COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1779 **Cir. Ct. No. 2003CV41**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

MCCLEAN ANDERSON, A DIVISION OF INDUSTRIAL SERVICE & MACHINE, INC.,

PLAINTIFF-APPELLANT,

V.

JOSEPH JANSEN AND GRAVES SPRAY SUPPLY, INC., D/B/A MAGNUM VENUS PRODUCTS AND/OR MAGNUM INDUSTRIES,

DEFENDANTS,

ADC ACQUISITION COMPANY, D/B/A AUTOMATED DYNAMICS,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Reversed and cause remanded for further proceedings.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. McClean Anderson appeals a judgment dismissing its complaint against ADC Acquisition Company for lack of personal jurisdiction. McClean argues ADC failed to establish a compelling case that exercising jurisdiction would violate due process. We agree and reverse and remand for further proceedings.

BACKGROUND

¶2 McClean Anderson is a Wisconsin corporation with its principal place of business in Schofield, Wisconsin. ADC is a foreign corporation with its principal place of business in Schenectady, New York. Magnum Venus Products is a competitor of McClean and a foreign corporation with its principal place of business in Clearwater, Florida. Joseph Jansen is a resident of Wisconsin and a former employee of McClean and at all times relevant to this appeal an employee of Magnum.

¶3 McClean and ADC operate in related industries. In the past, they have integrated their components into one product. They then jointly marketed that product to consumers. Over a ten-year period, ADC had a total of fifty-six contacts with McClean. These contacts took various forms, including sales, quote requests, re-quotes, faxes, emails, letters and phone calls. ADC has also made four visits to Wisconsin within that ten-year period to facilitate the integration of both companies' products. ADC has also purchased equipment designed and manufactured by Magnum.

¶4 On April 30, 2001, ADC and McClean entered into a Proprietary Mutual Exchange Agreement. The agreement provided for the exchange of

"commercial, technical and financial information that is regarded as valuable and confidential to both parties." The information was to be kept "in strict confidence and not disclosed to others …." The agreement also provided that it would be governed by New York law.

¶5 McClean brought suit against Jansen, Magnum, and ADC, alleging various claims. McClean alleges ADC violated the agreement and Wisconsin law by sending electronic CAD file drawings of McClean's multi-access winder and Gantry machines to Magnum at Jansen's request. McClean settled its claims against Jansen and Magnum. Therefore, its only remaining claims are against ADC for breach of the agreement, breach of an implied contract of confidentiality, violations of Wisconsin trade secret laws, and intentional misrepresentation.

¶6 ADC moved to have McClean's complaint dismissed due to lack of personal jurisdiction. The circuit court determined ADC had sufficient minimum contacts with Wisconsin to satisfy Wisconsin's long arm statute and the "purposeful availment" requirement of the due process clause.[1] However, the circuit court dismissed McClean's complaint against ADC because it concluded exercising personal jurisdiction over ADC would violate the "fair play and substantial justice" requirement of the due process clause.

DISCUSSION

¶7 Personal jurisdiction is a question of law that we review de novo. ***Capitol Fixture & Woodworking Group v. Woodma Distrib.***, 147 Wis. 2d 157, 160, 432 N.W.2d 647 (Ct. App. 1988). As a result, we need not defer to the trial

[1] ADC has not cross-appealed this determination.

court's decision. ***Id.*** Additionally, where a motion has been made to dismiss the pleadings, the plaintiff's factual assertions are presumed to be true. *See* ***Kopke v. A. Hartrodt S.R.L.***, 2001 WI 99, ¶8, 245 Wis. 2d 396, 629 N.W.2d 662; ***Fabry Glove & Mitten Co. v. Spitzer***, 908 F. Supp. 625, 628 (E.D. Wis. 1995).

¶8 McClean appeals the circuit court's determination that exercising personal jurisdiction would violate ADC's due process rights. Specifically, McClean argues ADC did not meet its burden of establishing a compelling case that exercising personal jurisdiction would make litigation so gravely difficult and inconvenient that ADC would be at a severe disadvantage compared to McClean. *See* ***Burger King Corp. v. Rudzewicz***, 471 U.S. 462, 477-78 (1985). We agree and reverse and remand for further proceedings.

¶9 Where the requirements of the applicable long-arm statute have been met, there is a presumption that due process is satisfied. ***Kopke***, 245 Wis. 2d 396, ¶22. However, the due process analysis presents two further inquires. ***Kopke***, 245 Wis. 2d 396, ¶23. The first inquiry is whether the defendant "purposefully established 'minimum contacts' in the forum state." ***Burger King***, 471 U.S. at 474. On this question, the plaintiff carries the burden. ***Id.*** If this inquiry is answered affirmatively, the second inquiry is whether, based on other considerations, there is a compelling case that defending the litigation in the forum state is so gravely difficult and inconvenient that the defendant would be at a severe disadvantage in comparison to the plaintiff. ***Id.*** at 476, 478. On this question, the defendant carries the burden. ***Id.*** at 477.

