STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
March 9, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Travis Hough, Plaintiff Below,
Petitioner

vs) No. 11-0814 (Kanawha County 10-Misc-463)

Boll Medical, Inc., Defendant Below,
Respondent

MEMORANDUM DECISION

Petitioner Travis Hough, plaintiff below, appeals the Circuit Court of Kanawha County's order staying and vacating a default judgment order entered in the State of Texas. The circuit court found that the Texas court lacked personal jurisdiction over the respondent herein, defendant below, Boll Medical, Inc., a West Virginia corporation. Petitioner appears by counsel Todd A. Mount and K. Brian Adkins, while respondent appears by counsel Christopher S. Smith and Nicola D. Smith.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In reviewing challenges to the findings and conclusions of a circuit court, we apply a three-pronged standard of review. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, the underlying factual findings are reviewed under a clearly erroneous standard, and questions of law are subject to de novo review. Syl. Pt. 2, *Walker v. W.Va. Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997); Syl. Pt. 1, *Evans Geophysical, Inc. v. Ramsey Associated Petroleum, Inc.*, 217 W.Va. 45, 614 S.E.2d 692 (2005) (per curiam).

Upon a careful review of the relevant legal authority and the parties' arguments, we conclude that the circuit court ruled correctly and should be affirmed. We adopt by reference the circuit court's "Order Granting the Defendant's Motion for Entry of an Order Vacating a Foreign Default

Judgment" entered April 15, 2011. The Clerk of Court is directed to attach a copy of the circuit court's order to this memorandum decision.

Affirmed.

ISSUED: March 9, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

11-D814

FILED
2011 APR 18 AM 8:48
CATHY GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

TRAVIS HOUGH,

Plaintiff,

v.

CIVIL ACTION NO. 10-Misc-463
(Judge Zakaib)

BOLL MEDICAL, INC.,

Defendant.

ORDER GRANTING THE DEFENDANT'S MOTION FOR ENTRY OF AN ORDER VACATING A FOREIGN DEFAULT JUDGMENT

On November 5, 2010, came the Defendant, Boll Medical, Inc., by its Counsel, Christopher S. Smith of Hoyer, Hoyer & Smith, PLLC, upon the Defendant's Motion to Vacate a Foreign Default Judgment, and the Plaintiff appeared by his Counsel, Todd A. Mount and K. Brian Adkins of Shaffer & Shaffer, PLLC.

This matter arises in connection with the Plaintiff's attempt to enforce a $313,413.08 Default Judgment entered in Texas against Boll Medical, Inc. on May 24, 2010.

The Court makes the following findings of fact and conclusions of law.

1. Boll Medical, Inc. ("Boll") is a West Virginia corporation with its principal place of business in Charleston, West Virginia. Boll is engaged in selling and leasing home medical equipment to individuals in the Kanawha, Putnam, and surrounding counties of West Virginia.

2. The contract in issue was executed in West Virginia, was to be governed by West Virginia law, and pertained to assets located in West Virginia and owned by a West Virginia limited liability company of which the Plaintiff was the majority member. Paragraph 10 of the contract provides for mandatory arbitration.

3. The Defendant's Motion is supported by the Affidavit of Charles E. Boll, II. The Plaintiff also filed an Affidavit, but it differs only slightly in substance from Mr. Boll's Affidavit in that it alleges that the Plaintiff performed acts in pursuance if his contractual obligations in Texas. The substance of Mr. Boll's Affidavit is not otherwise disputed in the Plaintiff's Response.

4. Under the contract, the Plaintiff's compensation was to be based upon his ability to negotiate smaller payoffs owing to the commercial lessors of the equipment to be purchased by Boll from the limited liability company that was a bankruptcy Debtor in the Bankruptcy Court for the Southern District of West Virginia. However, the Bankruptcy Court required the leases to be assumed at their full payoff. Therefore, as it was not possible to obtain smaller payoffs from the equipment lessors, Mr. Boll's Affidavit asserts that the Plaintiff never performed under the contract. The Affidavit further establishes that none of equipment lessors with whom the Plaintiff was to negotiate were located in Texas.

5. Pursuant to the Uniform Enforcement of Foreign Judgments Act, W. Va. Code, § 55-14-1 et seq., a foreign judgment "is entitled to full faith and credit in this state." W. Va. Code, § 55-14-2. However, for a judgment to be entitled to full faith and credit, the Court issuing the judgment must have personal jurisdiction over the person against whom the judgment was entered. Evans Geophysical, Inc. v. Ramsey Assoc. Petroleum, Inc., 217 W.Va. 45, 47, 614 S.E.2d 692, 694 (2005). The law of the foreign state governs whether the Court of the foreign state has jurisdiction, except when the exercise of jurisdiction violates the Due Process clause of the United States Constitution. Cook v. Cook, 199 W.Va. 309, 311, 484 S.E.2d 192, 194 (1997).

6. A person is subject to jurisdiction of a Texas Court under its Long-Arm Statute when that person purposely avails himself of the privilege of conducting activities in Texas such as to invoke the benefits and protections of the laws of Texas. Nationwide Capital Funding, Inc. v. Epps, 2006 Tex.App. LEXIS 3152, 10-11 (2006). This test for the appropriate reach of a Texas Court's jurisdiction is governed by federal cases concerning the Due Process requirements for invoking jurisdiction under state Long-Arm statutes. BMC Software Belgium v. Marchard, 83 S.W.3d 789, 795 (Tex. 2002).

7. In a line of cases beginning with International Shoe Co. v. Washington, 326 U.S. 310 (1945), the United States Supreme Court held that under the Due Process clause, before a non-resident defendant could be subject to in personam jurisdiction in a forum state, there must be a showing of sufficient "minimum contacts" of the non-resident with the forum state so as not to offend "traditional notions of fair play and substantial justice." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980). Minimum contacts are established where there has been "some act by which the defendant purposely avails [himself] of the privilege of conducting activities within the forum state, thus evoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958) (brackets added). Minimum contacts are established by a foreseeability standard. "[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

8. In the present case, the only possible contact with Texas is that the Plaintiff, Mr. Hough, a Texas resident, would have presumably contacted equipment lessors, all of whom were located outside of Texas, from his telephone in Texas. The Plaintiff alleges that these negotiations were prevented by the Bankruptcy Court's Order that the equipment leases had to be assumed at their full payoffs.

9. Assuming that telephone calls were made by Mr. Hough to the equipment lessors, this would be insufficient to establish minimum contacts for Due Process purposes. West Virginia Supreme Court's decision in Evans Geophysical, Inc. v. Ramsey Associated Petroleum, 217 W.Va. 45, 614 S.E.2d 692 (2005), is outcome determinative in this regard.

10. In Evans Geophysical, Inc., the Supreme Court of West Virginia affirmed the Circuit Court of Gilmer County's denial of a motion to reconsider its decision to void a Michigan default judgment. "Ramsey [the West Virginia Defendant] strategically chose not to defend the action in Michigan, or otherwise submit the company to the jurisdiction of the Michigan courts." Evans Geophysical, Inc., 217 W.Va. At 46, 614 S.E.2d at 692 (brackets added).

11. In Evans Geophysical, Inc., the Court relied on two federal cases, Michigan Steelcon, Inc. v. Beaver Ins. Co., 650 F.Supp. 520 (W.D. Mich. 1986), and Neighbors v. Penske Leasing, Inc., 45 F.Supp.2d 593 (E.D. Mich. 1999). Both cases applied Michigan's Long-Arm statute that provides for an extension of personal jurisdiction to the "maximum limits of due process". Michigan Steelcon, Inc., 650 F.Supp. at 522-23; Neighbors, 45 F.Supp.2d at 597. The Texas Long-Arm statute in issue also extends the jurisdiction of Texas Courts "as far as the

federal constitutional requirement of due process will permit." BMC Software Belgium v. Marchard, 83 S.W.3d 789, 795 (Tex. 2002).

12. In that both the Michigan and Texas Long-Arm statutes identically reach to the outer limits of the Due Process clause of the Federal Constitution, Evans Geophysical, Inc., provides the clear precedent for this case. Thus, under clear West Virginia precedent, even if the Plaintiff, Mr. Hough, did make telephone calls from Texas to the equipment lessors located outside of Texas, this would not cause Texas to have jurisdiction over Boll.

13. Our Supreme Court's decision in Evans Geophysical, Inc. provides as follows:

> Two federal district courts have addressed the Michigan long-arm statute. In Michigan Steelcon, Inc. v. Beaver Ins. Co., 650 F.Supp. 520 (W.D. Mich. 1986), the court found that **the mere contracting with an out-of-state corporation by a Michigan resident is insufficient** to invoke personal jurisdiction over the out-of-state defendant. Furthermore, in Neighbors v. Penske Leasing, Inc., 45 F.Supp.2d 593 (E.D. Mich. 1999), the court found that **an out-of-state corporation, whose sole link to Michigan was daily communications by telephone, mail, or facsimile to a supplier in Michigan, was insufficient contact to establish limited personal jurisdiction under the Michigan long-arm statute.**
>
> Much like the foreign corporation in Neighbors, the appellee's contact with the state of Michigan was **limited to communications with appellant by telephone, mail, and facsimile.**
>
> . . .
>
> The appellee's limited contact with the state of Michigan did not provide sufficient grounds on which to establish personal limited jurisdiction in Michigan. The circuit court did not abuse its discretion in finding that the Michigan court did not have limited personal jurisdiction over the appellee, Ramsey Associated Petroleum, Inc.

Evans Geophysical, Inc, 217 W.Va. at 47-48, 614 S.E.2d at 694-95 (emphasis added).

14. Due Process centers on the Defendant's activities in the forum state, not the Plaintiff's. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985). Under the contract, Boll Medical was not going to make calls from Texas to the equipment lessors. The undisputed fact is that Boll Medical conducted no activity in Texas.

15. Finally, in determining the Due Process reach of a state's Long-Arm statute, the Court must consider the inconvenience to the Defendant in litigating in Texas and whether Texas has some policy interest in enforcing the claim in its courts. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). The mere fact that the Plaintiff is a Texas resident is insufficient to invoke personal jurisdiction. "It is axiomatic that jurisdiction cannot be predicated on the plaintiff's residence." Michigan Steelcon, Inc., 650 F.Supp. at 524-25. Texas has no conceivable interest in enforcing a contract in its courts that in all respects is a West Virginia contract. The inconvenience of Boll of traveling to Texas and hiring Texas counsel is obvious.

16. This is not to say that the Plaintiff is without a remedy. He is free to institute a legal proceeding in West Virginia to enforce a contract that was made in West Virginia and that involves the assets of a West Virginia limited liability company of which he was a member.

Based upon the foregoing, it is clear that the undisputed evidence shows that Boll Medical, Inc. did not have sufficient minimum contacts with Texas to be haled into the jurisdiction of a Texas Court in an action to enforce a contract, which in all respects, is a West Virginia contract.

Therefore, it is ORDERED that the enforcement of that certain "Order Default Judgment" entered on May 24, 2010, in Cause No. DC-0917054C by the 68th Judicial District,

Dallas County, Texas, by Martin Hoffman, Judge, in the amount of $313,413.08 in favor of the Plaintiff, Travis Hough, and against the Defendant, Boll Medical, Inc., is STAYED and said foreign Default Judgment is hereby set aside and VACATED.

Entered: April 15, 2011

Paul Zakaib, Jr., Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS:
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 18th DAY OF APRIL 2011
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Submitted by:

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