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.	)	

CHRISTOPHER R. ERWIN'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF PERSONAL JURISDICTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(2)

E. Stratton Horres, Jr. – Lead Attorney
State Bar No. 10011800
Herbert J. Gilles
State Bar No. 07925350
William J. Akins
State Bar No. 24011972
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, L.L.P.
5000 Renaissance Tower
1201 Elm Street
Dallas, TX 75270-2161
214.698.8000 (Telephone)
214.698.1101 (Facsimile)

ATTORNEYS FOR DEFENDANTS

I. Summary Arguments

Mr. Erwin made three primary arguments as to the absence of personal jurisdiction: (i) he did not receive the investors' monies from ABC; (ii) the written agreements established that ABC retained E&J as its trustee/escrow agent, not Mr. Erwin in his individual capacity; and (iii) he lacked constitutionally sufficient minimum contacts with Texas. Quilling does not refute that ABC hired E&J as its trustee/escrow agent, nor does he contend that Mr. Erwin has minimum contacts with Texas. Quilling's only argument is that the Court has statutory personal jurisdiction over Mr. Erwin pursuant to 28 U.S.C. § 754.

II. Quilling Failed to Establish Statutory Personal Jurisdiction

Quilling failed to present ***admissible evidence*** that, if believed, would be sufficient to establish the existence of personal jurisdiction under Section 754, as he was required to do. *See D.J. Investments v. Metzeler Motorcycle Tire Agent Gregg*, 754 F.2d 542, 545 (5th Cir. 1985) (requiring evidence in face of personal jurisdictional challenge); *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 867-68 (5th Cir. 2001) (same).

1. *Quilling Does Not Rely on his Complaint; Allegations Therein are Conclusory and Contradicted by Mr. Erwin's Evidence*

Quilling makes the general reference that the Court may accept as true all allegations in the Complaint. But he does not cite any particular allegation in his Complaint. Even if he did, all such allegations are conclusory and have been contradicted by Mr. Erwin's evidence. The Court may accept as true only the "well pled" allegations, which are not conclusory or contradicted by Mr. Erwin's evidence. *See Panda*

Brandywine Corp., 253 F.3d at 867-68. Consequently, there is no evidentiary basis for exercising statutory personal jurisdiction over Mr. Erwin.

Quilling abandons the only allegation in his Complaint against Mr. Erwin individually: that unidentified "bank records" show that ABC paid $500,000 to Mr. Erwin individually, not to E&J.[1] ***Nowhere*** in his response does he mention this allegation or attach the supposed "bank records." Mr. Erwin's evidence shows that this money was unmistakably paid to E&J, ***not Mr. Erwin***. (*See* Mr. Erwin's Ex. A and Ex. C). Mr. Erwin's pre-suit correspondence to Quilling and his counsel advised them that this allegation was completely false and attached the bank statements to prove it. (*See* Mr. Erwin's Ex. B). Recklessly, Quilling and his counsel nonetheless chose to disregard the truthfulness of this claim and unjustifiably assert it anyway in his Complaint. To ignore the incontestable contrary evidence given to Quilling and his counsel pre-suit, to file suit against Mr. Erwin individually based on such a personally disparaging allegation, and to now finally abandon this allegation reflects Quilling's bad faith tactics.

Further, Quilling's response reveals that he has only the conclusory and speculative belief that Mr. Erwin ***might*** have received ***some unidentified portion*** of money paid to E&J. The beliefs expressed in his response are not evidence. The very standard for proving personal jurisdiction requires ***evidence***. *See D.J. Investments*, 754 F.2d at 545 ("conflicts between the ***facts*** contained in the parties' affidavits must be resolved in the plaintiff's favor for purposes of determining whether a prima facie case for personal jurisdiction exists.") (emphasis added); *WNS, Inc.*, 884 F.2d at 203-204 ("when the jurisdictional issue is to be decided by the court on the basis of ***facts***

[1] *See* Complaint at 6 ("Bank records show, however, that ABC paid the $500,000 to Erwin individually.").

contained in affidavits, a party need only present facts sufficient to constitute a prima facie case of personal jurisdiction."). Arguments of counsel certainly are not evidence.[2]

Moreover, the law is well-settled that conclusory or speculative allegations do not equal facts sufficient to prove personal jurisdiction:

> Generally, relying solely on unverified hearsay evidence will not pass the muster of the due process requirements. This is particularly true when the nonresident defendant puts on equally compelling evidence to rebut the conclusory allegations.

