THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2022-001028

RECEIVED

May 23 2023

S.C. SUPREME COURT

Alison Meyers,

Petitioner,

v.

Shiram Hospitality, LLC,

Respondent.

FINAL BRIEF OF RESPONDENT

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INTRODUCTION

Petitioner seeks review of the Court of Appeals' Opinion affirming the trial court's denial of Petitioner's motion for entry of a foreign judgment. At issue is whether there exists any evidence supporting the trial court's finding that the Illinois court in the underlying case lacked personal jurisdiction because Respondent did not have sufficient minimum contacts with Illinois. Petitioner contends the Court of Appeals erred by failing to consider specific allegations contained in her Illinois complaint. However, the complaint was not presented to or considered by the trial court, and it was never brought to the trial court's attention by a post hearing motion. As discussed below, the only evidence on this jurisdictional issue was Respondent's affidavit that wholly supports the trial court's order. As such, the Court of Appeals' Opinion should be affirmed.

STATEMENT OF THE CASE

Petitioner filed her Notice of Intent to Domesticate Foreign Judgment on August 15, 2019, together with an Attorney's Affidavit and a certified copy of a judgment against Respondent filed in Cook County, Illinois. [R.p.30-38]. Respondent timely filed its Notice of Defense, and Petitioner then moved for entry of the judgment. [R.p. 39, 69]. On December 4, 2019, a hearing took place before the Honorable Larry B. Hyman, Jr., and on February 18, 2020, Judge Hyman denied Petitioner's motion, concluding the evidence of record shows Illinois did not have personal jurisdiction over Respondent because Petitioner failed to properly serve Respondent with the Illinois pleadings and Respondent was not doing business in, and did not have minimum contacts with, Illinois. [R.p. 6]. Petitioner did not file any post hearing motions and appealed the Order.

By Opinion dated May 18, 2022, the Court of Appeals affirmed the trial court, finding there is evidence to support its finding that the Illinois court lacked personal jurisdiction over the Respondent because it did not have sufficient minimum contacts such that it was fairly warned it may be haled into and Illinois court. [Appx. p. 160]. Because this holding was dispositive of the appeal, the Court of Appeals did not address the trial court's conclusion that Petitioner failed to properly serve Respondent with the Illinois pleadings.

Petitioner filed a Petition for Rehearing, which the Court of Appeals denied on June 23, 2022. Thereafter, Petitioner filed a Petition for Writ of Certiorari, to which Respondent filed a Return, and this Court granted the Petition by Order dated March 30, 2023.

STATEMENT OF FACTS

Petitioner's recitation of facts relies heavily on the contents of her complaint filed in the Illinois case. However, as described below, the record fails to reflect this foreign pleading was ever presented to, or considered by, the trial court. Therefore, Respondent's statement of facts is limited to the record before the trial court.

Respondent Shiram Hospitality, LLC is a South Carolina limited liability company, and its principal, and only, business is the ownership and operation of a hotel located in North Myrtle Beach. [R.p. 83]. Sanjay Mishra is an owner of the Respondent and has always served as the company's registered agent. [Id].

In 2014, Petitioner filed suit in Cook County, Illinois, against Respondent, Haricharan "Mike" Mishra (the father of Sanjay Mishra), and La Quinta Holdings, Inc. In 2016, the Illinois trial court entered an "X-Parte Default Judgment for Plaintiff" against all three defendants, awarding compensatory damages in the amount of $3,120.74, plus $6,951.05 for attorney fees and

$24,500 for punitive damages.[1] [R.p. 35]. This order does not reflect how attorney fees in the amount of nearly $7,000 was deemed reasonable in a default judgment case, nor the basis for awarding punitive damages of nearly 8 times the compensatory damages. [Id.].

More than three years later, Petitioner filed her Notice of Intent to Domesticate Foreign Judgment in Horry County, SC. [R.p. 30]. By this time, Defendant Mike Mishra had passed away, and Defendant La Quinta Holdings was dismissed shortly thereafter. [R.p. 40, 84]. Respondent filed its Notice of Defense, asserting the Illinois judgment was unenforceable because of improper service and lack of personal jurisdiction. [R.p. 39]. Appellant's motion for entry of the judgment was heard by the Honorable Larry B. Hyman, Jr. on December 4, 2019. [R.p. 42, 69].

At the hearing, Appellant submitted the Affidavit of Substituted Service, in which Horry County Deputy Sheriff Cox states the Illinois lawsuit was served on Respondent by delivering a copy to "MIKE MISHRA, a person of discretion FATHER OF AGENT SANJAY H. MISHRA … said person of discretion bears the relation to said defendant or defendants as is hereinbefore stated". [R.p. 75]. Petitioner also submitted three items printed from the internet that Petitioner claimed supported a finding that Mike Mishra was an agent of Respondent. [R.p. 58-68]. Petitioner submitted no further evidence.

On the other hand, Respondent filed the Affidavit of its owner, Sanjay Mishra, in which he states, in relevant part, under oath:

- Respondent's only business is the ownership and operation of a La Quinta hotel located in the city of North Myrtle Beach, Horry County, SC.
- Respondent does not currently own, and has never owned, any property outside of Horry County, South Carolina, and it does not carry on business, nor has it ever carried on business, outside of Horry County, South Carolina.
- The Respondent has no presence, nor does it do any business in, the State of Illinois.

[1] There is no dispute that the Defendants made no appearance and did not litigate any issues in the Illinois case. [R.p. 70].

- The Company is in the business of operating the hotel and in doing so it rents rooms located in Horry County, provides its services to guests who are present in Horry County, and collects payments in Horry County, SC. All payments are deposited in the Company's bank accounts located in local, Horry County banks.

- Mike Mishra was never a member, officer, managing or general agent or any other agent authorized to receive service of process for Respondent, and he never informed Sanjay Mishra that he had been served with the Illinois lawsuit. [R.p. 83].

Important to this appeal, the record reflects Petitioner did not file in this case or otherwise submit a copy of her Illinois complaint to the trial court, nor did she request the trial court to take judicial notice of the complaint, nor did she provide the trial court any quotes or specific statements from the complaint. Instead, Petitioner's counsel orally described the underlying facts to the trial judge as follows: Petitioner's close friend was in South Carolina staying at Respondent's hotel but did not have a credit card, so the friend called Petitioner, who was in Illinois, and asked if she could charge the room to Petitioner's credit card, to which Petitioner agreed [R.p. 43, 44, 54]; the hotel desk clerk called Petitioner to confirm that she agreed to her friend's use of her credit card, which Petitioner confirmed, and then Petitioner provided her card number and security code to the desk clerk [R.p. 43, 54]; Petitioner contends she authorized her card for two nights only, but when there were additional charges, she called the hotel and requested a refund that the hotel refused to provide. [R. p. 44, 54].

Judge Hyman denied Petitioner's motion for entry of foreign judgment on February 24, 2020, referencing Respondent's affidavit and concluding the Illinois court did not have personal jurisdiction over Respondent because (i) Mike Mishra was not an agent of Respondent and therefore Petitioner failed to properly serve Respondent with the Illinois complaint, and (ii) Respondent was not doing business in Illinois and did not have sufficient minimum contacts in Illinois. [R.p. 6-13].

The Court of Appeals, also referencing the information contained in Respondent's affidavit, affirmed the trial court, concluding there was evidence to support the trial court's finding that Respondent did not have minimum contacts with Illinois. Since this issue was dispositive of the appeal, the Court of Appeals did not rule on the trial court's finding that Petitioner failed to properly serve the Illinois lawsuit on Respondent.

STANDARD OF REVIEW

An action to enforce a foreign judgment is an action at law. *Minorplanet Sys. USA Ltd. v. Am. Aire, Inc.*, 368 S.C. 146 (2006). 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. *Id*.

ARGUMENT

Personal jurisdiction is presumed when a foreign judgment appears on its face to be a record of a court of general jurisdiction. *Law Firm of Paul L. Erickson, P.A. v. Boykin*, 383 S.C. 497 (2009). However, "a judgment is void if a court acts without jurisdiction of the person", and the judgment of a court without personal jurisdiction "is not entitled to recognition or enforcement in another state, or to the full faith and credit provided for in the federal Constitution." *Fin. Fed. Credit, Inc. v. Brown*, 384 S.C. 555 (2009). "Consequently, before a court is bound by the judgment rendered in another state, it may inquire into the jurisdictional basis of the foreign court's decree." *Underwriters Nat. Assurance Co. v. N.C. Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 102 S.Ct. 1357, 71 L.Ed.2d 558 (1982).

The burden of undermining the decree of a sister state rests heavily on the assailant. *Cook v. Cook*, 342 U.S. 126, 72 S.Ct. 157, 96 L.Ed. 146 (1951). The debtor challenging a foreign judgment on the ground of lack of personal jurisdiction assumes the burden of overcoming, by the

record or by extrinsic evidence, the constitutionally mandated presumption of the foreign judgment's regularity. *Law Firm of Paul L. Erickson, P.A. v. Boykin*, 383 S.C. 497 (2009).

