

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Bradley Shoptaw,	:	
Appellant-Appellant,	:	
v.	:	No. 12AP-453 (C.P.C. No. 12CVH02-2298)
I & A Auto Sales, Inc. et al.,	:	(REGULAR CALENDAR)
Appellees-Appellees.	:	

D E C I S I O N

Rendered on December 31, 2012

Doucet & Associates, LLC, Gregory A. Wetzel and Troy J. Doucet, for appellant.

Flagel & Papakirk, LLC, James Papakirk and Sara C. Conley, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Plaintiff-appellant, Bradley Shoptaw ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas which dismissed appellant's action against defendants-appellees, Grand Prix Worx and Anton Golant (collectively "appellees") and defendants I&A Auto Sales, Inc. ("I&A"), Armada Trader Logistics ("Armada"), and Dimitry Seliverstov ("Seliverstov"), for lack of personal jurisdiction. Because we agree that the appellant failed to establish minimum contacts to establish personal jurisdiction, we affirm.

{¶ 2} On February 21, 2012, appellant filed a complaint against I&A, Armada, Seliverstov, and appellees alleging breach of contract, breach of warranty, and violation of the Ohio Consumer Sales Practices Act. I&A, Armada, and Seliverstov did not file an answer, motion or make an appearance in response to the complaint. Appellees, however, filed a motion to dismiss on the pleadings for lack of personal jurisdiction or improper venue. Appellant filed a memorandum in opposition. On May 2, 2012, the trial court agreed with appellees and dismissed appellant's complaint both as to appellees and as to I&A, Armada, and Seliverstov. In dismissing the complaint, the trial court relied on our holding in *Malone v. Berry*, 174 Ohio App.3d 122, 2007-Ohio-6501 (10th Dist.).

{¶ 3} On appeal, appellant sets forth the following two assignments of error for this court's review:

1. The trial court erred when it dismissed appellant's complaint for lack of personal jurisdiction.
2. The trial court erred when it sua sponte dismissed appellant's complaint for lack of personal jurisdiction against parties who had waived that defense.

{¶ 4} We will now address the first assignment of error. The trial court dismissed the case, pursuant to Civ.R. 12(B)(2), for lack of personal jurisdiction. We review this dismissal de novo. *Crosby-Edwards v. Morris*, 10th Dist. No. 09AP-152, 2009-Ohio-2994, ¶ 7. In so doing, we consider both the complaint and the complaint's sole exhibit and view the allegations and any reasonable inferences in a light most favorable to appellant, the non-moving party. *Joffe v. Cable Tech., Inc.*, 163 Ohio App.3d 479, 2005-Ohio-4930, ¶ 10 (10th Dist.). Finally, we remember that appellant was required to make only a prima facie showing of personal jurisdiction. *State ex rel. Atty. Gen. v. Grand Tobacco*, 171 Ohio App.3d 551, 2007-Ohio-418, ¶ 13 (10th Dist.).

{¶ 5} When a defendant moves to dismiss a case for lack of personal jurisdiction, the plaintiff must establish that the trial court has personal jurisdiction over the defendant. *Austin Miller Am. Antiques, Inc. v. Cavallaro*, 10th Dist. No. 11AP-400, 2011-Ohio-6670, ¶ 7. If the trial court determines personal jurisdiction without an evidentiary hearing, the plaintiff need only establish sufficient evidence to allow reasonable minds to conclude that the trial court has personal jurisdiction. *Id.* The trial court "must assume

the truth of the facts in the nonmoving party's affidavits and complaint for purposes of [a Civ.R. 12(B)(2)] motion to dismiss" and must resolve all reasonable competing inferences in the plaintiff's favor. *Id.*

{¶ 6} To determine whether it has personal jurisdiction over a nonresident defendant, an Ohio court must engage in a two-step analysis. It must first consider whether Ohio's long-arm statute and the applicable civil rule confer personal jurisdiction, and, if so, it must consider whether exercising jurisdiction under the statute and rule comports with the defendant's due process rights under the Fourteenth Amendment to the United States Constitution. *Id.* at ¶ 8.

{¶ 7} Ohio's long-arm statute, R.C. 2307.382, and the complementary civil rule, Civ.R. 4.3, authorizes an Ohio court to exercise personal jurisdiction over a nonresident defendant and authorize out-of-state service to effectuate that jurisdiction when the cause of action arises from the nonresident "[t]ransacting any business in this state." R.C. 2307.382(A)(1); Civ.R. 4.3(A)(1). As used in R.C. 2307.382(A)(1) and Civ.R. 4.3(A)(1), "[t]ransact" means 'to prosecute negotiations; to carry on business; to have dealings.' " (Emphasis omitted.) *Id.* at ¶ 9, quoting *Ky. Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St.3d 73, 75 (1990), quoting *Black's Law Dictionary* (5th ed.1979).

{¶ 8} With respect to the second step of the court's analysis, due process requires that the defendant must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." " *Id.* at ¶ 10, quoting *Internatl. Shoe Co. v. Wash., Office of Unemp. Comp. & Placement*, 326 U.S. 310, 316 (1945). This court has applied the three-part test adopted by the Sixth Circuit in *S. Machine Co., Inc. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir.1968), to analyze the existence of due process minimum contacts. *Austin Miller* at ¶ 10. First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. *Id.* Second, the cause of action must arise from the defendant's activities there. *Id.* Third, the defendant's acts or the consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction reasonable. *Id.*

{¶ 9} In support of the argument that appellant did not establish personal jurisdiction, appellees point to our decision in *Malone*. In *Malone*, the plaintiff alleged that the defendant had placed an advertisement to sell a vehicle on an online auction website. The vehicle was located in Alabama and had a listed price of \$15,500. The advertisement indicated that the price was negotiable and instructed buyers to call anytime with additional questions. A section entitled "Seller Information" suggested that the defendant had not placed any prior advertisements nor sold any other items on the website. Ultimately the vehicle was sold for \$13,000, and the plaintiff paid to have the vehicle shipped to Ohio. *Malone* at ¶ 12. In summarizing the facts in *Malone*, we also took limited judicial notice that the online-auction website was a forum for buyers and sellers "much the same as the more recognizable website eBay." *Id.* at ¶ 13. We also noted that there were no facts indicating that the activity at issue involved more than a single transaction, and the case did not involve circumstances in which a party to the action maintained a website. *Id.* at ¶ 14, 18.

{¶ 10} After considering numerous court decisions from Ohio and beyond, we noted that "[t]he majority of jurisdictions that have considered the issue of personal jurisdiction arising out of a single transaction on an auction website such as eBay have found the absence of jurisdiction." *Id.* at ¶ 19. We ultimately concluded in *Malone* that "the transaction at issue involved a one-time sale facilitated by the placement of an advertisement on an internet auction site not operated by appellant; the facts indicate that appellee arranged to have the vehicle shipped to Ohio, and there is no evidence that appellant ever entered Ohio as part of the transaction." *Id.* at ¶ 22. Based upon the pleadings and documentary evidence presented, we concluded that appellant did not purposefully avail himself of the privilege of conducting business within Ohio and that appellant's contacts were too "random" and "attenuated" to create a substantial connection within Ohio to make personal jurisdiction over him reasonable. *Id.* We therefore found that the trial court erred in denying appellant's motion to set aside the judgment, as the judgment was void for lack of personal jurisdiction.

{¶ 11} The allegations, which for purposes of this analysis we have accepted as true, in this case are similar to the facts in *Malone*. Defendants¹ advertised a 1984 Mercedes-Benz 300 Series Coupe for sale on the website www.eBay.com. Appellant won an eBay bid granting him the right to purchase the vehicle. Appellant and defendants then entered into a bill of sale. (Exhibit A to the Complaint.) At the top of the bill of sale, it states: "I&A Auto Sales Inc. Buyers Order, 4926 Arendel [A]venue, Philadelphia, PA 19115." As a condition of the sale, appellant required defendants to perform an inspection of the vehicle. Defendants I&A Auto Sales and Armada Trader Logistics employed Defendants Grand Prix Worx and Anton Golant for the purpose of preparing a vehicle inspection report. The vehicle inspection report graded as "OK" every part of the vehicle inspected except for a "small crack" in the lower right tail lens, "brown/dirty" brake fluid, old shocks, and "some minor seepage from the Vent." Appellant paid the invoice of \$5,794.00, which included the additional costs for documentation and for shipping the vehicle from Pennsylvania to Columbus, Ohio. The vehicle was not operable when it arrived because the battery was non-functional. Furthermore, inspections procured by appellant revealed that the car was not safe to drive and that several parts needed to be replaced or repaired.

