

No. 71011-7

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

C. COOK

Appellant

v.

ADVANCED AUTO BROKERS, LLC,
dba CARMAX BROKERS

Respondent

BRIEF OF RESPONDENT

Wendy E. Lyon, WSBA #34461
RIDDELL WILLIAMS P.S.
1001 Fourth Avenue Plaza
Suite 4500
Seattle, Washington 98154
Attorney for Respondent

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 APR 29 PM 4:29

Table of Contents

I.	INTRODUCTION.....	1
II.	RESPONSE TO ASSIGNMENTS OF ERROR.....	1
III.	STATEMENT OF THE CASE.....	2
IV.	ARGUMENT	2
	A. Standard Of Review.....	2
	B. Appellant did not Produce Evidence to Establish Jurisdiction.....	3
	1. General Jurisdiction	4
	2. Specific Jurisdiction.....	5
	a. Purposeful Act	9
	b. Cause of Action Arising from Contract.....	11
	c. Traditional Notions of Fair Play and Substantial Justice.....	12
V.	CONCLUSION.....	14

TABLE OF AUTHORITIES

CASES

State

<i>Bartusch v. Oregon State Bd. of Higher Educ.</i> , 131 Wn.App. 298, 304 (2006).....	4
<i>CTVC of Hawaii, Co., Ltd. v. Shinawatra</i> , 82 Wn.App. 699, 710 (1996).....	9, 12
<i>Dicomes v. State</i> , 113 Wn.2d 612, 782, P.2d 1002 (1989).....	3
<i>Does v. Dep't of Transp.</i> , 85 Wn.App. 143, 931, P.2d 196 (1997).....	3
<i>Grange Ins. v. State</i> , 110 Wn.2d, 752 (1988).....	12
<i>Hein v. Taco Bell, Inc.</i> , 60 Wn.App. 325, 328 (1991).....	4
<i>Im Ex Trading Co.</i> , 92 Wn.App. 529, 534 (1998).....	3, 4
<i>Marquis v. City of Spokane</i> , 130 Wn.2d 97, 922, P.2d 43 (1996).....	3
<i>MBM Fisheries, Inc. v. Bollinger Mach. Shop</i> , 804 P.2d 627, 60 Wn.App. 414 (1991).....	10
<i>Potter v. Wash. State Patrol</i> , 165 Wn.2d 67, 196, P.3d 691 (2008).....	2
<i>Raymond v. Robinson</i> , 104 Wn.App. 627 (2001).....	4, 10, 12
<i>Shute v. Carnival Cruise Lines</i> , 113 Wn.2d 763, 767 (1989).....	5

Federal

Boschetto v. Hansing, 539 F.3d 101 (9th Cir. 2008) 11, 14

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76
(1985).....6, 7, 11

Calder v. Jones, 465 U.S. 783 (1984)..... 7

CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1265 (6th
Cir. 1996)..... 10

Cybersell, Inc., 130 F.3d 414 (1997).....8

Doe v. Unocal Corp., 248 F.3d 915, 924 (9th Cir. 2001)..... 11

International Shoe Co., v. Washington, 326 U.S. 310
(1945) 13

Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984).....6

McGee v. International Life Ins. Co., 355 U.S. 220 (1957) 12

Pebble Beach Co. v. Caddy, 453 F.3d 1151 (2006).....8, 9

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797,
807 (9th Cir. 2004)6

Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648
(1950).....6

Van Steenwyk v. Interamerican Mgmt. Consulting Corp.,
834 F. Supp. 336, 339 (E.D. Wash. 1993).....4

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286,
297-99 (1980)8, 13

STATUTES AND REGULATIONS

CR 56(c).....3

CR 56(e).....3

RCW 4.28.080(10).....4

RCW 4.28.1854

OTHER

14 Karl B. Tegland, Washington Practice: Civil Procedure § 4.13,
at 71 (1st ed. 2003)6

I. INTRODUCTION

Respondent Advanced Auto Brokers, LLC. is a New York Limited Liability Respondent (“Respondent”). On or about March 18, 2012, the Respondent listed for sale via an unrestricted general e-Bay Internet auction a 2007 Jeep Grand Cherokee (“Vehicle”). The Vehicle was purchased by Mr. Cook (“Appellant”), a resident of the State of Washington, who was the winning bidder for the Vehicle at auction. The Appellant subsequently filed this action seeking various damages arising from the sale of the Vehicle.

Respondent filed a motion requesting that the trial court dismiss the action based on the fact that there was no personal jurisdiction over the Respondent who does not do business in Washington and otherwise does not have sufficient contacts with this State. The trial court dismissed Appellant’s claims for lack of personal jurisdiction.

