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2012 IL App (3d) 110483-U

Order filed March 28, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

MINERALS DEVELOPMENT & SUPPLY CO.,)	Appeal from the Circuit Court
an Illinois Corporation,)	of the 10th Judicial Circuit,
)	Tazewell County, Illinois,
Plaintiff-Appellant,)	
)	
v.)	Appeal No. 3-11-0483
)	Circuit No. 10-L-109
)	
FLEXFRAC PROPPANT SAND SUPPLIERS,)	
LLC., a Texas limited liability company,)	Honorable
)	Paul Gilfillan,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court properly granted defendant's motion to dismiss, finding that it lacked personal jurisdiction over defendant. Defendant did not establish minimum contacts with Illinois sufficient to satisfy jurisdiction under the long-arm statute or due process.

¶ 2 Plaintiff Minerals Development & Supply Co. brought a two-count complaint against defendant flexFrac Proppant Sand Suppliers, LLC., alleging tortious interference with contract and

breach of contract. On flexFrac's motion, the trial court dismissed the complaint for lack of personal jurisdiction. Minerals Development appealed. We affirm.

¶ 3

FACTS

¶ 4 Plaintiff Minerals Development (MDSC) filed a complaint against defendant flexFrac for tortious interference with contract and breach of contract. The complaint alleged, in part, that flexFrac breached a confidentiality agreement it executed with MDSC by disclosing confidential information to Superior Silica Sand, which thereafter breached its contract with MDSC. The complaint provides that MDSC was an Illinois corporation with its offices located in Pekin. Its president was Kenin Edwards and its vice-president was James (Jamie) Cote. Its primary business was to provide raw earthen materials to manufacture frac sand. flexfrac was a Texas limited liability company with its offices in Texas. flexFrac's president was Andrew Adams and its vice-president was Micah Torres. It provided frac sand to oil and gas industry end-users, primarily in Texas. Superior, a Texas limited liability company with offices in Texas, provided frac sand to flexFrac, its exclusive distributor.

¶ 5 flexFrac filed a motion to dismiss, asserting that the trial court lacked personal jurisdiction over it. Attached to the motion was Adams's affidavit in which he denied flexFrac engaged in any activities or had contacts sufficient to establish jurisdiction in Illinois. Adams averred that MDSC initiated contact with flexFrac regarding an initial relationship, the confidentiality agreement, and a stock sale proposal. He also stated that flexFrac may have initiated calls and e-mails to MDSC but in limited volume and only in response to requests from MDSC. Torres averred in his affidavit that during negotiations with MDSC, he believed MDSC was a Texas corporation "for the purpose of the agreement and contract with Superior." In response to flexFrac's motion, MDSC filed affidavits,

including those of Edwards and Cote, that established that flexFrac sent at least 34 e-mails to MDSC, which were received in Illinois, and made 30 to 35 phone calls to MDSC officers, who were located in Illinois. Attached to Cote's affidavit were copies of 23 e-mail messages, which discussed the supply chain for frac sand. The e-mails were sent from flexFrac's Adams and Torres, directed to Edwards and Cote, and received in Illinois. MDSC filed supplemental affidavits, in which Edwards and Cote averred that flexFrac initiated discussions regarding the sale of MDSC stock, which included several phone calls from Adams and Torres.

¶ 6 A hearing took place on flexFrac's motion to dismiss, where the following evidence was presented. In January 2009, Edwards, Adams and Torres met in person for the first time in Wisconsin, where MDSC mined the raw materials it sold to Superior. Although Edwards stated he gave his business cards to Adams and Torres at the meeting, Adams did not remember whether he was given a business card and Torres believed he may or may not have received one. The business card identified Edwards as the president of MDSC, gave its address in Pekin, and its phone and fax numbers with 309 area codes. On February 13, 2009, MDSC executed a contract with Superior to provide it with raw materials for the production of frac sand. Also on February 13, 2009, Superior contracted with flexFrac to sell the frac sand it bought from MDSC.

¶ 7 On March 24, 2009, MDSC and flexFrac entered into a confidentiality agreement, which stated, in part:

“Supplier [MDSC] and the Recipient [flexFrac] [*sic*] are discussing certain business transactions including but not limited [to] the purchase and transfer of MDSC shares of the company (the ‘Potential Transactions’).”

