

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001404-MR

DONALD JAMES
D/B/A SLEEP DIAGNOSTICS - LOUISVILLE, L.L.C.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEVEN MERSHON, JUDGE
ACTION NO. 98-CI-006716

OUTDOOR SYSTEMS, INC.

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
** ** * * * * *

BEFORE: DYCHE, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: This is an appeal from a judgment of the Jefferson Circuit Court which denied a motion to stay enforcement of a foreign judgment. We agree with the trial court that the Arizona court had jurisdiction to enter a judgment against a dissolved Kentucky limited liability company. However, we also find that the Arizona court did not have personal jurisdiction over the president of the limited liability company in his individual capacity. Hence, we affirm in part, reverse in part, and remand for entry of a new judgment in accord with this opinion.

The appellant, Donald James, is president of Sleep Diagnostics of Louisville, L.L.C., a Kentucky limited liability company whose date of organization is April 11, 1995. However, on November 1, 1996, Sleep Diagnostics was administratively dissolved by the Kentucky Secretary of State for failure to file its annual report. Sleep Diagnostics was reinstated by the Secretary of State as of March 4, 1999.¹ The appellee, Outdoor Systems, Inc., is a Delaware corporation with its principal business address located in Phoenix, Arizona. Among its business endeavors, Outdoor Systems provides billboard advertising throughout the country, including Kentucky.

On April 2, 1996, Sleep Diagnostics entered into a contract with Outdoor Systems for an outdoor advertising display located in Louisville. The contract was signed by Sleep Diagnostics' marketing director, Sharon Morrison. The agreement provided for the creation and maintenance of a billboard advertisement for Sleep Diagnostics for a period of twelve months at a cost of \$2,400.00 per month plus certain expenses.

Paragraph 13 of the agreement further provided:

Advertiser/Agency shall be responsible for payment to OUTDOOR of any costs of fees, including reasonable attorney's fees incurred by OUTDOOR, in enforcing its rights hereunder, Advertiser/Agency shall pay the same upon demand. Further, in the event any legal action is commenced by OUTDOOR to enforce payment of amounts owed hereunder, Maricopa County, Arizona shall be the

¹Under KRS 275.295 (3) (c), reinstatement of a limited liability company shall relate back to and take effect as of the effective date of the administrative dissolution, and the limited liability company shall resume carrying on business as if the administrative dissolution had never occurred.

exclusive jurisdiction and legal venue for said action.

According to Outdoor Systems' complaint, Sleep Diagnostics made a number of payments under the contract, but defaulted prior to the completion of the twelve month term. On April 9, 1997, Outdoor Systems brought a complaint in the Superior Court of Maricopa County, Arizona, naming as the defendant "Donald James, an individual, d.b.a. Sleep Diagnostics - Louisville LLC, a purported, non-existent limited liability company."² James was served on May 9, 1997, with a summons, complaint and certificate of compulsory arbitration. On June 11, 1997, Outdoor Systems filed an application for entry of a default judgment against James and Sleep Diagnostics. On June 24, 1997, James filed a one page, *pro se* answer with the Arizona court. The answer was typed on Sleep Diagnostics stationary and stated as follows:

Comes now, Donald James, an individual, dba Sleep Diagnostics - Louisville, LLC, and denies that they are liable and that this court has no jurisdiction over Sleep Diagnostics, LLC or Donald James.

. . .

/s/Donald E. James Manager
Donald James, and individual

Although James paid the required filing fee with the answer, he took no further part in the Arizona court proceedings. On July 7, 1997, the Arizona court appointed an arbitrator to hear the matter. Outdoor Systems moved for summary judgment on its claims on August 21, 1997, and there was no reply to the motion. Accordingly, on September 19, 1997, the Arizona

²Action No. CV97-06501.

arbitrator entered a judgment in favor of Outdoor Systems in the amount of the unpaid balance on the contract, \$16,320.00, with interest at the rate of one and one-half percent per month from March 1, 1997, until paid. In addition, the Arizona judgment awarded Outdoor Systems attorney's fees of \$671.50 and costs in the amount of \$97.25, each with interest thereupon at a rate of ten percent per annum until paid.

