5-12-1976

Clinic Masters, Inc. v. District Court In and For El Paso County

IN THE SUPREME COURT FOR THE STATE OF COLORADO

Civil Action No. 27224

CLINIC MASTERS, INC., a Colorado corporation, Petitioner, vs. THE DISTRICT COURT IN AND FOR THE COUNTY OF EL PASO AND STATE OF COLORADO IN THE 4th JUDICIAL DISTRICT, and THE HONORABLE JOHN F. GALLAGHER, One of the Judges Thereof, and DR.PETER G. FERNANDEZ, Respondents.	BRIEF IN SUPPORT OF PETITION FOR WRIT UNDER C.A.R. 21

In support of the petition filed herein seeking a Writ under C.A.R. 21, the Petitioner by its attorneys, PERKINS, GOODBEE, MASON & DAVIS, submits the following:

I

FACTS

The facts are as set forth in the Petition and as set forth in the Petitioner's Brief and Reply Brief filed in the Colorado Court of Appeals and in the Brief of Fernandez as filed in the Colorado Court of Appeals, all of said Briefs being attached as an Addendum to the Petition filed herein and which are by reference hereto made a part of this Brief.

II

STATEMENT OF THE LAW

Inasmuch as the parties filed briefs with the Colorado Court of Appeals on identical questions before this Court, it would

appear that this Court could fully understand this case by reference to the briefs heretofore filed by the parties. Said briefs are attached as an Addendum to the Petition filed herein and are incorporated by reference in this Brief. Thus, this Brief will attempt only to supplement the briefs heretofore filed.

A. THE LAW ON THE MINIMUM CONTACTS THEORY.

The contacts with Colorado by Fernandez were sufficient contacts to enable service of process to be made upon Fernandez under the Colorado Long-Arm Statute.

Both of the parties in the Colorado Court of Appeals filed Notice of Additional Authorities and which are not shown in the brief. In the case of Van Schaack & Co. v. District Court, (July 14, 1975) 538 P.2d 425, the Colorado Supreme Court considered an original proceeding under C.A.R. 21 to prohibit the lower court from proceeding without exercising jurisdiction over a third party defendant. The lower court had quashed service of a third party summons. In this case Atlas Realty sold land to Anderson and subsequently sued Anderson and Van Schaack for a forfeit of deposit. The deposit was guaranteed by a letter of credit from a Kansas bank. Van Schaack wanted the Kansas bank brought in as a third party defendant. The only contact was a letter of credit issued in Kansas and mailed to Colorado. At page 426 the Colorado Supreme Court held:

> "Application of that test to the facts of this case reveals that exercise of jurisdiction over Highland is appro-

> priate. First, in issuing the letter of credit, Highland induced conduct in this state in that the plaintiff relied on the letter in extending the contract beyond the August 20, 1973 date. Second, it is clear that this cause of action which Van Schaack asserts against Highland arises from the consequences in his state of Highland's cancellation of the letter. Finally, the letter of credit issued by Highland was issued in conjunction with a Colorado real estate transaction, which obviously has a substantial connection with this state."

The Van Schaack case is similar to the case at bar. When Fernandez signed the Clinic Masters' contract in Kansas City, he set in motion the nearly three hundred subsequent contacts between the parties, all of which were foreseeable consequences of his action.

The Van Schaack case relied upon the Colorado case of Dwyer v. District Court, (March 10, 1975) 532 P.2d 725, where the Colorado Supreme Court upheld jurisdiction. Of interest in the Dwyer case is the Court's considering concepts of "fair play and substantial justice" and quoting from page 728:

> "Furthermore, while 'fair play and substantial justice' are elusive concepts, not susceptible to precise definition, we are in agreement with Professor Leflar when he states in his treatise on American Conflicts Law that
>
> "'Plaintiffs ought ordinarily be entitled to try their cases where the facts occurred, where witnesses reside and the local law is to be applied. This is in keeping with the 'fair play and substantial justice' standard that the International Shoe case laid down. It is less unfair to require a nonresident defendant to try his case where his voluntary activity brought the

> dispute into being than to require the plaintiff to try it only where he may later be able to get service on the defendant's person.'" R. Leflar, American Conflicts Law Sec. 41, at p.78 (1968).

The Van Schaack case also relied upon the Oregon case of White Lumber Sales v. Sulmonetti, 448 P.2d 571. The Oregon Supreme Court upheld jurisdiction over a Florida corporation where the only contact was a telephone call to Oregon ordering lumber. At page 574 the Court stated:

> "It is clear that the placing of the telephoned order had effects, or 'significant contacts,' in Oregon."

