

[Cite as *King v. Sinon*, 2009-Ohio-5792.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THOMAS B. KING

Plaintiff-Appellant

-VS-

JOHN W. SINON, ET AL.

Defendants-Appellees

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. W. Scott Gwin, J.

Hon. Julie A. Edwards, J.

Case No. 2009CA00039

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 2008CV02055

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 2, 2009

APPEARANCES:

For Plaintiff-Appellant

JOHN L. WOLFE
45 Mayfield Avenue
Akron, OH 44313

For Defendant-Appellee

JOHN S. COURY
VIVIANNE WHALEN
Suite 206, Belden Village Tower
4450 Belden Village Street, NW
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Farmer, P.J.

{¶1} In February of 2005, appellant, Thomas King, entered into a retainer agreement with Stuart Abramson, Esq., an attorney in New York, to represent him in an EEOC action. Appellant paid Mr. Abramson \$8,000 of a \$14,000 fee upfront. Instead of this amount being deposited in a professional law office or trust account, it was deposited in accounts which were joint and survivorship accounts in the names of Mr. Abramson and his wife, appellee, Eileen Abramson.

{¶2} In April of 2005, Mr. Abramson "settled" and dismissed appellant's claims without appellant's knowledge. On December 7, 2005, appellant sent Mr. Abramson the balance of his fee, \$6,000. This amount was also deposited into a joint account with appellee.

{¶3} On July 4, 2006, Mr. Abramson died. Thereafter, appellant asked appellee to open an estate so he could present a claim for a refund of unearned attorney fees. Appellee refused as all of Mr. Abramson's assets had passed to appellee and his children as joint and survivorship property. Appellant then petitioned the Nassau County Surrogate's Court in New York to appoint an administrator. A public administrator was appointed as administrator of Mr. Abramson's estate.

{¶4} On December 18, 2007, appellant presented his claims for the return of unearned attorney fees and legal malpractice to the public administrator. Appellant's claims were de facto rejected.

{¶5} On April 28, 2008, appellant filed a complaint against the public administrator and appellee in the Court of Common Pleas of Stark County, Ohio for the return of the unearned attorney fees and legal malpractice. On August 26, 2008,

appellee filed a motion to dismiss, claiming no personal jurisdiction. A hearing was held on December 18, 2008. By judgment entry filed December 19, 2008, the trial court granted the motion and dismissed appellee from the case. A final judgment awarding appellant \$317,830.42 as against the public administrator for Mr. Abramson's estate and the estate of Mr. Abramson for unearned attorney fees and legal malpractice was filed on January 27, 2009.

{¶16} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶17} "THE TRIAL COURT BELOW ERRED IN SUSTAINING DEFENDANT-APPELLEE EILEEN ABRAMSON'S, MOTION TO DISMISS HER AS A PARTY-DEFENDANT ON THE GROUNDS THAT, UNDER OHIO'S LONG-ARM STATUTE, R.C. 2307.382, AND CIV. R. 4.3, OHIO HAD NO PERSONAL JURISDICTION OVER HER."

II

{¶18} "THE TRIAL COURT DEPRIVED PLAINTIFF OF A MEANINGFUL AND FAIR EVIDENTIARY HEARING ON THE ISSUE OF PERSONAL JURISDICTION OVER DEFENDANT-APPELLEE EILEEN ABRAMSON BY DENYING PLAINTIFF DISCOVERY ON WHETHER FURTHER FACTS COULD BE DEVELOPED THROUGH TAKING HER DEPOSITION IN NEW YORK AND REQUIRING HER TO RESPOND TO REQUESTS FOR ADMISSIONS TO SHOW THAT OHIO HAD PERSONAL JURISDICTION OVER HER."

I

{¶9} Appellant claims the trial court erred in granting appellee's motion to dismiss for lack of personal jurisdiction under Civ.R. 12(B)(2). We disagree.

