IN THE SUPREME COURT OF FLORIDA

CASE NO.: 78,248

DISTRICT COURT OF APPEAL
SECOND DISTRICT
CASE NO: 91-00568

GLENEAGLE SHIP MANAGEMENT CO.,
a foreign corporation, and
CHESAPEAKE SHIPPING, INC.,
a foreign corporation,

Petitioners,

vs.

ANTHONY LEONDAKOS and
CAROL LEONDAKOS, his wife

Respondents.

INITIAL BRIEF OF PETITIONERS

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STATEMENT OF THE CASE AND FACTS

Respondents Anthony Leondakos and Carol Leondakos ("Leondakos" or "Plaintiffs") filed a personal injury action against Petitioners Gleneagle Ship Management Company ("Gleneagle") and Chesapeake Shipping, Inc. ("Chesapeake") under general maritime law and the Jones Act, 46 U.S.C. §688. "Chesapeake" and "Gleneagle" are collectively referred to as "Defendants" or "Petitioners".

The complaint (A-1) alleges that Plaintiff Anthony Leondakos, a resident of Pinellas County, Florida, was injured on board Defendants' ship while in the Persian Gulf in the Middle East. The only allegation regarding jurisdiction is that the Defendants were "foreign corporations authorized and doing business in the State of Florida." Plaintiffs make no allegation tracking the necessary language of the long-arm statute, §48.193, Fla. Stat., and do not allege their cause of action had any connection with the Defendants' alleged "doing business" in Florida.

The summons and complaint were accepted by the Secretary of State pursuant to Chapter 48, Fla. Stat., (A-2). Defendants answered with affirmative defenses contesting jurisdiction. (A-3). Defendants moved to dismiss the complaint (A-4) on a number of grounds, including lack of jurisdiction. In support of their motion to dismiss, Defendants filed the sworn affidavits of Richard C. Parsons and John Lovell (A-5). These affidavits establish the following:

1. Gleneagle Ship Management Company is a Delaware corporation with its principal place of business in Houston, Texas.
2. Gleneagle is not authorized to do business in Florida and does not operate, conduct, engage in, or carry on a business or business venture in Florida, or have any office or agency in Florida.
3. Gleneagle has no office, goods stored, telephone listing or bank account in Florida, and Gleneagle does not own, lease, or have any interest in any real property in Florida.
4. None of Gleneagles' directors, officers, or employees reside in Florida and Gleneagle has no general agent or agents for service of process in Florida.
5. At no time did Gleneagle have reason to believe that it would be subjected to suit in Florida and at no time did Gleneagle intend to subject itself to suit in Florida.
6. Gleneagle does not advertise in Florida.
7. Gleneagle has not caused any injuries to persons or property within the State of Florida.

8. Chesapeake is a Delaware corporation with its principal place of business in Kuwait.

9. Chesapeake is not authorized to do business in Florida and does no business in Florida.

10. Chesapeake has no office, goods stored, telephone listing or bank account in Florida, and Chesapeake does not own, lease or have any interest in any real property in Florida.

11. None of Chesapeake's directors, officers, or employees reside in Florida, and Chesapeake has no general agent or agents for service of process in Florida.

12. Chesapeake does not operate, conduct, engage in or carry on any business or business venture in Florida.

13. At no time did Chesapeake have reason to believe that it would be subjected to suit in Florida and at no time did Chesapeake intend to subject itself to suit in Florida.

14. Chesapeake sends no sales representatives to Florida and does not advertise in Florida.

15. Chesapeake has not entered into any agreements requiring performance in Florida.

Plaintiffs filed a motion for continuance (A-6) of the hearing on the Defendants' Motion to Dismiss asserting a

desire to take depositions and obtain an affidavit in opposition. The motion to continue was granted. (A-7).

Plaintiffs filed no affidavits and took no depositions in opposition to Defendants' motion and affidavits.

Before the motion to dismiss was heard by the trial court, Leondakos propounded to Defendants a request for production and interrogatories (A-8) related to the issue of personal jurisdiction. In response, Defendants moved for a protective order (A-9) on the grounds that Leondakos' discovery was premature because Defendants were not "Parties" to the suit for discovery purposes as the question of jurisdiction had not yet been decided. The trial court entered an order summarily denying Defendants' motion for protective order. (A-10).

Defendants petitioned the Second District Court of Appeal for a writ of certiorari and requested the Court to remand the case to the trial court with instructions to grant the motion for protective order. The Second District denied the petition. (A-11).

Defendants filed a notice to invoke the discretionary jurisdiction of this Court and by Order of October 14, 1991, this Court accepted jurisdiction and set the matter for oral argument. (A-12).

SUMMARY OF THE ARGUMENT

The circumstances under which Florida may obtain jurisdiction over a non-resident defendant pursuant to its long-arm statute has recently been addressed by this Court in Venetian Salami Co. v. Parthenais, 554 So.2d 499 (Fla. 1989) with a detailed discussion of defendant's rights and plaintiff's obligations regarding long-arm jurisdiction.

The issue now before this Court is ancillary to those matters and focuses on whether or not the foreign defendant can be subjected to onerous discovery even before jurisdiction is determined, in the face of a complaint that is deficient.

Courts in Florida that have considered the issue of jurisdictional discovery have reached differing results. The Third Circuit in F. Hoffman LaRoche & Company v. Felix, 512 So.2d 997 (Fla. 3d DCA 1987) held that when jurisdictional issues are being contested by a defendant in the trial court, "a defendant does not become a 'party' for discovery purposes" until after the jurisdictional issues have been decided. Id. at 998. Based on this holding, the Third District Court of Appeal quashed the circuit court's orders requiring the defendants to answer jurisdictional interrogatories.

In the court below, the Second District Court of Appeal held to the contrary permitting jurisdictional discovery to be taken of Defendants even before the trial court has

decided the jurisdictional issues. Gleneagle Ship Management Co. v. Leondakos, 581 So.2d 222 (Fla. 2d DCA 1991), (A-11).

The Third District's holding in Hoffman LaRoche is the better rule as it furthers the sound and fair policy of requiring the party bringing suit to bear the burden of making reasonable inquiry regarding the facts necessary to establish personal jurisdiction before instituting an action. Under the conflicting rule adopted by the Second District, a plaintiff is permitted, if not encouraged, to file suit and then conduct a discovery "fishing expedition" to develop critical jurisdictional allegations.

ARGUMENT

DISCOVERY IS INAPPROPRIATE IN THE CIRCUMSTANCE WHERE DEFENDANTS ARE NOT "PARTIES" WHEN THE TRIAL COURT HAS NOT DETERMINED IT HAS PERSONAL JURISDICTION OVER THE DEFENDANTS.

Each Defendant has a legitimate and protectable interest in avoiding the time, effort, and expense of discovery where the court's jurisdiction to hear the merits may well be lacking. Review of the requests to produce (A-8) illustrate the onerous responses that might be entailed. Illustrative, in part, are the following items:

(1) "Copies of all itineraries of all vessels owned or operated by the Defendants within the past ten (10) years."

(2) "Copies of all contracts with any person or entity located in Florida executed in the past ten (10) years."

(3) "List of all employees for the last ten (10) years that resided in Florida while employed by the Defendant."

(4) "Copy of any indemnification agreements between Chesapeake Shipping, Inc. and Gleneagle Ship Management Company, Inc."

(5) "List of all Florida law firms Defendants have corresponded with, sought advice from, retained, contracted with or paid for services within the last five (5) years."

(6) "Copies of any and all lists of professional entities located in Florida with whom Defendants has had any contact with within the last five (5) years."

(7) "Copies of any documents reflecting business trips to Florida by any agent or representative of Defendants."

(7) "Copies of any documents reflecting business trips to Florida by any agent or representative of Defendants."

(8) Twelve other categories.

Such "fishing expedition" is particularly inappropriate where the Defendants have made a clear showing that there is a lack of jurisdiction. Review of the complaint in this case indicates that Leondakos was injured while on board Defendants' vessel in the Persian Gulf. The only assertion with regard to jurisdiction is that each Defendant is "a foreign corporation authorized and doing business in the State of Florida." Defendants made affirmative effort to contest the jurisdictional issue by filing affidavits which establish the following:

1. Gleneagle Ship Management Company is a Delaware corporation with its principal place of business in Houston, Texas.
2. Gleneagle is not authorized to do business in Florida and does not operate, conduct, engage in, or carry on a business or business venture in Florida, or have any office or agency in Florida.
3. Gleneagle has no office, goods stored, telephone listing or bank account in Florida, and Gleneagle does not own, lease, or have any interest in any real property in Florida.

