NO. 20-CI-004251

JEFFERSON CIRCUIT COURT
BUSINESS COURT DOCKET
DIVISION TEN (10)
JUDGE ANGELA MCCORMICK BISIG

NEWBURG HOSPITALITY, LLC PLAINTIFF

vs.

ORDER REGARDING
MOTION TO DISMISS

SUMEET SETHI AND BABITA JHA SETHI DEFENDANTS

* * * * *

This matter is before the Court on a Motion of Defendant, Babita Jha Sethi ("Babita"), to Dismiss under CR 12.02. Babita filed the Motion on August 11, 2020. Plaintiff, Newburg Hospitality, LLC ("Newburg") filed a Response on September 25, 2020. Babita filed a Reply on October 2, 2020, as well as a Motion to Supplement the Record on December 7, 2020.

The Court heard oral argument on October 26, 2020. The Honorable Van T. Willis represented Babita. The Honorable John D. Cox represented Newburg. The matter now stands submitted. The Court, having considered the written memoranda, oral argument, record in the case, and being otherwise sufficiently advised, rules as follows.

BACKGROUND

This is a Declaratory Judgment Action regarding the Operating Agreement of Newburg. Newburg is a Kentucky LLC that manages and owns a Holiday Inn Express Hotel in Louisville. Newburg was organized in 2015 and is jointly owned by Defendant Sumeet Sethi ("Sumeet") and his father, Krishan Sethi, owning 51% and 49% of the business, respectively. Defendant

Babita is Sumeet's wife and a California resident. Babita is not a Kentucky resident and has not visited Kentucky since 2000.

In September 2018, Babita filed for divorce from Sumeet in the California Superior Court, Family Law Division, San Diego County ("California Superior Court"). Under that action, the California Superior Court will attempt to determine what assets constitute community property, assign a value to the community assets, and divide the Sethis' community property equally between them. Pertinently, among the assets to be split are four LLCs in which Sumeet has an interest, one of which is Newburg.

Incident to the divorce proceeding, the California Superior Court imposed an automatic restraining order limiting Babita or Sumeet from transferring, concealing, or otherwise disposing of any property without first obtaining the consent of the other party or an order from the California Superior Court. On April 29, 2020, Sumeet moved the California Superior Court for an order permitting him to negotiate a sale of part or all of the community property interest in the four LLCs. The California Superior Court denied that request. Sumeet has also asked for Babita's consent to sell various hotel interests to obtain the capital necessary to keep the remaining hotels operational during the current COVID-19 pandemic, but she has refused to grant consent. Newburg contends that her refusal caused Newburg to be at risk of foreclosure.

Subsequently, the four LCCs in which Sumeet has an interest sued Babita in their respective forums (two in Indiana, one in Kentucky, and one in Indiana) seeking to enforce an analogous provision in their operating agreements. In the present action, the relevant provision is Section 8.3 of Newburg's Operating Agreement, which states as follows:

> If the marital relationship of a Member is terminated by death of the Member's spouse or by divorce, and the Member does not succeed to all of the Spouse's Interest in the Membership Interests held by the Member at such time (the "Spouse's Interest," regardless of whether the interest is

> characterized as community, quasi-community, or separate property, or as property held as joint tenants), then the spouse or spouse's estate shall sell to the Member, and the Member shall purchase, the Spouse's Interest in the Members Interests for the purchase price set forth as follows . . . .

Based on this provision, Newburg seeks a declaratory judgment from this Court that 1) Newburg Hospitality's operations are controlled by a valid and enforceable Operating Agreement; 2) section 8.3 of that Operating Agreement is a valid and enforceable provision; 3) under Section 8.3 of the Operating Agreement, termination of the marital relationship occurred upon Babita filing a petition for dissolution; 4) pursuant to Section 8.3 of the Operating Agreement, Babita is required to sell her 25.5% community property interest in Newburg Hospitality to Sumeet, and the purchase price of said interest shall be determined pursuant to the provisions set out in Section 8.3 of the Operating Agreement; and 5) pursuant to Section 6.3 of the Operating Agreement, because Sumeet is restricted by court order in California from selling his ownership interest in Newburg, Krishan Sethi is authorized, in his sole discretion, to market and sell the assets of Newburg, including the hotel asset, without a vote from Sumeet.

