

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

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ENQUIP TECHNOLOGIES GROUP,	:	
INC., et al.	:	C.A. CASE NO. 2010-CA-23
Plaintiffs-Appellees	:	
	:	T.C. CASE NO. 08-CV-1276
vs.	:	
	:	(Civil Appeal from
TYCON TECHNOGLASS, S.r.l.,	:	Common Pleas Court)
et al.	:	
Defendants-Appellants	:	

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O P I N I O N

Rendered on the 10th day of December, 2010.

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GRADY, J.:

{¶1} Defendants, Pfaudler, Inc. ("Pfaudler") and Tycon Technoglass S.r.l. ("TyTg"), appeal from an order dismissing Thaletec, GmbH ("Thaletec") and Karl Bergmann from the underlying action based on comity and lack of personal jurisdiction.

{¶2} We set forth the history of the case in *Enquip Technologies Group, Inc. v. Tycon Technoglass, S.R.L.*, Greene App. Nos. 2009 CA 42, 2009 CA 47, 2010-Ohio-28. For purposes of context and convenience, we will summarize some of the facts herein.

{¶3} Robbins & Myers, Inc. ("R&M") is a company with headquarters in Greene County, Ohio. R&M indirectly owns two subsidiary corporations: (1) Pfaudler, a Delaware corporation with its principal place of business in New York; and (2) TyTg, an Italian corporation with its principal place of business in Italy.

{¶4} Robert W. and Jeffrey L. Naidel ("the Naidels"), who are father and son, own and operate Enquip and QA Technologies ("QA"), which are Florida companies. EnEquip acted as a commissioned sales representative for TyTg. QA was a sales representative for Thaletec, a German company owned by a group led by Karl Bergmann, a former executive of Pfaudler in Europe. Thaletec is a direct competitor of TyTg.

{¶5} TyTg terminated its agreement with EnEquip in June 2007. On June 27, 2008, Enquip and the Naidels commenced an action in Ohio against TyTg, R&M, Pfaudler, and other related companies.

Subsequently, EnQuip filed a Third Amended Complaint, alleging claims for breach of contract, tortious interference with business relationships, failure to pay commissions, fraud, and for an accounting.

{¶ 6} In response to the Third Amended Complaint, TyTg and Pfaudler brought counterclaims against Plaintiffs EnQuip and the Naidels, as well as the Naidels' company, QA, and against Thaletec and Bergmann, alleging misappropriation of trade secrets, tortious interference with business relationships, unfair competition, and civil conspiracy. Pfaudler and TyTg claimed that Enquip, the Naidels, QA, Thaletec, and Bergmann are using misappropriated, confidential information the Naidels obtained from TyTg and Bergmann obtained from Pfaudler to compete unfairly with Pfaudler and TyTg.

{¶ 7} QA filed a motion to dismiss for lack of personal jurisdiction, which the trial court granted on April 23, 2009.

Pfaudler and TyTg appealed from the trial court's decision. On January 8, 2010, we affirmed the trial court's decision to dismiss QA for lack of personal jurisdiction. *Enquip Technologies Group, Inc.*, 2010-Ohio-28.

{¶ 8} Thaletec and Bergmann subsequently filed a motion to dismiss the counterclaims of TyTg and Pfaudler pursuant to Civ.R. 12(B)(2), (3), (4), and (6). On April 6, 2010, the trial court

granted the motion and dismissed Thaletec and Bergmann from the action based on comity and lack of personal jurisdiction. Pfaudler and TyTg appeal from this order.

SECOND ASSIGNMENT OF ERROR

{¶ 9} "THE TRIAL COURT ERRED IN DISMISSING THALETEC AND BERGMANN FOR LACK OF PERSONAL JURISDICTION."

