

1977

Summa Corporation v. Lancer Industries Inc. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

SUMMA CORPORATION,
A California Corporation

Plaintiff-Respondent

-vs-

LANCER INDUSTRIES, INC.,
An Illinois Corporation
The General Partner of
Synergetics, Inc.

Defendant-Appellant

Appeal from the
for lack of
of process
judgment of
Lake County

Walter L. Blum
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Attorney for Plaintiff

IN THE SUPREME COURT
OF THE STATE OF UTAH

)
SUMMA CORPORATION,
A California Corporation,)

Plaintiff-Respondent,)

-vs-) Case No. 15149

)
LANCER INDUSTRIES, INC.,)
An Illinois Corporation,)
The General Partner of)
Synergetics,)

Defendant-Appellant)

APPELLANT'S BRIEF

Appeal from an Order denying a motion to dismiss
for lack of jurisdiction and to quash service
of process of the Honorable Dean E. Conder, a
judge of the Third Judicial District in Salt
Lake County, State of Utah.

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IN THE SUPREME COURT
OF THE STATE OF UTAH

SUMMA CORPORATION,)
A California Corporation,)

Plaintiff-Respondent,)

-vs-

Case No. 15149

LANCER INDUSTRIES, INC.,)
An Illinois Corporation,)
The General Partner of)
Synergetics,)

Defendant-Appellant.)

APPELLANT'S BRIEF

NATURE OF THE CASE

Appellant-defendant, Lancer Industries was granted its motion to dismiss pursuant to a special appearance and motion to dismiss based on the doctrine of forum non conveniens from the District Court of the Third Judicial District. The Utah Supreme Court reversed the dismissal and held that the parties should be permitted to go forward. A special appearance and motion to dismiss was then filed by the appellant-defendant based upon lack of jurisdiction over the person of Lancer Industries. A ruling is asked for on the validity of in personam jurisdiction over Lancer Industries, Inc.

DISPOSITION IN LOWER COURT

This appeal arises out of the refusal of the District Court to grant appellant's motion to quash service of process to dismiss for lack of jurisdiction.

RELIEF SOUGHT ON APPEAL

Appellant respectfully asks this Court to reverse the trial court's order denying the motion of appellant to dismiss for lack of jurisdiction over the subject matter.

Appellant respectfully asks this Court to reverse the ruling of the trial court that the courts of Utah have jurisdiction over the defendant Lancer for the purpose of deciding the controversy between the parties.

STATEMENT OF THE FACTS

Suit was brought by Summa Corporation, a California corporation, with its principal place of business in Van Nuys, California (R.1) against the defendant Lancer Industries and Synergetics, a limited partnership.

Appellant Lancer Industries, Inc., is the partner in the limited partnership of Synergetics (R. 8). Synergetics is a partner in a general partnership owning a parcel of real property located in Tampa, Florida (R. 8). This lawsuit arises out of a dispute concerning the performance of a contract between the respondent, Summa Corporation, and the general partnership, whereby the respondent was to prepare a feasibility

study concerning the optimum use for development of the aforesaid parcel of property. The affidavits of appellants show that a full scale trial would be required in this matter because said study contained serious errors and was inadequate in view of physical characteristics of the parcel of property and the economic situation of the Tampa, Florida vicinity. Appellant and its partners, therefore, refused to pay the fee of the respondent, who filed this lawsuit in the Third Judicial District Court in the State of Utah (R. 8).

Neither Synergetics nor Lancer Industries, Inc., has any property, real, personal or otherwise in the state of Utah, and neither of the said defendants do business in any respect in the state of Utah (R. 49-50). The only contact Synergetics has with the state of Utah is to merely have its Articles of Limited Partnership filed here (R. 49-50). However, appellant has not engaged in any business within the state of Utah. The only affiliation Lancer Industries has with the state of Utah is the fact that its president resides here, while its place of incorporation and principal place of business is Illinois (R. 7). Also, Lancer Industries does business in five other states, including Florida, having a process agent in each (R. 49-50).

