

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

VAROOM WHOA, INC.,)

Plaintiff,)

VS.)

JEREMIAH C. DAVIS,)

Defendant/Third-Party Plaintiff,)

VS.)

HAYLEY N. WILLIAMS; TAYLOR B.)
YORK; JASON B. CHILDRESS;)
CURO FINANCIAL MANAGEMENT,)
LLC; MARK MERCADO; and FLY)
SOUTH MUSIC GROUP, LLC,)

Third-Party Defendants.)

NF
NO. 16-115-BC

2016 JUN 29 PM 3:57
FILED
CLERK OF CHANCERY CT.
DAVIDSON COUNTY
D.C. & M.

**MEMORANDUM AND ORDER: (1) DENYING THIRD PARTY
DEFENDANT FLY SOUTH'S RULE 12.02(2) MOTION;
(2) REVISING BENCH RULING AND DENYING
DEFENDANT MERCADO'S 12.02(2) MOTION: AND
(3) SETTING 7/8/16 DEADLINE TO SCHEDULE RULE 16 CONFERENCE**

It is ORDERED that the Tennessee Civil Procedure Rule 12.02(2) motion of Fly South Music Group, LLC for dismissal, on the grounds of lack of personal jurisdiction, of the third party claims asserted against it by Third Party Plaintiff Jeremy C. Davis is denied. The Court finds that although the record does not establish general personal jurisdiction, the record does establish specific personal jurisdiction.

In so concluding, the Court has applied the law cited by Movants' Counsel, *State v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 739 (Tenn. 2013), that when evaluating the evidence supporting a motion to dismiss for lack of personal jurisdiction, the trial court must take all factual allegations in the plaintiff's complaint and supporting papers as true and resolve all factual disputes in plaintiff's favor. *Id.* at 735. Also cited by Movants' Counsel is the standard that when a defendant supports its 12.02(2) motion with affidavits, as in this case, the burden is on the plaintiff to make a *prima facie* showing of personal jurisdiction over the defendant by filing its own affidavits or written evidence. *First Comm. Bank, N.A.*, 2015 WL 9025241, at *4. A trial court is "not obligated to accept as true factual allegations that are controverted by more reliable evidence and plainly lack credibility." *Id.*

Additionally, with respect to specific personal jurisdiction, the Court has used the factors provided by Counsel from the *Sumatra* case to assess specific personal jurisdiction from the record in this case:

1. The quantity of contact;
2. The nature and quality of the contract;
3. The connection of the cause of action with those contacts;
4. The interest of the forum state; and
5. Convenience.

Sumatra, 403 S.W.3d at 752.

After applying the foregoing law, the Court finds that Third Party Plaintiff Davis has established that this Court has personal jurisdiction over Defendant Fly South. From the Declaration of the Third Party Plaintiff, and taking all factual allegations in the Third Party

Plaintiff's complaint and supporting papers as true and resolving all factual disputes in Third Party Plaintiff's favor, the Court determines that the controverting evidence provided by the Third Party Defendant, Fly South, is not more reliable than the factual allegations asserted by the Third Party Plaintiff, and the Third Party Defendant has failed to demonstrate that the factual allegations asserted by the Third Party Plaintiff plainly lack credibility. *See First Comm. Bank, N.A.*, 2015 WL 9025241 at *4 (Tenn. Dec. 14, 2015).

The Court's findings on which this determination is based are that even though Fly South is a Florida LLC with its principle place of business there, the record contains its admission, taken from its website and LinkedIn page, that it has offices in Nashville, that it manages bands, and that one of its artists/clients is the band Paramour of which Third Party Plaintiff Davis was a member, along with Third Party Defendants Williams and York, at the relevant times in issue. This acknowledgment of management of Paramour is not inconsistent with the allegations of the Third Party Complaint and the Declaration of Third Party Plaintiff Davis that Fly South, through Mark Mercado, had numerous contacts with Paramour and Davis targeted to Davis in Tennessee. The admission on Fly South's website and LinkedIn page is also not inconsistent with Third Party Plaintiff Davis' allegations in the record that Fly South through Mark Mercado provided Davis management services which he relied upon, and that Fly South was paid commissions from gross revenues of Paramour based upon an agreement of the band members, including Davis. The admission by Fly South of management of Paramour is further consistent with the Declaration of Davis that

in September of 2015 in Franklin, Tennessee, a meeting was held at which Fly South was present and participating through Mark Mercado who advised and made business recommendations to the other members of the band to the detriment of Third Party Plaintiff Davis and in breach of fiduciary duties and an oral contract asserted by Davis.

In addition to the admission on Fly South's website and LinkedIn page of management of Paramour not being inconsistent with Third Party Plaintiff Davis' allegations and Declaration, evidence presented by Fly South of an artist contract of Williams with Spotlight Artist Management LLC does not constitute more reliable evidence or show that Davis' allegations plainly lack credibility. The evidence presented by Fly South of Williams' contract with Spotlight Artist Management LLC shows that it is a single artist contract. That fact does not overcome, rebut or impeach Davis' claims and allegations. The record at this point does not show how the Williams' contract with Spotlight Artist Management LLC relates to Fly South's representation on its website and LinkedIn page that it manages Paramour. Moreover, the artist contract between Williams and Spotlight Artist Management LLC does not establish that the relationship of Davis with Mark Mercado was derivative of Williams' artist contract with Spotlight Artist Management LLC.

For all of these reasons, the Court finds that the evidence presented by Fly South is neither more reliable nor does it show Davis' evidence plainly lacks credibility. Under these circumstances, the Court finds Third Party Plaintiff Davis has demonstrated specific personal jurisdiction of Fly South.

As to the Third Party Defendant Mark Mercado's motion to dismiss for lack of personal jurisdiction, the Court granted the motion from the bench based upon the fiduciary shield doctrine. This doctrine is recognized by some states as a defense to personal jurisdiction. The doctrine provides that "when an individual defendant is an officer of a corporation, a court may not exercise personal jurisdiction over the defendant based on actions taken in his or her corporate capacity." *Simplex Healthcare, Inc. v. MarketLinkX Direct, Inc.*, 761 F. Supp. 2d 726, 730-31 (M. D. Tenn. 2011) (citing *Stuart v. Spademan*, 772 F.2d 1185, 1197 (5th Cir. 1985)). Under the fiduciary shield doctrine, conduct or contacts that were taken in the defendant's sole capacity as a fiduciary for the company preclude a court from exercising personal jurisdiction over the defendant for that conduct or contacts.

In applying the doctrine to this case, the Court found that the facts of record, both as alleged by the Third Party Defendants and Third Party Davis, established that Mark Mercado's conduct and contacts in issue were taken in his sole capacity as a fiduciary for Fly South. Those facts establish grounds to apply the fiduciary shield doctrine.

Nevertheless, in preparing this Memorandum, while conducting additional research to string more case citations than *Boles v. National Development Co.*, 175 S.W.3d 226, 250-51 (Tenn. Ct. App. 2005), cited in the briefing and cited by the Court from the bench, to support its use of the fiduciary shield doctrine, the Court staff attorney came upon a number of substantial and persuasive cases which indicate that the fiduciary shield doctrine

is not followed in Tennessee. Particularly located was the *Simplex* case, cited above, in which Middle District of Tennessee Judge Aleta Trauger expressly rejected application of the fiduciary shield doctrine in Tennessee explaining in detail that the doctrine has only been referred to in Tennessee, has never been discussed or endorsed by the Tennessee Supreme Court, and is at odds with the Tennessee long-arm statute and U.S. Supreme Court precedent that individual defendant's contacts with the forum state pertaining to their status as employees does not insulate them from jurisdiction. *Caulder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984).

Also as noted by Judge Trauger, *Boles v. National Development Co.*, 175 S.W.3d 226, 250-51 (Tenn. Ct. App. 2005), the case cited in the briefing in this lawsuit in support of the application of the fiduciary shield doctrine, is in the context of a suit against an alter ego. In *Boles*, the plaintiff sought to pierce the corporate veil which is not an application or endorsement of the fiduciary shield doctrine per se. That is because a suit against an alter ego is not a separate and independent cause of action. Once a trial court has determined that an individual is a corporate entity's other self and a judgment against the corporate entity is in place, then there is also in place a judgment against the individual who is the corporate entity's other self.

In *Simplex*, Judge Trauger concluded, "In light of these two Supreme Court cases, there is a broad consensus among federal courts outside the Sixth Circuit that due process does not require application of the fiduciary shield doctrine." Judge Trauger went on to state,

“Because the Tennessee Supreme Court has clearly and repeatedly held that the state’s long-arm statute extends to the limits of federal due process, and because due process does not require the fiduciary shield doctrine, that doctrine does not limit this Court’s jurisdiction.” *Simplex*, 761 F. Supp. 2d 726, 730-33.

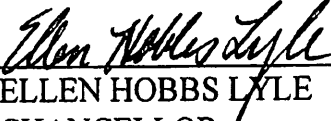
Cited in *Simplex* are these additional federal district court decisions which have declined to apply the doctrine: *Sledge v. Indico Sys. Res., Inc.*, 68 F. Supp. 3d. 834, 841 (W.D. Tenn. 2014); *MCA Records v. Highland Music*, 844 F. Supp. 1201, 1203 (M.D. Tenn. 1993). One case, *Jowers v. Beck*, No. 1:09-1131 2010 WL 455280 at *9 (W.D. Tenn. Feb. 2, 2010), has applied the doctrine.

From these authorities and the analysis contained therein, this Court’s conclusion as a matter of law is that the fiduciary shield doctrine does not apply in Tennessee. For this reason, then, the Court, pursuant to Tennessee Civil Procedure Rule 54.02, alters its decision stated from the bench on the grounds that it has located additional legal authority than was contained in the briefing and in the initial research performed by the Court, and based upon that authority it must deny the motion to dismiss. Having determined that the fiduciary shield doctrine does not apply in Tennessee, the evidence in the record detailed above concerning Mr. Mercado’s contacts in Tennessee on behalf of Fly South establish specific personal jurisdiction. As with Fly South, general personal jurisdiction of Mr. Mercado has not been established.

It is therefore ORDERED that the motion of Third Party Defendant Mark Mercado to dismiss for lack of personal jurisdiction is denied.

It is further ORDERED that by July 8, 2016, Counsel shall notify the Docket Clerk, Mrs. Smith (615-862-5719) of their availability for a Tennessee Civil Procedure Rule 16 Conference on these dates and times:

July 15, 2016 at noon
July 21, 2016, at 11:30 a.m.
July 22, 2016, at noon



ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc: Jay S. Bowen
Lauren Kilgore
Will Parsons
Derek Crownover
Hugh Howser, Jr.
Dustin Kovacic


MAILED
6/29/16