

FIFTH DIVISION
March 1, 2013

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

1-12-1710

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEKIN INSURANCE COMPANY,)	Appeal from
)	the Circuit Court
Plaintiff-Appellant,)	of Cook County
)	
v.)	11 CH 40985
)	
MEADOWWORKS, LLC, BRIAN WALSH, and EVANS & GREEN, LLP,)	Honorable
)	Lee Preston,
Defendants-Appellees.)	Judge Presiding

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices PALMER and TAYLOR concurred in the judgment.

O R D E R

HELD: Missouri resident's act of suing Illinois residents in Missouri regarding violations of federal and Missouri law was insufficient contact with Illinois to justify exerting personal jurisdiction in Illinois regarding availability of the Illinois residents' liability insurance coverage.

¶ 1 This is an action for declaratory judgment brought by Pekin Insurance Company seeking a declaration of no coverage under commercial liability and umbrella policies it issued to Meadowworks, Inc., whose principle is Brian Walsh. Meadowworks' registered address is in Schaumburg, Illinois and Walsh's personal residence is in Elk Grove Village, Illinois. The

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coverage action concerns a complaint filed by the Missouri partnership Evans & Green, LLP which is proceeding in the United States District Court for Missouri for damages due to Evans & Green's receipt in Springfield, Missouri, of an unsolicited advertising fax from Meadowworks, in purported violation of federal and Missouri law. The Illinois state court judge granted Evans & Green's motion to dismiss it as a party due to lack of personal jurisdiction pursuant to section 2-301 of the Code of Civil Procedure (735 ILCS 5/2-301 (West 2010)), on grounds that the Missouri partnership had no contacts with Illinois. The court then authorized Pekin Insurance Company to file an interlocutory appeal pursuant to Supreme Court Rule 304(a). Ill. S. Cr. R. 304(a) (eff. Feb. 26, 2010). The insurance company's main argument is that personal jurisdiction is properly asserted because the Missouri partnership created meaningful and substantial contacts with Illinois by suing and giving service to two of its residents, and could have reasonably expected to be haled into an Illinois courtroom regarding the availability of a defendant's insurance coverage.

¶ 2 The Illinois long-arm statute provides that a nonresident submits to the jurisdiction of the Illinois courts as to any cause of action arising from its activities in Illinois and may be served with process outside of Illinois with that service having the same force and effect as though it had been made in Illinois. 735 ILCS 5/2-209 (West 2010). The statute enumerates certain acts, such as entering into a contract or committing a tort in Illinois, but also includes a "catch all" provision indicating a court may exercise jurisdiction on any other basis permitted by the state and federal constitutions. 735 ILCS 5/2-209(c) (West 2010). Thus, under the catch all provision of the long-arm statute, when the due process guarantees of the Illinois and United States'

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constitutions are satisfied, an Illinois court may exercise jurisdiction over a nonresident defendant. *Keller v. Henderson*, 359 Ill. App. 3d 605, 612, 834 N.E.2d 930, 935 (2005) (indicating the enactment of the catch all provision of the long-arm statute made the statute coextensive with the Illinois and federal constitutions).

¶ 3 Illinois due process requires that a court exercise jurisdiction over a nonresident defendant 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 which occur in Illinois or which affect interests located in Illinois." *Rollins v. Ellwood*, 141 Ill. 2d 244, 275, 565 N.E.2d 1302, 1316 (1990). Federal due process is satisfied where the defendant has had sufficient "minimum contacts" with the forum state to the extent that maintaining an action in the forum does not offend "traditional notions of fair play and substantial justice." (Internal quotation marks omitted.) *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154 (1945). The minimum contact requirement ensures that a foreign defendant will not be forced to litigate in a distant or inconvenient forum solely as a result of random, fortuitous or attenuated contacts. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183 (1985). Generally when the federal due process concerns about personal jurisdiction are met, so are the Illinois due process concerns. *Keller*, 359 Ill. App. 3d at 620, 834 N.E.2d at 941. The parties are not arguing this case is an exception to that general principle. Accordingly, we will conduct a single analysis under the federal due process standard for specific personal jurisdiction. *Keller*, 359 Ill. App. 3d at 620, 834 N.E.2d at 941.

¶ 4 A federal due process analysis consists of three prongs. We must first determine

whether Evans & Green had "minimum contacts" with Illinois such that there was "fair warning" that the foreign entity might be haled into an Illinois courtroom. *Burger King Corp.*, 471 U.S. at 471-78, 105 S.Ct. at 2181-85; *Cameron v. Owens-Corning Fiberglas Corp.*, 296 Ill. App. 3d 978, 984, 695 N.E.2d 572, 576 (1998). "Minimum contacts" and "fair warning" are met when it can said that the defendant purposefully directed its activities at the forum's residents, reached out beyond one state to create continuing relationships with citizens of another state, or purposefully derived benefits from its activities and the cause of action arose from those contacts. *Burger King Corp.*, 471 U.S. at 471-78, 105 S.Ct. at 2181-85; *Cameron*, 296 Ill. App. 3d at 984, 695 N.E.2d at 576. "Personal jurisdiction over a defendant may be based upon a single act or transaction which is the subject matter of the lawsuit, if that act or transaction itself has a substantial connection with the forum state." *Kutner v. DeMassa*, 96 Ill. App. 3d 243, 247, 421 N.E.2d 231, 234 (1981). Our second inquiry is whether the insurance coverage action arose out of or related to the law firm's contacts with Illinois. *Burger King Corp.*, 471 U.S. at 471-78, 105 S.Ct. at 2181-85; *Cameron*, 296 Ill. App. 3d at 984, 695 N.E.2d at 576. The third prong is whether it is reasonable to require Evans & Green to litigate in this forum. *Burger King Corp.*, 471 U.S. at 476-78, 105 S.Ct. at 2181-85; *Cameron*, 296 Ill. App. 3d at 984, 695 N.E.2d at 576.

¶ 5 The plaintiff must allege facts in the complaint sufficient for the court to assert jurisdiction over the foreign defendant. *Heller Financial Inc. v. Conagra, Inc.*, 166 Ill. App. 3d 1, 4, 520 N.E.2d 922 924 (1988); *Kutner*, 96 Ill. App. 3d at 247, 421 N.E.2d at 234. When resolving a challenge to personal jurisdiction, a court may consider not only the complaint, but also affidavits from any party and any evidence presented regarding disputed facts. 735 ILCS

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5/2-301 (West 2010); *Cameron*, 296 Ill. App. 3d at 983-84, 695 N.E.2d at 576. Whether a trial court has personal jurisdiction is a question of law that is reviewed *de novo*. *Cameron*, 296 Ill. App. 3d at 983-84, 695 N.E.2d at 576.

¶ 6 As we summarized above, Pekin Insurance Company's complaint for declaratory judgment in the circuit court of Cook County, Illinois, indicates that Evans & Green filed a complaint in Missouri state court (Circuit Court of the 31st Judicial Circuit, Greene County, Missouri) on August 22, 2011, alleging that on June 16, 2011, it received an unsolicited facsimile advertisement from Meadowworks. Further, Evans & Green is seeking damages from Meadowworks for purported violation of the federal Telephone Consumer Protection Act of 1991 (47 U.S.C. 227 (West 2010) (which specifically prohibits, among other things, unsolicited advertising faxes)), violation of the Missouri Computer Tampering Act, and the torts of conversion, invasion of privacy, and negligence for causing the loss of the use of the facsimile machine and the consumption of facsimile paper and toner. Also, Evans & Green is a Missouri limited liability partnership that maintains its business office in Greene County, Springfield, Missouri. Meadowworks is an Illinois limited liability company that maintains a registered agent for the service of process in Illinois, namely Brian Walsh, and Walsh is an officer, director, managing agent, or has held similar positions of managerial responsibility for Meadowworks, and had actual or constructive knowledge of the transmission of unsolicited advertising faxes. Meadowworks' stated address for service of process was in Illinois, and Walsh himself resided in Illinois. We note that is undisputed that the Missouri state court action was removed to the United States District Court for the Western District of Missouri and is currently pending in that

federal forum. To these allegations, the insurer added that it issued certain primary and umbrella policies to Meadowworks and requested a judicial declaration that Meadowworks and Walsh were not entitled to coverage for the Missouri action because (1) the Missouri complaint is not seeking damages due to covered "bodily injury" or "property damage" caused by an "occurrence" as those terms are used in the insurance contracts, (2) the Missouri complaint does not seek damages because of "personal and advertising injury" to which the policies apply, and (3) the Missouri claims are specifically excluded from coverage by policy exclusions regarding unsolicited fax advertisements. Pekin Insurance Company also sought the court's declaration that policy endorsements in the primary policies entitle the insurer to recoup the defense costs it has expended on Meadowworks' behalf.

¶ 7 Appellant Pekin Insurance Company argues that it did allege a *prima facie* basis for exerting jurisdiction over Evans and Green, by alleging that Evans & Green "sued Illinois residents, who are insured by an Illinois insurance company, under policies of insurance issued in Illinois." We disagree.

¶ 8 Pekin Insurance Company alleged that it was an Illinois company that had a contractual relationship with Illinois residents Meadowworks and Walsh to provide commercial insurance coverage for various years, that Meadowworks and Walsh had been sued, and that the terms of the insurance contracts either did not encompass the suit or specifically excluded that type of suit from coverage. None of these allegations indicate that the plaintiff in the underlying action had any contact with Illinois. Furthermore, nothing in the underlying pleading suggested a connection to Illinois. Evans & Green filed suit in its home forum of Missouri regarding the

misuse of property owned and located in that forum and sought damages based on federal and Missouri law. Evans & Green's suit did not involve any transaction in or contact with the state of Illinois. The offense was alleged to have occurred in Missouri, regarding property and statutory rights in that jurisdiction. It makes no difference to Evans & Green whether the offending fax transmission came from a Missouri resident or from a resident of some other jurisdiction, and the fact that the named defendants are Illinois residents has no bearing on the underlying action. Thus, the underlying complaint did not indicate Evans & Green ever reached out beyond Missouri to create continuing relationships with citizens of Illinois, purposefully directed any activity toward an Illinois resident, or purposefully derived any benefit from any acts in Illinois.

¶ 9 In addition, an affidavit attached to the law firm's motion to dismiss it as a party to this Illinois action further confirmed the lack of minimum contacts. The affidavit filed by Evans & Green contained specific, relevant facts and these statements were not opposed by counteraffidavit from Pekin Insurance Company. See *Kutner*, 96 Ill. App. 3d at 248, 421 N.E.2d at 235 (when considering a challenge to personal jurisdiction, a court may consider and weigh facts set out in affidavits); *Aasonn, LLC v. Delaney*, 2011 IL App. 2d 101125, ¶9, 961 N.E.2d 939, 945 (2011) (a plaintiff's *prima facie* case for jurisdiction can be overcome by the defendant's uncontradicted evidence that defeats jurisdiction); *Kutner*, 96 Ill. App. 3d at 248, 421 N.E.2d at 235 (if a defendant's affidavit contesting jurisdiction is not refuted by counteraffidavit filed by the plaintiff, then the facts alleged in the defendant's affidavit are accepted as true). Douglas S. Evans swore (1) Evans & Green is a limited liability partnership consisting of himself and Brent D. Green, (2) Mr. Evans and Mr. Green are residents of Missouri, (3), the law firm's only office

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is located in Springfield, Missouri, (4) neither Mr. Evans nor Mr. Green are licensed to practice law in Illinois or have practiced in an Illinois matter, and (5) Evans & Green does not employ any residents of Illinois, or otherwise do business in the State of Illinois.

¶ 10 The additional fact that the Missouri complaint was served in Illinois is immaterial to the coverage suit. Evans & Green is haling defendants, wherever they might be or reside, into its home forum of Missouri to seek redress for an injury that occurred in Missouri. The insurer has argued Evans & Green purposefully availed itself of the benefits and protections of Illinois law when it effectuated service in Illinois. However, we do not consider the law firm's brief entry into the boundaries of Illinois strictly to hale Walsh and his company into the Missouri forum to be a basis for exerting personal jurisdiction over the Missouri law firm. Moreover, Evans & Green has argued that service of process was based on the Missouri long-arm statute. In any event, the minimum contact requirement ensures that a foreign defendant will not be forced to litigate in a distant or inconvenient forum solely as a result of random, fortuitous or attenuated contacts. *Burger King Corp.*, 471 U.S. at 475, 105 S.Ct. at 2183. In our opinion, serving process in Illinois was such a brief and attenuated contact with Illinois that it would offend the concepts of "fair play and substantial justice" to assert personal jurisdiction on this basis. *International Shoe Co.*, 326 U.S. at 316, 66 S.Ct. 154.

¶ 11 Naming Illinois residents in a Missouri lawsuit and serving them in Illinois was the full extent of Evans & Green's relationship with the state of Illinois and we find that those actions were not enough to satisfy the long-arm statute or constitutional standards of "minimum contacts" such that there was "fair warning" that Evans & Green might be haled into an Illinois

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courtroom regarding any aspect of its Missouri suit.

¶ 12 Even if there were sufficient minimum contacts, the other requirements of federal due process are lacking. The fact that the Missouri complaint was served in Illinois did not give rise to the insurance coverage action. The Missouri and Illinois actions (and their service) arose from Meadowworks' facsimile transmission of unsolicited advertising. The service of process in Illinois was not an independent action. Also, the fact that the Missouri complaint was served in Illinois is not material to the coverage action. The material facts in the coverage action are the terms of the contract between Pekin Insurance Company and Meadowworks and whether the underlying suit alleges facts within or potentially within the scope of policy coverage. See *State Farm Fire & Casualty Co. v. Martin*, 186 Ill. 2d 367, 371, 710 N.E.2d 1228, 1231-32 (1999) (indicating that when a complaint against an insured alleges facts within or potentially within the scope of policy coverage, the insurer taking the position that a complaint is not covered by its policy must either defend the suit under a reservation of rights or seek a declaratory judgment that there is no coverage). Coverage is not affected by the venue of the underlying suit or where service was perfected. We point out that the insurer itself alleged that Evans & Green was being named in the coverage action only as a nominal party so that it would be bound by the declaratory judgment.

¶ 13 Finally, it would be unreasonable to require Evans & Green to litigate in Illinois. Evans & Green filed suit in Missouri concerning injury that occurred in Missouri in violation of federal and Missouri law. Evans & Green is burdened by its participation in this coverage suit, Illinois has virtually no interest in the resolving whether there is insurance coverage for the

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Missouri injury, the most efficient forum for resolving coverage is forum venue where the underlying complaint will be litigated.

¶ 14 The circuit court's dismissal of Evans & Green as a party to this coverage action is affirmed.

¶ 15 Affirmed.