{¶10} R.C. 2307.382 governs personal jurisdiction. Subsection (A) states in pertinent part:

{¶11} "(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:

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

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

{¶14} "(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;"

{¶15} Civ.R. 4.3, which governs out-of-state service, states the following in pertinent part:

{¶16} "(A) When service permitted

{¶17} "Service of process may be made outside of this state, as provided in this rule, in any action in this state, upon a person who, at the time of service of process, is a nonresident of this state or is a resident of this state who is absent from this state. 'Person' includes an individual, an individual's executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who, acting directly or by an agent, has caused an event to occur out of which the claim that is the subject of the complaint arose, from the person's:

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

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

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

{¶21} It is appellant's position that appellee, as the spouse of Stuart Abramson, Esq., became a co-trustee and co-owner of the funds generated by Mr. Abramson's law practice:

{¶22} "5. Defendant Eileen Abramson is the surviving spouse of Stuart Abramson and was at all relevant times an agent, business partner, trustee, and co-owner of all assets and bank accounts, joint and survivorship, standing in the name of Stuart Abramson, both in his professional, business, and personal relationships.

{¶23} "6. Plaintiff has jurisdiction over Defendants under Ohio's long-arm statute, RC 2307.382 and Civil Rule 4.3 by reason of both Stuart Abramson and Eileen Abramson, through Stuart, having transacted business in Ohio and contracting to supply services to Plaintiff in Ohio and for other acts within the purview of Rule 4.3.

{¶24} "11. The above bank accounts were joint and survivorship accounts standing in the names of Stuart A. Abramson and his wife, Defendant Eileen Abramson. At no time did Stuart A. Abramson maintain identifiable bank accounts in New York State, either professional law office or trust accounts, as required by the Disciplinary Rules governing members of the New York bar.

{¶25} "14. After Stuart Abramson's death, Plaintiff demanded of Defendant Eileen Abramson that she and Mr. Abramson's estate reimburse him for all monies paid to Stuart Abramson, none of which had been earned.

{¶26} "15. Defendant Eileen Abramson refused to reimburse Plaintiff for any sums of money whatsoever, claiming that all Mr. Abramson's fees had been earned. Further, she refused to open any estate for Stuart Abramson, contending that there were no assets or funds belonging to him at the time of his death and that all of Mr. Abramson's funds and assets were joint and survivorship or tenancy by the entireties, which were not subject to administration by the New York Surrogate's Court." See, Appellant's Complaint filed April 28, 2008.

{¶27} On August 26, 2008, appellee filed a motion to dismiss with an accompanying affidavit. Within the affidavit, appellee avers that she is "a legal resident of the State of New York," did not transact "any business in the State of Ohio," and "was not an agent, employee, or business partner of Stuart A. Abramson in his law practice." Appellant does not dispute the first two averments.

{¶28} "In ruling on a Civ.R. 12(B)(2) motion to dismiss for lack of jurisdiction over the person, the trial court is not limited to the allegations in the complaint, but may consider other evidence contained in answers to interrogatories and counsel's affidavit filed with the motion." *Price v. Wheeling Dollar Savings & Trust Co.* (1983), 9 Ohio App.3d 315, paragraph one of the syllabus.

{¶29} In *Joffe v. Cable Tech, Inc.*, 163 Ohio App.3d 479, 2005-Ohio-4930, ¶10, our brethren from the Tenth District explained the following:

{¶30} "Once a defendant moves to dismiss for lack of personal jurisdiction, a plaintiff must establish that the trial court had personal jurisdiction over the defendant.***If the trial court determines personal jurisdiction without holding an evidentiary hearing, the trial court must 'view allegations in the pleadings and the documentary evidence in a light most favorable' to the plaintiff and resolve 'all reasonable competing inferences' in favor of the plaintiff.***Without an evidentiary hearing, a plaintiff need establish only a prima facie showing of personal jurisdiction.***A prima facie showing exists if a plaintiff produces sufficient evidence to allow reasonable minds to conclude that the trial court has personal jurisdiction.***If the plaintiff makes a prima facie showing of personal jurisdiction, the trial court shall not dismiss the complaint without holding an evidentiary hearing.***Lastly, personal jurisdiction is a question of law that we review de novo.***" (Citations omitted.)

