COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-1368

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

ALAN DERZON,

PLAINTIFF-APPELLANT,

V.

NEW OJI PAPER COMPANY, LTD. AND HONSHU PAPER COMPANY,

DEFENDANTS-RESPONDENTS,

APPLETON PAPERS, INC., JERRY A. WALLACE, MITSUBISHI PAPER MILLS, LTD., MITSUBISHI INTERNATIONAL CORPORATION, MITSUBISHI CORPORATION, ELOF HANSSON PAPER & BOARD, INC., JUJO PAPER CO., LTD., NIPPON PAPER INDUSTRIES CO., LTD. AND KANZAKI SPECIALTY PAPERS, INC.,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Alan Derzon appeals from an order denying his motion to vacate a judgment entered in favor of New Oji Paper Company, Ltd. and Honshu Paper Company. Derzon's complaint against these two companies was dismissed for lack of personal jurisdiction. Derzon claims the trial court erred in finding that his evidence of direct and indirect solicitations and sales in Wisconsin was insufficient to invoke personal jurisdiction. More specifically, Derzon argues that: (1) his newly discovered evidence satisfied the criteria for vacatur; (2) the trial court applied erroneous methodology in determining whether personal jurisdiction exists; (3) the trial court erred when it rejected the affidavit evidence submitted to establish an agency relationship between Elof Hansson Paper & Board, Inc. and Oji; (4) the evidence submitted satisfied the requirements of the long-arm statute; and (5) Oji's contacts with the State of Wisconsin were sufficient to satisfy due process requirements. Because the trial court did not err when it denied Derzon's motion seeking vacatur, we affirm.

I. BACKGROUND

¶2 This case involves an allegation that several Japanese companies were fixing the price of facsimile paper sold in Wisconsin. Two of the named defendants were Oji and Honshu. The two companies have since merged into one company referred to as Oji. Oji is a Japanese corporation that manufactures and sells various kinds of paper products, including thermal fax paper. In a 1994 federal case, Oji pled guilty to conspiring to fix the price of thermal fax paper in the United States.

¶3 The instant case was filed on May 17, 1996. The complaint alleged that Oji violated Wisconsin's antitrust statute, WIS. STAT. § 133.03(1), by conspiring to fix the price of thermal fax paper between February 1990, and March 1992. The defendants filed a motion to dismiss for lack of personal jurisdiction. The motion alleged that there were no meaningful contacts between Oji and the state at the time of the alleged injury. The motion paperwork explained the chain of distribution: Oji sold the fax paper to Elof Hansson KK, a Japanese corporation, and title passed in Japan. That company then sold the paper to its sister company, Elof Hansson, based in New York. Both Hansson companies are subsidiaries of a Swedish parent company. Hansson/New York then sold the paper to paper converters in the United States, who cut the "jumbo" rolls[1] of paper down to individual "finished" rolls, packaged them, and resold them to paper distributors and chain stores. The motion papers included an affidavit swearing that Oji did not sell paper to any customer in Wisconsin, and was not aware that Hansson/New York had done so either, at least during the time period alleged in the complaint.

¶4 Derzon opposed the motions to dismiss, arguing that Hansson/New York acted as an agent for Oji, that Hansson/New York solicited and executed sales in Wisconsin on behalf of Oji and, therefore, Hansson/New York's actions are imputed to Oji. In January 1998, after conducting some discovery, Derzon filed a motion seeking leave to submit supplemental evidence in opposition to the motions to dismiss. The motion was granted.

[1] The jumbo rolls were approximately 40-50 inches wide and weighed up to 2,000 pounds.

¶5 In an October 1998 oral decision, the trial court granted the motions to dismiss, ruling that Oji had not made any direct contact with the state:

> It's clear to me … that neither [WIS. STAT. § 801.05(1(d) or (4)] is satisfied directly by Oji Paper which includes New Oji and Honshu. There has not been any kind of a showing that Oji has engaged in any activities in this state, nor has it been established that there has been any solicitation or service activities carried on on behalf of the defendant as those terms are used in those sections of the statute.

