

IN THE MISSOURI SUPREME COURT

Supreme Court No. SC 90205

DONALD L. BRYANT, JR.,

Appellant,

vs.

SMITH INTERIOR DESIGN GROUP, INC. and WILLIAM KOPP,

Respondents.

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS

FOR THE EASTERN DISTRICT

APPELLANT'S SUBSTITUTE REPLY BRIEF

**THOMPSON COBURN LLP
John R. Musgrave, #20359
A. Elizabeth Blackwell, # 50270
One U.S. Bank Plaza
St. Louis, Missouri 63101
314-552-6000
314-552-7000 (facsimile)**

**Attorneys for Appellant
Donald L. Bryant, Jr.**

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ARGUMENT

Mr. Bryant asserts, *inter alia*, claims for fraudulent misrepresentation and fraudulent concealment, which arise out of a series of false and misleading communications Defendants intentionally sent into the state of Missouri for the purpose of defrauding Mr. Bryant. The Missouri Court of Appeals for the Eastern District held that the due process clause of the Fourteenth Amendment to the U.S. Constitution prevents the Missouri courts from exercising jurisdiction over the out-of-state Defendants-Respondents, even though they are alleged to have purposefully directed fraudulent communications into the state. The federal courts of appeal have held to the contrary. Mr. Bryant urges this Court to align Missouri with the decisions of the federal courts.

Defendants do not challenge the reasoning of the federal courts cited by Mr. Bryant. Rather, they argue that the cases do not apply here for three different reasons. First, Defendants argue here, for the first time, that Mr. Bryant failed to demonstrate that his claims arose from fraudulent communications. Second, Defendants argue that the federal decisions are distinguishable, because Defendants did not attempt to defraud Mr. Bryant until *after* he called them to inquire about their services. Third, Defendants argue that Mr. Bryant's claims are really breach of contract claims, not fraud claims. As shown below, all three arguments are without merit and none will allow Defendants to avoid answering for their fraud in the courts of this State.

I. The Court of Appeals Erred in Holding that the Federal Due Process Clause Prohibits the Exercise of Personal Jurisdiction Over Respondents, Because Directing False and Misleading Communications into the Forum, Which Respondents Are Alleged to Have Done, Satisfies the Due Process “Minimum Contacts” Requirement.

As shown in Mr. Bryant’s opening brief, the federal courts have uniformly held that allegations that an out-of-state defendant purposefully directed fraudulent communications into the forum state are sufficient to permit an exercise of jurisdiction over the defendant, where the plaintiff’s causes of action arise out of those communications.¹ See Appellant’s Sub. Br. at 10-11. Rather than challenge the reasoning of these federal decisions, Defendants seek to avoid their application here, arguing that: (1) “Plaintiff failed to allege facts demonstrating that his cause of action arose from fraudulent communications,” (2) Plaintiff “failed to allege facts showing that

¹ See, e.g., Murphy v. Erwin-Wasey, Inc., 460 F.2d 661, 664 (1st Cir. 1972) (“there can be no constitutional objection to Massachusetts asserting jurisdiction over the out-of-state sender of a fraudulent misrepresentation, for such a sender has thereby ‘purposefully avail[ed] itself of the privilege of conducting activities within the forum State....’”); Lewis v. Fresno, 252 F.3d 352, 358-59 (5th Cir. 2001) (“‘[w]hen the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment.’”).

any such communications were purposefully or voluntarily directed to the State of Missouri,” and (3) “Plaintiff’s cause of action, such as it is, arose from the personal services agreement between the parties.” Resp. Sub. Br. at 15-16. As shown below, Defendants cannot avoid application of the federal case law cited by Mr. Bryant on any of these three grounds.

A. The Amended Petition Alleges Claims Arising from Fraudulent Communications.

Defendants’ first argument – that “Plaintiff failed to allege facts demonstrating that his cause of action arose from fraudulent communications” – fails because Mr. Bryant specifically pled each of the required elements of fraudulent concealment and fraudulent misrepresentation. First, the Amended Petition specifically identifies several written communications that Defendants sent to Mr. Bryant that fraudulently concealed material information from him, as well as communications containing affirmative false statements Defendants made to Mr. Bryant that he alleges were intentionally false and misleading. For example, in paragraphs 12-13, 15-17, and 20 of his Amended Petition, Mr. Bryant identifies specific billing statements that Defendants sent to him in which Defendants fraudulently concealed the amounts they were charging him for commissions. (See L.F. at 64-67). Likewise, in his Amended Petition, Mr. Bryant identifies particular affirmative statements by Defendants that he alleges were fraudulent. For example, in Paragraph 12 of his Amended Petition, Mr. Bryant alleges that Defendants’ references to “Unit Price[s]” and “Extended Price[s]” in correspondence to him were false and/or

misleading, because they actually included undisclosed amounts for unauthorized commissions. (L.F. at 64-65). Mr. Bryant also alleges that certain billing statements included fraudulent charges – *e.g.*, incorrect charges and charges for time/travel not related to performing design services for Mr. Bryant. (See, e.g., Amend. Pet. at ¶¶ 16, 25, L.F. at 66, 68-69).

