IN THE COURT OF APPEALS OF IOWA

No. 6-291 / 04-1546
Filed July 12, 2006

TONY ROSS, BRIAN and TONI HAMMOND, GEORGE and NADINE HESS, DON and DONNA GERBELING, Individually and on behalf of all other persons similarly situated,
Plaintiffs-Appellants,

vs.

THOUSAND ADVENTURES OF IOWA, INC., THOUSAND ADVENTURES, INC., ALLSTATE FINANCIAL, n/k/a HARBOURTON FINANCIAL CORPORATION, TRAVEL AMERICA, INC., WESTERN AMERICAN BANK, N.A., n/k/a FIRST NATIONAL BANK OF THE MID-CITIES, LIBERTY BANK, 900 CAPITAL and TRAVELERS ACCEPTANCE CORP.,
Defendants-Appellees.

Appeal from the Iowa District Court for Lee (North) County, Cynthia Danielson, Judge.

Plaintiff-appellants appeal the district court's order holding that Iowa does not have personal jurisdiction over defendant-appellee, Liberty Bank. **AFFIRMED AS MODIFIED.**

Douglas H. Napier of Napier, Wolf & Napier, Fort Madison, for appellant.

Kevin J. Driscoll and Kami M. Lang of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gafney, P.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

SACKETT, C.J.

Plaintiff's-appellants,[1] purchasers of campground memberships via retail installment contracts from Thousand Adventures, Inc. (TAI), appealed the district court's August 27, 2004 order dismissing with prejudice for lack of personal jurisdiction their claim against defendant-appellee, Liberty Bank (Liberty). Our supreme court held the August 27, 2004 order was not a final judgment appealable as a matter of right, but granted permission for the case to proceed as an interlocutory appeal.[2] The case was transferred to our court on April 11, 2006.

Plaintiffs obtained a judgment against TAI for failing to fulfill contract obligations. TAI then filed for bankruptcy protection. Liberty, a mutual savings bank formed under the laws of Connecticut, had previously extended to TAI a $4.5 million revolving line of credit. As security TAI assigned certain member-borrowers' installment contracts to Liberty. The district court dismissed plaintiffs' subsequent suit against Liberty for lack of personal jurisdiction, wherein plaintiffs claimed that as a lender, Liberty had certain responsibilities to plaintiffs which responsibilities were breached. On appeal, plaintiffs contend (1) Iowa does have personal jurisdiction over Liberty, (2) the suit should not have been dismissed

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[1] Plaintiffs brought the action individually and on behalf of all other similarly situated persons.

[2] On November 4, 2005, the supreme court, on its own motion, raised the issue of its jurisdiction to hear the case as a matter of right due to the lack of a final judgment. The supreme court ordered the parties to submit statements addressing whether the ruling in question was an appealable final judgment. On March 8, 2006, after considering the parties' statements, the court held there was not a final judgment appealable as a matter of right, but granted that the appeal could proceed as an interlocutory appeal. Thus, the court indicated the notice of appeal and all subsequent documents filed by plaintiffs would be treated as an application for interlocutory appeal pursuant to Iowa Rule of Appellate Procedure 6.2.

with prejudice, and (3) the district court erred in denying its motion for leave to add party plaintiffs and motion to enlarge and amend.

We affirm the district court's finding of lack of personal jurisdiction. We modify the judgment to dismiss this case without prejudice. We find plaintiffs' appeal of the other issues is not timely. We affirm as modified.

I. PERSONAL JURISDICTION OVER LIBERTY BANK.

A. Scope of Review.

When reviewing a ruling on a motion to dismiss for lack of personal jurisdiction, the trial court's findings of fact have the effect of a jury verdict and are subject to challenge only if not supported by substantial evidence in the record, but we are not bound by the trial court's application of legal principles or its conclusions of law. *Hagan v. Val-Hi, Inc.*, 484 N.W.2d 173, 175 (Iowa 1992). "We accept the allegations of the petition and the contents of uncontroverted affidavits to be true." *Ross v. First Savings Bank of Arlington*, 675 N.W.2d 812, 815 (Iowa 2004) (quotation marks and citations omitted).

B. Minimum Contacts.

The power of a state to assert personal jurisdiction over a nonresident defendant to a lawsuit is limited by the Due Process Clause of the Fourteenth Amendment to the federal constitution. *Ross*, 675 N.W.2d at 815 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14, 104 S. Ct. 1868, 1872, 80 L. Ed. 2d 404, 410 (1984)). The requirement of establishing personal jurisdiction protects the liberty interest of an individual, in that the individual will not become bound to a judgment of a state court where there is no

meaningful contacts or relations with the state. *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 105 S. Ct. 2174, 2181, 85 L. Ed. 2d 528, 540 (1985)). Thus, nonresident defendants must have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice" in order for the forum state to have personal jurisdiction under the Due Process Clause. *Heslinga v. Bollman*, 482 N.W.2d 921, 922 (Iowa 1992) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945)).

"The minimum contacts must show 'a sufficient connection between the defendant and the forum state so as to make it fair' and reasonable to require the defendant to come to the state and defend the action." *Ross*, 675 N.W.2d at 815 (quoting *Hodges v. Hodges*, 572 N.W.2d 549, 551 (Iowa 1997)). The minimum contacts test makes it "essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283, 1298 (1958). Random or attenuated contacts are not sufficient for personal jurisdiction to be asserted. *Ross*, 675 N.W.2d at 816.

The following five factors are considered in determining whether a nonresident defendant has sufficient minimum contacts with Iowa such that the exercise of personal jurisdiction is constitutional: (1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source of and connection of the cause of action with those contacts, (4) the interest of the forum state, and (5) the

convenience of the parties. *Cascade Lumber Co. v. Edward Rose Bldg. Co.*, 596 N.W.2d 90, 92 (Iowa 1999). The first three factors are most important. *Id.*

As a preliminary matter we note that Liberty does not have offices, agents, employees, or property in Iowa. Liberty has never conducted any meeting in Iowa, has never been qualified to do business in Iowa, and has never brought a lawsuit in Iowa nor owned any subsidiary that did business in Iowa. However, these facts are not necessarily determinative of personal jurisdiction.

Because the quantity, nature and quality of contacts, and source of and connection of the cause of action with the contacts are closely related, we will consider these factors together.

Plaintiffs argue that because Liberty is an assignee of the original retail installment contracts between TAI and the member-borrowers we must attribute each contract entered into by each member-borrower to Liberty. Thus, plaintiffs claim the contacts between Liberty and State of Iowa are plentiful, as hundreds of the contracts entered into by Iowa residents were assigned to Liberty. The Supreme Court has stated "[e]ach defendant's contacts with the forum State must be assessed individually." *Calder v. Jones*, 465 U.S. 783, 790, 104 S. Ct. 1482, 1487, 79 L. Ed. 2d 804, 813 (1984); *see also Rush v. Savchuk*, 444 U.S. 320, 332, 100 S. Ct. 571, 579, 62 L.Ed.2d 516, 520 (1980) ("The requirements of *International Shoe*, however, must be met as to each defendant over whom a state court exercises jurisdiction."). Thus, in the present case it is improper to judge Liberty's contact with Iowa according to TAI's contacts with Iowa.

The chief contact between Liberty and the State of Iowa, for the purposes of our due process analysis, is the contractual loan agreement between Liberty and TAI which granted Liberty an assignment in certain retail installment contracts held by TAI as security for the loan Liberty extended to TAI. Some of the contracts were executed by Iowa residents.

Pursuant to the loan agreement, Liberty was assigned the right to receive all the amounts due under certain retail installment contracts. Additionally, the language of the loan agreement indicates that Liberty became the physical holder of the contracts assigned.[3] The loan agreement further granted Liberty the right to collect on delinquent contracts. Yet, that right was limited, as Liberty could only collect from individual members if TAI failed to pay in full or replace delinquent notes subsequent to Liberty's demand. Additionally, at no time did Liberty actually make any effort to collect payments directly from Iowa members.

"[A] contract *alone* cannot automatically establish sufficient contacts." *Hager v. Doubletree*, 440 N.W.2d 603, 607 (Iowa 1989). Rather,

> [A] "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of a business transaction." It is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

[3] Specifically, the contract states at section 11(b):

> Immediately upon payment, in full, or replacement of any Delinquent Note or Contract for Deed, by the Borrower, Lender shall reassign its interest in and deliver such Note or Contract for Deed (together with the other documents or instruments relating to thereto) to the Borrower.

Id. (quoting *Burger King,* 471 U.S. at 479, 105 S. Ct. at 2185, 85 L. Ed. 2d at 545). When evaluating the contractual dealing between Liberty and TAI the fact that the negotiations between TAI and Liberty did not involve Iowa or take place within the state becomes important. As does the fact that the contract was to be governed by the laws of Connecticut, not Iowa.

Another contact between Liberty and the State of Iowa occurred in the form of Iowa residents making payments on their loans which ultimately went to Liberty. Liberty argues that because these payments were made by the member-borrowers to a third party bank in another state, Nebraska State Bank, pursuant to a "lock box agreement,"[4] there was no contact between Iowa and Liberty in the course of these payments. The district court found otherwise, as it was clear all payments made pursuant to the lock box agreement were for the benefit of Liberty and Liberty had approval power over the notice of assignment TAI was to send to members whose contracts were assigned to Liberty. That notice of assignment directed the member-borrower as to the method to make installment contract payments.

Another relevant contact between Liberty and the State of Iowa was that Thousand Adventures of Iowa, Inc., an Iowa corporation, was a guarantor for the loan that Liberty extended to TAI. Thus, if TAI failed to live up to its end of the agreement, Liberty could have sought recompense from the Iowa corporation. However, there is no record evidence of Liberty taking any such action against Thousand Adventures of Iowa.

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[4] Pursuant to the lock box agreement member-borrowers whose contracts were assigned to Liberty were told to make their installment payments to Nebraska State Bank, which then endorsed the checks over to Liberty.

The final notable contact between Liberty and the State of Iowa is four mortgages held by Liberty on real estate in Iowa as security for the loan it extended to TAI.

The source of and connection of the cause of action with the contacts, is important in distinguishing between "general" and "specific" personal jurisdiction. *Hammond v. Florida Asset Fin. Corp.*, 695 N.W.2d 1, 5 (Iowa 2005).

> Specific jurisdiction refers to jurisdiction over causes of action arising from or related to a defendant's actions within the forum state, while general jurisdiction refers to the power of a state to adjudicate any cause of action involving a particular defendant, regardless of where the cause of action arose.

Roquette Am., Inc. v. Gerber, 651 N.W.2d 896, 900 (Iowa Ct. App. 2002) (quoting *Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F.3d 816, 819 (8th Cir. 1994)).

The facts of the present case do not support Iowa courts having specific jurisdiction over Liberty. "There may be no specific jurisdiction over a nonresident defendant absent a claim arising from that defendant's activities in this state." *Hammond*, 695 N.W.2d at 6. The underlying cause of action, essentially a breach of contract and fraud claim against TAI brought by its member-borrowers, is not related to Liberty's actions within Iowa. Liberty's actions of extending a loan to TAI, receiving an interest in certain retail installment contracts, receiving payment from some members, and obtaining mortgages over certain parcels of real property are not related to the failure of TAI to provide all of the promised benefits of membership, which gave rise to plaintiffs' lawsuit. The Ninth Circuit's "but for" test is useful in resolving this issue, that is: but for defendant's contacts with the State of Iowa, would plaintiffs'

claims against Liberty have arisen? *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995). In the present case, the answer to that question clearly is "no." Thus, Iowa does not have specific jurisdiction over Liberty in this case.

The facts also do not support Iowa having general jurisdiction over Liberty. General jurisdiction exists where the nonresident defendant's contacts with the forum are so substantial or continuous and systematic that the forum may exercise personal jurisdiction over the nonresident defendant even if the cause of action did not arise from specific activities within the forum. *See Bankers Trust Co. v. Fidata Trust Co. New York*, 452 N.W.2d 411, 415-16 (Iowa 1990). The objective is to ensure that it is reasonable for the nonresident defendant to foresee being haled into court in the foreign forum based on the defendant's contacts. *See State ex rel. Miller v. Baxter Chrysler Plymouth, Inc.*, 456 N.W.2d 371, 375 (Iowa 1990).

The district court held that Liberty's contacts were not sufficient to give rise to general jurisdiction. The court believed that the mortgages held were not "continuous and systematic" contacts with the state. Generally, when a defendant's forum activities consist solely of holding mortgages secured by property in the forum state, the contacts cannot be characterized as continuous or systematic such that an exercise of general personal jurisdiction would be permissible. *See Barry v. Mortgage Servicing Acquisition Corp.*, 909 F.Supp. 65, 75 (D.R.I. 1995).

