

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

JOHN NOEL, TYLER NOEL,
BETSY BROUGHER and WILLIAM ATKINS,

Plaintiffs,

v.

HCC INSURANCE HOLDINGS, INC.,

Defendant.

OPINION AND ORDER

11-cv-379-bbc

In 2007, plaintiffs John Noel, Tyler Noel, Betsy Brougher and William Atkins sold Multinational Underwriters, LLC to defendant HCC Insurance Holdings, Inc., but it was not a clean split. Plaintiff Brougher remained president of Multinational Underwriters and plaintiff Atkins also continued working there. All plaintiffs had the potential to receive “earnout payments” for several years under certain conditions. Eventually, the relationship between the parties soured and Brougher and Atkins left the company.

In this civil action, plaintiffs contend that defendant has breached various provisions of the purchase agreement and its duty of good faith and fair dealing. Defendant has moved to dismiss the case for lack of personal jurisdiction or, in the alternative, for failure to state

a claim upon which relief may be granted. I must resolve the jurisdictional question before the merits. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999).

In an order dated September 7, 2011, dkt. #28, I directed plaintiffs to submit supplemental materials regarding their domicile so that I could determine whether subject matter jurisdiction was present under 28 U.S.C. § 1332, which requires complete diversity of citizenship. Dakuras v. Edwards, 312 F.3d 256, 258 (7th Cir. 2002) (citizenship of individuals determined by their domicile for purpose of § 1332). In addition, I gave plaintiffs an opportunity to file a supplemental brief to address two matters raised in defendant's reply brief. In response, plaintiffs have filed a supplemental brief, along with affidavits and declarations showing that each of them is domiciled in Wisconsin or Indiana. Because defendant is a citizen of Delaware (its state of incorporation) and Texas (its principal place of business), complete diversity is present.

Turning to the question of personal jurisdiction, I conclude that plaintiff has made a prima facie showing that this court may exercise general jurisdiction over defendant on the ground that defendant exercises complete control over Multinational Underwriters, which is a Wisconsin limited liability company. Accordingly, I am denying defendant's motion to dismiss for lack of personal jurisdiction. I will address defendant's motion to dismiss for failure to state a claim in a separate order.

OPINION

Plaintiffs have the burden to show that subjecting defendant to suit in this state is consistent with both Wisconsin's long arm statute, Wis. Stat. § 801.05, and the due process clause. Purdue Research Foundation v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 782 n. 11 (7th Cir. 2003); Hyatt International Corp. v. Coco, 302 F.3d 707, 713 (7th Cir. 2002); Giotis v. Apollo of the Ozarks, Inc., 800 F.2d 660, 664 (7th Cir. 1986). With respect to the long arm statute, plaintiffs rely on Wis. Stat. § 801.05(5)(d), which authorizes jurisdiction when the action “[r]elates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on the defendant's order or direction.” In particular, plaintiffs argued in their opposition brief that “[s]ection 801.05(5)(d) applies here because this action relates to documents of title—the plaintiffs’ certificates of membership in [Multinational Underwriters]—that the plaintiffs shipped to [defendant] to fulfill their closing obligations under the Agreement.” Defendant argues that § 801.05(5)(d) does not apply for three reasons: (1) certificates of membership in a limited liability company are not “documents of title”; (2) this lawsuit does not “relate to” those documents; and (3) defendant did not direct plaintiffs to ship the membership certificates from Wisconsin.

With respect to the first reason, defendant says that the phrase “documents of title” is a term of art that relates to documents reflecting ownership of *goods*. In support, defendant cites a definition from Wisconsin’s version of the Uniform Commercial Code and a

prominent legal dictionary. Wis. Stat. § 401.201(2)(i) (“‘Document of title’ means a record that in the regular course of business or financing is treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers.”); Black’s Law Dictionary (9th ed. 2009) (“A written description, identification, or declaration of goods authorizing the holder (usu. a bailee) to receive, hold, and dispose of the document and the goods it covers.”).

