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IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT
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VENETIAN SALAMI COMPANY,
a foreign corporation,

Petitioner,

vs .

T. S. PARTHENAIS,

Respondent.

CASE NO.: 73,848

APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA
APPEAL NO. 88-1414

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Record on Appeal will be referred to with the abbreviation "R" and then the page number of the Record.

The Petitioner, Venetian Salami Company, hereinafter sometimes referred to as "Venetian", is a Canadian corporation located in Montreal. Venetian is not licensed to do business in the State of Florida. The Respondent, J. S. Parthenais, hereinafter sometimes referred as "Parthenais", is a resident of Alachua County, Florida.

In December of 1987, Venetian was served with a complaint, (R-1), filed in Alachua County, Florida alleging damages for breach of an oral contract. The complaint alleged that the payment was to be made in Alachua County, Florida.

Venetian filed a Motion to Quash service of process for lack of jurisdiction (R-1A), alleging that Venetian did not have the minimum contacts necessary with the State of Florida in order for a Florida Court to acquire jurisdiction over it.

In support of its Motion, Venetian filed an affidavit of Antoine Bertrand (R-4) which states that he is the president of Venetian Salami Company and that Venetian does not conduct any business in Florida or own any property in Florida and that they never had discussions with Parthenais in Florida. Parthenais filed two affidavits in response. One, from Parthenais himself (R-9), stated that his agreement with Venetian required his services to be performed in Florida, New York and Canada, that he would be paid in Alachua County, Florida, and that he did perform services and incur expenses in Florida, New York and Canada.

Parthenais also filed the affidavit of Pierre Patenaude (R-7). Mr. Patanaude's affidavit stated that at the time the agreement was made with Venetian he was president of Venetian, he hired Parthenais on behalf of Venetian at his place of business in Alachua County, Florida and agreed to pay Parthenais in Alachua County, Florida.

The trial court held a hearing and required parties to submit Memorandum of Law (R-11, 22). The trial court entered an Order (R-60) dismissing the complaint for lack of jurisdiction. The Respondent filed a Motion for Rehearing (R-61) requesting the right to amend the complaint which was denied without a hearing (R-62).

Parthenais appealed the trial court's Order to the First District Court of Appeal and, on February 15, 1989, the trial court's Order was reversed by the First District on the basis that once the plaintiff has met the requirements of Florida Statute 48.193, the plaintiff does not have to further allege sufficient minimum contacts in the State to meet constitutional due process. Parthenais vs. Venetian Salami Company, 538 S. 2d 532 (Fla. 1st DCA 1989). The First District's opinion did, however, indicate there was a conflict within the District Courts of Florida regarding whether long arm jurisdiction is a one-step (pleading statutory requirements) or a two-step process requiring statutory compliance and a showing of minimum contacts in order to meet due process requirements.

Venetian's notice to invoke this honorable Court's jurisdiction for review was granted by Order dated June 13, 1989.

SUMMARY OF ARGUMENT

Long arm jurisdiction over a non-resident corporation requires more than merely pleading a breach of an oral contract to pay money in Florida. Constitutional due process requires the defendant to have certain minimum contacts with the forum state. Thus, the test to determine long arm jurisdiction is a two step process. Florida trial courts must determine compliance with statutory requirements and then, additionally, determine whether the defendant has sufficient contact with Florida so that it would be fair and just to make him defend himself in a Florida Court.

The trial court, after reviewing the pleadings, affidavits, memorandum of law, and hearing argument of counsel decided that Venetian Salami had insufficient minimum contacts with the State of Florida to confer jurisdiction on the Circuit Court. The decision of the trial court went beyond the mere unilateral act of Parthenais in alleging a breach of oral contract to pay money. It relied, instead, on constitutional due process requirements and the total lack of contacts between Venetian and this State. The Venetian does not seek the benefits and privileges of doing business within this State, and should not be made to defend itself in this State.

ARGUMENT

FLORIDA LONG ARM JURISDICTION OVER A FOREIGN CORPORATION REQUIRES COMPLIANCE WITH FLORIDA STATUTE 48.193 AND SUFFICIENT MINIMUM CONTACTS WITH FLORIDA BY THE FOREIGN DEFENDANT TO MEET THE DUE PROCESS REQUIREMENTS OF FAIR PLAY AND SUBSTANTIAL JUSTICE.

The opinion of the First District Court of Appeal states that compliance with the requirements of the Florida long arm statute, FS 48.193(1)(g) alone are sufficient to meet due process requirements of substantial justice.

Jurisdiction over foreign defendants in this State should depend not only on the long arm statutes, but also to the constitutional due process requirements enunciated in International Shoe Company vs. Washington, 326 US 310, 66 S.Ct. 154, 90 L.Ed. 95, (1945):

Historically the jurisdiction of Courts to render judgment in personam is grounded on their defacto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. Citation omitted. But now that the capias ad respondendum has given away to personal service of summons or other form of notice, due 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 in substantial justice." Citation omitted.

It is simplicity itself for a plaintiff, such as in this case, to plead the breach of an oral contract of a promise to pay money in this State in order to come within the terms of FS 48.193(1)(g). This alone, however, is not sufficient to give Trial Courts jurisdiction without reviewing the "minimum contacts", if any, that a foreign defendant had with this State.

As the Court can see from the Affidavit in support of the Motion to Dismiss (R-4), Venetian Salami Company had absolutely no contact with this State.

In this case, the only "contact" the Plaintiff has alleged the Defendant had in this State was the "oral contract" to hire Plaintiff to perform consulting services. Those services were performed, if at all, in New York or other States, but not in Florida. In Burger King Corporation vs. Rudzewicz, 471 US 462, 105 S.Ct. 2174, 85 L.Ed. 2d 528 (1985), the Supreme Court made it clear that:

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 parties home forum, we believe the answer clearly is that it cannot.

Since Burger King was decided, several Florida District Courts of Appeal have held that an out-of-state resident did not subject himself to the jurisdiction of the Florida Courts merely because contractual payments were to be made in Florida. Reinauer vs. Greenman Advertising Associates, 503 S.2d 975 (Fla. 4th DCA 1987); American Vision Center, Inc. vs. National Yellow Pages Directory Services, 500 S.2d 642 (Fla. 2nd DCA 1986); Seville Financial, Inc. vs. Nationwide Marketing Associates, 488 S.2d 658 (Fla. 4th DCA 1986).

The case of Osborne vs. University Society, Inc., 378 S.2d 873 (Fla. 2d DCA 1979) dealt with a case wherein the plaintiff and defendant entered into a written contract for consulting services. The Second District, citing the constitutional issues of International Shoe, affirmed the dismissal of the complaint

for lack of jurisdiction. The Court stated at 874:

We find nothing in the complaint which would indicate that the Society was availing itself of the privilege of conducting activities in Florida. The execution of a contract with a Florida resident for him to furnish consulting services at an unspecified location is an insufficient contact with Florida upon which to predicate jurisdiction.

Unlike this case, Osborne had already received prior payments from the University Society in Florida. Nonetheless, the Second District affirmed the dismissal of the complaint by the Trial Court. The present case involves no prior payments and no written contract.

Many federal decisions have discussed due process requirements for exercising personal jurisdiction over a non-resident. As stated by the Fifth Circuit Court of Appeals in Stuart vs. Spademan, 772 Fed. 2d 1185 (Fifth Cir. 1985):

A minimum contacts analysis involves more than counting the non-resident's contacts with the forum. (Citation omitted). We must look to see whether there has been some act by which a non-resident "purposefully avails itself of the privilege of conducting activities within the forum State thus invoking the benefits and protection of its laws.

The defendant's conduct in connection with the forum State must be such that <it> should reasonably anticipate being haled into Court in the forum State. (Citation omitted).

The unilateral activity of those who claim some relationship with a non-resident defendant, however, cannot satisfy the requirement of contact with the forum State.

Clearly, the only "contact" that Venetian Salami Company has with Alachua County is based on the unilateral activity of plaintiff in stating that there was an "oral promise" to pay money in Alachua County. All activities were to be performed, if

at all, in New York and Montreal.

