UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHERYL CHASE and RHODA CHASE,	:	
	:	
Plaintiffs,	:	NO. 3:04CV588 (MRK)
	:	
v.	:	
	:	
EUGENE COHEN, ET AL.	:	
	:	
Defendants.	:	

RULING AND ORDER

This case arises out of a contract for two kitchen remodeling projects in West Hartford, Connecticut. Plaintiffs Cheryl Chase and Rhoda Chase sued Defendants alleging violations of the Connecticut Home Improvement Act, Conn. Gen. Stat. § 20-418, *et seq.*, and the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110a, *et seq.* Defendants have filed a Motion to Dismiss [doc. # 9]. Since the filing of Defendants' motion to dismiss, Plaintiffs have filed an Amended Complaint [doc. #20], in which they have dropped all claims against Defendants Rose Cohen, Design Concepts International, Inc. (d/b/a Neff by Design Concepts International, Inc.), and Neff Kitchens Mfg. Ltd. *See* Pls.' Mem. of Law in Opp'n to Mot. to Dismiss [doc. #19], at 1. Therefore, the only remaining defendant in this case is Eugene Cohen, and this Court need not address arguments in the motion to dismiss that focused on now-dismissed Defendants.[1] For the reasons stated below, Defendants' Motion to Dismiss [doc. #9] is

[1] For instance, the motion to dismiss presented a "prior pending action" argument based on a complaint filed by Plaintiffs against Defendants Neff Kitchens Mfg. Ltd. and Design Concepts International, Inc. in the State Superior Court. *See* Defs.' Mem. of Law in Supp. of Mot. to Dismiss [doc. #9], at 16-18. This argument is no longer viable because Mr. Cohen – the only remaining defendant – was not and is not a party to the prior pending state action.

DENIED.

I. Failure to State a Claim

On a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the *Federal Rules of Civil Procedure*, the Court should "construe the complaint in the light most favorable to the plaintiff, accepting the complaint's allegations as true." *Todd v. Exxon Corp.*, 275 F.3d 191, 197 (2d Cir. 2001). "A complaint should not be dismissed for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.* at 197-98 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Thus, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996) (internal quotation marks omitted).

If the Court accepts the allegations of the Amended Complaint as true – as the Court must on a motion to dismiss – Mr. Cohen would appear to have been an unregistered home improvement "contractor" or "salesman," as defined by Connecticut's Home Improvement Act. *See* Amended Complaint [doc. #20], at ¶¶ 12, 16; *see also* Conn. Gen. Stat. § 20-419(3) (" 'Contractor' means any person who owns and operates a home improvement business or who undertakes, offers to undertake or agrees to perform any home improvement."); Conn. Gen. Stat. § 20-419(7) (" 'Person' means an individual, partnership, limited liability company or corporation."); Conn. Gen. Stat. § 20-419(9) (" 'Salesman' means any individual who (A) negotiates or offers to negotiate a home improvement contract with an owner or (B) solicits or otherwise endeavors to procure by any means whatsoever, directly or indirectly, a home improvement contract from an owner on behalf of a contractor.").

If Mr. Cohen was an unregistered home improvement contractor or salesman, his dealings with the Plaintiffs regarding the remodeling of their kitchen may well have violated the Home Improvement Act. *See* Conn. Gen. Stat. § 20-420(a) ("No person shall hold himself or herself out to be a contractor or salesperson without first obtaining a certificate of registration."); Conn. Gen. Stat. § 20-420(c) ("No individual shall act as a home improvement salesman for an unregistered contractor."). Furthermore, if Mr. Cohen was an unregistered contractor or salesman at the time the parties entered into the remodeling contract, that contract may be invalid. *See* Amended Complaint [doc. #20], at ¶17; *see also* Conn. Gen. Stat. § 20-429(a) ("No home improvement contract shall be valid or enforceable against an owner unless it . . . is entered into by a registered salesman or registered contractor."). Finally, any violation by Mr. Cohen of the Home Improvement Act may also constitute a violation of CUTPA. *See* Conn. Gen. Stat. § 20-427(c) ("A violation of any of the provisions of this chapter shall be deemed an unfair or deceptive trade practice under subsection (a) of section 42-110b [of CUTPA]."); *see also* Conn. Gen. Stat. § 42-110b(a) ("No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.").

