UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

The Lightstone Group, LLC, a New Jersey corporation, Plaintiff, - vs. - Round House Realty Corp., a New Hampshire corporation, Defendant.	CIVIL ACTION NO. 03-2352 (SRC)

BRIEF IN OPPOSITION TO DEFENDANT
ROUND HOUSE REALTY's MOTION TO DISMISS OR TRANSFER VENUE

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PRELIMINARY STATEMENT

Plaintiff The Lightstone Group, LLC ("Lightstone") respectfully submits this memorandum of law in opposition to defendant's motion to dismiss on the basis of lack of personal jurisdiction, improper venue, and defective service of process.

This action is a straightforward contractual dispute. Plaintiffs, a New Jersey limited liability company, entered into a contract to purchase a property from defendants (the "Agreement.") This Agreement, freely negotiated by both sides, provided that the purchase would be conditioned, as is typical, on satisfactory results of plaintiff's due diligence, as determined by the plaintiff. After beginning its due diligence, plaintiff realized that the details of the situation were not as it had been led to believe. Plaintiff so informed the defendant, and requested its deposit back, as the Agreement provided. And yet, inexplicably, defendant refused to return plaintiff's deposit, despite repeated requests. As a result of defendant's breach, plaintiff has suffered a significant monetary loss.

Plaintiff is a New Jersey company, and the harm it has suffered – the unjustified retention of its $100,000 deposit – is in New Jersey. Naturally, plaintiff simply seeks to have its day in court where the harm occurred. As a result, defendant's motion should be denied.

STATEMENT OF FACTS

Plaintiff is a New Jersey company which wished to purchase property owned by the defendant. In or about July 2002, plaintiff began entering into negotiations with defendant over the contemplated transaction. Those negotiations lasted for a period of several months, during which the terms of the Agreement were altered by both sides. Faxes were sent back and forth between plaintiff's attorneys, in New Jersey, and defendant's representatives, in Massachusetts, discussing various provisions of the contract and discussing the finances of the property. See Exhibit A. Ultimately, agreement was reached, and on October 24, 2002, the Agreement was executed by both sides. The next day, plaintiff sent funds, from New Jersey, to defendant's representative in Massachusetts, as a good faith deposit.

While the Agreement does indeed provide that it is to be "construed as a New Hampshire contract," significantly, it does not contain a forum selection clause. See Defendant's Exhibit A.

Defendant's brief spends an inordinate amount of space on the merits of this case, to the exclusion of a convincing jurisdiction or venue argument. Nonetheless

certain points in defendant's brief must be addressed. While defendant accurately quotes language of the Agreement relating to due diligence, it neglects to mention other relevant provisions. The Agreement contained two separate provisions relating to due diligence. The first provision, in the body of the Agreement, provided forty-five days for the buyer to conduct due diligence related to physical inspections, zoning, permits, occupancy certificates, title, and environmental compliance ("Property Due Diligence.") These are the sections defendant quotes in its Memorandum. The second provision, located in the Second Rider to the Contract, provided forty-five days for buyer to inspect the books, records, leases, contracts, drawings, surveys, and accounts of the seller. ("Financial Due Diligence.") It states as follows (emphasis added):

> Buyer, or its authorized agents, accountants, and representatives, shall have full and complete access to all books, records, leases, contracts, drawings, surveys and accounts of Seller, and may make such examination and take such excerpts therefrom as it may deem necessary or desirable. Said examination shall be completed within forth five (45) days from the execution of this Contract by all parties. In the event Buyer determines that the books and records are unsatisfactory, Buyer shall have the right to terminate this Contract **without liability** by giving written notice thereof to Seller on or before forty-five (45) days from the date hereof and this Contract shall become null and void. **In the event this**

> **Contract is terminated as provided above, the deposit shall be returned to Buyer.**

See Defendant's Exhibit A.

After the Agreement was executed, plaintiff immediately commenced its due diligence. On or about November 2002, plaintiff realized that it needed more time to complete its due diligence, and requested this additional time from defendant. After reaching a tentative agreement for this extension, defendant's representative suggested that plaintiff had had sufficient time to complete its Financial Due Diligence, and proposed that this additional time apply solely to the Property Due Diligence. See Defendant's Exhibit B. After discussion, however, both parties agreed to extend the time for both the Property Due Diligence and Financial Due Diligence, and on December 4, 2002, defendant signed an agreement to that effect. See Exhibit B. This agreement not only provided notice to defendant that plaintiff's Financial Due Diligence was still ongoing, but also informed defendant that plaintiff had determined that several conditions about the deal were troubling to plaintiff.

