

DOCKET NO: LLI CV 07 5002640S : SUPERIOR COURT
 WEST STATE MECHANICAL, INC. : JUDICIAL DISTRICT OF
 LITCHFIELD
 V. : AT LITCHFIELD
 PARAMOUNT HEALTH RESOURCES, INC. : MARCH 11, 2008

MEMORANDUM OF DECISION
RE: MOTION TO DISMISS #101

The issue is whether the case against the defendant, James J. Cox, should be dismissed on the ground of lack of personal jurisdiction. The motion to dismiss is granted for the reasons below.

FACTS

On September 13, 2007, the plaintiff, West State Mechanical, Inc., filed a complaint against the defendants, Paramount Health Resources, Inc. (hereinafter Paramount) and James J. Cox (hereinafter Cox). In the complaint, the plaintiff brought two causes of action, sounding in breach of contract and unjust enrichment. The plaintiff alleged that the causes of action flowed from the following set of events.

On September 1, 2005, the plaintiff, a Connecticut corporation, and Paramount, a foreign corporation registered to do business in Connecticut, entered into an agreement wherein the plaintiff was to provide design work for Paramount for an expansion of the "Sarah Pierce," a residential care facility located in Litchfield, Connecticut, then owned by Paramount, in consideration for money payments made by Paramount to the plaintiff. Cox, a resident of Pennsylvania and a duly authorized representative of Paramount, contracted for the services and assured the plaintiff that he would receive payment from Paramount. The plaintiff subsequently

OFFICE OF THE CLERK
 SUPERIOR COURT
 LITCHFIELD, CONNECTICUT
 2007 MAR 12 A 857

performed all the work requested by Paramount in a timely and workmanlike manner. Paramount and Cox, however, failed to pay the plaintiff for a substantial portion of the invoiced labor, materials and customary finance charges.

On October 1, 2007, Paramount and Cox filed a motion to dismiss the complaint on the following two grounds: “(1) Insufficiency of [p]rocess, pursuant to [Practice Book] § 10-31 (4). [The] [p]laintiff failed to return the matter to [the] [c]ourt within six days of the return date; (2) Pursuant to [Practice Book] § 10-31 (a) (2) lack of jurisdiction over the person, only as to Cox.” Paramount and Cox filed a memorandum of law in support of the motion to dismiss. On February 1, 2008, the plaintiff filed a memorandum in opposition to the motion to dismiss. On February 2, 2004, the court heard oral argument on the matter. At the argument, Paramount and Cox orally waived the first ground of the motion to dismiss on the basis that the plaintiff cured the late return date by filing an amended complaint.¹ Therefore, this memorandum is restricted to the consideration of the second ground of the motion to dismiss, i.e, whether this court lacks jurisdiction over Cox.

DISCUSSION

“A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court.” (Internal quotation marks omitted.) *Caruso v. Bridgeport*, 285 Conn. 618, 627, __ A.2d __ (2008). “The motion to dismiss shall be used to assert . . . (2) lack of jurisdiction over the person. . . . This motion shall always be filed with a supporting

¹ Other than the change to the return date, the amended complaint is consistent with the original complaint.

memorandum of law and where appropriate, with supporting affidavits as to facts not apparent on the record.” Practice Book § 10-31. “In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction.” *Daimlerchrysler Corp. v. Law*, 284 Conn. 701, 711, 937 A.2d 675 (2007).

“When a defendant challenges personal jurisdiction in a motion to dismiss, the court must undertake a two part inquiry to determine the propriety of its exercising such jurisdiction over the defendant. The trial court must first decide whether the applicable state long-arm statute authorizes the assertion of jurisdiction over the [defendant]. If the statutory requirements [are] met, its second obligation [is] then to decide whether the exercise of jurisdiction over the [defendant] would violate constitutional principles of due process.” (Internal quotation marks omitted.) *Cogswell v. American Transit Insurance Co.*, 282 Conn. 505, 514-15, 923 A.2d 638 (2007). “As a general matter, the burden is placed on the defendant to disprove personal jurisdiction. . . . If the defendant challenging the court’s jurisdiction is a foreign corporation or nonresident individual, it is the plaintiff’s burden to prove the court’s jurisdiction.” (Citation omitted; internal quotation marks omitted.) *Id.*, 515.

