

rel: 10/14/2011

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2011-2012

1100764

Ex parte McNeese Title, LLC, et al.

PETITION FOR WRIT OF MANDAMUS

(In re: James E. Atchison

v.

IPC Industries, Inc., et al.)

(Mobile Circuit Court, CV-10-900356)

WOODALL, Justice.

McNeese Title, LLC, a Florida limited liability company owned and operated by Richard McNeese, and Richard McNeese

1100764

(hereinafter referred to collectively as "McNeese"), and Peggy S. Owens petition this Court for a writ of mandamus, directing the Mobile Circuit Court to vacate its order denying the motions of McNeese and Owens to dismiss the action filed against them by Mobile County resident James E. Atchison and to enter an order dismissing the action for lack of in personam jurisdiction. We grant the petition and issue the writ.

I. Factual and Procedural Background

This dispute arose out of Atchison's purchase of two residential lots in the Villa Lago subdivision ("the subdivision"), which was originally a 14-acre tract of land in the Golf and Beach Resort of Sandestin, Florida. On September 29, 2005, Atchison signed two documents entitled "Sandestin Villa Lago Subdivision Home Purchase and Sale Agreement" ("the agreements") for the purchase of two lots, namely, lots 61 and 81. Each of the agreements required Atchison to pay to McNeese Title a "non-refundable deposit" of \$15,000. The seller was identified as C-D Jones & Company, Inc. ("C-D Jones"), of Destin, Florida. The agreements stated, in pertinent part:

"3. Payment of Purchase Price. The purchase price specified above shall be paid as follows:

"(a) Deposit. Upon complete execution of this Agreement, [Atchison] shall deposit with Seller's escrow agent, McNeese Title, LLC, whose address is ... Destin, Florida ... (the 'Agent'), that Deposit described above to be held until closing in a federally insured non-interest bearing account until closing.

"(b) Remainder. The remaining Purchase Price for the Lot along with [Atchison's] closing costs shall be paid by cashier's check or wire transfer of funds to Seller at the Closing described here.

"4. Closing. The closing of the Lot (the 'Closing') shall be held at the office of [McNeese Title], on such a date as the parties may hereafter agree, but in no event later than the Closing Date described above (unless extended pursuant to Paragraph 26 hereof), time being of the essence of this Agreement. ...

".

"26. Contingencies to Close. This contract and the obligations of the parties herein are specifically contingent upon the following:

".

"(b) The successful closing of all Lots within the subdivision on or before the Closing Date. In the event the closings of all Lots do not occur on or before the Closing Date, the Closing Date may be extended, at the option of Seller, for a period not to exceed sixty (60) days."

1100764

(Emphasis added.)

According to Atchison, these agreements were sent to him by the "developers," who, he says, "developed, marketed and sold the lots" in the subdivision. Atchison's brief, at 4. He identifies those developers as C-D Jones and 331 Partners, LLC.¹ In that connection, Atchison also signed a "compliance agreement limited power of attorney," designating Richard McNeese or Owens as Atchison's "attorney in fact for [his] use and benefit, ... for the purpose of ... signing or initialing on [his] behalf, any and all documents affecting the closing or refinance of the [lots]." The closing was held on November 3, 2005, at which time Atchison allegedly paid McNeese "no less than \$683,589." At that time, however, many of the other lots in the subdivision had not closed, contrary to ¶ 26(b) of the agreements.

Eventually, Atchison sued a number of individuals and entities, including C-D Jones, 331 Partners, McNeese, and Owens, alleging that he had suffered damage as a result of activities conducted by C-D Jones and 331 Partners after the

¹331 Partners, LLC, is a Florida limited liability company, having its primary place of business in Mobile.

1100764

closing. Essentially, the counts against McNeese and Owens² averred that McNeese knowingly misrepresented to Atchison just prior to closing that all the lots in the subdivision had sold and would close by the closing date for his lots as required by ¶ 26(b) of the agreements; that McNeese nevertheless accepted Atchison's payments on the date of closing and paid the amount over to the developers without ensuring compliance with ¶ 26(b) of the agreements, thus resulting in damage to Atchison because of the post-closing activities of C-D Jones and 331 Partners.

