

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL**

**HILDA MONTES, HILDA MONTES
as Next Friend of her Daughter,
LIZA M. MERCADO, and PEDRO
MONTES,**

Plaintiffs,

vs.

**ANASTACIO CARINO, TERRANCE GUMBS,
GENERAL TRAILER AND EQUIPMENT
SALES, INC., CUSTOM TRAILER and
ATWOOD MOBILE HOME PRODUCTS,**

Defendants.

CIVIL NO. 631/1993

**ACTION FOR DAMAGES; AND
LOSS OF CONSORTIUM**

NOT FOR PUBLICATION

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MEMORANDUM OPINION
(Filed March 20, 1997)

THIS MATTER came before this Court on Defendant Atwood Industries, Inc. ("Atwood"), motion to dismiss for lack of personal jurisdiction. In response to defendant's motion, the plaintiffs ask this Court to delay ruling on this matter pursuant to Fed. R. Civ. P. 56(f) in order to complete written discovery and to take the deposition of the defendant in order to establish personal jurisdiction. They also argue that defendant has waived any right to bring such a motion

since it has engaged in substantial discovery.

DISCUSSION

I. Waiver of Personal Jurisdiction

Plaintiffs allege that Atwood has waived its ability to object to personal jurisdiction by conducting discovery in this case. Specifically, plaintiffs point to the fact that Atwood has sent plaintiff Liza Mercado and Hilda Montes demands for the production of documents and a number of authorizations.

Fed. R. Civ. P. 12(h)(1) states:

A defense of lack of jurisdiction over the person...is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

Fed.R.Civ.P. 12(h)(1)(1997).

Thus, a defendant wishing to raise a defense of lack of personal jurisdiction against plaintiff must first do so in either a Rule 12 motion or an answer to a complaint. In addition, the standard for waiver of personal jurisdiction in the Third Circuit is clear:

A party is deemed to have consented to personal jurisdiction if the party actually litigates the underlying merits or demonstrates a willingness to engage in extensive litigation in the forum. In re Texas Eastern Transmission Corp. PCB Contamination Ins. Coverage Litigation, 15 F.3d 1230, 1236 (3d Cir. 1994).

Plaintiffs rely on several Circuit Court cases to support their contention that a party may waive a defense of lack of personal jurisdiction notwithstanding compliance with Rule 12(h). In Marcial Ucin, S.A. v. SS Galicia, 723 F.2d 994, 996 (1st Cir. 1983), the Court noted that the

defense of lack of personal jurisdiction could be waived "by submission through conduct." See also Reliable Tire Distributors, Inc. v. The Kelly Springfield Tire Co., 623 F.Supp. 153 (E.D. Pa. 1985)(objection to personal jurisdiction waived despite allegation in Answer). Plaintiffs also cite Continental Bank, N.A. v. Meyer, 10 F.3d 1293, 1296-97(7th Cir. 1993) where the Court held that the privileged defenses in Rule 12(h)(1) "may be waived by 'formal submission in a cause, or by submission through conduct.'"

In the case sub judice, defendant filed an answer on March 20, 1996, that asserted lack of personal jurisdiction over Atwood Industries, Inc. Atwood subsequently filed a motion to dismiss for lack of personal jurisdiction on August 27, 1996. Accordingly, Atwood complied with Rule 12(h). However, there is evidence that Atwood engaged in discovery by submitting demand for production of documents and authorizations to plaintiffs Montes and Mercado. Despite defendant's discovery requests, defendant's actions are clearly distinguishable from the Marcial Ucin and Continental Bank cases. In Marcial Ucin, the First Circuit held that the party asserting lack of personal jurisdiction had waived that defense by "filing an appearance and attending the taking of 13 depositions, and then four years later presenting the defense of lack of in personam jurisdiction." Marcial Ucin, 723 F.2d at 997. The Court found that by engaging in such conduct, the party was "trying to obtain the very delay which Rule 12 was designed to prevent." Id. Additionally, in Continental Bank, the Seventh Circuit held that the defendants had waived their objection to personal jurisdiction because they:

fully participated in litigation of the merits for over two-and-a-half years without actively contesting personal jurisdiction. They participated in lengthy discovery, filed various motions and opposed a number of motions filed by the plaintiffs. While the defendants literally complied with 12(h), they did not comply with the spirit of

the rule, which is to expedite and simplify proceedings...

