UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NELES-JAMESBURY, INC.,	
Plaintiff,	
v.	**Civil Action No. 10-cv-40055-FDS**
POHJOLA INSURANCE CO., LTD.,	
Defendant.	

MEMORANDUM AND ORDER
ON DEFENDANT'S MOTION TO DISMISS

SAYLOR, J.

This is an action for breach of contract arising out of an insurance policy issued to a Massachusetts company. Plaintiff Neles-Jamesbury, Inc. ("NJI") seeks recovery from defendant Pohjola Insurance Co., Ltd., a Finnish insurer that entered into a reinsurance contract with Lumbermens Mutual Casualty Co. Subject matter jurisdiction is based on diversity of citizenship.

NJI seeks to hold Pohjola directly liable under the theory that Lumbermens was acting as Pohjola's agent, and has brought claims for breach of contract and unfair claims settlement practices. Pohjola contends that it is not subject to personal jurisdiction in Massachusetts, and has moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(2). For the reasons stated below, the motion to dismiss will be granted.

I. Background

Plaintiff Neles-Jamesbury, Inc. ("NJI") is a Delaware corporation with its principal place of business in Massachusetts.[1] It specializes in the manufacture of valves for industrial use.

Defendant Pohjola Insurance Co., Ltd. is a Finnish insurance company that provides insurance and reinsurance to entities around the world.[2]

In late 1988, NJI was acquired by Metso Oy, a Finnish corporation.[3] NJI was concerned that it would no longer be covered by its former parent's liability policy upon completion of the sale to Metso. (First Petersen Aff. ¶¶ 16, 17). At the time of the sale, Pohjola already provided a world-wide insurance program for Metso and its subsidiaries. (Vaartimo Aff. ¶ 9). NJI contends that Metso contacted Pohjola and requested that it provide gap coverage for NJI, and that Pohjola handled the particulars of acquiring that policy. (*Id.* ¶¶ 12, 20, 22).

On September 30, 1988—on or about the day of the closing—Pohjola contacted Lumbermens Mutual Casualty Co., an Illinois-based insurer licensed to issue policies in Massachusetts. Pohjola had a reinsurance agreement with Lumbermens that allowed it to request Lumbermens to issue policies in jurisdictions (such as Massachusetts) where Pohjola was not licensed to issue policies directly. (First Aropuu Aff. Ex. A). Pursuant to that agreement, Pohjola sent a fax to Lumbermens confirming "100% reinsurance" for the risk associated with "Jamesbury Corporation (Rauma-Repola)." (*Id.* Aff. Ex. B). On October 14, Pohjola sent a fax

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[1] NJI was known as Jamesbury Corp. prior to a merger with Neles, Inc. in 1989. For purposes of this order, the Court will refer to it as "NJI."

[2] Pohjola Insurance Co., Ltd. no longer exists and has been succeeded by Pohjola Insurance, Ltd., which appears in this action on its behalf. For purposes of this order, the Court will refer to it as "Pohjola."

[3] Metso was known as Rauma-Repola Oy at the time of the sale. For purposes of this order, the Court will refer to it as "Metso."

to Metso "to confirm that [NJI] is covered by [Metso]'s worldwide liability policy underwritten by Pohjola Insurance Company Ltd. from 28 September 1988 on." (Def. Admis. Ex. B).[4]

Over the next month, Lumbermens and NJI discussed the terms of the proposed policy. On October 18, NJI's agent forwarded underwriting data to Lumbermens. (DeBeck Aff. Ex. 2).[5] On October 25, two Lumbermens employees discussed whether it could provide coverage on the proposed risk and what an appropriate premium might be. (*Id.* Ex. 3). On November 15, Lumbermens wrote to NJI's agent confirming coverage "effective 10/1/88." (*Id.* Ex. 4). The letter also noted that the "[p]remium is being negotiated" and requested loss information from NJI. (*Id.*). Further correspondence discussed meeting to negotiate the premium and work out the details of the policy. (*Id.* Exs. 5, 6).

