

IN THE SUPREME COURT OF OHIO

Prouse, Dash & Crouch, LLP : Case No. 06-0957
:
Appellant, : On Appeal from the
: Cuyahoga County Court
v. : of Appeals, Eighth
: Appellate District
Bruce Anthony Gorcyca, et al. :
:
Appellee.

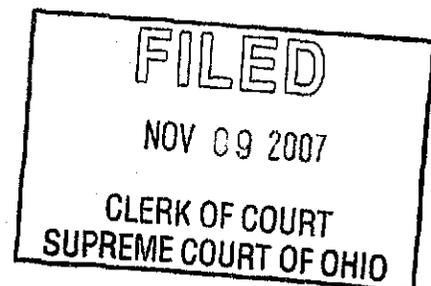
MEMORANDUM IN OPPOSITION TO MOTION FOR RECONSIDERATION

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ARGUMENT

The appellees have filed a Motion for Reconsideration of the unanimous decision of this Court to reinstate the verdict against appellee Bruce DiMarco and to remand the case to the Eighth District Court of Appeals to resolve jurisdictional issues as they relate to appellee Ji Hae Linda Yum DiMarco. The Reconsideration Motion simply attempts to reargue the case, which is prohibited by S. Ct. Prac. R. XI, Section 2(A). It also fails to meet its burden of raising new relevant legal issues and applying facts in the record that may not have been previously considered. Stated simply, appellees have not raised any issues or presented any cogent arguments that should cause the seven (7) justices that voted in favor of the decision to question whether they were correct.

Being direct, none of the factual or legal assertions of the appellees are correct. Appellees repeatedly argue that none of the acts of the appellees or appellant have any nexus to the state of Ohio. The record indicates otherwise. The issue that caused DiMarco to be initially detained by Canadian authorities and to retain appellee was that he was alleged to have been in Canada for more than six (6) months without a visa. It was DiMarco's position that he was an Ohio resident and that he had never been in Canada for six (6) continuous months. DiMarco claimed that he had traveled back to his home in Parma, Ohio during that period. (Supplement 13-14, 95). In order to defend appellee DiMarco, Mr. Gilmour traveled to Parma, Ohio to interview DiMarco's neighbors on Gilbert Avenue to prove that DiMarco had returned home as he had alleged. (Supplement 13-14, 95, Appendix 18).

As part of his representation, Mr. Gilmour also took photographs of a flood that occurred at the house to verify that DiMarco had returned to the home to fix the flooding.

(Supplement 13-14, 95). Mr. Gilmour was also asked to take an inventory of DiMarco and Yum's personal effects in the home and take steps to assure that the home and the possessions were secured and to perform banking tasks for DiMarco at his local Ohio bank. (Supplement 77-78).

Further, in its Judgment Entry for the Appellant, the Trial Court made the following specific findings of fact that pertain to jurisdictional issues of this case:

[DiMarco] was an American citizen, had no employment visa in Canada and had not been continuously in Canada for more than six (6) months...

The contract was formed and substantially performed in Ontario *with significant services performed in Ohio*. (Emphasis added) (Appendix 22).

Similarly inaccurate are appellees' legal arguments, which hinge solely upon a long-arm statute inquiry being applied to Mr. DiMarco. The primary problem with this reasoning is that Mr. DiMarco is an Ohio resident¹, and the express terms of the long-arm statute state that it does not apply to residents.

Ohio Revised Code §2307.382 provides in relevant part:

(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:... (Emphasis added).

Ohio Revised Code §2307.381 further provides:

As used in sections 2307.381 [2307.38.1] to 2307.385 [2307.38.5], inclusive, of the Revised Code, "person" includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who is a nonresident of this state. (Emphasis added).

¹ As a sidenote, the Court wrote that "the decision [regarding DiMarco] is a close one. There is one factor predominantly in DiMarco's favor: He continues to live in Canada..." On the date of the oral argument in this matter, DiMarco was imprisoned in Canada due to losing his fight against extradition. He has since been returned to the United States against his will for prosecution and presently remains here.

Lastly, appellees incorrectly argue that because the original complaint in this case alleged that DiMarco was a resident of Mississauga, Canada that the issue of his residency is conclusive. This allegation by Appellant was an incorrect legal conclusion that was not supported by the facts adduced as part of the merits of this case. Factually speaking, Mr. DiMarco's body was located in Mississauga, Canada at the time of the filing of the Complaint. However, as this Court stated in its opinion, the sworn testimony adduced at trial indicates that Mr. DiMarco was in Canada illegally, and therefore could not intend to remain there permanently and make it his home. (Slip opinion, paragraphs 10 and 11). Further, the court found that the transcript in this case indicated that prior to fleeing from the authorities, DiMarco demonstrated an intent to reside in Ohio. (Slip opinion, paragraphs 1, 2, 9, 10 and 11). The issue of a person's residency is a legal conclusion to be decided by the Court, not by a party through a notice pleading.

Furthermore, if we were to follow appellees' flawed logic and play the "pleadings are dispositive game," the Answer of appellee Yum denies the allegation regarding her husband's residence (paragraph 8 of her Answer) and "Admits that her husband (DiMarco) does not have a work permit in Canada." (paragraph 6 of her Answer).

DiMarco did not actually respond to the allegation in his Answer. However, DiMarco stated in both his Motion to Dismiss (by sworn affidavit) and his Trial Brief that he was actually a resident of Florida. Therefore, taking these statements as true, DiMarco would have denied appellant's allegation that he was a Canadian resident. Therefore, if the pleadings amounted to full blown admissions, as the appellees contend, then the diametrically contradicting admissions by the respective parties would create genuine

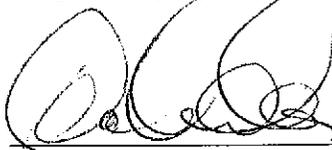
issues of material fact for trial. The uncontroverted evidence adduced at trial indicated that DiMarco was an Ohio resident. Case closed.

Appellant stands confident that the conclusions drawn by this Court in its ruling, as well as the supported facts and legal argument set forth in its Merit Brief warrant a denial of appellee's reconsideration motion.

CONCLUSION AND PRAYER FOR RELIEF

For the reasons discussed above, in the Court's slip opinion and the appellant's merit brief, the appellant requests that this Honorable Court deny to request for reconsideration by the appellees.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of this Memorandum in Opposition to Appellee's Motion for Reconsideration was sent by ordinary mail on this 8th day of November, 2007.

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Attorney for the Appellees

A handwritten signature in black ink, appearing to read 'Daniel F. Lindner', written over a horizontal line.

Daniel F. Lindner

COUNSEL FOR APPELLANT