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DISTRICT OF UTAH
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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

DENNIS J. WILKINSON,

Plaintiff,

vs.

**MICHAEL A. SIMON JR. and SUSAN
SIMON,**

Defendants.

**MEMORANDUM DECISION AND
ORDER**

Case No. 2:04CV39DAK

This matter is before the court on Defendants' Motion to Dismiss Pursuant to Rules 12(b)(1), (2), (3), and (7) of the Federal Rules of Civil Procedure and, in the alternative, to transfer venue.¹ A hearing on the motion was held on June 22, 2004. At the hearing, Plaintiff was represented by Eric P. Lee, and Defendant was represented by Jay R. Mohlman. The court took the matter under advisement. The court has considered the memoranda and other materials submitted by the parties, as well as the law and facts relating to the motion. Now being fully advised, the court renders the following Memorandum Decision and Order.

¹ Since the motions were filed, Plaintiff has agreed to dismiss Defendant Susan Simon from this case. Therefore, the only defendant remaining is Michael A. Simon.

25

BACKGROUND

Plaintiff and Defendant are business partners in Excel, a New Jersey Corporation that does business with shipping companies along the East coast of the United States. Defendant and his wife were guarantors on a business loan for Excel that the parties refer to as the Fleet Bank Loan. Plaintiff, who is a fifty percent owner of Excel, and his wife were also guarantors on the loan.

Plaintiff moved to Utah in 2000. Since that time, he has held at least yearly board of directors' meetings for Excel at his home in Park City. Defendant has attended those meetings. The last such meeting occurred May 31, 2003. At the time of that meeting, Excel was having financial difficulties, it had lost its line of credit with Fleet Bank, and Fleet Bank had called the loan due. At the meeting, the parties worked out an arrangement to merge Excel into Worldlink, a company owned and controlled by Plaintiff. Worldlink is a New Jersey corporation with its corporate offices in Voorhees, New Jersey.²

The parties did not enter into a written agreement at the May 31, 2004. Not surprisingly, therefore, there are significant disputes between the parties as to the terms of the agreement reached at the May 31, 2003 meeting. However, the parties agree that Worldlink paid off the Fleet Bank Loan. Plaintiff asserts that Defendant was required to meet several conditions in order for the merger to take place and that Defendant was personally responsible for half of the payoff of the Fleet Bank Loan if the merger did not occur. Defendant denies that he had any

² Plaintiff asserts that he has moved the executive offices of Worldlink to Park City. However, Defendant, who is also a director of Worldlink, states that the Board of Directors have never authorized a change of location to Utah. Worldlink's internet site lists Voorhees, New Jersey as the location of Worldlink's corporate office. Defendant also contends that Worldlink's base of operations is in Voorhees, New Jersey. Plaintiff has not refuted that assertion.

personal liability for paying off the loan.

The only other person at the May 31, 2003 board of directors meeting was the accountant for Excel, Terrence Mullens, who provided an affidavit stating that he cannot recall all of the decisions, agreements and events of the meeting but that he left the meeting believing that Defendant would be responsible for half of the Fleet Bank loan if the merger between Worldlink and Excel did not materialize.

Plaintiff also prepared meeting minutes that outline the agreement that was reached at the May 31 meeting. The minutes are dated June 1, 2003. However, Defendant claims that he did not receive the minutes until January 2004, shortly before Plaintiff filed this lawsuit. Defendant states that he disputes their authenticity and he does not approve them. However, for purposes of the pending motions, Defendant appears willing to accept the meeting minutes as true. The minutes state that Excel's receivables would be offset the amount advanced by Worldlink and if Excel's receivable's fell short, "the directors of Excel would be responsible to Worldlink on a 50/50 basis."

Worldlink paid off the Fleet Bank Loan on June 1, 2003. Excel continued to experience financial difficulties throughout the Fall of 2003. Beginning in October 2003, Worldlink, through Plaintiff, began demanding repayment of the Worldlink payment from Excel. Worldlink has taken the position that the Worldlink Payment represents a loan from Worldlink to Excel. On December 24, 2003, Worldlink executed a Security Agreement with Excel that described the Worldlink Payment as a loan. Defendant asserts that Plaintiff executed the Security Agreement on behalf of Excel without corporate authorization. Excel filed for Chapter 7 bankruptcy in February 2004.

DISCUSSION

Defendant argues that this action should be dismissed for several reasons. First, Defendant argues that this court lacks subject matter jurisdiction because Worldlink is a necessary Plaintiff whose addition to this case destroys diversity jurisdiction in this court. Defendant also argues that there is no personal jurisdiction over him in Utah because of the Fiduciary Shield Doctrine. Finally, Defendant argues that venue is improper in this district and, even if it is proper, this court should transfer the case to New Jersey under 28 U.S.C. § 1404(a).

Defendant argues that diversity jurisdiction does not exist in this case because Worldlink is an indispensable party to the litigation. Plaintiff argues that Worldlink is not an indispensable party because it was not a party to the agreement. Plaintiff asserts that he and Defendant were the only parties to the agreement, he personally agreed to pay off the loan, and he merely decided to use funds from Worldlink.

However, Plaintiff attaches the minutes he prepared from the May 31, 2003 meeting as evidence of the agreement. Assuming for purposes of this motion to dismiss that those minutes are true, the obligation of repayment was to Worldlink, not Plaintiff. The minutes state that the directors of Excel, Plaintiff and Defendant, "would be responsible *to Worldlink* on a 50/50 basis." (Emphasis added.) In addition, Worldlink, not Plaintiff, repaid the Fleet Bank Loan. Plaintiff's argument that his ownership and control of Worldlink gives him a right to seek repayment personally is not supported by law and ignores the corporate form. Plaintiff's status as a controlling owner of Worldlink stock does not give him personal ownership of a claim for repayment. Worldlink is the real party plaintiff in this action and should have been joined in order to effectuate complete relief to the parties.