Respondent respectfully asks this Court to affirm the trial court’s dismissal of Appellant’s claims.

II. RESPONSE TO ASSIGNMENTS OF ERROR

A. It was not error to deny Appellant’s summary judgment motion. Summary judgment was improper because the court did not have jurisdiction over Respondent.

B. It was not error to deny Appellant's motion to deem admitted and second motion to deem admitted because the court did not have jurisdiction over Respondent. The trial court properly exercised its discretion.

C. It was not error to deny Appellant's motion for relief for corporate party's failure to attend deposition and for costs because the court did not have jurisdiction over Respondent. The trial court properly exercised its discretion.

D. It was not error to grant Respondent's motion to dismiss because the court did not have jurisdiction over Respondent.

III. STATEMENT OF THE CASE

Appellant filed this action in King County Superior Court on December 14, 2012, alleging various cause of action against Respondent relating to his purchase of a vehicle. Clerk's Papers ("CP") at 1-5. Respondent moved to dismiss on August 29, 2013. CP at 51-63. The trial court granted Respondent's motion. CP at 88-89.

IV. ARGUMENT

A. Standard Of Review

"Summary judgment rulings are reviewed de novo." *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008). Summary

judgment is proper if the record shows that there are no genuine issues of any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Summary judgment should be granted where the plaintiff cannot make a showing sufficient to establish an essential element of the case. *Does v. Dep't of Transp.*, 85 Wn. App. 143, 147, 931 P.2d 196 (1997). A party opposing summary judgment may not rest on mere allegations in the pleadings, but must set forth specific facts showing there is a genuine issue of material fact. CR 56(e); *see Dicomes v. State*, 113 Wn.2d 612, 631, 782 P.2d 1002 (1989). Where reasonable minds could reach but one conclusion from the admissible facts in the record, summary judgment should be granted. *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996).

B. Appellant Did Not Produce Evidence To Establish Jurisdiction¹

The exercise of personal jurisdiction over a nonresident defendant must be consistent with the due process requirement of the Fourteenth Amendment. *Im Ex Trading Co. v. Raad*, 92 Wn.App. 529, 534 (1998). The amount and kind of activities required of the nonresident corporation in the forum state must be such that it is reasonable and just to subject the corporation to the jurisdiction of that state. *Id.* This Court may exercise

¹ All factual statements are supported by the Declaration of Yuri Konfederat. CP at ____.

personal jurisdiction over a nonresident defendant by asserting either general or specific jurisdiction. *Van Steenwyk v. Interamerican Mgmt. Consulting Corp.*, 834 F. Supp. 336, 339 (E.D. Wash. 1993). RCW 4.28.080(10) creates general jurisdiction, while RCW 4.28.185 creates specific jurisdiction. *See Hein v. Taco Bell, Inc.*, 60 Wash.App. 325, 328 (1991).

1. General Jurisdiction

General jurisdiction over a nonresident defendant is proper when the defendant's actions in the state are so substantial and continuous that justice allows the exercise of jurisdiction even for claims not arising from the defendant's contacts within the state. *Raymond v. Robinson*, 104 Wn.App. 627 (2001), RCW 4.28.080(10) authorizes general jurisdiction over a nonresident defendant if the defendant is transacting substantial and continuous business within the state of such character as to give rise to a legal obligation. *Im Ex Trading Co.*, 92 Wn.App. at 535. In making this determination, the Court looks to the amount, kind, and continuity of activities carried out by the nonresident in Washington. *Bartusch v. Oregon State Bd. of Higher Educ.*, 131 Wash.App. 298, 304 (2006).

The transaction at issue is Respondent's one-time listing of the Vehicle for sale via an unrestricted general e-Bay Internet auction. Given

this, Respondent's actions were in no way substantial and continuous within this State, as to give rise to a legal obligation here. The amount of the transaction was approximately ten thousand nine hundred dollars (\$10,900.00), which transaction was conducted one-time, via a nationwide unrestricted general Internet auction. Said auction was available to anyone in any state with a computer.

Moreover, Appellant does not allege that Respondent is using eBay to conduct regular business in this State generally. Given the amount, kind, and manner of the sales activity alleged by Appellant, it cannot be said that Respondent's actions in this State are so substantial and continuous that justice allows the exercise of jurisdiction.

2. Specific Jurisdiction

For long-arm specific jurisdiction Appellant must establish three factors: (1) Respondent must have purposefully done some act or consummated some transaction in this state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the exercise of jurisdiction must not offend traditional notions of fair play and substantial justice. *Shute v. Carnival Cruise Lines*, 113 Wash.2d 763, 767 (1989).

A court will not find jurisdiction under the long-arm statute unless a nexus exists between the plaintiff's cause of action and the defendant's activities in the state. 14 Karl B. Tegland, *Washington Practice: Civil Procedure* § 4.13, at 71 (1st ed. 2003).