Farmer Boys' Catfish Kitchens Int'l, Inc. v. Golden West Wholesale Meats, Inc., 18 F. Supp. 2d 656, 661-62 (E.D. Tex. 1998) (internal citations omitted); *Foyt v. Championship Auto Racing Teams, Inc.*, 947 F. Supp. 290, 294 (S.D. Tex. 1996) ("Foyt's allegations rest on sheer, unsupported speculation and conclusory opinions containing no factual basis" to support jurisdiction). The undeniable absence of any evidence supporting personal jurisdiction means that Quilling has failed to establish his *prima facie* case, and the Court should thus grant Mr. Erwin's motion to dismiss. The Court should grant Mr. Erwin's motion to dismiss due to Quilling's total lack of evidentiary support for statutory personal jurisdiction. *See Panda Brandywine Corp.*, 253 F.3d at 867-68.

2. *Quilling's Declaration Fails to Prove that Mr. Erwin Possesses Funds or Proceeds Traceable to Investor Monies*

Quilling's declaration merely states that he filed a notice of appointment in accordance with Section 754. His declaration fails to address the arguments and evidence

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[2] *In re REPH Acquisition Co.*, 134 B.R. 194, 206 (N.D. Tex., 1991) (Fitzwater, J.) ("It is, of course, well settled that the arguments of counsel are not evidence"); *see also Dunn v. Stewart*, 235 F. Supp. 955, 964 (S.D. Miss. 1964), *rev. on other grounds*, 363 F.2d 591 (5th Cir. 1966) ("Statements of counsel during arguments, unsupported by any record evidence, are, of course, not evidence and therefore cannot be proof.") *accord Barcamerica Intern. USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 593 n.4 (9th Cir. 2002) ("[T]he arguments and statements of counsel are not evidence and do not create issues of material fact capable of defeating an otherwise valid motion for summary judgment."); *Smith v. Mack Trucks, Inc.*, 505 F.2d 1248, 1249 (9th Cir. 1974) ("Legal memoranda . . . in the summary-judgment context, are not evidence, and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment."); *Truswal Systems Corp. v. Hydro-Air Engineering, Inc.*, 813 F.2d 1207, 1211 (Fed. Cir. 1987) ("We reject the unsupported statements of counsel . . . . Arguments of counsel are not evidence.").

presented by Mr. Erwin or show that Mr. Erwin ***individually*** received assets or funds or proceeds traceable to investor monies.

In what can only be considered an about-face from the allegations in his Complaint, Quilling now argues, in conclusory fashion, that E&J may have "shared or forwarded" proceeds that it received from ABC. (Resp. at 3-4). That any such argument is not evidence and does not satisfy Section 754 cannot be denied. Mr. Erwin attached a sworn declaration to his motion to dismiss, in which he averred: "**I do not have individual possession, custody, or control of any property of ABC Viaticals, Inc. or its investors**." (*See* Mr. Erwin's Ex. A, at 2). **Quilling did not, and cannot proffer, any evidence to overcome Mr. Erwin's sworn statement**.

Quilling also misinterprets the Court's Order Appointing Receiver as permitting jurisdiction "over any party who received 'funds' or 'proceeds' of funds that can be traced to ABC[.]" (Resp. at 4). The Order does not state "proceeds of funds," but instead "funds or proceeds."[1] Quilling attempts to bend the terms of the Court's Order to transform "funds or proceeds" into "proceeds of funds," which he takes to mean money "shared or forwarded" from E&J to Mr. Erwin. Quilling's bended interpretation is beyond the breaking point. ABC did not provide collateral to Mr. Erwin, which he then sold, exchanged, or converted into money or funds. And further, there is a conspicuous absence of any such allegation in Quilling's Complaint.

