

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Star Seal of Ohio, Inc., :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 09AP-969
 : (C.P.C. No. 09CVH3-4738)
 Tri State Pavement Supplies, LLC et al., : (ACCELERATED CALENDAR)
 :
 Defendants-Appellees. :

D E C I S I O N

Rendered on May 25, 2010

Kevin R. Nose and Timothy J. Ryan, for appellant.

Randy A. Vermilya, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, Star Seal of Ohio, Inc. ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas granting a motion to dismiss for lack of personal jurisdiction filed by defendants-appellees, Tri State Pavement Supplies ("Tri State"), Joseph A. Zulisky, and Timothy Michael Laurer (collectively, "appellees").

{¶2} Appellant is a company based in Franklin County which is engaged in the business of producing and selling pavement protection sealants and related products. Tri

State is a business with its headquarters in Pennsylvania, which is engaged in the business of selling asphalt products. Zulisky and Laurer are individuals acting as agents for Tri State. Appellant filed this action seeking to recover damages for an alleged breach of contract whereby Tri State purportedly failed to pay for products it purchased from appellant.

{¶3} In response to the complaint, appellees filed a motion to dismiss the complaint, pursuant to Civ.R. 12(B)(2), for lack of personal jurisdiction or, in the alternative, pursuant to Civ.R. 12(B)(5), for failure of service of process. In support of its motion to dismiss for lack of personal jurisdiction, appellees provided an affidavit executed by Zulisky, in which he stated, among other things, that Tri State does not maintain or conduct any business operations in Ohio, does not derive any revenue from any sources in Ohio, that no contract between appellant and Tri State was signed in Ohio, and that the only discussions regarding the possible purchase of product were held via telephone or facsimile.

{¶4} Appellant filed a memorandum contra, arguing that the trial court could appropriately exercise personal jurisdiction over appellees. In support of its memorandum contra, appellant attached an affidavit executed by Timothy Starr setting forth a number of alleged facts supporting its argument regarding personal jurisdiction. Appellees moved to strike Starr's affidavit on the grounds that nothing in the affidavit indicated that Starr had personal knowledge of the facts alleged, and that the alleged facts constituted inadmissible hearsay.

{¶5} Appellant filed a supplemental memorandum contra, to which it attached a second affidavit executed by Starr, in which he stated, in pertinent part, that he had

received a phone call at his Columbus office from Tri State inquiring about available products, and that he had a meeting at his Columbus office with Zulisky, acting on behalf of Tri State, in order to negotiate price and delivery terms for the sale of appellant's products to Tri State. The affidavit further stated that Zulisky and Laurer had signed an application for credit in which they agreed to personally guarantee Tri State's debt. Appellees filed a motion to strike Starr's second affidavit, which the trial court denied.

{¶6} The trial court, without holding a hearing, granted appellees' motion to dismiss. The court concluded that nothing in the evidentiary materials provided by appellant established that appellees were conducting business in the state of Ohio for purposes of R.C. 2307.382 and Civ.R. 4.3, and that those materials did not show that appellees had sufficient minimum contacts with the state such that the court could exercise personal jurisdiction consistent with due process.

{¶7} Although not specifically designated as an assignment of error, in its brief, appellant sets forth a single issue for our review:

DID THE TRIAL COURT ERR IN FAILING TO HOLD AN EVIDENTIARY HEARING BEFORE IT GRANTED DEFENDANTS-APPELLEES' MOTION TO DISMISS WHEN PLAINTIFF-APPELLANT HAD ESTABLISHED A *PRIMA FACIE* CASE THAT DEFENDANTS-APPELLEES TRANSACTED BUSINESS IN THIS STATE UNDER ORC 2307.382(A) AND THE APPLICABLE CIVIL RULE, CIV.R.4.3?

{¶8} When determining whether a trial court may properly exercise personal jurisdiction over a non-resident defendant, it is necessary to engage in a two-step analysis. This analysis requires the court to determine: (1) whether Ohio's long-arm statute, R.C. 2307.382, and Civ.R. 4.3(A) confer personal jurisdiction and, if so, (2)

whether granting personal jurisdiction under the statute and rule would deprive the defendant of due process under the Fourteenth Amendment to the United States Constitution. *Clark v. Connor*, 82 Ohio St.3d 309, 312, 1998-Ohio-385, citing *U.S. Sprint Communications Co., Ltd. Partnership v. Mr. K's Foods, Inc.*, 68 Ohio St.3d 181, 183-84, 1994-Ohio-504.

{¶9} The second part of the analysis requires consideration of whether the defendant has sufficient minimum contacts with the forum state such that "the case does not offend traditional due process concerns of fair play and substantial justice." *State ex rel. Toma v. Corrigan*, 92 Ohio St.3d 589, 593, 2001-Ohio-1289, citing *Internatl. Shoe Co. v. Washington* (1945), 326 U.S. 310, 66 S.Ct. 154. The inquiry into this constitutional issue depends upon consideration of whether the defendant should reasonably anticipate being haled into court in the forum state. *Toma* at 593. Both steps of the analysis must be considered because "the long-arm statute does not give Ohio courts jurisdiction to the limits of the due process clause." *Joffe v. Cable Tech, Inc.*, 163 Ohio App.3d 479, 2005-Ohio-4930, ¶11, citing *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 238, fn. 1, 1994-Ohio-229.

{¶10} Once a defendant has raised the issue of personal jurisdiction, the burden falls on the plaintiff to establish personal jurisdiction. *First Mut. Financial Corp. v. Family Savers of Mississippi, Inc.* (June 29, 1999), 10th Dist. No. 98AP-1436, citing *Jurko v. Jobs Europe Agency* (1975), 43 Ohio App.2d 79. If the court decides the issue of jurisdiction without holding an evidentiary hearing, the court must consider the allegations in the pleadings, as well as any other evidentiary materials, in a light most favorable to the party seeking to establish personal jurisdiction, and determine whether that party has set forth a

prima facie case for jurisdiction. *Meglan, Meglan & Co., Ltd. v. Abante Corp.*, 10th Dist. No. 07AP-130, 2007-Ohio-5013. We review a trial court's decision on the issue of personal jurisdiction de novo. *Parshall v. PAID, Inc.*, 10th Dist. No. 07AP-1019, 2008-Ohio-3171.

{¶11} Since the trial court did not hold an evidentiary hearing on appellees' motion to dismiss for lack of personal jurisdiction, the issue before us is whether the evidentiary materials appellant provided to the trial court were sufficient to set forth a prima facie case for jurisdiction. Appellees have filed a motion to strike portions of appellant's brief on the grounds that appellant's statement of facts include factual allegations that were not before the trial court. Since our review is confined to whether appellant made a prima facie case for personal jurisdiction at the trial court level, we can only consider those evidentiary materials that were properly before the trial court. Thus, to the extent that appellant asserts facts that were not contained in those evidentiary materials, appellees' motion to strike is granted.

{¶12} In the first step for analyzing whether Ohio courts may exercise personal jurisdiction over an out-of-state defendant, it is first necessary to consider whether the defendant's activities are covered by Ohio's long-arm statute, R.C. 2307.382, and Civ.R. 4.3(A). R.C. 2307.382 and Civ.R. 4.3(A) are essentially co-extensive, and act as complements to each other. *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.* (1990), 53 Ohio St.3d 73.

{¶13} In determining whether a defendant falls within the reach of the long-arm statute, courts should consider three factors: (1) whether the defendant purposely availed itself of the privilege of acting in the forum state or caused some consequence in the

forum state; (2) whether the cause of action arose from the defendant's activities in the forum state; and (3) whether the acts or consequences have a substantial enough connection with the forum state to make the exercise of personal jurisdiction over the defendant reasonable. *Parshall*, citing *Krutowsky v. Simonson* (1996), 109 Ohio App.3d 367.

{¶14} R.C. 2307.382 provides, in relevant part, that:

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

(1) Transacting any business in this state[.]

{¶15} Similarly, Civ.R. 4.3(A)(1) provides that service of process may be made on a non-resident defendant:

[W]ho, acting directly or by an agent, has caused an event to occur out of which the claim that is the subject of the complaint arose, from the person's:

(1) Transacting any business in this state[.]

{¶16} The term "transacting any business" has been considered by Ohio courts to be a broad statement of jurisdiction. *Kentucky Oaks Mall* at 75. Whether a defendant has transacted any business in Ohio depends heavily on the specific facts of an individual case. *U.S. Sprint* at 185. However, courts have generally recognized that in order to be considered to have transacted business in Ohio, a non-resident defendant must have done more than merely solicit business; it must have actually conducted business within the state. *Id.* A defendant is considered to have transacted business in Ohio "if the business operations set in motion by the defendant have a 'realistic impact' on Ohio commerce." *Priess v. Fisherfolk* (S.D. Ohio 1982), 535 F.Supp. 1271, 1274.

{¶17} It is not sufficient to find that a non-resident corporation was "transacting any business" in Ohio where the corporation merely solicited business in the state. *Barnabas Consulting Ltd. v. Riverside Health System, Inc.*, 10th Dist. No. 07AP-1014, 2008-Ohio-3287. However, the fact that a non-resident corporation initiated business dealings with an Ohio corporation through contact at the Ohio corporation's office is one factor that may support the conclusion that the non-resident corporation was transacting business in Ohio. *Id.* Additional factors that courts may consider include whether contract negotiations were carried out in Ohio, whether the majority of the work under the contract was to be carried out in Ohio, and whether the contract called for payment to be sent to the Ohio corporation. *Id.*

{¶18} The second affidavit executed by Timothy Starr stated, in its entirety:

I, Timothy Star [sic], the undersigned, being duly cautioned and sworn, do state that I have personal knowledge and information and am competent to testify as follows:

- 1) As Marketing Director for Star Seal of Ohio, Inc., the Plaintiff in the above-styled action and in my position, on or about March or April of 2007, took a phone call from Tri-State Pavement Supplies, LLC ("Tri-State[") and Mr. Joe Zulisky inquiring about products manufactured by Star Seal for use in their pavement coating operations;
- 2) On or about April 2007, I was in a meeting at the offices of Plaintiff and met with Mr. Zulisky on behalf of Tri-State who came to Columbus to visit with staff to negotiate pricing structure and delivery terms for the sale of Plaintiff's product to Tri-State;
- 3) In such meeting in Columbus, Ohio, I was told by Mr. Zulisky that Tri-State had their own storage facilities.
- 4) In my capacity with Plaintiff, Tri-State [sic], I reviewed orders for the product and am personally aware that Plaintiff shipped bulk product to Tri-State on a number of occasions

after product was ordered through the normal procedure for ordering of which I was personally in charge.

5) I am personally aware that, as part of the account set-up process, Tri-State forwarded to Plaintiff a Credit Application to order product on account and two individuals, Joe Zulisky and Timothy Michael Laurer who are identified on the application as co-owners, signed the part of the Credit Application whereby they personally guaranteed payment for the product.

{¶19} The only evidence that would support the conclusion that appellees were transacting business in Ohio is that Zulisky solicited business with appellant by calling appellant's office on behalf of Tri State to inquire about products sold by appellant, and that a meeting took place in appellant's Columbus office in which pricing and delivery terms were negotiated. Notably, nothing in the affidavit indicates that the parties executed a contract during the Columbus meeting or, in fact, at any other time. Paragraph 4 of the affidavit suggests that a contract was executed somewhere, since product was shipped from appellant to Tri State, but falls short of specifically stating so, and while the affidavit refers to orders being placed "through the normal procedure for ordering," there is nothing in the affidavit explaining what the "normal procedure" was, which would include information such as how and where payment was to be made. Finally, Starr's affidavit mentions the credit application signed by Zulisky and Laurer, but there is no indication that the document was executed during the Columbus meeting.

{¶20} Given the broad interpretation applied to the term "transacting any business," we conclude that the facts alleged by appellant were sufficient to make a prima facie case for personal jurisdiction under the long-arm statute.

{¶21} Having determined that appellant set forth a prima facie case for jurisdiction under the long-arm statute, we must now address the second part of the personal

jurisdiction analysis, which requires consideration of whether the exercise of personal jurisdiction would violate appellees' due process rights. See *Fritz-Rumer-Cooke Co., Inc. v. Todd & Sargent* (Feb. 8, 2001), 10th Dist. No. 00AP-817. The due process clause protects a non-resident defendant from being subjected to a judgment rendered in a forum with which that defendant has not established any "minimum contacts." *Barnabas Consulting* at ¶17, citing *Internatl. Shoe Co.*, 326 U.S. at 316, 66 S.Ct. at 158.

{¶22} For purposes of the due process analysis, personal jurisdiction falls into one of two categories: general jurisdiction, which involves jurisdiction over a cause of action that does not arise out of or relate to a defendant's contacts with the forum state; and specific jurisdiction, which involves jurisdiction over a cause of action that is related to a defendant's contacts with the forum state. *Parshall*, citing *Helicopteros Nacionales de Colombia v. Hall* (1984), 466 U.S. 408, 104 S.Ct. 1868. There appears to be no dispute in this case that the causes of action asserted by appellant arise from the contacts appellant argues makes the exercise of personal jurisdiction over appellees appropriate. Thus, the issue is whether appellees would be subject to specific personal jurisdiction in Ohio.

{¶23} A non-resident defendant establishes minimum contacts with a forum state when: (1) it purposefully directs activities at residents of the forum, and (2) the litigation arises out of or relates to those activities. *Barnabas* at ¶17, citing *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 105 S.Ct. 2174. Personal jurisdiction is proper when the non-resident defendant has deliberately engaged in "significant activities" that create a "substantial connection" with the forum state. *Id.* If a non-resident defendant

establishes such a substantial connection, that defendant "should reasonably anticipate being haled into court" in the forum state. *Id.*

{¶24} If the court determines that the non-resident defendant has the necessary minimum contacts with the forum state, it must next determine whether asserting personal jurisdiction over the defendant would "offend 'traditional notions of fair play and substantial justice.'" *Internatl. Shoe Co.*, 326 U.S. at 316, 66 S.Ct. at 158, quoting *Milliken v. Meyer* (1940), 311 U.S. 457, 463, 61 S.Ct. 339, 343. This involves consideration of " 'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.'" *Burger King*, 471 U.S. at 477, 105 S.Ct. at 2184, quoting *World-Wide Volkswagen Corp. v. Woodson* (1980), 444 U.S. 286, 292, 100 S.Ct. 559, 564.

{¶25} The facts relevant to determining whether appellees established sufficient minimum contacts are essentially the same as those relevant to determining whether appellees were transacting business in Ohio for purposes of the long-arm statute. Starr's affidavit asserted that the business relationship between the parties was initiated when Zulisky placed a telephone call to appellant's office to inquire about products sold by appellant. However, while the use of interstate means of communication such as the telephone is a factor that can be considered in determining whether a non-resident has established sufficient minimum contacts, that does not, standing alone, constitute

sufficient minimum contacts to make the exercise of personal jurisdiction appropriate. *Barnabas* at ¶20.

{¶26} In addition to the single telephone call placed to appellant's office, the only other evidence of appellees' contacts with Ohio is that Zulisky came to Columbus to negotiate pricing structure and delivery terms for the purchase of appellant's products, and the completed credit application was forwarded to appellant's office. Nothing in the evidentiary materials indicates that a contract was actually executed in Ohio, and, assuming that a contractual relationship did exist between the two parties, there is no indication that the terms of that contract required any performance by appellees within Ohio. Starr's affidavit made references to orders being made "through the normal procedure," but nothing in the affidavit establishes how the normal procedure would create the minimum contacts necessary to satisfy the due process clause. We cannot say that appellees' activities establish such a substantial connection with Ohio that appellees should reasonably anticipate being haled into court here. Therefore, the trial court did not err when it concluded that the exercise of personal jurisdiction over appellees would violate their rights to due process.

{¶27} Accordingly, we overrule appellant's assignment of error. Having overruled appellant's assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Motion to strike granted;
judgment affirmed.*

FRENCH and CONNOR, JJ., concur.
