

NOTICE
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2013 IL App (4th) 130359-U
NO. 4-13-0359
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
November 21, 2013
Carla Bender
4th District Appellate
Court, IL

B & R CONSTRUCTION, INC., an Illinois Corporation,) Appeal from
Plaintiff-Appellant,) Circuit Court of
v.) Sangamon County
EXPOTRACTOR CORP, a Corporation,) No. 12LM1092
Defendant-Appellee.)
) Honorable
) Chris Perrin,
) Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant did not have sufficient minimum contacts with Illinois such that the exercise of personal jurisdiction over defendant did not comport with due process, nor did defendant's activities within Illinois subject defendant to specific personal jurisdiction related to the sale at issue.

¶ 2 Plaintiff, B & R Construction, Inc., an Illinois corporation, appeals the trial court's order dismissing the complaint filed against defendant, Expotractor Corp., a corporation located in Florida, for lack of personal jurisdiction over defendant, a foreign corporation. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In August 2012, plaintiff filed a complaint against defendant, a heavy equipment dealer doing "business throughout the globe," after the excavator purchased online by plaintiff from defendant was allegedly not as represented. Plaintiff found defendant's excavator on

Machinery Trader's website with certain representations about the machine's model year, hours worked, parts replaced, and general condition. Plaintiff agreed to pay defendant \$60,000 for the excavator and wired the money from a local bank to defendant. Plaintiff's agent picked up the excavator in Miami, Florida, and delivered it to plaintiff in Herrick, Illinois. Upon delivery, plaintiff discovered several misrepresentations and filed this lawsuit.

¶ 5 Defendant's representative, Julio Lara, the sales manager, was served a summons in Miami, Florida, by an independent process server. After retaining counsel in Sangamon County, defendant filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)), claiming defendant does not have sufficient contacts with the State of Illinois to submit itself to the jurisdiction of our courts. Defendant also asserts it did not misrepresent the condition of the excavator, as Lara had informed plaintiff the advertised excavator had been sold. According to Lara, plaintiff agreed to purchase an older model.

¶ 6 The affidavit filed by Lara indicates defendant (1) does not maintain offices in Illinois, (2) does not engage in continuous and systematic conduct with residents of Illinois, (3) does not direct its website to target residents of Illinois, (4) utilizes Machinery Trader as an online advertising vehicle for the sale of equipment, and (5) pays Machinery Trader for its advertising services to a global market. Further, Lara indicated (1) plaintiff initiated contact with defendant, (2) defendant executed an invoice in Florida and forwarded the invoice to plaintiff via e-mail, (3) plaintiff wired the purchase price to defendant's bank in Florida, and (4) plaintiff's agent obtained possession of the machinery in Florida.

¶ 7 The affidavit, filed by Orville Kirkendoll, the president of plaintiff corporation,

indicated Lara had misrepresented the quality of the excavator Kirkendoll had purchased from defendant. The misrepresentations were not discovered until the machinery arrived in Illinois. Plaintiff received the invoice from Lara and accepted the terms of the sale in Illinois.

¶ 8 In April 2013, the trial court entered an order dismissing plaintiff's complaint for lack of personal jurisdiction under the "general jurisdiction theory" as well as under the "specific jurisdiction theory." This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 Plaintiff appeals the trial court's dismissal, claiming defendant submitted itself to the jurisdiction of Illinois courts by (1) making and performing an Illinois contract, and (2) committing a tortious act within the state. Both grounds are sufficient, plaintiff claims, for finding jurisdiction under the "specific jurisdiction theory." Plaintiff concedes Illinois does not have general jurisdiction over defendant.

¶ 11 Personal jurisdiction is the authority of the court to exercise its power to adjudicate as to a particular defendant. *In re L.E.J.*, 115 Ill. App. 3d 993, 997 (1983). The issue of whether the trial court has personal jurisdiction over a particular defendant is a question of law which we review *de novo*. *Cameron v. Owens-Corning Fiberglass Corp.*, 296 Ill. App. 3d 978, 983 (1998).

"The plaintiff bears the burden of establishing a basis for personal jurisdiction over the defendant. [Citation.] Once the plaintiff meets that burden, the burden then shifts to the defendant to demonstrate why the assertion of jurisdiction would be unreasonable. [Citation.] In determining whether a particular

defendant falls subject to the jurisdiction of this state, the court must first decide whether the plaintiff 'established a *prima facie* case of jurisdiction through the untraversed pleadings, documents, and affidavits.' [Citation.] In making that decision, the court must also accept as true any facts alleged in the defendant's affidavits unless the plaintiff's affidavits contradicted them, in which case the facts in the plaintiff's affidavits prevail. [Citation.] 'If jurisdictional facts remain in controversy, then the court must conduct a hearing to resolve those disputes.' [Citation.] Where, as in this case, the trial court decides the matter on documentary evidence alone, we review that decision *de novo*. [Citation.]" *Bell v. Don Prudhomme Racing, Inc.*, 405 Ill. App. 3d 223, 228 (2010) (quoting *Knaus v. Guidry*, 389 Ill. App. 3d 804, 813 (2009)).

¶ 12 Here, the trial court did not conduct an evidentiary hearing and thus, decided the issue solely on the basis of documentary evidence—the affidavits submitted in support of each respective position. "Conflicts between the parties' affidavits will be resolved in favor of the plaintiff for the purposes of establishing a *prima facie* case for personal jurisdiction over the defendant." *Estate of Isringhausen v. Prime Contractors & Associates, Inc.*, 378 Ill. App. 3d 1059, 1063 (2008).

¶ 13 There are two types of personal jurisdiction: general and specific. *Aasonn, LLC v. Delaney*, 2011 IL App (2d) 101125, ¶ 14. General jurisdiction rests on the defendant's "continuous and systematic contacts with the forum state" and can be exercised even where the

cause of action does not arise out of those contacts. *Aasonn*, 2011 IL App (2d) 101125, ¶ 14. Plaintiff concedes that general jurisdiction "was never an issue." That is, plaintiff concedes that Illinois does not have general jurisdiction over defendant, but it contends that Illinois *does* have specific jurisdiction.

¶ 14 Specific jurisdiction does not require such extensive contacts, but the contacts that do exist must be the basis for the cause of action. *Aasonn*, 2011 IL App (2d) 101125, ¶ 14. Section 2-209 of the Code of Civil Procedure (735 ILCS 5/2-209 (West 2010)) is known as the Illinois long-arm statute. Subsection (a) of section 2-209 governs specific jurisdiction, subsection (b) governs general jurisdiction, and subsection (c) is a "catchall provision" (*Isringhausen*, 378 Ill. App. 3d at 1064) and permits an Illinois court to exercise personal 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 (West 2010).

¶ 15 Jurisdiction lies under subsection (a) only if defendant performed any of the 14 different actions specifically set forth. 735 ILCS 5/2-209(a) (West 2010). That section of Illinois' long-arm statute, provides:

"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, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of 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[.]” 735 ILCS 5/2-209(a)(2), (a)(7) (West
2010).

¶ 16 The exercise of jurisdiction under Illinois' long-arm statute (in this case sections 2-209(a)(2) and (a)(7)) must also comport with the due-process clause, which requires the nonresident defendant to have at least "minimum contacts" with Illinois. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

"To satisfy the minimum-contacts standard, there must be some act by which the defendant purposefully availed himself of the privilege of conducting business in the forum state, in order to assure that a nonresident will not be called into a forum solely as a result of random, fortuitous, or attenuated contacts with the forum or the unilateral acts of a consumer or some other third person. [Citations.] In determining whether the federal due-process standard has been satisfied so as to warrant Illinois jurisdiction, we consider whether (1) the nonresident defendant had 'minimum contact' with Illinois such that there was 'fair warning' that the nonresident defendant may be haled into an Illinois court; (2) the

action arose out of or related to the defendant's contacts with Illinois; and (3) it is reasonable to require the defendant to litigate in Illinois. [Citation.] The defendant should be able to anticipate or foresee being called into an Illinois court. [Citation.]" *Isringhausen*, 378 Ill. App. 3d at 1065.

¶ 17 Here, plaintiff's argument is that the trial court has personal jurisdiction over defendant because, even though defendant sold the equipment over the Internet, it should have anticipated being brought to court in Illinois regarding the sale. Plaintiff contends (1) defendant contacted plaintiff in Illinois before the sale was finalized, (2) the sales contract was executed in Illinois, (3) money for the sale was provided by an Illinois bank, and (4) part of the contract was performed in Illinois. In other words, plaintiff contends the contract was "substantially connected" to Illinois. 735 ILCS 5/2-209(a)(7) (West 2010). However, a contract between a nonresident and an Illinois resident does not alone necessarily establish the requisite contacts. *Isringhausen*, 378 Ill. App. 3d at 1065. Instead, the court should consider also (1) who initiated the transaction, (2) where the contract was negotiated, (3) where the contract was formed, and (4) where performance took place. *Isringhausen*, 378 Ill. App. 3d at 1066.

¶ 18 Plaintiff urges us to follow the Seventh Circuit Court of Appeals' decision in *Rose v. Franchetti*, 979 F.2d 81 (1992), claiming it is on "all fours" with the case *sub judice*. In *Rose*, the plaintiff, an Illinois resident, contacted defendant, a Massachusetts business, about an advertisement for an airplane for sale. The plaintiff traveled from Illinois to Massachusetts, inspected, and purchased the airplane. The plaintiff flew the airplane back to Illinois. *Rose*, 979 F.2d at 83. After mechanical issues during the travel, the plaintiff discovered the airplane was

not in the condition as the defendant had represented and sued the defendant for breach of contract and fraud. *Rose*, 979 F.2d at 83. The defendant contested personal jurisdiction but lost on that issue. *Rose*, 979 F.2d at 83. The court concluded that the defendant had committed a tort in Illinois by initiating telephone conversations with the plaintiff in Illinois, and making representations during those conversations that led the plaintiff to suffer monetary damages. *Rose*, 979 F.2d at 83.

¶ 19 The parties in *Rose* concentrated on whether the Illinois court had specific jurisdiction. *Rose*, 979 F.2d at 84. The court, applying section 2-209(a)(7) (Ill. Rev. Stat. 1991, ch. 100, ¶ 2-209(a)(7)), ultimately held as follows: "Franchetti's ad reached Illinois and attracted a buyer; Franchetti knew that he was dealing with a customer in Illinois, to which the plane would head and in which any injury would register; the warranty accompanying the sale would lead to performance in or affecting Illinois. Such dealings suffice under [section] 2-209(a)(7), and the due[-]process clause of the Constitution as well." *Rose*, 979 F.2d at 85.

¶ 20 After our analysis, we choose to follow, not *Rose*, but the more recent cases decided by the Second District and the Northern District of Illinois, respectively. We analyze the facts of this case with the guidance provided by these more recent cases, due primarily to the increased frequency of global, or at least state-to-state, transactions being conducted on the Internet.

¶ 21 First, the federal court addressed the issue of whether it could obtain personal jurisdiction over a nonresident company as a result of an auction conducted online on eBay. The defendant listed a yacht located in Massachusetts for auction on eBay and the plaintiff, an Illinois resident, was the highest bidder. *Foley v. Yacht Management Group, Inc.*, No. 08-C-7254 (N.D.

