

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002184-MR

UNIFIED INSURANCE MANAGERS, INC.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 01-CI-03841

ABC AUTO INSURANCE AGENCY, INC.

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE: Unified Insurance Managers, Inc., ("Unified") appeals from an order of the Fayette Circuit Court that dismissed its cause of action against ABC Auto Insurance, Inc. ("ABC"). In ordering the dismissal of Unified's claim, the trial court held that it could not assert personal jurisdiction over ABC. Having thoroughly reviewed the record, the arguments submitted herein and the applicable law, we affirm.

Unified¹ is a Kentucky Corporation with its principal place of business in Lexington, Kentucky. Unified is in the business of placing insurance contracts with various insurance carriers. ABC is an Ohio corporation that sells automobile insurance policies. ABC's principal place of business is Cleveland, Ohio. ABC has no place of business in Kentucky, no registered agent for service of process in Kentucky, and according to the record, has no employees or operations in Kentucky. Moreover, ABC is not authorized to provide, sell or underwrite insurance policies to Kentucky residents. ABC solicits its business from Ohio.

In July 1997, representatives from Unified contacted ABC at its Cleveland, Ohio offices regarding the possibility of acting as a managing general agent for ABC and to place ABC's customers' contracts with certain insurers that Unified used. Negotiations between ABC and Unified occurred by mail, telephone and fax. At no time did any representative of ABC come to Kentucky for any contract negotiations. The record is unclear if any representative from Unified traveled to Ohio for meetings and contract negotiations.

On July 31, 1997, Unified and ABC entered into a "Producer's Agreement" wherein ABC obtained insurance coverage for its customers by placing insurance contracts with various

¹Prior to December 20, 2001, Unified was known as Equity Insurance Managers, Inc.

carriers through Unified. Under this agreement, Unified advanced commissions to ABC each time Unified successfully placed an insurance contract. In the event that one of these insurance contracts was cancelled or terminated mid-term, the producer's agreement required ABC to refund any unearned commission to Unified no later than twenty days after the end of the month in which the commission was paid. There exists no evidence that the insurers used by Unified were Kentucky corporations. All of the insureds affected by the arrangement between ABC and Unified were residents of Ohio.

Sometime during the course of this contract, a dispute arose between these parties concerning the refund of commissions advanced by Unified to ABC for policies that had been cancelled mid-term. The record reveals that ABC learned of plans by Unified's carriers to leave the automobile insurance market and, as a result, ABC experienced an increase in the number of policies cancelled for non-payment. ABC also claimed that it received numerous complaints from its clients concerning the insurance carriers, such as faulty notification practices, failure to receive insurance cards, failure to receive premium statements and failure to process payments. Nevertheless, Unified and ABC had an electronic funds transfer arrangement whereby Unified could withdraw funds deposited by ABC's clients

into a premium trust account². In September 2001, Unified unsuccessfully attempted to withdraw funds from this account to reimburse itself for unearned commissions that had been previously advanced to ABC. Despite Unified's demands for repayment of the unearned commissions, ABC continuously refused to remit payment.

On October 12, 2001, Unified filed suit against ABC in Fayette Circuit Court alleging breach of contract. ABC counterclaimed alleging that Unified breached the producer's agreement by violating an existing duty of good faith and fair dealing in the performance of this contract. Eventually, ABC moved the trial court to dismiss this matter for lack of personal jurisdiction. On September 30, 2002, the trial court found that it did not possess personal jurisdiction over ABC and granted ABC's motion to dismiss. This appeal followed.

As a preliminary point, we note that ABC failed to file a brief. Procedurally, we would be justified in imposing sanctions against ABC as provided in Kentucky Rules of Civil Procedure (CR) 76.12(8)(c), as follows:

(i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

²The purpose of this trust account was for ABC's clients to make payments of the initial amount due Unified for insurance policies.

Since Unified has not invoked the rule to seek a penalty, we shall avoid either extreme of summarily reversing the trial court or accepting *in toto* Unified's version of the facts. See, Scott v. Scott, Ky. App., 80 S.W.3d 447 (2002), and Whicker v. Whicker, Ky. App., 711 S.W.2d 857 (1986). Instead, we have reviewed the record in its entirety and have elected to address the issues on their merits.

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. Rudewicz, 471 U.S. 462, 471-472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985))). 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, 628 (6th Cir. 1998). We thus examine de novo whether Unified established a prima facie showing of jurisdiction over ABC.

Unified argues that Kentucky has *in personam* jurisdiction over ABC through Kentucky's long-arm statute, Kentucky Revised Statutes (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; . . .

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. State of 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 accepted test for personal jurisdiction 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.

Upon review, we do not believe that ABC has purposefully availed itself of the privilege of acting in the Commonwealth. ABC is a non-resident company without an office, post office box or telephone listing for the purpose of transacting business in this state. At no point did ABC solicit business in this state. In fact, Unified contacted ABC in Ohio regarding the possibility of offering its services to ABC for ABC's Ohio clients. The record is clear that ABC's

representatives never traveled to or visited Kentucky throughout the duration of this contractual relationship.

Further, all contract negotiations and compliance with the producer's agreement took place via telephone, mail or fax, with each party responding from its primary place of business. The Sixth Circuit Court of Appeals has identified these sorts of communication as "random, fortuitous and attenuated," the type the United States Supreme Court has rejected "as a basis for haling non-resident defendants into foreign jurisdictions." LAK, Inc. v. Deer Creek Enterprises, 885 F.2d 1293, 1301 (6th Cir. 1989).

In support of its assertion that the Fayette Circuit Court possessed personal jurisdiction over ABC, Unified relies heavily upon First Nat'l Bank of Louisville v. Shore Tire Co., Inc., Ky. App., 651 S.W.2d 472 (1982). Shore Tire involved a dispute between several nonresident dealers who placed orders for tires with a Kentucky tire manufacturer. A panel of this Court found that the placement of these orders constituted a transaction of business in Kentucky. The business relationships between the nonresident dealers and the Kentucky tire company involved a continuing business relationship between the tire company and each dealer, with each relationship containing a number of transactions over extended periods of time. Accordingly, this Court determined that sufficient minimum

contacts existed between the nonresident dealers with Kentucky to make those dealers subject to the personal jurisdiction of the Jefferson Circuit Court.

Unified correctly points out that, in Shore Tire, this Court placed particular emphasis on the fact that there was an on-going business relationship between the parties that continued over an extended period of time, involving a significant amount of money. While Shore Tire is very similar to this matter before us, we believe that Shore Tire can be easily distinguished from the matter at issue herein. The obvious difference between Shore Tire and the case before us is that the dealers in Shore Tire repeatedly and systematically conducted business with a Kentucky manufacturer as well as Kentucky citizens. Here, the record before us does not show any significant business conducted in Kentucky between ABC and Kentucky companies or citizens. The agreement at issue herein required Unified to place ABC's Ohio clients with various insurance carriers that were authorized to do business in Ohio. ABC's only in-state activities, pursuant to the producer's agreement, involved forwarding information concerning its clients to Unified's Lexington offices so that Unified could submit that information to non-resident insurance companies. ABC never purchased insurance in Kentucky on behalf of its clients, solicited a Kentucky insurer to provide such coverage,

or sold insurance inside of this Commonwealth. Instead, ABC contracted with Unified to act as its general agent in placing ABC's clients with insurance carriers licensed to conduct business in Ohio. Under these facts, it is apparent to us that Unified, acting in the capacity as ABC's general agent, intentionally and purposefully availed itself of the privilege of conducting business only in Ohio. Accordingly, we are not convinced that ABC intentionally and purposefully reached out beyond Ohio to create continuing relationships and obligations with citizens of this Commonwealth. Burger King, 471 U.S. at 473.

We also do not believe that the consequences caused by ABC in Kentucky have a substantial enough connection to this state for personal jurisdiction to be reasonable. Unified argues that ABC's refusal to refund \$15,264.89 in unearned commissions to Unified constitutes a substantial connection to Kentucky because ABC must have known that such a sum would impact the state's economy. In Franklin Roofing, Inc. v. Eagle Roofing and Sheet Metal, Inc., Ky. App., 61 S.W.3d 239 (2001), a panel of this Court held that the payment of a sum of money does not qualify as a "substantial connection." Moreover, imposing jurisdiction on a non-resident defendant based solely on a contract price which may never make it to the forum state, which

in this case it did not since the parties both assert a breach of contract claim, is unreasonable. Id.

Finally, in Texas American Bank v. Sayers, Ky. App., 674 S.W.2d 36 (1984), this Court listed several other considerations to be evaluated in determining whether a party has a reasonable "substantial connection" to the forum state. Reasonableness may be found if the party was an "active buyer," if the party could foresee being sued in the state, or if there were physical contacts between the party and the state. Id., at 39. We believe that ABC does not meet these criteria.

Both parties admit that ABC had no actual physical contact with the state of Kentucky. We doubt that ABC could foresee being sued in Kentucky on the basis of a contract with a Kentucky company to act as its general agent in placing its Ohio clients' insurance policies with various insurance companies authorized to do business in Ohio. Also, while ABC did engage in negotiations and communications with Unified concerning the agreement at issue, it is clear to us that Unified was the more "active" party. Unified contacted ABC about this agreement, submitted the agreement to ABC, and engaged in transactions involving Ohio residents pursuant to this agreement. Therefore, we hold that ABC did not have a "substantial connection" to Kentucky, making it unreasonable for the Fayette Circuit Court to exercise personal jurisdiction over ABC in this case.

For the aforementioned reasons, the decision of the
Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

No brief filed.