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

ROBERT W. FELLAND,

Plaintiff,

v.

PATRICK CLIFTON;
CM LA PERLA DE PENASCO, S. DE R.L. DE C.V.,
a Mexican corporation; and
CLIFTON MERIDIAN LLC,

Defendants.

OPINION AND ORDER

10-cv-664-slc

The subject of this removal case is a planned but never-completed seaside condominium development in Mexico known as La Parela del Mar. On June 1, 2010, plaintiff Robert Felland commenced a civil action against defendants Patrick Clifton, CM La Perla de Penasco, S. De R.L. De C.V. and Clifton Meridian LLC in the Circuit Court for Oneida County, Wisconsin, seeking rescission of the contract, which he alleges defendants fraudulently induced him to sign for the construction and purchase of a condo, and the return of his down payments. Dkt. 1, Exh. 2. On November 1, 2010, defendants removed the case to this court pursuant 9 U.S.C. § 205, which grants federal subject matter jurisdiction over international agreements arising under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq*., and the Inter-American Convention on International Commercial Arbitration, 9 U.S.C. § 301 *et seq*. Dkt. 1.

Before the court is defendants' motion to dismiss Felland's complaint for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2). Dkt. 15. Felland has filed a motion to remand in which he contests subject matter jurisdiction. Dkt. 4. Although subject matter jurisdiction generally should be considered before personal jurisdiction, a district court may entertain a

motion to dismiss for lack of personal jurisdiction without determining whether subject matter jurisdiction exists. *Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corporation*, 230 F.3d 934, 939 n. 2 (7th Cir. 2000) (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578, 587-88 (1999)). In this case, the parties have agreed that given the potentially complex question of subject matter jurisdiction, it is more efficient for the court first to resolve the issue of personal jurisdiction, dkt. 22, and I have accepted the joint stipulation to stay other proceedings until the matter of personal jurisdiction was resolved. Dkt. 23.

Defendants contend that this court cannot exercise jurisdiction over them because they lack sufficient contacts with the state of Wisconsin to satisfy the personal jurisdiction requirements of Wisconsin's long-arm statute and the Fourteenth Amendment's due process clause. Because I conclude that Felland has failed to meet his burden with respect to the due process clause, it is unnecessary to consider the requirements of the long arm statute. In short, I am granting defendants' motion to dismiss for lack of personal jurisdiction.

From the complaint and the documents submitted by the parties in connection with the pending motion, I draw the following facts, solely for the purpose of deciding this motion.

JURISDICTIONAL FACTS

Plaintiff Robert Felland is a resident of Three Lakes, Wisconsin in Oneida County. Defendant Patrick Clifton is a resident of Scottsdale, Arizona who owns and controls both defendant Clifton Meridian LLC, which is organized under Arizona law, as well as defendant CM La Perla de Penasco, S. De R.L. De C.V. ("CM la Perla"), a corporation organized under the laws of Mexico. Defendant Clifton Meridian is a real estate development firm based in Scottsdale

that specializes in building upscale beachfront residential projects located primarily in Northern Mexico.

In 2005, Clifton and Clifton Meridian began a luxury high rise condominium project named "La Perla del Mar" (the "Project") in the beachfront community of Puerto Penasco, Mexico, about 30 miles from the Arizona border. Clifton had formed CM La Perla to serve as the owner of the property on which the Project was to be constructed and to facilitate the sale of condominium units. CM La Perla maintained a sales office for the Project in Puerto Penasco, where it employed sales representatives employed by or affiliated with Clifton Meridian.

On February 23, 2006, while vacationing in Arizona, Felland and his wife, Linda Felland, made an excursion to Puerto Penasco to tour the Project's model unit. During their visit, the Fellands met with defendants' sales representative, Jon Puckett. The Fellands identified themselves as residents of Three Lakes, Wisconsin and provided Puckett their Wisconsin mailing address, telephone number and their e-mail address. During the sales presentation, the Fellands were told that construction of the Project was to start in a few weeks and would be completed no later than early 2008. None of the defendants (or their agents) told the Fellands that the defendants had not secured construction financing or that the initiation of construction was contingent upon the sale of additional units.

Relying on defendants' representations, and while still on site in Puerto Penasco, Felland signed a "Reservation of Unit" form on February 23, 2006, and paid a refundable $5,000 deposit. The form lists the Fellands' Wisconsin address and telephone number and also identifies Patrick Clifton as the representative and manager of CM La Perla. Under the terms

of the Reservation of Unit form, a buyer wishing to finalize the purchase of the unit had to sign a type of contract under the laws of Mexico called a Promise of Trust Agreement (PTA).

The Fellands returned to Arizona. On March 5, 2006, Puckett sent an email to the Fellands to confirm their plans to return to Puerto Penasco to execute the PTA. Four days later, Felland signed the PTA, which stated that CM La Perla was represented by Patrick Clifton. However, Clifton did not sign the form at that time.

The PTA states that the Project "will be built" and that CM La Perla "commits to deliver" Felland's condominium "no later than January 31, 2009." The purchase price for Felland's unit was $680,000. The PTA required a 30% down-payment (totaling $204,000), payable in three installments of $68,000 over 90 days. Having already paid $5,000 when he signed the Reservation of Unit form, Felland tendered a check for an additional $63,000 when he signed the PTA. Felland was told that a fully executed copy of the PTA would be mailed to him once it had been signed by Patrick Clifton.

Later in March 2006, the Fellands returned to Wisconsin. On April 10, 2006, when the next $68,000 payment was due, Linda Felland e-mailed Puckett to advise that her husband was "talking about canceling" the purchase because "no signed documents" had been received, a telephone call had not been returned and there were "no receipts/verifications that we have put down the first installment." Linda Felland also sought assurances that the Project was on track before sending the payment.

Puckett responded by e-mail, which the Fellands received in Wisconsin, indicating that the developer "was sending out the countersigned PTA ASAP." Puckett closes by assuring "please don't worry this is a great project and has huge appreciation potential. I have 168K of

my personal money invested in unit 801 I would not sell something that I am not invested in." Dkt. 27, Exh. C. The signed PTA and a "Statement" reflecting the receipt of the first $5,000 and $63,000 payments were mailed to the Fellands in Wisconsin in an envelope postmarked April 10, 2006.

Mollified, the Fellands decided to continue making payments on their down payment. On April 12, 2006 and again on May 7, 2006, Linda Felland mailed a check in the amount of $68,000 to defendants' Scottsdale address. Defendants' mailed statements to the Fellands reflecting the receipt of those installment payments on April 20 and June 2, 2006, respectively. But for defendants' continued statements confirming their payments, the Fellands would not have continued paying toward the down payment on their reserved unit and would have pulled out of the transaction (as indicated in Linda Felland's April 10, 2006 e-mail). Defendants' statements led the Fellands to believe that defendants were competent and reputable businesspeople who were processing their transaction properly, and that the project was proceeding as scheduled.

Over the course of 2006 and 2007, the Fellands received approximately six telephone calls to their home telephone in Wisconsin from employees of Clifton Meridian. These calls occurred both before and after the Fellands sent installments on their down payment. Between 2006 and 2009, defendants sent various communications via e-mail and regular mail to the Fellands in Wisconsin regarding the status of the project. For example, in an e-mail dated July 26, 2006, Puckett wrote that "groundbreaking will be now in August and completion would then be targeted for mid 08." Dkt. 27, Exh. F. In 2007 and 2008, defendants forwarded photographs purporting to show the commencement of excavation. Although defendants repeatedly

postponed the start of construction, they always assured the Project's buyers via e-mail that construction would soon begin.[1] These updates sent by defendants caused the Fellands to believe that the project was proceeding as planned.

But defendants failed to deliver Felland's condominium by January 31, 2009. On February 10, 2009, Defendant Patrick Clifton sent an e-mail to all of the owners, stating in part:

> Unfortunately I must be very clear about the following: if anyone, I don't care who they are, engages in any activities to deliberately sabotage our financing attempts by organizing some type of legal action against the project or spread malicious and false lies about the project or developer I will assure you that we will take immediate and punitive legal action against the party or parties at fault.

After receiving this e-mail, the Fellands contacted an attorney, who on February 18, 2009, demanded that defendants refund the Fellands' $204,000 payment. Defendants refused. On April 9, 2009, Felland's attorney requested copies of any construction financing agreements or commitments in place at the time Felland paid the $204,000 in 2006. In a telephone call shortly thereafter, defendants' attorney stated that there were no construction finance agreements or commitments. Similarly, in an e-mail dated April 29, 2009, defendants' attorney stated that there was no "funding when your client signed on" and that "advance sales were funding the undertaking of the project." Construction of the Project has not advanced beyond the limited and preliminary work performed in 2007 and 2008.

[1] Many of the e-mails are impersonal announcements addressed to "Friends of *La Perla del Mar*" and were sent to multiple recipients. *See*, *e.g.* Dkt. 27, Exhs. G - K, P-Q.

OPINION

I. Legal Framework

On a motion to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), the burden of proof rests on the party asserting jurisdiction–here, Felland– to make a prima facie showing supporting that assertion. *Hyatt International Corp. v. Coco*, 302 F.3d 707, 713 (7th Cir. 2002). In deciding defendants' dismissal motion, this court must accept as true all well-pleaded facts alleged in the complaint and also resolve in Felland's favor all disputes concerning relevant facts presented in the record. *Purdue Research Foundation v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 782 (7th Cir. 2003) (quoting *Nelson v. Park Industries, Inc.*, 717 F.2d 1120, 1123 (7th Cir. 1983)); *see also Tamburo v. Dworkin*, 601 F.3d 693, 700 (7th Cir. 2010) (quoting same).

A federal court has personal jurisdiction over a non-consenting, nonresident 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), unless the federal statute at issue permits nationwide service or the defendant is not subject to personal jurisdiction in any state in the United States, Fed. R. Civ. P. 4(k)(1) and *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1201-02 (7th Cir. 1997). Because the parties do not assert that either exception applies in this case, the issue is whether there is personal jurisdiction over defendants under Wisconsin law.

In Wisconsin, this is a two-step inquiry. First, the court must determines whether the defendants fall within the grasp of Wisconsin's long-arm statute, Wis. Stat. § 801.05. *Logan Prods., Inc. v. Optibase, Inc.*, 103 F.3d 49, 52 (7th Cir. 1996); *Kopke v. A. Hartrodt S.R.L.*, 245 Wis. 2d 396, 408-09, 629 N.W.2d 662, 667-68 (Wis. 2001). If the statutory requirements are satisfied, then the court must consider whether the exercise of jurisdiction over each defendant

comports with due process requirements of the Fourteenth Amendment of the United States Constitution. *Id.* Because I conclude that Felland has failed to meet the constitutional requirements for jurisdiction, it is unnecessary to decide whether he also has met the requirements of Wis. Stat. § 801.05. *Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*, 297 F. Supp. 2d 1154, 1157 (W.D. Wis. 2004) (citing *Steel Warehouse of Wisconsin, Inc. v. Leach*, 154 F.3d 712, 714 (7th Cir. 1998)).

II. Due Process

To comply with due process, "a defendant must have 'certain minimum contacts with [the state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1277 (7th Cir. 1997) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Personal jurisdiction under the due process clause is divided into two types, general and specific. *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Associates of Houston Metroplex, P.A.*, 623 F.3d 440, 444 (7th Cir. 2010). General jurisdiction means that the defendant "may be called into court there to answer for any alleged wrong, committed in any place." *uBID, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421, 425-26 (7th Cir. 2010). This "is a demanding standard that requires the defendant to have such extensive contacts with the state that it can be treated as present in the state for essentially all purposes." *Id.* Felland does not suggest that he can meet this standard with respect to defendants, and the evidence would not support such a claim.

Specific jurisdiction means that the alleged injuries "arise out of or relate to" actions "purposefully directed" by the defendant to residents in the forum state. *Burger King Corp. v.*

Rudzewicz, 471 U.S. 462, 472-73 (1985) (internal citations omitted). Requiring a nexus between a party's contacts and the parties' dispute adds a degree of predictability to the legal system by allowing 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. *Hyatt International Corp.*, 302 F.3d at 716. The reason for this is simple:

> Potential defendants should have some control over—and certainly should not be surprised by—the jurisdictional consequences of their actions. Thus, when conducting business with a forum in one context, potential defendants should not have to wonder whether some aggregation of other past and future contacts will render them liable to suit there.
>
> *Id.*

The crucial inquiry is whether a defendant's contacts with the state are such that it should reasonably anticipate being haled into court. *International Medical Group, Inc. v. American Arbitration Association, Inc.*, 312 F.3d 833, 846 (7th Cir. 2002) (citing *Burger King*, 471 U.S. at 474). A defendant can "reasonably anticipate" out-of-state litigation when it commits "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Burger King*, 471 U.S. at 475 (citations omitted). Defendants must have engaged "deliberately" in "significant activities" within the state. *Id.* at 475-76. The cause of action also "must *directly arise* out of the specific contacts between the defendant and the forum state." *GCIU-Employer Retirement Fund v. Goldfarb Corp.*, 565 F.3d 1018, 1024 (7th Cir. 2009) (quoting *RAR*, 107 F.3d at 1277) (emphasis in original).

Most of the salient events took place in Mexico: defendants advertised the Project, offered tours and made their sales pitches in Puerto Penasco. Felland was on site in Mexico when he signed two agreements and paid a deposit and the first installment on his down payment. After all this, defendants' contacts with Wisconsin over the next three years consist of mailing the signed contract and three receipts, making six telephone calls to the Fellands and sending personal and generic e-mails providing updates on the Project. To be relevant, these contacts must have been purposeful and bear on the substantive legal dispute between the parties. *GCIU*, 565 F.3d at 1024 (citing *RAR*, 107 F.3d at 1278).

Felland emphasizes that he made it clear that he was a resident of Wisconsin in all his dealings with defendants. However, as both the Supreme Court and the Court of Appeals for the Seventh Circuit have made clear, "an out-of-state party's contract with an in-state party is alone not enough to establish the requisite minimum contacts." *RAR*, 107 F.3d at 1277 (citing *Burger King*, 471 U.S. at 478). In fact, if this case involved a breach of contract claim, the personal jurisdiction analysis would be limited to defendants' conduct during the formation of the contract in Mexico. *See RAR*, 107 F.3d at 1278 ("in a breach of contract case, it is only the 'dealings between the parties in regard to the disputed contract' that are relevant to minimum contacts analysis") (adopting standard set forth by Third Circuit in *Vetrotex Certainteed Corp. v. Consolidated Fiber Glass Prods. Co.*, 75 F.3d 147, 153 (3d Cir. 1996)). Only where a contract has a substantial connection to the state, such as ongoing regulation from within the state, is a defendant said to have "reached out" for the purposes of minimum contacts. *Burger King*, 471 U.S. at 478-79. *See also Hyatt International Corp.*, 302 F.3d at 716. A contract anticipating no more than phone calls and payments to the state is not likely sufficient to establish minimum

contacts. *Federated Rural Electric Ins. Corp. v. Inland Power and Light Co.*, 18 F.3d 389, 395 (7th Cir. 1994).

However, in a tactical maneuver, Felland has eschewed a contract claim in favor of a misrepresentation claim, alleging that defendants misled him about the viability of the condominium project in a series of mailings and e-mails sent to his residence in Wisconsin.[2] Felland asserts that the communications he received from defendants after he returned to Wisconsin in March 2006 caused him to make the final two installments on his down payment and not pull out of the project.

Specifically, prior to Felland sending the final two installments on his down payment, defendants mailed him the signed contract and a receipt for the initial $68,000 payment and e-mailed him a receipt for his April 2006 payment. Although Felland also avers that defendants telephoned him a few times at his Wisconsin residence before he made the last two payments, he has not adduced any evidence about the subject matter of these calls and has not explained how he relied on them to his detriment. There also is evidence that defendants sent several e-mails over the next three years, updating buyers on the status of excavation and funding. However, Felland has not alleged that he incurred any further loss in reliance on these

[2] Assuming, *arguendo*, that Wisconsin law ends up governing this lawsuit (the PTA's choice-of-law clause chooses the law of Hermosillo, Sonora, Mexico), it is questionable whether Felland would be allowed to proceed on his misrepresentation claim. In Wisconsin, the economic loss doctrine prevents contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship. *Wickenhauser v. Lehtinen*, 302 Wis. 2d 41, 67, 734 N.W.2d 855, 868 (Wis. 2007). Although there is a narrow exception for claims of fraud in the inducement, the alleged fraud must have occurred before the contract was formed and be extraneous to the contract itself. *Id.* Simply put, misrepresentations relating to a breaching party's performance or the quality of the goods involved do not give rise to a separate cause of action. *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶ 43, 283 Wis.2d 555, 586, 699 N.W.2d 205, 219 (citations omitted). Because the viability of Felland's state law claim is not currently before the court, I must consider Felland's misrepresentation claim as the relevant cause of action in conducting the personal jurisdiction analysis.

reassurances, apart from not bringing this lawsuit sooner. In other words, Felland's cause of action did not arise out of those later communications received from defendants.