Ill. July 9, 2009), slip op. at 2. The plaintiff paid the defendant through the Internet service PayPal; however, the defendant refunded the money. The plaintiff filed a lawsuit for breach of contract and the defendant moved to dismiss for lack of personal jurisdiction. *Foley*, slip op. at 1. The court, after reviewing case law from other jurisdictions, concluded that a seller of an item on eBay was not subject to specific jurisdiction of the buyer's state without further ties. *Foley*, slip op. at 6. The court noted that a seller has no control over who ultimately purchases the item on eBay and thus, the seller cannot be said to have engaged in conduct that would constitute the purposeful availment necessary to establish personal jurisdiction. *Foley*, slip op. at 7. The exchange of communications via e-mail, messages, or telephone calls between the seller and a potential buyer did not render the sale anything other than "random, fortuitous[,] and attenuated." *Foley*, slip op. at 7.

¶ 22 The Second District agreed with the analysis in *Foley* in a similar case. See *MacNeil v. Trambert*, 401 Ill. App. 3d 1077 (2010). In *MacNeil*, the defendant, a California resident, listed a vehicle for auction on eBay. The plaintiff purchased the vehicle and informed the defendant a cashier's check drawn on an Illinois bank would be sent to the plaintiff's agent via FedEx. *MacNeil*, 401 Ill. App. 3d at 1078. The plaintiff's agent inspected the vehicle in California, paid the defendant, and accepted delivery. Upon his receipt of the vehicle, the plaintiff himself noticed certain items were not as represented by the defendant. *MacNeil*, 401 Ill. App. 3d at 1079. The plaintiff filed a lawsuit for breach of contract and the defendant contested personal jurisdiction. *MacNeil*, 401 Ill. App. 3d at 1079. Like the court in *Foley*, the Second District noted that the defendant, by placing an item for sale online, had no control over who ultimately purchased the item. *MacNeil*, 401 Ill. App. 3d at 1082. The court held the

plaintiff had not established that the communications between he and the defendant subjected the defendant to personal jurisdiction in Illinois. *MacNeil*, 401 Ill. App. 3d at 1083. The court held the defendant's contact with Illinois was "random, fortuitous, and attenuated." *MacNeil*, 401 Ill. App. 3d at 1083 (citing *Foley*, slip op. at 3).

¶ 23 The *MacNeil* court also addressed whether the plaintiff's intent to amend the complaint to include a tort claim of intentional misrepresentation would change the jurisdictional decision. The court noted it would be required to identify the place of the wrong to determine whether Illinois could exercise personal jurisdiction over the nonresident defendant. Quoting *Arthur Young & Co. v. Bremer*, 197 Ill. App. 3d 30, 36 (1990), the court noted the "'place of the wrong is the place where the last event necessary to hold the actor liable takes place.'" The "final event" necessary to hold the defendant liable would have been accepting the plaintiff's payment and delivering the vehicle to the possession of the plaintiff. *MacNeil*, 401 Ill. App. 3d at 1084. Both events had occurred in California. Although the economic injury occurred in Illinois, that "fact alone cannot establish that personal jurisdiction over [the defendant] is proper in Illinois." *MacNeil*, 401 Ill. App. 3d at 1084.

¶ 24 In this case, as in *MacNeil*, the transaction of business (the one-time sale to an Illinois customer) as well as the commission of a tort (the payment for and delivery of the equipment) took place in Florida. Defendant placed an advertisement for this particular excavator with a company who markets the machinery globally. Defendant does not target any particular potential buyer or any residents of any particular state. This global marketing scheme, without more, cannot sufficiently support the exercise of personal jurisdiction over defendant in, what could be, a myriad of potential jurisdictions. In other words, simply by placing a global

advertisement, defendant did not subject itself to the jurisdiction of the state or country in which the ultimate buyer resides. Such conduct is not sufficient to comply with due process and is not sufficient for personal jurisdiction under Illinois' long-arm statute. Therefore, under either subsection (a)(2) or (a)(7) of section 2-209, plaintiff has failed to establish a basis in the form of sufficient minimum contacts for an Illinois court to exercise specific personal jurisdiction over defendant. We conclude the trial court properly granted defendant's motion to dismiss for lack of personal jurisdiction.

¶ 25

III. CONCLUSION

¶ 26

For the foregoing reasons, we affirm the trial court's judgment.

¶ 27

Affirmed.