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SUPERIOR COURT OF NEW JERSEY
Chancery Division: Hudson County
Docket No. FM-09-600-23

TAMMY M. DURHAM,

Plaintiff,

OPINION

-vs-

JOHN W. DURHAM,

Defendant.

Decided: April 14, 2023

Motion Hearing: April 14, 2023

Peter G. Bracuti, Esq. for Plaintiff – Cross-Movant (Laufer, Dalena, Jensen,
Bradley & Doran, LLC, attorneys)

Matthew S. Coleman, Esq. for Defendant – Movant (Einhorn, Barbarito,
Frost & Botwinick, P.C., attorneys).

POTTERS, J.S.C.

OPINION

This matter comes before the Court on defendant's motion to dismiss plaintiff's Complaint and plaintiff's cross-motion seeking to deny defendant's motion to dismiss. Specifically, defendant asserts this Court lacks in personam jurisdiction over the defendant; and, therefore, plaintiff's Complaint must be dismissed. This issue presents as a matter of first impression in New Jersey. While there are several reported decisions addressing jurisdiction under the Uniform Interstate Family Support Act (UIFSA), N.J.S.A. 2A:4-30.124 to 30.201, and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), N.J.S.A. 2A:34-53 to 95, for cases involving children and myriad post-judgment jurisdiction decisions, there are no reported decisions addressing in personam jurisdiction on a dissolution action where no children are involved.

On January 4, 2023, Defendant filed a motion to dismiss claiming lack of in personam jurisdiction based on his residency in North Carolina and the alleged lack of any contacts with the State of New Jersey. After this motion was briefed by both parties, this Court entered an Order on February 10, 2023, permitting limited non-merits discovery on the jurisdiction issue only. The Order additionally posited a number of questions directed to each

party. Supplemental submissions were filed including defendant's March 31, 2023 Supplemental Certification, letter brief of defendant's counsel dated March 31, 2023 and letter brief of plaintiff dated April 5, 2023.

While limited discovery was permitted, neither side provided much information on what discovery was conducted, save for a scant reference to an interrogatory answer. Rather, the submissions focused on the parties' respective arguments. From all of the submissions, the following facts are not in dispute.

In 2009, the parties met in North Carolina. On October 17, 2009, the parties entered into a pre-marital agreement, which contains a North Carolina choice of law provision. There is no forum or venue provision in this pre-marital agreement. On October 24, 2009, the parties married in North Carolina, where they remained for one year. They then moved to Atlanta, Georgia, where they lived for two and one-half years. They relocated to Washington, D.C., where they lived for five years. They moved to Dallas, Texas and remained for two years. They relocated to New York in 2019 and remained until 2021, whereupon plaintiff moved to Bayonne, New Jersey and defendant to North Carolina.

On April 21, 2022, in response to an email received from the defendant, plaintiff's New Jersey attorney corresponded to the defendant

responding to defendant's inquiry on plaintiff's position regarding the parties' obligations under the pre-marital agreement. In response, on the same date, defendant emailed plaintiff's New Jersey counsel advising that he was going to insist on enforcing the arbitration provision in the parties' pre-marital agreement. Also on this date, defendant advised in a further email that he was represented by counsel, to which plaintiff's attorney responded that he was precluded from direct communication with defendant given that he was represented. Defendant responded, changed the statement in his prior email regarding legal representation and informed that he just paid for a consultation and "[g]ot advice, she would not be considered MY attorney, unless I change my mind" (emphasis in original).

On May 19, 2022, defendant sent plaintiff's counsel an email proposing several arbitrators and reiterating his demand for arbitration. Defendant followed up this email with an email on May 30, 2022. On June 2, 2022, plaintiff's counsel responded and advised of plaintiff's position that the pre-marital agreement is a valid and enforceable agreement. Counsel stated he was not understanding what disputes defendant had with the pre-marital agreement and made clear plaintiff would stand by the pre-marital agreement.