Cote signed the agreement for MDSC in Illinois and e-mailed it to Torres in Texas, where Torres executed it and returned it via e-mail to Cote. On March 26, 2009, Edwards, Adams and Torres participated in a conference call. At the beginning of the call, Edwards offered to sell flexFrac 100% of MDSC's stock for \$45 million. The offer was rejected and no further sale discussion took place. During the remaining conversation, MDSC disclosed confidential information, including the costs of its raw materials and the price Superior paid for the materials.

¶ 8 Edwards testified that flexFrac requested the confidentiality agreement because flexFrac wanted to buy MDSC and asked for confidential information regarding MDSC's contract with Superior. He admitted there were no e-mails evidencing a stock sale discussion or terms of a proposed sale. The materials MDSC sold were mined in Wisconsin and shipped to and distributed in Texas. When speaking on the phone with flexFrac officers, he would be located in Illinois, Wisconsin or Missouri. Neither Adams nor Torres ever came to Illinois. According to Edwards, Torres admitted that he knew "we lived in Illinois."

¶ 9 Cote testified he did not recall who initiated the business relationship between the parties but the business plan involved the creation of flexFrac's role as a sales arm for Superior. The parties held meetings in Wisconsin and Texas. At Edwards's direction, he sent the confidentiality agreement to flexFrac in Texas. The agreement was executed to protect MDSC. flexFrac's wrongful actions strained and ended MDSC's relationship with Superior, and the loss of the relationship caused monetary damages to MDSC which were felt in Illinois. In his view, flexFrac was aware MDSC was located in Illinois, a statement Cote based on conversations and small talk in which he engaged with Adams and Torres. He "probably" gave them his business card. Although he lived and worked in Illinois, he would receive and send e-mails wherever he was located, including Illinois, Wisconsin,

and Texas.

¶ 10 Adams testified that MDSC originally called flexFrac and proposed that flexFrac become the marketing arm for the frac sand MDSC shipped to Texas from Wisconsin. The confidentiality agreement he signed was to protect MDSC. Any breach of the agreement would involve the disclosure of confidential information to Superior, located in Texas. The March 24 conference call was about a proposal Edwards had to lower flexFrac's costs; it was not about the sale of MDSC. The sale discussion lasted less than 10 minutes of the 45-minute call. He thought Edwards lived in Missouri and had no knowledge anyone had any involvement with Illinois.

¶ 11 Torres testified he initially received a phone call from Edwards, who had discovered flexFrac through its website. He thought MDSC was located in Wisconsin, where the raw materials and equipment were located. The in-person meetings between the parties took place in Wisconsin. He saw Edwards's personal car there on a trip and thought that Edwards lived in either Wisconsin, Missouri, or Georgia. He was aware MDSC was not located in Texas. He did not read the confidentiality agreement before he signed it but understood it had something to do with stocks. He believed that execution of the confidentiality agreement allowed flexFrac and MDSC to pursue a dialogue where Edwards would present a loophole that could help flexFrac reduce its costs. He took notes contemporaneously during the March 24 conference call. The purpose of the call was to help flexFrac reduce its costs, although Edwards opened the call with an offer to sell 100% of MDSC stock to flexFrac for \$45 million. flexFrac did not make an offer to buy MDSC and was not in a financial position to do so in March 2009.

¶ 12 The trial court considered that both counts of the complaint constituted, "in essence[,] a breach of contract case." The trial court's factual findings included: flexFrac's witnesses were more

credible than MDSC's witnesses; MDSC initiated the confidentiality agreement and the possibility of selling the business to flexFrac; MDSC sent the confidentiality agreement to Texas via e-mail; the agreement was executed in Texas; no meetings took place in Illinois; the confidentiality agreement did not involve the actual sale of MDSC in any substantive way; and none of flexFrac's conduct was "purposely, expressly or actively aimed at Illinois." The trial court held that it lacked personal jurisdiction and dismissed MDSC's complaint. MDSC appealed.

