

IN THE SUPREME COURT OF MISSOURI

CEDAR CREST APARTMENTS, LLC)
and)
PETERSON PROPERTIES, INC.)
d/b/a THE PETERSON COMPANIES,)

Case No. SC96977

**Mo. Ct of Appeals,
Western District No.
WD81449**

Relators,)

**Circuit Court of
Jackson County, Missouri,
Case No. 1716-CV20519
Division 17**

v.)

THE HONORABLE JACK GRATE,)
JUDGE OF THE CIRCUIT COURT OF)
JACKSON COUNTY, MISSOURI at)
INDEPENDENCE,)

Respondent.)

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STATEMENT OF FACTS

This case arises out of the electrocution of Plaintiff Lincoln Rene Aguiriano Martinez (hereinafter “Plaintiff”) while he was performing construction work at an apartment complex as described in Plaintiff’s Petition (hereinafter “Underlying Suit”). *See* Exhibit 1–Plaintiff’s Petition. In the Underlying Suit, Relators filed a Motion to Dismiss for an alleged lack of personal jurisdiction. *See* Exhibit 2–Defendant’s Motion to Dismiss and Exhibit 3–Plaintiff’s Response to the Motion to Dismiss. In his denial of that motion, Honorable Judge Grate did not exceed his jurisdiction or violate the due process rights of Relators. *See* Exhibit 4–Judge Grate’s Order. Rather, his ruling comports with the requirements of personal jurisdiction over Relators Cedar Crest Apartments, LLC (hereinafter “Cedar Crest”) and Peterson Properties, Inc., d/b/a The Peterson Companies (hereinafter “Peterson Properties”). Relators filed a Petition for Writ of Prohibition in the Western District of the Missouri Court of Appeals, which was denied on February 01, 2018. *See* Exhibit 5–Court of Appeals Order. Relators then petitioned the Missouri Supreme Court of Missouri for a Writ of Prohibition which was preliminarily issued on April 03, 2018. *See* Exhibit 6–Supreme Court Order.

Here, a permanent writ is improper. Relators own property in Missouri, transact business in Missouri, and utilize its court system. Further, the Relators’ decisions regarding the control and management of the property where Plaintiff was injured are controlled by a Defendant J.A. Enterprises, Inc., a Missouri corporation. The Motion to Dismiss also

wrongfully attempted to dismiss the entire Underlying Suit where several Missouri entities are defendants. Therefore, the preliminary writ should be quashed, and permanent writ should not be issued.

ARGUMENT

STANDARD OF REVIEW GOVERNING ALL POINTS

While an extraordinary writ might be appropriate to address the propriety of an action proceeding in a particular jurisdiction in an appropriate case, such a writ should not issue in this case. A writ of prohibition will not issue as a matter of right, but rather is a matter resting within the sound discretion of the court to which application has been made. *Derfelt v. Yocum*, 692 S.W.2d 300, 301 (Mo. banc 1985); *State ex rel. Bates v. Rea*, 922 S.W.2d 430, 431 (Mo. App. 1996); *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576 (Mo. banc 1994). A court should be judicious in issuing a writ and “should only exercise its discretionary authority to issue this extraordinary remedy when the facts and circumstances of the particular case *demonstrate unequivocally* that there exists an extreme necessity for preventative action.” *Derfelt*, 692 S.W.2d at 301 (emphasis added). In other words, an act in excess of jurisdiction must be clearly evident for prohibition to issue. A writ of prohibition essentially provides litigants with a means to circumvent the normal appellate process and should therefore be employed by courts judiciously and with exceptional restraint. *Missouri Dept. of Social Services v. Administrative Hearing Com'n*, 826 S.W.2d 871 (Mo. Ct. App. W.D. 1992). Given the circumstances of this action and the inability of the Relators to bear the burden of showing that Judge Grate acted beyond his

jurisdictional authority and that a permanent writ is unequivocally necessary, this Court should quash the preliminary writ and deny a permanent writ.

a. PROHIBITION IS NOT APPROPRIATE AS THE REALTORS HAVE FAILED IN THEIR BURDEN OF DEMONSTRATING THAT THE RESPONDENT IS CLEARLY ACTING OUTSIDE OF HIS AUTHORITY.

