

LEXSEE 1993 ohio app lexis 5045

**JON A. YAUGER, Plaintiff-Appellant, v. HAMILTON SORTER CO., INC., et al.,
Defendants-Appellees.**

CASE NO. CA93-02-030

**COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT, BUTLER
COUNTY**

1993 Ohio App. LEXIS 5045

October 18, 1993, Decided

DISPOSITION:

[*1]

Judgment affirmed in part, reversed in part, and remanded.

COUNSEL:

Myron A. Wolf, 120 N. Second Street, P.O. Box 741, Hamilton, Ohio 45012 and Thompson, Hine & Flory, Deborah DeLong, 312 Walnut Street, Suite 1400, Cincinnati, Ohio 45202, for plaintiff-appellant.

Frost & Jacobs, Donald L. Crain and Elizabeth K. Lanier, 2500 PNC Center, 201 E. Fifth Street, Cincinnati, Ohio 45202, for defendants-appellees.

JUDGES:

JONES, KOEHLER, WALSH

OPINIONBY:

JONES

OPINION:

OPINION

JONES, P.J. Plaintiff-appellant, Jon Yauger, appeals from a judgment of the Butler County Court of Common Pleas dismissing certain defendants for lack of personal jurisdiction pursuant to Civ.R. 12(B)(2).

Appellant was employed by, and a minority shareholder of, Hamilton Sorter Co., an Ohio close corporation that manufactures office furniture and maintains its Principal place of business in Fairfield, Ohio. Appellant was fired on May 1, 1992 and on October 21, 1992 filed a complaint based on several

causes of action arising out of his termination. The complaint named as defendants: Hamilton Sorter Co., Inc. ("Hamilton Sorter"), HS Holdings, Inc. ("HS Holdings"), HS Morgan Limited Partnership ("HS Morgan Ltd."), HS Morgan [*2] Corporation ("HS Morgan Corp."), Morgan Schiff Holdings, Inc. ("Morgan Schiff Holdings"), Morgan Schiff & Company, Inc. ("Morgan Schiff & Co."), Allan M. Edwards ("Edwards"), Thaddeus S. Jaroszewicz ("Jaroszewicz"), Phillip Ean Cohen ("Cohen"), Bradley J. Stinn ("Stinn"), James Jefferson Dean ("Dean"), William I. Thompson ("Thompson") and Sterling Brinkley ("Brinkley").

Before appellant was fired, Hamilton Sorter underwent a change of ownership. The appellees consist of three corporations, one limited partnership, and certain directors of those business entities that participated in acquiring ownership of Hamilton Sorter. HS Holdings acquired a majority interest in Hamilton Sorter from an Ohio resident in May 1989. HS Morgan Ltd. owns all the stock of HS Holdings and was created by Morgan Schiff & Co. HS Morgan Corp. is a general partner of HS Morgan Ltd. HS Holdings is registered under the laws of Delaware but lists its principal place of business as Fairfield, Ohio. HS Morgan Ltd., HS Morgan Corp. and Morgan Schiff & Co. were formed under the laws of Delaware and are headquartered in New York, New York.

Appellee Cohen is Chairman and Director of Morgan Corp. and HS Holdings. [*3] Appellees Thompson, Stinn and Sterling Brinker are employees of Morgan Schiff or one of its affiliates and directors of HS Holdings. n1 None of the individual appellees are residents of Ohio. The individual appellees all filed affidavits with their motion to dismiss stating that they do not transact business, maintain offices, or own

property in Ohio. They also denied having any substantive personal dealings with appellant.

n1 Edwards and Dean, the two remaining named individual defendants, were not served in this action, but submitted affidavits in support of appellees' motion to dismiss.