On July 27, 2022, a North Carolina attorney named Daniel E. Potter, Esq. corresponded to plaintiff's New Jersey counsel advising of his representation of the defendant on defendant's separation and divorce, as well as any issues related to the pre-marital agreement and equitable distribution. Plaintiff's counsel responded to this correspondence by letter dated August 3, 2022. On August 4, 2022, plaintiff's counsel corresponded to defendant advising that Mr. Potter informed he was no longer representing defendant. Defendant acknowledged this letter by email and stated the pre-marital agreement is valid and further stated "I expect your office will formalize the 'expedited, partial settlement.'" Plaintiff's counsel acknowledged receipt of this email by letter dated August 9, 2022, and confirmed plaintiff's counsel would commence drafting a settlement agreement. Numerous other letters and emails were exchanged until September 14, 2022, whereupon plaintiff's counsel provided the draft settlement agreement to defendant by letter of even date. By email dated September 28, 2022, defendant acknowledged receipt of the draft agreement and plaintiff's counsel's letter dated September 14, 2022. Defendant sent an email on October 3, 2022, the content of which is not provided to the Court, and for which defendant's counsel responded by letter dated October 11, 2022. From the heavily redacted document, the Court discerns changes were

made/requested to be made to the draft settlement agreement by defendant evidenced by plaintiff's counsel's letter requesting for defendant to advise if the changes are acceptable. Clearly, changes were made to the initial draft settlement agreement.

On October 21, 2022, plaintiff filed a Complaint for dissolution and enforcement of the parties' pre-marital agreement in the Superior Court of New Jersey, Chancery Division, Hudson County under docket number FM-09-600-23.

On October 24, 2022, defendant filed a Complaint for equitable distribution in the General Court of Justice, District Court Division in the County of Craven, North Carolina under file number 22CVD01386. This Complaint does not seek dissolution of the marriage and only seeks access to records and equitable distribution. Curiously, this Complaint makes no reference to the parties' pre-marital agreement or defendant's previous acknowledgment of the controlling arbitration provision.

On October 26, 2022, defendant emailed the plaintiff's attorney stating that "you" received the summons yesterday and that defendant is "willing to negotiate but nothing like the trash you sent to me for the MSA previously. You left me no choice but to file for equitable distribution." By email dated October 26, 2022, plaintiff's attorney acknowledged receipt of

the summons and informed defendant that plaintiff filed in New Jersey on October 21, 2022.

On November 17, 2022, defendant filed a Complaint for Absolute Divorce in Craven County, North Carolina under file number 22CVD01508. On November 21, 2022, defendant sent this Complaint to plaintiff's counsel by Federal Express.

On November 29, 2022, plaintiff through North Carolina counsel filed a motion to dismiss defendant's Complaint in North Carolina under file number 22CVD01386. The basis of this motion was the pendency and earlier filing of this New Jersey action. This motion was granted by Order dated November 29, 2022. The dismissal Order provides that plaintiff (defendant in the North Carolina action) was not served with the North Carolina Complaint under 22CVD01386 and as such, defendant's North Carolina Complaint under file number 22CVD01386 was dismissed. On December 15, 2022, defendant filed a second Complaint seeking Absolute Divorce in Craven County, North Carolina under file number 22CVD01630. On January 12, 2023, defendant voluntarily dismissed his North Carolina Complaint under file number 22CVD01508.

The two complaints that currently exist are this New Jersey action and the North Carolina action under file number 22CVD01630. As best as can be discerned from defendant's submissions, his North Carolina Complaint under file number 22CVD01630 remains unserved. These undisputed facts are crucial to the analysis in adjudicating defendant's motion to dismiss.

There is no dispute this Court has subject matter jurisdiction of the plaintiff's New Jersey Complaint for dissolution and enforcement of the parties' pre-marital settlement agreement. N.J.S.A. 2A:34-8 and 10 provide causes of action for divorce are properly filed in New Jersey where either party was a bona fide resident of the State of New Jersey for one year since the time the cause of action arose. See Tatham v. Tatham, 429 N.J. Super. 502, 507 (App. Div. 2013). Jurisdiction in family matters is purely statutory. McChesney v. McChesney, 91 N.J. Super. 523 (Ch. Div. 1966).

To enter a valid judgment, this Court must have jurisdiction over the person of the defendant. Kulko v. Cal. Superior Ct., 436 U.S. 84, 91 (1978). One may not consent to jurisdiction. Lister v. Lister, 86 N.J. Eq. 30 (Ch. 1916); see also Raybin v. Raybin, 179 N.J. Super. 121 (App Div. 1981). In personam or personal jurisdiction is established where there is a sufficient connection between the defendant and the State. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). To not run afoul of the due process

requirements of the Fourteenth Amendment to the United States Constitution, the contacts of the non-resident defendant must be sufficient so as to not “offend the traditional notions of fair play and substantial justice.” Ibid. In evaluating the nature of the contacts of the non-resident defendant with the forum State, the Court looks at the defendant’s actions and conduct, and not that of the plaintiff. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980).

