

Facts and Background

Frazee lives in Wright County, Missouri. He never has lived in Oklahoma, or owned property or had any business interests there. He is a relative of Stephen and Jennifer Frazee of Tulsa, who were delinquent on their loan from Peoples Bank (Bank), also in Tulsa. Apparently at Stephen's suggestion, Bank called Frazee in Missouri to seek a guaranty.² Frazee returned Bank's call and agreed. Bank mailed a guaranty form to Frazee in Missouri, which he signed and mailed back to Bank.

Stephen and Jennifer defaulted again; Bank sued them and Frazee in Oklahoma; and took default judgment against all three. When Bank registered the foreign judgment in Wright County, Frazee challenged it on three grounds. The trial court rejected two of his claims,³ but found that Oklahoma lacked "constitutionally required contacts for personal jurisdiction" over Frazee and quashed the judgment.

Parameters of Review

Our review is *de novo*. We presume Oklahoma had jurisdiction, and unless the proceedings show this presumption is unwarranted, Frazee must overcome it. See ***L & L Wholesale, Inc. v. Gibbens***, 108 S.W.3d 74, 79 (Mo.App. 2003).⁴

² Bank's affidavit was ambiguous about who called first, but Bank's trial brief said that it was Bank. The trial court thus found that Bank initiated contact, and although the evidence was documentary, we defer to that finding of fact. See ***MSEJ, LLC v. Transit Casualty Co.***, 280 S.W.3d 621, 623 (Mo. banc 2009). That said, neither party claims this case hinges on that issue.

³ Frazee's other complaints related to service of process and sufficiency of the Oklahoma court record. He has not cross-appealed the trial court's rulings against him on these issues.

⁴ Such *de novo* review moots Bank's complaint that the trial court did not presume the judgment valid and erroneously put the burden of proof on Bank.

Ordinarily, we first would see if Frazee's actions fell within Oklahoma's long-arm statute, but Oklahoma courts are authorized by 12 OKLA. STAT. § 2004(F)(Supp. 2002) to "exercise jurisdiction on any basis consistent with" the Oklahoma or federal constitutions, which in turn, is construed as reaching the "outer limits of due process" established by Supreme Court cases. **Conoco, Inc. v. Agrico Chemical Co.**, 115 P.3d 829, 834 (Okla. 2004). The parties thus agree that only constitutional due process is at issue: Oklahoma could exercise jurisdiction over Frazee if -- but only if -- the U.S. Constitution allowed it.

Purposeful Availment

Under the Due Process Clause, one cannot be "subjected to a binding judgment in a forum where the person has no meaningful contacts, ties or relations." **Conoco**, 115 P.3d at 834 (citing **Burger King Corp. v. Rudzewicz**, 471 U.S. 462, 472 (1985)). There must be some act by which one "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." **Burger King**, 471 U.S. at 474-75 (quoting **Hanson v. Denckla**, 357 U.S. 235, 253 (1958)).

Random, fortuitous, or attenuated contacts are not enough, "actions by the defendant *himself* [must] create a 'substantial connection' with the forum State." **Id.** at 475. This substantial connection "must come about by *an action of the defendant purposefully directed toward the forum State.*" **Asahi Metal Industry Co. v. Superior Court**, 480 U.S. 102, 112 (1987).

It also seems clear that Frazee's guaranty, of itself, does not reflect purposeful availment. *See Burger King*, 471 U.S. at 478.⁵

Analysis

Although our review is *de novo*, it would be difficult to better the trial court's cogent assessment (emphasis the trial court's):

Both parties agree that Mr. Frazee's only contact with the State of Oklahoma for purposes of this lawsuit was via telephone and through the mail.

In this case, Plaintiff initiated contact via telephone with Mr. Frazee in Missouri. Mr. Frazee called Plaintiff back, apparently at the request of Plaintiff, to inform the Plaintiff he would sign a guaranty as requested by Plaintiff and/or Stephen Frazee. Mr. Frazee signed and returned the guaranty documents to Plaintiff in Oklahoma at the request of Plaintiff.

While Plaintiff and the other defendants may have benefited financially from the guaranty allegedly signed by Defendant Frazee, Defendant Frazee received no apparent pecuniary benefit or gain from signing the guaranty. While this fact alone is not dispositive, the Court finds this fact relevant in determining whether Defendant Frazee has purposefully availed himself of the privilege of conducting activities within the State of Oklahoma. In every other case cited by either party, the nonresident defendant received some pecuniary benefit directly or indirectly from the contact with the forum state.

The guaranty documents prepared by Plaintiff do not include a forum selection clause indicating Oklahoma would be the venue for any disputes which may arise from the guaranty. Once again, while this fact alone is not dispositive, the Court finds this fact relevant in determining whether there was any reasonable expectation of contractual consequences in the State of Oklahoma.

Based upon the totality of the facts and circumstances in this case, this court finds that it cannot be said that Mr. Frazee has

⁵ As to whether contracting with an out-of-state party establishes minimum contacts *per se*, "the answer clearly is that it cannot." *Id.* *See also Long John Silver's, Inc. v. DIWA III, Inc.*, --- F.Supp.2d ----, 2009 WL 127651 at *7 (E.D.Ky. 2009)("It is clear" that personal jurisdiction cannot be established on the basis of personal guaranties alone, citing *Burger King*).

“purposefully availed” himself of the privilege of conducting activities within the State of Oklahoma.

