2015 IL App (1st) 141303-U

FIFTH DIVISION
June 5, 2015

No. 1-14-1303

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOSEPH MONAHAN, an individual,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 L 14641
	)	
COREMEDIA AG, a German Corporation, and	)	
COREMEDIA CORPORATION, an Illinois	)	Honorable
Corporation,	)	Margaret Brennan,
	)	Judge Presiding.
Defendants-Appellees.	)	

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

ORDER

¶1 *Held*: Affirming the judgment of the circuit court of Cook County where plaintiff failed to establish a *prima facie* basis for exercising personal jurisdiction over defendant CoreMedia AG.

¶2 I. BACKGROUND

¶3 Following his termination as an independent contractor sales representative of CoreMedia software on November 10, 2009, plaintiff Joseph Monahan brought suit against defendants, CoreMedia AG (CMAG) and CoreMedia Corporation (CMC), on December 31, 2012, in the

circuit court of Cook County, alleging breach of contract and tortious interference with a prospective business advantage. CMAG is a German corporation based in Hamburg, Germany, that provides web content management software to businesses. CMC is an Illinois corporation formed in 2007 and is a subsidiary of CMAG. Monahan is an experienced seller and marketer of web content management software who resides in Naperville, Illinois.

¶4 According to Monahan's amended complaint, he negotiated with the director of CMAG, Florian Grebe, in September and October 2006, regarding the possibility of marketing and selling CoreMedia software in North America, and met with Grebe at O'Hare International Airport on November 28, 2006, to discuss Monahan becoming an independent sales consultant. In December 2006, Monahan traveled to Germany and met with CMAG chief executive officer Soeren Stamer, CMAG chief financial officer Klemens Kleiminger, CMAG director Martin Pakendorf, and Grebe. As a result of these meetings, Monahan entered into a sales consulting agreement on March 1, 2007, for a six-month "trial" period, set to terminate on August 31, 2007.

¶5 According to the amended complaint, CMAG brought Tobias Maurer from Germany to Chicago in July 2007 to act as Monahan's technical support for business development in the United States. In August 2007, CMAG formed CMC under Illinois law as a separate subsidiary for its United States operations. CMAG signed an agreement with Regus Management Group LLC (Regus) on July 5, 2007, to lease office space in Chicago beginning September 1, 2007. On August 27, 2007, after CMC was incorporated, CMC signed a lease with Regus to replace CMAG for the office space in Chicago with the same starting date of September 1, 2007. In addition, Stamer was made president of CMC, and Pakendorf was CMC's vice president.

¶6 According to Monahan, the parties began negotiating a new sales agreement as his initial one drew to a close. Monahan traveled to Germany in January 2008 and met with Stamer and

Pakendorf to finalize a new sales representative agreement (SRA), and Monahan and Stamer signed and initialed the SRA. Under the SRA, Monahan was to be CMC's sales representative of CoreMedia software products in the United States; in exchange, he received $12,500 per month, in addition to commissions and a potential bonus. The SRA commenced on January 1, 2008, and automatically terminated on June 30, 2010.

¶7 Pursuant to paragraph 9(a) of the SRA, either party could terminate the relationship without cause upon one-month written notice and payment of a $75,000 a cancellation fee. Paragraph 9(b) provided that the agreement could be terminated for cause under one of four conditions: (2) insolvency of a party; (2) non-cooperation by Monahan if he "unreasonably delays or refuses to perform required services reasonably requested by the Company, or violates any fiduciary duty to the Company;" (3) either party's failure to comply with the material provisions of the SRA; or (4) if Monahan agreed to represent, distribute, market, or sell any products of third party companies. The agreement provided that if Monahan was in material breach of the SRA and CMC terminated it for cause, he was obligated to pay the $75,000 cancellation fee. The SRA also contained a jurisdiction clause, which provided:

> "For purposes of any proceeding involving this Agreement, the parties hereby submit to the exclusive jurisdiction of the courts of the State of Illinois and of the United States having jurisdiction in the County of Cook and State of Illinois, and agree not to raise and hereby waive any objection to or defense based upon the venue of any such court and any objection or defense based upon forum *non conveniens*."[1]

¶8 Monahan alleged in his amended complaint that, in negotiating the SRA, he insisted on

[1] We note that the SRA indicated that it was between Monahan and "CoreMedia Corporation." Further, on the signature page, Stamer signed the agreement on behalf of CMC, with his title listed as "president." The attached appendices A and B, which included Monahan's commission schedule, were also signed by Stamer as president of CMC.

obtaining a perpetual software license for CoreMedia software and that this was a material part of the agreement as he was uncertain whether CMAG would continue its United States distributions and it would allow him to compete against CMAG in the event the SRA was terminated. According to Monahan's amended complaint, he provided CMAG with a draft software license and software maintenance agreement (SLMA) in March 2008 and delivered to Pakendorf at CMAG's Germany headquarters a signed copy of the SLMA on April 8, 2008. Monahan alleged that a lawyer for CMAG reviewed the SLMA and that Pakendorf signed the SLMA on behalf of CMAG on July 15, 2008. Monahan alleged that he was informed by Kleiminger that the CMAG advisory board also had to approve the SLMA, and that Monahan needed to execute an acknowledgment of tax consequences stemming from his receipt of the software license. Monahan alleged that on October 16, 2008, he and Kleiminger met at CMAG headquarters in Germany, Kleiminger struck one minor provision, and Stamer signed the SLMA on behalf of CMAG. By its terms, the SLMA commenced on May 1, 2008.[2] However, according to the amended complaint, CMAG failed and refused to provide him with perpetual software keys and eventually only transferred software keys that had an expiration date of June 30, 2009.

¶9 According to Monahan's allegations, he fully performed his obligations under the SRA, he reported directly to Pakendorf, he had weekly sales calls with CMAG leaders, he submitted expense reimbursements to CMAG, CMAG transferred funds to CMC to pay his compensation, and CMC had no employees at the time. Monahan alleged in the amended complaint that on July 1, 2009, Stamer resigned and Gerrit Kolb was appointed as chief executive officer of CMC, and Kolb hired Glen Conradt to manage the North American operations. According to Monahan, Conradt and two employees of CMAG came to Chicago to prepare for a tradeshow which would

[2] We note that the SLMA provides that it was entered into by "CoreMedia Corporation" and the signature page is signed by Stamer and Pakendorf as CMC officers. Their signatures appear under the heading "COREMEDIA."

take place on October 27 and 28, 2009. On October 27, Conradt sent Monahan an email stating that, "following advice from CoreMedia AG, I would respectfully request you do not attend the Forrester [Tradeshow]." On November 10, 2009, Monahan received an email and also a letter via FedEx advising him that the SRA was being terminated for cause pursuant to paragraph 9(b) due to Monahan's non-cooperation and breach of material provisions of the SRA, and demanding that Monahan pay the $75,000 cancellation fee. The letter was signed by Kolb as president of CMC and Kleiminger as vice president of CMC.

¶10 Monahan alleged that the SIRA was terminated without cause. Further, he continued marketing CoreMedia software to Bell Canada, but Bell Canada broke off negotiations and informed him that "CoreMedia" advised it that he was not authorized to sell the software. Monahan claimed that this deal would have earned him $6 million. Similarly, he alleged that the Association of American Medical Colleges (AAMC) also broke off negotiations with him after "CoreMedia" advised AAMC that he was not authorized to sell the software, and that this deal would have earned $350,000 for 12 months.

¶11 Based on the foregoing, Monahan brought claims for breach of contract and tortious interference in his amended complaint. Monahan alleged that CMC committed a breach of contract when it terminated the SRA because it lacked cause. Monahan alleged that CMC and CMAG breached the SRA and SLMA because he was granted a perpetual license for CoreMedia software, but defendants failed and refused to deliver the software to Monahan as required. In his third and final claim, Monahan alleged that CMAG and CMC tortiously interfered with business advantages in Monahan's negotiations with AAMC and Bell Canada. Monahan sought compensatory damages and attorney fees for all three claims and punitive damages for defendants' allegedly "willful and malicious" conduct in tortiously interfering with his business

advantages.

¶12 Defendant CMC answered Monahan's amended complaint, denying the allegations and raising several counterclaims against Monahan, including a claim for rescission of the SRA and SLMA based on its allegation that Monahan, unbeknownst to defendants, changed various provisions in the standard agreements in order to allow him to market, rent, lease, transfer, distribute, or sublicense his software license, which was normally prohibited under the standard contract. CMC alleged that Monahan brought two hard copies of the altered agreement to negotiations in Germany, where he represented that they were the standard contract, and failed to apprise CMC of the alterations.

¶13 Defendant CMAG filed a motion to dismiss the complaint pursuant to section 2-301 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-301(a) (West 2010)), on grounds that that court lacked personal jurisdiction over it. CMAG argued that Monahan failed to make a *prima facie* showing of general personal jurisdiction as CMAG did not have any offices, assets, property or employees in Illinois and was not licensed to do business in Illinois, and Monahan failed to make a showing of specific personal jurisdiction over CMAG as no evidence demonstrated that CMAG had purposefully availed itself of the protections of Illinois law. Regarding the claim of tortious interference, CMAG argued that Monahan failed to provide evidence of any communications initiated by CMAG, any communications made by CMAG from or to Illinois, or any evidence that the recipients of any alleged communications were physically present in Illinois, and Monahan failed to specify who made the alleged misrepresentations. CMAG indicated that any alleged calls to Bell Canada or AAMC would not have been made to or from Illinois. Further, Monahan's assertion that he felt the alleged economic injury here was insufficient to establish specific personal jurisdiction. CMAG also

noted that Monahan's contract with CMC did not permit him to resell CoreMedia software after his termination. As to Monahan's contractual claims, CMAG argued that all of the events which served as a basis for his claims arose at times when Monahan was under contract with CMC, not CMAG. CMAG asserted that it was not a party, signatory, or beneficiary of either the SRA or SLMA, and it was CMC, not CMAG that transferred the software license to Monahan in Illinois. CMAG noted that CMC had separate contracts with CMAG which governed CMC's right to license CoreMedia software. Additionally, CMAG argued that, as a mere shareholder of CMC, it was not liable for CMC's acts because it did not exercise complete domination over CMC's decision making or treat CMC as an alter ego, but, rather, it maintained the appropriate corporate formalities and CMC reimbursed CMAG for any services provided to it.

¶14 In support of its motion, CMAG provided the affidavit of Glenn Conradt, vice president and general manager of CMC. Conradt averred that he has been involved with CMC since June 2009 and became vice president and general manager on January 1, 2010, that CMC operates as a separate financial unit from CMAG, that its daily business is kept separate from CMAG's daily operations, that CMC maintains its own books and bank accounts and files separate tax returns, that CMC holds annual meetings and elects directors and officers, that CMC was adequately capitalized and that if a cash flow shortage arose, it was "subsidized" by CMAG, and that CMC entered into arms-length relationships with CMAG regarding the sale of CoreMedia software to third parties. Conradt averred that, to the best of his knowledge, CMAG has never maintained an office in Illinois. Conradt averred that he and Maurer were the only people from CMC who were contacted by Bell Canada or AAMC regarding Monahan's assertion that he was authorized to sublicense CoreMedia software.

¶15 In response to CMAG's motion, Monahan argued that Illinois courts had both general

personal jurisdiction and specific personal jurisdiction over CMAG. As evidence of CMAG's contacts with Illinois, Monahan asserted that CMAG made telephone calls to Chicago, sent representatives here, sent its employee Maurer to work and live in Chicago and secured his apartment lease, entered into a lease with Regus which included a provision consenting to jurisdiction in Illinois, and sent employees here to provide technical support. Monahan further asserted that CMC initially had no employees and he and Maurer continued working for CMAG; Maurer became a CMC employee on June 28, 2008. Monahan claimed that he believed he was dealing with CMAG when negotiating the SRA. Monahan also claimed that CMAG and CMC were both parties to the SLMA, a CMAG attorney approved the agreement, and CMAG was to supply him with the software. In addition, Monahan asserted that CMAG participated in CMC's daily operations by holding weekly telephonic sales meetings, consulting with CMC concerning sales in Illinois, and once directly paying Monahan's compensation. Monahan noted that CMAG marketed itself as operating out of the Chicago office in its marketing materials and at tradeshows. Monahan argued that his claims arise out of the SRA and SLMA, and CMAG committed tortious acts here in that Monahan experienced the injury in Illinois. Monahan additionally claimed that CMAG was liable under a "transaction-specific" theory as the evidence showed that CMAG directed CMC to terminate Monahan, CMAG directed Conradt to bar Monahan from the tradeshow, and CMAG decided whether to provide Monahan with the software. In support of his response, Monahan provided his own affidavit in which he set forth factual allegations consistent with his arguments for jurisdiction.[3]

¶16 In CMAG's reply brief, it argued that the undisputed facts showed that CMAG was not a party to any contract with Monahan that served as a basis for his contractual claims and CMAG

[3] Monahan also attacked Conradt's affidavit on grounds that Conradt failed to state that his affidavit was based on personal knowledge and he failed to attach the corporate records upon which he relied.

had not committed any tortious acts in Illinois. The initial consulting agreement with Monahan was effective only from March 1, 2007, to August 2007; CMC was incorporated on August 15, 2007, and CMC then entered into a new contract—the SRA—with Monahan which was dated January 1, 2008. CMAG also asserted that the SRA and SLMA were signed by Stamer as president of CMC, the agreements recited that they were between Monahan and CMC, and they contemplated no performance by CMAG. CMAG asserted that even if it used to maintain a presence in Illinois, this ended in August 2007, before the alleged acts underlying Monahan's claims occurred. CMAG argued that Maurer came to the United States on a visa issued in favor of CMC, he had an employment contract with CMC, and CMAG charged CMC for the work that he performed before becoming an employee of CMC. According to CMAG, CMC transacted its own business, kept separate financial accounts and records, entered into a lease with Regus, paid its own rent from its bank account, and any funds provided to CMC from CMAG were not a "gift," but paid-in capital. CMAG argued that the SRA and the SLMA were between CMC and Monahan, and nothing in the agreements obligated CMAG to deliver any software or maintenance services to Monahan. CMAG argued that Monahan averred that he attached a license agreement between CMAG and CMC, but the attached unsigned document was not a true and valid document. It argued that the terms of the SRA prohibited Monahan from selling the software until May 10, 2010, but he attempted to sell it to AAMC and Bell Canada in December 2009. CMAG argued that Monahan failed to provide any admissible evidence that would establish that CMAG committed any tortious conduct in Illinois, mere economic injury felt in Illinois was insufficient to establish personal jurisdiction, and Monahan failed to show an intent to affect an Illinois interest as he never alleged that CMAG took any action in Illinois regarding Bell Canada or AAMC, and the communications, if any, came from CMC, not CMAG. Further,

CMAG was not "doing business" through CMC as it did not exercise a high degree of control over CMC.

¶17 CMAG provided affidavits from Kleiminger and Malte Grohnert, an accountant, with its reply. Kleiminger averred that he has been the vice president, treasurer and secretary of CMC since its inception in August 2007, that he is the chief financial officer of CMAG, and that the statements in his affidavit were based on his personal knowledge. Kleiminger averred that the decisions made by the management team of CMC are not subject to approval by CMAG and CMC conducts its own business. He averred that after CMAG initially formed an agreement with Monahan, it decided to set up a separate subsidiary to conduct its own business in the United States; the initial consulting agreement with Monahan ended on August 31, 2007; CMAG's initial lease with Regus was later replaced with a lease between CMC and Regus once CMC was formed; and after CMC was set up, CMAG ceased transacting business in Illinois. Kleiminger averred that CMC has always maintained its own financial accounts and filed its own tax returns, and CMAG made capital contributions to CMC when needed, and CMAG charged CMC for any support services it provided. Kleiminger averred that CMAG was not a party to the SRA or the SLMA and had no obligations under these contracts, and the contracts with AAMA and Bell Canada were with CMC, not CMAG. Kleiminger also stated that Maurer came to work in the United States pursuant to a visa issued in favor of CMC, CMAG did not assist with Maurer's apartment, Maurer had an employment contract with CMC, and any work done before he became a CMC employee was charged by CMAG to CMC. Kleiminger averred that the exhibit Monahan attached to his affidavit purporting to be a software license agreement between CMAG and CMC was a forgery and no such document existed. Kleiminger attached several documents in support of his affidavit.

¶18 Grohnert averred in his affidavit that his accounting and tax consulting firm provided bookkeeping and treasurer services for CMC. Grohnert averred that CMC set up several bank accounts in 2007 which it used to pay its expenses. Grohnert was familiar with CMC's lease with Regus and ensured that the monthly rent was timely paid by checks drawn from CMC's bank account. It was also his firm's responsibility to see that Monahan was timely paid under the SRA and these payments came from CMC's bank account. Further, Grohnert averred that Maurer became an employee of CMC and CMC paid for his rented apartment in Chicago. Grohnert also attached supporting documentation.

¶19 On April 2, 2014, following oral argument, the trial court entered a written order granting CMAG's motion to dismiss for lack of personal jurisdiction and dismissed CMAG as a defendant from the case. The trial court found that Monahan failed to establish a *prima facie* showing of personal jurisdiction over CMAG. Monahan filed a timely appeal.

¶20 II. ANALYSIS

¶21 On appeal, Monahan argues that he established a *prima facie* basis for exercising personal jurisdiction over CMAG in alleging that his injury arose out of the SRA and SLMA, CMAG was a party to the SLMA, and CMAG directed CMC to terminate him. CMAG maintains that Monahan failed to establish a *prima facie* case because he offered only inadmissible, speculative assertions that were not based on his personal knowledge and which were refuted by the affidavits provided by Conradt, Kleiminger, and Grohnert.

¶22 When seeking jurisdiction over a nonresident defendant, "the plaintiff has the burden to establish a *prima facie* basis to exercise personal jurisdiction." *Russell v. SNFA*, 2013 IL 113909, ¶ 28. The court considers the " 'uncontroverted pleadings, documents and affidavits, as well as any facts asserted by the defendant that have not been contradicted by the plaintiff.' "

Madison Miracle Productions, LLC v. MGM Distribution Co., 2012 IL App (1st) 112334, ¶ 34 (quoting *Cardenas Marketing Network, Inc. v. Pabon*, 2012 IL App (1st) 111645, ¶ 28). "Any conflicts in the pleadings and affidavits must be resolved in the plaintiff's favor, but the defendant may overcome plaintiff's *prima facie* case for jurisdiction by offering uncontradicted evidence that defeats jurisdiction." *Russell*, 2013 IL 113909, ¶ 28. Where "a defendant's affidavit contesting jurisdiction is not refuted by a counter-affidavit filed by the plaintiff, the facts alleged in the defendants' affidavit are accepted as true." *Kutner v. DeMassa*, 96 Ill. App. 3d 243, 247 (1981). However, "[i]f any material evidentiary conflicts exist, *** the trial court must conduct an evidentiary hearing to resolve those disputes." *Madison Miracle Productions*, 2012 IL App (1st) 112334, ¶ 35. Where, as here, the circuit court determines a jurisdictional issue based only on the documentary evidence submitted by the parties, without an evidentiary hearing, this court reviews that decision *de novo*. *Madison Miracle Productions*, 2012 IL App (1st) 112334, ¶ 34.

¶23 To exercise personal jurisdiction, federal due process requires that a nonresident defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." (Internal quotation marks omitted.) *Soria v. Chrysler Canada, Inc.*, 2011 IL App (2d) 101236, ¶ 18 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The "minimum contacts" standard "must be based on some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum state, in order to assure that a nonresident will not be haled 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." (Internal quotation marks omitted.) *Russell*, 408 Ill. App. 3d at 832 (quoting *Rosier v. Cascade Mountain, Inc.*, 367 Ill. App. 3d 559, 561-62 (2006)).

Generally, where federal due process requirements for personal jurisdiction are satisfied, Illinois due process concerns are also satisfied. *Madison Miracle Productions,* 2012 IL App (1st) 112334, ¶ 44. "Under the Illinois Constitution's guarantee of due process, '[j]urisdiction is to be asserted only when it is 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' that occur in Illinois or that affect interests located in Illinois." *Compass Environmental, Inc. v. Polu Kai Services, L.L.C.*, 379 Ill. App. 3d 549, 558 (2008) (quoting *Rollins v. Ellwood,* 141 Ill. 2d 244, 275 (1990)).

¶24 Personal jurisdiction may be either general or specific. *Id.* General jurisdiction arises where the defendant has "continuous and systematic general business contacts, such that it may be sued in the forum state for suits unrelated to its contacts within the forum." (Internal quotation marks omitted). *Cardenas Marketing Network,* 2012 IL App (1st) 111645, ¶ 30. Specific jurisdiction exists where "a nonresident defendant has minimum contacts with the forum state, *** the defendant has purposefully directed its activities at the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." *Russell,* 408 Ill. App. 3d at 833. We note that Monahan does not challenge on appeal the trial court's decision that it did not have general personal jurisdiction over CMAG in this case. We therefore focus our analysis on determining whether CMAG is subject to specific personal jurisdiction.

¶25 Pursuant to the Illinois long-arm statute, Illinois courts may exercise personal jurisdiction over a party to the extent allowed under the Illinois and federal constitutions. 735 ILCS 5/2-209 (West 2010). The statute sets forth several bases upon which Illinois courts may exercise jurisdiction over a nonresident defendant. *Cardenas Marketing Network,* 2012 IL App (1st) 111645, ¶ 29; 735 ILCS 5/2-209 (West 2010). As is relevant to the present case, section 2-209(a)

provides for specific jurisdiction over a nonresident defendant if the cause of action arose from the transaction of business within Illinois, the commission of a tortious act within Illinois, or the making or performance of a contract that is substantially connected to Illinois. 735 ILCS 5/2-209(a)(1), (2), and (7). Our courts have held that "[a] nonresident defendant's contract with an Illinois resident does not automatically establish sufficient minimum contacts to satisfy federal due process." *Cardena's Marketing Network, Inc., v. Pabon*, 2012 IL App (1st) 111645, ¶ 36. As such, "in determining whether a defendant has purposefully availed himself of the benefits of Illinois law in forming the contract, the court considers the following factors: (1) who initiated the transaction; (2) where the contract was formed; and (3) where the contract was performed." *Graver v. Pinecrest Volunteer Fire Department*, 2014 IL App (1st) 123006, ¶ 16 (citing *Bolger v. Nautica International, Inc.*, 369 Ill. App. 3d 947, 952 (2007)). Further, where personal jurisdiction is asserted based on a defendant's tortious conduct in Illinois, "the plaintiff must allege that the defendant performed a tortious act or omission and caused an injury in Illinois." *Aasonn, LLC v. Delaney*, 2011 IL App (2d) 101125, ¶ 16 (citing *Arthur Young & Co. v. Bremer*, 197 Ill. App. 3d 30, 36 (1990)).

¶26 Monahan argues that CMAG transacted business in Illinois because it entered into contracts substantially connected to Illinois. We observe that, although CMAG initially had a consulting agreement with Monahan, this agreement ended on August 31, 2007, long before the events which gave rise to Monahan's claims occurred. It is undisputed that the agreements in effect at the time Monahan was terminated on November 10, 2009, were the SRA and the SLMA. Monahan entered into these agreements after CMC was formed as a separate corporate entity in Illinois in August 2007. By its terms, the SRA commenced on January 1, 2008, and was set to end on June 30, 2010. In the SRA, the first paragraph provides that the agreement was

entered into between "CoreMedia Corporation ('CoreMedia')" and its principal place of business is in Chicago. Stamer's signature appears on the signature page under the heading "CoreMedia Corporation," and it indicates that he signed in the capacity of president of CMC. Based on this evidence, it is apparent that CMAG was not a party to the SRA. The document does not refer to "CoreMedia AG" as one of the parties to the agreement, it was not signed by a representative of CMAG, and it did not require or contemplate any performance by CMAG under its terms.

¶27 Similarly, the cover page of the SLMA indicates that it is an agreement between Monahan and "CoreMedia Corporation" and again lists the Chicago office address. The first paragraph of the agreement recites that it is entered into between "CoreMedia Corporation," which is thereafter referred to as "COREMEDIA," and its principal place of business is in Chicago. The signature page contains Stamer's signature under the heading "COREMEDIA." It is also signed by Pakendorf under the heading "CoreMedia." We disagree with Monahan's assertion that because the second reference to "CoreMedia" which appears above Pakendorf's signature is not displayed in all capital letters, it must necessarily refer to CMAG instead of CMC. No provision in the agreement supports this inference or assumption made by Monahan. We also disagree with Monahan's argument that CMAG should be considered a party to the SLMA because the software was supposed to be delivered and serviced by CMAG. The contract for the software license was between CMC and Monahan and the terms of the SLMA called for CMC to provide the software and maintenance. Thus, the evidence also demonstrates that CMAG was not a party to the SLMA.

¶28 Monahan has failed to show that CMAG was a party to any of the contracts out of which his claims arise and, as such, he has not demonstrated that CMAG purposefully availed itself of the benefits of Illinois law. *Graver*, 2014 IL App (1st) 123006, ¶ 16. Accordingly, personal

jurisdiction pursuant to section 2-209(a) cannot be exercised on grounds that Monahan's claims arose out of the making or performance of a contract substantially connected to Illinois as it relates to CMAG. 735 ILCS 5/2-209(a) (West 2012).

¶29 Monahan also contends that personal jurisdiction over CMAG may be exercised based on CMAG's alleged tortious conduct in Illinois, namely, misrepresentations made to Bell Canada and AAMC regarding Monahan's authority to sell CoreMedia products. Initially, we note that in his amended complaint, Monahan alleges that "CoreMedia" told these two corporations that he was not authorized to sell the products, but he fails to specify whether he was referring to CMAG, CMC, or both. Monahan also failed to specifically allege that CMAG made these communications in or to Illinois. *Aasonn*, 2011 IL App (2d) 101125, ¶ 16 (when an assertion of personal jurisdiction relies on a defendant's tortious conduct, the plaintiff must allege that the defendant performed this tortious conduct in Illinois). We note that CMAG is based in Germany, Bell Canada is a Canadian entity, and it appears from the contract between CMC and AAMC that AAMC is based in Washington, D.C. Monahan provided no evidence of any alleged tortious conduct by CMAG in Illinois.

¶30 Nevertheless, Monahan argues that jurisdiction is proper because the economic impact of these tortious actions were felt by him in Illinois. "Where *** the injury is economic rather than physical or emotional, the plaintiff must also allege facts showing that the defendant intended to affect an Illinois interest. [Citation.] This intent requirement mirrors the purposeful-availment requirement." *Aasonn*, 2011 IL App (2d) 101125, ¶ 16. See, *e.g.*, *West Virginia Laborers Pension Trust Fund v. Caspersen*, 357 Ill. App. 3d 673, 678-79 (2005) (the defendant’s travel to Illinois in connection with the merger did not give rise to jurisdiction because the tortious acts were committed in the state where the defendant board took action, it did not commit any

tortious acts in Illinois, and the travel was unrelated to the due diligence investigation); *Arthur Young & Co. v. Bremer*, 197 Ill. App. 3d 30, 38-39 (1990) (California defendant called the third party several times in Illinois but these conversations were not designed to affect the plaintiff's Illinois interests or aid third party in breaching his agreement with the plaintiff); *Hanson v. Ahmed*, 382 Ill. App. 3d 941, 945 (2008) (Missouri resident defendants' defamatory statements made "into Illinois" in telephone conversations that were initiated by insurance company from Illinois were too attenuated to create minimum contacts sufficient for jurisdiction, even though economic loss was felt in Illinois, where the defendants otherwise conducted no activities in Illinois). See also *Goldberg v. Miller*, 874 F. Supp. 874, 876-77 (N.D. Ill. 1995) (Illinois plaintiff failed to prove jurisdiction over defendant Maryland corporation for a tortious interference claim where the defendant's alleged telephone calls from Maryland to a California client caused the plaintiff to lose the client as none of the allegedly tortious conduct occurred in Illinois); *Real Colors, Inc. v. Patel*, 974 F. Supp. 645, 649-50 (N.D. Ill. 1997) (plaintiff Illinois corporation failed to establish a *prima facie* case of jurisdiction over defendant North Carolina corporation where it alleged that one telephone call was made from the North Carolina corporation to the Illinois plaintiff, as this alleged basis for tortious interference was directed at the plaintiff, not at a third party, and the plaintiff did not allege that any tortious acts between the defendant and the third party occurred in Illinois). Here, plaintiff has failed to show that CMAG intended to affect an Illinois interest. As stated, Monahan failed to show that CMAG made the alleged misrepresentations to Bell Canada or AAMC, and he failed to allege that such misrepresentations were made in or to Illinois.

¶31 Monahan also advances on appeal the argument that CMAG should be subject to liability for CMC's misconduct under a "transaction-specific" theory of liability because CMAG

disregarded the separate legal identity of CMC and directed CMC's actions, *i.e.*, CMAG directed CMC to terminate the SRA and to refuse to comply with the SLMA.

¶32 Direct participant liability of a parent corporation is a "valid theory of recovery under Illinois law." *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 284 (2007). "The key elements to the application of direct participant liability *** are a parent's specific direction or authorization of the manner in which an activity is undertaken and foreseeability. If a parent company specifically directs an activity, where injury is foreseeable, that parent could be held liable. Similarly, if a parent company mandates an overall course of action and then authorizes the manner in which specific activities contributing to that course of action are undertaken, it can be liable for foreseeable injuries." *Id.*

¶33 Having carefully reviewed the record, we conclude that Monahan has failed to show that personal jurisdiction over CMAG can be established under this "transaction-specific" theory of recovery. He has not demonstrated that CMAG "interpose[ed] a guiding hand in the transactions of its subsidiary" such that it should be held liable for CMC's actions. *Forsythe*, 224 Ill. 2d at 285-86. Although Monahan claims that CMAG directed Conradt to fire him in October 2009 before a tradeshow, the record belies this assertion. Monahan provided an email correspondence from Conradt to Monahan dated October 26, 2009, in which Conradt states that, on the advice of CMAG, "I [Conradt] would respectfully request that you do not attend the Forrester Consumer Forum either today or tomorrow ***." Thus, Conradt simply requested that Monahan refrain from attending the tradeshow. Nowhere in this exchange did Conradt state that the SRA or Monahan's position were being terminated. In fact, the undisputed record evidence demonstrates that CMC terminated the SRA and Monahan's position as an independent contractor via a letter sent to him on November 10, 2009. The notice of termination letter was signed by Kolb, as

president of CMC, and by Kleiminger, as vice president of CMC. Ultimately, Monahan offers only his own conjecture that CMAG was behind CMC's decision to terminate the SRA in November 2009. Thus, the uncontroverted facts demonstrate that CMC, not CMAG, was responsible for terminating the SRA with Monahan.

¶34 In addition, Monahan has failed to provide any admissible factual evidence to support his claim that CMC refused to comply with its contractual obligations under the SLMA at the behest and direction of CMAG or that CMAG otherwise controlled and directed CMC. Monahan provided email correspondence discussing the fact that a software license had been delivered to Monahan and how to properly record the transaction on an invoice. Monahan also provided email exchanges between himself, Kleiminger, and an individual named Bjoern Bauer,[4] discussing his attempt to obtain a permanent license; Bauer informed Monahan that he had to provide an IP address in order to obtain a permanent license, but he did not do so. However, this evidence does not demonstrate that CMAG directed CMC to refuse to provide a permanent license or that CMAG refused to provide the license. Even if CMAG may have been tasked with actual delivery of the software to Monahan on behalf of CMC, this would not vitiate the fact that the SLMA contract itself was between Monahan and CMC. Notably, the SLMA provision entitled, "Form and date of delivery" provides that the software "will be provided electronically. Instructions, UserID and Password for downloading COREMEDIA SOFTWARE from COREMEDIA'S customer website will be provided to you by email after COREMEDIA received a fully executed copy of this Agreement." As noted, references to "COREMEDIA" in the SLMA refers to CMC. Thus, nowhere in the plain language of this provision is CMAG called upon or obligated to provide the software to Monahan.

¶35 Although Monahan maintains that CMAG controlled CMC, his factual assertions in

[4] According to Monahan's amended complaint, Bauer was the support services manager for CMAG.

support of this argument are insufficient. The fact that Maurer and other CMAG employees may have worked in Chicago in 2006 to 2008 is irrelevant to the question of specific personal jurisdiction over CMAG, as Monahan's claims arise out of the SRA and SLMA and actions that occurred in November and December of 2009 and January of 2010. Maurer has no apparent connection to the agreements and there are no allegations that Maurer was involved in Monahan's termination. Likewise, we do not find the fact that CMAG participated in tradeshows in various locations in the United States to be relevant to the question of specific jurisdiction in this case.

¶36 On the other hand, CMAG offered the affidavits of Conradt, Kleiminger, and Grohnert, along with supporting documentation, to rebut Monahan's assertions. As previously noted, Conradt, who has been involved in CMC since June 2009, averred that CMC's daily operations were separate from CMAG, CMC maintained its own books and accounts, CMC had its own elected directors, CMC was adequately capitalized, and CMC only entered into arms-length transactions with CMAG regarding the sale of CoreMedia software to third parties. Kleiminger, who has been the vice president, treasurer, and secretary of CMC since its inception in August 2007, averred that CMC management's decisions were not subject to approval by CMAG, that CMC maintained its own accounts and filed its own tax returns, and that CMAG charged CMC for any support services provided, including any work performed by Maurer before he became a CMC employee. Grohnert, CMC's accountant, averred that CMC had its own bank accounts, CMC paid for its lease in Chicago, CMC paid Monahan's salary, and that Maurer became a CMC employee and CMC paid for Maurer's apartment in Chicago. Considering these affidavits and the other documentary evidence provided by CMAG, the uncontested facts showed that CMAG ceased operating in Illinois once the CMC subsidiary was set up, that CMC was operated as a

separate corporate entity which made its own decisions and which reimbursed CMAG for any services provided, that CMC (and not CMAG) was a party to the SRA and SLMA, and that CMC made its own independent decisions regarding termination of its contractual relationship with Monahan, provision of the software license, and contact with third parties regarding sales.

¶37 Monahan also contends in the alternative that, even if CMAG was not a signatory to the agreements, the forum selection clauses therein should subject it to jurisdiction. Monahan asserts that four agreements contained forum selection clauses permitting jurisdiction in Illinois: the lease between CMAG and Regus, the lease between CMC and Regus, the SRA, and the SLMA. Citing *Solargenix Energy, LLC v. Acciona, S.A.*, 2014 IL App (1st) 123403, Monahan reasons that because CMAG was so "closely connected" to the disputes arising out of the SRA and SLMA, it became foreseeable that CMAG would be bound by the forum selection clause. CMAG maintains that this argument has been waived for appellate review because Monahan failed to raise it in the circuit court. "An argument not raised in the circuit court in response to a motion to dismiss and presented for the first time on appeal is waived." *Jespersen v. Minnesota Mining & Manufacturing Co.*, 288 Ill. App. 3d 889, 894-95 (1997). As Monahan did not specifically raise this argument in the trial court in response to CMAG's motion, we agree that it has been waived for appellate purposes.

¶38 However, it is also "well settled that the waiver rule is an admonition to the parties and provides no limitation on this court's jurisdiction." *Redelmann v. K.A. Steel Chemicals, Inc.*, 377 Ill. App. 3d 971, 976 (2007). Even if we were to consider Monahan's forum selection clause argument, we would find it unavailing. Contrary to his contentions, this case is distinguishable from the circumstances presented in *Solargenix*. In that case, the plaintiff joint venture member brought an action against the other joint venture members and foreign parent companies of the

members for claims relating to the alleged breach of the joint venture agreements. *Solargenix Energy,* 2014 IL App (1st) 123403, ¶ 1. The court determined that the trial court had personal jurisdiction over the nonresident parent companies based on the forum selection clause contained in the joint venture cooperation agreement, even though the foreign companies were not signatories. *Id.* ¶¶ 46-51. The court held that "a court may exercise personal jurisdiction over a defendant by enforcing a forum selection clause against it, even though it was not a signatory to the contract containing the clause, where it was closely related to the dispute such that it became foreseeable that the nonsignatory would be bound, regardless of whether the non-signatory is a defendant or a plaintiff in the subject litigation." *Id.* ¶ 42. The plaintiff's claims arose out of and were related to the cooperation agreement and the parties' joint venture, and the cooperation agreement contained a broad forum selection clause consenting to jurisdiction in Illinois " 'with regard to any actions, claims, disputes or proceedings relating to this Agreement, or any document delivered hereunder or in connection herewith ***.' " *Id.* ¶ 43. Although not a signatory to the cooperation agreement, one nonresident parent corporation executed a "letter of adhesion" which adopted several provisions of the cooperation agreement and agreed to the primary purpose of the joint venture; the cooperation agreement expressly referenced the letter of adhesion as being "attached" to the agreement. *Id.* ¶¶ 44-45. The court held that the forum selection clause was incorporated into each provision of the cooperation agreement, including those provisions adopted in the letter of adhesion, and the nonresident corporation that had signed the letter of adhesion could be subject to jurisdiction on that basis. *Id.* ¶ 45. Further, the defendant's parent company was also subject to personal jurisdiction even though it had not signed the cooperation agreement or the letter of adhesion because the evidence showed that it was the only entity capable of carrying out the purposes of the joint venture, it was involved in

the due diligence for the venture, and its officers and directors were directly involved in the joint venture entity's operations and decision making, but without simultaneously serving as directors, officers, or employees of the joint venture entity. *Id.* ¶¶ 49-50.

¶39 In contrast, the evidence here demonstrates that CMAG was not a signatory to the SRA or the SLMA. Indeed, CMAG was not a signatory to any agreement that is comparable to the letter of adhesion in *Solargenix*. The only agreement signed by CMAG was the lease with Regus for the Chicago office space, but it was subsequently replaced by a lease between CMC and Regus, and, in any event, Monahan's claims do not relate to or arise from the lease. Moreover, CMAG has shown through affidavits and supporting documentation that CMC functioned as a separate corporate entity that managed its own operations, had its own accounts, it paid its own expenses, and reimbursed CMAG for any services provided. CMAG officers and directors did not directly control CMC's daily operations or decision-making functions. In contrast to *Solargenix*, any CMAG officer or director that played a role in these functions did so based on their dual position as an officer, director, or employee of CMC, not of CMAG. Unlike the nonresident parent corporations in *Solargenix*, CMAG was not so closely connected to the dispute and the parties that it could fairly be bound by a forum selection clause in the SRA or SLMA.

¶40 In summary, we conclude that the trial court properly held that it did not have personal jurisdiction over CMAG. Plaintiff has failed to set forth a *prima facie* case for jurisdiction. In addition, CMAG has offered uncontroverted evidence that categorically defeats the exercise of jurisdiction over it in this case. *Russell*, 2013 IL 113909, ¶ 28. As such, we find that no material evidentiary conflict exists and, consequently, Monahan was not entitled to a hearing in the trial court to resolve any evidentiary dispute. *Madison Miracle Productions*, 2012 IL App (1st)

112334, ¶ 35.

¶41 In ruling, we observe that Monahan contends that the affidavit provided by Conradt in support of its motion to dismiss failed to comply with Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013) and should be stricken because it was not based on the affiants' personal knowledge. Rule 191 requires that an affidavit submitted in support of a motion contesting personal jurisdiction "shall be made on the personal knowledge of the affiants," shall set forth the facts upon which it is based, shall attach copies of documents relied upon, and shall consist of admissible facts. Ill. S. Ct. R. 191 (eff. Jan. 4, 2013). " 'If, from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied.' " *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009) (quoting *Kugler v. Southmark Realty Partners III*, 309 Ill.App.3d 790, 795 (1999)).

¶42 The trial court did not err in considering Conradt's affidavit as it adequately complies with Rule 191. Conradt stated that he is the vice president and general manager of CMC and is in charge of daily operations of CMC. Although he did not assume these positions until January 1, 2010, he stated that he has been involved with CMC since June 2009, *i.e.*, several months before Monahan was terminated in November 2009. Further, he stated that during his involvement, CMC was operated as a separate financial unit from CMAG. Based on the foregoing, it is apparent that his affidavit was based on personal knowledge and he could competently testify to its contents.

¶43 Monahan also takes issue with Kleiminger’s affidavit on grounds that he failed to attach supporting books and records to substantiate his assertion that CMC paid for services provided by CMAG. However, Kleiminger averred that all of the factual statements in his affidavit were

based on his personal knowledge. Given his position as an officer and treasurer of CMC, we agree that his assertions were based on his personal knowledge of these specific activities. In addition, we note that CMAG also submitted an affidavit of Grohnert, the accountant for CMC, along with supporting documentation, to support its contention that CMC was operated as a separate entity from CMAG. "If all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used." Ill. S. Ct. R. 191 (eff. Jan. 4, 2013).

¶44 CONCLUSION

¶45 For the reasons stated above, we affirm the circuit court's order granting CMAG's motion to dismiss based on lack of jurisdiction.

¶46 Affirmed.