1980

Deseret Company v. JSJ Corp : Brief of Defendant-Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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DESERET COMPANY,
a Delaware corporation,

Plaintiff-Appellant,

v.

JSJ CORPORATION,
a Delaware corporation,

Defendant-Respondent.

Case No. 16992

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BRIEF OF DEFENDANT-RESPONDENT

JSJ CORPORATION

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Appeal From the Order of the Third Judicial District Court of
Salt Lake County, State of Utah

The Honorable Bryant H. Croft, District Judge

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STATEMENT OF THE NATURE OF THE CASE

This case was originally brought by Appellant, Deseret Company, to recover money paid and to obtain removal from Appellant's premises of an allegedly defective custom-made pharmaceuticals packaging machine, manufactured by Respondent for Appellant.

DISPOSITION IN LOWER COURT

Respondent was served with the Complaint in this case at its offices in Grand Haven, Michigan. Respondent thereupon moved to quash service of process and/or dismiss the Complaint. Hearing upon the motion was held on January 25, 1980 at which time Appellant was allowed an opportunity to produce an additional counter-affidavit relating to the jurisdictional issues. Thereafter, Appellant supplied the court with the

requested affidavit and on February 19, 1980 the court granted Respondent's motion to quash service of process and dismiss the Complaint for lack of jurisdiction over the Respondent based on the Court's finding that:

> [T]his was a single isolated transaction, initiated originally by plaintiff's [Appellant's] telephone call based upon the single ad in a trade journal. In my opinion these facts do not warrant a finding that the "minimal contacts" requirements of due process have been met. (Record on Appeal at 63)

RELIEF SOUGHT ON APPEAL

Defendant-Respondent JSJ Corporation seeks to have the Order dismissing the Complaint and quashing service of process for lack of jurisdiction of the lower court affirmed.

STATEMENT OF FACTS

Respondent does not believe that all of the material facts pertinent to this particular matter have been set forth in the Statement of Facts in Appellant's Brief. Rather than attempt to just set forth omitted facts which Respondent believes are material the following Statement of Facts is provided by the Respondent.

Appellant, Deseret Company (plaintiff below), is a Delaware Corporation authorized to do business and doing business in Utah including at a facility in Sandy, Utah. Respondent, JSJ Corporation (defendant below), is a Delaware corporation with its

principal place of business in Grand Haven, Michigan. It is not qualified or authorized to do business in Utah, and has no offices, factories, warehouses or other places of business in Utah. Respondent has no telephone listing, bank account, inventory, files, books of account, facilities, investments or other real or personal property in the State of Utah. It has no employees or salesmen working in the State of Utah on a regular basis. (Affidavit of Paul A. Johnson, Record on Appeal at 14-15).

In late 1974 or early 1975, Respondent advertised in certain trade journals, none of which were directed specifically to the State of Utah. (Affidavit of Lee S. Kihnke, Record on Appeal at 50). Mr. George Ford was a former employee of Appellant and was charged with the responsibility of acquiring a packaging machine for the processing of some of Appellant's products. In seeking a manufacturer for such a machine he reviewed trade journals and noted an advertisement by Respondent as a manufacturer of packaging machines. Ford thereupon contacted Respondent's Michigan office stating that Appellant may be interested in ordering and developing a custom-made pharmaceuticals packaging machine. (Affidavit of George Ford, Record on Appeal at 59-60). Respondent had not manufactured such a machine before. Consequently, Mr. Kihnke, general manager of Dake Corporation, Packaging and Machinery Division of JSJ Corporation, traveled to Utah to discuss Appellant's needs and

the development and production of such a machine. Nothing came of these contacts, as Appellant acquired a machine from another source. Thereafter, Mr. George Ford left the employ of the Appellant. (Affidavit of George Ford, Record on Appeal at 60; Affidavit of Lee S. Kihnke, Record on Appeal at 53,54). Nearly two years later, on March 29, 1977, Appellant mailed to Respondent at Grand Haven, Michigan, samples of the packaging materials and specifications for a new machine. Respondent replied with a proposal, contained in a letter dated April 6, 1977. On August 10, 1977, a second letter was sent by Respondent JSJ requoting its bid for the machinery. On November 8, 1977, Appellant sent additional packaging samples and specifications and requested a bid on a machine as soon as possible. Respondent replied with a second revised proposal based on the new samples and specifications, on November 29, 1977, which included, inter alia, the following conditions of sale:

> 3. Acceptance. No order, sale, agreement for sale, accepted proposal, offer to sell and/or contract of sale shall be binding upon Dake unless accepted by an officer of Dake at its office in the City of Grand Haven, Ottawa County, Michigan on an order acknowledgement letter.
>
> 6. Shipment: Shipments are made F.O.B. Dake's plant of manufacture.
>
> * * *
>
> 18. Law: The rights and duties of all persons and the construction and effect of

> all provisions hereof shall be governed by and construed according to the laws of Michigan. (Emphasis added) (Affidavit of Lee S. Kihnke, Record on Appeal at 54-55).

On February 17, 1978, Appellant mailed to Respondent in Grand Haven Michigan, a Purchase Order agreeing to the terms of Respondent's order proposal of November 29, 1977, with certain stated exceptions, which order was accepted by Respondent in Michigan. The acceptance was confirmed by letter of February 17, 1978. Appellant sent a truck to pick up the completed machinery at Respondent's plant in Grand Haven, Michigan on August 16, 1978. (Affidavit of Lee S. Kihnke, Record on Appeal at 54-55).

Installation was supervised by one of Respondent's employees who came to Utah for that purpose. The machine allegedly did not function properly and in November 1978 two of Respondent's employees came to Utah and spent four days working on the machine. (Affidavit of James C. Loveless, Record on Appeal at 39-40).

Respondent's negotiations with Deseret and production of the pharmaceuticals packaging machine were the direct result of Appellant's inquiry and requests for bids. (Affidavit of Lee S. Kihnke, Record on Appeal at 55).

Appellant filed this action in Utah alleging, inter alia, that the machine is "defective and inoperative", that it has not and will not "operate according to the specifications in the sale documents" and that defendant has "breached the agreement

of sale by supplying a packaging machine which will not perform the functions for which it was designed and sold to plaintiff in violation of express and implied warranties of sale". As to jurisdictional facts Appellant's Complaint merely states the conclusion that:

> Defendant has transacted business and is doing business in the State of Utah pursuant to the applicable provisions of the Utah "long arm" statute, and is subject to the jurisdiction of the above-entitled court.

(See Complaint, Record on Appeal at 2-3).

Respondent, by special appearance, demonstrated through affidavit, memoranda and oral argument, to the satisfaction of the lower court that it in fact was not doing business or transacting business within the State and was not otherwise amenable to long-arm jurisdiction inasmuch as it did not have "minimum contacts" with Utah sufficient to satisfy due process. From the ruling of the trial court to that effect, Appellant prosecutes this appeal.

ARGUMENT

POINT I

THE ACTIVITIES OF THE RESPONDENT DO NOT CONSTITUTE "DOING BUSINESS" IN THE STATE OF UTAH AND ARE NOT SUFFICIENT FOR IN PERSONAM JURISDICTION ON THAT BASIS

While Appellant in its Complaint suggests that Respondent is subject to the jurisdiction of the Court in Utah because it is doing business in the State, it does not pursue this basis of jurisdiction on appeal. Respondent agrees that under the

"solicitation plus" test which this Court has developed and the extensive contacts with the forum that are necessary to constitute "doing business" in Utah, the facts of this case clearly demonstrate that Respondent is not doing business in Utah and is not subject to jurisdiction on that basis. See, Burt Drilling, Inc. v. Pacific Hydro Corp., 608 P.2d 294 (Utah 1980).

POINT II

THE ACTIVITIES OF THE RESPONDENT DO NOT SATISFY THE GROUNDS DELINEATED IN THE UTAH LONG-ARM STATUTE WHICH ARE ALLEGED AND/OR RELIED UPON BY APPELLANT

Assertion of jurisdiction under the Utah Long-Arm Statute, Utah Code Ann., §§78-27-22 to -28 (1953), involves two elements. First, the non-resident's activities within the State must satisfy one of the grounds delineated in the statute for assertion of jurisdiction and the cause of action must arise out of such contacts. Secondly, the exercise of jurisdiction must meet due process, minimum contacts requirements.

