



In the Missouri Court of Appeals Eastern District

DIVISION ONE

DONALD L. BRYANT, JR.,)	No. ED91924
)	
Appellant,)	Appeal from the Circuit Court
)	of St. Louis County
vs.)	
)	
SMITH INTERIOR DESIGN)	Honorable David Lee Vincent III
GROUP, INC.,)	
)	
Respondent.)	Filed: April 14, 2009

Introduction

Donald Bryant, Jr. (Appellant) appeals from the trial court's Order and Judgment dismissing his Amended Petition against Smith Interior Design Group, Inc. (Smith Interior) and William Kopp (Kopp) (collectively, Respondents) for lack of personal jurisdiction. We affirm.

Background

Appellant, a Missouri resident, sought the services of Smith Interior, a Florida interior design company, in a design project for a co-op apartment he planned to purchase in New York. Kopp, Smith Interior's president, was also a resident of Florida.

Appellant purchased his New York co-op apartment in June 2006. Before purchasing the co-op apartment, Appellant contacted Respondents regarding providing interior design services for the apartment, and Kopp traveled to Missouri to meet with Appellant to examine the furniture

he owned in Missouri and gather ideas for the New York property. In July 2007, more than one year after Appellant purchased the New York co-op apartment, Appellant contacted Kopp to discuss the interior design services to be provided by Respondents, including the purchase of furniture and other household items for the New York property. The parties later met and discussed the furnishing of the New York apartment. There is no evidence in the record that this meeting occurred in Missouri, or that the parties discussed any specific commission arrangement or consulting fees to be charged by Respondents. Appellant alleges in his Amended Petition that he understood, based on conversations with Kopp, his understanding of the custom and practice of the interior design industry, and his prior involvement with interior design companies providing services in New York that Respondents would charge the “standard and reasonable” commission of 20 to 30% for their services.

In August 2007, Kopp mailed Appellant a document to his address in Missouri, which Appellant understood to be a list of furniture and other household items selected during the meeting in July. Appellant then forwarded Respondents the necessary deposit. In October and December 2007, Kopp mailed Appellant additional documents regarding the New York property to Appellant’s address in Missouri. Appellant asserts that these documents did not list any charges for commissions or fees. Disputes arose between Appellant and Respondents regarding commissions, fees, and the quality of work, which the parties were unable to resolve.

On March 21, 2008, Appellant filed a Petition in the Circuit Court of St. Louis County alleging five counts: 1) fraudulent misrepresentation, alleging Respondents fraudulently made material misrepresentations regarding their fees and commissions, as well as the costs for the furniture and other household items; 2) fraudulent concealment, alleging Respondents concealed the true cost of their fees and commissions; 3) negligent misrepresentation, alleging Respondents

failed to exercise reasonable care in making representations regarding their fees and commissions, as well as the costs for the furniture and household items; 4) unjust enrichment, alleging Respondents received compensation for which they had no reasonable expectation to receive because they failed to meet the minimum standards of the interior design profession; and 5) violation of the Missouri Consumer Protection Statute, alleging documents sent by Respondents concealing their commissions and fees were false, deceptive, and fraudulent.

Respondents filed a Motion to Dismiss for Lack of Personal Jurisdiction (Motion to Dismiss) on June 6, 2008, asserting Appellant failed to allege facts demonstrating Respondents had sufficient contacts with Missouri for the trial court to exercise personal jurisdiction and that it would be fundamentally unfair for the trial court to exercise such jurisdiction. Appellant then filed a Motion for Leave to File Amended Petition on July 14, 2008. In his Amended Petition, Appellant alleged jurisdiction was proper because Respondents visited Missouri, sent numerous mailings to Missouri, and made several phone calls to Missouri, all relating to Appellant's claim. Appellant also filed a memorandum in opposition to Respondents' Motion to Dismiss on July 16, 2008.

On July 3, 2008, Appellant served discovery requests on Respondents. Respondents sought, and the trial court granted, an extension of time until August 22, 2008, to respond to Appellant's initial discovery requests.

