

IN 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

Digital Ally, Inc.,

Respondent,

v.

Light-N-Up, LLC and Steven
Shepherd

Appellants.

FINAL BRIEF OF APPELLANTS

August 1, 2013

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

1. Does the Missouri Long Arm Statute trump the parties agreement that Kansas law would apply and that exclusive jurisdiction was in the state or federal courts located in Johnson County, Kansas?

STATEMENT OF THE CASE

Light-N-Up, LLC is a South Carolina limited liability company with its principal, and only, place of business in Spartanburg County, South Carolina. Steven Shepherd is a member of Light-N-Up, LLC that is domiciled in and a resident of Spartanburg County, South Carolina. Light-N-Up, LLC is in the business of "up-fitting" law enforcement vehicles. For instance, a County may contract with Light-N-Up to take basic, "empty" Ford Crown Victoria cars and add sirens, light bars, decals and other equipment such that the cars are suitable for Sheriff's patrol use. Since inception, Light-N-Up, LLC has operated from one location in Roebuck, South Carolina, in the County of Spartanburg. All upfit work, assembly work and other services performed by Light-N-Up take place at the Roebuck location.

Digital Ally, Inc. is a Nevada corporation with its principal offices located in the State of Kansas. On December 2, 2009, Digital Ally, Inc. filed a lawsuit against Light-N-Up, LLC and Steven Shepherd in Jackson County, Missouri. In its pleadings, Digital Ally, Inc. alleged that "personal jurisdiction and venue are appropriate for this case in Jackson County, Missouri because the delivery of the products by Plaintiff to Defendants occurred in Jackson County, Missouri." See Petition for Recovery of Monies filed December 2, 2009 in the Circuit Court of Jackson County, Missouri, Civil Division — Case No. 0916CV37648. (R. pp. 000005 – 000012) According to the Plaintiff (Digital Ally, Inc.), beginning in 2008, it entered into a series of contracts with Light-N-Up, LLC whereby Digital Ally would supply products to Light-N-Up, LLC for use in its upfit of vehicles. The particular products sold by Digital Ally, Inc. to Light-N-Up, LLC were audio/video units that Light-N-Up installed per customer requests. Digital Ally alleges, in essence, that the third-party

government departments paid Light-N-Up, LLC for the products Digital Ally provided Light-N-Up yet Light-N-Up did not fully pay invoices due to Digital Ally. While this allegation is disputed, it was not adjudicated in the Jackson County, Missouri matter as the Appellants herein did not appear. A Default Judgment was entered against both Defendants on March 17, 2010 in the amount of \$60,932.00 plus \$6,591.72 as prejudgment interest.

On August 16, 2011, Digital Ally, Inc. filed an Affidavit for Registration of Foreign Judgment in the Court of Common Pleas for Spartanburg County. This document will be included in the Record. (R. pp. 000013-000017) On September 6, 2011, Light-N-Up, LLC and Stephen Shepherd filed a Motion for Relief from Foreign Judgment pursuant to S.C. Code Ann. §15-35-940. (R. p. 000018) A hearing was held on July 16, 2012 on the Motion filed by Light-N-Up, LLC and Stephen Shepherd. Both parties appeared at the Motion hearing represented by counsel and presented documents for the Court to consider in support of the arguments set forth. See Return to Motion for Relief from Foreign Judgment filed by Respondents herein on July 16, 2012 and Affidavit of Steven Shepherd dated June 14, 2012. (R. pp. 000019-000021 and p. 000081)

Defendants/Appellants herein argued that Missouri did not have jurisdiction over them as they had never appeared in the State of Missouri, never transacted business in the State of Missouri and that there were valid defenses to the allegations made in the Complaint against them filed in the State of Missouri. (R. p. 000063, line 3 – p. 000065, line 13) Further, it was pointed out to the Court that the agreements upon which the Plaintiff/Respondent based its underlying allegations regarding lack of payment for products it allegedly provided to Light-N-Up, LLC contained the following provision in each

document regarding Terms of Sale:

12. Governing Law; Jurisdiction and Venue. This Order and all disputes arising under this Order are exclusively subject to, governed by, and construed in accordance with law of the State of Kansas, without regard to rules of conflicts of law. Any action relating to this Order must be brought in state or federal courts located in Johnson County, Kansas, and the parties hereby irrevocably consent to the exclusive jurisdiction of, and venue in such courts.

