

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MERRILL IRON & STEEL, INC.,

Plaintiff,

MEMORANDUM AND ORDER

v.

06-C-110-S

JESSE H. BECHTOLD, UNITED STATES
FIDELITY & GUARANTY COMPANY and
FEDERAL INSURANCE COMPANY,

Defendants.

and

HAVENS STEEL COMPANY,

Interested Party.

Plaintiff Merrill Iron & Steel, Inc. commenced this civil action in Marathon County Circuit Court alleging: (1) breach of contract and violation of Wis. Stat. § 779.02(5) against interested party Havens Steel Company (Havens), (2) violation of Wis. Stat. § 779.02(5) against defendant Jesse H. Bechtold (Bechtold), (3) claim on a directors' and officers' policy of insurance against defendant Federal Insurance Company (Federal); and (4) breach of a surety bond against defendant United States Fidelity & Guaranty Company (USF&G). Additionally, plaintiff demands that defendant Bechtold provide it with an accounting of all funds that interested party Havens received in connection with the Honda Manufacturing of Alabama frame plant project based upon invoices or payment applications submitted by plaintiff.

Defendants Federal and USF&G removed this action pursuant to 28 U.S.C. §§ 1441 and 1446 citing 28 U.S.C. § 1332 as grounds for removal. Defendant Bechtold and interested party Havens had not been served with process when defendants Federal and USF&G filed their joint notice of removal.

On March 20, 2006 the Court entered an order dismissing this action without prejudice as to interested party Havens. The Court's order explained that the action could be reopened upon completion of Havens' bankruptcy proceedings. Additionally, on May 25, 2006 the Court entered an order granting: (1) defendant Bechtold's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction; and (2) defendant USF&G's motion for summary judgment. Jurisdiction is based on 28 U.S.C. § 1332. The matter is presently before the Court on plaintiff's motion to vacate the portion of the Court's May 25, 2006 order that granted defendant Bechtold's motion to dismiss.¹ Also presently before the Court is defendant Federal's motion for summary judgment. The following facts are either undisputed or those most favorable to the non-moving party.

BACKGROUND

Plaintiff Merrill Iron & Steel Company is a Wisconsin

¹The portion of the Court's May 25, 2006 order that granted defendant United States Fidelity & Guaranty Company's motion for summary judgment will stand regardless of the outcome of the motions presently before the Court.

corporation with its principal place of business in Schofield, Wisconsin. Plaintiff is engaged in the business of fabricating structural steel. Defendant Bechtold is a resident of the State of Missouri residing in Lees Summit, Missouri. At all times relevant to this action defendant Bechtold served as vice-president of finance and chief financial officer of interested party Havens. Additionally, defendant Bechtold served on interested party Havens' board of directors. Interested party Havens is a Missouri corporation with its principal place of business in Kansas City, Missouri and it is likewise engaged in the business of fabricating structural steel. Defendant Federal is an Indiana corporation with its principal place of business in Warren, New Jersey. Defendant Federal is a member of the Chubb Group of Insurance Companies and it is engaged in the insurance business.

On or about April 12, 2001 interested party Havens and plaintiff entered into a formal Joint Venture Agreement. The purpose of said Agreement was to memorialize the parties' existing but informal "spot trade relationship" in which the parties would subcontract fabrication work to each other. According to Mr. Mike Klussendorf who serves as plaintiff's chief financial officer the formal Joint Venture Agreement was intended for use on a "specific large project" which was the reconstruction and remodel of Lambeau Field in Green Bay, Wisconsin. Accordingly, the Agreement states in relevant part as follows:

WHEREAS, the Joint Venture submitted a bid to, and a contract (hereinafter referred to as the "Prime Subcontract"...) has been awarded by, Turner Construction (hereinafter referred to as the "General Contractor"), for the structural steel fabrication and erection package in connection with the construction of the Lambeau Field Redevelopment Project located in Green Bay, Wisconsin...

