

COPY

IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

BOBBY AND AMANDA MESSER,

PLAINTIFF,

V.

CIVIL ACTION NO: 06-C-182

**MORLAN ENTERPRISES, INC., a
West Virginia Corporation, et al.,**

DEFENDANTS.

V.

**MORLAN ENTERPRISES, INC., a
West Virginia Corporation,**

DEFENDANT and THIRD-PARTY PLAINTIFF,

V.

**OWNERS INSURANCE COMPANY,
a foreign corporation,**

THIRD-PARTY DEFENDANT.

**ORDER DENYING MOTION TO
DISMISS THIRD-PARTY COMPLAINT**

Pending before the Court is the Motion to Dismiss Third-Party Complaint for Declaratory Relief Filed by Owners Insurance Company. The underlying personal injury action has been resolved either by settlement or jury trial, except for plaintiff's appeal to the West Virginia Supreme Court of Appeals of the jury's defense verdict in favor of Hampton Coal Company, LLC.

Owner's Motion to Dismiss is pursuant to Rule 12(b)(2) of the West Virginia Rules of Civil Procedure for lack of jurisdiction.

FACTS

This civil action arises from an incident that occurred on September 15, 2005, when the plaintiff, Bobby Messer, was injured while working on high power electric lines in Mingo County, West Virginia. The plaintiffs filed suit on October 10, 2006, against several electric company and contractor defendants. On or about November 9, 2007, the plaintiffs amended their complaint to add claims against Morlan Enterprises, Inc., ("Morlan"). On or about November 30, 2007, Morlan filed a third-party complaint against Paul Kerns, claiming that any liability it had to the plaintiffs was the result of work performed by Paul Kerns. Morlan sought indemnification and/or contribution from Paul Kerns for those claims. On or about December 22, 2008, the plaintiffs asserted a claim directly against Paul Kerns.

Morlan retained the services of Paul Kerns to perform work at various locations in Ohio, West Virginia and Kentucky, including the location in West Virginia relating to the injury of the plaintiff Bobby Messer. This relationship existed for several years prior to the incident that is the subject of this controversy. From 2000 - 2006 Kerns worked exclusively for Morlan. Kerns also frequently stored his equipment at Morlan's in Parkersburg, West Virginia. At no time was there a written contract or written agreement between Morlan and Paul Kerns.

Owners Insurance Company is licensed to do business in the State of Ohio and has an office located in Columbus, Ohio. Owners is not licensed to do business in the state of West Virginia and does not maintain an office in West Virginia, nor does it have any officers or employees in West Virginia. Kerns is a resident of Cambridge, Ohio. The name insured on the Owners policy at issue is shown as Paul W. Kerns, dba Kerns Electrical Services. Morlan is a West Virginia Corporation with an address of 1 Chateau Hills, Parkersburg, West Virginia.

On or about March 3, 2005, Owners issued a Certificate of Insurance to Morlan listing Morlan as an additional insured under the commercial general liability insurance policy which Owners had issued to Kerns. The policy was identified as Owners Policy No. 004603-05001113-04, and covered the period from October 9, 2004 thru October 9, 2005.

Morlan requested that Owners provide them with a defense and/or coverage in this matter, but Owners refused to provide Morlan with a defense or coverage. Accordingly, Morlan sought leave to file its *Third-Party Company for Declaratory and Other Relief* against Owners in conjunction with this action on March 23, 2009. In lieu of filing an answer, Owners has filed a Motion to Dismiss asserting that owners does not have sufficient contacts with West Virginia for this Court to have jurisdiction over it.

LAW

§ 56-3-33. Actions by or against nonresident persons having certain contacts with this State; authorizing Secretary of State to receive process; bond and fees; service of process; definitions; retroactive application.

(a) The engaging by a nonresident, or by his or her duly authorized agent, in any one or more of the acts specified in subdivisions (1) through (7) of this subsection shall be deemed equivalent to an appointment by such nonresident of the Secretary of State, or his or her successor in office, to be his or her true and lawful attorney upon whom may be served all lawful process in any action or proceeding against him or her, in any circuit court in this State, including an action or proceeding brought by a nonresident plaintiff or plaintiffs, for a cause of action arising from or growing out of such act or acts, and the engaging in such act or acts shall be a signification of such nonresident's agreement that any such process against him or her, which is served in the manner hereinafter provided, shall be of the same legal force and validity as though such nonresident were personally served with a summons and complaint within this State:

- (1) Transacting any business in this State;
- (2) Contracting to supply services or things in this State;

(3) Causing tortious injury by an act or omission in this State;

(4) Causing tortious injury in this State by an act or omission outside this State if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;

(5) Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he or she might reasonably have expected such person to use, consume or be affected by the goods in this State: Provided, That he or she also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;

(6) Having an interest in, using or possessing real property in this State; or

(7) Contracting to insure any person, property or risk located within this State at the time of contracting.