In the memorandum in support of his motion to dismiss, Cox argues that an assertion of personal jurisdiction over him is not authorized by Connecticut’s long arm statute, codified in General Statutes § 52-59b, because he has never transacted business in Connecticut in a personal capacity. He asserts, rather, that he was, at all times, acting within his representative capacity as an officer or agent of his employer, Paramount. In its memorandum in opposition, the plaintiff

counters that it has alleged facts, in paragraphs three and five of the first and second count of the complaint, that sufficiently establish this court's jurisdiction over Cox pursuant to General Statutes § 52-59b (a) (1).

I. Connecticut's Long Arm Statute

Section 52-59b (a) (1) provides that jurisdiction may be exercised over any nonresident individual who "[t]ransacts any business within the state. . . ." "The General Statutes do not define what the phrase 'transacts any business' means in the context of 52-59b." *Zartolas v. Nisenfeld*, 184 Conn. 471, 474, 440 A.2d 179 (1981). The Supreme Court has "construed the term to embrace a single purposeful business transaction." (Internal quotation marks omitted.) *Ryan v. Cerullo*, 282 Conn. 109, 119, 918 A.2d 867 (2007). "A purposeful business transaction is one in which the defendant has engaged in some form of affirmative conduct allowing or promoting the transaction of business within the forum state." (Internal quotation marks omitted.) *Ruocco v. Metro Boston Hockey League*, Superior Court, judicial district of New Haven, Docket No. CV 07 4024835 (December 7, 2007, *Robinson, J.*). "Moreover, a nonresident individual who has not entered this state physically nevertheless may be subject to jurisdiction in this state under § 52-59b (a) (1) if that individual has invoked the benefits and protection of Connecticut's laws by virtue of his or her purposeful Connecticut related activity . . ." (Internal quotation marks omitted.) *Ryan v. Cerullo*, supra, 120. Finally, "[i]n determining whether the [plaintiff's] cause of action arose from the defendants' transaction of business within this state [courts] do not resort to a rigid formula. Rather, [courts] balance considerations of public policy, common sense, and the chronology and geography of the relevant factors." *Id.*, 122.

In the present case, the thrust of Cox's argument is that he is protected by the "fiduciary shield" doctrine. "[T]he 'fiduciary shield' doctrine is based upon the notion that it is unfair to subject a corporate employee personally to suit in a foreign jurisdiction when his only contacts with that jurisdiction have been undertaken on behalf of his corporate employer." (Internal quotation marks omitted.) *Ruocco v. Metro Boston Hockey League*, supra, Superior Court, Docket No. CV 07 4024835. "If Acme Corporation sends a salesman to exotic lands to transact business for Acme, it has been said to be unfair for the salesman, rather than Acme, to be haled back to answer in a court in the exotic locale." (Internal quotation marks omitted.) *Id.* "[W]hen examining the corporate officer's activities, the court must look to his personal contacts with the state of Connecticut and not to the contacts made on behalf of any corporate entity of which he was an officer or controlling shareholder." (Internal quotation marks omitted.) *Shafik v. Andria*, Superior Court, judicial district of New Britain, Docket No. CV 06 5001472 (June 1, 2007, *Shapiro, J.*). Therefore, "[i]n order to confer jurisdiction over the individual defendants under [§ 52-59b] (a) (1), the plaintiff must show that the individual defendants, in person or through an agent, transacted business within the state." (Internal quotation marks omitted.) *Zelinsky v. Borck*, Superior Court, judicial New Haven, Docket No. CV 04 4001993 (June 16, 2005, *Rodriguez, J.*).

"The appellate courts in Connecticut have not yet ruled on the viability of [the fiduciary shield] doctrine" *Ruocco v. Metro Boston Hockey League*, supra, Superior Court, Docket No. CV 07 4024835. Nonetheless, "[i]n Connecticut, the general rule is that there is no personal jurisdiction over nonresident officers of a corporation where their contact with the state was only in their capacity as a corporate officer." (Internal quotation marks omitted.) *Shafik v. Andria*,

supra, Superior Court, Docket No. CV 06 5001472. Thus, the majority of Superior Courts in this state recognize the “fiduciary shield” and apply it where appropriate.² There are, however, a handful of Superior Courts in this state that have rejected the “fiduciary shield” doctrine.³ These courts rely on Judge Blue’s opinion in *Under Par Associates, LLC v. Wash Depot A., Inc.*, 47 Conn. Sup. 319, 793 A.2d 300 (2001).⁴

