STATE OF MICHIGAN

COURT OF APPEALS

LUCKENBACH ZIEGELMAN ARCHITECTS, Plaintiff-Appellant,	UNPUBLISHED April 17, 2014
v	No. 313473 Oakland Circuit Court
FERNE MARGULIES, Defendant-Appellee.	LC No. 2012-127216-CK

Before: SERVITTO, P.J., and FORT HOOD and BECKERING, JJ.

PER CURIAM.

Plaintiff, Luckenbach Ziegelman Architects, appeals as of right the trial court's order granting defendant, Ferne Margulies, summary disposition pursuant to MCR 2.116(C)(1) (lack of personal jurisdiction). The order dismissed plaintiff's claims of account stated, breach of implied contract, promissory estoppel, and unjust enrichment. Plaintiff alleges that defendant owes money for architectural services she received. Because we find that the exercise of jurisdiction over defendant in this case would be inconsistent with the requirements of the Due Process Clause of the Fourteenth Amendment, we affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant is a lifelong resident of California who has never resided or owned property in Michigan. In fall of 2008, defendant was introduced to and began dating Robert Ziegelman, an architect and principle of plaintiff, which is an architectural design company licensed to do business in Michigan and California. Plaintiff's sole office is in Bloomfield Hills, Michigan. While dating Robert, defendant sold her home in Beverly Hills, California, looked at various apartments, and ultimately purchased one in Los Angeles. She moved into her Los Angeles apartment ("Unit 2A") on March 14, 2010.

Before defendant moved into her Los Angeles apartment, plaintiff began providing architectural design services for defendant so that she could renovate the apartment. The parties dispute the scope of these services and whether payment was expected. According to defendant, Robert volunteered to assist her with renovating her apartment's two bathrooms by providing design services. Defendant allegedly told Robert that she would not hire him because it was not practical, given that he lived in Michigan. Defendant contends that Robert offered his services free of charge because they were dating. Plaintiff alleges that although Robert told defendant that he would not charge her for architectural services pertaining to two other apartments she was

considering buying (units 4E and 11H), he never told her that he would provide her with free architectural services for Unit 2A. Rather, according to Robert, defendant agreed to pay for the "significantly more involved architectural and design services" pertaining to Unit 2A. Additionally, plaintiff alleges that the design services provided for defendant's apartment "were not limited to the two bathrooms, but also included the living room, dining room, kitchen, bedrooms, closets, powder room, doors, hardware, floors, fireplace, walls, plumbing, fixture, cabinets, and more." Robert alleges that plaintiff "performed over 200 hours of architectural and interior design services for Unit 2A, with over 80% of that work . . . being performed in Michigan."

The record reveals that defendant paid plaintiff for at least some of its design services. A February 5, 2010, invoice charges defendant for 12 hours of design work for Unit 2A by "P. Taylor," an employee of plaintiff, at a rate of $75 per hour, for a total fee of $900. An additional $70.91 is billed for costs associated with the services. The invoice further states that Robert provided 22 hours of work on Unit 2A at no charge. There is a "PAID" stamp at the top of the invoice. Additionally, according to plaintiff, defendant paid plaintiff for design work in March of 2010.[1]

It is undisputed that plaintiff performed a majority of the work at issue in Michigan. It is also undisputed that defendant visited Michigan during the time relevant to this action, but the parties dispute what occurred during defendant's visits to Michigan. According to defendant, she has only been to Michigan five times in her entire life and none of these trips related to the architectural services. Four of the five visits were solely for the social purpose of visiting Robert. The remaining visit was "to see [Robert] socially and for several meetings related to my production company (which is based in California), in my capacity as the owner of said production company, on a matter regarding a documentary film which was (and is) completely unrelated to the architectural work on my apartment." Defendant also averred that "during the times I was in Michigan with [Robert], we never (in any way) discussed the architectural work related to the bathroom in my California apartment. All of the discussions regarding the bathroom work, including the nature and scope of the work, took place in California." According to plaintiff, although Robert and defendant discussed the architectural services while in California, they also discussed the architectural services at plaintiff's office in Michigan during defendant's visits to the state in October of 2009 and March of 2010.

In addition to plaintiff working on the architectural designs in Michigan, it also performed services for defendant in California. Robert discussed the project with defendant while in California, took measurements of her apartment, oversaw the renovations, and inspected the renovations. The renovations to the apartment were finished in July of 2010. In September of 2010, defendant ended her relationship with Robert.

Eighteen months passed. Plaintiff alleges that on March 1, 2012, it sent defendant a bill for $26,701.95 for architectural services that it had provided to defendant, including associated expenses for long distance travel on four occasions in 2009 and 2010. Defendant denied

[1] The file does not contain an invoice for this alleged payment.

receiving this invoice or owing plaintiff any compensation for architectural services. On May 31, 2012, plaintiff filed suit against defendant in Oakland Circuit Court. On July 5, 2012, defendant moved the trial court for summary disposition on the basis of lack of personal jurisdiction pursuant to MCR 2.116(C)(1). On September 20, 2012, the trial court granted defendant's motion for summary disposition, concluding that defendant's actions did not bring her within the scope of Michigan's long-arm statute and that she had insufficient minimum contacts to satisfy the requirements of due process.

II. ANALYSIS

Plaintiff argues that the trial court erred in finding that defendant's actions did not bring her within the ambit of Michigan's long-arm statute and in finding that she lacked sufficient minimum contacts to satisfy the requirements of due process.

"This Court reviews de novo a trial judge's decision on a motion for summary disposition. The legal question of whether a court possesses personal jurisdiction over a party is also reviewed de novo." *Yoost v Caspari*, 295 Mich App 209, 219; 813 NW2d 783 (2012) (internal citation omitted).

> When reviewing a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(1), the trial court and this Court consider the pleadings and documentary evidence submitted by the parties in a light most favorable to the nonmoving party. The plaintiff bears the burden of establishing jurisdiction over the defendant, but need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition. The plaintiff's complaint must be accepted as true unless specifically contradicted by affidavits or other evidence submitted by the parties. Thus, when allegations in the pleadings are contradicted by documentary evidence, the plaintiff may not rest on mere allegations but must produce admissible evidence of his or her prima facie case establishing jurisdiction. [*Id.* at 221 (quotation and citations omitted).]

"If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party." *Id*. at 222 (quotation and citations omitted).

"When examining whether a Michigan court may exercise limited personal jurisdiction over a defendant, this Court employs a two-step analysis." *Id.* at 222. "First, this Court ascertains whether jurisdiction is authorized by Michigan's long-arm statute. Second, this Court determines if the exercise of jurisdiction is consistent with the requirements of the Due Process Clause of the Fourteenth Amendment." *Id.*, quoting *Electrolines, Inc v Prudential Assurance Co, Ltd*, 260 Mich App 144, 167; 677 NW2d 874 (2003).

A. MICHIGAN'S LONG-ARM STATUTE

The relevant section of Michigan's long-arm statute in this case is MCL 600.705, which sets forth limited personal jurisdiction over nonresident individual defendants. In pertinent part, MCL 600.705 provides that:

> The existence of any of the following relationships between an individual or his agent and the state shall constitute a sufficient basis of jurisdiction to enable a court of record of this state to exercise limited personal jurisdiction over the individual and to enable the court to render personal judgments against the individual or his representative arising out of an act which creates any of the following relationships:
>
> (1) The transaction of any business within the state.
>
> (2) The doing or causing an act to be done, or consequences to occur, in the state resulting in an action for tort.
>
> (3) The ownership, use, or possession of real or tangible personal property situated within the state.
>
> (4) Contracting to insure a person, property, or risk located within this state at the time of contracting.
>
> (5) Entering into a contract for services to be rendered or for materials to be furnished in the state by the defendant.

Initially, and contrary to plaintiff's contentions, MCL 600.705(5) does not provide a basis for the exercise of limited personal jurisdiction over defendant in the case at bar because the record contains no evidence that there was a contract under which services were to be rendered or materials were to be furnished in Michigan by *defendant*. Rather, the only services that were to be rendered were those by *plaintiff*. MCL 600.705(5) expressly permits a Michigan court to exercise jurisdiction over a nonresident defendant when she enters into a contract under which *she* is to render services or furnish materials in Michigan. See *WH Froh, Inc v Domanski*, 252 Mich App 220, 230 n 1; 651 NW2d 470 (2002), quoting MCL 600.705(5) ("Subsection 705(5) applies when a defendant enters 'a contract for services to be rendered or for materials to be furnished in the state *by the defendant.*' (Emphasis added.) Defendant did not agree to provide a service or furnish materials in Michigan."). Consequently, the plain language of the statute compels the conclusion that MCL 600.705(5) does not provide a basis for a Michigan court to exercise jurisdiction over defendant.

The other asserted basis for exercising jurisdiction over defendant is MCL 600.705(1), which enables a court to exercise limited personal jurisdiction over an individual arising out of "[t]he transaction of any business within this state." "The word 'any' within the statute has been interpreted to include[ ] 'each' and 'every.' It comprehends 'the slightest.'" *Yoost*, 295 Mich App at 229 (quotation omitted). In *Sifers v Horen*, 22 Mich App 351, 356; 177 NW2d 189 (1970), quoting Black's Law Dictionary (4th ed), this Court examined the phrase, "transaction of

any business," in MCL 600.705 and defined the phrase as: "'doing or performing series of acts occupying time, attention, and labor of men for purpose of livelihood, profit or pleasure.'"[2]

In defining the phrase, "transaction of any business," we find instructive our opinion in *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 430; 633 NW2d 408 (2001). In *Oberlies*, we interpreted the exact same phrase, "transaction of any business," in MCL 600.715(1), which concerns the exercise of personal jurisdiction over nonresident corporate defendants, and set forth the following definitions:

> "Transact" is defined as "to carry on or conduct (business, negotiations, etc.) to a conclusion or settlement." *Random House Webster's College Dictionary* (1997). "Business" is defined as "an occupation, profession, or trade . . . the purchase and sale of goods in an attempt to make a profit." *Id.* Our Legislature's use of the word "any" to define the amount of business that must be transacted establishes that even the slightest transaction is sufficient to bring a corporation within Michigan's long-arm jurisdiction. See *Sifers v Horen*, 385 Mich 195, 199 n 2, 188 NW2d 623 (1971) (stating that MCL 600.715(1) refers to "each" and "every" business transaction and contemplates even "the slightest" act of business in Michigan), and *Viches v MLT, Inc.*, 127 F Supp 2d 828, 830 (ED Mich, 2000) (Judge Paul Gadola stating: "The standard for deciding whether a party has transacted any business under § 600.715[1] is extraordinarily easy to meet. 'The only real limitation placed on this [long arm] statute is the due process clause.'" [citation omitted]).

Statutory provisions must be read and interpreted as a whole, and "[i]dentical terms in different provisions of the same act should be construed identically . . . ." *The Cadle Co v Kentwood*, 285 Mich App 240, 249; 776 NW2d 145 (2009). As such, we conclude that the definition of "transaction of any business" as articulated in *Oberlies*, 246 Mich App at 430, should apply to the phrase as it is used in MCL 600.705(1).

Adopting that definition in the case at bar, and when viewing the facts in a light most favorable to plaintiff, we conclude that plaintiff has made a prima facie showing that defendant's actions fell within the scope of MCL 600.705(1). Plaintiff alleges, and defendant has not denied, that defendant paid at least $970.91 for architectural design services. Further, it is undisputed that plaintiff's only office is located in Michigan. Moreover, plaintiff alleges that defendant discussed architectural services with Robert on two occasions in plaintiff's office in Bloomfield Hills. Although it is undisputed that the renovations on defendant's apartment occurred in Los Angeles, the *design* services that made these renovations possible occurred in plaintiff's Michigan office. Additionally, plaintiff spent over 200 hours on these services and 80 percent of this work occurred in Michigan. As discussed in more detail *infra*, defendant's actions in Michigan were not extensive, but the term "any" with regard to the transaction of business is interpreted in the broadest sense possible. *Yoost*, 295 Mich App at 229. Indeed, "[t]he standard

[2] Because *Sifers* was decided before November 1, 1990, this Court is not bound by the decision. MCR 7.215(J)(1).

for deciding whether a party has transacted any business . . . is *extraordinarily* easy to meet," and "[t]he only real limitation placed on this [long arm] statute is the due process clause." *Oberlies*, 246 Mich App at 430, quoting *Viches*, 127 F Supp 2d at 830. Consequently, when viewed in a light most favorable to plaintiff, defendant's actions, which, according to plaintiff, consisted of agreeing to pay for architectural design services to be performed in Michigan, demonstrate that defendant engaged in the transaction of any business in Michigan. Therefore, jurisdiction would be appropriate under MCL 600.705(1).

B. DUE PROCESS

The second step of our analysis requires us to ascertain whether the exercise of jurisdiction is also consistent with the requirements of the Due Process Clause of the Fourteenth Amendment. See *WH Froh, Inc*, 252 Mich App at 227 (explaining that "a Michigan court may not exercise limited personal jurisdiction over the defendant unless to do so would not offend constitutional due process concerns."). See also *International Shoe Co v Washington*, 326 US 310, 320; 66 S Ct 154; 90 L Ed 95 (1945) (explaining that the exercise of jurisdiction may not offend traditional notions of fair play and substantial justice as embodied in the Due Process Clause). We conclude that under the facts of this case, summary disposition in defendant's favor was appropriate because the exercise of jurisdiction would not comport with due process.

This Court uses a three-part test for determining whether the exercise of limited personal jurisdiction comports with due process:

> First, the defendant must have purposefully availed itself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws. Second, the cause of action must arise from the defendant's activities in the state. Third, the defendant's activities must be substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable. [*Yoost*, 295 Mich App at 223 (quotation omitted).]

"When undertaking a due process analysis case by case, a court should examine the defendant's own conduct and connection with the forum to determine whether the defendant should reasonably anticipate being haled into court there." *WH Froh, Inc*, 252 Mich App at 230. "The primary focus of personal jurisdiction is on 'reasonableness' and 'fairness.'" *Jeffrey v Rapid American Corp*, 448 Mich 178, 186; 529 NW2d 644 (1995).

"With respect to the first prong of the due process analysis, a defendant may submit himself to the jurisdiction of another state by reaching beyond his own state and purposefully availing himself of the privilege of exploiting the other state's business opportunities." *WH Froh, Inc*, 252 Mich App at 230-231.

> "Purposeful availment" means something akin to either a deliberate undertaking to do or cause an act or thing to be done in Michigan or conduct that properly can be regarded as a prime generating cause of resulting effects in Michigan. Something more than a passive availment of Michigan opportunities must exist that gives the defendant reason to foresee being haled before a Michigan court. [*Id.* at 231.]

This requirement ensures that a defendant will not be subject to jurisdiction "solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the unilateral activity of another party or a third person[.]" *Burger King Corp v Rudzewicz*, 471 US 462, 475; 105 S Ct 2174; 85 L Ed 2d 528 (1985) (citations and quotation omitted). The purposeful availment prong focuses on the defendant's actions. *Vargas v Hong Jin Crown Corp*, 247 Mich App 278, 285; 636 NW2d 291 (2001). As we explained in *Vargas*:

> The defendant must *deliberately* engage in significant activities within a state, or create "'continuing obligations' between himself and residents of the forum" to the extent that "it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." [*Id.*, quoting *Burger King*, 471 Mich at 476. (Emphasis added).]

A defendant's decision to enter into an agreement with the plaintiff in the forum state is not, by itself, sufficient to establish that the defendant purposefully availed herself of the protections of the forum state. *Burger King*, 471 US at 478. Further, when, as in the case at bar, the dispute involves a purchaser of goods or services, a reviewing court is to consider which party solicited the transaction at issue. *WH Froh, Inc*, 252 Mich App at 231. See also *Kerry Steel, Inc v Paragon Indus, Inc*, 106 F 3d 147, 151 (CA 6, 1997). Where the defendant is a mere "passive party" and there is no evidence that the defendant was involved in negotiating the terms of an agreement, this Court has declined to find that the defendant purposefully availed itself of an opportunity in Michigan. See *Norwood Indus, Inc v Grand Blanc Printing, Inc*, 219 Mich App 590, 593; 556 NW2d 897 (1996). See also *Jeffrey*, 448 Mich at 188 (explaining that the defendant's availment must be purposeful, not passive).

Even when viewing the record in a light most favorable to plaintiff, we find that defendant did not purposefully avail herself of a Michigan opportunity. The record reveals that defendant's participation with regard to the architectural services to be performed in Michigan was passive, rather than purposeful. Defendant alleged, and plaintiff does not dispute, that Robert contacted defendant and offered plaintiff's architectural services, for a price or otherwise, to plaintiff. Thus, plaintiff, not defendant, initiated this transaction. Further, the record does not reveal that defendant engaged in any negotiations related to these services, but rather, that she simply, as a passive party, accepted the services as plaintiff offered them. This tends to show that defendant did not purposefully avail herself of the forum state. See *Norwood Indus, Inc*, 219 Mich App at 594. Cf. *Burger King*, 471 US at 480 (finding that the defendant's involvement was not passive where the defendant purposefully reached out to the plaintiff and accepted a long-term and exacting regulation of his business from the plaintiff's headquarters in Florida). Moreover, defendant's involvement in the architectural work performed by defendant remained passive. Indeed, although defendant visited Michigan and discussed the design services with Robert, defendant alleged, and plaintiff does not dispute, that defendant's primary purpose for visiting Michigan was her dating relationship with Robert, or for meetings with her production company that were wholly unrelated to the design services at issue in this case. Any discussion during defendant's visits of the design services performed by plaintiff was merely incidental to defendant's decision to visit Michigan, and defendant's presence in Michigan was unrelated to plaintiff's architectural work. That defendant's visits to Michigan were merely incidental to the design services at issue weighs against finding that defendant purposefully availed herself of an opportunity in the forum state. See *Sifers*, 385 Mich at 209 (SWAINSON, J, dissenting)

(explaining that the defendant did not have sufficient minimum contacts with Michigan where the defendant's presence in the state was only incidental to the business at issue in that case). See also *Alexander-Schauss v Lew*, 351 F Supp 2d 635, 639 (ED Mich, 2004). Under the facts presented, we conclude that defendant did not "deliberately engage in significant activities within" Michigan, and that she did not purposefully avail herself of a Michigan opportunity. See *Vargas*, 247 Mich App at 285.

Because we conclude that defendant did not purposefully avail herself of the forum state, we only briefly comment on the remaining factors. Regarding the second factor, i.e., whether the cause of action arose from the defendant's activities within the state, *Oberlies*, 246 Mich App at 434, we find that this factor also weighs in favor of finding that the exercise of jurisdiction in the case at bar would not comport with traditional notions of fair play and substantial justice. This factor considers, in part, where the alleged injury occurred. See *WH Froh, Inc*, 252 Mich App at 232. As discussed *supra*, the record is largely void of any activities that defendant undertook in Michigan. Plaintiff actively solicited defendant's business in California; defendant was simply a passive party. Moreover, the only injury alleged is defendant's failure to pay for architectural design services. Defendant's purported refusal to pay occurred in California, not Michigan. Consequently, plaintiff failed to allege an injury arising out of defendant's in-state activities. See *Kerry Steel, Inc*, 106 F 3d at 152. See also *Oberlies*, 246 Mich App at 437.

The third factor considers whether defendant's activities were "substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable." *Id.* at 433 (quotation omitted). In determining whether the exercise of personal jurisdiction is reasonable, the burden on the defendant is this Court's primary concern. *WH Froh, Inc*, 252 Mich App at 232. However, in appropriate cases, this Court should consider other relevant factors, including:

> the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies . . . . [*Id.* at 232-233 (quotations omitted).]

Here, we find that the burden on defendant in defending against this suit would be considerable. She lives in California and has never resided in Michigan. Moreover, although she traveled to Michigan in the past, her purpose for doing so was not to discuss the design services at issue in this case. In the context of a personal relationship, Robert offered services to her for the renovations of her California residence. Under the circumstances presented, she would be unfairly surprised if haled before a Michigan court. See *First Nat'l Monetary Corp v Chesney*, 514 F Supp 649, 652 (ED Mich, 1980).

Affirmed.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Jane M. Beckering