

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT**

Hillsborough Superior Court Southern District  
30 Spring Street  
Nashua NH 03060

Telephone: 1-855-212-1234  
TTY/TDD Relay: (800) 735-2964  
<http://www.courts.state.nh.us>

**NOTICE OF FINAL DECISION**

**ISRAEL FRANCISCO PIEDRA, ESQ  
WELTS WHITE & FONTAINE PC  
29 FACTORY STREET  
PO BOX 507  
NASHUA NH 03061-0507**

Case Name: **Scott Philo v Benjamin** [REDACTED]  
Case Number: **226-2016-CV-00230 459-2016-SC-00202**

Enclosed please find a copy of the court's order of July 29, 2016 relative to:

**ORDER ON DEFENDANT'S MOTION TO DISMISS**

Unless a post-disposition motion or appeal is submitted, final judgment shall be entered 31 days from the date of this notice of decision. After the order becomes final and judgment entered, a Certificate of Judgment, Writ of Execution, or certified copy of the Final Order may be obtained upon request.

August 01, 2016

Marshall A. Buttrick  
Clerk of Court

(564)

C: William J. Amann, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
SOUTHERN DISTRICT

SUPERIOR COURT  
No. 2016-CV-00230

Scott Philo

v.

Benjamin [REDACTED]

**ORDER ON DEFENDANT'S MOTION TO DISMISS**

The plaintiff, Scott Philo, filed a Small Claim Complaint in the 9<sup>th</sup> Circuit – District Division – Nashua against the defendant, Benjamin [REDACTED] on March 24, 2016. On or about May 17, 2016, this matter was transferred to the Hillsborough County Superior Court – Southern District. Currently pending before the Court is the defendant's motion to dismiss for lack of personal jurisdiction, to which the plaintiff objects. For the reasons set forth herein, the defendant's motion to dismiss is GRANTED.

**Background**

For the purposes of this motion, the Court assumes the following relevant facts from the record are true, construed in the light most favorable to the plaintiff. This case arises out of a dispute regarding delivery and payment of a massage chair between the seller, Scott Philo and the buyer, Benjamin [REDACTED]

Mr. [REDACTED] is a resident of Mill Valley, California. ([REDACTED] Aff., June 22, 2016, ¶ 2.) He owns no assets in New Hampshire and conducts no business in New Hampshire. (*Id.* ¶ 5.) He has a brother that resides in New Hampshire that he visits once every two to three years. (*Id.* ¶ 6.)

Mr. Philo is a resident of Nashua, New Hampshire. (Philo Aff., July 11, 2016, ¶ 2.) Mr. Philo owns and conducts the business "Massage Chairs for Less." (Philo Aff.

¶ 5.) The business sells massage chairs through a website, www.massagechairsforless.com (hereinafter "the website") (Id. ¶ 3.) According to the website, the chairs are brought "into the Port of LA, CA by ship in containers directly from the factory & distributed by truck throughout North America." (██████████ Verified Motion to Dismiss ¶ 5, fn. 1)

On October 29, 2015, Mr. ██████████ purchased a massage chair through the website for \$3399.98. (Id. ¶ 3.) Although disputed by Mr. ██████████ Mr. Philo alleges as part of the checkout process, in order to purchase the chair Mr. ██████████ was required to "click through" the terms and conditions which confirmed that he had read and agreed to the terms and conditions. (Philo Aff. ¶ 7.) The terms and conditions read as follows:

If you are not totally satisfied simply return the massage chair in the original packaging within 7 days of receipt to us for a refund of the total purchase price including freight. We also arrange and pay the return freight with our carrier. Prior written return authorization is required. 7 day in-home trial only applies to brand new chairs that we ship, not to customer pick-ups & not to chairs bought for resale purposes or any other chairs sold at a discount from the published selling price on this website. 7 day in-home trial does not apply to a user not fitting in the chair. Any returned chair must be in good condition and working order with no damage and be complete in its original cartons and original packaging at the time of the return request.

(Id. ¶ 8.)

On that same date, Mr. Philo sent an e-mail to Mr. ██████████ with the subject line "Order Acknowledgement – We Require You to Reply to this E-mail Indicating That You Agree to This Order and Our Terms. Thanks". (Philo Verified Obj. to Def. Verified Mot. to Dismiss, Exhibit A.) The e-mail acknowledges Mr. ██████████'s order and states

that payment was "received by Visa ending in 4771." (Id. at 1.) Included in that e-mail were a number of terms and conditions including the following provision:

Buyer agrees to be bound by the laws of the State of NH for any disagreements & agrees that any legal action will be brought in NH. Buyer agrees to submit to the NH legal jurisdiction.

(Id. at 3.)

Neither Mr. [REDACTED] nor Mr. Philo assert or submit any evidence of an e-mail or any other communication by Mr. [REDACTED] specifically agreeing to the terms and conditions set forth in the e-mail of October 29, 2015. Communications following the placement of the order involved discussions of delivery of the chair. ([REDACTED] Aff. ¶ 13.)

On or about November 24, 2015, Mr. [REDACTED] picked up the massage chair at a FedEx facility in Petaluma, California. (Id. at ¶ 14.) On November 28, 2015, Mr. [REDACTED] e-mailed Philo informing him that the massage chair did not meet his expectations and he planned to return the item pursuant to Mr. Philo's seven (7) day "risk free" in-home guarantee. (Id. at ¶ 15.) On November 29, 2015, Mr. Philo informed Mr. [REDACTED] that he did not qualify for the return under the policy because he had picked up the chair and because it was sold at a discount. (Id. at ¶ 16.)

Mr. [REDACTED] asserts that he returned the massage chair to Mr. Philo's Nashua, NH business address and that he was notified that delivery of the chair was refused. (Id. at ¶¶ 19, 21.) He further asserts that since the time of the return the chair has been stored at his expense at a storage facility in Keene, NH. (Id. at ¶ 22.) Mr. Philo claims the chair was never returned to the business and return shipment was never

refused. (Philo Aff. ¶ 10.) He further asserts that he was not notified by Mr. [REDACTED] of the return delivery to the storage facility in Keene, NH. (Id.)

Mr. [REDACTED] initiated a successful credit card chargeback claim with his credit card company and was refunded the purchase price of the chair. ([REDACTED] Aff. ¶ 20.) Mr. Philo then initiated this action seeking small claims damages in the amount of \$10,000, which was subsequently transferred to this Court as a result of the defendant's jury demand. Mr. [REDACTED] has moved to dismiss for lack of personal jurisdiction.

#### Standard of Review

"When evaluating a defendant's motion to dismiss for lack of personal jurisdiction, the standard of review varies according to the procedural posture of the case." State v. N. Atl. Ref., Ltd., 160 N.H. 275, 280 (2010). "Where, as here, neither party requested an evidentiary hearing on disputed jurisdictional facts, the plaintiff[ ] ha[s] to make only a *prima facie* showing of jurisdictional facts to defeat the defendant[']s motion to dismiss." Fellows v. Colburn, 162 N.H. 685, 690 (2011). "Under the *prima facie* standard, the inquiry is whether the plaintiff[ ] ha[s] proffered evidence which, if credited, is sufficient to support findings of all facts essential to personal jurisdiction." Id. (citation and quotation omitted). "The plaintiff ordinarily cannot rest upon the pleadings, but is obliged to adduce evidence of specific facts." N. Atl. Ref., Ltd., 160 N.H. at 281 (quotation omitted); see also Staffing Network, Inc. v. Pietropaolo, 145 N.H. 456, 457 (2000) (citations omitted) ("While the general rule applicable to motions to dismiss is that all facts properly pleaded by the plaintiff are deemed true, . . . when those facts relate to personal jurisdiction, the plaintiff must offer affirmative proof.").

"Where a *prima facie* evidence standard is employed, . . . [the Court does] not [act] as a factfinder, but as a data collector. That is to say, the [C]ourt must accept the plaintiff's (properly documented) proffers as true for the purpose of determining the adequacy of the *prima facie* jurisdictional showing." N. Atl. Ref., Ltd., 160 N.H. at 281 (quotation and ellipsis omitted). "[T]he [C]ourt must construe the plaintiff's evidentiary proffers in the light most congenial to the plaintiff's jurisdictional claim." Id. (quotation omitted). "Facts put forward by the defendant[ ] may be considered only if they are uncontradicted by the plaintiff[s] submissions." Fellows, 162 N.H. at 690. Finally, "[t]he plaintiff bears the burden of demonstrating facts sufficient to establish personal jurisdiction over the defendant." Phelps v. Kingston, 130 N.H. 166, 170 (1987).

