[Cite as *Hawkins v. Integrity House, Inc.*, 2009-Ohio-5893.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

JOHN HAWKINS,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2008-L-120**
- vs -	:	
INTEGRITY HOUSE, INC.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 07 CV 001291.

Judgment: Affirmed.

Judson J. Hawkins, Center Plaza North, 35353 Curtis Boulevard, #441, Eastlake, OH 44095 (For Plaintiff-Appellant).

Rosemary Taft Milby and *Matthew G. Burg*, Weltman, Weinberg & Reis Co., L.P.A., Lakeside Place, #200, 323 West Lakeside Avenue, Cleveland, OH 44113-1099 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, John Hawkins, appeals from the July 9, 2008 judgment entry of the Lake County Court of Common Pleas, granting the motion for summary judgment of appellee, Integrity House, Inc.

{¶2} Appellant, an Ohio resident, and Judith Rodriguez ("Rodriguez"), a California resident, are the parents of Annie Hawkins ("Annie"). According to appellant's affidavit, in June of 2003, at the request of Rodriguez, he agreed to take custody of Annie, who was then a minor teenager. Annie moved from California to Ohio. In June

of 2004, appellant contacted Rodriguez and requested that she take custody of Annie. Rodriguez refused but suggested putting their daughter, who apparently was a troubled teen, in a boot camp. Appellant agreed to this alternative. Appellant and Rodriguez discussed how much each would pay for such services.

{¶3} Rodriguez made arrangements for Annie to be placed in appellee's facility in Utah. Rodriguez sent appellant the written contract for appellee's services. Appellant maintains that he did not read the contract and accompanying documents, but signed the contract, had it notarized, and returned it to Rodriguez. Appellant also completed and signed numerous other forms related to Annie's placement, which included the following: a power of attorney; authorization for release of confidential information; permission for release of school records; consent for treatment; consent for emergency treatment; registration and release for psychotherapy; and interstate compact placement request.

{¶4} Appellant placed Annie on a flight to Las Vegas, Nevada, to be transported by Rodriguez to appellee's facility. At the time Annie was sent to Utah, she was a minor child under the care, custody, and control of appellant.

{¶5} In July of 2006, appellee filed suit against appellant in the Fifth District Court of Iron County in Utah, asserting breach of contract as a result of nonpayment. Appellant was served with the Utah complaint. However, he did not file an answer or otherwise defend the claim. The Utah court entered a default judgment against appellant for his nonpayment in the amount of $31,330.94. In April of 2007, following the award of default judgment, appellee filed an affidavit of foreign judgment with the

Lake County Court of Common Pleas, domesticating the Utah default judgment awarded to it against appellant.

{¶6} On May 4, 2007, appellant filed a complaint for declaratory relief, requesting the trial court to enter a judgment declaring that the state of Utah and therefore, appellee, lacked personal jurisdiction over him and that the default judgment appellee had obtained against him for $31,330.94 was void. On July 16, 2007, appellee filed an answer.

{¶7} On October 2, 2007, appellee filed a motion for summary judgment. On June 13, 2008, appellant filed a brief in opposition to appellee's motion for summary judgment.

{¶8} Pursuant to its July 9, 2008 judgment entry, the trial court found that the forum selection clause is valid and enforceable, and that the Utah court had personal jurisdiction over appellant. The trial court granted appellee's motion for summary judgment and dismissed appellant's complaint. It is from that judgment that appellant filed a timely appeal, asserting the following assignments of error for our review:

{¶9} "[1.] The Trial court Erred When It Granted Defendant's Motion for Summary Judgment Because Plaintiff Demonstrated the Forum-selection Clause and the Choice of Law Clause Did Not Confer Specific Personal Jurisdiction over Plaintiff on the State of Utah.

{¶10} "[2.] The Trial court Erred to Plaintiff's Prejudice When It Held That Utah's Long Arm Statute Conferred Specific Personal Jurisdiction over Plaintiff on Utah.

{¶11} "[3.] The Trail (sic) Court Erred to Plaintiff's Prejudice When It Held That the Forum-Selection Clause and the Choice of Law Were Enforceable Despite the Fact That the Plaintiff Was Induced to Sign the Contract by Fraud.

{¶12} "[4.] The Trial Court Erred to the Prejudice of Plaintiff When It Held That the Enforcement of the Foreign Judgment Against Plaintiff Is Fair and/or Reasonable.

{¶13} "[5.] The Court Erred to the Prejudice of the Plaintiff When It Denied Plaintiff's Motion for (sic) Conduct an Evidentiary Hearing."

{¶14} Preliminarily, we note that "[t]his court reviews de novo a trial court's order granting summary judgment." *Hudspath v. Cafaro Co.*, 11th Dist. No. 2004-A-0073, 2005-Ohio-6911, at ¶8, citing *Hagood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, at ¶13. "'A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law.'" Id.

