ARIZONA COURT OF APPEALS

DIVISION ONE

ALAN SINGER, Plaintiff/Appellant v. JAMES PALMER a.k.a JONATHAN JAMES PALMER, and MONDEX CORPORATION, Defendants/Appellees	)	No. 1 CA-CV 18-0707 Mohave County Superior Court Case No. B8015CV201804044

PLAINTIFF/APPELLANT'S OPENING BRIEF

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INTRODUCTION

This Court is asked to rule on whether service of process upon a non-Indian defendant delivering a lecture at Scottsdale Community College, which is on leased tribal land, constitutes valid service in a state court action.

Both Arizona law and United States Supreme Court precedents hold that the dispositive question in determining subject matter jurisdiction is whether the parties are tribal members. *State v. Zaman* (1997) 946 P.2d 459, 190 Ariz. 208 ("Zaman I"); *State v. Zaman* (1999) 984 P.2d 528, 194 Ariz. 442 ("Zaman II").

"The State of Arizona, a non-Indian party, brought this action against Zaman, also a non-Indian. Jurisdiction over an action between two non-Indian parties...lies in state court." *Zaman I*, at p. 460. *Langford v. Monteith* (1880) 102 U.S. 145, 147, 26 L.Ed. 55 ("when a state has civil jurisdiction over a non-Indian on a reservation, it has jurisdiction to serve process on that non-Indian on a reservation."). See also *Zaman II,* holding same (I # 8, p. 4).

A state may properly exercise personal jurisdiction over a non-resident defendant who is served while physically present within the state even for a brief period, and even when his presence is unrelated to the subject matter of the controversy. *Burnham v. Superior Court* (1990) 495 U.S. 604; *Rutherford v. Rutherford* (1998) 971 P.2d 220, 193 Ariz. 173 (I # 8, pps. 5-6). Because both

defendants were personally served by a process server registered in the state of Arizona, personal jurisdiction in Arizona is proper.

Despite the weight of this authority, and the fact that none of the parties are tribal members, the trial court dismissed the instant action based upon Plaintiff's alleged non-compliance with tribal law.

STATEMENT OF THE CASE

A related case, B-8015-CV-201804018 ("case 4018"), was dismissed for lack of personal jurisdiction based upon Mondex' false claim that it lacked sufficient contacts with Arizona. An appeal from that dismissal is pending (Case No. 1 CA-CV 18-0346).

In the first case, Mondex, through its principal, James Palmer, filed a false affidavit, claiming that defendant Mondex had no contacts with the State of Arizona. In that case, Mondex was served at its corporate headquarters in Toronto, Ontario. Service of process was not challenged. The only issue was whether Mondex created sufficient contacts with Arizona so that the court could exercise jurisdiction over it.

As Plaintiff/Appellant was preparing his opposition to the motion to dismiss in the first case, Plaintiff discovered that Palmer, the affiant, had committed

perjury. Palmer was speaking in Scottsdale on April 12, 2018.

Therefore, Plaintiff filed the instant action. Both Palmer and Mondex were served in Scottsdale, Arizona by a registered process server (I #4 and I #5).

Nevertheless, the instant action (B-8015-CV-201804044) was also dismissed for lack of personal jurisdiction on October 17, 2018 and was certified under Rule 54(c).

A notice of appeal was timely filed on November 14, 2018. This court has jurisdiction under Arizona Revised Statutes ("A.R.S.") 12-2101(A)(1).

STATEMENT OF FACTS

Plaintiff/Appellant Alan Singer sued Mondex, a corporation headquartered in Toronto, Ontario. The first case (B-8015-CV-201804018), was dismissed for lack of personal jurisdiction based upon Mondex' purported lack of minimum contacts. An appeal from that dismissal is pending in this Court (Case No. 1 CA-CV 2018-0346).

In the related case, James Palmer, the owner of Mondex swore"under oath" that it had no contacts with Arizona, that it does not advertise in Arizona, that it does no business here, and that it was not served in Arizona (I #3, Exhibit B). After the first case was filed and served, after Mondex' motion to dismiss was

filed, and **Plaintiff/Appellant was preparing his opposition to said motion, Plaintiff discovered that Palmer had committed perjury, because Palmer *was* in Arizona.**

Therefore, Plaintiff filed the instant action, and had both Mondex and Palmer served by a process server registered in Arizona (I # 4 and 5).