The trial court also found that the record could not support Derzon's claim that Hansson/New York acted as Oji's agent in this state and that Derzon failed to make a showing of the minimum contacts necessary to satisfy due process. An order was entered dismissing Oji. Derzon did not timely appeal from that order.

¶6 On December 11, 1998, Derzon filed a motion to vacate the order of dismissal based on newly discovered evidence. The trial court held a hearing and ruled that Derzon's evidence did not satisfy the newly discovered evidence standard because he failed to demonstrate that the new evidence would change the result. The trial court found that the new evidence of direct sales or solicitation by Oji was outside of the time period involved in the complaint, involved a different product, and was too "minimal" to satisfy due process. With respect to Derzon's attempt to show that Hansson/New York was Oji's agent, the trial court found the evidence lacked a proper foundation and that due process was not satisfied to bind Oji based on Hansson/New York's actions: "The most we have here is an isolated contact outside of the time period that is at issue here, some eight to nine months before that time period." The court ruled that, under these circumstances, it could not find that personal jurisdiction existed. The trial court entered an order denying Derzon's motion to vacate. Derzon appeals from that order.

II. DISCUSSION

¶7 As a preliminary matter, we re-confirm our earlier order wherein we ruled that Derzon's appeal is limited to the order denying his motion to vacate. Despite this ruling, at times, Derzon's brief seems to focus on issues pertinent to the motion to dismiss for lack of personal jurisdiction. Derzon, however, did not appeal from that order and issues pertinent to that order are not before this court. Therefore, Derzon's attack on the trial court for not engaging in a complete analysis of the long-arm statute before concluding that the contacts were insufficient to establish due process is misplaced. That argument could have been entertained by us if Derzon had timely appealed from the order granting the motion to dismiss based on personal jurisdiction. Here, the personal jurisdiction issue is pertinent only as it relates to the order denying the motion to vacate based on newly discovered evidence, which will be addressed below.

A. Newly Discovered Evidence.

¶8 Derzon claims that the trial court erred when it denied his motion to vacate based on newly discovered evidence. We are not persuaded. A trial court has great discretion in ruling on a motion seeking to vacate a judgment, and that discretionary decision will not be reversed unless the trial court erroneously exercised its discretion. *See* ***Hollingsworth v. American Fin. Corp.***, 86 Wis. 2d 172, 184, 271 N.W.2d 872 (1978).

¶9 WISCONSIN STAT. § 805.15(3) sets forth the standard applied in cases involving newly discovered evidence:

> A new trial shall be ordered on the grounds of newly-discovered evidence if the court finds that:

> (a) The evidence has come to the moving party's notice after trial; and
>
> (b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and
>
> (c) The evidence is material and not cumulative; and
>
> (d) The new evidence would probably change the result.

As the moving party, the burden is on Derzon to prove each of these elements is satisfied. *See* ***Ritt v. Dental Care Assoc., S.C.***, 199 Wis. 2d 48, 79, 543 N.W.2d 852 (Ct. App. 1995).

¶10 The new evidence submitted by Derzon consisted of an affidavit of James Emmerich, the former owner and president of Hi-Tech Industries, Inc. The affidavit avers that Emmerich was a paper converter for nine years, operating in Neenah and Oshkosh. Hi-Tech would convert the jumbo rolls of fax paper into the smaller rolls. During 1990 and 1992, the company's primary source of fax paper was Appleton Papers, Inc. He then avers that during 1989 through 1993, Hi-Tech was "contacted on numerous occasions by telephone and mail by various representatives of" Hansson/New York, who were trying to get Hi-Tech to buy fax paper from Oji. Emmerich then avers that on July 20, 1989, Oji sent directly to Hi-Tech a set of production data. He states that Kevin Karey of Hansson/New York called him on March 26, 1990, to solicit sales. The affidavit then states that Hi-Tech purchased twenty-four rolls of Oji fax paper from Hansson/New York in July 1992. The affidavit then sets forth similar statements with respect to contacts with DaiEi Corporation, who was selling Honshu fax paper. The transaction with DaiEi occurred March 1, 1995. The Honshu fax paper was to be shipped directly from Japan and, when purchasing this paper, Emmerich needed to send a letter of credit directly to Japan by March 15, 1995.

