1972

Foreign Study League v. Holland-America Line : Reply Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

FOREIGN STUDY LEAGUE,
Plaintiff and Appellant,

vs.

HOLLAND-AMERICA LINE,
Defendant and Respondent.

Case No. 12445

REPLY BRIEF OF APPELLANT

Appeal from Judgment of the Third District Court for Salt Lake County
Honorable Bryant H. Croft, Judge

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PRELIMINARY STATEMENT

In this action for a declaratory judgment that no contract exists between the parties for the charter by plaintiff of the defendant's passenger steamship, the SS Ryndam, the plaintiff-appellant, Foreign Study League, seeks reversal of the lower court's judgment quashing service of process for lack of jurisdiction over the person of the defendant. The League contends that in light of the undisputed evidence the courts of this state have

jurisdiction over the defendant-appellee, Hollad America Line, both under the "transaction of business provision of Utah's long arm statute, Utah Code Ann. § 78-27-24(1) (Supp. 1969) and under the traditional minimum contacts theory. Holland America Line contends that its contacts with this state are insufficient to warrant the assertion of jurisdiction by our courts.

Holland America Line asserts that its contacts with this state are de minimus and "largely theoretical—if not imaginary," (HAL Brief at 6) and seeks by persistent misrepresentation of the evidence to convince this court of three erroneous factual propositions:

1. That HAL neither solicits nor transacts business in this state;

2. That the undisputed course of contact between the parties through their top management personnel was primarily social in character;

3. That the two negotiating sessions conducted in Salt Lake City, Utah by Holland America Line's chief sales managers regarding the use of the Ryndam for 1970 were isolated business contacts relating to a different claim than that sued upon in this case.

Contrary to these contentions of the appellee, however, the evidence below disclosed that Holland America Line has for many years engaged in a regular, systematic and continuous course of business dealings in this state, both with the Foreign Study League, its principal charter customer, and in general marketing activities.

I.

HOLLAND AMERICA LINE HAS SUFFICIENT MINIMUM CONTACTS WITH THIS STATE CONSTITUTIONALLY TO PERMIT THE ASSERTION OF JURISDICTION BY OUR COURTS.

Despite the appellee's efforts to mask the economic realities of its contacts with this state, the evidence disclosed that Holland America Line has derived over one and one-half million dollars ($1,500,000.00) in revenues from this state from the years 1967 through October, 1970. (Tr. 31, 33; Deft's Answers and Supp. Answers to Interrogatories.) The appellee urges that its revenues from Utah constitute only a minor portion of its total revenues, commenting that in 1969, for example it derived only $27,154 in revenues from Utah. (HAL brief at 7.) This figure, however, does not include appellee's additional $20,082.25 in freight revenues from Utah during that year. Similarly, the appellee neglected to mention that its total passenger and freight revenues from Utah for the years 1967 through October, 1970, were $423,403.25, and that its charter revenues from contracts with the Foreign Study League during that period amounted to another $1,200,000.00.

In like fashion, the appellee has attempted to minimize its profitable and long standing business relationship with the Foreign Study League by characterizing most of the parties contacts in Utah as incident to a social relationship between Mr. Tuinman of Holland America

Line and Mr. Touw of the League, who both testified below that they are close personal friends. (HAL Brief at 14-15.) This assertion, however, cannot withstand analysis. First, the lower court gave no credence whatsoever to this attempt by appellee. Nowhere does the opinion below even remotely suggest that the friendly relationship between Mr. Tuinman and Mr. Touw had any bearing whatever upon the nature and quality of defendant's contacts with this state. Second, the appellee again failed to mention the $1,200,000.00 worth of charter business it obtained from the League during the sumers of 1968 and 1969, and the appellee likewise failed to note its contention in another suit that Holland America Line's negotiations with the Foreign Study League during 1969 and 1970 even produced another $876,000 worth of charter business. (Exhibit A to complaint, p. 2.) These substantial business transactions over a three-year period can hardly be dismissed as casual social contacts between Mr. Tuinman and Mr. Touw.

The appellee concedes in its brief, moreover, that the two negotiating sessions conducted by its top level management personnel in this state related to specific business matters. (HAL brief at 17.) The appellee attempts to brush these meetings, characterized by Mr. Touw as the most important negotiations between the parties, aside by contending that these meetings related to a different use of the Ryndam than the parties subsequently discussed. (HAL brief at 21-23.) This argument is without merit for two reasons. First, there is no dispute between the parties that the March, 1969 meet-

ing in Utah related to the use of the Ryndam for 1970. While the defendant contended that the March meeting was devoted primarily to exploring the possibility of using the Ryndam for a West African cruise and the plaintiff contended that these negotiations were devoted principally to discussions of using the Ryndam for nine transatlantic crossings, even Mr. Tuinman admitted that transatlantic crossings were discussed at the March meetings, (Tr. 133-34) and Exhibit 3 unquestionably reflects partial deployment of the Ryndam on the North Atlantic. It is, moreover, undisputed that the January, 1970, meeting in Salt Lake City, between the League and top officials of Holland America Line related solely to discussions of using the Ryndam on the North Atlantic.