Plaintiffs do not identify any other definition of the term in case law or the Wisconsin statutes that could apply. Instead, they simply argue that § 801.05(5)(d) “must be liberally construed in favor of jurisdiction.” Plts.’ Br., dkt. #29, at 5. Plaintiffs are correct about the canon of construction, Federated Rural Electric Insurance Corp. v. Inland Power and Light Co., 18 F.3d 389 (7th Cir. 1994); Marsh v. Farm Bureau Mutual Insurance, 179 Wis. 2d 42, 505 N.W.2d 162 (Ct. App. 1993), but this canon has little meaning in the context of this issue if the phrase “document of title” has an established legal meaning. Liberally construing a statute does not give a court license to create its own meaning for a particular term.

My own research uncovered one alternative definition in Wis. Stat. § 700.01(2) in the chapter titled “Property”: “‘Document of title’ means a document which is evidence of ownership of certain kinds of personal property, tangible or intangible, the ownership of which may be transferred by transfer of the document.” This definition could cover the membership certificates if a membership interest in a limited liability company qualifies as

“personal property” and the transfer of the certificates was sufficient to transfer ownership of the company. Because the parties do not acknowledge § 700.01, they do not address these questions.

Even if I assumed that the membership certificates meet the definition under § 700.01, there are reasons to question whether the § 801.05(5)(d) embraces the broader definition. As defendant points out, § 801.05(5) is titled “Local services, goods or contracts.” Paragraphs (a), (b) and (c) address services and contracts, leaving (d) and (e) to cover “goods.” Thus, it is reasonable to infer that the meaning of “documents of title” in § 801.05(5)(d) matches the meaning from the UCC, which regulates the buying and selling of goods.

Plaintiffs argue for the first time in their supplemental brief that the membership certificates fall within § 801.05(5)(d) even if they are not “documents of title” because they are “things of value.” Plaintiffs do not develop an argument on this issue, but cite Mid-States Mortgage Corp. v. Louie, 841 F. Supp. 871, 874-75 (E.D. Wis 1993), in which the court concluded that stock certificates “indisputably are things of value” without further explanation. Although I may assume that the membership interests in the company had value, it is another question whether the certificates themselves had independent value. In any event, plaintiffs waived this argument by failing to raise it in their first brief.

If I assumed that the membership certificates are “documents of title” or “things of

value” under § 801.05(5)(d), the next question would be whether this action “relates to” those certificates. Plaintiffs say yes “because the plaintiffs allege that [defendant] breached its agreement, in consideration for title in [Multinational Underwriters], to operate [Multinational Underwriters] in a certain manner for a period of three years after the plaintiffs conveyed title.” Plts.’ Br., dkt. #15, at 9. Plaintiffs rely on Sub-Zero Freezer Co., Inc. v. R.J. Clarkson Co., Inc., 159 Wis. 2d 230, 234, 464 N.W.2d 52 (Ct. App. 1990), in which the court held that “[a]n action alleging breach of an agreement settling contract disputes concerning goods ‘relates’ to those same goods.”

Sub-Zero Freezer is not on point. This lawsuit has nothing to do with the adequacy of the membership certificates or even the sale of the company; plaintiffs are not accusing defendant of any improprieties in the transfer. Rather, plaintiffs are alleging that defendant breached its agreement regarding the *operation* of the company after the transfer. In particular, plaintiffs contend that defendant breached the agreement by refusing to allow plaintiff Brougher “to make any significant operational decisions,” terminating plaintiffs Brougher and Atkins, failing to give plaintiffs notice of certain decisions and generally making poor business decisions that had a negative impact on the value of the company. Although that agreement includes a provision regarding delivery of the certificates, that is not enough if the underlying dispute is not related to the certificates. E.g., FL Hunts, LLC v. Wheeler, 2010 WI App 10, ¶ 17, 322 Wis. 2d 738, 750-751, 780 N.W.2d 529, 535

(dispute about employment did not “relate to” goods shipped to Wisconsin under Wis. Stat. § 801.05(5)(d) simply because employment contract at issue included provision regarding those goods).