Mondex and Palmer filed the identical perjured affidavit in the instant action (I #3, Exhibit B). Unfazed by Palmer's perjury, the trial court dismissed this action also (I # 12), this time because Appellant purportedly did not comply with tribal rules of civil procedure.

History of this litigation

The parties

Mondex Corporation ("Mondex") is a company purportedly specializing in asset recovery and in reclaiming art looted by the Nazis. Mondex is incorporated in Ontario, Canada, but actively recruits business internationally, including in Arizona. James Palmer is the owner, founder, former president, and the decision maker of Mondex. I # 1.

As part of this aggressive international marketing, Palmer misrepresents his credentials, claiming to be a lawyer, and that Mondex is a law firm. In fact,

Palmer has no formal legal education, and Mondex is not a law firm. Since both Mondex and Palmer are not licensed, they can side step legal ethics at will. A client has no real recourse when Mondex refuses to turn over the client's share of its proceeds after recovery. I # pps. 1, 7, 11-16.

Fraudulent misrepresentations by Palmer and Mondex

The Mondex website features cases involving Mondex, including a case in Ontario entitled Estate of Morphy. The caption of that case states that "Jonathan" James Palmer represented the families of various claimants in Ontario Superior Court, falsely intimating that Palmer was an attorney. I #1, pps. 7-16.

Contrary to Palmer's and Mondex's repeated false assertions, "Jonathan" James Palmer was not a lawyer and never even bothered to get a legal education. Nevertheless, Palmer repeatedly represented others in courts and signed his e-mails as "Esq." Palmer also contacted best-selling author, Rhonda K. Garelick, who wrote *Mademoiselle: Coco Chanel and the Pulse of History*. In that book, Palmer was described as "a London-based attorney whose company, Mondex, specializes in the restitution of Jewish property stolen by the Nazis..."(p. 336).

With this background, it is not surprising that Mondex and Palmer filed a perjured affidavit claiming that Mondex was not served in Arizona, when it was.

(I # 3, Exhibit B).

Course of proceedings in the trial court:

As stated above, defendants were served while Palmer was lecturing at Scottsdale Community College (I # 4 and 5). Appellant immediately raised the issue of Palmer's perjury (I # 8, p.1, 2), but these objections were ignored.

Defendants filed a motion to dismiss (I # 3). Appellant responded with his Declaration (I # 7), the Declaration of Judith Rottmann (I # 6) describing the jurisdictional contacts and a 17 page memorandum of Points and Authorities (I # 8).

Instead of ruling on personal jurisdiction, the trial court responded with an order demanding simultaneous briefing on the issue of service of process (I # 9), and a briefing on why this case was not barred by the res judicata effect of the prior case which was on appeal.

This decision must be reversed because: (1) the tribal court had no jurisdiction over this case; (2) the Arizona Supreme Court and the United States Supreme Court held that service of process by state officers in such a circumstance is proper; (3) the trial court again ignored defendants' contract waiving personal jurisdiction in Arizona; (4) after deciding that this case is not barred by res

judicata (I # 12, p.5), the trial court dismissed Mondex anyway; (5) Palmer waived any defects in service by failing to file a timely specific objection and (6) the court failed to provide any weight to the intentional torts alleged by Plaintiff and clearly failed to read the complaint.

QUESTIONS PRESENTED

1. Whether state law applies to the service of process upon non-Indian defendants by a non-Indian plaintiff, where all the acts complained of occurred outside of the reservation.

2. Whether the Court erred by refusing to acknowledge defendants' contractual choice of law that waived personal jurisdiction; and

3. Whether the Court erred by ignoring the contacts created by the intentional torts created by Mondex and James Palmer.

ARGUMENTS

STANDARD OF REVIEW

When a trial court grants a defendant's motion to dismiss for lack of personal jurisdiction without holding an evidentiary the court's ruling is reviewed de novo. *Planning Grp. of Scottsdale, L.L.C. v. Lake Mathews Mineral Props.,*

Ltd., 226 Ariz. 262, 264 n.1, ¶ 2, 246 P.3d 343, 345 n.1 (2011). The Court views "the facts in the light most favorable to the plaintiffs but accept[s] as true the uncontradicted facts put forward by the defendants." Id. To survive a motion to dismiss for lack of jurisdiction, the plaintiff must offer facts establishing a prima facie showing of jurisdiction. *Beverage v. Pullman & Comley,* ¶ 10, 306 P.3d 71, 74 (App. 2013) aff'd as modified, 234 Ariz. 1 (2014). The burden then shifts to the defendant to rebut that showing. Id.