All business from which this action arises took place in the state of Florida and not Utah, since Florida is where the

property is located, the contract was entered into, performance was to take place, and where the alleged breach occurred. (R. 8, 13, and 15).

Appellant contends by special appearance (R. 5) that the Utah forum should not assert in personam jurisdiction over it because of the lack of any minimum contacts of the appellant within the state of Utah.

ARGUMENT

POINT I.

IN PERSONAM JURISDICTION OVER A FOREIGN CORPORATION HAS NOT EVOLVED TO SUCH AN EXTENT SO AS TO SUBJECT LANCER INDUSTRIES OR SYNERGETICS TO VALID SERVICE OF PROCESS BY ANOTHER FOREIGN CORPORATION.

The evolution of in personam jurisdiction over a foreign business entity, began with a holding, that a foreign corporation could not be used in an action for the recovery of a personal demand outside the state by which it was chartered. Pennoyer v. Neff, 95 U. S. 714 (1877). Mr. Chief Justice Taney, so held on the belief that a corporation must dwell in the place of its creation and cannot migrate to another sovereignty. This view was coupled with the doctrine that an officer of the corporation does not carry his function with him when he leaves the state, St. Clair v. Cox, 106 U. S. 350 (1882). This view of the exercise of a corporation from suit in a state other than its creation is the cause of much inconvenience and often manifest injustice.

great increase in the number of corporations, and the immense extent of their business, only made the injustice more frequent and marked. "To meet and obviate this inconvenience and injustice legislatures, interposed and provided for service of process on officers and agents of foreign corporations doing business therein. This change was rationalized on the basis that the corporation doing business in those states were protected by their laws; allowed to carry on business within their borders, and sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities that it incurred there". 73 Harvard Law Review 909, 916, (1917).

Even though the holding in Pennoyer was liberalized, the rule that the mere presence of an officer of a foreign corporation in another state will not subject the corporation to suit has not changed. The Supreme Court of Utah has so held in Western Gas Appliances v. Servel, Inc., 257 P2d 950, (1953). See also St. Clair v. Cox, 106 U. S. 350 (1882), 73 Harvard Law Review, 909, 919, (1958); and Dykes v. Reliable Furniture & Carpet, 277 P2d 969, 971, 3 Utah 2d, 34, 37, (1954). Thus, the fact that an officer of Lancer Industries was served while merely residing in the state of Utah does not make Lancer Industries amenable to service of process, since residency simply means to be present. Bohn v. Better Biscuits, Cal. App., 78 P2d 1177,

(1938); In re Cahall, 143 NYS 2d 511, 514, 208, Misc. 287; Las
v. U. S., Wis 1 Pin. 77, 79; 33 A W&P 1.

The metamorphosis of in personam jurisdiction over a foreign corporation was extended by International Shoe Co. v. Washington, 326 U. S. 310 (1945), and limited by Hanson v. Dat
357 U. S. 235 (1958).

In International Shoe, the Supreme Court rejected the consent and presence theories and accepted a new rationale.

The International Shoe Company, sued in the state court for unpaid unemployment-compensation contributions, challenged the court's jurisdiction over its person, arguing that its activities within the state were not sufficient to manifest its presence there. The Supreme Court of Washington was of the opinion that the corporation's regular solicitation within the state should be sufficient to constitute "doing business," but rested its decision upon the familiar solicitation-plus rule after finding enough additional activities to uphold jurisdiction on that basis. International Shoe Co. v. Washington, 154 P. 801, 812, 22 Wash. 2d 146, 169-70, (1945). On appeal to the Supreme Court, Mr. Chief Justice Stone discarded the presence and consent theories as mere legal conclusions that the assumption of jurisdiction was reasonable. In place of these he offered a new standard: whether the corporation had certain "minimum contacts" with the state such that the maintenance of the suit would not offend traditional notions of fair play and substantial justice. International Shoe Co. v. Washington, 326 U. S. 310 (1945).