Continental Bank, 10 F.3d at 1297.

In the instant matter, defendant Atwood's demands were limited to personal information of the plaintiffs. Atwood has neither litigated the underlying merits of plaintiffs' action nor has it engaged in "extensive litigation." In addition, only five (5) months passed between Atwood's answer and its motion to dismiss. This is clearly distinguishable from the two and one-half years that passed in the Continental Bank case and the four years that passed in the Marcial Ucin case. Accordingly, defendant Atwood has not waived its affirmative defense of lack of personal jurisdiction.

Ii. Rule 56(f) Motion

Plaintiffs also ask this Court to delay ruling on defendant's motion to dismiss pursuant to Fed.R.Civ.P. 56(f) in order to complete written discovery and to take the deposition of the defendant in order to establish personal jurisdiction.

Rule 56(f) states

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f)(1996)

Thus, Rule 56(f) allows a party who has no specific material contradicting his adversary's presentation to survive a summary judgment if he presents valid reasons justifying his failure of proof. The Third Circuit has provided clear guidelines for determining whether the reasons offered by the non-moving party are sufficient to merit postponement of a summary judgment motion. A

party seeking to delay responding to a summary judgment motion pending further discovery must specify: (1) what particular information is sought, (2) how, if uncovered, the information would preclude summary judgment, and (3) why the information has not previously been obtained. Dowling v. City of Philadelphia, 855 F.2d 136, 140 (3d Cir. 1988); Pastore v. Bell Telephone Company of Pennsylvania, 24 F.3d 508,511 (3d Cir. 1994).

Plaintiffs appear to have met the first two requirements to postpone action on a summary judgment pursuant to the Third Circuit rulings. First, the information sought by the plaintiffs was in the outstanding discovery to Atwood.¹ Second, the information, if uncovered, would preclude summary judgment since the discovery requests were directed primarily at jurisdiction, which is the basis for defendant's motion to dismiss.

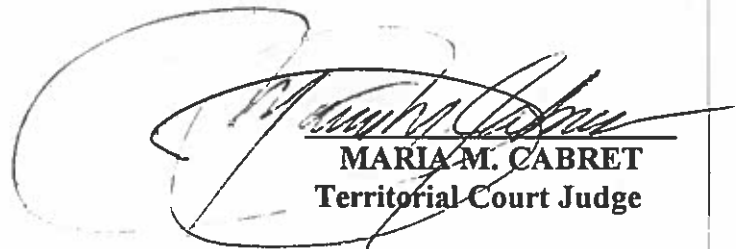
With respect to the third prong, *why the information has not previously been obtained*, there is a dispute. Plaintiff claims that the information had not been obtained earlier since defendant only answered the complaint on March 20, 1996. However, Atwood Industries, Inc. alleges that only after serving its motion to dismiss on plaintiffs did plaintiffs serve their second set of interrogatories dated August 21, 1996 and demand for production of documents on it. In addition, Atwood Industries, Inc. has responded to plaintiff's First and Second set of interrogatories and demand for production of documents. Despite Atwood's allegations, it appears that plaintiffs had served its first set of interrogatories on defendant before defendant filed the motion to dismiss in this Court on August 27, 1996 and had already prepared their second set of interrogatories before defendant's filing of its motion to dismiss. In addition, Attorney Cusick, counsel for plaintiffs,

¹ See Attorney Cusick's affidavit

specifically states in his affidavit in support of plaintiff's Rule 56(f) motion that "... the taking of a Rule 30 (b)(6) deposition of the defendant" is still necessary. Thus, defendant's responses to plaintiffs' interrogatories do not appear to have concluded discovery on the issue of jurisdiction and the Court shall grant plaintiff's Rule 56(f) motion .

CONCLUSION

Defendant Atwood has not waived its affirmative defense of lack of personal jurisdiction. Defendant complied with the procedural requirements of Fed.R.Civ.P. 12(h) and there is no evidence that it has engaged in "extensive litigation" pursuant to Continental Bank and Marcial Ucin. Furthermore, plaintiffs have met the Third Circuit's three-prong test for postponing a summary judgment motion. Accordingly, the Court shall DENY plaintiffs' motion for waiver and GRANT plaintiffs' Rule 56(f) motion.



MARIA M. CABRET
Territorial Court Judge