Furthermore, personal jurisdiction may be established by (1) physical presence; (2) consent; and (3) minimum contacts (I # 8, pps 1-2).

PROCEEDINGS IN THE SUPERIOR COURT OF ARIZONA ARE GOVERNED BY THE ARIZONA RULES OF CIVIL PROCEDURE

Article 6, section 5(6) of the Arizona Constitution grants the Arizona Supreme Court the power to promulgate statewide rules of civil procedure over all courts. Had the Supreme Court intended that all persons authorized to serve process on reservation land receive tribal court approval, the Supreme Court would have and could have said so, and has had since 1999 to make that determination. (I # 8 pps. 4-5; I #10 p. 4; I # 20, p.3):

Using the power conferred by the Constitution, the Arizona Supreme Court

created the Rules of Civil Procedure, including Rule 4(d) and 4(e), which provide for the qualifications of persons authorized to serve to serve process in Arizona.

Rule 4(d) states:

"(d) Who May Serve Process. (1) Generally. Service of process must be made by a sheriff, a sheriff's deputy, a constable, a constable's deputy, a private process server certified under the Arizona Code of Judicial Administration § 7-204 and Rule 4(e), or any other person specially appointed by the court. Service of process may also be made by a party or that party's attorney if expressly authorized by these rules."

Rule 4(e) states:

"(e) Statewide Certification of Private Process Servers. A person seeking certification as a private process server must file with the clerk an application under Arizona Code of Judicial Administration § 7-204. Upon approval of the court or presiding judge of the county in which the application is filed, the clerk will register the person as a certified private process server, which will remain in effect unless and until the certification is withdrawn by the court. The clerk must maintain a register for this purpose. A certified private process server will be entitled to serve in that capacity for any state court within Arizona."

12-3301. Private process servers; background investigation; fees"

"A. Private process servers who are duly appointed or certified pursuant to rules established by the supreme court may serve all process, writs, orders, pleadings or papers that are required or permitted by law to be served before, during or independently of a court action, including all such as are required or permitted to be served by a sheriff or constable pursuant to section 11-441, subsection A, paragraphs 6 and 7, section 11-447 and section 11-448... except writs or orders... or as may otherwise be limited by supreme court rule. A private process server is

an officer of the court."

There is no simply no statutory difference between a deputy sheriff and a registered process server serving a complaint, and defendants/appellees have cited none. "Proceedings in the Superior Court of Arizona are governed by the Arizona Rules of Civil Procedure. " *State v. Zaman*, 984 P.2d. 528, 194 Ariz. 442 (1999) at ¶14. If the Supreme Court disapproved of specific provisions of Rule 4, 4.1 or 4.2, it had plenty of opportunity since 1999 to amend the Rule.

Despite the lack of timely, specific jurisdictional objection by defendants, the trial court decided that Plaintiff should have complied with the Salt River Pima-Maricopa Indian Community ("SRPMIC") Rules of Civil Procedure (I # 12, pps. 3-5) merely because service of process occurred on tribal land.

The Arizona Supreme Court had already rejected this identical argument. See *State v. Zaman*, 984 P.2d. 528, 194 Ariz. 442 (1999) at ¶14. That rule [referring to Navajo Rules of Civil Procedure] "applies only to proceedings in the Navajo tribal courts. Proceedings in the Superior Court of Arizona are governed by the Arizona Rules of Civil Procedure." (I #8, p. 5; I # 10, p. 2).

The *Zaman* case involved efforts by the State of Arizona to declare Zaman, a non-Indian living on the Navajo reservation in Arizona, the father of an infant

daughter. The mother was a Navajo, and the child was eligible to become a member of the tribe. The issue was whether the service of process was lawful when carried out via state law methods, in this case, by personal service by a deputy sheriff. The service was challenged, and the trial court found that the service of process was proper.

The Court of Appeals reversed, holding that tribal land was sovereign, and process had to done by a process server recognized by the tribe. *State v. Zaman* (1998) 190 Ariz. 208, 946 P.2d 459 using identical reasoning employed by the trial court in this action.

However, the Arizona Supreme Court rejected this argument. *State v. Zaman*, 984 P.2d. 528, 194 Ariz. 442 (1999) at ¶14. That holding and its rationale is binding on the trial court.

Defendants' contention that tribal procedures apply merely because the college (where Palmer spoke for an hour) is located on leased tribal land is overblown. Indian reservations are within the political, governmental and geographical boundaries of Arizona. Enabling Act, § 20(2), A.R.S.; *Draper v. United States*, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419; *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456; *Porter v. Hall*, 34 Ariz. 308, 271 P. 411. This contention does not prevent an Arizona court from exercising jurisdiction over defendants.