Accordingly, I conclude that plaintiffs have not met their burden to show that an exercise of jurisdiction is appropriate under Wis. Stat. § 801.05(5)(d). Because I agree with defendant that the action does not “relate to” the membership certificates within the meaning of § 801.05(5)(d), I need not consider whether defendant directed plaintiffs to ship the certificates from Wisconsin.

Plaintiffs do not cite any other provision of the long arm statute, but they do cite Rasmussen v. General Motors Corp., 2011 WI 52, — Wis. 2d —, 2011 WL 2586324, in which the court considered whether Wisconsin had “general personal jurisdiction” over a defendant under Wis. Stat. § 801.05(1)(d). That provision authorizes an exercise of jurisdiction when the defendant “[i]s engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.” I have stated in previous cases that § 801.05(1)(d) “is similar to the test for general jurisdiction under the due process clause, under which the plaintiff must show that the defendants’ contacts are so ‘continuous and systematic’ that it would be fair to sue the defendant in that state on any matter, even those unrelated to its contacts.” Ricoh Co., Ltd. v. Asustek Computer, Inc., 481 F. Supp. 2d 954, 962 (W.D. Wis. 2007) (citing Helicopteros

Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984)). This is consistent with the view of the Wisconsin Supreme Court. Rasmussen, 2011 WI 52, at ¶ 20 (“[T]he legislative history underlying Wis. Stat. § 801.05(1)(d) shows that the statutory criteria and due process are intertwined.”).

In their brief, plaintiffs argue that the court may exercise general jurisdiction over defendant because Multinational Underwriters is organized under the laws of Wisconsin. There is no dispute that Wisconsin has general jurisdiction over a Wisconsin limited liability company. Although the general rule is that a subsidiary’s contacts with a state may not be imputed to the parent, Purdue Research Foundation, 338 F.3d at 788 n.17, plaintiffs argue that the court should make an exception in this case because defendant “exercise[s] total control” over Multinational Underwriters. Plts.’ Br. dkt. #15, at 16-17 (citing Rasmussen, 2011 WI 52).

In Rasmussen, 2011 WI 52, at ¶35, the court stated that an exercise of general jurisdiction over the parent is not proper unless there is “control by the nonresident parent corporation sufficient to cause us to disregard the separate corporate identities of the subsidiary and the parent corporations.” This is similar to the standard enunciated in federal cases. E.g., Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corp., 230 F.3d 934, 943-44 (7th Cir. 2000) (considering whether “corporate formalities are substantially observed” and whether “parent . . . dominate[s] the subsidiary);

Insolia v. Philip Morris Inc., 31 F. Supp. 2d 660, 669 (W.D. Wis. 1998) (in determining whether subsidiary's contacts may be imputed to parent, court may consider "whether the parent managed the subsidiary with a degree of control greater than that normally associated with common ownership and directorship.").

In support of their argument that defendant should not be distinguished from Multinational Underwriters for the purpose of personal jurisdiction, plaintiffs say that Craig Kelbel, an executive vice president for defendant, must approve nearly all business decisions for Multinational Underwriters, including personnel, spending, marketing and travel decisions. Brougher Decl., ¶¶ 12-24, dkt. #18. In addition, plaintiffs cite a provision of the agreement stating that defendant "shall have complete operational and budgetary control over all the operations of [Multinational Underwriters] after the Closing Date." Dkt. #12-1, § 10.4.

In its reply brief, defendant argues that Kelbel's oversight of Multinational Underwriters cannot be classified as control by defendant because Kelbel is an officer for Multinational Underwriters as well. Dft.'s Br., dkt. #21, at 11 (citing Rinicella Decl., dkt. #22). However, in their supplemental brief, plaintiffs say that Kelbel could not have been acting in his capacity as an officer for Multinational Underwriters because his position for that company was executive vice president; Brougher was president. Thus, unless Kelbel was acting for defendant, he would not have authority to control the day-to-day decisions of

plaintiff Brougher.

