

**IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION**

CAPITAL WEALTH ADVISORS, INC.,

Plaintiff,

VS.

Civil Action No.: 20-C-209

Presiding Judge: Shawn D. Nines

Resolution Judge: James H. Young, Jr.

**THOMAS BENYON, BENJAMIN
STEINER, MARTIN METODIEV, AND
CAPITAL WEALTH ADVISORS, LLC,**

Defendants.

**AMENDED ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S
COMPLAINT**

This matter came before the Court this 26th day of March, 2021, upon Defendants' Motion to Dismiss Plaintiff's Complaint. The Plaintiff, Capital Wealth Advisors, Inc., by counsel, Robert J. D'Anniballe, Jr., Esq., and Defendants, Thomas Benyon, Benjamin Steiner, Martin Metodiev, and Capital Wealth Advisors, LLC, by counsel, John F. Gianola, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. The Complaint in this matter was filed August 18, 2020, alleging causes of action against Defendants for the following causes of action: 1) Count 1 – Tortious Interference with a Business of Contractual Relationship; 2) Count 2 – Conversion; 3) Count 3 – Intentional Misrepresentation; 4) Count 4 – Fraud; 5) Count 5 – Civil Conspiracy; 6) Count 6 – Negligent Misrepresentation; and 7) Count 7 – Unjust Enrichment. *See*

3-30-2021
Bus. Ct. Central
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R. D'Anniballe, Jr.
R. Johnson

Compl. The allegations surround a situation in which certain Defendants are alleged to have contacted West Virginia-based third-party CityNet LLC (hereinafter “CityNet”) by phone and email, allegedly impersonating an employee of Plaintiff and obtaining valuable and confidential information belonging to Plaintiff, including Plaintiff’s email archives and other sensitive information. *Id.* at ¶¶14-21. The Court notes there are no allegations of hacking into CityNet’s servers contained in the Complaint. *See* Compl.

2. On September 23, 2020, Defendants, Thomas Benyon, Benjamin Steiner, Martin Metodiev, and Capital Wealth Advisors, LLC (hereinafter “Defendants”), filed Defendants’ Motion to Dismiss Plaintiff’s Complaint, moving this Court to dismiss Plaintiff’s Complaint on three bases: 1) dismiss under West Virginia Rule of Civil Procedure 12(b)(6) for failure to state a claim; 2) dismiss under West Virginia Rule of Civil Procedure 12(b)(2) for a lack of personal jurisdiction; and 3) dismiss under West Virginia Rule of Civil Procedure 12(b)(3) for improper venue. *See* Pl’s Mot., p. 1. In the alternative, Defendants argue the action should be stayed or dismissed pursuant to West Virginia’s *forum non conveniens* statute. *Id.*

3. Subsequently, on December 30, 2020, this matter was referred to the Business Court Division and then assigned to the undersigned. At the initial case management conference before the undersigned held on February 10, 2021, the Court set briefing deadlines for the instant motion. *See* Trial Court Rule 22 Scheduling Order.

4. On March 1, 2021, Plaintiff, Capital Wealth Advisors, Inc., (hereinafter “Plaintiff”) filed its Plaintiff’s Response to Defendants’ Motion to Dismiss, arguing the motion should be denied because the Complaint met the pleading requirements under Rule 12(b)(6), venue is proper under Rule 12(b)(3), and personal jurisdiction over Defendants is

appropriate because Defendants' actions connect them to West Virginia, that Defendants misrepresented their identity in West Virginia, that Defendants obtained sensitive info in West Virginia, and that Defendants committed civil conspiracy in West Virginia. *See* Pl's Resp., p. 6.

5. On March 8, 2021, Defendants filed their Reply Brief in Further Support of Defendants' Motion to Dismiss Plaintiff's Complaint, reiterating its arguments, asserting that making a telephone call is determined to take place where the call was made, and arguing Plaintiff did not plead any facts pursuant to the West Virginia Computer Crime and Abuse Act in the Complaint. *See* Reply, p. 3-4, 6.

