OA 10-6-89

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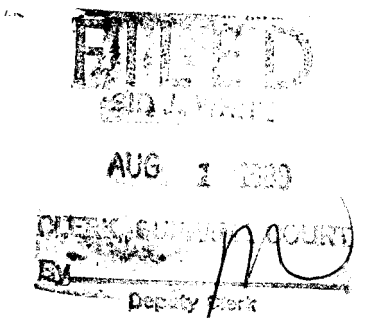
IN THE SUPREME COURT OF FLORIDA

VENETIAN SALAMI COMPANY,	)	CASE NO: 73,848
a foreign corporation,	)	
Petitioner,	)	
vs.	)	
T.S. PARTHENAIS,	)	
Respondent.	)	
.....	)	



APPEAL FROM THE DISTRICT COURT OF APPEAL

FIRST DISTRICT OF FLORIDA

APPEAL No. 88-1414

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent adopts the Petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

A pleading which meets the requirements of the Long Arm Statute fulfills constitutional requirements for jurisdiction over the Petitioner. The application of the statute to the Petitioner does not violate his due process rights. The Petitioner contacted the Respondent at the Respondent's place of business in Florida requesting his services. The agreement required the Respondent to conduct activities for the Petitioner in Florida and other locations. Petitioner was to pay Respondent's expenses at his place of business in Florida. Florida has an interest in seeing that its citizens have convenient forum in which to remedy wrongs which occur in Florida imposed on them by non-residents. Florida's Long Arm Statute is a valid, constitutionally permissable exercise of that interest.

ARGUMENT

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

> Any person, whether or not a resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself, and, if he is a natural person, his personal representative, so the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts.
>
> * * *
>
> Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state. Sec. 48.193 (1)(g) Fla. Stat. (1987).

It is Respondent's position that in order for the court to sustain Petitioner's position, the court must find that Sec. 48.193 (1)(g) Fla. Stat. is unconstitutional or has been unconstitutionally applied to the Petitioner in this case. The law and the facts do not support either result.

Florida Courts have held that the Long Arm Statute together with the Service on Non-Resident Statute are drawn so that compliance with requirements thereunder will more than satisfy the due process requirements of minimum contacts enunciated in

International Shoe Co. vs. State of Washington(citation omitted).Dublin Company vs. Pensular Supply Company,309 So 2d 207 (Fla. 4 DCA 1975). To acquire jurisdiction over non-residents, pursuant to Florida's Long Arm Statute, the Plaintiff must initially plead sufficient allegations to bring the Defendant within the statute. If jurisdiction is challenged by the Defendant, the Plaintiff is required to substantiate the allegations and the issue becomes has the Plaintiff alleged and proven all requisite jurisdictional facts justifying applicability of the Long Arm Statute. Electro Engineering Products Co., Inc. vs Louis, 352 So 2d 862 (Fla. 1977); Elmex Corporation vs Atlantic Federal Savings and Loan Association of Fort Lauderdale, 325 So 2d 58 (Fla. 4 DCA 1976).

Petitioner insists in its brief that in order to acquire jurisdiction over a non-resident Defendant, a Plaintiff is required to not only make sufficient allegations to comply with Fla. Stat. 48.193, but that there has been grafted on to the statute an additional requirement of additional allegations, and subsequent proof of the allegations if challeneged, that the Defendant has had the requisite number or quality of contacts with Florida. In other words, the statute is constitutionally inadequate.

