

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



CRACO LLC,)
)
Plaintiff,)
)
v.)
)
ILIR FIORA,)
)
Defendant.)

#1:03CV676

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter is before the court on Defendant's Motions To Dismiss For Lack Of Jurisdiction and For Improper Venue (docket no. 4). Plaintiff has responded in opposition to the motions, and Defendant has filed his reply. In this posture, the matter is ripe for disposition.

BACKGROUND

Plaintiff's complaint alleges a single claim against Defendant for money due and owing on three promissory notes. The jurisdiction of this court is invoked on the ground of diversity of citizenship. From the complaint's allegations and attachments, it appears that Defendant, a citizen of New York, was involved in an automobile accident in New York and began legal action there to recover for his injuries. As it developed, Defendant was out of work for a time because of injuries sustained in the accident, and he apparently turned to his New York attorney for assistance in

locating a source of funds. With attorney assistance, he was referred to Plaintiff, a North Carolina corporation with offices in Advance, Davie County, within this judicial district.

Beginning with a promissory note executed on or about March 24, 1999, Defendant borrowed \$35,000 from Plaintiff to be repaid in full two years later on March 31, 2001. Thereafter, Defendant borrowed another \$35,000 from Plaintiff on November 23, 1999, to be repaid in full on the same March 31, 2001, date as the first note. Again, on or about July 17, 2000, Defendant borrowed another \$35,000 from Plaintiff to be repaid in full on December 31, 2003. On each note, Defendant prepaid a significant amount of interest and received about \$25,000 cash-in-hand at the time of each transaction. In addition, "for [Plaintiff's] additional protection and in consideration of [Plaintiff's] awaiting payment" on these loans, Defendant gave what is in essence a "lien" to Plaintiff on any recovery Defendant might receive from his New York lawsuit on the automobile accident.

The complaint alleges that, as of July 23, 2003, Plaintiff has received no payment on either of the notes, and that Defendant owes an outstanding balance of \$105,000, plus accrued interest of \$159,963.36, and attorneys' fees according to the terms of the notes.¹

¹ No document before the court explains why, considering that the third note was not due in full until December 31, 2003, it was properly subject to this complaint filed in the court on July 15, 2003, before the due date of the note. As neither party addresses the question, the court only makes note of it.

Defendant's motions were filed before the time to file an answer, and they challenge this court's exercise of personal jurisdiction over him and contend that venue in this district is improper. He argues that he arranged for these notes through his attorney in New York, negotiated them through his attorney without submitting applications or financial statements, signed them at his attorney's office in New York, and that he never met or spoke with any representative of Plaintiff except for his attorney. He contends that "[t]he only connection to this state [is] the identity of the Creditor and that finding personal jurisdiction over a defendant who owes debts to a North Carolina lender would offend the sense of fairness of the Fourteenth Amendment" Memorandum at unnumbered p. 4 (docket no. 5). He also challenges proper venue in this district.

Predictably, Plaintiff opposes the motions. Plaintiff argues that the notes were delivered in North Carolina and that the funds were advanced in North Carolina. Plaintiff also points to language in the notes to the effect that they were made at Plaintiff's office in Advance and that payments were due at Plaintiff's office in Advance. And, in further support of its position, Plaintiff also points to the choice-of-law language in each note, which reads: "This Note is delivered and funds advanced hereunder in the State of North Carolina and the parties agree that the Note is to be governed and construed in accordance with the laws of the State of North Carolina."

ANALYSIS

1. Jurisdiction

In order for this court to exercise jurisdiction over Defendant, two conditions must be satisfied. *Christian Sci. Bd. of Dirs. of the First Church of Christ v. Nolan*, 259 F.3d 209, 215 (4th Cir. 2001). “First, the exercise of jurisdiction must be authorized by the long-arm statute of the forum state, and, second, the exercise of personal jurisdiction must also comport with Fourteenth Amendment due process requirements.” *Id.* The burden of establishing jurisdiction rests with the party asserting it. See *General Latex & Chem. Corp. v. Phoenix Med. Tech., Inc.*, 765 F. Supp. 1246, 1248 (W.D.N.C. 1991). This burden is not an onerous one, as the party asserting jurisdiction need only make a prima facie showing that jurisdiction exists, and conflicts must be resolved in favor of the party asserting jurisdiction. *Id.*