The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985) (citations omitted). Thus, Respondent must either have "purposefully availed" himself of the privilege of conducting activities in the forum, thus invoking the benefits and protections of its laws, or have "purposefully directed" his activities toward the forum. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 807 (9th Cir. 2004).

A defendant "purposefully avails" himself of a forum when he acts in a way that creates a "substantial connection" with the state, *Burger King*, 471 U.S. at 475, as where he deliberately engages in significant activities there, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984), or creates "continuing obligations" between himself and its residents. *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 648 (1950). In return for taking advantage of the forum state's "benefits and

protections,” the defendant must submit to the burden of being sued there.

Burger King, 471 U.S. at 475-76.

A defendant “purposefully directs” activity at a forum state when he: (1) commits an intentional act, that is (2) expressly aimed at the forum state, and that (3) causes harm that he knows is likely to be suffered in that jurisdiction. *Calder v. Jones*, 465 U.S. 783 (1984). Under this “effects test,” it is not sufficient that the defendant took action with a foreseeable effect in the forum state. *Id.* at 804-05. He must do “something more” for courts to conclude that he “expressly aimed” activity at the forum, such as individually targeting its residents. *Id.* at 805.

The Respondent did not purposefully avail itself of Washington. The Respondent created no continuing obligations to Washington residents by selling the Vehicle on eBay via a unrestricted general Internet auction. The Respondent’s only obligation was to complete the sale with the highest bidder, whoever and wherever he might be. Appellant was the winning bidder at the auction and retrieved the Vehicle from the Respondent in Philadelphia.

The Respondent’s eBay auction did not establish a substantial connection between itself and this State, such that it invoked the benefits and protections of its laws. There is no suggestion that the Respondent is

engaged in ongoing business activities here. Plainly, although a Washingtonian ultimately made the highest bid for the Vehicle at the auction, this was nothing more than happenstance. Appellant does not allege that the Respondent had any control over the high bidder's location within the United States or that Appellant's residence had any effect on the obligations under the contract for the sale of the Vehicle. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-99 (1980) (“the foreseeability that is critical to [the] due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.”) (citations omitted).

The Respondent did not purposefully direct any activity at this State. As previously held, merely advertising over the Internet is not sufficient to confer jurisdiction throughout the United States, even though the advertisement or website at issue may be viewed nationwide. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151 (2006); *Cybersell, Inc.*, 130 F.3d 414 (1997). Clearly, the Respondent must do “something more” to aim activity expressly at the State of Washington. *Cybersell*, 130 F.3d at 418, 419; *Pebble Beach Co.*, 453 F.3d at 1156-57. Moreover, Appellant has

not and cannot allege that the Respondent tailored, sent, or advertised its auction to the residents of any state in particular.

Arguably, the Respondent could foresee that Washington residents would bid on its auction, and that it would benefit from their participation. However, foreseeable participation by Washingtonians is not enough to establish jurisdiction. The Respondent must have done something more to aim its auction expressly at this State, such as individually targeting Washington residents. *Pebble Beach Co.*, 453 F.3d at 1157. On the facts of this case, the Respondent simply permitted those with eBay access throughout the United States to bid on the Vehicle. Accordingly, the Respondent neither availed itself of the privilege of doing business in this State nor purposefully directed any activity at this State.

a. Purposeful Act

To establish the requisite minimal contacts that the first factor addresses, the evidence must show that the Respondent purposefully did some act or consummated some transaction in this State. The sufficiency of the contacts is determined by the quality and nature of the Respondent's activities, not the number of acts or mechanical standards. *CTVC of Hawaii, Co., Ltd. v. Shinawatra*, 82 Wash.App. 699, 710 (1996). The mere execution of a contract with a State resident does not alone fulfill the

“purposeful act” requirement. *MBM Fisheries, Inc. v. Bollinger Mach. Shop*, 804 P.2d 627, 60 Wn.App. 414 (1991). The Court must examine the entire transaction, including negotiations; contemplated future consequences; the terms of the contract; and the parties' actual course of dealing. *Raymond*, 104 Wash.App. at 637.

Here, Appellant fails at step one of the test for specific jurisdiction, as the lone transaction for the sale of one item does not establish that the Respondent purposefully availed itself of the privilege of doing business in this State. The arrangement between the Appellant and the Respondent which is, at bottom, a contract for the sale of a good, is insufficient to have created a substantial connection with this State. The parties' contract did not create any ongoing obligations with each other in this State. Once the Vehicle was sold the parties were to go their separate ways. The complaint points to no continuing commitments assumed by the Respondent under the contract. Nor did performance of the contract require the Respondent to engage in any substantial business in this State. This was, a “one-shot affair.” See *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1265 (6th Cir. 1996).