Plaintiff further asserts that joinder of Worldlink is unnecessary because “any lingering concern about the need to join Worldlink is satisfied” by Worldlink’s May 4, 2004 Assignment to Plaintiff of any claims it may have against Defendant arising out of the May 31, 2003 agreement. The Assignment provides that

For value received, Assignor [Worldlink] assigns to Assignee [Plaintiff], his legal representatives and assigns, all of Assignor’s rights, claims and causes of action against Michael and Simon Jr. (“Simon”) of Long Beach Township, New Jersey, arising from Simon’s May 31, 2003 agreement to pay one-half of the \$350,000.00 paid by Assignor to retire the balance due on a credit line extended by Fleet Bank to Excel Transfer Corporation. . . . Assignee shall deduct from any sums received pursuant to this Assignment, prior to any distribution to Assignor, all amounts that Assignee may be compelled to pay in the prosecution or collection of the assigned rights, claims and causes of action.

Defendant argues that the Assignment is collusive under 28 U.S.C. § 1359 and invalid for jurisdictional purposes. Under 28 U.S.C. § 1359, jurisdiction is not appropriate when “any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of [the district] court.” Section 1359 forbids parties from “manufacturing diversity jurisdiction to inappropriately channel ordinary business litigation into the federal courts.” *Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909, 916 (10th Cir. 1993) (citation omitted). Only absolute transfers of a claim “with the transferor retaining no interest in the subject matter” pass scrutiny under Section 1359. *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 828 n.9 (1969).

In *Canton Industrial Corp. v. Mi-Jack Products, Inc.*, 944 F. Supp. 853 (D. Utah 1996), this court identified six factors to consider in determining whether an assignment between related parties is ineffective:

(1) whether and to what extent the assignee has a preexisting financial interest, (2) whether adequate consideration exchanged hands, (3) whether the underlying motivation of the assignment involved a sufficiently compelling business purpose that the assignment would have been made absent the purpose of gaining a federal forum, (4) whether the timing of the assignment supports an inference that the assignment was not entered into to create diversity, (5) whether the assignor has transferred all interest in the litigation, and (6) whether the assignee is financing the litigation.

Id. at 857.

The Assignment between Plaintiff and Worldlink appears to be entered specifically to create jurisdiction. The timing of the Assignment refutes any other legitimate purpose for entering the agreement. The Assignment was made three weeks after Defendant's motion to dismiss was filed and one week before Plaintiff filed his response. In addition, under the Assignment, Worldlink retains a right to receive all sums recovered less a deduction for Wilkinson's expenses incurred in collecting the debt. The Assignment appears to be a partial assignment for collection.³ Furthermore, assignments between related corporate entities or between a corporation and its directors are "presumptively ineffective" to create diversity jurisdiction. *Nike Inc. v. Comercial Iberica de Exclusivas Deportivas*, 20 F.3d 987, 991 (9th Cir. 1994). The purported transfer in this case is from a corporation controlled by Plaintiff. Plaintiff does not personally have a preexisting financial interest separate from the interest of Worldlink. Moreover, the Assignment provides no business reason for the parties to have entered such an agreement and no consideration is stated other than the statement "for value received." Plaintiff has offered no compelling business reason for Worldlink to give its claim for repayment to

³ Even if Plaintiff and Worldlink are joint obligees of the debt, courts have found that both obligees are indispensable parties. *Brackin Tie, Lumber & Chip Co. v. McLarty Farms, Inc.*, 704 F.2d 585, 586 (11th Cir. 1983).

Plaintiff personally absent the purpose of gaining a federal forum. For these reasons, the Assignment fails to establish diversity jurisdiction and violates Section 1359.

Where an omitted party, whose joinder would defeat diversity jurisdiction is the true party entitled to prosecute the action, the action must be dismissed under Section 1359. *Edlow International Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 830-31 (D.D.C. 1977). Under 28 U.S.C. § 1332(c)(1), for purposes of diversity jurisdiction “a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.” Because Worldlink is a New Jersey corporation, and Defendant is a New Jersey resident, diversity is destroyed. *See Harris v. Ill.-Cal. Express, Inc.*, 687 F.2d 1361, 1367 (10th Cir. 1982). The joinder of Worldlink is necessary in this case because Worldlink is the real party plaintiff. Furthermore, Plaintiff has an adequate remedy before the New Jersey courts. Therefore, Defendant’s motion to dismiss is granted and Plaintiff’s Complaint is dismissed for failure to join Worldlink and lack of subject matter jurisdiction. Because this court does not have subject matter jurisdiction, the court does not reach Defendant’s arguments regarding personal jurisdiction and venue.

CONCLUSION

Based on the above reasoning, Defendant’s Motion to Dismiss [Docket entry No. 6-1] is GRANTED. This court lacks subject matter jurisdiction pursuant to 28 U.S.C. § 1359. Because this court lacks subject matter jurisdiction, it need not address the remaining issues in Defendant’s motion regarding personal jurisdiction and venue [Docket Entry No. 6-2]. Furthermore, Plaintiff’s pending motion to amend complaint, filed March 30, 2004, [Docket Entry No. 4-1] is now MOOT. This case is dismissed and should be brought in the courts of

New Jersey.

DATED this 24th day of June, 2004.

BY THE COURT:



DALE A. KIMBALL,
United States District Judge

United States District Court
for the
District of Utah
June 25, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cv-00039

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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