McNeese and Owens moved to dismiss the action for lack of personal jurisdiction. See Rule 12(b)(2), Ala. R. Civ. P. Their motions were accompanied by affidavits addressing the limited extent of their contacts with Alabama. The trial court denied the motions to dismiss; this mandamus petition followed.

II. Discussion

"[A] petition for a writ of mandamus is the proper device by which to challenge the denial of a motion to dismiss for lack of in personam jurisdiction." Ex parte Dill, Dill, Carr,

²According to Atchison, Owens is an officer or employee of McNeese Title.

1100764

Stonbraker & Hutchings, P.C., 866 So. 2d 519, 525 (Ala. 2003). "A petitioner may be entitled to a writ of mandamus in such a case upon a showing of a clear legal right to an order dismissing the action against it." Ex parte First Western Bank, 898 So. 2d 701, 704 (Ala. 2004). "'The burden of establishing a clear legal right to the relief sought rests with the petitioner.'" Ex parte Dangerfield, 49 So. 3d 675, 680 (Ala. 2010) (quoting Ex parte Metropolitan Prop. & Cas. Ins. Co., 974 So. 2d 967, 972 (Ala. 2007)).

Jurisdiction over out-of-state defendants is acquired pursuant to Rule 4.2(b), Ala. R. Civ. P., which provides, in pertinent part:

"An appropriate basis exists for service of process outside of this state upon a person or entity in any action in this state when the person or entity has such contacts with this state that the prosecution of the action against the person or entity in this state is not inconsistent with the constitution of this state or the Constitution of the United States"

In other words, "[t]his rule extends the personal jurisdiction of Alabama courts to the limit of due process under the United States and Alabama Constitutions." Hiller Invs., Inc. v. Insultech Group, Inc., 957 So. 2d 1111, 1115 (Ala. 2006).

1100764

Under this rule, the exercise of jurisdiction is appropriate so long as the out-of-state defendant has "'some minimum contacts with this state [so that] ... it is fair and reasonable to require the person to come to this state to defend an action.'" Dillon Equities v. Palmer & Cay, Inc., 501 So. 2d 459, 461 (Ala. 1986) (quoting former Rule 4.2(a)(2)(I), Ala. R. Civ. P.).

According to McNeese and Owens, Atchison has failed to show that jurisdiction over them is proper in this case. Specifically, they argue:

"[I]n this case, [Atchison's] Complaint and Amended Complaint are completely devoid of any factual allegations that would establish personal jurisdiction over the [Petitioners]. Instead, the Complaint and Amended Complaint contain only generic allegations that the Petitioners are subject to personal jurisdiction in Alabama, with no supporting factual allegations. Indeed, the Complaint and Amended Complaint contain no factual allegations whatsoever as to any contacts between the Petitioners and the State of Alabama. Based on this fact alone, Petitioners believe [Atchison's] claims against them are due to be dismissed for want of personal jurisdiction, regardless of any other evidentiary submissions."

Petition, at 9. We agree.

"This Court has explained the appropriate analysis and the parties' respective burdens on a personal-jurisdiction issue as follows. 'The plaintiff has the burden of proving that the trial

court has personal jurisdiction over the defendant. Ex parte Covington Pike Dodge, Inc., 904 So. 2d 226 (Ala. 2004).' J.C. Duke & Assocs. Gen. Contractors, Inc. v. West, 991 So. 2d 194, 196 (Ala. 2008).

"'"In considering a Rule 12(b)(2), Ala. R. Civ. P., motion to dismiss for want of personal jurisdiction, a court must consider as true the allegations of the plaintiff's complaint not controverted by the defendant's affidavits, Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253 (11th Cir. 1996), and Cable/Home Communication Corp. v. Network Productions, Inc., 902 F.2d 829 (11th Cir. 1990), and "where the plaintiff's complaint and the defendant's affidavits conflict, the ... court must construe all reasonable inferences in favor of the plaintiff." Robinson, 74 F.3d at 255 (quoting Madara v. Hall, 916 F.2d 1510, 1514 (11th Cir. 1990)).'"