As the Supreme Court expressly cautioned, a contract alone does not automatically establish minimum contacts in the Appellant's home

forum. *See Burger King Corp.*, 471 U.S. at 478; *see also Doe v. Unocal Corp.*, 248 F.3d 915, 924 (9th Cir. 2001) (“However, an individual’s contract with an out-of-state party alone [cannot] automatically establish sufficient minimum contacts to support personal jurisdiction.”).

With regard to the issue of purposeful availment, this case is identical to *Boschetto v. Hansing*, 539 F.3d 101 (9th Cir. 2008) (Wisconsin seller, as employee of auto dealer, did not purposefully avail himself of privilege of doing business in California when he sold one car to California buyer via Internet auction site, and thus was not subject to specific personal jurisdiction in buyer’s action in California for, *inter alia*, breach of contract, given that seller did not assume any ongoing obligations to buyer in California and performance of contract did not require seller to engage in substantial business in California, and that auction site listing for car was not part of broader e-commerce activity, but rather temporarily advertised good for sale and was closed once item was sold.) Accordingly, this Court should similarly conclude that Appellant cannot meet the first part of the three part test.

b. Cause of Action Arising from Contract

Washington courts apply the “but for” test to determine whether a claim against a nonresident defendant arises from, or is connected with, its

solicitation of business within the state. *Raymond*, 104 Wash.App. at 640. Jurisdiction is proper in Washington if the events giving rise to the claim would not have occurred “but for” the corporation's solicitation of business within this state. *CTVC of Hawaii*, 82 Wn.App. at 719. This test preserves the requirement that there must be some nexus between the cause of action and the defendant's activities in the forum. *Raymond*, 104 Wn.App. at 640.3d 697.

This was a one-time contract for the sale of a good that involved this State only because that is where the Appellant happens to reside. The contract, otherwise, created no “substantial connection” or ongoing obligations in the State of Washington. *See McGee v. Internatinal Life Ins. Co.* , 355 U.S. 220 (1957).

c. Traditional Notions of Fair Play and Substantial Justice

In determining whether the assumption of jurisdiction by this State would offend traditional notions of fair play and substantial justice, courts consider 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. *Grange Ins. v. State*, 110 Wn.2d 752 (1988).

The Supreme Court has, in the past, sounded a note of caution that traditional jurisdictional analyses are not upended simply because a case involves technological developments that make it easier for parties to reach across state lines. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 293 (1980) (“[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.”). The Respondent’s use of eBay no doubt made it far easier to reach a buyer in this State, but the ease with which Appellant was contacted does not determine whether the nature and quality of the Respondent’s contacts serve to support jurisdiction.

Only where eBay is used as a means for establishing regular business with a remote forum such that a finding of personal jurisdiction comports with “traditional notions of fair play and substantial justice,” *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), then the Respondent’s use of eBay may be properly taken into account for purposes of establishing personal jurisdiction. On the facts of this case, a one-time transaction, the use of eBay as the conduit for that transaction does not have any dispositive effect on jurisdiction.

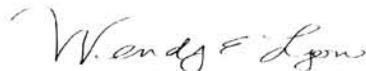
As held in *Boschetto, supra*, the Respondent did not establish minimum contacts nationwide by listing an item for sale on eBay; rather, the Respondent must do “something more,” such as individually target residents of this State or a particular state, to be haled into another jurisdiction. Appellant does not allege that the Respondent individually targeted Appellant. In fact Appellant cannot make this allegation, as the Vehicle was listed for sale on e-Bay by the Respondent via an unrestricted general Internet auction.

V. CONCLUSION

The sale of one automobile via the eBay website, without more, does not provide sufficient “minimum contacts” to establish jurisdiction over the nonresident Respondent in this State. Accordingly, the trial court’s dismissal of Appellant’s claims should be affirmed, and Appellant’s complaints about procedure at the trial court level are thus, irrelevant.

Dated this 29th day of April, 2014.

RIDDELL WILLIAMS, P.S.



Wendy E. Lyon, WSBA #34461
Attorney for Respondent

CERTIFICATE OF SERVICE

I, Jan Sherred, certify that:

1. I am an employee of Riddell Williams P.S., attorneys for Respondent Advanced Auto Brokers LLC in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.

2. On April 29, 2014, I served a true and correct copy of the foregoing document on the Appellant Pro Se via U.S. Mail as follows:

Carl Cook
14912 N. Park Ave. N.
Shoreline, WA 98133

Pro Se Plaintiff

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington, this 29th day of April, 2014.


Jan Sherred

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 APR 29 PM 4:29