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

S&S COMPUTERS AND DESIGN, INC.,	)	
Plaintiff,	)	**Civil Action No. 5:00-CV-00058**
v.	)	**MEMORANDUM OPINION**
PAYCOM BILLING SERVICES, INC.,	)	**By: Samuel G. Wilson,**
	)	**Chief United States District Judge**
Defendant.	)	

This is an action brought by plaintiff S&S Computers & Design, Inc., ("S&S"), against defendant Paycom Billing Services, Inc., ("Paycom"), alleging breach of contract. This matter is before the court on Paycom's motion to dismiss for lack of personal jurisdiction, motion to transfer venue to a California federal district court, and motion for a more definite statement. Finding that Paycom has sufficient contacts with Virginia to support personal jurisdiction, that a transfer of venue is not appropriate, and that S&S has pled sufficient facts to put Paycom on notice, the court denies all three motions.

I.

Defendant Paycom Billing Services, Inc., ("Paycom") is a Delaware corporation with its principle place of business in California (Andrews 9/6/2000 Aff. ¶ 1) and provides Internet payment processing and billing services (Kilbride Dep. at 36-37). It does not currently have, nor has it ever had, an office or registered agent in Virginia. (Andrews 9/6/2000 Aff. ¶ 2, 3.) Paycom does not own real property in Virginia and has not paid corporate income or franchise taxes, maintained a bank account, registered or qualified to do business, or placed any advertisements in

Virginia. (Id. ¶ 4-8.) At all times relevant to this lawsuit, Paycom was a wholly owned subsidiary of Solutions America, Inc. ("Solutions"), a Delaware corporation with its principle place of business in California. (Michael Sanders Aff. ¶ 4; Kilbride Dep. at 13, 14.)

In late 1999, Paycom associated itself with Sentinel Software, Inc., ("Sentinel"), a Virginia corporation with its principle place of business in Virginia, in order to assist Paycom in expanding its database. (Evid. Hearing Trans. at 37, 38.) Realizing that the magnitude of the project was beyond the capacity of Sentinel, Paycom CEO Jeff Kilbride and Paycom Chairman and Senior Manager Floyd Kephart decided that Paycom would need to hire additional consultants. (Id. at 38.) In late 1999, Kilbride and Kephart instructed Marc Overman, President of Sentinel, to find and negotiate pricing with other companies qualified to provide technical design, analysis, and programming services to make Paycom's database more efficient. (Id.; Kilbride Dep. at 19, 20, 65.) Pursuant to this instruction, Overman, who lived and worked in Virginia, contacted plaintiff S&S Computers & Design, Inc., ("S&S"). (Evid. Hearing Trans. at 38; Overman Aff. ¶ 6; Michael Sanders Aff. ¶ 7; Kilbride Dep. at 28, 29, 42, 44, 65.) From at least November 1999, and at the time he contacted S&S, Overman was receiving compensation directly from Paycom. (Evid. Hearing Trans. at 32-33; Evid. Hearing Ex. 1; Kilbride Dep. at 16, 63, 64, 82.)[1]

[1]Paycom was known as Epoch Application Systems ("Epoch") until it changed its name to Paycom Billing Services, Inc., in or about January 2000. (Evid. Hearing Trans. at 32-33; Evid. Hearing Ex. 1; Kilbride Dep. at 12.) Overman's pay-stubs contained the Epoch name from at least November 1999 through December 1999 and, thereafter, bore the Paycom name. (Evid. Hearing Ex. 1.) Both Epoch and Paycom pay-stubs contained the same business address in Marina Del Ray, California. (Id.) In January 2000, Solutions America (parent of Paycom) acquired Sentinel. (Michael Sanders Aff. ¶ 4; Andrews 11/8/2000 Aff. ¶ 2, 3; Kilbride Dep. at 13.) Marc Overman continued as President of Sentinel and, after the acquisition, was officially named Paycom's Vice President of Internet Operations on January 21, 2000. (Andrews 11/8/2000 Aff. ¶ 2; Overman Aff. ¶ 2; Kilbride Dep. at 28.)

