

STATE OF MICHIGAN
COURT OF APPEALS

LARSEN SERVICES, INC.,

Plaintiff-Appellant,

v

NOVA VERTA USA, INC.,

Defendant-Appellee,

and

JOHN KUHN and COMPLETE MECHANICAL
SOLUTIONS, INC.,

Defendants.

UNPUBLISHED

May 14, 2013

No. 306280

Wayne Circuit Court

LC No. 09-022451-CK

Before: CAVANAGH, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant’s motion to dismiss for lack of personal jurisdiction, MCR 2.116(C)(1).¹ We reverse and remand for proceedings consistent with this opinion.

Defendant is a Washington-based company that sells spray booth applications for use in body shops. Plaintiff, a Michigan corporation, sold defendant’s products to plaintiff’s customers. Plaintiff contended in its complaint that it “was a sales representative for Defendant NV and [was] paid on a commission basis for work done on behalf of the Defendant NV.” Plaintiff further averred that defendant ceased doing business with plaintiff after June 2007, but defendant continued to do business and benefit from plaintiff’s prior efforts—particularly with regard to Exhibit Works, a Michigan-based company—without paying the “sales commissions, expenses and costs” due to plaintiff. Thus, plaintiff’s complaint sought damages under the Sales

¹ Plaintiff’s claims against defendants John Kuhn and Complete Mechanical Solutions, Inc. were dismissed by stipulation on September 15, 2011; thus, we refer to Nova Verta USA, Inc. as “defendant” in this opinion.

Commission Act, MCL 600.2961 *et seq.* Plaintiff also alleged a breach of contract claim arising from defendant's violation of its contractual agreement with plaintiff, which included that plaintiff would provide services to defendant related to distribution, construction, sales, and servicing of defendant's products in the metropolitan Detroit area.

Defendant responded to plaintiff's complaint with a motion for summary disposition based on lack of personal jurisdiction, MCR 2.116(C)(1). Defendant argued that it was based in the State of Washington, had no presence in Michigan, did not maintain employees or property in Michigan, and did not have "systematic and continuous business operations in Michigan." Defendant acknowledged that plaintiff "has in the past sold [defendant's] products to [plaintiff's] customers." In that regard, defendant offered plaintiff discounted pricing, and plaintiff sold defendant's products to plaintiff's customers at an increased price. In 2004, plaintiff ordered products from defendant to sell to plaintiff's customer, Exhibit Works. When Exhibit Works decided to purchase directly from defendant instead, defendant completed the sale but paid plaintiff an amount equal to plaintiff's net profit if the sale had gone as originally contemplated. However, defendant argued, since that sale it had not sold any products to Exhibit Works for use in Michigan. A sale in 2007 to Exhibit Works in North Carolina occurred, but it was not facilitated by plaintiff. In any case, defendant argued, plaintiff could not show sufficient minimum contacts with the State of Michigan to satisfy due process requirements, as its contacts had been "sporadic at best, not continuous and systematic." Moreover, "its response to business opportunities in Michigan is passive insofar as it historically sold to Plaintiff at Plaintiff's initiation of an order to the State of Washington." Further, plaintiff's cause of action did not arise from defendant's activities in the State of Michigan. Defendant supported its motion with the affidavit of its operations manager, Chris Gumm.

Plaintiff responded to defendant's motion, arguing that defendant sells its products throughout the United States through distributors including plaintiff. Defendant required that plaintiff, as its Michigan distributor, enter into an exclusive relationship which restricted plaintiff from selling competitors' products and effectively made plaintiff its agent. Plaintiff attached defendant's "USA Sales Policy and Distributor Requirements" in support of its claim, as well as the affidavit of Shawn Larsen, owner and employee of plaintiff. Plaintiff also argued that defendant "has systematically and continuously sold, distributed, and consulted and advertised its products to the public in Michigan." Further, plaintiff was part of defendant's sales distribution network for ten years, as evidenced by the exclusive sales distributor agreement that plaintiff was required to enter into with defendant. Accordingly, plaintiff argued, defendant had "more than sufficient systematic and continuous business, and minimum contacts under MCL 600.711 or 600.715 to give this Court jurisdiction."

