

STATE OF MICHIGAN
COURT OF APPEALS

BAKERY EQUIPMENT/DESIGN LTD.,

Plaintiff/Counterdefendant/Third-
Party Plaintiff,

v

SUNRISE BAKERS L.L.C.,

Defendant/Counterplaintiff-
Appellant,

and

TECNOFAST CARIN S.P.A.,

Third-Party Defendant-Appellee.

UNPUBLISHED

September 13, 2002

No. 227575

Kent Circuit Court

LC No. 97-013289-CZ

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

Defendant Sunrise Bakers L.L.C. (“Sunrise”) appeals as of right from the trial court’s order granting third-party defendant Tecnopast Carin S.P.A.’s motion to set aside a default judgment and dismissing all claims against Tecnopast Carin S.P.A. (“Tecnopast”) for lack of personal jurisdiction. We affirm the dismissal of the case.

I

In early 1996, Bakery Equipment, a wholesaler based in Wayland, Michigan, purchased a \$15,000 specialty dough mixer from Tecnopast, an Italian company, for resale to Sunrise, a Bakery Equipment customer based in Grand Rapids, Michigan. When Sunrise failed to pay for the mixer, Bakery Equipment commenced legal action against Sunrise, which filed a counterclaim alleging that the mixer was defective and failed to perform as represented.

Bakery Equipment filed a third-party complaint against Tecnopast, seeking a refund of the purchase price and other costs. Tecnopast failed to respond to the third-party complaint, and in April 1999, the trial court entered a consent judgment in the principal action awarding Sunrise

\$729,523.91 against Bakery Equipment.¹ The court also entered a default judgment in that action against Tecnopast in the same amount for failure to respond to the third-party complaint. In addition, the court entered an assignment of judgment pursuant to which Bakery Equipment assigned all of its rights in the default judgment to Sunrise, leading to the present action between Tecnopast and Sunrise.

On March 10, 2000, Tecnopast moved to set aside the default judgment pursuant to MCR 2.603(D) and for lack of personal jurisdiction. The trial court granted Tecnopast's motion to set aside the default judgment and dismissed the action against Tecnopast.

II

On appeal, Sunrise first argues that the trial court erred when it dismissed the case against Tecnopast for lack of personal jurisdiction. We disagree.

Whether a court has personal jurisdiction over a party is a question of law that is reviewed de novo on appeal. *Vargas v Hong Jin Crown Corp*, 247 Mich App 278, 282; 636 NW2d 291 (2001); *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 426; 633 NW2d 408 (2001). The plaintiff bears the burden of establishing jurisdiction over the defendant, but need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition. *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995).

This Court employs a two-step analysis when examining whether the state of Michigan may exercise limited personal jurisdiction over a defendant under its long-arm statute. The Court must determine whether the defendant's conduct falls within a provision of Michigan's long-arm statute, and whether the exercise of jurisdiction comports with due process. *Starbrite Distributing, Inc v Excelda Mfg Co*, 454 Mich 302, 304; 562 NW2d 640 (1997); *Oberlies, supra* at 427-428.

A. Long-arm Statute

With regard to limited personal jurisdiction over an out-of-state corporation, Michigan's long-arm statute, MCL 600.715, provides, in pertinent part:

The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgments against such corporation arising out of the act or acts which create any of the following relationships:

- (1) The transaction of any business within the state.

¹ Although Sunrise allegedly owed Bakery Equipment approximately \$22,000 for the mixer, the award of \$729,523 apparently included Sunrise's loss of profits and other damages.

It is undisputed that Tecnopast's sole contact in this state involved sending promotional materials to Bakery Equipment, at Bakery Equipment's request, and selling bakery products to Bakery Equipment. There is no evidence that Tecnopast had any other contact with this state. With regard to subsection (1), this Court recently held that *any* transaction of business in Michigan by a non-resident corporation is sufficient contact with Michigan to establish long-arm jurisdiction over the corporation. See *Oberlies supra* at 430, citing *Sifers v Horen*, 385 Mich 195, 199, n 2, 188 NW2d 623 (1971). In *Sifers*, our Supreme Court noted that the word "any" in subsection (1) "includes 'each' and 'every'" transaction in this state, and "comprehends 'the slightest.'" *Id.* at 199 n 2. Given the inclusive nature of the subsection (1), Tecnopast's acts of sending promotional materials to Bakery Equipment in Michigan, even if Bakery Equipment initiated the contact, and selling the Michigan company a mixer satisfies the requirements of the long-arm statute. See also *Aaronson v Lindsay & Hauer Int'l Ltd*, 235 Mich App 259; 597 NW2d 227 (1999).