The trial court heard the parties' respective motions on July 17, 2008, and entered a Judgment and Order on July 28, 2008, granting Appellant leave to file his Amended Petition and denying Respondents' Motion to Dismiss.

On August 1, 2008, Respondents filed a second motion to dismiss Appellant's Amended Petition for lack of personal jurisdiction (Second Motion to Dismiss), to which Appellant filed a

memorandum in opposition on August 6, 2008. The trial court heard the motion on August 8, 2008, and entered its Order and Judgment on August 11, 2008, granting Respondents' Second Motion to Dismiss.

Appellant's motion to reconsider was denied by the trial court on September 4, 2008, and thereafter Appellant filed his timely Notice of Appeal. This appeal follows.

Points on Appeal

Appellant presents three points on appeal. First, Appellant alleges the trial court erred in granting Respondents' Second Motion to Dismiss because Missouri courts are permitted to exercise jurisdiction over Respondents under the Missouri long-arm statute.

Second, Appellant asserts the trial court erred in granting Respondents' Second Motion to Dismiss because Respondents have sufficient minimum contacts with Missouri to satisfy due process concerns.

Third, Appellant claims the trial court erred in refusing him an opportunity to conduct discovery because the record on Respondents' contacts with Missouri was incomplete.

Discussion

Points I and II – Personal Jurisdiction

When a defendant raises the issue of personal jurisdiction, a plaintiff has the burden of pleading and proving sufficient minimum contacts with the forum state to justify the exercise of personal jurisdiction. State ex rel. William Ranni Assoc. v. Hartenbach, 742 S.W.2d 134, 137 (Mo. banc 1987). While the determination of jurisdiction is for the trial court "in the first instance," the sufficiency of the evidence to make a prima facie case demonstrating that the trial court may exercise personal jurisdiction is a question of law, which we review independently on

appeal. Wilson Tool & Die, Inc. v. TBDN-Tenn. Co., 237 S.W.3d 611, 615 (Mo. App. E.D. 2007).

When presented with a motion to dismiss for lack of personal jurisdiction, a trial court is limited to examining the petition on its face and the supporting affidavits in determining the limited question of personal jurisdiction. Id. The plaintiff is not required to prove the elements forming the basis of the defendant's liability, but must demonstrate that the acts contemplated by the long-arm statute took place. Aldein v. Asfoor, 213 S.W.3d 213, 215 (Mo. App. E.D. 2007).

Analysis

Because the record before this Court contains no affidavits relating to the issue of the trial court's exercise of personal jurisdiction over Respondents, our review is limited to examining the Amended Petition on its face. The issue before us is whether Appellant has met his burden of pleading the commission of acts contemplated by Missouri's long-arm statute, and the presence of sufficient minimum contacts with Missouri to justify the exercise of personal jurisdiction.

In Missouri, for courts to invoke personal jurisdiction over a non-resident defendant, the plaintiff must make a prima facie showing that 1) the cause of action arose out of an activity covered by Missouri's long-arm statute, Section 506.500, RSMo 2000¹ and 2) the defendant has sufficient minimum contacts within Missouri to satisfy the requirements of due process. Wilson Tool & Die, Inc., 237 S.W.3d at 614-15.

Appellant alleges that he has sufficiently pleaded in his Amended Petition that his causes of action arose from Respondents' transaction of business in Missouri and their commission of tortious acts in Missouri. Appellant further claims that allegations of Respondents' travel to Missouri, as well as Respondents' mailing of documents and correspondence into Missouri, sufficiently plead and demonstrate the minimum contacts necessary to satisfy the requirements of

¹ Unless otherwise indicated, all further statutory references are to RSMo 2000.

due process. Respondents counter that the allegations of the Amended Petition fail to demonstrate that the causes of action arise out of Respondents' contacts in Missouri, or that Respondents "purposefully availed" themselves to jurisdiction in Missouri. Our examination of the Amended Petition leads us to conclude that Appellant has failed to demonstrate the necessary minimum contacts required to make a prima facie showing that Respondents are subject to personal jurisdiction in Missouri. Because our analysis of the due process requirement of minimum process is dispositive of this appeal, we will consider Appellant's points out of order, and first address his second point on appeal. We decline to review Appellant's arguments under Missouri's long-arm statute contained within his first point on appeal.