(b) When jurisdiction over a nonresident is based solely upon the provisions of this section, only a cause of action arising from or growing out of one or more of the acts specified in subdivisions (1) through (7), subsection (a) of this section may be asserted against him or her.

§ 31D-15-1501. Authority to transact business and jurisdiction over foreign corporations.

(d) A foreign corporation is deemed to be transacting business in this State if:

(1) The corporation makes a contract to be performed, in whole or in part, by any party thereto in this State;

(2) The corporation commits a tort, in whole or in part, in this State; or

(3) The corporation manufactures, sells, offers for sale or supplies any product in a defective condition and that product causes injury to any person or property within this State notwithstanding the fact that the corporation had no agents, servants or employees or contacts within this State at the time of the injury.

Rule 12. Defenses and objections — When and how presented — By pleading or motion — Motion for judgment on the pleadings.

(b) How presented. — Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

If the Court rules on a 12(b)(2) dismissal motion without an evidentiary hearing, the party plaintiff need make only a “prima facie showing of personal jurisdiction in order to survive the motion to dismiss”. Syl. Pt 4, *State ex rel Bell Atlantic-West Virginia, Inc. v. Ranson*, 201 W. Va. 402, 497 S.E.2d 755 (1997); *Easterling v. American Optical Corp.*, 207 W. Va. 123, 529 S.E.2d 588 (2000) In considering the Motion, the Court “must view the allegations in the light most favorable” to the plaintiff, “drawing all inferences in favor of jurisdiction”. *Id.*

A 12(b)(6) motion “test(s) the formal sufficiency of the complaint.” *Mandolidis v. Elkins Industries, Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978) The Court views the complaint’s allegations as true and in the light most favorable to the plaintiff; it dismisses a claim only when it is clear “that the plaintiff can prove no set of facts” that support recovery. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 461 S.E.2d 516 (1995)

DISCUSSION

Owner's Motion to Dismiss is based upon the contention that the Court does not have personal jurisdiction over Owners because it is a foreign corporation that does not do business in West Virginia. In this matter Owners issued a Certificate of Insurance to (Morlan), a West Virginia corporation. This certificate stated that Morlan was an additional insured under Owners' Policy with Kerns, and listed Morlan's West Virginia address in its identification of the "Certificate Holder".

In the case of *Abbot v. Owens Corning Fiberglass Corp.*, 191 W.Va. 198, 444 S.E.2d 285 (W.Va. 1994), the West Virginia Supreme Court of Appeals held:

A Court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident. The first step involves determining whether the defendant's actions satisfy our personal jurisdiction statutes set forth in W.Va. Code 31-1-15 (1984) and W.Va. Code 56-3-33 (1984). The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process.

In that regard, West Virginia Code 31D-15-1501 (which replaced 31-1-15) provides at Subsection (d):

A foreign corporation is deemed to be transacting business in this state if:

- (1) The corporation makes a contract to be performed, in whole or in part, by any party thereto in this state.

Similarly, West Virginia Code 56-3-33 provides, in pertinent part, as follows:

- (a) The engaging by a nonresident, or by his duly authorized agent, in any one or more of the acts specified in subdivision (1) through (7) of this subsection shall be deemed equivalent to an appointment by such nonresident of the secretary of state, or his or her successor in office, to be his or her true and lawful attorney upon whom may be served all lawful process in any action or proceeding against him or her, in any circuit court in this state, including an action or proceeding brought by a nonresident plaintiff or plaintiffs, for a cause of action arising from or growing out of such act or acts, and the engaging in such act or acts shall be a signification of such nonresident's

agreement that any such process against him or her, which is served in the manner hereinafter provided, shall be of the same legal force and validity as though such nonresident were personally served with a summons and complaint within the state:

- (7) Contracting to insure any person, property or risk located within this state at the time of contracting.
- (b) When jurisdiction over a nonresident is based solely upon the provisions of this section, only a cause of action arising from or growing out of one or more of the acts specified in subdivision (1) through (7), subsection (a) of this section may be asserted against him or her.