On December 1, 1998, Outdoor Systems filed its Notice and Affidavit of Foreign Judgment Registration with the Jefferson Circuit Court, seeking enforcement of the Arizona judgment. On February 9, 1999, James filed a motion to stay execution of the judgment liens and orders of garnishment. James contested the jurisdiction of the Arizona court over him and Sleep Diagnostics, as well as the validity of the underlying contractual obligation. Following briefing of the issues and a hearing, the trial court found that the Arizona judgment is entitled to full faith and credit. In particular, the trial court concluded that James's defenses to personal liability for the debts of Sleep Diagnostics should have been raised in the Arizona proceeding. The trial court further concluded that the forum selection clause in the contract was not unreasonable, and thus the Arizona court had personal jurisdiction over both Sleep Diagnostics and James. This appeal followed.

Kentucky has adopted the Uniform Enforcement of Foreign Judgments Act, which states that a foreign judgment filed with the clerk of any court of competent jurisdiction of the Commonwealth has the same effect as a judgment rendered by a

Kentucky court.³ Thus, a sister state's judgment is entitled to full faith and credit and to registration if the judgment is valid under that state's own laws.⁴ The essential question presented in this action is whether the Arizona court had personal jurisdiction to enter a judgment against Sleep Diagnostics and James.

Arizona's long-arm rule has been interpreted to extend to the permissible limits of due process.⁵ The Due Process Clause contained in the Fifth Amendment to the United States Constitution protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has no meaningful contacts, ties or relations.⁶ Individuals must have "fair warning" that a particular activity may subject them to the jurisdiction of a foreign court.⁷ When the defendant has purposefully directed his activities at the residents of the forum state, and the litigation results from alleged injuries that arise out of or relate to those activities, he cannot avoid

³ KRS 426.950.

⁴ Sunrise Turquoise, Inc. v. Chemical Design Co., Inc., Ky. App., 899 S.W.2d 856, 857-58 (1995).

⁵ 16 A.R.S. Rules of Civil Procedure, Rule 4.2(a); See also Meyers v. Hamilton Corp., 143 Ariz. 249, 252, 693 P.2d 904, 907 (1984). Similarly, Kentucky's long-arm statute also extends personal jurisdiction over non-residents to the limits of due process. Wright v. Sullivan Payne Co., Ky., 839 S.W.2d 250, 253 (1992).

⁶ International Shoe Co. v. Washington, 326 U.S. 310, 319, 66 S. Ct. 154, 160, 90 L. Ed. 95 (1945).

⁷ Shaffer v. Heitner, 433 U.S. 186, 218, 53 L.Ed.2d 683, 706, 97 S.Ct. 2569 (1977) (Stevens, J., concurring).

jurisdiction merely because he did not physically enter the state.⁸

In the present case, the contract between Sleep Diagnostics and Outdoor Systems designated Maricopa County, Arizona as the appropriate forum in which to seek collection of any amounts due. Where a forum selection clause is held enforceable, a due process analysis is unnecessary.⁹ Under Arizona law, a forum selection clause that is fairly bargained for and not the result of fraud will be enforced so long as to do so is reasonable at the time of litigation and does not deprive the litigant of his day in court.¹⁰ As noted by the trial court, the contracting parties were both experienced and knowledgeable businesses and were on an equal footing. As a result, we cannot find that the contract's forum selection clause was unreasonable. Therefore, we find that the Arizona court had jurisdiction to enter a judgment against Sleep Diagnostics.

However, we find that a separate issue exists as to whether the Arizona court had personal jurisdiction over James. The trial court correctly concluded that the issues of the liability of Sleep Diagnostics for the debt, as well as James's personal liability for the debts of Sleep Diagnostics, were

⁸Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 85 L. Ed. 2d 528, 540-41, 105 S. Ct. 2174 (1985).

⁹Morgan Bank v. Wilson, 164 Ariz. 535, 537-38, 794 P.2d 959, 961-62 (Ariz. App., 1990).

¹⁰ Id. Unlike Kentucky, Arizona does not consider whether the selected forum is a seriously inconvenient place for trial or whether the state has more than a minimal interest in the litigation. Id. (citing Prudential Resources Corp v. Plunkett, Ky. App, 583 S.W.2d 97 (1979)).

matters which should have been raised before the Arizona court and are not subject to review now. However, the Arizona court's exercise of personal jurisdiction over James is a distinct matter which may be raised in this proceeding.

In order to find that James is personally liable for the debts of Sleep Diagnostics, the Arizona court must have had personal jurisdiction over him. The contract was signed by an agent of Sleep Diagnostics at a time when Sleep Diagnostics was still a registered limited liability company. Being a member of a limited liability company is not sufficient, by itself, to constitute transacting business within Arizona.¹¹ Furthermore, Outdoor Systems has not pointed to any conduct by James, in his individual capacity, which was purposefully directed toward Arizona. As a result, we find that Arizona lacked the minimum contacts with James to support the exercise of personal jurisdiction over him.

Outdoor Systems argues that James's answer to the Arizona complaint constituted a general appearance which waived any objection which he might have to personal jurisdiction in Arizona. We disagree. Arizona has abolished the distinction between general and special appearances.¹² Rather, the court must inquire whether a party, by his actions in the conduct of the litigation, has manifested an intent to be subject to the jurisdiction of the court even though he has raised

¹¹ Ariz. Rev. Stat. Ann. § 10-1501(B)(12).

¹² 16 A.R.S. Rules of Civil Procedure, Rule 12(i)(1).

jurisdictional defects.¹³ The extent of an appearance is always a matter of intention and is not to be inferred, except as the result of acts from which an intent may be properly inferred.¹⁴ If a party invokes the power of the court for his own purpose, he will not be allowed the inconsistent objection that the forum was personally inconvenient to him.¹⁵

In his answer, James generally denied liability, and he asserted that the Arizona court was without jurisdiction over him or Sleep Diagnostics. He filed no further pleadings with the Arizona court, and did not respond to Outdoor Systems' motion for summary judgment. Given these circumstances, we cannot find that James invoked the power of the Arizona courts for his own purposes, or that he has consented to the Arizona court's jurisdiction over him. Furthermore, the Arizona arbitrator made no finding concerning James's assertion of lack of personal jurisdiction. Consequently, the matter is not *res judicata* in this proceeding.¹⁶

¹³ National Homes Corp. v. Totem Mobile Home Sales, Inc., 140 Ariz. 434, 437, 682 P.2d 439, 442 (Ariz. App., 1984). See also Ellman Land Corp. v. Maricopa County, 180 Ariz. 331, 884 P.2d 217 (Ariz. App., 1994); Aries v. Palmer Johnson, Inc., 153 Ariz. 250, 735 P.2d 1373 (Ariz. App., 1987).

¹⁴ National Homes, at 437, 682 P.2d at 442; (citing Austin v. State ex rel. Herman, 10 Ariz. App. 474, 477 459 P.2d 753, 756 (1969)).

¹⁵ Id.

¹⁶ See Giehrl v. Royal Aloha Vacation Club, 188 Ariz. 456, 937 P.2d 378 (Ariz. App., 1997); Armstrong v. Aramco Services Co., 155 Ariz. 345, 746 P.2d 917 (Ariz. App., 1987).

Based upon the foregoing, we find that the judgment of the Superior Court of Maricopa County, Arizona in Action No. CV97-06501 is entitled to full faith and credit and enforcement by the courts of Kentucky only insofar as it states a judgment against Sleep Diagnostics - Louisville, L.L.C. or its successor in interest under Kentucky law. However, we find that the Arizona court lacked personal jurisdiction over James in his individual capacity, and so the judgment in that respect is not entitled to full faith and credit in Kentucky. Any issue of James's potential liability for the debts of Sleep Diagnostics must be adjudicated in a Kentucky court.¹⁷

Accordingly, we affirm in part, reverse in part, and remand for entry of a new judgment in accord with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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¹⁷ See KRS §§ 275.150, 275.205, 275.300, 275.305.