As for the first prong, the North Carolina long-arm statute provides, in part, for jurisdiction in any action which arises out of a promise made anywhere to a plaintiff by a defendant to deliver within North Carolina “things of value” N.C. GEN. STAT. § 1-75.4(5)(c). Money payments are “things of value,” and a defendant’s promise in a note to make payments to a plaintiff in North Carolina is a promise to deliver a thing of value within this state; thus, these promissory notes at issue are within the purview of the North Carolina long-arm statute. See *Wohlfahrt v. Schneider*, 311 S.E.2d 686 (N.C. Ct. App. 1984); see also *ETR Corp. v. Wilson*

Welding Serv., Inc., 386 S.E.2d 766 (N.C. Ct. App. 1990); *Pope v. Pope*, 248 S.E.2d 260 (N.C. Ct. App. 1978).²

As for the second prong, “[t]he Due Process Clause protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985). This so-called “fair warning” that a person’s activity might subject him to the jurisdiction of a foreign state “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” *Id.* Thus, this “fair warning” requirement is satisfied if a defendant has “purposefully directed” his activities at residents of the forum. *Id.* The Supreme Court has warned that, with respect to contracts, “parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in that other state for the consequences of their activities.” *Id.* at 473. Nevertheless, the Court has said that the Constitution requires that a defendant

² The North Carolina long-arm statute has been construed to extend to the outer limits allowed by the Due Process Clause. See *Sara Lee Corp. v. Gregg*, No.1:02CV195, 2003 WL 23120116 at *2 (M.D.N.C. Dec. 18, 2003); *General Latex*, 765 F. Supp. at 1249 n.1 (also noting that the prevailing law in North Carolina presumes the existence of personal jurisdiction)(emphasis added); *Occidental Fire & Cas. Co. of N.C. v. Continental Ill. Nat’l Bank & Trust Co. Of Chicago*, 689 F. Supp. 564, 566 (E.D.N.C. 1988)(also noting that the long-arm statute is to be construed liberally in order to find jurisdiction)(emphasis added).

required to submit to the burdens of litigation there. *Id.* at 474-76. The Court has called this a “purposeful availment” requirement, saying that “it is essential in each case that there be some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Id.* at 475. Under this test, if a defendant himself has created a “substantial connection” with the forum state, or has created “continuing obligations” between himself and the residents of the forum, he has met this “purposeful availment” requirement. *Id.* at 475-76.

Still, assuming these standards are met, a court must determine whether the assertion of personal jurisdiction would comport with “fair play and substantial justice,” that is, whether, considering other factors, it is reasonable for the forum state to assert jurisdiction. *Id.* at 476-77. Among these other factors are the burden on the defendant and the interests of the plaintiff in obtaining convenient and effective relief. *Id.* at 477. In the end, “the two-prong personal jurisdiction analysis can be collapsed into one inquiry, that is, whether the requirements of the constitutional ‘minimum contacts’ analysis, developed under the Due Process Clause, are met.” *Sara Lee Corp. v. Gregg*, No.1:02CV195, 2003 WL 23120116 at *2 (M.D.N.C. Dec. 18, 2003); *see also General Latex*, 765 F. Supp. at 1249 n.1.

The application of these standards convinces this court that due process is not offended by this court’s assuming jurisdiction over this Defendant. As the Supreme

Court has recognized, it is a fact of modern commercial life that business is transacted by mail and wire communications across state lines without the need for a defendant to have a presence within the state where the business is conducted. *Id.* at 476. From all that appears in this record, that is what happened here. Defendant, through his New York attorney, contacted Plaintiff at its office in Advance for the purpose of arranging a money loan. The first bargain apparently was struck by telephone or some other electronic means without a requirement that either Defendant or his attorney come to North Carolina. Again, for all that appears in this record, the remaining two additional bargains were struck in the same manner, in relatively quick succession -- all three loans were consummated at roughly eight-month intervals covering the time period from March 24, 1999, to July 17, 2000.

It is obvious that this was not a single contact nor a single contract. As noted, there were three promissory notes, all executed at regular intervals over the short life of the mutual dealings between Plaintiff and Defendant. Each note was crafted with similar language. Each note showed Plaintiff's office location in Advance, each one required payments there, and each note contained the identical choice-of-law language set out verbatim above.

On this record, it is simply disingenuous for Defendant to make the argument that he was an unwitting dupe of his attorney. To the contrary, Defendant himself acknowledges that he was seriously injured in the automobile accident and that he was unable to work for a significant time after the accident. He must have had a

need for money that he expressed to his attorney, and he obviously accepted his attorney's offer of help in finding a source of money. After all the proceeds of the first loan were gone, from all that appears in this record, Defendant chose to return to that same source of funds two more times for the second and third loans. Both the Supreme Court and the North Carolina courts have said that even a single contact with the forum state can support jurisdiction there. See *Burger King*, 471 U.S. at 475 n.18; *Wohlfahrt*, 311 S.E.2d at 688.

