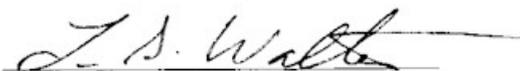


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: March 30, 2007


Lawrence S. Walter
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: HUFFY CORPORATION, ET AL.,

Debtors.

MARK S. STICKEL, TRUSTEE,

Plaintiff

v.

KENNETH FINKELSTEIN, ET AL.,

Defendants

Case No. 04-39148 through 04-39167
Jointly Administered
Adv. No. 06-3127

Judge L. S. Walter
Chapter 11

**DECISION GRANTING TRUSTEE MARK STICKEL'S MOTION FOR
RECONSIDERATION OF THE COURT'S PRIOR DECISION
AND CONCLUDING THAT THE COURT HAS PERSONAL JURISDICTION
OVER DEFENDANT THE FORZANI GROUP LTD.**

The matter is before the court on the *Motion for Reconsideration, New Trial, and to Alter or Amend Decision as to Personal Jurisdiction, and Memorandum of Law in Support* [Adv. Doc. 83] filed by Plaintiff Mark S. Stickel, Trustee of the Huffey Recovery Trust (“Trustee”) and the Response filed by Defendant Forzani Group Ltd. (“Forzani”) [Adv. Doc. 87]. Also relevant to the analysis is the Affidavit of David Bryant, and the exhibits attached thereto, filed in support of the Trustee’s motion [Adv. Doc. 84]. In his motion, the Trustee asks the court to reconsider its dismissal of this action against Forzani for a lack of personal jurisdiction. The Trustee alleges that new factual evidence that has been discovered subsequent to his responsive filing to the motions to dismiss provides the court with a basis for exercising specific personal jurisdiction over Forzani as a defendant in this case. For the reasons discussed in this decision, the court agrees and will vacate its prior dismissal of the action against Defendant Forzani.

Background

On December 21, 2006, this court issued its decision on a motion to dismiss filed by Defendants Finkelstein, Salter, White and Osgoode Financial, Inc. as well as a separate motion filed by Defendant Forzani Group, Ltd (“Forzani”) [Adv. Doc. 79]. The motions to dismiss were based on allegations that the court lacked personal jurisdiction over the defendants.

Relevant to the current matter is the court’s disposition of Forzani’s motion to dismiss. In its motion, Forzani had argued that it was a Canadian sporting goods retailer that lacked sufficient significant contacts with the United States for this court to exercise personal jurisdiction over it. In response, the Plaintiff-Trustee had alleged that personal jurisdiction existed because Forzani had significant contacts through its direct

participation in an allegedly fraudulent transaction, labeled the “2004 OPP Transaction,” involving the sale of Huffey Corporation assets called the “OPP assets.” Through the transaction, Huffey Corporation (“Huffey”) sold the OPP assets to a company known as “New Gen-X.” New Gen-X was owned by certain individual defendants in this adversary proceeding, Defendants Finkelstein, Salter and White (the “individual defendants”), who were also officers and fiduciaries of a Huffey subsidiary at the time of the sale. The circumstances surrounding the 2004 OPP Transaction and subsequent transfer of the same OPP assets by the individual defendants and New Gen-X to Forzani by means of a stock sale are at the heart of this adversary proceeding.

Essentially, the Trustee argued that upon purchasing the OPP assets in the 2004 OPP Transaction, the individual defendants immediately “flipped” the OPP assets to Forzani. Thus, the 2004 OPP Transaction was merely a subterfuge controlled by Forzani which enabled Forzani to acquire the OPP assets through intermediaries rather than purchasing the assets directly from Huffey for a higher price. Furthermore, the Trustee alleged that Forzani aided the individual defendants to breach their fiduciary duties to Huffey by depriving Huffey of the full value of the sale of its OPP assets in the 2004 OPP Transaction.

In its prior decision, the court concluded that the Trustee lacked sufficient evidentiary proof to support the allegations that Forzani directly participated in the 2004 OPP Transaction or aided the individual defendants in breaching their fiduciary duties to Huffey. Without evidentiary proof, the court concluded that Forzani’s participation was indirect and limited to acquiring the OPP assets by means of purchasing the stock of New Gen-X, a Canadian corporation, from the individual defendants, all of whom were

Canadian citizens. In other words, without evidentiary proof that Forzani directed or controlled the individual defendants and New Gen-X in the OPP Transaction or that there was an agency relationship between these defendants and Forzani, the Trustee's mere allegations did not provide a basis for personal jurisdiction over Forzani. Furthermore, the court concluded that Forzani's other contacts with the United States and Huffly outside of the 2004 OPP Transaction were insufficient to provide the court with either general or specific personal jurisdiction over Forzani as a defendant in this case. Consequently, the court granted the motion to dismiss the Trustee's action against Forzani.

On January 2, 2007, the Trustee filed his motion for reconsideration, new trial and to alter or amend the decision as to personal jurisdiction based on newly discovered evidence. The Trustee alleges that this evidence demonstrates Forzani's direct participation in and control over the 2004 OPP Transaction and merits reconsideration of the court's earlier dismissal of Forzani from the case.

Newly Discovered Evidence

According to the affidavit filed in support of the Trustee's motion for reconsideration, counsel for the Trustee received new documents from Defendants Finkelstein, Salter, White and Osgoode Financial, Inc. on November 14, 2006 pursuant to an informal discovery request. The documents are described as "the Closing Book for the Purchase of All the Issued and Outstanding Shares of 1294506 Ontario Limited" and relate to transactions between Forzani and these other defendants.¹ [Adv. Doc. 84, ¶ 3.]

¹The documents attached as exhibits to the affidavit are somewhat voluminous, but the Trustee specifically references only a few to support his argument on reconsideration. In this decision, the court considers and discusses only those documents on which the Trustee specifically relies.

The new evidence includes a March 8, 2004 letter from Forzani’s counsel to the Toronto Stock Exchange seeking listing of three hundred thousand (300,000) new Forzani shares on the Exchange. [Adv. Doc. 84, Ex. B.] The letter clarifies that Forzani’s purpose in listing the shares was to provide them to New Gen-X and the individual defendants as the purchase price for the assets that they were negotiating to purchase from Huff. [Id.] The Toronto Stock Exchange granted the request on March 10, 2004. [Id., Ex. C.]

In addition, the evidence includes an “Inter-Company Assignable Note” signed by Defendant Finkelstein on behalf of 1294506 Ontario Ltd. / New Gen-X and by a representative of Forzani. [Id., Ex. A.] With this note, Forzani advanced \$7,015,264 to the individual defendants and directed them to use the funds to enter an asset purchase agreement with Gen-X Sports Canada, Inc. and Huff Corporation for the OPP assets. [Id.] The Note provided that the advance to the individual defendants was only to be used to purchase the OPP assets. [Id., Ex. A, ¶ 3.] Furthermore, the advance was conditioned on Forzani, “in its sole discretion,” being satisfied with the terms and conditions of the Asset Purchase Agreement with Huff. [Id., Ex. A, ¶ 2(a).]

The Trustee asserts that the documents confirm Forzani’s central role in the 2004 OPP Transaction between Huff and the individual defendants and, consequently, provide the evidentiary support needed for this court to exercise jurisdiction over Forzani on reconsideration.

Reconsideration Standard

A motion for reconsideration, also referred to as a motion to amend or alter a judgment, is governed by Fed. R. Civ. P. 59(e) adopted in bankruptcy pursuant to Fed. R.

Bankr. P. 9023. See *In re Nosker*, 267 B.R. 555, 564-65 & n.2 (Bankr. S.D. Ohio 2001). Such motions are appropriate only to correct manifest errors of law or fact or to present newly discovered evidence. *Id.* at 564-65; *In re Oak Brook Apartments of Henrico County, Ltd.*, 126 B.R. 535, 536 (Bankr. S.D. Ohio 1991); *Ohio Savings Bank v. Larson (In re Larson)*, 103 B.R. 896, 897 (Bankr. S.D. Ohio 1989). Such motions are not intended to give a party an opportunity to relitigate issues and facts already decided or present the case under new theories. *Nosker*, 267 B.R. at 564-66 (rejecting a motion for reconsideration that was merely a rehash of previously asserted arguments); *Oak Brook Apartments*, 126 B.R. at 536. Motions for reconsideration are within the sound discretion of the court to grant or deny. *Oak Brook Apartments*, 126 B.R. at 536.