See also *Nevada v. Hicks* (2001) 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398. *Strate v. A-1 Contractors* (1997) 520 U. S. 438.

"State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. *Worcester v. Georgia* (1832) 6 Pet. 515, 561 (1832)," *White Mountain Apache Tribe v. Bracker* (1980) 448 U. S. 136, 141 (1980). *See Nevada v. Hicks* (2001) 533 U.S. 353, fn 4.

"Ordinarily," it is now clear, "an Indian reservation is considered part of the territory of the State." *U. S. Dept. of Interior, Federal Indian Law* (1988) 510, n. 1 (1958), citing *Utah & Northern R. Co. v. Fisher*, 116 U. S. 28 (1885); see also *Organized Village of Kake v. Egan* (1962) 369 U. S. 60, 72. William C. Canby, Jr., *American Indian Law* 151 (2d ed. 1988) ("State courts have jurisdiction over suits by non-Indians against non-Indians, even though the claim arose in Indian country, so long as Indian interests are not affected. State court process may be served in Indian country in connection with such a suit.").

Strate v. A-1 Contractors (1997) 520 U. S. 438 involved a catastrophic motor vehicle accident on a highway owned by a tribe but maintained by the state. None of the parties were Indians, and the case was tried in tribal court. After a

large adverse verdict against them, defendants filed an action for declaratory relief, claiming that the tribal court had no jurisdiction. In **a unanimous decision**, the United State Supreme Court held that there was no jurisdiction over the case because none of the parties were tribal members. "After *Strate*, it is undeniable that a tribe's remaining inherent civil jurisdiction to adjudicate civil claims arising out of acts committed on a reservation depends in the first instance on the character of the individual over whom jurisdiction is claimed, not on the title to the soil on which he acted. The Court looks first to human relationships, not land records, and it should make no difference *per se* whether acts committed on a reservation occurred on tribal land or on land owned by a nonmember individual in fee. **It is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact.**" *Nevada v. Hicks* (2001) 533 U.S. 353 at pps. 381.

"A rule generally prohibiting tribal courts from exercising civil jurisdiction over nonmembers, without looking first to the status of the land on which individual claims arise, also makes sense from a practical standpoint, for tying tribes' authority to land status in the first instance would produce an unstable jurisdictional crazy quilt. Because land on Indian reservations constantly changes hands (from tribes to nonmembers, from nonmembers to tribal members, and so

on), a jurisdictional rule under which land status was dispositive would prove extraordinarily difficult to administer and would provide little notice to nonmembers, whose susceptibility to tribal-court jurisdiction would turn on the most recent property conveyances." *Nevada v. Hicks* (2001) 533 U.S. 353 at pps. 381-383.

THERE IS NO TRIBAL COURT JURISDICTION AND THEREFORE THE TRIBAL RULES OF CIVIL PROCEDURE ARE IRRELEVANT

In their supplemental briefing, defendants/appellees referred to Plaintiff/Appellant's alleged non-compliance with the SRPMIC Code of Civil Procedure.(I # 11, pps. 2).

The preamble to the Salt River Rules of Civil Procedure states:

"Code" means the Code of Ordinances of the Salt River Pima-Maricopa Indian Community.

"Court" means the Salt River Pima-Maricopa Indian Community Court as defined in the Code.

The subject matter jurisdiction of the Community Court is defined in the Code of Ordinances 4.1 (b) and (d) which specify civil jurisdiction of that court:

"(b) Subject matter jurisdiction limited by council action. The ***Community court*** shall have jurisdiction in all cases involving disputes... over any ***land*** located within the boundaries of the reservation..." [Emphasis added].

"(d) Civil jurisdiction over persons. The Community court shall have jurisdiction in all cases wherein:
(1) The defendant is a member of the Community;
(2) The defendant is domiciled or residing within the Community;
(3) The defendant has caused an event to occur within the Community out of which the claim which is the subject matter of the complaint arose;
(4) The counter-defendant has filed an action in Community court against the counterclaimant arising out of the subject matter of such action, and which counterclaim might be brought under the federal rules of civil procedure;
(5) The defendant is a real party in interest to a lease of land and/or improvements within the Community and then as to matters involving such leasehold interests; or
(6) The defendant is a real party in interest regarding the ownership of land and/or improvements located within the reservation boundaries and sought to be acquired pursuant to the powers of eminent domain."

Subject matter jurisdiction cannot be waived and may be even be asserted for the first time on appeal. The provisions of the SRPMIC Code simply do not apply to this action which was filed in state court. (I # 8, pps. 4-5; I # 8, p.2).

In addition, comity does not apply.

"Comity" as defined in the preamble of the SRPMIC Code of Civil Procedure means "the discretionary process by which the Court might recognize and give effect to a judgment of another tribal, state or federal Court. The Court

may change the foreign court's order in its discretion...." Since there was no judgment by another court, comity does not apply, as it applies only to judgments by independent sovereigns. "Comity is a doctrine that could have been considered if the tribal court had subject matter jurisdiction." *Zaman*, 190 Ariz. at 212-13, 946 P.2d at 463-64;

No specific tribal law was raised in defendants' motion to dismiss. Plaintiff/appellant objected to this procedure (I # 10, p. 1).
Because the trial court demanded simultaneous briefing by both parties regarding the important question of jurisdiction (I # 9), Appellant was deprived of the opportunity to brief this issue in response to defendants' more specific argument.

Defendants pointed to Rule 5-13 of the SRPMIC Rules of Civil Procedure to indicate that service of process was deficient. However, all of the provisions in that Code apply only to civil proceedings in the Community Court, not the Superior Court of the State of Arizona.

For example, Rule 5-13 (c)(4) states in relevant part:

The Process Server shall deliver to defendant a copy of the complaint and summons at the defendant's house, residence, or usual place of abode or **any other place within the Community** [Emphasis added].

Clearly, the employment of a process server, authorized to serve process in

the tribal court only, would violate Rule 4(d) and (e). I # 8 p. 4: 17-26.

DEFENDANT PALMER CONCEDED PERSONAL JURISDICTION BY FAILING TO MAKE A TIMELY SPECIFIC OBJECTION

In the motion to dismiss (I # 3) **only a part of a single sentence in the entire motion to dismiss even mentions Palmer** (I # 3, p. 2: 23-24). The headings in the rest of the motion to dismiss pps 3-6 (I # 3) clearly state that it is argued on behalf of a defendant (singular) and that defendant is Mondex.

Plaintiff/Appellant repeatedly raised this issue in his Opposition (I # 8, pps. 3; I # 10, pps. 3-4,), but the trial court failed to rule on this matter, and dismissed Palmer anyway.

MONDEX FAILED TO ASSERT A TIMELY, SPECIFIC OBJECTION TO SERVICE OF PROCESS

Defendant/Appellees, in their motion to dismiss, (I # 3) stated: " Defendant Mondex contends that person (sic) jurisdiction was not properly acquired by this court because the court lacks general and specific jurisdiction over this defendant." I #3, p. 1: 21-26.

The relevant part of the motion to dismiss states: "Defendants were served

on sovereign tribal land within the sovereignty of the Salt River Pima-Maricopa Indian Community. Only specifically identified process servers are permitted to effectuate service of process on sovereign tribal land." The motion refers vaguely to a memo by the tribe's general counsel a copy of which was not attached and never provided. I # 3, p.2: 10-17.

Rule 7.1(a), in relevant part, states:

(1) Generally. An application to the court for an order must be by motion which, ...must be in writing, *state with particularity the grounds* for granting the motion, and set forth the relief or order sought (emphasis added).
(2) Supporting Memorandum. All motions must be accompanied by a memorandum setting forth the reasons for granting the motion, along with citations to the specific parts or pages of supporting authorities and evidence.

Here, there was no citation to legal authority, only a hazy reference to the tribe's general counsel's written directive, which was not attached to defendants' motion and never provided. Plaintiff specifically objected to the inclusion of a non-existent memo that was never made available, as the only source of "authority." I # 8, p.4: 1-10.

Rule 12(g)(2) states that "...a party who makes a motion under this rule must not make another motion under this rule **raising a defense or an objection that was available to the party but omitted from the earlier**." Clearly, the specific objections regarding service of process were available to defendants. Despite this

fact, the trial court provided defendants with an extra bite at the jurisdictional apple (I # 9) by ordering further briefing on a non-issue: whether service of process without tribal permission was proper.

A party must press, not merely intimate, an argument. *Kelly v. Foti*, 77 F.3d 819, 823 (5th Cir. 1996). An argument cannot be raised in a 'perfunctory and underdeveloped' manner. *Kensington Rock Island L.P. v. American Eagle Historic Partners,* 921 F.2d 122, 124-25(7th Cir. 1990). A vague, undefined reference to an argument, without legal reasoning, will be deemed waived. *Kensington*, 921 F.2d at 125 n. 1.

