

[Cite as *ComDoc v. Derzack*, 2009-Ohio-2998.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COMDOC

C.A. No. 24212

Appellee

v.

ADVANCE PRINT COPY SHIP CENTER,
and KAREN DERZACK

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 07 01 0893

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 24, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Advanced Print, Copy & Ship Center Inc. leased copy machines from ComDoc. Karen Derzack personally guaranteed Advanced’s performance under the lease. After Advanced stopped making payments, ComDoc sued Ms. Derzack. The trial court found in favor of ComDoc, awarding it \$18,009. Ms. Derzack has appealed, assigning seven errors. This Court affirms because the trial court had jurisdiction over her, ComDoc’s dismissal of its previous action against her was without prejudice, the lease was valid, the trial court exercised proper discretion when it allowed ComDoc to introduce documents disclosed only a few days before trial, and Ms. Derzack failed to prove fraud, duress, undue influence, release, or that ComDoc breached the lease agreement.

PERSONAL JURISDICTION

{¶2} Ms. Derzack’s first assignment of error is that the trial court lacked personal jurisdiction over her. She has argued that the court did not have jurisdiction over her because she resides in Pennsylvania and all of her dealings with ComDoc were in that state. The trial court determined that Ms. Derzack “had substantial contact with Ohio concerning this transaction [because ComDoc’s] office from which the equipment lease at issue was administered is in Summit County.”

{¶3} “Once a defendant has challenged the trial court’s personal jurisdiction over him or her, ‘the plaintiff . . . bears the burden of proving jurisdiction by a preponderance of the evidence.’” *McKinley Mach. Inc. v. Acme Corrugated Box Co. Inc.*, 9th Dist. No. 98CA007160, 2000 WL 961300 at *1 (July 12, 2000) (quoting *Giachetti v. Holmes*, 14 Ohio App. 3d 306, 307 (1984)). “In deciding if an Ohio court has personal jurisdiction over a nonresident defendant, [this Court] must determine (1) whether Ohio’s long-arm statute, R.C. 2307.382, and the applicable Rule of Civil Procedure, Civ.R. 4.3(A), confer personal jurisdiction and, if so, (2) whether granting jurisdiction under the statute and rule would deprive the nonresident defendant of the right to due process of law under the Fourteenth Amendment to the United States Constitution.” *State ex rel. Toma v. Corrigan*, 92 Ohio St. 3d 589, 592 (2001).

{¶4} Regarding the long-arm statute, Section 2307.38.2(A)(1) of the Ohio Revised Code provides that “[a] court may exercise personal jurisdiction over a person . . . as to a cause of action arising from the person’s . . . [t]ransacting any business in this state.” See also Civ. R. 4.3(A)(1). ComDoc presented evidence that it entered into a leasing agreement with Advanced and that Ms. Derzack personally guaranteed the lease. The Ohio Supreme Court has held that “[a] commercial nonresident lessee, for purposes of personal jurisdiction, is ‘transacting any

business’ within the plain and common meaning of the phrase, where the lessee negotiates, and through the course of dealing becomes obligated, to make payments to its lessor in Ohio.” *Kentucky Oaks Mall Co. v. Mitchell’s Formal Wear Inc.*, 53 Ohio St. 3d 73, syllabus (1990) (quoting R.C. 2307.382). It follows that a corporate officer who agrees to personally guarantee a lease as part of her company’s negotiation of its terms is also “transacting any business” under Section 2307.38.2 and Rule 4.3(A) of the Ohio Rules of Civil Procedure.