On November 30, 1992, Hamilton Sorter and Jaroszewicz, Chairman and CEO of Hamilton Sorter, filed an answer to appellant's complaint. The other defendants, appellees herein, filed a motion to dismiss for lack of personal jurisdiction on December 29, 1992. The trial court granted appellees' motion to dismiss on January 21, 1993. Appellant did not file an opposing memorandum until January 25, 1993, well after time to file such [*4] memoranda had expired under Butler County Court of Common Pleas Loc.R. 3.06, and four days after the trial court actually granted appellees' motion to dismiss. Appellant alleges that appellees orally agreed that he would have until January 25, 1993 to respond to appellees' motion to dismiss, but the trial court apparently did not grant an extension to file said memorandum. The trial court did not consider appellant's untimely opposing memorandum or supporting affidavit, and denied appellants' motion for reconsideration on June 10, 1993.

Appellant asserts two assignments of error:

Assignment of Error No. 1:

The Trial Court abused its discretion by dismissing the Defendants, HS Holdings Inc., HS Morgan Limited Partnership, HS Morgan Corporation, Morgan Schiff Holdings Inc., Morgan Schiff & Company, Inc., Alan M. Edwards, Phillip Ean Cohen, Bradley J. Stinn, James Jefferson Dean, William Thompson and Sterling Brinker without considering Plaintiff's Memorandum and Affidavit in Opposition to Defendants' Motion to Dismiss.

Assignment of Error No. 2:

The Trial Court erred in dismissing Defendants, HS Holdings Inc., HS Morgan Limited Partnership, HS Morgan Corporation, [*5] Morgan Schiff Holdings Inc., Morgan Schiff & Company, Inc., Alan M. Edwards, Phillip Ean Cohen, Bradley J. Stinn, James Jefferson Dean, William Thompson and Sterling Brinker on the basis that this Court lacked personal jurisdiction over them.

Appellant argues in his first assignment of error that the trial court abused its discretion in granting appellees' motion to dismiss without considering appellant's opposing memorandum and affidavit. This argument is not well-taken. Abuse of discretion connotes more than error of judgment and results only when a decision is arbitrary, fanciful or unreasonable, or only when no reasonable man would take the view adopted by the trial court. *Sandusky Properties v. Aveni (1984), 15 Ohio St.3d 273, 473 N.E.2d 798.*

Loc.R. 3.06, Butler County Court of Common Pleas, provides in relevant part: "Unless an extension of time is granted for good cause shown, any memorandum in opposition to a motion, or a memorandum of a co-party in support of the motion, shall be filed within fourteen days of the filing of the motion ***[.]" Appellees filed their motion to dismiss on December 29, 1992. Appellant apparently never filed a motion with the trial [*6] court for an extension of time to file a memorandum in opposition. Appellant filed his opposing memorandum on January 25, 1993, twenty-seven days after appellees filed their motion and four days after the court dismissed appellees for lack of personal jurisdiction.

The trial court was not obligated to consider appellant's opposing memorandum under these circumstances, and appellant was not entitled to rely on appellees' alleged agreement to allow appellant to wait until January 25, 1993 to file his opposing memorandum. Appellant should have sought an extension to file from the trial court. We hold that the trial court did not abuse its discretion by not considering appellant's memorandum in opposition to appellees' motion to dismiss. Appellant's first assignment of error is overruled.

Appellant asserts in his second assignment of error that the trial court erred in dismissing all appellees on the basis that the trial court lacked personal jurisdiction. We find that the trial court erred in dismissing HS Holdings for lack of personal jurisdiction, but was justified in dismissing all other appellees.

The Ohio Supreme Court, in *Kentucky Oaks Mall v. Mitchell's Formal Wear (1990), [*7] 53 Ohio St.3d 73, 559 N.E.2d 477*, set forth a two-part test to determine whether an Ohio court can exercise personal jurisdiction over a nonresident defendant. The court must first decide whether the defendant's conduct falls within Ohio's Long-Arm Statute. Once the court determines that the Long-Arm Statute confers personal jurisdiction, the court must then determine whether the exercise of jurisdiction comports with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id. at 75. R.C. 2307.382(A)(1)*, Ohio's "Long-Arm Statute,"

provides in pertinent part: "A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's: (1) Transacting any business in this state ***[.]" R.C. 2307.382 is very broadly worded; the Supreme Court has held that the term "transact" is broader than the word "contract," and may involve business negotiations which have been either wholly or partly concluded. Kentucky Oaks Mall, at 75.