6. The Court finds the issue ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion to dismiss for lack of personal jurisdiction. Motions to dismiss for lack of personal jurisdiction are governed by Rule 12(b)(2) of the West Virginia Rules of Civil Procedure.

"Every defense, in law or fact, to a claim for relief ... shall be asserted in the responsive pleading ... except that the following defenses may at the option of the pleader be made by motion ... (2) lack of jurisdiction over the person" W.Va. R. Civ. P. 12(b).

"When a defendant files a motion to dismiss for lack of personal jurisdiction under W. Va. R. Civ. P. 12(b)(2), the circuit court may rule on the motion upon the pleadings, affidavits and other documentary evidence or the court may permit discovery to aid in its decision. ... If [] the court conducts a pretrial evidentiary hearing on the motion ... the party asserting jurisdiction must prove jurisdiction by a preponderance of the evidence." Syl. Pt. 6, *State ex rel. Ford Motor Co. v. McGraw*, 237 W.Va. 573, 788 S.E.2d 319 (2016).

“In determining whether a party has made a prima facie showing of personal jurisdiction, the court must view the allegations in the light most favorable to such party, drawing all inferences in favor of jurisdiction.” *Bowers v. Wurzburg*, 202 W. Va. 43, 501 S.E.2d 479 (1998)(citation and quotation marks omitted).

CONCLUSIONS OF LAW

Defendants have filed the instant Defendants’ Motion to Dismiss Plaintiff’s Complaint, moving this Court to dismiss Plaintiff’s Complaint on three bases: 1) dismiss under West Virginia Rule of Civil Procedure 12(b)(6) for failure to state a claim; 2) dismiss under West Virginia Rule of Civil Procedure 12(b)(2) for a lack of personal jurisdiction; and 3) dismiss under West Virginia Rule of Civil Procedure 12(b)(3) for improper venue. *See* Pl’s Mot., p. 1. In the alternative, Defendants argue the action should be stayed or dismissed pursuant to West Virginia’s *forum non conveniens* statute. *Id.*

The Court turns to the argument for dismissal of the Complaint for lack of personal jurisdiction pursuant to West Virginia Rule of Civil Procedure 12(b)(2).

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 statute set forth in W. Va. Code, § 56–3–33 [2012]. The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process.” Syl. Pt. 3, *State ex rel. Ford Motor Co. v. McGraw*, 237 W.Va. 573, 788 S.E.2d 319 (2016).

Pursuant to West Virginia Code § 56-3-33, certain enumerated acts, if engaged in by a nonresident, can subject that nonresident to personal jurisdiction in West Virginia. The seven enumerated acts are:

- (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.

W.Va. Code § 56-3-33.

First, the Court will apply the above two-part test, beginning with an examination of the enumerated factors. Specifically, in this case, in their Response, Plaintiff argued one of these enumerated acts, number 3, “[c]ausing tortious injury by an act or omission in this state”. *See* Defs’ Resp., p. 4. Plaintiff argues improperly accessing confidential information, misrepresenting your identity in West Virginia, and committing a civil conspiracy in West Virginia, “constitute a number of torts and causes of action that occurred within West Virginia, giving this Court jurisdiction”. *Id.* at 6.

However, Defendant aver they did not commit any act or omission in West Virginia. *See* Reply, p. 3. Plaintiff argued the Complaint alleged that Defendants contacted a third party, nonparty CityNet, which is located in West Virginia, and that certain Defendants called and emailed a CityNet employee. *Id.* Defendants aver no Defendant was present in West Virginia at the time of these communications. *Id.* Also, Defendants proffer a federal case from the Northern District of West Virginia determining that making a call is determined to take place in the place that the call was made. *See Jarmuth v. Waters*, 2005 WL 5715172 at * 2 (N.D.W. Va. 2005), *aff’d*, 220 F. App’x 228 (4th Cir.

2007)(“acts of mailing a letter or placing a phone call are considered to take place in the state from which the call is placed or the letter is mailed”).