As a result of these negotiations, Lumbermens issued a comprehensive general liability insurance policy covering NJI for the period from October 1, 1988, to February 28, 1989. (*See Id.* Ex. 1). The policy was stamped "Facultative Reinsurance" and contained the notation "reverse flow business 100% reinsured by Pohjola Insurance Company." (*Id.*).

Starting in 1998, NJI was sued by a number of individuals claiming bodily injury from exposure to asbestos contained in its products. NJI sought recovery from Lumbermens under the 1988 policy. When Lumbermens refused to cooperate, NJI brought an action against it in Massachusetts state court. Lumbermens did not consult Pohjola about how to handle these

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[4] Pohjola and Metso's relationship was governed by a "master" insurance policy that included, among other things, a provision requiring that actions be brought in Finnish courts and an exclusion for asbestos-related claims. (Def. Admis. Ex. A at 5, 8).

[5] NJI stated that it was forwarding the data "per the direction of [Kaltek, Inc.]," a company based in Georgia. (DeBeck Aff. Ex. 2). NJI contends that Kaltec was an agent of Pohjola and asserts that Pohjola, through Kaltec, was directly involved in the negotiation of the premium and policy terms. (Second Petersen Aff.; *see also* DeBeck Aff. Exs. 5, 6).

claims; indeed, Pohjola was not aware of the asbestos litigation against NJI until six years after Lumbermens received notice from NJI. (Second Aropuu Aff., ¶¶ 10-13).

When NJI learned that Lumbermens was suffering from financial troubles and might be forced into liquidation, it commenced this action against Pohjola. On February 4, 2010, it filed a complaint in Superior Court asserting claims under the Lumbermens policy against Pohjola on the theory that Lumbermens was Pohjola's agent when it issued the policy. Pohjola removed the action and filed a motion to dismiss for lack of personal jurisdiction. The parties have undertaken limited discovery as to the jurisdictional issues.

II. Analysis

A. General Principles of Personal Jurisdiction

The exercise of personal jurisdiction over a defendant must be both authorized by statute and consistent with the due process requirements of the United States Constitution. *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 712 (1st Cir. 1996); *Intech, Inc. v. Triple "C" Marine Salvage, Inc.*, 444 Mass. 122, 125 (2005); *Good Hope Indus., Inc. v. Ryder Scott, Co.*, 378 Mass. 1, 5-6 (1979).

> A district court may exercise authority over a defendant by virtue of either general or specific jurisdiction. Specific jurisdiction exists when there is a demonstrable nexus between a plaintiff's claims and a defendant's forum-based activities. 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.

United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 618 (1st Cir. 2001) (citations and quotations omitted).

The plaintiff bears the burden of showing that a court has personal jurisdiction over the

defendant. *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 50 (1st Cir. 2002). A district court faced with a motion to dismiss under Rule 12(b)(2) may choose among several methods for determining whether the plaintiff has met its burden: the "*prima facie*" standard, the "preponderance-of-the-evidence" standard, or the "likelihood" standard. *Id.* at 50-51, 51 n.5; *Foster-Miller, Inc., v. Babcock & Wilcox Can.*, 46 F.3d 138, 145-47 (1st Cir. 1995); *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675-78 (1st Cir. 1992).

B. The Appropriate Standard

NJI and Pohjola dispute which method is appropriate here. NJI asserts that the *prima facie* standard is the correct one, while Pohjola contends that the Court should use the likelihood standard. For reasons given below, the Court will use the *prima facie* standard.

The *prima facie* standard is the "most conventional" of the methods for determining personal jurisdiction. *Daynard*, 290 F.3d at 51 (quoting *Foster-Miller*, 46 F.3d at 145). In conducting a *prima facie* analysis, courts are required to take specific facts affirmatively alleged by the plaintiff as true (whether or not disputed) and "construe them in the light most congenial to the plaintiff's claim." *Massachusetts Sch. of Law at Andover, Inc., v. American Bar Ass'n*, 142 F.3d 26, 34 (1st Cir. 1998). It then "add[s] to the mix facts put forward by the defendant[], to the extent that they are uncontradicted." *Daynard*, 290 F.3d at 51.

