2004 WL 1803269
United States District Court,
S.D. New York.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
PLAZA OPERATING PARTNERS, LTD. d/b/a the Plaza Hotel, Fairmont Hotels and Resorts, Inc., and Fairmont Hotel Management L.P., Defendants.
Tulun AHMED, Mohammed Alam, Musa Choudhury, Emdadur Chowdhury, Shamsul Chowdhury, Abdel El Bettal, Adel Fathelbab, Ehsan Khan, Mohammad Mamun, and Mohab Sayed, Plaintiffs–Intervenors,
v.
THE PLAZA HOTEL, et al., Defendants.

No. 03 Civ. 7680 LTS FM. | Aug. 13, 2004.

Opinion

MEMORANDUM ORDER

SWAIN, J.

***1** Plaintiff, the Equal Opportunity Employment Commission ("Plaintiff"), brings this action, alleging unlawful employment practices on the basis of religion and/or national origin, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–5(f)(1) and (3) and 2000e–6, and Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. Defendant Fairmont Hotels and Resorts, Inc. ("FHRI"), a Canadian corporation, moves pursuant to Rules 12(b)(1) and 12(b)(2) of the Federal Rules of Civil Procedure to dismiss the Amended Complaint ("Complaint") as against it for lack of subject matter jurisdiction and lack of personal jurisdiction. Plaintiff seeks denial of the motion or, in the alternative, leave to conduct further discovery to establish jurisdiction over FHRI.

The Court has fully considered all submissions related to this motion. For the reasons set forth below, Defendant's motion is denied.

DISCUSSION

Subject Matter Jurisdiction

A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. *Makarova v. U.S.,* 201 F.3d 110, 113 (2d Cir.2000). Where the defendant challenges the factual basis of jurisdiction, a district court may refer to evidence outside the pleadings. *Id.; See Goodman v. Children's Television Workshop,* No. 98 Civ. 8348, 1999 WL 228396, at *2 (S.D.N.Y. April 19, 1999). A plaintiff asserting subject matter jurisdiction, once challenged, has the burden of proving by a preponderance of the evidence that jurisdiction exists. *Makarova,* 201 F.3d at 113. Unlike a motion to dismiss under Rule 12(b)(6), a motion to dismiss for lack of subject matter jurisdiction is not directed to the claim's merits. *See Exchange Nat'l Bank of Chicago v. Touche Ross & Co.,* 544 F.2d 1126, 1130–31 (2d Cir.1976), *modified sub nom. on other grounds.*

FHRI contends that the Court does not have subject matter jurisdiction over Plaintiff's claim against it because Plaintiff has not met its burden of showing that FHRI is an "employer" within the meaning of Title VII. Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C.A. § 2000e(b) (West 2004). FHRI asserts that this 15–employee threshold constitutes a jurisdictional prerequisite. The Second Circuit has held, however, that the threshold number of employees established by the definition of "employer" set forth in Title VII is not a jurisdictional issue, at least as long as the plaintiff makes a non-frivolous claim that defendant is a covered employer.[1] *Da Silva v. Kinsho Int'l Corp.,* 229 F.3d 358, 366 (2d Cir.2000). A plaintiff's failure to prove that the defendant is a covered employer "is a ground for defeating her federal claim on the merits," and is therefore not an issue properly addressed on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *Id.* at 365. Accordingly, Defendant's motion is denied to the extent it seek dismissal pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

1 The Court is satisfied that Plaintiff's claim that FHRI is a covered employer is non-frivolous. FHRI and Fairmont Hotel Management L.P. are interrelated corporate entities that could plausibly be regarded as a single, integrated enterprise, thereby potentially satisfying the fifteen-employee requirement. *See Cook v. Arrowsmith Shelbourne, Inc.,* 69 F.3d 1235 (2d Cir.1995) (a parent and a subsidiary may represent a single entity for purposes of title VII liability where there is evidence of (1) interrelation of operations, (2) centralized control of labor relations, (3) common

management, and (4) common ownership or financial control).

***2** Having found that Defendant's motion to dismiss is predicated improperly on Rule 12(b)(1), the Court could construe the motion as one to dismiss under Rule 12(b)(6) (failure to state a claim upon which relief can be granted) or, in that both parties have proffered materials outside the pleadings, a motion for summary judgment under Rule 56. *See* Fed.R.Civ.P. 12(b); *EEOC v. St Francis Xavier Parochial School,* 117 F.3d 621, 624 n. 3 (D.C.Cir.1997). The Court declines to do so because the alleged infirmity with respect to FHRI's status as a covered employer under Title VII is not apparent on the face of the complaint and the evidence thus far proffered is insufficient to allow the Court to make a full and fair determination of the issue. Reasonable discovery is appropriate prior to any resolution of this question. The Court urges the parties, who are in the process of discovery, to give this issue precedence if their views continue to diverge.