In Abbott G.M. Diesel, Inc. v. Piper Aircraft Corp., 578 P.2d 850 (Utah 1978) this Court, in a unanimous opinion, stated:

> [T]he long-arm statute can be invoked only if there are allegations that one or more of the enumerated acts therein obtain. (Emphasis added).

The plaintiff in that case alleged that its claims arose from the transaction of business, contracting to supply services or goods and breach of warranty. In its Complaint, the Appellant

in this case asserts Respondent is subject to jurisdiction because it was involved in the "transaction of business" and was "doing business" in the State. On appeal, Appellant has gone beyond the scope of its pleadings and suggests that jurisdiction may also be based on the long-arm grounds of contracting to supply services or goods in Utah or causing injury within Utah by breach of warranty.

Respondent submits that it is not transacting business within the State, as more fully discussed below, and that the other bases for assertion of long-arm jurisdiction are not appropriately before the Court for consideration. However, assuming, arguendo, that these other grounds raised by Appellant's brief are appropriate for consideration, Respondent submits that the facts of this case do not justify their application.

A. Respondent Did Not Transact Business Within the State of Utah

Utah Code Ann., §78-27-23, (1953), defines "transaction of business within this State" as follows:

> Activities of a nonresident person, his agents or representatives in this state which affect persons or businesses within the State of Utah. (Emphasis added).

Appellant claims that this standard is met by Respondent by coming here to solicit Appellant's business, by communicating with Appellant by telephone and through the mails, by selling

Appellant a machine worth approximately $90,000.00, knowing that it would be used in Utah, and by sending its employees and representatives here to install, service and attempt to repair the machine.

As set forth in the statement of facts, Respondent traveled to Utah in response to Appellant's solicitation. Moreover, no contract was entered into as a result of that visit. The communications and telephone conversations, and the consummating of the contract in Michigan obviously do not involve activities or presence of Respondent, its agents or representatives in Utah. Finally, even if the installation and subsequent service work by Respondent in Utah were sufficient to constitute the transaction of business in the State, they are not the activities which give rise and/or result in Appellant's claim. Appellant has not alleged any breach of the installation contract. Rather, the claim goes to the design and manufacture of the machinery which occurred in Michigan. Clearly under the statutory standard, Respondent did not transact business in the State of Utah.

The concurring opinion of Justice Stewart in Burt Drilling, Inc., supra, sustained the decision that Pacific Hydro was amenable to jurisdiction only on the long-arm basis of "causing any injury within this State whether tortious or by breach of warranty". This he did because in precedential long-arm jurisdiction cases involving causes of action based on the transaction

of business within the State, the Supreme Court had "found the necessary significant minimal contacts on the basis of more than a single act performed within the State". In the instant case, Respondent submits that it has not transacted any business in this State giving rise to this cause of action, much less does it have a multiplicity of acts within this State as required by Utah decisional law.

B. Appellant's Cause of Action Does Not Arise Out of Respondent's Contracting to Supply Services in the State

Appellant did not plead Respondent's contracting to supply services in the State as a basis for jurisdiction and therefore this basis of long-arm jurisdiction should not be relied upon on appeal. But even assuming, arguendo, that the Court may consider this ground of jurisdiction, it is not appropriate under the facts of this case.

In its brief, Appellant asserts that:

> [Respondent's] actions fall within this provision of the Long-Arm Statute, [contracting to supply services or goods in this State]. . . because it contracted to provide a factory trained service technician to supervise the installation of the machine in Utah which plaintiff purchased from defendant. The installation was plainly a service and the contract to provide such a service in Utah places defendant squarely within the ambit of the Long-Arm Statute.

