UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MILLER DEVELOPMENT ENTERPRISES, INC., Plaintiff	)	
v.	)	C.A. NO. 07-30158-MAP
RED ROOF INNS, INC., Defendant	)	

MEMORANDUM AND ORDER REGARDING
REPORT AND RECOMMENDATION RE:
DEFENDANT'S MOTION TO DISMISS
(Docket Nos. 4 & 8)

January 25, 2008

PONSOR, D.J.

Plaintiff has brought this action seeking damages for breach of contract. On September 19, 2007, Defendant filed a Motion to Dismiss for Lack of Jurisdiction and for Improper Venue. The Motion to Dismiss was referred to Chief Magistrate Judge Kenneth P. Neiman for report and recommendation.

On December 21, 2007, Magistrate Judge Neiman issued his Report and Recommendation, to the effect that Defendant's motion should be denied. His memorandum admonished the parties that they had ten days from the receipt of the Report and Recommendation to file objections. No objection to the Report and Recommendation has been filed by either party.

Having reviewed the substance of the Report and Recommendation and finding it meritorious, and noting that there is no objection, the court, upon de novo review, hereby ADOPTS the Report and Recommendation. Based upon this, Defendant's Motion to Dismiss (Dkt. No. 4) is hereby DENIED.

This matter is hereby referred to Judge Neiman for a pretrial scheduling conference.

It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U. S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MILLER DEVELOPMENT ENTERPRISES, INC., Plaintiff	)	
E.	)	Civil Action No. 07-30158-MAP
RED ROOF INNS, INC., Defendant	)	

REPORT AND RECOMMENDATION WITH REGARD TO DEFENDANT'S MOTION TO DISMISS (Document No. 4)
December 21, 2007

NEIMAN, C.M.J.

In this case, Miller Development Enterprises, Inc. ("Plaintiff") seeks, among other claims, to recover damages for breach of contract from Red Roof Inns, Inc. ("Defendant"). Pursuant to Fed. R. Civ. P. 12(b)(2), Defendant has filed a motion to dismiss the action for lack of personal jurisdiction, which motion has been referred to this court for a report and recommendation. *See* 28 U.S.C. § 636(b)(1)(B). For the reasons which follow, the court will recommend that Defendant's motion be denied.

I. STANDARD OF REVIEW

On a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff has the burden of proving that jurisdiction lies with the court. *Mass. Sch.*

of Law at Andover, *Inc. v. Am. Bar Ass'n*, 142 F.3d 26, 34 (1st Cir. 1998) (citing cases). In particular, the plaintiff must show that the state's long-arm statute grants jurisdiction and that the exercise of jurisdiction is consistent with the Due Process clause of the United States Constitution. *Daynard v. Ness, Motley, Loadholt, Richardson & Poole*, *P.A.*, 290 F.3d 42, 52 (1st Cir. 2002). To meet this burden, the plaintiff "must go beyond the pleadings and make affirmative proof" of material jurisdictional facts. *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 675 (1st Cir. 1992) (citations omitted). It should be noted, however, that the court "does not act as a fact finder; to the contrary, it ascertains only whether the facts, duly proffered, fully credited, support the exercise of personal jurisdiction." *Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81, 84 (1st Cir. 1997).

II. BACKGROUND

Most of the following facts are undisputed, with additional facts addressed in the discussion below. Plaintiff is a Massachusetts construction company with its principal place of business in Holyoke. Defendant is a Delaware corporation with its principal place of business in Texas. Defendant operates seven hotels in Massachusetts and maintains a corporate office in Boston where it hires general managers for its hotels.

In 2004 and afterwards, Plaintiff and Defendant entered into seven contracts for remodeling work related to certain hotels in Georgia, Connecticut, Massachusetts, Texas, Pennsylvania and Virginia. Each contract covered specific remodeling work and stated that the governing law would come from the state in which the particular

work was to be performed. Although Plaintiff concedes that the contracts at issue were performed in Georgia, Connecticut, Massachusetts, Texas, Pennsylvania and Virginia, it asserts, as explored more fully below, that the contract negotiations were all linked to Massachusetts.

Plaintiff claims with respect to each of the seven contracts that Defendant failed to pay in full for the services rendered. Plaintiff's main claims are for breach of contract. Plaintiff, however, also alleges violations of Mass. Gen. Laws ch. 93A § 11, defamation, and tortious interference with a contractual relationship. While Plaintiff's suit was originally filed in Massachusetts state court, Defendant, in due course, removed the matter to this forum based on diversity of citizenship. Defendant now seeks to dismiss the complaint for lack of personal jurisdiction.

III. DISCUSSION

As indicated, Plaintiff must show both that the Massachusetts long-arm statute grants jurisdiction and that the exercise of jurisdiction is consistent with due process. *Daynard*, 290 F.3d at 52. Defendant focuses only on the due process concerns. Accordingly, the court does likewise.

Due process requires the court to find either that it has "specific jurisdiction" over the defendant or "general jurisdiction." *See generally Harlow v. Children's Hosp.*, 432 F.3d 50, 57 (1st Cir. 2005). Specific jurisdiction exists when a defendant's contacts with the Commonwealth "arise out of" or "relate to" the plaintiff's particular cause of action. *See Sawtelle v. Farrell*, 70 F.3d 1381, 1389 (1st Cir. 1995). General jurisdiction may be found when a defendant has "continuous and systematic" contacts

with Massachusetts, even though those contacts do not relate to the particular cause of action. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984). Here, Plaintiff asserts that this court has both specific and general jurisdiction, while Defendant asserts that the court has neither and, moreover, that venue is improper. In the court's view, Plaintiff has the stronger argument on every issue.

A. Specific Jurisdiction

The First Circuit uses a three-part test for determining whether a court has specific jurisdiction over a defendant:

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

Sawtelle, 70 F.3d at 1389 (emphasis added) (citing cases). *See also United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 620-21 (1st Cir. 2001). The court will address each part of the test in turn, mindful that "[c]entral to each step . . . are the contacts which are attributable to [the] defendant." *Sawtelle*, 70 F.3d at 1389.

1. *Relatedness*

With respect to the first prong of the analysis, relatedness, Defendant argues that the claims do not "arise out of, or relate to" its Massachusetts activities. Defendant acknowledges that it has several hotel locations in Massachusetts, but contends that there is no relationship between these locations and the present action. Rather,

Defendant states, the activities that give rise to this suit occurred in the various states where the renovations occurred, namely, Texas, Connecticut, Georgia, Virginia and Pennsylvania. As to the one Massachusetts location where Plaintiff did work on Defendant's hotel, West Springfield, Defendant asserts that a "General Release and Waiver of Lien" was signed by Plaintiff, barring all claims with respect to that location.

For its part, Plaintiff argues that the damages it seeks with regard to the Massachusetts location fall outside the terms of the release. More generally, Plaintiff asserts that all the other claims arise out of or relate to Defendant's forum activities as well. Citing *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995), Plaintiff proffers a "but for" test to determine whether its claims are related to Defendant's contacts. According to Plaintiff, "[i]f [Defendant] had not cultivated and maintained a business relationship from 2004 through 2007 with a Massachusetts company, by consistent communications through faxes, telephone communications, contracts mailed to Massachusetts, e-mails and in-person visits, disputes arising from the business relationship would not have arisen." (Document No. 7 ("Plaintiff's Brief") at 6.)

Plaintiff's reliance to the contrary, the First Circuit does not use a "but-for" test. It prefers a "proximate cause" test to determine whether a claim arises out of, or relates to, a defendant's contacts in the forum. *Negrón-Torres v. Verizon Communs., Inc.*, 478 F.3d 19, 25 (1st Cir. 2007) ("A broad but-for argument is generally insufficient. Because but for events can be very remote, due process demands something like a proximate cause nexus.") (citation, internal quotation marks and court's alteration omitted). Accordingly, in contract cases such as this, "a court charged with determining

the existence *vel non* of personal jurisdiction must look to the elements of the cause of action and ask whether the defendant's contacts with the forum were instrumental either in the formation of the contract or in its breach." *Phillips Exeter Acad. v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 289 (1st Cir. 1999) (citing cases).

In the court's view, Defendant's contacts -- as noted in the undisputed affidavit of Plaintiff's President, Joseph Miller ("Miller") -- were sufficient to meet the relatedness prong of the due process analysis. (The court reaches this conclusion without even considering Defendant's "release and waiver" argument with respect to the West Springfield location.) First, there can be no dispute but that Defendant formed a three-year business relationship with Plaintiff, a Massachusetts company, and, in the course of that relationship: telephoned Plaintiff in Massachusetts, sent faxes to Plaintiff's Massachusetts office, sent e-mail to Plaintiff's Massachusetts office, and conducted numerous telephone meetings with Miller while he was stationed in his Holyoke office. (See Miller Aff. ¶¶ 11, 15, 16.) Second, on approximately ten occasions, the Vice President of Defendant's Construction Department traveled to Massachusetts and Connecticut to meet with Plaintiff's representatives. (See *id.* ¶¶ 9, 10.) Third, all of the various contracts were mailed to Plaintiff in Massachusetts for it to sign and return. (*Id*. ¶ 14.) And fourth, Defendant sent other first class mail to Plaintiff's Massachusetts address during the course of the parties' business relationship. (*Id*. ¶ 13.) All of these contacts, in the court's view, were instrumental either in the formation of the parties' contracts or in their breach.

In summary, the court believes that Plaintiff has proffered enough

Massachusetts contacts by Defendant to demonstrate relatedness under the governing proximate cause inquiry. Decisions by other judges in this circuit support this conclusion. *See, e.g.*, *Champion Exposition Servs.. v. Hi-Tech Elec., LLC.*, 273 F. Supp. 2d 172, 177-78 (D. Mass. 2003) (defendant's pre-contractual visit and the transmission back and forth of a business plan and letter agreement were instrumental in forming the parties' contract and, hence, sufficient to demonstrate relatedness); *Microfibres, Inc. v. Squires Hightech Corp.*, 2006 WL 305975, at *5 (D.R.I. Feb. 8, 2006) (finding relatedness in contract claim based on only the following contacts: three meetings held in the forum state, a phone call from defendant to plaintiff, four e-mails from defendant to plaintiff, and two faxes transmitted from defendant to plaintiff). *See also Lantor, Inc. v. Nicassio Corp.*, 2007 WL 204015, at *8 (D.R.I. Jan. 24, 2007) (holding that the parties' "course of dealing, involving numerous communications between [them], was instrumental in the formation of the contract at issue" and, thus, sufficient to establish relatedness).

2. *Purposeful Availment*

As for the second prong of the analysis, Defendant argues that it did not purposefully avail itself of the benefits and obligations of the Commonwealth's laws because it was not foreseeable that its contracts for hotel renovations outside Massachusetts would require it to be brought into court here. As stated by the First Circuit in *Swatelle*, 70 F.3d at 1391, "[t]he function of the purposeful availment requirement is to assure that personal jurisdiction is not premised solely upon a defendant's "random, isolated, or fortuitous" contacts with the forum state." To

determine purposeful availment, a court must look at whether the defendant's forum activity is voluntary and made it foreseeable that it could be brought to court in the Commonwealth. *See id.*

As Plaintiff argues, it is unquestionable that Defendant's contacts with Plaintiff were voluntary. Plaintiff was hired by Defendant to do the work detailed in the various contracts between the parties. For three years, Defendant maintained an ongoing relationship with Plaintiff in the renovation of its buildings. Defendant also made trips to the forum to hold discussions with Plaintiff about sites outside of Massachusetts. (Miller Aff. ¶ 17.) This on-going relationship, in the court's opinion, was sufficient to find that Defendant's activities in Massachusetts were voluntary.

3. *Reasonableness*

In what is perhaps its strongest argument, Defendant contends, with regard to the third prong of the analysis, that making it defend claims in Massachusetts would be, in light of the "Gestalt" factors, unreasonable. *See Sawtelle*, 70 F.3d at 1389. The five Gestalt factors are: "(1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies." *Noonan v. Winston Co.*, 135 F.3d 85, 89 n.2 (1st Cir. 1998).

Citing these factors, Defendant argues, first, that it is a Delaware company with its principal place of business in Texas and that it would be an insurmountable burden

to have to litigate these claims in Massachusetts because the witnesses are scattered all over the country; in contrast, Defendant continues, Plaintiff only has a few witnesses here and upon whom the burden to travel would be less. Second, Defendant argues that a Massachusetts court would have no interest in litigating claims that arise elsewhere, particularly when it would require the interpretation of other state laws. Third, Defendant argues that there would be no burden on Plaintiff to travel to the various jurisdictions to litigate its claims because it had to travel to those locations anyway in order to perform work under the contracts. Fourth, Defendant argues that the most effective way to resolve the several contractual disputes is in the various jurisdictions in which the claims arise. And fifth, Defendant argues that the common interests of the various sovereign states would be for each jurisdiction to adjudicate the claims that arise under its laws.

Having considered the question carefully, the court, despite Defendant's protestations to the contrary, believes that the five Gestalt factors militate in favor of exercising personal jurisdiction over Defendant. As Defendant is well aware, the factors "rarely seem to preclude jurisdiction where," as here, "relevant minimum contacts exist." *Cambridge Literary Props. v. W. Goebel Porzellanfabrik G.m.b.H & Co Kg.,* 295 F.3d 59, 66 (1st Cir. 2002). Rather, they are used in situations where the question of jurisdiction is very close. *Nowak v. Tak How Investments, Inc.*, 94 F.3d at 708, 717 (1st Cir. 1996). Moreover, a strong showing of reasonableness may overcome a smaller showing of relatedness and purposeful availment. *Id.* That is certainly the situation here.

As for the first factor -- the burden of appearing in this forum -- Defendant has not shown "special, unusual, or other constitutionally significant" circumstances. *Id.* at 718. While the burdens on Defendant may be significant, they are not particularly unusual. If anything, Defendant's suggestion that the instant case be dismissed and scattered to five other jurisdictions (plus one remaining in a Massachusetts state court) would be far more burdensome. Moreover, as Plaintiff notes, Defendant also has seven hotels in Massachusetts from which it derives significant income. *See id.* at 717 ("Exercising jurisdiction is appropriate where the defendant purposefully derives economic benefits from its forum-state activities.").

As to the second and third Gestalt factors, there is little doubt that Massachusetts has an interest in providing its citizens, here Plaintiff, a forum to litigate claims. *See Cambridge Literary*, 295 F.3d at 66. Moreover, it is irrelevant whether any other single forum -- at oral argument Defendant suggested possibly Virginia -- has more of an interest. *See Nowak*, 94 F.3d at 718. Defendant, it should be noted, concedes that Massachusetts is a convenient forum for Plaintiff.

As for the fourth factor, the administration of justice, the court believes that the most effective resolution of the parties' various disputes would occur here in Massachusetts. As the First Circuit has explained, the "judicial system's interest in obtaining the most effacious resolution of the controversy . . . counsels against furcation of the dispute among several different jurisdictions." *Pritzker v. Yari*, 42 F.3d 53, 64 (1st Cir. 1994). Moreover, it would be easy enough for this court to apply any state law which might govern a particular contract.

With regard to the fifth and last factor, it certainly is true that each of the sovereign states where construction was done may have an interest in the underlying contract. But, as Plaintiff argues and for the reasons stated, it would be blatantly inefficient to spawn this litigation throughout the United States. In the end, therefore, the Gestalt factors strongly suggest that Massachusetts is the most reasonable forum for Plaintiff's combined claims.

B. General Jurisdiction and Venue

Plaintiff also posits that general jurisdiction could be exercised over Defendant. For its part, Defendant resists a finding of general jurisdiction and argues as well that venue is improper. Both of these issues, in the court's view, can be dealt with quickly.

As described, general jurisdiction may be found when a defendant has "continuous and systematic" contacts with the forum state even when the cause of action has no relation to those contacts. *Helicopteros*, 466 U.S. at 414-16. Defendant's operation of seven hotels and its registration to do business in the Commonwealth, Plaintiff asserts, are sufficient contacts for purposes of general jurisdiction. In response, Defendant argues simply that Plaintiff has not met its burden of showing that general jurisdiction should be exercised. In addition, as Defendant made clear at oral argument, it relies again on the Gestalt factors to argue why the exercise of such jurisdiction would be unreasonable.

Although the court notes that the Gestalt factors are only "secondary" in the context of general jurisdiction, *see Donatelli v. Nat'l Hockey League*, 893 F.2d 459, 465 (1st Cir. 1990), it does not believe that the question of such jurisdiction need be

resolved given its recommendation concerning the exercise of specific jurisdiction. *Cf. Noonan*, 135 F.3d at 93 (noting that general jurisdiction standards are "considerably more stringent" than specific jurisdiction standards) (citation and internal quotation marks omitted). Similarly, the court finds it unnecessary to address Defendant's argument that venue is improper. Given that "a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced," 28 U.S.C. 1391, venue is proper since, in the court's opinion, Defendant is subject to personal jurisdiction in this forum.

IV. CONCLUSION

For the reasons described, the court recommends that Defendant's motion to dismiss be DENIED.[1]

DATED: December 21, 2007

/s/ Kenneth P. Neiman
KENNETH P. NEIMAN

1 The parties are advised that under the provisions of Rule 3(b) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts, any party who objects to these findings and recommendations must file a written objection with the Clerk of this Court **within ten (10) days** of the party's receipt of this Report and Recommendation. The written objection must specifically identify the portion of the proposed findings or recommendations to which objection is made and the basis for such objection. The parties are further advised that failure to comply with this rule shall preclude further appellate review by the Court of Appeals of the District Court order entered pursuant to this Report and Recommendation. *See Keating v. Secretary of Health & Human Services*, 848 F.2d 271, 275 (1st Cir. 1988); *United States v. Valencia-Copete*, 792 F.2d 4, 6 (1st Cir. 1986); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *United States v. Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 604 (1st Cir. 1980). *See also Thomas v. Arn*, 474 U.S. 140, 154-55 (1985). A party may respond to another party's objections within ten (10) days after being served with a copy thereof.

Chief Magistrate Judge