

FIFTH DIVISION  
December 21, 2012

No. 1-11-3637

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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RON THEMEL,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 M5 001103
	)	
NICK'S BUILDING SUPPLY, INC.,	)	
	)	Honorable
Defendant - Appellant.	)	Thomas W. Murphy,
	)	Judge Presiding.

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JUSTICE HOWSE delivered the judgment of the court.  
Presiding Justice McBride and Justice Palmer concurred in the judgment.

**ORDER**

*HELD:* Jurisdiction over Indiana defendant proper under both federal due process and the Illinois long-arm statute.

¶ 1 This interlocutory appeal arises as a result of the circuit court's denial of defendant Nick's Building Supply, Inc.'s combined motion to strike plaintiff Ron Themel's verified complaint and

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to dismiss the action on the basis of a lack of personal jurisdiction. On appeal, defendant contends that: 1) plaintiff failed to make a *prima facie* case for jurisdiction over it; 2) it was not susceptible to jurisdiction in Illinois under applicable Illinois and federal due process standards; 3) plaintiff's affidavit is inadmissible under Illinois Supreme Court Rule 191 and general rules of evidence; and 4) the trial court improperly denied defendant's combined motion to strike plaintiff's complaint and dismiss the action against defendant pursuant to sections 2-619(a)(1) and 2-301. 735 ILCS 5/2-619(a)(1), 2-301 (West 2010). For the following reasons, we affirm.

## ¶ 2 BACKGROUND

¶ 3 Briefly stated, the facts as indicated in the verified complaint are as follows: on November 16, 2010, plaintiff placed a special order for custom wood doors from defendant via its website after a series of correspondence over email, facsimile and the telephone. Plaintiff is an Illinois resident and defendant is an Indiana company. When the doors were delivered, plaintiff discovered that they were not in accordance with what he ordered and they were defective. After several attempts to resolve the issues with defendant, plaintiff filed suit in Cook County on August 5, 2011, seeking \$9,768 as damages, plus attorney fees and costs.

¶ 4 Defendant responded by filing a combined motion to strike plaintiff's verified complaint and dismiss the action based on a lack of personal jurisdiction pursuant to sections 735 ILCS 5/2-619(a)(1) (West 2010) and 735 ILCS 5/2-301 (West 2010). After a hearing, the trial court denied defendant's motion.

¶ 5 Defendant filed a petition in this court for leave to file an interlocutory appeal pursuant to Illinois Supreme Court Rule 306(a)(3) (Ill. S. Ct. R. 306(a)(3) (eff. Sept. 1, 2006)). We granted

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the petition and this appeal followed.

#### ¶ 6 ANALYSIS

¶ 7 On appeal, defendant contends that: 1) plaintiff failed to make a *prima facie* case for jurisdiction over it; 2) it was not susceptible to jurisdiction in Illinois under applicable Illinois and federal due process standards; 3) plaintiff's affidavit is inadmissible under Illinois Supreme Court Rule 191 and general rules of evidence; and 4) the trial court improperly denied defendant's combined motion to strike plaintiff's complaint and dismiss the action against defendant pursuant to sections 2-619(a)(1) and 2-301. 735 ILCS 5/2-619(a)(1), 2-301 (West 2010).

#### ¶ 8 A. *Prima Facie* Case for Jurisdiction

¶ 9 A plaintiff has the burden of establishing *prima facie* bases for exercising a court's *in personam* jurisdiction over a defendant. *Illinois Commerce Commission v. Entergy-Koch Trading, LP*, 362 Ill. App. 3d 790, 795 (2005). A plaintiff's *prima facie* case may be rebutted by a defendant's uncontradicted evidence that defeats jurisdiction. *Entergy-Koch*, 362 Ill. App. 3d at 795. Where a circuit court determines jurisdiction based on documentary evidence, we review the court's decision *de novo*. *Entergy-Koch*, 362 Ill. App. 3d at 795.

