

No. 1-15-0224

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

LISA INMAN, individually and as Administrator of the Estate of JESSE INMAN, deceased,)	Appeal from the
)	Circuit Court of Cook County
)	
Plaintiff-Appellee,)	
v.)	
)	
HOWE FREIGHTWAYS, INC., et al.,)	
)	
Defendant-Appellant.)	No.12 L 004183
)	
)	Honorable James N. O'Hara
HOWE FREIGHTWAYS, INC., et al.,)	Judge Presiding
)	
Third-Party Plaintiff-Appellee,)	
v.)	
)	
HANIFEN COMPANY, INC.,)	
)	
Third-Party Defendant-Appellant.)	
)	

JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in dismissing the third-party defendant's motion to dismiss when the third-party defendant was not subject to personal jurisdiction in Illinois.

¶ 2 Third-party defendant Hanifen Company, Inc. ("Hanifen") appeals under Illinois Supreme Court Rule 306(a)(3) from an order of the circuit court of Cook County denying its motion to dismiss defendant's, Howe Freightways, Inc. ("Howe"), third party complaint for lack of personal jurisdiction. For the following reasons, we reverse the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On September 13, 2011, Jesse Inman, was fatally injured when he was crushed between two tractor-trailers as a result of a multi-vehicle accident that took place near Malcolm, Iowa, on Interstate 80. Howe's driver, James Langholf, pulled onto the shoulder of westbound Interstate 80 after the tractor-trailer broke down. Jesse Inman, who was employed by Hanifen as a heavy duty truck driver, responded to a call to assist Langholf and parked his freight line wrecker in front of the disabled tractor-trailer. Another Hanifen employee, Daniel Walsh, reported to the scene to help and parked his tractor behind the disabled tractor.

¶ 5 Herbert Terrell, an employee of Hiner Equipment, LLC, was driving his tractor-trailer westbound on Interstate 80 in the lane closest to the shoulder. Terrell's tractor-trailer sideswiped Daniel Walsh's tractor-trailer and collided with the Langholf's tractor-trailer. The collision caused Jesse Inman to be crushed between his tractor-trailer and Langholf's tractor-trailer. On April 19, 2012, plaintiff, Lisa Inman, individually and as administrator of the estate of Jesse Inman filed her complaint alleging ten counts of negligence against seven defendants, including Howe.

¶ 6 Howe filed a third-party complaint for contribution against Hanifen, decedent's employer. In response, Hanifen filed a limited appearance and objections to jurisdiction, claiming that the circuit court lacked personal jurisdiction over Hanifen. Limited discovery for jurisdictional purposes was then conducted by the parties, including the deposition of Julie Hanifen on May 6,

2014. Julie Hanifen testified to the following facts. Hanifen was an Iowa corporation with its primary place of business in Des Moines, Iowa. Hanifen's primary business was towing and recovery of disabled vehicles. Towing involved picking up and moving a disabled vehicle while recovery involved the actual act of recovering a vehicle that has been involved in an accident or rolled over into a ditch.

¶ 7 Between September 13, 2011, and August 6, 2013, Hanifen made 18 business trips to the Illinois for purposes of towing and recovery of vehicles. Customers, either individuals or corporations, generally called Hanifen either directly, or through a service center to request towing or recovering services for disabled vehicles. Hanifen's vehicles have never performed a recovery in Illinois. As a result of its Illinois towing activities, Hanifen received the sum of \$36,146.37 for the time period from the date of the accident through August 6, 2013, when Hanifen was served with the third-party complaint.

¶ 8 For its towing business, Hanifen had a "48-state authority" which allowed Hanifen's tow trucks to travel on the roads in the continental United States. To obtain the 48-state authority, Hanifen paid \$96.00 to a private business and provided its U.S Department of Transportation number (DOT), Motor carrier number and Certificate of Insurance. The actual motor vehicle usage charges were administered by the Iowa Department of Transportation and fees were paid to the State of Iowa. A portion of the fees were then paid to the states in which the roads were used, and such payments were made by the Iowa Department of Transportation.

¶ 9 Hanifen has maintained a website to market its services where it stated that it had authority in 48 states. The advertising was limited to a Des Moines radio station, brochures, and occasional ads for used cars in the Des Moines Register Newspaper.

¶ 10 On January 9, 2015, the trial court denied Hanifen's objections to jurisdiction. The trial court found that it could properly exercise personal jurisdiction over Hanifen pursuant to both 735 ILCS 5/2-209(b)(4) and the minimum contact requirements of the due process finding that Hanifen had "repeatedly and systematically" conducted business in Illinois. Hanifen filed a Rule 306(a)(3) petition, which the court granted on March 19, 2015. This appeal followed.

¶ 11 ANALYSIS

¶ 12 On appeal, Hanifen argues that the circuit court erred in denying its motion to dismiss for lack of personal jurisdiction. Specifically, Hanifen argues that the trial court's application of the Illinois long-arm statute pursuant to section 735 ILCS 5/2-209(b)(4) was erroneous because Hanifen was not "doing business" in Illinois. Hanifen argues that the miles driven in Illinois and the financial benefit derived from towing the cars from Illinois are a relatively small percentage of its overall business. Hanifen contends that it did not maintain any offices in Illinois, it made no sales in Illinois, it did not employ any single Illinois resident, and that it has no regular "routes" into and through Illinois. Hanifen claims that its 18 trips to Illinois, during the two-year relevant period, for towing cars for its Iowa customers were sporadic and casual and were not sufficiently regular to satisfy the long-arm statute. In addition, Hanifen argues that the trial court erred because the exercise of personal jurisdiction over Hanifen did not satisfy the due process requirements.

¶ 13 In turn, Howe argues that Hanifen's contacts with Illinois were sufficiently regular and conducted with a fair measure of continuity to justify the exercise of personal jurisdiction over Hanifen. Howe contends that the following facts support its position that Hanifen was conducting business in Illinois: 1) Hanifen sent its drivers to Illinois on average ten times a year to perform towing and recovery operations; 2) Hanifen advertised that it has 48-state authority;

3) Hanifen earned a significant sum as of result of Illinois towing and recovering activities; 4) a portion of the IFTA fee that Hanifen paid in Iowa was remitted to Illinois, and 5) that Hanifen contracted with an Illinois customer to perform towing services. Additionally, Hanifen contends that the exercise of personal jurisdiction over Hanifen was consistent with due process requirements under the Illinois and federal constitutions.

¶ 14 When the circuit court decides a jurisdictional question solely on the basis of documentary evidence, as it did in this case, the question is addressed *de novo* on appeal. *Rosier v. Cascade Mountain, Inc.*, 367 Ill. App. 3d 559, 561 (2006). It is the plaintiff's burden to establish a *prima facie* case for personal jurisdiction over the defendant. *Id.* at 561. To determine whether the plaintiff has set forth a *prima facie* case for jurisdiction, the trial court must consider the uncontroverted pleadings, documents and affidavits, as well as any facts asserted by the defendant that have not been contradicted by the plaintiff. *Knaus v. Guidry*, 389 Ill. App. 3d 804, 813 (2009).

¶ 15 Section 2–209 of the Code of Civil Procedure sets forth the grounds when Illinois courts will exercise personal jurisdiction over a nonresident defendant. 735 ILCS 5/2–209 (West 2010). Section 2–209(a) outlines specific actions by a defendant that will subject him or her to specific personal jurisdiction in Illinois. 735 ILCS 5/2–209(a) (West 2010). Section 2–209(b) outlines the instances in which Illinois has general jurisdiction over a nonresident corporation. 735 ILCS 5/2–209(b) (West 2010). Finally, section 2–209(c) is a “catchall provision” (*Rosier*, 367 Ill. App. 3d at 561), which permits Illinois courts to “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(c) (West 2010). After determining whether a specific statutory provision of section 2–209 has been satisfied, the next inquiry is determining whether the due process

requirements of the United States and Illinois Constitutions have been met. *Rollins v. Ellwood*, 141 Ill. 2d 244, 275 (1990). The two-part analysis is no longer necessary when subsection (c) is invoked because it constitutes an independent basis for exercising personal jurisdiction that effectively collapses the jurisdictional inquiry into the single issue of whether a defendant's Illinois contacts are sufficient to satisfy federal and Illinois due process. *Russell v. SNFA*, 2013 IL 113909, ¶ 30.

¶ 16 We consider whether the trial court has general jurisdiction over defendant pursuant to section 2–209(b) and find that only subsection (b)(4) could be applicable in this case. Under section 2–209(b)(4), a court may exercise jurisdiction over a defendant that is "doing business within this State." 735 ILCS 5/2–209(b)(4) (West 2008). "Illinois limits general jurisdiction over nonresidents to instances in which the nonresident was present and doing business in the forum." *Compass Environmental, Inc. v. Polu Kai Services, L.L.C.*, 379 Ill. App. 3d 549, 558 (2008). The "doing business" standard is "very high" and requires the nonresident corporation's business activity in Illinois to be carried on, not casually or occasionally, but with a fair measure of permanence and continuity. *Rosier*, 367 Ill. App. 3d at 562. This requirement means that "[i]n effect, the foreign corporation has taken up residence in Illinois and, therefore, may be sued on causes of action both related and unrelated to its activities in Illinois." *Id.* at 563. Although there may be no such all-inclusive test, almost all Illinois cases determining the existence of personal jurisdiction over foreign corporations have based their findings upon the existence of factors such as offices or sales activities in Illinois. *Cardenas Marketing Network, Inc. v. Pabon*, 2012 IL App (1st) 111645, ¶ 31.

¶ 17 In the instant case, the trial court erred in determining that Hanifen's 18 trips to Illinois to provide towing services for its customers were sufficiently regular to establish that Hanifen was

conducting business in Illinois. The relevant period of time for determining whether Hanifen was "doing business" in Illinois was from the date of the accident through the date that Hanifen was served with the third party complaint, September 13, 2011 through August 6, 2013, respectively. See *Reeves v. Baltimore & Ohio R.R. Co.*, 171 Ill. App. 3d 1021, 1027 (1998).

First, we note that Hanifen is an Iowa corporation that does not maintain any offices in Illinois, it made no sales in Illinois, and it did not employ any Illinois resident. *Huck v. Northern Indiana Public Service Co.*, 117 Ill. App. 3d 837, 840 (1983) (whether the defendant has maintained offices or engaged in sales activities in Illinois is determinative for a court to exercise personal jurisdiction over the defendant corporation).

¶ 18 Next, the record on appeal indicates that the actual road use in Illinois for Hanifen's tow trucks was very small compared to the total miles traveled by Hanifen's vehicles, representing, on average, less than 1% of the total miles traveled by Hanifen's vehicles per year. Furthermore, the record indicates that Hanifen's vehicles were all dispatched from its Des Moines, Iowa office, and, when they entered in another state, such as Illinois, the trip had always originated from Des Moines, it included a "swap out" of the defective vehicle and always ended in Des Moines. The mere fact that Hanifen drove into Illinois 18 times while providing towing services for its non-Illinois customers during the relevant period of time without any other showing of permanence and continuity falls short of demonstrating that Hanifen was conducting business in Illinois. See *Reimer v. KSL Recreation Corp.*, 348 Ill. App. 3d 26, 34 (2004).

¶ 19 Additionally, the invoices issued by Hanifen charging its customers \$36,146.37 indicate that these charges included travel in Iowa en route to Illinois and were not solely charges for the mileage in Illinois. The invoices merely show that Hanifen's vehicles traveled on Illinois roadways while providing towing services for its non-Illinois customers. Notably, none of the

invoices were issued to an Illinois customer because Hanifen did not have any Illinois customers during the relevant period of time.¹ Therefore, Hanifen's contacts with Illinois were merely sporadic and collateral to its towing business in Iowa and were not carried with a fair measure of permanence and continuity. See *Rosier*, 367 Ill. App. 3d at 562.

¶ 20 Moreover, contrary to Howe's argument otherwise, even if Hanifen advertised that it had 48-state authority to conduct its services, the mere advertisement and solicitation does not subject a defendant to personal jurisdiction. See *Riemer v. KSL Recreation Corp.*, 348 Ill. App. 3d at 36. Similarly, the argument that personal jurisdiction over Hanifen was justified because a portion of Hanifen's payment of IFTA fee was remitted to the State of Illinois is not persuasive. The record indicates that Hanifen paid a fee of \$96.00 to an Iowa business entity that obtained a 48-state authority on its behalf. The Iowa Department of Transportation administers the authority, accesses and receives fees from Hanifen based upon its road usage. The Iowa Department of Transportation then pays the fees to other states, including Illinois. Hanifen had no dealings with the Illinois government, had no vehicles registered in Illinois, and did not license any of his vehicles in Illinois.

¶ 21 Howe cites to *Gaidar v. Tippecanoe Distribution Serv., Inc.*, 299 Ill. App. 3d 1034, 1041, (1998), and *Colletti v. Crudele*, 169 Ill. App. 3d 1068 (1988) in support of its argument. However, both cases are distinguishable from the instant case. In *Gaidar*, the plaintiff brought a negligence action in an Illinois court following an automobile accident in Indiana with a truck driven by an Indiana resident and owned by an Indiana trucking corporation. *Gaidar v. Tippecanoe Distribution Serv., Inc.*, 299 Ill. App. 3d 1034, 1041 (1998). The record in *Gaidar*

¹ Hanifen contracted with Insurance Auto Auctions Inc., an Illinois company to perform towing services in Iowa, effective December 15, 2013, outside the relevant period.

showed that the defendant corporation conducted a majority of its business in the Midwest, with less than 2% of its monthly trucking business originating or terminating in Illinois and less than 10% of its total monthly mileage driven in Illinois. *Id.* at 1038. In *Gaidar*, the frequency of the defendant corporation's business contacts with Illinois were further described as “fewer than 30 times a year” in relation to one Illinois client, and “from time to time” with several other Illinois clients. *Id.* We concluded that the plaintiff in *Gaidar* proved a *prima facie* case of *in personam* jurisdiction based on section 2–209(b)(4) of the Code when, in addition to the regular trips to Illinois, the defendant delivered loads to Illinois railroad yards and had interchange agreements with several companies and three railroads in Illinois. *Id.* at 1039.

¶ 22 Unlike *Gaidar*, where we found that defendant's business in Illinois was "fairly regular" as it made regular delivery trips to Illinois and earned \$257,000 annually from its business in Illinois, Hanifen did not deliver or sell any goods in Illinois, and it did not have any established routes. Unlike *Gaidar*, where the defendant had several customers in Illinois, including several companies and railroad yards where it would pick up freight, in the instant case, Howe cannot identify one Illinois customer for which Hanifen was performing services during the relevant time period. To the contrary, here, the invoices reflect that they were all sent to non-Illinois customers. Therefore, Howe's reliance on *Gaidar* is misplaced.

¶ 23 Next, in *Colletti v. Crudele*, 169 Ill. App. 3d 1068 (1988), this court found jurisdiction over a defendant corporation from Florida in a personal injury complaint arising out of an automobile accident in Kentucky that killed a passenger who was an Illinois resident. *Colletti*, 169 Ill. App. 3d at 1072. The truck driver was also a resident of Illinois. *Id.* In the year of the accident, .04% of defendant's gross income (or \$980.58) was derived from Illinois, including stops for delivery or pickup in Illinois but not including trips made through the state without such

stops. *Id.* at 1073. We noted that the defendant corporation's Illinois activities could not necessarily be minimized by reference to the percentage of its total business and that an average of a dozen trips a year to and from an Illinois consignee was not intrinsically insubstantial. *Id.* at 1079. We concluded that defendant had continuous and systematic contacts with Illinois, as illustrated by the history of its operations, because it did not refuse business in Illinois and because defendant regularly transported materials to Illinois. *Id.* at 1080.

¶ 24 Our decision in *Colletti*, was also supported by several other important factors such as that defendant had a registered agent in Illinois, that defendant in three other cases arising from the same accident already venued in Illinois, and that defendant had not contested jurisdiction in those cases. Unlike *Colletti*, no such considerations exist in the instant case. Moreover, unlike the defendant in *Colletti*, Hanifen did not actively procure business in Illinois, as all of Hanifen's trips into Illinois were at the request of non-Illinois customers and did not involve conducting business with any entities located in Illinois. Hanifen's trips to Illinois were entirely the result of a vehicle breaking down within the borders of Illinois and its non-Illinois customers requesting that Hanifen service the vehicle. Therefore, *Colletti* does not support Howe's arguments.

¶ 25 In addition, the trial court erred in finding that the due process requirements under the Illinois and the United States Constitutions supported personal jurisdiction over Hanifen. 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." *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." *Russell*, 408 Ill. App. 3d at 832 (quoting *Rosier v. Cascade Mountain, Inc.*, 367 Ill. App. 3d at 561–62). 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.

¶ 26 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)).

¶ 27 In the present case, Hanifen's contacts with Illinois consisted of 18 trips for towing purposes and were not continuous or systematic. As discussed previously, Hanifen did not have any regular scheduled trips to Illinois, its tow trucks only entered in Illinois when one of its Iowa customers asked Hanifen to tow a broken-down vehicle on Illinois roadways, and during the relevant period Hanifen tow trucks driving on Illinois roadways amounted to less than 1% of Hanifen's total miles traveled. Furthermore, Hanifen did not have any Illinois customers or Illinois employees. Accordingly, we cannot say that Hanifen purposefully availed itself of the privilege of conducting activities within Illinois considering the limited activities that Hanifen performed in Illinois. Therefore, the exercise of personal jurisdiction over Hanifen in Illinois would offend traditional notions of fair play and substantial justice. See *Soria v. Chrysler Canada, Inc.*, 2011 IL App (2d) 101236, ¶ 18.

¶ 28 In sum, we find that Illinois courts cannot exercise general jurisdiction over Hanifen. Hanifen did not transact business in Illinois and it does not have offices, employees or sales activities in Illinois. Hanifen's business in Illinois did not have a fair measure of continuity or permanency. Nor had Hanifen engaged in continuous and systematic business contacts in Illinois. Therefore, the trial court erred in finding that it had general personal jurisdiction over Hanifen.

¶ 29 CONCLUSION

¶ 30 Accordingly, we reverse the judgment of the trial court and remand the case to the trial court for further proceedings consistent with this order.

¶ 31 Reversed and remanded.