FILED
JUN 25 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

42

WALTER A. CROSS,	)	
Plaintiff-Appellant,	)	Filed June 25, 1986
vs.	)	
LIGHTOLIER INCORPORATED,	)	5-493 84-1273
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Polk County (No. CL55-32215) - Harry Perkins, Judge.

Plaintiff appeals from district court granting defendant's special appearance. ***REVERSED AND REMANDED.***

Thomas E. Leahy of Grefe & Sidney, Des Moines, for plaintiff-appellant.

Keith Uhl and Ann Fitzgibbons of Scalise, Scism, Sandre & Uhl, Des Moines, for defendant-appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

DONIELSON, P.J. 43

The trial court sustained the defendant's special appearance on the ground the defendant had insufficient contacts with the State of Iowa to confer jurisdiction upon the Iowa courts. The plaintiff has appealed, contending Iowa can exercise personal jurisdiction over the defendant.

Walter Cross, an Iowa resident, asserts that he was solicited in 1983 to apply for a job with Lightolier, Inc., a New York corporation. Cross flew to Chicago for an interview on June 14, 1983. A representative of Lightolier later telephoned Cross at his home in Des Moines and offered Cross a job in Lightolier's Kansas City office. Cross accepted the offer. Cross asserts that the employment contract required Cross to do several things before he left Iowa: to terminate his position with his previous employer, to sell his Des Moines house, to buy a car for use in his employment with Lightolier, to begin to familiarize himself with Lightolier's line of products, and to inform potential customers that he was joining Lightolier.

Lightolier dismissed Cross from his new employment before he started working. On January 17, 1984, Cross filed the present suit alleging breach of contract in Polk County District Court. Lightolier responded with a special appearance, asserting that the Iowa court lacked personal jurisdiction because Lightolier did not have sufficient minimum contacts with the State of Iowa to satisfy due process principles. Lightolier asserted that it has no offices, agencies, or property in Iowa, that it is not licensed to do business in Iowa, that it does not in fact do business in Iowa, that it has never tried to avail itself of the benefits of Iowa law, and that it has engaged in no activity subjecting it to service of process in this case. Lightolier also asserted that the contract with Cross was not made in Iowa and was not to be performed in whole or in part in Iowa.

41

The trial court sustained Lightolier's special appearance. The trial court concluded:

> That this court does not have in personam jurisdiction over the defendant. It appears without dispute that the parties did not enter into a contract to be performed in whole or in part in the state of Iowa. The action of the plaintiff in preparing to perform the alleged contract by terminating his Iowa employment, purchasing a new car and placing his home in the hands of a realtor for sale were unilateral actions of the plaintiff and not acts of the defendant. Those actions do not confer jurisdiction over this defendant to this court. The reasons urged by defendant in its supporting brief are by this reference adopted by the court and are the basis for this ruling. (emphasis in original)

Defendant's supporting brief did not address the "doing business" contacts alleged by Cross. As the trial court's ruling indicates, no specific findings were made as to the "doing business" issue.

Cross has appealed from the district court ruling which sustained Lightolier's special appearance. He contends Lightolier is subject to Iowa's jurisdiction in this case because his contract with Lightolier was to be performed in part in Iowa. He also contends Lightolier is subject to Iowa's jurisdiction because it does business in Iowa by maintaining a full-time sales representative stationed in Iowa and selling products worth about $500,000 per year in Iowa, and has availed itself of Iowa courts by filing a previous unrelated suit in Iowa. Finally, he contends that Lightolier should be subject to Iowa's jurisdiction because it committed a tortious act within Iowa by its conduct toward him.

While this appeal was pending, appellee-Lightolier filed a motion to strike the appellant-Cross's brief. Lightolier alleged various technical violations of the rules of appellate procedure, and it also alleged that Cross's appellate brief included factual allegations not supported by the record. In a reply to a resistance to its motion to strike, Lightolier expanded on these allegations by stating, among other things, that a certain affidavit of Walter Cross was not part of

the record on appeal. The supreme court ordered that Lightolier's motion to strike Cross's appellate brief, including the issue of whether the affidavit was part of the record, be submitted with this appeal.

I.

Before we can address the issue of personal jurisdiction over a foreign corporation raised by Cross, another jurisdictional issue, namely service of process, which is raised on appeal by Lightolier, must be addressed.

Cross sought proper service of process and personal jurisdiction under Iowa Code § 617.3, and we review his compliance with that statute.

