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No. 67654-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FILED
APR 19 2011
CLERK OF COURT
JG

SAIPRASAD KUNABOINA,

Plaintiff-Respondent,

v.

RAJASHEKHAR REDDY GARLAPATI, individually, and the marital community composed of Rajashekhar Reddy Garlapati and Jane Doe Garlapati; VENKAT REDDY VENUMULA, individually, and the marital community composed of Venkat Reddy Venumula and Jane Doe Venumula; SUDHIR VEMURI, individually, and the marital community composed of Sudhir Vemuri and Jane Doe Vemuri; VIVEK SHARMA, and the marital community composed of Vivek Sharma and Jane Doe Sharma; HEADWAY GLOBAL TECHNOLOGIES, LLC, a Texas Domestic Limited Liability Company; NICOINFO SYSTEMS, INC, an Iowa Domestic For-Profit Corporation ; DIBON SOLUTIONS, INC, a Texas Foreign For-Profit Corporation,

Defendants-Appellants.

BRIEF OF RESPONDENT

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II. STATEMENT OF THE CASE

This is a case where Dibon Solutions Inc. (hereinafter “Dibon”), a Texas corporation, transacted business in Washington by agreeing to provide Software Services Programmers to one of AT&T’s facilities in Washington, which the causes of action in this case arises therefrom.

Dibon entered into a business transaction with Tek Systems wherein Dibon agreed to provide Software Services Programmers to one of AT&T’s facilities in Washington. CP 48. AT&T was one of Tek Systems’ clients. *Id.*

On or about December 12, 2008, Dibon through its Director of Operations, Vivek Sharma (collectively hereinafter “Appellants”), entered into a service agreement with Headway wherein Dibon would utilize the services of Headway’s Software Services Programmers for the AT&T facility in Washington. *Id.*; CP 53-58. Appellants agreed to pay Headway \$53.00 per hour for each hour the programmer worked at the AT&T facility on behalf of Dibon. CP 17, 57-58. Respondent Saiprasad Kunaboina was one of the Software Services Programmer for Headway. From the \$53.00 per hour paid by Dibon, the programmer such as Mr. Kunaboina was to be paid \$51.00 per hour for the services the programmer provided to AT&T on behalf of Dibon. CP 17, 58.

Mr. Kunaboina was dispatched to AT&T's facility in Washington to provide said services on behalf of Dibon. CP 17. During the time Mr. Kunaboina performed services on behalf of Dibon, he communicated with Appellants via telephone and email concerning said services. CP 49. Additionally, Appellants also monitored Mr. Kunaboina's services and timesheets at regular intervals as he continued to provide services on behalf of Dibon at the AT&T facility. CP 58. Mr. Kunaboina fully performed the services on behalf of Dibon. CP 45, 96-97. Yet, Appellants failed to pay Headway for Mr. Kunaboina's services. *See id.*; CP 36-45.

On March 5, 2010, after not being paid, Mr. Kunaboina emailed Rajeshkhar Garlapati of Headway to request payment for the services he provided for Dibon. CP 36-39. Mr. Garlapati then emailed Vivek Sharma, the Director of Operations for Dibon, requesting that Dibon send payments for Mr. Kunaboina's services. *See id.*, CP 40-45. Mr. Sharma agreed to pay for the services Mr. Kunaboina performed on Dibon's behalf. *See id.* However, payment was never made. CP 45.

In or around December 2010, after Headway ceased its efforts to collect the money for Mr. Kunaboina's services, Mr. Kunaboina flew to Texas and met with Mr. Sharma concerning payments Dibon owed to him for the services he provided AT&T on Dibon's behalf. *See Appendix A, p.5, to Respondent's Surreply to Petitioners Reply in Support of Motion*

for Discretionary Review. Notwithstanding the meeting, Appellants still failed to pay Mr. Kunaboina, which resulted in this lawsuit. CP 32.

In Mr. Kunaboina's Complaint, he asserted causes of actions for failure to pay wages under RCW 49.48 et seq., wrongful withholding under RCW 49.52 et seq., and breach of contract. CP 29-34.

Appellants moved for dismissal for lack of personal jurisdiction. CP 3-11, 62-79. In support of their motion, Appellants presented the Affidavit of Vivek Sharma along with exhibits attached thereto. CP 46-58. Mr. Kunaboina opposed the motion. CP 16-25. In opposing the motion, Mr. Kunaboina submitted the Declaration of Riley Lovejoy along with exhibits attached thereto. CP 26-45. After hearing all of the evidence, including oral arguments by the parties, the trial court denied the motion. CP 13-15.

The evidence considered by the trial court, when viewed in the light most favorable to Mr. Kunaboina, established that Appellants had business transactions within this state to give jurisdiction to the courts of this state. Specifically, Appellants agreed to provide Software Services Programmers to AT&T's facilities in Washington. CP 48. Appellants did provide Software Services Programmers to AT&T's facilities, utilizing Mr. Kunaboina's skills and services for the benefit of Dibon. CP 31-32; 53-58. Mr. Kunaboina was dispatched to AT&T's facility in Washington

on behalf of, and for the benefit of, Dibon. CP 17. Additionally, Mr. Kunaboina and Appellants communicated via telephone and email concerning his services to AT&T on behalf of Dibon. CP 49. Furthermore, Appellants monitored Mr. Kunaboina's services and timesheets at regular intervals concerning the services he was providing on behalf of Dibon at the AT&T facility in Bothell, Washington. CP 58.

III. ISSUES PRESENTED

1. Whether the superior court acted properly in viewing the evidence presented and the pleadings in the light most favorable to Mr. Kunaboina in ruling on the motion to dismiss pursuant to CR 12(b)(2)?

2. Whether, based on the record before it, the superior court erred in denying the motion as to Dibon?

3. Whether, based on the record before it, the superior court erred in denying the motion as to Mr. Sharma?

4. Whether the superior court denies a motion to dismiss for lack of personal jurisdiction without resolving facts in controversy, must the order denying the motion be deemed a temporary order and must the defendants be given an opportunity to have the facts found by a trier of fact, either in a subsequent pre-trial hearing or at the trial itself?

IV. ARGUMENT

Respondent Kunaboina will only address the four issues that this Court requested in its Order Granting Discretionary Review, dated April 30, 2012.

A. Standard of Review

A trial court's ruling on personal jurisdiction is a question of law reviewable de novo when the underlying facts are undisputed. *Lewis v. Bours*, 119 Wn.2d 667, 669 (1992); *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 60 Wn. App. 414, 418 (1991). If the trial court's ruling is based on affidavits and discovery, “only a prima facie showing of jurisdiction is required.” *MBM Fisheries*, 60 Wn. App. at 418; *Precision Lab Plastics v. Micro Test*, 96 Wn. App. 721, 725 (1999). The allegations in the plaintiff’s Complaint are considered substantiated for purposes of appeal. *MBM Fisheries*, 60 Wn. App. at 418.

B. The Superior Court Properly Viewed the Evidence in the Light Most Favorable To Mr. Kunaboina in Ruling on the Motion to Dismiss Pursuant to CR 12(b)(2)

When matters outside the pleadings are presented to the trial court on a motion to dismiss for lack of personal jurisdiction under CR 12(b)(2), “the motion is to be treated as a motion for summary judgment.” *Puget Sound Bulb Exch. v. Metal Bldgs. Insulation*, 9 Wn. App. 284, 289 (1973). Accordingly, when the trial court considers matters outside the pleadings

on a motion to dismiss for lack of personal jurisdiction, all facts and reasonable inferences to be drawn therefrom must be viewed in the light most favorable to the nonmoving parties. *CTVC v. Shinawatra*, 82 Wn. App. 707-08 (1996); *Lewis*, 119 Wn.2d at 669; *Puget Sound Bulb Exch.*, 9 Wn. App. at 289. Similarly, the appellate court reviewing a ruling on a motion to dismiss for lack of personal jurisdiction is also required to view all evidence and reasonable inferences in the light most favorable to the nonmoving party. *Puget Sound Bulb Exch.*, 9 Wn. App. at 289.

Appellants presented to the trial court in their motion to dismiss the Affidavit of Vivek Sharma along with exhibits attached thereto. CP 46-58. In opposing the motion to dismiss, Respondent submitted the Declaration of Riley Lovejoy along with exhibits attached thereto. CP 26-45. Because matters outside the pleadings were presented to the trial court on Appellants' motion to dismiss for lack of personal jurisdiction, the trial court properly considered the motion to dismiss as a motion for summary judgment, and properly viewed the evidence and all reasonable inferences in the light most favorable to Respondent, the nonmoving party. Accordingly, this Court is also required to view all evidence and reasonable inferences in the light most favorable to the nonmoving party.