"'Wenger Tree Serv. v. Royal Truck & Equip., Inc., 853 So. 2d 888, 894 (Ala. 2002) (quoting Ex parte McInnis, 820 So. 2d 795, 798 (Ala. 2001)). However, if the defendant makes a prima facie evidentiary showing that the Court has no personal jurisdiction, "the plaintiff is then required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and he may not merely reiterate the factual allegations in the complaint." Mercantile Capital, LP v. Federal Transtel, Inc., 193 F. Supp. 2d 1243, 1247 (N.D. Ala. 2002) (citing Future Tech. Today, Inc. v. OSF Healthcare Sys.,

1100764

218 F.3d 1247, 1249 (11th Cir. 2000)). See also Hansen v. Neumueller GmbH, 163 F.R.D. 471, 474-75 (D. Del. 1995) ("When a defendant files a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2), and supports that motion with affidavits, plaintiff is required to controvert those affidavits with his own affidavits or other competent evidence in order to survive the motion.") (citing Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 63 (3d Cir. 1984)).'

"Ex parte Covington Pike Dodge, Inc., 904 So. 2d 226, 229-30 (Ala. 2004) (emphasis added; footnote omitted)."

Ex parte Excelsior Fin., Inc., 42 So. 3d 96, 103 (Ala. 2010).

However, when the complaint fails to allege any jurisdictional basis, "there is nothing in the complaint ... that the court must consider as true and that therefore places [any] burden on [the defendant] to controvert by affidavit." Excelsior, 42 So. 3d at 104 (defendant need not present evidence of absence of jurisdiction when the complaint contains no jurisdictional averments).

Atchison does not direct us to any paragraphs of the complaint, as amended, that he contends specifically allege jurisdiction. However, according to Atchison, his complaint alleged that "the McNeese defendants were agents, representatives and co-conspirators of the developers and

1100764

marketers associated with the development and sale of [the subdivision]." Atchison's brief, at 11 (citing ¶¶ 39, 40, 42, 57-60, and 61-82 of his complaint).

Although it is true that personal jurisdiction may, in some cases, be obtained by "imputing conduct to an alleged coconspirator who has personally performed no overt act in Alabama," Ex parte Reindel, 963 So. 2d 614, 624 (Ala. 2007), "it is well established in Alabama that a plaintiff cannot establish personal jurisdiction under a conspiracy theory unless the plaintiff 'plead[s] with particularity the conspiracy as well as the overt acts within the forum taken in furtherance of the conspiracy.'" Matthews v. Brookstone Stores, Inc., 469 F. Supp. 2d 1056, 1066 (S.D. Ala. 2007) (quoting Ex parte McInnis, 820 So. 2d 795, 806-07 (Ala. 2001)). See also Ex parte Troncalli Chrysler Plymouth Dodge, Inc., 876 So. 2d 459 (Ala. 2003) (plaintiff is not entitled to discovery on jurisdictional issue where the complaint does not "at least allege facts that would support a colorable claim of jurisdiction.'" (quoting Schenck v. Walt Disney Co., 742 F. Supp. 838, 840 n.1 (S.D.N.Y. 1990))).

1100764

In that connection, Atchison's first amended complaint avers, in pertinent part:

"39. On November 3, 2005, after McNeese Title, McNeese and Owens, actually and/or constructively received Atchison's money, to-wit no less than \$683,589, C-D Jones and 331 Partners engaged in a collusive transaction whereby 331 Partners purported to sell lots in Villa Lago Subdivision, including Lots 61 and 81, to C-D Jones in exchange for the money previously transferred by Atchison and the other buyers of Villa Lago lots, (hereinafter referred to as the '331/C-D Jones Land Transfer').

"40. At the time of the 331/C-D Jones Land Transfer, 331 Partners and C-D Jones were partners, joint venturers and co-conspirators in a fraudulent scheme to sell the lots to Atchison and other similarly situated buyers under circumstances constituting a fraudulent transfer under the Uniform Fraudulent Transfers Act.

". . . .