Personal Jurisdiction

When a defendant brings a motion under Rule 12(b)(2) of the Federal Rules of Civil Procedure to dismiss an action for lack of personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction over the defendant. *Metropolitan Life Ins. Co. v. Robertson–Ceco Corp.,* 84 F.3d 560, 566 (2d Cir.1996). The plaintiff's obligation varies, however, depending upon the procedural posture of the litigation. *Ball v. Metallurgie Hoboken–Overpelt, S.A.,* 902 F.2d 194, 197 (2d Cir.1990). Where—as in this case—discovery has not been conducted regarding the defendant's contacts with the forum state, the plaintiff may satisfy its burden "by making a prima facie showing, based only on the 'good faith' allegations in the pleadings, of a permissible basis for personal jurisdiction." *Atl. Mut. Ins. Co. v. M/V Humacao,* 169 F.Supp.2d 211, 214 (S.D.N.Y.2001) (citing *Ball,* 902 F.2d at 197). "At [this] preliminary stage, the plaintiff's prima facie showing may be established solely by allegations." *Ball,* 902 F.2d at 197. The court may consider matters outside the pleadings without converting a motion to dismiss into a motion for summary judgment. *Bensusan Restaurant Corp. v. King,* 937 F.Supp. 295, 298 (S.D.N.Y.1996), *aff'd,* 126 F.3d 25 (2d Cir.1997). "The court must accept the averment of facts in the pleadings and motion papers as true, and resolve all doubts in the plaintiff's favor." *Kernan v. Kurz–Hastings, Inc.,* 997 F.Supp. 367, 371 (W.D.N.Y.1998) (citing *Cutco Industries, Inc. v. Naughton,* 806 F.2d 361, 365 (2d Cir.1986)). Further, the court should "construe jurisdictional allegations liberally." *Atl. Mut. Ins.,* 169 F.Supp.2d at 214 (quoting *Robinson v. Overseas Military Sales Corp.,* 21 F.3d 502, 507 (2d Cir.1990) (citation omitted)).

In evaluating personal jurisdiction, the Court engages in a two-part analysis: first, it must determine whether there is jurisdiction over the defendant under New York law, and second, if New York law would support jurisdiction, the Court examines "whether an exercise of jurisdiction under these laws is consistent with federal due process requirements." *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 305 F.3d 120, 124 (2d Cir.2002). Both state law and due process requirements must be met in order to exercise jurisdiction over a non-domiciliary. *Id.* In this case, FHRI has not argued that its contacts with New York State are so attenuated as to offend the "minimum contacts" test of due process established in *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). Because FHRI does not argue that it lacks sufficient contacts with New York to satisfy federal due process requirements, the only issue to be addressed is whether the statutory requirements for jurisdiction under New York law have been met. *See Wilson v. Danka Corp.,* No. 01 Civ. 10592, 2002 U.S. Dist. LEXIS 25055, at *7 (S.D.N.Y. Dec. 10, 2002).

***3** Plaintiff contends that this Court has personal jurisdiction over FHRI pursuant to Section 301 of the New York Civil Practice Law and Rules ("CPLR"). CPLR § 301 provides for the exercise of "jurisdiction over such persons, property, or status as might have been exercised heretofore." N.Y. CPLR § 301 (McKinney 2001). This Section has been interpreted to permit the exercise of a personal jurisdiction over a foreign corporation that is "engaged in a continuous and systematic course of 'doing business' [in New York] as to warrant a finding of its 'presence' in this jurisdiction." *Frummer v. Hilton Hotels Int'l, Inc.,* 19 N.Y.2d 533, 536 (1967) (citations omitted). "The essential factual inquiry is whether the defendant has a permanent and continuous presence in the State, as opposed to merely occasional or casual contact with the State." *Holness v. Mar. Overseas Corp.,* 251 A.D.2d 220, 222 (1st Dept.1998).

The complaint in this action alleges that, "[a]t all relevant times, Defendant Fairmont Hotels and Resorts, Inc. has continuously been a corporation doing business in the State of New York and the county of New York." (Compl.¶ 6.) Plaintiff alleges that FHRI has engaged in this continuous course of business by managing the day-to-day operations of the Plaza Hotel in Manhattan. (Pl.'s Memo at 7.) FHRI contests Plaintiff's factual allegations and proffers its own averment of facts to show that it is merely an investment holding company with no involvement in the day-to-day operations of the Plaza. (Def.'s Memo at 5.) In bringing a Rule 12(b)(2) motion, however, a defendant must "assume[ ] the truth of the plaintiff's factual allegations for the purposes of the motion" and be "content to challenge only [their]

sufficiency....” *Ball,* 902 F.2d at 197. A defendant who wishes to contest a plaintiff’s factual allegations in support of jurisdiction may request an adjudication of disputed jurisdictional facts, either at a post-discovery hearing on the issue or in the course of a trial on the merits. *Ball,* 902 F.2d at 197. Prior to discovery, however, if a plaintiff is able to make a prima facie showing of jurisdiction through its own pleadings or supporting materials, a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction will be defeated “notwithstanding any controverting presentation by the moving party.” *Marine Midland Bank, N.A. v. Miller,* 664 F.2d 899, 904 (2d Cir.1981).

Plaintiff’s factual allegations, liberally construed, are sufficient to constitute a prima facie showing of personal jurisdiction over FHRI pursuant to CPLR § 301. The day-to-day management of a major hotel is clearly a continuous and systematic course of “doing business” within the scope of CPLR § 301. Accordingly, Defendant’s motion is denied to the extent that it seeks dismissal pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure.[2]

[2] Plaintiff has also argued that the Court may exercise jurisdiction over FHRI pursuant to CPLR §§ 302(a), which provides for jurisdiction over non-domiciliaries who commit tortious acts within the state and non-domiciliaries who commit tortious acts without the state causing injury to persons or property within the state. However, because Plaintiff has met his burden of making a prima facie showing of jurisdiction under Section 301, the Court declines to reach the issue of whether jurisdiction over FHRI may properly be exercised pursuant to Section 302(a).

CONCLUSION

For the foregoing reasons, Defendant FHRI’s motion to dismiss the Complaint as against Defendant FHRI is denied in its entirety.

***4** SO ORDERED.

Parallel Citations

94 Fair Empl.Prac.Cas. (BNA) 883