UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MARTIN DONNER,	:	
Plaintiff,	:	CIVIL ACTION NO.
v.	:	3:01-CV-2171 (JCH)
KNOA CORPORATION,	:	
Defendant.	:	JULY 29, 2002

RULING ON DEFENDANT'S MOTION TO DISMISS [DKT. NO. 9]

Plaintiff Martin Donner ("Donner"), a Connecticut resident, brings this action against defendant knoa Corporation ("knoa"), a Delaware corporation headquartered in New York, alleging breach of contract, violation of Connecticut's wage payment laws, and other common law claims. Donner alleges that he and knoa negotiated an employment agreement under which Donner worked on knoa's behalf during the months of August and September, 2001. Knoa did not provide Donner with the compensation provided by the contract. Donner requests damages, equitable relief, and attorney's fees.

Donner originally filed this action in Connecticut Superior Court, Judicial District of Stamford/Norwalk. Defendant removed the action to this court on the basis of diversity of citizenship and now moves for dismissal of the action, alleging

lack of personal jurisdiction and failure to state a claim on which relief may be granted. For the following reasons, defendant's motion is GRANTED.

I. STANDARD

Knoa moves to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(2), arguing that this court does not have personal jurisdiction over it. The plaintiff ultimately bears the burden of establishing personal jurisdiction. Distefano v. Carozzi North America, Inc., 286 F.3d 81, 84 (2d Cir. 2001). Where, as here, the court relies on pleadings and affidavits, without the benefit of a full evidentiary hearing, the plaintiff need only make a prima facie showing of personal jurisdiction. Id. "A plaintiff can make this showing through his own affidavits and supporting materials containing an averment of facts that, if credited . . ., would suffice to establish jurisdiction over the defendant." Whitaker v. American Telecasting, Inc., 261 F.3d 196, 208 (2d Cir. 2001)(citations omitted). Allegations in the pleadings and affidavits "are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor." Id.

In order to determine whether it has personal jurisdiction over a party, the court must first look to the long arm statute of the forum state. Id. If the exercise of jurisdiction under that statute is proper, the court must determine whether its

exercise also satisfies the federal constitutional requirements of due process. Id. Thus, "the amenability of a foreign corporation to suit in a federal court in a diversity action is determined in accordance with the law of the state where the court sits, with 'federal law' entering the picture only for the purpose of deciding whether a state's assertion of jurisdiction contravenes a constitutional guarantee." Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996)(citation and internal quotation marks omitted).

Connecticut's long arm statute relating to foreign corporations, Section 33-929, provides, in pertinent part, as follows:

> (e) Every foreign corporation which transacts business in this state in violation of section 33-920, shall be subject to suit in this state upon any cause of action arising out of such business.
>
> (f) Every foreign corporation shall be subject to suit in this state, by a resident of this state or by a person having a usual place of business in this state, whether or not such foreign corporation is transacting or has transacted business in this state and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows: (1) Out of any contract made in this state or to be performed in this state. . ..

Conn. Gen. Stat. § 33-929(e) & (f). For the purposes of § 33-929(e)-(f), "foreign corporation" is "a corporation incorporated under a law other than the law of [Connecticut]." Conn. Gen. Stat. § 33-602(13).

II. STATEMENT OF FACTS

Because, for the purposes of this ruling, the facts are "construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor," Whitaker, 261 F.3d at 208, the court will assume as true the following facts, which are set forth as Donner presents them.

Donner and knoa entered into an oral employment agreement on July 31, 2001. Under that agreement, Donner would serve as the President and Chief Operating Officer of knoa. Although his official start date was September 4, 2001, Donner and knoa agreed he would begin working sometime in August of 2001. Donner and knoa also verbally agreed on Donner's compensation, which included a base salary of $200,000 per year and a signing bonus of $10,000, to be paid on September 4, 2001. His agreed-upon responsibilities were "the normal duties of a President and Chief Operating officer, such as entering into contracts, developing and implementing a business plan, hiring and firing employees and reporting regularly to the board of directors." Donner Aff. [Dkt. No. 21] ¶ 4. The details of this oral agreement were to be memorialized in a formal written contract, which Donner signed on August 31, 2001.