¶11 In reviewing this material, the trial court found that the first three factors of the newly discovered evidence test were satisfied. The trial court then determined, however, that this evidence would not have changed the result because the isolated contacts referred to were outside of the time period set forth in the complaint, the statements were conclusory, and the evidence was insufficient to satisfy constitutional due process requirements. As a result, the trial court stated it would not have changed its ruling regarding personal jurisdiction. We agree that the affidavit submitted was insufficient to change the result of the dispositive motion.

¶12 When determining whether a foreign corporation is subject to personal jurisdiction in this state, we engage in a two-step process. First, we must determine whether our long-arm statute is satisfied. If the statute is satisfied, we may still determine that the foreign corporation should not be subjected to jurisdiction in this state on constitutional grounds. That is, when the facts do not establish minimum contacts sufficient to render the state's exercise of personal jurisdiction consistent with fair play and substantial justice as required by the due process clause, we will not rule that personal jurisdiction exists. *See* ***Asahi Metal Indus. Co., Ltd. v. Superior Court***, 480 U.S. 102, 116 (1987).

¶13 In the instant case, given the procedural posture of the case, the trial court did not need to engage in a full-scale long-arm statute analysis. The issue was whether the newly discovered evidence would change the result of the dispositive motion. The trial court found that the affidavit could not satisfy the due process requirements and, therefore, could not alter the result. We agree.

¶14 The power of this state to exert personal jurisdiction over a foreign corporation is limited by the due process clause of the Fourteenth Amendment.

See ***Asahi*** at 109. The constitutional touchstone of the determination whether an exercise of personal jurisdiction comports with due process remains whether the defendant purposefully established minimum contacts in the forum state. *See* ***Burger King Corp. v. Rudzewicz***, 471 U.S. 462, 474 (1985) (citations omitted). The United States Supreme Court reaffirmed the oft-quoted reasoning that minimum contacts must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." ***Id.*** at 475. "Jurisdiction is proper ... where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State." ***Id.*** (citation omitted).

¶15 The "substantial connection" between a defendant and the forum state necessary for a finding of minimum contacts must derive from an action purposely directed toward the forum state, and the mere placement of a product into the stream of commerce is not such an act, even if done with an awareness that the stream will sweep the product into the forum state absent additional conduct indicating an intent to serve the forum state market. *See* ***Asahi***, 480 U.S. at 112.

¶16 Derzon asserts two bases on which the content of the Emmerich affidavit comports with due process requirements. First, he argues that the affidavit contains information documenting direct action by Oji to solicit, sell, and ship its product to Wisconsin. We are not persuaded that the Emmerich affidavit does so. The references to direct contact by Oji are outside the pertinent time period or conclusory. For instance, in paragraph 3 of the Emmerich affidavit, the averment states: "Hi-Tech was contacted … by Oji Paper Company itself." This is an unsupported conclusory statement insufficient to satisfy the "substantial

relationship" due process standard. Next, the affidavit states that Oji itself sent production data to Hi-Tech in July 1989. This date is outside the time period associated with Derzon's complaint and, therefore, cannot be used to exert personal jurisdiction in this matter. Finally, the affidavit avers direct contact with Honshu, with respect to shipment of thermal paper from Japan and a letter of credit sent directly to Japan. However, this contact references dates of March 1-15, 1995. Again, this is outside the pertinent time period included within the complaint in this matter.

