

DA 23-0294

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 100

CREATIVE GAMES STUDIO LLC and
RICARDO BACH CATER,

Plaintiffs and Appellants,

v.

DANIEL ALVES,

Defendant and Appellee.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DV 22-1211
Honorable Jessica T. Fehr, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Matthew I. Sack, Sack Law PLLC, Bozeman, Montana

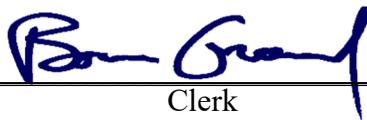
For Appellee:

Griffin B. Stevens, Crowley Fleck PLLP, Bozeman, Montana

Submitted on Briefs: March 13, 2024

Decided: May 14, 2024

Filed:


Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Appellants Creative Games Studio LLC and Ricardo Bach Cater appeal the judgment of the Thirteenth Judicial District Court, Yellowstone County, dismissing their claims against Daniel Alves for lack of personal jurisdiction. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In 2018, Cater, Alves, Erico Neto, and Marcio Assis founded Creative Games Studio (CGS). Alves, Neto, and Assis are citizens and residents of Brazil; Cater is a United States citizen residing in Billings. CGS is a limited liability corporation with its principal place of business in Billings, created for the purpose of developing board games for online sale. Sometime between March 20, 2022, and May 22, 2022, Cater, Alves, Neto, and Assis executed Acordo Estratégico & Operacional (the Operating Agreement). The document, drafted in Brazilian Portuguese, included a non-compete clause and a forum selection clause.

¶3 Sometime in 2022, CGS discovered that Alves was working with Noah Adelman of GameTrayz LLC, a Missouri-based competitor of CGS. CGS alleges that Alves provided Adelman with intellectual property and assets belonging to CGS. CGS further alleges that Alves used CGS funds to hire Paulo Scabeni, an independent contractor who regularly produced work for CGS, to create artwork for GameTrayz. Based on these alleged violations of the Operating Agreement, CGS terminated Alves, expelled him from the company, and filed suit against him in Montana. In their complaint, CGS alleges breach

of contract, breach of the implied covenant of good faith and fair dealing, constructive fraud, and deceit.

¶4 Alves moved to dismiss the complaint under M. R. Civ. P. 12(b)(2) for lack of personal jurisdiction or under the doctrine of *forum non-conveniens*. The District Court determined that the exercise of jurisdiction over Alves would not comport with constitutional requirements and dismissed the claims.

STANDARDS OF REVIEW

¶5 We review de novo a district court’s determination on a motion to dismiss. *Buckles v. Cont’l Res., Inc.*, 2020 MT 107, ¶ 10, 400 Mont. 18, 462 P.3d 223 (citation omitted). We take all well-pleaded factual allegations as true and affirm a dismissal only if no set of facts can support the claim for relief. *DeLeon v. BNSF Ry. Co.*, 2018 MT 219, ¶ 6, 392 Mont. 446, 426 P.3d 1 (citation omitted). The validity of a district court’s exercise of jurisdiction is a question of law that we review de novo. *Groo v. Eleventh Jud. Dist. Ct.*, 2023 MT 193, ¶ 21, 413 Mont. 415, 537 P.3d 111 (citation omitted).

DISCUSSION

Did the District Court err when it determined that it could not exercise personal jurisdiction over Alves?

¶6 Personal jurisdiction determines a court’s power to render judgment over the parties to a dispute. *DeLeon*, ¶ 7 (citation omitted). Modern jurisprudence distinguishes between two types of personal jurisdiction—general and specific. *Daimler AG v. Bauman*, 571 U.S. 117, 127, 134 S. Ct. 746, 754 (2014) (citing *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 318, 66 S. Ct. 154, 159 (1945)). Litigants are subject to general personal jurisdiction when “their

affiliations with the [s]tate are so continuous and systematic as to render them essentially at home in the forum[.]” *Daimler*, 571 U.S. at 127, 134 S. Ct. at 754 (internal quotation omitted). That is, an out-of-state defendant may be hailed into a foreign state court if the defendant has “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.” *Int’l Shoe*, 326 U.S. at 316, 66 S. Ct. at 158 (citing *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 343 (1940)) (internal quotations omitted). Here, the District Court ruled that Alves was not subject to the general jurisdiction of Montana courts—Appellants do not challenge this ruling on appeal.

