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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001353-MR

AMERICAN TRADE ALLIANCE, INC. APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 08-CI-00376

SOUTHERN CROSS TRADING, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT AND NICKELL, JUDGES.

NICKELL, JUDGE: American Trade Alliance, Inc. (ATA), has appealed from the Barren Circuit Court's May 12, 2009, entry of a summary judgment in favor of Southern Cross Trading, Inc. (Southern Cross). We affirm.

ATA is a Florida corporation with its sole office located in Boca Raton, Florida. Southern Cross is a Kentucky corporation with its principal office

located in Barren County, Kentucky. ATA and Southern Cross had conducted business with one another for a period of time prior to the instant dispute. Southern Cross contacted Ed Norkus of ATA via telephone and electronic mail regarding the purchase of medical supplies and equipment. In April of 2006, the parties agreed that Southern Cross would purchase the items for the sum of $103,334.60. On April 18, 2006, Southern Cross caused a wire transfer to be sent to ATA for the full contract amount. The items were to be shipped immediately.

After several months, the items remained unshipped and Southern Cross demanded a full refund of the amounts paid to ATA. In response, ATA indicated the problem was with the supplier and that it would attempt to get the items shipped or request a refund. Neither came to fruition. Norkus acknowledged the repayment obligation in subsequent communications with Southern Cross and, in fact, repaid $36,000.00 of the $103,334.60 it had been paid. Southern Cross continued to demand a refund of the balance of $67,334.60, but payment was not forthcoming.

On June 6, 2008, Southern Cross filed the instant complaint against ATA, Norkus and Karen Norkus,[1] asserting claims for breach of contract and violations of the Kentucky Consumer Protection Act.[2] ATA filed a motion to dismiss the complaint for lack of personal jurisdiction, claiming all of its actions originated in Florida and its contacts with Kentucky were insufficient to subject it

[1] Karen Norkus was the sole shareholder of ATA.

[2] Kentucky Revised Statutes (KRS) 367.110 *et seq*.

to personal jurisdiction in the Kentucky courts. ATA and Norkus did not dispute Southern Cross was entitled to a refund of the amounts paid, but contended that any failure to ship the goods resulted from the default of ATA's supplier. The trial court denied the motion on October 9, 2008, finding "the parties have engaged in a series of business transactions involving large sums of money over a period of time spanning at least from 2005 to 2006." Based on this relationship, the trial court found sufficient minimum contacts to exercise personal jurisdiction under KRS 454.210 and the guidance set forth in *First National Bank of Louisville v. Shore Tire Co., Inc.*, 651 S.W.2d 472 (Ky. App. 1982). In a subsequent order denying ATA's motion to reconsider, the trial court specifically found "sufficient contacts to exercise personal jurisdiction over American Trade Alliance, Inc. and Edmond S. Norkus, individually."[3]

In April of 2009, Southern Cross moved for summary judgment and filed a memorandum of law in support of its position contending ATA and Norkus had not denied Southern Cross was due a refund, no genuine issues of material fact existed, and Southern Cross was entitled to judgment as a matter of law. ATA and Norkus responded to the motion alleging genuine issues of material fact existed, discovery was incomplete and thus the matter was not ripe for adjudication, the defaulting supplier should be joined as a third party defendant, and minimum

[3] At a hearing on November 10, 2008, Southern Cross stipulated that the trial court did not have jurisdiction over Karen Norkus. Based on that stipulation, the trial court's November 26 order dismissed her as a party to the action. No appeal has been taken from that order. Thus, for the remainder of this opinion, any discussions of "Norkus" shall refer to Edmond S. Norkus only.

contacts had not sufficiently been proven to exercise personal jurisdiction over Norkus. On May 12, 2009, the trial court granted summary judgment in favor of Southern Cross and against ATA in the amount of $67,334.60 as a refund for the unshipped medical goods, plus costs and interest. The trial court found genuine issues of material fact existed as to Southern Cross's claim against Norkus and the claim under the Kentucky Consumer Protection Act and reserved those matters for further proceedings.[4] By order entered on June 29, 2009, the trial court amended the May 12, 2009, order to include finality language to allow ATA to prosecute an appeal. This appeal followed.

ATA presents three allegations of error. First, ATA contends the trial court erred in concluding sufficient minimum contacts existed to exercise personal jurisdiction. Next, it contends the Barren Circuit Court was the improper venue for resolution of the matter. Finally, ATA argues the trial court erred in granting summary judgment to Southern Cross as genuine issues of material fact existed and the record was not ripe for adjudication. After a careful review of the briefs, the record and the law, we affirm.

First, ATA contends there were insufficient minimum contacts with Kentucky to establish personal jurisdiction over it and the trial court erred in finding to the contrary. It is well-settled that before a state court can exercise personal jurisdiction over a non-resident party, sufficient "minimum contacts"

[4] It appears these additional claims remain unresolved by the trial court and no argument is made to this Court regarding those claims.

must exist between the non-resident and the forum state. *International Shoe Co. v Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). These contacts must be of such significance "that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id*. (citation and internal quotation marks omitted). Kentucky's "long-arm statute" reads, in pertinent part:

> (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;
> >
> > . . . .
> >
> > 5. Causing injury in this Commonwealth to any person by breach of warranty expressly or impliedly made in the sale of goods outside this Commonwealth when the seller knew such person would use, consume, or be affected by, the goods in this Commonwealth, if he also 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.