The Colorado Supreme Court upheld Long-Arm Jurisdiction against a Missouri resident on a guarantee signed in Missouri and sent to Colorado in the case of Giger v. District Court, (September 8, 1975) 540 P.2d 329. The court stated at page 330:

> "Applying the same analysis we utilized in Van Schaack to the facts here, it is apparent that personal jurisdiction over this petitioner exists. In executing the contract of guarantee, petitioner induced the Theobalds to furnish their consent, as lessors, for the assignment to Harold Giger of a lease of Colorado real property. Allegedly, the lessee, Harold Giger, subsequently violated the covenants and agreements of the lease, thus causing the lessors damages. In our view, the facts here amply justify long-arm jurisdiction over the person of this petitioner. Dwyer v. District Court, Colo., 532 P.2d 725 (1975). Petitioner urges that we follow the ruling in D.E.B. Adjustment Co. v. Dillard, 32 Colo.App. 184, 508 P.2d 420 (1973) in which personal jurisdiction was refused under facts similar to this case. However, in Van Schaack, we disapproved the D.E.B. Adjustment decision, and declined to follow it."

The decision in D.E.B. Adjustment Co. v. Dillard, 32 Colo.App. 184, 508 P.2d 420 (1973), which was disapproved by the Colorado Supreme Court involved a guarantee signed in California on a Colorado note for room and board.

In conclusion, the contacts of Fernandez with Colorado were ample and continued for a period of nearly two years while he was receiving management consulting services from and with Colorado. Fernandez was certainly transacting business in the State of Colorado as meant by the Colorado Long-Arm Statute, and which statute was enacted to allow the State of Colorado to have jurisdiction over cases such as the case at bar.

B. THE LAW ON LIMITING JURISDICTION BY CONTRACT.

The modern rule as supported by Williston, Restatement, the Federal Courts, and Goodrich is that the parties may limit the jurisdiction by contract if the limitation on jurisdiction is not unreasonable and if not prohibited by statutory mandate or requirement.

To understand this rule, a look can be taken at circumstances when it would be unreasonable to limit jurisdiction:

1. When there is a statutory requirement or mandate prohibiting.

Fernandez cites six Colorado cases and urges that they are controlling. The answer is that they are not controlling. These cases consist of two divorce cases, two industrial commission cases, a liquor license case, and a

child dependency case. The answer to Fernandez' case is a simple answer and stated on page 11 of Clinic Masters' Reply Brief, in one sentence:

> "To all his cited cases one finds the common thread holding these cases in one class, being the statutory requirement or mandate which fixed jurisdiction."

2. Where the provision limiting jurisdiction is to harass or punish -- or to make litigation difficult or nearly impossible.

3. Where the limited place of jurisdiction has no contact with the parties and no reason for trial there.

Fernandez in his brief cited the case of Paragon Homes v. Carter, 228 NYS.2d 817, which involved a Maine company doing home improvements in Massachusetts. A contract was entered into which limited jurisdiction to New York and which was done for the "purpose of harassing and embarrassing" and that there was no reason for trial in New York.

In conclusion, the Clinic Masters contract provision is reasonable as at least twenty witnesses are from the Colorado Springs office and all the records and information are in Colorado Springs, Colorado. This paragraph to confer jurisdiction upon the Colorado courts is based upon necessity and reason and not as a penalty against Fernandez. Admittedly, it may be harsh to force Fernandez to come to Colorado to try the case; however, it would be a much harsher and greater burden on Clinic Masters to force litigation elsewhere. Fairness and reason require litigation in Colorado.

C. ADHESION CONTRACT ARGUMENT AND DUE PROCESS ARGUMENT PRESENTED BY FERNANDEZ.

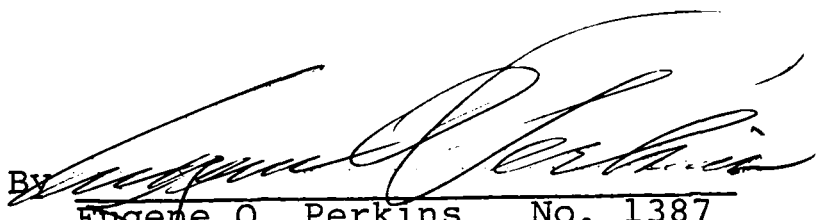
Fernandez attempted in the Appellate Court to raise two arguments which were not properly before the lower court, being an adhesion contract argument and a due process argument. Rules 7 and 12 of the Colorado Rules of Civil Procedure, require that the grounds for the Motion to Quash be set forth in particularity and require presentation when proper or else certain defenses are waived. Counsel submits that these defenses were not properly presented and were therefore waived by Fernandez.

As to the adhesion argument, Clinic Masters answered this in its Reply Brief filed in the Appellate Court.

As to the due process argument raised since filing of briefs, it should be noted that Fernandez filed an Affidavit in the lower court and not once did he assert lack of consent or waiver and made no attempt to show that he did not knowingly and voluntarily consent. Fernandez cannot raise this defense without making such factual attack.

Respectfully submitted this 12th day of May, 1976.

PERKINS, GOODBEE, MASON & DAVIS

By 

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