In this case, Owners issued a Certificate of Insurance to Morlan, thereby contracting and agreeing to insure a "person, property or risk located within" West Virginia. Under these circumstances, Owners is clearly subject to personal jurisdiction in West Virginia pursuant to W.Va. Code 31D-15-1501 and 56-3-33.

Next, this Court must determine whether Owners has sufficient contacts with West Virginia to meet federal due process requirements.

The United States Supreme Court established that a corporation is thought to be "present" in a state not only when it is physically there, but also when it has "certain minimal contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice". *International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement*, 326 U.S. 310, 316, 66 S.Ct. 154, 158 (1945). The West Virginia State Supreme Court has also adopted this "minimum contacts" standard, stating:

To what extent a nonresident defendant has minimum contacts with the forum state depends upon the facts of the individual case. One essential inquiry is whether the defendant has purposefully acted to obtain benefits or privileges in the forum state.

Easterling v. American Optical Corp., 207 W.Va. 123, at 130, 529 S.E.2d 588 at 595 (W.Va. 2000)

In *International Shoe*, the United States Supreme Court explained:

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

International Shoe at 319, 160. In this case, Owners issued a Certificate of Insurance to Morlan and undertook the risk associated with insuring a West Virginia Corporation which was located and doing business in West Virginia. It also provided a defense in this action for its other insured, Kerns, by retaining West Virginia counsel and ultimately setting the Plaintiffs' claims against both Kerns and Owners. Those are "acts" by which Owners did business in West Virginia. Pursuant to the principles set forth in *International Shoe and Easterling*, Owners cannot complain that being forced to defend such an action violates its federal due process rights.

The Court in *Easterling* noted:

[W]e have recognized that foreseeability is a necessary element in determining whether a defendant's contacts satisfy due process. In this regard, we have commented that "the foreseeability that is critical to due process analysis...is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate 'being haled into court there'."

Easterling at 130, 595. In this case, Owners was aware of the fact that Morlan was a West Virginia corporation located in West Virginia, and doing business in West Virginia at the time it issued its Certificate of Insurance to Morlan. In addition, Owners' named insured, Mr. Kerns, was not merely a local Ohio contractor who occasionally did work for customers in other states. Instead, Mr. Kerns has acknowledged that he worked exclusively for Morlan, a West Virginia corporation, from 2000 to 2006.

Having issued an insurance policy to a contractor who worked exclusively for a West Virginia customer and frequently stored its equipment at that customer's Parkersburg, West Virginia facility, it is clear that Owners must have reasonably foreseen having to defend and indemnify Kerns with respect to claims arising from Kerns' operations in West Virginia. Once Owners issued a Certificate providing insurance coverage to Morlan as well, the possibility that Owners might be called upon to defend and indemnify Kerns and Morlan with respect to claims in West Virginia, and be subject to a suit over any coverage disputes, was obvious.

At this point in the case Morlan only needs to make a prima facie showing of personal jurisdiction in order to survive the motion to dismiss. See Syl. Pt 4, *State ex rel Bell Atlantic-West Virginia, Inc. v. Ranson*, 201 W. Va. 402, 497 S.E.2d 755 (1997); *Easterling v. American Optical Corp.*, 207 W. Va. 123, 529 S.E.2d 588 (2000) In reviewing this motion in a light most favorable to the third-party plaintiff, the Court must find that this Court has jurisdiction and deny Owners Motion To Dismiss.

For the reasons set forth in this Order, is hereby **ADJUDGED** and **ORDERED** that the Motion to Dismiss Third-Party Complaint for Declaratory Relief is **DENIED**.

The next issue that will need to be addressed by this Court is whether Ohio or West Virginia law applies to the interpretation of the insurance contract that is the subject of this action. At this time the Court believes that there are insufficient facts to make this determination, but is confident that sufficient facts will be developed during discovery.

The Clerk is directed to send an attested copy of this Order to the following:

Brent K. Kesner, Esq.
Kesner, Kesner & Bramble, PLLC
P. O. Box 2587
Charleston, WV 25329

Barbara J. Keefer, Esq.
MacCorkle, Lavender & Sweeney, PLLC
P. O. Box 3283
Charleston, WV 25332-3283

222 Capitol Street, Suite 202
PO Box 3425
Charleston, WV 25385-3425

Enter this the 22nd day of March, 2011.


RUDOLPH H. MURENSKY, II JUDGE