#### Analysis

"Personal jurisdiction can either be general or specific." Vt. Wholesale Bldg. Prods. v. J.W. Jones Lumber Co., 154 N.H. 625, 628 (2006). "General jurisdiction exists when the litigation is not directly founded on the defendant's forum-based contacts, but the defendant has nevertheless engaged in continuous and systematic activity, unrelated to the suit, in the forum state." Id. (citing Pritzker v. Yari, 42 F.3d 53, 60 (1st Cir. 1994)) (quotation omitted). "On the other hand, specific jurisdiction is narrower in scope, and may only be relied upon where the cause of action arises out of or relates to the defendant's forum-based contacts." Vt. Wholesale Bldg. Prods., 154 N.H. at 628 (citing Staffing Network, Inc., 145 N.H. at 458)). In this case, the plaintiff only argues that specific personal jurisdiction exists. The Court will therefore so limit its analysis.

In determining whether it may exercise specific personal jurisdiction over a non-resident defendant, the Court must engage in a two-part inquiry, including whether: (1)

the State's long-arm statute applicable to nonresident defendants, RSA 510:4, I, authorizes such jurisdiction; and (2) the federal Due Process Clause is satisfied. See Staffing Network, Inc., 145 N.H. at 457. However, "[b]ecause [the New Hampshire Supreme Court] construe[s] the State's long-arm statute as permitting the exercise of jurisdiction to the extent permissible under the Federal Due Process Clause, [the] primary analysis relates to due process." Vt. Wholesale Bldg. Prods., 154 N.H. at 628. Thus, a separate determination under the long-arm statute is not generally required. McClary v. Erie Engine & Mfg. Co., 856 F. Supp. 52, 54–55 (D.N.H. 1994); see also Sawtelle v. Farrell, 70 F.3d 1381, 1388 (1st Cir. 1995); Dehmlow v. Austin Fireworks, 963 F.2d 941, 945 (7th Cir. 1992) ("The first inquiry is wholly unnecessary in the case of many modern state statutes which include catch-all provisions that grant to state courts jurisdiction over all matters in which the state may constitutionally assert jurisdiction."). Therefore, the Court here must only determine whether the Federal Due Process Clause is satisfied.

The exercise of specific personal jurisdiction comports with due process only if it meets a three-part test, including whether: "(1) the contacts relate to the cause of action; (2) the defendant has purposefully availed itself of the protection of New Hampshire's laws; and (3) it would be fair and reasonable to require the defendant to defend the suit in New Hampshire." Vt. Wholesale Bldg. Prods., 154 N.H. at 628 (citation omitted). "All three factors must be satisfied in order for the exercise of jurisdiction to be constitutional, and each factor must be evaluated on a case-by-case basis." Id. at 629. This test is to ensure that the defendant "has 'minimum contacts' with



the State sufficient to insure that suit against him there does not offend “traditional notions of fair play and substantial justice.” Phelps, 130 N.H. at 170 (quotation omitted).

Because it is dispositive, the Court only addresses the second factor—whether “the defendant’s in-state contacts [ ] represent a purposeful availment of the privilege of conducting activities in the forum state . . . .” N. Atl. Ref., Ltd., 160 N.H. at 283–84 (quotation omitted). “Purposeful availment requires [ ] foreseeability . . . .” N.H. Bank Comm’r. v. Sweeney, 167 N.H. 27, 34 (2014) (citation omitted). Foreseeability, in turn, “requires that the contacts must be of a nature such that a [defendant] could reasonably anticipate being haled into court here.” Id. (citation omitted). “The contacts cannot be merely fortuitous, but rather, the [defendant] must have purposefully directed actions at New Hampshire.” Id. “This requirement ensures the orderly administration of the laws, and, thus, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” Fellows, 162 N.H. at 694–95 (quotation omitted).