Relators have failed to sustain their burden in establishing that jurisdiction was not proper. Judge Grate acted within his jurisdictional authority and did not abuse his discretion. The extraordinary writ of prohibition should be issued only when *a clear right to it appears*. *State ex rel. Missouri Ozarks Economic Opportunity Corp. v. Long*, 763 S.W.2d 381, 382 (Mo. App. 1989). The Relators have the burden of showing that respondent will usurp or act in excess of his authority. *Id.* at 382-83. “[R]espondent is presumptively correct in determining that he has jurisdiction.” *Id.* at 383.

That the respondent is exceeding his authority must be clearly evidenced. *State ex rel. Clem Trans. Inc. v. Gaertner*, 688 S.W.2d 367, 370 (Mo. banc 1985). When the question of jurisdiction turns upon a fact to be determined by the trial court, and when there is no evidence that would support the conclusion that the trial court's determination of the fact is wrong as a matter of law, prohibition is not an *appropriate remedy*. *Id.*; *Missouri Ozarks Economic Opportunity Corp.*, 763 S.W.2d at 383-84.

This Court should consider the prior rulings of the Honorable Judge Welsh of the Missouri Court of Appeals for the Western District denying the Relators’ prior Petition for Writ of Prohibition and the Honorable Judge Grate of the Circuit Court of Jackson County denying the Relators’ prior Motion to Dismiss. While the Court may certainly overturn a

previous ruling or the ruling of a previous judge in this case, the fact that the Missouri Court of Appeals and the Honorable Judge Grate have all found Relators' claims to be without merit is instructive. Further, Relators have not defeated the presumption that Respondent was properly exercising his discretion, and thus, the preliminary writ should be quashed.

b. PLAINTIFF HAS MADE A PRIMA FACIE CASE OF PERSONAL JURISDICTION OVER RELATORS. THEREFORE, RELATORS ARE SUBJECT TO PERSONAL JURISDICTION IN MISSOURI.

Relators are subject to Missouri's personal jurisdiction. The inquiry into the court's jurisdiction focuses on whether a plaintiff has set out sufficient prima facie allegations in his petition that, if believed, satisfy principles of due process. Here, in the Underlying Suit, Plaintiff sufficiently made a prima facie case against the Relators, both in his Petition and in the response to the Motion to Dismiss, that establishes personal jurisdiction, both specific and general, over them. Therefore, Judge Grate did not exceed his jurisdiction in denying the Motion to Dismiss, and the preliminary writ should be quashed.

i. POINT 1: RELATORS ARE NOT ENTITLED TO A PERMANENT WRIT OF PROHIBITION AS THE SIXTEENTH JUDICIAL CIRCUIT OF JACKSON COUNTY, MISSOURI, AND RESPONDENT THE HONORABLE JACK GRATE PROPERLY EXERCISED PERSONAL JURISDICTION OVER RELATORS UNDER SPECIFIC JURISDICTION IN THAT THE ALLEGATIONS IN THE UNDERLYING PETITION ARISE FROM OR RELATE TO RELATOR'S ACTIVITIES IN MISSOURI AND RELATORS' CONTACTS SATISFY DUE PROCESS.

Specific jurisdiction over a defendant is exercised when a state asserts personal jurisdiction over a non-resident defendant in a suit "arising out of or related to" the defendant's contacts with the forum. *Shouse v. RFB Const. Co., Inc.*, 10 S.W.3d 189, 193

(Mo. App. W. Dist. 1999). This Court can exercise personal jurisdiction over the Defendants under specific jurisdiction if (1) the suit arises out of one of the activities listed in Missouri's long arm statute, and (2) if the Defendants have sufficient minimum contacts with Missouri to satisfy due process requirements. *Chromalloy Am. Corp. v. Elyria Foundry Co.*, 955 S.W.2d 1,4 (Mo. banc 1997). Here, the Respondent properly denied the Motion to Dismiss in the Underlying Suit, as personal jurisdiction was properly exercised over the Relators.

1. LONG ARM STATUTE

While Missouri's long-arm statute purports to limit the court's jurisdiction over a non-resident defendant to a narrow list of enumerated situations, the Missouri Supreme Court has held that the purpose of the long-arm statute is to extend the jurisdiction of Missouri courts over out-of-state defendants to the "full extent permitted by the due process clause of the Fourteenth Amendment." *State ex rel. Metal Serv. Ctr. of Georgia, Inc. v. Gaertner*, 677 S.W.2d 325, 327 (Mo. 1984).

