

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STOUGHTON TRAILERS, INC.,

Plaintiff,

v.

COOPERSBURG KENWORTH, INC.,

Defendant.

OPINION AND
ORDER

00-C-0473-C

This is a civil action for monetary relief in which plaintiff Stoughton Trailers, Inc. contends that defendant Coopersburg Kenworth, Inc. breached its performance obligations under the contract by failing to make payments for the purchase of trailers. The court has diversity jurisdiction. See 28 U.S.C. § 1332.

The case is now before the court on defendant's motion to dismiss, or in the alternative, to stay the action pending resolution of an identical action in Pennsylvania. Defendant contends that this court lacks personal jurisdiction because defendant does not have sufficient minimum contacts with Wisconsin. In the alternative, defendant contends that the court

should stay the proceedings or transfer this case to the Pennsylvania court under the abstention doctrine, the first-filed rule, the balance of conveniences and in the interest of justice. Plaintiff contends that personal jurisdiction is proper because defendant has numerous contacts in Wisconsin, that the abstention doctrine is inapplicable and that both the first-filed rule and the balance of conveniences favor the Wisconsin venue. Because I conclude that defendant does not have sufficient minimum contacts with Wisconsin to satisfy the requirements of due process, I will grant defendant's motion to dismiss for lack of personal jurisdiction, making defendant's motion to stay moot.

For the sole purpose of deciding this motion, I find the following facts from the allegations in the complaint and the averments in the affidavits to be material.

FACTS

Plaintiff Stoughton Trailers, Inc. is a Wisconsin corporation that manufactures and markets over-the-road trailers, including aluminum van trailers. Defendant Coopersburg Kenworth, Inc. is a Pennsylvania corporation that purchases aluminum van trailers.

A. The November 3, 1999 Contract

On November 3, 1999, defendant entered into a contract with plaintiff to purchase ten

aluminum van trailers for \$16,600.00 each. During the process of initiating and negotiating the contract, plaintiff and defendant communicated by telephone and facsimile. In May 2000, defendant contracted with Nationwide Equipment, a Colorado company, to pick up two of the ten trailers. Nationwide Equipment contracted with DeBoer, Inc., a Wisconsin company, to pick up the trailers for defendant. On May 16, 2000, defendant requested by facsimile that plaintiff release two of the ten trailers at plaintiff's facility in Stoughton, Wisconsin to DeBoer, Inc. On May 17, 2000, a DeBoer, Inc. driver arrived at plaintiff's facility, inspected one of the trailers purchased by defendant in the November 3, 1999 contract, executed a Stoughton "security release check" form, accepted delivery of the trailer and departed from plaintiff's facility with the trailer. On May 31, 2000, another DeBoer, Inc. driver arrived at plaintiff's facility, inspected the second trailer, executed a Stoughton "security release check" form, accepted delivery of the trailer, and departed from plaintiff's facility with the second trailer. Defendant has refused to pay for any of the trailers under the contract and has not accepted delivery of the remaining eight trailers under the November 3, 1999 contract.

B. The Lawsuits

On July 31, 2000, defendant filed a praecipe for writ of summons against plaintiff and

three individual defendants in the Court of Common Pleas of Bucks County in Pennsylvania. On August 2, 2000, a process server served plaintiff with the writ of summons. The praecipe for writ of summons was not accompanied by a complaint and contained no factual basis for the lawsuit.

On August 1, 2000, plaintiff filed the complaint in this case with this court. Defendant was served with plaintiff's complaint on August 4, 2000.

On August 23, 2000, defendant filed a complaint in the Pennsylvania case in which it alleged the causes of action against plaintiff and the individual defendants.

C. Defendant's Other Contacts with Wisconsin

1. Additional contract

In October 1999, defendant agreed to purchase two trailers from plaintiff for \$15,200 each. Defendant hired an independent contractor from Cold Iron Driveway Service to accept delivery of the trailers in Wisconsin.

2. Negotiations regarding proposed dealership

Defendant initiated negotiations with plaintiff concerning a proposed dealership arrangement. In the fall of 1999, Edward Egan, a sales manager for defendant, contacted

plaintiff's Wisconsin-based Vice President for Sales, Carl Anderson, three or four times in attempting to persuade plaintiff to enter into a dealership agreement with defendant. Egan sent a copy of defendant's business plan to Anderson for consideration. The dealership arrangement never materialized.

3. Defendant's website

Defendant maintains a website that is accessible to Wisconsin residents. The website allows customers to purchase parts from defendant, but does not offer trucks and vehicles for sale. Defendant's website contains a link to the "Coopersburg Trailer Mart," which advertises trailers for sale, two of which are plaintiff's trailers that defendant accepted for delivery in May 2000. The website also contains a reproduction of plaintiff's trademark without permission and allows customers to interact with defendant by e-mail.