B. Due Process

Although Tecnopast's "transaction of business" in Michigan satisfies the requirements of the long-arm statute, the exercise of personal jurisdiction over Tecnopast does not comport with principles of due process. The constitutional inquiry whether the exercise of personal jurisdiction would violate the Due Process Clause focuses on whether the defendant purposefully established sufficient minimum contacts in Michigan such that the exercise of jurisdiction over the defendant is fair and reasonable. *Oberlies, supra* at 433; see also *Starbrite Distributing, supra* at 308-309. In determining whether sufficient minimum contacts exist between a defendant and Michigan, the Court must apply a three-pronged test:

"First, the defendant must have purposefully availed himself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws. Second, the cause of action must arise from the defendant's activities in the state. Third, the defendant's activities must be substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable." [*Oberlies, supra* at 433, quoting *Jeffrey, supra* at 186.]

With regard to the first prong, the purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. *Starbrite Distributing, supra* at 310 (citations omitted). For a foreign corporation to have purposefully availed itself of the privilege of conducting business in Michigan, it must have deliberately undertaken to do or cause a thing to be done, or engaged in conduct that can properly be regarded as a primary cause of the effects in Michigan. *Id.* at 309-310 (citations omitted).

"[W]here the defendant 'deliberately' has engaged in significant activities within a State, or has created 'continuing obligations' between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Id.* at 310,

quoting *Burger King Corp v Rudzewicz*, 471 US 462, 475-476; 105 S Ct 2174; 85 L Ed 2d 528 (1985).

The defendant's own conduct and connection with the forum must be examined to determine whether the defendant should reasonably anticipate being haled into court in that forum. *Jeffrey, supra* at 187.

Having weighed the circumstances presented, we find the question whether Tecnopast's conduct constitutes "purposeful availment" a close call. Tecnopast's contacts in Michigan resulted entirely from Bakery Equipment's solicitation, and were merely responsive to the desires and needs of Bakery Equipment, which chose to engage in the international business market by traveling to a European trade show and making a purchase from Tecnopast, an Italian company, which apparently had no business connections in the United States. Nonetheless, once Bakery Equipment made the initial contact, Tecnopast undertook activities that created continuing obligations between it and Bakery Equipment, sufficient to constitute purposeful availment under the due process standard.

Although the first contact was initiated by Bakery Equipment and was the sole impetus for Tecnopast's business in Michigan, we cannot conclude that Tecnopast's conduct of business with Bakery Equipment over the course of the relationship, and its contacts with the state, were random, fortuitous or attenuated. *Aaronson, supra* at 266. Tecnopast's active participation in the business relationship dispels the notion that it was the passive recipient of "unilateral activity" on the part of Bakery Equipment. *Id.*, citing *Starbrite Distributing, supra* at 310-311. Tecnopast conducted multiple transactions with Bakery Equipment and communicated by mail, telephone, and facsimile for some period of time in regard to its products, including providing sales literature. Tecnopast availed itself of the opportunity to do business in Michigan. *Aaronson, supra* at 266. Consequently, it should have anticipated the possibility that it could generally be subject to suit in Michigan, barring any legal impediment, e.g., an enforceable contractual agreement to the contrary. *Id.* Tecnopast created continuing obligations between itself and Bakery Equipment and manifestly availed itself of the privilege of conducting business in Michigan, thus shielding its activities with the benefits and protections of Michigan law. *Starbrite Distributing, supra* at 310, citing *Burger King, supra* at 475-476. We conclude that the purposeful availment prong is met.

With regard to the second prong of the due process test, the cause of action must arise from the defendant's activities in the state. *Oberlies, supra* at 433. Because this cause of action was predicated on Tecnopast's sale of the mixer to Bakery Equipment, and the contractual obligations arising therefrom, we conclude that that second prong is met. *Aaronson, supra* at 267.

Finally, the third prong requires that the defendant's activities be substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable. *Oberlies, supra* at 433. We conclude that this prong of the due process standard is not met. Under the circumstances of this case, it would be unreasonable to require Tecnopast to defend this action in Michigan.

“Once the threshold requirement of minimum contacts is satisfied, a court must still consider whether the exercise of personal jurisdiction comports with fair play and substantial justice.” *Jeffrey, supra* at 188-189. The burden on the defendant is a primary concern, but must be weighed in light of other relevant factors. *Starbrite Distributing, supra* at 313. Other factors that may be considered include the forum state’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. *Id.*; *Jeffrey, supra*.

Considering the circumstances of this case, where the contacts with the Michigan wholesale purchaser, Bakery Equipment, were not initiated by Tecnopast, were merely responsive to Bakery Equipment’s requests, were limited exclusively to Bakery Equipment’s needs, and at Bakery Equipment’s direction, we conclude that requiring Tecnopast to defend this claim in a Michigan forum would pose an unfair burden on Tecnopast and does not comport with traditional notions of fair play and substantial justice. *Starbrite Distributing, supra* at 313.