{¶15} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [(1996), 75 Ohio St.3d 280, 296,] the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no

evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, ***." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶40. (Parallel citations omitted.)

{¶16} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, ***, is too broad and fails to account for the burden Civ.R. 56 places upon a *moving* party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff.* (Emphasis added.)" Id. at ¶41. (Parallel citations omitted.)

{¶17} "The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, 'and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' Id. at 276. (Emphasis added.)" Id. at ¶42.

{¶18} In his first assignment of error, appellant argues that the trial court erred by granting appellee's motion for summary judgment because he demonstrated the forum-selection clause and the choice of law clause did not confer specific personal jurisdiction over him on the state of Utah.

{¶19} Forum selection clauses should be distinguished between commercial and noncommercial parties. See *Preferred Capital, Inc. v. Power Engineering Group, Inc.*, 112 Ohio St.3d 429, 2007-Ohio-257, at ¶8, citing *Kennecorp Mtge. Brokers, Inc. v. Country Club Convalescent Hosp., Inc.* (1993), 66 Ohio St.3d 173.

{¶20} "*** [T]he commercial nature of a contract is a vital factor weighing in favor of enforcement of the forum-selection clause. See [*Kennecorp*, supra] at syllabus. Commercial forum-selection clauses between for-profit business entities are prima facie valid. See id. at 175 ***. By contrast, in Ohio, forum-selection clauses are less readily enforceable against consumers. See *Copelco Capital, Inc. v. St. Mark's Presbyterian Church* (Feb. 1, 2001), 8th Dist. No. 77633, 2001 Ohio App. LEXIS 315. The federal courts, however, have held that forum-selection clauses are presumptively valid even in form contracts, or contracts of adhesion, arising between a cruise line and its noncommercial, consumer passengers. See *Carnival Cruise Lines, Inc. v. Shute* (1991), 499 U.S. 585 ***." *Info. Leasing Corp. v. Jaskot*, 151 Ohio App.3d 546, 2003-Ohio-566, at ¶13. (Parallel citations omitted.)

{¶21} In *Valley Imports, Inc. v. Simonetti* (Mar. 15, 1991), 11th Dist. No. 90-L-14-080, 1991 Ohio App. LEXIS 1052, at 2-3, this court stated:

{¶22} "*** [A] foreign judgment is subject to collateral attack if jurisdiction is questioned.

{¶23} "'A judgment of a sister state's court is subject to collateral attack in Ohio if there was no subject matter or personal jurisdiction to render the judgment under the sister state's internal law, and under that law the judgment is void; (***) *Litsinger Sign Co., Inc. v. American Sign Co.* (1967), 11 Ohio St.2d 1, syllabus paragraph one.'

{¶24} "If, however, the defendant has submitted to the jurisdiction of the sister state, collateral attack is precluded. *Speyer v. Continental Sports Cars, Inc.* (1986), 34 Ohio App.3d 272. The procedural law of the state, where the original judgment was rendered, governs the issue of personal jurisdiction."

{¶25} The case at bar deals with a noncommercial transaction. The agreement between appellant and appellee contains an express choice of jurisdiction and choice of law provision, which provides:

{¶26} "**8. CHOICE OF JURISDICTION, LAW, AND OTHER MATTER –** Sponsor(s) agree to be subject to jurisdiction of Utah Courts in any dispute between the parties of this agreement. The parties agree that this agreement constitutes a business transaction in subject to the provisions of Title 78, Chapter 27, Section 24, of the Utah Code Annotated 1953 and as amended. Moreover, the parties agree that Utah law shall govern this agreement. Failure of either party to enforce any term or provision of this agreement shall not constitute or be constructed as a waiver of such term or provision of the right to enforce it. If any provision of this agreement is construed as overbroad as written, the remaining provisions shall remain enforceable according to applicable law."

{¶27} Based on the foregoing, although appellant is a consumer and this is a noncommercial transaction, appellant agreed to be subject to the jurisdiction of the

courts in Utah, and the parties agreed that Utah law would govern the agreement. Thus, the question of whether the Utah court had personal jurisdiction over appellant must be decided under Utah law.

{¶28} The Supreme Court of Utah in *Phone Directories Co., Inc. v. Henderson* (2000), 8 P.3d 256, 261, stated:

{¶29} "*** [W]hile a forum selection/consent-to-jurisdiction clause by itself is not sufficient to confer personal jurisdiction over a defendant as a matter of law, such clauses do create a presumption in favor of jurisdiction and will be upheld as fair and reasonable so long as there is a rational nexus between the forum selected and/or consented to, and either the parties to the contract or the transactions that are the subject matter of the contract." The Supreme Court of Utah further indicated that "*** people are generally free to bind themselves pursuant to any contract, barring such things as illegality of subject matter or legal incapacity." Id.

{¶30} Here, we conclude that the forum selection/consent-to-jurisdiction clause in the parties' agreement, specifying Utah as the appropriate jurisdiction to resolve claims under the contract, creates a rebuttable presumption that the Utah court had personal jurisdiction over appellant. See *Phone Directories*, supra, at 262. In addition, the record establishes the necessary rational nexus: appellant consented to Utah's jurisdiction under the agreement; appellee's principal place of business is in Utah; appellant contracted for services to be provided in Utah**;** and appellant agreed to send and sent Annie to Utah. The forum selection/consent-to-jurisdiction clause is fair and reasonable. Because there is a rational nexus between Utah and the parties, as well as the subject matter of the agreement, the Utah court had personal jurisdiction over

appellant. Id.; see, also, *Jacobsen Constr. Co., Inc. v. Teton Builders* (2005), 106 P.3d 719, at ¶32-39.

{¶31} Appellant argues that Ohio public policy prevents obtaining jurisdiction over consumers through the use of forum selection clauses, relying on R.C. 2307.39. R.C. 2307.39 provides that any person may bring a civil action in Ohio against an out-of-state defendant, regardless of whether the cause of action bears a reasonable relation to Ohio, if the cause of action arises out of a contract which includes an agreement that the parties submit to the jurisdiction of Ohio courts and agree to be governed by Ohio law. R.C. 2307.39 indicates that it does not apply to consumer transactions. However, R.C. 2307.39(C) provides that it applies to transactions covered by R.C. 1301.05, which relates to commercial transactions. R.C. 2307.39(D) states that "[t]his section does not limit or deny, and shall not be construed as limiting or denying the enforcement of a provision respecting choice of law or choice of forum in a contract, agreement, or undertaking to which this section does not apply." Thus, by its own terms, R.C. 2307.39 does not affect the enforceability of a choice of forum clause in a consumer transaction.

{¶32} Appellant's first assignment of error is without merit.

{¶33} In his second assignment of error, appellant contends that the trial court erred when it held that Utah's long arm statute conferred specific personal jurisdiction over him on Utah.

{¶34} Although appellant alleges that the trial court erred by holding that Utah's long arm statute conferred specific personal jurisdiction over him, the record reveals that the trial court never made such a holding. Rather, as previously addressed, the

trial court properly determined that a different inquiry is required in cases involving contractual forum selection/consent-to-jurisdiction clauses, i.e., the rational nexus standard pronounced by the Supreme Court of Utah in *Phone Directories*. We note that "[i]t is a well established rule of appellate review that a court will not consider issues that an appellant fails to raise initially at the trial court." *Warmuth v. Sailors*, 11th Dist. No. 2007-L-198, 2008-Ohio-3065, at ¶36. However, even assuming arguendo that Utah's long arm statute and Utah's traditional three-part inquiry to determine personal jurisdiction apply, the exercise of personal jurisdiction over appellant by the Utah court was still proper.

{¶35} In the absence of a forum selection clause, a three-part inquiry is used to determine specific personal jurisdiction under Utah law: "(1) the defendant's acts or contacts must implicate Utah under the Utah long-arm statute; (2) a 'nexus' must exist between the plaintiff's claims and the defendant's acts or contacts; and (3) application of the Utah long-arm statute must satisfy the requirements of federal due process." *Phone Directories*, supra, at 260, citing *Harnischfeger Eng'rs., Inc. v. Uniflo Conveyor, Inc.* (D.Utah 1995), 883 F. Supp. 608, 612-13.

{¶36} First, "Utah's long-arm statute subjects any person to personal jurisdiction in Utah concerning any claim arising from *** the transaction of any business within this state[.]" *Neways, Inc. v. McCausland* (1997), 950 P.2d 420, 422, citing Utah Code Ann. 78-27-24. In the instant case, appellant was subjected to Utah's jurisdiction under its long-arm statute due to the fact that he contracted with appellee for its services to house and care for his minor daughter in Utah.

{¶37} Second, as previously discussed in appellant's first assignment of error, because there is a rational nexus between Utah and the parties, as well as the subject matter of the agreement, the Utah court had personal jurisdiction over appellant.

{¶38} Third, the application of Utah's long-arm statute satisfies federal due process since the record establishes that appellant has had "'certain minimum contacts with [Utah] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" *Rush v. Savchuk* (1980), 444 U.S. 320, 327, quoting *International Shoe Co*. *v*. *Washington* (1945), 326 U.S. 310, 316. "In determining whether a particular exercise of state-court jurisdiction is consistent with due process, the inquiry must focus on 'the relationship among the defendant, the forum, and the litigation.'" *Rush*, supra, at 327, quoting *Shaffer v. Heitner* (1977), 433 U.S. 186, 204.