Following oral arguments, the trial court denied defendant's motion and permitted discovery limited to the issue of personal jurisdiction. Subsequently, defendant filed its renewed motion for summary disposition for lack of jurisdiction, arguing that discovery had been completed and "the fundamental facts and legal results remain unchanged."

Plaintiff responded, arguing that it was entitled to a sales commission on an Exhibit Works' project that was negotiated in Michigan. Plaintiff claimed that the underlying work that was the basis of the sales commission, including all negotiations and all transfer of monies, took place in this state with regard to that sale. The sales commission plaintiff lost was in excess of

\$200,000. Plaintiff also argued that it had a contract with Exhibit Works regarding the maintenance and servicing of defendant's paint booths purchased by and installed at Exhibit Works' facility in Livonia, Michigan. However, as a result of defendant's actions, plaintiff's contract was not fulfilled by Exhibit Works, causing a loss to plaintiff in excess of \$50,000. And as a result of defendant's actions, Exhibit Works entered into a service agreement with defendant on June 7, 2007, which would have otherwise gone to plaintiff. That service agreement provided that it was governed by Michigan law. Plaintiff argued that defendant carried on a continuous and systematic part of its general business in Michigan, and attached the deposition testimony of two of defendant's employees. Plaintiff had been defendant's exclusive Michigan distributor for ten years. The products and services sold by defendant to Exhibit Works, a Michigan company, netted defendant over \$500,000, alone. Further, the affidavit of Chris Gumm, which was relied on by defendant in support of this motion, was in significant part refuted during his deposition. The deposition of another employee of defendant's also reveals significant contacts with this state. These depositions were attached to plaintiff's response.

Following oral arguments on defendant's motion, the trial court noted that it read the depositions of defendant's employees. The trial court then held as follows:

The only contact [defendant] has, as far as I'm concerned, and they're in the business of selling spray booths for use in body shops. They're prime place of business is in the state of Washington. They're not registered nor do they conduct regularly any business in Michigan. They have no presence in Michigan, no employees or property. The last time they had a significant contact with the plaintiff was in 2004. Motion granted.

This appeal followed.

Plaintiff argues that the trial court erroneously concluded that it lacked personal jurisdiction over defendant. We agree.

This Court reviews de novo a trial court's jurisdiction rulings. The plaintiff has the burden of establishing that the court has personal jurisdiction over a 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). All documentary evidence submitted by the parties must be considered by the court, and all factual disputes are resolved in plaintiff's favor for the purpose of deciding the motion. *Id.*

Pursuant to MCL 600.711, a Michigan court may exercise general personal jurisdiction over a defendant corporation, adjudicating claims that do not arise out of its contacts with Michigan, when the corporation (1) is incorporated under Michigan laws, (2) consents to jurisdiction, or (3) carries on a continuous and systematic part of its general business within this state. *Electrolines, Inc v Prudential Assurance Co, Ltd*, 260 Mich App 144, 166-167; 677 NW2d 874 (2003). In this case, defendant is not incorporated under the laws of this state and did not consent to jurisdiction; thus, we turn to whether it carried on a continuous and systematic part of its general business within this state.

In determining whether a corporation carries on a “continuous and systematic part of its general business” in this state, we may consider whether the corporation has a place of business, officers, employees, or bank accounts in this state. See *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 428; 633 NW2d 408 (2001). We may also consider defendant’s conduct, including its solicitation of sales, sales presence, purchases, and actual sales in this state. See *Helzer v F Joseph Lamb Co*, 171 Mich App 6, 11; 429 NW2d 835 (1988); *Lincoln v Fairfield-Nobel Co*, 76 Mich App 514, 518; 257 NW2d 148 (1977); *Kircos v Goodyear Tire & Rubber Co*, 70 Mich App 612, 614; 247 NW2d 316 (1976). As succinctly stated by the United States Supreme Court, general jurisdiction may be asserted over foreign corporations when “their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.” *Goodyear Dunlop Tires Operations, SA v Brown*, ___ US ___; 131 S Ct 2846, 2851; 180 L Ed 2d 796 (2011).