C. The Superior Court Did Not Err by Denying the Motion as to Sharma and Dibon Solutions

1. The Superior Court had General Jurisdiction Over Dibon Solutions

The party asserting jurisdiction bears the burden of proof that jurisdiction exists. *CTVC*, 82 Wn. App. at 708; *Mbm Fisheries*, 60 Wn. App. at 418. The allegations set forth in the Complaint are treated as established for purposes of determining jurisdiction. *Id.* Only a prima facie showing of jurisdiction is required when the trial court considers its ruling solely on the affidavits and discovery. *Id.* The rationale is that “[a]ny greater burden such as proof by a preponderance of the evidence would permit a defendant to obtain a dismissal simply by controverting the facts established by a plaintiff through his own affidavits and supporting materials.” *Data Disc, Inc. v. Sys. Tech. Assoc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). Even so, at any time when the plaintiff avoids a preliminary motion to dismiss by making a prima facie showing of jurisdictional facts, he must still prove the jurisdictional facts at trial by a preponderance of evidence. *Id.* Alternatively, if the pleadings and materials submitted in connection with the motion to dismiss raise issues of credibility or disputed questions of fact with regard to jurisdiction, the trial court has the discretion to take evidence at a hearing in order to resolve the contested issues. *Id.* (citing 5 CHARLES K. WRIGHT &

ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1373 at 714-15 (1969); 4 JAMES WILLIAM MOORE, FEDERAL PRACTICE, § 26.56(6), at 26-190 (1976)).

Under Washington law, a state court may exercise general over a nonresident defendant without regard to whether the cause of action is related to the defendant's contacts with the forum state. RCW 4.28.080(10); *Mbm Fisheries*, 60 Wn. App. at 418. The Supreme Court in *Crose v. Volkswagenwerk Aktiengesellschaft*, 88 Wn.2d 50, 54 (1977), held that RCW 4.28.080(10) "confers general jurisdiction over a nonresident defendant 'doing business' in this state, that is, transacting substantial and continuous business of such character as to give rise to a legal obligation." *Mbm Fisheries*, 60 Wn. App. 418 (citing *Crose v. Volkswagenwerk Aktiengesellschaft*, supra). In determining whether a nonresident defendant is "doing business" in Washington requires an inquiry into "whether the amount, kind and continuity of activities carried on by the nonresident defendant in Washington are continuous and substantial and of such character as to give rise to a legal obligation." *Id.* (citing *Hein v. Taco Bell, Inc.*, 60 Wn. App. 325, 330 (1991)).

Here, viewing the evidence and inferences in the light most favorable to Mr. Kunaboina, Dibon's activities in Washington were continuous and substantial and of such character as to give rise to a legal

obligation. First, Dibon provided Software Services Programmers to AT&T's facilities in Washington in compliance with its agreement with Tek Systems. In exchange, Dibon received an economic benefit. It was also reasonable to infer that Dibon dispatched other programmers to Washington on behalf of, and for the benefit of, Dibon, just like it dispatched Mr. Kunaboina to Washington. Additionally, Dibon continued to provide Software Services Programmers to AT&T's facilities in Washington from 2008 to 2010, and possibly longer. Furthermore, as part of providing the programmers to the AT&T facilities, it was reasonable to infer that Appellants communicated with the other programmers via telephone and email, monitoring their services to AT&T in the same way Appellants communicated with Mr. Kunaboina. It was also reasonable to infer that Appellants were monitoring the timesheets of the other programmers at regular intervals for the services at the AT&T facility just like Dibon was doing with Mr. Kunaboina's timesheets. Further, Mr. Sharma, on behalf of Dibon, agreed to pay Mr. Kunaboina for the work Mr. Kunaboina performed on behalf of Dibon.

Although the evidence presented to the trial court was limited due to the lack of opportunity to conduct formal discovery, when the evidence and all reasonable inferences drawn therefrom are viewed in the light most

favorable to Mr. Kunaboina, the trial court did not err by concluding that the court had personal jurisdiction over Dibon.

2. The Superior Court had Specific Jurisdiction Over Dibon Solutions

Under RCW 4.28.185 (Washington's long-arm statute), a Washington court may exercise specific personal jurisdiction over a nonresident defendant when the defendant's limited contacts give rise to the cause of action. *CTVC*, 82 Wn. App. at 709.

RCW 4.28.185(1)(a), provides in relevant part:

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state...

In order for a Washington court to exercise specific personal jurisdiction over a nonresident defendant for the transaction of business in this state, the following three factors must be satisfied:

(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent

of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

CTVC, 82 Wn. App. at 710 (quoting *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 767 (1989)).

a. The first factor, Purposeful Availment, is satisfied.

To satisfy the first factor, the plaintiff must establish that the nonresident defendant “purposefully availed itself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its law.” *Walker v. Bonney-Watson Co.*, 64 Wn. App. 27, 34 (1992). The focus of the inquiry is on the defendant’s activities in the forum. *John Does v. CompCare Inc.*, 52 Wn. App. 688, 693 (1988). The sufficiency of the contacts is determined by the quality and nature of the defendant's activities, not the number of acts or mechanical standards. *Walker*, 64 Wn. App. at 34.

[A state] does not acquire that jurisdiction by being the "center of gravity" of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved . . . by considering the acts of the [defendant].

Hanson v. Denckla, 357 U.S. 235, 253 (1958).

Purposeful availment may be established by a nonresident defendant’s act of doing business in Washington. RCW 4.28.185(1)(a).

The contact may be “the initiation of a transaction outside the state in contemplation that some phase of it will take place in the forum state.” *Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.*, 71 Wn.2d 679, 684 (1967) (jurisdiction proper over nonresident insurance broker who ordered insurance from a Washington corporation). A nonresident defendant may also purposefully act in Washington even though the defendant did not initiate contact with Washington “if a business relationship subsequently arises.” *Sorb Oil Corp. v. Batalla Corp.*, 32 Wn. App. 296, 299 (1982).

When the evidence and inferences are viewed in the light most favorable to Mr. Kunaboina, it was not err for the trial court to conclude that Dibon purposefully availed itself to Washington courts’ jurisdiction by doing business in Washington. As described above, Dibon provided Software Services Programmers to AT&T’s facilities in Washington. In exchange, Dibon was financially compensated. It was also reasonable to infer that Dibon dispatched other programmers to Washington on behalf of, and for the benefit of, Dibon. Additionally, Dibon continued to provide Software Services Programmers to AT&T’s facilities in Washington for at least a couple of years, if not longer. Furthermore, as part of providing the programmers to the AT&T facilities, it was reasonable to infer that Appellants communicated with the other

programmers via telephone and email to monitor their services to AT&T. It was also reasonable to infer that Appellants were monitoring the timesheets of the other programmers for the services they provided at the AT&T facility in Washington.

Appellants contend that “Dibon’s involvement with Headway was in no way purposefully aimed at Washington, or with the intent that Headway hires a Washington employee.” Appellant’s brief, p. 8. But Appellants focus on their relationship with Headway is misplaced. Appellants ignore the important fact that they agreed to provide programmers to AT&T’s facilities in Washington that caused Mr. Kunaboina to be dispatched to Washington for the benefit of, and on behalf of, Dibon. Based on information provided above, viewing the evidence and inferences most favorably to Mr. Kunaboina, this Court should conclude that the first factor (Purposeful Availment factor) was satisfied.

b. The second factor, Cause of Action Arising from the Contract, is also satisfied.

To determine whether a claim against a foreign entity arises from its contact within this jurisdiction, Washington courts apply the “but for” test. *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 772 (1989). Jurisdiction is proper in Washington if the events giving rise to the claim

would not have occurred “but for” the nonresident defendant’s “transaction of any business in this state.” *Id.*

Here, Mr. Kunaboina has asserted claims for nonpayment of wages, wrongful withholding of wages, and breach of contract. It is undisputed that these claims arise from Dibon’s business transaction of providing programmers to AT&T here in Washington.

c. The third factor, Fair Play and Substantial Justice, is also satisfied.

The final factor to consider in the long-arm jurisdiction analysis is whether the assumption of jurisdiction offends traditional notions of fair play and substantial justice in light of the quality, nature, and extent of the defendant’s activity in the state; the relative convenience of the parties in maintaining the action here; the benefits and protection of Washington’s laws afforded the parties; and the basic equities of the situation. *Raymond v. Robinson*, 104 Wn. App. 627, 641 (2001).

Here, Dibon purposefully availed itself to Washington by agreeing to provide Software Services Programmers to AT&T’s facilities in Washington for its own economic benefit. Dibon had Mr. Kunaboina as well as other similarly situated programmers sent to Washington to provide programming services to AT&T on behalf of Dibon. Dibon also communicated with Mr. Kunaboina and possibly other similar

programmers via email and telephone concerning the services they were providing AT&T on Dibon's behalf. Further, Dibon continued providing programmers to AT&T in Washington for at least a couple of years, if not longer. Dibon also was monitoring the timesheets submitted by the programmers for the services they were providing AT&T on Dibon's behalf. Based on these activities, which Dibon knowingly and continuously engaged in for its own economic benefit, it should not be held that jurisdiction in this state offends traditional notions of fair play and substantial justice.