Nevertheless, Defendants argue that “Plaintiff has failed to set forth with particularity what purportedly ‘fraudulent’ statements were purposefully directed to Defendants (sic) and has generally failed to satisfy the strict requirements of pleading a fraud claim.” Resp. Sub. Br. at 18. As shown above, that argument is without merit. Mr. Bryant specifically identified several fraudulent statements that were purposefully directed to him, to support his affirmative fraud claims. Moreover, under Brown v. Mickelson, 220 S.W.3d 442 (Mo. Ct. App. W.D. 2007), the very case Defendants cite to support their argument, where the claim is for fraudulent concealment, the “‘party’s failure to disclose the information serves as a substitute for the false representation element required in fraud....’” Brown, 220 S.W.3d at 451.

Mr. Bryant also specifically alleged all of the other elements of his fraud claims. The Amended Petition alleges the materiality of the information misrepresented and/or concealed. (See Amend. Pet. at ¶ 23, L.F. at 68) (alleging that he would never have agreed to pay commissions ranging up to 172% if they had been disclosed to him). Mr. Bryant also specifically alleges his own reliance on the concealment. (See Amend. Pet. at ¶ 13, L.F. at 65) (alleging that he paid the fraudulent invoices sent to him because they

concealed and did not disclose the fact that they included amounts for unauthorized commissions). The Amended Petition further alleges that Mr. Kopp knew his affirmative misstatements were false. (See Amend. Pet. at ¶ 34, L.F. at 71) (“These representations were false and Defendants knew they were false when made.”). The Amended Petition also alleges that Mr. Kopp was aware that the commissions being charged had not been agreed to by Mr. Bryant. (See Amend. Pet. at ¶ 13, L.F. at 65 (alleging that parties had not agreed to commissions being charged); ¶ 19, L.F. at 67 (alleging that Mr. Kopp’s representative refused to explain commissions being charged); ¶ 20, L.F. at 67 (alleging that Mr. Kopp initially refused to reveal the amount of the commissions); id. (alleging that Mr. Kopp finally acknowledged that the commissions were not the same as those Mr. Kopp charged his other clients)). The Amended Petition also alleges that Mr. Kopp intended for Mr. Bryant to rely on the fraudulent documents. (See, e.g., Amend. Pet. at ¶ 28, L.F. at 69) (alleging that Kopp demanded payment of the false invoices). Giving the allegations of the Amended Petition the intendment most favorable to the existence of the jurisdictional fact, as is required,² Mr. Bryant’s Amended Petition clearly alleges facts demonstrating that his causes of action arise from fraudulent communications.³

² Moore v. Christian Fid. Life Ins. Co., 687 S.W.2d 210, 211 (Mo. Ct. App. W.D. 1984).

³ Defendants also argue: “[I]t is the initial meeting and conversations, and the ‘agreement which [Plaintiff] believed and understood had been reached’ which form the ‘factual basis’ for Bryant’s allegations that the subsequent invoices and mailings from Kopp were misleading or constituted misrepresentations. Yet Plaintiff does not allege that this

B. Defendants' Decision to Defraud Mr. Bryant and Actions Taken in Furtherance of that Goal Were Purposeful.

Defendants' second argument is that their decision to send fraudulent and misleading communications into Missouri, in attempt to defraud Mr. Bryant out of money, does not amount to "purposeful availment," because "the communications were made in response to contact initiated by the Plaintiff." Resp. Subst. Br. at 20. This argument fails on both the facts and the law. As an initial matter, the Amended Petition does not support Defendants' contention that it was not their conduct that led to the formation of a business relationship between the parties. The Amended Petition alleges:

- (1) Defendants were already performing substantial interior design services in the state of Missouri when Mr. Bryant initially contacted them (Amend. Pet. at ¶8, L.F. at 63);
- (2) Mr. Bryant only learned of Defendants' interior design services as a result of their prior work in the state of Missouri (Amend. Pet. at ¶8, L.F. at 63);

meeting or these conversations occurred in Missouri or were directed by Defendants to Missouri. Resp. Sub. Br. at 16 (citations omitted). First, Mr. Bryant does allege that he met with Defendants in Missouri. (See Amend. Pet. at ¶ 9, L.F. at 63). Second, where those conversations occurred does not alter the fact that Mr. Bryant alleges that particular communications Defendants sent into the state of Missouri were fraudulent.