¶10 Here, neither party disputes ADC purposefully established minimum contacts with Wisconsin. However, the parties do dispute whether ADC over

came the presumption in favor of jurisdiction by meeting its burden to demonstrate a compelling case against jurisdiction. ***Id.*** at 476.

¶11 Both the United States Supreme Court and the Wisconsin Supreme Court have held there are five factors courts should analyze when determining whether the defendant has made a compelling case to defeat personal jurisdiction. Our court has stated those factors as follows:

> (1) the forum state's interest in adjudicating the dispute; (2) the plaintiff's interest in obtaining convenient and effective relief; (3) the burden on the defendant; (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 substantive social policies.

Kopke, 245 Wis. 2d 396, ¶39; *see also* ***Burger King***, 471 U.S. at 476-77; and ***Asahi Metal Ind. v. Superior Ct. of Cal.***, 480 U.S. 102, 113 (1987).[2]

¶12 In ***Burger King***, the Supreme Court upheld jurisdiction in Florida over a Michigan resident. In addressing the fair play and substantial justice inquiry, the Court noted Florida and the plaintiff had an interest in holding the defendant accountable for his alleged breach of a franchise agreement. ***Id***. at 482-

[2] ADC argues the factors articulated in ***Zerbel v. H.L. Federman & Co.***, 48 Wis. 2d 54, 179 N.W.2d 872 (1970), are applicable to the second inquiry of personal jurisdiction. In ***Kopke v. A. Hartrodt S.R.L.***, 2001 WI 99, ¶23 n.9, 245 Wis. 2d 396, 629 N.W.2d 662, the supreme court did state ***Zerbel***'s factors were encompassed by subsequent personal jurisdiction jurisprudence. However, ADC ignores the court's express statement in the very next sentence, with which the dissent also agreed, that ***Zerbel***'s framework was set aside in favor of current United States Supreme Court precedent. ***Kopke***, 245 Wis. 2d 396, ¶49 n.1 (Crooks, J., dissenting). ADC does not cite any case decided after ***Kopke*** to support ***Zerbel***'s application here. In fact, one of our most recent cases involving personal jurisdiction applied ***Kopke***'s framework and did not cite ***Zerbel***. *See* ***Druschel v. Cloeren***, 2006 WI App 190, 295 Wis. 2d 858, 723 N.W.2d 430. We reiterate the proper framework upon which to analyze whether the requirements of personal jurisdiction have been met is explicitly outlined in ***Kopke***. Therefore, we constrain our analysis to those arguments relating to ***Kopke***'s factors.

83. The Court also noted that the record contained no evidence supporting the assertion that conducting the trial in Florida "severely impaired [the defendant's] ability to call Michigan witnesses who might be essential to his defense and counterclaim." ***Id.*** at 483-84. The Court concluded the defendant did not point "to … factors that can be said persuasively to outweigh the considerations" in favor of exercising jurisdiction. ***Id.*** at 482.

¶13 In ***Asahi***, the Supreme Court held the defendant met its burden of establishing a compelling case that jurisdiction was unreasonable. ***Asahi***, 480 U.S. at 114. The Court noted the burden on the Japanese company was severe because it not only had to travel from Japan to California, but also had to submit its dispute with a Taiwanese company to American jurisdiction. ***Id.*** at 114-15. The Court concluded the interests in favor of jurisdiction were slight because the plaintiff had settled his claims against the companies, the plaintiff was not a California citizen, and the only issue remaining was indemnification between two alien companies. ***Id.*** Turning to the interests of the several states and the advancement of substantive policies, the Court concluded given, the international context of the case, that it would be inappropriate for a state court to exercise personal jurisdiction in that dispute. ***Id.*** Thus, the Court held, "[c]onsidering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair." ***Id.*** at 116.

¶14 In ***Kopke***, the Wisconsin Supreme Court held exercising personal jurisdiction over an Italian company did not violate due process. In addressing the second inquiry of due process analysis, the court considered the first three factors articulated by the United States Supreme Court in ***Asahi***. ***Kopke***, 245 Wis. 2d

396, ¶39. Regarding the first factor, the court concluded Wisconsin "has an unquestionable interest in providing its citizenry with a forum to adjudicate claims arising here." ***Id.***, ¶40. Regarding the second factor, the court concluded an injured plaintiff has an undeniable interest in obtaining convenient and effective relief. ***Id.***, ¶41. Regarding the third factor, the court distinguished the ***Asahi*** decision to conclude the interests of the forum and plaintiff outweighed the burden on an alien company defending in Wisconsin. *See* ***id.***, ¶¶42-48. Based on these factors, the court concluded the defendant had not met its burden of establishing a compelling case that made jurisdiction unreasonable. ***Id.***, ¶48.

¶15 Here, despite ADC's conclusory assertions to the contrary, Wisconsin has a significant interest in this litigation. Wisconsin has an unquestionable interest in providing its citizenry with a forum to adjudicate claims. *See* ***id.***, ¶40. The communication of McClean's CAD drawings to a competitor could have a severe impact on a Wisconsin company that employs twenty-five to thirty Wisconsin residents. ADC knew or should have known that providing McClean's trade secrets to a competitor would have a potentially devastating effect upon this Wisconsin company. Additionally, some of McClean's claims potentially involve Wisconsin law. Wisconsin therefore has a significant interest in the outcome of this litigation because it directly bears upon the future of a Wisconsin company, the Wisconsin residents it employs, and perhaps the development of Wisconsin law.

¶16 We also conclude McClean has an undeniable interest in obtaining convenient and effective relief for its claims of breach of the agreement, breach of an implied contract, intentional misrepresentation, and violations of Wisconsin trade secret law. *See* ***id.***, ¶41. ADC concedes McClean has an interest in convenient and effective relief, which weighs in favor of exercising jurisdiction in

Wisconsin. However, ADC asserts the remaining factors establish exercising jurisdiction would be unreasonable. We disagree.

¶17 ADC apparently argues the burden of defending itself in Wisconsin outweighs McClean's interest in litigating the dispute here because ADC would have to produce many witnesses from New York. Conversely, McClean argues most of the necessary witnesses are located in Wisconsin. There is no dispute ADC has sufficient minimum contacts and we have concluded Wisconsin and McClean have significant interests in litigating this dispute in Wisconsin. The Supreme Court has stated, "[w]hen minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." ***Asahi***, 480 U.S. at 114. Based on the record and arguments, ADC has not demonstrated a compelling case that the burden of producing witnesses from New York is so grave as to violate due process. *See* ***Burger King***, 471 U.S. at 483-84.

¶18 Regarding interstate judicial interests, ADC makes four arguments based on a Tenth Circuit Court of Appeals case. *See* ***OMI Holdings, Inc. v. Royal Ins. Co.***, 149 F.3d 1086 (10th Cir. 1998). While these considerations have some merit, in aggregate, these considerations are at best neutral as to whether Wisconsin or New York would be the more efficient forum.

¶19 First, ADC argues most of the witnesses are located in New York because that is where the agreement was signed. McClean disputes this assertion. As we noted above, we cannot conclude this factor weighs in support of denying jurisdiction.

¶20 Second, ADC argues the wrong underlying the lawsuit occurred in New York because that is where the email originated. McClean argues the wrong

underlying the lawsuit occurred in Wisconsin because that is where the request to send the drawings came from and where the harm occurred. Even assuming the underlying wrongful conduct occurred in New York, we cannot conclude this factor outweighs the other factors in favor of exercising jurisdiction because the alleged harm was suffered in Wisconsin.

¶21 Third, ADC argues New York's laws govern this case because of the choice of law clause in the agreement and therefore the forum should be New York. McClean responds that there is no choice of forum clause and New York law does not govern all of its claims. Even assuming New York law governed all of the claims, ADC has not demonstrated how New York's "acknowledged interest might possibly render jurisdiction in [Wisconsin] unconstitutional." ***Burger King***, 471 U.S. at 483. For example, ADC has not shown, or even alleged, that McClean has not complied fully with New York law. *See* ***id.*** at 483 n.26. Given that McClean has other claims which are arguably governed by Wisconsin law and that ADC has not argued New York law has been violated, we cannot conclude this factor supports the conclusion that exercising personal jurisdiction in Wisconsin would be unreasonable.

¶22 Fourth, ADC argues jurisdiction in Wisconsin is not necessary to prevent piecemeal litigation because McClean settled its other claims. While McClean did settle its other lawsuits, denying jurisdiction in Wisconsin still presents the potential for piecemeal litigation because McClean arguably has other claims based in Wisconsin law (e.g., Wisconsin trade secret law violations). The agreement does not contain a choice of forum clause. It is possible that McClean could sue ADC in New York and then sue ADC in Wisconsin. Therefore, litigating in New York actually increases the potential for piecemeal litigation.

¶23 Neither ADC nor McClean present a developed argument as to the fundamental social policies that would be served by Wisconsin exercising jurisdiction. Therefore, we will not address that factor. *See* ***Druschel v. Cloeren***, 2006 WI App 190, ¶25 n.4, 295 Wis. 2d 858, 723 N.W.2d 430.

¶24 Wisconsin and McClean have significant interests in this case. The remaining factors are neutral to ADC and McClean, as they may be effectively argued either for or against the exercise of personal jurisdiction. We therefore conclude the exercise of jurisdiction over ADC comports with notions of fair play and substantial justice because ADC has not met its burden of a compelling case to deny jurisdiction.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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