Tecnopast’s activities were not substantially connected with Michigan to make the exercise of jurisdiction over Tecnopast reasonable. Although the lack of physical presence is not an impediment to asserting jurisdiction over a non-resident defendant, *Witbeck v Bill Cody’s Ranch Inn*, 428 Mich 659, 668; 411 NW2d 439 (1987), it is noteworthy that Tecnopast has never owned property or maintained offices or representatives in the United States. Tecnopast did not place advertisements to solicit business or procure orders from Michigan companies, did not participate in any trade shows in Michigan or the United States, and did not have a marketing system that targeted Michigan companies.

Although Tecnopast engaged in three transactions prior to that which is the subject of the instant case, Bakery Equipment always initiated the contact. With regard to this particular matter, Bakery Equipment initiated contact with Tecnopast in Italy and ordered a mixer from the Italian company. Tecnopast responded to the inquiry and order. Tecnopast sent an order of confirmation from Italy to Bakery Equipment, and ultimately shipped the mixer “ex factory” to San Bonifacio, Italy, per Bakery Equipment’s request, along with an invoice and the general terms of sale. The contract for the mixer was finalized in Italy, and Tecnopast delivered the mixer to San Bonifacio pursuant to Bakery Equipment’s request. Tecnopast’s purported general terms of sale for the mixer provided that the Court of Vicenza, in Italy, would be the exclusive court to resolve any controversies.

Sunrise, through an assignment of rights from Bakery Equipment, now seeks to enforce its default judgment of \$729,523 against Tecnopast, alleging that the mixer did not perform as represented. In defense, Tecnopast claims that any failure in performance was the result of misuse by Sunrise and that Tecnopast has had no other complaints concerning the mixer model sold to Sunrise.

Presumably, most of Tecnopast’s evidence and witnesses to defend against this claim would be based in Italy, where the equipment was designed and manufactured. Tecnopast had never had officers, agents or dealers in the United States. It did not advertise its products in Michigan, and has had no contact with Michigan residents other than the business entities in this case. Requiring Tecnopast to secure evidence and multiple witnesses from Italy to defend against the action in Michigan would pose an overwhelming burden on it as a defendant. Not

only did Tecnopast not solicit the particular business contacts in Michigan, but evidence indicates that the company's general sales terms accompanying the mixer invoice, expressly limited the adjudication of disputes to Italian courts. On the other hand, the Michigan claimants ventured into the world market to solicit Tecnopast's business from its home base in Italy, and therefore do not present an overwhelming interest for obtaining convenient and effective relief in a Michigan court. Michigan's interest in adjudicating this dispute is not overwhelming, since the claim is for economic damages sought by a single business entity that chose to engage in a sale with an Italian company.

We find no interests or other relevant factors that would make an exercise of jurisdiction reasonable given these facts. We conclude that the exercise of jurisdiction in Michigan would not comport with traditional notions of fair play and substantial justice. *Jeffrey, supra* at 189. Accordingly, the trial court properly dismissed the case on the basis that it lacked personal jurisdiction over Tecnopast.

III

Sunrise also argues that the trial court erred when it set aside the default judgment against Tecnopast on the basis that Tecnopast did not receive notice of the default, as required by MCR 2.603(A).

The decision to grant or deny a motion to set aside a default or a default judgment is within the discretion of the trial court. *Park v American Casualty Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996). Except when grounded on lack of jurisdiction over the defendant, a motion to set aside a default judgment generally may be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1); *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 223, 233; 600 NW2d 638 (1999). Failure to notify a party of an entry of default constitutes a violation of MCR 2.603(A)(2), and is sufficient to show a substantial defect in the proceedings meriting a finding of good cause pursuant to MCR 2.603(D). *Gavulic v Boyer*, 195 Mich App 20, 25; 489 NW2d 124 (1992), overruled on other grounds *Allied Electric Supply Co, Inc v Tenaglia*, 461 Mich 285, 289; 602 NW2d 572 (1999).

In setting aside the default judgment, the trial court ruled that there was no notice of the entry of the default as required by MCR 2.603(A), noting that there was no proof of service. The trial court did not address any further argument related to setting aside the default judgment. The court denied Sunrise's request for an adjournment in order to prove that the notices were sent.

On appeal, Sunrise proffers proof that Tecnopast was served with a notice of default and a motion for entry of default judgment, yet failed to respond. However, these documents were not before the trial court, and we decline to consider them, and Sunrise's concomitant claim of proper notice, in the first instance.²

² We note that Tecnopast argues that it was not served because the Tecnopast Carin division of the company was sold and it no longer retained the previous address. However, documents sent to a party's last known address suffices for service under MCR 2.603(A)(2).

Because the trial court correctly dismissed all claims against Tecnopast based on lack of personal jurisdiction, any error in setting aside the default judgment against Tecnopast is moot. See *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 493; 608 NW2d 531 (2000).

Affirmed.

/s/ Janet T. Neff