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DISCRETIONARY REVIEW GRANTED BY SUPREME COURT:
OCTOBER 21, 2009
(FILE NO. 2009-SC-000389-DG)

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000989-MR

BRAD ROBEY, D/B/A ROBEY'S
PAWN WORLD

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 05-CI-03321

GERALD S. HINNERS

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; BUCKINGHAM,¹
SENIOR JUDGE.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

BUCKINGHAM, SENIOR JUDGE: Brad Robey, d/b/a as Robey's Pawn World, appeals from a default judgment of the Kenton Circuit Court in favor of Gerald S. Hinnners resulting from Robey's sale of a vehicle to Hinnners through eBay. Robey, a Missouri resident, contends that the circuit court lacked personal jurisdiction to enter the judgment against him. We agree; thus, we reverse and remand.

Robey operates a pawn business in Sikeston, Missouri, and Hinnners is a resident of Kentucky. Ebay is a widely-used auction site on the Internet. It provides an online forum for sellers to list items for auction and for prospective buyers to bid.

On or about September 15, 2005, Robey listed a 2002 Cadillac Escalade automobile for auction on eBay Motors, a division of the eBay auction site. The auction listing stated that the vehicle was "clean, better than average" and that "the engine runs like a dream." The listing also stated that there was a "1 month/1,000 mile Service Agreement."

Hinnners successfully outbid others at \$25,869 and won the auction. He traveled to Missouri to close the transaction, paid Robey the renegotiated amount of \$23,000 rather than the bid amount, and took possession of the vehicle.

Hinnners claims that after returning to Kentucky, he began to experience problems with the vehicle. After attempts to resolve his complaints were unsuccessful, on December 22, 2005, Hinnners filed a civil complaint against Robey in the Kenton Circuit Court. The complaint alleged that the vehicle began to have mechanical troubles immediately after delivery and that a mechanic

examined it and determined that it had been rolled and had suffered extensive physical damage. The complaint further alleged that the vehicle had severe electronic problems and was unsafe to drive.

Robey filed an answer and also a motion to dismiss on the ground of lack of personal jurisdiction. The trial court denied the motion.² Thereafter, Robey failed to respond to discovery requests, and the court entered an order compelling discovery. When Robey failed to comply with the order compelling discovery, the court granted Hinnners's motion to strike Robey's answer and entered a default judgment. The judgment against Robey is in the amount of \$36,320.05, an amount that exceeds the purchase price by more than \$13,000. Robey's appeal herein followed.

Before examining Robey's argument that the court erred in ruling that it had personal jurisdiction, we must address Hinnners's argument that Robey may not appeal from the court's order on personal jurisdiction but may only appeal from the issue of whether the default judgment was proper. In support of his argument, Hinnners cites *Jeffrey v. Jeffrey*, 153 S.W.3d 849 (Ky. App. 2004), wherein a panel of this court stated that:

In Kentucky it is permissible to appeal directly from a default judgment. "However, the issue in such an appeal [is] limited to determining whether the pleadings were sufficient to uphold the judgment, or whether the appellant was actually in default."

² The record does not show that there was an evidentiary hearing. Apparently, the motion was submitted on the pleadings.

Id. at 851 (citations omitted). The *Jeffrey* court also noted that “[t]he exception to this rule is that subject matter jurisdiction is ‘open for the consideration of the reviewing court whenever it is raised by any party[.]’” *Id.* (citation omitted).

Nevertheless, the court specifically concluded that jurisdiction, including personal jurisdiction, was “[t]he only issue that may be properly addressed in this appeal[.]”

Id. In other words, contrary to Hinners’s argument, the *Jeffrey* court concluded that the issue of personal jurisdiction was subject to the appellate review of a default judgment.

The U.S. Supreme Court stated in *Ruhrigas AG v. Marathon Oil Co.*, 526 U.S. 574, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999), that personal jurisdiction is “an essential element of the jurisdiction” of a court and that without such jurisdiction a court is “powerless to proceed[.]” 526 U.S. at 584, 119 S.Ct. at 1570 (citation omitted). The Supreme Court stated in *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418, 77 S.Ct. 1360, 1362, 1 L.Ed.2d 1456 (1957), that “[i]t has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.” (Footnote omitted.) The Sixth Circuit of the U.S. Court of Appeals explained that “[i]t is elemental that a judgment rendered by a court lacking personal jurisdiction over the defendant is void as to that defendant.” *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1081 (6th Cir. 1990).