3. The Superior Court had Specific Jurisdiction Over Mr. Sharma

If this Court concludes that the Washington court has personal jurisdiction over Dibon, then it should similarly conclude that personal jurisdiction over Mr. Sharma also exists. Mr. Sharma was the Director of Operations for Dibon. He was one that agreed on behalf of Dibon to provide AT&T facilities in Washington with Software Services Programmers. Further, Mr. Sharma was the one that entered into an agreement with Headway to obtain Mr. Kunaboina's services for Dibon's benefit on the AT&T project. Mr. Sharma was also the one that monitored and communicated with Mr. Kunaboina via telephone and email regarding the services to AT&T. He was also the person that Headway

communicated with via email concerning payment for Mr. Kunaboina's services, which emails Mr. Kunaboina was copied on. Furthermore, Mr. Sharma was also the person that Mr. Kunaboina met with to discuss the money owed to him after Headway ceased its efforts to collect the payments.

Additionally, if there is personal jurisdiction over Dibon, there should also be personal jurisdiction over Mr. Sharma as an agent of Dibon under the wage statutes. Under Washington law, an agent who had some control over the payment of wages may be held personally liable for nonpayment of wages to an employee. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 523 (2001).

When the evidence and all reasonable inferences are viewed in the light most favorable to Mr. Kunaboina, this Court should hold that the Superior Court did not err in concluding that there was personal jurisdiction over Appellants based on the information before it.

D. The Superior Court's Order Denying Dismissal for Lack of Personal Jurisdiction Without Resolving Facts in Controversy Must be Deemed a Temporary Order, Giving Defendant an Opportunity to Have the Trier of Fact Resolve the Issue Either in a Subsequent Pre-trial Hearing or at the Trial Itself

If a plaintiff makes a prima facie showing of jurisdictional facts through the submitted materials to avoid a defendant's motion to dismiss,

“it does not necessarily mean that he may then go to trial on the merits.” *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). “If the pleadings and other submitted materials raise issues of credibility or disputed questions of fact with regard to jurisdiction, the district court has the discretion to take evidence at a preliminary hearing in order to resolve the contested issues.” *Id.* (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1373, at pp. 714-15 (1969); 4 J. Moore, *Federal Practice* § 26.56[6], at p. 26-190 (1976)). In such a situation, the plaintiff must establish the jurisdictional facts by a preponderance of the evidence, just as he would have to do at trial. *Id.*

Additionally, as the *Data Disc* court noted:

Where the jurisdictional facts are intertwined with the merits, a decision on the jurisdictional issues is dependent on a decision of the merits. In such a case, the district court could determine its jurisdiction in a plenary pretrial proceeding. [Citations omitted.] However, it is preferable that this determination be made at trial, where a plaintiff may present his case in a coherent, orderly fashion and without the risk of prejudicing his case on the merits. [Citations omitted.] Accordingly, where the jurisdictional facts are enmeshed with the merits, the district court may decide that the plaintiff should not be required in a Rule 12(d) preliminary proceeding to meet the higher burden of proof which is associated with the presentation of evidence at a hearing, but rather should be required only to establish a prima facie showing of jurisdictional facts with affidavits and perhaps discovery materials. [Citations omitted.] Of course, at any time when the plaintiff avoids a preliminary motion to dismiss by making a prima facie showing of jurisdictional facts, he must still prove

the jurisdictional facts at trial by a preponderance of the evidence. [Citations omitted.]

Id. at 1285, fn.2.

Furthermore, the plaintiff should be permitted to conduct discovery “where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.” *Id.* at 1285, fn. 1 (citing *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 fn. 24 (9th Cir. 1977)).

Therefore, it is fair to assume that the trial court’s denial of Appellant’s motion to dismiss without resolving facts in controversy was a denial without prejudice, and that Appellants would be entitled to having the trier of fact resolving the jurisdictional issue at a subsequent pre-trial hearing or at the trial itself.

E. Attorney Fees Should Be Granted to Respondent

Pursuant to RCW 49.48.030 and 49.52.070, a prevailing party in a nonpayment of wage action is entitled to reasonable attorney’s fees and costs. Respondent respectfully requests that this Court grant fees and costs pursuant to RAP 14.2 and 18.1.

IV. CONCLUSION

The trial court correctly viewed the evidence and all reasonable inferences in the light most favorable to Respondent in denying

Appellants' motion to dismiss. When the evidence and inferences were viewed in the light most favorable to Respondent, the trial court correctly concluded that there was a prima facie showing of personal jurisdiction over Dibon and Sharma. However, the trial court's denial of the motion to dismiss for lack of personal jurisdiction was without prejudice, and Appellants are entitled to having the trier of fact resolve the personal jurisdiction issue at a later pre-trial hearing or at trial.

Respectfully submitted this 15th day of November, 2012.

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