The burden is on the movant to demonstrate the existence of one of the grounds for granting reconsideration. *Nosker*, 267 B.R. at 565; *Larson*, 103 B.R. at 897. When a motion for reconsideration is based on the existence of newly discovered evidence, the movant must demonstrate that the evidence was previously unavailable. *Edwards v. Ford Motor Co.*, 218 F.Supp.2d 846, 849 (W.D. Ky. 2002); *In re Quality Stores, Inc.*, 272 B.R. 643, 650 (Bankr. W.D. Mich. 2002). Furthermore, the movant must show: 1) facts from which the court may infer reasonable diligence on the part of the movant; 2) that the facts are not merely cumulative or impeaching, and 3) that the evidence is material and, if the motion is granted, would probably produce a different result. *Quality Stores*, 272 B.R. at 650. See also *In re Frank*, 35 B.R. 305, 307 (Bankr. S.D. Ohio 1983) (movant must not only show that the evidence was newly discovered since the original disposition, but must also show that the movant was excusably ignorant of the facts).

In this case, Forzani does not dispute that the Trustee received the newly discovered evidence on November 14, 2006, subsequent to the Trustee's deadline for filing a response to the motions to dismiss. Although Forzani argues that the documents are not "new" to the Trustee because Forzani mentioned them in its initial motion to dismiss, Forzani does not suggest that it produced the documents to the Trustee nor does Forzani's discussion of the documents in its motion to dismiss highlight the portions relevant to whether Forzani had direct participation in the 2004 OPP Transaction.

Furthermore, there is no suggestion that the Trustee lacked diligence in obtaining the documents. Indeed, the defendants filed their motions to dismiss the Trustee's action for lack of personal jurisdiction prior to filing their answers. As such, no significant formal discovery had yet been initiated. Consequently, it is understandable that the Trustee would not have obtained every relevant document in the defendants' possession prior to the court's disposition of the motions to dismiss.

Finally, the court concludes that the newly discovered evidence is not cumulative of other documents and is highly relevant to the court's determination of personal jurisdiction because the documents demonstrate Forzani's participation in the 2004 OPP Transaction beyond just the purchase of stock in a Canadian corporation from Canadian citizens. For these reasons, the court will reconsider whether it is appropriate to exercise personal jurisdiction over Forzani.

Legal Analysis of Personal Jurisdiction with Newly Discovered Evidence

Generally, the court shall not repeat here the analysis contained in its prior decision, but will incorporate it by reference. Suffice it to say that the court's determination that it did not have specific personal jurisdiction over Forzani was an

exceedingly close question. As already noted, the Trustee presented a credible theory for specific jurisdiction over Forzani. Simply put, that theory was that Forzani was the *de facto* purchaser in the 2004 OPP Transaction, controlling the entire transaction by providing all of the financing for the asset purchase and simultaneously orchestrating the substance and timing of the asset and stock purchases. If Forzani was in reality the purchaser from Huffly, merely using surrogates (including Finkelstein and Salter who were officers of a Huffly affiliate) to implement the 2004 OPP Transaction, then Forzani would be subject to the specific jurisdiction of this court.

Without belaboring the point, the cumulative effect of the new evidence summarized above is to persuade the court that Forzani controlled and orchestrated the 2004 OPP Transaction for its own advantage. The evidence shows that Forzani earmarked its stock and funds specifically for the 2004 OPP Transaction, directed and controlled the actions taken by the individual defendants to the same end, and retained “sole discretion” over the terms and conditions of the Asset Purchase Agreement with Huffly, an agreement that was subject to Ohio law. While not conclusive, this evidence together with the nearly simultaneous flip of the New Gen-X stock to Forzani is sufficient to make a *prima facie* case that Forzani was a prime participant in the 2004 OPP Transaction and may have aided the individual defendants in breaching their fiduciary duties to Huffly. As a consequence, the actions of the individual defendants pertaining to the negotiation and closing of the 2004 OPP Transaction are now attributable to Forzani.