In *Wohlfahrt*, the North Carolina Court of Appeals addressed circumstances where a Texas doctor bought medical equipment from the plaintiffs and executed a promissory note for payment which required the doctor to make payments in Wilmington. Plaintiffs sued in New Hanover County Superior Court and the doctor challenged jurisdiction, contending that neither he nor the equipment had ever been in North Carolina and that he had never engaged in any kind of activity here. The court of appeals upheld jurisdiction, saying it was "fair" to require the doctor to litigate his obligation here because he "promised to make the note payments here, and in doing so he must have anticipated that here is where he would be sued if the payments were not made." 311 S.E.2d at 688.³

³ Admittedly, another case from the court of appeals has addressed circumstances where a single promissory note was found to be insufficient to establish jurisdiction. In *Corbin Ruswin, Inc. v. Alexander's Hardware, Inc.*, 556 S.E.2d 592 (N.C. Ct. App. 2001), the defendant, a Connecticut corporation, bought hardware from the plaintiff, a Delaware corporation with a principal place of business in North Carolina. No products were shipped to or from North Carolina, but when the defendant failed to pay for the hardware, it executed a note "in Connecticut," 556 S.E.2d at 595, for the balance. The defendant

Likewise, it is also disingenuous for Defendant to claim that his attorney was the driving force behind the contacts with North Carolina, and that he should not be bound by his attorney's efforts because Defendant himself never had any direct dealings with Plaintiff here. "A prospective defendant need not initiate the relevant 'minimum contacts' to be regarded as purposefully availing himself of the privileges of conducting activity in the forum state." *Christian Sci. Bd.*, 259 F.3d at 216 (citing *Burger King*, 471 U.S. at 475). The court also observes that, looking no further than the notes themselves, there must have been some negotiation as to a payment schedule, at least with regard to the third note. The first two notes made payment in full due on March 31, 2001. The third note, however, made payment in full due on December 31, 2003, a significantly later time (33 months) from the first due dates. There is no need to speculate into these negotiations, such as when or how they occurred or the reasons behind this change in due dates, but it is beyond cavil that this extension of the due date on the third note served to extend Defendant's

mailed four payments to North Carolina and defaulted. The court of appeals said that the single factor of mailing four payments to this state was "too tenuous" to establish jurisdiction here. *Id.* at 597. The court noted that the defendant never solicited business here, never shipped products here, never purchased products from here, that the parties executed the note in Connecticut, and that the defendant's sole contact with North Carolina was mailing four payments here.

Nevertheless, other courts have found that a single promissory note can support jurisdiction over a non-resident borrower where the payment schedule was arranged over the telephone and the note was payable in the forum state. *See, e.g., Parish v. Mertes*, 269 N.W.2d 591, 593-94 (Mich. Ct. App. 1978)(also noting that the defendants agreed to make payments on a note in Michigan, thus "[t]hey should reasonably have expected that they would be subject to jurisdiction in Michigan as long as adequate notice and the opportunity to be heard were provided").

repayment obligation by 33 months beyond the due dates of the first two notes, and to be sure must have inured to his benefit. Thus regardless of the primacy of any role played by Defendant's attorney, Defendant himself obtained significant benefits in obtaining loans from Plaintiff in North Carolina.

Defendant challenges Plaintiff's claim that the notes were executed in North Carolina, contending instead that he signed the notes at his attorney's office in New York. Regardless of the legal niceties of the location of the execution of the notes, however, "it is the borrowing of the money, not simply the execution of the notes," that is the critical transaction, and the money was borrowed in North Carolina from a North Carolina entity. *See Lancaster v. Zufle*, 165 F.R.D. 38, 41 (S.D.N.Y. 1996)(finding that, in addition to the fact that money was borrowed in New York from a New York bank even though the loan documents were signed in Louisiana, the designated place of payment in New York in a promissory note was a significant factor, along with the choice-of-law clause, to be weighed in the jurisdiction analysis)(emphasis added).

As noted in some of the cases cited in the text and the margin, the place of payment is a factor to be considered in the jurisdiction analysis. But more than being just a factor, the place of payment has been called "significant contact" in determining jurisdiction. *See Snyder v. Madera Broad., Inc.*, 872 F. Supp. 1191, 1195 (E.D.N.Y. 1995); *see also Wohlfahrt*, 311 S.E.2d at 688; *Parish v. Mertes*, 269 N.W.2d 591, 593-94 (Mich. Ct. App. 1978). It is without doubt that the place of payment for all three notes at issue here was Plaintiff's office in Advance.

