

Rel: May 29, 2020

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, 2019-2020

1180998

Ex parte TD Bank US Holding Company and TD Bank, National
Association

PETITION FOR WRIT OF MANDAMUS

(In re: Dynamic Civil Solutions, Inc., and Bolaji Kukoyi

v.

ServisFirst Bank; A Prime Location, Inc.; Jessyca McKnight;
TD Bank US Holding Company; TD Bank, National Association;
Ozoria Global, Inc.; and Manuel Diaz Ozoria)

(Jefferson Circuit Court, CV-17-904639)

STEWART, Justice.

TD Bank, National Association, and TD Bank US Holding Company¹ (hereinafter referred to collectively as "TD Bank") petition this Court for a writ of mandamus directing the Jefferson Circuit Court ("the trial court") to dismiss claims filed against them by Bolaji Kukoyi and Dynamic Civil Solutions, Inc.² (hereinafter referred to collectively as "the plaintiffs"), on the basis of a lack of personal jurisdiction. We grant the petition and issue the writ.

Facts and Procedural History

In January 2017, Kukoyi retained Jessyca McKnight, a real-estate agent and broker employed with A Prime Location, Inc., d/b/a A Prime Real Estate Location ("Prime"), to assist him in purchasing a house. Kukoyi made an offer on a house, the offer was accepted, and the closing was scheduled to take place at attorney David Condon's office in Birmingham. Before the closing date, McKnight and Prime received an e-mail purportedly from Condon's paralegal instructing Kukoyi to wire

¹According to the petitioners, TD Bank US Holding Company is a holding company that does not provide banking services in its own name.

²Dynamic Civil Solutions, Inc., is identified in the plaintiffs' complaint as a domestic corporation doing business in Alabama; Kukoyi is identified as its principal.

1180998

funds for the closing costs one week before the closing date to an account at a TD Bank location in Florida. McKnight and Prime forwarded the e-mail to Kukoyi. According to Kukoyi, he questioned the instructions but was assured by McKnight and Prime that wiring the funds was necessary for the closing to go forward.

On January 27, 2017, Kukoyi initiated a wire transfer in the amount of \$125,652.74 from an account he owned jointly with Dynamic Civil Solutions with ServisFirst Bank ("ServisFirst") to the account at TD Bank as instructed in the e-mail McKnight and Prime had forwarded to Kukoyi. Unbeknownst to the plaintiffs, the account to which Kukoyi wired the funds had been opened by a company known as Ozoria Global, Inc.

According to the plaintiffs, Kukoyi contacted ServisFirst on February 3, 2017, to determine whether the funds had been transferred. At that time, ServisFirst discovered that the wire transfer was fraudulent and had not been completely processed. Kukoyi requested that ServisFirst put a stop-payment on the wire transfer, and ServisFirst advised TD Bank that the transfer had been fraudulent and requested that TD Bank reverse the transfer. According to the plaintiffs, as of

1180998

February 3, 2017, the funds had not been credited to any account at TD Bank. The plaintiffs asserted that the Ozoria Global, Inc., account had been flagged by TD Bank for suspicious activity and that, as a result, the funds had been automatically placed on a hold.

On February 6, 2017, TD Bank forwarded ServisFirst a wire-transfer charge and instructed ServisFirst to contact its corporate security office. ServisFirst advised TD Bank's corporate security department of what had occurred. According to the plaintiffs, the funds were still on hold at that time. At some point thereafter, however, TD Bank released the funds to the Ozoria Global, Inc., account and stopped communicating or cooperating with ServisFirst and refused to return the funds.

On November 3, 2017, the plaintiffs filed an action in the trial court asserting various causes of action against TD Bank and other defendants in relation to the wire transfer. The plaintiffs thereafter amended their complaint three times. On March 15, 2019, TD Bank filed a motion to dismiss the claims against it based on a lack of personal jurisdiction. In its motion, TD Bank argued that it was not subject to general

1180998

or specific personal jurisdiction. TD Bank asserted that its main office was located in Delaware and that its principal place of business was in New Jersey. TD Bank asserted that it had no office, store, branch location, automatic-teller machine, or other facility in the State of Alabama. TD Bank also asserted that it had not directed any advertising or marketing efforts to residents or businesses in Alabama. TD Bank further asserted that any of the alleged activities made the basis of the plaintiffs' complaint occurred out of state because a Florida account received a wire transfer that would have been processed through TD Bank's servers in Toronto, Canada. TD Bank attached to its motion an affidavit of one of its employees.

It does not appear from the materials submitted to this Court that the plaintiffs filed a response to TD Bank's motion to dismiss. At the trial court's direction, however, both sides submitted proposed orders. On August 1, 2019, the trial court entered an order denying TD Bank's motion to dismiss. TD Bank then filed a petition for a writ of mandamus in this Court, and the trial court stayed the trial-court proceedings

1180998

pending this Court's resolution of TD Bank's mandamus petition.

Standard of Review

"A writ of mandamus is an extraordinary remedy which requires a showing of (a) a clear legal right in the petitioner to the order sought, (b) an imperative duty on the respondent to perform, accompanied by a refusal to do so, (c) the lack of another adequate remedy, and (d) the properly invoked jurisdiction of the court. Ex parte Bruner, 749 So. 2d 437, 439 (Ala. 1999)."