² See *Shafik v. Andria*, supra, Superior Court, Docket No. CV 06 5001472; *Zelinsky v. Borck*, supra, Superior Court, Docket No. CV 04 4001993; *U/w, No. 834/FB9700166 v. Wayne*, Superior Court, complex litigation docket at Waterbury, Docket No. X02 CV 02 01733606 (June 17, 2003, *Schuman, J.*); *Whalley Glass Co. v. Nielson Co.*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 00 0176028 (May 18, 2001, *Hickey, J.*); *Advanced Claims Service v. Franco Enterprises*, Superior Court, judicial district of Fairfield, Docket No. CV 00 0374548 (October 13, 2000, *Melville, J.*); *Leach Holdings v. Raymark Industries*, Superior Court, judicial district of Fairfield, Docket No. CV 97 0345036 (December 23, 1997, *Melville, J.*) (21 Conn. L. Rptr. 468); *Abrams v. Riding High Dude Ranch*, Superior Court, judicial district of Fairfield, Docket No. CV 97 0345046 (November 21, 1997, *Skolnick, J.*); *Charles Town Associates Ltd. Partnership v. Dolente*, Superior Court, judicial district of Litchfield, Docket No. CV 95 0069233 (May 1, 1996, *Pickett, J.*); *Basta v. Today’s Adoption*, Superior Court, judicial district of Waterbury, Docket No. 119321 (July 25, 1995, *Sullivan, J.*); *Tek-Motive, Inc. v. AFB, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV 93 0349298 (November 12, 1993, *Zoarski, J.*); *N.E. Contract Packers v. Beverage Services*, Superior Court, judicial district of Waterbury, Docket No. 1000039 (June 18, 1992, *Gaffney, J.*) (6 Conn. L. Rptr. 582; 7 CSCR 828); *Corp. For Independent Living v. Charter Oak Associates*, Superior Court, judicial district of Tolland, Docket No. 48503 (April 10, 1992, *Sferrazza, J.*).

³ See *Ruocco v. Metropolitan Boston Hockey League*, supra, Superior Court, Docket No. CV 07 4024835; *University of Bridgeport v. Maxus Leasing*, Superior Court, judicial district of Fairfield, Docket No. CV 05 4009423 (June 15, 2006, *Gilardi, J.*) (41 Conn. L. Rptr. 522); *Sobol Family Partnership v. Cushman & Wakefield*, Superior Court, complex litigation docket at Middlesex, Docket No. X04 CV 044003559 (November 1, 2005, *Beach, J.*) (40 Conn. L. Rptr. 214); *Haynes Construction Co. v. Famm Steel, Inc.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV 04 0085304 (April 27, 2005, *Moran, J.*) (39 Conn. L. Rptr. 195); *Membersworks, Inc. v. Heartland Direct*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 03 0197372 (September 27, 2004, *Lewis, J.*) (38 Conn. L. Rptr. 24); *Under Par Associates, LLC v. Wash Depot A., Inc.*, 47 Conn. Sup. 319, 793 A.2d 300 (2001).

⁴ In his opinion, Judge Blue reasoned, “[t]he doctrine of ‘fiduciary shield’ . . . emerged with little notice and with no critical examination as a novel principle by way of dicta in a series of decisions of the New York state and federal courts in the mid-sixties just as a more liberal and relaxed rule was developing in federal courts in favor of the application of state long-arm

This court finds the majority position to be more persuasive. As such, it will now determine whether the “fiduciary shield” applies to Cox. Cox, in his memorandum in support of his motion to dismiss, asserts that the “fiduciary shield” applies to him because he was, at all times, acting within his capacity as a representative of Paramount. The plaintiff, in its memorandum in opposition, counters that it has alleged sufficient facts to establish that Cox has adequate ties with Connecticut, pursuant to § 52-59b (a) (1), regardless of whether Cox’s acts were done personally and/or as a representative of Paramount. The plaintiff avers that these alleged facts are located in paragraphs three and five of the first and second count of its complaint. In paragraph three, the plaintiff identifies Cox as an “authorized representative of [d]efendant Paramount.” In paragraph five, the plaintiff states: “Defendant Cox, as duly authorized representative of the [d]efendant Paramount, personally contracted for said services and personally assured [p]laintiff would receive payment for the same from [d]efendant Paramount.”

Regardless of the use of the word “personally,” it is clear from these allegations that the plaintiff is suing Cox only for acts Cox performed on behalf of his employer, Paramount.

Paragraph five only provides that Cox, while acting as an agent for Paramount, contracted with

statutes themselves. . . . The doctrine was initially considered to be a substantive requirement of New York law. . . . In 1988, however, the New York Court of Appeals rejected the doctrine in . . . *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 522 N.E.2d 40, 527 N.Y.S.2d 195 (1988).” (Citations omitted; internal quotation marks omitted.) *Under Par Associates, LLC v. Wash Depot A., Inc.*, supra, 47 Conn. Sup. 325-26. Judge Blue, quoting *Kreutter*, further provided, “[t]he equitable concerns which motivated development of the doctrine are amply protected by constitutional due process requisites which guarantee that jurisdiction over a nonresident will be sustained only when the demand for his presence is reasonable and consistent with notions of fair play and substantial justice. . . . Finally . . . the ‘fiduciary shield’ doctrine is undesirable as a matter of public policy. . . . It unfairly prejudices plaintiffs who seek relief against defendants conducting affairs in this [s]tate.” (Citations omitted; internal quotation marks omitted.) *Id.*, 326.

the plaintiff to perform work for Paramount. The plaintiff has not alleged any transactions on the part of Cox that establish that he was, at any time, acting for his own personal benefit or in an individual capacity. Cf. *Zelinsky v. Borck*, Superior Court, judicial district of New Haven, Docket No. CV 04 4001993 (June 16, 2005, *Rodriguez, J.*) (defendant was not protected by the “fiduciary shield” doctrine because the defendant “individually transacted business in this state when she personally loaned money to the plaintiff”). Therefore, pursuant to the “fiduciary shield” doctrine, the court lacks jurisdiction over Cox.

Before concluding, the court would like to note that if it had found that Cox was acting in an individual capacity, or even if it had rejected the “fiduciary doctrine” doctrine to begin with, it would still hold that it lacks personal jurisdiction over Cox. The plaintiff has ultimately failed to set forth sufficient facts that show that Cox was transacting business in this state. “The term ‘transacting business,’ as used in § 52-59b (a) (1), is not broadly interpreted in Connecticut. Several factors are relevant to the consideration of whether an out-of-state defendant has transacted business in Connecticut, including: (1) whether the defendant has an on-going contractual relationship with a [Connecticut] corporation; (2) whether the contract was negotiated or executed in [Connecticut] and whether, after executing a contract with a [Connecticut] business, the defendant visited [Connecticut] for the purpose of meeting with parties to the contract regarding the relationship; (3) what the choice-of-law clause is in any such contract; and (4) whether the contract requires franchisees to send notices and payments into the forum state or subjects them to supervision by the corporation in the forum state. . . . All factors are relevant, however, no one factor is dispositive; the ultimate determination is based on the totality of the circumstances.” (Internal quotation marks omitted.) *Finnimore v. Jobel*, Superior

Court, judicial district of Ansonia-Milford, Docket No. CV 07 5002925 (August 10, 2007, *Hartmere, J.*).

In the present case, the plaintiff, in both its complaint and memorandum in opposition, fails to give any indication of whether Cox, in conjunction with the negotiation, execution and carrying out of the contract in question, ever visited Connecticut, sent mail, e-mail or facsimiles to Connecticut, or made telephones calls to Connecticut. Not one of the several factors that are relevant to the consideration of whether an out-of-state defendant has transacted business in Connecticut is present in the plaintiff's factual allegations. Thus, the plaintiff has failed to sustain its burden of demonstrating that the court has personal jurisdiction over Cox under § 52-59b (a) (1).

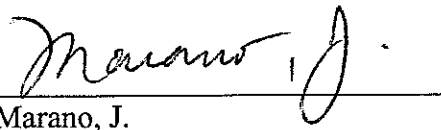
II. Due Process

Inasmuch as the court concludes that the Connecticut long arm statutory requirements were not met, it is not necessary for the court to decide whether the exercise of jurisdiction over Cox would violate constitutional principles of due process. *Rosenblit v. Danaher*, 206 Conn. 125, 142, 537 A.2d 145 (1988).

Accordingly, the motion to dismiss is granted.

So Ordered.

BY THE COURT,


Marano, J.