

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

ORIGINAL

THOMAS B. KING

CASE NO. : 2009-2268

Appellant

vs.

JOHN W. SINON, et al.

Appellee

ON MOTION FOR LEAVE TO APPEAL FROM
THE OHIO COURT OF APPEALS FOR STARK COUNTY,
FIFTH APPELLATE DISTRICT
CASE NO. 2009CA00039

MEMORANDUM IN RESPONSE OF APPELLEE EILEEN ABRAMSON

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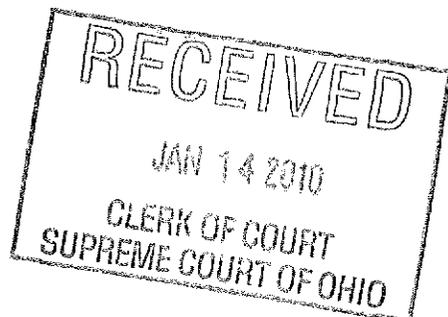
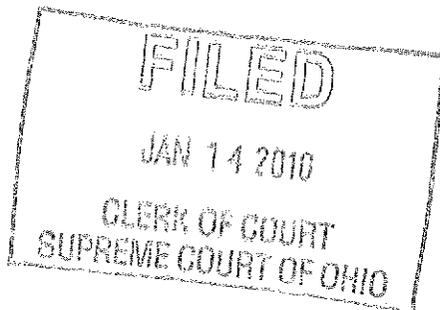


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WHY THIS CASE SHOULD NOT BE ACCEPTED FOR REVIEW

The Supreme Court of Ohio should not accept this case for review because it is not of public or great general interest. The case does not present any novel propositions of law, and merely involves the application of clear and well established standards of law to the particular facts of this case. The legal issue involved, jurisdiction over an out-of-state defendant, is straightforward and unexceptional.

The Court of Appeals reviewed this case and set forth its decision in a detailed fashion. The Appellate Court applied the long standing standards of law for the legal issue raised and concluded that Appellant's assignments of error were without merit. Appellant simply disagrees with the decision of the Court of Appeals and thus seeks discretionary review from this Court. The Appellate Court, however made no errors in this regard, and the proposition of law raised by Appellant should be rejected and the appeal denied.

STATEMENT OF THE CASE AND FACTS

For purposes of the instant appeal, Appellee will state the facts as alleged by, and construed most favorably to, Appellant Thomas King. Plaintiff-Appellant Thomas King filed the instant Complaint in Stark County Common Pleas Court against John Sinon, Public Administrator of the Estate of Stuart A. Abramson and Eileen Abramson. Appellant's first cause of action alleges that Appellant hired Stuart Abramson, an attorney who lived in the State of New York, to perform some legal work for him in the State of Ohio. Appellant alleges Stuart Abramson failed to perform and/or negligently performed the legal work. The Complaint alleges that Stuart Abramson died July 4, 2006 and that after Stuart Abramson's death, Eileen Abramson failed to return to Appellant certain attorney fees Appellant claims were paid to Stuart Abramson, but were not earned. King's Second Cause of Action is a claim for legal malpractice against only Defendant John W. Sinon as Public Administrator of Stuart Abramson's estate.

Eileen Abramson is the widow of Stuart Abramson. As is apparent from the complaint, Mrs. Abramson is a resident of the State of New York. The claim against Eileen Abramson is that she shared certain joint personal bank accounts located in New York with her late husband, Stuart Abramson, and that Stuart Abramson deposited money received by Thomas King into these joint accounts. Defendant-Appellee Eileen Abramson filed a motion to dismiss the Complaint pursuant to Civil Rule 12(B)(2)(4) and (5). The basis of the motion to dismiss was that the trial court lacked personal jurisdiction over her. The Appellee attached the affidavit of Eileen Abramson to the motion which stated she had not transacted business in Ohio and was not involved in Stuart Abramson's law practice.

On October 3, 2008 Plaintiff-Appellant, for a purpose not known to Appellee, filed an unsworn, uncertified letter from Madelynn R. Mason. Defendant-Appellee Eileen Abramson moved to strike the document, as being improper evidence pursuant to Civil Rule 56, and otherwise irrelevant to the issues at hand. On October 17, 2008, Plaintiff-Appellant filed a memorandum in opposition to defendant's motion to dismiss. Defendant-Appellee also filed a reply to plaintiff's memorandum. Subsequently Appellant also filed an affidavit of John Wolfe. The affidavit does not address issues relative to Eileen Abramson's motion to dismiss, but rather discusses the assets owned by Stuart Abramson and whether they were joint and survivorship property. This has no bearing on Eileen Abramson's minimum contacts, or lack thereof, with the State of Ohio. Notably absent from the record is any affidavit from Appellant contradicting Eileen Abramson's affidavit.

While the motion to dismiss was pending, counsel for Appellant requested permission to take the deposition of Eileen Abramson in the State of New York for the instant case which was of course, pending in the State of Ohio. Appellee advised that she would not consent to such a deposition until the Court had ruled on her motion to dismiss. Subsequently, Appellant filed a motion for an order requiring Eileen Abramson to submit to a deposition. In response, Appellee

filed a motion for a protective order. A similar procedure was followed with respect to a series of requests for admissions which were directed Eileen Abramson, while her motion to dismiss for personal jurisdiction was pending.

The trial court did not issue a written ruling with respect to the various discovery motions which had been filed nor the various motions to strike which had been filed. However on December 18, 2008 the trial court ordered that the parties to appear for an evidentiary hearing on Appellee's motion to dismiss. Plaintiff-Appellant was permitted to testify and/or call witnesses. Plaintiff-Appellant did not testify, however he did call a witness, Dennis Petrack, who was not able to provide any support for defendant's position that Eileen Abramson had any contacts with the State of Ohio. Following the hearing, the trial court found it lacked jurisdiction over Eileen Abramson. The trial court further found that subjecting Eileen Abramson to suit in Ohio would deprive her of due process of law.

Thomas King appealed the trial court's decision to the Fifth District Court of Appeals. The Court of Appeals affirmed the trial court's decision, finding that the complaint did not establish minimum contacts of Appellee to the State of Ohio. The Appellate Court further rejected Appellant's theory of agent or co-conspirator activity by Appellee in the State of Ohio.

RESPONSE TO PROPOSITION OF LAW

WHERE A COMPLAINT FAILS TO ALLEGE FACTS TO SUPPORT PERSONAL JURISDICTION OVER AN OUT OF STATE DEFENDANT AND NO SUCH FACTS ARE PRESENTED AT AN EVIDENTIARY HEARING ON THIS ISSUE, FURTHER DISCOVERY ON THE JURISDICTION ISSUE IS NOT REQUIRED AND THE TRIAL COURT PROPERLY DISMISSED THE COMPLAINT AGAINST THE OUT OF STATE DEFENDANT FOR LACK OF PERSONAL JURISDICTION.

The trial court correctly did not order that any discovery be conducted in the instant case. The basis of defendant's motion to dismiss was that on its face, the Complaint failed to allege any set of facts which would confer personal jurisdiction upon Eileen Abramson in the State of Ohio. The claimed basis for personal jurisdiction over Eileen Abramson is the existence of joint personal

accounts with Stuart Abramson in the state of New York. This does not come close to establishing personal jurisdiction over Eileen Abramson in Ohio.

Plaintiff-Appellant never moved to amend his Complaint, nor at any time has there been any allegation from Appellant that Eileen Abramson transacted any business in the State of Ohio, nor had any involvement in her husband's law practice. In fact, the only evidence presented indicates the contrary. It would have been inappropriate and unduly burdensome to require a non-Ohio resident to undertake a deposition, written discovery, etc. prior to the Court determining whether it even had personal jurisdiction over her.

The Appellant alleges that had he been permitted to conduct discovery in the instant case, he could have discovered evidentiary facts showing Eileen Abramson's "state of mind", and further could have demonstrated that Eileen Abramson had knowledge that Stuart Abramson was depositing client funds into their personal, joint checking account in the State of New York.

In the first instance it is highly unlikely Appellant could have discovered this information since Eileen Abramson had no such knowledge. Secondly, even if Appellant could have discovered information to support this allegation, this would not have been sufficient to confer personal jurisdiction over Eileen Abramson in the State of Ohio.

The determination of whether a court has personal jurisdiction is a two-step process: first the Court must determine whether Ohio's long-arm statute and Civil Rule 4.3 confer jurisdiction and second, if so, the Court must determine whether granting jurisdiction would deprive the defendant of due process under the Fourteenth Amendment. State ex rel. Toma v. Corrigan (2001), 92 Ohio St. 3d 598; Muzzin v. Brooks, Sr. (2006), 168 Ohio App 3d 231; Ricker v. Fraza/Forklifts of Detroit (2005), 160 Ohio App 3d 634.

Revised Code §2307.382 sets forth the circumstances under which a Court may exercise personal jurisdiction. In his brief to this Court, Appellant seems to have abandoned his other

theories of personal jurisdiction and is now claiming jurisdiction is proper under Ohio Revised Code §2307.382(A)(6), Civ.R. 4.3(A)(9) and under a "conspiracy theory" of jurisdiction. R.C. 2307.382 provides in pertinent 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:
 - (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured in this state.

Civ.R. 4.3(A)(9) provides substantially identical language. The Complaint does not allege that Eileen Abramson performed any act outside of Ohio for the purpose of injuring anyone. At best, Eileen Abramson shared a joint bank account with her husband in New York. Sharing an out of state bank account with one's spouse is hardly sufficient to confer personal jurisdiction over Eileen Abramson in Ohio, simply because Stuart Abramson transacted business here.

For support, Plaintiff-Appellant cites Toma v. Corrigan (2001), 92 Ohio St.3d 589. The Toma case involves an out-of-state resident who obtained power of attorney over an individual who eventually lived in the State of Ohio. The defendant liquidated the assets of the victim after the victim moved to Ohio. In that case, the Ohio Supreme Court held that in light of Toma's contacts with Ohio, personal jurisdiction in Ohio was not patently and unambiguously lacking. The Toma case may provide some support for personal jurisdiction over Stuart Abramson, but not Eileen Abramson.

Plaintiff-Appellant also asserts that Eileen Abramson could be subject to Ohio's jurisdiction under the "conspiracy theory of jurisdiction". There are no Ohio appellate court decisions accepting such a theory to Appellee's knowledge. Furthermore, even if such a theory could form the basis of jurisdiction in some circumstances, it has no basis here.

Black's Law Dictionary defines conspiracy as "a combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or

criminal act, or some act which is lawful in itself, but becomes unlawful when done by the concerted action of the conspirators, or for the purpose of using criminal or unlawful means in the commission of an act not in itself unlawful. Black's Law Dictionary 5th Edition.

In support of his claim that Eileen Abramson and Stuart Abramson were "co-conspirators", Appellant makes an unsupported leap by claiming that simply because Mrs. Abramson allegedly shared joint bank accounts in the State of New York with her husband, she became a co-conspirator in his alleged legal malpractice in Ohio. Appellant has failed to state in his Complaint, or in any of his briefs, any act by Eileen Abramson that could possibly be construed as participating in a conspiracy with respect to King's funds.

Additionally, the case of Instituto Bancario Italiano Spa v. Hunter 449 A.2d 210, is not of assistance to Appellant. The Instituto case is a corporate shareholder dispute. The court after much analysis concludes:

"We therefore hold that a conspirator who is absent from the forum state is subject to the jurisdiction of the court, assuming he is properly served under state law, if a plaintiff can make a factual showing that:

1. A conspiracy to defraud existed;
2. The defendant was a member of that conspiracy;
3. A substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state;
4. The defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state;
5. The act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.

The Court went onto say "thus, a defendant who has so voluntarily participated in the conspiracy with knowledge of its acts in, or effects in the forum state can be said to have purposely

availed himself of the privilege of conducting activities in the forum state, thereby invoking the benefits and burdens of its laws.

In the Instituto case, the parties had stipulated to certain facts which the court viewed as a voluntary and knowing participation by the non-resident defendant in a conspiracy to use the laws of Delaware to achieve the purpose of the conspiracy which resulted in a direct benefit to the non-resident defendant.

There is no plausible argument that the facts in Instituto Bancario are analogous to this case, nor that this Court should even adopt a conspiracy theory of jurisdiction.

Respectfully Submitted,



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PROOF OF SERVICE

A copy of the foregoing has been sent by regular U.S. Mail to John L. Wolfe, Attorney for Appellant, at his address of 45 Mayfield Avenue, Akron, Ohio 44313 on this 13th day of January, 2010.



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