The Court finds that the foreseeability requirement has not been satisfied. The massage chairs were posted for sale on the internet. Although the Massage Chairs for Less company is located in New Hampshire, it is internet-based and does not appear to have an actual physical store. Mr. [REDACTED] had virtually no contact with New Hampshire except for a few e-mail and phone conversations with Mr. Philo to arrange for delivery of the chair in California and to raise his dissatisfaction with the purchase once he had picked up the chair. See Eric J. Wiener, v. DKH, INC. d/b/a City Line Auto Sales, Hills. Cnty. Super. Ct. S. Div., No. 05-C-148 (Oct. 12, 2005) (Order, Hicks, J.)



(finding that emails and telephone conversations prior to purchase of vehicle were insufficient to establish personal jurisdiction over out-of state seller). Additionally, according to the website, the massage chairs are shipped from the factory directly to California and then distributed throughout North America. Mr. [REDACTED] picked his chair up from a location in California. This fact also militates against a finding of jurisdiction. See Canon v. Towns, 99 So. 3d 1122, 1127 (La. Ct. App. 2012) (Louisiana court lacked personal jurisdiction over dispute regarding boat purchased because the plaintiff “went to North Carolina and took possession of the boat there.”); cf. Attaway v. Omega, 903 N.E.2d 73, 79 (Ind. Ct. App. 2009) (Indiana court had personal jurisdiction over internet car buyer because buyer “hired an auto shipping company, based in Washington, to enter the state of Indiana as their representative, pick up the Porsche, and deliver it to them in Idaho”).

Further, the defendant never came to New Hampshire to negotiate any part of the deal. Cf. Town of Haverhill v. City Bank & Trust Co., 119 N.H. 409, 410 (1979) (personal jurisdiction over defendant in contract dispute where contract was signed in New Hampshire). A single purchase over the internet, without more, is simply insufficient to subject a non-resident defendant to New Hampshire jurisdiction. See Metcalf v. Lawson, 148 N.H. 35, 40 (2002)<sup>1</sup>; see also Staffing Network, Inc., 145 N.H. at 460 (implying that purposeful availment prong would not be met in “a case arising from

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<sup>1</sup> In Metcalf, the Court held that a single eBay purchase by a New Hampshire buyer was insufficient to subject the defendant (non-resident) merchant to New Hampshire jurisdiction. The fact that in Metcalf the defendant was the seller, whereas in this case the defendant is the buyer, does not change the analysis. If anything, courts are *more* hesitant to find personal jurisdiction where a commercial internet seller brings suit against a one-time buyer in the seller’s jurisdiction. See, e.g., Machulsky v. Hall, 210 F. Supp. 2d 531, 539 (D.N.J. 2002) (concluding that a nonresident defendant’s single purchase was not enough to establish minimum contacts with the seller’s home state).


an isolated retail sale or a contract between a corporate giant and an individual with no ties to the business world”);

Mr. Philo argues that the foreseeability prong of the purposeful availment requirement is met because “the Defendant should have reasonably anticipated being haled into court in New Hampshire, particularly given the pre-suit disclosures, website and contract language.” (Pl. Verified Obj. to Def. Mot. to Dismiss, p. 9.) It is notable, however, that the terms and conditions on the website which Mr. Philo states Mr. [REDACTED] was required to “click through and accept” before making his purchase only included the terms and conditions related to a 7-day risk free trial. The pre-purchase terms and conditions did not include the provisions related to jurisdiction. Those conditions were only included in the post-purchase e-mail, to which [REDACTED] never expressly agreed.

For these reasons, the Court cannot find that the defendant purposefully availed himself of the protection of New Hampshire laws. Put differently, the defendant’s contacts with New Hampshire were not of a “nature such that a [defendant] could reasonably anticipate being haled into court here.” N.H. Bank Comm’r, 167 N.H. at 34. Accordingly, the defendant’s motion to dismiss is GRANTED. In light of this decision, the Court need not consider the first and third prongs of the personal jurisdiction analysis. See Fellows, 162 N.H. at 696 (court need not address third prong if foreseeability requirement is not met).

So ordered.

Date: July 29, 2016

  
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Amy B. Messer  
Presiding Justice