¶ 10 Defendant contends that plaintiff made no factual allegations which would make a minimal case for general or specific jurisdiction in Illinois. Specifically, defendant maintains that the allegation contained in paragraph two of the complaint is conclusory and devoid of any facts which would support that conclusion. Defendant further contends that plaintiff's other allegations lack jurisdictional facts and totally fail to make any claim for jurisdiction.

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¶ 11 A plaintiff must allege facts in its initial complaint upon which to base the relevant court's jurisdiction over a nonresident under the long-arm statute. *Entergy-Koch*, 362 Ill. App. 3d at 795-96, (citing *Heller Financial, Inc. v. Conagra, Inc.*, 166 Ill. App. 3d 1, 4 (1988)). Any conflicts between the parties' affidavits will be resolved in the plaintiff's favor for purposes of determining if a *prima facie* case for jurisdiction has been alleged. *Larochelle v. Allamian*, 361 Ill. App. 3d 217, 221 (2005).

¶ 12 Plaintiff's verified complaint alleged breach of contract as follows:

"BREACH OF CONTRACT: 1. Plaintiff is a resident of the County of Cook, State of Illinois. 2. Defendant is an Indiana company doing business in the Cook County, State of Illinois. 3. On or about, November 16, 2010, plaintiff entered into a written contract with defendant to provide interior and exterior wood doors stained to special order for plaintiff's residence located at 27 Cass Street, Lemont, IL 60439. (See attached: Exhibit A) 4. Plaintiff paid defendant the full contracted price for said doors prior to delivery. 5. Upon delivery, plaintiff discovered that certain interior doors were not stained to plaintiff's special color, and said doors were inferior in quality and defective. (See attached: Exhibit B) 6. Defendant has failed to remedy the breach of contract in spite of plaintiff's numerous written and oral request[s] for repair or replacement. 7. Defendant's breach of contract has resulted in

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damages to the plaintiff in the amount of \$9,768 plus interest and attorney's fees. (See attached: Exhibit C)"

¶ 13 Exhibit A is a copy of a paid receipt issued by defendant to plaintiff for the order showing payments totaling \$4,028. Exhibit B is a list of doors and the issues with each. Exhibit C is a list of itemized damages totaling \$9,768.

¶ 14 Plaintiff's affidavit, filed in response to defendant's motion to dismiss, averred that: he entered into a written contract with defendant on November 16, 2010, when he paid the full price via credit card for custom doors to be produced and delivered to his home in Lemont, Illinois; defendant agreed to produce and deliver the doors to his home; defendant's driver delivered the doors to his home in a truck representing defendant's company and defendant's truck driver assisted in unloading the doors at plaintiff's home; on numerous occasions plaintiff saw defendant's truck delivering items to other locations within his community and traveling on Illinois roadways; he viewed defendant's website and viewed several advertisements related to their product, including a Chicago Home Magazine article promoting defendant's products; and representatives of defendant's company told plaintiff they had supplied numerous Illinois residences with custom doors and because of that experience, could successfully fill his special order. Plaintiff also included pages printed from defendant's website in the record.

¶ 15 Defendant's sales and administration manager, John Thorski, also filed an affidavit with defendant's combined motion to strike the complaint and dismiss the action. Thorski averred that: he had personal knowledge of sales made to plaintiff; defendant is an Indiana business with its sole location in Crown Point, Indiana and its sole listed phone number in the Lake County

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area code 219; defendant solicits its business exclusively through an internet-based website; orders for products are submitted to defendant solely by telephone, email or through the company's website and all such orders are received, processed, and accepted by staff in Indiana; sales are made FOB the Crown Point office/warehouse, and its general practice is that sold products are available for pick up in Indiana or shipment by independent freight carrier; defendant has no Illinois office or phone number and does not advertise in Illinois other than through a general internet-based website; plaintiff ordered doors by submitting an order acknowledgment to defendant via facsimile or email; plaintiff paid via credit card which was processed by defendant in Indiana; all further communications were by interstate telephone or email; all critical aspects of the transaction - the offer, the acceptance, the payment, and the shipment - occurred in Indiana; and at no time did defendant purposely avail itself of the privileges of conducting business in Illinois or otherwise invoke the benefits and protections of Illinois law in the contractual relationship.

