

NO. 694138

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

JACKSON MIKA,

Respondent.

v.

JBC ENTERTAINMENT HOLDINGS INC., a corporation doing business in the State of Washington; JBC OF SEATTLE, WA, INC., a Washington business, a subsidiary of JBC Entertainment Holdings Inc.; GEMINI INVESTORS, an entity, owner of JBC Entertainment Holdings Inc.; ALPHA CAPITAL PARTNERS, LTD., an entity, owner of JBC Entertainment Holdings Inc.; GAMEWORKS ENTERTAINMENT LLC, a corporation doing business in the State of Washington; MICHAEL B. KNUDSEN, an individual, husband and wife, and their community; MARQUIS HOLMES, an individual, dba BOSS LIFE ENTERTAINMENT, JANE DOE, husband and wife, and their community, GREG STEVENS, an individual, husband and wife, and their community; TONY HUMPHREYS, husband and wife, and their community,

Appellants.

APPELLANT'S REPLY BRIEF

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and JBC Entertainment Holdings, Inc.

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COURT OF APPEALS
STATE OF WASHINGTON
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TABLE OF CONTENTS

	Page
I. ARGUMENT	1
A. Mr. Mika ignores argument that the court lacks jurisdiction over Mr. Stevens for alleged wrongdoing in the March 21, 2010 tort claim.	1
B. Mr. Mika impermissibly raises new evidence and issues for the first time on appeal.....	2
C. The sale of JBC Entertainment’s assets to Gameworks was a bonafide business transaction as a matter of law.	6
D. Mr. Mika fails to show either general or specific jurisdiction over Mr. Stevens with regard to the March 21, 2010 incident.....	8
E. The sale of JBC Entertainment in October 2011 is immaterial to considerations of the exercise of specific jurisdiction over Mr. Stevens with regard to the tort claim arising on March 21, 2010.	11
II. CONCLUSION.....	13

TABLE OF AUTHORITIES

Table of Cases

Page(s)

Federal Cases

Colombia, S.A. v. Hall, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)..... 9

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)..... 9

Keaton v. Hustler Magazine, Inc., 465 U.S. 770, 781 Fn.13, 104 S. Ct. 1473, 70 L. Ed. 2d 790 (1984)..... 11

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 801 (9th Cir. 2004)..... 8

Cases

Hartley v. Am. Contract Bridge League, 61 Wn. App. 600, 812 P.2d 109, rev. denied, 117 Wn.2d 1027, 820 P.2d 511 (1991)..... 9

Im Ex Trading Co. v. Raad, 92 Wn. App. 529, 963 P.2d 952 (1998), rev. denied 137 Wn.2d 1023, 980 P.2d 1280 (1999)..... 9, 11

Rapid Settlements Ltd v. Symetra Life Ins. Co., 166 Wn. App. 683, 271 P.3d 925 (2012)..... 10

SeaHAVN, Ltd. v. Glitnir Bank, 154 Wn. App. 550, 226 P.3d 141 (2010)..... 2, 9, 13

Statutes

RCW 4.28.080(10)..... 9

Rules and Regulations

RAP 9.12..... 3, 14

I. ARGUMENT

A. **Mr. Mika ignores argument that the court lacks jurisdiction over Mr. Stevens for alleged wrongdoing in the March 21, 2010 tort claim.**

Appellant Gregory Stevens contests the trial court's exercise of jurisdiction over him with regard to injuries Respondent Jackson Mika sustained on March 21, 2010. Mr. Mika alleges that he suffered a gunshot wound while a patron of JBC of Seattle, Inc. d/b/a Jillian's Billiards Club, CP 19, 1003. Mr. Mika alleges that JBC Corporate entities and later Mr. Stevens and Regional Manager, Tony Humphreys, were personally responsible for the alleged lack of security at the club at the time. CP 26. However, Mr. Stevens was a resident of Nevada and took no action with regard to this incident at Jillian's that would submit him to the jurisdiction of Washington State courts. CP 96. On May 29, 2012, Mr. Stevens filed a Motion for Dismissal in the King County Superior Court arguing that the record failed to establish personal jurisdiction over him, under either a theory of general jurisdiction or transactional jurisdiction. CP 69, 71.