The likelihood standard is preferable to the *prima facie* standard only where there is a "possibility of permitting a dubious case to proceed beyond the pleading stage." *Foster-Miller*, 46 F.3d at 146. A dubious case exists where the plaintiff's evidence is "patently incredible" or "the proffered evidence is conflicting and the record is rife with contradictions." *Id.* at 146 (quoting *Boit*, 967 F.2d at 676). Under the likelihood standard, courts engage in limited

factfinding to determine whether the plaintiff has shown a likelihood of the existence of each fact necessary to support personal jurisdiction. *Id.*

In support of its argument for the likelihood standard, Pohjola contends that "there are material differences between the facts proffered by the parties as to both (a) whether Pohjola is a direct insurer of NJI or the reinsurer of Lumbermens; and (b) whether Pohjola had an agency relationship with Lumbermens." (Def. Opp. at 5-6).

Pohjola contrasts documents showing that Lumbermens and NJI communicated about the policy with NJI's statements that it "never dealt with Lumbermens" and that "all dealings involving insurance for NJI . . . were with Pohjola . . . . [and none were] with Lumbermens." (Pl. Opp. at 6, 12). NJI, however, clearly admits that it transferred underwriting materials to Lumbermens and otherwise corresponded with it about the specific terms of the primary policy. (Pl. Surrep. at 2). It contends only that its insurance relationship with Lumbermens was *initiated* by Pohjola and that Pohjola guaranteed 100% reinsurance to Lumbermens before the primary policy was issued—facts that are undisputed and supported by documentary evidence.[6] The parties *do* appear to dispute whether the Lumbermens-NJI correspondence was central to contract formation or simply an afterthought, but this is question of law and not relevant to deciding which standard is appropriate here.

The parties also dispute how premiums were paid. Pohjola contends that premiums were paid to Lumbermens, which forwarded the funds less its own fee directly to Pohjola. NJI

[6] Pohjola appears to cite the affidavit of Jon Ganger (NJI's principal insurance broker) as evidence that NJI initiated the policy with Lumbermens. Ganger, however, disavows any precise knowledge about how the relationship with Lumbermens was initiated. He attests that "although I no longer recall exact years, I do recall placing [NJI]'s primary coverage with Liberty Mutual Insurance Co., Employers Mutual Insurance Co., and [Lumbermens]" (Ganger Aff. ¶ 7). Ganger goes on to state that he "no longer recall[s] specifics about the discussions preceding the placements of particular policies." (*Id.* ¶¶ 7, 8).

contends that it "paid neither Pohjola nor Lumbermens" and that its parent Metso paid Pohjola directly. (Pl. Opp. at 11). This appears to be a legitimate dispute between the parties. However, the existence of one disputed fact does not rise to the level necessary to abandon the *prima facie* method. *See Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 284 F. Supp. 2d 204, 212 n.6 (D. Mass. 2003) (*prima facie* standard applied despite some contradictory statements because record was not "rife with contradictions").

Furthermore, and in any event, this dispute should be resolved against NJI because NJI has failed to support its statement with specific record evidence. Under the *prima facie* method, the plaintiff "ordinarily cannot rest upon the pleadings, but is obliged to adduce [properly documented] evidence of specific facts." *Foster-Miller*, 46 F.3d at 145. NJI has pointed to no evidence that supports its contention that NJI did not pay any premiums to Lumbermens. Instead, the evidence on the record points the other way. NJI's broker attested that it normally forwarded payments from NJI directly to the insurer. (Ganger Aff. ¶ 10). The reinsurance agreement between Lumbermens and Pohjola provided that Lumbermens would "collect from [the insured] the agreed premium for the insurance provided." (First Aropuu Aff. Ex. A). Finally, the primary insurance policy specifies Lumbermens as the party owed the full premium amount from NJI. (DeBeck Aff. Ex. 1). Under these circumstances, NJI's version of the facts cannot be supported under the more permissive *prima facie* standard, and there is no need to resort to the likelihood method.

As a result, the *prima facie* standard is appropriate here.[7]

C. <u>The Massachusetts Long-Arm Statute</u>

[7] Because of this determination, the Court need not decide whether an evidentiary hearing would be necessary under the likelihood standard.