On that same day, Donner received notice from knoa that the employment

agreement had to be approved by knoa's Board of Directors. Donner continued to work on behalf of knoa, primarily from his home in Stamford, Connecticut, until September 29, 2001, when he learned his employment agreement had never been approved.

III. DISCUSSION

Donner asserts this court has personal jurisdiction over knoa under two subsections of the Connecticut long arm statute, Conn. Gen. Stat. § 33-929(e) and § 33-929(f)(1).

A. Personal Jurisdiction under Conn. Gen. Stat. § 33-929(e)

Conn. Gen. Stat. § 33-929(e) provides that a "foreign corporation which transacts business in this state in violation of section 33-920, shall be subject to suit in this state upon any cause of action arising out of such business." A foreign corporation violates section 33-920 if it "transacts business" within the meaning of that statute in the absence of a valid certificate of authority from the Secretary of State. Conn. Gen. Stat. § 33-920(a). Donner claims that knoa transacted business in Connecticut through the activities that Donner performed there.[1] Under this theory, knoa is subject to personal jurisdiction because it knew and approved of

[1]Neither party claims that knoa holds a certificate of authority to transact business in Connecticut.

Donner's conduct of business on its behalf out of his home.

Even if Donner did conduct business for knoa in Connecticut during the months of August and September, this activity alone is insufficient to support jurisdiction under section 33-929(e). "The term 'transacting business' is not broadly interpreted in Connecticut." Chemical Trading, Inc. v. Manufacture de Produits Chimiques de Tournan, 870 F. Supp. 21, 23 (D. Conn. 1994). For example, section 33-920(b) sets forth a non-exhaustive list of activities that "do not constitute transacting business." Conn.Gen.Stat. § 33-920(b). Among those explicitly excluded by the statute are the activities Donner claims to have performed on knoa's behalf.

Donner alleges that knoa transacted business in Connecticut because it approved of his actions, which included, inter alia, reviewing business plans, developing marketing plans, discussing corporate operations and priorities, and making hiring recommendations. All of these activities involve Donner's management of knoa's corporate affairs.[2] The statute specifically excludes these

[2]Donner mentions in his Opposition to Defendant's Motion to Dismiss that he also "pursu[ed] business with contacts at IBM." Pl.'s Mem. of Law in Opp'n to Def.'s Mot. to Dismiss [Dkt. No. 20] at 23. However, Donner's affidavit asserts only that he discussed the possibility of soliciting business from IBM with fellow knoa employees, not that he actually solicited it. Donner Aff. ¶ 12. Even if Donner did contact IBM, this single act of correspondence does not constitute "transacting business" under the Connecticut long arm statute. Surveyors, Inc. v. Berger Brothers Co., 9 Conn. Supp. 175 at *3 (Conn. Super. Ct. 1941) ("business" contemplated by long arm

activities from the definition of "transacting business." Section 33-920(b) provides, "[t]he following activities, among others, do not constitute transacting business within the meaning of subsection (a) of this section: ... (2) holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs." Conn.Gen.Stat. § 33-920(b).

Furthermore, personal jurisdiction cannot be invoked over a foreign corporation merely because it has an office or employee in Connecticut, even if an employee maintains the office or performs work for the corporation on a permanent basis. Alfred M. Best Co., Inc. v. Goldstein, 124 Conn. 597, 603 (1938)(existence of agent with office in Connecticut did not render New York corporation subject to jurisdiction in Connecticut); Airguard Industries. Inc. v. New England Air Filters, Inc., No. 326415, 1992 WL 369535 at *1 (Conn.Super. Ct. 1992)(Kentucky corporation's maintenance of office in Connecticut for the convenience of Eastern Regional Sales Manager insufficient grounds for assertion of personal jurisdiction). The fact that a company allows an employee to work from home, at his convenience, is not a sufficient basis to invoke personal jurisdiction under section 33-929(e).

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statute is primary business of foreign corporation and does not include activities incident to that business, such as "the solicitation and procuring of a contract to do or carry on" the primary business of the corporation).

Hospitality Systems, Inc. v. Oriental World Trading Co. Ltd., No. CV 990169927, 2000 WL 177441 at *4 (Conn. Super. Ct. 2000)(Tokyo corporation not subject to jurisdiction in Connecticut merely because employee worked for corporation for five years out of his home office in Stamford, Connecticut).

B. Personal Jurisdiction under Conn. Gen. Stat. § 33-929(f)(1)

Conn. Gen. Stat. § 33-929(f)(1) provides that a "foreign corporation shall be subject to suit in this state, by a resident of this state or by a person having a usual place of business in this state, . . . on any cause of action arising as follows: (1) Out of any contract made in this state or to be performed in this state." This long-arm statute, "unlike section 33-929(e), does not require that a party transact business within the state to be subject to suit nor does it require a causal connection between the plaintiff's cause of action and the defendant's presence in the state." Tomra of N. Am. v. Envtl. Prods. Corp., 4 F. Supp. 2d 90, 93 (D. Conn. 1998) (footnote omitted) (citing Thomason v. Chemical Bank, 234 Conn. 281, 295-97 (1995) and Lombard Bros. Inc., v. General Asset Management Co., 190 Conn. 245, 253-54 (1983)). Rather, "[i]t requires only 'a nexus between the cause of action alleged and the conduct of the defendant within the state.'" Id. (citations omitted).

It is axiomatic that a contract must first exist, i.e., have been made, in order

for it "to be performed" pursuant to Conn. Gen. Stat. § 33-929(f)(1). Chemical Trading, 870 F. Supp. at 23-24; Bowman v. Grolsche Bierboruwerij B.V., 474 F. Supp. 725, 729 (D. Conn. 1979). In this case, Donner and knoa contest whether a valid contract existed. However, even if the court assumes that Donner and knoa formed a binding contract, it was not to be performed in Connecticut as Donner claims.

In order to satisfy section 33-929(f)(1), "the agreement serving as the basis for jurisdiction must contemplate or encompass some performance in Connecticut." Miller v. American Bank Note Holographics, Inc., No. CV 010181989, 2001 WL 1187137 at *2 (Conn. Super. Ct. 2001). The performance need not be by the party over which jurisdiction is sought, but rather "jurisdiction is appropriate where the contract in question contemplated and required performance in this state by the plaintiff." Id.

Donner claims, in his affidavit, that the written agreement between himself and knoa memorialized the terms of the oral contract forming the basis of this action. Donner Aff. [Dkt. No. 21] ¶ 10. However, that contract provides that Donner "shall perform his services for knoa primarily at the headquarters of knoa but will need to travel from time to time on behalf of knoa according to the needs of

knoa's business." Empl. Agr., Def's Mem. of Law in Supp. of Mot. to Dismiss [Dkt. No. 10], Exh. A ¶ 1.3. While Connecticut courts have asserted jurisdiction in cases where the contract implicitly required the plaintiff's performance in Connecticut, Advanced Claims Service v. Franco Enterprises, No. CV000374548S, 2000 WL 1683416 at *4 (Conn. Super. Ct. 2000)(contract between plaintiff and defendant specifically required plaintiff to perform investigative services in Connecticut), the contract between Donner and knoa does not contemplate or mandate performance in Connecticut. Rather, the contract explicitly provides for performance at knoa headquarters in New York. The fact that knoa permitted Donner to work out of his home in Connecticut for a brief period does not transform the employment agreement into a contract for services to be performed in this state. As a result, Conn.Gen.Stat. § 33-929(f)(1) does not authorize personal jurisdiction over knoa.

IV. CONCLUSION

For the reasons set forth above, the court finds that Connecticut's long-arm statute does not authorize personal jurisdiction over knoa. Therefore, the court will not address whether jurisdiction over knoa comports with due process nor will it address knoa's claims under Fed. R. Civ. P. 12(b)(6). The court hereby grants the

defendant's Motion to Dismiss [Dkt. No. 9] for lack of personal jurisdiction. The clerk is ordered to close this case.

SO ORDERED.

Dated at Bridgeport, Connecticut this 29th day of July, 2002.

_____/s/_____
Janet C. Hall
United States District Judge