Mr. Mika tacitly concedes that the record is insufficient to meet his burden to show jurisdiction in the tort claim arising from his March 21, 2010 injury. Instead, without citing any example in the record, he argues that Mr. Stevens misrepresented his ownership interest in JBC Entertainment. Appellee's Br. at 5-6. In so doing, he continually miscasts

that interest as a “majority” interest when in fact it was less than 50 percent, while investment partners Gemini Investors and Alpha Capitol together held 51 percent. CP 978 ¶ 6; CP 688-89. He then argues that the court should exercise jurisdiction over Mr. Stevens because of his role in the sale of JBC Entertainment, LLC--a sale that closed on October 14, 2011. He alleges that the purpose of the sale was to avoid prospective liability for plaintiff’s claims arising from the March 21, 2010 incident. Appellee’s Br. at 7-8.

However, the trial court ruled as a matter of law that the sale was a bonafide transaction, made for sound business reasons unrelated to any theoretical liability to Mr. Mika. CP 921, 926. Mr. Mika therefore argues to this court that Washington can exercise jurisdiction over Mr. Stevens for claims involving Mr. Mika’s personal injuries occurring in March 2010, because Mr. Stevens participated in a legitimate sale of a defendant company in October 2011. The argument is without legal authority and is contrary to traditional notions of fair play and substantial justice, which are hallmarks of due-process jurisdictional analysis. *SeaHAVN, Ltd. v. Glitnir Bank*, 154 Wn. App. 550, 564, 226 P.3d 141 (2010).

B. Mr. Mika impermissibly raises new evidence and issues for the first time on appeal

The Rule for Appellate Procedure pertaining to the record for consideration on summary judgment is clear:

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

RAP 9.12. This trial court order does not refer to the sale of JBC Entertainment or any of the record Mr. Mika cites in his brief. CP 505. Even though he knew about the sale prior to Mr. Stevens's motion, Mr. Mika asks for the first time in this appeal to consider arguments related to the sale as it pertains to jurisdiction, arguments that Mr. Mika never raised before the trial court.

Mr. Mika could have made his argument in response to Mr. Stevens motion for summary judgment had he chosen to do so. Mika's counsel had access to the information he now claims establishes jurisdiction. Mr. Mika initially filed his complaint against JBC Entertainment, Inc., and its subsidiary corporation, JBC of Seattle, Inc. and other defendants on January 5, 2011. CP 1003. The sale of JBC Entertainment and six of its subsidiary restaurants, including JBC of

Seattle, to Gameworks closed on October 14, 2011, after an extended negotiation. CP 997-98.

On September 30, 2011 and again on December 20, 2011, Mr. Mika's counsel deposed Mr. Stevens. CP 7, 32, 41, 98, 135, 152, 480. One of the priorities for the second deposition was to discuss the sale, as is evident in plaintiff's counsel's line of questioning. CP 481, p. 6. While Mr. Mika's counsel complains that Mr. Stevens failed to inform him of his ownership interest in JBC Entertainment, counsel never asked Mr. Stevens, or any other defendant at the time, whether Mr. Stevens had an ownership interest. Mr. Mika's counsel then misleads this court regarding Mr. Stevens's testimony in December 2011 on this point. Appellee Br. at 2. The full exchange involved a series of questions regarding Gemini Investments' and Mr. Stevens's decision-making in selling JBC to Gameworks. CP 482-483. The specific question and answer omitted by Mr. Mika's counsel, states:

Q. It's fair to say, the, that you were not one of the decision makers in Gemini who made the decision to sell these properties?

A. It's —you know, it's Gemini's investment. I'm—you know, was the CEO. But they looked to me for guidance and advise and I am part of the process, if you will. So I would say it's somewhat collaborative more than kind of one side versus the other. I mean, if they said no, then it would not have happened. **If they said yes, it would not**

have happened without my saying, yeah, I agree this is something that we should be doing.

CP 483.

Mr. Stevens clearly indicates in his answer that he too had a stake in the sale of JBC to Gameworks. Mr. Mika's counsel did not follow up with any clarifying questions. In fact, Mr. Mika presents nothing in the record showing that, prior to Mr. Stevens's Motion for Summary Judgment, that he asked in written discovery or in deposition who comprised the ownership interests in JBC Entertainment.