Dicta in the Iowa Supreme Court's *Ross* decision indicates that the Iowa Supreme Court deems that contacts similar to Liberty's may be sufficient to

confer general personal jurisdiction; however, the present case contains distinguishing facts. *Ross*, 675 N.W.2d at 817-18. In *Ross*, the defendant seeking to avoid personal jurisdiction was a "participant bank" investing in a pool of retail installment contracts. The court found that the participant bank received something less than an assignment in the contracts, as a "participation agreement does not give the participant bank control over collection of the loan or contract." *Id.* at 817.

> Instead only the lead bank maintains a contractual relationship with the borrower. The participant bank is not a creditor of the borrower, has no ability to assert a claim against a borrower, and can only look to the lead bank for satisfaction of its claims.

Id. (citations omitted). Thus, the court stated, "[I]t is the lead bank, not the participant bank, which maintains contact with the forum state by collecting the payments." *Id.* Further, the court noted "the borrower's contact with the loan is with the lead bank." *Id.*

Liberty is situated in a manner similar, but not identical, to the "lead bank" in *Ross.* We conclude the facts of the present case make it sufficiently distinguishable from the "lead bank" scenario such that Iowa does not have personal jurisdiction over Liberty. *See id.* Liberty did receive an assignment of certain retail installment contracts of Iowa residents, and in such cases the "assignee assumes not only the benefits of the contract, but also the rights and remedies." *Id.* However, Liberty did not receive a full assignment of rights because Liberty's right to collect from delinquent member-borrowers was made conditional. Before taking measures against the member-borrower, Liberty was required to demand that TAI either pay the contract in full or replace the contract.

Only if TAI failed to act did Liberty have the right to take measures to collect from delinquent borrowers. In holding that the participant bank did not have minimum contacts with Iowa, the *Ross* opinion asserts:

> Importantly, a participation agreement does not give the participant bank control over collection of the loan or contract. . . . The participant bank is not a creditor of the borrower, has no ability to assert a claim against the borrower, and can only look to the lead bank for satisfaction of its claims.

Id.

Additionally, while Liberty did obtain the right to receive loan payments made by member-borrowers, Liberty received those payments from member-borrowers through its lock box agreement, not directly from borrowers. Thus, while Liberty received payments from Iowa residents, it did not maintain contact with the State of Iowa in order to do so. *See id*. ("[T]he lead bank . . . maintains contact with the forum state by collecting the payments.")

After having considered the first three, and most important, factors of the minimum contacts test–the quantity of contacts, the nature and quality of contacts, and the source of and connection of the cause of action with those contacts–we deem that these factors do not favor the exercise of personal jurisdiction over Liberty. The final two factors of the minimum contacts test–interest of the forum state and convenience of the parties–do not favor either party. Therefore, we conclude that Iowa does not have personal jurisdiction over Liberty and affirm the district court's dismissal on those grounds.

C. FTC Holder Rule.

The retail installment contracts entered into by plaintiffs contained the following language:

> Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof. Recovery hereunder by the debtor shall not exceed amounts paid by the debtor.

Inclusion of this provision in installment contracts is mandated by the Federal Trade Commission; it is known as the FTC holder rule. *See* 16 C.F.R. § 433.2. The rule was enacted to deal with the transfer of contractual obligations and it "seeks to protect consumers from being required to make payments under the contract to a holder of the contract even though the consumer may have a valid defense to payment against the original vendor of the contract." *Ross*, 675 N.W.2d at 818.

The FTC holder rule clearly preserves all of a borrower's causes of action and defenses such that they can be asserted against an assignee just as they could be asserted against the original party to the contract. Plaintiffs contend that pursuant to the holder rule Liberty steps into the shoes of the assignor, TAI, and thus Iowa has personal jurisdiction over Liberty just as it has personal jurisdiction of TAI.