To validly effectuate service of process under § 617.3, the plaintiff must file a copy of the original notice and petition with the Secretary of State's office. The Secretary of State then issues a certificate of filing which is to be filed with the district court. Section 617.3 mandates service of process shall be by registered or certified mail. The plaintiff met all the requirements of service of process under § 617.3 except one: for an unexplained reason he did not file the certificate of filing from the Secretary of State with the district court.

This shortcoming in the service of process is not fatal however. The Iowa Supreme Court has held that failure to raise a service of process issue under § 617.3 at the trial level precludes the defendant from raising the issue for the first time on appeal. DeCook v. Environmental Security Corp., 258 N.W.2d 721, 725 (Iowa 1977) (defendant's conceded proper proof of service issue was not presented to trial court, so supreme court held issue could not be raised on appeal for first time).

While Lightolier no doubt would claim its special appearance did challenge

service of process, we find this not to be the case.[1] Lightolier's special appearance did indicate that it challenged "personal service and in personam jurisdiction," but the six alleged grounds to sustain such appearance all relate to minimum contact or personal jurisdiction type arguments. None of the allegations in the special appearance address any deficiency with proper proof of service. Because using the magic words "personal service" in the special appearance does not constitute raising the issue to the trial court, we find that the service of process issue is precluded on appeal.

II.

As to the merits of the personal jurisdiction issues properly raised, Cross claims: that Lightolier was "doing business" in Iowa, the contract activity satisfies the requirements of Iowa Code § 617.3 (1983), and the alleged tortious activity by Lightolier satisfies Iowa Code § 617.3. For good reason, Lightolier claims Cross only appeals on the two grounds under § 617.3. The trial court apparently ruled on the special appearance by only reviewing the § 617.3 grounds. we do not need to address the § 617.3 grounds for exercising personal jurisdiction nor the issue of the disputed affidavit (pp. 58-62 of the appendix) which was raised pending appeal because there is sufficient evidence in the record from another affidavit made by Cross (pp. 22-25 of the appendix) that Lightolier may be "doing business" in Iowa to satisfy minimum contact requirements.

Iowa Code § 617.3 is a single act statute which applies to foreign corporations contracting or committing torts in Iowa. Section 617.3 provides, in relevant part:

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[1]It is fair to assume the proof of service issue was never raised to the trial court. However, the trial court in its ruling on the special appearance and reconsideration of the special appearance motions refers to a hearing but no transcript of such hearing exists for our review. The briefs filed to the trial court do indicate that no error was preserved by Lightolier on any proper proof of service issues.

> If a foreign corporation makes a contract with a resident of Iowa to be performed in whole or in part by either party in Iowa, or if such foreign corporation commits a tort in whole or in part in Iowa against a resident of Iowa, such acts shall be deemed to be doing business in Iowa by such foreign corporation for the purpose of service of process or original notice on such foreign corporation under this section, and, if the corporation does not have a registered agent or agents in the state of Iowa, shall be deemed to constitute the appointment of the secretary of state of the state of Iowa to be its true and lawful attorney upon whom may be served all lawful process or original notice in actions or proceedings arising from or growing out of such contract or tort.

This means that to be "doing business" for personal jurisdiction purposes, the contacts of the party over whom jurisdiction is sought must relate to the cause of action. Based on these jurisdictional requirements, Lightolier's contacts regarding the alleged contract and tort claims are, admittedly, close questions. Cf. Sporcam, Inc. v. Greeman Brothers, Inc., 340 F. Supp. 1168 (S.D. Iowa 1972).

However, "doing business" for personal jurisdiction purposes can also be satisfied when a corporation engages in systematic and continuous activity in the forum state even though the cause of action is unrelated to the contacts used to establish personal jurisdiction. Davenport Machinery & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 434-35 (Iowa 1982) (citing Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 72 S. Ct. 413, 96 L. Ed. 485 (1952) reh'g denied, 343 U.S. 437, 725 S. Ct. 645, 96 L. Ed. 2d 1332 (1952)); see also Mayer v. Wright, 234 Iowa 1158, 1163, 15 N.W.2d 268, 270-71 (1944) (requirement for "doing business" in Iowa); Kalbach v. Service Station Equipment Co., 207 Iowa 1077, 1079, 224 N.W. 73, 75 (1929). This issue has been framed as follows:

> The problem of whether a [federal] court may assert jurisdiction over a corporation under state law consistently with the limitations imposed by International Shoe and its progeny often is approached in terms of whether defendant's local activities constitute "doing business." This concept is employed by both the older state jurisdic-

> tion statutes and the newer long-arm statutes. A myriad of factors have been taken into account in making a determination on this question.
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> [W]hen the claim is based upon an act committed outside the state that has no consequences within the state, the propriety of asserting jurisdiction depends on whether the corporation *has carried on continuous and systematic*, although unrelated, activities in the state. If this proves to be the case, it is consonant with "fair play and substantial justice" to require the corporation to defend the suit.

4 C. Wright & A. Miller, Federal Practice and Procedure, § 1069, at 251, 261 (1969). See also Taisho Fire & Marine v. Vessel Montana, 335 F. Supp. 1238, 1241 (N.D. Cal. 1971) (Jurisdiction asserted over foreign *corporation where* cause of action did not arise from activities in forum state because "where a nonresident defendant 'does business' in a state, jurisdiction may be had over it *even* where the cause of action is unrelated to the activities in the forum, since the doing of business, the purposeful availment of the state's opportunities, is sufficient contact in and of itself. Perkins v. Benguet Consolidated Mining Co.") Cf. Agtanase v. Economy Baler Co., 343 F.2d 187, 197 (8th Cir. 1965).

The principles presented in this appeal were squarely addressed in Al-Jon, Inc. v. Garden State Iron & Metal, 301 N.W.2d 709 (Iowa 1981). In Al-Jon, the court stated:

> The question here is whether the nonresident defendant corporation had sufficient contacts with Iowa to permit our courts to acquire personal jurisdiction over it. The trial court sustained defendant's special appearance after finding defendant did not have "the necessary minimum contact with the State of Iowa" to subject it to jurisdiction under *Iowa R. Civ. P. 56.2 and the governing* due process stricture. We affirm.
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> *Jurisdiction* under rule 56.2 is coextensive with what is permitted by the due process clause of U.S. Const. amend. XIV. Larsen v. Scholl, 296 N.W.2d 785, 788 (Iowa 1980). Therefore the only relevant issue is whether in this case personal jurisdiction over the nonresident defen-

> dant is consistent with due process. Controlling principles are delineated in Larsen and need not be fully repeated here. See id. at 787-88.
>
> Because due process is infringed unless the defendant has had sufficient minimum contacts with Iowa, we must determine whether the contacts were sufficient in the present facts. In doing so, we consider:
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> (1) the quantity of the contacts;
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> (2) the nature and quality of the contacts;
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> (3) the source of and connection of the cause of action with those contacts;
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> (4) the interest of the forum state; and
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> (5) the convenience of the parties.
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> Id. at 788. The first three factors are most important.

Id. at 711.

While this legal authority is on point, the facts of Al-Jon are readily distinguishable because the opinion indicates the Ohio corporation, which was in the recycling business and sought to buy an Iowa-made baler, only had contacts with Iowa involving the sales contract negotiations. Apparently, no other unrelated contacts with Iowa existed in Al-Jon.

In this case, Cross alleges Lightolier filed a lawsuit in Polk County (Docket No. CL49-28970) on December 14, 1982, has a sales agent in Iowa, and sells approximately $500,000 of its products at wholesale value within this state on an annual basis. Lightolier, in its special appearance, asserted that it has no offices or agents in Iowa, is not licensed to and is not engaged in doing business in Iowa, but did not address the $500,000 in annual sales. If the facts are as Cross alleges, this could constitute systematic and continuous contacts with Iowa so as to justify exercising personal jurisdiction.

The trial court denied Cross's motion for reconsideration of its ruling on the special appearance and stated:

> The court in so ruling views the petition and affidavits in a light most favorable to the plaintiff and concludes that the acts of defendant do not rise to the level necessary to confer jurisdiction upon the Iowa courts.

Once again, the trial court did not specifically address the alleged pending lawsuit and the sales employee and the $500,000 in annual Iowa sales by Lightolier. After reviewing both rulings by the trial court regarding the special appearance, we are unwilling to assume the trial court considered these factual issues. Because a specific finding on these jurisdictional facts is necessary to determine whether personal jurisdiction can be exercised, we cannot conclude, based on the trial court's two rulings, that these factual allegations were adequately considered in relationship to the "doing business" criteria. For further determination of Lightolier's activities in Iowa, we reverse and remand.

REVERSED AND REMANDED.[2]

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[2]Given the controversy already surrounding appellant's brief, we, nonetheless, find it necessary to refer appellant's counsel to Iowa Rule of Appellate Procedure 16(a), which provides: "The appendix and brief shall be printed or duplicated on both sides of the sheet." This rule shall be followed in all future submissions counsel makes to this forum.