IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
U.S. Magistrate Judge S. Kato Crews

Civil Action No. 1:20-cv-01236-RM-SKC

RAYMOND E. CLARK, and
BETTYJUNE CLARK,

Plaintiffs,

v.

HYATT HOTELS CORPORATION, *et al.*,

Defendants.

RECOMMENDATION RE: DEFENDANTS' [DKTS. 141, 143, 144] MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION

When Plaintiffs Raymond and Bettyjune Clark visited the Hyatt Place Boulder (Hotel), they were allegedly exposed to carbon monoxide due to a faulty boiler and ventilation system in the Hotel.[1] [Dkt. 112][2] Based on their alleged injuries arising from the exposure, Plaintiffs filed this lawsuit naming several Hyatt entities as Defendants. [*Id.*] Hyatt Hotels Corporation (Hyatt), Interstate Hotels & Resorts, Inc. (Interstate), and Noble Investment Group, LLC (Noble), have filed separate motions

[1] The Court accepts the well-pleaded facts as true and views the allegations in the light most favorable to the non-movants. *Casanova v. Ulibarri*, 595 F.3d 1120, 1124-25 (10th Cir. 2010).

[2] The Court uses "[Dkt.__]" to refer to specific docket entries in CM/ECF.

seeking to dismiss the claims against them based on a lack of personal jurisdiction. [Dkts. 141, 143, 144.] Plaintiffs argue they have made a *prima facie* showing of jurisdiction and, if they haven't, they are entitled to conduct jurisdictional discovery. [Dkts. 81, 82, 84.][3] The Court has reviewed the Motions, related briefing, and applicable law. No hearing is necessary. For the following reasons, the Court RECOMMENDS the Motions be GRANTED.

STANDARD OF REVIEW

Hyatt, Interstate, and Noble move to dismiss under Fed. R. Civ. P. 12(b)(2) alleging a lack of personal jurisdiction over them.[4] The purpose of a motion to dismiss under Rule 12(b)(2) is to determine whether a court has personal jurisdiction over a defendant. The question of personal jurisdiction must be addressed before a court can reach the merits of a case because "a court without jurisdiction over the parties cannot render a valid judgment." *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998) (citing *Leney v. Plum Grove Bank*, 670 F.2d 878, 879 (10th Cir. 1982)).

The plaintiff bears the burden of establishing either general or specific jurisdiction over the defendants. *Rambo v. Am. S. Ins. Co.*, 839 F.2d 1415, 1417 (10th

[3] Plaintiffs received permission from District Judge Raymond P. Moore to rely on their original responses and other filings. [Dkt. 151.] Defendants' replies can be found at docket entries: 94, 96, and 98.

[4] Hyatt offers a variety of reasons the case against it should be dismissed. [Dkt. 141 at pp.8-9.] But the Court's conclusions regarding personal jurisdiction make analysis of those issues unnecessary.

Cir. 1988). "Where, as in the present case, there has been no evidentiary hearing, and the motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written material, the plaintiff need only make a *prima facie* showing that jurisdiction exists." *XMission, L.C. v. Fluent LLC*, 955 F.3d 833, 839 (10th Cir. 2020) (quoting *Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995)). The plaintiff may survive a motion to dismiss by presenting evidence (either uncontested allegations in its complaint or other materials such as affidavits or declarations) "that if true would support jurisdiction over defendant." *Id.* (quoting *OMI Holdings, Inc.*, 149 F.3d at 1091).

The Court accepts the well-pled allegations (plausible, nonconclusory, nonspeculative facts) of the operative complaint as true "to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes must be resolved in the plaintiff's favor, and the plaintiff's *prima facie* showing is sufficient notwithstanding the contrary presentation by the moving party." *Wenz*, 55 F.3d at 1505 (internal quotation marks and citations omitted).

ANALYSIS

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts ties, or relations." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985) (internal quotation marks and citation omitted). Therefore, a "court

may exercise personal jurisdiction over a nonresident defendant only so long as there exist minimum contacts between the defendant and the forum state." *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1979) (internal quotation marks and citation omitted). The "minimum contacts" requirement protects a defendant "against the burdens of litigating in a distant or inconvenient forum[;]" and ensures "the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id*. at 292. If minimum contacts are shown, the court must then determine whether the exercise of personal jurisdiction over the defendant would "offend traditional notions of fair play and substantial justice." *OMI Holdings, Inc.*, 149 F.3d at 1091 (citing *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 113 (1987)).

Plaintiffs' claims arise under state law, and therefore, they must demonstrate the Court's jurisdiction under Colorado law, in addition to showing the exercise of jurisdiction is proper pursuant to the due process clause of the Fourteenth Amendment. *See Far W. Capital, Inc. v. Towne*, 46 F.3d 1071, 1074 (10th Cir. 1995). The Colorado long-arm statute extends jurisdiction to the greatest extent permitted by due process, which allows the court to bypass the statutory analysis and proceed with the due process inquiry. *AST Sports Sci., Inc. v. CLF Distribution Ltd.*, 514 F.3d 1054, 1057 (10th Cir. 2008) ("The Colorado Supreme Court has interpreted Colorado's long-arm statute to extend jurisdiction to the fullest extent permitted by the Due Process Clause of the Fourteenth Amendment.").

Consistent with due process, a court may exercise personal jurisdiction in one of two ways. First, a court may assert specific jurisdiction over a nonresident defendant "if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King*, 471 U.S. at 472. Second, where a defendant has not engaged in forum-related activities, the court may nonetheless exercise general jurisdiction over the defendant based on the defendant's general business contacts with the forum state. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 415 (1984). However, "[b]ecause general jurisdiction is not related to the events giving rise to the suit, courts impose a more stringent minimum contacts test, requiring the plaintiff to demonstrate the defendant's 'continuous and systematic general business contacts.'" *Metropolitan Life Ins. Co. v. Robertson–Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996) (quoting *Helicopteros*, 466 U.S. at 416).

A. Interstate Hotels & Resorts, Inc.

The Second Amended Complaint contains two allegations specific to Interstate: (1) it is a Delaware corporation whose principal place of business is outside of Colorado;[5] and (2) "On information and belief, [Interstate] as of November 2018, owned, operated, or controlled, directly or through its subsidiaries, the Hotel." [Dkt. 112 at ¶¶34-35, 67.] Plaintiffs also allege (on information and belief) several

[5] In their complaint, Plaintiffs allege Interstate's primary place of business is Virginia. According to Interstate's affidavit, it is licensed to do business in Texas. [Dkt. 143-1 at ¶¶2-3.]

Defendants, including Interstate, entered into a management agreement and shared profits and losses related to the Hotel. [*Id.* at ¶¶66-67.]

In its Motion and supporting affidavit, Interstate attests it has no offices or employees in Colorado, and it owns no Colorado properties. [Dkts. 143 at p.6, 143-1 at ¶¶4-5.] It contends the alleged parent-subsidiary relationship is insufficient to establish general jurisdiction, and Plaintiffs have failed to allege sufficient facts for specific jurisdiction. In response, Plaintiffs argue Noble-Interstate Management Group, LLC (Noble-Interstate)—which manages the Hotel—is Interstate's agent, and therefore, Interstate is subject to Colorado jurisdiction.

"The agency theory of personal jurisdiction is rooted in the concept that the principal is responsible for the actions of the agent." *Shell v. Am. Fam. Rts. Ass'n*, 899 F. Supp. 2d 1035, 1053 (D. Colo. 2012) (citing *In re Goettman*, 176 P.3d 60, 67 (Colo. 2007)). To achieve general jurisdiction over a corporation through a subsidiary, the plaintiff must establish the existence of a "general" agency relationship "so that it is not unfair or unreasonable to have [the foreign corporation] answer to the general jurisdiction of the . . . district court." *Beverly Kuenzle, Wayne Kuenzle v. HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 459 (10th Cir. 1996) (internal quotation marks and citation omitted). Agency is a manifestation of consent that one person shall act on behalf, and be subject to the control, of another. *Id.* "There can be no agency relationship unless the factual element of control is present." *Id.* This relationship cannot be presumed but must be clearly demonstrated. *Id.*

Plaintiffs have attempted to controvert Interstate's affidavit with several documents that appear to have been printed from the internet. None of these documents are authenticated or supported by an affidavit, and therefore, prove nothing regarding the jurisdictional analysis. "The plaintiff has the duty to support jurisdictional allegations in a complaint by *competent proof* of the supporting facts if the jurisdictional allegations are challenged by an appropriate pleading."[6] *Pytlik v. Pro. Res., Ltd.*, 887 F.2d 1371, 1376 (10th Cir. 1989) (citing *Becker v. Angle*, 165 F.2d 140, 141 (10th Cir. 1947)) (emphasis added). While Fed. R. Evid. 902 provides certain evidence to be self-authenticating, Plaintiffs' exhibits are not of that sort. For example, Rule 902(4) provides public records may be self-authenticated if they are certified copies. Plaintiffs have attached Colorado and Georgia Secretaries of State filings and a Texas tax document, but none are certified copies. [Dkts. 84-4, 84-5, 84-6.] Without this evidence, the Court is left only with Plaintiffs' conclusory allegation that Interstate owned, operated, or controlled the hotel directly or through its subsidiaries.

Based on the foregoing, the Court concludes Plaintiffs have failed to satisfy their burden of making a *prima facie* showing of this Court's jurisdiction over Interstate. *White v. Christian*, 474 F. Supp. 3d 1196, 1200 (D. Colo. 2020) (citing *Ten*

[6] Black's Law Dictionary defines "competent evidence" as "admissible evidence." *Competent Evidence*, Black's Law Dictionary (8th ed. 2004).

Mile Indus. Park v. Western Plains Serv. Corp., 810 F.2d 1518, 1524 (10th Cir. 1987) and *Mitchell v. King*, 537 F.2d 385, 386 (10th Cir. 1976)).

B. Noble Investment Group, LLC

Plaintiffs' allegations regarding Noble are slim and conclusory. They allege Noble is a Georgia company whose principal place of business is in Atlanta. [Dkt. 112 at ¶26.] They further allege (on information and belief) Noble owned, operated, and controlled the Hotel through its subsidiaries, NF II Boulder Op Co, LLC (NF II) and HP Boulder, LLC (HP Boulder). [*Id.* at ¶¶26-37, 29, 32.] Plaintiffs contend NF II and HP Boulder are Noble's agents. But for the same reasons they failed to satisfy their burden as to Interstate, the Court concludes Plaintiffs have not made a *prima facie* showing of jurisdiction over Noble.

With its Motion, Noble included the affidavit of its Vice President, James E. Conley, Jr. [Dkt. 144-1.] Conley avers Noble has no offices, employees, or owned properties in Colorado. He further attests Noble is not involved in the day-to-day operations of the Hotel, nor is it a party to the franchise or management agreements relevant to the Hotel. [*Id.* at ¶¶4-8.] In response, Plaintiffs again attach multiple documents that are unsupported by affidavits, unauthenticated, or fail to meet the requirements for self-authentication. [Dkts. 82-1 – 82-13.] These documents are inadmissible and do not satisfy Plaintiffs' duty "to support jurisdictional allegations in [the Complaint] by competent proof of the supporting facts." *Pytlik*, 887 F.2d at 1376. And because the conclusory allegations in the Second Amended Complaint

regarding Noble are unsupported by factual allegations, they establish neither the existence of a general agency relationship between Noble and NF II or HP Boulder nor a basis for this Court to assert jurisdiction. *Kuenzle*, 102 F.3d at 459.

C. Hyatt Hotels Corporation

In the Second Amended Complaint, Plaintiffs acknowledge Hyatt is a Delaware corporation whose principal place of business is in Chicago, Illinois. [Dkt. 112 at ¶12.] In addition to general information regarding Hyatt's business model, relevant here, Plaintiffs also allege:

- Hyatt (and/or Hyatt Place Franchising, LLC (Hyatt Place)) entered into a Franchise Agreement with Noble, NF II, and HP Boulder. [*Id*. at ¶64.]
- Noble, NF II, and HP Boulder were required to obtain Hyatt's (and/or Hyatt Place's) approval for the selection of the Hotel's property management. [*Id*. at ¶65.]
- The Franchise Agreement gave Hyatt (and/or Hyatt Place) a pervasive right to control many aspects of the other Defendants' business regarding the Hotel. [*Id*. at ¶68.]
- Hyatt and the other Defendants shared profits and losses. [*Id*. at ¶67.]
- Hyatt (and/or Hyatt Place) required the other Defendants to follow a detailed set of operating procedures that regulated many aspects of the Hotel business. [*Id*. at ¶69.]

- Hyatt (and/or Hyatt Place) reserved the right to—and did—conduct scheduled and unscheduled inspections and audits to determine whether the Hotel was up to Hyatt standards and to determine whether repairs were required. [*Id*. at ¶¶70-71.]
- Hyatt (and/or Hyatt Place) had control over whether the boilers in the Hotel were properly serviced and whether functional carbon monoxide alarms were properly installed. [*Id*. at ¶¶72, 74.]
- Hyatt (and/or Hyatt Place) had control over the design of the Hotel. [Id. at ¶73.]

With its Motion to Dismiss, Hyatt has included the franchise agreement (accompanied by affidavit), and in fact, it is not a party to the contract. [Dkt. 142.] Instead, the agreement is between NF II and Hyatt Place. To be sure, Plaintiffs' allegations (pleaded in the alternative) recognize that Hyatt Place is party to the agreement. From further review of the agreement, it is clear Plaintiffs' allegations implicating Hyatt's control over the Hotel are not supported by facts. For example, according to the agreement, NF II had to submit plans to Hyatt Place regarding the designs and specifications for the Hotel. [*Id*. at p.8] In addition, NF II was required to obtain only Hyatt Place's consent before retaining a management company, and it was Hyatt Place that was entitled to conduct unannounced inspections of the Hotel. [*Id*. at pp.16, 20.]

With the franchise agreement, Hyatt submitted the affidavit of Christina Urbanski, the Assistant Secretary for Hyatt, who attests Hyatt has no offices,

registered agents, properties, addresses or phone numbers, or employees in Colorado. [Dkt. 141-2.] She further attests Hyatt is not registered to do business in Colorado, pays no taxes in Colorado, and does not franchise or have any authority to control Hotel operations. [*Id.*] Based on Hyatt's evidence, and because Plaintiffs have not submitted any affidavits to support their allegations, the Court cannot simply accept them as true for the purposes of determining jurisdiction. *See Wenz*, 55 F.3d 1505 (allegations in the complaint must only be taken as true "to the extent they are uncontroverted by Defendant's affidavits"); *Fed. Deposit Ins. Corp. v. Oaklawn Apartments*, 959 F.2d 170, 175 (10th Cir. 1992) (defendants' affidavit was sufficient to overcome a legal presumption in plaintiff's favor on a motion to dismiss for lack of personal jurisdiction).

In their Response, Plaintiffs attach several documents, none of which are competent evidence because they are unsupported by affidavits or are otherwise unauthenticated.[7] They also submit a portion of Hyatt's Form 10-K (filed with the Securities and Exchange Commission) and note that it states, "we lease spaces for our regional offices, service centers, and sales offices in multiple locations, including. . . Denver, Colorado." But this is not a certified document, which might otherwise be self-authenticating. Fed. R. Evid. 902(4). And even if the Court were to consider it, the Hotel is in Boulder, not Denver. [Dkt. 81-3.] Plaintiffs have not explained how the

[7] Plaintiff's supplemental evidence [Dkt. 101] is also unauthenticated or unsupported by an affidavit, and therefore, not competent to support a showing of personal jurisdiction.

events at the Hotel could relate to an unspecified rental space in a different city such that it would be grounds for asserting personal jurisdiction over Hyatt; nor have they pleaded facts to demonstrate the extent or nature of the leased space in Denver for purposes of general personal jurisdiction. And the Form 10-K is clear that "we" (as used in the form) is not exclusive to Hyatt, but also includes Hyatt's consolidated subsidiaries. To be sure, with its Reply, Hyatt (via the affidavit of Mark Hickey, Senior Vice President of Destination Residential Management) attests that Hyatt Corporation, a wholly owned subsidiary of Hyatt, leased the property in Denver. [Dkt. 94-1.]

Citing *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1215 (11th Cir. 1999), Plaintiffs argue Ms. Urbanski's affidavit is conclusory and insufficient to shift the burden to Plaintiff. *Posner* is distinguishable. There, the defendant's affidavit primarily explained its corporate structure and status. *Id*. In addition, the *Posner* affiant summarily asserted the defendant had not done business in or directed contacts into Florida and denied, in a conclusory way, any other actions that would bring it within the ambit of the Florida long-arm statute. *Id*.

Here, the corporate structure is only a portion of Ms. Urbanski's affidavit. Furthermore, she does not summarily assert there are no connections with Colorado. Rather, she states that Hyatt does not own, manage, maintain, or franchise the hotel and that Hyatt neither owns properties nor does business in Colorado. These are statements of fact sufficient to shift the burden to Plaintiff. Indeed, it is difficult to

conceive what additional statements would be necessary as Hyatt would otherwise be required to prove a negative. *See Toy v. Am. Family Mut. Ins. Co.*, No. 12-cv-01683-PAB-MJW, 2013 WL 1324903, at *1 (D. Colo. April 1, 2013) (citing *Winner v. Etkin & Co., Inc.*, No. 2:07-cv-903, 2008 WL 5429623, at *2 (W.D.Pa. Dec. 31, 2008) (a party "cannot be required to 'prove a negative' by demonstrating that non-existent documents do not exist")).

Because Plaintiffs have not proffered competent evidence in response to Hyatt's, the Court concludes they have failed to make a *prima facie* showing of personal jurisdiction over Hyatt.

D. Jurisdictional Discovery

Plaintiffs also argue even if they have not met their burden regarding personal jurisdiction, they should be permitted to conduct jurisdictional discovery prior to ruling on Defendants' motions. [Dkts. 81 at p.14-16; 82 at pp.6-9; 84 at pp.5-6.] As an initial matter, Defendants are correct that Plaintiffs request for jurisdictional discovery is not properly before the Court. The Local Rules of Practice expressly require motions to be made in a separate document, as opposed to in a response or reply. D.C.COLO.LCivR 7.1(d). This is basis alone to deny the request. Nevertheless, the Court has reviewed the arguments and does not find limited discovery to be justified.

"In the Tenth Circuit, '[w]hen a defendant moves to dismiss for lack of jurisdiction, either party should be allowed discovery on the factual issues raised by

that motion." *Grynberg v. Ivanhoe Energy, Inc.*, 666 F. Supp. 2d 1218, 1227 (D. Colo. 2009), as corrected (Jan. 28, 2010) (quoting *Budde v. Ling–Temco–Vought, Inc.*, 511 F.2d 1033, 1035 (10th Cir. 1975)). If a plaintiff presents factual allegations that suggest, "with reasonable particularity[,]" the possible existence of the requisite contacts, the request to conduct jurisdictional discovery should be sustained. *Reg'l Airline Mgmt. Sys., Inc. v. Airports USA, Inc.*, No. 06-cv-01758-WYD-CBS, 2007 WL 1059012, at *6 (D. Colo. Apr. 4, 2007) (citing *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003)). When, however, "the allegations in the complaint do not demonstrate contacts that might be sufficient to establish personal jurisdiction, a request of jurisdictional discovery will not be viewed favorably." *St. Paul Travelers Cas. & Sur. Co. of Am. v. Guaranty Bank & Trust Co.*, No. 05-cv-00968-REB-BNB, 2006 WL 1897173, at *4 (D. Colo. July 10, 2006) (citing *Wenz v. National Westminster Bank, PLC*, 91 P.3d 467, 469 (Colo. Ct. App. 2004)).

The latter applies here. Given the Court's preceding analysis regarding Plaintiffs' failure to submit any competent evidence in response to Defendants' affidavits and explanations regarding jurisdiction, the Court is left only with Plaintiffs' conclusory and speculative allegations. These do not constitute a factual predicate concrete enough to warrant discovery on the matter. Furthermore, the speculative nature of the allegations and Plaintiffs' arguments are suggestive of a fishing expedition, which does not justify the costs incurred in undertaking jurisdictional discovery.

The current record indicates it is unlikely Plaintiffs will discover evidence of sufficient minimum contacts because the contacts cease at each Defendants' wholly owned subsidiary, over whom there is no evidence or indication of general agency. *Bell Helicopter Textron, Inc. V. Heliquest Int'l, Ltd.*, 385 F.3d 1291, 1299 (10th Cir. 2004) ("given the very low probability that the lack of discovery affected the outcome of this case we find no abuse of the district court's discretion here" in effect denying jurisdictional discovery). Minimum contacts have not been alleged to the degree necessary for the Court to assume personal jurisdiction, and therefore, the Court rejects Plaintiffs' request for jurisdictional discovery.

* * *

Based on the foregoing, the Court RECOMMENDS Defendants' Motions to Dismiss [Dkts. 141, 143, 144] be GRANTED and Hyatt Hotels Corporation, Interstate Hotels & Resorts, Inc., and Noble Investment Group, LLC be dismissed from this action.[8]

[8] Be advised the parties have 14 days after service of this recommendation to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are made. The District Court need not consider frivolous, conclusive, or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within 14 days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the

DATED: November 12, 2021.

BY THE COURT:

S. Kato Crews
United States Magistrate Judge

Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).