Overman negotiated with S&S in person in Virginia, but most negotiations took place via phone, mail, electronic mail ("e-mail"), and facsimile. (Overman Aff. ¶ 6-9; Evid. Hearing Trans. at 40; Kilbride Dep. at 28-30.) Overman reported back to Kilbride, who authorized Overman to engage S&S and to instruct S&S to begin work immediately. (Evid. Hearing Trans. at 39, 40, 55.) On November 17, 1999, two representatives from S&S traveled to Paycom's offices in California to meet Paycom officers and employees and to learn more about the project. (Evid. Hearing Trans. at 46-47.) Thereafter, Paycom drafted an agreement and e-mailed it to S&S. (Michael Sanders Aff. ¶ 9.) Michael Sanders, President of S&S, signed the agreement in Virginia on or about December 22, 1999, and returned it to Paycom. (Id.; Kilbride Dep. at 19.) However, it appears that Paycom never executed the agreement.

Under the terms of the written agreement, Paycom agreed to provide S&S with a minimum of 6,000 hours of labor at the rate of $200 per hour for work conducted on-site (at Paycom's place of business in California) and $150 per hour for work conducted off-site (at S&S's place of business in Virginia). (Michael Sanders Aff. ¶ 12-13; Kilbride Dep. at 50.) Pursuant to the agreement, Paycom shipped their "Sun Box" (a large Sun System E-450 computer server worth approximately $250,000 to $300,000) to S&S in Virginia, which contained Paycom's database information and the computer source code that controlled their database. (Evid. Hearing Trans. at 49-51, 54, 62-64; Kilbride Dep. at 58, 60-62.) Thus, the parties contemplated that S&S employees would do most of their work at their office in Virginia using Paycom's Sun Box as their development platform. (Evid. Hearing Trans. at 58, 59, 62-64; Kilbride Dep. at 41, 50-52, 58.) By the time the alleged breach of contract occurred, S&S had incurred reimbursable expenses of $11,324.69 and completed 2,305 hours of work, mostly in

Virginia, resulting in invoices totaling $359,474.69. (Michael Sanders Aff. ¶ 15-16.) Of that amount, Paycom had paid $92,657.69 as of the commencement of this suit. (Id. ¶ 19.)

On July 10, 2000, S&S filed this lawsuit against Paycom, alleging breach of contract. On September 11, 2000, Paycom moved to dismiss for lack of personal jurisdiction and, in the alternative, for transfer of venue to California. Paycom also moved for a more definite statement pursuant to Rule 12(e). See Fed. R. Civ. P. 12(e). The court heard argument on the motions on October 10, 2000, and held an evidentiary hearing on December 11, 2000.

II.

Federal Rule of Civil Procedure 12(b)(2) permits dismissal of an action in which the forum court lacks the requisite personal jurisdiction. "When a court's personal jurisdiction is properly challenged by a Rule 12(b)(2) motion, the jurisdictional question thus raised is one for the judge, with the burden on the plaintiff ultimately to prove the existence of a ground for jurisdiction by a preponderance of the evidence." Combs v. Bakker, 886 F.2d 673, 676 (4th Cir. 1989). "If the existence of jurisdiction turns on disputed factual questions the court may resolve the challenge on the basis of a separate evidentiary hearing . . . ." Id.

Any resolution of a personal jurisdiction question requires a two part analysis: (1) whether the case falls within the Virginia long arm statute's reach; and (2) whether the defendant has certain minimum contacts with the forum state such that the exercise of personal jurisdiction in the matter is consistent with traditional notions of fair play and substantial justice (i.e. whether the exercise of jurisdiction comports with the Due Process Clause of the United States Constitution). See Roche v. Worldwide Media, Inc., 90 F. Supp. 2d 714, 716 (E.D. Va. 2000) (citing Ellicott

Mach. Corp. v. John Holland Party Ltd., 995 F.2d 474, 477 (4th Cir. 1993)).[2]

Virginia's long arm statute provides that "[a] court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's . . . [t]ransacting any business in this Commonwealth . . . ." Va. Code Ann. § 8.01-328.1(A)(1) (Michie 2000).

> [P]ertinent factors for assessing whether a defendant has transacted business in the forum are (i) where any contracting occurred, and where the negotiations took place, (ii) who initiated the contact, (iii) the extent of the communications, both telephonic and written, between the parties, and (iv) where the obligations of the parties under the contract were to be performed.

Affinity Memory & Micro, Inc. v. K & Q Enterprises, Inc., 20 F. Supp. 2d 948, 952 (E.D. Va. 1998).