Accordingly, viewing the allegations in the Amended Complaint in the light most favorable to the Plaintiffs, the Court cannot say with reasonable certainty that the Plaintiffs can prove no set of facts that would entitle them to relief. *See, e.g.*, *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 511-14 (2002). Defendants' motion to dismiss under Rule 12(b)(6) for failure to state a claim is, therefore, denied.

II. Personal Jurisdiction

In *Haynes Const. Co. v. International Fidelity Ins. Co.*, No. 3:03CV1669 (MRK), 2004

WL 1498119 (D. Conn. June 23, 2004), this Court recently addressed a defendant's motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2) of the *Federal Rules of Civil Procedure*. As the Court stated in *Haynes*,

> When . . . a defendant moves to dismiss an action for lack of personal jurisdiction under Rule 12(b)(2) of the *Federal Rules of Civil Procedure*, the plaintiff has the burden of establishing that the court has jurisdiction over the defendant. *See In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 206 (2d Cir. 2003); *see also Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566 (2d Cir. 1996). Before discovery, a plaintiff may defeat a motion to dismiss by making a *prima facie* showing through affidavits and other evidence that the defendant's conduct was sufficient to warrant the exercise of personal jurisdiction. *See DiStefano v. Carozzi North Am., Inc.*, 286 F.3d 81, 85 (2d Cir. 2001); *see also Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981); *Indymac Mortgage Holdings, Inc. v. Reyad*, 167 F. Supp. 2d 222, 231-32 (D. Conn. 2001).

Haynes, 2004 WL 1498119, at *2. In this case, because discovery was not complete at the time the motion to dismiss was filed, Plaintiffs may defeat Defendants' motion by making a *prima facie* showing of personal jurisdiction. The Court concludes that Plaintiffs have done so.

In diversity cases, "personal jurisdiction is determined by the law of the state in which the district court sits." *Distefano v. Carozzi North America, Inc.*, 286 F.3d 81, 84 (2d Cir. 2001); *see also Savin v. Ranier*, 898 F.2d 304, 306 (2d Cir. 1990). Section 52-59b(a)(1) of the Connecticut General Statutes provides that a court may exercise jurisdiction over a nonresident defendant who "(1) transacts any business within the state." The Connecticut Supreme Court "construe[s] the term 'transacts any business' to embrace a single purposeful business transaction." *Zartolas v. Nisenfeld*, 184 Conn. 471, 474 (1981) (citations omitted).

Mr. Cohen asserts that Plaintiffs have failed to establish any facts which indicate that he transacted business within Connecticut or solicited business in Connecticut in his personal and individual capacity (as opposed to on behalf of his employer) and therefore there is no basis for

exercising jurisdiction over him under § 52-59b(a)(1). *See* Defs.' Mem. of Law in Supp. of Mot. to Dismiss [doc. #9], at 10-11. Mr. Cohen further argues that any attempt to exercise long arm jurisdiction over him would also run afoul of the Constitution because he does not have sufficient minimum contacts with the State of Connecticut to satisfy the Due Process Clause. *See* Defs.' Mem. of Law in Supp. of Mot. to Dismiss [doc. #9], at 12. In particular, Mr. Cohen claims that he only dealt with the Plaintiffs in his capacity as an agent/employee of a corporation and that as a result, the assertion of personal jurisdiction over him in his individual capacity would not "comport[] with 'traditional notions of fair play and substantial justice.' " *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); *see also* Defs.' Mem. of Law in Supp. of Mot. to Dismiss [doc. #9], at 12-14. The Court disagrees.

Plaintiffs have made a *prima facie* showing of the following facts, all of which this Court must accept as true at this stage of the proceeding. First, on at least two occasions Mr. Cohen met with both Plaintiffs in their homes in Connecticut to discuss the kitchen remodeling and take pictures of the existing kitchens. *See* Affidavit of Cheryl A. Chase, Appendix A of Pls.' Mem. of Law in Opp'n to Mot. to Dismiss [doc. #19], at ¶¶ 7-8. Second, though the parties apparently signed the original contract in New York on October 24, 2001,[2] after discovering discrepancies with the written agreement and the prior oral representations between the parties, the parties