OPINION

A. Personal Jurisdiction

In a diversity case, a federal court has personal jurisdiction over a non-consenting non-resident defendant to the extent authorized by the law of the state in which the court sits. See Heritage House Restaurants, Inc. v. Continental Funding Group, Inc., 906 F.2d 276, 279 (7th

Cir. 1990). Under Wisconsin law, the requirements of both the Wisconsin long-arm statute, Wis. Stat. § 801.05, and due process must be satisfied before jurisdiction can be established. See Marsh v. Farm Bureau Mutual Insurance Co., 179 Wis. 2d 42, 52, 505 N.W.2d 162, 165 (Ct. App. 1993). The plaintiff must first show that the defendant comes within the grasp of the Wisconsin long-arm statute, which is to be liberally construed in favor of jurisdiction. See id.; see also Vermont Yogurt Co. v. Blanke Baer Fruit & Flavor Co., 107 Wis. 2d 603, 606, 331 N.W.2d 315, 317 (Ct. App. 1982). Compliance with the statute is presumed to be compliance with due process, but that presumption may be rebutted if the exercise of personal jurisdiction does not comport with notions of fairness and substantial justice. See Vermont, 107 Wis. 2d at 608-609, 331 N.W.2d at 318; see also Steel Warehouse of Wisconsin, Inc. v. Leach, 154 F.3d 712, 714 (7th Cir. 1998) (burden switches to defendant to show jurisdiction violates due process). In order to establish personal jurisdiction, the out-of-state defendant's contact with Wisconsin must satisfy the due process minimum contacts test of International Shoe Co. v. Washington, 326 U.S. 310 (1945).

Wisconsin's long arm statute codifies the rules regarding minimum contacts within the state to comply with due process notions of fair play and substantial justice. See Davanis v. Davanis, 132 Wis. 2d 318, 329-330, 392 N.W.2d 108, 113 (Ct. App. 1986). Section 801.05(5)(d) provides in relevant part:

A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to § 801.11 under any of the following circumstances:

(5) . . . In any action which:

- (d) Relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on the defendant's order or direction.

Plaintiff bears the burden of establishing that defendant comes within the reach of the long-arm statute by establishing that defendant's contacts with Wisconsin make it "foreseeable" that defendant could be subject to suit in Wisconsin. Daniel J. Hartwig Associates, Inc. v. Kanner, 913 F.2d 1213, 1218 (7th Cir. 1990). Contacts that are merely "random," "fortuitous" or "attenuated" are not sufficient. Id. (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).

A state cannot force a nonresident to litigate in its courts unless there is "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1362 (7th Cir. 1985) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

Under the foreseeability standard, the contract between plaintiff and defendant is not enough by itself to give Wisconsin courts personal jurisdiction over defendant in this breach of contract action. See Burger King, 471 U.S. at 478 ("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 is clear that it cannot.”) Plaintiff must show that defendant purposefully established minimum contacts with Wisconsin in order for the exercise of personal jurisdiction to comport with “fair play and substantial justice.” Burger King, 471 U.S. at 476 (citing International Shoe, 326 U.S. at 320).

Plaintiff contends that personal jurisdiction over defendant is proper under § 801.05(5)(d) of Wisconsin's long-arm statute because this case relates to goods (trailers) delivered in Wisconsin by plaintiff to defendant at defendant's direction. Defendant disputes the application of the long-arm statute and relies on Lakeside Bridge & Steel Co. v. Mountain State Construction Co., 597 F.2d 596 (7th Cir. 1979), for the position that Wis. Stat. § 801.05(5)(d) does not apply because its application violates due process.

In Lakeside, the Wisconsin plaintiff offered its services to an out-of-state defendant, Mountain State, to manufacture structural steel assemblies for use in a construction project. See id. at 598. Mountain State ordered the assemblies from Lakeside by mailing a purchase order to Lakeside in Wisconsin. See id. Lakeside manufactured the assemblies at its plant in Wisconsin and shipped them to the out-of-state construction project. See id. Aside from the contract, the only contacts between the parties involved letters and telephone calls. See id. The Court of Appeals for the Seventh Circuit held that the Wisconsin long-arm statute § 801.01(5)(d) did not apply because the contacts were not sufficient to exercise personal

jurisdiction over the out-of-state defendant. See id. at 603-604. Specifically, the court found that a non-resident defendant's act of ordering goods from a Wisconsin plaintiff, combined with the defendant's knowledge that the goods would be manufactured and shipped from Wisconsin is not enough to confer jurisdiction over the defendant. See id. at 603.

Defendant contends that Lakeside controls this case because the facts are similar. Plaintiff and defendant had no substantial contacts besides the contract for sale and delivery of the trailers. Defendant contracted with plaintiff for the purchase of trailers and the contract negotiations took place by telephone and facsimile solely. Subsequently, defendant hired independent contractors to accept delivery of the trailers at plaintiff's facility. Defendant contends that personal jurisdiction is not proper in this case because similar contacts in Lakeside did not confer personal jurisdiction over a non-resident defendant. Plaintiff contends that the present case falls outside the narrow limits of Lakeside for three reasons: defendant sent independent contractors to inspect and assume possession of the trailers, defendant had more than one contract with plaintiff and defendant maintains a website accessible to Wisconsin residents.