In this case, Respondent met its burden by producing direct evidence to the trial court showing the Illinois court was without personal jurisdiction because Appellant failed to properly serve the Illinois lawsuit and Respondent was not doing business in, and had no minimum contacts with, Illinois. While Petitioner presented some evidence relating to service of process, Petitioner did not present any evidence concerning the minimum contacts issue. As such, the only evidence of record as to whether Respondent conducted business in, or had minimum contacts with, Illinois consists of the unrebutted affidavit of Sanjay Mishra.

I. THE COURT OF APPEALS PROPERLY APPLIED THE FACTS IN EVIDENCE.

Petitioner argues the Court of Appeals misapplies facts in evidence and applies facts not in evidence. A plain reading of the Opinion, however, reveals the opposite. The Court of Appeals only relied on the same facts as were properly before the trial court, but it did not rely on facts that were not in evidence.

As to the Court of Appeals' application of facts, Petitioner makes three arguments. First, Petitioner questions the "source" of the following statement of the Court of Appeals:

> Here, the LLC's only business is a La Quinta Hotel located in Horry County, South Carolina. The LLC has never owned property outside of this location and does not have a presence in Illinois. The LLC, through La Quinta Hotel, provides services to guests, collects payments, and deposits those payments all within Horry County.

No doubt, the source is Sanjay Mishra's affidavit, which states nearly identical facts and was also cited by the trial court. Petitioner generally concedes the affidavit is the likely source, but then suggests some further error occurred because the affidavit does not address (i) whether Respondent advertises in Illinois, (ii) whether Petitioner was physically in the state of South

Carolina or whether payment was collected from Illinois, and (iii) whether Respondent's owner could competently testify regarding the contents of the Affidavit. Notably, however, Petitioner did not raise these concerns to the trial court, nor object to the affidavit or argue to the trial court that the affidavit was somehow defective or lacking. In fact, Petitioner did not raise these points to the Court of Appeals either, until her Petition for Rehearing. As such, these issues are not preserved for review. See, *Wilder Corp. v. Wilke*, 330 S.C. 71 (1998)(It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review). Moreover, Petitioner offers no legal basis or relevant law explaining how these items serve as a basis for error by the Court of Appeals. *First Sav. Bank v. McLean*, 314 S.C. 361 (1994)(conclusory argument with no citation of authority is deemed abandoned).

Next, Petitioner contends the Court of Appeals erred by stating the action "arose out of Meyers' offer to pay for a friend's stay at La Quinta Hotel using her credit card." [Petition, p. 3]. This is odd, as Petitioner's counsel told the trial court that Petitioner's close friend called her from South Carolina, asking if she could use her credit card to stay at Respondent's hotel, and Petitioner said yes and authorized her card's use. If anything, the Court of Appeals appears to be giving context to the dispute, but there is nothing in its Opinion to suggest this comment was in any way material to its decision. Petitioner is parsing words that make no difference to this case.

Finally, Petitioner argues the Court of Appeals erred by failing to reverse the trial judge based on specific, numbered allegations contained in her Illinois complaint. As stated above, however, the record reflects this document was never presented to or considered by the trial court. In fact, the document does not have the South Carolina "Electronically Filed" stamp showing Petitioner filed it or otherwise made it part of the record in this case. [R. p. 14]. To be sure, nothing in the record even suggests the trial judge ever saw the Illinois complaint. Of course, Petitioner

had the opportunity to introduce the complaint into evidence, provide a copy to the court, or even request the trial court to take judicial notice of the document, but she did not do so. It simply did not exist in the record before the trial court.[2] As such, the trial judge did not address the admissibility, relevance, significance or effect of the allegations of this foreign document, and Petitioner did not file a post-hearing motion requesting otherwise.

Petitioner offers no explanation or legal authority to support her assertion that the Court of Appeals should have reversed the trial court based on a document that was not before the trial judge. South Carolina appellate courts do not recognize the "plain error rule", which allows a court to consider and rectify an error not raised below by the party. *Elam v. S.C. DOT*, 361 S.C. 9 (2004). To the contrary, South Carolina law repeatedly emphasizes the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration, and that issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *Id.*

A trial judge will not be reversed for failing to act on a matter that was not submitted to him. *Roche v. South Carolina Alcoholic Beverage Control Com.*, 263 S.C. 451 (1975). The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C 406 (2000). This requirement "prevents a party from keeping an ace card up his sleeve - intentionally or by chance - in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *Id*.

Petitioner's ace card on appeal is repeatedly arguing that her Illinois complaint should somehow serve as direct evidence on jurisdiction, even though the document did not appear in this

[2] Of course the Illinois judgment had to be based on something, and Respondent is not suggesting the trial court didn't know that a complaint was probably located somewhere in Cook County's filing system, but the Petitioner never submitted the document to the court and never asked the court to consider its specific allegations.

case until her appeal. The Court of Appeals properly excluded consideration of this foreign pleading, as it was never presented to the trial court, its allegations were not referenced in the trial court's order, and its effect, if any, was never addressed or ruled upon by the trial court.[3] In this case, the Court of Appeals needed only to determine whether "any evidence" supports the trial court's denial of Petitioner's motion for entry of judgment. Respondent's affidavit, upon which the trial court relied, wholly rebuts the presumption that Illinois had personal jurisdiction of Respondent, and the affidavit serves as direct evidence – indeed the only evidence of record – that Respondent did not have minimum contacts with Illinois.

Therefore, the Court of Appeals properly applied the facts in evidence and properly did not consider facts that were not in evidence.

II. THE COURT OF APPEALS PROPERLY APPLIED ILLINOIS LAW TO THE FACTS OF THIS CASE AS IT RELATES TO SPECIFIC JURISDICTION.

When determining the validity and effect of a foreign judgment based on lack of personal jurisdiction, South Carolina courts look to the law of the state that rendered the judgment. *Fin. Fed. Credit, Inc., v. Brown*, 384 S.C. 555 (2009). Thus, to ascertain whether the Illinois court properly exercised jurisdiction over Respondent, the court must consult Illinois law regarding personal jurisdiction. As required, both the trial court and Court of Appeals consulted and ruled according to Illinois law in this case.

Illinois law provides that "the plaintiff has the burden to establish a prima facie basis to exercise personal jurisdiction over a nonresident defendant." *Russell v. SNFA*, 2013 IL 113909, 987 N.E.2d 778 (2013). Once the plaintiff has met this burden, the burden then swings over to the

[3] The Court of Appeals explained, "As to whether the circuit court included unsupported facts, cited inapplicable Illinois caselaw, or engaged in dicta in its order, we hold these issues are not preserved for appellate review because Meyers did not raise them to the circuit court in a Rule 59(e), SCRCP, motion. *See Sweeney v. Sweeney*, 420 S.C. 69, 82, 800 S.E.2d 148, 154 (Ct. App. 2017) (finding because the husband did not raise an argument in his Rule 59(e) motion—thereby not allowing the family court the opportunity to rule upon the issue or correct any alleged mistakes in its final order—the issue was not preserved on appeal)."

defendant to show why the assertion of jurisdiction would be unreasonable. *Flanders v. Cal. Coastal Cmtys., Inc.*, 356 Ill.App.3d 1113, 828 N.E.2d 793 (2005).

Any conflicts in the pleadings and affidavits must be resolved in the plaintiff's favor, but the defendant may overcome plaintiff's prima facie case for jurisdiction by offering uncontradicted evidence that defeats jurisdiction. *Russell v. SNFA*, 2013 IL 113909, 987 N.E.2d 778 (2013). "If facts alleged in a defendant's affidavit contesting jurisdiction are not refuted by a counter affidavit filed by the plaintiff, then those facts are accepted as true." *Aspen Am. Ins. Co. v. Interstate Warehousing, Inc.*, 2016 IL App (1st) 151876, 57 N.E.3d 656 (2016), *reversed on other grounds,* 2017 IL 121281, 418 Ill. Dec. 282, 90 N.E.3d 440. See also, *Continental Nut Co. v. Robert L. Berner Co*., 345 F.2d 395 (7th Cir. 1965)(mere allegation when denied by uncontroverted affidavits is not sufficient in itself to establish the jurisdictional prerequisite of the Illinois long arm statute).

Petitioner contends the Court of Appeals did not correctly apply Illinois law "to the facts in evidence – and not in evidence – in this matter." [Petition, p. 6]. However, Petitioner's argument again rests on specific allegations contained in her Illinois complaint. As already discussed, this document was not before the trial court, and the trial court never ruled upon, and was not asked to rule upon, its admissibility, relevance, significance or effect. Even if Petitioner had some vague, undefined expectation that the Illinois complaint was before the trial court, or was supposed to be before the trial court, Petitioner did not preserve for review by post hearing motion any alleged failure by the trial court to reference or rule on the effect of the complaint's allegations. Moreover, Petitioner did not submit a counter-affidavit, and therefore the facts in Respondent's affidavit are accepted as true under Illinois law. Thus, the Court of Appeals properly applied Illinois law to the only evidence of record on this issue - Respondent's affidavit.

The Illinois long arm statute governs the exercise of personal jurisdiction by an Illinois court over a nonresident. 735 ILCS 5/209. Under Illinois law, personal jurisdiction under the

statute is proper if the requirements of federal and state due process are satisfied. *Russell v. SNFA*, 987 N.E.2d 778 (2013). When federal due process concerns regarding personal jurisdiction are satisfied, so are Illinois due process concerns. *Id*.; *Soria v. Chrysler Can., Inc.,* 958 N.E.2d 285 (Ill.App. Ct. 2d 2011). Illinois recognizes the "minimum contacts" test as the threshold issue in any personal jurisdiction challenge. *Russell v. SNFA*, *supra*.

In matters of specific jurisdiction, the defendant must "purposefully direct" its activities at the forum state, which can occur based on certain single or occasional acts in the state but only with respect to matter related to those acts. *Id*. A defendant purposefully directs its activities to the forum state when it "purposefully avails" itself of the privilege of conducting activities within the forum State and invoking the benefits and protections of its laws. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

However, a plaintiff may not "lure" a nonresident defendant into a jurisdiction, and the mere unilateral action of the plaintiff in seeking and obtaining the service of the defendant cannot serve to satisfy the jurisdictional requirement. *Allen v. Mo. Baptist Med. Ctr*., 2022 IL App (5th) 210263 (2022). Moreover, by requiring a showing of purposeful availment, a nonresident defendant is protected from being haled into a jurisdiction based on random or attenuated contacts or the unilateral activity of a third party. *Burger King Corp. v. Rudzewicz, supra*.

Respondent's affidavit states it conducts business in Horry County only, it provides services to customers and collects and deposits money in Horry County only, it has never conducted business outside of Horry County, and it has no presence, nor does it do any business in the State of Illinois. This is the only evidence of record on the minimum contacts jurisdictional issue. As such, the Court of Appeals properly affirmed the trial court because the only evidence of record establishes that Respondent did not purposefully direct its activities at Illinois or purposefully avail itself of the privilege of conducting business in Illinois.

The Court of Appeals briefly referred to the underlying events when it said the action arose out of Meyers's offer to pay for a friend's stay at Respondent's hotel. As stated above, this was no doubt for context only, as the record is completely barren as to what happened except for the background summaries provided by the Petitioner's counsel at the trial court hearing. Clearly, statements by counsel are not evidence and there is nothing in the Court of Appeals' Order that suggests this contextual statement served as a basis for its conclusion. See, *Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence. Consequently, the family court may not base necessary findings of fact and conclusions of law solely on counsel's statements of fact or arguments").

Even if the lawyers' descriptions carry any evidentiary weight, which they should not, these statements still fail to establish minimum contacts. When evaluating minimum contacts, "focus is on the defendant's activities within the forum State, not on those of the plaintiff." *Madison Miracle Prods., LLC v. MGM Distrib. Co.,* 2012 IL App (1st) 112334 (2012); *Poplar Grove State Bank v. Powers*, 218 Ill.App.3d 509, 578 N.E.2d 588 (1991)(a defendant does not transact business in Illinois merely by entering into a contract that involves an Illinois resident). Indeed, narratives by counsel reflect that Petitioner and her friend had already reached an agreement and they brought their agreement to Respondent in South Carolina. The friend was renting a room in South Carolina, and the friend called Petitioner from South Carolina to use her credit card. Use of the credit card only took place in South Carolina. The charging of the card took place in South Carolina and the deposit of money took place in South Carolina. Clearly, the contract was entered into in South Carolina and the performance (renting the room) took place in South Carolina. Respondent's only alleged contact with Illinois was a single call to Petitioner to verify her existing agreement. No doubt, these oral descriptions by counsel clearly show Respondent did not "purposefully direct its

activities" at Illinois; quite the contrary, Petitioner and her friend directed their activities at South Carolina. At best, the verbal background as conveyed by the lawyers reflects this was a random, fortuitous, or attenuated contact that precludes jurisdiction.

Based on the above, the Court of Appeals properly applied Illinois law to the facts of this case.

CONCLUSION

The trial court's order is not only supported by "any evidence", it is overwhelmingly, if not totally, supported by the entirety of the evidence of record. The trial court never ruled upon, and was not asked to rule upon, the admissibility, relevance, significance or effect of Petitioner's Illinois complaint, and therefore the document, which did not exist in this case until Petitioner filed her appeal, cannot serve as the basis to reverse the trial court. Because Respondent's affidavit supports the trial court order and there was no contrary evidence before the trial court on the minimum contacts jurisdictional issue, the Court of Appeals properly held the evidence supports the trial court's order denying Petitioner's motion for entry of the foreign judgment.

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