{¶ 12} The complaint did not contain any facts indicating that the activity at issue involved more than a single transaction.² Moreover, the complaint did not allege that any of the defendants maintained or operated the website containing the advertisement for the vehicle. Finally, there is no evidence that any of the defendants ever entered Ohio as part of the transaction. Therefore, based on the precedent we set in *Malone*, we overrule appellant's first assignment of error.

{¶ 13} In his second assignment of error, appellant argues that the trial court erred in sua sponte dismissing I&A, Armada, and Seliverstov because they waived the affirmative defense of personal jurisdiction by not filing a motion to dismiss. Appellant

¹ In referring to "defendants," we refer collectively to I&A, Armada, Seliverstov, and appellees, because the complaint does not specifically indicate which defendant or defendants advertised the vehicle for sale.

² Although from the name "I&A Auto Sales, Inc." an inference could be drawn that I&A had engaged in more than a single transaction in the selling of vehicles, no such inference can be drawn from the names Grand Prix Worx, Anton Golant, Armada Trader Logistics, or Dimitry Seliverstov. Furthermore, with regard to I&A, we can not infer upon the inference noted above, that any such transactions involved the use of eBay or any other website or for that matter any buyers from Ohio.

points to Civ.R. 12(H)(1) and to this court's precedent in *NetJets, Inc. v. Binning*, 10th Dist. No. 04AP-1257, 2005-Ohio-3934, ¶ 4, that personal jurisdiction is an affirmative defense that may be waived.

{¶ 14} First, we examine whether defendants I&A, Armada, and Seliverstov waived the defense of lack of personal jurisdiction. In *NetJets*, the defendant did not plead lack of personal jurisdiction in his answer or amended answer and did not move for dismissal at any time for lack of personal jurisdiction. Based on these facts alone, we determined that the defense of lack of personal jurisdiction was "considered waived." *Id.* at ¶ 5. We further stated that "[p]articipation in the case can also waive any defect in personal jurisdiction," *id.* at ¶ 6, and noted that the defendant also hired local counsel, conducted discovery, and appeared and testified at trial. We held, "[a]ccordingly, defendant submitted to the court's jurisdiction and waived any defense based on lack of personal jurisdiction by his continued participation in the case." *Id.*

{¶ 15} Our conclusion in *NetJets* was based on Civ.R. 12(H)(1), which states "[a] defense of lack of jurisdiction over the person * * * is waived (a) if omitted from a motion in the circumstances described in subdivision (G), or (b) if it is neither made by motion under this rule nor included in a responsive pleading[.]" Civ.R. 12(G) provides that a party who makes a motion under Civ.R. 12 must join with it the other motions provided for in Civ.R. 12. It further provides that "[i]f a party makes a motion under [Civ.R. 12] and does not include therein all defenses and objections available to him which this rule permits to be raised by motion, he shall not thereafter assert by motion or responsive pleading, any of the defenses or objections so omitted, except as provided in [Civ.R. 12(H)]." Civ.R. 12(G).

{¶ 16} This is consistent with the nature of waiver. Generally, waiver is defined as "a voluntary relinquishment of a known legal right." *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Util. Comm.*, 129 Ohio St.3d 485, 2011-Ohio-4189, ¶ 44. In the context of a defendant who has not been effectively served with process and has not appeared in an action or voluntarily waived service, we have stated that " 'a defendant is considered to have waived his defense of lack of personal jurisdiction when his conduct does not reflect a continuing objection to the power of the court to act over the defendant's person.' " *Harris v. Mapp*, 10th Dist. No. 05AP-1347, 2006-Ohio-5515, ¶ 10,

quoting *Nichols, Rogers & Knipper, LLP v. Warren*, 2d Dist. No. 18917 (Jan. 11, 2002). Furthermore, we have said that "[c]ertain preliminary actions before a court do not qualify as the type of appearance during which a defendant must challenge the lack of personal jurisdiction to avoid submission to the court's jurisdiction." *During v. Quoico*, 10th Dist. No. 11AP-735, 2012-Ohio-2990, ¶ 29, citing *Maryhew v. Yova*, 11 Ohio St.3d 154 (1984), syllabus. "Only those appearances and filing that give the plaintiff 'a reasonable expectation that [the defendant] (sic) will defend the suit on the merits or must cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking" result in a waiver of a personal jurisdiction defense.' " *During*, at ¶ 29, citing *Gerber v. Riordan*, 649 F.3d 514, 519 (6th Cir.2011).

{¶ 17} In the instant case, we have no answer, no motion to dismiss, no appearance whatsoever. Nothing in this case has given appellant a reasonable expectation that I&A, Armada, or Seliverstov will defend the suit on the merits, and I&A, Armada, and Seliverstov have not caused the court to go to some effort that would be considered wasted since personal jurisdiction was found lacking. Therefore, in these circumstances, we are unwilling to say that I&A, Armada, and Seliverstov waived the defense of lack of jurisdiction.

{¶ 18} Second, although we cannot say there was a waiver, it is still necessary to determine whether the trial court could sua sponte dismiss the complaint against I&A, Armada, and Seliverstov.

{¶ 19} In *D'Amore v. Matthews*, 12th Dist. No. CA2010-12-030, 2011-Ohio-2853, the court agreed with the appellant that a trial court erred in sua sponte deciding that personal jurisdiction was lacking in the case. The court's determination of error, however, turned on the fact that the defendant had waived the defense of lack of personal jurisdiction by voluntarily appearing and failing to raise the defense in pleadings. "[O]nce the lack of personal jurisdiction was waived, the trial court could not sua sponte address the issue of personal jurisdiction." (Emphasis added.) *Id.* at ¶ 34. See also *Snyder Computer Sys., Inc. v. Stives*, 7th Dist. No. 07-JE-19, 2008-Ohio-1192, ¶ 16 ("Indeed, once [defendant] waived personal jurisdiction, it was procedurally incorrect for the trial court to raise it on its own motion." (Emphasis added.)). As noted above, we cannot say that the defendants had waived lack of personal jurisdiction.

{¶ 20} After diligently searching, we have been unable to find any case law addressing the situation where, as here, there is no indication of waiver, and the question of whether, in such a circumstance, a trial court errs in sua sponte finding a lack of personal jurisdiction. In this regard, appellant has not pointed us to any authority to support his argument that the trial court erred. We consider, however, that the allegations in the complaint, referred to the "defendants" collectively. The same facts we have accepted as true for purposes of our analysis regarding appellant are the same facts alleged against I&A, Armada, and Seliverstov. We know no more, no less, except that appellees were hired by I&A, Armada, and Seliverstov to inspect the vehicle. This does not change our analysis of whether there were minimum contacts sufficient enough to satisfy due process requirements. Therefore, it would be illogical for us to determine that the trial court had personal jurisdiction over I&A, Armada, and Seliverstov, when we found that it did not have personal jurisdiction over appellant. With this in mind, pursuant to the facts of this case, we find the trial court did not err in sua sponte dismissing the complaint against I&A, Armada, and Seliverstov. ³

{¶ 21} Because we cannot conclude that, under these circumstances, I&A, Armada, and Seliverstov waived the defense of lack of personal jurisdiction and because we conclude that the trial court did not err in sua sponte dismissing the complaint against I&A, Armada, and Seliverstov, we overrule appellant's second assignment of error.

³ We note that no determination appears to have been made by the trial court regarding whether I&A, Armada and Seliverstov were served with the complaint. Nevertheless, we find the cases of *Maryhew* and *Haley v. Hanna*, 93 Ohio St. 49 (1915), to be somewhat analogous to the case at bar, taking into consideration that the defense of lack of personal jurisdiction and the defense of insufficiency of service and service of process are both addressed in Civ.R. 12(H). In *Maryhew*, the court held: "Inaction upon the part of the defendant who is not served with process, even though he might be aware of the filing of the action, does not dispense with the necessity of service." *Maryhew* at 157, citing *Haley*. In *Haley*, the trial court found that a defendant was not served with summons. *Haley* at 51. Nevertheless, the defendant had knowledge of the pendency and did not advise the court or the opposite party of the defective service upon him. The court could not agree that it was the duty of defendant to advise the court or the opposite party before judgment of the defective service, and that, having failed to do so, his omission constituted a waiver of the original defective service. The "[defendant] had knowledge of the proceedings in court, it is true, but we do not see upon what theory the duty devolved upon him to advise the court or the parties to the proceeding of the defective service." *Id.* at 52.

{¶ 22} For the reasons explained above, we overrule both of appellant's assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