1. The inspection

Plaintiff relies on Afram Export Corp., 772 F.2d 1358, for the proposition that

jurisdiction can rest on defendant's act of sending an independent contractor to plaintiff's facility to inspect and assume possession of the trailers ordered by defendant. In Afram, 772 F.2d at 1364, the Seventh Circuit held that where the non-resident defendant sent an agent to inspect goods in the forum state pursuant to the contract, the defendant subjected itself to jurisdiction in that state. Distinguishing Lakeside, the court upheld personal jurisdiction because the inspection was required under the contract and amounted to contact with the seller's state in addition to the sale and delivery. See id.

Plaintiff contends that Afram controls because there was an inspection of the trailers at the time defendant's independent contractors accepted delivery of the trailers. However, in Afram, the defendant's agent performed the inspection pursuant to the contract. See id. The inspection in this case was not required by the contract and furthermore, the inspection was initiated by plaintiff. Plaintiff's "security release checks" were not initiated by defendant and therefore cannot be the basis for personal jurisdiction over defendant. To establish personal jurisdiction, "the defendant, not merely the plaintiff, [must] conduct activities in the forum state, which in a contract case must relate to the formation or performance of the contract." Wisconsin Electrical Manufacturing Co., Inc. v. Pennant Products, Inc., 619 F.2d 676, 678 (1980); see also Burger King, 471 U.S. at 475 (personal jurisdiction proper only where contacts result from actions by defendant and not activity by another party or third person). Because

defendant did not initiate the “security release check” inspection or perform the inspection pursuant to the formation or performance of the contract, the inspection cannot provide a sufficient basis for personal jurisdiction over defendant.

2. Continuing relationship

In addition to the inspection, plaintiff contends that Lakeside does not apply because plaintiff and defendant have entered into more than one contract with each other. Plaintiff relies on Zerbel v. H.L. Federman & Co., 48 Wis. 2d 54, 179 N.W.2d 872 (Wis. 1970), and Daniel J. Hartwig Associates, Inc. v. Kanner, 913 F.2d 1213, for the position that plaintiff and defendant have a continuing relationship, making defendant subject to personal jurisdiction.

In Hartwig, the Seventh Circuit explained the effect of an ongoing relationship:

While a single contract between a seller and a nonresident buyer, without something more (such as active solicitation), does not automatically establish purposeful availment, where a defendant has created “continuing obligations” between himself and the residents of the forum, he manifestly avails himself of the privilege of conducting business in the forum.

Hartwig, 913 F.2d at 1219 (citations omitted). The court of appeals approved the exercise of personal jurisdiction over a non-resident defendant in Hartwig because the defendant initiated the contracts with plaintiff, the parties had entered into two other contracts with each other, the defendant had connections with other Wisconsin businesses and the defendant performed

a substantial amount of the contract in Wisconsin. See id. Similarly, in Zerbel, the Wisconsin Supreme Court exercised personal jurisdiction over an out-of-state defendant under Wis. Stat. § 801.01(5)(a) of the long-arm statute. See Zerbel, 48 Wis. 2d at 59, 179 N.W.2d at 875. The court found that the parties had two or three similar prior contracts and that the defendant had initiated the negotiations. See id. at 65-66, 179 N.W.2d at 878.

In Lakeside, the Seventh Circuit distinguished the facts of Zerbel noting that in Zerbel, the court applied a different subsection of the Wisconsin long-arm statute, the parties had two or three prior contracts with each other and the defendant initiated the contracts. The same factual differences are significant here. Unlike both Hartwig and Zerbel, plaintiff and defendant have entered into only two contracts with each other. Although two is more than one single contract, two contracts do not constitute a continuing relationship. Plaintiff and defendant discussed establishing a dealership arrangement, but the idea did not materialize. Discussions alone do not establish a continuing relationship. Furthermore, although plaintiff alludes to the fact that defendant initiated the contracts with plaintiff, plaintiff provides no support for its allusion. The contacts between plaintiff and defendant do not demonstrate the existence of a continuing relationship subjecting defendant to personal jurisdiction in this court.

3. Defendant's website

Finally, plaintiff contends that Lakeside is not controlling because defendant maintains an interactive website that allows for communication with Wisconsin residents. Because defendant's website does not direct business to Wisconsin and was not involved in creating the contract between plaintiff and defendant, the website is not sufficient to confer personal jurisdiction. See Wisconsin Electrical Manufacturing, 619 F.2d at 678 (to confer jurisdiction in contract case defendant's activities must relate to formation or performance of contract).

B. Abstention Doctrine

Because I will grant defendant's motion to dismiss for lack of personal jurisdiction, defendant's alternative motion to stay the proceeding under the abstention doctrine will be denied as moot.

ORDER

IT IS ORDERED THAT the motion of defendant Coopersburg Kenworth, Inc. to dismiss this case for lack of personal jurisdiction is GRANTED. FURTHER, IT IS ORDERED that defendant's alternative motion to stay the proceeding is DENIED as moot.

The clerk of court is directed to enter judgment for defendant and close this case

Entered this 17th day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge