

STATE OF MICHIGAN
COURT OF APPEALS

MGSI KARAS, INC.,

Plaintiff-Appellant,

v

AMERICAN ARBITRATION ASSOCIATION,
INC.,

Defendant,

and

THOMAS E. TOOLSON, D.D.S., INC.,

Defendant-Appellee.

UNPUBLISHED

May 14, 2009

No. 284332

Macomb Circuit Court

LC No. 2007-004497-CK

Before: Servitto, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Plaintiff MGSI Karas, Inc., (Karas) sought to enjoin arbitration proceedings against defendant Thomas E. Toolson, DDS, Inc., (Toolson) that were being run by defendant American Arbitration Association (AAA) on the ground that the arbitration was not proceeding according to the terms of its dispute resolution agreement with Toolson. The trial court granted Toolson's motion for summary disposition pursuant to MCR 2.116(C)(1), denied plaintiff's motion to order AAA to cease arbitration, and dismissed AAA from the case. Plaintiff now appeals as of right. We affirm.

Karas is a Delaware corporation with offices located in St. Clair Shores, Michigan. Karas apparently provides instructional services for dealing with medical patients. Toolson is a California corporation and the entity used by Dr. Thomas E. Toolson to run his dental practice in Fairfield, Solano County, California.¹

¹ We will refer to the Toolson Corporation as "Toolson" and Thomas E. Toolson as "Dr. Toolson."

Karas and Toolson entered a contract on February 20, 2006, in which Karas agreed to provide instructional services to Dr. Toolson and his staff for \$39,500. In the contract, the parties agreed that any dispute arising from the contract would be arbitrated “under the commonly agreed-upon rules of the American Arbitration Association,” with the exception that “an arbitrator shall be chosen by mutual agreement by the parties from a mutually agreeable source.”

In May 2007, Toolson filed a demand for arbitration with AAA, alleging that Karas provided Dr. Toolson with a program far different from the program that Dr. Toolson thought he would receive. AAA accepted the dispute and sent a letter setting forth basic guidelines for arbitration. In a separate letter dated June 7, 2007, AAA notified Karas and Toolson that they “shall designate their arbitrator, pursuant to the contract, and advise the Association on or before June 22, 2007.” On July 17, 2007, AAA notified the parties that because they had not advised AAA of their designated arbitrator within the proscribed period, AAA had administratively appointed William C. Rust, Jr., to arbitrate the dispute.

Soon thereafter, Karas contacted AAA and claimed that its appointment of an arbitrator to oversee the dispute violated the dispute resolution terms of the contract between Karas and Toolson. In response, AAA indicated that Rule R-2 of the Commercial Arbitration Rules and Mediation Procedures supported its continued arbitration of the dispute.² Accordingly, Rust continued to arbitrate the matter, and Karas refused to participate in the proceedings.

Karas then initiated this cause of action, alleging in its complaint that Toolson was refusing to arbitrate according to the dispute resolution terms of its contract with Karas, which required that the parties mutually agree upon an arbitrator, and requesting that the trial court order AAA to stop the arbitration and order Toolson to pay Karas all attorney fees and expenses incurred in bringing this case. On the same day, Karas also filed a separate motion to cease arbitration.

Soon thereafter, counsel for AAA sent plaintiff’s attorney a letter indicating that the litigation that Karas had initiated against AAA was improper and that it would not participate, because such involvement would hinder the organization’s objectivity with regard to providing arbitration services to Karas. AAA did not file a formal answer to Karas’s complaint with the trial court, although the trial court was aware that AAA had sent this letter. Toolson filed an

² Rule R-2 states,

When parties agree to arbitrate under [the Commercial Arbitration Rules and Mediation Procedures], or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA’s representatives as it may direct. The AAA may, in its discretion, assign the administration of the arbitration to any of its offices.

answer, raising jurisdictional challenges in its list of affirmative defenses. A day later, Toolson moved for summary disposition pursuant to MCR 2.116(C)(1), (4), and (7).

The trial court granted Toolson's motion for summary disposition pursuant to MCR 2.116(C)(1), finding that it lacked personal jurisdiction over Toolson. The trial court then determined that plaintiff's motion to order AAA to cease arbitration lacked merit and dismissed AAA from the case.

First, Karas argues that Toolson consented to the trial court's jurisdiction by filing responsive pleadings and making a general appearance before the trial court. We do not agree. MCR 2.116(D)(1) requires that a challenge to the trial court's jurisdiction over a party must be raised in that party's first motion or in the party's responsive pleading, or it is waived. Toolson raised a challenge to the trial court's personal jurisdiction in the list of affirmative defenses filed with its answer and in its motion for summary disposition filed a day later. Therefore, Toolson satisfied the requirements of MCR 2.116(D)(1) and did not waive the right to challenge the trial court's jurisdiction over it and over plaintiff's claims. Toolson did not consent to the trial court's jurisdiction, and plaintiff's claim of error lacks merit.

Next, Karas argues that the trial court has personal jurisdiction over Toolson pursuant to MCL 600.711(3) and MCL 600.715(1), and that the trial court erred when it determined that it lacked personal jurisdiction over Toolson and dismissed Karas's claims against Toolson pursuant to MCR 2.116(C)(1).³ We disagree.

In *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 427-428; 633 NW2d 408 (2001), this Court explained the circumstances under which an exercise of personal jurisdiction may occur:

Before a court may obligate a party to comply with its orders, the court must have in personam jurisdiction over the party. Jurisdiction over the person may be established by way of general personal jurisdiction or specific (limited) personal jurisdiction. See *Jeffrey v Rapid American Corp*, 448 Mich 178; 529 NW2d 644 (1995)], and *Kircos v Goodyear Tire & Rubber Co*, 70 Mich App 612, 613-614; 247 NW2d 316 (1976). The exercise of general jurisdiction is possible when a defendant's contacts with the forum state are of such nature and quality as to enable a court to adjudicate an action against the defendant, even when the claim at issue does not arise out of the contacts with the forum. *Helicopteros Nacionales de Colombia, SA v Hall*, 466 US 408, 414, n 9, 415-416; 104 S Ct 1868; 80 L Ed 2d 404 (1984). When a defendant's contacts with the forum state are insufficient to confer general jurisdiction, jurisdiction may be based on the

³ As the plaintiff, Karas bears the burden of proving that the trial court has personal jurisdiction over a defendant. *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995). "[W]hether a court has personal jurisdiction over a party is a question of law that is reviewed de novo on appeal." *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 426; 633 NW2d 408 (2001).

defendant's specific acts or contacts with the forum. *Witbeck v Bill Cody's Ranch Inn*, 428 Mich 659, 665; 411 NW2d 439 (1987). Our Legislature has provided long-arm statutes to allow courts to take jurisdiction over nonresident corporations under theories of general and specific jurisdiction. MCL 600.711, 600.715. When analyzing whether it is proper to exercise personal jurisdiction over a defendant, we must determine whether the defendant's conduct falls within a provision of a Michigan long-arm statute and whether the exercise of jurisdiction comports with due process. *Green v Wilson*, 455 Mich 342, 351; 565 NW2d 813 (1997); *Aaronson v Lindsay & Hauer Int'l Ltd*, 235 Mich App 259, 262; 597 NW2d 227 (1999). Long-arm statutes delineate the nature, character, and types of contacts that must exist to exercise personal jurisdiction. *Green*, *supra* at 348. Due process restricts permissible long-arm jurisdiction by defining the quality of contacts necessary to justify the exercise of personal jurisdiction over a defendant. *Id.*

MCL 600.711 permits a court to exercise general personal jurisdiction over a corporation when that corporation conducts "a continuous and systematic part of its general business within the state."⁴ A trial court may consider whether a corporation has a place of business, officers, employees, or bank accounts in the state when determining whether it can exercise general personal jurisdiction over a corporation. *Oberlies*, *supra* at 428.

The trial court correctly determined that it lacked general jurisdiction over Toolson. Toolson is not incorporated in Michigan and never consented to jurisdiction in this state. Further, Karas provides no evidence indicating that Toolson carried on a continuous and systematic part of its general business within the state of Michigan. Dr. Toolson created the incorporated entity bearing his name in order to run his dental practice in California. Toolson's only office is in California, Toolson's employees are all in California, and Karas provides no indication that any Toolson clients were from Michigan or that Toolson ever contracted with any business entity besides Karas that was either incorporated in or did business in Michigan.

⁴ MCL 600.711 states, in its entirety,

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 [MCL 600.745].

(3) The carrying on of a continuous and systematic part of its general business within the state.

Toolson lacks the necessary contacts needed for a Michigan trial court to exercise general personal jurisdiction over it.

Karas also claims that the trial court has limited personal jurisdiction over Toolson pursuant to MCL 600.715.⁵ Karas never identifies the provision of MCL 600.715 under which it claims that the trial court could exercise limited personal jurisdiction over Toolson. Regardless, the trial court lacked limited personal jurisdiction over Toolson because Toolson lacked the sufficient minimum contacts with the state of Michigan necessary to ensure that the trial court's exercise of jurisdiction over Toolson comported with the requirements of due process. See *Oberlies*, *supra* at 427-428.

In *Mozdy v Lopez*, 197 Mich App 356, 359; 494 NW2d 866 (1992), this Court set forth a three-part test to determine whether a defendant has sufficient minimum contacts with Michigan to permit a Michigan court to exercise limited personal jurisdiction over that party:

First, the defendant must have purposefully availed itself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws. Second, the cause of action must arise from the defendant's activities in the state. Third, the defendant's activities must be so substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable.

⁵ MCL 600.715 states,

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.

Purposeful availment requires the defendant to “deliberately engage in significant activities within a state, or create “continuing obligations” between himself and residents of the forum’ to the extent that ‘it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.’” *Vargas v Hong Jin Crown Corp*, 247 Mich App 278, 285; 636 NW2d 291 (2001), quoting *Burger King Corp v Rudzewicz*, 471 US 462, 476; 105 S Ct 2174; 85 L Ed 2d 528 (1985). “The constitutional touchstone is whether the defendant purposefully established minimum contacts in the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Witbeck v Bill Cody’s Ranch Inn*, 428 Mich 659, 667-668; 411 NW2d 439 (1987) (internal citations and quotations omitted).

Karas has failed to establish that Toolson has “purposefully availed itself of the privilege of conducting activities in Michigan” and, therefore, has failed to establish that Toolson has sufficient minimum contacts with the state to justify an exercise of jurisdiction by the trial court. Although Karas claims that the trial court had jurisdiction over Toolson because Toolson (1) contracted with Karas to receive services in Michigan, (2) negotiated the terms of the contact over the phone with Karas representatives located in Michigan, (3) attended a seminar in Detroit pursuant to the terms of the contract, and (4) agreed to travel to Michigan for “additional seminars” pursuant to the terms of the contract, these activities did not constitute deliberate engagement in significant activities in Michigan or create a sufficient continuing obligation between Toolson and Michigan residents to establish jurisdiction. Although Toolson contracted with Karas to receive a package of services that included attendance at two seminars in Michigan, Karas agreed to provide the majority of the services that it offered, including at least half the required training, materials, and technical support, at Toolson’s California office. Further, Toolson apparently negotiated the contract from its California office, and Dr. Toolson only attended one seminar in Detroit before initiating the arbitration. And as noted earlier, Karas provides no indication that Toolson did any other business in Michigan or with a Michigan-based corporation. Therefore, Karas has failed to establish that Toolson “purposefully availed itself of the privilege of conducting activities in Michigan” and, therefore, the trial court did not err when it determined that it could not exert limited personal jurisdiction over Toolson.⁶

Next, Karas argues that the trial court erroneously dismissed AAA from the litigation when AAA refused to participate in it. Karas maintains that because AAA failed to file a responsive pleading, the trial court should have deemed Karas’s claims against AAA “admitted” and should have granted Karas’s request to order AAA to cease arbitration. However, we need not address this issue because, instead, we conclude that the trial court did not have subject-matter jurisdiction over the issues raised by Karas against AAA.

⁶ In addition, the trial court correctly noted that under the terms of the dispute resolution agreement between Karas and Toolson, each party waived any objection “to jurisdiction over the person being asserted in a court in Solano County, California.” The trial court noted that “[t]his provision does not provide that California has exclusive jurisdiction over this matter; rather it provides that the parties will not object to jurisdiction in California.” However, one could reasonably interpret this provision to mean that the parties agreed that if a lawsuit arose from a breach of this agreement, it would be filed in Solano County, California.

Although the parties did not raise this issue below, “jurisdictional defects may be raised at any time, even if raised for the first time on appeal.”⁷ *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 97; 693 NW2d 170 (2005). Whether a court has subject-matter jurisdiction is a question of law that we consider de novo. *Id.* at 98.

Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending. The question of jurisdiction does not depend on the truth or falsity of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry. Jurisdiction always depends on the allegations and never upon the facts. [*Ryan v Ryan*, 260 Mich App 315, 331; 677 NW2d 899 (2004), quoting *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992).]

In this case, AAA gave Karas and Toolson an opportunity to mutually select an arbitrator according to the terms of their contract and, when they did not do so, it selected an arbitrator to oversee their case. Although Karas and Toolson contractually agreed to “mutually agree upon and designate an arbitrator,” they also agreed to have the dispute arbitrated pursuant to AAA rules. In particular, they agreed that AAA rules would apply “except as otherwise provided.” Further, in the agreement, they did not provide for a procedure under which they would mutually agree upon and designate an arbitrator, nor did they identify a method under which an arbitrator would be chosen if the parties declined to mutually agree upon an arbitrator in some fashion. But because the parties agreed to abide by AAA rules, they bound themselves to follow AAA procedures both in the execution of their agreement to mutually select an arbitrator and, in the event that the parties declined to actively engage in the process of selecting an arbitrator as permitted by the contract, to have an arbitrator selected for them.

Therefore, by claiming that AAA improperly assigned an arbitrator to the arbitration matter, Karas essentially challenges a procedural matter arising from the arbitration. However, “procedural matters arising out of the dispute are for the arbitrator and not the courts to determine.”⁸ *Bay Co Bldg Auth v Spence Bros*, 140 Mich App 182, 188; 362 NW2d 739 (1984). Simply put, the trial court lacks subject-matter jurisdiction over procedural determinations by AAA made with respect to the arbitration matter between Karas and Toolson. Therefore, the

⁷ Whether a court has subject-matter jurisdiction is a question of law that we consider de novo. *Polkton Charter Twp*, *supra* at 98.

⁸ The arbitrator, not the trial court, should resolve procedural matters because arbitrators are more expert with regard to the meaning of their rules of arbitration and are better able to interpret and apply them. *Gregory J Schwartz & Co, Inc v Fagan*, 255 Mich App 229, 232; 660 NW2d 103 (2003), citing *Howsam v Dean Witter Reynolds, Inc*, 537 US 79; 123 S Ct 588; 154 L Ed 2d 491 (2002). Further, parties to an arbitration contract normally expect a forum-based decision maker to decide forum-specific procedural issues that might arise. *Id.* at 233.

trial court's decision to deny Karas's motion to cease arbitration and to dismiss AAA as a party in this case does not require reversal.⁹

Finally, Karas claims that the trial court should have granted its motion ordering AAA to cease arbitration because the trial court has personal jurisdiction over AAA and therefore cannot "avail itself of the protections allegedly afforded to Appellee Toolson by way of the forum selection clause" of the contract between Toolson and Karas. However, because the trial court lacked subject-matter jurisdiction over AAA, plaintiff's claim of error on this ground is moot and we need not address it further.

Affirmed.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra

⁹ In addition, we note that AAA is also entitled to arbitral immunity granted by law.

Since the function of arbitrators is analogous to that of a court and their duties require the exercise of judgment, like public judicial officers, arbitrators and umpires enjoy immunity from private actions for damages against them for judicial acts done in arriving at their award. They are not liable for negligence, fraud, or misconduct, even where it is sufficient to invalidate the award. [*Boraks v American Arbitration Ass'n*, 205 Mich App 149, 151; 517 NW2d 771 (1994), quoting 5 Am Jur 2d, Arbitration and Award, § 107, p 600.]

"Arbitral immunity also extends to boards, associations, commissions, and other quasi-judicial bodies that sponsor arbitrations and make arbitration facilities available." *Id.* Accordingly, the trial court correctly noted that arbitral immunity would protect AAA from civil suit in this matter.