On February 2, 2012, Mr. Mika moved to amend his complaint, naming Greg Stevens as an additional defendant. CP 1, 102. The First Amended Complaint alleged Stevens's responsibility for the claimed security failures at JBC of Seattle. CP 102. It also alleged that Gemini and Gameworks colluded in the sale of JBC Entertainment and its assets in order to avoid the theoretical liability to Mika. CP 108 (¶33).

Mr. Stevens filed his motion for summary judgment before the trial court on May 29, 2012, and Mr. Mika filed his response on July 9, 2012. CP 515. Within the response, Mr. Mika argued exclusively that Mr. Stevens was subject to jurisdiction due to his personal role in setting security on March 21, 2011 when Mr. Mika was injured. CP 515-640. Mr. Mika made no argument with regard to the sale of JBC Entertainment assets to Gameworks Entertainment, LLC in October 2011.

On September 10, 2012, the trial court entered its order denying Mr. Stevens's motion for dismissal. CP 505. Mr. Stevens filed a timely motion for discretionary review with this court on October 22, 2012. Mr. Mika filed a 49-page response to that motion on November 2, 2012. This court granted discretionary review on February 22, 2013. CP 513. Nowhere within any of his responses did Mr. Mika raise any issue regarding Mr. Stevens's involvement in the October 2011 sale of JBC Entertainment to Gameworks.

C. The sale of JBC Entertainment's assets to Gameworks was a bonafide business transaction as a matter of law.

On December 21, 2012, defendant Gameworks Entertainment moved for summary judgment, arguing that it had no successor liability arising from its purchase of JBC Entertainment. CP 927. On January 13, 2013, defendant Gemini Investors similarly moved for summary judgment arguing that even though it was a owner of JBC Entertainment, the sale to JBC was in fact an arms-length transaction and it has no liability as a result. CP 952. JBC Entertainment was losing money and unable to meet its payments to its creditors. JBC Entertainment owners negotiated the sale with Gameworks and with JBC's creditors, GE Capital and Fifth Third Bank, allowing for the repayment of a reduced sum to these creditors while allowing Gameworks to acquire ownership and assume management of JBC Entertainment assets going forward. CP 976, 978-79.

On February 11, 2013, the trial court granted summary judgment to Gemini Investors. CP 919. On February 15, 2013 the trial court granted summary judgment to Gameworks. CP 923.

Mr. Mika's argument before this court ignores the trial court's holding that the sale of JBC and its assets to Gameworks was a sale necessitated by sound business reasons. CP 921, 926. The trial court granted both Gemini's and Gameworks' motions for summary judgment. CP 919, 923. In finding for Gemini Investments, the court held:

Gemini, as an affiliate of a Massachusetts private equity firm, was a minority shareholder in JBC Entertainment Holdings, Inc. which was a parent company to JBC Entertainment, Inc. which owned a number of businesses including JBC of Seattle which ran the establishment whose negligence is asserted to have been the proximate cause of the plaintiff's injuries. Essentially, the plaintiff's claim against Gemini rests upon an inference to be drawn from the timing of the sale of JBC Entertainment's assets while his premises liability claim was pending; in opposition to such speculation stands the overwhelming direct evidence that, at least as far as Gemini is concerned, the sale was compelled by sound business reasons without regard to the unadjudicated tort claims of the plaintiff. Gemini (which was not a party to this lawsuit at the time of the transaction in question) did not receive any proceeds from the transaction; in fact, it lost money. JBC Entertainment's secured creditors received some relief although not their full measure.

CP 921-22.

Like Gemini, Mr. Stevens was not a party to this litigation in October 2011. Like Gemini, he was not a majority shareholder in JBC.

CP 688-89. Like Gemini, Mr. Stevens made no profit from the sale. CP 687, 978-979. Mr. Stevens lost his position as CEO and was initially contracted by Gameworks as a consultant only. CP 987. Finally, as the trial court found, there was “overwhelming direct evidence” that the sale was compelled by sound business reasons.

Mr. Mika is left with an argument with no foundation, in fact or law. He pleads that jurisdiction is based on Steven’s participation in a bonafide contract for the sale of JBC. He then, without authority, implicitly argues that the sale in 2011 is the basis to exert jurisdiction over tort claims arising in 2010, which are independent of the sale and arose more than a year earlier.

D. Mr. Mika fails to show either general or specific jurisdiction over Mr. Stevens with regard to the March 21, 2010 incident.