{¶39} Applying the *Harnischfeger* three-part inquiry additionally establishes that the Utah court had specific personal jurisdiction over appellant, as all three prongs are satisfied.

{¶40} Appellant's second assignment of error is without merit.

{¶41} In his third assignment of error, appellant alleges that the trial court erred by holding that the forum-selection clause and the choice of law were enforceable despite the fact that he was induced to sign the contract by fraud.

{¶42} We note that appellant did not allege fraud in his complaint. Again, "[i]t is a well established rule of appellate review that a court will not consider issues that an appellant fails to raise initially at the trial court." *Warmuth*, supra, at ¶36. However, because he raised in his affidavit filed in opposition to appellee's motion for summary

judgment that he relied on misrepresentations made to him by Rodriguez prior to signing the contract, we will address that issue here.

{¶43} In *Jacobsen*, supra, at 723, the Supreme Court of Utah held:

{¶44} "*** [T]he Wyoming Supreme Court [in *Durdahl v. Natl. Safety Assoc., Inc.*, (Wyo. 1999), 988 P.2d 525] adopted the modern approach to forum selection clauses, holding that such clauses 'are *prima facie* valid and will be enforced absent a demonstration by the party opposing enforcement that the clause is unreasonable or based upon fraud or unequal bargaining positions.' Id. at 528. A party seeking to avoid enforcement of such a clause must provide 'evidence that the forum selection clause is unreasonable, against any public policy of this state, or that the forum of choice . . . is seriously inconvenient.' Id. at 530." (Emphasis sic.)

{¶45} The *Jacobsen* court further indicated at fn. 3: "[t]he analysis utilized in *Durdahl* appears consistent with the approach outlined in section 80 of the Second Restatement of Conflict of Laws, which has been adopted by the majority of jurisdictions, including Utah. See *Prows v. Pinpoint Retail Sys., Inc*., 868 P.2d 809, 812 (Utah 1993) ('The modern view adopted by a majority of courts and which we adopt today is set forth in section 80 of the Second Restatement of Conflict of Laws . . . .')."

{¶46} A party that challenges a forum-selection clause on the basis that it was induced by fraud or other unconscionable means, i.e., misrepresentation, bears a heavy burden. See *Prows*, supra, at 812.

{¶47} In the case sub judice, appellant's sole allegation of fraud/misrepresentation solely relates to the actions of Rodriguez, not the actions of appellee. Also, appellant fails to reference fraud/misrepresentation with respect to the

choice of jurisdiction and governing law provision or the form and content of the written agreement. Thus, appellant's alleged fraud/misrepresentation claim must fail. See, generally, *Prows*, supra. In addition, as we previously determined that the forum-selection clause satisfies the rational nexus standard, we find no merit in appellant's claim here that the forum-selection clause is unreasonable and unfair. See *Phone Directories*, supra, at 261.

{¶48} Appellant's third assignment of error is without merit.

{¶49} In his fourth assignment of error, appellant maintains that the trial court erred when it held that the enforcement of the foreign judgment against him is fair and/or reasonable.

{¶50} The Supreme Court of Ohio in *Wyatt v. Wyatt* (1992), 65 Ohio St.3d 268, 270-271, faced with a similar situation, stated:

{¶51} "This is the crux of the case: Can the plaintiff relitigate in Ohio the same issue that has been litigated and decided by an Alaska court? The answer is no. Since the Alaska judgment appears on its face to be a record of a court of general jurisdiction and jurisdiction has not been disproved by the record or by extrinsic evidence, this court must accept Alaska's factual determination on this issue, even if it is legally or factually incorrect. *Milliken v. Meyer* (1940), 311 U.S. 457 ***, rehearing denied (1941), 312 U.S. 712 ***. We are not permitted to re-examine the merits of plaintiff's claim. *Dressler v. Bowling* (1986), 24 Ohio St.3d 14, 16 ***." (Parallel citations omitted.)

{¶52} Here, appellant attacks the merits of the underlying default judgment from the Utah court. However, based on *Wyatt*, supra, he is precluded from doing so, as a foreign judgment cannot be attacked on its substantive merits.

{¶53} Appellant's fourth assignment of error is without merit.

{¶54} In his fifth assignment of error, appellant contends that the trial court erred by denying his motion to conduct an evidentiary hearing.

{¶55} This court has indicated that a hearing is required only where operative facts are alleged that create an issue as to jurisdiction. *Valley Imports*, supra, at 5-7. In this case, the trial court did not err by failing to hold a hearing due to the fact that no material issues of genuine fact exist relating to the underlying Utah court's judgment, and appellant failed to allege operative facts warranting a hearing.

{¶56} Appellant's fifth assignment of error is without merit.

{¶57} Accordingly, the trial court properly granted appellee's motion for summary judgment.

{¶58} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Lake County Court of Common Pleas is affirmed. It is ordered that appellant is assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.