The Court has reviewed the Complaint and considers while Plaintiff has pled that Defendants have improperly accessed confidential information of Plaintiff by calling and emailing employees of West Virginia-based CityNet, it is clear that none of the calls or emails took place in West Virginia. Therefore, no tortious injury occurred in West Virginia, and if any tortious injury occurred, it was outside of West Virginia. *See* Defs’ Mem., p. 14. It appears to the Court that no Defendant physically committed any act or omission in West Virginia. *See* Reply, p. 3.

The Court notes it also considers Plaintiff’s argument that the West Virginia Computer Crime and Abuse Act supports a finding of personal jurisdiction in this matter: Under the Act, “[a]ny person who violates any provision of this article and, in doing so, accesses, permits access to, causes access to or attempts to access a computer, computer network, computer data, computer resources, computer software or computer program which is located, in whole or in part, within this state, or passes through this state in transit, shall be subject to criminal prosecution and punishment in this state and to the civil jurisdiction of the courts of this state”. W. Va. Code Ann. § 61-3C-20 (West).

However, Plaintiff does not plead any provisions of the Act in its Complaint. *See* Reply, p. 6. Plaintiff did not allege that Defendants accessed or attempted to access a computer or computer network, data, resources, software, or program. *Id.* Plaintiff alleges merely that Mr. Beynon “contacted CityNet” and that Defendant Beynon and Defendant Metodiev made “false statements ... via telephone calls and e-mails to CityNet.” (Plaintiff’s Complaint (“Compl.”) at ¶¶ 14, 36-37). *Id.* Throughout its Complaint, Plaintiff alleges that Defendants “obtain[ed]” Plaintiff’s information. (Compl. at ¶¶ 17, 19, 20 25, 28, and 51). *Id.* Plaintiff does not allege that any Defendant improperly accessed a computer or anything related thereto or that Defendants violated any other portion of the

Act. *Id.* The Court considers this an important distinction. The Court finds this attempt to prove jurisdiction is unconvincing.

Therefore, the Court is not convinced that Plaintiff has set forth sufficient allegations in the Complaint to assert a *prima facie* case of jurisdiction as to Defendants in West Virginia. However, even if the Court concluded the Defendants did, this conclusion would not end the inquiry. The Court will also analyze the second step, which requires undertaking an analysis to determine whether Defendants contacts with West Virginia are such that the maintenance of the suit does not offend constitutional due process concerns of fair play and substantial justice. *See State ex rel. Ford Motor Co. v. McGraw*, 237 W. Va. 573, 582, 788 S.E.2d 319, 328 (2016); *see also Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945) (internal quotations omitted); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (internal quotations omitted). The Supreme Court of Appeals has directed in *Nines*:

“Personal jurisdiction may be either general or specific. There is no dispute in the present matter that specific jurisdiction applies. The United States Supreme Court has described specific jurisdiction as follows: “Specific or case-linked jurisdiction depends on an affiliatio[n] between the forum and the underlying controversy (i.e., an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation).” (*citing Walden v. Fiore*, 571 U.S. 277, 283 n. 6, 134 S.Ct. 1115, 1121, n. 6, 188 L.Ed.2d 12 (2014) (Internal citation and quotation omitted)). This Court has set forth three main inquiries to consider when examining specific jurisdiction: 1) purposeful availment, that is, whether a defendant has purposefully availed itself of the privilege of conducting activities within the forum; 2) whether the controversy arises out of or relates to the defendant's activities in the forum; and 3) whether the exercise of jurisdiction is reasonable and comports with fair play and justice.”

State ex rel. Third-Party Defendant Health Plans v. Nines, 852 S.E.2d 251, 260 (W. Va. 2020).

Even if one of the required statutory factors was present in this case, the Court finds Defendants' contacts with West Virginia are not sufficient minimum contacts pursuant to federal due process jurisprudence.