...NOW THEREFORE, said parties hereto hereby constitute themselves as a Joint Venture for the purpose of performing and completing the Prime Subcontract, but not for any other purpose, it being expressly understood that this Agreement contemplates only the furnishing and performance of the work, labor, services, materials, plant, equipment and supplies necessary for the completion of the Prime Subcontract defined herein and that the parties are not making any permanent partnership agreement or joint venture agreement to bid for or undertake any contracts other than said Prime Subcontract.

Defendant Bechtold did not execute the Joint Venture Agreement on behalf of interested party Havens. However, paragraph nine of said Agreement indicates that defendant Bechtold was designated as one of the individuals who were allowed to write checks or wire funds on interested party Havens' behalf. Additionally, in the year 2002 defendant Bechtold traveled to Green Bay, Wisconsin to discuss issues concerning the parties' Joint Venture Agreement including issues related to subcontractor minority participation requirements.

In addition to his 2002 trip to Green Bay, Wisconsin defendant Bechtold visited the State of Wisconsin on one other occasion. He traveled to Madison, Wisconsin in September of 2001 to attend a continuing education seminar in cost containment at the University

of Wisconsin-Madison. However, it is undisputed that these two occasions were the only instances where defendant Bechtold was physically present in the State of Wisconsin. Additionally, it is undisputed that defendant Bechtold does not own any assets or have any offices or employees in the State of Wisconsin.

On or about November 22, 2002 plaintiff entered into a purchase order agreement with interested party Havens in which plaintiff was to furnish approximately 389 pieces of roof trusses for incorporation into a project known as the Honda Manufacturing of Alabama frame plant project (hereinafter the Honda project) which was located in Lincoln, Alabama. Said purchase order agreement and project serve as the basis for plaintiff's complaint. Defendant Bechtold did not execute the parties' purchase order agreement on behalf of interested party Havens rather it was executed by Mr. Joe Lehmkuhl who serves (or served) as interested party Havens' sub-fabrication manager. Additionally, it is undisputed that defendant Bechtold's name does not appear anywhere in the Honda project's purchase order agreement.

Plaintiff supplied the roof trusses to interested party Havens and said material was inspected and accepted for incorporation into the project. Accordingly, in September of 2003 Mr. Klussendorf signed a final waiver of lien for the project. However, plaintiff failed to receive its full payment from interested party Havens. Its outstanding balance remains at \$108,588.19. Plaintiff alleges

defendant Bechtold breached his fiduciary duty in violation of Wis. Stat. § 779.02(5) by failing to assure that funds paid to interested party Havens for plaintiff's scope of work on the Honda project were paid to plaintiff.

Defendant Federal issued a ForeFront Portfolio Insurance Policy (policy number 8171-1210) to interested party Havens as named insured for the period of March 23, 2003 through April 1, 2004. However, said period was later extended by endorsement through October 1, 2008. Defendant Federal's policy was issued and delivered to interested party Havens as well as to the producer Lockton Companies, Inc. in Kansas City, Missouri.

Plaintiff alleges that defendant Bechtold is an insured person under the terms of this ForeFront Portfolio Insurance Policy because of his status as an executive of interested party Havens. Additionally, plaintiff alleges that defendant Bechtold's violation of Wis. Stat. § 779.02(5) constitutes a wrongful act as such term is defined by said policy. Accordingly, plaintiff alleges the ForeFront Portfolio Insurance Policy issued to interested party Havens by defendant Federal provides coverage for its damages.

On April 3, 2006 defendant Bechtold filed a motion to dismiss for lack of personal jurisdiction which the Court granted on May 25, 2006. On May 30, 2006 plaintiff filed a motion to vacate the portion of the Court's May 25, 2006 order that granted defendant Bechtold's motion to dismiss. In its motion plaintiff alleged that

it did not receive either defendant Bechtold's motion to dismiss or his supporting brief and affidavit until May 26, 2006 which was one day after the Court entered its order. Accordingly, the matter is presently before the Court on plaintiff's motion to vacate. Also presently before the Court is defendant Federal's motion for summary judgment which was filed on June 1, 2006.