{¶5} Regarding Ms. Derzack’s right to due process, “[i]t is well-established that ‘. . . due process requires only that in order to subject a defendant to a judgment *in personam*, if [s]he be not present within the territory of the forum, [s]he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.’” *Anilas Inc. v. Kern*, 31 Ohio St. 3d 163, 164 (1987) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). “In judging minimum contacts, a court properly focuses on ‘the relationship among the defendant, the forum, and the litigation.’” *Id.* (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). “[F]oreseeability is one of the primary factors to be considered in determining whether there are sufficient minimum contacts.” *Id.* “[T]he focus of analysis ought to be whether one *purposefully* established contacts with the forum state.” *Id.*

{¶6} In *Kern*, the Ohio Supreme Court concluded that “a corporate officer, who signed an agreement in her capacity as guarantor and . . . knew the corporate headquarters of the other contracting party to be located in a foreign state . . . should have reasonably expected that an action could be brought against her in [the other state].” *Id.* at 165. “Such knowing creation of ongoing obligations with a [foreign] corporation, it to provide equipment in Ohio and [the lessee] to deliver money to the corporate headquarters in [the other state], created minimum contacts [with the other state].” *Id.*

{¶7} ComDoc presented evidence that Advanced proposed the lease. It submitted copies of invoices it sent Advanced that instructed Advanced to send its payments to Akron, Ohio. ComDoc also presented evidence that Advanced made payments for two years before defaulting on the lease. Ms. Derzack testified that she was involved in proposing the lease. In light of her position as president of Advanced, the trial court reasonably could have inferred that she knew that the company's payments to ComDoc were being sent to Ohio. This Court concludes that, taking into account Advanced's ongoing relationship with ComDoc and Ms. Derzack's role in the company, ComDoc established that Ms. Derzack had minimum contacts with Ohio regarding her personal guarantee of the lease. The trial court, therefore, correctly concluded that it had jurisdiction over her. Ms. Derzack's first assignment of error is overruled.

CIVIL RULE 41

{¶8} Ms. Derzack's second assignment of error is that the trial court incorrectly concluded that ComDoc was not barred from pursuing its action against her. She has argued that, because ComDoc filed an earlier action against her and did not dismiss it until after the date set for trial, the dismissal of that case was with prejudice.

{¶9} In February 2006, ComDoc filed a complaint against Ms. Derzack in Stark County Common Pleas Court, alleging the same claims as in this case. In June 2006, the case was transferred to Summit County and trial was set for January 10, 2007. Ms. Derzack has alleged that she "showed up timely for trial," but ComDoc did not appear. On January 11, 2007, the clerk of courts docketed a notice of dismissal, which ComDoc wrote was filed under Rule 41(A) of the Ohio Rules of Civil Procedure. Ms. Derzack moved for the dismissal to be with prejudice, but the trial court denied her motion.

{¶10} After ComDoc filed this action, Ms. Derzack moved to dismiss, arguing that the dismissal of the earlier case should have been with prejudice under Rule 41(B) of the Ohio Rules of Civil Procedure for failure to prosecute. The trial court determined that, although ComDoc's notice of dismissal in the first case was not docketed until January 11, 2007, it had informed the court of its intent to dismiss the case on January 8, 2007, and had faxed the court a copy of its notice of dismissal on that day. The court concluded that, because it was aware of the dismissal before the commencement of trial, ComDoc complied with Civil Rule 41(A).

{¶11} Civil Rule 41(A)(1)(a) provides that "a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by . . . filing a notice of dismissal at any time before the commencement of trial" "[T]he right to one dismissal without prejudice is absolute under Civ.R. 41(A)(1)(a)." *Sturm v. Sturm*, 63 Ohio St. 3d 671, 675 (1992).

{¶12} "[A] civil trial commences when the jury is empaneled and sworn, or, in a bench trial, at opening statements." *Frazer v. Ellis Bros. Inc.*, 113 Ohio App. 3d 828, 831 (1996); see also *Douthitt v. Garrison*, 3 Ohio App.3d 254, 256 (1981). Although trial in the first action was scheduled for January 10, 2007, no jury was empaneled and sworn and no opening statements were given that day, apparently because of the trial court's knowledge that ComDoc planned to dismiss its case. Accordingly, when ComDoc filed its dismissal the next day, it was "before the commencement of trial" under Civil Rule 41(A). The trial court properly concluded that the dismissal was without prejudice. Ms. Derzack's second assignment of error is overruled.