Of note, Babita has never participated in the management of Newburg, been an employee of Newburg, been on the payroll of Newburg, attended a business meeting of Newburg, been treated as a Member of Newburg, or held herself out as a Member of Newburg. Further, Babita contends she has never possessed an ownership interest in Newburg in her individual and separate capacity. Babita now moves the Court to dismiss Newburg's claims based upon lack of personal jurisdiction and subject matter jurisdiction.

1. *Babita's Argument*

First, Babita argues that exercising jurisdiction is improper because the issues of valuation and division of Newburg are already before the California Superior Court. Next, Babita argues that the issue of whether she can be required to sell her interest in Newburg to Sumeet

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pursuant to the Operating Agreement is not ripe for adjudication. More particularly, Babita argues the issue is not ripe because she is not yet divorced from Sumeet, nor has she succeeded (or is it clear that she will succeed) to an interest in Newburg, both of which are prerequisites to enforcing Section 8.3 of the Operating Agreement. Since the conditions precedent have not occurred, Babita argues that declaratory judgment concerning the provision would be both premature and hypothetical. Relatedly, Babita also contends that exercising jurisdiction over this case would violate comity.

Lastly, Babita contends this Court lacks personal jurisdiction over her because 1) her conduct does not fall under the Kentucky long-arm statute, and 2) even if her conduct fell under that statute, exercising jurisdiction over her would offend her federal due process rights. Regarding the long-arm statute, Babita argues she has not "transacted any business" in Kentucky, citing that she has not been involved in the business of Newburg whatsoever. Further, Babita contends that her interest in a community estate is not an interest in using or possessing real property. Babita continues that even if she has an interest in a hotel as a result of her potential ownership of Newburg through the community estate, such an interest does not bring her within the long-arm statute because she did not voluntarily institute any such relationship with said real property. Moreover, Babita contends the Complaint concerns the internal governance of a Kentucky LLC that owns Kentucky real property, not the real property itself.

Regarding federal due process, Babita argues she did not purposefully avail herself of the privilege of acting within Kentucky because her contact, a possible future ownership interest, arose not as a consequence of her own purposeful choices but rather as a fortuitous, attenuated consequence of her husband's actions. And lastly, Babita argues that asserting jurisdiction over her would be unreasonable because 1) it would be excessively and unnecessarily burdensome for

her to have to litigate four separate lawsuits in three separate states; 2) Newburg has a negligible interest in relief because it could have joined the California divorce action or sued Babita in California or Florida; 3) the interstate judicial system has an interest in resolving this dispute in one unified action, the California divorce proceedings, rather than four separate lawsuits; and 4) the interest of the several states in furthering fundamental social policies would be served by dismissing this case because the lawsuit is an attempt to forum shop.

2. *Newburg's Argument*

Newburg first argues that since Babita includes over a hundred pages of documents to support her Motion to Dismiss, the Motion should be treated as one for summary judgment under Rule 56 if the Court relies upon the attached evidence. Second, Newburg argues that the issues before this Court are not those before the California Superior Court because the issue there is the division of Sumeet and Babita's community property, whereas the issue in the present litigation is the validity and enforceability of Newburg's Operating Agreement. Moreover, Newburg contends that the California Superior Court has no jurisdiction over Newburg and cannot bind Newburg to its interpretation of its Operating Agreement. Newburg maintains therefore that the issues are ripe for adjudication because Newburg is not and cannot be under the jurisdiction of the California Superior Court.

Third, Newburg contends that the issue of whether Babita can be required to sell her interest in Newburg is ripe for adjudication. Newburg maintains that since Babita has used her community property interest in Newburg to prevent buying, selling, or transferring of interests in Newburg, she has succeeded to an interest in Newburg. Further, since Babita filed for a dissolution of marriage petition, Newburg contends Sumeet and Babita are now divorced within the meaning of Section 8.3 of the Operating Agreement.

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Lastly, Newburg contends this Court may properly exercise personal jurisdiction over Babita because her contacts fall under the Kentucky long-arm statute and that exercising jurisdiction over her would not offend her federal due process rights. First, Newburg argues Babita transacted business in Kentucky, and that the present action arises from that conduct because her refusal to grant consent for a sale of Newburg has impacted its financial and operational capacity, effectively making Babita the manager instead of Sumeet. Second, Newburg contends that Babita has an interest in using or possessing real property in Kentucky because Newburg has a hotel there.

Regarding federal due process, Newburg contends that Babita has purposefully availed herself of the privilege of conducting activities within Kentucky because her refusal to grant Sumeet consent foreseeably harmed the financial and operational capacity of Newburg and she stands to benefit from a sale of the entity. And last, Newburg argues that exercising personal jurisdiction over Babita is reasonable because 1) modern transportation and communication make it less burdensome for Babita to defend this suit in Kentucky; 2) Kentucky has a significant interest in the operation and viability of a Kentucky business, as well as an interest in interpreting an operating agreement governed by Kentucky law; 3) Newburg has a substantial interest in litigating in Kentucky because Newburg operates exclusively in Kentucky and Kentucky business courts are made to ensure effective, efficient relief of the type sought in this case (whereas California family courts are not); 4) the interstate judicial system's interest is served by Kentucky business courts handling commercial disputes, like the present one, and letting the California Superior Court focus on the distribution of marital assets; and 5) letting the Kentucky business court decide this furthers the substantive social policy of effective, efficient, and consistent dispute resolution.

OPINION

1. *Personal Jurisdiction*

Determining whether this Court may exercise personal jurisdiction over a non-resident defendant is a two-step process:

> First, review must proceed under KRS 454.210 to determine if the cause of action arises from conduct or activity of the defendant that fits into one of the statute's enumerated categories. If not, then in personam jurisdiction may not be exercised. When that initial step results in a determination that the statute is applicable, a second step of the analysis must be taken to determine if exercising personal jurisdiction over the non-resident defendant offends his federal due process rights.

Caesars Riverboat Casino, LLC v. Beach, 336 S.W.3d 51, 57 (Ky. 2011). The provisions of the long-arm statute "should be liberally construed in favor of long-arm jurisdiction." Id. at 56. Thus, the trial court should give "the benefit of the doubt in favor of jurisdiction." Id. at 59.

Kentucky's long-arm statute, KRS 454.210, governs personal jurisdiction over foreign defendants. Of relevance here, the statute provides in pertinent part:

> (2) (a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:
>
> 1. Transacting any business in this Commonwealth . . . [or]
>
> 6. Having an interest in, using, or possessing real property in this Commonwealth, providing the claim arises from the interest in, use of, or possession of the real property, provided, however, that such in personam jurisdiction shall not be imposed on a non-resident who did not himself voluntarily institute the relationship, and did not knowingly perform, or fail to perform, the act or acts upon which jurisdiction is predicated.

The Court finds that Babita neither transacted business nor held an interest in real property in Kentucky sufficient to bring her within the scope of the long-arm statute. Although the statute should be liberally construed in favor of long-arm jurisdiction, it is not satisfied by "contacts, conduct, and activities which may not fairly be said to meet one of these explicit categories." Caesars, 336 S.W.3d at 56. Here, Babita cannot fairly be found to have transacted

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business in Kentucky. She has never participated in the management of Newburg, been an employee of Newburg, been on the payroll of Newburg, attended a business meeting of Newburg, or been treated as a member of Newburg. Babita has not been to Kentucky since the year 2000, fifteen years before Newburg was established. Newburg's contention that Babita transacted business in the Commonwealth by refusing to grant Sumeet consent to sell Newburg, which, in turn, caused operational and financial duress to Newburg, is too attenuated. Babita's refusal to grant consent to her husband to dispose of his property during a California divorce proceeding cannot fairly be held to be transacting business within Kentucky.