"42. The transfer made through the 331/C-D Jones Land Transfer was done with knowledge and/or participation by Defendants . . . McNeese Title, McNeese and Owens, and with the actual intent to hinder, delay or defraud Atchison, who was then or subsequently became a Creditor of Debtors 331 Partners, C-D Jones and/or McNeese Title.

". . . .

"57. The transfer of assets from C-D Jones to Defendant McNeese Title was done with knowledge and/or participation by Defendant McNeese Title and with actual intent to hinder, delay or defraud Atchison, who was then or subsequently became a Creditor of C-D Jones.

1100764

"58. After McNeese Title received the assets of C-D Jones and/or Atchison, McNeese and/or Owens received all or part of said assets without payment of reasonably equivalent value through dividends and/or distributions from McNeese Title.

"59. In the case of each distribution by McNeese Title to Defendant McNeese and/or Owens the dividend(s) or distribution(s) were done under circumstances constituting a fraudulent transfer under the Uniform Fraudulent Transfers Act.

"60. At the time of each distribution by McNeese Title to McNeese and/or Owens, said Defendant(s) was an Insider of McNeese Title and the dividend(s) or distribution(s) which was received by said Defendant(s) was made and accepted under circumstances constituting a fraudulent transfer under the Uniform Fraudulent Transfers Act."

(Emphasis added.)

These paragraphs contain no jurisdictional averments. To be sure, ¶ 40 does use the terms "partners," "joint venturers," and "co-conspirators." However, the allegations in these paragraphs are directed solely to the merits of the claims against C-D Jones and 331 Partners, that is, they do not purport to identify a basis for jurisdiction. In other words, they allege no "'overt acts within the forum taken in furtherance of the conspiracy.'" Matthews v. Brookstone Stores, Inc., 469 F. Supp. 2d at 1066 (quoting Ex parte McInnis, 820 So. 2d at 806-07 (emphasis added)).

1100764

Moreover, ¶ 40 fails even to mention McNeese. Indeed, Atchison states in his brief in support of the petition: "Because this Petition involves only the challenge to jurisdiction filed by McNeese Title, LLC, Richard McNeese and Peggy Owens, ... discussion will be limited to their involvement in the sale of the lots with references to other parties only as needed." Atchison's brief, at 2 n.1. However, without integrating the specific activities of McNeese and Owens with those of the entities of which they are alleged to be agents or coconspirators, it is difficult -- if not impossible -- to impute the conduct of such others to McNeese and Owens. Thus, the complaint contains no specific averments of conspiracy or agency.

Similarly, although it mentions McNeese in passing, ¶ 39 is devoted to allegations concerning C-D Jones and 331 Partners. The allegations are directed entirely to the merits of the claims against those defendants and do not purport to reveal how the selling of the lots in the subdivision, which is located in Florida, might form a basis for jurisdiction in Alabama over any defendant.

1100764

Paragraphs 42 and 57 aver in virtually identical terms that Richard McNeese or McNeese Title knew about, and participated in, the alleged sales of lots/transfer of assets in order to "defraud Atchison." They do not allege that such sales or transfer -- or any other relevant activity -- occurred in Alabama. The averments in ¶¶ 58-60 are similarly restricted to the merits of the case, that is, they merely allege that distributions were made from McNeese Title to Richard McNeese and/or Owens "under circumstances constituting a fraudulent transfer under the Uniform Fraudulent Transfers Act." Thus, they are irrelevant for jurisdictional purposes.

Paragraphs 61-82 of the complaint, which are not quoted above, are as jurisdictionally insignificant as the paragraphs just discussed. Paragraphs 69-71 aver that Richard McNeese made certain misrepresentations to Atchison but fail to disclose the mode or location of those conversations. Likewise, ¶¶ 72-73 aver that Atchison executed a power of attorney in favor of McNeese but allege no specifics regarding the location or manner of that transaction. In essence, ¶¶ 61-82 merely purport to describe the manner in which McNeese allegedly breached "contractual obligations" to Atchison.