In determining whether it has jurisdiction, the trial court may consider affidavits, exhibits, and evidence pursuant to Rules 55.27 and 55.28. "When affidavits are presented, the trial court may believe or disbelieve any statements made within those affidavits. It is within the sole discretion of the trial court to make such factual determinations." *Shouse*, 10 S.W.3d at 194(citing *Quelle Quiche, Ltd. v. Roland Glass Foods, Inc.*, 926 S.W.2d 211, 213 (Mo. App. E. Dist. 1996), *overruled by Chromalloy Am. Corp. v. Elyria Foundry Co.*,

955 S.W.2d 1 (Mo. 1997)). The Court “must determine whether the affidavit submitted by [the Defendants] show that [they] did not commit any act sufficient to invoke the jurisdiction of the courts of this state.” *Shouse*, 10 S.W.3d at 194. In *Shouse*, the affidavit submitted by the defendant was found to be insufficient as it merely stated that the defendant was not conducting certain activities in Missouri on the date of the incident.

Here, the affidavit submitted by the Relators in the Underlying Suit makes no mention of Peterson Properties or Cedar Crest’s business activities in Missouri, but simply states that they do not own real property in Missouri and that Peterson Properties is a Kansas employer. See Exhibit 7—Plaintiff’s Suggestions in Opposition of Preliminary Writ at 18-19. “This is a far cry from evidence that [they] had ‘no business’ in [Missouri].” *Id.* Further, the exhibits Plaintiff presented in its response to the Motion to Dismiss directly contradict Relators’ allegations that they have absolutely no connection to Missouri. See Exhibit 3 at 12-20. Therefore, the affidavit submitted by the Relators in the Underlying Suit fails to show that they did not transact business in Missouri. Further, a finding a specific jurisdiction under these facts is not “*so great* as to be an act in excess of jurisdiction” that would require the issuance of a permanent writ. *State ex rel. K-Mart Corp. v. Hollinger*, 986 S.W.2d 165, 169 (Mo. *banc* 1999) (emphasis added).

2. DUE PROCESS

The Relators have sufficient contacts with Missouri so that the exercise of jurisdiction over them is fundamentally fair and is proper under the Due Process clause.

After a determination that the long-arm statute is satisfied, the next inquiry is whether minimum contacts exist such that the suit does not offend “traditional notions of fair play and substantial justice.” *International Shoe v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). This “minimum contacts” test is not susceptible of mechanical application; rather, “the facts of each case must be weighed to determine whether the requisite ‘affiliating circumstances’ are present.” *Id.* (quoting *Kulko v. Superior Court of California, Etc.*, 436 U.S. 84, 92, 98 S.Ct. 1690, 1697, 56 L.Ed.2d 132 (1978)). A defendant's contacts with the forum state must be purposeful and such that defendant should “reasonably anticipate being haled into court in the forum state.” *Id.*; *Chromalloy Am. Corp.*, 955 S.W.2d at 5 (Mo. 1997).

Relators allege that Cedar Crest and Peterson Properties have no contacts with Missouri. However, as stated in Plaintiff’s response to the Motion to Dismiss in the Underlying Suit:

Defendant [J.A. Peterson Enterprises, Inc. (“Enterprises”)] is the managing member of Defendant Cedar Crest, and Enterprises owns J.A. Peterson Reality Co., Inc.—the owner of Peterson Properties. Because Defendant Enterprises is a Missouri Corporation, and *it makes the decisions for Cedar Crest and the Peterson Properties*, these entities contacts with Missouri are more than sufficient....¹

* * *

¹ It should be noted that for purposes of diversity jurisdiction, a limited liability company’s citizenship is the citizenship of each of its members. *OnePoint Solutions, LLC v. Borchert*, 486 F.3d 342 (8th Cir. 2007). Accordingly, Cedar Crest is a citizen of Missouri.