In conducting this analysis, the terms “general” and “specific” jurisdiction are employed. General jurisdiction exists where the defendant has “continuous and systematic contacts” with the forum state. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984). If defendant has created a “substantial connection” with the forum by deliberately engaging in significant activities within the forum state, this may also establish general jurisdiction. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475–76 (1985). The exercise of general jurisdiction, however, is permissible only where the defendant’s contacts with the forum state “are so constant and pervasive ‘as to render [it] essentially at home in the forum State.’” Daimler AG v. Bauman, 571 U.S. 117, 122 (2014) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

Specific jurisdiction is established when the cause of action arises directly from a defendant's contacts and/or activity within the forum State. Waste Mgmt., Inc. v. Admiral Ins. Co., 138 N.J. 106, 129 (1994). Whether predicated on general or specific jurisdiction, a court may only exercise personal jurisdiction over a non-resident defendant consistent with due process of law. Bayway Refin. Co. v. State Utils., Inc., 333 N.J. Super 420, 428 (App. Div. 2000).

Defendant argues he has never resided or worked in the State of New Jersey, has no connection or contacts of any kind with New Jersey and has only entered New Jersey when driving through the State using its highways. Defendant denies engaging in any activity in New Jersey or purposefully availing himself of conducting activities in New Jersey. Defendant relies on Sharp v. Sharp, 336 N.J. Super. 492, 496 (App. Div. 2001), Katz v. Katz, 310 N.J. Super. 25, 30 (App. Div. 1998) and M.A.P. v. E.B.A., 471 N.J. Super. 250 (App. Div. 2022) in support of his assertion that no personal jurisdiction can be established against him in the State of New Jersey. None of the aforecited authority squarely addresses the issue presented by the matter sub judice, namely, the issue of personal jurisdiction on a Complaint for dissolution that does not involve children.

Katz is readily distinguished because it is a post-judgment child support (college contribution) matter that involved an out-of-State judgment and an application filed some ten years later, and not an initial complaint for dissolution. That said, Katz provides instructive language most certainly applicable here; to wit, “*In personam* jurisdiction is appropriate when a defendant has acted in such a purposeful manner, because ‘the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.’” Katz, 310 N.J. Super. at 30 (quoting World-Wide Volkswagen, 444 US. at 297).

Sharp v. Sharp, 336 N.J. Super. 492 is inapposite to the issue before this Court. Sharp also involved a post-judgment college contribution claim by a resident of New Jersey where the parties were divorced out-of-State some sixteen years prior to the application to enforce in New Jersey and where there were ongoing proceedings in California. Unlike the present matter, Sharp also involved issues arising under UIFSA, which is wholly inapplicable here because no children are involved and therefore there are no issues concerning exclusivity of jurisdiction.

M.A.P. v. E.B.A., 471 N.J. Super. 250 does not squarely address the issue presented in this matter. M.A.P. also involved a UIFSA issue. Long-arm jurisdiction under UIFSA, and M.A.P.’s holding precluding the exercise

of jurisdiction in New Jersey over a non-New Jersey resident who fathered a child with a New Jersey resident in an act occurring outside of New Jersey is not directly applicable. However, M.A.P.'s analysis of general versus specific jurisdiction is relevant. Where the non-resident's contacts with the forum state relate to the claims asserted is specific jurisdiction, and where those contacts are unrelated to the claims asserted is general jurisdiction. M.A.P. found a lack of evidence to support a claim of general jurisdiction. M.A.P. specifically found that the contacts at issue (the non-resident defendant sent a letter to plaintiff at her New Jersey address, sent text messages and engaged a New Jersey attorney, who was subsequently discharged, who sent at least one settlement proposal) also do not permit a finding of specific jurisdiction.

