NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

BURKE PRODUCTS, INC., an Ohio company, Appellant, v. ACCESS ELECTRONICS, LLC, a Florida Limited Liability Company, Appellee.	)	Case No. 2D19-4086

Opinion filed June 19, 2020.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Lee County; Alane C. Laboda, Judge.

Jason C. King and James M. Scarmozzino of Scarmozzino Law Firm, P.A., Fort Myers, for Appellant.

Jarred D. Duke and Katherine Cook of Henderson, Franklin, Starnes & Holt, P.A., Fort Myers, for Appellee.

ROTHSTEIN-YOUAKIM, Judge.

Burke Products, an Ohio corporation, appeals from the nonfinal order of the Lee County Circuit Court denying its motion to dismiss a complaint filed against it by

Access Electronics, a Florida LLC.[1] Because the trial court incorrectly concluded that Burke has sufficient minimum contacts with Florida to justify the exercise of personal jurisdiction over it in this state, we reverse.

Access, as alleged in its complaint, is a wholesale distributor of electronic parts to the military and aerospace industries. After initially indicating an intent to purchase smaller quantities, Burke ultimately sent a purchase order to Access for 100 push-button switches.[2] Access shipped the switches to Burke in two lots on different dates. Burke made three partial payments to Access but allegedly then stopped, leaving more than half of the $100,000 contract unpaid. Access filed suit in Lee County, alleging that jurisdiction over Burke lay pursuant to section 48.193(1)(a)(7), Florida Statutes (2018), because Burke had breached the parties' agreement by failing to perform acts required to be performed in this state, i.e., failing to make payments to Access in Florida.

Burke moved to dismiss the complaint on the ground that Burke's purchase order, which Access had accepted and had acted upon, had included a forum-selection clause requiring that all disputes be settled in Ohio. Alternatively, Burke asserted that personal jurisdiction was lacking in Florida because Burke did not have the requisite minimum contacts with the state.[3]

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[1]We have jurisdiction. See Fla. R. App. P. 9.130(a)(3)(C)(i).

[2]This final purchase order consolidated two previous purchase orders.

[3]Burke also argued that dismissal was warranted because Access had failed to comply with certain conditions precedent spelled out in the contract, including that it attempt to negotiate a good-faith settlement of the dispute and, failing such settlement, that it submit the dispute to mediation.

Burke attached to its motion a copy of its terms and conditions, which included the forum-selection clause. Burke also submitted the affidavit of its CEO, who averred that Burke is an Ohio corporation; that it has never sold electrical or mechanical components in Florida; that it has never solicited business in Florida; that it has no offices, employees, or agents in Florida; that it does not own any real or personal property in Florida; that it holds no licenses in Florida; and that it has not carried on any business activities in Florida other than submitting the subject purchase orders to Access.

In an opposing affidavit, Access's managing member, Kevin Ferraro, averred that Access had never received or agreed to Burke's forum-selection clause, and Access attached documentation supporting that averment.[4] Moreover, Ferraro averred, Access requires its customers to accept *Access's* terms and conditions by completing a "Declaration of Usage and End User Statement," and Access attached documentation supporting his averment that Burke had done so.

For purposes of the limited evidentiary hearing, Burke agreed to assume that "we have to go by [Access's] contract terms and conditions," apparently abandoning any challenge based on its own forum-selection clause. It also conceded that the allegations in Access's complaint brought it within the purview of section 48.193(1)(a)(7). The hearing, therefore, focused on whether Burke had sufficient "minimum contacts" with Florida to satisfy due process requirements.

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[4]Apparently, the clause was set forth on "the reverse side" of each purchase order, but Ferraro averred that Access had never received any reverse side.

Based on the evidence that the parties had submitted and the arguments at the hearing, the trial court concluded that Burke had sufficient minimum contacts with Florida because Burke had "sought out [Access's] brokerage services," "conducted substantial communications with [Access] for purposes of receiving brokerage services," and "partially performed its obligations by making payments to [Access's bank in Florida]." Accordingly, the court concluded, Burke "should have reasonably anticipated being haled into court in Florida."

We review de novo orders regarding personal jurisdiction over a nonresident defendant. Schwartzberg v. Knobloch, 98 So. 3d 173, 180 (Fla. 2d DCA 2012) (citing Camp Illahee Inv'rs, Inc. v. Blackman, 870 So. 2d 80, 83 (Fla. 2d DCA 2003)). "Because this case arises from a motion to dismiss for lack of personal jurisdiction, we derive the facts from the affidavits in support of the motion to dismiss, and the transcripts and records submitted in opposition to the motion to dismiss." Wendt v. Horowitz, 822 So. 2d 1252, 1254 (Fla. 2002).

Preliminarily, we note that Burke's acquiescence at the hearing to the application of Access's terms and conditions does not resolve the question of personal jurisdiction. Although Access's terms and conditions included a "governing law" clause—which provided that the agreement shall be construed in accordance with the laws of Florida—they did not include a forum selection clause, and a choice-of-law clause is insufficient by itself to confer personal jurisdiction. See deMco Techs., Inc. v. C.S. Eng'rd Castings, Inc., 769 So. 2d 1128, 1131 (Fla. 3d DCA 2000) (continuing to hold that "a choice of laws provision, without more, is insufficient to establish long-arm

jurisdiction over a nonresident defendant"). Therefore, we look to see whether there is a statutory basis for the trial court's exercise of jurisdiction.

"Personal jurisdiction can be either general or specific, depending upon the nature of the contacts that the defendant has with the forum state." Wiggins v. Tigrent, 147 So. 3d 76, 85 (Fla. 2d DCA 2014) (quoting Bird v. Parsons, 289 F.3d 865, 873 (6th Cir. 2002)). General jurisdiction exists when a defendant engages in "substantial and not isolated activity" in Florida, "whether or not the claim arises from that activity." § 48.193(2). Specific jurisdiction exists under section 48.193(1) when the "alleged activities or actions of the defendant are directly connected to the forum state." Caiazzo v. Am. Royal Arts Corp., 73 So. 3d 245, 250 (Fla. 4th DCA 2011). In this case, there is nothing in the complaint, the affidavits, or the record that would support a finding that Burke has engaged in substantial and not isolated activity in Florida under section 48.193(2), a conclusion that Access appears to concede. Thus, our only inquiry is whether Burke is subject to specific personal jurisdiction under section 48.193(1)(a)(7).

Pursuant to section 48.193(1)(a)(7), a person is subject to the jurisdiction of the Florida courts if he or she "[breaches] a contract in this state by failing to perform acts required by the contract to be performed in this state." Burke correctly concedes that Access's complaint, which alleges that Burke failed to make payments in Florida as their contract requires, alleges sufficient jurisdictional facts to bring it within the ambit of the statute. See Magic Pan Int'l, Inc. v. Colonial Promenade, 605 So. 2d 563, 566 (Fla. 5th DCA 1992) (holding that the breach of a contractual obligation to make payment in Florida facially provides personal jurisdiction under Florida's long-arm statute). But

whether Burke's actions are sufficient under section 48.193(1) is not, standing alone, determinative of the question of personal jurisdiction. Instead, "the plaintiff must still establish that the nonresident defendant has sufficient minimum contacts with the State of Florida to satisfy due process of law." Schwartzberg, 98 So. 3d at 177-78 (citing Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945)); see also Osborn v. Univ. Soc'y, Inc., 378 So. 2d 873, 874 (Fla. 2d DCA 1979) ("[U]nder a given factual situation, even though a nonresident may appear to fall within the wording of a long arm statute, a plaintiff may not constitutionally apply the statute to obtain jurisdiction in the absence of the requisite minimum contacts with the forum state.").

Whether the nonresident has those requisite minimum contacts is a fact-specific inquiry. See Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 500 (Fla. 1989) (relying on Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), for the proposition that whether the minimum-contacts requirement has been satisfied depends upon the facts of each case). And, as set forth above, the trial court relied on the following factual findings to conclude that it could properly exercise personal jurisdiction over Burke: that Burke sought out Access's "brokerage services," conducted "substantial communications" with Access "for purposes of receiving brokerage services," and partially performed its obligations in Florida by making payments in Florida.

Burke argues at length that the evidence did not establish a contract for "brokerage services" or, in fact, for any services at all. We agree. Access's complaint alleges that it is a "wholesale distributor of custom, highly-sophisticated products for customers in the military and aerospace marketplace." Access's terms and conditions

identify Access as the "seller" and establish an arm's-length relationship between it and Burke, the "buyer" of one of the types of goods that it sells, i.e., the switches. The trial court did not find, and the jurisdictional evidence would not support a finding, that Burke and Access had contracted for Access to act as Burke's agent, to negotiate on Burke's behalf, or to facilitate a contract between Burke and the manufacturer of the switches.[5]

Nonetheless, we agree with Access that jurisdiction does not turn on whether the contract is one for goods or one for services. Although the nature of the contract may be relevant to determining whether the defendant has engaged in sufficient activities in Florida justifying the exercise of personal jurisdiction over it, it is not dispositive. See Kulko v. Superior Court of California, 436 U.S. 84, 92 (1978) ("Like any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test of International Shoe is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present."). Thus, more pertinent than the label that the trial court affixed to the parties' agreement are the court's findings that Burke had initiated the relationship with Access, that Burke's employees had repeatedly contacted Access's employees in Florida via email and telephone, and that Burke was required to make payments on the contract to Access's bank in Florida and, in fact, had done so on a few occasions.