The West Virginia Supreme Court of Appeals has been clear that a minimum contacts' analysis "looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *State ex rel. Third-Party Defendant Health Plans v. Nines*, 852 S.E.2d 251, 261 (W. Va. 2020), quoting *Walden v. Fiore*, 571 U.S. 277, 284-85 (2014). Similarly, a defendant does not "purposefully avail itself of the privileges of doing business in West Virginia by simply communicating by phone and email with [a] West Virginia company" *Justice Family Farms LLC v. Guess Irrigation Co. LLC*, 2012 WL 775063 * 5 (S.D.W. Va. 2012).

Plaintiff alleges that certain Defendants called or emailed an entity or individual in West Virginia (when said certain Defendants called and/or emailed CityNet employee(s)). Even if these allegations are taken as true, they are not sufficient to establish constitutionally-required minimum contacts. That third-party CityNet is a West Virginia entity is altogether irrelevant; the defendant, not any third party, "must create contacts with the forum jurisdiction." See *Nines* at 262, citing *Walden* at 291. The Court must conclude that communicating with a West Virginia entity, like certain Defendants are alleged to have done here, does not constitute any Defendant availing itself of jurisdiction in West Virginia. See *Justice Family Farms*, at *5.

The Court has examined available case law regarding phone calls and emails from one state into a forum state. While there is no published West Virginia state case directly on point, many federal cases arising out of the Fourth Circuit, and out of the Northern and Southern Districts of West Virginia specifically, address the issue.

In *Justice Family Farms*, the Court held that communicating by phone and email with a West Virginia company and attending a one hour meeting in West Virginia to discuss a contract, which the parties never intended to be performed in West Virginia was not sufficient purposeful availment. See *Just. Fam. Farms LLC v. Guess Irr. Co. LLC*, No. 5:11-CV-00426, 2012 WL 775063 (S.D.W. Va. Mar. 8, 2012). In that case, it was undisputed that the defendant breached a contract with a West Virginia company. *Id.* The Court finds even less contact with the State of West Virginia occurred in the case at bar.

Further, the Fourth Circuit expressly held in *Stover v. O'Connell Assocs.* that the “acts of mailing a letter or placing a phone call are considered to take place in the state from which the call is placed or the letter is mailed”. 84 F.3d 132 (4th Cir.1996). In *Stover*, the Court affirmed dismissal for lack of jurisdiction finding that Maryland courts may not exercise personal jurisdiction over a New York private investigation firm whose only connection with Maryland was its occasional retention by telephone of Maryland investigation companies to provide it with information about Maryland subjects, including the plaintiff. *Id.* The Court finds like in *Stover*, the only possible contact with the State of West Virginia in the case at bar would be some telephone calls and emails to CityNet in Spring of 2020.

In *Jarmuth v. Waters*, the Court specifically analyzed phone calls and mailed letters from Pennsylvania into West Virginia in the context of personal jurisdiction. No. 1:04CV63, 2005 WL 5715172 (N.D.W. Va. Mar. 31, 2005), aff'd, 220 F. App'x 228 (4th Cir. 2007), There, the Court found four phone calls and one mailed letter was not enough for tortious conduct (the same element of West Virginia Code § 56-3-33 pled in the case at bar), did not amount to a “persistent course of conduct”. *Id.* The Court considered that that defendant (Defendant Waters) had no other connection to West Virginia.

Id. She never traveled into the state, never transacted business here, and had no contractual relationship with any person or thing in West Virginia. *Id.*

The Court in *Jarmuth* considered that she did something more than passively support another Defendant's alleged actions that caused harm in West Virginia (calling and writing letters to someone's employer accusing them of child abuse). Despite the purposeful nature of these actions, the Court concluded that the phone calls she made and the letter she wrote are insufficient to comply with the provisions of West Virginia's Long Arm Statute. *Id.*

The Court finds here that if the allegations in the case at bar are proven true, they would amount to harm and appear to be quite purposeful. Regardless, like in *Jarmuth*, the Court finds the phone calls and emails to CityNet are simply insufficient to comply with the provisions of West Virginia's Long Arm Statute.