LEASE AGREEMENT

{¶13} Ms. Derzack's fourth assignment of error is that the trial court incorrectly found that there was a valid lease agreement. Her argument is, in effect, that the trial court's finding that there was a lease was against the manifest weight of the evidence.

{¶14} In *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, at ¶26, the Ohio Supreme Court held that the test for whether a judgment is against the weight of the evidence in civil cases is different from the test applicable in criminal cases. According to the Supreme Court in *Wilson*, the standard applicable in civil cases “was explained in *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279.” *Id.* at ¶24. The “explanation” in *C.E. Morris* was that “[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” *Id.* (quoting *C.E. Morris Co.*, 54 Ohio St. 2d at 279); but see *Huntington Nat’l Bank v. Chappell*, 9th Dist. No. 06CA008979, 2007-Ohio-4344, at ¶17-75 (Dickinson, J., concurring).

{¶15} “Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.” *Kostelnik v. Helper*, 96 Ohio St. 3d 1, 2002-Ohio-2985, at ¶16 (quoting *Perlmutter Printing Co. v. Strome Inc.*, 436 F. Supp. 409, 414 (N.D. Ohio 1976)). Ms. Derzack has argued that there was no lease agreement because ComDoc did not deliver a fully-executed copy of it to Advanced. Her argument, therefore, is that ComDoc did not validly accept the lease proposal that she made.

{¶16} Section 1310.13(A) of the Ohio Revised Code provides that, “[u]nless otherwise unambiguously indicated by the language or circumstances, an offer to make a lease contract shall be construed as inviting acceptance in any manner and by any medium reasonable under the circumstances.” Ms. Derzack testified that Advanced completed a lease proposal and gave it to ComDoc’s sales representative. The trial court found that ComDoc executed the agreement on August 13, 2002, and, on September 1, 2002, delivered the copiers that Advanced had requested. This Court concludes that, even if ComDoc never gave Advanced a fully-executed copy of the

lease agreement, it communicated its acceptance of the proposal by delivering the requested copiers. Accordingly, the trial court's finding that there was a valid lease agreement is not against the manifest weight of the evidence. Ms. Derzack's fourth assignment of error is overruled.

DISCOVERY VIOLATIONS

{¶17} Ms. Derzack's third assignment of error is that the trial court incorrectly allowed ComDoc to continue its action even though it failed to provide discovery. She has argued that ComDoc failed to give her all the documents she requested on time. She has also argued that the trial court incorrectly allowed ComDoc to introduce documents that she did not receive from it until a few days before trial.

{¶18} In September 2007, Ms. Derzack propounded interrogatories, requests for admissions, and requests for production of documents on ComDoc. When ComDoc did not respond by the required deadline, she moved to dismiss. According to Ms. Derzack, after the trial court scheduled a hearing on her motion, ComDoc produced the discovery she had requested. Five days before trial, however, she received several new documents from ComDoc. One of those documents was a different copy of the lease agreement. Unlike the copy she had previously received, the new copy did not have fax headers, had reference numbers handwritten on it, contained information regarding payment dates, contained an acceptance date, and was executed by ComDoc. At trial, the court let ComDoc submit the copy with the additional information. Ms. Derzack has argued that the trial court improperly allowed the document because ComDoc did not give it to her until after the discovery deadline. She has also argued that the document was fabricated.

{¶19} The decision of whether to receive admissible evidence is within the sound discretion of the trial court. See *State v. Sage*, 31 Ohio St. 3d 173, paragraph two of the syllabus (1987). Unless the court has improperly exercised its discretion and “the defendant has been materially prejudiced thereby, [appellate courts] should be slow to interfere.” *State v. Hymore*, 9 Ohio St. 2d 122, 128 (1967).

{¶20} ComDoc submitted the lease agreement to prove that Ms. Derzack signed a provision agreeing to personally guarantee it. Ms. Derzack has not alleged that the personal guarantee section of the copy that ComDoc submitted at trial was different from the one it produced in response to her discovery requests. Although the document was different in some respects, the trial court told Ms. Derzack that it would continue the trial if she needed more time to address it. Ms. Derzack declined the trial court’s offer. Furthermore, although the changes in the fully-executed copy of the lease give additional support to ComDoc’s argument that it accepted Advanced’s proposal, this Court has already determined that ComDoc communicated its acceptance by delivering the requested machines. Ms. Derzack, therefore, has failed to show that she was materially prejudiced by the admission of the fully-executed lease agreement. Her third assignment of error is overruled.