MEMORANDUM

Defendant Bechtold concedes that plaintiff did not receive his motion papers concerning his April 3, 2006 motion to dismiss for lack of personal jurisdiction until May 26, 2006. However, defendant Bechtold asserts the Court's order dismissing him from this action should stand because as a Missouri resident he lacks the requisite minimum contacts with Wisconsin that would support the Court's exercise of personal jurisdiction.

Defendant Federal asserts plaintiff cannot maintain its direct action against it because: (1) the insurance policy at issue was neither issued nor delivered in the State of Wisconsin; and (2) the insured is no longer a party to this action. Accordingly, defendant Federal argues it is entitled to summary judgment.

Plaintiff asserts defendant Bechtold can be held personally liable for tortuous acts that he committed in his capacity as chief financial officer of interested party Havens. Additionally, plaintiff asserts defendant Bechtold solicited business during his visit to Green Bay, Wisconsin. Further, plaintiff asserts

defendant Bechtold was personally involved in the Honda project because he was the person responsible for making payment decisions. Accordingly, plaintiff argues defendant Bechtold possesses sufficient contacts with Wisconsin which justify the exercise of personal jurisdiction over him and as such the Court's May 25, 2006 order granting defendant Bechtold's motion to dismiss should be vacated. However, plaintiff failed to respond to defendant Federal's allegation that its direct action against defendant Federal cannot proceed in defendant Bechtold's absence.

The Court finds plaintiff did not receive defendant Bechtold's motion papers concerning his April 3, 2006 motion to dismiss for lack of personal jurisdiction until May 26, 2006 which was one day after the Court entered its order dismissing him from this action. Accordingly, plaintiff was not provided with an opportunity to oppose defendant Bechtold's motion before the Court entered its order. However, plaintiff was provided with such an opportunity when it addressed the merits of defendant Bechtold's motion to dismiss in connection with its brief filed in opposition to defendant Federal's motion for summary judgment. In turn, defendant Bechtold filed his reply on July 17, 2006. Accordingly, defendant Bechtold's April 3, 2006 motion to dismiss for lack of personal jurisdiction is now ripe for decision and the Court will address the merits of said motion before it addresses defendant Federal's motion for summary judgment.

**A. Defendant Bechtold's Motion to Dismiss for Lack of
Personal Jurisdiction**

General personal jurisdiction is proper when a defendant has "continuous and systematic general business contacts" with the forum which allow defendant to be amenable to suit within that forum regardless of the subject matter of the suit. Steel Warehouse of Wis., Inc. v. Leach, 154 F.3d 712, 714 (7th Cir. 1998) (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416, 104 S.Ct. 1868 (1984)). Specific jurisdiction refers to jurisdiction over a defendant in a suit arising from or related to that defendant's contacts with the forum. Id. (citing Helicopteros Nacionales de Colombia, S.A., at 414 n. 8). Plaintiff bears the burden of demonstrating that personal jurisdiction exists. Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd., 100 F.3d 1353, 1359 (7th Cir. 1996) (citations omitted). To satisfy its burden, plaintiff must make a prima facie showing that personal jurisdiction exists. Nelson v. Park Indus., Inc., 717 F.2d 1120, 1123 (7th Cir. 1983) (citations omitted). In deciding whether plaintiff has made the necessary showing the Court may receive and weigh affidavits submitted by the parties. Id. (citation omitted).

Plaintiff does not allege defendant Bechtold has continuous and systematic general business contacts with Wisconsin such that he is subject to general personal jurisdiction. Accordingly, the focus of the Court's analysis is the exercise of specific personal jurisdiction over defendant Bechtold.