¶17 Second, Derzon argues that the affidavit satisfies due process requirements by virtue of the actions of the agents, Hansson/New York and DaiEi, who, according to the affidavit, were acting on behalf of Oji and Honshu, respectively. Again, we are not convinced that the affidavit establishes the agency relationship.

¶18 Emmerich's affidavit states that the agents were acting "on behalf of" Oji. Without anything to support those statements, the affidavit is insufficient to establish an agency relationship required to impute the acts of the agents to Oji. To impute liability to a parent corporation based on the acts of its subsidiary, there must be some showing that the parent directly participated in the subsidiary's unlawful conduct. *See* ***Esmark, Inc. v. N.L.R.B.***, 887 F.2d 739, 756 (7th Cir. 1989) ("a parent corporation may be held liable for the wrongdoing of a subsidiary where the parent directly participated in the subsidiary's unlawful conduct"). Here, the agents are not even subsidiaries of the principal. There is no evidence of a contract between the agents and Oji as there was between those through whom the link was established in ***Schmitz v. Hunter Machinery Co.***, 89 Wis. 2d 388, 279 N.W.2d 172 (1979), or any evidence indicating that the sales by the agents were at Oji's direction or that Oji consented to the agents acting on its behalf as

was the situation in ***Pavlic v. Woodrum***, 169 Wis. 2d 585, 486 N.W.2d 533 (1992). The Emmerich affidavit does not proffer that Oji acknowledged or acquiesced in the agents' actions directed at Wisconsin. Accordingly, Derzon's newly discovered evidence does not establish that an agency relationship existed between the agents and Oji, which would bind Oji for the agents' conduct.

¶19 Accordingly, we conclude that the trial court did not erroneously exercise its discretion when it denied Derzon's motion to vacate. The newly discovered evidence submitted was insufficient to establish that Oji had a "substantial relationship" with the State of Wisconsin as required by the dictates of the due process clause, and failed to demonstrate any agency relationship to bind Oji for Hansson/New York's or DaiEi's acts.

B. Personal Jurisdiction Methodology.

¶20 Derzon next complains that the trial court employed an erroneous methodology in applying the long-arm statute to determine whether personal jurisdiction exists. This argument, however, was waived when Derzon failed to appeal from the order denying the motions to dismiss.

C. Foundation of Emmerich Affidavit.

¶21 Derzon claims that the trial court erred when it ruled that the Emmerich affidavit lacked proper foundation in asserting that the agents contacted Hi-Tech *on behalf of Oji*. We disagree. Without some specific evidentiary factual statements to support that conclusion, the trial court was within its discretion to summarily disregard the statements.

D. Agency Relationship.

¶22 Derzon argues that the affidavit was sufficient to establish the agency relationship. This argument was addressed and rejected earlier in this opinion.

E. Long-Arm Statute Satisfied.

¶23 Derzon claims that the trial court erred when it concluded the evidence was insufficient to satisfy the long-arm statute. He asserts that the evidence satisfies the statute. This issue, however, was waived when Derzon failed to timely appeal from the motions to dismiss.

F. Due Process Satisfied.

¶24 Derzon's last claim is that Oji's contacts with this state were sufficient to satisfy due process requirements. This argument was addressed and rejected earlier in this opinion.[2]

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[2] Derzon also makes a brief reference to a conspiracy theory involving Oji and Hansson/New York, which would require a separate jurisdiction analysis. In a recent case, the Florida Supreme Court found that, under the conspiracy theory, Oji submitted itself to personal jurisdiction in a class action in that state. *See* ***Execu-Tech Bus. Sys., Inc. v. New Oji Paper Company, Ltd.***, 752 So. 2d 582, 585 (Fla. 2000). Wisconsin, however, has not accepted the conspiracy jurisdiction theory and, regardless, the contacts present between Oji and the State of Florida are not present in the instant case.