In viewing the specific section of the Long Arm Statute which is involved in the instant case, the First, Third and Fifth District Courts of Appeal have held that the allegations

contained in the complaint are sufficient to gain jurisdiction over a non-resident Defendant if they meet the requirements of the statute. The First District Court in a case which it cites as controlling in the instant case held that tracking the statute fulfills the "minimum contacts" requirement but if the sufficiency of the pleadings are challenged and the Defendant submits proof in contravention of the allegation, the Plaintiff has the burden of proving the allegation by affidavit, deposition, or other proof. Jones vs. Jack Maxton Chevrolet, **484** So 2d **43** (Fla. 1 DCA 1986). In the instant case, the Defendant (Petitioner) admitted in its brief to the District Court of Appeal that Respondent's (Plaintiff's) complaint had sufficient allegations to comply with Florida's Long Arm Statute, (Answer Brief of Appellee, pgs. 2 and **5)** and the Court found that the Plaintiff alleged sufficient facts to comply with Sec. **48.193.** When the Defendant challenged the allegations of the complaint, the Plaintiff filed affidavits in support of its allegations. J.S. Parthenais vs. Ventian Salami Company, **538** So 2d **532** (Fla. 1 DCA **1989).**

Does Florida's Long Arm Statute fall unconstitutionally upon Petitioner? The Plaintiff's complaint which is conceded to comply with the statute alleges that the Defendant's engaged his services in Alachua County, Florida to assist the Defendant in determining the collectability and methods of collection of a large delinquent account. The complaint goes on to allege that

the Defendant would reimburse the Plaintiff his expenses; that payment would be made to the Plaintiff at his place of business in Alachua County, Florida; that the Plaintiff performed the services; and that the Defendant has refused to pay (R-1). When the Defendant challenged the jurisdiction, the Plaintiff responded with two affidavits. The affidavit of Pierre Patenaude (R-7) states that he was the President of Venetian Salami Company at the time the company engaged the services of the Plaintiff; that the company contacted the Plaintiff at his place of business in Alachua County, Florida; that they agreed to pay him all of his expenses including the use of private investigators and attorneys; and that they would pay those expenses at his place of business in Alachua County, Florida.

The other affidavit furnished by the Plaintiff was the affidavit of the Plaintiff (R-9). His affidavit states that he was contacted by Petitioner at his place of business in Gainesville, Florida; that he entered an agreement with the Respondent to investigate the collectability of a receivable; and that the Petitioner would reimburse him his expenses. It also states that the agreement contemplated that his services would be performed in Florida, New York and Canada and that he would be paid at his business location in Florida. Finally that the Plaintiff did, in fact, perform services for the Petitioner and incur expenses for the Petitioner in Florida, New York and Canada.

The affidavit furnished by Antoine Bertrand (R-4) for the Defendant, states that the Defendant had never, ever had anything to do with Florida and had only heard of the Plaintiff.

The Third District Court of Appeal in Professional Patient Transportation, Inc. vs. Fink, 365 So 2d 209 (Fla. 3 DCA 1978) held that a complaint was sufficient that alleged that an agreement was breached by failing to make payment in the State of Florida even though the services were to be rendered outside the State of Florida. In a subsequent case, the Third District Court held that a foreign corporate defendant failing to pay money to a Florida plaintiff would give jurisdiction over the Defendant to the Florida courts. The court went on to hold that where jurisdiction over the party is satisfied pursuant to Section 48.193 (l)(g) the Court need not determine whether the Defendant also operates, conducts, engages in or carries on a business in the state pursuant to Section 48.193(l)(a). Engineered Storage Systems, Inc. vs. National Partitions and Interiors, 415 So 2d 114 (Fla. 3 DCA 1982). The Fifth District Court in Kane vs. American Bank of Merrit Island, 449 So 2d 974 (Fla. 5 DCA 1984) held that the legal presumption that a debt is to be paid at the creditors place of business is sufficient to satisfy the language of the Long Arm Statute provision that refers to contractural acts required "to be performed in Florida." In Unger vs. Publisher Entry Service, Inc.. 513 So 2d 674 (Fla. 5 DCA 1987), at 676, the Court in upholding Florida jurisdiction over a

non-resident who allegedly failed to pay the Florida plaintiff noted that:

> Surely the Defendants would have sought the protection of Florida law had the Plaintiff not performed as promised, or had performed negligently. Under these circumstances, it was reasonably foreseeable that the Defendant would be hauled into Florida's courts for failing to fulfill its contractural duties. It is this conduct in connection with Florida, in addition to the contractural obligation to render payments in this state, that establishes the minimum contacts necessary to assume jurisdiction over the Defendant.

