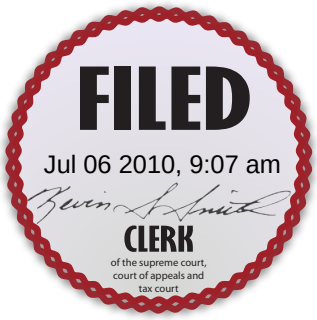

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IN THE
COURT OF APPEALS OF INDIANA

H & L MOTORS, LLC.,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 43A03-1002-PL-105
	)	
MILLENNIUM AUTO GROUP, INC.,	)	
	)	
Appellee.	)	

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-0909-PL-455

July 6, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

H&L Motors, LLC ("H&L") appeals the trial court's order dismissing its complaint against Millennium Auto Group, Inc. ("Millennium").

We affirm.

ISSUE

Whether the trial court erred when it dismissed H&L's complaint.

FACTS

On September 8, 2009, H&L, an Indiana limited liability company located in Warsaw, Indiana, filed a complaint in Kosciusko Circuit Court against Millennium, a Michigan corporation. The complaint contained two counts. Count I alleged Millennium's "failure to pay on account." (App. 5). Specifically, Count I alleged that in early 2001, H&L had entered into what it called the "Rhoades Agreement" with Millennium, whereby Rhoades Automotive, Inc., ("Rhoades") an Indiana corporation, "was named as a direct buyer from Millennium," and "Millennium agreed to pay H&L" $300.00 "as a commission for each vehicle purchased from Millennium by Rhoades. (App. 5, 6). H&L alleged that from January 1, 2001 to January 1, 2006, Rhoades had purchased 181 vehicles from Millennium but had "failed to pay commissions for" 171 of them. (App. 6). In Count II, H&L alleged that it and Millennium "had an agreement" as to a certain 2002 Mini Cooper automobile, whereby Millennium would reimburse H&L for "expenses incurred in" the repair of the Mini and "legal fees and costs in prosecuting

litigation against the importer of the Mini" in Kosciusko County Superior Court. (App. 7). H&L "demand[ed] reimbursement" as agreed. *Id.*

The complaint was served on Millennium in Flint, Michigan on September 14, 2009 by certified mail. On October 6, 2009, a *pro se* answer was filed. On October 30, 2009, H&L sought a default judgment, citing Indiana's requirement that a corporation must appear in court by an attorney and Millennium's failure to file an answer in compliance with Indiana law. On December 15, 2009, counsel for Millennium entered an appearance and filed an objection to the motion for default judgment and for leave to file an amended answer. After a hearing on December 17, 2009, the trial court denied H&L's motion for default judgment and granted Millennium's motion to file an amended answer.

On December 28, 2009, Millennium filed its amended answer and affirmative defenses, admitting that it was a Michigan corporation but otherwise generally denying the allegations of H&L's complaint; and, pursuant to its affirmative defenses, sought dismissal based on the lack of jurisdiction over Millennium and *forum non conveniens*. Also on December 28th, Millennium filed a counterclaim, alleging H&L's "conversion" and "breach of contract" with respect to the Mini. Finally, on December 28th, Millennium also filed a motion to dismiss, therein asserting that it was neither incorporated in Indiana nor had its principal place of business in Indiana; was not served with the complaint in Indiana; and did "not conduct continuous and systematic business in Indiana nor . . . have any minimum contacts related to the alleged cause of action

within" Indiana, such that the trial court lacked "*in personam* jurisdiction over Millennium." (App. 46). The motion further asserted that even if the trial court found it had jurisdiction of Millennium,

> venue is improper because the activities in dispute between the parties originated in Michigan, the potential witnesses and evidence is [sic] in Michigan, and other related litigation is already pending in the state of Michigan;

specifically, the "currently pending" matter

> in the Michigan 67th District Court, under the caption *Millennium Auto Group, Inc. v. Harvey Hays*, [sic] File No. GCE 08-00852, involving similar issues of the rights and obligations of the parties over the same automobile in Count II of Plaintiff's Complaint.

(App. 46, 47). Accordingly, Millennium asserted, the trial court should dismiss the matter "for *forum non conveniens* and in the interests of judicial economy to avoid duplicitous litigation." (App. 47).

In response, on January 21, 2010, H&L filed its objection to the motion to dismiss. H&L asserted that the trial court did "have *in personam* jurisdiction over Millennium," the matter was "properly venued," and the trial court was "not an inconvenient forum." (App. 54). H&L also asserted that Millennium had "voluntarily submitted to the jurisdiction of Indiana courts by filing a permissive counterclaim." (App. 59). In support of its objection to the motion to dismiss, H&L submitted the affidavit of Harvey Hayes, "a managing member of H&L," who averred that "H&L established Rhoades . . . as direct buyer from Millennium," and Millennium "agreed to pay commission to H&L regarding business transacted between Millennium and Rhoades." (App. 63). Mr. Hayes

further averred that H&L had purchased and sold the Mini; that Millennium had subsequently acquired it and found "problems" with it; that Millennium "delivered the Mini to H&L in Indiana"; and that Millennium subsequently failed to honor its agreement to reimburse H&L for the repair work and for legal expenses, incurred with respect to litigation involving the Mini in the Kosciusko County Superior Court. (App. 63, 64). H&L also submitted the affidavit of Lamonte Rhoades, the president of Rhoades, who averred that "Rhoades was involved in transacting business with Millennium" from December of 2001 to January 1, 2006, during which time "Rhoades purchased vehicles from Millennium," and that the vehicles "were delivered to Rhoades at its location in Columbia City, Indiana by Millennium." (App. 66). On January 25, 2010, the trial court heard the parties' argument. Thereafter, it granted Millennium's motion and ordered the dismissal of H&L's complaint.

DECISION

H&L argues that the trial court "erred by concluding that personal jurisdiction was lacking with Millennium." H&L's Br. at 7. We turn to the most recent guidance of our Supreme Court in this regard.

Personal jurisdiction is a question of law. *LinkAmerica Corp. v. Albert*, 857 N.E.2d 961, 965 (Ind. 2006). As with other questions of law, a determination of the existence of personal jurisdiction is entitled to de novo review by appellate courts. *Id.* Personal jurisdiction turns on facts, typically the contacts of the defendant with the forum, and the trial court finds the facts necessary to determine jurisdiction. *Id.*

Subsequent to the 2003 amendment to Indiana Trial Rule 4.4(A), the trial court's jurisdiction over a party is determined by "whether the exercise of personal jurisdiction is consistent with the Federal Due Process Clause." *Id.* at 967. The Due Process Clause of the Fourteenth Amendment requires that before a state may exercise jurisdiction over a defendant, the defendant must have certain minimum contacts with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Id.*

If the defendant's actions are so continuous and systematic that the defendant should reasonably anticipate being haled into the courts of that state for any matter, then the defendant is subject to general jurisdiction, even in causes of actions unrelated to the defendant's contacts with the forum state. *Id.* If the defendant's contacts are not continuous and systematic, specific jurisdiction may be asserted if the controversy is related to or arises out of the defendant's contacts with the forum state. *Id.* Specific jurisdiction requires that the defendant purposefully availed itself of the privilege of conducting activities with the forum state so that the defendant reasonably anticipates being haled into court there. *Id.* A single contact with the forum state may be sufficient to establish specific jurisdiction over a defendant if it creates a substantial connection with the forum state and the suit is related to that connection. *Id.*

Finally, if the defendant has contacts with the forum state sufficient for general or specific jurisdiction, due process requires that the assertion of personal jurisdiction over

the defendant be reasonable. *Id.* The reasonableness of exercising jurisdiction over a defendant is determined by balancing five factors:

> (1) the burden on the defendant; (2) the forum State's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenience and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several States in furthering fundamental substantial social policies.

Id. at 968.

There are neither allegations nor evidence as to whether Millennium sought vehicle sales to Indiana residents; where the parties' agents were when they negotiated/entered into the "Rhoades Agreement"; whether Rhoades was in Michigan for the purchase of the vehicles; or why Millennium delivered the vehicles to Rhoades in Indiana (*e.g.,* did the agreement so require?). Nevertheless, H&L's assertion that Millenium delivered vehicles to Rhoades in Indiana is undisputed, and such could arguably establish "general jurisdiction" as "continuous and systematic contacts" by Millennium with Indiana. *LinkAmerica,* 857 N.E.2d at 967. Moreover, Millennium's delivery of the vehicles to Rhoades in Indiana would appear related to the controversy in Count I of H&L's complaint: that Millenium failed to pay to H&L the commissions as agreed on Rhoades' "direct buyer" vehicle purchases from Millennium. (App. 5). Such could arguably establish "specific jurisdiction" as "related to or arising from" Millennium's "contacts" with Indiana with respect to the Rhoades sales. *LinkAmerica*, 857 N.E.2d at 967.

Accordingly, we turn to whether the assertion of personal jurisdiction over Millennium "is reasonable." *Id.* Concerning "the burden on the defendant," *id.* at 968, taking judicial notice as to the respective locations involved, we find that the burden on Millennium to defend against H&L's complaint in Indiana rather than Michigan would not be great; however, as will be discussed later, the fact that Count II of the complaint is intertwined with an action previously filed by Millennium in Michigan diminishes the weight of this factor. We find the same considerations apply to the second and third factors: Indiana's interest in adjudicating the dispute, and the interest of H&L in obtaining convenient and effective relief.

We find the latter two factors – "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," *id.* – to strongly weigh against a finding of jurisdiction by the trial court in this case. In the trial court, H&L did not dispute Millennium's assertion that there had previously been filed in Michigan's court an action "involving similar issues of the rights and obligations of the parties over the same automobile in Count II of [H&L]'s complaint." (App. 47).[1] Moreover, H&L did not challenge Millenium's statements that "the activities in dispute

[1] In its reply brief, H&L asserts that the Michigan litigation "was, in fact, dismissed on March 24, 2010." Reply at 3. It cites no authority, however, for the proposition that this subsequently occurring "fact" should be considered in our review of the trial court's January 25, 2010 order. *Id.*

H&L's reply also asserts that the Michigan litigation was "against Harvey Hayes," and that "while Harvey Hayes is a member of H&L, his claims and defenses vis-à-vis Millennium are not the same as those of H&L, and an adjudication of issues between Millennium and Harvey Hayes would not resolve issues between Millennium and H&L." *Id.* This argument was neither presented to the trial court nor raised in its appellate brief. "[A]n argument raised for the first time in the reply brief is waived." *United States Gypsum v. Indiana Gas Co.*, 735 N.E.2d 790, 797 n.1 (Ind. 2000).

between the parties originated in Michigan," and that "the potential witnesses and evidence is [sic] in Michigan." (App. 46).

We also take into consideration that application of the above Federal Due Process Clause analysis strongly indicates that Michigan would have jurisdiction to hear H&L's claims against Millennium. That said, having balanced the five factors, we find that they weigh against a finding that jurisdiction by the trial court with respect to the instant action by H&L against Millennium is reasonable.

Moreover, consideration of the previously filed pending litigation in Michigan concerning the Mini implicates the principles of comity. Comity is a doctrine which permits Indiana courts to respect proceedings pending in the courts of sister states. *Cloverleaf Enters., Inc. v. Centaur Rosecroft, LLC*, 815 N.E.2d 513, 519 (Ind. Ct. App. 2004) (citing *George S. May Int'l Co. v. King*, 629 N.E.2d 257, 260 (Ind. Ct. App. 1994), *trans. denied*). Comity is not a constitutional requirement but "a rule of convenience and courtesy." *Id.* Comity is "a willingness to grant a privilege, not as a matter of right, but out of deference and good will." *Id.* "Its primary value is to promote uniformity of decision by discouraging repeated litigation of the same question." *Id.* When there is a pending action concerning the same matter in another state, the parties face the danger of "multiple or inconsistent judgments." *Hexter v. Hexter*, 179 Ind. App. 618, 640, 386 N.E.2d 1006, 1008 (1979). Thus, under the comity doctrine, an Indiana state court may dismiss a case in order to respect pending proceedings in another state's court. *American Econ. Ins. Co. v. Felts*, 759 N.E.2d 649, 661 (Ind. Ct. App. 2001), *trans. denied*.

A dismissal based on comity grounds is subject to review for an abuse of discretion. *Id.* Based upon the record before us, we find no abuse of discretion in a dismissal on these grounds by the trial court.

H&L also argues that the trial court erred in dismissing its complaint for lack of jurisdiction because Millennium waived any objection to the trial court's jurisdiction by filing a permissive counterclaim that sought affirmative relief from the Indiana court. In support of its argument, it cites *Hotmix & Bituminous Equip., Inc. v. Hardrock Equip. Corp.*, 719 N.E.2d 824, 830 (Ind. Ct. App. 1999).

As we explained in *Hotmix*, "a party not otherwise subject to the personal jurisdiction of a court may nonetheless submit himself to that court's jurisdiction by either seeking affirmative relief or by failing to object in a timely matter to the jurisdiction of the court." *Id.* Further, a timely objection to personal objection may be waived

> if subsequent actions by the defendant go beyond matters of defense and seek affirmative relief. Filing a permissive counterclaim falls within this category. However, filing a compulsory counterclaim is altogether another matter.

Id.

A compulsory counterclaim is a claim that arises out of the same "transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." *Id.* (quoting Ind. Trial Rule 13(A)). The phrase "transaction or

occurrence" is to be broadly defined so as to effectuate the rule's intended purpose of avoiding multiple lawsuits between the same parties arising from the same event or events. *Id.* (citing *Riddick v. Carfield*, 656 N.E.2d 518, 522 (Ind. Ct. App. 1995), *trans. denied*). Two causes of action are "said to arise from the same transaction if there is a logical relationship between them, meaning that the counterclaim arises from the same aggregate set of operative facts as the opposing party's claim." *Id.* Further, "[f]ailure to file a compulsory counterclaim in the initial action results in that claim forever being barred." *Id.*

H&L concedes that its Count II and Millennium's counterclaim "involve the same Mini," but argues that its complaint "stems from allegations that Millennium agreed to reimburse H&L for repair costs and legal expenses incurred with regards to the Mini but failed to do so," while Millenium's counterclaim "stems from allegations that H&L converted the Mini and that H&L agreed to purchase the Mini but failed to do so." H&L's Br. at 9. Although clothed with some validity at first blush, H&L's argument fails to recognize that both its complaint and Millennium's counterclaim arise from H&L's possession of the Mini. The parties' legal actions arising from that possession involve determinations of whether H&L is subject to any consequent civil liability therefor, and whether Millennium has breached its contractual obligations as to the Mini. Therefore, there is "a logical relationship between" the actions. *Hotmix*, 719 N.E.2d at 830.

Accordingly, we find that Millennium's counterclaim is a compulsory counterclaim. When a compulsory counterclaim "is filed contemporaneously with an answer which properly raises personal jurisdiction as an issue," it "does not waive the defense of lack of personal jurisdiction." *Id.* Therefore, H&L's argument in this regard must fail.

Affirmed.

BAKER, C.J., and CRONE, J., concur.