Also regarding a phone call into West Virginia, the Court finds *Branch Bank & Tr. v. Engine Components, Inc.*, 394 F. Supp. 2d 859 (S.D.W. Va. 2005) instructive. There, the Court found that even assuming (in spite of an Affidavit they had in that case) that the phone conversation occurred in West Virginia, this does not establish the minimum contacts needed. *Id.* Instead, the Court considered that there "is no evidence that Third-Party Defendant derived such benefits from the state of West Virginia during this phone call as to warrant its being subject to suit in West Virginia". *Id.* In the case at bar, while phone calls and emails are alleged to have been called into West Virginia, like in *Engine Components*, the record is completely devoid of any evidence that the defendants derived any benefits from the State of West Virginia during its phone calls and/or emails as to warrant its being subject to suit in West Virginia.

The Court also considered *Autoscribe Corp. v. Goldman & Steinberg*, 47 F.3d 1164, 1995 WL 56662 (4th Cir.1995). There, the Fourth Circuit stated that phone calls between a customer and an out-

of-state technician do not establish minimum contacts for due process purposes. (cited the Fifth and Seventh Circuits for the same proposition). *Id.* In *Autoscribe*, Goldman & Steinberg had contacted Autoscribe at its company location in Maryland to get technical advice on a software problem. *Id.* The Fourth Circuit noted that the defendant only made these calls to Maryland because Autoscribe was located there; thus, the calls were not “purposely directed” toward Maryland. *Id.* Here, like in *Autoscribe*, the defendants allegedly made phone calls and emails to CityNet, but only because CityNet was located in West Virginia. Thus, the Court, like that in *Autoscribe* concludes that the calls were not purposely directed toward West Virginia. The Court notes that in the instant case, CityNet is not even a party, unlike in *Autoscribe*.

For these reasons, the Court finds that the phone calls and emails as alleged in the Complaint do not establish minimum contacts for due process purposes. *See Branch Bank & Tr. v. Engine Components, Inc.*, 394 F. Supp. 2d 859, 862–63 (S.D.W. Va. 2005) *citing Autoscribe Corp. v. Goldman & Steinberg*, 1995 WL 56662 * 5-6 (4th Cir.1995); *See also Marion v. Sabra Tours Int'l, Inc.*, 438 S.E.2d 42, 46 (W. Va. 1993).

The Court concludes that Defendants here did not “engage[] in some activity purposefully directed toward the forum state.” *Just. Fam. Farms LLC*, at *2 *citing Lesnick v. Hollingsworth & Vose Co.* 35 F.3d 939, 945 (4th Cir.1994). Further, since that initial test is not met, the Court does not need to determine whether the exercise of such jurisdiction would offend traditional notions of fair play and substantial justice.” *Id.*

For all of these reasons, the Court finds Plaintiff’s Complaint should be dismissed pursuant to West Virginia Rule of Civil Procedure 12(b)(2) for a lack of personal jurisdiction, and that therefore, Defendants’ Motion to Dismiss Plaintiff’s Complaint should be granted on this basis. Having found

and concluded the Plaintiff's Complaint should be dismissed for lack of personal jurisdiction, the Court declines to address the issues of venue or failure to state a claim.

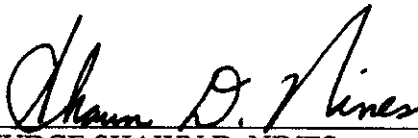
CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Defendants' Motion to Dismiss Plaintiff's Complaint is hereby GRANTED. Plaintiff's Complaint is hereby **DISMISSED WITHOUT PREJUDICE**.

The Court notes the objections and exceptions of the parties to any adverse ruling herein. This is a FINAL ORDER. There being nothing further to accomplish in this matter, the Clerk is directed to retire this matter from the active docket.

The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, to any *pro se* parties of record, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

03-29-2021
date of entry



JUDGE SHAWN D. NINES
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION