

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court Of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2010-CP-42-2075
Appellate Case No. 2013-000648

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MAY 28 2013

SC Court of Appeals

Digital Ally, Inc.,

v.

Light-N-Up, LLC and
Steven Shepherd,

Respondent,

Appellants.

INITIAL BRIEF OF RESPONDENT

Spartanburg, South Carolina
May 24, 2013

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STATEMENT OF ISSUE ON APPEAL

- I. DID THE FORUM SELECTION CLAUSE IN THE CONTRACT PREVENT THE MISSOURI COURT FROM PROPERLY EXERCISING SUBJECT MATTER AND PERSONAL JURISDICTION OVER APPELLANTS?

STANDARD OF REVIEW

“ An action to enforce a foreign judgment is an action at law.” *Minorplanet Systems USA Limited v. American Aire, Inc.*, 368 S.C. 146, 628 S.E.2d 43 (2006), citing, *Carson v. Vance*, 326 S.C. 543, 485 S.E.2d 126 (Ct.App. 1997). In an action at law, tried by a judge without a jury, the findings of the trial court must be affirmed if there is any evidence to support them. *Minorplanet* at 45, citing, *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

ARGUMENTS

- I. APPELLANTS FAILED TO PRESENT COMPETENT EVIDENCE TO OVERCOME THE PRESUMPTION OF JURISDICTION AND VALIDITY AFFORDED THE MISSOURI JUDGMENT UNDER THE FULL FAITH AND CREDIT CLAUSE OF THE U.S. CONSTITUTION.

In the Order Confirming Foreign Judgment, the trial judge relied on *Law Firm of Paul L. Erickson, PA v Boykin*, 383 S.C. 497, 681 S.E.2d 575 (2009)(*Boykin II*). In *Boykin II*, the Court held that a foreign judgment is presumed valid under the Full Faith and Credit Clause of the U.S. Constitution (U.S. Const. art. IV, §1.). A debtor who challenges a foreign judgment has the burden of overcoming the constitutionally mandated presumption of the

foreign judgment's regularity. *Boykin II* at 578, 579. The trial court held that "Defendants failed to present any evidence regarding the lack of jurisdiction of the Missouri Courts." Implicit in this finding is that Appellants failed to present competent evidence to overcome the presumption of jurisdiction and validity afforded the Missouri judgment under the Full Faith and Credit Clause of the U.S. Constitution (U.S. Const. art. IV, §1.).

On Appellants Motion to Reconsider, the trial judge amended his order to include mention of the Shepherd affidavit and the fact that the contract contained a Kansas forum selection clause. These additional details did not change his decision to confirm the foreign judgment in his Amended Order Confirming Foreign Judgment. Implicit in this decision is that Appellants' evidence was insufficient to overcome the presumption of jurisdiction and validity afforded the Missouri judgment under the Full Faith and Credit Clause of the U.S. Constitution (U.S. Const. art. IV, §1.).

Appellants erroneously argue that the burden of proving that the foreign judgment is entitled to full faith and credit shifted to Respondent when the Appellants filed their motion for relief from a foreign judgment. Appellants mistakenly rely on *The Jay Group, Ltd. v. The Bootery of Haywood Mall, Inc.*, 335 S.C. 114, 116, 515 S.E.2d 542, 543 (Ct. App. 1999)(*Jay Group*) and *Law Firm of Paul L. Erickson, PA v Boykin*, 375 S.C. 204, 651 S.E.2d 606 (S.C. App. 2007)(*Boykin I*)(Initial Brief of Appellants, Page 8).

In *Jay Group* and *Boykin I*, the Court of Appeals construed S.C. Code §15-35-940 to shift the burden of proving the foreign judgment's regularity to the creditor when the debtor challenges the judgment in South Carolina. The decision was based on the last

sentence of S.C. Code §15-35-940(B) which expressly shifted the burden to the creditor. *Boykin II* at 578.

In *Boykin II*, the Supreme Court reversed *Boykin I*, overruled *Jay Group* and struck the last sentence of S.C. Code §15-35-940(B) because the Full Faith and Credit Clause of the U.S. Constitution (U.S. Const. art. IV, §1.) was violated by shifting the burden of proof to the creditor. *Boykin II* at 579-580.

The only evidence presented by Appellants at the hearing was the Affidavit of Steve Shepherd. Appellants did not provide supporting authority to the court to indicate that the Missouri Court lacked jurisdiction. Appellants' Affidavit was insufficient to shift the burden of proof to Digital to require Digital to show that its Missouri judgment was entitled to full faith and credit under the U.S. Constitution. Jurisdiction may not be avoided merely because the defendant did not physically enter the forum State. *Austin Hardware And Supply, Inc. v. SFI Of Tennessee, LLC*, 11-CV-00485-W-FJG [USDC WD Mo. 2011], citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

Even if the Appellants' Affidavit was sufficient to shift the burden of proof to Digital, the trial court must be affirmed because there was evidence to support the court's decision that the Missouri Courts had proper personal and subject matter jurisdiction over Appellants. In an action at law, tried by a judge without a jury, the findings of the trial court must be affirmed if there is any evidence to support them. *Minorplanet* at 45, citing, *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

In its Return To Motion For Relief From Foreign Judgment , Digital supplied the court with a complete record of the proceedings in the Missouri Court, the Missouri long-arm statute, Mo. Rev. Stat. §506.500, and cogent reasons that jurisdiction was proper under the Missouri long-arm statute and under the due process clause of the US Constitution. In *Austin Hardware*, the defendant was found to be subject to jurisdiction in Missouri even though it did no business in the state because it ordered materials from the supplier in Missouri, opened a line of credit with the supplier, submitted purchase orders by phone or fax, received several shipments and failed to pay. The action was a direct result of the contract sued upon and convenience of the parties was neutral.

In this case, Appellants ordered materials from Digital in Missouri, opened a line of credit with Digital, submitted at least six purchase orders over a seven month period, received all shipments and failed to pay for at least six of them. The action was a direct result of the contract sued upon. The convenience of the parties is neutral, since Appellants claim the action should have been tried in Kansas which is still in the same metropolitan area of Kansas City.

Digital has supplied evidence to support the trial court' s decision that the Missouri Courts had proper personal and subject matter jurisdiction over Appellants and therefore the trial court must be affirmed. *Minorplanet at 45*, citing, *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

II. THE TRIAL COURT PROPERLY CONFIRMED THE FOREIGN JUDGMENT BECAUSE THE FORUM SELECTION CLAUSE IN THE TERMS OF SALE RELATED TO VENUE AND DID NOT DEPRIVE THE MISSOURI COURT OF SUBJECT MATTER AND PERSONAL JURISDICTION OVER APPELLANTS.

Appellants' only issue on appeal is that the Courts of Missouri did not have jurisdiction over the Appellants or the subject matter of the suit because the forum selection clause in Paragraph 12 of the Terms of Sale vested the Kansas courts with exclusive jurisdiction and venue.

“ The law against which a foreign judgment is evaluated for viability and effect is the law of the State rendering the judgment.” *Boykin II* at 577., citing, *PYA/Monarch, Inc. v. Sowell's Meats & Servs., Inc.*, 327 S.C. 469, 486 S.E.2d 766 (Ct. App.1997).

The Missouri Court of Appeals has held that a creditor can unilaterally waive its right to enforce a forum selection clause setting exclusive jurisdiction and venue in another state. *Peoples Bank v. Carter*, 132 S.W.3d 302 (Mo. App. W.D. 2004), relying on *Seals v. Callis* 848 S.W.2d. 5(Mo. App. W.D. 1992).

In *Peoples Bank*, Carter argued the Missouri Court lacked subject matter jurisdiction in that “ the note contained an outbound forum selection clause providing that Kansas is the exclusive forum, venue and place of jurisdiction for all litigation pertaining to the note.” *Id* at 304. The Missouri Court held that the trial court had subject matter jurisdiction of the Bank' s suit and Bank was free to unilaterally waive its right to enforce the forum selection clause.

In *People Bank*, the Missouri Court noted that it normally honors the parties' choice of law so long as the application of this law is not contrary to a fundamental policy of Missouri. "However, this choice of law applies only to substantive law. Procedural questions are determined by the state law where the action is brought. Thus, insofar as procedural questions are raised, Missouri law applies." *Peoples Bank* at 305, citing, *Consol. Fin. Invs. v. Manion*, 948 S.W.2d 222, 224 (Mo.App. E.D.1997) .

In *Peoples Bank*, the Missouri Court noted that "Whether a court has subject matter jurisdiction to adjudicate a given controversy is ... a question of procedure antecedent to the right of relief on the particular cause of action pled." *Peoples Bank* at 305. As they pertain to what court may be the proper forum or venue for a particular case, forum selection clauses are procedural, not substantive. *Id.*

"Subject matter jurisdiction cannot be waived by agreement." *Powell v State Farm Mutual Automobile Ins. Co.*, 245 S.W.3d 864 (Mo. App. E.D. 2008).

Thus, the forum selection clause in Paragraph 12 of the Terms of Sale did not prevent the Missouri Courts from properly exercising subject matter and personal jurisdiction over Appellants because subject matter jurisdiction cannot be waived. Digital was free to waive its contractual right to bring the action in Kansas.

Appellants confuse subject matter jurisdiction and venue. Subject matter jurisdiction concerns a court's power to hear and determine cases of the general class to which the proceeding in question belongs. A court obtains jurisdiction of the subject matter by operation of law. *Missouri Soybean Ass'n v. Mo. Clean Water Comm'n* 102

S.W.3d 10 at 21-22 (Mo. Banc 2003). Appellant makes no credible argument that the Missouri court did not have subject matter jurisdiction.

CONCLUSION

Appellants' failed to present sufficient evidence to overcome the presumption of jurisdiction and validity afforded the Missouri judgment under the Full Faith and Credit Clause of the U.S. Constitution, Article IV, §1. The trial court must be affirmed because Digital presented evidence to support the court's decision that the Missouri Courts had proper personal and subject matter jurisdiction over Appellants.

Under Missouri law, the forum selection clause in the contract relates to venue and did not deprive the Missouri Court of proper personal and subject matter jurisdiction over Appellants. Digital unilaterally waived the venue provision in the contract as permitted under Missouri law. Therefore, the order of the court below should be affirmed.

Respectfully Submitted

Spartanburg, South Carolina
May 24, 2013

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RESPONDENT'S DESIGNATION OF ADDITIONAL MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent proposes the following to be included in the Record on Appeal in the following order:

1. Notice of Filing pursuant to S.C. Code Ann. § 15-35-930 filed August 16, 2011 in the Court of Common Pleas for Spartanburg County, South Carolina - Case No. 2010-CP-42-2075 [7 pages].
2. Motion for Relief from Foreign Judgment filed by Appellants herein on September 6, 2011
3. Return to Motion for Relief from Foreign Judgment filed by Respondents herein on July 16, 2012 [39 pages][including attachments A-1 - A-36].
4. Affidavit of Stephen Shepherd dated June 14, 2012.
5. Transcript of Record for hearing held July 16, 2012 by Pamela E. Green, Reporter.

6. E-mail dated August 30, 2012 to counsel of record from Matthew E. Rupert, Law Clerk to the Hon. Ralph F. Cothran, Jr. regarding instructions for Order.
7. Order Confirming Foreign Judgment filed February 6, 2013.
8. Motion to Alter/Amend Order Confirming Foreign Judgment filed February 11, 2013.
9. Amended Order Confirming Foreign Judgment dated February 26, 2013 at Manning, South Carolina, filed March 1, 2013.

I certify that this designation contains no matter which is irrelevant to this appeal [Counsel for the parties have not yet met to compare documents or whether some pages can be redacted].

Spartanburg, South Carolina
May 24, 2013

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PROOF OF SERVICE


I certify that on the 24th day of May, 2013, I deposited in the Post Office of Spartanburg, South Carolina, and left there to be carried a copy of the Initial Brief Of Respondent, Respondent's Designation of Additional Matter to Be Included in the Record on Appeal with this Proof of Service and cover letter to the Appellate Court Clerk in the above-entitled matter securely enclosed in an envelope with postage duly prepaid addressed to the Appellants' attorney of record at his last known address as follows:

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