute. There is thus no dispute about this Court’s personal jurisdiction over Erwin & Johnson LLP (“E&J”). Jurisdiction, however, over E&J is not jurisdiction over Mr. Erwin. First, while E&J may have received money from ABC, Mr. Erwin did not. Second, the written agreements clearly indicate that ABC hired E&J as its trustee/escrow

agent, not Mr. Erwin in his individual capacity. Finally, Mr. Erwin had no minimum contacts with Texas.

As Mr. Erwin testifies in his declaration, attached hereto as Exhibit A, he did not receive, and does not possess, any funds directly traceable to the receivership estate, he was not an individual signatory to any agreements, and he had no individual relationship with ABC. (Ex. A). Quilling's sole basis for asserting jurisdiction over Mr. Erwin is his reckless allegations that ABC transferred \$500,000 to Mr. Erwin personally. In pre-suit communications, Mr. Erwin's counsel advised Quilling in written correspondence, attached hereto as Exhibit B, that this allegation was untrue and he supplied Quilling with all of the bank receipts, attached hereto as Exhibit C, showing that the \$500,000 was deposited into E&J's bank account. Quilling (with knowledge of its falsity) nonetheless included this baseless allegation in his Complaint. The Court must, therefore, reject Quilling's allegation that ABC paid \$500,000 to Mr. Erwin individually. Absent that allegation, there is nothing showing that Mr. Erwin obtained any property of the receivership estate.

In addition, while Mr. Erwin is mindful, of course, of the Court's August 9, 2007 Order denying the personal jurisdiction challenge brought by Donald S. Kaplan,¹ Mr. Erwin posits, in good faith, that the situation presented here is notably distinct. Mr. Kaplan received direct monetary commissions from ABC; Mr. Erwin did not. In other cases concerning *in personam* receivership jurisdiction, the challenging defendant had received some portion of the receivership estate. Here, Mr. Erwin did not. Thus, *in personam* receivership jurisdiction is absent here as to Mr. Erwin. Traditional personal

¹ August 9, 2007 ORDER, filed in *SEC v. ABC Viaticals, Inc.*, 3:06-CV-2136-P (N.D. Tex. 2007 Dallas Division).

jurisdiction is absent, as well, because Mr. Erwin lacks minimum contacts with Texas, as evidenced by Mr. Erwin's declaration. Accordingly, Mr. Erwin respectfully requests that Quilling's Complaint be dismissed in its entirety.

II. NO PERSONAL JURISDICTION OVER MR. ERWIN²

A. Plaintiff Bears the Burden of Establishing Personal Jurisdiction Under Rule 12(b)(2)

When a nonresident defendant moves under Rule 12(b)(2) to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing personal jurisdiction. *Lewis v. Fresne*, 252 F.3d 352, 358 (5th Cir. 2001). When no evidentiary hearing is held, the plaintiff must satisfy its burden by presenting a prima facie case for jurisdiction. *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 867-68 (5th Cir. 2001). In determining whether the plaintiff has presented a prima facie case, the court must assume the truth of "well pled" allegations in the complaint that are not contradicted. *Panda Brandywine Corp.*, 253 F.3d at 867-68.

The court need not, however, assume the truth of conclusory allegations. *Id.* The plaintiff must produce admissible evidence that, if believed, would be sufficient to establish the existence of personal jurisdiction. *WNS, Inc. v. Farrow*, 884 F.2d 200, 203-204 (5th Cir. 1989). The court may consider any affidavits, interrogatories, deposition testimony, or other recognized discovery method. *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1165 (5th Cir. 1985).

² The relevant factual background is set forth at length in Defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). It is incorporated fully herein.

B. Personal Jurisdiction in Receivership Action Extends to Those who Hold the Receivership Estate's Property

In a receivership action, the exercise of personal jurisdiction over a nonresident defendant must be based on the satisfaction of two related federal statutes: 28 U.S.C. §§ 754 and 1692. 28 U.S.C. § 754, provides, in pertinent part:

A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such *property* with the right to take possession thereof.

28 U.S.C. § 754 (emphasis added). Section 754 is aimed at recovery of receivership property: “the purpose of the statute is to give the appointing court jurisdiction over property *in the actual or constructive possession and control of the debtor*, wherever such property may be located.” *American Freedom Train Foundation v. Spurney*, 747 F.2d 1069, 1072 (1st Cir. 1984) (emphasis added) (citing *Inland Empire Insurance Co. v. Freed*, 239 F.2d 289, 292 (10th Cir. 1956)).