A plaintiff, however, has the burden of showing that the trial court has personal jurisdiction over a defendant once that defendant challenges the court's [*8] jurisdiction. *Speck v. Mutual Serv. Life Ins. Co. (1990)*, 65 Ohio App.3d 812, 815, 585 N.E.2d 509, citing *Giachetti v. Holmes (1984)*, 14 Ohio App.3d 306, 471 N.E.2d 165. The Giachetti court addressed the plaintiff's burden of initially establishing jurisdiction as follows:

If the court determines its jurisdiction without an evidentiary hearing, it must view allegations in the pleadings and documentary evidence in the light most favorable to the nonmoving party. ***

If the court holds no evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdiction to withstand the motion to dismiss. If plaintiff produces evidence from which reasonable minds could find personal jurisdiction, the court must refuse dismissal, absent an evidentiary hearing.

Giachetti, at 307.

Appellant has met his burden of initially demonstrating that the trial court has personal jurisdiction over appellee HS Holdings. Appellant alleges in his complaint that "HS Holdings is a Delaware corporation with its principal place of business in Fairfield, Butler County, Ohio." Jaroszewicz acknowledged, in an affidavit filed with the court, that HS Holdings' principal [*9] place of business was in Butler County, Ohio, and this fact was mentioned twice in appellees' memorandum in support of their motion to dismiss certain defendants. This information was sufficient to establish a prima facie showing of jurisdiction to withstand the motion to dismiss as to HS Holdings, therefore the court erred in dismissing HS Holdings.

Appellant did not satisfy his initial burden of demonstrating that the trial court has jurisdiction over

any of the remaining appellees. Since we have determined that the trial court did not abuse its discretion in refusing to consider appellant's untimely memorandum opposing dismissal, we will only consider those documents the trial court considered when it granted appellees' motion to dismiss; i.e., appellant's complaint and appellees' motion to dismiss filed with supporting affidavits.

With the exception of appellee HS Holdings, appellant did not make out a prima facie showing of jurisdiction over appellees in his complaint. The complaint only states that appellee HS Morgan Ltd. owned all the stock of HS Holdings, which in turn owned appellant's employer, Hamilton Sorter. Appellee Morgan Schiff & Co. created HS Morgan Ltd., and [*10] HS Morgan Corp. is a general partner of HS Morgan Ltd. The individual appellees are either directors or employees of the corporate appellees.

The fact that a business organization owns or participates in establishing ownership of an Ohio corporation is not sufficient to establish a prima facie showing of jurisdiction. Furthermore, when the trial court dismissed the appellees for lack of personal jurisdiction, appellees memorandum and supporting affidavits in favor of dismissal were unchallenged and supported the conclusion that the trial court lacked jurisdiction over all appellees except HS Holdings. The trial court therefore did not abuse its discretion when it determined that the relationships described above did not constitute a prima facie showing of jurisdiction.

After a thorough review of the record, we hold that the trial court did not abuse its discretion when it determined that appellant had not made a prima facie showing of jurisdiction over appellees HS Morgan Ltd., HS Morgan Corp., Morgan Schiff Holdings, Inc., Morgan Schiff & Co., Cohen, Stinn, Thompson and Brinkley. The trial court was in error in dismissing appellee HS Holdings, however. Therefore, appellant's second [*11] assignment of error is sustained in part and overruled in part. The trial court's judgment dismissing appellee HS Holdings is hereby reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Judgment affirmed in part, reversed in part, and remanded.

KOEHLER and WALSH, JJ., concur.