IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ROBERT MALLORY	:	**SEPTEMBER TERM 2017**
	:	
v.	:	**NO. 1961**
	:	**802 EDA 2018**
NORFOLK SOUTHERN RAILWAY CO.	:	
	:	

OPINION

NEW, J. **May 30th, 2018**

For the reasons set forth below, this Court respectfully requests the Superior Court affirm this Court's Order dated February 6, 2018, and docketed February 7, 2018.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Robert Mallory, a Virginia resident, commenced this action by filing a Complaint on September 18, 2017. The Complaint's single claim sounds in violation of the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51, *et seq.* According to the Complaint, Plaintiff worked for Defendant Norfolk Southern[1] as a carman in Ohio and Virginia from 1988 through 2005. Complaint at ¶¶ 9-11. Plaintiff alleged his employment with Defendant exposed him to harmful carcinogens, Id. at ¶¶ 10-11, which caused him to develop colon cancer. Id. at ¶¶ 13-14.

Defendant filed Preliminary Objections arguing this Court lacked personal jurisdiction. Plaintiff's Response in Opposition raised a single argument – Defendant consented to personal jurisdiction by registering to do business in Pennsylvania. This Court heard oral argument on Defendant's Preliminary Objections on February 6, 2018, at which Plaintiff argued Defendant

[1] The Complaint avers Defendant Norfolk Southern is a Virginia Corporation with its principal place of business in Norfolk, Virginia. Complaint at ¶ 2.

consented to personal jurisdiction pursuant to 42 Pa. C.S.A. § 5301 by registering to do business in Pennsylvania. By Order dated February 6, 2018 and docketed February 7, 2018, this Court sustained Defendant's Preliminary Objection and dismissed this matter for want of personal jurisdiction. Plaintiff filed a timely appeal.

Plaintiff's Concise Statement of Errors raised a single alleged error – this Court erred in finding it lacked personal jurisdiction over Defendant because § 5301 confers general jurisdiction by consent over any corporation who registers to do business in Pennsylvania. See Plaintiff's Concise Statement at ¶ 3.

ANALYSIS

Pennsylvania Rule of Civil Procedure 1028 requires a party to assert a lack of personal jurisdiction by preliminary objection. Pa.R.C.P. 1028(a)(1). "When a defendant challenges the court's assertion of personal jurisdiction, that defendant bears the burden of supporting such objections to jurisdiction by presenting evidence." De Lage Landen Fin. Servs., Inc. v. Urban P'ship, LLC, 903 A.2d 586, 590 (Pa. Super. 2006). Here, Defendant argues the Due Process Clause prohibits this Court from exercising personal jurisdiction over it. E.g. Preliminary Objections at ¶ 32. To support this argument, Defendant points to the averments of the Complaint – Defendant is a Virginia corporation with its principal place of business in Virginia and all alleged exposure to carcinogens occurred outside of Pennsylvania – to satisfy its burden.

This Court's exercise of personal jurisdiction must conform to both Pennsylvania's long-arm statute and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Kubik v. Letteri, 614 A.2d 1110, 1112 (Pa. 1992). The long-arm statute provides:

> (a) General Rule – a tribunal of this Commonwealth may exercise personal jurisdiction over a person ... who acts directly or by an agent, as to a cause of action or other matter arising from such person:

1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business in this Commonwealth, any of the following shall constitute transacting business for the purposes of this paragraph:
   i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit ....
   ...
   iv) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by any government unit of this Commonwealth.

...

(b) Exercise of full constitutional power over non-residents. In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons ... to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact within this Commonwealth allowed under the Constitution of the United States.

42 Pa. C.S. § 5322. Pennsylvania courts have recognized subsection (b) renders the reach of the long-arm statute coextensive with that permitted by the Due Process Clause of the Fourteenth Amendment. See e.g. Gaboury v. Gaboury, 988 A.2d 672, 677-78 (Pa. Super. 2009); Efford v. Jockey Club, 796 A.2d 370, 373 (Pa. Super. 2002); Kingley and Keith (Canada) Ltd. v. Mercer Intern. Corp., 435 A.2d 585, 587-88 (Pa. Super. 1981); Koenig v. International Brotherhood of Boilermakers, 426 A.2d 635, 639-40 (Pa. Super. 1980). Therefore, this Court need only address the Due Process issue.

