

STATE OF MICHIGAN
COURT OF APPEALS

THE ESTATE OF ROSS MICHAEL
MARINO, Deceased, by its Personal
Representative Eugene Anthony Marino,
individually, and EUGENE ANTHONY
MARINO, MARY CATHERINE MARINO,
WILLIAM MARINO, and EDWIN
MARINO,

UNPUBLISHED
May 3, 1996

Plaintiffs-Appellees,

v

No. 176192
LC No. 91-403267-NO

ODETUR S. A. de C.V., d/b/a TUCAN
CUN BEACH RESORT AND VILLAS,
individually, jointly and severally,

Defendant-Appellant.

Before: Griffin, P.J., and Smolenski and L. P. Borrello,* JJ.

PER CURIAM.

The dispositive issue presented in this appeal is whether defendant, a hotel/resort operating in Cancun, Mexico, purposefully availed itself to the privilege of conducting business in Michigan, thereby subjecting itself to limited personal jurisdiction in the courts of the State of Michigan. We hold that defendant did not possess sufficient minimum contacts with Michigan to warrant the exercise of personal jurisdiction.

I

In January, 1988, plaintiffs' decedent, Ross Marino, drowned in the Gulf of Mexico. Decedent had allegedly been swimming off the beach adjacent to defendant's Tucan Cun Beach Resort and Villas

*Circuit judge, sitting on the Court of Appeals by assignment.

in Cancun, Mexico, where he and a companion were staying.

In January, 1991, plaintiffs commenced this action in the Oakland Circuit Court alleging negligence and wrongful death. After service of process¹, defendant failed to answer or otherwise respond to plaintiffs' complaint. On July 7, 1992, plaintiffs moved for a default judgment. At the hearing on the motion, the circuit court requested plaintiffs' counsel to submit a brief on the issue whether it had personal jurisdiction over defendant. Thereafter, the lower court entered a default judgment against defendant.

After plaintiff instituted garnishment proceedings against defendant, defendant moved for relief from judgment. The lower court denied the motion after concluding that it possessed personal jurisdiction over defendant. Defendant's motion for reconsideration was later denied. Defendant now appeals, and we reverse.

II

On appeal, defendant contends that it possessed insufficient minimum contacts with Michigan for the circuit court to exercise personal jurisdiction over it consistent with the Due Process Clause of the Fourteenth Amendment. We agree.

The following salient facts are not in dispute. Decedent decided to vacation at defendant's resort after contacting the Bee Kalt Travel Agency of Birmingham, Michigan. Pursuant to decedent's request for information, a representative of the travel agency had mailed decedent several fliers that detailed available charter packages. Decedent decided to purchase a charter package to Cancun that was offered through travel wholesaler Hamilton, Miller, Hudson and Fayne. Selecting from one of the various lodging options listed on the wholesaler's flier, decedent chose to stay at defendant hotel. The travel agency arranged decedent's vacation through the wholesaler.

In creating the charter package to Cancun, the wholesaler's president, Michael Fayne, traveled to Mexico to inspect hotels and to negotiate contracts for the rental of hotel rooms that the wholesaler could sell to customers who enrolled in one of its charter packages. While in Mexico, Fayne inspected defendant's hotel and negotiated a contract with defendant's representatives for the advance purchase of a block of rooms. Upon the conclusion of the negotiations, Fayne returned to Michigan.

Thereafter, defendant faxed Fayne a memorandum to confirm the terms of the agreement along with a contract that Fayne was asked to sign and return. The contract provided that the wholesaler would pay defendant \$82,000 in exchange for the rental of a block of twenty rooms that, between December 15, 1987, and April 15, 1988, the wholesaler could use at its discretion. The price the wholesaler paid defendant was not affected by the wholesaler's ability to resell the rooms to its own customers. The contract provided for no continuing relationship between the parties and provided that all contractual terms "will be under the jurisdiction of the Mexico City Law Courts." Fayne executed the contract and returned it to defendant in Mexico.

The wholesaler then composed and printed fliers to advertise the charter package it offered in Cancun. Included on the fliers was a brief written description of the several hotels in which a charter traveler could choose to stay. Although defendant was among those listed on the flier, defendant provided no input in either the substance or the distribution of the flier.

