

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Judge

C.A. No. 2012-CP-23-1735

RECEIVED

MAR 31 2014

SC Court of Appeals

Hidria USA, Inc. Appellant

v.

Delo, d.d., d/b/a *Slovenske Novice* Respondent.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENTS

I. Respondent fails to rebut Appellant's argument that the Circuit Court impermissibly relied solely on Respondent's business contacts in South Carolina to reject personal jurisdiction.

As acknowledged by both Appellant and Respondent, personal jurisdiction in South Carolina is premised on satisfaction of the Constitution's Due Process clause as contained in the Fourteenth Amendment. The Circuit Court impermissibly relied solely on Respondent's assertion that it conducts no business in South Carolina in determining personal jurisdiction. Even Respondent concedes that Due Process involves more than consideration of a parties' business transactions in any given jurisdiction. (Resp. Brief at pp. 8-9). Thus, the Circuit Court's Order of Dismissal, based on lack of personal jurisdiction, was both unsupported by evidence and influenced by an error of law.

The Circuit Court's Order of Dismissal states, in pertinent part, "The Court finds that South Carolina's long-arm statute does not apply to this case because [Delo] has not transacted any business in this state." (R. p. 6). The Circuit Court reaffirms its basis for dismissal in stating, "Foreign corporations are subject to personal jurisdiction in South Carolina only when they are found to have been 'transacting business' in this state." (Id.) Whether Respondent transacts business in South Carolina, however, is not dispositive of whether South Carolina acquired personal jurisdiction over it. Rather, personal jurisdiction is established by demonstration that the court has both (1) the power to assert jurisdiction over the defendant and (2) that the exercise of jurisdiction would be fair. See, Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992).

Respondent, in attempting to bolster the Circuit Court's order, points out that the court also found that Respondent had no online subscriptions in South Carolina and did not conduct any "online business activity" toward South Carolina. This statement, Respondent contends, is evidence that the Circuit Court found no minimum contacts within the state. However, such an interpretation exceeds the bounds of the court's order. A review of the Order of Dismiss clearly reveals that the Circuit Court makes these findings in support of its conclusion that Respondent is not transacting business in South Carolina. (R. p. 6).

Beyond a conclusory statement that Respondent "does not have and has not had traditional minimum contacts with the state of South Carolina," the Circuit Court made no analysis of the Due Process requirements for personal jurisdiction. Had it done so, it would have found that Respondent's publication of its articles to its website and its notice that South Carolinians view its website constitute minimum contacts. Indeed, Respondent admitted that over 800 South Carolinians had viewed its website in the three years preceding the publication of the articles at issue and that approximately 10 South Carolinians viewed the articles at issue. The Court also failed to consider that Hidria produced evidence that its South Carolina employees had read the articles and that Respondent conceded that its reporter had used South Carolina sources in writing the articles. Thus, the Circuit Court erroneously narrowed the test for personal jurisdiction by focusing not on minimum contacts, but on whether Respondent transacted business in South Carolina.

II. South Carolina acquired personal jurisdiction over the Respondent through application of the “effects test” and the Circuit Court failed to analyze personal jurisdiction using this test.

Although Hidria argued that South Carolina acquired jurisdiction over Respondent through application of the “effects test” set forth in Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed2d 804 (1984), the Circuit Court improperly construed the test to require that the Respondent’s conduct be “expressly aimed” at South Carolina. (R. pp. 7-8). Respondent continues to advance this construction, though the “effects test” as enunciated by the United States Supreme Court does not condition personal jurisdiction upon a finding that the defendant’s conduct be “expressly aimed” at a particular jurisdiction.

Respondent, in fact, fails to discuss the “effects test” as enunciated by the Calder Court. Instead, it prefers to advance permutations of the test, adopted in opinions with no precedential value to this Court, that require that the defendant target the forum state, rather than a citizen of the forum state. Simply stated, the Calder “effects test” allows the forum state to acquire personal jurisdiction if (1) the plaintiff was the target of the defendant’s intentional conduct, (2) the plaintiff felt the brunt of the harm resulting from the defendant’s conduct in the forum state, and (3) the defendant should have reasonably been aware that the plaintiff would be injured in the forum state. See, Calder, 465 U.S. at 789-90.

In this case, there is no doubt that Respondent targeted Hidria, a South Carolina corporate citizen. Moreover, as Hidria’s only facilities in the United States are located in South Carolina, it obviously felt the brunt of Respondent’s defamatory conduct in South Carolina. Finally, Respondent has already demonstrated that it was aware that Hidria

would be injured in South Carolina. The articles it published advise their readers that Hidria maintained property in South Carolina, where the property was located, a description of the property and the assessed value of the property. Thus, it knew, prior to publishing the articles to the world, that Hidria would be injured in South Carolina.

The Circuit Court erroneously viewed the “effects test” as requiring that Respondent’s defamatory actions be directed toward the State of South Carolina. Rather, it merely requires that the plaintiff be injured in South Carolina and that the defendant be cognizant of the likelihood of injury in South Carolina. This is amply supported by the allegations of the complaint and the evidence before the court. Thus, the Circuit Court’s dismissal of Hidria’s action should be reversed.

III. Respondent’s contention that Hidria failed to preserve its argument that the Circuit Court erroneously applied South Carolina’s Long Arm Statute is unsupported.

Respondent argues that Hidria failed to raise the application of § 36-2-803(A)(3) of South Carolina’s Long Arm Statute to the Circuit Court.¹ However, the record is replete with evidence that the applicability of this section of the Long Arm Statute was raised and argued to the lower court. First, Hidria’s Memorandum in Support of its Motion to Compel, or in the alternative, For Jurisdictional Discovery and in Opposition to Motion to Dismiss (“Hidria Memo”) cites § 36-2-803(A)(3) as a basis for jurisdiction. (R. p. 59). The Hidria Memo argues, “In this case, Defendant’s publication of the Articles caused tortious injury in South Carolina, and because Defendant targets South Carolina residents for subscriptions by publishing articles with content related to South

¹ § 36-2-803(A)(3) allows South Carolina’s courts to exercise personal jurisdiction arising from the defendant’s “commission of a tortious act in whole or in part in this State.” S.C. Code Ann. § 36-2-803(A)(3) (Supp. 2012).

Carolina, exercising jurisdiction over [D]efendant satisfies South Carolina's long-arm statute."

Second, § 36-2-803(A)(3) was argued before the Circuit Court during the hearing on Respondent's Motion to Dismiss. In fact, Respondent itself interjected this subsection into the oral arguments. Counsel for Respondent stated, "I believe [Hidria] stated that this, that the long arm statute applied because the defendant's publication of the articles caused a tortuous injury in South Carolina." (R. p. 86, ¶¶ 5-8). The fact that Respondent's conduct was an intentional tort committed in South Carolina was, thus, clearly before the Circuit Court. Although the Circuit Court failed to address it in its Order of Dismissal, the issue was clearly raised prior to the order's issuance.

CONCLUSION

For the reasons set forth below, this Court should reverse the Circuit Court's Order of Dismissal, find that South Carolina acquired personal jurisdiction over Respondent, and remand this matter for trial.

Respectfully submitted,

March 21, 2014



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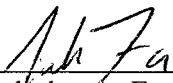
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RULE 211, SCACR CERTIFICATION
FINAL REPLY BRIEF OF APPELLANT

I, Nicholas A. Farr, Esquire, hereby certify that the *Final Reply Brief of Appellant* complies with the requirements of Rule 211(b) of the South Carolina Appellate Court Rules.



Nicholas A. Farr, Esquire

Greenville, South Carolina

March 28, 2014

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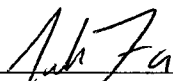
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PROOF OF SERVICE

The undersigned hereby certifies that he is the attorney for the Appellant, Hidria USA, Inc., in the above-referenced matter and that he served the Final Reply Brief of Appellant and Final Brief of Appellant upon the attorney for the Respondent, by hand delivering the same on March 28, 2014, addressed as follows:

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