(3) One of Defendants’ existing Missouri clients suggested that Mr. Bryant contact Defendants (Amend. Pet. at ¶8, L.F. at 63);

(4) Defendants proactively responded to Mr. Bryant’s initial inquiry by traveling into the state of Missouri to meet with Mr. Bryant, to attempt to sell their services to him, and to begin work on the project (Amend. Pet. at ¶9, L.F. at 63);⁴ and

(5) Defendants purposefully engaged in a scheme to defraud Mr. Bryant and intentionally drafted and sent a series of false and misleading communications to Mr. Bryant in the state of Missouri in furtherance of that goal.

In short, the factual allegations of the Amended Petition contradict Defendants’ contention that they were simply the passive recipients of a business inquiry from Mr. Bryant, and are now, to their great surprise, being sued by him in Missouri.

This Court should reject Defendants’ efforts to characterize themselves as passive agents in the events giving rise to this litigation. See Resp. Sub. Br. at 30-31 (claiming Mr. Bryant’s causes of action “arose from his own decision to proactively seek out-of-state services from a Florida resident...”). This litigation does not arise from Mr. Bryant’s decision to contact Defendants, but on the intentional decision of Defendants to

⁴ Defendants’ assertion that Mr. Bryant’s wife asked them to fly to Missouri for a meeting is not supported by the record. (See Amend. Pet. at ¶9, L.F. at 63) (alleging that Defendants came to St. Louis after speaking with Mrs. Bryant, but not alleging that Mrs. Bryant requested that they do so).

perpetrate a fraud on Mr. Bryant, one of their Missouri clients, and on their purposeful actions taken in furtherance of that fraud.

Moreover, even if Defendants had done nothing to set in motion the chain of events leading to their establishment of a business relationship with Mr. Bryant, the case law does not support Defendants' efforts to avoid the jurisdiction of the Missouri courts on the ground that Mr. Bryant allegedly initiated the business relationship between the parties. To the contrary, federal courts have found that, where the plaintiff's claims arise out of fraudulent communications the defendant sent into the forum, the minimum contacts "purposeful availment" requirement is satisfied, without more. See, e.g., Lewis, 252 F.3d at 358-59 ("[w]hen the actual content of communications with a forum gives rise to intentional tort causes of action, *this alone constitutes purposeful availment.*") (emphasis added).

As Defendants point out, where the out-of-state defendant initiated the contact with the forum, courts have noted that this additional fact also supports jurisdiction. But none have held that it is necessary for jurisdiction, and it is not. See Kennedy v. Freeman, 919 F.2d 126, 129 (10th Cir. 1990) ("Whether a 'party solicited the business interface is irrelevant, so long as defendant then directed [his] activities to the forum resident.'") (quoting Lanier v. Am. Bd. of Endodontics, 843 F.2d 901, 910 (6th Cir. 1988)); see also Amerada Hess Corp. v. Diamond Servs. Corp., 1995 U.S. App. LEXIS 30946, 1995 WL 631817 (10th Cir. Okla. Oct. 27, 1995) (finding jurisdiction where non-resident defendant did not solicit relationship but accepted employment from plaintiff,

had numerous telephone conversations concerning its services with plaintiff's personnel in the forum state, mailed and faxed numerous documents relating to its services in the forum state, and sent its bill for services to, and received payment from, plaintiff's representatives in the forum state) (unpublished).

Defendants fail to cite a single case holding that an out-of state defendant can avoid jurisdiction as long as it only sends fraudulent communications into the state *after* being contacted by a state resident. The lone federal district court decision Defendants cite in support of their position, Callahan v. Harvest Bd. Int'l, Inc., 138 F.Supp.2d 147 (D. Mass. 2001), does not so hold. In fact, Callahan is wholly inapplicable here because, contrary to Defendants' representation, in Callahan, the plaintiff's harm did not arise out of the allegedly fraudulent communication sent into the state. Compare Resp. Sub. Br. at 23 ("Although Callahan plainly 'arose from' a purportedly fraudulent misrepresentation set to the forum....") with 138 F.Supp.2d at 164 ("As an initial matter, the plaintiff's harms did not arise out of the letter sent to Massachusetts.").⁵ Defendants claim that they

⁵ Moreover, Callahan involved a defendant who sent a single letter into Massachusetts in response to a demand letter sent by a Massachusetts resident. Unlike the Callahan defendants, Defendants here purposefully chose to accept Mr. Bryant as a referral from their other Missouri clients, traveled into the state of Missouri for purposes of establishing and advancing their relationship with Mr. Bryant, and then purposefully sent false and misleading communications into the state of Missouri in an effort to defraud him.

can avoid the jurisdiction of the Missouri courts because they only defrauded Mr. Bryant *after* he contacted them is without merit. As the federal courts have held, Defendants' fraudulent misconduct directed at a Missouri resident is sufficient to satisfy the due process "purposeful availment" requirement, regardless of when it occurred.

C. Mr. Bryant's Claims Sound in Tort, Not Contract.

In their final argument, Defendants incorrectly claim that they can avoid the Court's jurisdiction here "because Plaintiff's cause of action, such as it is, arose from the personal services agreement between the parties."⁶ Defendants apparently claim that Mr. Bryant cannot assert claims for fraud, because they believe his claims sound in contract:

Plaintiff has framed his allegations as 'fraud,' because acceptance of the agreement by Defendants in Florida would constitute a Florida contract.

Defendants respectfully submit that the purported causes of action set forth in Plaintiff's Petition do not arise from the commission of tortious acts in Missouri by Plaintiffs (sic). If anything, the allegations amount to a breach of a contract that was entered into in Florida

Resp. Sub. Br. at 34. After Mr. Bryant filed this action for fraud in Missouri, Defendants filed a retaliatory lawsuit against Mr. Bryant in Florida, alleging breach of contract, seeking to force Mr. Bryant to litigate his claims against them in Florida. See Smith Interior Design Group, Inc. v. Bryant, 2009 WL 996054, 2009 U.S. Dist. LEXIS 36915

⁶ Resp. Sub. Br. at 15-16.

(S.D. Fla. Apr. 10, 2009) (slip copy).⁷ Mr. Bryant denies the formation of a valid contract between the parties.

Whether the claims sound in tort/fraud as Mr. Bryant alleges, or in contract as Defendants allege, goes directly to the merits of the controversy. As shown above, Mr. Bryant has satisfied the pleading requirements for the assertion of his fraud claims. And, under Missouri law, that is the end of the inquiry for purposes of the jurisdictional analysis. In deciding the issue of personal jurisdiction, the “court’s inquiry is limited to an examination of the petition on its face and the supporting affidavits and depositions when determining the limited question of personal jurisdiction; the ... court may not consider the merits of the underlying action.” Schilling v. Human Support Services, 978 S.W.2d 368, 370 (Mo. Ct. App. E.D. 1998). See also Longshore v. Norville, 93 S.W.3d 746, 751 (Mo. Ct. App. E.D. 2002) (“[w]hen determining the issue of personal jurisdiction, the Court should not consider the merits of the underlying action.”).

⁷ The U.S. District Court for the Southern District of Florida has stayed the Florida litigation pending resolution of this appeal. See Order Granting Motion to Stay Proceeding Pending Resolution of Jurisdictional Issue in Related State Case and Denying Without Prejudice Motion for Certification of Order to File Immediate Appeal and to Stay Proceedings, Smith Interior Design Group, Inc., v. Bryant, Case No. 08-81038-CIV-RYSKAMP/VITUNAC (S.D. Fla. July 8, 2009), attached hereto at A-1 to A-5.

Defendants cannot require that Mr. Bryant's claims be presented as contract claims because they believe it would help them avoid jurisdiction in Missouri.

D. An Exercise of Jurisdiction Over a Defendant Is Proper Under Missouri's Five-Factor Test Where the Plaintiff's Claims Arise Out of Fraudulent Communications Sent by the Defendant into the Forum.

Consistent with the federal decisions cited by Mr. Bryant in his opening brief, it is clear that the exercise of personal jurisdiction is also proper under Missouri's five-factor test, where, as here, the plaintiff's causes of action directly arise from fraudulent communications sent by the defendant into the state. See Watlow Elec. Mfg. Co. v. Sam Dick Indus., Inc., 734 S.W.2d 295, 297 (Mo. Ct. App. E.D. 1987). Under that test, the Court evaluates: (1) the nature and quality of Defendants' contacts with Missouri, (2) the quantity of those contacts, (3) whether those contacts relate to the causes of action, (4) Missouri's interest in providing a forum to Mr. Bryant, and (5) the inconvenience of the parties. Id. Under that test, directing fraudulent communications into the state permits an exercise of jurisdiction, particularly where such communications are the basis of the lawsuit.