The fee decedent paid for the charter package and hotel reservations was sent to the wholesaler. Decedent had no contact with defendant prior to his arrival in Mexico. Finally, after decedent's death, defendant faxed the wholesaler two letters, each requesting instructions on the handling of decedent's body.

III

Plaintiffs do not argue that defendant's contacts with Michigan are sufficiently "continuous and systematic" so as to support general jurisdiction under MCL 600.711; MSA 27A.711. Instead, plaintiffs contend that jurisdiction exists pursuant to Michigan's long-arm statute, MCL 600.715; MSA 27A.715, which extends limited personal jurisdiction to out-of-state defendants on the basis of specific acts or contacts with Michigan.²

In *Mozdy v Lopez*, 197 Mich App 356, 358-359; 494 NW2d 866 (1992), this Court stated that:

There are two issues in deciding whether a court of this state can exercise jurisdiction under this statute. First, whether the rules of statutory construction support the exercise of jurisdiction over the defendant[.]. Second, whether the exercise of limited personal jurisdiction violates the Due Process Clause of the Fourteenth Amendment. *Witbeck v Bill Cody's Ranch Inn*, 428 Mich 659, 666, n 3; 411 NW2d 439 (1987); *Walter v M Walter & Co, Inc*, 179 Mich App 409, 412; 446 NW2d 507 (1989).

The issue of statutory construction need not be reached, however, if the exercise of jurisdiction would violate due process. *Witbeck, supra* at 666; *Mozdy, supra* at 359; *Gooley v Jefferson Beach Marina, Inc*, 177 Mich App 26, 30; 441 NW2d 21 (1989).

Due process "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Witbeck, supra* at 666, quoting *Int'l Shoe Co v Washington*, 326 US 310, 319; 66 S Ct 154; 90 L Ed 95 (1945); see also *Hughes v Cabanas del Caribe Hotel*, 744 F Supp 788, 794 (1990), aff'd 947 F 2d 945 (CA 6, 1991). The exercise of personal jurisdiction comports with due process only if defendant has "purposefully established 'minimum contacts' in [Michigan] 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Witbeck, supra* at 666, quoting *Int'l Shoe, supra* at 316; see also *Burger King Corp v Rudzewicz*, 471 US 462, 474; 105 S Ct 2174; 85 L

Ed 2d 528 (1985); 161 ALR 1057 (1945). Due process is not satisfied simply because a contact with this state was “foreseeable.” *Witbeck, supra* at 666-667. Instead, “the foreseeability that is critical to due process analysis . . . is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into Court there.” *Witbeck, supra* at 667, quoting *World-Wide Volkswagen Corp v Woodson*, 444 US 286, 297; 100 S Ct 559; 62 L Ed 2d 490 (1980).

In *Mozdy, supra* at 359, this Court summarized the standard for determining whether minimum contacts exist as follows:

Whether sufficient minimum contacts exist between a nonresident defendant and Michigan to support exercising limited personal jurisdiction is determinable by a three-part test. First, the defendant must have purposefully availed itself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws. Second, the cause of action must arise from the defendant's activities in the state. Third, the defendant's activities must be so substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable. *Moore v McFarland*, 187 Mich App 214, 218; 466 NW2d 309 (1991); *Walter, [supra at]* 413.

See *Witbeck, supra* 667-669. Additionally, where the case involves a nonresident alien defendant, the third criterion is assessed with special emphasis on the "unique burdens placed on one who must defend oneself in a foreign legal system." *Asahi Metal Industry Co v Superior Court*, 480 US 102, 114; 107 S Ct 1026, 1033; 94 L Ed 2d 92, 105 (1987); see *Mozdy, supra* at 361.

IV

In the case at bar, the first prong of the minimum contacts test is not satisfied. Defendant is a Mexican corporation that has no offices, employees, or operations in Michigan. Defendant has no specific marketing plan aimed at prospective customers in Michigan. Nor did defendant solicit the business of the Michigan-based travel wholesaler who, on its own accord, sent a representative to Mexico to negotiate a temporary rental of hotel rooms. Defendant’s sole purposeful contact with Michigan occurred when, in response to the contact that had been initiated by the Michigan-based wholesaler, it faxed the wholesaler a contract to memorialize the agreement that had been reached in Mexico. The contract involved neither the performance of services in Michigan nor the sale of any product to be brought into Michigan. Furthermore, the contract contemplated no continuing arrangement between the parties but, instead, memorialized the single, temporary purchase of a block of rooms in a Mexican hotel. In fact, defendant specifically avoided availment to the protection of Michigan law by providing that the terms of the contract would be under the authority of Mexican courts. Moreover, defendant played no role in either the composition or distribution of the advertisements the wholesaler printed in attempt to resell the rooms it had purchased. Nor had decedent made any contact with defendant prior to his arrival in Mexico.