Ex parte McInnis, 820 So. 2d 795, 798 (Ala. 2001).

"'[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. See Ex parte McInnis, 820 So. 2d 795 (Ala. 2001); Ex parte Paul Maclean Land Servs., Inc., 613 So. 2d 1284, 1286 (Ala. 1993). "'An appellate court considers de novo a trial court's judgment on a party's motion to dismiss for lack of personal jurisdiction.'" Ex parte Lagrone, 839 So. 2d 620, 623 (Ala. 2002) (quoting Elliott v. Van Kleef, 830 So. 2d 726, 729 (Ala. 2002)). Moreover, "[t]he plaintiff bears the burden of proving the court's personal jurisdiction over the defendant." Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 50 (1st Cir. 2002)."

"Ex parte Dill, Dill, Carr, Stonbraker & Hutchings, P.C., 866 So. 2d 519, 525 (Ala. 2003)."

Ex parte Covington Pike Dodge, Inc., 904 So. 2d 226, 229 (Ala. 2004).

Discussion

TD Bank argues that the trial court should have granted its motion to dismiss because, it says, the trial court lacked both general and specific personal jurisdiction over it.

""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., 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))."

Covington Pike Dodge, 904 So. 2d at 229-30.

Rule 4.2(b), Ala. R. Civ. P., allows Alabama courts to exercise personal jurisdiction over nonresident defendants "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"

There are two types of personal jurisdiction -- general and specific. Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty., ___ U.S. ___, ___, 137 S. Ct. 1773, 1776 (2017). TD Bank argues that the plaintiffs failed to demonstrate that TD Bank had general contacts such that it was "at home" in Alabama, and the plaintiffs do not contend that the trial court can properly exercise general jurisdiction over TD Bank.³

³"For general jurisdiction, the 'paradigm forum' is an 'individual's domicile,' or, for corporations, 'an equivalent place, one in which the corporation is fairly regarded as at home.'" Bristol-Myers Squibb Co., ___ U.S. at ___, 137 S. Ct.

The specific-jurisdiction inquiry "focuses on 'the relationship among the defendant, the forum, and the litigation.'" Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984) (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)). TD Bank argues that the plaintiffs failed to demonstrate that it had sufficient minimum contacts with Alabama to subject it to specific jurisdiction in Alabama. The plaintiffs argue that TD Bank took numerous actions directed toward the State of Alabama and the plaintiffs sufficient for the trial court to exercise specific personal jurisdiction.

We must initially determine whether TD Bank made a prima facie evidentiary showing in the trial court in support of its motion to dismiss and, if so, whether the plaintiffs substantiated the jurisdictional allegations in their complaint. See Ex parte Güdel AG, 183 So. 3d 147, 156 (Ala. 2015). In their complaint, the plaintiffs alleged that TD Bank is a foreign entity that does business in Jefferson County. The plaintiffs alleged that TD Bank "received a fraudulent transfer of Plaintiff's funds from Defendant ServisFirst, but refused to return said funds after being notified by

at 1776 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011)).

1180998

ServisFirst of the fraud." The plaintiffs further alleged that the funds were wired to a TD Bank branch in Florida.

In support of its motion to dismiss, TD Bank submitted an affidavit from an employee, JoAnn Leon, who testified that TD Bank's main office was located in Delaware and that its principal place of business was in New Jersey. Leon's testimony further demonstrated that TD Bank had no office, store, branch location, automatic-teller machine, or other facility in Alabama. Leon further testified that TD Bank had not directed any advertising or marketing efforts to residents or businesses in Alabama. Leon also testified that TD Bank processes incoming wire transfers through its servers in Toronto, Canada. Through its evidentiary submission, TD Bank made a prima facie showing that the trial court lacked specific personal jurisdiction over it. The burden then shifted to the plaintiffs to "substantiate [their] jurisdictional allegations with affidavits or other competent evidence." Covington Pike Dodge, 904 So. 2d at 232. See also Ex parte Excelsior Fin., Inc., 42 So. 3d 96, 104 (Ala. 2010), and Ex parte Güdel AG, 183 So. 3d at 156 (in which this Court granted mandamus relief when the defendant's evidence in support of its motion to dismiss "disproved the factual

1180998

allegations asserted in the [plaintiffs'] complaint that would establish specific jurisdiction and constituted a prima facie showing that no specific jurisdiction existed" and the plaintiffs had "indisputably failed" to meet their burden of substantiating "their jurisdictional allegations with affidavits or other competent evidence").

As mentioned above, the plaintiffs did not file a response to TD Bank's motion to dismiss, and, moreover, they did not submit any evidence to "substantiate [their] jurisdictional allegations" in their complaint. Covington Pike Dodge, 904 So. 2d at 232. Because TD Bank made a prima facie showing that the trial court lacked specific personal jurisdiction and the plaintiffs failed to produce any evidence to contradict that showing, the trial court should have granted TD Bank's motion to dismiss.

Conclusion

TD Bank has demonstrated that it has a clear legal right to the relief sought. The petition is granted, and the trial court is directed to grant TD Bank's motion to dismiss.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, and Mendheim, JJ., concur.

Mitchell, J., recuses himself.