Here, Defendants contacts are of the quality and nature to justify Missouri's jurisdiction over them. Defendants travelled to St. Louis to establish their business relationship with Mr. Bryant, sent fraudulent communications to him in St. Louis, and communicated by email, mail and telephone with Mr. Bryant in St. Louis to extract payment for their fraudulent conduct from Mr. Bryant in St. Louis. (L.F. at 64-69).

Second and third, these contacts are sufficient in quantity, especially considering that each contact is directly related to the causes of action alleged in the Amended Petition. See, e.g., Tempmaster Corp. v. Elmsford Sheet Metal Works, Inc., 800 S.W.2d 45, 47-48, (Mo. Ct. App. W.D. 1990) (finding jurisdiction over out of state defendant despite “slight” number of contacts because “the nature of these contacts and their relationship to the cause of action are such that it does not seem unfair.”). Fourth, Mr. Bryant is a Missouri resident, and Missouri has an interest in affording its residents a forum to address the injuries caused to them in the state. Fifth, Defendants do not argue in their substitute brief that they would be inconvenienced to litigate in Missouri. Thus, Missouri’s five-factor test is also satisfied.

II. Jurisdiction Is Proper Under the Missouri Long-Arm Statute.

Defendants also seek to avoid the exercise of jurisdiction by arguing that they have not satisfied the provisions of the Missouri long-arm statute. First, Defendants again argue that Mr. Bryant’s claims are not really tort claims, but contract claims. Yet, Mr. Bryant has not alleged breach of contract and does not seek contractual damages. Rather, he asserts that Defendants perpetrated a fraud on him through a series of false and misleading communications sent to him in the state of Missouri. Under Missouri law, those allegations are sufficient to satisfy the “tortious act” provision of the long-arm statute. See Longshore, 93 S.W.3d at 752 (“The tortious act section of Missouri’s long arm statute includes extraterritorial acts that produce consequences in the state.”). Defendants cannot re-write the pleadings to defeat jurisdiction.

While Defendants deny that they “transacted business” in Missouri within the meaning of the long-arm statute, they fail entirely to address the actions that Mr. Bryant claims satisfy that section of the long arm statute – i.e., Defendants’ trip into the state of Missouri to meet with Mr. Bryant and formalize the parties’ business relationship. Under Missouri law, that meeting alone is sufficient to satisfy the long-arm statute. See, e.g., Watlow Electric, 734 S.W.2d at 297-98 (“[R]espondents sent its chief engineer to Missouri to finalize the design of the product. This single meeting is sufficient to satisfy the transaction of business requirement....”). Because Defendants transacted business in the state of Missouri, the long-arm statute permits the courts of this state to exercise personal jurisdiction over them.

CONCLUSION

For the foregoing reasons and for the reasons stated in his opening brief, Appellant Donald L. Bryant, Jr., requests that this Court reverse the judgment of the court of appeals, remand the case to the circuit court for further proceedings, and grant such other and further relief as the Court may deem proper.

Respectfully submitted,

THOMPSON COBURN LLP

By _____

John R. Musgrave, #20359
A. Elizabeth Blackwell #50270
One U.S. Bank Plaza
St. Louis, Missouri 63101
314-552-6000
314-552-7000 (facsimile)

Attorneys for Appellant
Donald L. Bryant, Jr.

CERTIFICATION REQUIRED BY RULES 84.06(c) AND 84.06(g)

The undersigned hereby certifies that this Appellant's Substitute Reply Brief complies with the limitations in Rule 84.06(b), and that it contains 3792 words (exclusive of the cover, certificate of service, this certification, signature block and appendix) as counted by Microsoft Word 2003.

Appellant has filed an electric copy of the Substitute Reply Brief with the Clerk on a CD-ROM, and certifies that the electronic copy has been scanned for viruses and that it is virus-free.

Ryan K. Manger, MO Bar No. 53218

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Appellant's Substitute Reply Brief and an electronic copy on CD-ROM have been served by Federal Express overnight delivery, this 19th day of October, 2009 to:

Douglas P. Dowd
Paul G. Lane
Alex R. Lumaghi
Dowd & Dowd
Bank of America Tower
100 North Broadway, Suite 1600
St. Louis, Missouri 63102

Ryan K. Manger, MO Bar No. 53218

APPENDIX

Order, Smith Interior Design Group, Inc., v. Bryant, Case No. 08-81038-CIV-

RYSKAMP/VITUNAC (S.D. Fla. July 8, 2009).....A-1