IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

GREGORY TORRES, et al., *Plaintiffs/Appellants*,

v.

AVCO CORPORATION, et al., *Defendants/Appellees*.

No. 1 CA-CV 19-0645
FILED 11-24-2020

Appeal from the Superior Court in Maricopa County
No. CV2017-007542
The Honorable Timothy J. Thomason, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Jennifer M. Perkins delivered the decision of the Court, in which Judge David B. Gass and Judge Michael J. Brown joined.

P E R K I N S, Judge:

¶1 Appellants Gregory Torres, individually and as the executor of the estate of Diana Marie Soto, Melinda C. Green, individually and as the executor of the estate of Evelyn C. Walker, and Samantha Walker Perry, individually and as the personal representative of the estate of James Dale Walker, challenge the dismissal of their complaint against Appellees Avco Corporation ("Avco") and Lycoming Engines ("Lycoming") for lack of personal jurisdiction. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Appellants brought a wrongful death and personal injury action against Avco, its operating division Lycoming, and numerous other defendants stemming from a 2015 airplane crash. They alleged the crash was caused by a defective turbocharging system that Avco and Lycoming, among others, designed or manufactured.

¶3 Avco and Lycoming moved to dismiss the complaint under Arizona Rule of Civil Procedure ("Rule") 12(b)(2) for lack of personal jurisdiction. Appellants opposed the motion and requested "a brief period for factual discovery to take place." In December 2017, the superior court dismissed Lycoming on the parties' stipulation but denied the motion as to Avco without prejudice. When Appellants' counsel expressed concern that denying the motion without prejudice could create statute of limitations issues, the court ordered as follows:

> **IT IS FURTHER ORDERED** that Plaintiffs' counsel and Avco's counsel shall confer about a deadline for Avco to file a renewed Motion to Dismiss for lack of personal jurisdiction. If they agree, they shall file a stipulation. If they cannot agree, Plaintiffs shall file a motion requesting a deadline by which any renewed motion to dismiss for lack of personal jurisdiction for AVCO has to be filed.

No such stipulation or motion was ever filed.

¶4 Approximately one month later, Appellants filed an amended complaint. Avco answered, asserting lack of personal jurisdiction as an affirmative defense. Appellants filed a second amended complaint in July 2018, which Avco again answered and again asserted lack of personal jurisdiction. Avco renewed its motion to dismiss in April 2019, stating that "[a]ll relevant jurisdiction-related discovery has now been completed" and that "no evidence supporting Plaintiffs' claim that Avco is subject to personal jurisdiction in Arizona has been uncovered." Appellants opposed the renewed motion, arguing (1) Avco "waived its ability to re-raise its jurisdictional challenge through its conduct in litigation," which included participating in inspections and depositions; (2) additional discovery, including depositions of Avco's "witnesses with knowledge on the nature of its business [in Arizona]," was needed; and (3) the court could exercise specific jurisdiction over Avco because it "worked with the Honeywell Defendants in the support, design and manufacture of the turbocharger."

¶5 The court granted Avco's renewed motion, finding Avco's evidence that it had "no contact at all with Arizona related to the engine or turbocharger" to be undisputed. The court denied Appellants' request for additional jurisdictional discovery, stating that they "literally had years to conduct discovery and bring any discovery problems to the Court. It is far too late in the day to claim that discovery is needed."

¶6 Appellants timely appealed following the entry of final judgment on their claims against Avco and Lycoming under Rule 54(b). We have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(1).

DISCUSSION

¶7 "Arizona courts may exercise personal jurisdiction to the maximum extent allowed by the United States Constitution." *Planning Grp. of Scottsdale, L.L.C. v. Lake Mathews Min. Props., Ltd.*, 226 Ariz. 262, 265, ¶ 12 (2011); Ariz. R. Civ. P. 4.2(a). Constitutional due process requires that the

defendant have a sufficient connection with Arizona so that it is fair to require it to defend the action here. *Scott v. Kemp*, 248 Ariz. 380, 386, ¶ 11 (App. 2020) (citing *N. Propane Gas Co. v. Kipps*, 127 Ariz. 522, 525 (1980)).

I. Avco Did Not Waive Its Personal Jurisdiction Defense

¶8 Appellants first contend Avco waived its personal jurisdiction objection because Avco's "conduct made it clear that [it] consented to litigate in Arizona." Waiver generally presents questions of fact. *Jones v. Cochise Cnty.*, 218 Ariz. 372, 380, ¶ 28 (App. 2008). We have previously held, however, that a party who receives an adverse ruling on its jurisdictional defense does not waive the defense even if it proceeds to trial on the merits and has judgment entered against it. *Nat'l Homes Corp. v. Totem Mobile Home Sales, Inc.*, 140 Ariz. 434, 442 (App. 1984); *see also Desarrollo Immobiliario y Negocios Industriales de Alta Tecnologia de Hermosillo, S.A. de C.V. v. Kader Holdings Co. Ltd.*, 229 Ariz. 367, 371, ¶ 10 n.4 (App. 2012) ("[A] personal jurisdiction defense can be waived only where the defendant files a permissive pleading *before* the trial court rules on the jurisdictional issue.") (emphasis added).

¶9 Appellants cite *City of Phoenix v. Fields*, 219 Ariz. 568 (2009), and *Jones* for the proposition that a party can waive an affirmative defense by participating in litigation even after preserving the defense in an answer or Rule 12(b) motion. Neither case involved a personal jurisdiction defense; both instead involved alleged lack of compliance with Arizona's notice of claim statute. *Fields*, 219 Ariz. at 574-75, ¶¶ 29-32; *Jones*, 218 Ariz. at 378-79, ¶¶ 21-23. And both defendants substantially participated in the litigation before asserting their notice of claim defenses. *Fields*, 219 Ariz. at 575, ¶ 31; *Jones*, 218 Ariz. at 380, ¶ 27.

¶10 Here, in contrast, Avco timely moved to dismiss the complaint and reasserted its defense in its answers to Appellants' amended complaints. Moreover, the court denied Avco's motion without prejudice, thereby allowing Avco to renew it if appropriate. It also afforded Appellants an opportunity to set a deadline for Avco to renew its motion, but Appellants did not do so. We find no waiver on this record.

II. The Court Correctly Determined It Lacked Specific Jurisdiction over Avco

¶11 Appellants next contend the court erred in finding it could not exercise specific jurisdiction over Avco. Personal jurisdiction may be either general or specific. *Hoag v. French*, 238 Ariz. 118, 122, ¶ 19 (App. 2015).

Appellants do not contend the court could have exercised general jurisdiction over Avco.

¶12 "[S]pecific jurisdiction exists when the defendant establishes minimum contacts with the forum state by purposefully directing its activities to that state, and the litigation arises out of those activities." *Wal-Mart Stores, Inc. v. LeMaire*, 242 Ariz. 357, 359, ¶ 4 (App. 2017) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). Due process is satisfied if (1) the defendants performed some act or consummated some transaction with Arizona by which they purposefully availed themselves of the privilege of conducting activities in this state; (2) the claim arises out of or results from the defendants' activities related to Arizona; and (3) the exercise of jurisdiction would be reasonable. *In re Consol. Zicam Prod. Liab. Cases*, 212 Ariz. 85, 90, ¶ 10 (App. 2006). Casual or accidental contacts with the forum state, particularly those not directly related to the asserted cause of action, are not enough. *Planning Grp.*, 226 Ariz. at 266, ¶ 16. The exercise of specific jurisdiction is appropriate only if Avco reasonably could have anticipated its conduct and connections to Arizona would subject it to jurisdiction. *In re Consol. Zicam Prod. Liab. Cases*, 212 Ariz. at 90, ¶ 11 (citing *Bils v. Nixon, Hargrave, Devans & Doyle*, 179 Ariz. 523, 525 (App. 1994)).

¶13 Appellants had to present facts establishing a *prima facie* showing of specific jurisdiction to defeat Avco's motion. *Beverage v. Pullman & Comley, LLC*, 232 Ariz. 414, 417, ¶ 10 (App. 2013) (*aff'd as modified*, 234 Ariz. 1 (2014)). If Appellants did so, Avco would bear the burden to rebut that showing. *See id*. Because the superior court did not conduct an evidentiary hearing, we review the ruling *de novo*, viewing the facts in the light most favorable to Appellants but accepting as true any uncontradicted facts presented by Avco. *Scott*, 248 Ariz. at 386, ¶ 13 (citing *Planning Grp.*, 226 Ariz. at 264 n.1).

¶14 Appellants first contend Avco worked with the "Honeywell Defendants," who they allege are based in Arizona, "in the support, design and manufacture of the turbocharger which was the cause of the accident, and continue to use their components, which are now made in Arizona." They cite *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987); there, the Fifth Circuit stated that

> [w]hen the contact stems from a product, sold or manufactured by the foreign defendant, which has caused harm in the forum state, the court has jurisdiction if it finds that the defendant delivered the product into the stream of

> commerce with the expectation that it would be purchased by or used by consumers in the forum state.

Id. at 374. *Bearry* is not a specific jurisdiction case; the court instead determined that the district court lacked general jurisdiction over the defendant. *Id*. at 375. In any event, the "minimum contacts" analysis looks to Avco's contacts with Arizona, not its contacts with others who may be based here. *See Walden v. Fiore*, 571 U.S. 277, 284-86 (2014) ("[A] defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction."). For the same reason, we reject Appellants' contention that the superior court could exercise specific jurisdiction over Avco because "[t]he plane was owned by an Arizona resident, was registered and serviced in Arizona, and all of the plaintiffs or their decedents [were] domiciled in Arizona." *See Planning Grp.*, 226 Ariz. at 266, ¶ 16 (the contacts required for specific jurisdiction cannot be established through the plaintiff's unilateral activities; the contacts must instead arise from the defendant's purposeful conduct).

¶15 Appellants also cite *Van Heeswyk v. Jabiru Aircraft Pty., Ltd*., 229 Ariz. 412 (App. 2012), for the proposition that Avco could not "close its eyes and plead ignorance" to its products being sold in Arizona. In *Van Heeswyk*, we concluded that a manufacturer that used intermediaries to distribute its products in Arizona was subject to specific jurisdiction in Arizona. *Id*. at 417, ¶ 12. Here, however, Avco presented undisputed evidence that it did not manufacture or install the turbocharger, which was originally intended for use with other Avco/Lycoming engine models. Moreover, Appellants presented no evidence to show that Avco sold or delivered either the turbocharger or the engine in Arizona, whether through a distributor or otherwise. They instead asserted Avco's "involvement with the Honeywell Defendants and maintenance of a distributor in Arizona" were "causally connected" to their claims, but only cited the distributor's overall sales figures.

¶16 The other cases on which Appellants rely are distinguishable. In *McCaskey v. Cont'l Airlines, Inc*., 133 F. Supp. 2d 514 (S.D. Tex. 2001), the district court found it could exercise jurisdiction over MedAire, an Arizona-based company providing medical advice for in-flight medical emergencies, because it (1) entered into a contract with a Texas-based airline to provide in-flight medical assistance in Texas and elsewhere; (2) it had similar contracts to provide its medical service for numerous other airlines operating in Texas; (3) one of MedAire's physicians lived and worked in Texas; and (4) the flight on which the plaintiff was traveling originated in Texas. *Id*. at 520. The court expressly noted that MedAire's

contract "contemplated that [it] would deliberately reach out of Arizona and provide medical advice to Continental aircraft wherever they might be located," including Texas, and had no trouble concluding MedAire "had full knowledge that its medical advice would affect air travelers in Texas." *Id*. at 520-21. Appellants offered no evidence to show Avco contracted to provide any services to anyone in Arizona.

¶17 In *Nogle & Black Aviation, Inc. v. Faveretto*, 290 S.W.3d 277 (Tex. App.—Houston [14th Dist.] 2009, no pet.), the court determined specific jurisdiction was proper based on the defendant aircraft maintenance company's interactions with a Texas engineer who helped the company obtain FAA approval of an Alternate Means of Compliance on an aircraft it built. 290 S.W.3d at 280, 283. The court determined that the defendant "specifically chose to use the work of this Texas resident," which was performed in Texas, and that choice reasonably "could lead to litigation in Texas for a claim relating to a wing spar failure." *Id.* at 283. Appellants point to no such choice by Avco relating to either the turbocharger or the engine at issue; they instead contend, without citation to the record, that Avco "distribute[s] Honeywell . . . parts which were made . . . in Arizona" and "service literature for . . . the accident aircraft." Although the undisputed record suggests Avco has purchased turbochargers from Honeywell, Appellants offered no evidence to show Avco distributed them in Arizona or elsewhere.

III. The Court Did Not Abuse Its Discretion in Denying Additional Jurisdictional Discovery

¶18 Appellants also challenge the superior court's decision not to allow them to conduct additional jurisdictional discovery. We review the court's discovery rulings for an abuse of discretion. *Cohen v. Barnard, Vogler & Co.*, 199 Ariz. 16, 20, ¶ 22 (App. 2000).

¶19 Appellants contend more discovery is needed because Avco "refused to disclose the location where the turbocharger was made and [its] correspondence with Honeywell and Garrett," the company that manufactured the turbocharger. But Avco's alleged contacts with Garrett do not satisfy minimum contacts. *Walden*, 571 U.S. at 284-86; *see also Batton v. Tenn. Farmers Mut. Ins. Co.*, 153 Ariz. 268, 271 (1987) ("When specific jurisdiction is at issue, the minimum-contacts inquiry focuses on the relationship between the defendant, the forum, and the litigation."). And Appellants offered no further specificity. They instead requested "a brief period for a deposition to occur of Lycoming's witnesses" and repeated

their desire, from their response to Avco's initial motion to dismiss, "to present a full factual record."

¶20 They had ample time to conduct this discovery between December 2017, when the court denied Avco's initial motion, and April 2019, when Avco filed its renewed motion. Appellants now concede they "did not press this issue" because they assumed Avco had waived its jurisdictional defense by "participat[ing] in litigation . . . for over a year." As discussed above, Avco did not waive the defense. We see no abuse of discretion.

CONCLUSION

¶21 We affirm. Avco is awarded taxable costs upon compliance with ARCAP 21.

AMY M. WOOD • Clerk of the Court
FILED: AA