The Fifth Circuit went on to discuss an additional due process requirement of jurisdiction over a non-resident defendant, ie., "traditional notions of fair play and substantial justice". Those factors were, among other things, the interest of the State in providing a forum for the suit, the relative conveniences and inconveniences to the parties, and the basic equities. However, the fairness factors must be weighed by trial court only after it has decided, as a threshold issue, whether there were sufficient minimum contacts with the forum State. As explained by the Fifth Circuit in Stuart:

Nevertheless, the fairness factors cannot of themselves invest the Court with jurisdiction over a non-resident when the minimum contacts analysis weighs against the exercise of jurisdiction.

The question of what (and how much) constitutes minimum contacts is difficult to quantify. It is necessarily a case by case decision based on the unique facts of each situation. The Trial Judge is, of course, in the best position to evaluate what is fair and whether Venetian should reasonably anticipate being haled into Court in Florida under the circumstances of its case. As was pointed out by the U. S. Supreme Court in Shaffer vs. Heitner, 433 US 186, 204 (1977), it is the perspective of the defendant, not the plaintiff, that the Court should examine to determine whether the jurisdiction is reasonable.

The affidavit of Mr. Bertrand, president of Venetian, (R-4), supported Venetian's motion challenging jurisdiction. Mr. Bertrand's affidavit addressed many of the criteria courts examine to determine whether "minimum contacts" exist. For

example:

Contacts with Florida

1. Venetian never conducted any business in Florida.
2. Venetian is not licensed to do business in Florida.
3. Venetian has no office or representative in Florida.
4. Venetian does not own or lease any real or personal property in Florida.
5. Venetian has not derived any revenue from Florida.

Contacts with Parthenais

6. Venetian had no continuing relationship with Parthenais.
7. The negotiations with Parthenais consisted of collecting a delinquent account in New York, not Florida.
8. Agents of Venetian did not enter Florida to negotiate the alleged contract with Parthenais.

The only allegations linking Venetian with Florida (and they are solely allegations of Parthenais) are that Venetian "contracted" with Parthenais over the telephone at his office in Gainesville and that money was to be paid in Florida. Clearly, Venetian did not purposely avail itself of the privilege of conducting activities within Florida. The U. S. Supreme Court in Hanson vs. Deckla, 357 US 235, 78 S. Ct. 1228, 1239, L. Ed. 2d 1283 (1958) stated that this "purposeful availment" requirement is designed to ensure that a defendant will not be haled into Court in a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. Parthenais is attempting to hale Venetian into a Florida Court on just such flimsy "contacts". The supporting affidavits of Parthenais, even taken as true, do not meet the minimum contacts threshold.

CONCLUSION

The District Courts of Appeal for the Second, Fourth, and Fifth Districts agree with the U. S. Supreme Court that long arm jurisdiction requires more than technical compliance with the wording of a State's long arm statute. The "substance" of due process and fairness must be looked to over and above the "form" of statutory compliance. The Venetian Salami Company has no contacts with the State of Florida, and does not seek the benefits and privileges of doing business within this State. Mr. Parthenais may have a cause of action against the Venetian Salami Company, but he has merely brought it, if it exists, in the wrong forum.

This honorable Court should reverse the decision of the First District Court of Appeal with instructions to reinstate the Order of the Trial Court dismissing this action for lack of jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of July, 1989, a true and correct copy of the above and foregoing Petitioner's Brief on the Merits was placed in the United States mail, with postage prepaid thereon, to: Mr. Kenneth S. Davis, 515 N. Main Street, No. 300, Gainesville, Florida 32601, attorney for Respondent.


LAURENCE H. BARTLETT, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of July, 1989, a true and correct copy of the above and foregoing Appendix to Petitioner's Brief on the Merits was placed in the United States mail, with postage prepaid thereon, to: Mr. Kenneth S. Davis, 515 N. Main Street, No. 300, Gainesville, Florida 32601, attorney for Respondent.


LAURENCE W. BARTLETT, ESQUIRE