Point II - Minimum Contacts

Even if Appellant is able to demonstrate that his cause of action arose out of Respondents' conduct under Missouri's long-arm statute, it remains incumbent upon Appellant to plead and prove that Respondents had sufficient minimum contacts with Missouri to satisfy the requirements of due process and establish personal jurisdiction over Respondents. See Wilson Tool & Die, Inc., 237 S.W.3d at 614-15. The exercise of personal jurisdiction over a defendant is consistent with the due process requirements of the Fourteenth Amendment if the non-resident defendant has certain "minimum contacts" with the forum state such that the maintenance of the suit does not offend traditional notions of "fair play and substantial justice." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985); State ex rel. William Ranni Assocs., 742 S.W.2d at 137. It is essential in each case that the non-resident defendant commits some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." State ex rel. William Ranni Assocs., 742 S.W.2d at 137-38 (internal quotations omitted). This "purposeful availment"

requirement ensures a defendant will not be haled into a jurisdiction solely because of random, fortuitous, or attenuated contacts. Johnson Heater Corp. v. Deppe, 86 S.W.3d 114, 120 (Mo. App. E.D. 2002) (internal quotations omitted). Furthermore, “[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.” Conway v. Royalite Plastics, Ltd., 12 S.W.3d 314, 319 (Mo. banc 2000). Jurisdiction is proper where the contacts with the forum state result from actions by the defendant that create a substantial connection with the forum state. Id.

In analyzing minimum contacts to satisfy the due process requirements, a court focuses on the relationship between the defendant, the forum, and the litigation. State ex rel. Nixon v. Beer Nuts, LTD, 29 S.W.3d 828, 835 (Mo. App. E.D. 2000). A defendant’s contacts in connection with the forum state must be purposeful, such that the defendant should reasonably anticipate being haled into court in that state. Wilson Tool & Die, Inc., 237 S.W.3d at 616.

Missouri courts consider five factors in determining whether a non-resident defendant has sufficient minimum contacts for a Missouri court to exercise personal jurisdiction: “1) the nature and quality of the contact; 2) the quantity of those contacts; 3) the relationship of the cause of action to those contacts; 4) the interest of Missouri in providing a forum for its residents; and 5) the convenience or inconvenience to the parties.” Id. Of these factors, the first three are of primary importance and the last two of secondary importance. Aldein, 213 S.W.3d at 216. The “minimum contacts” test is not susceptible to mechanical application; instead “the facts of each case must be weighed to determine whether the requisite affiliating circumstances are present.” Beer Nuts, LTD, 29 S.W.3d at 834 (internal quotations and citations omitted).

Here, the parties chose not to submit any affidavits in support or in opposition to the underlying Second Motion to Dismiss. Accordingly, we are left with only the Amended Petition

as a basis for our review. At the core of Appellant's argument that he has met his burden of pleading personal jurisdiction over Respondents is his allegation that Kopp traveled to Missouri to meet with him for the purpose of discussing their business relationship. We note first that a single visit to Missouri may, in certain circumstances, support an exercise of personal jurisdiction. See Watlow Elec. Mfg. Co. v. Sam Dick Indus., Inc., 734 S.W.2d 295 (Mo. App. E.D. 1987). However, while this allegation may suffice to plead the requisites for exercising personal jurisdiction over a non-resident defendant in some cases, when considered in the context of the remaining allegations contained in the Amended Petition, we find that Appellant has failed to plead Respondents' requisite minimum contacts with Missouri sufficient to satisfy the due process requirements of the Fourteenth Amendment.

First, it is important to note that the "nature and quality" of Respondents' alleged contacts with Missouri were minimal. Appellant did not plead the quality of contacts necessary to subject Respondents to jurisdiction in this State. Appellant alleges that he solicited and initiated contact with Respondents when he sought Respondents' services for the interior design of his property in New York. See Childers v. Schwartz, 262 S.W.3d 698, 703 (Mo. App. W.D. 2008) (finding unilateral conduct by the plaintiff in soliciting defendant cannot be used to satisfy the "purposeful availment" test). To the extent Appellant argues that Kopp's visit to Missouri establishes sufficient minimum contacts so as to allow Missouri courts to exercise personal jurisdiction over Respondents, we are not persuaded. Appellant alleges that Kopp visited Missouri to discuss the business arrangement, but this visit occurred before the New York apartment was purchased by Appellant, and more than a year before any business arrangements were formally concluded between Appellant and Respondents. See State ex rel. Barnes v. Gerhard, 834 S.W.2d 902, 904 (Mo. App. E.D. 1992) (finding it was not probable that the

defendant would anticipate being sued in Missouri when he was hired by a Missouri resident to litigate an Illinois action, after only traveling to Missouri once and making telephone calls to Missouri). The Amended Petition contains no allegations that Respondents entered into Missouri at anytime thereafter, and only transmitted information to Missouri regarding their business in New York.

While Respondents also are alleged to have mailed several documents to Missouri, Appellant does not allege that Respondents maintained an agent in Missouri, or conducted any business in Missouri other than the mailing of documents regarding the New York apartment. See Elaine K. v. Augusta Hotel Assoc. Ltd. P'ship, 850 S.W.2d 376, 379 (Mo. App. E.D. 1993). Missouri courts have clearly held that the mere use of the interstate mail and telephone are insufficient to satisfy due process requirements. Johnson Heater Corp., 86 S.W.3d at 120 (phone calls, mailings, and a facsimile transaction were not enough to create a “substantial connection” with Missouri such that compelling defendant to court in Missouri would not offend the notion of fair play); Elaine K., 850 S.W.2d at 379 (contacts limited to the use of interstate mail and phone facilities are insufficient to satisfy due process requirements).

Appellant also asserts that payments he made to Respondents from Missouri are a factor to be considered in measuring the Respondents’ “minimum contacts.” However, it also has been clearly decided by our courts that “[a] financial loss of a Missouri resident as a result of [the defendant’s] out-of-state activities does not make [the defendant] amenable to the courts of this state.” Anderson Trucking Serv., Inc. v. Ryan, 746 S.W.2d 647, 649 (Mo. App. E.D. 1988); see also Childers, 262 S.W.3d at 704 (finding payment to a non-resident defendant from the plaintiff’s escrow accounts insufficient to establish the necessary minimum contacts). Respondents are not alleged to have solicited Appellant’s business in Missouri, to have traveled

to Missouri after the business relationship was initiated, or to have conducted any activity in Missouri other than the one visit in 2006. At most, Respondents' pleaded contacts with Missouri are fortuitous, attenuated, and born of the necessity of communicating with a client regarding a personal service agreement to be performed in New York.

Second, we find the "quantity of the contacts" Respondents are alleged in the Amended Petition to have had with Missouri to be limited, and somewhat tenuous. Appellant's arguments to support the exercise of jurisdiction over the out-of-state Respondents are delicately balanced on its allegations that Respondents mailed documents to Appellant in Missouri, and visited Appellant in Missouri one time. The mailings of documents into a state, when the business relationship is focused on goods and services provided out of state, are not sufficient to satisfy the requirements of the due process clause as these actions do not demonstrate that Respondents "purposely availed [themselves] of the privilege of conducting activities within" Missouri. See Beer Nuts, LTD, 29 S.W.3d at 835; Farris v. Boyke, 936 S.W.2d 197, 201 (Mo. App. S.D. 1996) (finding defendants' four visits to Missouri as well as telephone calls and communications with people in Missouri did not provide sufficient connections with the State such that the defendants should reasonably anticipate being hauled into court in Missouri).

Third, we find that the "relationship of the cause of action to those contacts" does not satisfy the minimum contacts test. The causes of action alleged by Appellant in his Amended Petition arose from Respondents' actions in New York, which is the place where the goods and services were actually delivered and performed. The allegations contained in the Amended Petition leave little doubt that the performance of the business relationship between Appellant and Respondents was to be performed in New York. Other than the allegation of the 2006 visit to Missouri by Kopp, Respondents are alleged to have met and conversed with Appellant outside

of Missouri. Respondents are not alleged to have purchased any of the furnishings in Missouri. The actual installation and physical work was performed in New York. From the inception, the exclusive focal point of the business relationship as set forth in the Amended Petition was Appellant's New York co-op apartment, and not his residence in Missouri. Appellant does not allege that Respondents were retained to provide a broad range of services for Appellant, of which the New York property was merely one assignment. Given the nature of the allegations contained in the Amended Petition, we cannot conclude that Appellant's causes of actions arise from Respondents' one visit to Missouri and the subsequent correspondence sent to Appellant in Missouri.

Finally, when examining "the interest of Missouri in providing a forum for its residents" and "the convenience or inconvenience to the parties," we find these factors similarly do not fall in Appellant's favor. Although Appellant is located in Missouri, the goods and services provided by Respondents were all located in New York. We see no reason why Appellant, who clearly not only owns a residence in New York, but alleges in his pleadings that "he was scheduled to move into [the residence in New York] in December of 2007," could not litigate his case in New York. While Missouri may have an interest in providing a forum for a Missouri resident litigating a matter arising from a personal service agreement to be completed in another state, any such interest is secondary. Aldein, 213 S.W.3d at 216. As for the convenience of the parties, the property and work in question is located in New York, any witnesses regarding the workmanship presumably also would be located in New York. Because Appellant owns the property in New York, there is no legitimate reason why he should not be willing to travel there to litigate his claims regarding that property.

We find the facts of this case are similar to those in State ex rel. Barnes v. Gerhard, 834 S.W.2d 902 (Mo. App. E.D. 1992) and Farris v. Boyke, 936 S.W.2d 197 (Mo. App. S.D. 1996). In State ex rel. Barnes, the defendant, an Illinois attorney, was hired by a Missouri resident to represent his mother, an Illinois resident, in an Illinois lawsuit. 834 S.W.2d at 903. The defendant made only one trip to Missouri, five days prior to being hired in the litigation, in order to discuss the litigation and become familiar with the case and the file. Id. In addition to the visit, there were a number of phone calls between the defendant and Missouri residents. Id. After analyzing several other similar cases, this Court found that it was not probable the defendant would anticipate being sued in Missouri because he handled Illinois litigation for an Illinois resident, even if he was hired by a Missouri resident, because he did not purposefully avail himself of the benefits and protections of the laws of Missouri. Id. at 904. This Court found the defendant did not have minimum contacts with Missouri sufficient to satisfy the due process requirements necessary for personal jurisdiction. Id.; compare Watlow Elec. Mfg. Co., 734 S.W.2d at 297-98 (This Court found the exercise of personal jurisdiction was proper when the defendant only visited Missouri once and communicated with the plaintiff in Missouri via telephone and through the mail. However, in this case the agreement was to be performed in Missouri and the parts were to be manufactured in Missouri.). The facts in State ex rel. Barnes are strikingly similar to those set forth in the Amended Petition. As in State ex rel. Barnes, Kopp visited Missouri only once. The visit was for the purpose of examining furniture Appellant had in his St. Louis home and develop ideas for decorating an apartment Appellant planned to purchase in New York. In essence, Respondents used the visit to become familiar with the job they were asked to perform in New York. Thereafter, like the attorney in State ex rel. Barnes, Respondents had several mail and telephone contacts with Appellant in Missouri. However,

according to the pleadings, the subject of the mail and telephone contacts always related to the services Respondents were to perform in New York. Moreover, similar to State ex rel. Barnes, Respondents' services were performed outside of Missouri, and Respondents' actions from which Appellant's claims arose all occurred in New York.²