¶ 13

ANALYSIS

¶ 14 The issue on appeal is whether the trial court erred when it dismissed Minerals Development's complaint for lack of personal jurisdiction over flexFrac. MDSC challenges the trial court's finding that it lacked jurisdiction over flexFrac. MDSC submits that jurisdiction is proper in Illinois courts based on flexFrac's engagement in activities that confer jurisdiction under the state's long-arm statute and based on flexFrac's minimum contacts with Illinois from which the cause of action arose and that make it reasonable to be haled into court in this state.

¶ 15 In determining the question of personal jurisdiction, courts consider whether the assertion of jurisdiction comports with the Illinois long-arm statute and federal and state due process. *Viktron Limited Partnership v. Program Data Incorp.*, 326 Ill. App. 3d 111, 117 (2001). When federal and state due process concerns are satisfied, the long-arm statute is also satisfied, regardless of whether the defendant performed any of the statute's enumerated activities. *Keller v. Henderson*, 359 Ill. App. 3d 605, 612 (2005). It is the plaintiff's burden to prove jurisdiction is proper. *Bolger v. Nautica International, Inc.*, 369 Ill. App. 3d 947, 949 (2007). We will not reverse the trial court's determination regarding jurisdiction following an evidentiary hearing unless it was against the manifest weight of the evidence. *W.R. Grace & Co. v. Ensey*, 279 Ill. App. 3d 1043, 1046 (1996).

¶ 16 MDSC first maintains that flexFrac is subject to personal jurisdiction in Illinois because it committed a tort in Illinois and entered into a contract substantially connected with Illinois, both activities that confer jurisdiction under the long-arm statute. 735 ILCS 5/2-209(a)(2), (7) (West 2010). MDSC argues that flexFrac committed tortious interference with its contract with Superior, causing it injury in Illinois, and thus establishing jurisdiction. 735 ILCS 5/2-209(a)(2) (West 2010). MDSC further argues that Illinois has jurisdiction over flexFrac because flexFrac entered into a contract substantially connected with Illinois. 735 ILCS 5/2-209(a)(7) (West 2010). According to MDSC, because the confidentiality agreement it executed with flexFrac concerned the sale of stock of an Illinois corporation, the agreement was substantially connected with Illinois.

¶ 17 The Illinois long-arm statute provides, in part:

“(a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person *** to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts:

(2) The commission of a tortious act within this State;

(7) The making or performance of any contract or promise substantially connected with this State[.]

(c) A court may also exercise jurisdiction on any other basis now or

hereafter permitted by the Illinois Constitution and the Constitution of the United States.” 735 ILCS 5/2-209(a) (2), (7), (c) (West 2010).

¶ 18 To sustain jurisdiction under section 2-209(a)(2), a plaintiff must allege the defendant performed an act which caused an injury in Illinois and was tortious in nature. *Arthur Young & Co. v. Bremer*, 197 Ill. App. 3d 30, 36 (1990). In the alternative, the provision may be satisfied if the plaintiff establishes an economic injury in Illinois and activity by the defendant “indicating an intent to affect Illinois interests.” *Arthur Young & Co.*, 197 Ill. App. 3d at 36. As pertains to section 2-209(a), the place of the wrong is the place where the last event necessary to establish the defendant’s liability occurred. *Arthur Young & Co.*, 197 Ill. App. 3d at 36. The state in which the victim suffered an injury is considered the state in which the tort occurred. *Russell v. SNFA*, 408 Ill. App. 3d 827, 833 (2011). However, where none of the tortious acts occurred in Illinois, an economic loss to the plaintiff is insufficient to establish jurisdiction. *Poplar Grove State Bank v. Powers*, 218 Ill. App. 3d 509, 519 (1991). To determine whether a contract is substantially connected to Illinois, a court considers the following factors: (1) who initiated the transaction; (2) where the contract was formed; (3) where performance was to take place; (4) where the contract was negotiated. *Viktron*, 326 Ill. App. 3d at 117.

¶ 19 MDSC cannot establish jurisdiction based on commission of tortious interference in Illinois. It claims that it suffered economic injury in Illinois as a result of flexFrac’s breach of the confidentiality agreement. The breach, if any, occurred when flexFrac disclosed confidential information to Superior. The confidential information was shared by MDSC with flexFrac when the parties met in Texas. Both flexFrac and Superior are located in Texas. The disclosure of information

occurred in Texas and involved business transaction occurring in Texas. Although MDSC asserts that it suffered economic damage in Illinois, thus establishing jurisdiction because flexFrac committed a tortious act in this state, it does not present sufficient evidence of any flexFrac activities intended to affect interests in Illinois. The facts do not establish that the cause of action arose out of any acts connected with Illinois.

