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Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-001714-MR

GRIFFIN INDUSTRIES, INC. APPELLANT

APPEAL FROM CAMPBELL CIRCUIT COURT
v. HON. LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 02-CI-00586

TURNER ENVIROLOGIC, INC. APPELLEE

OPINION

REVERSING AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Griffin Industries, Inc. (Griffin) appeals from an order of the Campbell Circuit Court dismissing its cause of action for lack of personal jurisdiction over the appellee, Turner Envirologic, Inc. (Turner). Griffin has its principal place of business in Kentucky and is incorporated in Kentucky. Turner has its principal place of business in Florida and is incorporated in Florida. The Campbell Circuit Court found that Kentucky could not assert personal jurisdiction over Turner. The circuit court stated the correct test for specific

jurisdiction, but erroneously based its decision on a general jurisdiction inquiry. Griffin argues that minimum contacts necessary for finding specific jurisdiction are present and that personal jurisdiction can be asserted over Turner under Kentucky's long-arm statute, KRS[1] 454.210. We agree with Griffin. Therefore, we reverse and remand for further proceedings.

Turner does not have offices in Kentucky, is not licensed to do business in Kentucky, and has never conducted any previous business in Kentucky. However, in 1999, Art Eberle of Compliance Assurance Associates, Inc., contacted Griffin to solicit business on behalf of Turner. Eberle is an independent contractor and manufacturer's representative for several companies, including Turner. Eberle represents Turner in Kentucky pursuant to a contract, and is assigned to the western territory of the state. Although Eberle is authorized to make non-binding price estimates for Turner, he is not authorized to form contracts or make bids for Turner.

Eberle visited Griffin at its primary Kentucky offices either three or four times. During these visits, Eberle became aware of needs Griffin had for products Turner sells. Eberle contacted Turner to inform it of this potential business. As a result, Turner mailed to Griffin a proposal for a Regenerative

[1] Kentucky Revised Statutes.

Thermal Oxidizer (RTO) for a plant Griffin owns in Pennsylvania. Turner was not awarded the Pennsylvania contract.

However, officials at Griffin mentioned to Eberle an interest in purchasing other products from Turner. As a result, Tom Turner, President of Turner, contacted Griffin to discuss other potential business between the two corporations. Turner mailed a proposal dated October 23, 2000, to Griffin for an RTO at a plant Griffin owns in Alabama. The quoted price for the RTO exceeded $300,000. Negotiations continued between the two corporations via phone and mail, and Jack Crowley of Griffin visited Turner in Florida to inspect the RTO. A contract was formed for purchase of the RTO, for installation of the RTO at Griffin's Alabama plant, and for training at the Alabama plant to operate the RTO.

Over the course of the next two years, Griffin and Turner negotiated for other products to be used at plants Griffin owns in Kentucky. These discussions apparently followed the same sequence of events described previously, with Griffin expressing an interest in Turner's products to Eberle and then Turner sending proposals by mail or telephone. These further negotiations did not result in the formation of additional contracts between Griffin and Turner.

During the two years following installation of the Alabama Plant RTO, Griffin encountered problems with it not

operating up to design specifications and needing repairs. As a result, Griffin filed a complaint for rescission of contract, breach of contract, breach of warranty, and unjust enrichment on May 3, 2002, in the Campbell Circuit Court. On July 8, 2002, Turner filed its "Motion to Dismiss for Lack of *In Personam* Jurisdiction." The Campbell Circuit Court, by order dated August 2, 2002, granted Turner's motion. This appeal followed.

Review of a dismissal for lack of personal jurisdiction is de novo. Bridgeport Music, Inc. v. Still N the Water Pub., 327 F.3d 472, 477 (6th Cir. 2003). A de novo standard is used, in part, because "'[t]he decision to exercise personal jurisdiction is a question of law based on the Due Process Clause of the Constitution.'" Id. (quoting Tobin v. Astra Pharm. Prods., Inc., 993 F.2d 528 (6th Cir. 1993) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985))). However, factual findings necessary for the personal jurisdiction determination must be reviewed for clear error. Vetrotex Certainteed Corp. v. Consolidated Fiber Glass Products Co., 75 F.3d 147, 150 (3d Cir. 1996) (citations omitted). Finally, the burden is on the party seeking jurisdiction to present a prima facie showing that personal jurisdiction is proper. 6 Kurt A. Phillips, Jr., Kentucky Practice: Rules of Civil Procedure Annotated, at 219 (5th ed. 1995). See also Aristech Chemical International Ltd.

v. Acrylic Fabricators Ltd., 138 F.3d 624, 626 (6th Cir. 1998). We thus examine de novo whether Griffin established a prima facie showing of jurisdiction over Turner.

Griffin argues that Kentucky has *in personam* jurisdiction over Turner through Kentucky's long-arm statute, KRS 454.210. KRS 454.210 provides, in relevant part, as follows:

> (2)(a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:
>
> 1. Transacting any business in this Commonwealth; . . .
>
> 5. Causing injury in this Commonwealth to any person by breach of warranty expressly or impliedly made in the sale of goods outside this Commonwealth when the seller knew such person would use, consume, or be affected by, the goods in this Commonwealth, if he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth.

KRS 454.210 reaches "to the full constitutional limits of due process in entertaining jurisdiction over non-resident defendants." Wilson v. Case, Ky., 85 S.W.3d 589, 592 (2002) (citations omitted). In addition, under the framework used in Wilson, "'the traditional two step approach of testing jurisdiction against first statutory and then constitutional standards is . . . collapsed into the single inquiry of whether

jurisdiction offends constitutional due process.'" Wilson, 85 S.W.3d at 592 (quoting First Nat'l Bank of Louisville v. Bezema, 569 F.Supp. 818, 819 (S.D.Ind. 1983)).

The United States Supreme Court established in International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), that due process requires the satisfaction of certain "minimum contacts" with the forum state before specific jurisdiction may be asserted over a non-resident. Kentucky has since adopted, in Tube Turns Div. of Chemetron Corp. v. Patterson Co., Inc., Ky. App., 562 S.W.2d 99, 100 (1978), the three-prong test used by the Sixth Circuit in Southern Machine Co. v. Mohasco Industries, Inc., 401 F.2d 374, 381 (6th Cir. 1968). This test attempts to simplify the minimum contacts inquiry and "to determine the outer limits of personal jurisdiction based upon a single act." Wilson, 85 S.W.3d at 593.

The three prongs of the Southern Machine test are: (1) whether the defendant purposefully availed "himself of the privilege of acting within the forum state or causing a consequence in the forum state;" (2) whether the cause of action arose "from the alleged in-state activities;" and (3) whether the defendant has "such connections to the state as to make jurisdiction reasonable." Wilson, 85 S.W.3d at 593 (citing Tube

Turns, 562 S.W.2d at 100). For jurisdiction to be proper, all three requirements must be satisfied. Id.

The first prong of the Southern Machine test is whether Turner purposefully availed itself "of the privilege of acting within the forum state or causing a consequence in the forum state." Wilson, 85 S.W.3d at 593. In deciding whether this first prong is satisfied, two sub-prongs are considered: (1) whether the defendant transacted business in the state, and (2) whether the defendant "should have reasonably foreseen that the transaction would have consequences in that state." Southern Machine, 401 F.2d at 382-383.

In the present case, Turner's own unequivocal admissions in its affidavits and briefs support satisfaction of both sub-prongs of the first part of the Southern Machine test. Turner actively sought and transacted business in Kentucky by contracting with Eberle to serve as a manufacturer's representative in the western part of the state. Turner also transacted business in Kentucky by entering a contract with a Kentucky corporation. And finally, Turner's admission in its brief that Eberle "made a sales call" to Griffin which resulted in Turner submitting a proposal for the Alabama RTO and other projects also supports the conclusion that it transacted business in Kentucky.

Likewise, Turner should have reasonably foreseen the consequences its solicitation of and entering into business with Griffin would have in Kentucky. When Turner entered the contract, it was aware that Griffin was a Kentucky corporation with its principal place of business in Kentucky. It was foreseeable that Griffin would make payments from Kentucky bank accounts and that the operations at its Alabama plant would have a financial effect in Griffin's principal place of business. Moreover, since the RTO is a major article of industrial equipment, it was likewise foreseeable to Turner "[t]hat the making (and breaking) of a contract . . . would have substantial consequences with the state." In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 227 (6th Cir. 1972) (citations omitted).

Turner argues at length that Art Eberle was not its "agent" and that therefore his activities do not fall under the scope of KRS 454.210. However, our review is more concerned with satisfying due process in asserting long-arm jurisdiction than with applying a strict construction to the terms of the statute. Wilson, 85 S.W.3d at 592. This is because KRS 454.210 is to be interpreted as reaching to the full constitutional limits in entertaining jurisdiction over nonresident defendants. Id.

Thus, for our jurisdictional analysis, the classification of Eberle as a "manufacturer's representative" or "independent contractor" instead of an "agent" is less significant than his presence in Kentucky soliciting business on behalf of Turner. Eberle, despite not being able to form contracts or make sales himself, nonetheless solicited business in Kentucky for Turner. Moreover, but for Eberle's efforts on behalf of Turner, Griffin would not have entered into a contract with Turner for the purchase of the Alabama RTO.

Finally, with regard to the first prong of Southern Machine, Sixth Circuit cases have noted that "[t]he making of a substantial business contract with a corporation based in another jurisdiction has been held to be adequate to satisfy the requirements of the 'purposeful' test of Southern Machine." In-Flight Devices, 466 F.2d at 227 (citing Simpson Timber Co. v. Great Salt Lake Minerals and Chemicals Corp., 296 F. Supp. 243 (D.Or. 1969)).[2] The Alabama contract was a substantial business contract requiring an outlay by Griffin in excess of $300,000. As such, the "purposeful availment" test of Southern Machine is satisfied under this analysis.

In summary, we are persuaded that the first prong of the Southern Machine test has been satisfied in this case.

[2] Concern about unfairness resulting from a flat application of this rule was discounted in In-Flight Devices by reference to "[t]he third part of the Southern Machine approach" which "requires an investigation of the general fairness of the assertion of jurisdiction." In-Flight Devices, 466 F.2d at 228 n. 13.

Through the efforts of Eberle, Turner directed its activities at Kentucky and purposefully availed itself of acting in Kentucky. Also, by forming a contract with a Kentucky corporation for a major article of industrial equipment, the Alabama RTO, Turner "'purposefully entered into a connection with [Kentucky] (such that [it] should reasonably anticipate being haled into court there.)'" Wilson, 85 S.W.3d at 594 (quoting LAK, Inc. v. Deer Creek Enterprises, 885 F.2d 1293, 1300 (6th Cir. 1989) (citation omitted).

The second prong of the Southern Machine test "considers whether the cause of action arises from the alleged in-state activities." Wilson, 85 S.W.3d at 593. This criterion is also met in the present case. The present case has the same foundation for satisfaction of this prong as seen in In-Flight Devices where the Sixth Circuit stated, "Defendant's transaction of business in Ohio – its entering of a contractual relationship with an Ohio corporation – is necessarily the very soil from which the action for breach grew." In-Flight Devices, 466 F.2d at 229. Similarly, the Alabama RTO contract is the very soil from which Griffin's cause of action against Turner grew. Griffin's cause of action for breach arises from Turner's in-state solicitation and contract formation. As a result, the second prong is established.

The third prong of the Southern Machine test inquires into fairness and "requires such connections to the state as to make jurisdiction reasonable." Wilson, 85 S.W.3d at 593. Among the factors considered in resolving this issue are (1) the state's interest in resolving the controversy, (2) whether the defendant is a buyer or seller, (3) the existence of substantial interstate business in general, and (4) the quantity and quality of physical contacts with the state. In-Flight Devices, 466 F.2d at 232-235.

In the present case, "Kentucky has an interest in seeing that contracts formed in this Commonwealth are carried out." Texas American Bank v. Sayers, Ky. App., 674 S.W.2d 36, 40 (1984). In addition, the defendant is a seller and "[j]urisdiction has more often been assumed over non-resident sellers than . . . buyers." In-Flight Devices, 466 F.2d at 232 (citations omitted).[3] Further, Turner is a corporation, rather than an individual. It is engaged in substantial interstate business and actively solicits additional interstate business through its manufacturer representatives. Finally, Eberle, through his efforts to solicit business for Turner in Kentucky, establishes direct physical contact with the state. The third prong of the Southern Machine test is thus also satisfied.

[3] The rationale for this tendency is explained by noting that it is more often the seller who "initiates the deal, tends to set many, if not all of the terms on which it will sell" while the buyer "is frequently a relatively passive party." In-Flight Devices, 466 F.2d at 233. "It is understandable that sellers more often seem to have acted in a manner rendering them subject to long-arm jurisdiction." Id.

An overarching concern inherent in all personal jurisdiction inquiries is that "'"the facts of each case must [always] be weighed" in determining whether personal jurisdiction would comport with "fair play and substantial justice."'" Wilson, 85 S.W.2d at 596 (quoting Burger King v. Rudzewicz, 471 U.S. 462, 485-486, 105 S. Ct. 2174, 2189, 85 L. Ed. 2d 528 (1985) quoting Kulko v. Superior Ct. of California, 436 U.S. 84, 92, 98 St. Ct. 1690, 1697, 56 L. Ed. 2d 132 (1978)). These considerations are particularly important "in the single contract context" where due process analysis "is a matter of some dispute." Continental American Corp. v. Camera Controls Corp., 692 F.2d 1309, 1314 (1982) (citations omitted). Calling on a corporation to defend in a distant forum is generally not as burdensome as in the past and thus comports with notions of fair play and substantial justice. Id. (citing Hanson v. Denckla, 357 U.S. 235, 250-251, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)). Further, through Eberle, Turner actively sought to conduct business with a Kentucky corporation, did so, and a resulting lawsuit should not be a surprise. Finding personal jurisdiction to exist over Turner thus does not offend notions of fairness or substantial justice.

In summary, the three criteria in the Southern Machine test, adopted by Kentucky in Tube Turns, are satisfied by the facts of this case. Cases concerning personal jurisdiction

often note that "talismanic jurisdictional formulas" should be rejected and instead emphasize the need to consider the facts of each case. Wilson, 85 S.W.3d at 596 (citing Burger King, 471 U.S. at 485-486). However, the facts of this case satisfy the Southern Machine test and indicate that Griffin has made the required prima facie showing that jurisdiction is proper. Accordingly, the judgment of the Campbell Circuit Court is reversed and this case remanded for proceedings consistent with this opinion.

ALL CONCUR.

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