Much has been made by Petitioner and others of language in Burger King Corp. vs. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174 (1985) which appears at page 479, saying that an individual's contract with an out-of-state party alone cannot automatically establish sufficient minimum contacts in the other party's home forum. But such an allegation alone would not comply with Florida's Long Arm Statute which requires more than the existence of a contract but requires the allegation that the contract was breached by the Defendant by failing to perform acts which were required to be performed in Florida. Burger King upholds Florida's Long Arm Statute and made a non-resident Burger King franchisee subject to the personal jurisdiction of the United States District Court in Florida.

Justice Brennan notes that there are several reasons why a forum may legitimately exercise personal jurisdiction over a non-resident.

> A state generally has a manifest interest in providing its residents with a convenient form for redressing injuries inflicted by out-of-state actors. id at **U.S.** 472.
>
> The due process clause may not be readily wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. id at **U.S.** 475.
>
> Jurisdiction may not be avoided merely because the Defendant did not physically enter the forum state and a non-forum resident who seeks to defeat jurisdiction must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. id at **U.S.** 475.

Indeed, the Supreme Court permitted California to exercise jurisdiction over two Florida individuals who were connected with an alleged defamatory story in the National Inquirer when neither individual had any significant contacts with California. The lack of contacts was not held to defeat otherwise proper jurisdiction. The Court held that an individual injured in California need not go to Florida to seek redress from persons, although remaining in Florida, knowingly cause injury in California. Calder **vs.** Jones, 465 **U.S.** 781, 104 S.Ct 1482 (1984).

The cases cited by Petitioner in support of its position that there are insufficient contacts in the instant case to meet constituional muster are generally distinguishable. Reinauer vs. Greenman Advertising Associates, Inc., 503 So 2d 975 (Fla. 4 DCA 1987) involved a contract executed in Louisanna and which

expressly provided for jurisdiction in the Courts of Louisana. American Vision Center, Inc. vs. National Yellow Pages Directory Service, Inc., 500 So 2d **642** (Fla. 2 DCA **1986)** involved a brokerage which placed orders for advertisements in non-Florida directories. The court found where there was no evidence that any of the advertisements were for Florida directories or that the scope of the Defendant's business operations included Florida and that the only contact between the Defendant and Florida was the payments made to the brokerage concluding that the Defendant had not availed himself for the privilege of conducting business in Florida. It is Respondent's position that Seville Financial, Inc. vs. Nationwide Marketing Associates, Inc., **488** So 2d **658** (Fla. **4** DCA **1986)** was wrongly decided. While admitedly the facts are a bit sketchy, the Court in its summary of the contacts of the Appellant with Florida leaves out significant aspects of the contacts described in the opinion.

Petitioner has relied on Osborn vs. University Society, Inc., **378** So 2d **873** (Fla. **2** DCA 1979) since its first motion attacking jurisdiction (R-la). That case involved a contract which provided for consulting services an unspecified location which the Court found was an insufficient contact. However, a single act may, depending upon the character or quality of the contact, subject a foreign corporation or non-resident to the jurisdiction of Florida courts. Lacey vs. Force V Corporation,

403 SO 2d 1050 (Fla. 1 DCA 1981).

CONCLUSION

The Plaintiff's complaint complies with Florida's Long Arm Statute and its application to the Defendant and this case is not violative of Defendant's due process rights. This Honorable Court should affirm the decision of the First District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits was furnished to Lawrence H. Bartlett, Esquire, Attorney for Petitioner, P.O. Box 5488, Daytona Beach, Florida 32118, this 31st day of July, 1989.

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