28 U.S.C. § 1692 is a service-of-process statute, which authorizes service of process in any district where section 754 filings are made: “In proceedings in a district court where a receiver is appointed for property, real, personal, or mixed, situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district, but orders affecting the property shall be entered of record in each of such districts.” 28 U.S.C. § 1692. Together, these statutes operate to permit the receiver to obtain the property belonging to the receivership estate from those who hold it in all districts where the property is located. *See Spurney*, 747 F.2d at 1072. Service of process is not at issue here, as Defendants voluntarily agreed to accept service, albeit preserving their right to challenge personal jurisdiction.

C. **Mr. Erwin Received No Funds from ABC**

Receivership *in personam* jurisdiction is absent as to Mr. Erwin individually, because he never received property from ABC. Quilling bears the burden of proving that this Court has personal jurisdiction over Mr. Erwin. *See Lewis*, 252 F.3d at 358. To do this, Quilling must establish that Section 754 reaches Mr. Erwin *individually*. At least one court has recognized that Section 754 extends *in personam* jurisdiction to permit recovery of the receivership estate's property. *See Spurney*, 747 F.2d at 1073-1074 ("If there is *in personam* jurisdiction, it need not be shown that the court has jurisdiction over property under section 754.").

Logically, then, if it is shown (through 12(b)(2)'s evidentiary balance) that a person or an entity is holding property of the receivership estate, then that person or entity should be expected to be subject to the receivership court's jurisdiction. *See id.* If, however, the plaintiff cannot show, through admissible evidence, that the specific defendant holds receivership property, then what justice does it serve to hail that defendant into foreign jurisdiction? The receivership estate is bound to gain no receivership property from the nonresident defendant. Justice is served at the earliest possible stage by dismissing the claims against that nonresident defendant.

Here, Quilling's presents only one specific allegation that Mr. Erwin received receivership property: that he personally received \$500,000 from ABC. However, Mr. Erwin's declaration, the bank statements, and the correspondence from Mr. Erwin's personal counsel to Quilling all evidence that the \$500,000 was deposited into the account of E&J. (Ex. A; Ex. B; Ex. C). Quilling's discredited and false allegation is, therefore, insufficient to show that Mr. Erwin had any individual receipt of receivership

property. *See WNS, Inc.*, 884 F.2d at 203-204 (the plaintiff must produce admissible evidence that, if believed, would be sufficient to establish the existence of personal jurisdiction); *see also Panda Brandywine Corp.*, 253 F.3d at 867-68. The ineluctable conclusion is that there never has been, and currently is no, receivership property in Mr. Erwin's possession. The Court should dismiss Quilling's claims against Mr. Erwin for lack of receivership *in personam* jurisdiction.

D. Mr. Erwin had No Minimum Contacts with Texas

With the absence of receivership *in personam* jurisdiction, the only remaining issue is whether Mr. Erwin had minimum contacts with Texas. The evidence establishes that he did not.

The well-known formulation of *International Shoe* requires that, in order for due process requirements to be satisfied, the nonresident defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Busch v. Buchman, Buchman & O'Brien, Law Firm*, 11 F.3d 1255, 1258 (5th Cir. 1994) (citing cases). To establish these minimum contacts, the plaintiff must show that the defendant purposefully availed itself of "of the privilege of conducting activities in the forum state." *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 108-09 (1987).

There are no allegations in Quilling's Complaint that Mr. Erwin had individual minimum contacts with Texas. For example, he did not personally transact business with ABC in Texas. (Ex. A). He was not a signatory to any agreements with ABC. (Ex. A). And his position at E&J certainly is not enough to subject him to personal jurisdiction in

Texas. *See Shaffer v. Heitner*, 433 U.S. 186, 216 (1977) (holding that the mere acceptance of positions as officers and directors of a corporation is insufficient to constitute minimum contacts). Certainly, the considerations of “ fair play and substantial justice” would be offended if the Court's *in personam* jurisdiction in this case were based on the defendants' holding of those offices. *See id.* Based on the only admissible evidence before this Court, there is no basis for exercising personal jurisdiction over Mr. Erwin individually.

III. CONCLUSION

The Court should dismiss Quilling's claims against Christopher R. Erwin individually pursuant to Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction. The evidence establishes that Mr. Erwin never received, and therefore does not possess, receivership property. Thus, the receivership *in personam* jurisdictional statutes fail to establish personal jurisdiction over Mr. Erwin. Mr. Erwin also lacks minimum contacts with Texas necessary to otherwise support personal jurisdiction over him. Consequently, the Court should grant the motion to dismiss Christopher R. Erwin.

WHEREFORE, PREMISES CONSIDERED, the Court should grant Christopher R. Erwin's Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction Under Federal Rule of Civil Procedure 12(b)(1), and award Christopher R. Erwin any and all further and other relief to which he is justly entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on this 24th day of September, 2007, to all known counsel of record as required by the Federal Rules of Civil Procedure.



E. Stratton Horres, Jr.