In a diversity action such as this a federal court has personal jurisdiction over a non-consenting non-resident defendant to the extent authorized by the law of the state in which that court sits. Giotis v. Apollo of the Ozarks, Inc., 800 F.2d 660, 664 (7th Cir. 1986) (citations omitted). Accordingly, the Court will apply Wisconsin law to determine if defendant Bechtold is subject to specific personal jurisdiction. Under Wisconsin law, the jurisdictional question has two components. First, plaintiff must establish defendant Bechtold comes "within the grasp of the Wisconsin long-arm statute." Steel Warehouse of Wis., Inc., at 714 (citations omitted). Should plaintiff establish that defendant Bechtold is within the grasp of said statute the burden shifts to defendant Bechtold to demonstrate that jurisdiction would violate due process. Id.

Plaintiff alleges Wis. Stat. § 801.05(4)(a) is the provision of Wisconsin's long-arm statute that applies to this action. Said provision states in relevant part as follows:

A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s. 801.11 under any of the following circumstances:

(4) Local injury; foreign act. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

(a) Solicitation or service activities were carried on within this state by or on behalf of the defendant...

The Wisconsin Supreme Court has determined that its long-arm statute "is to be liberally construed in favor of the exercise of jurisdiction." Federated Rural Elec. Ins. Corp. v. Inland Power & Light Co., 18 F.3d 389, 391 (7th Cir. 1994) (citations omitted). Additionally, Wisconsin's long-arm statute is intended to provide for the exercise of jurisdiction over nonresident defendants to the full extent consistent with the requisites of due process of law. Flambeau Plastics Corp. v. King Bee Mfg. Co., 24 Wis.2d 459, 464, 129 N.W.2d 237, 240 (1964) *overruled in part on other grounds by Pavalon v. Thomas Holmes Corp.*, 25 Wis.2d 540, 131 N.W.2d 331 (1964).

Clearly interested party Havens would be subject to personal jurisdiction under Wis. Stat. § 801.05. However, the question is whether defendant Bechtold himself is subject to personal jurisdiction under said statute. It is well established that neither the officers nor the directors of a corporation are personally liable to third parties merely because of their status as officers or directors. Lands' End, Inc. v. Remy, 2005 WL 2932224 at 3, No. 05-C-368-C (W.D.Wis. Nov. 4, 2005) (citation omitted). However, a corporate agent cannot shield himself from personal liability for a tort he personally commits or participates in by hiding behind the corporate entity. Oxmans' Erwin Meat Co. v. Blacketer, 86 Wis.2d 683, 692, 273 N.W.2d 285, 289 (1979).

Plaintiff alleges defendant Bechtold engaged in theft by contractor because he breached his fiduciary duty by failing to assure that funds paid to interested party Havens for plaintiff's scope of work on the Honda project were paid to plaintiff. Additionally, plaintiff alleges that both interested party Havens and defendant Bechtold personally have retained the remaining \$108,588.19 owed to plaintiff. Both of these allegations constitute tortuous acts. Accordingly, defendant Bechtold is subject to suit for his own alleged torts.

However, an officer of a corporation is not always subject to personal jurisdiction in Wisconsin simply because he or she allegedly committed a tortuous act. Pavlic v. Woodrum, 169 Wis.2d 585, 594, 486 N.W.2d 533, 536 (Wis. Ct. App. 1992). There must be some act or omission by that officer in Wisconsin to justify exercising personal jurisdiction. Id. There is neither an act nor an omission by defendant Bechtold in Wisconsin which justifies exercising personal jurisdiction over him. Accordingly, the Court's order granting his motion to dismiss must stand.

Plaintiff contends the Joint Venture Agreement between it and interested party Havens demonstrates that defendant Bechtold solicited plaintiff in Wisconsin. However, it is undisputed that defendant Bechtold did not execute this Agreement on behalf of interested party Havens. Additionally, while paragraph nine of the Agreement indicates that defendant Bechtold was designated as one

of the individuals who was allowed to write checks or wire funds on interested party Havens' behalf this alone is not evidence of solicitation. Plaintiff's cited definition of solicitation is as follows: "[t]he act or an instance of requesting or seeking to obtain something." *Black's Law Dictionary*, 1124 (7th ed.). Writing checks and wiring funds can hardly be categorized as solicitation under this definition.

As an additional justification for exercising personal jurisdiction, plaintiff asserts that defendant Bechtold solicited business during his 2002 visit to Green Bay, Wisconsin in which issues concerning the Joint Venture Agreement were discussed. However, even if this allegation proved correct it does not establish personal jurisdiction over defendant Bechtold because specific personal jurisdiction refers to jurisdiction over a defendant in a suit arising from or related to that defendant's contacts with the forum, Steel Warehouse of Wis., Inc., at 714 (citation omitted), and it is undisputed that this action does not arise from or relate to the Joint Venture Agreement.

Such a conclusion is supported by the language of the Joint Venture Agreement. Said Agreement clearly indicates that it only applied to the Lambeau Field Redevelopment project. For example, one paragraph of the Agreement reads in relevant part as follows: "said parties hereto hereby constitute themselves as a Joint Venture for the purpose of performing and completing the Prime

Subcontract, but not for any other purpose...the parties are not making any permanent partnership agreement or joint venture agreement." Mr. Klussendorf's statement that the formal Joint Venture Agreement was intended for use on a "specific large project" which was the reconstruction and remodel of Lambeau Field in Green Bay, Wisconsin is further support for this conclusion.

This cause of action arises from the purchase order agreement that interested party Havens entered into with plaintiff for the Honda project and it is undisputed that defendant Bechtold did not execute said agreement on behalf of interested party Havens. Rather, it was executed by Mr. Lehmkuhl who serves (or served) as interested party Havens' sub-fabrication manager. Additionally, it is undisputed that defendant Bechtold's name does not appear anywhere in the purchase order agreement concerning the Honda project. Accordingly, there is no evidence that defendant Bechtold solicited plaintiff for the Honda project and as such he does not come within the grasp of Wisconsin's long-arm statute.

However, plaintiff argues that defendant Bechtold was personally involved in the Honda project because he was the one responsible for making payment decisions related to that project. Plaintiff also alleges that defendant Bechtold intentionally withheld plaintiff's payment. Accordingly, plaintiff argues that these facts justify exercising personal jurisdiction over defendant Bechtold. While these allegations may satisfy the local injury;

foreign act portion of subsection (4) of Wis. Stat. § 801.05 they do not satisfy the solicitation requirement of subsection (4)(a) of said statute. Accordingly, plaintiff failed to meet its burden of establishing that defendant Bechtold comes within the grasp of Wisconsin's long-arm statute.

Finally, plaintiff attempts to establish personal jurisdiction by arguing that defendants with fewer contacts to Wisconsin than defendant Bechtold have been held to be subject to jurisdiction in Wisconsin. Plaintiff cites State v. Advance Mktg. Consultants, Inc., 66 Wis.2d 706, 225 N.W.2d 887 (1975); Fields v. Playboy Club of Lake Geneva, Inc., 75 Wis.2d 644, 250 N.W.2d 311 (1977) as support for this assertion. However, these cases are distinguishable from the present action because in both Advance Mktg. Consultants, Inc. and Fields the individual officer or corporate defendant acted in Wisconsin during their alleged tortuous activity.

In Advance Mktg. Consultants, Inc., the individual officer came to Wisconsin, discussed business with the plaintiff, presented a contract to the plaintiff, and eventually became a signatory to the parties' contract. Advance Mktg. Consultants, Inc., at 711, 225 N.W.2d at 890. In Fields, the corporate defendant Audi advertised its product in Wisconsin through national magazines. Fields, at 650, 250 N.W.2d at 315. However, in this action defendant Bechtold never committed any acts in Wisconsin. His only

actions concerning the Honda project occurred in Missouri. Accordingly, both Advance Marketing Consultants, Inc. and Fields are not controlling.