Under these circumstances, we conclude that defendant did not purposefully avail itself to the privilege of conducting activities in Michigan. *Khalaf v Bankers & Shippers Inc*, 404 Mich 134, 148; 273 NW2d 811 (1978); see *Hughes, supra*. Therefore, defendant's limited connection with this state was not such that it would be reasonable for it to expect to be hauled into a Michigan court. See *Witbeck, supra* at 667, quoting *World-Wide Volkswagen, supra* at 297. Accordingly, we conclude that the trial court erred in concluding that it had jurisdiction to render judgment over defendant.

Our conclusion that defendant's contacts with Michigan do not satisfy the first prong of the due process analysis makes discussion of the remaining criteria unnecessary. Nevertheless, we conclude that the second and third prongs of the due process test are similarly unsatisfied. We reject plaintiffs' contention that decedent's death by drowning in the Gulf of Mexico arose from or is sufficiently connected to defendant's decision to rent a block of rooms to a Michigan-based travel wholesaler who, in turn, re-rented one such room to a Michigan resident. See *Hughes, supra*; see generally *World-Wide Volkswagen, supra*. Furthermore, it would not be reasonable to force defendant, a Mexican business, to travel to Michigan to defend against actions that occurred exclusively in Mexico. Indeed, such an extension of jurisdiction would force defendant to retain counsel in a foreign county and send its representatives, witnesses, and experts from Mexico to Michigan. Moreover, the resolution of the case would force Michigan courts to translate and interpret Mexican law regarding the duty a hotel owes a tourist who decides to swim in coastal waters adjacent to property owned by the hotel.

We reject plaintiffs' contention that the Sixth Circuit's decision in *Theunissen v Matthews*, 935 F 2d 1454 (CA 6 1991), supports a contrary holding. In *Theunissen*, the defendant maintained a residence in Michigan and conducted a business in Windsor, Ontario, that regularly contracted with Michigan businesses to ship goods to Michigan. Moreover, the incident spawning the lawsuit in *Theunissen* occurred while the plaintiff, a truck driver residing in Michigan who had contracted with the defendant to ship defendant's goods into Michigan, was preparing goods to be transported to Michigan. In short, the contacts with Michigan possessed by the defendant in *Theunissen* are significantly greater than those possessed by defendant in the instant case. Accordingly, we do not consider the conclusion in *Theunissen* useful in directing our resolution of the case at bar. We consider the facts of this case far more analogous to the circumstances involved in both *Witbeck, supra*, and *Hughes, supra*. Therefore, we consider the holdings in *Witbeck* and *Hughes* significantly more useful in guiding our conclusion.

In accordance with the foregoing, we hold that plaintiffs have failed to satisfy their burden of showing that the exercise of personal jurisdiction over defendant would be consistent with the Due Process Clause of the Fourteenth Amendment. Thus, because a judgment entered without personal jurisdiction is void, *Thos P Gonzalez Corp v Consejo Nacional de Produccion de Costa Rica*, 614 F2d 1247, 1255 (CA 9 1980), the judgment of the circuit court must be vacated.

Reversed.

/s/ Richard Allen Griffin
/s/ Michael R. Smolenski
/s/ Leopold P. Borrello

¹ In view of our resolution of the minimum contacts issue, we choose not to address the question of whether the service of process was legally deficient

²MCL 600.715; MSA 27A.715 provides in full:

The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgments against such corporation arising out of the act or acts which create any of the following relationships:

- (1) The transaction of any business within the state.
- (2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort.
- (3) The ownership, use, or possession of any real or tangible personal property situated within the state.
- (4) Contracting to insure any person, property, or risk located within this state at the time of contracting.
- (5) Entering into a contract for services to be performed or for materials to be furnished in the state by the defendant.