[Cite as *Kerger v. Dentsply Internatl., Inc.*, 2011-Ohio-84.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94430

JESSICA KERGER, ET AL.

PLAINTIFFS-APPELLANTS

vs.

DENTSPLY INTERNATIONAL INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-635068

BEFORE: Cooney, J., Rocco, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: January 13, 2011

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Plaintiffs-appellants, Jessica and Richard Kerger (collectively "the Kergers"), individually and on behalf of their minor children, appeal the trial court's dismissal of their complaint for lack of personal jurisdiction under Civ.R. 12(B)(2) and failure to state a claim under Civ.R. 12(B)(6). We find no merit to the appeal and affirm.

{¶ 2} The Kergers sued the American Dental Association ("ADA"), the Ohio Dental Association ("ODA") and various dental product manufacturers[1] in September 2007 alleging that Jessica Kerger ("Jessica") was injured by amalgam fillings her dentist placed in her teeth. The complaint alleged that Jessica's dentist placed twelve mercury-containing dental amalgam fillings in her mouth over a period of years before her twenty-first birthday, where they remained until 2002. Kerger's dentist purchased the amalgam fillings from Johnson & Johnson.

Sometime in 1991, Jessica read an article from which she learned that dental amalgams contain mercury. The article allegedly stated the ADA's view that the use of mercury in amalgam fillings was safe. Based on her trust in the ADA, Jessica accepted and relied upon the ADA's opinion.

{¶ 3} The complaint further alleged that the ADA never advised dentists to warn patients about the potential hypersensitivity or systemic responses to mercury and actively concealed the risks and dangers of such fillings. The Kergers asserted that the ADA had a financial interest in amalgam because it owned a patent on amalgam and received revenues from amalgam manufacturers who put the ADA seal of acceptance on their products. The Kergers also alleged that the ADA website affirms that "consumers can be

[1] The Kergers did not appeal the trial court's order dismissing their claims against the ODA. They appealed the order dismissing Dentsply, but chose not to pursue the appeal. Johnson & Johnson remains a defendant in the trial court. Thus, the Kergers are pursuing an appeal solely related to dismissal of the ADA.

confident that the product meets ADA requirements for safety and effectiveness and that the manufacturer's claims about that product are accurate," and that the seal "symbolizes dentistry's commitment to protect the profession and the public."

{¶ 4} The complaint also alleged that the ADA's code of ethics prohibits dentists from warning patients about the presence of mercury in amalgam fillings and makes it illegal for dentists to remove fillings due to the presence of mercury. The Kergers maintain that, as a result of the ADA's conduct, they had no reason to believe that the amalgam fillings in Jessica's mouth were hazardous to her health prior to April 2002.

{¶ 5} According to the complaint, the ADA is not a resident of Ohio. It is a nonprofit corporation headquartered in Illinois, authorized to conduct business in Ohio, and accredits dental schools in Ohio. The complaint alleged that Jessica's dentist was a member of the ADA, and that all Ohio dentists who are members of the ODA are required to be members of the ADA. The amalgam placed in her teeth was allegedly delivered to her dentist's office in packaging containing the ADA's Seal of Acceptance. Finally, the complaint alleged that Jessica bought tubes of Crest toothpaste bearing the ADA's Seal of Acceptance and that Ohio television stations aired Crest commercials promoting their products with the ADA Seal of Acceptance.

{¶ 6} The record contains an affidavit from Mary K. Logan ("Logan"), the ADA's then-chief operating officer, attached to the ADA's motion to dismiss, in which she describes the ADA's limited contacts with Ohio. Logan states that the ADA has never been incorporated in Ohio, does not transact business in Ohio, and has never had a designated agent for service of process in Ohio. She stated that the ADA does not derive substantial revenue from goods used or consumed or services rendered in Ohio. The ADA has no office, employees, agents, mailing addresses, bank accounts, or telephone service in Ohio and does not own any property in Ohio.

{¶ 7} Logan also stated that the ADA is a voluntary association, which means that dentists are not required to be ADA members to practice dentistry in Ohio. Further, the ADA cannot grant, revoke, or suspend the licenses of any Ohio dentists, and has not taken or threatened disciplinary action against any Ohio dentist for discussing the safety of amalgam with patients.

{¶ 8} According to Logan, the ADA does not specifically direct business solicitation efforts in Ohio; does not promulgate and has not promulgated nor issued any policies, procedures, or positions specifically directed to Ohio or Ohio dentists; and does not instruct or order dentists to use any type of fillings.

{¶ 9} Based on these facts, the trial court granted the ADA's motion to dismiss the Kergers' claims against the ADA for lack of personal jurisdiction over the ADA pursuant to Civ.R. 12(B)(2) and for failure to state a claim against the

ADA pursuant to Civ.R. 12(B)(6). The Kergers now appeal, raising two assignments of error.