AFFIRMATIVE DEFENSES

{¶21} Ms. Derzack’s fifth, sixth, and seventh assignments of error are that the trial court should not have allowed ComDoc to pursue its claims because it made misrepresentations, committed fraud in the inducement, exercised duress and undue influence, and breached the lease agreement. She has argued that, even if there was an agreement, ComDoc breached it by failing to service or provide supplies for the copiers. She has also argued that ComDoc’s sales representative lied to her when it told her that ComDoc would not approve the lease proposal

without her personal guarantee and that it would never seek to enforce the guarantee. She has further argued that ComDoc told her at the time it repossessed the copiers that Advanced would not owe any further compensation.

{¶22} Fraud, duress, undue influence, and release are affirmative defenses. Civ. R. 8(C); *Kingston Nat'l Bank v. Stulley*, 4th Dist. No. 443, 1990 WL 155741 at *4 (Sept. 28, 1990). Ms. Derzack, therefore, had the burden of proving them by a preponderance of the evidence. See *Ohio Loan & Disc. Co. v. Tyarks*, 173 Ohio St. 564, 568 (1962) (noting that the burden of proof for an affirmative defense “is on the one who asserts it.”). She testified that a ComDoc representative told her that ComDoc would provide Advanced with service and supplies for the copiers and that it would never use her personal guarantee. She said that, because ComDoc failed to provide service or supplies for the copiers, they stopped working. She also said that, when ComDoc removed the copiers from Advanced, ComDoc and Advanced mutually agreed to end their relationship.

{¶23} The lease agreement did not require ComDoc to provide Advanced with service or supplies. While ComDoc agreed to “pass along . . . all manufacturer warranties on this equipment,” it did not make any “warranty express or implied, including that the equipment is fit for a particular purpose or that the equipment is merchantable.” In addition, the trial court “[did] not find Ms. Derzack’s unsupported testimony persuasive that [ComDoc] breached the Lease Agreement . . . through a failure to provide supplies or service.” Furthermore, Ms. Derzack did not support her claim that ComDoc released Advanced from its obligations under the lease. This Court, therefore, concludes that the trial court’s finding that Ms. Derzack failed to prove her affirmative defenses is not against the manifest weight of the evidence. Ms. Derzack’s fifth, sixth, and seventh assignments of error are overruled.

CONCLUSION

{¶24} The trial court correctly concluded that it had personal jurisdiction, ComDoc's dismissal of a previous action against Ms. Derzack was without prejudice, the lease was valid, the trial court exercised proper discretion when it allowed ComDoc to submit a fully-executed copy of the lease agreement, and Ms. Derzack failed to prove fraud, duress, undue influence, release, or that ComDoc breached the lease. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

BELFANCE, J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶25} I respectfully dissent because I believe that the trial court erred by denying Ms. Derzack's motion to dismiss for lack of prosecution pursuant to Civ.R. 41(B).

{¶26} In this case, the matter was scheduled for trial on ComDoc's complaint on January 10, 2007. ComDoc's January 8, 2007 oral notification to the trial court of its intent to voluntarily dismiss its complaint pursuant to Civ.R. 41(A) did not constitute filing of the notice of dismissal. The trial court issued no order either dismissing the action or continuing the trial date based on ComDoc's notification. Accordingly, the matter remained scheduled for trial on January 10, 2007. Ms. Derzack appeared, prepared for trial, on January 10, 2007, while ComDoc failed to appear. ComDoc did not file its notice of dismissal until January 11, 2007, the day after the trial date. Accordingly, I would reverse and remand this matter to the trial court.

APPEARANCES:

KAREN DERZACK, pro se, appellant.

SARA M. DONNERSBACH, attorney at law, for appellee.