[2] Although the agreement between the parties is apparently dated October 15, 2001, see Attachment to Def.'s Mem. of Law in Supp. of Mot. to Dismiss [doc. #9], the Plaintiffs claim that Mr. Cohen signed and presented the agreement to Plaintiffs during a meeting with Plaintiffs in Connecticut, but Plaintiffs did not immediately sign the agreement, deferring until their meeting with Mr. Cohen in New York on October 24, 2001. *See* Affidavit of Cheryl A. Chase, Appendix A of Pls.' Mem. of Law in Opp'n to Mot. to Dismiss [doc. #19], at ¶¶ 8-9.

clarified the terms in a phone call from Mr. Cohen to the Plaintiffs in Connecticut. Mr. Cohen subsequently sent a letter to the Plaintiffs in Connecticut, dated October 25, 2001, that incorporated the revised terms. *See id.* at ¶¶ 9-11; *see also id.* at Ex. A (a copy of the letter dated October 25, 2001). Third, according to the October 25, 2001 letter, Mr. Cohen apparently intended to pick up the Plaintiffs' deposit check at the Plaintiffs' residence in Connecticut during a meeting scheduled for October 29, 2001. *See id.* at ¶ 11; *see also id.* at Ex. A. Fourth, the underlying contract concerned home improvement work on a kitchen located in Connecticut, and thus all the work (including the receipt of building materials, the hiring of kitchen cabinet installers, and the actual installation of the kitchen cabinets) occurred in Connecticut. *See id.* at ¶ 13.

Other courts have held that in similar circumstances a court has personal jurisdiction over a home improvement contractor or salesman under a forum state's long-arm statute for construction work to be done in the forum state. *See, e.g.*, *Gelinas v. Smith*, No. 38 78 30, 1991 WL 225165, at *2 (Conn. Super. Oct. 25, 1991) (defendant's construction work in Connecticut, among other contacts, sufficient to establish long arm jurisdiction under Conn. Gen. Stat. § 52-59b(a)); *Clee v. Remillard Bldg., Inc.*, 649 F. Supp. 1127, 1131 (D. Conn. 1986) (same). The Court agrees with these courts and holds that Plaintiffs have made a *prima facie* showing that this Court has personal jurisdiction over Mr. Cohen on the basis of Connecticut's long-arm statute.

Mr. Cohen's due process arguments are equally unavailing. Given the fact that Mr. Cohen knew that the home improvement project concerned two kitchens in Connecticut, in homes owned by Connecticut homeowners, he cannot credibly argue that he lacked fair warning that his activities could subject him to suit in Connecticut. *Cf. Chase v. Neff Kitchens Mfg., Ltd.*,

No. CV020820079S, 2004 WL 2546797, at *2 (Conn. Super. Oct. 19, 2004) ("There was no question during the course of the hearing that [Mr. Cohen] and others at [Design Concepts International Inc. ("Design")] specifically knew that its products were going to Connecticut and that it was doing work in Connecticut. . . . There seemed to be no question about personal jurisdiction over Design, and at the hearing Design's attorney indicated that he agreed that the court had personal jurisdiction over Design."). To the contrary, it is clear that Mr. Cohen had far more than merely "minimal contacts" with Connecticut and that this Court's exercise of personal jurisdiction over him comports with traditional notions of fair play and substantial justice. *See, e.g.*, *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985); *Gelinas*, 1991 WL 225165, at *2-3.

Invoking the "fiduciary shield" doctrine,[3] Mr. Cohen also argues that Plaintiffs cannot establish personal jurisdiction over him under § 52-59b(a)(1) of the Connecticut General Statutes because he was transacting business as the agent or employee of a corporation. The Court finds this argument unpersuasive. The "fiduciary shield" doctrine was recently rejected in a thoughtful opinion by the Connecticut Superior Court in *Under Par Associates, L.L.C. v. Wash Depot A., Inc.*, 47 Conn. Sup. 319 (2001), on the grounds that the text and underlying policy of Connecticut's long-arm statute did not contemplate such a doctrine, and that any of the concerns underlying the doctrine were sufficiently protected by a due process analysis. *Id.* at 323-28. Another judge of the District of Connecticut recently followed *Under Par* in rejecting a similar

