

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

ROY M. TERRY, JR., <i>et al.</i> ,)	CIVIL ACTION NO. 3:04CV00040
)	
Plaintiffs,)	
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
JACK DEMPSEY and)	
DOROTHY DEMPSEY,)	
)	
Defendants.)	JUDGE JAMES H. MICHAEL, JR.

Before the court are the defendants' Motion to Dismiss for lack of personal jurisdiction, filed on August 9, 2004, and the plaintiffs' Objection to Defendants' Motion to Dismiss, filed on August 10, 2004. By order dated August 25, 2004, this case was referred to the Honorable B. Waugh Crigler, United States Magistrate Judge, to conduct proceedings on all dispositive pretrial matters and to submit to this court proposed findings of fact and recommendations for their disposition, pursuant to 28 U.S.C. § 636(b)(1)(B). The Magistrate Judge heard oral arguments on the motion to dismiss on September 13, 2004, and he filed his Report and Recommendation on September 20, 2004. The Magistrate Judge recommends that an order enter denying the defendants' motion to dismiss, because the court has personal jurisdiction over the defendants pursuant to federal statutes.

Meanwhile, with leave of the Magistrate Judge, the plaintiffs filed an amended complaint on September 9, 2004, asserting an additional basis for personal jurisdiction, namely Virginia's long-arm statute. The defendants filed an Amended and Restated Motion to Dismiss on September 23, 2004, arguing that the court lacks personal jurisdiction over the

defendants under *either* federal statutes or Virginia's long-arm statute. In response, the Magistrate Judge issued a second Report and Recommendation on October 12, 2004, recommending that this court deny the amended motion to dismiss as moot to the extent that it challenges personal jurisdiction under the long-arm statute. The Magistrate Judge reasoned that acceptance by this court of the recommendation concerning personal jurisdiction under federal law would render unnecessary any need to address the plaintiffs' alternative claim under the long-arm statute.

For the reasons explained below, the court will adopt the Magistrate Judge's recommendations and deny the defendants' motion to dismiss.

I. Standard of Review

After the Magistrate Judge in this case issued his September 20, 2004 Report and Recommendation, defendants' counsel sent a letter to the Magistrate Judge dated September 29, 2004, largely reiterating the defendants' arguments against personal jurisdiction. After the Magistrate Judge issued his second Report and Recommendation on October 12, 2004, the defendants' counsel sent a second, two-paragraph letter to the Magistrate Judge on October 22, 2004. Although the letter stated that it was in response to the second Report and Recommendation, the additional point that it makes relates to the plaintiffs' claim of personal jurisdiction under federal statutes, which was the subject of the initial Report and Recommendation. Both letters from defendants' counsel state that they are submitted pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, which permits parties to file objections to a Magistrate Judge's report. That rule, however, requires an objecting party to "serve and

file specific, written objections to the proposed findings and recommendations.” Fed. R. Civ. P. 72(b). The two letters are not in the form of pleadings, and they are addressed to the Magistrate Judge, not to the Clerk of the Court or the presiding judge.¹ Further, while the letters note that carbon copies were sent to the plaintiffs’ counsel, they do not include certificates of service. Therefore, the defendants’ letters were neither filed nor served properly, as required by Rule 72(b).

This court must review *de novo* any portion of the Magistrate Judge’s findings and recommendations to which an objection has been made in accordance with Rule 72(b). Fed. R. Civ. P. 72(b); *Orpiano v. Johnson*, 687 F.2d 44, 48 (4th Cir. 1982). On the other hand, where no objection is properly made, *de novo* review is not required. *See Orpiano*, 684 F.2d at 47. In such cases, “the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.” Fed. R. Civ. P. 72(b), Advisory Committee Notes, 1983 Addition; *see also Brown v. Cushman & Wakefield, Inc.*, 235 F. Supp. 2d 291 (S.D.N.Y. 2002) (reviewing only for clear error); *Strawbridge v. Sugar Mountain Resort, Inc.*, 243 F. Supp. 2d 472, 475 (D.N.C. 2003) (requiring only “careful review”).

The court finds that the defendants did not file objections to the Magistrate Judge’s findings in the proper manner. Nevertheless, out of an abundance of caution, the court will

¹ The second letter, however, made its way to the Clerk of the Court at some point, since it was filed on October 22 and entered by a Deputy Clerk on October 25, 2004. The first letter, though in the same format, was never filed and entered, and there is no indication that defendants’ counsel sought to correct this situation.

review the Magistrate Judge's Reports and Recommendations *de novo*, and it will consider the defendants' two letter responses.

II. Facts

From 1998 to 2001, Terry L. Dowdell created and operated a class Ponzi scheme, defrauding would-be investors of millions of dollars. To facilitate recovery of these losses, this court appointed Roy M. Terry, Jr. and the law firm of DuretteBradshaw PLC as Receiver for Terry L. Dowdell and his various business entities.² The Receiver filed this action against Jack and Dorothy Dempsey on May 28, 2004, alleging that Dowdell's Vavasseau Corporation transferred over \$480,000 to the Dempseys in violation of an asset freeze order, and charging the defendants with unjust enrichment and fraudulent conveyance.

III. Analysis

The plaintiffs' complaint asserts personal jurisdiction over the defendants pursuant to Federal Rule of Civil Procedure 4(k)(1)(D) and 28 U.S.C. §§ 754 and 1692. The defendants argue that nothing in Rule 4(k)(1)(D) or 28 U.S.C. §§ 754 and 1692 allows for *in personam* jurisdiction in this case, although they may provide a basis for *in rem* jurisdiction.