(Brief of Appellant at 3-4). As noted in Appellant's Statement of Facts, the "Dake Installation Policy" was a separate document, independent of the contract proposal to sell and manufacture

the machinery which is in issue herein. Even if the installation policy is considered a contract for services in the State, Appellant's Complaint does not allege any breach of the installation contract, or warranties related thereto, or any defective or negligent installation. Rather, Appellant seeks to rescind the contract for sale and manufacture of the machinery and recover its money paid thereon based on Respondent's alleged breach of the contract by providing defective machinery or by breaching implied warranties of sale and manufacture.

In the recent case of Roskelley & Co. v. Lerco, Inc., No. 15987 (Utah, April 11, 1980) this Court reaffirmed its position that in actions brought pursuant to the long-arm Statute the "plaintiff must show that his claim arises out of some contact defendant has with the forum State." The Court declined the invitation to extend this requirement to embrace claims sued on which have a "nexus" with, but do not arise out of a defendant's activities within the forum or claims which have a "close relationship" with the non-resident defendant's jurisdictional activities. (Slip Opinion at 13-14).

Respondent submits that in the instant case just as in Roskelly, supra, "it does not here assist the plaintiff to show the contacts the defendant has with the forum if the specific litigation at bar does not arise out of any of those contacts". (Slip. Opinion at 5).

In Roskelly, supra, the cause of action was based on an alleged contract for commissions on the sale of certain equipment ultimately to a Utah corporation. The Court found that though the defendant's contacts with the State in being present to oversee the installation of the equipment may be sufficient for jurisdiction if the litigation involved an action for breach of warranty or negligence in installing the equipment, the plaintiff could not avail himself of such contacts for the purpose of his claim on an entirely different contract. Likewise, in the case at bar, Appellant's claim is based on an entirely different contract (manufacture and sale) than the one which resulted in Respondent's contact with the forum (installation), or at best a completely separate phase and aspect of the same contract, and such contact is thus not available to Appellant to support a claim of jurisdiction in this action.

C. Respondent Did Not Contract To Provide Goods in Utah

This basis of long-arm jurisdiction also was not alleged in Appellant's Complaint and is not properly before the Court. But even assuming, arguendo, that consideration is appropriate Appellant has not specifically relied on this basis of jurisdiction and the facts do not warrant its application.

As is discussed in the Statement of Facts, Appellant and Respondent entered a contract negotiated by mail and telephone which contract was accepted by Respondent and therefore

consummated at Respondent's place of business in Michigan, as per the contract provisions. Thus, the contracting to supply goods did not occur in Utah. Moreover, the contract did not call for the supplying of goods in Utah. Rather, Respondent was to manufacture the machinery in Michigan and hold the machinery there for pickup by Appellant. Thus, the goods were supplied to the Appellant in Michigan. Moreover, Appellant does not appear to claim jurisdiction based on contracting to supply goods in the State. Rather, Appellant bases its claim for jurisdiction on Respondent's contracting to provide services in the State of Utah, apparently acknowledging that there must be some activity within the State for long-arm jurisdiction to obtain.

Just as in the case of long-arm jurisdiction based on the transaction of business in the State, Justice Stewart in Burt Drilling Corp., supra, summarized Utah precedent as requiring more than a single act performed in the State in order to satisfy the necessary significant minimal contacts necessary to invoke jurisdiction in causes of action arising out of the contracting to supply services or goods in the State.

In the instant case Respondent submits that it has not contracted to supply goods in Utah nor done any act, much less several acts in contracting to supply goods, in the State as required by Utah decisional law.

D. Respondent Did Not Cause Injury Within this State Whether Tortious Or by Breach of Warranty

Again, this provision of the long-arm statute is not invoked by Appellant's Complaint and cannot be relied on by Apellant here. In any event, this basis of jurisdiction is not supported by the facts.

Appellant's Complaint alleges, inter alia, that Respondent "breached the Agreement of Sale by supplying a packaging machine which will not perform the functions for which it was designed and sold to plaintiff in violation of express and implied warranties of sale", and that the machine is "totally defective and inoperative".

Appellant does not recite these charges in support of a product's liability claim, or a claim for damages for breach of warranty. Rather, Appellant makes these allegations to support its theory of breach of contract and its prayer for recission and restitution.