{¶31} The trial court conducted an evidentiary hearing on December 18, 2008, and evidence was presented by Dennis Petrack as to the employment of Mr. Abramson as an attorney in EEOC hearings for himself and other postal workers. Mr. Petrack testified he personally hired Mr. Abramson to represent him, and his contact with appellee was social only, although Mr. Abramson did practice law out of his home. T. at 8, 10-11.

{¶32} The *Joffe* court further explained the following at ¶11:

{¶33} "When determining whether an Ohio court has personal jurisdiction over a nonresident defendant, the court must (1) determine whether Ohio's long-arm statute and the applicable civil rule confer personal jurisdiction and, if so, (2) whether granting jurisdiction under the statute and rule comports with the defendant's due process rights

under the Fourteenth Amendment to the United States Constitution.***Courts must engage in the two-step analysis because the long-arm statute does not give Ohio courts jurisdiction to the limits of the due process clause.***" (Citations omitted.)

{¶34} In *U.S. Sprint Communications Co., Ltd. Partnership v. Mr. K's Foods, Inc.* (1994), 68 Ohio St.3d 181, 186, the Supreme Court of Ohio noted the following:

{¶35} "The United States Supreme Court has held that in order for a state court to subject a foreign corporation to a judgment *in personam*, the corporation must 'have certain minimum contacts with [the state] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."****' (Citations omitted.) *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102. In formulating this rule, the United States Supreme Court emphasized that the analysis 'cannot simply be mechanical or quantitative,' but rather whether due process is satisfied depends 'upon the quality and nature of the activity.' *Id.* at 319, 66 S.Ct. at 159-160, 90 L.Ed. at 103-104."

{¶36} We are required to accept as true the allegation that Mr. Abramson co-mingled attorney fees with personal funds in an account he shared with appellee. However, this allegation alone is insufficient to establish minimum contacts of appellee with the state of Ohio. The complaint does not establish agent or co-conspirator activity by appellee in Ohio.

{¶37} Upon review, we concur with the trial court that Ohio lacked personal jurisdiction over appellee.

{¶38} Assignment of Error I is denied.

II

{¶39} Appellant claims he was denied a fair hearing because the trial court did not permit discovery via a deposition of appellee in order to establish jurisdiction under R.C. 2307.382. We disagree.

{¶40} The trial court held an evidentiary hearing on December 18, 2008. It consisted solely of the testimony of Dennis Petrack who was instrumental in appellant's hiring of Mr. Abramson to represent appellant in Ohio. Mr. Petrack testified Mr. Abramson worked out of his home and traveled throughout the United States to represent persons in EEOC cases. T. at 10-12. Appellee was present during some of Mr. Petrack's visits, but his contact with her was social. Id.

{¶41} Prior to the evidentiary hearing, on November 26, 2008, appellant had requested an order to take appellee's deposition and had filed a request for admissions from her as well. Appellee then filed for a protective order on December 9, 2008. The trial court did not address the protective order in its judgment entry, nor did the trial court rule on the requests.

{¶42} It is appellant's position that the trial court should have permitted a deposition of appellee so appellant could have properly developed his conspiracy claim.

{¶43} Without a ruling on the issue, we cannot address the request for the furtherance of discovery. From the transcript of the evidentiary hearing which was limited to the issue of personal jurisdiction, we presume the trial court's silence on the discovery requests was a denial of said requests.

{¶44} We find the trial court permitted appellant to develop his theory of personal jurisdiction at the hearing.

{¶45} Upon review, we find appellant was not denied a fair hearing.

{¶46} Assignment of Error II is denied.

{¶47} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, P.J.

Gwin, J. and

Edwards, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ Julie A. Edwards

JUDGES

SGF/sg 1007

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THOMAS B. KING

Plaintiff-Appellant

-vs-

JOHN W. SINON, ET AL.

Defendants-Appellees

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JUDGMENT ENTRY

CASE NO. 2009CA00039

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed. Costs to appellant.

JUDGES