IN THE COURT OF APPEALS OF IOWA

No. 2-678 / 92-885

FILED
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CLERK SUPREME COURT

OMNILINGUA, INC.,

Appellant,

vs.

WALTERS & STENBERG PRODUCTIONS, INC.,

Appellee.

Appeal from the Iowa District Court for Linn County, Lynne E. Brady, Judge.

Plaintiff, OmniLingua Inc., appeals the district court's ruling that there was not sufficient minimum contacts for Iowa to exercise personal jurisdiction over the defendant. **AFFIRMED.**

Larry J. Thorson and Douglas C. Meyer of Ackley, Kopecky & Kingery, Cedar Rapids, for appellant.

Michael S. Vestle and Kathleen Corcoran of Childers & Vestle, P.C., Cedar Rapids, for appellee.

Considered by Oxberger, C.J., and Sackett and Habhab, JJ.

HABHAB, J.

The plaintiff, OmniLingua Inc., appeals the district court's determination that there was not sufficient minimum contacts for Iowa to exercise personal jurisdiction over the defendant Walters & Steinberg Productions, Inc. (hereinafter referred to as "Walters"). We affirm.

OmniLingua is an Iowa corporation, performing foreign language translation services. Walters is an Indiana business which produces commercial and industrial video tapes. At various times prior to 1991, an OmniLingua salesperson called on Walters' office in Indiana and introduced his company's services.

After receiving such general solicitation from the OmniLingua's salesperson, Walters' president contacted the salesperson regarding the translation of a video tape training program for Alcoa. Walters sought to have OmniLingua translate the English script into French, German, Spanish, Chinese, Japanese, and Korean, and record the voice-over narration of these translations.

OmniLingua's salesperson gave Walters a quote and after negotiations a price of $5991 was accepted by Walters. Walters mailed two letters to OmniLingua's Iowa office, a down payment check of $1497.75 and the return of a letter of authorization confirming the agreement. The agreement included a provision that Walters had waived review of the translations. The agreement did not provide that its execution would constitute an acceptance by Walters of

jurisdiction in Iowa in the event of any dispute. The translation work was performed in Iowa and the finished work product was delivered to Walters. Alcoa refused to accept the work by OmniLingua. OmniLingua's president called Walters to request a meeting with Alcoa to discuss the problems. Walters, under Alcoa's instructions, ultimately refused to accept the work performed by OmniLingua.

OmniLingua filed suit against Walters claiming breach of contract for its refusal to pay the remainder of the fees owing under the agreement. The suit also sought recovery on the basis of unjust enrichment.

Walters filed a motion to dismiss asserting that the Iowa district court lacked personal jurisdiction over Walters. The district court entered an order finding Walters had insufficient minimum contacts with Iowa for the court to exercise jurisdiction over Walters and therefore granted Walters' motion to dismiss. OmniLingua appeals.

Our review of challenges to personal jurisdiction is limited to corrections of errors at law. Percival v. Bankers Trust Co., 450 N.W.2d 860, 861 (Iowa 1990). The plaintiff has the burden of sustaining the requisite jurisdiction; however, once a prima facie case has been established, the burden shifts to the defendant to produce evidence to rebut the prima facie showing. Id. The district court's findings of fact have the effect of a

special verdict and are binding if supported by substantial evidence. Id.

In resolving jurisdictional questions regarding nonresidents, the courts are to employ a two-step process. Svendsen v. Questor Corp., 304 N.W.2d 428, 429 (Iowa 1981). Courts first determine whether there has been compliance with Iowa Code section 617.3, the long-arm statute. Id. The court then considers whether the exercise of personal jurisdiction under the long arm statute comports with the requirements of due process. Walters does not contend OmniLingua failed to comply with section 617.3, thus only the constitutional issue is presented in this case.

The due process clause limits the power of a state court to render a valid personal judgement against a nonresident defendant by permitting the exercise of in personam jurisdiction only so long as the defendant has "certain minimum contacts with the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." Id. at 430 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945).

We must consider whether a defendant has purposefully established minimum contacts in a forum state and if the defendant's conduct and connection with a forum state are such that it should reasonably anticipate being haled into court there. Burger King Corp. v. Rudzewicz, 471 U.S. 462,

474, 105 S. Ct. 2174, 2183, 85 L. Ed. 2d 528, 542 (1985). The unilateral activity of one who claims some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239-40, 2 L. Ed. 2d 1283, 1298 (1958).

Because the notion of minimum contacts has never been a fixed concept, it cannot be mechanically applied. Kulko v. California Superior Court, 436 U.S. 84, 92, 98 S. Ct. 1690, 1696-97, 56 L. Ed. 2d 132, 141 (1978). Our supreme court has set out five factors for determining whether the exercise of personal jurisdiction over a nonresident defendant is constitutionally permissible, the first three being the most important. Larsen v. Scholl, 296 N.W.2d 785, 788 (Iowa 1980). Those factors are as follows:

> (1) The quantity of the contacts; (2) The nature and quality of the contacts; (3) The source and connection of the cause of action with those contacts; (4) The interest of the forum state; and (5) The convenience of the parties.

Id. at 788.

In light of the five factors we find that Walters did not have the requisite minimum contacts with Iowa. Walters contacted OmniLingua only after OmniLingua's salesperson had done a presentation in Indiana and made follow-up calls. Walters mailed two letters to Iowa, a down payment check and the return of an authorization letter. There were some telephone calls but these were initiated by

OmniLingua and made for the purpose of demanding payment on the balance due and to arrange a meeting with Alcoa.

Basically, Walters placed an order for translation and videotaping services with an Iowa company. In general, an Iowa seller of goods to a foreign buyer cannot ordinarily subject the buyer to suit in Iowa courts. Davenport Machine & Foundry v. Adolph Coors Co., 314 N.W.2d 432, 433 (Iowa 1982). Our courts have recognized a distinction between "active" and "passive" purchasers. Al-Jon, Inc. v. Garden Street Iron & Metal, 301 N.W.2d 709, 714 (Iowa 1981). An active purchaser aggressively solicits a business transaction and participates in some way in production of the subject goods. A passive purchaser simply places an order and awaits delivery of the goods. Id.

The situation in this case is more analogous to that of a passive purchaser. Although the product involved was custom made for Walters by OmniLingua, Walters had very little input into the final product, shown by the authorization form waiving review of the translations. Although Walters contacted OmniLingua to set up the order, this was after several solicitations by OmniLingua's salesperson.

We cannot find Walter's actions were such that it could be said to have created a "substantial connection" with the forum state. Asahi Metal Industry Co. v. Superior Court,

480 U.S. 102, 109, 107 S. Ct. 1026, 1031, 94 L. Ed. 2d 92, 102 (1987). The district court's decision is affirmed.

AFFIRMED.