

STATE OF SOUTH CAROLINA
COUNTY OF EDGEFIELD
Barry Lanham and Obvia Gamble-Lanham,

Plaintiffs,

vs.

Wumag Texroll GmbH & Co. KG f/k/a
Kelzenberg + Co: GmbH & Co. KG and
Wumag Texroll GmbH & Co. KG,

Defendant,

IN THE COURT OF COMMON PLEAS

Case No. 2021-CP-19-00005

**WUMAG TEXROLL GMBH & CO. KG
F/K/A KELZENBERG + CO. GMBH &
CO. KG'S MOTION FOR SUMMARY
JUDGMENT**

Wumag Texroll GmbH & Co. KG f/k/a
Kelzenberg + Co: GmbH & Co. KG,

Third-Party Plaintiff,

vs.

Wumag Texroll GmbH & Co. KG,

Third-Party Defendant.

RECEIVED
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SC Court of Appeals

PLEASE TAKE NOTICE Defendant Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co: GmbH & Co. KG (“Kelzenberg-Wumag” or “Defendant”), hereby moves, pursuant to Rules 12(b)(2), 12(b)(5) and 56(c) of the South Carolina Rules of Civil Procedure, for an order dismissing Plaintiffs’ claims against Kelzenberg-Wumag.

I. STATEMENT OF FACTS

A. Plaintiffs’ Allegations

The complaint alleges that on January 22, 2018, Barry Lanham was severely injured at work while cleaning a Laminating Calender Line machine (the “Machine”) at Bondex, Inc.’s facility in Trenton, South Carolina. (*Id.* ¶¶ 7—8). Plaintiffs filed this action on January 6, 2021, almost three years later, asserting causes of action against “Wumag Texroll GmbH & Co. KG” for (1) negligence, (2) strict liability pursuant to S.C. Code Ann. § 15-73-10, *et seq.*, (3) breach of

express and implied warranties, and (4) loss of consortium. (*Id.* ¶¶ 9–22). In support of their claims, Plaintiffs allege that the Machine was designed, manufactured, sold, delivered, and installed by Wumag Texroll GmbH & Co. KG. (*Id.* ¶ 6). Plaintiffs further allege that after the Machine was installed at Bondex’s facility, employees and/or agents of Wumag Texroll GmbH & Co. KG deactivated safety devices on the Machine. (*Id.* ¶ 7).

B. Declaration of Michael Hess

The sworn declaration of Michael Hess (“Hess”), Kelzenberg-Wumag’s Managing Director demonstrates that Kelzenberg-Wumag cannot be liable for Plaintiffs’ alleged injuries and is not subject to personal jurisdiction in this action. (*See* Michael Hess Declaration in Support of Wumag Texroll GmbH & Co. KG’s Motion to Dismiss (hereinafter “Hess Declaration”) attached hereto as **Exhibit A**). Kelzenberg-Wumag is a German corporation and is registered at the district court of Düren, Germany under number HRA 224. (¶ 4). Kelzenberg-Wumag’s principal place of business is in Düren, Germany. (*Id.* ¶ 5). Kelzenberg-Wumag came into existence in September 2019, eighteen months after Barry Lanham was allegedly injured. (*Id.* ¶ 8).

On September 1, 2019, Wumag Texroll GmbH & Co. KG (“Wumag”), the company who, upon information and belief, designed, manufactured, sold, delivered, and installed the Machine filed for insolvency.¹ (*Id.* ¶ 6). German insolvency proceedings commenced in the district court of Krefeld, Germany. (*Id.*). As part of the insolvency proceedings, on or around September 18, 2019, Kelzenberg + Co: GmbH & Co. KG (“Kelzenberg”) entered into an asset purchase agreement to purchase the assets, but not the liabilities, of Wumag. (*Id.* ¶¶ 8, 10–12). Ownership of the purchased assets was transferred from Wumag to Kelzenberg on October 1, 2019. (*Id.* ¶

¹ Prior to being insolvent, Wumag was registered at the district court of Krefeld, Germany under number HRA 3719. (Hess Declaration ¶ 7). This is significant because it demonstrates that Wumag and Kelzenberg-Wumag are now, and have always been registered as separate and distinct companies.

10). Dr. Peter Minuth, a German attorney and the insolvency administrator for the Wumag insolvency proceedings, oversaw the asset purchase. (*Id.* ¶ 9).

Following the asset purchase, for marketing reasons, Kelzenberg changed its name to Wumag Texrol GmbH & Co. KG (identified in this brief as “Kelzenberg-Wumag”). (*Id.* ¶ 5). Although Kelzenberg-Wumag adopted the Wumag name, there is not now, and has never been, commonality of officers, directors, or stockholders between Wumag and Kelzenberg-Wumag. (*Id.* ¶ 14). In addition and relevant to this case, Kelzenberg-Wumag does not now, and has never held an ownership interest in the Machine. (*Id.* ¶ 18). It also did not design, test, manufacture, market, sell, import, distribute, deliver or install the Machine. (*Id.* ¶ 19). Kelzenberg-Wumag is not now, and has never been registered with the South Carolina Secretary of State. (*Id.* ¶ 20). Kelzenberg-Wumag has never registered an agent for service of process with the South Carolina Secretary of State. (*Id.* ¶ 21). Kelzenberg-Wumag does not now, and has never, maintained an office, manufacturing facility or other place of business within South Carolina. (*Id.* ¶ 22). Kelzenberg-Wumag does not now, and has never, employed any personnel based in South Carolina. (*Id.* ¶ 23).

II. LEGAL STANDARD

A. Rule 12(b)(5)

Rule 12(b)(5) of the South Carolina Rules of Civil Procedure governs motions to dismiss for insufficiency of service of process. Rule 12(b)(5) is the “proper vehicle for challenging both the mode of delivery [and] the lack of delivery of the summons and complaint.” *Unisun Ins. V. Hawkins*, 342 S.C. 537, 543, 537 S.E.2d 559, 562 (Ct. App. 2000)(citing 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Civil 2d § 1353 (1990)) (internal citations omitted). When raising a defense under Rule 12(b)(5), the individual or corporation challenging service should provide sufficient specificity detailing how a Plaintiff “failed to satisfy the requirements of the service provision he utilized.” *Id.* at 542, 537 S.E.2d at 562.

B. Rule 12(b)(2)

Rule 12(b)(2) of the South Carolina Rules of Civil Procedure governs motions to dismiss for lack of personal jurisdiction. The party seeking to invoke personal jurisdiction over a nonresident defendant bears the burden of proving the existence of personal jurisdiction. *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 327, 594 S.E.2d 878, 882 (Ct. App. 2004). “The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case.” *Id.* “When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction. *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct.App. 2008). When a defendant challenges the Court’s personal jurisdiction under Rule 12(b)(2), the plaintiff has the burden of proving that jurisdiction exists by a preponderance of the evidence. *Sunny Days Entm’t, LLC v. Traxxas, L.P.*, 376 F. Supp. 3d 654, 658 (D.S.C. 2019).

C. Rule 56(c)

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Under South Carolina law, where “plain, palpable and indisputable facts exist on which reasonable minds cannot differ,” summary judgment in favor of the moving party is proper. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976). When a party makes a motion for summary judgment, “an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial.” *Coker v. Cummings*, 381 S.C. 45, 54, 671 S.E.2d 383, 388 (Ct. App. 2008) (quoting *S.C. Elec. & Gas Co. v. Combustion Eng’g, Inc.*, 283 S.C. 182, 188–89, 322 S.E.2d 453, 457 (Ct.App.1984)). The

nonmoving party must specifically set forth such facts, “as would be admissible in evidence,” to show that a true jury issue exists. *See* 56(e), SCRCP. If the adverse party does not respond accordingly, the trial court shall enter summary judgment against him if appropriate.” *Coker*, 381 S.C. at 54, 671 S.E.2d at 388. “When a party makes no factual showing in opposition to a motion for summary judgment, the trial “ court must grant summary judgment to the moving party if, under the facts presented, the latter is entitled to summary judgment as matter of law.” *Id.*