Because judgments against defendants over whom the courts lack personal jurisdiction are void, the inquiry for our purposes becomes whether the

issue of personal jurisdiction may be raised by Robey in this appeal even though a default judgment was entered. In *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir. 1994), the court held that “courts have generally held that ‘[d]efects in personal jurisdiction . . . are not waived by default when a party fails to appear or to respond.’” *Id.* at 1120 (quoting *Williams v. Life Savings and Loan*, 802 F.2d 1200, 1202 (10th Cir. 1986)). In *Hugel v. McNell*, 886 F.2d 1, 3 n.3 (1st Cir. 1989), the court held that there was no waiver of the defense of lack of the personal jurisdiction issue in a default judgment case where the defendants failed to respond to pleadings. In *Pacific Atlantic Trading Co., Inc. v. M/V Main Exp.*, 758 F.2d 1325, 1331 (9th Cir. 1985), the court held that a default judgment entered without personal jurisdiction is void.

Foremost Ins. Co. v. Whitaker, 892 S.W.2d 607 (Ky. App. 1995), is very similar to this case. In that case, the trial court entered a default judgment against a Michigan corporation. The nonresident corporation then moved the court to set aside the default judgment on the ground that the court lacked personal jurisdiction to enter the judgment. *Id.* at 609. The court denied the motion, and the corporation appealed. This court held as follows:

A void judgment is not entitled to any respect or deference by the courts. *Mathews v. Mathews*, Ky.App., 731 S.W.2d 832, 833 (1987). A void judgment is a legal nullity, and a court has no discretion in determining whether it should be set aside. Bertelsman and Philipps, *Kentucky Practice*, Civil Rule 60.02, Vol. 7, p. 396 (4th ed. 1984). Therefore, because the trial court had no jurisdiction over Foremost at the time default judgment

was entered, the judgment was void *ab initio* and the trial court erred as a matter of law in refusing to set it aside.

Id. at 610.

Even though this case involves a default judgment, Robey actually contested the issue of personal jurisdiction by moving the court to dismiss Hinners's complaint on that ground. By raising the issue of personal jurisdiction on appeal, Robey is alleging that the judgment against him is void. We conclude that under the foregoing authorities, he may raise this issue on appeal.

Hinners asserts that the court had personal jurisdiction over Robey under the Kentucky long-arm statute, KRS 454.210. That statute provides in relevant part that

(2) (a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

1. Transacting any business in this Commonwealth;
2. Contracting to supply services or goods in this Commonwealth;
-
4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, provided that the tortious injury occurring in this Commonwealth arises out of the doing or soliciting of business or a persistent

course of conduct or derivation of substantial revenue within the Commonwealth.

Hinners maintains that the court had personal jurisdiction over Robey pursuant to these three subsections of the statute.

The Kentucky long-arm statute “extends personal jurisdiction over nonresidents only to the limits of the Constitution’s due process clause.” *Wright v. Sullivan Payne Co.*, 839 S.W.2d 250, 253 (Ky. 1992). The requirements of due process in this regard were set forth by the U.S. Supreme Court in the landmark case of *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In that case, the Supreme Court stated as follows:

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’

326 U.S. at 316, 66 S.Ct. at 158 (citation omitted).

In Kentucky, the courts have established a “three-pronged analysis to determine the outer limits of personal jurisdiction based upon a single act.” *Wilson v. Case*, 85 S.W.3d 589, 593 (Ky. 2002). The test is stated as follows:

The first prong of the test asks whether the defendant purposefully availed himself of the privilege of acting within the forum state or causing a consequence in the forum state. The second prong considers whether the cause of action arises from the alleged in-state activities. The final prong requires such connections to the state as to make jurisdiction reasonable.

Id. (citing *Tube Turns Div. of Chemetron Corp. v. Patterson Co., Inc.*, 562 S.W.2d 99, 100 (Ky. App. 1978)). The *Wilson* court also stated that “[e]ach of these three criteria represents a separate requirement, and jurisdiction will lie only where all three are satisfied.” *Id.*

In *Sunrise Turquoise, Inc. v. Chemical Design Co., Inc.*, 899 S.W.2d 856 (Ky. App. 1995), this court held that “[i]n terms of a due process analysis, the defendant’s connection must be such ‘that he should reasonably anticipate being haled into court there.’” *Id.* at 858 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985)). Further, the court in *Sunrise Turquoise* stated that “[t]he requirement of ‘purposeful availment’ is significant since it assures that the defendant will not be haled into a jurisdiction as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts.” *Id.*

“Whether personal jurisdiction may be exercised over a defendant is a fact-specific determination, and ‘[e]ach case involving the issue of personal jurisdiction over a nonresident defendant must be decided on its own facts.’”