The parties have cited us to numerous long-arm decisions, and we have considered many more. Each case can be distinguished from the others, and from this one,⁶ but we draw from them this conclusion: *Oklahoma could exercise jurisdiction over Frazee if his guaranty related to or was accompanied by some substantial activity in Oklahoma that he purposefully directed toward that state or its residents.*⁷ This explains cases finding long-arm jurisdiction where a guaranty supported a start-up or ongoing business venture in the forum state, or furthered sales activities there by the guarantor or his corporation, or included forum selection or choice-of-law clauses in favor of that state;⁸ but why long-arm jurisdiction has not been found absent such factors.⁹

⁶ The determination of minimum contacts is fact-specific, so “few answers will be written ‘in black and white. The greys are dominant and even among them the shades are innumerable.’” *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978)(quoting *Estin v. Estin*, 334 U.S. 541, 545 (1948)).

⁷ Compare *deMco Technologies, Inc. v. C.S. Engineered Castings, Inc.*, 769 So.2d 1128, 1131 (Fla.App. 2000)(personal jurisdiction properly exercised if guarantor’s failure to pay debt owed in Florida “is accompanied by some other related substantial act in Florida that is purposefully directed toward the state or its residents.”).

⁸ Illustrating one or more of these situations, see, e.g., *Federal Nat’l Bank & Trust v. Moon*, 412 F. Supp. 644 (D. Okla. 1976); *Orix Fin. Serv. v. Murphy*, 9 So.3d 1241 (Ala. 2008); *Perry v. Central Bank & Trust Co.*, 812 S.W.2d 166 (Ky.App. 1991); *State ex rel. Farmland Industries, Inc. v. Elliott*, 560 S.W.2d 60 (Mo.App. 1977); *United Buying Group v. Coleman*, 251 S.E.2d 610 (N.C. 1979).

⁹ E.g., *Bond Leather Co. v. Q.T. Shoe Mfg. Co.*, 764 F.2d 928 (1st Cir. 1985); *Labry v. Whitney Nat’l Bank*, 8 So.3d 1239 (Fla.App. 2009); *deMco Technologies*, *supra* note 7; *Stuart v. Peykan, Inc.*, 581 S.E.2d 609 (Ga.App. 2003); *United Buying Group*, *supra* note 8.

A case in point is ***United Buying Group***. Two brothers, Lawrence and Morton Coleman, guaranteed a shoe company's account with a North Carolina buying group. Lawrence, who lived in Virginia, was president and principal shareholder of the shoe company and a shareholder in the buying group. By contrast, Morton was a New York physician with no ownership or other interest in either the shoe company or buying group. When the shoe company failed, the buying group sued both brothers in North Carolina, and they each moved to dismiss for lack of personal jurisdiction.

Lawrence was unsuccessful, not surprisingly, but Morton prevailed since his only North Carolina contact was signing, in New York, an obligation payable in North Carolina. "Under these circumstances, we fail to see how Dr. Coleman purposefully availed himself of the benefits and protections of North Carolina laws." 251 S.E.2d at 615.

By agreeing to guarantee [the] account indebtedness with Buying Group, Dr. Coleman incurred a potential liability to a North Carolina corporation with no attending commercial benefits to himself enforceable in the courts of North Carolina. The only conceivable benefit accruing to Dr. Coleman as a result of signing the note was the personal satisfaction of helping his brother Lawrence. Needless to say, such a benefit, while substantial, does not give rise to legal rights enforceable in the courts of North Carolina. The attainment of such personal gratification can hardly be said to constitute a purposeful invocation of the benefits and protection of North Carolina's laws under the minimum contacts standard articulated in *International Shoe* and its progeny.

Id.

Bank's strongest case may be ***Perry***, which also involved an otherwise disinterested family member who guaranteed an out-of-state debt. *Perry*, the

guarantor, challenged long-arm jurisdiction “because he was never in Kentucky concerning the guaranty note, his signature was solicited by the bank, and the note was sent to him in Virginia where he signed it and mailed it back to the bank.” 812 S.W.2d at 168. Long-arm jurisdiction was upheld largely due to two factors, at least one of which was missing in *United Buying Group*, and neither of which is found here.

First, Perry’s guaranty said it would be governed, construed, applied, and enforced in accordance with Kentucky law. “Although not an explicit consent to jurisdiction, this language put Perry on notice that he could expect any legal ramifications to be dealt with in Kentucky.” *Id.* at 169. Frazee’s guaranty, by contrast, did not say it could be enforced in Oklahoma or that Oklahoma law applied.

Second, Perry’s guaranty supported a \$500,000 buy-in loan for his daughter and son-in-law to enter a Kentucky business venture. Although Perry “did not acquire any economic interest in the business itself, he certainly had a stake in its success.” *Id.* There is no indication that this case involves a similar scenario. Rather, Bank solicited Frazee to guarantee a bad loan that Bank already had made.

Conclusion

Perry, United Buying Group, and this appeal present close cases, and close cases often turn on little things. Frazee is more like Morton Coleman in *United Buying Group* than the guarantor in *Perry*, and the fine distinctions between those cases favor Frazee here. “Based upon the totality of the facts and circumstances in this case,” the trial court found, “it cannot be said that Mr. Frazee has ‘purposefully availed’ himself of the privilege of conducting activities within the

State of Oklahoma.” We agree. Oklahoma could not exercise jurisdiction over Frazee because his guaranty was not accompanied by any substantial activity in Oklahoma that Frazee purposefully directed toward that state or its residents.

We affirm the judgment granting Frazee’s motion to quash.

Daniel E. Scott, Chief Judge

RAHMEYER, J. – CONCURS

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