Peterson Properties has maintained its presence in Missouri since August 31, 1979 and has solicited business in Missouri since that time. Since 1979, Peterson Properties has been registered to conduct business in Missouri. (Pl.'s Ex. 1, Foreign Corporation Application.) Moreover, as previously explained, a Missouri corporation is the managing member of Cedar Crest and ultimately the owner of Peterson Properties.... It is worth noting that Defendant Cedar Crest has consistently used the Missouri courts by filing lawsuits in Missouri. (Pl.'s Ex. 2, Case.net.).... Finally, *the Peterson Companies own at least four apartment complexes in Missouri.*

See Exhibit 3 at 4-6, (emphasis added). Therefore, Relators' contacts with Missouri are clearly sufficient to satisfy the Due Process Clause of the Fourteenth Amendment.

ii. POINT 2: RELATORS ARE NOT ENTITLED TO A PERMANENT WRIT OF PROHIBITION AS THE SIXTEENTH JUDICIAL CIRCUIT OF JACKSON COUNTY, MISSOURI, AND RESPONDENT THE HONORABLE JACK GRATE PROPERLY EXERCISED PERSONAL JURISDICTION OVER RELATORS UNDER GENERAL JURISDICTION IN THAT RELATORS ARE ESSENTIALLY AT HOME IN MISSOURI.

In addition to being subject to specific personal jurisdiction, general jurisdiction absolutely applies to Relators in this case. General jurisdiction requires that a defendant have continuous, systematic contacts within the state such that the exercise of personal jurisdiction for actions arising out of contacts with Missouri or for any other action does not offend due process. A foreign corporation must be *present* and *conducting substantial business* in Missouri in order to be subject to general jurisdiction. *Fulton v. The Bunker Extreme, Inc.*, 343 S.W.3d 9, 13 (Mo. App. S. Dist. 2011). In *International Shoe*, the United States Supreme Court held that a Missouri corporation had sufficient minimum contacts for a Washington state court to take personal jurisdiction. There the court held: “[T]he activities carried on in behalf of appellant in the State of Washington were neither irregular

nor casual. They were systematic and continuous throughout the years in question.” *Intl. Shoe Co.*, 326 U.S. at 320. Here, the Relators “cannot avail themselves of the benefits of doing...business in Missouri and cannot reach out to Missouri...without accepting the legal responsibilities that accompany these transactions.” *Andra v. Left Gate Prop. Holding, Inc.*, 453 S.W.3d 216, 232 (Mo. 2015).

In their Petition, Relators contend that general jurisdiction does not exist because they are Kansas entities. However, these Kansas entities are essentially “at home” in Missouri. Peterson Properties has maintained a “systematic and continuous” presence in Missouri since August 31, 1979 and has solicited business in Missouri since that time. Since 1979, Peterson Properties has been registered to conduct business in Missouri. *See* Exhibit 3 at 12, 17. Moreover, J.A. Peterson Enterprises (“Enterprises”), a Missouri corporation and defendant in the Underlying Suit, is the managing member of Cedar Crest and ultimately the owner of Peterson Properties. The Petition alleged that Cedar Crest and Peterson Properties owned, controlled, managed, or maintained the premises—both of these entities are managed by Enterprises in Missouri. It is also worth noting that Defendant Cedar Crest has consistently used the Missouri courts by filing lawsuits in Missouri. *See* Exhibit 3 at 18. Finally, the Peterson Companies own at least four apartment complexes in Missouri.

c. Plaintiff is Entitled to Jurisdictional Discovery

While Plaintiff continues to assert that Judge Grate acted within his discretion in

denying Relators' Motion to Dismiss in the Underlying Suit, Plaintiff properly requested, in the alternative to a finding that personal jurisdiction did not exist, jurisdictional discovery should be conducted. This is true where Plaintiff has asserted contradictory evidence to Relators' claims that they do not have any Missouri connections.

“Where a motion to dismiss for lack of personal jurisdiction is filed and supported by an affidavit, to the effect that no business is being conducted in the state of Missouri, the plaintiff may be allowed to conduct discovery on the issue before a ruling is made.” § 3.9. Missouri long-arm statute, 2 Mo. Prac., Methods of Prac.: Litigation Guide § 3.9 (4th ed.); see *Mohnihan v. City of Manchester*, 203 S.W.3d 774 (Mo. App. E.D. 2006).

Even if this Court finds Plaintiff's allegations insufficient to establish personal jurisdiction, Plaintiff has a right to conduct discovery to determine the Defendants' actual contacts with Missouri. In order to be entitled to jurisdictional discovery, a plaintiff is required merely to have alleged facts in the petition which, if true, establish jurisdiction. *Mello v. Giliberto*, 73 S.W.3d 669, 673 (Mo. App. 2002). For purposes of obtaining jurisdictional discovery, a simple broad statement that a defendant “conducts business” in Missouri is a sufficient basis for obtaining jurisdictional discovery:

Concerning the extent of [the defendant's] business activities in Missouri, Appellant claimed ... that [the defendant] is a resident of Kansas and ‘conducts business’ in Missouri... [T]his language is sufficient to withstand a motion to dismiss because it is broad enough to encompass the requirement that [the defendant] conducts substantial business in Missouri and therefore has “substantial and continuous” contacts with Missouri such that the trial court could exercise general personal jurisdiction. Of course, the parties have the right to conduct discovery to demonstrate whether [the defendant] has such substantial business or contacts.

