

2017 IL App (1st) 162241-U
Nos. 1-16-2241 & 1-16-2483 (Consolidated)
Order filed June 22, 2017

Fourth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PETER SMITH ELY, AS EXECUTOR AND)
SUCCESSOR TRUSTEE OF THE MSA TRUST,)
THE MSB TRUST, THE MSE TRUST, THE CADE)
FAMILY TRUST, and THE MARY CADE SMITH)
TRUST, PETER SMITH ELY, AS SUCCESSOR) Appeal from the
TRUSTEE OF THE MARY CADE SMITH) Circuit Court of
DECLARATION OF TRUST OF 1985, PETER) Cook County
SMITH ELY, BRUCE GRAHAM ELY, SUSAN)
BURCH, KAREN ANDERSON DAVIS, STEVEN J.)
ANDERSON, and STANLEY G. CADE,)
)
Plaintiffs-Appellants)
) No. 15L8387
v.)
)
RUTH PIVAR, ESQ., DLA PIPER, LLP, UNGARETTI)
& HARRIS, QUARLES AND BRADY, LLP, ROBERT)
WILNEFF, CBIZ MHM, LLC, MAYER HOFFMAN)
MCCAIN, P.C., and WILLIAM PAUL ROGERS) Honorable
) Brigid M. McGrath,
Defendants,) Judge Presiding.
)
(William Paul Rogers,)
)
Defendant-Appellee.))

JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the judgment of the circuit court granting Rogers' motion to dismiss for lack of personal jurisdiction where plaintiffs failed to establish a *prima facie* case that jurisdiction in Illinois was proper.

¶ 2 I. BACKGROUND

¶ 3 A. Plaintiffs' Complaint

¶ 4 On August 17, 2015, plaintiffs filed a complaint in the circuit court of Cook County naming, among others, Ruth Pivar, Robert Wilneff, and William Paul Rogers as defendants. Rogers filed a motion to dismiss the complaint for lack of personal jurisdiction. Plaintiffs subsequently filed an amended complaint.¹ The allegations in the complaint relate to five trusts that were created in 1966 by Wilmuth and Carroll Cade. Mary Cade Smith was listed as one of the beneficiaries of each of the five trusts and Philip Rootberg was the trustee of all five trusts. In 2001, Wilneff became the trustee of the trusts and Pivar was retained as counsel for the trusts. In 2014, Smith died. Plaintiffs alleged in the complaint that prior to her death, Wilneff, Pivar, and Rogers attempted to improperly disburse the trusts' assets through promissory notes and gifts. Only Counts IV and V of the complaint raised claims against Rogers.

¶ 5 Count IV of plaintiffs' complaint was directed solely at Rogers and asserted a claim for breach of fiduciary duty. Plaintiffs asserted that in 2001, Smith granted Rogers, a resident of the state of Georgia, financial power of attorney. Plaintiffs contended that Rogers regularly contacted Wilneff and Pivar in Illinois with information about Smith's assets and the Mary Cade

¹ All references are made to plaintiffs' amended complaint unless otherwise noted.

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Smith Declaration of Trust of 1985 (1985 Trust). Plaintiffs further alleged that Rogers requested and received money derived from the five trusts. Plaintiffs asserted that Rogers violated the fiduciary duty owed to Smith by influencing her to direct funds from the trusts to him for his own benefit.

¶ 6 Count V of plaintiffs' complaint was directed at all defendants and asserted a claim for conspiracy. Plaintiffs contended that the defendants worked in concert to conceal from the plaintiffs that they were the beneficiaries under the trusts. As relevant to Rogers, plaintiffs asserted that Smith, Wilneff, Pivar, and Rogers met on numerous occasions and that Wilneff, Pivar, and Rogers agreed upon a course of conduct to conceal the improper disbursements from the trusts. Plaintiffs further alleged that Rogers was loaned funds from the trusts which were never intended to be repaid.

