

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JOHN A. PARKINS, JR.
JUDGE

**NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801-3733
TELEPHONE: (302) 255-2584**

January 31, 2011

Charles J. Brown, III, Esquire
Archer & Greiner, P.C.
300 Delaware Avenue, Suite 1370
Wilmington, Delaware 19801

Keith A. Shearer
500 Bairs Road
York, Pennsylvania 17408

**Re: Growmark FS, LLC
v. Keith A. Shearer
C.A. No. N10C-05-154 JAP**

Dear counsel and Mr. Shearer:

Presently before the court are plaintiff's motion for summary judgment, defendant's motion to dismiss for lack of personal jurisdiction and plaintiff's motion to stay. For the reasons set forth below, defendant's motion to dismiss for lack of personal jurisdiction is granted and the remaining motions are denied as moot.

Defendant is a farmer residing in York, Pennsylvania. In January, 2008 he purchased seed from plaintiff Growmark, a Delaware LLC with

offices in Milford, Delaware. Defendant Shearer entered into a credit agreement with Growmark as part of this transaction, and, according to the complaint, defendant Shearer now owes Growmark in excess of \$357,000.

The jurisdictional facts are not in dispute. Mr. Shearer's farm (and acreage he apparently leases) are located in Pennsylvania. He dealt exclusively with Lynne Strawser, Plaintiff's field credit manager, who is located in Pennsylvania. The seed was delivered to Mr. Shearer in Pennsylvania and his payments were to be sent to an address in Philadelphia. There is no evidence that any negotiations or other activity related to this transaction occurred in Delaware. Nor did Mr. Shearer agree to submit to the jurisdiction of Delaware courts in the credit agreement he signed with Growmark.¹

The touchstone in Delaware of the analysis of challenges to personal jurisdiction is 10 *Del.C* §3104. The court need not consider the constitutional repercussions of exercising personal jurisdiction over an out-of-state defendant until the plaintiff first establishes under section 3104.² The court finds that Growmark cannot establish jurisdiction under section 3104. It therefore does not need to reach the constitutional issues raised in Defendant's submittals.

¹ The credit agreement provided that Mr. Shearer agreed not to contest Growmark's choice of "venue" in the event Growmark filed suit. Under this provision, Growmark could have filed suit in any state of the union and Mr. Shearer was contractually bound not to challenge it. The court finds this provision unconscionable and will not enforce it. *Tulowitzki v. Atlantic Richfield Co.*, 396 A.2d 956, 960 (Del. 1978) (contract term unconscionable when there was an absence of meaningful choice and the provision unreasonably favored one party over the other).

² *AeroGlobal Capital Management, LLC v. Cirrus Industries, Inc.* 871 A.2d 428, 437 (Del.2005).

In order to assert personal jurisdiction under section 3104, Growmark must show that at least one of several criteria set out in sub-section 3104(c) are satisfied:

(c) As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or a personal representative who in person or through an agent:

- (1) Transacts any business or performs any character of work or service in the State;
- (2) Contracts to supply services or things in this State;
- (3) Causes tortious injury in the State by an act or omission in this State;
- (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State;
- (5) Has an interest in, uses or possesses real property in the State; or
- (6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.³

This record contains no evidence which would allow this court to conclude that Growmark has satisfied any of those criteria.

- Subpart (1) is not satisfied because Defendant has not transacted business in Delaware. The discussions leading to the execution of the agreement, the delivery of the seed and payment for the seed all took place within Pennsylvania.

³ 10 Del.C. §3104 (c).

- Subpart (2) does not apply because Defendant did not contract to supply goods or services.
- Subparts (3) and (4) do not apply because there is no allegation of tortious conduct.
- Subpart (5) does not apply because there is no evidence that Mr. Shearer owns real estate in Delaware.
- Subpart (6) does not apply because Defendant did not contract to act as a surety.

In sum, the evidence does not support the exercise of personal jurisdiction by this court over Defendant. The motion to dismiss is therefore **GRANTED**.

Growmark has now brought an identical suit against Defendant in Pennsylvania. Growmark has sought a stay of the instant case while it pursues its Pennsylvania case in order to preserve judicial resources. While the court appreciates Growmark's consideration, it believes the parties are better served by resolving this jurisdictional dispute now. Therefore, the application for a stay is **DENIED**. The court emphasizes that nothing herein is intended as an adjudication of, or an opinion about, the substantive claims or defenses raised in this matter.

It is **SO ORDERED**.

Very truly yours,

John A. Parkins, Jr.

cc: Prothonotary