1100764

Conspicuously absent are references to the situs of any relevant conduct of McNeese or to the identity of the party initiating the transactions. Such factors would be material for jurisdictional purposes, as this Court has noted. See, e.g., Hiller Invs., Inc. v. Insultech Group, Inc., 957 So. 2d at 1119 (the first-contact factor is "highly significant"); Ex parte Phase III Constr., Inc., 723 So. 2d 1263, 1265 (Ala. 1998) (jurisdiction was proper where the foreign defendant initiated the business contact with the Alabama resident); and Ex parte AmSouth Bank, N.A., 675 So. 2d 1305, 1308 (Ala. 1996) (discussing Steel Processors, Inc. v. Sue's Pump, Inc., Rentals, 622 So. 2d 910 (Ala. 1993), in which this Court found no personal jurisdiction "where (1) the contractual relationship was initiated by the Alabama plaintiff, (2) 'the repair project in Florida was developed by an Ohio business; [3] the repairs were made in Florida; and [4] no goods or services went out of Florida.'").

In short, Atchison's first amended complaint failed to allege any basis for the exercise of in personam jurisdiction over McNeese and Owens and, therefore, "place[d] [no] burden on [McNeese and Owens] to controvert [anything] by affidavit."

1100764

Ex parte Excelsior, 42 So. 3d at 104. Because the first amended complaint contains no factual averments to the effect that McNeese and Owens purposefully directed their activities at Alabama, we need not analyze the evidence they offered in support of their motions. Id. Consequently, McNeese and Owens have demonstrated a clear legal right to an order dismissing the action against them.

III. Conclusion

For the above-stated reasons, we grant the petition and direct the trial court to dismiss the claims against McNeese and Owens based on a lack of in personam jurisdiction.

PETITION GRANTED; WRIT ISSUED.

Malone, C.J., and Stuart, Bolin, Parker, Shaw, Main, and Wise, JJ., concur.

Murdock, J., concurs in the result.

1100764

MURDOCK, Justice (concurring in the result).

The main opinion begins its analysis by quoting the following argument made by McNeese Title, LLC, and Richard McNeese (hereinafter referred to collectively as "McNeese") and Peggy S. Owens:

"'[T]he Complaint and Amended Complaint contain no factual allegations whatsoever as to any contacts between the Petitioners and the State of Alabama. Based on this fact alone, Petitioners believe [James E. Atchison's] claims against them are due to be dismissed for want of personal jurisdiction, regardless of any other evidentiary submissions.'"

___ So. 3d at ___. The main opinion then states that it agrees with this argument. I do not.

The main opinion embraces the notion that a complaint that fails to allege grounds for personal jurisdiction must be dismissed based merely upon this fact. In so doing, I believe it recognizes a new basis for dismissal of a claim, one that does not fit within either Rule 12(b)(2) or Rule 12(b)(6), Ala. R. Civ. P.

Rule 12(b)(6) provides that a complaint should be dismissed if it "fail[s] to state a claim" cognizable under Alabama law. That is not what is at issue here. The question

1100764

of in personam jurisdiction is a question that, instead, is governed by Rule 12(b)(2).

Unlike Rule 12(b)(6), Rule 12(b)(2) does not entitle a defendant to dismissal upon a plaintiff's "failure to state" personal jurisdiction, but only if there is in fact a lack of personal jurisdiction. Accordingly, for a defendant to be entitled to a dismissal there must at least be some evidentiary showing sufficient to satisfy the court that, as a matter of fact, Alabama courts do not have personal jurisdiction over the defendant.

The purpose of this Court's holding in Ex parte Covington Pike Dodge, Inc., 904 So. 2d 226 (Ala. 2004), was to explain the circumstances under which the defendant will have been deemed to have made a sufficient evidentiary showing to carry the day. On neither its facts nor its express holding can Covington Pike Dodge be said to address whether a defendant is entitled to the dismissal of a complaint solely because the complaint contains no express allegations as to personal jurisdiction. We are made aware of no case holding as to a state court of general jurisdiction that a rule of procedure comparable to Alabama's Rule 12(b)(2) provides a basis for the

1100764

dismissal of a complaint based merely on the failure of the complaint to allege facts regarding personal jurisdiction.

Instead, Covington Pike Dodge addressed the issue of which would prevail as between mere allegations in a complaint, on the one hand, and sworn averments presented in opposition thereto by a defendant, on the other hand. Covington Pike Dodge and its progeny do not address the question of the appropriate outcome when a defendant has made no averments in support of a motion under Rule 12(b)(2) but, instead, merely alleges a lack of personal jurisdiction or, as here, seeks to rely merely on the fact that the complaint contains no allegations in favor of personal jurisdiction. Similarly, this Court's decision in Ex parte Excelsior Financial, Inc., 42 So. 3d 96, 103 (Ala. 2010), relied upon by the main opinion, states only that "[t]he plaintiff has the burden of proving that the trial court has personal jurisdiction over the defendant." (Quoting J.C. Duke & Assocs. Gen. Contractors, Inc. v. West, 991 So. 2d 194, 196 (Ala. 2008).) Nothing in Covington Pike Dodge or Excelsior states that "[t]he plaintiff has the burden of pleading that the trial court has personal jurisdiction over

1100764

the defendant." I believe today's opinion incorrectly reads such an additional requirement into Excelsior, Covington Pike Dodge, and Rule 12(b)(2).

Quoting Covington Pike Dodge, 904 So. 2d at 229 (quoting in turn Wenger Tree Service v. Royal Truck & Equip., Inc., 853 So. 2d 888, 894 (Ala. 2002)), the Court in Excelsior explained that, "[i]n considering a Rule 12(b)(2), Ala. R. Civ. P., motion to dismiss for want of personal jurisdiction, a court must consider as true the allegations of the plaintiff's complaint not controverted by the defendant's affidavits" and that, "'where the plaintiff's complaint and the defendant's affidavits conflict, the ... court must construe all reasonable inferences in favor of the plaintiff.'" Excelsior, 42 So. 3d at 103 (emphasis and internal quotation marks omitted). Although Excelsior and Wenger Tree Service correctly observe that "a court must consider as true the allegations of the plaintiff's complaint not controverted by the defendant's affidavits," nothing in either of those cases holds that there must be allegations in the plaintiff's complaint regarding the basis for personal jurisdiction over the defendants. The point of both cases -- indeed, all the

1100764

related cases cited in Excelsior -- is that when a complaint does contain allegations setting forth potential bases for the exercise of personal jurisdiction, a defendant can prevail on a Rule 12(b)(2) motion only if it controverts those allegations with evidence. Excelsior then goes on to explain that it is when sufficient allegations of grounds for personal jurisdiction are not "left standing" in the complaint after a comparison is made with the defendant's evidentiary submissions that the plaintiff must meet the evidentiary submissions of the defendant with evidence of its own in order to avoid a dismissal of the complaint. "'[I]f the defendant makes a prima facie evidentiary showing that the Court has no personal jurisdiction, "the plaintiff is then required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and he may not merely reiterate the factual allegations in the complaint.'" Excelsior, 42 So. 3d at 103 (quoting Covington Pike Dodge, 904 So. 2d at 229, quoting in turn Mercantile Capital, LP v. Federal Transtel, Inc., 193 F. Supp. 2d 1243, 1247 (N.D. Ala. 2002)) (emphasis omitted; emphasis added). Nothing in Excelsior (or for that matter Covington Pike Dodge or related

1100764

cases) states that when a defendant does not put on a prima facie evidentiary showing of lack of personal jurisdiction, the plaintiff nonetheless labors under a pleading requirement as to personal jurisdiction that, if not satisfied, necessitates the dismissal of the plaintiff's complaint upon the defendant's mere request.³

I note that later in the Excelsior opinion the Court states that it is "do[ing] something Excelsior has failed to do -- analyz[ing] the [plaintiffs'] complaint for specific allegations that relate to personal jurisdiction over Excelsior." 42 So. 3d at 103. The Court undertook this analysis in Excelsior, however, not because every complaint must contain allegations of personal jurisdiction, but because in Excelsior itself the defendant did make a prima facie evidentiary showing and, under the principles laid out in

³As the defendants, McNeese and Owens, themselves put it in their petition in this case, "once the defendant makes a prima facie showing that the Court lacks personal jurisdiction, the plaintiff must then substantiate any jurisdictional allegations with competent proof." Petition, at 8, citing Ex parte Citizens Prop. Ins. Corp., 15 So. 3d 511, 515 (Ala. 2009) (emphasis added). The petition goes on to say that, "because Petitioners have presented a prima facie evidentiary showing that they are not subject to personal jurisdiction in Alabama, the burden shifts back to the Plaintiff to establish personal jurisdiction by competent proof." Petition, at 10 (emphasis added).

1100764

Covington Pike Dodge, it became necessary for this Court to determine if there were allegations in the complaint "left standing" in the face of that evidentiary showing that would provide a sufficient basis for personal jurisdiction.

The main opinion contains the following statement:

"[W]hen the complaint fails to allege any jurisdictional basis, 'there is nothing in the complaint ... that the court must consider as true and that therefore places [any] burden on [the defendant] to controvert by affidavit.' Excelsior, 42 So. 3d at 104 (defendant need not present evidence of absence of jurisdiction when the complaint contains no jurisdictional averments)."

___ So. 3d at ___. I believe that when the entirety of the quoted sentence from Excelsior is considered in context, its meaning is not the meaning suggested by the main opinion. The full statement in Excelsior, without any omission, reads as follows: "Consequently, there is nothing in the complaint dealing with conspiracy that the court must consider as true and that therefore places the burden on Excelsior to controvert by affidavit." 42 So. 3d at 104 (emphasis added). In other words, the Court in Excelsior was not saying in some general sense that "there is nothing in the complaint" in the way of jurisdictional allegations and that, therefore, the defendant has no burden of putting on any evidence in order to

1100764

"join the issue" of the trial court's personal jurisdiction over it. Instead, the statement is one in which the Excelsior Court is specifically explaining that there are no allegations in the complaint "dealing with conspiracy" and that, therefore, it was not necessary for the success of the defendant's evidentiary showing that it specifically address that potential ground.

It also is important to note the narrow focus of the Court's statement. The statement is made in the context of the Court's having first determined that the defendant had joined the issue of in personam jurisdiction by submitting an affidavit sufficient to constitute a "prima facie evidentiary showing" that there were not sufficient contacts between the defendant and the State of Alabama to confer jurisdiction. Bearing in mind the principle, as stated earlier, that, even when a defendant has made an prima facie evidentiary showing, "a court must consider as true the allegations of plaintiff's complaint not controverted by the defendant's affidavits," 42 So. 3d at 103, the Excelsior Court simply was engaged in the process of determining whether there were, in that case, allegations in the complaint that would support in personam

1100764

jurisdiction and that were "not controverted by the defendant's affidavits." 42 So. 3d at 101. The Court first looked at the fact that the complaint contained allegations of fraudulent conduct in Alabama committed by Excelsior through an agency relationship with other defendants. The Court observed, however, that the affidavits submitted on behalf of Excelsior did in fact "expressly deny an agency relationship with the other defendants and therefore refute the allegations" of agency in the complaint. 42 So. 3d at 103-04. On that basis, the Court reasoned that "the petition for the writ of mandamus filed by Excelsior establishes a clear legal right to the dismissal of the complaint as to it to the extent that personal jurisdiction was alleged in the complaint to have been based upon an agency relationship." 42 So. 3d at 104 (emphasis added).

The Court then expressly considered whether, in light of the prima facie evidentiary showing otherwise contained in Excelsior's affidavits, there was any other sufficient basis for personal jurisdiction alleged in the complaint that was not defeated by evidentiary submissions of the defendant. The Court noted one other potential basis suggested by the

1100764

complaint in this regard, namely, the allegation in the complaint of a conspiracy. The Court, however, found that the allegation of conspiracy was "devoid of the requisite specificity." 42 So. 3d at 104. It was for this reason that the Court found it unnecessary to go further and specifically consider whether the evidentiary averments in Excelsior's affidavits would have been sufficient to counter the allegations of conspiracy:

"[T]he allegation of conspiracy in the complaint is devoid of the requisite specificity. ... Consequently, there is nothing in the complaint dealing with conspiracy that the court must consider as true and that therefore places the burden on Excelsior to controvert by affidavit."

42 So. 3d at 104 (emphasis added). To emphasize, the Court merely was explaining that there was nothing in the complaint "dealing with conspiracy" that Excelsior was obligated "to controvert by affidavit" in order to prevail on its motion, having already made a general prima facie evidentiary showing of lack of jurisdiction over it.

In the next paragraph of its opinion, the Excelsior Court simply restates and summarizes what it has theretofore explained in more detail:

"Excelsior argues extensively that the evidence presented by the parties does not show any action by Excelsior purposefully directed toward Alabama and that its contacts with Alabama resulted from the unilateral activity of third persons. However, the complaint, other than the allegations of agency, which were refuted without contradiction from the Tillises, does not contain any allegations that Excelsior, independent of an agency relationship, purposefully directed its actions toward Alabama. In the absence of such allegations, we need not analyze the evidence as Excelsior suggests."

42 So. 3d at 104 (emphasis added). Read in context with the analysis that proceeded it, the emphasized sentence -- part of a restatement and summary of that analysis -- simply means that, in the absence of sufficient allegations regarding the conspiracy, we needed not analyze the evidence presented by Excelsior to determine if it specifically rebutted conspiracy as a potential basis for personal jurisdiction.

Thus, I disagree with the holdings in the main opinion that a defendant is entitled to the dismissal of a complaint against it based merely upon a motion asserting the absence of sufficient jurisdictional allegations in the complaint and that, in order to obtain such a dismissal, a defendant has no burden of initially coming forward with an evidentiary showing of a lack of personal jurisdiction. Notwithstanding the disagreement with these holdings, I can agree with the result

1100764

reached in this particular case because it is not one in which these particular holdings are necessary to the result. Specifically, this is not a case in which the defendant has failed to make a prima facie evidentiary showing of lack of personal jurisdiction over it.

In point of fact, the complaint and amended complaint in this case actually do contain "generic allegations that the Petitioners are subject to personal jurisdiction in Alabama."⁴ In order to counter this general allegation that the petitioners are subject to personal jurisdiction in Alabama, the defendants, McNeese and Owens, submitted an affidavit from Richard McNeese averring that "McNeese Title is not licensed to do business in Alabama and has never done business in Alabama," "does not have offices in Alabama, and has never actively pursued business in Alabama or otherwise advertised in Alabama," "owns no real property in Alabama," does not hold bank accounts in Alabama, and does not employ Alabama

⁴Although somewhat general in nature, the allegations in this regard in the complaint are indeed "factual allegations." I therefore cannot agree with the assertion by McNeese and Owens as quoted in the main opinion that "'the Complaint and Amended Complaint contain no factual allegations whatsoever as to any contacts between the Petitioners and the State of Alabama.'" ___ So. 3d at ___ (emphasis added).

1100764

citizens. The affidavit continues by explaining that McNeese Title provides closing, title, and escrow services for transactions involving real property in Florida" and that "McNeese Title has never served as title agent, closing agent, and/or escrow agent for real property located in any state other than Florida. Finally, Richard McNeese's affidavit states that his "only contacts with Alabama are rare communications made on behalf of McNeese Title and/or McNeese law firm, or when I travel through Alabama on trips." An affidavit from Owens to similar effect also was submitted. Clearly, these affidavits are of sufficient substance and breadth to provide a prima facie evidentiary showing of a lack of personal jurisdiction by Alabama courts over McNeese and Owens.

The question in this case, as it was in Excelsior, then becomes whether the plaintiff, Atchison, put on contrary evidence. As in Excelsior, he did not. It therefore falls to this Court, as it did to the Court in Excelsior, to consider whether there are allegations in the complaint (1) that have not specifically been rebutted by the evidentiary submission of the defendants and, therefore, are "left standing" and

1100764

(2) that are of a nature sufficient to provide a basis for the exercise of personal jurisdiction over the defendants. As in Excelsior, there are not. Specifically, just as in Excelsior, there are allegations touching upon conspiracy that are not controverted by the defendants' evidentiary submission. Just as in Excelsior, however, those allegations lack the specificity required by law and therefore are not sufficient to provide a basis for the exercise of personal jurisdiction over the defendants. Accordingly, I agree with the result reached by the main opinion.