III. Quilling's Cited Case Authority is Inapposite

Quilling cites three cases, which he apparently believes save him from the need to present evidence. None of these cases support the exercise of personal jurisdiction.

Not surprisingly, the first case Quilling cites is one of his own: *Quilling v. McDuff*, No. 3:06-CV-0959 (N.D. Tex. Dec. 13, 2006) (mem. op.). He claims that it shows that the Court exercised personal jurisdiction over an individual who "washed" the proceeds of investor funds through other entities. (Resp. at 5). *McDuff* is distinguishable on two important grounds.

First, Quilling cites docket # 39, which is the Findings and Recommendation of the United States Magistrate Judge, recommending the granting of a motion for partial summary judgment. (*Id.*). No motion to dismiss for lack of personal jurisdiction was before the court. And contrary to the situation here, Quilling presented there a long list of evidence to show the tracing of the investor monies. (*See* docket # 29, 30, 31). Second, the Magistrate Judge's findings refer to a prior motion to dismiss (docket # 20). If the Court refers to the motion at docket # 20 and the Order denying same (docket # 32), the Court will see that the rambling *pro se* motion was construed as a motion to dismiss for lack of ***subject matter*** jurisdiction – not personal jurisdiction. Accordingly, *McDuff* is inapposite to Mr. Erwin's motion and fails to save Quilling from his burden of presenting believable evidence to establish a *prima facie* case of personal jurisdiction.

Second, Quilling cites *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995), as a case where the "court exercised personal jurisdiction over ex-wife who received proceeds of funds fraudulently transferred to her husband." (Resp. at 5). Again, personal jurisdiction was not at issue there. Indeed, there is nothing to reflect that the defendant even had a basis for challenging personal jurisdiction, or that the lack of possession of funds or proceeds traceable to investor monies was as starkly discredited as it is here. Quilling has found no case law to refute Mr. Erwin's cited authority, which states that:

"the purpose of the statute [Section 754] 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).

Third, Quilling cites a ruling in *SEC v. ABC Viaticals, Inc.* (docket # 81). Quilling concocts the argument that the defendant Kaplan "presented the exact same defense now put forth by Erwin – i.e., the direct transfers from ABC went to his company, not to him personally." (Resp. at 5) (citing docket # 60 at 6-7). This argument is contradicted by Quilling's earlier characterization of Kaplan's motion to dismiss. Docket # 60 is a brief in support of Kaplan's motion to dismiss for lack of personal jurisdiction. Pages 6-7 of the brief show that Kaplan challenged the minimum contacts between himself and his company and Texas, ***not*** the individual possession of funds traceable to investor monies.

Additionally, in Quilling's response to that motion, he construed Kaplan's argument to mean something very different than he construes it now, stating: "In his responsive pleadings, **Kaplan does not dispute the amount of these transfers or the fact that they can be traced to investor funds**." (*Response to Donald S. Kaplan's Motion to Dismiss and Combined Reply Brief Supporting the Receiver's Motion for Show Cause Hearing and Expedited Consideration*, docket #67, at 6) (citing Kaplan's motion to dismiss) (emphases added). **Mr. Erwin argues precisely that he has no money traceable to investor funds**. This is not "the exact same defense," and Quilling's attempts to misdirect the Court into believing that it is should be rejected. There being

neither evidence nor authority supporting Quilling, the Court should grant Mr. Erwin's motion and dismiss this case for lack of personal jurisdiction.

IV. Quilling Should Not be Permitted to Conduct Discovery on This Issue

Almost as an afterthought, Quilling mentions that he should be permitted to conduct discovery regarding the funds that E&J allegedly paid Mr. Erwin from the $500,000. (Resp. at 4). The Court should deny the request for two primary reasons.