III. ARGUMENT

A. Plaintiffs’ Complaint Against Kelzenberg-Wumag Should be Dismissed for Insufficient Service of Process.

Plaintiffs only attempt to serve Kelzenberg-Wumag was through the South Carolina Secretary of State pursuant to S.C. Code Ann. S.C. Code Ann. § 15-9-245. Under section 15-9-245(a), “[e]very foreign business or nonprofit corporation which is not authorized to do business in this State, ***by doing in this State, either itself or through an agent, any business,***...is considered to have designated the Secretary of State as its agent upon whom process against it may be served....” (emphasis added). The plain language of section 15-9-245 clearly provides that a foreign corporation must do business in South Carolina, “either itself or through an agent,” in order to be subject to service under the statute. *See* S.C. Code Ann. § 15-9-245. Case law interpreting the statute is equally clear. In *South Carolina v. Bulgartabac Holding Grp.*, No. CV 3:05-124-22, 2005 WL 8165771, at *2 (D.S.C. May 24, 2005), the district court explicitly held that that “[i]n order for § 15-9-245(a) to apply, it [is] necessary to find that [a defendant] does business in South Carolina, either itself or through an agent.” *South Carolina v. Bulgartabac Holding Grp.*, No. CV 3:05-124-22, 2005 WL 8165771, at *2 (D.S.C. May 24, 2005) (quoting S.C. Code Ann. § 15-9-245). When it was purportedly served, Kelzenberg-Wumag did not do business in South Carolina. Hess’s unrefuted declaration establishes this fact. (*See* Hess Declaration ¶¶ 17-23). Accordingly, Plaintiffs’ attempt to serve Kelzenberg-Wumag pursuant to section 15-9-245 is improper.

Moreover, even ignoring that Kelzenberg-Wumag is not subject to service under section 15-9-245, Plaintiffs' failed to comply with section 15-9-245(c), which sets forth specific requirements for demonstrating proof of service.

B. Plaintiffs' Complaint Against Kelzenberg-Wumag Should be Dismissed for Lack of Personal Jurisdiction.

Traditionally, in South Carolina, the determination of whether a court may exercise personal jurisdiction over a nonresident involved a two-step analysis which examined (1) whether the South Carolina long-arm statute is satisfied, and then (2) whether the nonresident's contacts in South Carolina satisfied due process. *Cribb v. Spatholt*, 382 S.C. 490, 499, 676 S.E.2d 714, 719 (Ct.App. 2009) (citing *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 431, 665 S.E.2d 660, 664 (Ct.App. 2008)). However, "because South Carolina treats its long-arm statute as coextensive with the due process clause, the question becomes whether the exercise of personal jurisdiction would violate due process." *Moosally*, 358 S.C. at 329, 594 S.E.2d at 883. There are two ways to establish personal jurisdiction: (1) general jurisdiction and (2) specific jurisdiction. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Kelzenberg-Wumag is not subject to either general or specific personal jurisdiction in South Carolina, and therefore, Plaintiffs' claims should be dismissed for lack of personal jurisdiction pursuant to Rule 12(b)(2), SCRCPP.

C. Plaintiffs' Claims Against Kelzenberg-Wumag Fail as a Matter of Law.

Plaintiffs' Amended Complaints, without any factual supports, alleges the Machine was designed, manufactured and sold by Kelzenberg-Wumag. (Am. Compl. ¶ 6). However, the evidence is undisputed that Kelzenberg-Wumag had no involvement in the design, manufacture or sale of the Machine. Rather, approximately eighteen (18) months after the accident, Kelzenberg-Wumag purchased the assets (but did not assume liabilities) of the company who, upon information and belief, designed, manufactured and sold the Machine. The evidence is also undisputed that

Kelzenberg-Wumag is not subject to successor liability. Accordingly, Plaintiffs' claims against Kelzenberg-Wumag fail as a matter of law.

WHEREFORE, Wumag respectfully requests that this Court enter an Order dismissing Plaintiffs' Complaint for insufficient service of process, lack of personal jurisdiction, and/or pursuant to Rule 56(c). This Motion is based on the pleadings, applicable statutes, regulations, case law and legal authorities, and other materials as may be submitted in support hereof.

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