Plaintiffs' argument, however, is misguided. Personal jurisdiction is a constitutional proposition pursuant to the Due Process Clause of the Fourteenth Amendment. Iowa Rule of Civil Procedure 1.306 "expands Iowa's jurisdictional reach to the widest due process parameters allowed by the United States

Constitution." *Hammond*, 695 N.W.2d at 5 (citing *Hodges v. Hodges,* 572 N.W.2d 549, 552 (Iowa 1997)). Thus, in determining whether Liberty is subject to Iowa's personal jurisdiction, the relevant inquiry is simply whether such exercise of jurisdiction would offend due process, which is governed by the minimum contacts test. *See Aquadrill, Inc. v. Environmental Compliance Consulting Serv., Inc.*, 558 N.W.2d 391, 392-93 (Iowa 1997). Certainly the fact that Liberty was assigned and became the holder of retail installment contracts entered into by Iowa residents is a factor in analyzing Liberty's minimum contacts; however, the holder rule cannot constitute a per se grant of personal jurisdiction. *See id.*

D. Iowa Consumer Credit Code.

Iowa Code section 537.1203 (2001), part of Iowa's consumer credit code chapter, states: "The district court of this state may[5] exercise jurisdiction over any person with respect to any conduct in this state governed by this chapter or with respect to any claim arising from a transaction subject to this chapter."

Nonetheless, as stated above, personal jurisdiction is a constitutional proposition pursuant to the Due Process Clause of the Fourteenth Amendment and Iowa's jurisdictional reach expands to the widest due process parameters allowed by the United States Constitution. *Hammond*, 695 N.W.2d at 5. Thus, the relevant inquiry is simply whether such an exercise of jurisdiction would offend due process, which is governed by the minimum contacts test. *See Aquadrill*, 558 N.W.2d at 392-93.

[5] Plaintiffs incorrectly assert the code says "must" rather than "may" in their brief.

II. THE DISTRICT COURT'S ORDER DISMISSING WITH PREJUDICE.

Plaintiffs' claim even if the district court correctly dismissed their claim for lack of personal jurisdiction, the district court erred in dismissing their claim with prejudice. We agree, dismissal with prejudice was clearly improper.

> Iowa Rule of Civil Procedure 1.946 provides: "All dismissals not governed by rule 1.943 *or not for want of jurisdiction* or improper venue, shall operate as adjudications on the merits unless they specify otherwise."
>
> We have held that the converse of this pronouncement is also true, i.e., that dismissals for lack of jurisdiction are not adjudications on the merits. *Jorge Constr. Co. v. Weigel Excavating & Grading Co.,* 343 N.W.2d 439, 444 (Iowa 1984).

Hammond, 695 N.W.2d at 8.

A dismissal with prejudice is a means of declaring that there has been adjudication on the merits. *Id.* In the present case the procedural posture in which the district court's ruling was made was only a challenge to jurisdiction. The district court's order is modified to provide that this case is dismissed without prejudice.

III. PLAINTIFFS' MOTION FOR LEAVE TO ADD PARTY PLAINTIFFS AND MOTION TO ENLARGE AND AMEND.

Plaintiffs' also argue here that the district court should have granted their motion for leave to add party plaintiffs and to enlarge and amend their petition. These issues are not properly before us in this interlocutory appeal and will not be considered here.

On April 13, 2004, the district court entered the order they now seek to challenge denying plaintiffs' motion for leave to add party plaintiffs. On June 1, 2004, the district court entered a ruling they now seek to challenge here denying

plaintiffs' motion to enlarge and amend that order. The plaintiffs did not seek an interlocutory appeal within thirty days from either of these rulings.

On August 27, 2004 the district court dismissed plaintiffs' claim against Liberty for lack of personal jurisdiction. On September 23, 2004, plaintiffs filed a notice of appeal. On March 8, 2006, the Iowa Supreme Court entered an order finding the appeal to be interlocutory in nature pursuant to Iowa Rule of Appellate Procedure 6.2. Interlocutory appeals must be "made within 30 days from the date of the ruling, decision, or judgment sought to be reviewed" in order to be considered timely. Iowa R. App. P. 6.5; *see McGruder v. State*, 420 N.W.2d 425, 426 (Iowa 1988). Thus, in order to be timely in making an interlocutory appeal as to the district court's orders denying plaintiffs' motion for leave to add party plaintiffs and the motion to enlarge and amend, notice of an interlocutory appeal had to be made by July 1, 2004. Notice of appeal was not filed by that date. Therefore, the interlocutory appeal of these issues is untimely. "It is our duty to refuse, on our own motion, to entertain an appeal not authorized by rule." *Robco Transp., Inc. v. Ritter*, 356 N.W.2d 497, 498 (Iowa 1984).

Costs on appeal are taxed to plaintiffs.

AFFIRMED AS MODIFIED.