I.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution limits the authority of a state to exercise personal jurisdiction over non-resident defendants. Mendel v. Williams, 53 A.3d 810, 817 (Pa. Super. 2012) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174 (1985)). "A defendant's activities in the forum State may give rise to either specific jurisdiction or general jurisdiction." Id. (citations omitted).

The seminal case of International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154 (1945), established the dichotomy between specific jurisdiction and general jurisdiction. "Specific jurisdiction ... depends on an affiliatio[n] between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." Mendel, 53 A.3d at 817 (citations omitted). International Shoe defined general jurisdiction as "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." International Shoe, 66 S.Ct. at 159. For decades, courts interpreted this language as permitting a court to exercise general personal jurisdiction over a foreign corporation so long as the foreign corporation's business activities within the forum state were considered continuous and substantial. The United States Supreme Court's decisions in Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 131 S.Ct. 2846 (2011) and Daimler AG v. Bauman, 134 S.Ct. 746, 755 (2014) dramatically altered general jurisdiction analysis. When read together, Goodyear and Daimler hold a court may only exercise general jurisdiction over a corporation if its "affiliations within the state are so continuous and systematic as to render [it] essentially at home in the forum state," Goodyear, 131 S.Ct. at 2851, with "the place of incorporation and the principal place of business [being the paradigmatic] bases for general jurisdiction." Daimler, 134 S.Ct. at 755.

Accordingly, for Pennsylvania courts to acquire general personal jurisdiction over foreign corporations under the current state of the law, the foreign corporation must be incorporated in Pennsylvania, have its principal place of business in Pennsylvania, or have consented to the exercise of jurisdiction. See Daimler, 134 S.Ct. at 755; Moyer v. Teledyne Continental Motors, Inc., 979 A.2d 336, 349 (Pa. Super. 2009) (observing courts may exercise general jurisdiction

over corporations who consent). In the case *sub judice*, Plaintiff's sole argument is Defendant consented to general jurisdiction by registering to do business in Pennsylvania. The crux of Plaintiff's argument rests on the notion foreign corporations consent to general jurisdiction when they voluntarily register to do business in this Commonwealth, pursuant to § 5301.

II.

The United States Supreme Court and the Pennsylvania Supreme Court have long held a foreign corporation may consent to the jurisdiction of a court. For example, a foreign corporation may consent to jurisdiction by voluntarily appearing before the court. McDonald v. Mabee, 243 U.S. 90, 37 S.Ct. 343, 343-44 (1917) (stating in *dicta* a defendant's voluntary appearance before a tribunal is an acquiesce to the court's jurisdiction); Wagner v. Wagner, 768 A.2d 1112, 1120 (Pa. 2001). Likewise, foreign corporations may contractually agree to submit to a court's jurisdiction, National Equipment Rental Ltd. v. Szukhent, 375 U.S. 311, 84 S.Ct. 411, 414 (1964), or stipulate a court has jurisdiction over them. Petrowski v. Hawkeye-Security Ins. Co., 350 U.S. 495, 76 S.Ct. 490, 490-91 (1956); Wagner, 768 A.2d at 1120.

According to Plaintiff, Defendant consented to general jurisdiction by registering to do business in Pennsylvania. Section 5301 of the Judiciary Act provides:

> **(a) General rule.**--The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:
> ...
> (2) Corporations.--
> (i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.
> (ii) Consent, to the extent authorized by the consent.
> (iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth

42 Pa.C.S.A. § 5301; see also Plaintiff's Memorandum in Opposition at p. 7 (citing Simmers v. American Cyanamid Corp., 576 A.2d 376, 382 (Pa. Super. 1990) (stating "when jurisdiction is based on a foreign corporation's general activity or consent, i.e. ... has voluntarily registered itself to do business here, the courts of this Commonwealth may exercise jurisdiction over the foreign corporation regardless of whether the cause of action being prosecuted is related to the corporation's activities in Pennsylvania")). Plaintiff also cites precedent from Pennsylvania's federal courts and the courts of our sister states for the proposition a corporation may voluntarily consent to jurisdiction by choosing to register as a foreign business organization in a given state. Id. at pp. 7-11.

A review of Pennsylvania's statutory scheme belies Plaintiff's argument because Defendant's consent to jurisdiction was not voluntary. Pursuant to the Associations Code, foreign corporations must register with the Commonwealth before conducting business within Pennsylvania. 15 Pa.C.S. § 411(a) (stating "... a foreign filing association or foreign limited liability partnership *may not* do business in this Commonwealth until it registers with the department under this chapter") (emphasis added); see also 15 Pa.C.S. § 102(a) (defining "association" as "a corporation, for profit or not-for-profit, . . ."). The Associations Code punishes foreign corporations' failure to register prior to doing business in this Commonwealth by prohibiting them from seeking redress in Pennsylvania's courts.[2] 15 Pa.C.S. §411(b)

[2] The committee notes to § 411 claim the closure of Pennsylvania's courts to foreign corporations who fail to register is not a punitive sanction. 15 Pa.C.S. § 411 at Committee Comment. This characterization is inaccurate. The Pennsylvania Constitution guarantees access to the courts. PA Const. art. I, § 11 ("All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law ..."). By denying foreign corporations their constitutional right to access the courts unless they register, the Legislature imposed a punitive sanction upon those foreign corporations; it matters not if such a sanction is characterized as a carrot rather than a stick, the punitive result is the same.

("Penalty for failure to register – a foreign filing association … doing business in this Commonwealth may not maintain an action or proceeding in this Commonwealth unless it is registered to do business under this chapter."); see also Hoffman Const. Co. v. Erwin, 200 A. 579 (Pa. 1938) (foreign corporation could not maintain breach of contract action because the foreign corporation failed to register, as required by Pennsylvania law); University of Dominica v. Pennsylvania College of Podiatric Medicine, 446 A.2d 1339, 1340-41 (Pa. Super. 1982)(Section 411(b) prevented foreign corporation from prosecuting a breach of contract action in Pennsylvania court even though the foreign corporation attempted to register with the Commonwealth, since the Pennsylvania Department of Education rejected the registration).

Contrary to Plaintiff's argument, foreign corporations do not submit to general jurisdiction by choosing to register as foreign business corporation in this Commonwealth. Instead, § 5301 of the Judiciary Act and § 411 of the Association Code, when read together, mandate foreign corporations to submit to general jurisdiction as a condition of being permitted to conduct business within the Commonwealth. Stated differently, a foreign corporation has two choices: 1) doing business in Pennsylvania while concomitantly consenting to general personal jurisdiction, or 2) not doing business in Pennsylvania.

III.

"Because a state court's assertion of jurisdiction exposes defendants to the State's coercive power, it is subject to review for compatibility with the Fourteenth Amendment's Due Process Clause, which limits the power of a state court to render a valid personal judgment against a nonresident defendant." Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, 137 S.Ct. 1773, 1779 (2017) (internal quotations and citations omitted). Accordingly, this Court must determine whether Pennsylvania's statutory scheme – i.e. forcing

foreign corporations to choose between consenting to general jurisdiction in Pennsylvania or foregoing the opportunity to conduct business in Pennsylvania – offends the Due Process Clause. This Court finds that it does.

A.

"The Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." Bristol-Myers, 137 S.Ct. at 1780 (2017) (internal citation omitted). The United States Supreme Court recognized the burden placed on defendants when they are required to "[submit] to the coercive power of a state that may have little legitimate interest in the claims in question." Id. Since "[t]he sovereignty of each State [implies] a limitation on the sovereignty of all of its sister States . . . the reasonableness of asserting jurisdiction over the defendant must be assessed 'in the context of our federal system of government.'" World-wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 565 (1980) (citations omitted).

> [T]he requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of [Pennoyer v. Neff, 95 U.S. 714, 720, 5 Otto 714 (1877)] to the flexible standard of [International Shoe Co.,]. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.

Hanson v. Denckla, 357 U.S. 235, 251, 78 S.Ct. 1228 (1958) (internal quotations omitted). As the United States Supreme Court reiterated in Bristol-Myers, "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to

render a valid judgment." Bristol-Myers, 137 S.Ct. at 1780-81 (citing World-Wide Volkswagen, 100 S.Ct. at 565-66).

The United States Supreme Court's recent decision in Bristol-Myers reaffirmed the role federalism plays in personal jurisdiction analysis. In Bristol-Myers, over 600 plaintiffs, most of whom were not California residents, filed suit against Bristol-Myers Squibb Co., asserting state law claims based on injuries allegedly caused by the drug Plavix. Bristol-Myers, 137 S.Ct. at 1777. The California Supreme Court found it lacked general jurisdiction over the non-residents' claims because Bristol-Myers is a Delaware Corporation with its principal place of business in New York. Id. at 1778. Nevertheless, the California Supreme Court held it had specific jurisdiction over the claims of all plaintiffs, including those who were not California residents, based on Bristol-Myers' extensive contacts with California, which included: 1) "the claims of the nonresidents were similar in several ways to the claims of the California residents," 2) "both the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product," and 3) Bristol-Myers' research and development of other drugs in California. Id. at 1779. The United States Supreme Court, relying on the Due Process Clause as an instrument of interstate federalism, reversed the California Supreme Court stating "there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or occurrence that takes place in the forum State[;]" "a corporation's continuous activity of some sorts within a state ... is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." Id. at 1781 (internal citations omitted). Furthermore, the Court held federalism prevented the California courts from exercising personal jurisdiction over the non-residents' claims, even though any inconvenience experienced by Bristol-Myers in defending the suits in a foreign

jurisdiction would be minimalized in light of the fact the non-residents' claims were similar to the California residents' claims, because the nonresidents did not suffer harm in California and the conduct giving rise to their claims occurred outside California. Id. at 1782.

Similarly, the Pennsylvania Supreme Court recognizes federalism limits Pennsylvania courts' ability to regulate a foreign corporation's actions in our sister states. In United Farm Bureau Mut. Ins. Co. v. U.S. Fidelity & Guar. Co., an Indiana insurance company issued an automobile insurance policy to an Indiana family, the Palmers. 462 A.2d 1300 (Pa. 1983). The Palmers subsequently suffered personal injury in a car accident in Mercer County, Pennsylvania. Id. at 1301-02. After the accident, the Palmers sought benefits under Pennsylvania's no-fault law. Id. The Pennsylvania insurer assigned under the Assigned Claims Plan, United States Fidelity and Guarantee Co., refused to pay no-fault benefits, asserting the only benefits to which the Palmers were entitled were from the Indiana insurance company. Id. at 1302. Following this refusal to pay, the Palmers sued United States Fidelity and Guarantee Co. in Allegheny County. United States Fidelity and Guarantee Co., in turn, filed a declaratory judgment action against the Palmers and the Indiana insurer, arguing the Palmers were not entitled to no-fault benefits or the Indiana insurer was responsible for paying the Palmers' no-fault benefits. Id. The Indiana insurer challenged Pennsylvania's exercise of personal jurisdiction, arguing it lacked sufficient contacts with Pennsylvania since it was an Indiana corporation who only did business in Indiana. Id. Our Supreme Court, relying on federalism, held Pennsylvania did not have jurisdiction over the Indiana insurer. Id. at 1305-07. In particular, the Court noted "federalism would not permit our legislature to require a totally foreign insurance company ... to provide no-fault insurance to its policyholders. [Therefore,] the courts of this Commonwealth cannot require such an action, a

requirement which would be implicit in our upholding jurisdiction in cases such as this." Id. at 1307.

B.

As the United States Supreme Court made clear in Daimler and Goodyear, federalism prevents this Court from exercising general jurisdiction over Defendant simply because Defendant does business in Pennsylvania. Daimler, 134 S.Ct. at 754; Goodyear, 131 S.Ct. at 2846. This Court must determine whether federalism limits the exercise of general personal jurisdiction by consent.

In Szukhent and Petrowski, the United States Supreme Court held the defendants consented to jurisdiction because they voluntarily appeared before those courts, Szukhent, 84 S.Ct. at 414; Petrowski, 76 S.Ct. at 490-91; no similar voluntary action has occurred in the case *sub judice*. As set forth above, Pennsylvania law requires foreign corporations to submit to general jurisdiction in exchange for the right to do business within the Commonwealth. Under the current state of Pennsylvania law, the only way foreign corporations such as Defendant can avoid Pennsylvania courts' assertion of general jurisdiction over them is for those corporations to avoid doing business in Pennsylvania. Faced with this Hobson's choice, a foreign corporation's consent to general jurisdiction in Pennsylvania can hardly be characterized as voluntary. In light of the Supreme Court's repeated admonishment that the Due Process Clause prohibits a state from claiming general jurisdiction over every corporation doing business within its borders, see BNSF Ry. Co. v. Tyrrell, 137 S.Ct. 1549, 1558 (2017); Daimler, 134 S.Ct. at 754; Goodyear, 131 S.Ct. at 2846, it logically follows the Due Process Clause also prohibits a state from forcing every corporation doing business within its borders to consent to general jurisdiction.

This Court acknowledges the existence of United States Supreme Court precedent from the late 1800s and early 1900s permitting state courts to obtain personal jurisdiction over foreign corporations via mandatory registration statutes or the required appointment of an in-state agent to accept service of process. See e.g. Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Min. & Mill Co., 243 U.S. 93, 37 S.Ct. 344 (1917) (finding the defendant insurer consented to jurisdiction in Missouri when it complied with Missouri's foreign corporation law, which required foreign corporations to grant the superintendent of the insurance department a power of attorney to accept service of process); Ex parte Schollenberger, 96 U.S. 369, 6 Otto 369 (1877) (holding the Eastern District of Pennsylvania had personal jurisdiction over foreign insurance corporations because Pennsylvania's state courts had personal jurisdiction over those same insurers under a Pennsylvania law requiring foreign insurers to appoint an agent to receive original process). These cases are relics of the Pennoyer era, in which a bright-line rule prohibited courts from exercising personal jurisdiction over persons or corporations outside the geographic boundary of the court. See Pennoyer v. Neff, 95 U.S. at 720, (holding "The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established"). Due to the strict territorial nature of Pennoyer, courts and legislatures relied on innovative techniques to gain jurisdiction over otherwise untouchable foreign corporations, and cases such as Pennsylvania Fire and Schollenberger are the result of such innovative efforts. Indeed, the Pennsylvania Supreme Court recognized the purpose of the registration requirement at issue here is to bring foreign corporations under the jurisdiction of Pennsylvania's courts. Hoffman Const., 200 A. at 386.

International Shoe obviated the need for such innovative efforts by creating the specific jurisdiction/general jurisdiction dichotomy, thereby allowing courts to exercise personal

jurisdiction over foreign corporations in various scenarios. While the United States Supreme Court has never explicitly overruled Pennsylvania Fire and Schollenberger, the Court has acknowledged International Shoe and its progeny have implicitly overruled them. See Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 2584 n.39 (1977) ("It would not be fruitful for us to re-examine the facts of cases decided on the rationales of Pennoyer and [Harris v. Balk, 198 U.S. 215, 25 S.Ct. 625 (1905)] to determine whether jurisdiction might have been sustained under [International Shoe and its progeny]. To the extent that prior decisions are inconsistent with [International Shoe and its progeny], they are overruled").

By requiring foreign corporations to submit to general jurisdiction as a condition of doing business here, Pennsylvania's statutory scheme infringes upon our sister states' ability to try cases against their corporate citizens. This infringement runs counter to the concept of federalism and should not be tolerated. Bristol-Myers, 137 S.Ct. at 1780 ("[T]he states retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts ... at times, this federalism interest must be decisive") (internal quotations and citations omitted).

In the case *sub judice*, Plaintiff alleges a single violation of the Federal Employers' Liability Act due to exposure to harmful carcinogens in Ohio and Virginia. Since Plaintiff's alleged exposure to carcinogens occurred outside of this Commonwealth, Pennsylvania courts do not have specific jurisdiction over Plaintiff's claims. See e.g. Bristol-Myers, 137 S.Ct. at 1781; Mendel, 53 A.3d at 817. This Court also lacks general jurisdiction because Defendant Norfolk Southern is not "at home" in Pennsylvania; it is a Virginia corporation with its principal place of business located in Virginia. Daimler, 134 S.Ct. at 754; Goodyear, 131 S.Ct. 2846.

Pennsylvania's statutory scheme requiring consent to personal jurisdiction does not comport with federalism as it encroaches our sister-states' power to render verdicts against their corporate citizens solely because those corporate citizens do business in Pennsylvania. The United States Supreme Court made clear a state cannot claim general jurisdiction over every corporation doing business within its borders. See Tyrrell, 137 S.Ct. at 1558; Daimler, 134 S.Ct. at 754; Goodyear, 131 S.Ct. at 2846. By wrapping general jurisdiction in the cloak of consent, Pennsylvania's mandated corporate registration attempts to do exactly what the United States Supreme Court prohibited in Tyrrell, Goodyear, and Daimler. Therefore, Plaintiff's jurisdiction by consent argument infringes upon the doctrine of federalism, as protected by the Due Process Clause.

WHEREFORE the above stated reasons, this Court properly held it lacked personal jurisdiction over Defendant Norfolk Southern, and this Court's Order dated February 6, 2018, and docketed February 7, 2018 should be affirmed.

BY THE COURT:

ARNOLD L. NEW, J.