After further due diligence, plaintiff determined that the property was unsatisfactory, and notified defendant in

a timely manner on January 3, 2003, that it was terminating the agreement, and requested a refund of its deposit, as provided under the Agreement. See Defendant’s Exhibit C. An exchange of correspondence between the two sides occurred, but at no time did defendant agree to return plaintiff’s deposit. Defendant relied upon the Property Due Diligence language, which it claims allows defendant to retain the deposit until plaintiff provides due diligence reports to defendant, but defendant refused to acknowledge plaintiff’s rights under the plain language of the Financial Due Diligence provision, which required only that plaintiff provide notice that the results were unsatisfactory. See Defendant’s Exhibits D-F.

ARGUMENT

POINT I

PERSONAL JURISDICTION IS PROPER BECAUSE ROUND HOUSE REALTY HAD SUFFICIENT VOLITIONAL CONTACTS WITH NEW JERSEY.

The exercise of personal jurisdiction is entirely appropriate here because Round House Realty purposefully availed itself of the benefits of this forum by doing business with Lightstone, and the claims asserted herein arise from those specific contacts.

Under Fed. R. Civ. P. 4(h), a federal court has personal jurisdiction over a non-resident defendant to the extent authorized by the law of the state in which that court sits. *North Penn Gas Co. v. Corning Natural Gas Corp.*, 897 F.2d 687, 689 (3d Cir.), *cert. denied*, 498 U.S. 847 (1990). In turn, New Jersey Court Rule 4:4-4 enables the exercise of personal jurisdiction as far as is constitutionally permissible under the Due Process Clause of the Fourteenth Amendment. *Apollo Technologies Corp. v. Centrosphere Industrial Corp.*, 805 F. Supp. 1157, 1181 (D.N.J. 1992); *Charles Gendler & Co. v. Telecom Equip. Corp.*, 102 N.J. 460, 469 (1986). The constitutional standards serve the dual function of protecting the defendant and ensuring "that the States . . . do not reach

out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

Due process requires that there exist minimum contacts between the defendant and the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). *See also Ketcham v. Charles R. Lister Int'l, Inc.*, 167 N.J. Super. 5, 7 (App. Div. 1979) (personal jurisdiction may be exercised "wherever possible with a liberal and indulgent view if the facts reasonably support the presence of the flexible concepts of 'fair play and substantial justice'").

As defendant acknowledges, an important threshold issue in this regard is the distinction between general and specific jurisdiction, and the related level of minimum contacts which each standard invokes. *Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 437 (3d Cir. 1987). Plaintiff does not suggest that defendant is subject to general jurisdiction in New Jersey; however, given that Lightstone's cause of action arises directly out of Round House Realty's forum contacts, specific jurisdiction may be asserted. This less onerous standard of minimum contacts can be satisfied by sporadic contacts

or even an isolated event of forum activity. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984); *De James v. Magnificence Carriers, Inc.*, 654 F.2d 280, 286 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981); *Charles Gendler*, 102 N.J. at 471.

In formulating the minimum contacts analysis, the United States Supreme Court posited that a non-resident defendant's enjoyment of the privilege and benefit of conducting business in the forum state entails a concomitant obligation to possibly litigate within that forum. *International Shoe*, 326 U.S. at 317. The minimum contacts standard was subsequently refined in *Hanson v. Denckla*, where the Court required that "there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State . . ." 357 U.S. 235, 253 (1958). This requisite of a volitional contact underlies a defendant's reasonable expectation that he or she may be haled into the forum. *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978); *American Tel. & Tel. Co. v. MCI Communications Corp.*, 736 F. Supp. 1294, 1302-03 (D.N.J. 1990); *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 323 (1989).

In the present case, Round House Realty knowingly entered into a contract with Lightstone, a New Jersey

resident. This contract was negotiated over a period of time with defendant, which knowingly and repeatedly interacted with plaintiff in New Jersey – ultimately accepting a New Jersey check drawing on a New Jersey bank account – in order to undertake this transaction. As such, there can be no plausible dispute that defendant purposefully availed itself of the privilege of conducting business activity within New Jersey with respect to this transaction. These contacts, over the course of several months before the contract was signed, and continuing over several months before the deal was completed, made it reasonably foreseeable that the defendant might become subject to a lawsuit in New Jersey for claims arising out of those specific contacts.

The cases defendant cites are not comparable to the situation in this case; in defendant's cases, the contacts between defendant and the state in question were far more attenuated than in this case.