In sum, the consideration of all these factors together convinces this court that Defendant is properly subject to the jurisdiction of the court. He made three bargains, all in relatively short order, to borrow significant sums of money from a North Carolina entity. Each document evidencing the transactions identified both the place of each transaction and the place of payment on the obligations as being Plaintiff's office in North Carolina. Each document clearly stated in unequivocal language that North Carolina law governed each transaction. Simply from the face of the third promissory note, it is a reasonably supportable inference that some negotiation occurred at least with respect to the due date when this third note was to be paid in full. As noted, the fact that Defendant might not have come to North Carolina to engage in any of the negotiations leading up the signing of the promissory notes is of no moment, considering modern-day business transactions. And as noted, the fact that Defendant might have conducted his business with a North Carolina entity through a third-party intermediary is of no moment, considering that the business was apparently conducted to Defendant's satisfaction over the period from March 1999 until at least mid-July 2000.

2. Venue

Defendant contends that venue in this district is improper. He contends that he signed the documents evidencing the money transactions in New York, that he assigned proceeds from his lawsuit pending in New York as an additional incentive for Plaintiff to loan the money at issue here, and that he has no further connection

to North Carolina. He seeks a dismissal for these reasons and for the added reason that “the North Carolina Fair Debt Collection Act requires that a suit filed to collect a debt must be filed where the debt was incurred or where the Defendant resides.” Memorandum at unnumbered pp. 5-6.

Again, predictably Plaintiff opposes the motion.

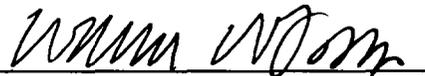
This contention need not detain the court long. First, to the extent that Defendant has cited the so-called North Carolina Fair Debt Collection Act, it is noted that the act is identified in Defendant’s brief by name only, there is no statutory citation supporting the reference to the act in the brief. As for the name North Carolina Fair Debt Collection Act, the court questions whether there is, in fact, such an act because independent research has failed to uncover any legislation by the General Assembly bearing such a name. There is a statute called the Setoff Debt Collection Act, N.C. GEN. STAT. § 105A-1 et seq., but that act cannot apply here as it is intended to apply to state and local agencies and debts owed to them by individual debtors. Also, Article 2, Chapter 75, N.C. GEN. STAT. § 75-50 et seq., is styled Prohibited Acts by Debt Collectors and perhaps that is the statute to which Defendant refers. That article provides, in part, that it is an “unconscionable means” to bring a suit on a debt “in a county other than that in which the debt was incurred or in which the debtor resides if the distances and amounts involved would make it impractical for the debtor to defend the claim.” N.C. GEN. STAT. § 75-55 (4). Far from being a strict venue provision as Defendant argues, however, this subpart of

the statute makes it an unfair and deceptive act or practice, see § 75-56, to sue in a location which does not comport with the statutory language - - i.e., where the debt was incurred, or where the debtor resides if the distances and amounts involved would make it impractical for the debtor to defend the claim. In any event, I find no North Carolina case construing § 75-55(4), none has been cited to the court, and the North Carolina courts have held that actions to recover on a debt can be brought in the county where the lender maintains its office. See *Conseco Finance Servicing Corp. v. Dependable Housing, Inc.*, 564 S.E.2d 241 (N.C. Ct. App. 2002); *Centura Bank v. Miller*, 532 S.E.2d 246 (N.C. Ct. App. 2000).

Second, 28 U.S.C. § 1391(a), the other venue provision which Defendant contends supports his argument for a dismissal, was amended in 1990 with the aim in mind “to increase the number of districts in which an action can be brought” *Gen. Latex*, 765 F. Supp. at 1250-51 (citing Federal Courts Study Committee Implementation Act of 1990, *reprinted in* 1990 WL 200439). Venue in this district is proper under either § 1391(a)(2) as a “substantial part of the events or omissions giving rise to the claim occurred” here, or under § 1391(a)(3), as Defendant is subject to personal jurisdiction here. See *id.* (finding venue proper in the western district under either of the second or third provisions of §1391(a) where the plaintiff North Carolina corporation shipped goods to the defendant South Carolina corporation and the plaintiff sued the defendant for failure to pay).

CONCLUSION

For all the foregoing reasons, IT IS RECOMMENDED that Defendant's motions to dismiss for lack of personal jurisdiction and for improper venue (docket no. 4) be DENIED.



Wallace W. Dixon
United States Magistrate Judge

Durham, NC

January 23rd, 2004