Plaintiff failed to establish that defendant Bechtold comes "within the grasp of the Wisconsin long-arm statute." Steel Warehouse of Wis., Inc., at 714 (citations omitted). Accordingly, the Court need not address whether exercising jurisdiction would violate due process. Id. As such, the Court's May 25, 2006 order granting defendant Bechtold's motion to dismiss for lack of personal jurisdiction must stand.

B. Defendant Federal's Motion for Summary Judgment

Defendant Federal alleges plaintiff cannot maintain its direct action against it because: (1) the insurance policy at issue was neither issued nor delivered in the State of Wisconsin; and (2) the insured is no longer a party to this action. Accordingly, defendant Federal argues it is entitled to summary judgment. Plaintiff failed to respond to this allegation.

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56©).

Plaintiff failed to respond to defendant Federal's proposed findings of fact. Accordingly, the Court views defendant Federal's

proposed facts as undisputed. McGee v. Wis. Bell, Inc., 349 F.Supp.2d 1146, 1149 (W.D. Wis. 2004). When the material facts are not in dispute the "sole question is whether the moving party is entitled to judgment as a matter of law." Santaella v. Metro. Life Ins. Co., 123 F.3d 456, 461 (7th Cir. 1997) (citations omitted). Defendant Federal is entitled to summary judgment as a matter of law. However, the Court's decision rests on different grounds than those asserted by defendant Federal.

In Wisconsin the ability to sue an insurance carrier is authorized by Wis. Stat. § 632.24 which states in relevant part as follows:

Any bond or policy of insurance covering liability to others for negligence makes the insurer liable, up to the amounts stated in the bond or policy, to the persons entitled to recover against the insured for...injury to ...property, irrespective of whether the liability is presently established or is contingent and to become fixed or certain by final judgment against the insured.

Courts have interpreted the direct action statute as creating a separate claim against the insurer for damages caused by the negligence of the insured. See Decade's Monthly Income and Appreciation Fund v. Whyte & Hirschboeck, S.C., 164 Wis.2d 227, 235, 474 N.W.2d 766, 769 (Wis. Ct. App. 1991); Gibson v. City of Glendale Police Dept., 786 F.Supp. 1452, 1455 (E.D. Wis. 1992) (applying Wisconsin law). The plain language of Wis. Stat. § 632.24 demonstrates that a direct action against an insurer may proceed when the underlying claim against the insured is grounded

in negligence. See Wis. Stat. § 632.24.

However, Wis. Stat. § 632.24 "does not provide a right of action against the insurer for a separate, intentional tort committed by the insurer." Kranzush v. Badger State Mut. Cas. Co., 103 Wis.2d 56, 75, 307 N.W.2d 256, 266 (1981). Plaintiff has not inserted a negligence claim against either interested party Havens or defendant Bechtold. Rather, its only claims against said parties are for breach of contract and theft by contractor which are separate intentional torts allegedly committed by the insureds. Accordingly, the Court must grant defendant Federal's motion for summary judgment.

ORDER

IT IS ORDERED that plaintiff's motion to vacate the portion of the Court's May 25, 2006 order that granted defendant Jesse H. Bechtold's motion to dismiss for lack of personal jurisdiction is DENIED.

IT IS FURTHER ORDERED that defendant Federal Insurance Company's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment is entered in favor of defendants Federal Insurance Company and United States Fidelity and Guaranty Company against plaintiff dismissing the action and all claims contained therein with prejudice and costs.

IT IS FURTHER ORDERED that judgment is entered in favor of defendant Jesse H. Bechtold against plaintiff dismissing the action and all claims contained therein without prejudice.

Entered this 28th day of July, 2006.

BY THE COURT:

JOHN C. SHABAZ

District Judge