

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL QUILLING, Receiver §
for HOWE FINANCIAL TRUST, MVP §
NETWORK, INC. d/b/a MVP TRUST, §
and TRED'S FINANCIAL TRUST §

Plaintiff, §

v. §

Civil Action No. 3-00-CV-2401-D

JAMES W. CONWAY, an individual and, §
JAMES W. CONWAY, P.S.C. a Kentucky §
Professional Services Corporation, §
Defendant §

**DEFENDANTS JAMES W. CONWAY AND JAMES W. CONWAY P.S.C.'S MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 12 (B)(2)**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Defendants James W. Conway, an individual, and James W. Conway, P.S.C., a Kentucky Professional Services Corporation, ("the lawyer defendants"), and make and file this their Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(2) and would respectfully show unto the court the following:

I.

This is an ancillary receivership action brought by Michael J. Quilling, a receiver appointed in the *Funding Resources* litigation (Civil Action No. 3-98CV2689-X), a matter currently pending in the United States District Court for the Northern District of Texas. The lawyer defendants move that this matter be dismissed due to lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2).

II.

Even though personal jurisdiction over the lawyer defendants is primarily predicated upon 28 U.S.C. §§ 1692 and 754, those sections only apply *to in rem* or *quasi in rem* proceedings, and not to those *in personam* in character. Since Mr. Quilling's (hereinafter the "Receiver") claims against the lawyer defendants are entirely *in personam*, the Receiver cannot rely upon §§1692 and 754 as a basis for personal jurisdiction here.

III.

Alternatively, due to rulings by the Honorable Judge Barbara Lynn in a previous, albeit identical, lawsuit against the lawyer defendants, the Receiver is collaterally estopped from taking the position that personal jurisdiction over the lawyer defendants exists and/or is precluded from taking such position by virtue of the doctrine of law of the case.

IV.

Similarly, collateral estoppel and/or law of the case prevents the Receiver from arguing this court has personal jurisdiction over the lawyer defendants due to minimum contacts with Texas.

V.

Moreover, even assuming §§ 1692 and 754 apply, and further assuming neither collateral estoppel nor law of the case can be invoked, the Receiver still has not complied with the local filing requirement contained in §754 such that personal jurisdiction over the lawyer defendants cannot be maintained.

VI.

Finally, the Receiver cannot rely upon the lawyer defendants' minimum contacts with Texas as a jurisdictional safety net. With the evidence attached to their brief in support of this motion, the lawyer defendants affirmatively establish the absence of any such contacts with Texas.

VII.

The additional arguments and authorities in support of the grounds for this motion to dismiss are contained in a brief in support filed contemporaneously herewith. The arguments and authorities contained in that brief are hereby incorporated into this motion as if fully set forth verbatim.

VIII.

WHEREFORE, PREMISES CONSIDERED, the lawyer defendants respectfully ask this court, due to an absence of personal jurisdiction over them, to dismiss this action with prejudice. The lawyer defendants additionally request any and all additional relief to which they are justly entitled.

Respectfully submitted,

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ATTORNEYS FOR LAWYER DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served on counsel for Plaintiff via certified mail, return receipt requested on this the 20th day of February, 2001 to:

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