[3] The fiduciary shield doctrine is "a judicially created principle that precludes the exercise of personal jurisdiction over nonresident corporate agents or employees who are acting in the forum state in their role as corporate agents or employees." Sonja Larsen, Annotation, *Validity, Construction, and Application of "Fiduciary Shield" Doctrine-Modern Cases*, 79 A.L.R. 587 (5th ed. 2000).

argument founded on the fiduciary shield doctrine. *See Grunberger Jewelers v. Leone*, No. 3:03CV647(CFD), 2004 WL 1393608, at *3 (D. Conn. Jun. 18, 2004) ("The Superior Court was also correct in *Under Par* in specifically rejecting the 'fiduciary shield doctrine' in insulating corporate officers for their own conduct. The better course is that the contacts with the forum of each defendant – the corporate officer and the corporation – 'must be assessed individually,' both with regard to the long-arm statute and due process analysis. . . . [I]ndividuals should not be shielded from their own conduct simply because they were acting on behalf of a corporation or other entity.") (quoting *Under Par*, 47 Conn. Sup. at 327). Whatever validity the "fiduciary shield" doctrine may have in other contexts, it would appear to have no place in this case, which involves allegations that Mr. Cohen violated Connecticut statutes by his *own* conduct in this state. Any other conclusion would create a situation where employees of out-of-state contractors could come to Connecticut with impunity, violate Connecticut's laws (including laws that require them to register with state officials) through their conduct in Connecticut, and then escape suit in Connecticut for their actions in Connecticut on the ground that everything they did in Connecticut was done in a "corporate" capacity. There is no reason to believe that is what the Connecticut General Assembly intended when it enacted § 52-59b(a)(1). Any concern that individuals may be unfairly hauled into Connecticut courts can be addressed, as here, through a due process analysis.

III. Arbitration Clause

In their brief in support of their motion to dismiss, Defendants assert that Plaintiffs' claims must be dismissed because of the existence of a valid arbitration clause in the parties' contract. The arbitration clause at issue is found in the original agreement between the parties,

dated October 15, 2001, and states in full:

> ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATED TO THIS AGREEMENT OR ANY ALLEGED BREACH THEREOF SHALL BE SETTLED BY BINDING ARBITRATION IN ACCORDANCE WITH THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION AND JUDGMENT UPON ANY AWARD RENDERED BY SUCH ARBITRATORS MAY BE ENTERED IN ANY COURT HAVING JURISDICTION.

Attachment to Def.'s Mem. of Law in Supp. of Mot. to Dismiss [doc. #9]. Located directly above the arbitration clause is a hand-written phrase "TO BE HEARD IN NEW YORK." *Id.*

The Second Circuit has made it abundantly clear that in order to further the "liberal federal policy favoring arbitration agreements," a district court should ordinarily grant a stay when it decides that a dispute must be arbitrated, rather than dismissing the action and thereby triggering appeal rights and the delay attendant to such appeals. *Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90, 93 (2d Cir. 2002) (quoting *Ermenegildo Zegna Corp v. Segna*, 133 F.3d 177, 180 (2d Cir. 1998)). Therefore, a dismissal in favor of arbitration would not be warranted in this case under any circumstances.

In an appropriate case, this Court might nonetheless *sua sponte* consider whether a stay is justified. Here, however, it is not clear from Defendants' brief whether their arbitration argument is limited to the now-dismissed Defendant Design Concepts International, Inc., or whether it also encompasses Mr. Cohen individually. *See* Defs.' Mem. of Law in Supp. of Mot. to Dismiss [doc. #9], at 15 ("As to the Defendant, Design Concepts International, Inc., this court lacks subject matter jurisdiction of the Plaintiffs' claims against it on a contractual arbitration clause."). For their part, Plaintiffs failed to address the arbitration clause in their opposition to the motion to dismiss. *See generally* Pls.' Mem. of Law in Opp'n to Defs.' Mot. to Dismiss [doc. #19].

Therefore, without further clarification and briefing by both parties, the Court will neither dismiss this action based on an alleged arbitration agreement, nor will it stay these proceedings *sua sponte.*

IV. Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss [doc. # 9] is DENIED. However, Mr. Cohen is permitted to move to stay this action if he believes this dispute is arbitrable, by filing an appropriate motion and supporting papers no later than **January 31, 2005.**

IT IS SO ORDERED.

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: December 29, 2004.