In this case, plaintiff has failed to establish that defendant carries on a “continuous and systematic part of its general business” in this state. Plaintiff’s arguments that it had been a distributor of defendant’s products for several years and that defendant entered into contracts with one company in Michigan several years ago are unavailing. Simply stated, even if true, plaintiff’s assertions do not lead to the conclusions that defendant carried on a continuous and systematic part of its general business within this state or that defendant’s affiliations with this state are such that defendant would be “essentially at home” in Michigan. See *id.* Accordingly, plaintiff has failed to make a prima facie showing that the connection between defendant and the State of Michigan constitutes a sufficient basis for the exercise of general jurisdiction.

Pursuant to MCL 600.715, however, a Michigan court may exercise limited or specific jurisdiction over a corporation, adjudicating claims that arise out of its contacts with this state, when the corporation transacts any business within the state. MCL 600.715(1); see, also, *Goodyear Dunlop Tires Operations*, 131 US at 2853. As this Court has previously explained, the term “transact” means “to carry on or conduct (business, negotiations, etc.) to a conclusion or settlement.” *Oberlies*, 246 Mich App at 430, quoting *Random House Webster’s College Dictionary* (1997). The definition of the word “business” includes “the purchase and sale of goods in an attempt to make a profit.” *Oberlies*, 246 Mich App at 430. And the use of the term “any” by our Legislature “establishes that even the slightest transaction is sufficient to bring a corporation within Michigan’s long-arm jurisdiction.” *Id.* In this case, it is undisputed that defendant transacted business in Michigan. At minimum, defendant sold Exhibit Works, a Michigan-based company, its products for use in Michigan in 2004. Further, in 2007, defendant entered into a service contract with Exhibit Works, which is headquartered in Livonia, Michigan. Thus, jurisdiction is authorized under MCL 600.715.

Even if jurisdiction is authorized under MCL 600.715, we must still consider whether the exercise of jurisdiction is consistent with the requirements of the Due Process Clause of the Fourteenth Amendment. *Green v Wilson*, 455 Mich 342, 347-351; 565 NW2d 813 (1997); *Oberlies*, 246 Mich App at 432-433. The exercise of jurisdiction over the defendant is considered fair and reasonable only if the defendant purposely established sufficient minimum contacts with this state. *Jeffrey*, 448 Mich at 186; *Oberlies*, 246 Mich App at 433. A three-part test is employed to determine whether the defendant’s contacts have been sufficient to subject defendant to adjudication in Michigan:

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. [*Jeffrey*, 448 Mich at 186 (citation omitted).]

A defendant is deemed to have "purposefully availed himself of the privilege of conducting activities in Michigan" if it deliberately undertook to do or cause an act to be done in Michigan or engaged in "conduct which can be properly regarded as a prime generating cause of the effects resulting in Michigan, something more than a passive availment of Michigan opportunities." *Id.* at 187-188 (citation omitted). Further, it is the relationship of the defendant, this state, and the litigation that is significant. "The defendant's own conduct and connection with the forum must be examined in order to determine whether the defendant should reasonably anticipate being haled into court there. The unilateral acts of unrelated third parties may not be used to justify the imposition of personal jurisdiction." *Jeffrey*, 448 Mich at 187 (citation omitted).

In this case, first, defendant purposefully availed itself of the privilege of conducting business in Michigan. Plaintiff was a distributor of defendant's products in Michigan for ten years. In 2004, plaintiff secured a sale of defendant's products to Exhibit Works, a Michigan-based company. Subsequently, defendant directly sold those products to Exhibit Works and compensated plaintiff for that sale. Thus, defendant's sale resulted from plaintiff's efforts either as a distributor or, as plaintiff argues, as a sales representative.² That is, the sale was solicited, and secured, by plaintiff in Michigan and plaintiff received compensation for that sale from defendant. Then, in 2007, defendant sold additional products to Exhibit Works for use in its North Carolina facility and also entered into a service contract with that same Michigan company related to defendant's products. That contract provided, in relevant part, that it "shall be governed in all respects by the law of Michigan applicable to agreements negotiated, executed and performed in Michigan." Further, in the affidavit of Shawn Larsen, owner and employee of plaintiff, Larsen averred that defendant's spray booths sold in Michigan, including to Exhibit Works, would require periodic servicing and parts which are exclusive to defendant, yet Larsen had not been contacted to provide either. Defendant's operations manager and national sales manager were deposed and did not provide any information regarding sales in Michigan during the last several years to refute Larsen's claims.³ Thus, we conclude that defendant purposefully availed itself of the privilege of engaging in business transactions directly with Michigan residents.

Second, the issues presented in plaintiff's cause of action derive from or are connected with those Michigan transactions. Specifically, plaintiff claims that it is entitled to commissions related to the sale of additional products to Exhibit Works, for use in their facility located in

² See MCL 600.2961(e).

³ In response to numerous questions related to Michigan sales, both Brad Kennison and Chris Gumm repeatedly responded that they did not know or did not recall the information.

Michigan, as well as for products sold to Exhibit Works' North Carolina facility, which resulted from plaintiff's efforts to solicit and secure business for defendant from Exhibit Works. Further, plaintiff claims that defendant breached their contract, which included that plaintiff would be the exclusive distributor of defendant's products, as well as the exclusive service provider, for leads generated by plaintiff in Michigan. Thus, plaintiff's cause of action arises out of defendant's activities in Michigan.

Third, defendant's activities are substantially connected with Michigan such that the exercise of jurisdiction over defendant is reasonable. Defendant engaged plaintiff as a distributor, at minimum, and possibly as a sales representative, to sell defendant's products to Michigan-based companies, and to service defendant's products in this and other states. As a consequence, plaintiff solicited and secured a business transaction for defendant with Exhibit Works, a Michigan company, which purchased defendant's products. Defendant compensated plaintiff for the sale. Then, as a consequence of that successful business transaction, plaintiff alleges, Exhibit Works purchased additional products from defendant, including for its facility located in North Carolina, but plaintiff was not compensated for those sales. Plaintiff also had a service contract with Exhibit Works, to service the products it purchased from defendant, but defendant interfered with that contractual relationship by entering directly into a service contract with Exhibit Works. Defendant's contract with Exhibit Works was governed by Michigan law. In light of defendant's significant business activities, including contracting activities, it is reasonable to require defendant to defend an action in Michigan.

Finally, although the threshold requirement of minimum contacts is satisfied, we must still consider whether the exercise of personal jurisdiction comports with fair play and substantial justice. See *Jeffrey*, 448 Mich at 188-189. As explained by our Supreme Court in *Jeffrey*:

Factors that may be weighed in appropriate cases include the burden on the defendant, 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. These factors may sometime serve to establish the reasonableness of jurisdiction on a lesser showing of minimum contacts. To defeat jurisdiction, a defendant who has purposefully directed its activities at forum residents must present a compelling case that the presence of some other considerations render jurisdiction unreasonable. [*Id.* at 189 (citations omitted.)]

Under the facts of this case, we conclude that the exercise of personal jurisdiction over defendant comports with fair play and substantial justice. Defendant had a long-term business relationship with plaintiff, a Michigan corporation, which has a significant interest in obtaining convenient and effective relief on its claims. Defendant has transacted significant business in Michigan, particularly with Exhibit Works, a Michigan company. As our Supreme Court noted in *Jeffrey*, "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *Id.* at 203, quoting *McGee v Int'l Life Ins Co*, 355 US 220, 223; 78 S Ct 199; 2 L Ed 2d 223 (1957). While defendant may be inconvenienced by having to litigate plaintiff's claims in Michigan, such burden does not rise to a constitutional violation. Further, defendant has failed to "present a

compelling case that the presence of some other considerations render jurisdiction unreasonable.” *Jeffrey*, 448 Mich at 189.

In summary, resolving all factual disputes in plaintiff’s favor, we conclude that plaintiff made a prima facie showing, sufficient to defeat defendant’s motion for summary disposition, that the trial court may exercise personal jurisdiction over defendant. See *id.* at 184. Accordingly, we reverse the trial court’s order granting defendant’s motion for summary disposition for lack of jurisdiction and remand for further proceedings consistent with this opinion. We express no opinion regarding the merits of plaintiff’s claims.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Douglas B. Shapiro