There cannot be any doubt that the argument regarding tribal jurisdiction could have been made earlier and could have been made with far greater precision and specificity. This was unfair to Plaintiff, who bears the burden of proving personal jurisdiction. One cannot respond to a non-existent letter or controvert a non-existent statute (I # 8, p.4; I # 10, pps 1-2).

Realizing that defendants violated this simple rule, the Court provided defendants with yet an extra opportunity to ensure that this case would be dismissed, by asking for "supplemental" simultaneous briefing (I # 9). Appellant objected to the supplemental pleading (I # 10, p. 1: 21-26).

A court may not allow what the law forbids.

MONDEX AND PALMER BARGAINED AWAY THEIR RIGHT TO CONTEST PERSONAL JURISDICTION

Paragraph 12 of the contract (I # 10, Exhibit A) states the agreement will be construed under the laws of the province of Ontario. "It is a well established principle of contract construction that clauses which ... are knowingly incorporated into a contract should not be treated as meaningless." *Morgan Bank (Delaware) v. Wilson* (1990) 794 P.2d 959, 164 Ariz. 535.

This argument was also raised in the Opening Brief in case no.1 CA-CV 18-0346, pps. 10-15. The issue was also raised and briefed in the instant action. (I # 8, pp. 7-8; I # 10, p. 4; I # 20, p.5). Defendants again failed to respond to this argument, despite the fact that Appellant also raised it in the prior related case.

In Arizona, courts follow the Restatement (Second) of Conflict of Laws (1971) to determine which state's law applies in a contract action. *Cardon v. Cotton Lane Holdings, Inc.*, (1992)173 Ariz. 203, 207, 841 P.2d 198, 202; *Swanson v. Image Bank, Inc.*, (2003) 77 P.3d 439, 206 Ariz. 264.

If the parties to a contract expressly choose the law governing their contract, as Mondex did in this case, its choice of law will be honored if the requirements of Restatement § 187 are met. The parties' choice of Ontario law is valid and effective if the parties could have contractually waived the minimum contacts test

for personal jurisdiction. Restatement § 187 comment c.

Personal jurisdiction is a right which may be waived. A litigant may enter into a variety of legal arrangements in which express or implied consent to the personal jurisdiction of a court is given. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee* (1982) 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492. In view of present-day commercial realities, most courts recognize that parties may include contractual provisions for resolving controversies in a particular jurisdiction. *National Equip. Rental, Ltd. v. Szukhent* (1964) 375 U.S. 311, 84 S.Ct. 411.

Enforcement of such forum selection or choice of law provisions does not offend due process. *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 472, n. 14, 105 S.Ct. 2174, 2182, n. 14, 85 L.Ed.2d 528, 540 n. 14. "It is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." *M/S Bremen v. Zappata Off-Shore Co.*, (1972) 407 U.S. 1, at p. 11; 92 S.Ct. 1907, 32 L.Ed.2d 513. See also *Societe Jean Nicolas Et Fils v. Mousseux* (1979) 123 Ariz. 59, 597 P.2d 541. In addition, where a forum selection clause (or choice of law clause) is enforceable, the necessity for a due process analysis of the type and extent of the defendant's contacts with the forum is obviated. *Batton v.*

Tennessee Farmers Mut. Ins. Co., (1987)153 Ariz. 268, 736 P.2d 2. See also *National Equip. Rental, Ltd. v. Polyphasic Health Sys's, Inc.*, (1986)141 Ill.App.3d 343, 95 Ill.Dec. 569, 490 N.E.2d 42 (upholding consent to jurisdiction clause does not violate due process, even though no minimum contacts existed between defendants and State of New York).

Ontario does not use the minimum contacts test, and there is a *presumption* of jurisdiction. Under Ontario law, a defendant may challenge jurisdiction. But the burden of rebutting the presumption of jurisdiction rests upon the party resisting jurisdiction, the defendant, not upon the plaintiff, as in the United States. I # 8, p.7. See *Club Resorts v. Van Breda* (2012), 1 SCR 572, 2012 SCC 17 for a review of the "real and substantial test" employed in Canada for exercising personal jurisdiction. [1]

The facts of *Van Breda* are instructive. Two plaintiffs, residents of Ontario, sued a Bermuda corporation for injuries sustained in Cuba while vacationing there. The Canadian Supreme Court upheld jurisdiction over the corporation, Club Resorts, even though Club Resorts was a Bermuda corporation that had no contacts with Ontario and carried out no business in Ontario.

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[1] Canadian case law may be accessed on *Canlii.org*, the website of the Canadian Legal Institute.

Ontario uses as one of its tests for assumption of jurisdiction *lex loci delecti* ("where the harm occurred."). See *Black v. Breeden*, 2010 ONCA 547 (CanLII) stating that Ontario properly asserted jurisdiction over American defendants because Ontario is where plaintiff's reputation was established, where the defamatory statements were published and republished, and where the alleged damage occurred. To deny plaintiff the opportunity to vindicate his reputation in a jurisdiction that is obviously very important to him would be unfair (I # 8, pps. 7-8).

"The case law is clear that the heart of a libel action is publication. The tort of defamation is committed where the publication takes place. Publication occurs when the words are heard, read or downloaded. The statements in question may well have been made in the U.S. by the directors or advisors of a U.S. company, but they were published or republished in Ontario and they are alleged to have caused injury in Ontario. The connection between the subject matter of the actions and Ontario is thus significant." *Black v. Breeden*, 2010 ONCA 547, 550.

Clearly, under this standard, Plaintiff could prove that the publication occurred in Arizona and the harm he suffered occurred in Arizona. (I # 8, pps. 7-8) and under Ontario law, Arizona could properly exercise jurisdiction over Palmer and Mondex.

THE COURT MADE NO FINDINGS OF FACT AND ONCE AGAIN FAILED TO TAKE PLAINTIFF'S ALLEGATIONS AS TRUE

In a motion to dismiss for lack of jurisdiction, all uncontroverted allegations in the complaint are deemed true, and factual disputes are to be resolved in favor of the non-moving party.

At this point in the proceedings, Plaintiff must make only a *prima facie* case regarding personal jurisdiction. *The Planning Group of Scottsdale L.L.C. v. Lake Mathews Mineral Properties, Ltd.* (2011) 246 P. 3d 34, 226 Ariz. 343.

Prima facie means "at first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary. ..." Black's Law Dictionary, 6th Ed., 1990. If the burden were any greater, it would permit a defendant to obtain dismissal simply by controverting facts established by plaintiff through his own affidavits and other material.

Arizona courts also "look to whether the transaction resulted in an ongoing and continuous relationship between the parties." **Such an ongoing and continuous relationship may exist where the parties negotiated in Arizona, the non-resident defendant solicited the contract or initiated the business**

relationship with the plaintiff in Arizona, the non-resident defendant sent materials to the plaintiff in Arizona, and performance was sent from Arizona. *Beverage v. Pullman & Comley* (2013) 306 P.3d 71, 74, aff'd as modified, 234 Ariz. 1 (2014)

However, where, as here, the jurisdictional facts are in conflict, the Court must resolve the differences in favor of Plaintiff. *MacPherson v. Taglione*, 158 Ariz. 309, 311-12, 762 P.2d 596, 598-99 (Ct. App. 1988).

The declarations of Alan Singer (I # 7) and Judith Rottmann (I # 6), along with the attached exhibits, constitute proof of the contacts with Arizona intentionally created by Mondex and Palmer. In the accompanying declarations, Plaintiff and assignor testify that: (a) the preliminary negotiations took place in Arizona, with multiple e-mails exchanged between 2016 and 2017(I # 6, ¶4; I # 7 ¶ 2, Exhibit A); (b) the contract was executed by plaintiff and assignor in Arizona on May 19, 2017(I # 6 ¶5; I # 7 ¶ 3); (c) Mondex induced plaintiff and assignor to carry out research on the assets, which they did in Arizona; therefore, performance was tendered in Arizona; (I # 6 ¶ 6; I # 7 ¶ 8); (d) after the contract was signed on May 19, 2017, Mondex sent thirty-nine (39) e-mails directly to Plaintiff regarding the subject matter of the contract (I # 6 ¶ 8-11; I # 7 ¶ 6); and (e) an additional ninety (90) e-mails from Mondex to assignor were sent to Arizona (I # 6, ¶ 9-11;

I # 7 ¶ 6). In addition, three (3) international conference calls (I # 6 ¶9) occurred between Mondex, its lawyers, and plaintiff.