¶ 7 B. Rogers' Motion to Dismiss

¶ 8 Rogers filed a motion to dismiss plaintiffs' complaint for lack of personal jurisdiction under section 2-301 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-301 (West 2000)). In his motion, Rogers contended that he lives in Georgia and that the allegations asserted against him in the complaint do not arise out of or relate to any of his conduct that took place in Illinois. Rogers attached an affidavit to his motion in which he averred that he has lived in Georgia his entire life and has never lived or owned property in Illinois. He further averred that he has never worked in Illinois, maintained bank accounts in Illinois, nor been a party to a contract in Illinois. He also averred that when Smith granted him power of attorney in 2001, the document was executed in Georgia and all actions he undertook pursuant to his role as her power of attorney took place in Georgia where both he and Smith lived.

¶ 9

C. Rogers' Deposition

¶ 10 The court granted plaintiffs leave to take limited discovery of Rogers on the issue of jurisdiction. As part of this discovery, Rogers produced documents, responded to interrogatories, and sat for a deposition. At his deposition, Rogers testified that he lives in Georgia and met Smith, who lived in Chicago at the time, in 1980 in Georgia. Shortly thereafter, he helped her buy a home and move to Georgia. He further testified that in 2001, Smith granted him financial power of attorney, via a document that was drafted and executed in Georgia. He testified that he helped Smith keep track of her finances and would often send her financial information to Wilneff at Smith's request. Rogers testified that in 2001 and 2007, he accompanied Smith to Chicago to meet with Wilneff and Pivar regarding Smith's finances. He testified that he was Smith's travel companion and that although he attended the meetings, he did not participate in any discussions regarding her finances or the trusts.

¶ 11 Rogers testified that he knew both Wilneff and Pivar were located in Chicago and he communicated with them several times by both email and telephone. He testified that these communications always occurred at Smith's request and were often to inform Wilneff and Pivar about her finances for her tax returns. He testified that he believed Wilneff was Smith's accountant and knew he was a trustee, but did not know of which trust. Rogers further testified that he knew Smith had an account at The Northern Trust Company in Chicago and that he often received money from Smith from that account, but he never directed funds from that account to anyone, including himself.

¶ 12

D. The Circuit Court's Ruling

¶ 13 The court granted Rogers' motion and dismissed the allegations against him in the complaint finding that Illinois lacked personal jurisdiction. The court found that all of the

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contacts related to the allegations in the complaint took place in Georgia. The court noted that although Smith wrote checks to Rogers from an Illinois bank, the trust was a Georgia trust, Rogers received the checks in Georgia, and both Smith and Rogers lived in Georgia. The court further noted that the power of attorney was executed in Georgia and that “everything centered around Georgia.” The court determined that the fact that Rogers travelled to Illinois with Smith and corresponded with Wilneff and Pivar did not form the basis for jurisdiction in Illinois. The court reiterated that “the wrongdoings alleged in the complaint took place in Georgia.” The court therefore granted Rogers’ motion and dismissed the allegations against Rogers in plaintiffs’ complaint with prejudice. This appeal follows.²

¶ 14

II. ANALYSIS

¶ 15 On appeal, plaintiffs contend that the trial court erred in granting Rogers’ motion and dismissing the allegations against him in the complaint where Rogers maintained sufficient minimum contacts with Illinois to establish specific personal jurisdiction. Plaintiffs maintain that the evidence presented established that Rogers availed himself of the State of Illinois in a manner directly related to the allegations in the complaint.

¶ 16

A. Standard of Review

¶ 17 It is well-settled that the plaintiff has the burden of establishing a *prima facie* basis to exercise personal jurisdiction over a non-resident defendant. *Russell v. SNFA*, 2013 IL 113909, ¶ 28. Although we resolve any conflicts in the evidence in favor of the plaintiff, “the defendant may overcome plaintiff’s *prima facie* case for jurisdiction by offering uncontradicted evidence

² After granting Rogers’ motion, the circuit court granted plaintiffs’ motion pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016)) finding there was no just reason for delaying the enforcement of the judgment or appeal of its order.

that defeats jurisdiction.” *Id.* We review *de novo* the trial court’s determination of the issue of personal jurisdiction. *Id.*

¶ 18

B. Due Process

¶ 19 Due process “requires that the defendant have certain minimum contacts with the forum State such that maintenance of the suit there does not offend ‘traditional notions of fair play and substantial justice.’” (Internal quotation marks omitted.) *Russell*, 2013 IL 113909, ¶ 34 (citing *Wiles v. Morita Iron Works Co.*, 125 Ill. 2d 144, 150 (1988)). The determination of whether defendant has the requisite minimum contacts depends on whether plaintiff is seeking general or specific jurisdiction. *Russell*, 2013 IL 113909, ¶ 36 (citing *Keller v. Henderson*, 359 Ill. App. 3d 605, 613 (2005)). General jurisdiction exists where defendant has continuous and systematic general business contacts with the forum and where the nonresident defendant is doing business in Illinois with a “fair measure of permanence and continuity.” *Russell*, 2013 IL 113909, ¶ 36. Specific jurisdiction, in contrast, “requires a showing that the defendant purposefully directed its activities at the forum state and the cause of action arose out of or relates to the defendant’s contacts with the forum state.” *Id.*, ¶ 40. Plaintiffs recognize that Rogers is not subject to general jurisdiction in Illinois, but contend that the circuit court erred in finding that it lacked specific jurisdiction in this case.

¶ 20

1. *Specific Jurisdiction*

¶ 21 Specific jurisdiction requires a showing that defendant purposefully directed its activities at the forum state and the cause of action arose from those contacts with the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). Under specific jurisdiction, a nonresident defendant may be subjected to a forum state’s jurisdiction based on certain “ ‘single or occasional acts’ ” in the state but only with respect to matters related to those acts. *Goodyear*

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Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 923 (2011) (quoting *International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement*, 326 U.S. 310, 318 (1945)). A nonresident should be able to “reasonably anticipate” being drawn into litigation in the foreign forum based on its activity in that forum. *Burger King*, 471 U.S. at 474-75.

¶ 22 In support of the contention that specific jurisdiction applies in this case, plaintiffs contends that Rogers conducted business in Illinois, regularly had contact with Wilneff and Pivar, who were Illinois residents, and travelled to Illinois with Smith on several occasions. Plaintiffs further assert that the allegations in the complaint are related to Rogers’ contacts with Illinois and Rogers received a benefit from his contacts with Illinois in the form of checks written to him from the Northern Trust account. Plaintiffs maintain that Rogers’ contention in his deposition testimony that although he attended the meetings in 2001 and 2007 in Illinois, but did not participate in the discussion of Smith’s finances, is inconsistent with his role as Smith’s power of attorney. As discussed, in order for specific jurisdiction to apply, the cause of action must arise from Rogers’ contact with the state. Accordingly, we must examine the allegations in plaintiffs’ complaint in order to determine whether they arise from Rogers’ contact with Illinois.

¶ 23 Count IV of plaintiffs’ complaint was directed solely at Rogers at asserted a claim that Rogers breached his fiduciary duty. Plaintiffs contended that this fiduciary duty derived from Rogers’ long-standing relationship with Smith, her dependence on him, and the terms of the financial power of attorney. Plaintiffs asserted that Rogers breached the fiduciary duty in his role as her financial power of attorney by influencing Smith to use trust funds for his own benefit and personally directing the use of funds for his own benefit.

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¶ 24 Count V of the complaint was directed at all defendants and raised a claim for conspiracy. Plaintiffs asserted that the defendants worked in concert to conceal from plaintiffs that they were the beneficiaries of the trusts. Plaintiffs asserted that Rogers, Wilneff, and Smith held meetings where they discussed the trusts and agreed to protect defendants from liability by concealing improper disbursements. Plaintiffs further contended that the parties never intended for Rogers to repay the “loans” made to him from the 1985 Trust and that Pivar and Wilneff attempted to forgive all loans given to Rogers and endeavored to make Rogers a beneficiary to the trusts. On appeal, plaintiffs point to Rogers’ consistent and willful contact with Illinois residents, Pivar and Wilneff, regarding Smith’s finances as a basis for finding specific jurisdiction.