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[5]"Broker" is defined as (1) "One who is engaged for another, usu. on a commission, to negotiate contracts relating to property in which he or she has no custodial or proprietary interest," or (2) "An agent who acts as an intermediary or negotiator, esp. between prospective buyers and sellers; a person employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation." Broker, Black's Law Dictionary (11th ed. 2019).

On these facts, we, like Burke, find guidance in Marsh Supermarkets, Inc. v. Queen's Flowers Corp., 696 So. 2d 1207 (Fla. 3d DCA 1997). In that case, Marsh, an Indiana corporation, placed 105 orders for flowers from Queen's, a Florida corporation, over the course of about fourteen months. Like Access, Queen's did not solicit the business; "rather, Marsh initiated each transaction by faxing its order to Queen[']s in Florida." Id. at 1207. Like Access, Queen's required payment in Florida. Like Burke, Marsh allegedly failed to pay, and Queen's filed suit in Florida. "[T]he sole question before [the court was] whether Marsh's mere purchases of goods within this state are . . . sufficient to comport with the constitutional due process requirements." Id. at 1208.

The Third District answered that question in the negative, distinguishing its facts from cases in which jurisdiction was held to attach because

> th[o]se cases involved non-resident corporations who engaged Florida corporations to perform specific services on their behalf and then actively monitored such services and/or otherwise engaged themselves in the performance of the services in the state of Florida. Under such circumstances, we held that the non-resident defendants were amenable to suit in Florida because they had essentially availed themselves of the privilege of conducting business in Florida. Here, on the other hand, there are no allegations that Marsh had any active participation in Queen's flower business. Marsh's sole relationship with Queen[']s, as well as with other vendors in the state of Florida, was that of a purchaser.

Id. at 1209.[6]

[6]Although the Third District concluded that Marsh fell within the ambit of a different section of the long-arm statute than Burke does, its minimum contacts analysis was, contrary to Access's contention, clearly within the context of specific jurisdiction.

While Burke seizes on the word "services," we find more instructive the phrase "actively monitored such services and/or otherwise engaged themselves in the performance of the services in the state of Florida." Nonetheless, that phrase is equally fatal to personal jurisdiction. The trial court found, "Throughout the life of the transaction, Defendant[']s employees routinely contacted Access employees in Florida via email and telephone." But as Marsh suggests, routine contact, in and of itself, is not enough, see also, e.g., Moncrief Oil Int'l Inc. v. OAO Gazprom, 481 F.3d 309, 312 (5th Cir. 2007) ("An exchange of communications in the course of developing and carrying out a contract also does not, by itself, constitute the required purposeful availment of the benefits and protections of [state] law." (citing Holt Oil & Gas Corp. v. Harvey, 801 F.2d 773, 778 (5th Cir. 1986))); rather, Burke must have "actively monitored" Access's procurement of the switches on Burke's behalf "and/or otherwise engaged themselves" in Access's procurement of the switches. Burke's repeated communications with Access, however, merely pertained to Burke's request that Access find out from the manufacturer if part of the order could be expedited. Such communications do not rise to the level establishing minimum contacts. Cf. Ben M. Hogan Co. v. QDA Inv. Corp., 570 So. 2d 1349, 1351 (Fla. 3d DCA 1990) (affirming trial court's exercise of personal jurisdiction over a nonresident defendant who had engaged a Florida investment firm for a six-month period to broker a promissory note and then refused to pay the contractual fee; "[QDA] performed its work in Florida and received payment in Florida, and Hogan repeatedly contacted QDA's offices in Florida in connection with the performance of QDA's contractual duties. Under this factual scenario, the trial court's finding that Hogan was subject to jurisdiction in Florida was correct.").

Although Burke reached out to Access, a Florida corporation, to purchase the switches, contacted Access on a number of occasions to inquire about how its order was proceeding and whether the order could be expedited, and made payments (and then stopped making payments) to Access in Florida, these contacts were insufficient to satisfy due process concerns. Accordingly, we reverse the court's denial of Access's motion to dismiss the complaint for lack of personal jurisdiction.

Reversed.

SILBERMAN and LUCAS, JJ., Concur.