¶ 16 It is undisputed that defendant is a foreign corporation not licensed in Illinois. Under the "long-arm statute," section 2-209 of the Code of Civil Procedure (Code) (735 ILCS 5/2-209 (West 2010)), an Illinois court may exercise jurisdiction over such a corporation based upon the 1) fact that the corporation is "doing business" in Illinois (735 ILCS 5/2-209(b)(4) (West 2010)); or 2) compliance with one or more of the requirements of section 2-209(a) of the Code (735 ILCS 5/2-209(a) (West 2010)). Additionally, section 2-209(c) of the Code (735 ILCS 5/2-209(c) (West 2010)) provides that a court may exercise jurisdiction on any basis consistent with the Illinois Constitution and United States Constitution. Further, the long-arm statute allows Illinois

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courts to assume personal jurisdiction over non-resident corporate defendants in causes of action arising from the making or performance of any contract or promise substantially connected with this state. *Autotech Controls Corp. v. K.J. Electric Corp.*, 256 Ill. App. 3d 721, 724 (1993).

¶ 17 We find that plaintiff's verified complaint, while it did not cite specific statutory bases for exercising the circuit court's jurisdiction, did allege sufficient facts to allege jurisdiction pursuant to section 2-209(a)(7), making or performance of a contract connected with Illinois and section 2-209(b)(4), doing business in Illinois. 733 ILCS 5/2-209 (a)(7), (b)(4) (West 2010).

Accordingly, we find that plaintiff made a *prima facie* case for jurisdiction over defendant in its verified complaint.

¶ 18 B. Defendant's Susceptibility to Jurisdiction

¶ 19 Defendant next contends that it was not susceptible to jurisdiction in Illinois under applicable Illinois and federal due process standards.

¶ 20 Once we have found that jurisdiction is proper under the long-arm statute, we must determine if the exercise of jurisdiction comports with due process of law. *Larochelle*, 361 Ill. App. 3d at 221.

¶ 21 For personal jurisdiction to satisfy federal due process requirements, a defendant must have minimum contacts with the forum state so that maintaining suit there would not offend " 'traditional notions of fair play and substantial justice.' " *MacNeil v. Tranbert*, 401 Ill. App. 3d 1077, 1080 (2010), (quoting *Spartan Motors, Inc. v. Lube Power, Inc.*, 337 Ill. App. 3d 556, 560 (2003)), (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945)), (quoting *Miliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 343 (1940)); *Bombliss v.*

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*Cornelsen*, 355 Ill. App. 3d 1107, 1112 (2005). The minimum contacts requirement must be based on some act by which a defendant purposely avails himself of the privilege of conducting activities within a state, thus invoking the benefits and protections of its laws. *MacNeil*, 401 Ill. App. 3d at 1081; *Bombliss*, 355 Ill. App. 3d at 1112-13. The defendant's conduct with respect to the forum state must be such that he would reasonably anticipate being sued in that state's court. *Bombliss*, 355 Ill. App. 3d at 1113. The factors a court must consider include: 1) whether the defendant had sufficient minimum contacts with the forum state, 2) whether the cause of action arose from those contacts, and 3) whether it is reasonable to require the defendant to litigate in the forum state. *MacNeil*, 401 Ill. App. 3d at 1081, (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-77, 105 S. Ct. 2174, 2181-84 (1985)); *Bombliss*, 355 Ill. App. 3d at 1113.

¶ 22 When the parties have a contractual relationship, minimum contacts may be shown by the parties' negotiations preceding their agreement, the course of dealing between the parties, the terms of the agreement and foreseeable future consequences arising out of the agreement. *Bombliss*, 355 Ill. App. 3d at 1113. Where the defendant is shown to have deliberately engaged in significant ongoing obligations with a resident of the forum state, the defendant has accepted the privilege of doing business with the forum state, and it is not unreasonable to require him to litigate there. *Bombliss*, 355 Ill. App. 3d at 1113, (citing *Burger King*, 471 U.S. at 476, 105 S. Ct. at 2184). Moreover, a single meeting between an agent of a nonresident defendant and an Illinois plaintiff may be sufficient to constitute the transaction of business for purposes of jurisdiction under the long-arm statute. *D.S. America (EAST) Inc., d/b/a Screen (EAST) v. Elmendorf Grafica, Inc.*, 274 Ill. App. 3d 643, 650 (1995).