¶ 25 As the circuit court recognized, and as Rogers points out on appeal, all of the allegations directed at Rogers in the complaint stem from actions that took place, or were concerned with, Georgia, not Illinois. The financial power of attorney, from which plaintiffs argue Rogers’ fiduciary duty arose, was drafted and executed in Georgia by Georgia residents pursuant to Georgia law. Rogers testified that he has lived in Georgia his entire life and Smith has lived there since about 1980. Rogers and Smith’s long-standing relationship developed in Georgia after she moved there shortly after they met in Georgia. Although the funds Rogers received were drawn from an account located in Illinois, the funds were directed by Smith, a Georgia resident, in Georgia, and sent to Rogers, a Georgia resident, in Georgia. Although plaintiffs assert that Rogers conspired with Wilneff and Pivar, who are Illinois residents, Rogers testified that he did not participate in the meetings regarding Smith’s finances and merely accompanied Smith as a travel companion. In addition, he testified that he believed that the documents he sent to Wilneff

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and Pivar from Georgia as Smith's requests were for the purpose of preparing her tax returns. As the circuit court recognized, "everything centered around Georgia."

¶ 26 Plaintiffs contend, however, that the circuit court improperly gave greater weight to Rogers' and Smith's Georgia residency, rather than Rogers continued communication with Pivar and Wilneff regarding Smith's finances. Plaintiffs rely on *In re Marriage of DiFiglio* in support of its contention that Rogers is subject to specific jurisdiction in Illinois where he took trips to Illinois, accepted money drawn from Illinois bank accounts, and remained in contact with Illinois residents. *In re Marriage of DiFiglio*, 2016 IL App (3d) 160037. In *DiFiglio*, Stanislawa DiFiglio filed a petition for a dissolution of marriage against James DiFiglio. *Id.* ¶ 3. After the petition was filed, James executed an Illinois power of attorney for property, naming his brother-in-law, David Malmstedt, his attorney-in-fact. *Id.* James then sold an Illinois corporation that he started during the marriage and Malmstedt participated in the sale and received proceeds from it. *Id.*

¶ 27 Stanislawa filed a third-party complaint against Malmstedt seeking to recover the portion of the proceeds from the sale of the corporation that he received. *Id.* ¶ 6. Malmstedt filed a motion to dismiss for lack of personal jurisdiction contending that he was a resident of California and had not committed any act that would subject him to jurisdiction in Illinois. *Id.* ¶ 7. The circuit court denied Malmstedt's motion finding that the power of attorney entered into between James and Malmstedt created a fiduciary relationship between Malmstedt and Stanislawa by way of Malmstedt taking control of marital assets in which Stanislawa had an interest. *Id.* ¶ 10.

¶ 28 On review, this court found that "[w]here the defendant makes trips to Illinois, obtains property, including money from Illinois residents, and remains in continual communication with Illinois residents, the minimum contacts requirement is satisfied" *Id.* ¶ 18 (citing *Mandalay Associates Ltd. Partnership v. Hoffman*, 141 Ill. App. 3d 891, 897 (1986)). The court found that

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the circuit court had jurisdiction over Malmstedt because he obtained possession and control of the proceeds of the corporation while they were in Illinois and Stanislaw's cause of action against Malmstedt arose from the possession of those funds. *In re Marriage of Difiglio*, 2016 IL App (3d) 160037, ¶ 19. The court further found that Malmstedt had sufficient minimum contacts with Illinois to satisfy the due process clauses of the Illinois and federal constitutions where he travelled to Illinois at least two times, once for the sale of the corporation, and appeared in court with James. *Id.* ¶ 20. The court also noted that Malmstedt kept in regular contact with James, an Illinois resident, and acted as James' attorney-in-fact pursuant to a power of attorney that was drafted and executed in Illinois. *Id.* The court therefore determined that Malmstedt had purposefully availed himself of the privilege of conducting activities in Illinois. *Id.*

¶ 29 Here, by contrast, Rogers did not have power of attorney for an Illinois resident, did not receive proceeds from the sale of an Illinois corporation, did not have a fiduciary relationship with an Illinois resident, and did not appear in court with an Illinois resident. Although Rogers received funds that were drawn from an Illinois bank account, Smith, who directed the funds, was a Georgia resident and Rogers received the funds in Georgia. Moreover, as discussed, plaintiffs failed to establish a *prima facie* basis to show that the allegations in the complaint arose from Rogers' contacts with Illinois. Plaintiffs assert that Rogers regularly corresponded with Wilneff and Pivar, Illinois residents, through emails and telephone calls. Rogers acknowledged that he was in contact with Wilneff and Pivar, but testified that he did so only at Smith's request to update them about Smith's financial information.