Powers v. Park, M.D., 192 S.W.3d 439, 444 (Ky. App. 2006) (footnote omitted).

“The question of jurisdiction is ordinarily one of law, meaning that the standard of review to be applied is *de novo*.” *Appalachian Regional Healthcare, Inc. v.*

Coleman, 239 S.W.3d 49, 54-55 (Ky. 2007).

The issue of personal jurisdiction in the context of an eBay transaction between a resident buyer and a nonresident seller is an issue of first impression in

the appellate courts of this state. Other jurisdictions have addressed the issue, however. Several of the cases involve the sale of automobiles.

Recently, the Ninth Circuit of the U.S. Court of Appeals addressed the issue in a case very similar to this one. In *Boschetto v. Hansing*, 539 F.3d 1011 (9th Cir. 2008), a California buyer purchased a 1964 Ford Galaxie through eBay from a Wisconsin seller for \$34,106. Following the purchase, the buyer arranged to have a transport company take possession of the car in Wisconsin and deliver it to California. After accepting delivery of the car, the buyer soon determined that it did not meet his expectations or the advertised description. He then filed a civil complaint against the Wisconsin seller in a California court.

After applying the same three-prong test adopted in Kentucky, the Ninth Circuit held that the lower court was without personal jurisdiction over the Wisconsin seller. *Id.* at 1016-19. Referring to the transaction as a “one-shot affair” and finding that there were no continuing commitments between the parties, the court stated that “the lone transaction for the sale of one item does not establish that the Defendants purposefully availed themselves of the privilege of doing business in California.” *Id.* at 1017. The court also noted as follows:

[t]he cases that have found that jurisdiction was proper based on eBay sales relied heavily on the fact that the defendant was using the platform as a broader vehicle for commercial activity.

Id. at 1019. In holding that there was no personal jurisdiction over the defendants, the court also stated that there was no allegation that the defendants were “regular users of the eBay sales platform to sell their cars.” *Id.* at 1019 (footnote omitted).

Another case involving an eBay sale and a subsequent suit by a resident buyer against a nonresident seller is *Sayeedi v. Walser*, 835 N.Y.S.2d 840 (N.Y.City Civ.Ct. 2007). In that case, a Missouri seller sold a New York buyer an automobile engine through eBay. When the New York buyer became dissatisfied, he filed a civil complaint against the Missouri buyer in New York.

In holding that the court had no personal jurisdiction over the Missouri seller, the court stated as follows:

It has not been shown to this Court’s satisfaction that the Defendant purposefully invoked the benefits and protections of New York law. No evidence was provided by Plaintiff as to Defendant’s overall eBay statistics, experience, or of any marketing directed at potential customers, designed for instance, to welcome bids from New Yorkers or any other acts that indicate [a] Defendant may be purposely availing himself specifically to the business of New Yorkers or any desire to take advantage of New York law. The Defendant was prepared to sell his Chevrolet engine to whoever the highest bidder happened to be regardless of the state in which they happened to reside. Given this unique sale style, even though a contract may be formed, the location of delivery is not likely in the seller’s realm of contemplation. In the typical on-line auction sale the ultimate destination of any item is completely determined by the potential buyers through the bidding process. Accordingly, to summon the Defendant into a New York court on this matter would contravene the traditional notions of “fair play” and “substantial justice” that have become the touchstone of personal jurisdiction.

Id. at 846.

In *Choice Auto Brokers, Inc. v. Dawson*, 274 S.W.3d 172 (Tex. App. 2008), a Texas resident purchased an automobile from a Florida corporation that sold automobiles using both its website and the eBay auction site. After experiencing mechanical failures with the automobile, the Texas buyer filed a civil complaint against the Florida corporation in Texas. The complaint was dismissed for lack of personal jurisdiction. *Id.* at 178-79.

The court noted that the vehicle was delivered in Florida and that no misrepresentation occurred in Texas. Further, the court stated that “[n]othing in the record suggests that CAB’s potential liability arises from or is related to an activity conducted within the forum.” *Id.* at 178. The court also stated that the Florida corporation’s activities “did not establish a pattern of continuing and systematic activity sufficient to support the exercise of personal jurisdiction in Texas.” *Id.* at 178.

In *Metcalf v. Lawson*, 802 A.2d 1221 (N.H. 2002), the Supreme Court of New Hampshire held that it did not have personal jurisdiction over a New Jersey resident who had sold an excavator to a New Hampshire resident through eBay. The court stated:

In this case, the defendant did not purposefully avail herself of the privilege of doing business in New Hampshire by selling her excavator through eBay [S]he had no control over who would ultimately be the winning bidder on the excavator, nor could she exclude bidders from particular jurisdictions. While it is arguable that the defendant may have foreseen the possibility that

a New Hampshire resident might bid on the excavator, foreseeability alone is insufficient to support the exercise of personal jurisdiction under the Federal Due Process Clause.

Id. at 1226 (citation omitted).

Karstetter v. Voss, 184 S.W.3d 396 (Tex. App. 2006), is another case with circumstances similar to those herein. In that case, a Kansas resident purchased a Dodge pickup truck through eBay from Texas residents who were in the business of automobile sales. The Kansas buyer obtained a default judgment against the Texas sellers in Kansas and then sought to enforce it in Texas. In determining that the Kansas judgment was properly vacated for lack of personal jurisdiction, the Texas court held as follows:

The record shows that the interaction between the parties was minimal. The email correspondence between the parties relating to the single purchase was initiated by appellant. There was no evidence that appellees traveled to Kansas or engaged in other transactions with appellant or other Kansas residents either through the eBay service or otherwise. Although appellees did seek some benefit, advantage or profit by selling the truck to a Kansas resident, their contact with Kansas was random, isolated, and fortuitous. The interaction between the parties did not rise to a level such that appellees should have reasonably foreseen that they would be haled into a Kansas court.

Id. at 405.

A different view was expressed in *Dedvukaj v. Maloney*, 447 F.Supp.2d 813 (E.D.Mich. 2006). In that case, the court stated that the nonresident sellers in an eBay sale had transacted business in Michigan by communicating with

the resident buyers through email messages and telephone calls, accepting the buyer's bids in two auctions, confirming to the buyer that he had submitted the winning bids, confirming the shipping charges to Michigan, and accepting payment from Michigan. *Id.* at 818-19. The court interpreted such eBay transactions in this manner:

Internet forums such as eBay expand the seller's market literally to the world and sellers know that, and avail themselves of the benefits of this greatly expanded marketplace. It should, in the context of these commercial relationships, be no great surprise to sellers – and certainly no unfair burden to them – if, when a commercial transaction formed over and through the internet does not meet a buyer's expectations, they might be called upon to respond in a legal forum in the buyer's home state. Sellers cannot expect to avail themselves of the benefits of the internet-created world market that they purposefully exploit and profit from without accepting the concomitant legal responsibilities that such an expanded market may bring with it.

Id. at 820.

We turn, finally, to this case. The circuit court began its analysis by stating that Robey's listing of the automobile on eBay was "not alone sufficient for the exercise of personal jurisdiction over defendant to comport with due process requirements." The court further held that "at the time of the posting of the ad, the defendant did not demonstrate purposeful availment to Kentucky as a state of proper jurisdiction over him."

The court next stated that because Robey accepted Hinnert's Application for Kentucky Certificate of Title/Registration when the car was picked

up, the transaction became “more than a random, fortuitous or attenuated contact with this state. Acceptance of the application created a continuing obligation between the defendant and the plaintiff.” The court further noted that “the consequences of the sale of the car are in Kentucky” and that “[t]he defendant clearly had knowledge that the car was being brought back into this state.”

In addition, the court held that “jurisdiction in Kentucky is reasonable” because the plaintiff was an individual, “whereas defendant is in the business of selling cars through his pawn shop.” The court emphasized that Robey “placed the vehicle into the stream of commerce, sold it to a Kentucky consumer, and accepted the Kentucky resident’s application for a Kentucky title.” The court also stated that Robey had a “continuing obligation regarding the title and perhaps other matters (such as the alleged warranty)[.]” Finally, the court held that “Kentucky has a manifest interest in providing its resident, the consumer, a convenient forum to redress the damages, if any, caused by the defendant.”

In his brief, Robey argues that the facts do not support personal jurisdiction over him because the first prong (“purposeful availment”) of the three-prong test explained in the *Wilson* case is missing. Further, Robey argues that Hinnert’s cause of action is more closely related to Missouri than to Kentucky. He states that Hinnert initiated the contact and traveled to Missouri to pay for the automobile and to take possession of it. He further states that any oral representations about the condition of the automobile were made in Missouri.

Hinners places much reliance on the argument that “[i]n disputes that arise basically from a contract between a resident and a nonresident, the first two prongs of the [three-prong] test are met.” He cites *First National Bank of Louisville v. J.W. Brewer Tire Co.*, 680 F.2d 1123 (6th Cir. 1982), to support that statement. The *Brewer Tire* case does appear to support that argument. *Id.* at 1126.

