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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2007-10T4

J.F. LOMMA, INC., OF DELAWARE,

Plaintiff-Respondent,

v.

OSCAR J. BOLDT CONSTRUCTION, INC.,

Defendant-Appellant.

Submitted May 25, 2011 – Decided June 7, 2011

Before Judges Axelrad and J. N. Harris.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3119-10.

Leary, Bride, Tinker & Moran, attorneys for appellant (Peter M. Bouton, of counsel and on the brief).

Christopher O. Eriksen, General Counsel, attorney for respondent.

PER CURIAM

By leave granted, defendant Oscar J. Boldt Construction, Inc. (Boldt) appeals from the Law Division's interlocutory orders of August 27 and November 17, 2010, which determined that Boldt had been properly haled into court in New Jersey by

plaintiff J.F. Lomma, Inc., of Delaware (J.F. Lomma).[1] Because we find that Boldt did not have the requisite minimum contacts with New Jersey to establish personal jurisdiction, we reverse and remand for the entry of judgment dismissing the complaint without prejudice to permit J.F. Lomma to seek remedies against Boldt in an appropriate forum.

I.

Although no jurisdictional discovery was conducted in this case, and neither party requested the opportunity to engage in any supplemental investigation, we glean the facts from the pleadings, as well as from the parties' scant submissions in

[1] J.F. Lomma contends that Boldt's appeal is time-barred, notwithstanding that Boldt was granted leave to appeal by this court. Rule 2:5-6(a) states that a motion for leave to appeal from an interlocutory order shall be made within twenty days of service of the order. Here, the reconsideration order was issued on November 17, 2010, and Boldt received it two days later. Boldt's motion for leave to appeal was not filed until December 14, 2010, more than twenty days after Boldt was served with the order. It is well-settled that the grant of leave to appeal from an interlocutory order rests within the sound discretion of the appellate court, which may grant such relief "'in the interest of justice.'" Taylor v. Gen. Elec. Co., 208 N.J. Super. 207, 211 (App. Div.) (quoting R. 2:2-4), certif. denied, 104 N.J. 379 (1986). In particular, leave to appeal nunc pro tunc has been granted in some cases to allow an appellate court to reach the merits of the dispute. Pressler & Verniero, Current N.J. Court Rules, comment 3 on R. 2:4-4 (2011) (citing Potomac Aviation, LLC v. Port Auth. of NY and NJ, 413 N.J. Super. 212, 222 (App. Div. 2010)). Here, our decision to grant Boldt leave to appeal, despite the fact that its motion was filed five days out of time, was not a misapplication of discretion, and does not prevent us from adjudicating the merits of the interlocutory appeal.

Boldt's motions to dismiss the complaint and for reconsideration. In point of fact, the only competent evidentiary materials submitted to the Law Division were (1) a three-page certification by Randall A. Haak, Boldt's general counsel referring to three exhibits; (2) a two-page certification by Randall DeMeuse, Boldt's Vice-President of Industrial & Wind Farm Operations; and (3) a two-page certification by James F. Lomma, President and sole shareholder of J.F. Lomma.

J.F. Lomma is a Delaware corporation in the business of crane rental, rigging, and transportation with its principal place of business in South Kearny, New Jersey. Boldt is a Wisconsin corporation with its principal place of business in Appleton, Wisconsin. Sometime in 2008, Boldt bargained with J.F. Lomma to rent industrial cranes for use on a number of wind farm projects in Fowler, Indiana and Ransom, Illinois. The cranes were actually supplied by a Virginia company, W.O. Grubb, which leased the cranes to J.F. Lomma pursuant to a separate agreement, which in turn leased the cranes to Boldt.

J.F. Lomma's lawsuit alleges that when it sought to collect the balance due on Boldt's account, Boldt disputed the charges and refused to pay. On June 10, 2010, J.F. Lomma filed a complaint against Boldt seeking $326,180 under breach of contract, quantum meruit, and unjust enrichment theories. Boldt

did not file an answer, but moved to dismiss for lack of personal jurisdiction.

Boldt maintained that it dealt exclusively with J.F. Lomma's Bridgeville, Pennsylvania office throughout the negotiations and contract term, asserting that "[a]ll significant dealings for these transactions, including the negotiation of the contract terms took place by phone and email" between DeMeuse in Appleton, Wisconsin, and Steve Burkholder, a J.F. Lomma employee located in Bridgeville, Pennsylvania. Boldt produced copies of written estimates, order forms, and invoices from J.F. Lomma listing its address as 251 Millers Run Road, Bridgeville, Pennsylvania, but also indicating, "Please remit payment to J.F. Lomma, Inc., 48 Third Street, South Kearny, NJ 07032." An unauthenticated and unsigned rental agreement between the parties for a "Manitowoc 18000 Crawler Crane" and blank "Notice of Lease Termination" form provided by J.F. Lomma also listed its Pennsylvania address.

Lomma's opposing certification is noteworthy for its brevity and lack of specificity. It stated the following, in its entirety:

> James F. Lomma, of full age, hereby certifies as follows:
>
> 1. I am the President and have a 100% stock interest in Plaintiff J.F. Lomma, Inc. of Delaware. In this capacity, I am fully familiar with the facts and circumstances

surrounding my company's transaction with Oscar J. Boldt.

2. On multiple occasions, I personally participated in the contract negotiations with Oscar Boldt[2] from my South Kearny, New Jersey office. I am also aware that this same contract, per my direction, included a provision calling for the application of New Jersey law.

3. I also have personal knowledge that our crane was shipped back to my offices in New Jersey after the crane rental was completed.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

By: /s/
JAMES F. LOMMA

Dated: August 17, 2010

DeMeuse, however, denied that Lomma participated in any portion of the negotiations between DeMeuse and Burkholder. Nevertheless, DeMeuse did admit to speaking to Lomma once about a possible settlement prior to the commencement of the litigation.

The Law Division denied defendant's motion to dismiss and motion for reconsideration on August 27, 2010, and November 17, 2010, respectively. In a written decision, the court evaluated

[2] We cannot tell from this certification whether the references to "Oscar J. Boldt" and "Oscar Boldt" are meant to refer to an individual, or to defendant corporation, Oscar J. Boldt Construction, Inc.

Boldt's minimum contacts under a specific jurisdiction standard, which it noted placed a lesser burden on J.F. Lomma than under a general jurisdiction analysis. Also observing that "when the motion to dismiss is made early in the litigation, a plaintiff need only demonstrate a prima facie case of personal jurisdiction, utilizing pleadings and affidavits," the court concluded that "[d]efendant has more than minimum contacts in New Jersey" to sustain J.F. Lomma's prima facie jurisdictional burden.[3]

II.

A.

New Jersey's long-arm jurisprudence permits our courts to exercise personal jurisdiction over out-of-state defendants to the extent permitted by the federal Constitution. See R. 4:4-4(b)(1); State ex rel. McCormac v. Qwest Commc'ns Int'l Inc., 387 N.J. Super. 487, 498 (App. Div. 2006), cert. denied sub nom. Szeliga v. N.J. Dep't of Treasury, 550 U.S. 935, 127 S. Ct. 2263, 167 L. Ed. 2d 1092 (2007), Anschutz v. N.J. Dep't of Treasury, 550 U.S. 935, 127 S. Ct. 2262, 167 L. Ed. 2d 1092

[3] Boldt had also moved to dismiss the complaint on the grounds of forum non conveniens, which the motion court denied. On appeal, Boldt abandoned its assertion that New Jersey is an inappropriate forum by not arguing for that proposition in its brief. See Mandel, New Jersey Appellate Practice, ch. 33:4-3 at 659-60 (Gann 2011) (citing Div. of Youth & Family Servs. v. S.S., 405 N.J. Super. 1, 3 n.2 (App. Div. 2008)).

(2007). In International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), the Supreme Court held that absent actual presence in the forum, a defendant must have "certain minimum contacts with [our state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Id. at 326 U.S. 316, 66 S. Ct. at 158, 90 L. Ed. at 102 (quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 343, 85 L. Ed. 278, 283 (1940)); see also C.L. v. W.S., 406 N.J. Super. 484, 491 (App. Div. 2009).

"[T]he requisite quality and quantum of contacts is dependent on whether general or specific jurisdiction is asserted." Citibank, N.A. v. Estate of Simpson, 290 N.J. Super. 519, 526 (App. Div. 1996). General jurisdiction may be obtained where defendant's contacts with the forum state are "'continuous and substantial,'" regardless of where the cause of action arose. Wilson v. Paradise Village Beach Resort & Spa, 395 N.J. Super. 520, 528 (App. Div. 2007) (quoting Charles Gendler & Co. v. Telecom Equip. Corp., 102 N.J. 460, 472 (1986)). Specific jurisdiction, which J.F. Lomma invokes here, "is established when a defendant's acts within the forum-state give rise to the cause of action." McDonnell v. Illinois, 319 N.J. Super. 324, 333 (App. Div. 1999) (quoting Jacobs v. Walt Disney World, Co.,

309 N.J. Super. 443, 452 (App. Div. 1998)), aff'd, 163 N.J. 298 (2000)).

In the context of specific jurisdiction, we "focus on 'the relationship among the defendant, the forum, and the litigation.'" Blakey v. Cont'l Airlines, Inc., 164 N.J. 38, 67 (2000) (quoting Shaffer v. Heitner, 433 U.S. 186, 204, 97 S. Ct. 2569, 2579, 53 L. Ed. 2d 683, 698 (1977)). Absent territorial presence in the forum, "'it is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefit and protection of its laws.'" Waste Mgmt. v. Admiral Ins. Co., 138 N.J. 106, 120 (1995) (quoting Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283, 1298 (1958)). The unilateral activities or actions of a plaintiff are not enough. Blakey, supra, 164 N.J. at 67.

This requirement of purposeful availment ensures that an out-of-state defendant "will not be compelled to participate in litigation in a foreign jurisdiction 'on the basis of random, fortuitous, or attenuated contacts or as a result of the unilateral activity of some other party.'" YA Global Invs., L.P. v. Cliff, 419 N.J. Super. 1, 9 (App. Div. 2011) (quoting Waste Mgmt., supra, 138 N.J. at 121). The "mere forseeability" that defendant's conduct could have "some effects in the forum state" is not sufficient to establish jurisdiction. Bovino v.

Brumbaugh, 221 N.J. Super. 432, 436 (App. Div. 1987). Rather, "'[t]he question is whether the defendant's [purposeful] conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.'" Blakey, supra, 164 N.J. at 67 (quoting Lebel v. Everglades Marina, Inc., 115 N.J. 317, 324 (1989)); see also McKesson Corp. v. Hackensack Med. Imaging, 197 N.J. 262, 273 (2009).

This inquiry must be conducted on a case-by-case basis. Sharp v. Sharp, 336 N.J. Super. 492, 500 (App. Div. 2001); see also Shah v. Shah, 184 N.J. 125, 138 (2005). In particular, the court should consider:

> the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "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."
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> [Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 113, 107 S. Ct. 1026, 1033, 94 L. Ed. 2d 92, 105 (1987) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292, 100 S. Ct. 559, 564, 62 L. Ed. 2d 490, 498 (1980)).]

Finally, where jurisdiction is at issue, the burden is on the plaintiff to "allege or plead sufficient facts" to warrant the court's exercise of jurisdiction. Blakey, supra, 164 N.J. at 71; see also Citibank, N.A., supra, 290 N.J. Super. at 533.

This may be accomplished by way of "'sworn affidavits, certifications, or testimony.'" Jacobs, supra, 309 N.J. Super. at 454 (quoting Catalano v. Lease & Rental Mgmt. Corp., 252 N.J. Super. 545, 547-48 (Law Div. 1991)).

The standard of review from a motion to dismiss for personal jurisdiction is de novo, Mastondrea v. Occidental Hotels Mgmt. S.A., 391 N.J. Super. 261, 268 (App. Div. 2007), and the motion court's legal determinations are "not entitled to any special deference" on appeal, Manalapan Realty, L.P. v. Twp. Comm. Of Manalapan, 140 N.J. 366, 378 (1995).

B.

The issue before us is whether J.F. Lomma carried its low-threshold burden of establishing Boldt's sufficient contacts with New Jersey to warrant our exercise of jurisdiction. It is undisputed that Boldt neither resides nor does business in New Jersey,[4] and that the significant events after the contract was formed took place in Illinois and Indiana, where the cranes were delivered and used.

Nevertheless, J.F. Lomma claims: 1) its President participated in contract negotiations by telephone from his South Kearny office; 2) Boldt was aware that the crane would be

[4] Haak's certification states that Boldt "has not transacted any business in New Jersey in the last two years."

returned to New Jersey; 3) the unsigned contract contained a New Jersey choice-of-law provision[5]; and 4) J.F. Lomma's principal place of business is in South Kearny.

Boldt outright denies these allegations or challenges them on evidentiary grounds. It maintains that it never "purposely availed" itself of the privileges and obligations of New Jersey law, claiming to have transacted business with a J.F. Lomma representative from western Pennsylvania only, and to have utilized the cranes in Illinois and Indiana. Boldt also indicates that all paperwork from J.F. Lomma had prominently printed on it the Pennsylvania address. Even if J.F. Lomma's President participated in the contract negotiations while stationed in New Jersey, Boldt urges that "phone calls alone are almost never enough" to establish personal jurisdiction.

From our review of the record, we are unable to agree that J.F. Lomma satisfied its burden of demonstrating minimum contacts. First, with regard to the participation of Lomma in phone conversations with an unidentified Boldt representative regarding the contract terms, Lomma's singular remark that he "personally participated in the contract negotiations with Oscar

[5] As Boldt points out, the unsigned contract in the record pertains to the lease of a "Manitowoc 18000 Crawler Crane." The underlying dispute, however, is over the lease of a Liebherr 1400 crane. Not only is the evidentiary significance of the unsigned contract called into question, but we question the document's relevance to the dispute between the parties.

Boldt from my South Kearny, New Jersey office" raises more material questions than it answers. For example, we cannot discern the number of times Lomma spoke with someone from Boldt; we do not know who initiated the communications; and we do not know whether the negotiations were by telephone, email, instant messaging, video conference, or by some other means. Moreover, DeMeuse, who purportedly "personally negotiated all of the substantive terms of the contracts on behalf of [Boldt]," denied having had any communications with Lomma. Rather, he asserts that "[a]ll of [his] substantive communications . . . were directly with Steve ("Burkey") Burckhalter [sic] of Lomma Crane & Rigging in Bridgeville, Pennsylvania." We do not credit DeMeuse's version over Lomma's version, but Lomma's certification is entirely unilluminating and insufficient to establish that Boldt took any action to trigger the invocation of jurisdiction in this State. See Blakey, supra, 164 N.J. at 68 ("[T]he means by which a message is communicated is not as important as the quality of the contact.").

Next, relying on Lebel, J.F. Lomma argues that because one of the rented cranes "was actually delivered back to New Jersey," Boldt could reasonably expect to be subject to suit here. Unlike in Lebel, however, where the defendant seller had consummated a sale with plaintiff, who in turn arranged to have the item shipped to New Jersey where he resided, Boldt was not

deriving any benefit from the crane being shipped to New Jersey. See, e.g., Bayway Refining Co. v. State Utils., Inc., 333 N.J. Super. 420, 433 (App. Div.) ("Knowledge that some aspect of the production of goods to fulfill a contract occurs in a jurisdiction is not enough to establish the required 'minimum contacts' with that jurisdiction."), certif. denied, 165 N.J. 605 (2000). Rather, as Boldt contends, J.F. Lomma's unilateral arrangement to have the crane shipped to New Jersey at the completion of the lease term does not bespeak even a minimum contact here by Boldt. Not only is there no evidence that Boldt was made aware or had reason to know of this arrangement, this fact would not suggest the kind of purposeful conduct towards the forum to render Boldt amenable to suit in New Jersey. Accordingly, the mere fact that the crane was shipped to New Jersey after the contract term does not support personal jurisdiction over Boldt.

J.F. Lomma further argues that the choice of law provision in the alleged contract between the parties supports our exercise of jurisdiction over Boldt. We disagree. It is well-settled that a choice-of-law clause is just one factor in support of jurisdiction and by itself, is generally insufficient to establish jurisdiction. See Kislak Inc. v. Trumbull Shopping Park, Inc., 150 N.J. Super. 96, 102 (App. Div. 1977) (finding Connecticut choice-of-law was one factor militating against

jurisdiction in New Jersey); Baron & Co. v. Bank of N.J., 497 F. Supp. 534, 538 (E.D. Pa. 1980) ("The mere presence of a choice of law provision in a contract is not sufficient to vest jurisdiction in a court."). Therefore, because J.F. Lomma has failed to otherwise demonstrate sufficient contacts with New Jersey to warrant jurisdiction, we are not persuaded by the mere inclusion of a New Jersey choice-of-law clause in the putative agreement.

Finally, as Boldt argues, the fact that J.F. Lomma has an office in New Jersey has little bearing on whether Boldt purposely availed itself of the laws of the State. It is well settled that "an individual's contract with an out-of-state party alone can[not] automatically establish sufficient minimum contacts in the other party's home forum." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478, 105 S. Ct. 2174, 2185, 85 L. Ed. 2d 528, 545 (1985). Rather, a court is called to evaluate the parties' "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing" to determine whether defendant "purposefully established minimum contacts within the forum." Id. at 479, 105 S. Ct. at 2185, 85 L. Ed. 2d at 545.

In summary, the contractual arrangement in dispute has little connection, much less a "substantial connection with the forum state." See Avdel Corp. v. Mecure, 58 N.J. 264, 269

(1971) (a nonresident defendant who does not transact business in a state, may nonetheless be amenable to suit "where he enters into a contract which will have significant effects in that state"). We are satisfied that the demonstrable facts do not support the exercise of personal jurisdiction over Boldt and that to so find would "'offend traditional notions of fair play and substantial justice.'" Shah, supra, 184 N.J. at 138 (quoting Blakey, supra, 164 N.J. at 66).

Reversed and remanded for the entry of a judgment dismissing the complaint without prejudice.[6]

[6] The dismissal shall be without prejudice to enable J.F. Lomma to initiate proceedings, if it wishes, against Boldt in an appropriate jurisdiction. We express no opinion as to the merits of such lawsuit if and when it is commenced.