Both the trial court and Mondex focused entirely on Plaintiff's agreement with Mercury. However, in its haste to dismiss this case, the trial court failed to take into account the fact that Mondex libeled Plaintiff and published the defamation in Arizona (I # 9). Mondex also interfered with Plaintiff's contractual relationships here. (I # 8, pps. 7-10).

A non-resident defendant may purposefully avail itself of the privilege of conducting business in Arizona based on the following: (1) plaintiff is solicited and induced to enter into contract in Arizona that is negotiated in Arizona; (2) contract is drafted, executed and performed in Arizona; and (3) plaintiff's payment (or performance) is received in or from Arizona. See, e.g., *Davis v. Metro Prod., Inc.*, 885 F.2d 515 (9th Cir. 1989); *Sullivan v. Metro Prod., Inc.*,(1986) 150 Ariz. 573, 724 P.2d 1242.

In deciding if minimum contacts exist, "it is not the number of contacts involved but the importance of the particular contacts. Quality, not the quantity of defendant's activities, is what is persuasive." Therefore, a single act may be sufficient to establish a basis for personal jurisdiction. *O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, P.A. v. Bonus Utah, Inc.*, 156 Ariz. 171, 173, 750 P.2d 1374, 1376 (Ct. App. 1988) (defendant's hiring of Arizona law

firm to file answer on its behalf in pending lawsuit created minimum contact necessary to establish personal jurisdiction over him); *Holmes Tuttle Broadway Ford, Inc. v. Concrete Pumping, Inc.*, 131 Ariz. 232, 235, 639 P.2d 1057, 1060 (Ct. App. 1981) (defendant's single act of ordering a new engine from plaintiff without intending to pay for it was sufficient to satisfy minimum contacts test).

Despite the fact that the standard of review is well-settled, the trial court refused to acknowledge that the perpetration of the torts at Plaintiff was sufficient for Arizona to grant jurisdiction. I # 9, p.2 ¶ 4; see *DeMont v. DeFrantz* (1999) 303 Ariz. Adv. Rep. 11; *Pegler v. Sullivan* (1967) 432 P.2d 593, 6 Ariz. App. 338.

Instead, the Court erroneously claimed that the torts were targeted against Mercury (the assignor), and not at Plaintiff. I # 9, p.2 ¶ 4. That is inaccurate.

The Declaration of Alan Singer (I # 7, ¶¶13-20) clearly states that he was the victim of fraud and libel, and that Palmer and Mondex interfered with the contract between Mercury and Plaintiff. Throughout the complaint (I #1), Plaintiff/Appellant clearly describes the manner in which he was injured by the tortious actions of defendants. See ¶ 76, ¶ 83, ¶109, ¶ 110, ¶ 115, ¶ 116, ¶¶ 119-120, ¶¶ 122-123, ¶¶ 156-159.

SUMMARY

It is a basic tenet of law that "similarly situated people ought to be treated similarly." Judith M. Stinson, *Why Dicta Becomes Holding and Why it Matters,* 76 Brook. L. Rev. (2010) p. 223. If state service of process upon a non-Indian is valid when performed by a deputy sheriff, it is also valid when performed by an Arizona process server. There is no statutory difference or case law between the two state actors when serving a complaint, and no one has cited any.

Because the trial court acquired in personam jurisdiction over both of the defendants, dismissal was improper.

CONCLUSION

Appellant respectfully asks that the Court reverse and remand this case to the Superior Court for further proceedings.

Dated this 25th day of February, 2019.

By: Alan Singer

Alan Singer

Plaintiff/Appellant/*In Pro Se*

CERTIFICATE OF COMPLIANCE

This Certificate of Compliance concerns a brief and is submitted pursuant to Arizona Rules of Civil Appellate Procedure 14(c)(5).

The undersigned certifies that this brief to which this Certificate is attached uses Times New Roman font with type size of at least 14 points, is double-spaced, and contains 6,007 words.

The document to which this Certificate is attached does not exceed the word limit that is set by Rule 14.

By: Alan Singer
Alan Singer

CERTIFICATE OF SERVICE AND PAPER FILING

The undersigned, Alan Singer, Plaintiff/Appellant/*In Pro Se*, delivered an **ORIGINAL** and one **(1) TRUE COPY** of his Opening Brief to a third-party commercial carrier, on this 25th day of February, 2019 for delivery, via Federal Express to:

Clerk of the Court
Arizona Court of Appeals
Division One
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and Plaintiff/Appellant, mailed two **(2) TRUE COPIES** of his Opening Brief, via U.S. Mail, on this 25th day of February, 2019 to:

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