As the Receiver and the Magistrate Judge have pointed out, in two companion cases brought by the same Receiver, this court has ruled that the interplay between Rule 4(k)(1)(D) and 28 U.S.C. §§ 754 and 1692 allows the court to exercise personal jurisdiction over out-of-

² For additional information on Dowdell's fraud scheme and the appointment of the Receiver, see *Terry v. Virginia June*, No. 3:03CV00047, 2003 U.S. Dist. LEXIS 12873 (W.D. Va. July 21, 2003); *Terry v. Robert June, Sr.*, No. 3:03CV00052, 2003 U.S. Dist. LEXIS 16080 (W.D. Va. Sept. 12, 2003).

state defendants in ancillary proceedings brought by the Receiver to recover assets related to the Dowdell fraud scheme, as long as the procedural requirements of 28 U.S.C. §§ 754 and 1692 have been met (which the defendants here do not dispute), and so long as jurisdiction is compatible with due process. See *Terry v. Robert June, Sr.*, No. 3:03CV00052, 2003 U.S. Dist. LEXIS 16080 (W.D. Va. Sept. 12, 2003); *Terry v. Virginia June*, No. 3:03CV00047, 2003 U.S. Dist. LEXIS 12873 (W.D. Va. July 21, 2003). While the Fourth Circuit has not ruled on this issue, this court's previous rulings are in accord with the law in at least three other circuits. See *SEC v. Bilzerian*, 378 F.3d 1001 (D.C. Cir. 2004); *SEC v. Vision Communications, Inc.*, 74 F.3d 287 (D.C. Cir. 1996); *American Freedom Train Foundation v. Spurney*, 747 F.2d 1069 (1st Cir. 1984); *Haile v. Henderson National Bank*, 657 F.2d 816 (6th Cir. 1981).

The defendants' memorandum in support of their motion to dismiss labors to distinguish this case from the *June* cases, and they point the court to the decision in *Stenger v. World Harvest Church, Inc.*, No. 02-C-8036, 2003 U.S. Dist. LEXIS 15108 (N.D. Ill. Aug. 29, 2003) (holding that 28 U.S.C. §§ 754 and 1692 provide a court that appoints a receiver *in rem* jurisdiction over receivership property located in another district, but not nationwide *in personam* jurisdiction over persons sued by the receiver). In their September 29, 2004 letter, the defendants ask the court to overturn its prior holding. The court, however, finds that its previous rulings in the *June* cases, in particular *Terry v. Robert June, Sr.*, apply to this case. In that case, this court stated:

Because section 754 deals exclusively with *in rem* jurisdiction over the receivership

property, it is insufficient, standing alone, to serve as the basis for jurisdiction with regard to an individual defendant. When read in conjunction with Federal Rule of Civil Procedure 4(k)(1)(D) and 28 U.S.C. § 1692, however, section 754 may be used as a “stepping stone” for the exercise of *in personam* jurisdiction.

June, 2003 U.S. Dist. LEXIS 16080, at *10 (citations omitted). The court finds that its earlier reasoning is still valid and declines to reverse itself. Indeed, since the court’s earlier ruling, as the Magistrate Judge discusses, the D.C. Circuit has reaffirmed its position on this issue with an analysis that this court finds persuasive. *See SEC v. Bilzerian*, 378 F.3d 1001 (D.C. Cir. 2004).

While federal statutes authorize *in personam* jurisdiction in this case, the court may only exercise this jurisdiction “so long as the assertion of jurisdiction over the defendant is compatible with due process.” *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 626 (4th Cir. 1997). The due process requirement is satisfied if jurisdiction is not so extremely inconvenient or unfair that it outweighs the congressionally articulated policy of allowing personal jurisdiction. *Id.* at 627; *cf. Bilzerian*, 378 F.3d at 1104, 1106 n.8 (finding that when personal jurisdiction is based on federal statutes, the due process requirement of “minimum contacts” with the forum state is inapplicable). Here, as in *Terry v. Robert June, Sr.*, this court finds no evidence of such “extreme inconvenience or unfairness” as would outweigh the “congressional policy behind the authorization of nationwide service of process provided by section 1692.” *June*, 2003 U.S. Dist. LEXIS 16080, at *12-13.

IV. Conclusion

Therefore, the court finds that it may exercise personal jurisdiction over the defendants pursuant to Rule 4(k)(1)(D) and 28 U.S.C. §§ 754 and 1692. Consequently, it is unnecessary

for the court to decide whether it may also have personal jurisdiction under Virginia's long-arm statute.

An appropriate order this day shall issue.

ENTERED: _____

Senior United States District Judge

Date

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ROY M. TERRY, JR., <i>et al.</i> ,)	CIVIL ACTION NO. 3:04CV00040
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Plaintiffs,)	
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v.)	<u>ORDER</u>
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JACK DEMPSEY and)	
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)	
Defendants.)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED, ORDERED, AND DECREED

that:

1. The Magistrate Judge's Report and Recommendation of September 20, 2004, is ADOPTED in full.
2. The Magistrate Judge's Report and Recommendation of October 12, 2004, is ADOPTED in full.
3. The defendants' Motion to Dismiss, filed on August 9, 2004, is DENIED.

4. The defendants' Amended and Restated Motion to Dismiss, filed on September 23, 2004, is DENIED as moot.

5. The defendants are hereby directed to respond the complaint by December 3, 2004.

6. This case is hereby recommitted to United States Magistrate Judge B. Waugh Crigler under 28 U.S.C. §§ 636(b)(1)(A) and (b)(1)(B) for further proceedings, including pretrial scheduling.

The Clerk of the Court is hereby directed to send a certified copy of this Order to the Magistrate Judge and to all counsel of record.

ENTERED: _____

Senior United States District

Judge

Date