

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
C/A No.: 2017-CP-26-03008

Douglas Kelsey,)
Plaintiff,)

vs.)

House of Blues Myrtle Beach Restaurant)
Corporation; HOB Entertainment, Inc.;)
and Travis Scott Wagoner,)
Defendants.)

**ORDER GRANTING MOTION TO
RECONSIDER IN PART AND
DENYING IT IN PART**

House of Blues Myrtle Beach Restaurant)
Corporation,)
Third-Party Plaintiff,)

vs.)

Throttlefest, LLC; American Outlaw)
Spirits Incorporated; Full Throttle LLC;)
and Full Throttle Sloon Shine, LLC,)
Third-Party Defendants.)



This matter is before the Court on Motions to Reconsider, Alter, and Amend filed by Third-Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation (“House of Blues”). . After considering all materials of record and for the reasons set forth below, the Court hereby GRANTS IN PART AND DENIES IN PART Third-Party Plaintiff’s Motion to Reconsider.

This Order is substituted in the place of the Court’s March 26, 2020 Order.

FACTS

Full Throttle, LLC is a South Dakota real estate holding company that holds real estate only in South Dakota. Michael Ballard is its sole member. American Outlaw Spirits, Inc. (“AOC”) is a Georgia corporation that manufactures a brand of liquor. Jesse James Dupree is its sole owner. Sloon Shine, LLC is a Tennessee company that manufactures spirits in Tennessee. Michael Ballard is its sole member. Neither of these manufacturers has an office or facility in South Carolina; neither directly sells its products in South Carolina; and neither derives a substantial portion of its revenue from its respective regional distributors’ sales here. The liquor allegedly at issue was purchased wholesale, not from any of these entities.

The facts giving rise to this litigation concern an event that a different Third-Party Defendant, Throttlefest, put on with the Defendant House of Blues in 2014. Ballard and Dupree are the two members of Throttlefest. Throttlefest and House of Blues entered into a Co-Promotion Agreement (hereinafter the “Co-Promotion Agreement”) with an effective date of March 19, 2014 “concerning the functions and acts necessary for promoting and conducting” an event called the Full Throttle Festival (hereinafter the “Event”) which was held at the House of Blues in Myrtle Beach from May 9 until May 17, 2014. AOS, Sloon Shine, and Full Throttle were not parties to this contract.

Plaintiff alleges that Defendant Travis Wagoner was present at the House of Blues on May 16, 2014 and that House of Blues’ employee Michael Garner gave Wagoner two shots of liquor despite Wagoner showing signs of intoxication. Plaintiff then alleges that Wagoner left the House of Blues in an intoxicated state and caused an accident that injured the Plaintiff. Plaintiff alleges Garner was an employee of House of Blues. House of Blues has alleged Garner was acting as the employee or agent of Throttlefest, American Outlaw Spirits, Full Throttle, and Sloon Shine.

Additionally, House of Blues argues that Dupre and Ballard were acting not only as the hosts of ThrottleFest, but also as agents of American Outlaw Spirits, Full Throttle, and Sloon Shine.

PROCEDURAL HISTORY

Plaintiff filed his initial Complaint on May 12, 2017 and an Amended Complaint on July 7, 2017. Plaintiff originally alleged that Garner was acting as an employee or agent of the Third-Party Defendants and House of Blues, and that he was selling alcohol under House of Blues' alcohol license. House of Blues did not file any crossclaims against American Outlaw Spirits, Full Throttle, or Sloon Shine.

Full Throttle, Sloon Shine, and AOS moved to dismiss on August 31, 2017 pursuant to Rules 12(b)(2) and 12(b)(6), SCRCP. On January 2, 2018, Plaintiff dismissed AOS. Full Throttle and Sloon Shine settled with Plaintiff and received a full and final release of all liability and damages of any kind relating to the injuries Plaintiff sustained from the accident. Despite obtaining the Release from Plaintiff, House of Blues refused to consent to Sloon Shine's and Full Throttle's dismissal from the case, even though House of Blues did not have any claims pending against them. On June 25, 2019, Full Throttle and Sloon Shine again moved to dismiss the claims against them. The Court granted Full Throttle's and Sloon Shine's Motion to Dismiss on August 13, 2019.

On October 15, 2019, Plaintiff filed a Second Amended Complaint, which did not include AOS, Full Throttle, or Sloon Shine as Defendants. Plaintiff's Second Amended Complaint alleges that it was only House of Blues' employees and agents that served Wagoner alcohol to the point of intoxication and caused the accident. (Second Am. Compl. ¶¶ 8, 16, 29, 39, 40, 41, 42, 68, 74, 91, 93, 97.) Plaintiff's Second Amended Complaint alleges that Garner was solely House of Blues' employee and cites to House of Blues' testimony admitting the same. (*Id.* at ¶¶ 40-41.) Plaintiff

alleges that when he filed his first Amended Complaint he had not yet discovered that Garner was a House of Blues employee. (*Id.* at ¶ 68.)

On October 18, 2019, House of Blues filed its Answer to the Second Amended Complaint and its Third-Party Complaint. House of Blues asserted the following, third-party claims against all Third-Party Defendants: (1) breach of contract; (2) negligent misrepresentation; (3) negligence; (4) equitable indemnification; (5) contractual indemnification; and (6) contribution. On December 5, 2019, Throttlefest filed a Motion to Dismiss. On December 17, 2019, these Third-Party Defendants moved to dismiss House of Blues' claims. The Court, Judge Culbertson presiding, granted Throttlefest's Motion to Dismiss on February 4, 2020. Arguments on the remaining Third-Party Defendants' motions were heard on February 5, 2020.

LAW/ANALYSIS

“The party invoking personal jurisdiction over a nonresident bears the burden of proving the existence of personal jurisdiction.” *Int'l Mariculture Res. v. Grant*, 336 S.C. 434, 437, 520 S.E.2d 160, 161 (Ct. App. 1999) (citing *Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256, 259, 423 S.E.2d 128, 130 (1992)). To meet its burden at this pre-trial stage, House of Blues must make a prima-facie showing of jurisdiction by pleadings and affidavits. See *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). The showing of personal jurisdiction “must be based upon specific facts set forth in the record in order to defeat defendants' motion to dismiss.” *Magic Toyota, Inc. v. Southeast Toyota Distributors, Inc.*, 784 F. Supp. 306, 310 (D.S.C. 1992). “When a motion to dismiss attacks the allegations of the complaint on the issue of jurisdiction, the court is not confined to the allegations

of the complaint but may resort to affidavits or other evidence to determine jurisdiction.” *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478.

I. The Court Lacks Jurisdiction Over These Third-Party Defendants.

The invocation of personal jurisdiction over a nonresident traditionally had involved a two-step analysis involving both the South Carolina long-arm statute and the relevant constitutional protections. In light of the interpretation that South Carolina’s long-arm statute extends as far as the due process clause, courts now focus on whether the nonresident’s contacts in South Carolina are sufficient to satisfy due process requirements. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). Due process requires that there exist “minimum contacts” between the nonresident and the forum state such that the maintenance of the suit does not offend traditional notions of fair play and justice. *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 402 S.E.2d 177, 180 (S.C. 1991). Without minimum contacts, the court does not have the “power” to adjudicate the action. *Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131(1992).

The allegations here concern a claim of “specific jurisdiction,” that is, the right to exercise personal jurisdiction because the cause of action arises specifically from a defendant’s contacts with the state.¹ *See Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. The focus of the court’s inquiry must be the contacts generated *by the defendant*, and not on the unilateral actions of some other person or entity. *Id.*

The primary allegations at issue involve the actions Michael Garner. House of Blues acknowledges in its Answer that it issued Garner a W-2 for his work during the Event. Seeking to

¹ General jurisdiction, which arises from continuous and systematic contacts with the state, clearly is not present here. *See Coggeshall*, 376 S.C. at 17, 655 S.E.2d at 479.

distance itself from Garner's actions, House of Blues then says Garner was "part of the Throttlefest festival talent." House of Blues admits that it and Throttlefest undertook the duties for promoting and conducting the Throttle Fest event and asserts that Throttlefest was responsible for "festival talent/personalities." House of Blues nevertheless seeks to reach through the Throttlefest LLC to its two individual members and even further beyond that, tracing duties through those members to each of their other businesses. It seeks to hold responsible those non-resident, non-contracting parties with the duties of the contracting party, and to hold them responsible for acts or omissions in the performance of the contract. It seeks to hold a South Dakota real estate holding company, for example, responsible for the alleged actions of "festival talent" that another entity purportedly obtained—and whom House of Blues reported to the IRS was their employee.

In light of the materials submitted to address the lack of contacts of these Third-Party Defendants and other matters of record, House of Blues cannot establish that the three non-resident companies themselves had sufficient contacts to have purposefully availed themselves of the privilege of conducting activities within South Carolina. *See generally Cockrell v. Hillerich & Bradshy Co.*, 363 S.C. 485, 492, 611 S.E.2d 505, 509 (2005) ("The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there."); *Aviation Assocs.*, 402 S.E.2d at 180 (nonresident seller's limited contact insufficient); *Power Prod. & Servs. Co. v. Kozma*, 379 S.C. 423, 433, 665 S.E.2d 660, 666 (Ct. App. 2008) (finding conclusory assertions unavailing). The only contact that these entities could be argued to have made here was the requirement by ThrottleFest that House of Blues buy liquor from the Third-Party Defendants to serve at the ThrottleFest event. This singular contact, which was directed by ThrottleFest rather than the Third-

Party Defendants themselves, is not enough to create jurisdiction. These Defendants did not conduct the requisite activity to have purposefully availed *themselves* of the laws of South Carolina. In other words, the actions of Throttlefest in South Carolina can subject itself to the jurisdiction to the courts of South Carolina, but not additional parties.

Additionally, House of Blues alleges that Ballard and Dupree, in conducting their duties as the hosts of ThrottleFest, were also serving as agents of the Third-Party Defendants, by nature of their positions within those companies. House of Blues therefore argues that the contacts made by Ballard and Dupree should be imputed to the Third-Party Defendants. The Court disagrees. House of Blues has not provided sufficient evidence that Dupree and Ballard were serving as agents for the Third-Party Defendants. Mere conclusory statements or allegations in pleadings concerning Dupree and Ballard serving as agents for these Third-Party Defendants are not enough to base the exercise of jurisdiction upon. As a result, the Court cannot exercise jurisdiction over these parties on this, or any other basis as alleged by House of Blues.

Because the Court finds it lacks the “power” to hear this matter with regard to these Defendants, the Court need not address the “fairness” prong of personal jurisdiction.

The Court declines to address Third-Party Defendants’ other defenses and arguments, as the Court has found it does not have personal jurisdiction over these parties.

CONCLUSION

Accordingly, House of Blues’ Motion to Reconsider is **GRANTED IN PART AND DENIED IN PART**. Additionally, (1) Full Throttle, LLC’s Motion to Dismiss is **GRANTED** and the third-party claims asserted against it by House of Blues are **dismissed for lack of personal jurisdiction**; (2) American Outlaw Spirits, Incorporated’s Motion to Dismiss is **GRANTED** and the third-party claims asserted against it by House of Blues are **dismissed for lack of personal**

jurisdiction; and (3) Full Throttle Sloon Shine, LLC's Motion to Dismiss is GRANTED and the third-party claims asserted against it by House of Blues are **dismissed for lack of personal jurisdiction**. The Court declines to reach Third-Party Defendants' other defenses and arguments.

IT IS SO ORDERED.

The Honorable William A. McKinnon
Presiding Judge



Horry Common Pleas

Case Caption: Douglas Kelsey , plaintiff, et al VS House Of Blues Myrtle Beach
Restaurant Corporation , defendant, et al
Case Number: 2017CP2603008
Type: Order/Other

So Ordered

/s William A. McKinnon, #2761, Circuit Judge