Mr. Mika entirely ignores Mr. Stevens’s argument that the record does not establish jurisdiction over him with regard to the March 21, 2010 incident, which is the subject of the initial Complaint. CP 1003. Mr. Mika tacitly concedes that the record establishes neither general nor specific personal jurisdiction over Mr. Stevens with regard to that incident. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004) (“the test for general jurisdiction is ‘an exacting standard, as it should be, because of finding of general jurisdiction permits a defendant to

be hailed the court in a forum state to answer for any of its activities anywhere in the world”). The record also shows that Mr. Stevens committed no purposeful act related to the March 21, 2010 incident subjecting him to jurisdiction with regard to plaintiff’s injury claims. *Sea Haven, Ltd. v. Glitnir Bank*, 154 Wn. App. 550, 564, 226 P.3d 141 (2010).

Even if the court were to aggregate Mr. Stevens’s involvement in the sale of JBC Entertainment assets to Gameworks with the record of his involvement in security at JBC of Seattle, it would not support general jurisdiction. A plaintiff must show that the defendant’s activities transcend doing business “with” the forum state such that it is fair to say that it is actually doing business “in” the forum state. *See* RCW 4.28.080(10); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417-18, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). *See also* *Hartley v. Am. Contract Bridge League*, 61 Wn. App. 600, 605, 812 P.2d 109, *rev. denied*, 117 Wn.2d 1027, 820 P.2d 511 (1991). Plaintiff must also show that a nonresident defendant was carrying on substantial and continuous business **when plaintiff was injured**. *See Im Ex Trading Co. v. Raad*, 92 Wn. App. 529, 537, 963 P.2d 952 (1998), *rev. denied* 137 Wn.2d 1023, 980 P.2d 1280 (1999). Proof of such business after the cause of action arose is insufficient. *See id.*

The record does not show that Mr. Stevens was doing business in Washington State at the time Mr. Mika's claim arose. Mr. Stevens does not reside in Washington State but rather Nevada. CP 97(¶2). Mr. Stevens was a CEO and CFO of JBC Entertainment and a 49 percent owner. CP 96, 688-89. JBC Entertainment was not a Washington Corporation but a Delaware Corporation with its corporate offices in Kentucky. CP 97. Mr. Stevens never lived in Washington, possessed no bank account here, paid no sale taxes other than hotel and sales taxes during his visits. CP 97.

Mr. Mika fails to explain how Mr. Steven's ownership interest in JBC Entertainment, a foreign corporation, somehow tips the balance towards a finding of jurisdiction in Washington State. Mr. Stevens's ownership interest is immaterial to the analysis, it does not establish either general or specific jurisdiction in Washington State.

Mr. Mika infers without providing authority that JBC Entertainment is Mr. Steven's "alter ego." See *Rapid Settlements Ltd v. Symetra Life Ins. Co.*, 166 Wn. App. 683, 692, 271 P.3d 925 (2012). But the record simply does not support this. The testimony of Mr. Stevens (CP 482-83) and Matthew Keis of Gemini Investments (CP 977) are entirely consistent. Mr. Stevens had a leadership role in managing JBC Entertainment but he was not in exclusive control of a company that held

assets in several states. Mr. Stevens was a 49-percent shareholder while Gemini and Alpha Capital held 51 percent. CP 688-89, 978 (¶6). Mr. Stevens was not free to sell JBC Entertainment without the approval of Gemini. CP 483.

Mr. Mika also ignores the court's analysis in *Im Ex. Trading*, that subsequent activity does not provide a basis for jurisdiction over prior events. 92 Wn. App. at 536-537. Mr. Mika's injuries, and the alleged failure at JBC of Seattle to provide adequate security, predated the sale of JBC Entertainment. Mr. Stevens's role in the sale is irrelevant to the issue before this court.

E. The sale of JBC Entertainment in October 2011 is immaterial to considerations of the exercise of specific jurisdiction over Mr. Stevens with regard to the tort claim arising on March 21, 2010.

Jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him. *Keaton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 Fn.13, 104 S. Ct. 1473, 70 L. Ed. 2d 790 (1984). Similarly, an individual defendant's ownership interest in a corporation or other business entity should not alone convey jurisdiction; the individual's contacts with the forum jurisdiction are at issue not the corporations. Each defendant's contact with the forum state must be assessed individually. *Keaton*, 465 U.S. at 70-81 n. 13.

Mr. Mika invites this court to ignore the lack of evidence establishing personal jurisdiction over Mr. Stevens regarding the events of March 21, 2010. The record shows that he had no knowledge of the promotion occurring at JBC of Seattle on that date. CP 97. He had no direct involvement in setting policy for security on the night in question or in general at subsidiary restaurants, such as JBC of Seattle. CP 97-98. Mr. Mika does not meet his burden of establishing a prima facie case supporting jurisdiction with regard to these tort claims.

Mr. Mika cannot bootstrap the sale of JBC Entertainment and its assets, including JBC of Seattle to Gameworks in October 2011, in order to establish jurisdiction for the tort claim arising a year and a half earlier. For purposes of establishing specific jurisdiction, Mr. Mika must demonstrate the following elements:

(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.

SeaHAVN, Ltd. v. Glitnir Bank, 154 Wn. App. 550, 564, 226 P.3d 141 (2010) (emphasis added).

The two transactions alleged here are completely distinct, and the finding of the trial court has already established that the subsequent sale was a bonafide transaction. The claimed tort liability arising from the March 21, 2010 incident is a distinct act or transaction from the sale of JBC Entertainment in October of 2011. Liability in this case does not “arise” from the subsequent sale; it allegedly arises out of Mr. Stevens’s alleged failure to provide adequate security at JBC Seattle.

While Mr. Mika argues that the sale was intended to avoid potential liability to Mr. Mika and his unresolved tort claim, it is only argument and not fact. There is no factual basis on the record establishing that the sale was in anyway related to Mr. Mika’s claims. Each of these transactions should be judged on their individual merit and the issue of specific jurisdiction over Mr. Stevens is relevant only to a consideration of each event. At best, Mr. Mika belatedly attempts to establish jurisdiction over Mr. Stevens for a sale already ruled by the trial court to have been a proper transaction.

II. CONCLUSION

Mr. Mika fails to support the trial court’s decision denying summary judgment to Gregory Stevens for lack of jurisdiction.

Mr. Stevens, as the CEO of JBC Entertainment Co., did not purposely avail himself of the jurisdiction of Washington with regard to Mr. Mika's personal injury claims arising in March 2010. The record does not establish a *prima facie* case that Mr. Stevens was somehow personally involved in establishing security on the night in question, resulting in plaintiff's injuries at the hands of an unknown gunman. For the first time on appeal, Mr. Mika instead argues that the court should impose jurisdiction because of Mr. Stevens's role in the sale of JBC Entertainment to Gameworks Entertainment in October 2011. The trial court already has determined that the sale was a *bonafide* business transaction. RAP 9.12 specifies that Mr. Mika cannot raise this evidence for the first time on appeal, especially where there is no record where the trial court gave any consideration to this evidence in its ruling. Mr. Mika had every opportunity to include evidence and argument regarding the sale of JBC in the initial hearing before the trial court in July of 2012. This was eight months after plaintiff's counsel learned details of the sale of JBC to Gameworks. It was five months after plaintiff amended the complaint to include allegations against Gemini Investments (a minority shareholder in JBC Entertainment) and Gameworks, which purchased JBC Entertainment and its assets. Even if Mr. Mika's argument is considered on its merits, Mr. Stevens's involvement in the sale of JBC Entertainment does not

establish jurisdiction. Mr. Stevens is not a resident of Washington, and no evidence establishes systematic business contacts sufficient to confer general jurisdiction over him. The sale is a distinct transaction from the events of March 21, 2010 when Mr. Mika was injured. There can be specific jurisdiction only as to each transaction, and evidence of the subsequent sale is therefore irrelevant to the issue over the March 2010 incident. Without a valid finding of general or specific jurisdiction related to that event, this court should reverse the order of the trial court denying summary judgment to Mr. Stevens.

Respectfully submitted this 8 day of July, 2013.

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By: 
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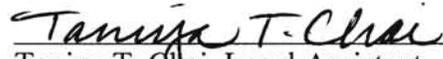
CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on July 9, 2013, I caused service of the foregoing on each and every attorney of record herein:

VIA E-MAIL AND LEGAL MESSENGER

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DATED this 9th day of July at Seattle, Washington.


Taniya T. Chai, Legal Assistant