Nor does Babita have an interest in real property in Kentucky sufficient to bring her within the scope of the long-arm statute. Although Newburg contends that Babita need not directly own the real property at issue because a membership interest in a company that has an interest in that real property is sufficient, Babita presently has no membership interest in Newburg. Babita merely has an interest in community property that may mature into a membership interest in Newburg, which, in turn, owns real property in Kentucky. That connection cannot fairly be held to constitute an interest in real property for purposes of the long-arm statute. Moreover, even if Babita's community property interest were held to be an interest in real property for purposes of the long-arm statute, it is of no consequence because Babita did not "voluntarily institute the relationship" with said real property as required by KRS 454.210(2)(a)(6). Rather, her relationship arose out of connections with her husband's unilateral activities in forming Newburg.

Even if this Court were to find that the long-arm statute applies, exercising jurisdiction over Babita would offend her federal due process rights. Due process is satisfied if three conditions are met:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Calphalon Corp. v. Rowlette, 228 F.3d 718, 721 (6th Cir. 2000). Purposeful availment is present only if "the defendant's contacts with the forum state are such that 'he should reasonably anticipate being haled into court there.'" Papa John's Int'l, Inc. v. Entm't Mktg. & Commc'ns Int'l, Ltd., 381 F. Supp. 2d 638, 641 (W.D. Ky. 2005). "[R]andom, fortuitous, or attenuated" contacts the defendant makes by interacting with other persons affiliated with the State are insufficient to establish purposeful availment. Walden v. Fiore, 571 U.S. 277, 286 (2014) (citing Burger King Corp. v. Rudzewicz, 471 U. S. 462, 475 (internal quotation marks omitted)). Accordingly, "[t]he unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State." Hanson v. Denckla, 357 U.S. 235, 253 (1958).

Here, Newburg contends that Babita has purposefully availed herself of the privilege of acting in Kentucky because she refused to grant Sumeet consent to sell Newburg, which harmed its financial and operational health. The Court disagrees. The question is "not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." Walden, 571 U.S. at 286. For example, even though Georgia defendants knew plaintiffs had Nevada connections before the defendants allegedly tortiously delayed the return of funds to the plaintiffs, the defendants did not purposefully avail themselves of the privilege of acting in Nevada. Id. at 289. Here, Babita's refusal to grant consent to her husband to sell his business during a divorce proceeding in California is not a meaningful connection to Kentucky. It is not enough that her foreign actions had consequences in this forum.

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Accordingly, Babita has not purposefully availed herself of the privilege of acting in Kentucky and exercising jurisdiction over her would offend her federal due process rights.

2. *Comity*

Even if the Court were to find that personal jurisdiction could be exercised over Babita, it would decline to exercise it at this time on comity grounds. As an initial matter, the Court acknowledges Kentucky authorities holding that "[t]he declaratory judgment act cannot be invoked to determine an issue presented in another pending suit." Shick v. Shick, 240 S.W.2d 533 (Ky. 1952); see also Pritchett v. Marshall, 375 S.W.2d 253, 257 (Ky. 1963). However, those cases are distinguishable because each involved litigation in other courts, or administrative tribunals, within Kentucky. In contrast, the underlying divorce action here is pending in a foreign jurisdiction.

The Court concludes that where, as here, issues are pending in a foreign jurisdiction rather than in another forum within Kentucky, comity is the controlling legal doctrine. The principle of comity allows but does not require the Court to decline jurisdiction over an action involving issues pending in a foreign jurisdiction:

> "The pendency of an action in the courts of one state or country is not a bar to the institution of another action between the same parties and for the same cause of action in a court of another state or country, nor is it the duty of the court in which the latter action is brought to stay the same pending a determination of the earlier action, even though the court in which the earlier action is brought has jurisdiction sufficient to dispose of the entire controversy. Nevertheless, sometimes stated as a matter of comity, not of right, it is usual for the court in which the later action is brought to stay proceedings under such circumstances until the earlier action is determined . . . ."

Brooks Erection Co. v. William R. Montgomery & Assocs., Inc., 576 S.W.2d 273, 275 (Ky. App. 1979). The Court further notes that KRS 418.065 also explicitly provides

> [t]he court may refuse to exercise the power to declare rights, duties or other legal relations in any case where a decision under it would not

> terminate the uncertainty or controversy which gave rise to the action, *or in any case where the declaration or construction is not necessary or proper at the time under all the circumstances.*

(emphasis added). This statute allows courts to defer consideration of declaratory judgment actions "until the circumstances are more favorable for a resolution of the issue presented." Gilland v. Dougherty, 500 S.W.3d 217, 224 (Ky. Ct. App. 2016) (citing W.B. v. Commonwealth, Cabinet for Health & Family Servs., 388 S.W.3d 108, 112 (Ky. 2012)).

Here, the Court determines it is appropriate to decline to consider jurisdiction over Newburg's claims.[1] Although Newburg contends that this suit involves issues separate from those pending in the California divorce action, the Court disagrees. Sumeet has already asked the California Superior Court for an order permitting him to sell his interest in Newburg. Upon denial of that request, Newburg now asks this Court to force the same sale. Thus, the issue of whether a sale of interests in Newburg may occur are presented in both actions. In addition, Newburg is asking the Court to determine whether Sumeet and Babita are divorced and whether Babita has succeeded to an interest in Newburg. Both of these questions are more properly answered in the pending litigation in the California Superior Court. Moreover, 51% of Newburg's equity is within the community estate, which will be valued and eventually distributed by the California Superior Court. Additionally, the California Superior Court has jurisdiction sufficient to interpret the Operating Agreement. Finally, even if this Court issued declaratory judgment, it would not terminate the controversy because it may conflict with a

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[1] The Court's determination is based upon the Complaint allegations regarding the nature and history of the California divorce proceedings, including that Sumeet requested and was denied leave to sell his assets and is barred from such sale by the California Superior Court. See Complaint ¶¶ 21-36. As such, the Court need not convert the pending Motion to one for summary judgment under CR 56.

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judgment from the California Superior Court. Accordingly, the Court finds it proper to exercise its discretion and decline to issue a declaratory judgment on comity grounds.

3. *Ripeness*

Lastly, even if this Court found it had personal jurisdiction over Babita, the present controversy is not ripe for adjudication. Declaratory judgment will not issue in the absence of an "actual controversy." Nordike v. Nordike, 231 S.W.3d 733, 739-40 (Ky. 2007) (citations and quotations omitted). An "actual controversy" does not involve deciding "speculative rights or duties which may or may not arise in the future." Id.

Here, there is no ripe claim for declaratory judgment. The alleged controversy is that Babita is bound to sell any interest she has in Newburg subject to the provisions of Newburg's Operating Agreement but refuses to do so. But the Operating Agreement provides that Babita is only required to sell her interest in Newburg in the event that her marital relationship is terminated by divorce and Sumeet does not succeed to all of Babita's potential interest in Newburg. Presently, the parties are not yet divorced, nor has Babita succeeded to an interest in Newburg. The California Superior Court may determine not to split the ownership of Newburg between Babita and Sumeet but instead grant Sumeet his entire membership interest. Since it remains unclear whether Babita will succeed to any interest in Newburg, the Court finds that this controversy is unripe because it involves deciding speculative duties which may or may not arise in the future.

In sum, the Court concludes that it lacks personal jurisdiction over Babita. The Court further finds that even if it had personal jurisdiction over her, it would decline to exercise such jurisdiction on comity grounds, and that the issues presented are in any event unripe for adjudication. Accordingly, the Motion to Dismiss is GRANTED.

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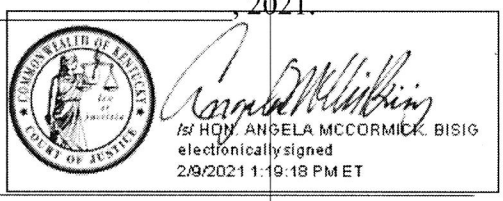
ORDER

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the Defendants' Motion to Dismiss is **GRANTED**. Plaintiff Newburg Hospitality, LLC's claims are **DISMISSED WITH PREJUDICE**.

This is a final and appealable Order and there is no just cause for delay in its entry or execution.

IT IS SO ORDERED this____day of _____, 2021.



JUDGE ANGELA MCCORMICK BISIG
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cc: Van T. Willis
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