¶ 30 Furthermore, although Rogers acknowledged that he travelled to Chicago with Smith, he testified that he did so only as Smith's travel companion. He further testified that although he attended the meetings with Smith, Wilneff, and Pivar, he did not participate in the discussions

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regarding Smith's finances. Plaintiffs contend that this testimony is inconsistent with Rogers' role as Smith's power of attorney, however, plaintiff has presented no evidence which contradicts his testimony. Although we resolve any conflicts in the evidence in favor of the plaintiff, "the defendant may overcome plaintiff's *prima facie* case for jurisdiction by offering uncontradicted evidence that defeats jurisdiction." *Russell*, 2013 IL 113909, ¶ 28. Here, the uncontradicted evidence shows that Rogers accompanied Smith to Chicago and the meetings, but did not participate in any discussions regarding her finances with Wilneff and Pivar. The mere fact that Rogers corresponded with Wilneff and Pivar and travelled to Chicago, without more, was insufficient to establish a *prima facie* basis for jurisdiction when viewed in light of the uncontradicted evidence presented by Rogers.

¶ 31 Plaintiffs, nonetheless, contend that jurisdiction is proper where Rogers financially benefitted from his contact with Illinois. In support of this contention, plaintiffs rely on *LaSalle National Bank of Chicago v. Akande*, where this court found that personal jurisdiction was proper in Illinois where defendant entered into a lease guaranty with an Illinois resident and the cause of action arose from that contract. *LaSalle National Bank of Chicago v. Akande*, 235 Ill. App. 3d 53, 59 (1992). The court found that defendant transacted business in Illinois where the lease guaranty was executed in Illinois, was to be performed in Illinois, and was entered into with an Illinois resident. *Id.* The court further found that this transaction gave rise to the cause of action against defendant where the plaintiffs' claimed that a tenant defaulted on the lease and defendant failed to perform under the lease guaranty by paying the amounts due. *Id.* The court found that due process was satisfied where defendant took advantage of a business opportunity and purposely availed himself of the privilege of conducting activities in Illinois. *Id.* at 59-60. The court concluded that "defendant *** should reasonably have anticipated that any lawsuit

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against him would be filed in Illinois, the situs of the execution of the guaranty and the place where the lease and the guaranty were likely to be performed.” *Id.* at 60.

¶ 32 Here, at contrast with defendant in *LaSalle*, Rogers did not enter into a contract with an Illinois resident. Rather, the contract at issue here was the power of attorney between two Georgia residents, which was executed and performed in Georgia. Rogers did not take advantage of a business opportunity and purposefully avail himself of the privilege of conducting activities in Illinois when he entered into the power of attorney in Georgia. Thus, the “situs of the execution” of that contract was Georgia, the place where the power of attorney was likely to be performed, and, in fact, was performed.

¶ 33 We also find plaintiffs’ contention that Rogers benefited financially through his contacts with Illinois to be unpersuasive. As stated, although the funds from the 1985 Trust were drawn from an Illinois bank account, they were directed to Rogers from a Georgia resident to a Georgia resident. Rogers testified that he did not direct Smith to use the funds from the Northern Trust Company and he never directed the funds himself. We likewise find plaintiffs’ reliance on *Keller* misplaced where defendant in that case hired an Illinois company to broker a contract for the sale of plane in Illinois that he knew would be flown in Illinois by an Illinois resident and thus had “fair warning” that a suit could take place in Illinois. *Keller*, 359 Ill. App. 3d at 614-15. Here, as discussed, there was no such “fair warning” where Rogers did not similarly direct his interactions at Illinois.

¶ 34 Plaintiffs have thus failed to establish a *prima facie* basis for exercising personal jurisdiction over Rogers, a nonresident defendant. We therefore hold that the circuit court did not err in granting his motion to dismiss and finding that plaintiffs failed to establish that Illinois courts had personal jurisdiction over Rogers

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¶ 35

III. CONCLUSION

¶ 36 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.