As explained in the court’s prior decision, the customary framework used in the Sixth Circuit for analyzing specific personal jurisdiction is the three-factor test enunciated in *Southern Machine Company, Inc. v. Mohasco Industries, Inc.*, 401 F.2d

374, 381 (6th Cir. 1968). The preeminent factor is that “the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state.” *Id.* In the court’s view, this factor is satisfied here because Forzani purposefully involved itself with and directed the activities of corporate officers of a Huffly affiliate, interjecting itself between the officers and the U.S. corporation to whom they owed a fiduciary duty under U.S. corporate laws. It did so to effectuate the acquisition by Forzani of significant Huffly assets, including some U.S. intellectual property, pursuant to the terms of an Asset Purchase Agreement governed by Ohio law. Such activities necessarily cause a substantial consequence in the United States, impacting its laws, the welfare of one of its corporate citizens, and the disposition of significant assets.

Although each of the *Southern Machine* factors is an independent requirement, in this case the second factor strongly buttresses the first factor. The second factor is that “the cause of action must arise from the defendant’s activities” in the forum state. *Id.* The causes of action against Forzani (generally fraudulent transfer and aiding and abetting breaches of fiduciary duty and constructive fraud) arise directly and entirely from Forzani’s involvement in the 2004 OPP Transaction, including its interaction with the individual defendants. It is unreasonable to suppose that Forzani would be surprised to be haled into court in Ohio given the degree to which it controlled the transaction. This tight fit between the causes of action and the transaction forming the essential basis for specific jurisdiction makes such jurisdiction all the more appropriate. Absent a strong countervailing factor, justice is best served if all parties to the transaction can receive adjudication in the same forum.

Any such countervailing factors can best be considered in the context of the third *Southern Machine* factor, that “the acts of the defendant or consequences caused by the defendant . . . have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.” *Id.* Generally, “reasonableness” depends upon whether Ohio or the United States have a strong interest in resolving the conflict. *Id.* at 384; *Aristech Chemical International Limited v. Acrylic Fabricators Limited*, 138 F.3d 624, 628 (6th Cir. 1998). In its prior decision, in the context of discussing specific jurisdiction over Finkelstein and Salter, the court discussed at some length this issue as well as the reasonableness of imposing jurisdiction over citizens of Canada. That discussion, which the court will not repeat here, applies equally to Forzani and leads to the same conclusion that specific jurisdiction is reasonable. The court is unaware of any other factors that would compel a different result.

It may, however, be instructive to repeat here a small portion of the court’s prior decision pertaining to Forzani:

Consequently, so the argument goes, the triangular transaction should be collapsed and viewed as a two party transaction between Huff and Forzani, a transaction that would seemingly qualify as purposeful availment of American laws or at least the purposeful causation of a consequence in the United States.

* * *

Although the Trustee does not specifically use agency terminology, his argument in effect casts Finkelstein, Salter, and White as agents of Forzani rather than Huff. Under this theory, the three of them acted on behalf of Forzani in the negotiation and closing of the 2004 OPP Transaction resulting in the “flip” to Forzani a day later. If they were agents of Forzani, their activities might well be attributed to their principal. It is also true that the use of an intermediary does not necessarily shield a foreign party from jurisdiction. *See, e.g., Fortis Corporate Insurance v. Viken Ship Management*, 450 F.3d 214, 220 (6th Cir. 2006). However, speculation aside, there is no evidence that Forzani directed the activities of the three men and there are no other facts to support such an agency relationship.

[Adv. Doc. 79]. The quoted language illustrates how close the court was to finding specific jurisdiction over Forzani in the first instance. But speculation has now been supplanted by evidence which, in the court's estimation, is sufficient to make a *prima facie* case for jurisdiction. The court's findings and determinations in this decision do not, however, constitute findings of fact or legal conclusions for any other purpose.

Conclusion

For the foregoing reasons, it is hereby **ORDERED** that the *Motion for Reconsideration, New Trial, and to Alter or Amend Decision as to Personal Jurisdiction* [Adv. Doc. 83] filed by Plaintiff Mark S. Stickel, Trustee of the Huffy Recovery Trust is hereby **GRANTED** to the following effect:

- A. The court's prior Decision [Adv. Doc. 79] and Order [Adv. Doc. 80] entered herein on December 21, 2006 are hereby amended in accordance with the foregoing decision; and
- B. The court has personal jurisdiction over the Forzani Group Ltd. and this adversary proceeding shall remain pending as to this defendant.

SO ORDERED.

Copies to:

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