¶ 23 In the present case, we note that plaintiff's affidavit states that defendant delivered the doors in Illinois. Thorski's affidavit did not contradict plaintiff's affidavit that defendant's agent delivered the goods; Thorski's affidavit merely stated that defendant generally uses an independent freight carrier for delivery and did not deny delivery to plaintiff's home in Illinois. We find that plaintiff's affidavit undisputedly established that defendant delivered goods to plaintiff in Illinois, thus conferring jurisdiction over defendant. See *D.S. America*, 274 Ill. App. 3d at 652 (the exercise of jurisdiction comports with federal due process based on a single act).

¶ 24 Based on our review of the record, we find sufficient minimum contacts between defendant and plaintiff for purposes of federal due process. Accordingly, we conclude that the trial court's assertion of jurisdiction did not offend federal due process.

¶ 25 A similar result is reached under the due process requirement of the Illinois long-arm statute, which requires it to be fair, just and reasonable to require a non-resident to defend an action in Illinois. *Autotech*, 256 Ill. App. 3d at 726. We have already determined that plaintiff established a *prima facie* case for jurisdiction under section 2-209 and that jurisdiction over defendant does not offend federal due process. It follows then that jurisdiction over defendant satisfies Illinois' long-arm statute.

¶ 26 C. Admissibility of Plaintiff's Affidavit

¶ 27 Defendant next contends that plaintiff's affidavit should be disregarded because it is defective and inadmissible, and also fails to correct any of the deficiencies of the complaint or make any factual points. Defendant states that the trial court did not rule upon its motion to strike plaintiff's affidavit but contends that plaintiff's affidavit should be stricken.

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¶ 28 We note that defendant has failed to supply us with the report of proceedings from the various hearings in the trial court, or a bystander's report. There is nothing in the record to show that the defendant's motion was presented for ruling before the trial court or whether the trial court considered the motion. As it is the appellant's duty to present a sufficiently complete record of the proceedings at trial to support a claim of error (*Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984); *EDN Real Estate Corp. v. Marquette National Bank*, 263 Ill. App. 3d 161, 167 (1994)), we must presume that the orders entered by the trial court were in conformity with the law and had a sufficient factual basis. Without a report of proceedings or bystander's report, we are unable to determine whether the trial court considered the motion or the substance of the trial court's various rulings in the instant case. Accordingly, we affirm all orders entered.

¶ 29 D. Denial of Defendant's Combined Motion to Strike and Dismiss the Complaint

¶ 30 Finally, defendant contends that the trial court improperly denied its combined motion to strike plaintiff's complaint under section 2-619(a)(1) (735 ILCS 5/2-619(a)(1) (West 2010)) and dismiss the action under section 2-301 (735 ILCS 5/2-301 (West 2010)).

¶ 31 We note that defendant's brief does not contain any specific argument as to this issue in violation of Supreme Court Rule 341(h)(7) (Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008)), nor does the record contain a report of the proceedings held before the trial court on this issue or a bystander's report in compliance with Supreme Court Rule 323 (Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)). Generally speaking, the appellant bears the burden of presenting this court with an adequate record on appeal. *Medow v. Flavin*, 336 Ill. App. 3d 20, 36 (2002). In the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in

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conformity with the law. *Landeros v. Equity Property and Development*, 321 Ill. App. 3d 57, 63 (2001), (citing *Foutch*, 99 Ill. 2d at 391). Without an adequate report of the proceedings showing the basis for the trial court's ruling on the motion to dismiss and strike, we must presume its decision was appropriate. *Landeros*, 321 Ill. App. 3d at 63; *Foutch*, 99 Ill. 2d at 391.

¶ 32 Moreover, as we have previously concluded that jurisdiction in Illinois was proper, we find that the trial court properly denied defendant's combined motion to dismiss and strike plaintiff's complaint.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 35 Affirmed.