Respondent submits that this cause of action for recission and restitution is not a claim for "injury" caused by breach of warranty. Moreover, this Court has recognized that "financial injury" which occurs in Utah to a Utah plaintiff as the result of alleged wrongdoing outside of the State is not a sufficient basis for jurisdiction. See, Hydroswift Corp. v. Louie's Boats and Motors, Inc., 27 Utah 2d 233, 494 P.2d 532 (1972); Burt Drilling Corp., (Stewart J. concurring), supra, at 9. A contrary result would allow assertion of jurisdiction over a

non-resident in any forum in which a plaintiff may locate. Such would clearly be an abuse of long-arm jurisdiction.

Respondent submits that scrutiny of Appellant's Complaint demonstrates that it is not based on "injury within the state by breach of warranty" as that phrase has been construed by Utah Courts. Plaintiff is suing for rescission not for damages. Even assuming plaintiffs' claim could be construed to allege injury, it is clear that such injury would only be financial in nature.

POINT III

ASSERTION OF JURISDICTION OVER RESPONDENT IN THIS CASE WOULD VIOLATE DUE PROCESS

The landmark case of International Shoe Co. v. Washington, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945) laid down a new test regarding a State's jurisdiction of nonresidents. That test provided that to obtain in personam jurisdiction of a defendant, the due process clause requires "certain minimum contacts" within the forum and that the maintenance of the suit does not "offend traditional notions of fair play and substantial justice". The Court added that these demands of due process "may be met by such contacts of the corporation with the state of the forum as make it reasonable in the context of our federal system of government to require the corporation to defend the particular suit which is brought there."

The Supreme Court in Hanson v. Denkla, 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958) warned that it is a mistake to assume that International Shoe and its progeny "herald the eventual demise of all restrictions on the personal

jurisdiction of state courts". The Court also stated that the application of the "minimum contacts" rule will vary with the quality and nature of the defendant's activity, but that it is essential in each case "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus, invoking the benefits and protections of its laws." (Emphasis added).

There are numerous cases from other jurisdictions which have held that activities parallel to those in the instant case were insufficient to meet the due process limitations ennunciated by the United States Supreme Court. In Saletko v. Willys Motors, Inc., 36 Ill. App. 2d 7, 183 N.E.2d 569 (1962), the plaintiff sued for breach of a foreign corporation's contractual promise to sell and deliver certain auto parts. The Court held that the defendant was not subject to jurisdiction as it never was physically present in Illinois (the forum) and the parts were delivered outside of Illinois to a trucking company (agent of the purchaser) for shipment to the purchaser. Likewise, in Morgan v. Heckle, 171 F. Supp. 482 (D.Ill. 1959), a non-resident seller's motion to quash was granted where the only contacts the seller had with Illinois were that the plaintiff's telephone order was made from Illinois, the goods were shipped c.o.d. to Illinois, and payment was made from Illinois and received in Tennessee. The defendant was never physically present in Illinois and had no agent there.

Due process was held to prohibit assertion of jurisdiction in Chassis-Trak, Inc. v. Federated Purchaser, Inc., 179 F. Supp. 780 (D.N.J. 1960). The case involved a single business transaction in which all pertinent negotiations, including the purchase order were by mail and telephone.

The Court granted the defendant's motion to dismiss for lack of jurisdiction in Old Westbury Golf & Country Club, Inc. v. Mitchell, 44 Misc. 2d 68 7, 254 N.Y.S.2d 679, aff'd, 219 N.E.2d 868 (1961), where the contract was executed in Ohio and the defendant did nothing in New York (the forum) as regards the plaintiff's cause of action, except deliver the materials involved. In addition, a single conversation had taken place in New York more than a month before the Ohio contract was executed.

In Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956), the plaintiff placed an order with the defendant, a non-resident manufacturer, which order was accepted at defendant's plant in New York. The goods were sold f.o.b. the seller's plant in New York. After receipt of the shipment, plaintiff complained that the goods were defective. There were several communications between the parties. The defendant's manager went to the forum to discuss the complaint. The court rejected the argument that a single interstate shipment and the presence of the defendant in the state to discuss the claim constituted minimum contacts.

The defendant in AMCO Transworld, Inc. v. M/V Bambi, 257 F. Supp. 215 (D.Tex. 1966), a French corporation, accepted purchase orders in France, mailed notice of acceptance to the plaintiff, shipped the goods to Texas, and received payment by issuing drafts drawn on a Texas bank. The defendant's commercial director had made two trips to Texas prior to the execution of this contract and solicited business there without achieving the consummation of the contracts within the state. The Court held that these activities did not satisfy the minimum contacts test.

In the present case, Appellant saw an advertisement of the Respondent's. That advertisement was not specifically directed to Appellant or Utah, but rather appeared in a trade journal. The specific relationship between the parties was initiated by Appellant when its employee contacted Respondent by telephone. In response to Appellant's inquiry, Respondent's employee came to Utah. No contract was consummated in Utah and nothing came of this visit. Appellant purchased the machine it was then seeking from another company. Clearly, plaintiff's subsequent purchase of a different machine and its resulting alleged cause of action did not arise from the Respondent's trip to the forum.

The contract which is the basis of this lawsuit was without doubt initiated by Appellant when it sent samples and specifications to Respondent and requested a bid. At this time

it is interesting to note that Appellant's employee who had originally seen Respondent's advertisement and who suggested that Respondent manufacture the first machine, had left the company. Communications by telephone and mail resulted in the consummation of the contract finally in Michigan. Respondent performed the contract at issue in this case in Michigan, inasmuch as the machinery was manufactured there and was sold and turned over to Appellant there. Appellants then had a truck take the machinery to Utah. Respondent's installation of the machinery in Utah, as discussed above, does not involve a contact with Utah pertinent to this litigation. Respondent's other trips to Utah in response to Appellant's claim that the machinery was defective, to make adjustments and hopefully resolve or settle the matter, are not available to Appellant to show contacts with the State as Appellant's cause of action does not arise out of such contacts. A contrary result, allowing contacts which occur after the alleged cause of action has arisen, made in an effort to work the situation out, to be used by Appellant to support its claim of jurisdiction is clearly not contemplated by the long-arm statute.

Appellant's claim arises out of the isolated sale and manufacture of machinery which was ultimately located in Utah. The record clearly indicates that Respondent was not qualified to do business in Utah, does not maintain offices, factories, warehouses or other places of business in Utah, has no telephone

listing, bank accounts, inventory, books of account, facilities or other files, real or personal property in the state.

Appellant suggests that recent decisions announced by this Court require the exercise of jurisdiction of the Respondent in this case. Respondent submits that these cases are distinguishable from the instant case and that the principles ennunciated therein demonstrate that a finding of jurisdiction in this case would violate due process.

Burt Drilling, Inc., supra, differs from the present case in that the record there clearly indicated that the defendant was a nationwide, multistate business and consequently should reasonably expect to be required to defend suits in foreign forums. Appellant cannot rely on this argument in the instant case as there is nothing in the record that treats this beyond the fact of some trade journal advertising in late 1974 or early 1975. Moreover, in Burt Drilling, Inc., supra, the Court made reference to the fact that the defendant had a security interest in the machinery located in Utah, thereby invoking the protection of Utah law. Consequently, the Court felt it would be fair to require the defendant to be subject to jurisdiction in Utah. There is no evidence in this case that Respondent had such a security interest. Finally, the plurality holding in Burt Drilling, Inc., supra, was that the defendant was subject to jurisdiction on the basis of causing injury in the State. The injury in that case consisted of the fact that the equipment failed to operate properly causing

plaintiff to lose drilling contracts, and resulting in loss of some of the machinery parts which fell into a well casing and could not be removed. Justice Stewart characterized the injury as tortious injury in the State and distinguished it from the financial injury in the State alleged in Hydro-Swift Corp. v. Louie's Boats & Motors, Inc., and which allegedly exists in the present case, which was held to be insufficient contact with the State to satisfy due process.

In Roskelly & Co., supra, this Court ordered the lower court to dismiss the plaintiff's complaint for lack of jurisdiction. In reaching this decision the Court noted as relevant the fact that the specific contacts between the parties were initiated by the plaintiff's telephone call from Utah to the defendant, just as they were in the instant case. The record apparently does not demonstrate how plaintiff came to be acquainted with defendant -- whether by advertisement, prior business dealings, or otherwise. The Court focused on the direct contact between the parties initiated by plaintiff's telephone call. Also of significance to the Court was the fact that the defendant entered Utah only for the purpose of supervising the installation of the equipment it had sold. The Court held that this contact would be significant if suit were brought based on negligence or breach of warranty in installing the equipment, but that it had no relevance in a suit on an entirely different contract. The same situation obtains in the instant case. Finally, the Court also noted with interest that the defendant in that case, like the Respondent in this case, was not qualified to do business in Utah.

In Ted R. Brown and Associates v. Carnes Corp., No. 15978 (Utah April 24, 1980) jurisdiction of a foreign corporation was determined to be appropriate. The foreign corporation in that case, however, had local sales representatives who were under contract in the State of Utah, and had a substantial volume of business in the State. Through these agents the corporation received orders for sales of its goods and supplied those goods in the State seeking the benefits of the Utah market. In the particular transaction in issue in that case representatives of the foreign corporation came to Utah and combined their efforts with the local sales representative to sell their product, make adaptations thereof to satisfy the purchaser's needs and to install it. Plaintiff, a sales representative, sued for its commission due from this sale.

In the instant case, Respondent does not have the substantial activities in the forum that Carnes Corporation had. It has no local sales representatives. It did not negotiate or consummate the contract in issue here in Utah. There is no evidence in the record that it had the volume of business within Utah that Carnes Corporation enjoyed.

In Mallory Engineering, Inc. v. Brown, Nos. 15530 and 15544. (Utah, Mar. 6, 1980) defendant not only contracted to sell goods to a Utah buyer but contracted to deliver the goods in Utah, unlike Respondent here who supplied the machinery to the Appellant in Michigan. This was considered to be a purposeful

contact with the State whereby the defendant availed himself of the privilege of conducting activities within the State.

In its brief Appellant notes that the Mallory decision requires a balancing of the interest and inconveniences of the parties as part of the due process inquiry. However, contrary to Appellant's suggestion, in the due process balancing of inconveniences, risk of default by the defendant is not the only consideration in the equation. Another factor is whether the defendant is a multistate or local manufacturer or business. Except for the fact of Respondent's advertising in general trade journals in 1974 and 1975, plaintiff has not established in the record before the Court the interstate sweep of Respondent's business. The instant transaction was consummated and performed all at Respondent's place of business in Michigan. The Mallory Court did note, however, that even the operation of interstate business alone cannot justify personal jurisdiction over a non-resident defendant. Finally, while the machine is located in Utah and inspection thereof may have some value, Appellant's action is based on the machine's failure to perform according to contract specifications and warranties. The machine was developed and custom made in Michigan. All of the witnesses with knowledge of the manufacture are located in Michigan.

While Utah may have an interest in providing a forum to its residents to seek redress against non-residents, due process cannot be violated in so doing.

CONCLUSION

Respondent is not doing business in Utah. Hence it may be subject to jurisdiction in the State only if it has activities within the state that satisfy the long-arm statute, the cause of action specifically arises out of those specific activities, and exercise of jurisdiction would not offend due process. Respondent submits that it did not transact business in the State, contract to provide goods in the State or cause injury in the State as those terms are given content by Utah cases, and that Respondent's activities in the forum, if any, did not give rise to the present cause of action.

Assertion of jurisdiction in this case would offend due process requirements as recognized in cases from other jurisdictions. Moreover, recent Utah cases which have upheld the application of long-arm jurisdiction are distinguishable from the present case, and the principles recently ennunciated by this Court demonstrate that a finding of jurisdiction in this case would violate due process.

RESPECTFULLY SUBMITTED this 17th day of July, 1980.

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