Third District Court of Appeal

State of Florida

Opinion filed September 2, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D20-469
Lower Tribunal No. 19-21016

Johnny's Pool Super Center, Inc.,
Appellant,

vs.

Foreverpools Caribbean, LLC,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Martin Zilber, Judge.

Dieguez & Associates, PLLC, Anthony Dieguez and Joshua Dieguez, for appellant.

Best & Menendez, and Virginia M. Best and Johanna M. Menendez, for appellee.

Before EMAS, C.J., and HENDON and GORDO, JJ.

EMAS, C.J.

INTRODUCTION

The defendant below, Johnny's Pool Super Center, Inc. (Johnny's), a Puerto Rican company, appeals a non-final order denying its motion to dismiss for lack of personal jurisdiction. We reverse, holding that Foreverpools Caribbean, LLC (Foreverpools), the plaintiff below, failed to establish Johnny's had sufficient minimum contacts with Florida to satisfy federal due process requirements for personal jurisdiction over the defendant.

FACTS AND PROCEDURAL BACKGROUND

A. The Contract

Johnny's was hired by a Puerto Rican company to construct two Olympic-sized pools in Puerto Rico to host a competition among twenty nations in preparation for the 2019 Pan American Games. In preparing for the construction, Johnny's purchased glass tiles from a Puerto Rican distributor, SCP Distributors. The tile was manufactured in Spain by a Spanish company Vidrepur. Vidrepur offered a 15-year warranty on its tile but advised it would honor the warranty only if Johnny's hired Foreverpools to install the tile. Johnny's did so, and the tiles were shipped to Puerto Rico. Johnny's and Foreverpools signed the contract in their respective cities (San Juan and Miami).

In December 2018, a Foreverpools' representative traveled to Puerto Rico to meet with a representative from Johnny's and to arrange logistics for installation of the tiles. No Johnny's representative traveled to Florida for any reason related to the contract or installation of the tiles.

In January 2019, four installers from Foreverpools arrived in Puerto Rico to begin their part of the work on the project. In compliance with the contract, Johnny's made several payments to Foreverpools via wire transfer to Ocean Bank in Miami. However, Johnny's later asserted that the installation was "faulty and untimely," hired Puerto Rican installers to complete the work, and refused to make the remaining two payments due to Foreverpools under the contract.

B. The Complaint and Motion to Dismiss

In July 2019, Foreverpools sued Johnny's in a four-count complaint for breach of contract, goods sold, account stated, and unjust enrichment. Foreverpools alleged the following jurisdictional facts:

- Foreverpools, a Miami company, entered into a contract with Johnny's to "provide certain services and materials . . . for the sale and installation of glass tile in an Olympic swimming pool complex."
- The breach of contract "occurred in Miami-Dade County and the causes of action otherwise accrued here."

- Johnny's "made some of the payments required by the Contract in Miami-Dade County, Florida."
- Johnny's failed to pay Foreverpools "the remaining balance owed in Miami-Dade County, Florida."

Johnny's moved to dismiss for lack of personal jurisdiction and, alternatively, forum non conveniens. Attachments to its motion included an affidavit from Johnny's president discussing the company's lack of ties to Florida and substantial connection to Puerto Rico.

Foreverpools filed a memorandum in opposition, arguing that the complaint alleged sufficient jurisdictional facts to bring the cause within the ambit of Florida's long-arm statute—i.e., the contract required payment in Miami, Florida and contemplated "repeated contacts" over the term of the project and warranty. It further contended that Johnny's had sufficient contacts with Florida where it sought out and engaged Foreverpools to perform specific services on its behalf. Attachments to Foreverpools' memorandum included a translated version of the contract; Sunbiz information for a separate Florida company owned by the father of the owner of Johnny's; and an affidavit from the president of Foreverpools describing the business relationship between Johnny's and Foreverpools.

C. The Hearing and Ruling

Following a non-evidentiary hearing on the motion, the trial court denied the motion to dismiss, stating "there is enough here to have the case heard in Florida." Its written order denied the motion "for reasons stated on the record." The trial court made no findings (either orally at the hearing or in its subsequent written order) addressing or articulating the forum non conveniens factors required under Kinney System, Inc. v. Continental Insurance Co., 674 So. 2d 86 (Fla. 1996).[1]

This appeal followed.

ANALYSIS:

The Florida Supreme Court adopted a two-prong analysis for determining whether personal jurisdiction exists over a foreign corporation. Highland Stucco and Lime Prods., Inc., 259 So. 3d 944 (Fla. 3d DCA 2018) (citing Venetian Salami Co. v. Parthenais, 544 So. 3d 499 (Fla. 1989)). A trial court must determine: (1) whether there exist sufficient jurisdictional facts to bring the action within the purview of Florida's long-arm statute, section 48.193, Florida Statutes; and if so (2) whether the foreign corporation possesses sufficient minimum contacts with Florida

[1] Our disposition of this appeal on personal jurisdiction grounds renders it unnecessary to address Johnny's alternative argument for dismissal on forum non conveniens grounds. Nevertheless, it bears noting that, generally, an order denying a motion to dismiss for forum non conveniens will be reversed where neither the order nor the hearing transcript establishes that the trial court engaged in a meaningful analysis of the relevant, requisite Kinney factors. See, e.g., Tome v. Herrera-Zenil, 273 So. 3d 140 (Fla. 3d DCA 2019); Camperos v. Estrella, 126 So. 3d 351 (Fla. 3d DCA 2013).

to satisfy federal constitutional due process requirements—i.e., that the defendant corporation's "conduct and connection with the forum State are such that [it] should reasonably anticipate being haled into court there." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

First Prong (Statutory): Florida's Long-Arm Statute

We conclude that the first (statutory) prong of Florida's long-arm statute is satisfied in this case under the specific jurisdiction provision of section 48.193(1)(a)7., Florida Statutes (2019), which provides in relevant part:

> A person . . . submits himself . . . to the jurisdiction of the courts of this state for any cause of action arising from . . . [b]reaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

The record on appeal supports the jurisdictional allegation that Johnny's breached the contract by failing to make payments in Florida as required under the contract. See Metnick & Levy, P.A. v. Seuling, 123 So. 3d 639, 643 (Fla. 4th DCA 2013) (holding: "Failure to pay a contractual debt where payment is due to be made in Florida is sufficient to satisfy Florida's long-arm provision that refers to contractual acts 'required' to be performed in Florida.") (quotation omitted); see also RG Golf Warehouse, Inc. v. Golf Warehouse, Inc., 362 F. Supp. 3d 1226, 1238 (M.D. Fla. 2019) (holding: "Failure to make payments owed under a contract 'where payment is due to be made in Florida is sufficient to satisfy' Section (1)(a)(7) of

Florida's long-arm statute.'") (quoting Glob. Satellite Commc'n Co. v. Sudline, 849 So.2d 466, 468 (Fla. 4th DCA 2003)). However, even if the allegations in the complaint and evidence in support are sufficient to bring the action within the ambit of the long-arm statute, Foreverpools must also show that Johnny's possessed sufficient minimum contacts with Florida to satisfy federal constitutional due process requirements. Venetian Salami, 554 So. 2d at 502. This is the crux of the case.

Second Prong (Constitutional): Minimum Contacts

"While the statutory prong of the analysis is applied broadly, the constitutional prong is controlled by United States Supreme Court precedent interpreting the Due Process Clause and imposes a more restrictive requirement." Highland Stucco, 259 So. 3d at 950. Under the constitutional prong, the trial court must consider "whether the defendant has sufficient minimum contacts with the state so that the exercise of jurisdiction would not offend traditional notions of fair play and substantial justice." Id. (citing Venetian Salami, 554 So. 2d at 502). "Factors that go into determining whether sufficient minimum contacts exist include the foreseeability that the defendant's conduct will result in suit in the forum state and the defendant's purposeful availment of the forum's privileges and protections." Smith Architectural Grp., Inc. v. Dehaan, 867 So. 2d 434, 436 (Fla. 4th DCA 2004) (quotation omitted); see also Highland Stucco, 259 So. 3d 950 (explaining that "the

plaintiff must establish that the defendant's contacts with the forum state are: (1) related to the cause of action or gave rise to it; (2) involve some act by which the defendant purposefully availed itself of the privilege of conducting business within the forum; and (3) the defendant's act is such that it should reasonably anticipate being haled into court in that forum state.") Here, the primary issue is whether the nature of the services contract (including the 15-year warranty) constitutes "purposeful availment" of Florida sufficient to satisfy minimum contacts. We conclude that it does not.

As we have already discussed, specific jurisdiction under the long-arm statute may be satisfied by showing that the defendant breached a contract by failing to make payment in Florida as required under the terms of the contract. However, this conduct, without more, does not provide the requisite minimum contacts to satisfy the constitutional due process aspects of personal jurisdiction. See Venetian Salami, 554 So. 2d at 502 (holding: "The mere proof of any one of the several circumstances enumerated in section 48.193 as the basis for obtaining jurisdiction of nonresidents does not automatically satisfy the due process requirement of minimum contacts"); Bohlander v. Robert Dean & Assocs. Yacht Brokerage, Inc., 920 So. 2d 1226, 1228 (Fla. 3d DCA 2006) (holding: "The due process requirement of minimum contacts is not satisfied by a showing that a party has entered into a contract with a non-

resident, or a showing that payment must be made in Florida"); O'Brien Glass Co. v. Miami Wall Sys., Inc., 645 So. 2d 142, 144 (Fla. 3d DCA 1994).

At the same time, this court has held that such a contract is enough where it is "for substantial services to be performed in Florida." Bohlander, 920 So. 2d at 1228; see also Metnick, 123 So. 3d 644. The question then is whether the services contract and 15-year warranty constitute "substantial services" sufficient to mean that Johnny's "availed itself of the privilege of conducting business activities in Florida." Bohlander, 920 So. 2d 1228. Our de novo review of the affidavits and service contract compels the conclusion that they do not. Estes v. Rodin, 259 So. 3d 183, 190 (Fla. 3d DCA 2018) (noting: "We review de novo a trial court's ruling on a motion to dismiss for lack of personal jurisdiction.")

In its answer brief, Foreverpools lists several bases—in addition to the parties entering into a contract requiring payment in Florida—in support of its position that Johnny's has sufficient minimum contacts with Florida to satisfy due process:

- Johnny's "reached out to Foreverpools specifically because it needed and wanted the 15-year warranty that Foreverpools agreed to provide."
- Johnny's "was involved in overseeing the work performed by Foreverpools and was not simply a mere bystander who had no input or oversight into the work performed by Foreverpools."

• Johnny's complied with the contract by "tendering payment as payment became due to Plaintiff's bank in Florida."

• Johnny's had contacts in Florida as noted in the SunBiz documents and Foreverpools' affidavit.

Even if it could be said that Johnny's "sought out" Foreverpools, the fact remains that the services themselves were performed in Puerto Rico, not Florida. Dehaan, 867 So. 2d 436 (finding sufficient contacts where Dehaan contracted with a Florida company, agreed to make payment in Florida, services in the contract **were performed in Florida**, and Dehaan, "through an agent, solicited the firm in Florida") (emphasis added). As our sister court pointed out in Dehaan, and consistent with other case law on this point, merely reaching out to a Florida corporation is insufficient to establish that a foreign company purposefully availed itself of doing business in Florida where "substantial services" thereafter were not performed in Florida. Further, it is not entirely accurate to say that Johnny's sought out a Florida company to install the tiles. More accurately, Johnny's was directed (even required) to hire one specific company—which also happened to be a Florida company—to maintain eligibility for the manufacturer's 15-year warranty on the tile.

Returning to the overarching question—whether "substantial services" were performed in Florida—we note that aside from the one arguable fact that Johnny's

"sought out " Foreverpools, the actions and conduct presented in this case simply do not constitute the performance of "substantial services" in Florida. For instance, the fact that Johnny's (a Puerto Rican company) supervised a Florida company's employees as they performed all of their work in Puerto Rico, does not support Foreverpools' position. Nor does the fact that there is a related company in Florida, separately owned and managed by a relative of Johnny's owner and having no connection to the contract or work performed in the instant case. We conclude that "substantial services" were performed in Puerto Rico, not in Florida, and that Johnny's did not purposely avail itself of the privilege of conducting business activities in Florida.[2]

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[2] "Prior negotiations" and "future consequences" under the contract also fail to meet the requisite proof of purposeful availment. Glob. Satellite Commc'n Co. v. Sudline, 849 So. 2d 466, 469 (Fla. 4th DCA 2003) (noting: "Prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.") With respect to the parties' negotiations, review of both affidavits reveals that negotiations occurred over the telephone, and that a Foreverpools representative traveled to Puerto Rico to finalize logistics. Compare with Hartcourt Cos., Inc. v. Hogue, 817 So. 2d 1067, 1071 (Fla. 5th DCA 2002) (stating: "[A]lthough it took a few telephone calls and e-mail transmissions to make the arrangements, the agreement was an isolated transaction"). As for "future consequences," Foreverpools contends that the 15-year warranty established a "long-term business relationship" between the parties. We disagree. Whatever minimal relationship between Johnny's and Foreverpools might have followed from this warranty is simply insufficient to satisfy the due process prong of personal jurisdiction. Compare, Bruzzone Roldos v. Americargo Lines, Inc., 698 So. 2d 1368, 1370 (Fla. 3d DCA 1997) (finding insufficient contacts where "the undisputed facts show that the nonresident defendant, Bruzzone, purchased goods at regular intervals from Americargo and that

Foreverpools relies on our decisions in Industrial Casualty Insurance Co. v. Consultant Assocs., Inc., 603 So. 2d 1355 (Fla. 3d DCA 1992) and Ben M. Hogan Co. v. Q.D.A., Inv. Corp., 570 So. 2d 1349 (Fla. 3d DCA 1990). However, these cases are distinguishable:

In Industrial Casualty Insurance, 603 So. 2d 1357, we found defendant had sufficient minimum contacts with Florida to satisfy due process requirements where

> the allegations in the complaint and the averments in the affidavits that were filed by the parties in connection with the motion to dismiss, establish that Industrial Casualty contracted with a Florida corporation; **that most, if not all, of the services were performed in Florida;** and that payment was due in Florida. Under the circumstances, Industrial Casualty has had sufficient minimum contacts with Florida to subject it to the jurisdiction of Florida courts. There can be no doubt that the Industrial Casualty "availed itself of the privilege of conducting business in Florida."
>
> (Emphasis added) (citing Ben M. Hogan, 570 So. 2d 1351)

Likewise, in Ben M. Hogan, 570 So. 2d 1351, the Court found sufficient minimum contacts with Florida where the plaintiff's services were performed at a

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Americargo shipped them to Ecuador"); with Burger King Corp. v. Rudzewicz, 471 U.S. 462, 487 (1985) (providing: "Because [franchisee] Rudzewicz established a substantial and continuing relationship with [franchisor] Burger King's Miami headquarters, received fair notice from the contract documents and the course of dealing that he might be subject to suit in Florida, and has failed to demonstrate how jurisdiction in that forum would otherwise be fundamentally unfair, we conclude that the District Court's exercise of jurisdiction pursuant to Fla. Stat. § 48.193(1)(g) (Supp.1984) did not offend due process").

place of business in Miami: "[I]n this case, although some of QDA's activities were focused on foreign investors, **it 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." (Emphasis added).

This court's decision in Bohlander, 920 So. 2d 1226, is instructive. In that case, defendant entered into a listing agreement with a Florida company to sell his yacht. The agreement provided that the Florida company "would distribute information and advertise" about the yacht on a multiple listing service and "generally manage the sale of the Vessel." Id. at 1227. While the agreement provided that it was governed by Florida law, it did not require that any services be performed in Florida. We rejected the contention that this was sufficient for personal jurisdiction:

> [T]he Record before us shows that Bohlander did not have sufficient contacts with Florida to meet due process requirements. The substantial services rendered in the sale of the yacht in this case were not performed in Florida. Although the Agreement with Gilman provided that Florida law would govern any dispute, and Dean supported its jurisdictional claim with certain closing documents that were prepared on Gilman stationary, Dean presented no other sworn evidence to counter the statements in Bohlander's affidavit that the substantial services relating to the sale of "Sunshine Man" occurred in Ohio, not Florida.
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> In his affidavit, Bohlander states that at all relevant times "Sunshine Man" was located in Ohio, he met the buyer in Ohio, the contract was written in Ohio, and the closing

> occurred in Ohio. Bohlander used an Ohio broker to handle the transaction, Gilman traveled to Ohio to complete the transaction, and the receipt of proceeds occurred in Ohio. Bohlander paid a commission to both Gilman and the Ohio broker. Other than listing the sale of the yacht with Gilman, which happened to be located in Palm Beach, Bohlander stated that he took no other actions in Florida to sell or market the yacht in Florida. The documents prepared on Gilman stationary and the deposition testimony of Campbell, relied upon by Dean, regarding the sale process for "Sunshine Man" do not establish that substantial services were performed in Florida.

Id. at 1228-29 (emphasis added). Compare with Stomar, Inc. v. Lucky Seven, 821 So. 2d 1183 (Fla. 4th DCA 2002) (finding "Lucky Seven had sufficient contacts with this state, including more than a mere obligation to make payment in Florida. Lucky Seven hired plaintiff to perform brokerage services on its behalf in Florida, including negotiations, for the purpose of selling Lucky Seven's vessel here").

Similar to Bohlander, the record in the instant case evidences that some minimal "work"—i.e., gathering of material to send to Puerto Rico—was likely performed in Florida. And, as in Bohlander, this is insufficient to show that "substantial services were performed in Florida." Id. at 1229. Compare with Managed Care Sols., Inc. v. Baptist Health Sys., Inc., No. 07-61263-CIV, 2008 WL 11399703, at *7 (S.D. Fla. May 30, 2008) (noting: "The Defendant herein is not a mere distant purchaser of goods from a resident plaintiff. On the contrary, as discussed previously, the Parties had a minimum two-year contract with the resident

Plaintiff, which required the Defendant to upload its files on a daily basis into Plaintiff's database in Florida, spoke to the Plaintiff in Florida on a regular, if not daily, basis and received significant financial benefit from Plaintiff's work performed in Florida, thereby satisfying the second prong.")

Here, Foreverpools was hired by a Puerto Rican company to install tile in a pool in Puerto Rico, and any remedial work performed under the warranty would also have been performed in Puerto Rico. Review of the parties' contract and the remaining record compels the conclusion that "substantial services" were performed in Puerto Rico, not in Florida. The entire purpose of the contract was the installation of tiles in two pools being constructed in Puerto Rico. Although some minimal preparation for the project may have occurred in Miami, the only "substantial services" were contemplated to be provided (and were provided) in Puerto Rico.

CONCLUSION

The trial court erred in denying Johnny's motion to dismiss for lack of personal jurisdiction. Although the statutory prong of personal jurisdiction was established by specific jurisdiction under section 48.193(1)(a)7., Florida Statutes, Foreverpools failed to establish that Johnny's had the sufficient minimum contacts with Florida such that the exercise of jurisdiction would not offend traditional notions of fair play and substantial justice. Foreverpools' failure to satisfy this

constitutional due process prong required the trial court to grant the motion and dismiss for lack of jurisdiction.

Reversed and remanded.