In addition to its efforts to escape the reality of its substantial contacts with this state by arguing that one or another use of the Ryndam changes the basic character of the parties' 1969 and 1970 negotiations, the defendant has attempted to minmize the impact of its negotiations here by characterizing them as "isolated" contacts having no bearing on the jurisdictional issue. (HAL Brief at 17.) But these two negotiating sessions were not "one-shot" contacts between strangers. On the contrary, these negotiations followed a highly profitable business relationship of several years' duration. The Utah meetings were, moreover, preceded by a series of telephonic, letter and telegraphic communications with the plaintiff in Utah regarding the use of the Ryndam for 1970.

Consistent with its attempts to negate the existence of and to minimize the significance of its contacts with this state, the appellee has attempted to fragment the evidence of its contacts with Utah by treating each such contact as a separate and independent issue. The appellee, thus, argues at length in its brief that its relationships with nineteen Utah travel agents holding sub-agency appointments from the Transatlantic Passenger Steamship Conference are not "business contacts" and are insufficient to warrant the assertion of jurisdiction by the courts of this state. (HAL Brief at 10-13, 31-39.) The question, however, is not as the appellee suggests, whether Holland America Line's agency relationships with these nineteen Utah travel agents, together with the nine days spent by HAL sales personnel calling upon these agents and working with them, are alone sufficient to warrant the assertion of jurisdiction by our courts. On the contrary, Holland America Line's agency relationships with these travel agents, its regular calls upon such agents, its use of these agents to conduct business in Utah and its generation of substantial revenues from these agents are simply further evidence of the appellee's continuous, systematic and regular business contacts with this state. Holland America Line, moreover, markets its passenger and freight services in Utah in precisely the same manner as it does "everywhere else in the United States," (Dep. Tuinman at 26-28), and if the appellee's contacts in Utah are not "business" contacts it has no such contacts anywhere in the United States.

In addition to the authorities cited in appellant's main brief the appellant calls the attention of the court to the case of *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970). In that case, the defendant California citizen requested and received a catalogue from defendant, a New York auctioneer. On the day of the auction plaintiff's employee relayed defendant's bids by telephone from Los Angeles to the auction floor and defendant successfully bid on two items. A dispute subsequently arose between the parties concerning the defendant's telephonic purchase of an auctioned item and the plaintiff New York citizen sought to assert jurisdiction over the defendant in New York. The defendant had had absolutely no contact of any kind with the forum other than his request for the catalogue and his telephoned bid. The New York Court of Appeals upheld jurisdiction, finding the transaction of business in the telephone contact. It is, therefore, clear that under this case and the authorities cited in appellant's main brief that Holland America Line's regular, continuous, and systematic business contacts with this state are more than sufficient to support the assertion of jurisdiction by the courts of this state.

II.

THIS APPEAL WAS PROPERLY BROUGHT AS AN APPEAL FROM A FINAL ORDER OR JUDGMENT UNDER RULE 72(a) OF THE UTAH RULES OF CIVIL PROCEDURE.

This appeal was taken by filing a notice of appeal pursuant to the provisions of Rule 72(a) of the Utah Rules of Civil Procedure relating to final orders and judgments. The appellee contends that the lower court's memorandum decision was not a final order or judgment within the meaning of Rule 72(a) of the Utah Rules, but rather was merely an interlocutory order quashing service of summons and that the appeal, therefore, could only have been taken by petition to the Supreme Court for an intermediate appeal under Rule 72(b).

The appellee, however, relies upon inapplicable authority and ignores the entire purpose and effect of the lower court's decision. After an evidentiary hearing upon the defendant's motion to quash service of summons and to dismiss the complaint for lack of jurisdiction over the person, the court below ruled upon the sufficiency of the defendant's activities in this state to permit the assumption of jurisdiction by the courts of Utah. In a ten page memorandum decision the lower court held that in light of the fact that plaintiff sought a declaratory judgment that no contract existed between the parties for the charter by appellant of the SS Ryndam for the summer of 1970, the defendant's activities in this state were insufficient to meet the requirements of due process, either under the long arm statute, or under the traditional minimum contacts theory. On this basis the court below granted the defendant's motion to quash service of process. The court did not expressly rule upon the defendant's motion to dismiss the complaint for lack of jurisdiction over the person. In purpose and effect, how-

ever, the lower court's judgment is clearly a final determination that the courts of Utah lack jurisdiction over the person of the defendant.

The appellee's authorities are not in point. Two of the cases cited by appellee as holding that an order granting a motion to quash service of process is not a final judgment involved alleged improprieties in the form of the service. *Honerine Mining & Milling Co. v. Tallerday Steel Pipe & Tank Co.*, 30 Utah 449, 85 P. 626 (1906); *State Tax Comm'n v. Larsen*, 110 P.2d 558 (Utah 1941). The third case cited by appellee, *Baer v. Young*, 479 P.2d 351 (Utah 1971) involves an appeal from an order granting a motion to set aside a default judgment and has nothing whatever to do with quashing service of process. In the case at bar the sufficiency of service is undisputed. Not one of the cases cited by appellant involved, as does this case, a final determination on the merits that a defendant foreign corporation's contacts with this state were insufficient to permit the assertion of jurisdiction by our courts.

Rule 72(a), moreover, was expressly amended in 1971 to include appeals from final "orders" as well as from final "judgments." Utah R. Civ. P. 72(a). The lower court's decision in this case is clearly a "final order" determining the issue of jurisdiction over the person of the defendant and the appeal was properly brought under Rule 72(a).

Respectfully submitted,

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