¶ 20 We also find that the confidentiality agreement was not substantially connected to Illinois and was not sufficient to establish jurisdiction. The trial court found that MDSC initiated execution of the confidentiality agreement. The pleadings and testimony support its conclusion. The agreement was prepared in Illinois and e-mailed to flexFrac in Texas where it was executed and returned via e-mail. Performance of the agreement, that is, flexFrac's non-disclosure of the confidential information, was to take place in Texas, where Superior was located. Lastly, it appears that there was no negotiation regarding the confidentiality agreement. Torres and Adams both indicated they conceded to MDSC's request flexFrac sign it. Moreover, contrary to MDSC's assertion, the evidence does not support its claim that the confidentiality agreement was designed to further negotiations of the sale of MDSC stock to flexFrac. Although MDSC's Edwards testified that flexFrac requested the confidentiality agreement in furtherance of its proposal to purchase MDSC, there was no documentary support, such as e-mails, discussing a stock sale or terms. FlexFrac's Adams testified that the confidentiality agreement was executed so the parties could discuss a cost reduction for flexFrac, not for discussion regarding a sale of MDSC. Torres stated that flexFrac was not in a financial position to purchase MDSC. The trial court noted that there was no viable discussion regarding the sale of MDSC stock. The evidence supports the trial court's findings that MDSC did not establish that the confidentiality agreement was substantially connected to

Illinois sufficient to confer jurisdiction.

¶ 21 MDSC also argues that jurisdiction in Illinois satisfies due process. It claims that it flexFrac has sufficient minimum contacts with Illinois to comport with federal and state due process concerns.

¶ 22 Federal due process is satisfied and an Illinois court has specific jurisdiction over a nonresident when: "(1) the defendant had minimum contacts with Illinois such that it was fairly warned that it may be haled into an Illinois court; (2) the action arose out of or was related to the defendant's contacts with Illinois; and (3) it is reasonable to require the defendant to litigate in Illinois." *Soria v. Chrysler Canada, Inc.*, 2011IL App. (2d) 101236 ¶ 18. The minimum contacts with Illinois must be such that an action in Illinois does not offend " 'traditional notions of fair play and substantial justice.' " *Viktron*, 326 Ill. App. 3d at 120, quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The minimum contacts "must involve '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.' " *Viktron*, 326 Ill. App. 3d at 120, quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). To determine the reasonableness element, courts consider (1) the burden on the defendant; (2) the interest of the forum state in resolving the dispute; (3) the interest of the plaintiff in obtaining relief; (4) the interest of the affected forums; and (5) the interests of the affected forums in the advancement of substantive social policies. *Russell*, 408 Ill. App. 3d at 836-37.

¶ 23 The first step in our analysis is whether flexFrac had sufficient minimum contacts with Illinois to confer jurisdiction in our courts. MDSC points to the e-mails and phone calls from flexFrac to MDSC in Illinois regarding the supply chain and the confidentiality agreement, the creation of the agreement in Illinois, and the conference call between the parties to discuss price

reduction and the stock sale. While acknowledging that the contacts were limited, MDSC characterizes them as “significant”, maintaining that the calls and e-mails concerned the sale of 100% stock in an Illinois corporation. According to MDSC, flexFrac’s activities were directed at Illinois and its injury resulted from those activities.