Shouse, 10 S.W.3d at 194 (finding that appellant's petition set forth facts which, “if given their broadest intendment, [were] sufficient to infer that [the

defendant] conducts substantial business in Missouri” and remanding the case to the trial court to allow discovery on the issue of minimum contacts).

See Exhibit 3 at 7-8.

Plaintiff made assertions that Relators made contracts and conducted business within Missouri, which is sufficient to allow for jurisdictional discovery. Relators are owned by Defendant Enterprises. Enterprises is the managing member of Relator Cedar Crest, and as a collective operating under the “Peterson Properties,” Relators and Enterprises own numerous rental properties in Missouri. Relators contend that Judge Grate’s order does not contain any findings and thus a permanent writ should issue. But the order did not address jurisdictional discovery either. Accordingly, Plaintiff should be able to discover to what extent Relators have reached into Missouri, and a permanent writ should not issue prior to the completion of such discovery.

d. IF THE COURT DOES GRANT A PERMANENT WRIT OF PROHIBITION, WHICH IT SHOULD NOT, IT SHOULD ONLY APPLY TO THE RELATORS.

Despite Plaintiff’s arguments that personal jurisdiction exists over the Relators, if the Court is inclined to make the preliminary writ permanent, the writ should be made specific to the Relators and not include the other Missouri Defendants in the Underlying Suit. The Motion to Dismiss was submitted by Defendants Cedar Crest, Peterson Properties, and J.A. Peterson Enterprises. However, J.A. Peterson Enterprises and several other defendants in the Underlying Suit are clearly Missouri residents or entities. *J.A. Peterson Enterprises is a domestic corporation that was incorporated in Missouri.*

Missouri courts can clearly exercise general jurisdiction of J.A. Peterson Enterprises. Therefore, if the writ of prohibition is made permanent, which it should not, then it should only be applicable to the Relators Cedar Crest and Peterson Properties.

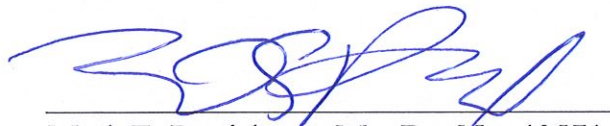
CONCLUSION

In conclusion, Plaintiff has satisfied his burden of the proper exercise of personal jurisdiction over Relators, or in the alternative, appropriately requested that jurisdictional discovery be permitted. Relators, however, have failed to show that Judge Grate acted outside of his discretion in his denial of the Motion to Dismiss. Relators are subject to personal jurisdiction in Missouri as they have sufficient contacts with Missouri to satisfy the due process clause of the Fourteenth Amendment, and an assertion of jurisdiction is reasonable and does not offend traditional notions of fair play and substantial justice.

WHEREFORE, Plaintiff requests that the Court quash the Preliminary Writ of Prohibition and deny a permanent Writ of Prohibition and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

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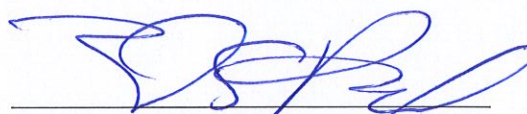
CERTIFICATE OF SERVICE

I hereby certify that copies of this Respondent's Brief were served on the 20th day of June 2018, through the electronic filing system pursuant to Supreme Court Rule 103.08 on:

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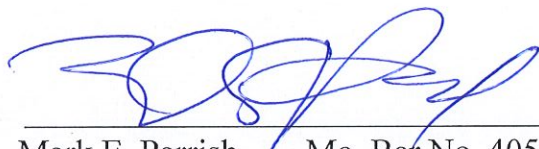
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RULE 84.06(C) CERTIFICATION

Undersigned counsel for the Respondent hereby certifies that this Brief contains the information required by 55.03. additionally, this Brief complies with the limitations contained in Rule 84.06(b) in that it contains 3830 words.



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