Digital Ally itself stated that these Terms of Sale were part of each purchase order regarding a transaction with Light-N-Up, LLC. (R. p. 000068, lines 13-18) Digital Ally argued that paragraph 5 of the Terms of Sale regarding product shipping set jurisdiction in Missouri. (R. pp. 000069, line 14 – 000072) Further, it is admitted by Digital Ally that the Terms of Sale containing the above-referenced exclusive jurisdiction language is a document it produces and uses as a work order on a regular basis. (R. pp. 000074 – p. 000075, line 1) The Respondent herein is the creator of the document Terms of Sale from which the above-language is taken, yet it took the first step in bringing the underlying action against Light-N-Up, LLC and Steven Shepherd in Missouri Courts despite its own language setting exclusive jurisdiction in the State of Kansas, County of Johnson per the Terms of Sale. (R. p. 000053)

On February 6, 2013, an Order was filed confirming the judgment of Digital Ally, Inc. obtained in the State of Missouri as a valid judgment that could be enforced in South Carolina effective as of its filing in this State on April 19, 2010. (R. p. 000002) The Order stated, in part, that the burden in challenging the judgment was on Light-N-Up, LLC and Steven Shepherd. The Court found that both Defendants/Appellants failed to present any evidence regarding the lack of jurisdiction of the Missouri Courts. The Court further found that Defendants conducted business, contracted with Plaintiff and committed torts within the State of Missouri. Further, the Court found that the Missouri Long Arm Statute conferred

proper personal and subject matter jurisdiction over LightN-Up, LLC and Stephen Shepherd to the courts of the State of Missouri. This is in direct contradiction to the contract/agreement entered into by the parties that was entered at the hearing by the Plaintiff/Respondents herein.

On February 11, 2013, Light-N-Up, LLC and Steven Shepherd properly filed and served a Motion for Reconsideration/Alter/Amend Judgment as to the Court's Order filed February 6, 2013. (R. pp. 000058-000059) The Motion for Reconsideration was based on two points in the Court's Order filed February 6, 2013: 1. The stated absence of presentation of evidence by Defendants that Missouri courts lacked jurisdiction over the parties Light-N-Up, LLC and Steven Shepherd and 2. the provision in the parties agreements regarding exclusive jurisdiction over any dispute in the State of Kansas (as set forth above from the Terms of Sale). While the Court did not hold a hearing on the Motion to Reconsider, both parties were allowed to submit documents and evidence in support of their positions on the Motion to Reconsider.

On March 1, 2013, an Amended Order Confirming Foreign Judgment was filed in the County of Spartanburg, State of South Carolina stating that the facts as presented indicate that Light-N-Up, LLC and Steven Shepherd contracted with Plaintiff/Respondent "in Kansas and the goods were shipped from the factory of Digital Ally in Missouri." (R. p. 000003) The Court further adopted its previous holding that the Missouri Long Arm Statute conferred both personal and subject matter jurisdiction. In its Amended Order, the Court acknowledged that "Defendants presented evidence that the contract entered into between the parties included a forum selection clause listing Kansas law as the governing law for the contract." In essence, the Court has found that the shipping of goods from the

state of Missouri thus triggering the long-arm statute trumps the parties agreement that exclusive jurisdiction of any dispute between them would be in the State of Kansas subject to Kansas law.

Notice of this Appeal was then filed by Appellants on March 13, 2013 and properly served upon the Respondent.

ISSUE ON APPEAL

1. Does the Missouri Long Arm Statute trump the parties agreement that Kansas law would apply and that exclusive jurisdiction was in the state or federal courts located in Johnson County, Kansas?

ARGUMENT

In the Amended Order Confirming Foreign Judgment, the trial court in this matter relied upon *Law Firm of Paul L. Erickson, P.A. v Boykin*, 651 SE2d 606 (S.C. App. 2007) to state that the debtor (Appellant herein) has the burden of overcoming the presumption of validity of the foreign judgment. (See Amended Order dated February 26, 2013). The trial court further found that there was evidence regarding a forum selection clause setting jurisdiction in Kansas; further, the Defendants/Appellants had never conducted business in the State of Missouri (see Affidavit of Stephen Shepherd). (R. p. 000081) The trial court found that since the goods were shipped from Missouri, the Missouri long-arm statute conferred proper personal and subject matter jurisdiction over Appellants in Missouri despite the explicit language of the parties agreement, which was prepared by and presented to the Appellants by the Respondent.

The Full Faith and Credit Clause does not prevent the litigation of personal jurisdiction in an action to enforce a foreign judgment. *Colonial Pacific Leasing Corp. v. Taylor*, 484 SE2d 595 (Ct. App. 1997). The presumption that jurisdiction over a case is proper when a judgment is rendered by a court may be disproved by extrinsic evidence or by the record itself according to the South Carolina Supreme Court. *Taylor v. Taylor*, 229 S.C. 92 (1956). Once the judgment debtor (Appellant herein) files the Motion it filed seeking relief from the foreign judgment, the burden of proving that the foreign judgment is entitled to full faith and credit shifts to the judgment creditor (Respondent herein). *The Jay Group, Ltd. v. The Bootery of Haywood Mall, Inc.* 335 S.C. 114, 116 (Ct. App. 1999).

In the case at hand, it is uncontested that the Terms of Sale, which contains paragraph 12 as set forth above, was part of each and every agreement entered into

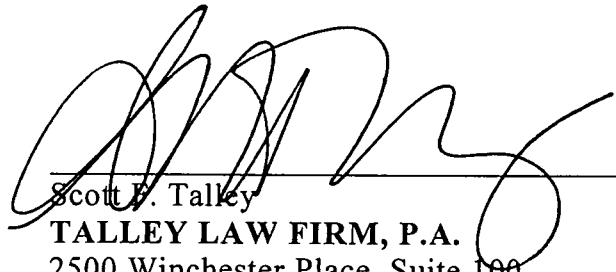
between the parties. Respondents argument is that the Appellant herein is subject to jurisdiction in Missouri based on its long-arm statute, contained in Missouri Statutes, §506.500(2), which states, in part, that "the making of any contract in this State (Missouri)" subjects one to jurisdiction. (R. pp. 000054-000057) However, analysis of the Missouri Long Arm Statute is not necessary as the parties agreement clearly, unequivocally sets forth exclusive jurisdiction over any controversies involving the parties, including the claims set forth by Respondent in the underlying Complaint in Missouri (see Complaint filed December 2, 2009 in the Circuit Court of Jackson County, Missouri, Civil Division — Case No. 0916CV37648), in the courts, whether state or federal, in Johnson County, Kansas. The Terms of Sale were prepared by the Respondent herein. Whichever theory of contract law one would choose to analyze the parties agreement (specifically the Terms of Sale) would be construed against the Respondent. If the exclusive jurisdiction language of the Terms of Sale is found to be invalid, or unenforceable, then the same should hold true for the other paragraphs of the Terms of Sale, including the provisions that require Appellant herein to pay Respondent as set forth and the clause, in paragraph 5 of the Terms of Sale, that Respondent relied upon to file its original action in the State of Missouri.

Respondent argues that Appellants entered into financing agreements in Missouri, that they took delivery of the goods subject to the parties' agreements (including the Terms of Sale) in Missouri and that payment was to be made in Missouri. Transcript, p. 9, lines 4-5, 14-15 and p. 10, lines 1-3. (R. pp. 000068, lines 4-5, 14-15 and p. 000069, lines 1-3) See also paragraph 6(A) of Return to Motion for Relief from Foreign Judgment filed by Respondents herein on July 16, 2012. (R. pp 000019-000020) In short, Respondent

states that since Appellant transacted business in the State of Missouri by doing the things set forth above, it was subject to jurisdiction in Missouri, even despite the fact that all acts performed by Appellant were pursuant to the Terms of Sale setting exclusive jurisdiction in the State of Kansas Respondents are asking the Court to consider only paragraph 5 of the Terms of Sale without regard to the language of paragraph 12 of the Terms of Sale. Respondent presented an Order from the case of *Austin Hardware and Supply, Inc. v. SFI of Tennessee, LLC (Case No. 11-CV00485-W-FJG)* in support of its argument that the long-arm statute applied. While not clear at the time of submission if that case had been reported, the United States District Court for the Western District of Missouri analyzed the due process requirement of the Missouri Long-Arm Statute and held that "sufficient contacts exist when the Defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into Court there. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The Court further held that a party may anticipate being haled into court in a particular jurisdiction if the Defendant has purposefully directed his activities at residents of the forum state . . . and the litigation results from alleged injuries that arise out of or relate to those activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). Respondent's argument as to jurisdiction fails even a minimum contacts due process analysis.

CONCLUSION

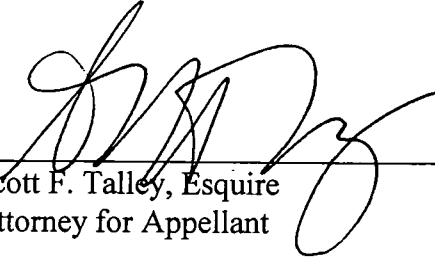
The trial court acknowledged the agreement entered into by the parties contained the language of paragraph 12, Terms of Sale, set forth hereinabove yet found that the judgment would still be enforceable in South Carolina. Appellants properly objected to the filing of the foreign judgment by the Respondent and presented evidence, including the Respondent's own contractual language, to show that the Courts of Missouri did not have jurisdiction over the Appellants or the subject matter of the suit filed by the Respondent initially. The Amended Order appealed from herein should be reversed based on the foregoing.



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CERTIFICATION BY COUNSEL

The undersigned counsel for the Appellant, pursuant to Rule 211(b), South Carolina Appellate Court Rules, hereby certifies that the foregoing Final Brief of Appellants contains content identical to the brief(s) previously served under Rule 208 except for References to the Record.



Scott F. Talley, Esquire
Attorney for Appellant

August 1, 2013

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PROOF OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing **Final Brief of Appellants** in this action was served upon Counsel for Respondent, David L. Walsh, Esquire, by placing a copy in the Post Office for Spartanburg, SC and left there for delivering to Mr. Walsh's place of business located at the following location:

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