To make out a claim for intentional misrepresentation, Felland would have to show: (1) a false representation of fact; (2) made with the intent to defraud and for the purpose of inducing another to act on it; and (3) such person relies on the representation to his or her detriment. *Brentwood Condo, LLC v. Walstead*, 2010 WL 4972682, ¶ 28 (Wis. Ct. App. Nov. 24, 2010) (citing *Lundin v. Shimanski*, 124 Wis. 2d 175, 184, 368 N.W.2d 676 (Wis. 1985)). Defendants' communications into Wisconsin consisted of follow up paperwork on the sale of the condominium unit and were subsequent to and temporally remote from Felland's actual commitment to pay the down payment. The alleged misrepresentations upon which Felland relied to his detriment were made in Mexico at the time of the sale. Felland points out that the copy of the PTA sent to his home contained representations about when the project would be completed. However, he signed this PTA with those very representations in Mexico. In their later communications with Felland, defendants did not ask for more money or otherwise ask him to make an additional commitment beyond those Felland made in Mexico when he signed the PTA.

Even assuming that defendants' communications somehow reassured Felland that construction was proceeding in timely manner and contributed to his decision to make the last two installments required of him by the PTA, they did not "directly" cause him to suffer injury and they are too attenuated to support specific personal jurisdiction. *See GCIU*, 565 F.3d at 1025 (distinguishing between acts that actually cause harm and those that contribute to harm in personal jurisdiction analysis). Arguably, Felland might not have paid the remainder of his

installments had defendants not sent Felland the signed contract and payment receipts. However, this "but for" causal relationship between defendants' contacts with the state and Felland's alleged harm is not sufficient to establish the required nexus between the contacts and the cause of action. *Id.* ("But-for causation cannot be the sole measure of relatedness because it is vastly overinclusive in its calculation of a defendant's reciprocal obligations. The problem is that it 'has . . . no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain.'") (quoting *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 322 (3d Cir. 2007)).

In addition, it would be neither fair nor just to subject defendants to personal jurisdiction in this forum merely because they sent the signed contract and payment receipts to Felland in Wisconsin. Defendants did not initiate these conversations, they did not make additional promises and they did not request additional money beyond that Felland already had contracted to pay. They responded to Felland's request for a receipt by mailing him a receipt rather than say, holding it for him to pick up the next time he was in Arizona. This is not enough to establish that defendants purposefully availed themselves of the privilege of conducting activities within Wisconsin. To force a defendant to defend itself in a Wisconsin court simply because a Wisconsin resident happened to make a large purchase in Mexico would be inequitable and exactly the kind of random and attenuated situation the Court contemplated in *Burger King*. *See Fried v. Surrey Vacation Resorts, Inc.*, 2009 WL 585964, *5 (W.D. Wis. Mar. 6, 2009) (concluding same with respect to defendants' collection of monthly maintenance fees from Wisconsin resident for timeshare purchased in Missouri).

Let's be clear about what this means and what it does not mean. This court has not taken sides on the underlying dispute. This court has not decided whether there is subject matter over this lawsuit. This court has not decided under which sovereign's law such determinations will be made. This court simply has concluded that exercising personal jurisdiction in Wisconsin over any of these defendants would violate due process. Therefore, I am granting defendants' motion to dismiss for lack of personal jurisdiction.

ORDER

IT IS ORDERED that:

(1) The motion to dismiss by defendants Patrick Clifton, CM La Perla de Penasco, S. De R.L. De C.V. and Clifton Meridian LLC is GRANTED, and plaintiff Robert Felland's complaint is DISMISSED without prejudice.

(2) The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 14th day of March, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge