

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Ashton Park Apartments, Ltd.

Court of Appeals No. L-08-1395

Appellant

Trial Court No. CI0200705331

v.

Carlton-Naumann Construction, Inc.

DECISION AND JUDGMENT

Appellee

Decided: December 4, 2009

* * * * *

Keith A. Wilkowski and Paul R. Bonfiglio, for appellant.

John R. Kuhl, for appellee.

* * * * *

HANDWORK, P.J.

{¶ 1} This appeal is from the October 2, 2008 judgment of the Lucas County Court of Common Pleas, which granted summary judgment to appellee, Carlton-Naumann Construction, Inc., and dismissed the complaint of appellant, Ashton Park Apartments, Ltd., on the ground that the court lacked personal jurisdiction over appellee. Upon consideration of the assignment of error, we affirm the decision of the lower court,

in part, and reverse, in part. Appellant asserts the following single assignment of error on appeal:

{¶ 2} "The trial court erred in granting the Appellee's Motion for Summary Judgment on the basis that it lacked personal jurisdiction over the Appellee on the Appellant's claims filed against it in the Lucas County Court of Common Pleas."

{¶ 3} Appellant, an Ohio limited liability company authorized to do business in Ohio and an assignee of the claims of this action, brought suit against appellee, a Florida corporation asserting that it transacted business in Ohio and Florida. Appellant asserted that appellee entered into a construction contract with the assignors, Gary and Jacquelyn Howe and Sancap. Ltd., an Ohio limited liability company owned by the Howes, for the construction of a new \$800,000 home to be built in Florida. The contract was executed by the Howes in Lucas County, Ohio, where they reside and where the assignor company is located. The home was substantially completed in August 1997. In 2006, the Howes discovered that their home contained a latent defect due to the negligence of appellee, which required \$44,967.13 of repairs. Appellant also asserted claims of breach of contract and breach of implied warranties of fitness.

{¶ 4} In its answer to the complaint, appellee asserted that it is a Florida corporation doing business in Florida. It admitted only that it entered into a contract with the Howes for the construction of a home in Florida and that a certificate of occupancy was issued. Appellee moved for summary judgment asserting that the trial court lacked personal jurisdiction over appellee or, alternatively, that the case should be dismissed under the doctrine of forum non conveniens.

{¶ 5} Attached to the motion was the affidavit of appellee's president, Mark Naumann. He attested that as president and sole shareholder, he has knowledge of the company's business practices and records for the last 20 years. Appellee further attested that appellee is a Florida company that has been in business for the last 20 years constructing homes in Florida and it has never transacted any kind of business or advertisement outside of Florida, including Ohio; the company entered into a contract with the Howes in 1995 to construct a residential home in Florida; the home was completed in 1997 and a certificate of occupancy was issued at that time; none of appellee's agents traveled to Ohio regarding this contract; and appellee has no contacts with Ohio.

{¶ 6} Appellant opposed the motion for summary judgment. Attached to appellant's motion is the affidavit of Gary Howe who attested that during the time period that appellee was constructing the home, the Howes resided in Ohio and all communications were made to appellant in Ohio. Furthermore, Howe attested that appellee, a former resident of Ohio, maintains a web site advertising its homes in Florida to Ohio buyers. Furthermore, Howe attested that the defective deck at issue has been fully repaired and, therefore, there would be no benefit to a jury view of the premises.

{¶ 7} Appellant argued that appellee transacted business in Ohio when it advertised in Ohio and communicated with the Howes in Ohio regarding the negotiation and performance of the contract (telephone calls, written communications, and the mailing of numerous checks written on Ohio accounts). Appellant contended that these

contacts and the significant value of this contract alone meet the minimum contacts requirement for establishing personal jurisdiction. Appellant also argued that each factor of the forum non-convenience test weighs in favor of venue in the Ohio court.

{¶ 8} The trial court found that the only contact appellee had with Ohio was the use of interstate communication lines for the purpose of executing and performing a contract with appellant. Based upon the holdings in *Durkin v. Gran Turismo Jaguar* (Dec. 17, 1999), App. No. 98-L-101 and *Huskin v. Pappse* (June 30, 2000), 11th Dist. No. 99-T-0069, the trial court found that this single contact was insufficient to satisfy the transaction requirements of R.C. 2307.382 and Civ.R. 4.3 or the minimum contacts requirement of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Having disposed of the case on the issue of personal jurisdiction, the trial court did not address the issue of forum non-conveniens.

{¶ 9} On appeal, appellant argues that the trial court erred in granting appellee's motion for summary judgment on the basis that it lacked personal jurisdiction over appellee. Appellant argues that: (1) jurisdiction was proper under Ohio's long-arm statute; (2) jurisdiction in Ohio complies with the due process requirement that the defendant had minimum contacts with the forum to justify litigation in that forum; and (3) that there was no basis for dismissing the action on the basis of forum non-conveniens.

{¶ 10} Personal jurisdiction over the defendant must be acquired before a court can render a valid judgment. *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156-157.

Personal jurisdiction is acquired "* * * either by service of process upon the defendant, the voluntary appearance and submission of the defendant or his legal representative, or by certain acts of the defendant or his legal representative which constitute an involuntary submission to the jurisdiction of the court." Id. at 156. Personal jurisdiction must be based upon the direct or indirect actions of the defendant that occurred within the state which gave rise to cause of action. Civ.R. 4.3(A); *Universal Coach, Inc. v. New York City Transit Auth., Inc.*, 90 Ohio App.3d 284, 289.

{¶ 11} First, we note that summary judgment is not the appropriate procedure for seeking to dismiss an action on the grounds that the court lacks personal jurisdiction over a party. The issue of personal jurisdiction may be raised either by asserting it in the responsive pleading or by separate motion under Civ.R. 12(B)(2). The court has inherent authority to consider additional evidence needed to make the determination of whether it has personal jurisdiction and does not need to convert the motion to dismiss into a motion for summary judgment as it would for a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim for relief. *Southgate Development Corp. v. Columbia Gas Transmission Corp.*, (1976), 48 Ohio St.2d 211, paragraph one of the syllabus (which addresses a motion to dismiss for lack of subject matter jurisdiction) and *Alpha Telecommunications, Inc. v. ANS Connect*, 8th Dist. No. 90173, 2008-Ohio-3069, ¶¶ 6-8; *Buchheit v. Watson*, 11th Dist. No. 2001-L-189, 2002-Ohio-7147, ¶ 19; *Spraragowski v. CompuAdd Computer Corp.* (Mar. 21, 1997), 6th Dist. No. L-96-251 (all of these appellate courts applied the *Southgate* holding to motions to dismiss for lack of in personam jurisdiction).

Therefore, we find that the trial court erred by ruling on the motion for summary judgment, and we address only the issue of whether the court should have dismissed the complaint for lack of personal jurisdiction.

{¶ 12} When a defendant challenges the court's exercise of personal jurisdiction over him, the plaintiff has the burden of establishing the jurisdiction of the court. *Jurko v. Jobs Europe Agency* (1975), 43 Ohio App.2d 79. Although the trial court considered the affidavits filed in this case, it did not hold an evidentiary hearing. Therefore, at this stage, appellant was only required to make a prima facie showing of personal jurisdiction to defeat appellee's motion to dismiss based on that ground. *Century Marketing Corp. v. Aldrich*, 6th Dist. No. WD-02-045, 2003-Ohio-1390, ¶ 9. The trial court was required to consider the facts in the light most favorable to appellant and not consider the conflicting facts offered by the defense. *Goldstein v. Christiansen* (1994), 70 Ohio St.3d 232, 236. The non-moving party meets his prima facie burden by producing sufficient evidence to allow reasonable minds to conclude that the trial court has personal jurisdiction over the moving party. *Kauffman Racing Equipment, L.L.C. v. Roberts*, 5th Dist. No. 07-CA-14, 2008-Ohio-1922, ¶ 9. We review the decision to dismiss a complaint for lack of personal jurisdiction under a de novo standard of review. *Information Leasing Corp. v. Jaskot*, 151 Ohio App.3d 546, 2003-Ohio-566, ¶ 9.

{¶ 13} The determination of whether a state court may exercise personal jurisdiction over a foreign corporation requires a two-step analysis. First, the court must determine if Ohio's long-arm statute and the applicable civil rule confer personal

jurisdiction. Second, the Court must determine whether the exercise of personal jurisdiction would deprive the defendant of the right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. *U.S. Sprint Communications Co., Ltd. Partnership v. Mr. K's Foods, Inc.*, 68 Ohio St.3d 181, 183-184, 1994-Ohio-504.

{¶ 14} Appellant contends that under Ohio long-arm statute and Civil Rule, appellee was subject to the jurisdiction of the court because he transacted business within the state of Ohio. The statute, R.C. 2307.382(A)(1), provides that: "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 * * * [t]ransacting any business in this state." Furthermore, Civ.R. 4.3(A)(1), which is essentially the same as the statute, *Parshall v. PAID, Inc.*, 10th Dist. No. 07-AP-1019, 2008-Ohio-3171, ¶ 11, likewise authorizes out-of-state service of process on a non-resident defendant who is "* * * [t]ransacting any business in this state[.]" The terms of the Ohio's long-arm statute and corresponding Civil Rule have not been defined by statute and the courts have concluded that these broad terms cannot be defined in a generalized manner. *Goldstein v. Christianson*, 70 Ohio St.3d 232, 235-236, 1994-Ohio-229, and *U. S. Sprint Communications Co. Ltd. Partnership v. Mr. K's Foods, Inc.*, 68 Ohio St.3d 181, 185, 1994-Ohio-504. Therefore, each case turns on its own set of unique facts. *Id.*

{¶ 15} The common meaning of "transact any business," has been defined as "* * * to prosecute negotiations; to carry on business; to have dealings * * *." *Kentucky*

Oaks Mall Co. v. Mitchell's Formal Wear, Inc. (1990), 53 Ohio St.3d 73, 75, quoting Black's Law Dictionary (5 Ed.1979) 1341. Therefore, the term encompasses more than just the creation of a contract and can include business negotiations. *Id.* See, also, *Schneider v. Gunnerman* (Aug. 24, 1998), 12th Dist. App. Nos. CA97-07-017, CA97-12-034 (there must be "a continuing business endeavor"). But, the mere solicitation of business does not constitute "transacting business." *U.S. Sprint Communications Co. Ltd. Partnership v. Mr. K's Foods, Inc.* (1994), 68 Ohio St.3d 181, 185, citing *Wainscott v. St. Louis-San Francisco Ry. Co.* (1976), 47 Ohio St.2d 133, 140-141. Furthermore, physical presence within the state is not necessary. *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.* (1990), 53 Ohio St.3d 73, 76. Use of the internet to "transact business" in Ohio can result in application of Ohio's long-arm statute. *Parshall v. PAID, Inc.*, supra ¶ 16; and *Malone v. Berry*, 174 Ohio App.3d 122, 2007-Ohio-6501, ¶ 15. The determination of when internet use constitutes "transacting business" depends upon the type of internet activity involved. *Parshall*, supra; *Malone*, supra; and *Edwards v. Erdey*, 118 Ohio Misc.2d 232, 2001-Ohio-4367, ¶ 17-20 (adopting the sliding scale test for analyzing the due process component of personal jurisdiction first developed in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* (W.D.Pa.1997), 952 F.Supp. 1119, 1123-1124).

{¶ 16} The case before us arises out of a building contract for an \$800,000 home to be built in Florida. The buyers were Ohio residents and the builder was a Florida corporation. There was no evidence as to how the negotiations for the contract were initiated. Every aspect of the contract (their execution of the contract, payments, and

communication) concerning the buyers involves Ohio. Every aspect of the contract (its execution of the contract, building of the home, and communication) involving the builder occurs in Florida.

{¶ 17} Appellant places a great deal of emphasis on the fact that appellee marketed its homes through an internet web site. In his affidavit, Howe cited to appellant's web site, but did not attach any printouts of the web site as it existed at the time the contract was negotiated. He also did not describe the web site as it existed at the time of contracting in any detail. However, on appeal, appellant alleged in its brief that this web site was an interactive web site which requested contact information. These additional allegations are not supported by Howe's affidavit. Howe did attest that in another web site advertising a different development, appellee targeted its market to the "snowbird" residents from "Ohio, Minnesota, Michigan, Illinois, New York, the Carolinas and other northern states." However, the attached copy of this web site was dated 2008.

{¶ 18} Upon consideration of all of the evidence, we find that appellant has failed to meet its burden to establish that appellee transacted business in Ohio with an interactive web site or that its web site was targeted to Ohio consumers. We have not considered the effect of the second web site as it was not involved in the contract at issue in this case. We conclude that while appellee maintained a national web site advertising its home construction business in Florida at the time the contract was executed, appellee did not target Ohio residents and was not "transacting business" in Ohio by entering into a single contract with two Ohio residents to build a home in Florida.

{¶ 19} Finding that appellee's contacts with Ohio do not satisfy the "transacting business" requirements of R.C. 2307.382(A)(1) and Civ.R. 4.3(A)(1), we need not reach the remaining issues of whether the assertion of personal jurisdiction by an Ohio court over appellee would violate the Due Process Clause of the Fourteenth Amendment or whether the case should be dismissed on the basis of the doctrine of forum non conveniens as these remaining issues are now moot.

{¶ 20} While we find that the trial court erred by granting the motion for summary judgment, we find that its order dismissing the complaint for lack of personal jurisdiction was proper. Accordingly, we therefore affirm the trial court's judgment, in part, and reverse, in part. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.