This case presents an issue of specific, rather than general, jurisdiction. The Massachusetts long-arm statute, Mass. Gen. Laws ch. 223A, § 3, states in relevant part:

> A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's:
>
> (f) contracting to insure any person, property, or risk located within this commonwealth at the time of contracting . . . .

Mass. Gen. Laws ch. 223A § 3.[8]

NJI does not contend that reinsurance—even for 100% of the risk of loss—would, by itself, constitute "contracting to insure any person, property, or risk located within [the] Commonwealth." (M. Hr'g Tr. 42, Sept. 10, 2010). Instead, it contends that the contractual arrangement between Lumbermens and Pohjola, as well as Pohjola's role in procuring the Lumbermens policy, show that Lumbermens was acting as Pohjola's agent in Massachusetts.[9] In support of this argument, NJI notes that Pohjola assumed 100% of the risk of loss, received the entirety of the premium payments (less a small fee), was involved in the initiation and negotiation of the Lumbermens policy, and acted as a direct insurer for other Metso entities. In response, Pohjola notes that Lumbermens had the option to reject risks suggested by Pohjola, that it engaged in its own underwriting activities, and that it had complete control over claims handling procedures.

Even drawing all inferences in favor of NJI, the Court concludes that there is insufficient

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[8] The parties agree that Mass. Gen. Laws ch. 223A, § 3(f) is the only potential basis for jurisdiction under the statute.

[9] NJI also appears to assert that the "master" policy covering Metso is an additional grounds for personal jurisdiction. Beyond tending to substantiate NJI's assertion that Pohjola initiated the Lumbermens transaction, the master policy—executed by two Finnish companies in Finland—provides no additional grounds for jurisdiction in this case.

evidence that Lumbermens was merely Pohjola's agent. The touchstone of agency is whether the agent's work is "controlled or is subject to the right to control" by the principal. *See Lopez v. Massachusetts*, 588 F.3d 69, 85 (1st Cir. 2009) (citing Restatement (Second) of Agency § 2(2)). Although the Court has found no cases directly on point, courts have addressed the related issue of whether an insured can take direct action against a reinsured. NJI urges reliance on *Koken v. Legion Ins. Co.*, 831 A.2d 1196 (Pa. Commw. Ct. 2003), *aff'd* 583 Pa. 400 (2005).[10] While acknowledging that the general rule is to deny direct access to reinsurance, *Koken* held that an insured can sue a reinsured directly "where the . . . insurer act[s] only as a pass-through and not a true insurer." *Id.* at 1236. The court found that the insurer in that case acted as a pass-through because the reinsurer assumed 100% of the risk, the policyholders placed the reinsurance directly, the insurer did not participate in the claims handling process, and the insurer was not obligated to pay claims until after it had received money from the reinsurer to do so. *Id.* at 1234, 1237. In essence, "[t]he [insurer] was the last party to the transaction; its identity was not even known until after the reinsurance was placed and all material terms decided by the [insureds] and their reinsurers." *Id.* at 1241.

The facts of this case are clearly distinguishable. Unlike the insurer in *Koken*, Lumbermens had the rights under the reinsurance agreement to refuse Pohjola's suggested risks and to make claims decisions. It also had the obligation to pay claims before seeking reimbursement from Pohjola. The parties' practices appear to have conformed to this contractual arrangement. Lumbermens engaged in internal discussions about whether to accept the risk

[10] Pohjola asserts that the Court should not consider *Koken* and related cases because they do not explicitly address the question of agency. Although that argument is technically correct, *Koken* turns on the level of independence exercised by the insurer—a question that is central to agency analysis in this context. In the absence of more directly relevant cases, the Court will consider it here.

proposed for Pohjola, and it handled the asbestos claims for six years without consulting or even informing Pohjola. It is also undisputed the Lumbermens would first pay the claim and then seek indemnity from Pohjola. (Hr'g Tr. 38). Lumbermens' role in the transaction thus was not that of a mere "pass-through." Insofar as *Koken* bears on the question of agency, it does not support a finding that Lumbermens was Pohjola's agent here.[11]

The Court also notes that its decision today is consistent with existing interpretations of Mass. Gen. Laws ch. 228A § 3(f). In *Nolan v. Barr & Barr, Inc.*, the Massachusetts Superior Court addressed whether § 3(f) extended jurisdiction over a nonresident insurer for the actions of an insured that began activities in Massachusetts only after the policy was issued. 2010 Mass. Super. LEXIS 119, at *1 (May 10, 2010). Determining that it did, the court reasoned that

> it [was] reasonably foreseeable that the thing being insured would travel outside the state where the insurance contract was [executed]. Among the duties assumed by [the insurer] [were], in the event of a claim against its insured, to defend and indemnify that insured. Satisfaction of these duties [might] necessarily require [the insurer's] participation in a Massachusetts court case.

Id. at *3 (internal citations omitted). In short, the court found that personal jurisdiction was proper where the insurer could have reasonably foreseen being called into Massachusetts to

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[11] Other cases support this determination. *See In re Bennett Funding Group, Inc.*, 60 Fed. Appx. 863, 865 (2d Cir. 2003) (dictum) (no right to sue reinsurer directly, even where insurer was a captive "fronting" company established for the sole purpose of allowing a reinsurance policy to be issued); *United States Fidelity and Guaranty Co. v. S.B. Phillips Co.*, 359 F. Supp. 2d 189 (D. Conn. 2005) (reinsurer who held all risk and received all benefit could not be sued by insured absent an express contractual provision); *Wash. Schs. Risk Mgmt. Pool v. American Prot. Ins. Co.*, 2004 U.S. Dist. LEXIS 28647, at *11 (W.D. Wash. Nov. 9, 2004) (applying "general insurance principle" that insured cannot sue reinsurer directly); *Klockner Stadler Hurter, Ltd. v. Insurance Co. of Pennsylvania*, 785 F. Supp. 1130, 1134 (S.D.N.Y. 1990) (right to direct suit where 75% reinsurer dealt directly with insured, "handled all matters prior to and subsequent to loss," and contractual provision conferred right of direct suit); *Cent. Nat'l Ins. Co. of America v. Insurance Co. of Ireland, Ltd.*, 601 F. Supp. 357 (D. Neb. 1984) (no personal jurisdiction in suit by insurer against out-of-state reinsurer where reinsurance contracts were executed outside of the forum state); *Venetsanos v. Zucker, Facher & Zucker*, 271 N.J. Super. 459 (App. Div. 1994) (insured could proceed directly against 100% reinsurer where it took charge of defense of suits and had final say on claims and their settlement); *Reid v. Ruffin*, 503 Pa. 458, 463 (1983) (no agency relationship where reinsurer had no control over insurer's decision not to settle claims; "It is difficult to conceive of an agency relationship wherein the principal has no authority to require his agent to perform an act on his behalf.").

defend claims. Other cases have applied the same reasoning. *See American Home Assurance Co. v. Sport Maska, Inc.*, 808 F. Supp. 67, 76 (D. Mass. 1992) (§ 3(f) applied to insured where contract provision required it to aid insurer in defense of claims); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Concord Group Ins. Co.*, 2006 Mass. Super. LEXIS 447, at *1 (Aug. 15, 2006) (§ 3(f) applied to automobile insurer who would have been required by policy to defend insured in Massachusetts accident). The factors that led to a finding of jurisdiction in those cases is absent here. The reinsurance contract between Pohjola and Lumbermens expressly assigns sole responsibility for claims handling and defense to Lumbermens, and it therefore would not be reasonably foreseeable that Pohjola could be called into court in Massachusetts. For that reason, the authorities support the Court's finding that the exercise of personal jurisdiction is inappropriate.

In summary, because Lumbermens was not the mere agent of Pohjola, and because Pohjola reinsured the risk rather than issuing the policy to the insured, Pohjola did not "contract[] to insure any person, property, or risk located within [the] Commonwealth" within the meaning of the long-arm statute.

D. Due Process

Because there are insufficient contacts between Pohjola and the forum state to justify finding personal jurisdiction under the Massachusetts long-arm statute, any further constitutional inquiry is unnecessary.

IV. Conclusion

For the foregoing reasons, Pohjola's motion to dismiss for lack of personal jurisdiction is GRANTED.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: December 7, 2010