In this case, Paycom did not have a corporate presence in Virginia, but had associated itself with Sentinel, a Virginia corporation. In addition, when Paycom asked Marc Overman, President of Sentinel, to seek out external consultants for Paycom and gave him the authority to conduct preliminary negotiations, Overman, who lived and worked in Virginia, became an agent of Paycom.[3] It was this agent of Paycom that initiated contact with S&S in Virginia. Furthermore, Overman conducted much of the negotiations with S&S, including at least one face-

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[2]The Supreme Court of Virginia has held that the long arm statute extends personal jurisdiction to the fullest extent permitted by due process. See Danville Plywood Corp. v. Plain and Fancy Kitchens, Inc., 218 Va. 533, 238 S.E.2d 800, 802 (1977); see also English & Smith v. Metzger, 901 F.2d 36, 38 (4th Cir. 1990). Thus, the two steps of the analysis are often merged. See, e.g., ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 623 (4th Cir. 1997).

[3]Although Overman was receiving his paychecks from Paycom, there is some dispute as to whether he was actually an employee of Paycom. (See Evid. Hearing Trans. at 28-36; Andrews 11/8/2000 Aff. ¶ 2, 3; Gazani Aff. ¶ 1, 2.) However, even if he was not technically an employee, he was acting at the behest and under the authority of Paycom and therefore would have been Paycom's agent.

to-face meeting in Virginia. Although the agreement was never executed by Paycom, S&S signed it in Virginia.

Finally, the agreement contemplated that much of the work would be performed "off-site," that is, at S&S's office in Virginia. To this end, Paycom, at their expense, shipped a quarter-million-dollar piece of computer equipment, along with their proprietary information and database computer code, to S&S in Virginia. Paycom's decision to ship the Sun Box to S&S indicates that Paycom intended that most of the work was to be completed at S&S's office in Virginia, no doubt to take advantage of the lower "off-site" rate that they had negotiated. By the time the alleged breach of contract occurred, S&S had completed 2,305 hours of work, mostly in Virginia. For these reasons, the court finds that Paycom transacted business in Virginia.

In addition to satisfying the Virginia long arm statute, the defendant must also have sufficient "minimum contacts" with Virginia so that requiring it to defend its interests in Virginia would not "offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citation omitted). Personal jurisdiction may rest on either specific or general jurisdictional contacts. General jurisdiction may be attained where a defendant's contacts are "continuous and systematic," even though the contacts have no relation to the cause of action. See Helicopteros v. Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-16 (1984).

In contrast, specific jurisdiction attaches where a defendant has "purposefully directed" its activities at a forum, and the litigation "'arises out of or relate[s] to' those activities." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (citation omitted). A single contract may properly form the basis for jurisdiction, but that contract must have a "substantial connection"

with the forum state, determined by the "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing." Chung v. NANA Development Corp., 783 F.2d 1124, 1127-28 (4th Cir.) (citing Burger King, 471 U.S. at 480-81), cert. denied, 479 U.S. 948 (1986). However, "[j]urisdiction . . . may not be avoided merely because the defendant did not physically enter the forum state." Burger King, 471 U.S. at 476.[4]

In this case, Paycom has purposefully directed its activities at the forum state, Virginia. Paycom not only associated itself with a Virginia firm, but also engaged that firm's president, Marc Overman, to act as its agent in Virginia to initiate contact and negotiate with S&S. Moreover, the agreement negotiated between the parties contemplated a relationship lasting several months, performance of at least 6,000 hours of work to be completed mostly in Virginia, and a transaction worth at least $900,000. The "quality and nature" of Paycom's relationship with S&S in Virginia can in no sense be viewed as "random," "fortuitous," or "attenuated." Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980); Hanson v. Denckla, 357 U.S. 235, 253 (1958).

Paycom urges the court to follow Bond Associates, Inc. v. Broad Waverly & Associates, Inc., No. 3:93cv803, 1994 U.S. Dist. LEXIS 12000 (E.D. Va. 1994), and decline to find personal jurisdiction. In that case, Broad Waverly, a New Jersey corporation, entered into a contract with

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[4]The court will concentrate on the specific jurisdictional analysis. Nonetheless, it should be noted that Paycom has numerous clients and consumers in Virginia, unrelated to the current litigation, who have on-going business relationships with Paycom and who access Paycom's services through the Internet. (See Kilbride Dep. at 32-37.) These contacts might be sufficient to form the basis for general jurisdiction, but the court need not reach that issue because the specific jurisdictional contacts are enough to support personal jurisdiction.

