

STATE OF MICHIGAN
COURT OF APPEALS

DAVID M. CLAPPER and FORTHRIGHT II, INC.,

Plaintiffs-Appellees,

v

FREEMAN MARINE EQUIPMENT, INC.,

Defendant-Appellant.

UNPUBLISHED

June 16, 2000

No. 211139

Wayne Circuit Court

LC No. 97-737513-CK

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying its motion for summary disposition based on lack of personal jurisdiction. We reverse.

I

This case arises from a 1993 contract between James Allen and the Burger Boat Company of Wisconsin for the construction and sale of a yacht. Plaintiffs David M. Clapper, an Oakland County resident, and Forthright II, Inc., a Delaware corporation doing business in Michigan, assumed Allen's rights under the contract in 1995.¹ In their complaint, plaintiffs allege that defendant Freeman Marine, an Oregon corporation doing business in Oregon, provided defective doors, hatches, and other components to Burger for use in the construction of the yacht. They filed this action seeking damages from Freeman under a variety of theories and/or cancellation of the contract. Plaintiffs maintain that

¹ We are unable to ascertain the exact nature of the relationship between Clapper and Forthright or their respective rights under the contract. Clapper assumed Allen's rights under the contract in 1995, and Forthright later assumed Clapper's rights, but Clapper has apparently remained involved in the transaction. Clapper appears to be affiliated with Forthright because he closed on the sale and took delivery of the yacht in Windsor, Canada. According to the transcript, Clapper kept the boat in Detroit for a short time and then moved it down to Florida. The boat was later sold but he and/or Forthright retained some sort of interest in it. Defendant has not challenged either Clapper's or Forthright's status as the real party in interest here, so the exact nature of the relationship is unimportant to this appeal.

defendant conducted business in Wayne County and is therefore subject to the jurisdiction of Michigan courts.

In lieu of an answer, Freeman moved for summary disposition pursuant to MCR 2.116(C)(1), lack of personal jurisdiction. Freeman asserted that it did not conduct sufficient business in Michigan to give the state's courts general or limited personal jurisdiction over it. Freeman maintained that it

does not carry on a continuous or systematic part of its general business within the State of Michigan. It is not qualified to do business in Michigan. It has no sales tax number and has not paid taxes or manufactured any product in Michigan. Freeman Marine operates no facilities in Michigan, has no office in Michigan, has no employees in Michigan, and does not maintain any bank accounts or property in Michigan. Freeman Marine does not advertise in Michigan, is not listed in any Michigan telephone book, and does not avail itself of any Michigan services.

Freeman stated that its sole contact with the state in 1997 was the sale of \$7,155 worth of goods to Michigan companies and another \$711 worth of goods to a Florida company for shipment to that company's Michigan facility—sales solicited by the buyers, not by Freeman. The \$7,866 worth of goods shipped to Michigan constituted "less than .02% (two one-hundredths of one percent) of Freeman Marine's 1997 total sales."

In response, plaintiffs contended that Freeman could have foreseen that its products would be used in Michigan: Freeman sold products to Burger, a Wisconsin company situated on the western shore of Lake Michigan, which should have alerted Freeman to the likelihood that boats built by Burger would be sailed on Michigan territorial waters after leaving Wisconsin. In addition to its sales of \$7,866 to Michigan companies, defendant sold another \$6,327 worth of goods to a Florida company for use in its Michigan facility. Defendant advertised in national magazines that are circulated in Michigan and maintained an Internet Web site that Michigan residents could access, although plaintiffs have not alleged or proved that anyone associated with the manufacture, sale or delivery of the boat accessed or was even aware of the existence of the Web site or that the Web site resulted in any Michigan sales for defendant. Plaintiffs maintained that such contacts were more than sufficient to confer personal jurisdiction on the court.

Plaintiffs also cited examples of Freeman's direct contacts with plaintiffs as a basis for asserting personal jurisdiction. After Clapper advised Freeman of his problems with Freeman's products, the company wrote to him at his Michigan address. In one letter, it offered to provide field service for products under warranty. Freeman advised Clapper that one problem with a door was caused by a damaged gasket and offered to ship a replacement gasket "immediately upon your instructions."

After hearing oral arguments and strongly encouraging the parties to settle the case because of the modest amount in controversy, the trial judge described the dispute as a "close issue" because Freeman's advertisements in national magazines, its maintenance of a Web site, and its sales to Michigan residents were barely sufficient to confer jurisdiction. The trial judge denied defendant's

motion, but acknowledged that she had doubts that this was the correct ruling. We granted defendant leave for interlocutory appeal and stayed proceedings pending appeal.

II

A. Personal Jurisdiction

We review jurisdictional rulings de novo on appeal. *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995). “The plaintiff bears the burden of establishing jurisdiction over the defendant but need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition. The affidavits, together with any other documentary evidence submitted by the parties, must be considered by the court. All factual disputes for the purpose of deciding the motion are resolved in the plaintiff’s (nonmovant’s) favor.” *Id.*

Personal jurisdiction is governed by both state statute and by the United States Constitution. A court’s exercise of personal jurisdiction must satisfy two requirements: (1) it must be authorized by one of Michigan’s long-arm jurisdictional statutes; and (2) it must be consistent with the requirements of the Due Process Clause of the Fourteenth Amendment.” *Aaronson v Lindsay & Hauer Int’l Ltd*, 235 Mich App 259, 262; 597 NW2d 227 (1999); see also *Green v Wilson*, 455 Mich 342, 349-350; 565 NW2d 813 (1997). To comply with the statutory requirement, the plaintiff must establish that personal jurisdiction over a corporate defendant is authorized by either the general jurisdiction statute, MCL 600.711; MSA 27A.711, or the limited/specific jurisdiction statute, MCL 600.715; MSA 27A.715. The constitutional inquiry involves a determination whether the defendant “purposefully established ‘minimum contacts’—a sufficient nexus with Michigan—so that requiring [it] to defend itself in a suit in Michigan does not offend traditional notions of ‘fair play and substantial justice.’” *Comm’r of Ins v Albino*, 225 Mich App 547, 559; 572 NW2d 27 (1997), quoting *Int’l Shoe, supra* 320. In accordance with this two-stage inquiry, *Green, supra*, we first consider whether either long-arm statute allows exercise of jurisdiction.

B. Limited or Specific Jurisdiction

The limited or specific jurisdiction statute provides as follows:

The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgments against such corporation *arising out of the act or acts which create any of the following relationships*:

- (1) The transaction of any business within the state.
- (2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort.

- (3) The ownership, use, or possession of any real or tangible personal property situated within the state.
- (4) Contracting to insure any person, property, or risk located within this state at the time of contracting.
- (5) Entering into a contract for services to be performed or for materials to be furnished in the state by the defendant. [MCL 600.715; MSA 27A.715, emphasis added.]

Succinctly stated, the courts may exercise personal jurisdiction over a foreign corporation where the claim being litigated arises out of an act or acts creating one of the five relationships specified in the statute. *Neagos v Valmet-Appleton, Inc*, 791 F Supp 682, 687 (ED Mich, 1992); *LAK, Inc v Deer Creek Enterprises*, 885 F2d 1293, 1298 (CA 6, 1989).

Here, plaintiffs have focused on Freeman's minimum contacts without addressing the threshold question of whether their suit arises out of one of the five specified relationships and they do not allege that any of their claims arise from defendant's Internet activity. This omission could be construed as plaintiffs' implicit concession that the limited jurisdiction statute does not apply here, and that they seek jurisdiction under the general jurisdiction statute.

In any event, limited jurisdiction is not warranted under MCL 600.715; MSA 27A.715 on the facts of this case: defendant did not contract to provide goods or services for plaintiffs here in Michigan, is not an insurance company and did not undertake to insure plaintiffs against any risk, and plaintiffs' claim is not based on any allegation regarding property defendant might have owned in the state.

This leaves subsection (1), the transaction of business within the state, as the only possible basis for jurisdiction, but subsection (1) does not apply here. None of the allegations in plaintiffs' claim arises from any business defendant conducted in the state. Defendant's sale of component parts to a Wisconsin ship manufacturer does not constitute doing business in Michigan. A defendant's mere awareness that its products could reach the forum state in the stream of commerce does not establish a sufficient contact for personal jurisdiction if the defendant did not purposefully direct its actions toward the forum state. *Witbeck v Bill Cody's Ranch Inn*, 428 Mich 659, 677-678; 411 NW2d 439 (1987), citing *Asahi Metal Industry Co, Ltd v Superior Court of California*, 480 US 102, 112; 107 S Ct 1026; 94 L Ed 2d 92 (1987). The fortuitous circumstance that plaintiffs in Michigan bought a product from Wisconsin that incorporated defendant's component parts does not establish the transaction of business in Michigan.

Plaintiffs argue that defendant conducted business in Michigan when it corresponded with plaintiffs in order to attempt to rectify the problem with the doors or hatches. However, these communications do not constitute the transaction of business within the state for purposes of § 715(1). Our Supreme Court held in *Witbeck, supra*, that "a nonresident defendant's contacts with the forum state must exist at the time the cause of action arose or, at the very least, before or at the time of

commencement of the action.” *Id.*, 680. Here, plaintiffs’ cause of action arose either when the boat was delivered with allegedly faulty doors and hatches or when plaintiffs first had notice that the doors and hatches were unsatisfactory, before defendant made efforts to resolve the problem. Were we to say that defendant transacted business in Michigan when it made these efforts, we still could not say that plaintiffs’ claim “arose from” this business as required by the statute. Having failed to establish that their claims arose from one of the five relationships specified in the statute, plaintiffs have not met their burden of proving limited jurisdiction under the long-arm statute.

C. General Jurisdiction

The general jurisdiction statute provides as follows:

The existence of any of the following relationships between a corporation and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise general personal jurisdiction over the corporation and to enable such courts to render personal judgments against the corporation.

- (1) Incorporation under the laws of this state.
- (2) Consent, to the extent authorized by the consent and subject to the limitations provided in section 745.
- (3) The carrying on of a continuous and systematic part of its general business within the state.
[MCL 600.711; MSA 27A.711.]

Clearly, the first two provisions do not apply here. The parties agree that defendant is not a Michigan corporation. Plaintiffs have not identified any written agreement by which Freeman consented to submit to the jurisdiction of Michigan’s courts. MCL 600.745; MSA 27A.745. Therefore, we must determine if defendant carried on “a continuous and systematic part of its general business within the state.” If it did, “the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant’s contacts with the state without violating due process because the defendant’s contacts with the forum state are ‘continuous and systematic.’” *Neagos, supra*, 791 Fed Supp at 686.

It is proper to consult dictionary definitions to ascertain the plain and ordinary meaning of words used in a statute. *People v Hack*, 219 Mich App 299, 305; 556 NW2d 187 (1996). The word “continuous” is defined as “[u]ninterrupted; unbroken; not intermittent or occasional; so persistently repeated at short intervals as to constitute virtually an unbroken series. Connected, extended, or prolonged without cessation or interruption of sequence.” Black’s Law Dictionary (5th ed). The word “systematic” is defined as “having, showing, or involving a system, method, or plan” or “given to or using a system or method; methodical.” *Random House Webster’s College Dictionary* (1997). The examples cited above showed that the defendants in those cases had a general plan for selling their goods in Michigan that was carried out on a regular basis. Thus, the courts of this state would have

general jurisdiction over defendant if it had a general plan for selling marine hatches, windows, doors, portlights, and related parts on a regular basis within the state.

What constitutes “a continuous and systematic part” of a corporation’s general business can be determined only on case-by-case evaluations. Here, defendant’s activities in Michigan do not constitute a continuous and systematic part of its general business. Although Freeman’s products have sometimes been incorporated in boats that are taken to Michigan or sold to Michigan residents, these facts do not establish that Freeman is carrying on a continuous and systematic part of its general business in the state. As this Court stated in *Kircos v Lola Cars Ltd*, 97 Mich App 379, 386-387; 296 NW2d 32 (1980):

A corporation is not “present” merely because goods that it has manufactured and sold are within a jurisdiction, absent an incident creating a limited jurisdiction under RJA [Revised Judicature Act] § 715. The fact that the corporation knows that purchasers of its products will be continuously selling its products within a jurisdiction does not mean that it is carrying on a continuous and systematic part of its general business within the state, as required by RJA § 711.

Although the facts of *Kircos v Lola Cars* are not strictly analogous to the facts here, we nonetheless conclude that defendant’s knowledge or constructive knowledge that the buyers of boat components would be continuously selling the finished boats in Michigan does not constitute a continuous and systematic operation of business in Michigan.

Additionally, it is well established that advertising in national publications does not constitute a minimum contact with the state absent evidence that the advertisements actually generate sufficient business in the state. *Witbeck, supra*, 671; *Sears Roebuck & Co v Sears*, 744 F Supp 1289, 1297 (D Del, 1990); *Wines v Lake Havasu Boat Mfg, Inc*, 846 F2d 40, 43 (CA 8, 1988). Accordingly, defendant’s advertising cannot constitute the carrying on of a continuous and systematic part of the business within the state.

Likewise, simply maintaining a Web site does not constitute a minimum contact with the state absent some evidence that it actually generated sufficient business in the state. As noted, plaintiffs have made no claim that defendant’s Web site generated any business in Michigan. The only evidence produced by plaintiffs on this matter consisted of an affidavit of an employee who accessed the site after the litigation was begun. The affidavit indicates that the Web site lists the products offered by defendant and includes a section for catalog requests. There is no allegation that the Web site can be used to place orders for defendant’s products. The affidavit actually supports the conclusion that the posting of defendant’s Web site—like an advertisement in a national publication—is merely an attempt to create contacts within the forum state. Unless some contacts actually take place, jurisdiction is not warranted. Although the Internet allows the viewer to communicate with the Web site operator, this still is nothing more than a potential for communication to take place.

Our concurring colleague, in a scholarly dissertation, urges us to use this case to venture far beyond the limited facts of this case to establish broad, sweeping principles of law relating to Internet e-

commerce and the maintenance of Web sites vis-à-vis traditional notions of jurisdiction. We decline his invitation to take this approach because, as noted above, there is no evidence on the record before us that the Web site in question played any role in the transactions that are claimed to establish jurisdiction, and plaintiffs do not argue that it did. Plaintiffs' brief on appeal merely mentions that defendant maintains a home page on which a catalog can be requested and which includes phone and fax numbers. Any ruling on the Internet issue would therefore be based only on hypothetical fact situations and would constitute pure dicta unlikely to be of any benefit to the bench and bar.

Defendant has conducted some business in the state. It made four sales to Michigan companies in 1997, totaling \$7,866. Defendant did not solicit the business; rather, its customers contacted defendant.² Those sales totaled just under \$7,900 or less than two one-hundredths of one percent of defendant's gross sales. Plaintiffs offered evidence showing that a Florida company buying goods for its Michigan facility placed three orders totaling approximately \$6,400 with defendant in 1994. Eight sales generating less than \$15,000 over a four-year period (with no sales at all for two years straight) does not demonstrate that defendant had a general plan for transacting business on a regular basis within the state; thus, defendant did not carry on a continuous and systematic part of its business within the state.

In sum, defendant's contacts with Michigan consist of national advertising not specifically targeted at Michigan, maintenance of an Internet Web site providing product information and the means to obtain catalogs, sales of component parts to companies that sold their finished products in Michigan, and a modest volume of sales directly to Michigan. In their totality, these do not establish the continuous and systematic business activity necessary to establish jurisdiction under Michigan's long-arm statute for general jurisdiction.

Reversed.

/s/ Janet T. Neff

/s/ Michael J. Talbot

² The record does not show if the customers were responding to defendant's advertisements.