{¶ 10} Personal jurisdiction is a question of law that we review de novo. *Joffe v. Cable Tech, Inc.*, 163 Ohio App.3d 479, 2005-Ohio-4930, at ¶10. When a party moves for dismissal for lack of personal jurisdiction, the nonmoving party bears the burden of establishing the court's jurisdiction. *Jurko v. Jobs Europe Agency* (1975), 43 Ohio App.2d 79, 85. "Determining whether an Ohio trial court has personal jurisdiction over a nonresident defendant involves a two-step analysis: (1) whether the long-arm statute and the applicable rule of civil procedure confer jurisdiction and, if so, (2) whether the exercise of jurisdiction would deprive the nonresident defendant of the right to due process of law under the Fourteenth Amendment to the United States Constitution." *Kauffman Racing Equipment, L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-255, at ¶28 (citation omitted).

{¶ 11} Ohio's long-arm statute, R.C. 2307.382,¹ enumerates

¹ Civ.R. 4.3 allows service of process on nonresidents in certain circumstances and mirrors the long-arm statute.

specific acts that give rise to personal jurisdiction over non-residents² and provides, in part:

{¶ 12} "(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

{¶ 13} "(1) Transacting any business in this state;

{¶ 14} "(2) Contracting to supply services or goods in this state;

{¶ 15} "(3) Causing tortious injury by an act or omission in this state;

{¶ 16} "(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

{¶ 17} "****

{¶ 18} "(6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

{¶ 19} "****

² Thaletec is a German company, and Karl Bergmann is a resident of Germany.

{¶ 20} "(B) For purposes of this section, a person who enters into an agreement, as a principal, with a sales representative for the solicitation of orders in this state is transacting business in this state. As used in this division, 'principal' and 'sales representative' have the same meanings as in section 1335.11 of the Revised Code."

{¶ 21} In our January 8, 2010 Opinion, we found that personal jurisdiction over QA did not comport with due process and Ohio's long-arm statute. Our prior opinion is instructive with regard to whether personal jurisdiction should be exercised over Thaletec and Bergmann. We stated, in part:

{¶ 22} "R.C. 2307.382(C) provides that the exercise of personal jurisdiction under the long-arm statute is appropriate only if the cause of action arises from acts enumerated in the statute. Here, there is no indication that TyTg's and Pfaudler's claim arise out of QA's actions in Ohio. As stated above, neither TyTg's nor Pfaudler's counterclaims allege any specific activity by QA in Ohio, and they contain no suggestion that QA's conduct in Ohio resulted in any injury to TyTg and Pfaudler. Jeffrey Naidel stated in his affidavit that they spoke only to receptionists when the brochures were dropped off, and QA received no requests for information or requests for proposals as a result of those brochures. Moreover, QA 'has not sold [Thaletec] products or

services to customers located in Ohio. Nor has it submitted proposals for sale of [Thaletec] products or services to customers or potential customers located in Ohio.' Thus, assuming that QA wrongfully distributed brochures in Ohio, there are no allegations by TyTg or Pfaudler - nor any facts provided by Jeffrey Naidel - that indicate that TyTg and Pfaudler suffered any injury in Ohio and brought suit based on QA's conduct in this state.

{¶ 23} "Further, turning to the second prong of the analysis, we agree with the trial court that the exercise of personal jurisdiction under R.C. 2307.283(A)(3) does not comport with due process.

{¶ 24} "***

{¶ 25} "Applying these standards, even if the Naidels' actions of leaving five brochures on behalf of QA constituted a tortious act, such as unfair competition, QA's mere solicitation through five brochures was attenuated contact with Ohio, which itself brought no apparent injury to TyTg's or Pfaudler's business. This contact was insufficient to constitute purposeful availment. We agree with the trial court that QA could not reasonably have been expected to be sued in Ohio based on those five brochures." *Enquip Technologies Group, Inc.*, 2010-Ohio-28, at ¶71-72, 78.

{¶ 26} In its April 6, 2010 Order, the trial court found that personal jurisdiction over Thaletec and Bergmann in Ohio was not

proper. The trial court reiterated that QA leaving a few brochures in Ohio was insufficient to subject it to personal jurisdiction in Ohio. The trial court then reasoned that “[i]f QA Technologies could not be sued in Ohio because of those brochures, then Thaletec and Bergmann’s even more attenuated connection to this state cannot warrant this court exercising jurisdiction over them.” (Dkt. 362, at ¶13.)

{¶27} The trial court also explained that even if the minimal brochure activity in Ohio had constituted “acts sufficient to invoke the long-arm statute, the court declines to apply it” because “[i]t would offend traditional notions of fair play and justice for suit to be brought in Ohio, a place Thaletec and Bergmann could not reasonably have been expected to be sued in. Exercising jurisdiction would be improper under the Due Process Clause of the Fourteenth Amendment.” (Id. at ¶15-16).

{¶28} TyTg and Pfaudler argue that the trial court erred in granting the motion to dismiss their various claims against Thaletec and Bergmann because “Thaletec and Bergmann were fully aware that Pfaudler and TyTg were both subsidiaries of R&M, an Ohio corporation. And they knew that injury to Pfaudler and TyTg would ultimately be felt in Ohio.” TyTg and Pfaudler Appellate Brief, p. 10. According to TyTg and Pfaudler, the injury that would be felt by R&M in Ohio triggers personal jurisdiction pursuant

to R.C. 2307.382(A)(6) and Civ.R. 4.3(A)(9). We do not agree.

{¶ 29} In their respective Answers to Enquip's Third Amended Complaint, TyTg and Pfaudler asserted "Contingent Counterclaims" against Enquip and the Naidels, and "claims" against QA, Thaletec, and Bergmann. TyTg stated that "[t]he exercise of personal jurisdiction over QA Technologies is proper in the State of Ohio pursuant to Revised Code § 2307.382(A)(1), (2) and (3)." TyTg Answer, ¶ 24. But TyTg did not identify in its Answer a basis for personal jurisdiction over Thaletec and Bergmann. Pfaudler stated that "[t]he exercise of personal jurisdiction over the Naidels, QA Technologies, [Thaletec] and Bergmann is proper in the State of Ohio pursuant to Revised Code § 2307.382(A)(1), (2), (3), (4) and (B)." Pfaudler Answer, ¶ 15. TyTg and Pfaudler did not identify in their Answers or claims any conduct by Thaletec and Bergmann in Ohio or any injury to TyTg and Pfaudler that occurred in Ohio.

{¶ 30} Pfaudler is a Delaware corporation with its principal place of business in Rochester, New York and affiliates with manufacturing facilities in Germany and the United Kingdom. TyTg is an Italian corporation with its principal place of business in Italy. Therefore, even if Pfaudler and TyTg had alleged in their Answers and claims that they were injured in Ohio, which they did not, such allegations would be contradicted by the fact

that any injury Pfaudler and TyTg would suffer normally would occur in the state in which the companies were incorporated or in the state in which the companies' principal places of business were located. TyTg and Pfaudler concede as much. TyTg and Pfaudler Reply Appellate Brief, p. 7. Further, any alleged future injury in Ohio to the parent company of TyTg and Pfaudler is too remote and arguably too speculative to establish a sufficient connection with Ohio to establish personal jurisdiction pursuant to R.C. 2307.382(A)(6), on claims for relief brought not by R&M, the parent company that allegedly suffered injury, but by TyTg and Pfaudler, the indirect subsidiary corporations. Moreover, allowing personal jurisdiction over Thaletec and Bergmann pursuant to R.C. 2307.382(A)(6) solely on a theory of harm to a parent corporation in Ohio that was not even alleged in the claims brought by TyTg and Pfaudler would not comport with due process.

{¶ 31} TyTg and Pfaudler also argue that Thaletec and Bergmann should be subject to personal jurisdiction because they sent an agent into Ohio to solicit business. TyTg and Pfaudler Appellate Brief, p. 17. We rejected this argument raised by TyTg and Pfaudler in the previous appeal relating to QA, the alleged agent of Thaletec and Bergmann. TyTg and Pfaudler have failed to put forth sufficient allegations and facts to demonstrate that Thaletec and Bergmann should be subject to personal jurisdiction pursuant to

R.C. 2307.382(A)(1)-(4).

{¶ 32} We acknowledge that TyTg and Pfaudler alleged in its opposition to Thaletec and Bergmann's motion to dismiss, which post-dated our prior Opinion, that Robert Naidel solicited business on behalf of Thaletec "definitely aimed to a specific entity in Ohio." (Dkt. 317, p. 11.) We do not believe the additional evidence, however, is sufficient to trigger personal jurisdiction pursuant to R.C. 2307.382(A)(1-4) or (B). Further, even if we were to find that TyTg and Pfaudler had alleged sufficient facts to bring Thaletec and Bergmann within the long-arm statute, we do not believe exercising personal jurisdiction in the Ohio action over Thaletec and Bergmann would comport with due process.

{¶ 33} Finally, TyTg and Pfaudler argue that the trial court erred in granting Thaletec and Bergmann's motion to dismiss without allowing for more time for jurisdictional discovery. Along these same lines, TyTg and Pfaudler filed an October 7, 2010 motion "to supplement the record, remand or appoint a magistrate" based on additional discovery recently provided by the Naidels and Enquip. We do not find these arguments persuasive.

{¶ 34} We acknowledge the genuine concern that "[w]ithout adequate - and accurate - discovery, a foreign defendant 'could defeat the issue of personal jurisdiction by merely withholding information . . . based on the unchallenged assertions' of its

management and attorneys." TyTg and Pfaudler Appellate Brief, p. 19, quoting *Heritage Plastics Inc. v. Rohm & Haas Co.* (Belmont Cty. Com. Pleas July 27, 2004), No. 03 CV 113. But jurisdictional discovery is not required in every case involving a Civ.R. 12(B)(2) motion. *Theunissen v. Matthews* (6th Cir. 1991), 935 F.2d 1454, 1458. Rather, a trial court may determine jurisdiction without ordering discovery or holding an evidentiary hearing. In such a case, "the trial court must 'view allegations in the pleading and the documentary evidence in a light most favorable' to the plaintiff and resolve 'all reasonable competing inferences' in favor of the plaintiff. *** If the plaintiff makes a prima facie showing of personal jurisdiction, the trial court shall not dismiss the complaint without holding an evidentiary hearing." *Joffe v. Cable Tech, Inc.*, 163 Ohio App.3d 479, 2005-Ohio-4930, at ¶10 (citations omitted).

{¶ 35} As discussed supra, TyTg and Pfaudler have failed to make even a prima facie showing of personal jurisdiction over Thaletec and Bergmann. Consequently, the trial court did not err in failing to hold an evidentiary hearing and did not abuse its discretion in not ordering additional, jurisdictional discovery.

Indeed, it is revealing that the parties involved in this appeal each have spent a substantial amount of time and paper arguing that all of the companies other than R&M have little or no connection

with Ohio and should not be facing claims, counterclaims, or discovery requests in an Ohio court.

{¶ 36} On April 13, 2010, the Clerk of the Court of Appeals filed the App.R. 11(B) notice, notifying the parties and this Court that the record for appeal was complete. We may not consider any evidentiary materials that were not a part of the appellate record as of April 13, 2010. Therefore, we will not remand this case for the trial court to conduct the additional discovery that Pfaudler and TyTg requested in their October 7, 2010 motion. TyTg and Pfaudler's October 7, 2010 motion is overruled.

{¶ 37} The second assignment of error is overruled.

FIRST ASSIGNMENT OF ERROR

{¶ 38} "THE TRIAL COURT ERRED IN FINDING THAT COMITY PRINCIPLES DICTATED DISMISSAL."

{¶ 39} Based on our disposition of the second assignment of error, it is unnecessary to address the merits of this assignment of error. Therefore, this assignment of error is overruled as moot. App.R. 12(A)(1)(c).

{¶ 40} The assignments of error are overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J. and FAIN, J. concur.

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