Bond Associates ("Bond"), a Virginia corporation. An employee of Bond initially contacted Broad Waverly's president in New Jersey to see if he would be interested in purchasing customized computer systems. Bond conducted a sales presentation at Broad Waverly's offices in New Jersey, and subsequent contract negotiations took place over the telephone. Bond customized Broad Waverly's computer systems in Virginia, delivered and installed them in New Jersey, and thereafter provided service either on-site in New Jersey or over a telephone or computer connection initiated in Virginia. Broad Waverly had no other contacts with Virginia.

The facts of Broad Waverly are distinguishable from the case at bar. In the present case, Paycom initiated contact with S&S in Virginia through their agent who was based in Virginia. Negotiations took place in Virginia mostly through e-mail and telephone but included a face-to-face meeting in Virginia. Furthermore, Paycom delivered their computer equipment to S&S in Virginia, and the work contemplated by the negotiations was performed almost exclusively in Virginia. Thus, in contrast to Broad Waverly, which was a company that did not reach into Virginia, Paycom initiated contact with and purposefully engaged S&S in Virginia and transacted business here through Marc Overman, their agent in Virginia. As a result, Broad Waverly is not controlling.

This case is more analogous to English & Smith v. Metzger, 901 F.2d 36 (4th Cir. 1990). In that case, Metzger, an attorney in California, contacted Smith, a lawyer in Virginia, to associate him on a case he was working on. They signed a contract that split a contingency fee between the two of them, but Metzger did not honor their agreement. As a result, Smith's law firm sued Metzger in Virginia. The court found that Metzger had sufficient contacts with Virginia to support personal jurisdiction, reasoning:

> Metzger initiated contact with Smith in Virginia, entered into contracts with Smith by virtue of action taken in Virginia, and carried on a continuing relationship with Smith in Virginia while the two worked on the Pemberton forfeiture case. Metzger's intentional contacts with the State were enough that he could "reasonably anticipate being haled into court there" . . . .

Id. at 39-40.

Likewise, through its course of action, Paycom purposefully availed itself of the privilege of conducting activities within Virginia, thereby invoking the benefits and protections of Virginia's laws. Paycom had sufficient contacts with Virginia such that maintenance of this action in Virginia does not "offend traditional notions of fair play and substantial justice." Therefore, the court finds that it is reasonable to require Paycom to defend this suit in Virginia.

III.

Paycom moves, in the alternative, to transfer venue to California. In deciding a motion to transfer venue, the court considers the "plaintiff's choice of venue, witness convenience and access, party convenience, and the interest of justice." Affinity Memory, 20 F. Supp. 2d at 954. However, the "plaintiff's choice of forum should rarely be disturbed unless the balance is strongly in favor of [the] defendant." Doe v. Connors, 796 F. Supp. 214, 221 (W.D. Va. 1992) (quoting Eldridge v. Bouchard, 620 F. Supp. 678, 684 (W.D. Va. 1985)).

While Paycom employees and witnesses would have to travel to Virginia for any proceedings, transferring the case to California would create the same burden for S&S employees and witnesses. Furthermore, there is no evidence that there are more non-party witnesses in California than there are in Virginia. Likewise, Paycom has failed to show, and the court fails to recognize, any reason why the interest of justice would weigh in favor of one venue over another. Consequently, the court will allow the plaintiff's choice of venue to stand.

IV.

Finally, Paycom moves for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e). Rule 12(e) states that "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." Paycom asserts that S&S has failed to clarify the details of the alleged contract, specifically, whether it was oral or written, whether it was executed, etc.

The Federal Rules of Civil Procedure only require that a plaintiff's complaint put the defendant on notice. See Fed. R. Civ. P. 8(a)(2) ("a short and plain statement of the claim"). Here, the complaint has accomplished that goal. Paycom may glean additional details through discovery.

V.

For the reasons stated above, the court denies Paycom's motion to dismiss, motion to transfer venue, and motion for a more definite statement. An appropriate order will be entered this day.

ENTER: This _____ day of January, 2001.

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CHIEF UNITED STATES DISTRICT JUDGE