¶7 If general jurisdiction is not applicable, a court nonetheless may assert jurisdiction over a defendant where the litigation arises out of the specific acts of the defendant in the forum state. *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 1872 (1984). To determine whether a defendant’s acts subject them to a court’s jurisdiction, we utilize a two-part test. *See Buckles*, ¶ 12 (citations omitted). First, a defendant’s in-state acts must be sufficient to potentially confer jurisdiction under state law. *Ford Motor Co. v. Eighth Judicial Dist. Court*, 2019 MT 115, ¶ 10, 395 Mont. 478, 443 P.3d 407 (citing *Milky Whey, Inc. v. Dairy Partners, LLC*, 2015 MT 18, ¶ 18, 378 Mont. 75, 342 P.3d 13). If the suit-related conduct does not fall within the ambit of state law, we decline jurisdiction. *Buckles*, ¶ 12 (citation omitted). If, however, a state’s long-arm statute does reach the defendant’s actions, the assertion of jurisdiction still must comply with “the traditional notions of fair play and substantial justice embodied in the

[D]ue [P]rocess [C]lause” of the Fourteenth Amendment. *Milky Whey*, ¶ 18 (internal quotations omitted).

¶8 The District Court held that Alves’s actions potentially were subject to Montana’s long-arm statute under M. R. Civ. P. Rule 4(b)(1)(A), (B), and (F), which reads:

(1) Subject to Jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of Montana courts. Additionally, any person is subject to the jurisdiction of Montana courts as to any claim for relief arising from the doing personally, or through an employee or agent, of any of the following acts:

(A) the transaction of any business within Montana;

(B) the commission of any act resulting in accrual within Montana of a tort action;

. . . .

(F) acting as director, manager, trustee, or other officer of a corporation organized under the laws of, or having its principal place of business within, Montana.

Alves does not challenge the District Court’s determination. Accordingly, we need only discuss whether Alves consented to jurisdiction or, if not, whether asserting jurisdiction under Montana’s long-arm statute is consistent with the due process guarantees of the Fourteenth Amendment.

¶9 The requirement that a court have jurisdiction over the parties to a case is a personal right and is, therefore, waivable. *Ins. Corp. of Ir. C. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703, 102 S. Ct. 2099, 2105 (1982) (citation omitted). One way a defendant may waive an objection to personal jurisdiction is by entering into a contract that contains a valid forum selection clause. *DeLeon*, ¶ 12 (citing *Milanovich v. Schnibben*, 2007 MT

128, ¶¶ 10-11, 337 Mont. 334, 160 P.3d 562). To be valid, a forum selection clause must “clearly, unequivocally and unambiguously express a waiver.” *Polzin v. Appleway Equip. Leasing, Inc.*, 2008 MT 300, ¶ 20, 345 Mont. 508, 191 P.3d 476 (internal quotations omitted). Where a forum selection clause is valid, the parties to the contract “agree to a particular court’s jurisdiction regarding any disputes arising from that contract.” *DeLeon*, ¶ 12 (citing *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316, 84 S. Ct. 411, 414 (1964)).

¶10 As noted above, the Operating Agreement was drafted in Brazilian Portuguese and contained a forum-selection clause (Clause 14h). In a sworn declaration, Cater appended a translation of the agreement in which Clause 14h is purported to read:

This Agreement shall be governed by the U.S. laws, with all shareholders taking shared responsibilities before the U.S. laws, and the courts of Montana are elected to settle any disputes related to it, with the exception of any other, however privileged it may be.

Relying on our decision in *DeLeon*, in which we stated that a valid forum selection clause is an “agree[ment] to a particular court’s jurisdiction regarding any disputes *arising from* that contract[.]” the District Court concluded that this clause did not constitute a valid waiver of personal jurisdiction because it applied only to disputes “related to” the Operating Agreement. *See DeLeon*, ¶ 12. Because Appellants’ claims arose from Alves’s alleged tortious conduct, the court reasoned, the claims were not sufficiently related to any contractual claims for which Alves consented to jurisdiction.

¶11 On appeal, Appellants argue that the District Court erroneously conflated the term “related to”—used in the Operating Agreement—and the term “arising from”—which we

used in *DeLeon*. The forum selection clause in the Operating Agreement, Appellants assert, is much broader than claims merely “arising from” the contract, and the District Court was incorrect to rely on *DeLeon*. Further, Appellants argue that the District Court ignored their claims for breach of contract and breach of the implied covenant of good faith and fair dealing when dismissing the entirety of the complaint. In response, Alves primarily makes two arguments. He first argues that the translation provided by Cater does not comply with the rules of evidence and should not be considered. Alves also claims that, even under Cater’s translation, the clause is not clear and unambiguous and cannot support a waiver.

¶12 Upon review, we conclude that the forum selection clause in the Operating Agreement—accepting Cater’s translation—is not a clear and unambiguous consent to personal jurisdiction. Clause 14h’s first two provisions read, “This Agreement shall be governed by the U.S. laws, with all shareholders taking shared responsibilities before the U.S. laws[.]” This language does not suggest that the Operating Agreement would be governed by the laws of Montana. This is a peculiar provision as LLCs in Montana are governed by state law—a fact Appellants seemingly recognize, as the complaint alleges that Alves was expelled under § 35-8-803, MCA. The next phrase states that “the courts of Montana are elected to settle any disputes related to it[.]” The final phrase adds, “*with the exception of any other*, however privileged it may be.” One plausible interpretation of the language of Clause 14h, adopted by the Appellants, is that the parties intended the courts of Montana to be the exclusive forum where disputes related to the Operating

Agreement could be resolved. As Alves points out, however, that is not what the plain text of Appellants' proffered translation says. A phrase or term in a contract is ambiguous if it is subject to more than one reasonable interpretation. *See Pablo v. Moore*, 2000 MT 48, ¶ 15, 298 Mont. 393, 995 P.2d 460 (citing *Wendell v. State Farm Mut. Auto Ins. Co.*, 1999 MT 17, ¶ 53, 293 Mont. 140, 974 P.2d 623). The emphasized language above clearly modifies the selection of "the courts of Montana," but it is unclear what that modification does. "[T]he exception of any other" does not define "other" *what*, and it is not clear what "however privileged it may be" pertains to. Because the language of Clause 14h is not a "clear[], unequivocal[], and unambiguous[]" expression of consent to the jurisdiction of the courts of the State of Montana, Alves has not waived his right to object to personal jurisdiction. *Milanovich*, ¶ 11.

¶13 Having determined that Alves did not consent to jurisdiction, we turn to whether subjecting Alves to the jurisdiction of Montana courts in this instance complies with due process.

¶14 As noted above, to be subject to specific jurisdiction, a defendant must have "certain minimum contacts necessary to create specific jurisdiction." *Walden v. Fiore*, 571 U.S. 277, 283, 134 S. Ct. 1115, 1121 (2014) (internal quotations omitted). To determine whether such contacts exist and whether due process is thus satisfied, we consider whether "(1) [t]he nonresident defendant purposefully availed itself of the privilege of conducting activities in Montana, thereby invoking Montana's laws; (2) the plaintiff's claim arises out

of or relates to the defendant's forum-related activities; and (3) the exercise of personal jurisdiction is reasonable." *Ford Motor Co.*, ¶ 12 (citation omitted).

¶15 The first two prongs of the *Ford Motor Co.* test consider a defendant's connections to and action in the forum state. In general, where a defendant takes voluntary action designed to have an effect in the forum state, it can be said to have purposefully availed itself of the privileges of the state. *Buckles*, ¶ 27 (citing *B.T. Metal Works v. United Die & Mfg. Co.*, 2004 MT 286, ¶ 35, 323 Mont. 308, 100 P.3d 127). A defendant does not, however, avail itself of the privileges of the forum state where the defendant's connections thereto are "random, fortuitous, attenuated, or due to the unilateral activity of a third party." *B.T. Metal Works*, ¶ 35 (citation omitted). Nor does a defendant avail itself of the privileges of the forum state where its only contact with the state is a connection with a person who resides in it. *Walden*, 571 U.S. at 285, 134 S. Ct. at 1122 (citing *Int'l Shoe*, 326 U.S. at 319, 66 S. Ct. at 159-60).

¶16 In their complaint, Appellants allege that Alves used CGS funds and intellectual property to benefit a direct competitor of CGS. Taking Appellants' well-pleaded allegations as true, they make no claim that any of Alves's actions took place in or were connected to Montana. The entirety of Alves's alleged conduct took place in Brazil. Adelman, the competitor with whom Alves is alleged to have been collaborating, was headquartered in Missouri. Further, Appellants present no evidence that Alves purposefully availed himself of the privileges of Montana law. Alves is a Brazilian citizen who resides in Brazil. His only connection to Montana is the fortuitous fact that Cater

resides in Billings and established CGS in Montana. We have stated that specific jurisdiction over a defendant is not valid where the only connection between the defendant and the forum state is the plaintiff—precisely the case here. *Ford Motor Co.*, ¶ 26 (citing *Walden*, 571 U.S. at 285, 134 S. Ct. at 1122). Accordingly, Appellants have not demonstrated that Alves either availed himself of the privileges of Montana law or that their claims arise out of Alves’s actions in Montana, as there were none. *See Ford Motor Co.*, ¶ 12. Because Appellants have not established either of the first two prongs of the *Ford Motor Co.* test, we need not address the reasonableness of asserting jurisdiction over Alves. Having determined that Alves is not subject to the jurisdiction of Montana courts for Appellants’ claims, we need not address his arguments regarding *forum non-conveniens*.

CONCLUSION

¶17 Appellants have failed to show that Alves either consented to jurisdiction or has sufficient contacts with Montana such that asserting jurisdiction over him would comply with the requirements of due process. Taking the well-pleaded facts of the complaint as true, no set of facts could serve to support a Montana court’s exercise of *in personam* jurisdiction over Alves. The District Court’s dismissal of Appellants’ complaint is affirmed.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH

/S/ JAMES JEREMIAH SHEA

/S/ INGRID GUSTAFSON

/S/ DIRK M. SANDEFUR