First, Quilling should not be permitted to conduct discovery, as he has already conducted substantial discovery and it would only delay the inevitable – that Mr. Erwin has no investor monies. Quilling has been involved the investigation of the underlying entities dealing with ABC for quite some time, having been appointed as Receiver for ABC almost one year ago. Mr. Erwin and E&J cooperated with the SEC's investigation and afterwards, with the Receiver himself, providing a substantial amount of documents of their own volition. Even Quilling's own sworn declaration, attached as Exhibit A to his response to Defendants' motion to dismiss for lack of standing, shows that he has already obtained substantial evidence supposedly related to E&J's involvement with ABC:

> I have investigated virtually all aspects of ABC's investment program involving life settlement policies and the activities of its directors, C. Keith LaMonda and Jesse W. LaMonda, Jr. (collectively, the "LaMondas"). I have seized known corporate and escrow accounts, subpoenaed records, investigated the underlying transfers of investor funds, and interviewed numerous agents, employees, and investors. Through these efforts, I have acquired personal knowledge of ABC's relationship with respect to Erwin & Johnson ("E&J") and Christopher R. Erwin ("Erwin") (collectively, the "Defendants").

(Response to Defendants' Motion to Dismiss for Lack of Standing, Exhibit A, at 1-2). While Defendants disagree with the implication that they were involved in the wrongful

activities of the LaMondas, Quilling's sworn statements certainly demonstrate the extent to which he has already conducted discovery. Quilling fails to identify exactly what he would hope to receive in addition. Mr. Erwin has already presented an uncontested declaration stating that he has no investor monies. When lack of personal jurisdiction is clear and discovery would serve no valid purpose, additional time for discovery should not be allowed. *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 855 (5th Cir. 2000).

Second, Quilling's one-sentence request is inadequately briefed. As such, it fails to present a clear picture to the Court of all of the documents exchanged between the parties thus far, and the information that Quilling had available for a long time before filing this suit, and it prevents Mr. Erwin from having an adequate opportunity to respond.[3]

V. Quilling's "Chose in Action" Argument is Simply a Recasting of his Erroneous Belief that Mr. Erwin Possesses Investor Monies

Quilling claims that the Court has personal jurisdiction over Mr. Erwin because the Order Appointing Receiver granted this Court exclusive jurisdiction over ABC's right to bring a "chose in action" to recover investor monies. This argument is strained to say the least, as it relies on no personal jurisdiction case law or statute, and does not appear to have been the basis for personal jurisdiction in any of Quilling's numerous prior receivership actions. A receiver is not omnipotent.

[3] This is also not a proper motion for leave to conduct premature discovery. Local Rule 5.1(c) requires that any document containing more than one pleading, motion, or other paper must clearly identify such in the title. N.D. TEX. L. CIV. R. 5.1(c). Quilling did not identify his motion as an alternative request for leave to be permitted to conduct premature discovery. Moreover, there is no certificate of conference, as would be required for such motion under Local Rule 7.1(c) N.D. TEX. L. CIV. R. 7.1(c).

Black's Law Dictionary defines a "chose in action" as: "1. A proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort. 2. The right to bring an action to recover a debt, money, or thing. 3. Personal property that one person owns but another person possesses, the owner being able to regain possession through a lawsuit." BLACK'S LAW DICTIONARY (8th ed. 2004). What Quilling appears to be arguing is that he has ABC's right to bring an action to recover a debt or money owing to ABC by Mr. Erwin (or, to its logical conclusion, anyone else whom E&J might have transacted business with). Mr. Erwin does not owe ABC any debt or money. The money in the trusts belonged to the investors, not to ABC. That Quilling may assert claims to obtain funds or proceeds traceable to that money does not make it ABC's money. Nothing in Quilling's Complaint alleges that Mr. Erwin owes ABC a debt or money. As stated above, the only allegation against Mr. Erwin individually has been discredited and abandoned. This is simply a recasting of Quilling's speculative and conclusory belief that Mr. Erwin has investor monies.

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. 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,

E. Stratton Horres, Jr. – Lead Attorney
State Bar No. 10011800
Herbert J. Gilles
State Bar No. 07925350
William J. Akins
State Bar No. 24011972

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, L.L.P.
5000 Renaissance Tower
1201 Elm Street
Dallas, TX 75270-2161
214.698.8000 (Telephone)
214.698.1101 (Facsimile)

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on this 9th day of November 2007, to all known counsel of record as required by the Federal Rules of Civil Procedure.

William J. Akins