¶ 24 There is no evidence that flexFrac purposefully directed its activities at Illinois. In fact, according to Torres and Adams, they were not aware there was any Illinois connection with MDSC. MDSC initiated the business relationship between the parties after discovering flexFrac’s website. At that time, flexFrac was doing business solely in Texas. The business relationship between the parties concerned processing and sale of frac sand in Texas. The in-person meetings between the parties occurred in either Wisconsin or Texas. Torres and Adams observed the Wisconsin mine, where the equipment was located. Edwards and Cote both stated they received and made phone calls and e-mails in various states, including Illinois, Wisconsin, Missouri, and Texas. The confidentiality agreement was prepared in Illinois but executed in Texas and involved non-disclosure of information between two Texas companies in Texas. Edwards testified that he gave Torres and Adams his business card at their initial meeting in Wisconsin; neither man could recall whether they had received it. The trial court found flexFrac’s witnesses more credible than MDSC’s witnesses. It was in a better position to assess witness credibility. Other than the testimony of Edwards and Cote that they lived in Illinois and that flexFrac was aware of the fact, there are no facts to support a finding that flexFrac maintained minimum contacts with Illinois such that haling it into court here would not offend traditional notions of fair play and substantial justice.

¶ 25 We next consider whether the cause of action arose out of flexFrac's contacts with Illinois. As discussed above, MDSC has not established that flexFrac had minimum contacts with Illinois.

In addition, the cause of action did not arise out of or relate to any supposed contacts with Illinois. MDSC points to the confidentiality agreement which it contends concerned the sale of 100% of an Illinois corporation. However, the tortious interference and breach of contract alleged in MDSC's complaint concern the alleged disclosure of information between two Texas companies regarding costs and prices MDSC charged for supplies delivered to and processing done in Texas. The phone exchanges involving the confidentiality agreement were limited and initiated by MDSC. There are no e-mails evidencing any discussion or negotiation of the stock sale. The other e-mails presented by MDSC concerned the supply chain, which is irrelevant to the causes of action at issue. Moreover, because MDSC suffered only monetary injury in Illinois by Superior's alleged breach of contract, that fact alone is insufficient without the establishment of minimum contacts and activities directed at Illinois.

¶ 26 The next step in our analysis concerns whether it was reasonable to require flexFrac to litigate in Illinois. The first reasonableness factors favors flexFrac. The burden on flexFrac to litigate in Illinois would be substantial. Its witnesses would have to come to Illinois and it would have to bring its documentary evidence to Illinois. Any witnesses from Superior it wished to call would also have to travel from Texas to Illinois. The second factor generally would favor MDSC, an Illinois corporation. However, contrary to MDSC's claims, at issue is not the sale of an Illinois corporation but the alleged breach of a confidentiality agreement by two Texas companies in Texas making Illinois's interest negligible. The third factor, MDSC's interest in obtaining relief, does not favor MDSC. The record indicates that MDSC brought several actions against Superior in federal court in Wisconsin in connection with the events at issue in this appeal. While MDSC would reasonably anticipate relief, its interest in obtaining it apparently does not require it to occur in an

Illinois court. The fourth factor would favor Texas, not Illinois, since the alleged tortious interference and breach of contract occurred in Texas between two Texas companies. Finally, the fifth factor, the affected forums' interest in the advancement of substantive social policies, also favors Texas, not Illinois. Two Texas companies are involved and the contracts at issue concern processing done in Texas and sale of the final product also in Texas. Under these factors, we find it would not be reasonable to require flexFrac to litigate in Illinois.

¶ 27 Under the Illinois Constitution, due process requires it be “ ‘fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant’s acts which occur in Illinois or which affect interests located in Illinois.’ ” *Keller*, 359 Ill. App. 3d at 619, quoting *Rollins v. Ellwood*, 141 Ill. 2d 244, 275 (1990). Generally, when federal due process is satisfied, so are the due process requirements under the Illinois constitution. *Keller*, 359 Ill. App. 3d at 619.

¶ 28 As discussed above, MDSC cannot establish flexFrac had minimum contacts with Illinois such that requiring it to defend this action in Illinois would comport with traditional notions of fair play and substantial justice. It would not be fair, just, and reasonable to require flexFrac to defend the complaint in Illinois, considering that flexFrac did not perform any acts in Illinois which affect interests in Illinois and did not direct any activities at Illinois. State due process requirements were satisfied by denying jurisdiction.

¶ 29 For the reasons discussed above, the trial court’s finding that it did not have jurisdiction over flexFrac was not against the manifest weight of the evidence. We hold that it did not err in granting flexFrac’s motion to dismiss MDSC’s complaint.

¶ 30 For the foregoing reasons, the judgment of the circuit court of Tazewell County is affirmed.

¶ 31 Affirmed.