In Farris, the defendants were Illinois residents and co-trustees of a trust created by a settlor, also a resident of Illinois. 936 S.W.2d at 199. One of the assets of the trust corpus was a portion of real estate located in Missouri. Id. After the death of the settlor, the defendants traveled to Missouri on four occasions to investigate the real estate in question. Id. at 200. The defendants also were involved in "several dozen telephone conversations, facsimiles and letters" transmitted between Illinois and Missouri. Id. After review of the applicable case law, the Southern District found that the defendants' "physical presence in Missouri on four occasions and their telephone calls and communications with people within the state, do not provide those affiliating connections with the forum state such that they should reasonably anticipate being hauled into court in Missouri." Id. at 201. The personal contacts between the defendants and Missouri in Farris, where the appellate court declined to exercise personal jurisdiction, were far more substantial than the contacts alleged in the Amended Petition in this case. Similarly, the only contacts here were one visit to Missouri to discuss the New York apartment project and several subsequent mail and telephone communications.

The limited contacts alleged in the Amended Petition do not depict a "substantial connection" with Missouri demonstrating that Respondents should reasonably anticipate being

² Appellant alleges that Respondents misrepresented the amount of fees and commissions to be charged. Paragraph 11 of the Amended Petition sets forth the factual basis of Appellant's claim, and asserts that, *inter alia*, "[b]ased on [Appellant's] conversations with [Kopp] . . . [Appellant] understood and believed that [Kopp] would charge the standard and reasonable commission of 20-30% for his services." Even taking these allegations as true, Appellant does not allege that "[Appellant's] conversations with [Kopp]" occurred in Missouri, or that any of Respondents' conduct that forms the basis of Appellant's misrepresentation claims occurred in Missouri.

haled into court here. The Amended Petition is insufficient to justify the exercise of this Court's personal jurisdiction over Respondents.

Appellant's Amended Petition was insufficient, as a matter of law, to make a prima facie showing of the requisite minimum contacts to satisfy the constitutional requirements of due process. For Missouri to assume jurisdiction in this case would violate due process and offend traditional notions of fair play and substantial justice. The trial court's finding that Missouri lacked personal jurisdiction over Respondents was proper. Point II is denied.

Point III – Discovery

Appellant believes Respondents perform a significant amount of work for Missouri residents, and seeks the opportunity for discovery to more fully develop those facts. In his final point on appeal, Appellant asserts the trial court abused its discretion in refusing him an opportunity to conduct his requested discovery. We disagree.

When administering the rules of discovery, the trial court is vested with wide discretion. Mello v. Giliberto, 73 S.W.3d 669, 673 (Mo. App. E.D. 2002). A trial court abuses its discretion when its ruling is “clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” Id. at 673-74 (internal quotations omitted).

Analysis

To be entitled to discovery, a plaintiff is required to allege *facts* in his petition, which, if true, are sufficient to establish jurisdiction. Id. at 673. In the absence of those alleged facts, the plaintiff is not entitled to discovery. Id.

In this case, the trial court found, and we affirm, that Appellant has failed to allege facts in his Amended Petition to support the exercise of jurisdiction by the Missouri courts. Having

failed to allege facts in the Amended Petition to support a finding of personal jurisdiction over Respondents, we conclude that the trial court did not err and abuse its discretion in denying Appellant an opportunity to conduct discovery on issues related to personal jurisdiction.³ Point III is denied.

Conclusion

The judgment of the trial court is affirmed.

Kurt S. Odenwald, Judge

Nannette A. Baker, C.J., Concurs
Lawrence E. Mooney, J., Concurs

³ Given our disposition of Point III, Appellant's Motion to Supplement the Record on Appeal is denied as moot.