Since, under the old analysis, presence was predicated upon contacts with the state, the Court's formulation might have been regarded as merely a verbalization of the old theory. However, the old test looked to a quantum of activities sufficient to establish a basis of jurisdiction for all suits, whereas Mr. Chief Justice Stone's approach made jurisdiction depend on all of the circumstances of:

particular case. Although he emphasized the importance of the activities of the corporation, he indicated that these were not to be considered quantitatively but were to be examined in terms of their "quality and nature" and their connection with the obligations sued upon. Id. at 319-320.

In deciding that case the Court noted that the activities of the International Shoe Company in Washington was continuous and resulted in a large volume of business activity in the state and that the obligation sued upon arose out of these activities. "These operations," it concluded, "establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there." Id. at 320.

Taking the Shoe doctrine and comparing it to the instant case it is obvious that Lancer Industries did not establish minimum contact to a degree sufficient to warrant the imposition of in personam jurisdiction over it, since there was neither solicitation nor continuous volume of business activity. Furthermore, this controversy does not arise out of any association in which the two companies have engaged within the state of Utah. Moreover, neither of these criteria existed with regards to Synergetics; hence, under the test of International Shoe to allow jurisdiction over either party would, in essence, offend notions of fair play and substantial justice.

The case of Hansen v. Danckla, 357, U. S. 235 (1958) provides the appellant with a further outpost of security in this area. In that case, a Delaware corporate trustee was found not to be amenable to Florida's in personam jurisdiction because there were no activities, purposefully carried on by the trust in Florida. The Court held that there must exist some activity by which the defendant purposefully availed itself, "of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Id. at 251.

It might be said that Synergetics, of which Lancer Industries is a general partner, might have purposefully availed itself of the privilege of conducting activities within the state of Utah and thus able to be protected by its laws because of its filing of Articles of Limited Partnership, had it actually engaged in any business. However, when one considers the Shoe requirement of minimum contacts, it becomes evident that there does not exist a basis of jurisdiction over Lancer Industries or Synergetics.

Utah law is consistent and unqualified with the doctrine set forth in International Shoe and Hansen.

"Jurisdiction over nonresidents---Acts submitting person to jurisdiction.---Any person, notwithstanding section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal

representative, to the jurisdiction of the courts of this state as to any claim arising from:

(1) The transaction of any business within this state;

(2) Contracting to supply services or goods in this state;

(3) The causing of any injury within this state whether tortious or by breach of warrant;

(4) The ownership, use, or possession of any real estate situated in this state;

(5) Contracting to insure any person, property or risk located within this state at the time of contracting.

(6) With respect to actions of divorce and separate maintenance, the maintenance in this state of a matrimonial domicile at the time the claim arose or the commission in this state of the act giving rise to the claim." UCA 1953 Section 78-27-24.

The code further provides: (1) That the words "any person" is to encompass any individual, firm, company, association, or corporation. (2) That the words "transaction of business within this state" means activities of a non-resident person, his agent, or representatives in the state which affect persons or businesses within the state of Utah. UCA 1953, Section 78-27-23.

In the case at hand, no persons or business in the state of Utah have been affected by either Lancer Industries or Synergetics, nor is there any allegation to bring the service of process or parties within any of the provisions of Section 78-27-24 or 25 UCA.

In Hill v. Zale Corporation, 482 P2d 332, 25 Utah 2d 357 (1971) the phrase "transaction of business within this state," was delineated.

"If there is any difference between what is stated as the "doing business" and the "minimal contacts" tests it is probably more in semantics than in substance. In practical application they are essentially the same. When the problem arises, its solution depends on whether it can fairly be said that the corporation is doing business within the State in a real and substantial sense. This involves the analysis of a number of factors, none of which is alone the sine qua non to establish a business presence in the State, but from a consideration of the total picture as to the existence or absence of them the answer to that critical question is to be found:

1. Whether there are local offices, stores or outlets;

2. The presence of personnel, how hired, fired and paid; the degree of control and the nature of their duties;

3. The manner of holding out to the public by way of advertising, telephone listings, catalogs, etc.;

4. The presence of its property, real or personal, or interest therein, including inventories, bank accounts, etc.;

5. Whether the activities are sporadic or transitory as compared to continuous and systematic;

6. The extent to which the alleged facts of the asserted claim arose from activities within the state;

7. The relative hardship or convenience to the parties in being required to litigate the controversy in the state or elsewhere."

Id. at 334, (emphasis added); Casper v. Smith & West

346 P2d 409, 53 Cal. 2d 77 (1957); Fisher Governor Co. v. Super

Court, 347 P2d 1, 53 Cal. 2d 222, 1 Cal. Rptr. 1 (1957). Quite

obviously, none of the above factors exist in this case. The

contacts the defendants have with the forum state are that

Synergetics has filed its Articles of Limited Partnership in the

state of Utah, and the president of Lancer Industries merely

resides in the state of Utah.

While it is provided that a limited partnership file for record a certificate indicating the amount of contribution by the partners in the office of the County Clerk of the County in which the principal place of business of the partnership shall be situated, UCA 1953 Section 48-2-2 (1) (b), there is no clear indication from, UCA § 48-2-2 (1) (b), that its purpose is to establish a basis of jurisdiction over partnerships complying with it. Morelikely, the filing of Articles of Limited Partnership is for the purpose of merely establishing its existence, and ability to transact business.

In addition, to allow the mere residency of a corporate officer to establish a basis for in personam jurisdiction over the corporation would abrogate the well ingrained minimum contacts test, and severely restrict a corporate officers choice of residency.

POINT II.

ASSERTION OF IN PERSONAM JURISDICTION BY THE STATE OF UTAH WOULD BE UNCONSTITUTIONAL UNDER THE 14TH AMENDMENT BECAUSE OF THE RESULTING HARDSHIP AND INCONVENIENCE UPON THE APPELLANT.

The last factor mentioned in Hill is the relative hardship or convenience to the parties in being required to litigate

the controversy in Utah as opposed to Florida.

"Inconvenience to the defendant is the primary consideration which may make an assertion of jurisdiction over a corporation unconstitutional since neither the plaintiff, who has indicated his choice of forum, nor the state, whose courts may dismiss the action on the basis of forum non conveniens, needs constitutional protection. Therefore, the process of determining the constitutionality of the forum's assertion of jurisdiction over the defendant involves the balancing of certain interests against the inconvenience to the defendant. The purpose of this balancing process is to determine whether entertaining the action would be unfair to the defendant. For convenient reference the other relevant interests may be described as those of the plaintiff and of the forum state. Like the defendant, the plaintiff has a legitimate interest, for example, in not being put to undue expense in litigating a claim, though this interest without more has not been considered sufficient to require the defendant to appear. Further, a state has an interest in providing a forum for the effectuation of its protective or regulatory policies, but this interest in itself is again usually said to be insufficient." 73 Harvard Law Review 909, 929 (1917).

The reasonable cost estimated of obtaining attendance willing witnesses to testify on respondent's behalf at a trial in Utah would be \$11,257.24 (R. 20-21). The amount sued for by respondent is \$16,347.24. Obtaining testimony of each or any of the nine witnesses by deposition proceedings would be unsatisfactory in two respects. First, the cost of taking each deposition would be prohibitive in terms of attorney's fees and expenses, especially if Utah counsel were forced to attend proceedings in Florida. Respondent required to retain additional legal counsel in Florida for this limited purpose, the costs would not be greatly diminished.

second, this course of action would deprive the Utah trial court of the necessary and valuable opportunity to observe the attitude and demeanor of each witness and to cross examine on issues where further inquiry would expedite court proceedings.

A possibility of a view of the parcel of property is precluded if the trial takes place in Utah. A visual inspection of the premises would be appropriate in this case since the reasonableness and adequacy of respondent's performance on the contract can only be determined by a careful appraisal of the subject property and the adjacent properties and some idea of the economic possibilities for the development of such property in Tampa, Florida.

The partners of Synergetics are not amenable to the jurisdiction of the courts of this state and no right of contribution could be enforced against them in the state of Utah. While Synergetics could, under principles of equity, enforce a right of contribution in Florida against the co-obligors on the contract, such an action would result in an additional burden because of the necessity and expense of an additional trial. If the original lawsuit were instituted in Florida, the necessity for a second trial on the issue of contribution as well as the issue of liability of the partners would in all likelihood disappear, since they would be joined as third party defendants.

The inconvenience to the appellant in being forced to defend this action in Utah is compounded by the inconvenience to the local court system. To require a Utah court to entertain an action involving Florida law, Florida property and an economic feasibility study having no connection with the state of Utah with the resultant expense to local taxpayers, the extra burden on residents of increased jury duty, the delay caused local litigants by an increased case load, and the added burden on an already congested court calendar, is at the very least, economically unwise in terms of judicial resources and expenditure of taxpayers' money.

It is apparent that considering all of the factors of "doing business" or "minimum contacts" cited in the Hill case Supra, that there is no jurisdiction over the defendants Lancer Industries or Synergetics within the state of Utah.

POINT III.

THE PLAINTIFF HAS NEVER SERVED ANY PERSON AS REQUIRED BY RULE 4 (e) (4) URCP.

Rule 4 (e) URCP provides as follows: Personal service within the State shall be as follows:

"4 (e)(4) Upon any corporation, not herein otherwise provided for, ...by delivering a copy thereof to an officer, managing agent or general agent, or to any other agent authorized by appointment or by law to receive service of process...if no such officer or agent can be found in the county in which the action is brought, then upon any such

officer or agent, or any clerk, cashier, managing agent, chief clerk, or other agent having the management, direction or control of any property of such corporation, partnership or other unincorporated association within the State if no other officer or agent can be found in the State, and the defendant has, or advertises or holds itself out as or having, an office or place of business in this State, or does business in this State, then on the person doing such business or in charge of such office or place of business." (emphasis added)

It is quite apparent from the wording in Rule 4 quoted above that the statute contemplates that a partnership, organization, or corporation would have a person designated by law to receive service of process for it in this state. There is no such person in the state of Utah for Lancer Industries or Synergetics (R. 7). It is also apparent that the rule contemplates that if no such agent is appointed by law which is the case here, then any managing agent or chief clerk, etc. who has the management, direction or control of any property of such corporation or incorporated association with the state is amenable to process, and if no such property is in existence within the state, then the rule provides that any person in fact doing business or in charge of any office or place of business that the corporation has in the state of Utah would be amenable to process.

There is no question but what neither the defendant Lancer Industries nor Synergetics have any property or place of business in the state of Utah, and the only connection with the state of Utah is a filing of Articles of Limited Partnership for

the purpose of doing business in other states and the mere residence of a corporate officer.

There is no showing in the record of any other purported service of process upon the defendants other than by Rule 4(e)(4). The requirements of this rule have not been fulfilled, therefore the motion to quash purported service of process upon W. A. Bailey should have been quashed.

CONCLUSION

In conclusion, from the record herein the defendants have never and do not now do business in the state of Utah, they have no place of business, own no property and have no process agent within this state, hence the defendants do not have minimal contacts with the state of Utah. The action sued upon does not arise from any activities in the state of Utah. The defendants have never submitted themselves to the jurisdiction of the state of Utah, nor has any designated agent to receive process or agent doing business or having charge of property within the state of Utah been served, therefore the motion to quash service of process and to dismiss for lack of jurisdiction should have been granted.

Respectfully submitted,
RYBERG & McCOY

John L. McCoy
Attorney for Appellant

I HEREBY CERTIFY THAT I DELIVERED TWELVE OF THE
FOREGOING BRIEFS TO THE SUPREME COURT, STATE OF UTAH,
THIS 15th DAY OF SEPTEMBER, 1977.



Liz Miller