KRS 454.210. This statute "authorizes Kentucky courts to reach to the full constitutional limits of due process in entertaining jurisdiction over non-resident defendants." *Shore Tire*, 651 S.W.2d at 473 (citing *Poyner v. Erma Werke GMBH*, 618 F.2d 1186 (6th Cir. 1980)). "A single transaction has been held sufficient to

invoke jurisdiction where the plaintiff-purchaser is a resident of the forum state and the defendant-seller is a non-resident." *Id*. (citing *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957)).

Here, ATA clearly contracted to do business in the Commonwealth when it accepted the order from Southern Cross and agreed to ship the goods here. The active promotion of the sales of its products to Kentucky residents indicates the intent to invoke the benefits and protections of this jurisdiction and constitutes the "transaction of any business" in this state. Thus, the requirements of KRS 454.210(2)(a)(1) and (2) were sufficiently satisfied to permit the Barren Circuit Court to exercise jurisdiction over ATA.

Further, this was not an isolated transaction between these parties, as evidenced by their past conduct and series of dealings, each of which involved orders for substantial amounts of product. This on-going business relationship, continuing over an extended period of time and involving a significant amount of money, was sufficient to find ATA intentionally and purposefully created a continuing relationship and obligations to a resident of this state. *See Shore Tire*. *See also Burger King Corp. v. Rudewicz*, 471 U.S. 462, 473, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528 (1985) (citations omitted). Thus, we cannot say the trial court erred in concluding it could properly exercise personal jurisdiction over ATA.[5]

[5] We have carefully reviewed the authorities cited by ATA in support of its position that insufficient minimum contacts existed and find them to be inapposite. Most, if not all, are factually distinguishable from the instant case. We believe no formal discussion of any of these cases is warranted.

Second, ATA contends Barren Circuit Court was an improper venue for this action and alleges the trial court erred in failing to so find and in declining to dismiss the case. We disagree.

Before the trial court, ATA argued the doctrine of *forum non conveniens* required dismissal. That doctrine

> permits a court properly vested with jurisdiction and venue nevertheless to decline the exercise of its jurisdiction where an alternative forum exists and where the private interests of the parties or the public interests of the tribunal would be better served by proceeding in the alternative forum.

Stipp v. St. Charles, 291 S.W.3d 720, 725 (Ky. App. 2009) (citing *Beaven v. McAnulty*, 980 S.W.2d 284, 285 (Ky. 1998) (superseded by statute on other grounds)). "In general, venue derives from a statutory mandate as to which county or counties is the proper place for a claim to be heard. *Forum non conveniens* presupposes proper venue . . . ." *Dollar General Stores, Ltd.v. Smith*, 237 S.W.3d 162, 166 (Ky. 2007). Plaintiffs make the choice as to the forum in which to bring their actions and that choice "'should rarely be disturbed.'" *Stipp*, 291 S.W.3d at 726 (quoting *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947)). We will uphold a trial court's decision on whether to disturb that decision absent an abuse of discretion. *Id*.

On appeal, ATA persists in its argument that the trial court should have dismissed this action based on *forum non conveniens*, citing *Roos v. Kentucky Educ. Ass'n*, 580 S.W.2d 508 (Ky. App. 1979), in support of its position.

However, ATA has failed to grasp that "[w]ith enactment of KRS 452.105, the General Assembly made it clear that venue should be transferred in a proper case, and that the action should not be dismissed." *Dollar General*, 237 S.W.3d at 167. The same rule applies with equal force in cases where a trial court determines there is a more convenient forum for the prosecution of an action. *Id*. Our review of the record reveals ATA produced no evidence that another forum would be more convenient than Barren Circuit Court for the prosecution of this action. Further, in arguing *forum non conveniens*, ATA has implicitly admitted that venue was proper in Barren Circuit Court. *Id*. at 166. Thus, we cannot say the trial court abused its discretion in refusing to disturb Southern Cross's choice of venue. Even had ATA produced sufficient evidence to warrant a finding of a more convenient forum, our statutes make it abundantly clear that transfer rather than dismissal would have been the proper remedy. There was no error.

Finally, ATA argues the trial court erred in entering summary judgment in favor of Southern Cross. In its brief to this Court, ATA

> submits that there are genuine issues of material fact that precluded the entry of summary judgment and that the record, at the time of the Barren Circuit Court's entry of Summary Judgment was not ripe as genuine issues of fact exist that should have allowed the development of additional proof on the reasons for the third party nonperformance.

However, ATA fails to specify what additional facts would have been developed had the summary judgment not been entered. Further, it fails to specify what genuine issues of material fact existed. Absent specific citations to the record as

required by CR 76.12, we are required to assume the evidence supported the findings of the trial court. *See Porter v. Harper*, 477 S.W.2d 778 (Ky. 1972). "[I]t is not our responsibility to search the record to find where it may support a party's contentions." *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006). Therefore, we are unable to conclude the trial court erred in granting summary judgment.

For the foregoing reasons, the judgment of the Barren Circuit Court is AFFIRMED.

ALL CONCUR.

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