The conduct of the defendant presented by these facts has everything to do with the claims asserted in plaintiff's dissolution Complaint, and the question is whether such actions and conduct are sufficient to confer personal jurisdiction over the non-resident defendant. The analysis focuses on the sufficiency of the defendant's contacts with New Jersey and whether those contacts constitute purposeful availment such that defendant may reasonably expect to be "haled" into this forum as a result, i.e., does the exercise of personal jurisdiction over the defendant by this Court offend

traditional notions of fair play and substantial justice? This Court concludes that defendant's actions and conduct relate to the claims asserted by plaintiff, namely, dissolution and enforcement of the parties' pre-marital agreement. Not only did defendant engage directly in settlement discussions with plaintiff's New Jersey counsel, he did so over a period of eight months, which is a significant factual disparity from M.A.P. Unlike M.A.P., defendant was actively engaged in the resolution process over an extended period of time and in fact appears to have requested plaintiff's attorney to draft a settlement agreement. He was even represented by North Carolina counsel for a short period of time for which plaintiff's New Jersey counsel was engaged. That defendant chose to proceed pro se and may not have appreciated the significance of applicable North Carolina rules on service and what to include in a pleading does not provide him any succor.

That in his first filing in North Carolina defendant took a position inconsistent with his communications with plaintiff's New Jersey counsel on the applicability of the parties' pre-marital agreement is significant. One is left to wonder what defendant's intention was in the filing of his initial Complaint in North Carolina while he was actively engaged in resolution discussions with plaintiff's New Jersey counsel. As noted at the outset, the parties were permitted to conduct discovery on the issue of jurisdiction, and

no information was provided in any of the supplemental submissions explicating the defendant's several filings in North Carolina. The frequency and regularity of the communications by the defendant and plaintiff's New Jersey counsel readily distinguishes these facts from M.A.P. It is more about the defendant's conduct and actions than a physical presence in the State of New Jersey. As noted in Burger King, "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State." 471 U.S. at 476. This decision predates the advent of email by approximately ten years and therefore has even more force and import today, where email has essentially replaced most other forms of exchanged communication.

This Court finds plaintiff's argument compelling. Namely, if defendant's position is accepted, then one could engage in settlement discussions for a lengthy period of time, approaching one year in this case, and then use that delay to then file a Complaint in their jurisdiction. This would be the epitome of bad faith. While there is no information provided on why these settlement discussions broke down, there are an abundance of written communications (summarized above) making clear defendant's voluntary and willful participation in resolution discussions. Of particular

note is defendant's written acknowledgment of the controlling pre-marital agreement. Thus, any issues in contention are required to be arbitrated. The dissolution will simply follow the determination of any contested issues in the arbitration and is therefore anticipated to proceed either by way of default or uncontested hearing. That is, the site of any discovery to be conducted as part of the parties' arbitration will be governed by and adjudicated by the arbitrator. It is not anticipated any discovery will be conducted in this action, based on the parties' mutual assent the pre-marital agreement controls. This comports with Lebel v. Everglades Marina, Inc., 115 N.J. 317 (1989).

An additional legal analysis is required, even though not raised by either party. Let us assume defendant is correct and New Jersey lacks in personam jurisdiction. Under that scenario, plaintiff's Complaint is dismissed in this action. Surely, defendant would have to agree, to avoid any judicial estoppel preclusion, that litigating the dissolution of this marriage in North Carolina would raise the identical in personam jurisdiction issues presented on this application. Query as to where the parties may then seek dissolution?

In rem jurisdiction answers this question and provides further support for continuing the dissolution of the parties' marriage in New Jersey. In rem

jurisdiction vests the Court with the power over a thing so that the judgment of the Court is of value as against the rights of every other person. Black's Law Dictionary 767 (5th ed. 1979). The marriage itself may constitute the res. Estin v. Estin, 334 U.S. 541 (1948); see also Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Drobney v. Drobney, 146 N.J. Super. 317, 322 (App. Div. 1977). Here, plaintiff seeks only to dissolve the marriage and to enforce the parties' pre-marital agreement. No other relief is sought. This Court has in rem jurisdiction to adjudicate the dissolution of the parties' marriage.

The Court addresses two new arguments presented in the supplemental submissions, first to file and forum non conveniens. As to the forum argument, this goes both ways. That is, unless there is fulsome discovery anticipated to be conducted, which would necessarily involve a determination on the validity and enforceability of the pre-marital agreement and if it is adjudicated that its arbitration provision somehow does not control, both sides will be inconvenienced if the matter is adjudicated in a state not of their choosing.

The "first to file" law strongly militates in favor of plaintiff. Not only did plaintiff commence this action first in New Jersey, but also defendant's North Carolina Complaint was dismissed based in part on the existence of

the preceding filing in New Jersey. Sensient Colors v. Allstate Ins., 193 N.J.
373 (2008).