Defendant cites *Telesis Mergers & Acquisitions, Inc. v. Atlis Federal Svcs. Inc.*, 918 F. Supp. 823 (D.N.J. 1996) and *Associated Business Telephone Systems v. Danihels*, 829 F. Supp. 707 (D.N.J. 1993) for the proposition that a short-term contract cannot be the basis for personal jurisdiction. In *Telesis*, however, the court found that

the only contact between the defendant and New Jersey was "an initial telephone call or letter." *Id.* at 834. The plaintiff then traveled out of New Jersey to negotiate and consummate the contract. In this case, however, Lightstone and defendant negotiated the Agreement over a period of several months, exchanging numerous rounds of correspondence between New Jersey and New Hampshire.

In *Associated Business*, not only had the defendant had not sought to enter into a contract with the plaintiff, but it had not negotiated that contract with the plaintiff. Rather, defendant had been appointed by the court as a receiver for a third party business, and in its duties as receiver in running that business, defendant was forced, in what the court found to be akin to a contract of adhesion, to temporarily assume the obligations of that third party. Here, on the other hand, defendant voluntarily chose to enter into the Agreement, and freely negotiated the terms of the Agreement with plaintiff.

Similarly, defendant's citations of *Vetrotex Certainteed Corp. v. Consolidated Fiber Glass Prod. Co.*, 75 F.3d 147 (3d Cir. 1996), *Mellon Bank (East) PSFS, N.A. v. DiVeronica Bros., Inc.*, 983 F.2d 551 (3d Cir. 1993), and *Sunbelt Corp. v. Noble, Denton & Assoc., Inc.*, 5 F.3d 28 (3d Cir. 1993) for the proposition that "informational

communications" are insufficient to establish personal jurisdiction are not relevant, for the simple reason that the contacts between Round House and New Jersey far exceeded the contacts in those cases. In *Vetrotex* and *Sunbelt*, the defendants had merely made a few "informational" calls to the state in question, but the contracts in each case were negotiated in other states. In *Mellon*, defendant had not even contracted with the plaintiff, and its only connection to plaintiff's state was inadvertent, through the decisions of a third party. In this case, however, Round House's communications with New Jersey were extensive, and for the purpose of negotiating the Agreement at issue here.

Defendant argues that finding personal jurisdiction here, would offend the due process mandate of fair play, citing *Lehigh Coal & Navigation Co. v. Geko-Mayo, GmbH*, 56 F. Supp. 2d 559, 569 (E.D.Pa. 1999), and characterizing the facts in this case as "nearly identical" to those in *Lehigh*. But *Lehigh* was in reality quite different. *Lehigh* involved a suit in Pennsylvania over a contract between two German companies to perform a contract in Germany, in which the only connection to the state of Pennsylvania was that one of the parties might have opted to perform the contract by obtaining materials from Pennsylvania. In other words,

neither party was a resident of the state in question, and the contract did not touch on the state in any substantial way, so the defendant had no reason to think it might be haled into court in that state. In this case, in contrast, plaintiff is a resident of New Jersey, a fact of which defendant was well aware at the time it entered into the contract, and thus defendant had reason to be on notice that it might have to answer for a breach of contract in a New Jersey court.

Moreover, defendant inaccurately characterizes the contract in *Lehigh* as containing a choice of law clause, when in reality it contained a forum selection clause, which would weigh heavily in favor of jurisdiction in that forum. In this case, however, the Agreement merely contains a choice of law clause. Considering that defendant was represented by able counsel and yet chose not to insert a forum selection clause, this distinction is very significant.

Defendant argues that the property which is the subject of this action is located entirely in New Hampshire. But defendant misunderstands the nature of this suit. Neither plaintiff nor defendant seeks to compel performance under the Agreement; hence, property, though the subject of the contract, is not the subject of this

action at all. This is simply a dispute over the disposition of the money deposited by the plaintiff in the hands of the defendant.

In *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 558 A.2d 1252 (1989), the court held that the significant size of the transaction was an important consideration in finding that a party to the transaction could reasonably expect to be haled into court in the forum of the buyer. That suit involved what the court characterized as a "big-ticket luxury item" worth $200,000. This was a contract of sale for an almost $7 million property, and the underlying dispute is over a $100,000 deposit. It is hardly offensive to fair play to find that New Jersey would have an interest in adjudicating a matter involving a $100,000 loss to one of its residents.

POINT II

VENUE IS PROPER IN THE DISTRICT OF NEW JERSEY

Venue is entirely appropriate under 28 U.S.C. § 1391(a)(2). As the defendants acknowledge, the applicable venue statute in this matter is 28 U.S.C. § 1391(a), which provides as follows:

> (a) A civil action wherein jurisdiction is founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any of the defendants reside, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a).

Defendant correctly notes that neither § 1391(a)(1) nor § 1391(a)(3) apply to the situation here, but mistakenly contends that § 1391(a)(2) does not allow for venue in New Jersey. Section 1391 (a)(2) provides for jurisdiction where a "substantial part of the events or

omissions giving rise to the claim occurred." It is important to note that under § 1391, venue may be proper in more than one district, and the statute does not require the court to choose the best venue. *Bates v. C&S Adjusters, Inc.*, 980 F.2d 865, 867 (2d Cir. 1992). It bears emphasis that the burden of proving that venue is improper rests with the moving party. *See Myers v. American Dental Ass'n*, 695 F.2d 716, 724 (3d Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983).

As previously noted, defense's argument that the property which is the subject of this action is located entirely in New Hampshire is irrelevant, because the property is not the subject of this action. The deposit, a liquid asset, is the subject of this action, and defendant's failure to return the deposit caused an injury in New Jersey, not in New Hampshire. Plaintiff, of course, is not a New Hampshire resident, and although the final contract may have been signed in New Hampshire, it was negotiated in both New Jersey and New Hampshire, over a period of months. Thus, in the language of 28 U.S.C. § 1391(a)(2), "a substantial part of the events or omissions giving rise to" Lightstone's claims arose in New Jersey.

Finally, as noted above, while the contract contains a choice of law clause selecting New Hampshire law, it does *not* contain a forum selection clause. Again, as this contract was negotiated by attorneys who surely knew the difference between the two, and as defendant concedes in its own affidavit that it specifically negotiated the choice of law clause into the contract, defendant cannot now argue that the parties contemplated that litigation arising out of the transaction would only take place in New Hampshire.

Hence, while defendant can argue that New Hampshire would be an appropriate venue, it cannot argue that New Jersey is an improper venue under § 1391 (a)(2), and its motion should be denied.

POINT III

ASSUMING THAT SERVICE WAS DEFECTIVE, SERVICE HAS BEEN CORRECTED

Plaintiff initially served defendant at the offices of one of its officers; regardless of whether plaintiff’s initial service was defective, on July 17, 2003, defendant was re-served via defendant’s registered agent at 149 Emerald Street, Keene, New Hampshire.

POINT IV

THE MOTION TO TRANSFER SHOULD BE DENIED BECAUSE VENUE IS CONVENIENT IN NEW JERSEY

A motion to transfer venue based on inconvenience is governed by 28 U.S.C. § 1404(a), which provides that "[f]or the convenience of the 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." The burden placed on the moving party is a heavy one, requiring the moving party to show "something more than a mere preponderance of the evidence." *Resorts International, Inc. v. Liberty Mutual Insurance Co.*, 813 F. Supp. 289, 291 (D.N.J. 1992).

In addition, a plaintiff's choice of forum is given "paramount consideration." *See, e.g.*, *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970), *cert. denied,* 405 U.S. 910 (1971). As the Third Circuit has explained, "unless the balance of convenience of the parties is strongly in favor of defendant, the plaintiff's choice of forum should prevail." *Shutte,* 431 F.2d at 25. *Accord, e.g., Resorts International,* 813 F. Supp. at 291. As demonstrated below, the defendants cannot establish that the factors routinely considered on a motion to transfer

venue — namely, the balance of conveniences and interest of justice — outweigh the paramount consideration that must be afforded the selection of a New Jersey forum by Lightstone through the filing of this action.

Defendant presents no argument why New Jersey would be any more inconvenient a forum for parties or witnesses than New Hampshire will. Defendants are correct that the property which was the subject of the contract is located in New Hampshire, but do not explain why this makes any difference, considering that this lawsuit does not concern the disposition of the property. This action involves monetary damages only, and the injured party in this case is Roundhouse, which was damaged by defendant's breach of its contractual obligations. Therefore, while New Hampshire may have an interest with respect to the defendants' claims, it cannot be said that New Jersey has any lesser interest in this litigation than New Hampshire.

It is true that the Agreement provides that it is to be construed as a New Hampshire contract, but given the relatively simple legal issues in this matter, this should not present a problem for a federal court sitting in New Jersey. This factor, therefore, should not outweigh plaintiff's choice of forum.

CONCLUSION

For the foregoing reasons, plaintiff The Lightstone Group LLC respectfully requests that this Court deny the motion of defendant Round House Realty to order dismissal or transfer of this case.

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