{¶ 10} In the first assignment of error, the Kergers argue that the trial court erred in dismissing their claims against the ADA for lack of personal jurisdiction. The Kergers contend the ADA has sufficient contacts with Ohio to confer personal jurisdiction over it because the ADA has solicited membership from all Ohio dentists and promulgated a "gag" rule prohibiting them from warning their patients about the risks associated with amalgam. The Kergers also claim that the ADA has purposely availed itself of doing business in Ohio. We disagree.

Standard of Review

{¶ 11} Personal jurisdiction is a question of law that appellate courts review de novo. *Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 784, ¶27. Matters of jurisdiction are very often not apparent on the face of the summons or complaint. Where a defendant asserts that the court lacks personal jurisdiction over him, the plaintiff has the burden of establishing the court's jurisdiction. Id. In deciding the merits of that defense, the court may hold an evidentiary hearing or "hear" the matter on affidavits, depositions, interrogatories, or receive oral testimony. Id. If the court determines its jurisdiction without an evidentiary hearing, it must view allegations in the pleadings and documentary evidence in the light most favorable to the nonmoving party. *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 236, 1994-Ohio-229, 638 N.E.2d 541. In the absence of an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdiction to withstand the motion to dismiss. *Klug v. Trivison* (2000), 137 Ohio App.3d 838, 739 N.E.2d 1243. A prima facie showing exists if a plaintiff produces sufficient evidence to allow reasonable minds to conclude that the trial court has personal jurisdiction. *Giachetti v. Holmes* (1984), 14 Ohio App.3d 306, 307, 471 N.E.2d 165.

Personal Jurisdiction

{¶ 12} In determining whether an Ohio court has personal jurisdiction over a nonresident defendant, the court must ascertain the following: (1) whether Ohio's long-arm statute, R.C. 2307.382(A), and the applicable civil rule, Civ.R. 4.3, permit it to assert personal jurisdiction; and, if so, (2) whether bringing the defendant within the jurisdiction of the Ohio courts would violate traditional notions of fair play and substantial justice under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Goldstein* at 235, citing *U.S. Sprint Communications Co., Ltd. Partnership v. Mr. K's Foods, Inc.*, 68 Ohio St.3d 181, 183-184, 1994-Ohio-504, 624 N.E.2d 1048. Courts must engage in this two-step analysis because the long-arm statute does not give Ohio courts jurisdiction to the same extent as the Due Process Clause. *Goldstein* at 238, fn. 1.

{¶ 13} The Due Process Clause protects an individual from being subject to the binding judgments of a forum in which he has not established any meaningful contacts, ties, or relations. *Blue Flame Energy Corp. v. Ohio Dept. of Commerce*, 171 Ohio App.3d 514, 2006-Ohio-6892, 871 N.E.2d 1227, ¶16, citing *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 471-472, 105 S.Ct. 2174, 85 L.Ed.2d 528. Due process is satisfied if a forum has either specific or general jurisdiction over a nonresident defendant. *Helicopteros Nacionales de Colombia, S.A. v. Hall (*1984), 466 U.S. 408, 414-415, 104 S.Ct. 1868, 80 L.Ed.2d

404, fns. 8 and 9. Specific jurisdiction exists if defendant "purposefully established minimum contacts within the forum State" and if the "litigation results from alleged injuries that 'arise out of or relate to' those activities" creating "minimum contacts." *Burger King* at 476. In contrast, general jurisdiction is based upon "continuous and systematic" contacts with the forum that are unrelated to the underlying litigation. *Helicopteros* at 415, fn. 9.

{¶ 14} To establish specific jurisdiction consistent with due process, a plaintiff must demonstrate (1) that the defendant purposefully availed himself of the privilege of acting in the forum state or caused a consequence in the forum state, (2) the cause of action arose from the defendant's activities in the forum state, and (3) the acts of the defendant or consequences caused by the defendant had a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. *Fritz-Rumer-Cooke Co., Inc. v. Todd & Sargent* (Feb. 8, 2001), Franklin App. No. 00AP-817, citing *Calphalon Corp. v. Rowlette* (C.A.6, 2000), 228 F.3d 718, 721.

{¶ 15} General jurisdiction requires a more demanding minimum-contacts analysis than specific jurisdiction and requires a showing of substantial activities within the forum state. *Helicopteros* at 414-416. Although the cause of action need not arise from or relate to the nonresident's purposeful conduct within the forum state, there must be "continuous and systematic contacts" between the nonresident defendant and the forum state. Id. The ultimate test of minimum

contacts for both general and specific jurisdiction is whether a party "'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Burger King* at 475, quoting *Hanson v. Denckla* (1958), 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283. The "purposeful availment" requirement "ensures that a party will only be haled into a jurisdiction where it has either deliberately engaged in significant activities or created continuing obligations between itself and residents of the state." *Blue Flame* at ¶17, citing *Burger King* at 475-476.

{¶ 16} The Kergers allege, without any evidentiary support: (1) that the ADA markets and sells amalgam-related products in Ohio through its seal of approval; (2) that Jessica's dentist was a member of the ADA; (3) that all Ohio dentists who are members of the ODA are required to be members of the ADA; (4) that Ohio member dentists must comply with the ADA's code of ethics; (5) that the ADA accredits Ohio dental schools; (6) that the ADA derives income from its "ADA seal of approval" program; (7) that Ohio television stations aired Crest commercials promoting their products with the ADA Seal of Acceptance; and (8) that the ADA's website indicated that amalgam products are safe. The Kergers argue these contacts are sufficient to invoke the jurisdiction of Ohio courts.

{¶ 17} Although the Kergers' complaint alleged facts that indicate the ADA purposely engaged in activities in Ohio that would warrant personal jurisdiction, the Kergers offer no evidentiary support for their claims apart from an affidavit of

a paralegal affirming the authenticity of certain ADA webpages. The ADA produced the sworn testimony of its then-chief operating officer, which refutes most of these allegations. According to this affidavit, the ADA does not transact business in Ohio and does not derive substantial revenue from goods used or consumed or services rendered in Ohio. Logan states the ADA does not manufacture, package, sell, recommend, market, advertise, promote, distribute, or place into the stream of commerce dental amalgam, and the ADA has not received any revenue from the sale or distribution of dental amalgam in Ohio or anywhere else.

{¶ 18} Logan also states that the ADA is a voluntary association, which means that dentists are not required to be ADA members to practice dentistry in Ohio. Contrary to the Kergers' allegations, Logan affirms that the ADA does not accredit dental schools in Ohio, but has representatives on the Commission on Dental Accreditation, which does accredit dental school programs. Further, the ADA does not license dentists to practice dentistry in Ohio and cannot grant, revoke, or suspend the licenses of any Ohio dentists, and has not taken or threatened disciplinary action of any Ohio dentist for discussing the safety of amalgam with patients.

{¶ 19} According to Logan, the ADA does not specifically direct business solicitation efforts in Ohio; does not promulgate and has not promulgated or issued any policies, procedures, or positions specifically directed to Ohio or Ohio

dentists; and does not instruct or order dentists to use a specific type of filling. The ADA has not attempted to require member dentists to purchase dental amalgam or any other dental restorative and does not have the authority to impose such a requirement.

{¶ 20} Although we are required to view the pleadings in a light most favorable to the Kergers, without evidentiary support for their allegations, they fail to establish that the ADA committed a purposeful act in Ohio that caused this litigation. Therefore, we affirm the trial court's conclusion that it does not have specific jurisdiction over the ADA.

{¶ 21} With regard to general jurisdiction, we must determine whether there are "continuous and systematic contacts" between the ADA and Ohio to ascertain whether the ADA's contacts establish a pattern of continuing and systematic activity. The Kergers alleged that the ADA accredits dental schools in Ohio, sells amalgam products in Ohio through its seal of approval program, and imposes a "gag" rule on Ohio dentists prohibiting them from warning their patients of the potential hazards inherent in amalgam filling. However, again, none of these allegations are supported with any evidence in the record.

{¶ 22} In her affidavit, Logan states that the ADA: (1) does not transact business in Ohio; (2) does not supply services or goods in Ohio; (3) does not derive substantial revenue from goods used or consumed or services rendered in Ohio; (4) has no office, employees, or property in Ohio; (5) does not specifically

direct business solicitation efforts at Ohio; (6) is a voluntary organization that does not require Ohio dentists to be members; (7) has not developed, promulgated, or issued any policies, procedures, or positions that are specifically directed to either Ohio dentists or residents; (8) has not instructed or ordered Ohio dentists to use any particular type of filling; and (9) does not manufacture, package, sell, recommend, market, advertise, promote, distribute, or place into the stream of commerce dental amalgam fillings in Ohio or anywhere else.

{¶ 23} The ADA bears the burden of negating the Kergers' alleged bases of jurisdiction but the Kergers must first make a prima facie showing of an actual basis of jurisdiction. *Giachetti v. Holmes* (1984), 14 Ohio App.3d 306, 307, 471 N.E.2d 165. The blanket statement that the ADA does all of the things the Kergers allege is not sufficient to survive the ADA's motion to dismiss, which is supported by some competent, credible evidence refuting those allegations.

{¶ 24} Although the ADA implicitly concedes that its seal of approval appears on Crest and other products that may be sold by separate companies to Ohio residents, such actions do not demonstrate purposeful availment of activities in Ohio because the ADA has no control over when, where, or how often those companies sell their products. *Botter v. Am. Dental Assn.* (2003), 124 S.W.3d 856. Similarly, the fact that the ADA maintains a website available to anyone on the internet is insufficient to justify general jurisdiction. Accordingly,

we affirm the trial court's conclusion that it does not have general jurisdiction over the ADA.

{¶ 25} Having concluded that the ADA does not have sufficient contacts with Ohio to substantiate personal jurisdiction under the due process analysis, we need not engage in an analysis under Ohio's long-arm statute or the ADA's alternative proposition that the Kergers' complaint fails to state a claim under Civ.R. 12(B)(6).

Judgment affirmed.

It is ordered that appellees recover of appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, JUDGE

KENNETH A. ROCCO, P.J., and
MELODY J. STEWART, J., CONCUR