4. None of Gleneagles' directors, officers, or employees reside in Florida and Gleneagle has no general agent or agents for service of process in Florida.

5. At no time did Gleneagle have reason to believe that it would be subjected to suit in Florida and at no time did Gleneagle intend to subject itself to suit in Florida.

6. Gleneagle does not advertise in Florida.

7. Gleneagle has not caused any injuries to persons or property within the State of Florida.

8. Chesapeake is a Delaware corporation with its principal place of business in Kuwait.

9. Chesapeake is not authorized to do business in Florida and does no business in Florida.

10. Chesapeake has no office, goods stored, telephone listing or bank account in Florida, and Chesapeake does not own, lease or have any interest in any real property in Florida.

11. None of Chesapeake's directors, officers, or employees reside in Florida, and Chesapeake has no general agent or agents for service of process in Florida.

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14. Chesapeake sends no sales representatives to Florida and does not advertise in Florida.

15. Chesapeake has not entered into any agreements requiring performance in Florida.

In response, Plaintiffs offered nothing by way of affidavit and presumably could make no showing that there was any Florida connection with his cause of action. Plaintiffs filed no affidavit indicating that Anthony Leondakos was recruited by the Defendants in the State of Florida, contacted by the Defendants in the State Florida, joined the vessel in the State of Florida, or had any contact whatsoever with the Defendants in the State of Florida. There simply is no showing that there was any connection between Plaintiffs' cause of action and the State of Florida or activities taking place in the State Florida, or resulting from any business activities of the Defendants in the State of Florida. The egregious fact is that the trial court was content to permit Plaintiffs to seek discovery in the circumstance where the Plaintiffs' com-

plaint is itself deficient on jurisdictional allegations. Plaintiffs' complaint contains no allegations tracking the language of the long-arm statute §48.193, Fla. Stat. For instance,

> (1) no allegation of jurisdiction "for any cause of action arising from the doing of any type of the following acts. . ." §48.193, Fla. Stat.,;
>
> (2) no allegation that defendants were "engaged in substantial and not isolated activity within this state. . ." §48.193(2), Fla. Stat.

Fla. R. Civ. P. 1.110 requires the Plaintiff to include in his complaint the grounds upon which the court's jurisdiction depends.

The courts in Florida have consistently required the plaintiff to allege sufficient jurisdictional facts to fall within the applicable provisions of Florida's long-arm statute when a foreign defendant is being sued in Florida. Unger v. Publishers Entry Service, Inc., 513 So.2d 674 (Fla. 5th DCA 1987), review denied, 520 So.2d 586 (Fla. 1988); Kaufman v. Machinery Wholesalers Corp., 574 So.2d 1225, 1227 (Fla. 3d DCA 1991); Nordmark Presentations, Inc. v. Harman, 557 So.2d 649, 651 (Fla. 2d DCA 1990); Wynn v. Aetna Life Insurance Co., 400 So.2d 144 (Fla. 1st DCA 1981); Hartman Agency Inc. v. Indiana Farmers Mut. Ins. Co., 353 So.2d 665 (Fla. 2d DCA 1978); Kennedy v. Reed, 533 So.2d 1200 (Fla. 2d DCA 1988).

To render a non-resident Defendant subject to jurisdiction in a Florida court, the statutory requirements of the long-arm statute and the minimum contacts requirement must be met. Venetian Salami Co. v. Parthenais, 554 So.2d 499 (Fla. 1989).

For a Florida court to acquire jurisdiction over a foreign defendant, the trial court must first ascertain whether the complaint alleges sufficient jurisdictional facts to comply with Florida's long-arm statute. Kaufman v. Machinery Wholesalers Corp., 574 So.2d 125 (Fla. 3d DCA 1991).

This Court in Venetian Salami Co., supra, has again outlined the procedure to be followed in cases where jurisdiction over a non-resident defendant is asserted. The plaintiff may seek to obtain jurisdiction over a non-resident defendant by pleading the basis for service in the language of the statute without pleading the supporting facts. A defendant wishing to contest the allegations of the complaint concerning jurisdiction or raise a contention of minimum contacts must file affidavits in support of this position. The burden is then placed upon the plaintiff to prove by affidavit the basis upon which jurisdiction may be obtained.

In the case presently before the Court, the Plaintiffs have fallen short by failing even to plead the language of the statute, §48.193, Fla. Stat. Defendants moved to

dismiss and filed affidavits in support of their position. Plaintiffs filed nothing in response other than to seek discovery.

Under any analysis of fairness, a plaintiff should be required to establish at least a modicum of facts to contest the defendants' affirmative showing of lack of jurisdiction if that plaintiff expects to succeed in pursuing an action against the defendants in the State. Due process requires that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Venetian Salami Co. v. Parthenais, 544 So.2d 499, 500 (Fla. 1989), citing International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (U.S. 1945). The constitutional touchstone of minimum contacts analysis is whether Defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into Florida court. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed. 2d 490 (U.S. 1980); Ben M. Hogan Co., Inc. v. QDA Investment Corp., 570 So.2d 1349, 1350 (Fla. 3d DCA 1990); Pellerito Foods, Inc. v. American Conveyors Corp., 542 So.3d 426 (Fla. 3d DCA 1989); Fleming & Weiss v. First American Title, 580 So.2d 646 (Fla. 3d DCA 1991); Kaufman v. Machinery Wholesalers Corp., 574 So.2d 1225 (Fla. 3d DCA 1991); Carver v. Johnson, 556 So.2d 516 (Fla. 2d DCA 1990).

The court should not encourage a fishing expedition to discover the possible presence in Florida of a foreign corporation where absolutely no issues of fact on that subject or their interpretation are in dispute. All there is to pursue is a plaintiff's fanciful hope.

This is not a case where the Plaintiffs have no remedy. The Defendants' affidavits clearly indicate that suit would be appropriate in Texas or Delaware and perhaps other states in which activities of the Defendants are either related to the Plaintiff and to the Plaintiff's cause of action or are "substantial and not isolated activity." To permit extensive discovery where there is no allegation that the cause of action arose out of a business relationship in Florida and where the jurisdictional allegations of the Plaintiffs are deficient, is to sanction blatant forum shopping. Surely a plaintiff must make some specific factual showing in order to assert jurisdiction. The plaintiff cannot be permitted to effect service of process on an out-of-state defendant on the mere basis that such plaintiff hopes somehow and somewhere to find enough facts to create grounds for jurisdiction.

Granted, the "federal" rule, has evolved to the circumstance where a court assumes jurisdictional power to order discovery to determine its own jurisdiction. However merely because that is the "federal" rule does not mean that it is right or should be embraced as appropriate in Florida.

Policy considerations which dictate against the federal rule include: (1) Unless the party bringing the suit has the burden of making a reasonable inquiry regarding the facts necessary to establish personal jurisdiction before filing suit, the plaintiff initiating the suit can sue a defendant and then commence a "fishing expedition" to support the plaintiff's allegations and (2) the federal system is a much more liberal "notice-pleading system" which is more consistent with the rule that a plaintiff may merely allege personal jurisdiction and then rely on the defendant to sustain the burden and expense of providing the plaintiff with the information supporting the jurisdiction.

In an day of burgeoning litigation and indiscriminate filing of lawsuits, the courts must impose some degree of order and restraint. One small way to begin is to accept the validity of the Hoffman LaRoche decision and clearly announce that in Florida, a court does not have the jurisdictional power to order discovery to determine its own jurisdiction. A plaintiff must at least be able to show a modicum of facts to support a jurisdictional basis, before the defendant is forced to undertake those procedural steps to participate in discovery as a "party".

CONCLUSION

Defendants request that this case be remanded with instructions to the Circuit Court to grant Defendants' Motion for Protective Order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Corey R. Stutin, Esquire, Trapp, Chastain & Uiterwyk, P.A., 1810 S. MacDill Avenue, Tampa, Florida 33602 by U.S. Mail this 6 day of November, 1991.

Nat Pieper

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