

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

| | |
|--------------------------------|-------------------------------|
| IN RE: |) Chapter 11 |
| |) |
| RENAISSANCE COSMETICS, INC., |) Case Nos. 99-2136 (MFW) |
| et al., |) through 99-2144 (MFW) |
| |) |
| Debtors. |) (Jointly Administered Under |
| |) Case No. 99-2136 (MFW)) |
| _____ |) |
| SEAN GREENE, |) |
| |) |
| Plaintiff, |) |
| |) Adversary No. 99-783 (MFW) |
| v. |) |
| |) |
| NEW DANA PERFUMES CORPORATION; |) |
| DPC ACQUISITION CORPORATION; |) |
| DANA do BRASIL S.A.; and |) |
| MARCAFIN S.A., |) |
| |) |
| Defendants. |) |
| _____ |) |

MEMORANDUM OPINION¹

Before the Court is the request of the Plaintiff, Sean Greene ("Greene"), to conduct discovery of one of the Defendants, Marcafin S.A. ("Marcafin"), as to any contacts which Marcafin has with the United States before this Court decides Marcafin's Motion to Dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(2). We grant Greene's request.

¹ This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. FACTS

In his complaint, Greene asserts that the Defendants breached his employment contract by refusing to provide severance payments and other benefits after his employment was terminated. Specifically, Greene asserts that in November, 1997, he entered into an employment contract with RCI, one of the Defendants, pursuant to which Greene was entitled to participate in any stay bonus program and receive certain other bonuses as long as he remained employed by the company. Greene's complaint further asserts that his employment contract was amended in May, 1999 ("the Amendment").² The Amendment changed the definition of "company" to refer to "employers." Greene asserts, that as a result of the Amendment, Greene became an employee of each of the Defendants, including Marcafin.

After the Debtors filed for bankruptcy relief, the Debtors entered into an asset purchase agreement with DPC Acquisition Corp. ("DPC") by which DPC purchased assets of the estate including, inter alia, Marcafin. Pursuant to the purchase agreement, DPC agreed to assume and pay all liabilities or obligations of any entity which it had purchased.

Greene asserts that, shortly before the closing on the asset purchase agreement, he was terminated effective July 30, 1999.

² A copy of the original Employment Agreement and the Amendment are attached to the Complaint as exhibits.

Green further asserts that he has not received the benefits to which he is entitled under the Employment Agreement.

In response to the complaint, Marcafin filed a motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2). Marcafin's motion, and the affidavit of Marc Albert attached thereto, assert that Marcafin had "absolutely no contact with [the United States]" and therefore has done nothing to avail itself of the benefits and protections of United States law. Specifically, Marcafin asserts that it is a Swiss corporation which is wholly owned by a Dutch company with no active sales, manufacturing, or business operations in the United States. Rather, Marcafin asserts it is a holding company which exists solely to own foreign-registered trademarks. It asserts it owns no property in the United States, even a post office box. Additionally, Marcafin asserts that it was not a signatory to the Employment Agreement (or the Amendment) and none of the signatories to those Agreements had authority to sign on its behalf. Therefore, Marcafin asserts it is not subject to personal jurisdiction of this Court.

At a scheduling conference held on November 15, 2000, Greene requested discovery on Marcafin's motion to dismiss, limited to the issue of Marcafin's personal jurisdiction. Marcafin objected to this request. At a hearing held on November 27, 2000, we permitted the parties to brief the issue.

II. DISCUSSION

In his brief, Greene asserts that he is entitled to discovery prior to responding to Marcafin's motion to dismiss because a plaintiff is generally entitled to conduct discovery relevant to jurisdictional issues. Renner v. Lanard Toys Limited, 33 F.3d 277 (3d Cir. 1994).

In Renner, the plaintiffs brought a product liability suit against the defendant, a foreign company, which had manufactured a toy that allegedly injured one of the plaintiffs. After the plaintiffs filed their complaint, the defendant filed a motion to dismiss for lack of personal jurisdiction.

In support of its motion, the defendant submitted an affidavit in which it asserted that: (1) it did not manufacture or sell the product in Pennsylvania, (2) it did not own any real estate or other assets in Pennsylvania, and (3) it did not have any employees in Pennsylvania. The defendant asserted that it had sold the product to independent distributors outside the United States and had no way of knowing or controlling where those distributors marketed its product. The plaintiffs' only evidence of personal jurisdiction over the defendant were two affidavits which asserted that the defendant's product was sold in at least three stores and two "test reports" of whether its products complied with the safety specifications of one of the Pennsylvania stores.

As a result of those submissions, the district court granted the defendant's motion to dismiss, finding that there was no evidence that the defendant had purposefully availed itself of Pennsylvania's jurisdiction. The Third Circuit vacated the District Court's order dismissing the case for lack of personal jurisdiction because the plaintiffs were not permitted to take discovery regarding personal jurisdiction. Id. at 284.

Since the Renner decision, a number of courts in this District have considered a party's right to take discovery on the limited issue of personal jurisdiction. See e.g., Sandvik AB v. Advant Int'l Corp., 83 F. Supp.2d 442 (D. Del. 1999); Hueblein, Inc. v. Walker, (Joint Stock Society Trade House of Descendants of Peter Smirnoff), 936 F. Supp. 177 (D. Del. 1996); Hansen v. Neumueller, 163 F.R.D. 471 (D. Del. 1995). The rule which has emerged is that a plaintiff is entitled to discovery limited to jurisdictional issues where he has met a threshold of frivolousness in alleging personal jurisdiction. See Sandvik, 83 F. Supp.2d. at 447; Joint Stock, 936 F. Supp. at 192.

Marcafin is correct that Greene bears the ultimate burden of proving that Marcafin is subject to personal jurisdiction. See Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 65 (3d Cir. 1984). However, Greene must meet that burden only after he has had the opportunity to take discovery. Discovery regarding jurisdiction is permitted because "without discovery, a

plaintiff may not be able to ascertain the extent of the defendant's contacts with the forum" especially where, as here, the defendant is a corporation. Hansen, 163 F.R.D. at 473-474.

Turning to the facts of the case, we find that Greene's allegations are not frivolous. In his complaint, Greene asserts that the signatory to the Employment Agreement, Becker, had authority to bind Marcafin to employ Greene. If that is correct, Marcafin had an agent in the United States and, therefore, had minimal contacts with this jurisdiction. Greene's allegations, coupled with the documents attached to the complaint, meet the minimal standard to permit Greene to take discovery regarding the personal jurisdiction of Marcafin.

We make no decision at this point whether those assertions would adequately meet the burden of proof which Greene will be required to satisfy after discovery has been completed. However, the complaint, and the evidence attached thereto, satisfies the low threshold for permitting discovery.

III. CONCLUSION

For the reasons stated above, we find that Greene is entitled to discovery on the issue of whether Marcafin has minimal contacts which would subject it to this Court's jurisdiction.

An appropriate order is attached.

BY THE COURT:

Dated: December 14, 2000

Mary F. Walrath
United States Bankruptcy Judge

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| _____ |) |

O R D E R

AND NOW, this **14TH** day of **DECEMBER, 2000**, upon consideration of the Plaintiff's Motion for authority to conduct discovery on Marcafin's Motion to Dismiss for Lack of Personal Jurisdiction, for the reasons set forth in the accompanying Opinion, it is hereby

ORDERED that the Motion is **GRANTED**; and it is further

ORDERED that such discovery shall be completed on or before February 15, 2001, and that the Plaintiff's answer to Marcafin's Motion to Dismiss shall be filed on or before March 1, 2001.

BY THE COURT:

Mary F. Walrath
United States Bankruptcy Judge

cc: See attached

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