I conclude that plaintiffs have adduced enough evidence to make a prima facie showing that Wisconsin has general jurisdiction over defendant, which is all they are required to do at this stage of the proceedings. Central States, Southeast and Southwest Areas Pension Fund v. Phencorp Reinsurance Co., Inc., 440 F.3d 870, 876-77 (7th Cir. 2006) (when motion is decided on written submissions, question is whether plaintiff has “established a prima facie case for personal jurisdiction, such that it should [be] allowed to conduct discovery”). After the parties have had an opportunity to conduct discovery, defendant is free to renew its objection to personal jurisdiction in a motion for summary judgment.

In a last ditch effort to obtain dismissal of the case on jurisdictional grounds, defendant argues that plaintiffs should be “estopped” from using Multinational Underwriters’s contacts with Wisconsin to establish personal jurisdiction over defendant:

Plaintiffs allege this Court has subject matter jurisdiction on the basis of diversity. Complaint ¶ 6. If [Multinational Underwriters] were a party to this action, diversity jurisdiction would not exist because [Multinational Underwriters] is a Wisconsin limited liability company. Plaintiffs now seek to establish that [Multinational Underwriters] and [defendant] should be treated as one entity so they can establish personal jurisdiction. Plaintiffs should not be allowed to treat the two entities as one to establish personal jurisdiction, and yet maintain their separateness to establish subject matter jurisdiction.

Dft.’s Br., dkt. # 21, at 12.

Defendant does not cite any authority for its estoppel theory. My own research uncovered a split in authority on the question whether the alter ego doctrine should apply in the context of determining a party's citizenship under § 1332. Compare Pyramid Securities Ltd. v. IB Resolution, Inc., 924 F.2d 1114, 1120-21 (D.C. Cir. 1991) (concluding that alter ego doctrine did not apply because it is not part of text of § 1332 and “[f]ocusing on the subsidiary for jurisdictional purposes seems wholly anomalous where the substantive claim is about the parent and any remedy must come from the parent's pocket”) with Freeman v. Northwest Acceptance Corp., 754 F.2d 553, 558 (5th Cir. 1985) (“When two corporate entities act as one, or are in fact one, they should be treated as one for jurisdictional purposes.”). See also John Mohr and Sons v. Apex Terminal Warehouses, Inc., 422 F.2d 638, 641 (7th Cir. 1970) (in dicta, stating that “a consolidated corporation may, under certain circumstances, be found to have the citizenship of each of the pre-consolidation, separate, corporate components”).

I need not stray into this jurisprudential thicket because defendant's argument relies on a misconception of the way in which a court determines the citizenship of a limited liability company such as Multinational Underwriters. It is not, as defendant assumes, determined by the laws under which the company is organized. Rather, a limited liability company is a citizen of the states of which its *members* are citizens. Cosgrove v. Bartolotta, 150 F.3d 729, 731 (7th Cir. 1998); see also Thomas v. Guardsmark, LLC, 487 F.3d 531,

534 (7th Cir. 2007) ("[A]n LLC's jurisdictional statement must identify the citizenship of each of its members as of the date the complaint or notice of removal was filed, and, if those members have members, the citizenship of those members as well"). In this case, it seems to be undisputed that defendant is now the sole member of Multinational Underwriters. Thus, the citizenship of the parent and subsidiary are the same and diversity jurisdiction is preserved even if the citizenship of Multinational Underwriters is relevant to the analysis.

ORDER

IT IS ORDERED that defendant HCC Insurance Holdings, Inc.'s motion to dismiss for lack of personal jurisdiction, dkt. #9, is DENIED.

Entered this 21st day of September, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge