

United States District Court
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

THE CLEMENT GROUP, LLC.,	§	
	§	
v.	§	
	§	
ETD SERVICES, LLC., D/B/A THE	§	Civil Action No. 4:16-cv-00773
DAVITZ GROUP;	§	Judge Mazzant
E. EARL DAVIS, II;	§	
TARA DAVIS,	§	
	§	
v.	§	
	§	
BILL’S BOOKKEEPING SERVICES, LLC.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is Third Party Defendant’s Motion to Dismiss for Lack of Personal Jurisdiction (Dkt. #22). After reviewing the pleadings, the Court finds the motion should be denied.

BACKGROUND

The Clement Group, LLC (“Clement”), is an Alabama-based company operating in Montgomery, Alabama (Dkt. #10 at p. 11). Clement’s members are Alabama citizens (Dkt. #10 at p. 12). ETD Services, LLC d/b/a The Davitz Group (“ETD”), is a Texas-based company operating in McKinney, Texas (Dkt. #10 at p. 10). ETD’s sole member is a Texas citizen (Dkt. #10 at p. 12). Bill’s Bookkeeping Services, LLC (“BBS”) is an Alabama-based company operating in Montgomery, Alabama (Dkt. #10 at p. 11). BBS’s members are Alabama citizens (Dkt. #10 at p. 12).

Both Clement and ETD operate as construction companies (Dkt. #10). On May 3, 2013, Clement and ETD agreed to become partners as part of the United States Small Business

Association's Mentor/ Protégé Program (the "SBA Mentor Program") (Dkt. #10 at p. 17). Under this program, ETD, the protégé, sought to gain business insight and experience in providing contacting services to federal government agencies in construction and renovation projects on military installations (Dkt. #10 at p. 17). The program allowed joint ventures between Clement and ETD to bid for federal contracts for which the companies individually would otherwise not have been eligible to bid (Dkt. #10 at p. 17).

On or about May 2014, ETD and Clement formed a joint venture known as ETD-TCG, LLC (Dkt. #10 at p. 18). On July 17, 2014, ETD and Clement entered into a Joint Venture Agreement to bid for projects involving construction services for the United States Army Corp of Engineers (the "USACE"), Norfolk District (Dkt. #10 at p. 18). On August 12, 2014 and December 18, 2014, ETD-TCG, LLC entered into two addenda to the Joint Venture Agreement to provide construction services for the USACE, Mobile District (Dkt. #10 at p. 18). On January 20, 2015, ETD-TCG, LLC entered into another addendum to the Joint Venture Agreement to provide design-build construction services to the USACE, Louisville District (collectively, the "Joint Ventures") (Dkt. #10 at p. 19).

Prior to Clement and ETD forming ETD-TCG, LLC, BBS performed bookkeeping services for Clement (Dkt. #22, Exhibit 1 at ¶ 10). BBS managed a "pooling arrangement" in which participants contributed a percentage of their revenue from construction projects to a general fund. Participants could use the fund to pay their overhead expenses as well as direct and indirect costs (Dkt. #10 at p. 15). ETD alleges it was required to participate in the "pooling arrangement" as part of the Joint Ventures (Dkt. #10 at p. 16).

According to ETD's managing member, Earl Davis, the "pooling arrangement" included all of ETD's project in "any location and particularly its projects in Texas." (Dkt. #27, Davis

Decl. ¶ 11). Davis states that BBs provided “significant project management oversight for all the construction projects in which ETD was engaged throughout Texas and the United States” (Dkt. #27, Davis Decl. ¶ 12). The project oversight included oversight of the bidding opportunities, preparation of bids, management of project budgets, management of contract acquisition and execution for subcontractors, job costs and profit estimation, and payment of bonds for projects in Texas and elsewhere (Dkt. #27, Davis Decl. ¶ 13–15). Davis further states that BBS provided and organized marketing efforts for the participants of the “pooling arrangement” for areas including Texas (Dkt. #27, Davis Decl. ¶ 13). Davis states that BBS was responsible for bid solicitation of construction projects in Fort Hood in Killeen, Texas, the Veterans Administration facility in Dallas, Texas and Fort Sam Houston in San Antonio, Texas (Dkt. #27, Davis Decl. ¶ 14). According to Davis, BBS maintained relationships with the United States Small Business Association in Fort Worth, Texas for the purpose of managing construction contracts that fell within the oversight of that Small Business Association (Dkt. #27, Davis Decl. ¶ 15).

ETD alleges that “from the beginning of the operation of the Joint Ventures” ETD expressed concerns to Clement that “all did not seem appropriate with respect to the allocations for costs and expenses of the Joint Ventures, the profits and losses of the Joint Ventures.” (Dkt. #10 at p. 19). ETD alleges it received limited financial reports and that BBS and Clement ignored its requests for project information and pay requests (Dkt. #10 at p. 19–20). Specifically, ETD alleges that in September 2015, it sought bonding coverage for a construction project in Arkansas from Baldwin Cox (Dkt. #10 at p. 20). ETD alleges that as part of its bond application, it provided Baldwin Cox a set of financial records prepared by BBS (Dkt. #10 at p. 20). ETD alleges that Baldwin Cox found the financial records reflected a \$1.1 million distribution to ETD’s

members (Dkt. #10 at p. 20). ETD alleges that during that same period, BBS advised Earl Davis that ETD's financial records reflected a \$600,000 loss (Dkt. #10 at p. 20).

ETD alleges it continued to ask BBS and Clement about this apparent discrepancy and BBS and Clement refused to respond to ETD. ETD alleges that, on information and belief, Clement and BBS charged ETD-TCG, LLC excessive consulting fees (Dkt. #10 at p. 20). ETD alleges that Clement and BBS were unjustly enriched by portions of ETD-TCG, LLC's assets to which they were not entitled, that Clement and BBS misdirected funds that should have been paid to ETD-TCG, LLC, and that BBS's representations regarding the "pooling arrangement" were false, misleading, and deceptive (Dkt. #10 at pp. 27–28).

On October 7, 2016, Clement brought suit against ETD, alleging breach of contract, breach of fiduciary duty, defamation, conversion, unjust enrichment and fraud (Dkt. #1). Clement alleged ETD breached the Joint Venture Agreement and withdrew funds from ETD-TCG, LLC accounts without Clement's approval (Dkt. #1)

On December 26, 2016, ETD filed a First Amended Original Answer, Affirmative Defenses, and Counter-Complaint (Dkt. #10). ETD brought counter-claims against Clement for breach of contract, breach of fiduciary duty, unjust enrichment, common law fraud, and statutory fraud under the Texas Deceptive Trade Practices Act ("DTPA") (Dkt. #10). ETD's Counter-Complaint included a Third-Party Complaint against BBS alleging unjust enrichment, common law fraud, and statutory fraud under the DTPA (Dkt. #10).¹

On March 15, 2017, BBS filed the pending Motion to Dismiss for Lack of Personal Jurisdiction (Dkt. #22). On April 7, 2017, ETD filed a response (Dkt. #27). On April 14, 2017, BBS filed a reply (Dkt. #28).

¹ The Court granted ETD's motion for leave to re-plead its common law fraud claim.

LEGAL STANDARD

Personal Jurisdiction

Federal Rule of Civil Procedure 12(b)(2) requires a court to dismiss a claim if the court does not have personal jurisdiction over the defendant. Fed. R. Civ. P. 12(b)(2). After a non-resident defendant files a motion to dismiss for lack of personal jurisdiction, the party seeking to invoke the court's jurisdiction must "present sufficient facts as to make out only a prima facie case supporting jurisdiction." *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000). When considering the motion to dismiss, the court must accept as true the plaintiff's uncontroverted allegations and resolve factual conflicts in favor of the plaintiff. *Id.*

A federal court may exercise personal jurisdiction over a nonresident defendant if (1) the forum state's long-arm statute confers personal jurisdiction over that defendant, and (2) the exercise of personal jurisdiction comports with the due process clause of the Fourteenth Amendment. *Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 212 (5th Cir. 2016). Because the Texas long-arm statute extends as far as constitutional due process permits, a court only needs to determine whether a suit in Texas is consistent with the due process clause of the Fourteenth Amendment. *Id.*

The due process clause requires that a court exercise personal jurisdiction over a nonresident defendant only if the defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Minimum contacts with a forum state can be satisfied by contacts that give rise to either general jurisdiction or specific jurisdiction. *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir. 1994).

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