However, in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), a case decided three years after *Brewer Tire*, the U.S. Supreme Court held that the formation of a contract with a nonresident defendant was not, standing alone, sufficient to create jurisdiction. 471 U.S. at 478, 105 S.Ct. at 2185. The Court stated specifically as follows:

At the outset, we note a continued division among lower courts respecting whether and to what extent a contract can constitute a “contact” for purposes of due process analysis. If the question is whether an individual’s contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party’s home forum, we believe the answer clearly is that it cannot.

Id. (footnote omitted).

Hinners argues in his brief that by advertising on eBay, Robey “solicited purchasers from all jurisdictions.” Thus, he maintains that “[b]y engaging in such conduct, it is clear that [Robey] should foresee suits in foreign jurisdictions.” The court, while acknowledging that Robey placed the vehicle in the “stream of commerce” by placing it for auction on eBay, based its jurisdiction

over Robey on the fact that Robey had accepted Hinners's Application for Kentucky Certificate of Title/Registration and also on the fact that Robey knew that Hinners would take the vehicle to Kentucky and that "the consequences of the sale of the car are in Kentucky."

"The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 112, 107 S.Ct. 1026, 1032, 94 L.Ed.2d 92 (1987). We conclude, as did the trial court, that merely placing the vehicle for auction on eBay did not alone create personal jurisdiction over Robey in Kentucky. We further conclude that merely accepting the Application for Kentucky Certificate of Title/Registration did not create personal jurisdiction. In addition, the fact that Hinners took the vehicle to Kentucky and determined there that it was not as advertised did not create personal jurisdiction. Also, there was no evidence that Robey used eBay through which to sell automobiles on any occasion other than this one. Finally, we conclude that the language in the eBay listing referring to a "1 month/1,000 mile Service Agreement" also did not create jurisdiction.

Contrary to the conclusion of the circuit court, we conclude that the transaction was a random, fortuitous, and attenuated contact with this state. *See Sunrise Turquoise, supra*. In short, we conclude that Robey did not have sufficient minimum contacts with Kentucky to allow a Kentucky court to assert personal jurisdiction over him.

Based upon the foregoing authority from the U.S. Supreme Court and on the persuasive reasoning of the courts from other jurisdictions that have addressed this issue, we reverse the judgment of the Kenton Circuit Court and remand for the entry of an order dismissing Hinnners's complaint.

ACREE, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS BY SEPARATE OPINION.

COMBS, CHIEF JUDGE, DISSENTING: After careful study and reflection about this important issue of first impression, I file this dissent. The majority opinion is tempered and well-reasoned, reflecting due deference to established principles of law regarding the Kentucky long-arm statute and the precedent set forth in *International Shoe, supra*. However, I am convinced that the particular facts of this case dictate a different outcome. Therefore, I would affirm the trial court.

The world of eBay commercial transactions indeed presents a new frontier for both legislators and courts. Its very existence was never contemplated by the drafters of the Uniform Commercial Code. However, the fundamental precepts of fair play and honesty in commerce remain applicable even in this "brave new world" of commercial transactions.

Hinnners clearly did not receive the benefit of his bargain as to the Cadillac that he purchased. The transaction occurred by way of an eBay site located in Missouri rather than with a car dealer doing business in Kentucky. However, that distinction alone should not foreclose Hinnners's ability to invoke a

legal remedy. Such is the very purpose of the legislative creation of long-arm statutes.

In this case, the trial court meticulously enumerated an impressive array of contacts between Hinnners in Kentucky and Robey in Missouri – ranging from the solicitation by Robey on eBay, Hinnners’s journey to Missouri to close the deal, the removal of the car from Missouri to Kentucky by a Kentucky resident, and the registration of the car in Kentucky. Any property taxes owed on the car will become due and payable to an entity of Kentucky government.

I am persuaded that the trial court set forth numerous contacts in sufficient detail to satisfy the dictates of our long-arm statute and to comply with the precedent of *International Shoe*. I would carefully restrict a holding recognizing Kentucky jurisdiction in such eBay cases to fact situations that are capable of satisfying the tests of traditional law. The legislature has yet to address the issue of eBay transactions; however, it is clear from this case that the time has come. The era of eBay has opened the door to opportunities for a new kind of fraud and commercial piracy as well as having created the more positive potential for vastly expanded commercial exchanges.

Obviously, we live in challenging times as we face this evolution in commercial law. However, I am satisfied that the injury alleged in the case before us is capable of remedy under the current state of the law – despite the novel context. Therefore, I would affirm the trial court in its award of damages in this case.

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