

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,262

FILED

SD J. VANCE

APR 13 1966

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

JULIUS MEYER,

Plaintiff/Petitioner,

-vs-

AUTO CLUB INSURANCE ASSOCIATION,
a foreign corporation,

Defendant/Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

ACIA will supplement Plaintiff's Statement of the Case and Facts as set forth below. Reference to Plaintiff's Appendix will be "A___".

Plaintiff's Complaint (A.1,2) and Amended Complaint (.3,4) contained identical allegations purporting to establish long-arm jurisdiction over ACIA. These allegations are paraphrased below for the Court's convenience:

1. At all times material, ACIA was a foreign corporation authorized and licensed to do business in Michigan; (A.1,3)

2. Plaintiff was a Michigan resident at the time of the accident, but has since become a resident of Florida; (A.1,3)

3. The accident occurred while the Plaintiff was in Florida; (A.1,3)

4. At the time of the accident, Plaintiff was an insured under an ACIA policy which provided PIP benefits pursuant to Michigan law. (A.1,2,3,4)

Plaintiff's Complaint (A.1,2) and Amended Complaint (A.3,4) failed to contain any allegations establishing that ACIA had any knowledge that Plaintiff might at some time become a resident of Florida. Further, the Com-

plaint (A.1,2) and Amended Complaint (A.3,4) failed to contain any allegations establishing that ACIA conducted business in Florida or that ACIA had an office or agency in this state. In addition, the Complaint (A.1,2) and Amended Complaint (A.3,4) failed to contain any allegations establishing: (1) the state in which the Plaintiff purchased the insurance policy in question, and (2) the policy territory applicable to said policy. While the Plaintiff now incorporates the insurance policy in his Appendix (A.12-29), the policy was not a part of the trial record.

SUMMARY OF ARGUMENT

Plaintiff's Amended Complaint failed to contain allegations sufficient to establish jurisdiction over the person of ACIA, and the Second District Court of Appeal was correct in reversing the trial court's denial of ACIA's motion to dismiss for lack of personal jurisdiction under the Florida long-arm statute, section 48.193 Florida Statutes (1983). Subsection (1)(d) of the aforementioned statute is controlling where jurisdiction is sought over an out-of-state insurance company.

Plaintiff urges a strained interpretation of the long-arm statute that is contrary to the mandate of existing case law that such a statute should be strictly construed. Further, due to the fact that the dispute in this particular case involves first party coverage, ACIA has a justified expectation that the appropriate forum will be Michigan. This might not necessarily be the case if the dispute involved third party coverage.

ARGUMENT

SINCE PLAINTIFF'S AMENDED COMPLAINT FAILED TO CONTAIN ALLEGATIONS SUFFICIENT TO ESTABLISH JURISDICTION OVER THE PERSON OF ACIA, THE SECOND DISTRICT COURT OF APPEAL WAS CORRECT IN REVERSING THE TRIAL COURT'S DENIAL OF ACIA'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION UNDER THE FLORIDA LONG-ARM STATUTE, SECTION 48.193 FLORIDA STATUTES (1983).

As indicated in Plaintiff's Initial Brief, Florida's long-arm statute section 48.193 Florida Statutes (1983), sets forth a specific list of acts which will subject a non-resident defendant to the jurisdiction of the courts of this state. In the decision below, the Second District followed the established case law in this state by citing subsection (1)(d) of the aforementioned statute as controlling where jurisdiction is sought over an out-of-state insurance company. Right vs. New Jersey Manufacturers Insurance Company, 441 So.2d 189 (Fla. 5th D.C.A. 1983); Nettles vs. White, 439 So.2d 1048 (Fla. 2nd 1983); National Grange Mutual Insurance Company vs. Fondren, 433 So.2d 1276 (Fla. 4th D.C.A. 1983). This particular subsection is set forth below for the Court's convenience:

(d) Contracts to insure any person, property or risk located within this state at the time of contracting. (emphasis supplied)

While Plaintiff's Initial Brief makes an argument for the applicability of subsection (1)(g) to the facts of this case,

Plaintiff has failed to cite any decision of this state specifically applying that particular subsection to a case involving a contract or policy of insurance. Further, since Plaintiff was a resident of Michigan at the time of the accident and the pleadings do not indicate when he moved to Florida, and since the declarations sheet on his policy (A.28) lists a Michigan address for the Plaintiff, the place of performance could not be said to be Florida. See also Trammell vs. Coral Ridge Interiors, Inc., 457 So.2d 593 (Fla. 4th D.C.A. 1984.)

To invoke jurisdiction under the long-arm statute a plaintiff must establish that the non-resident defendant committed one of the acts listed in the statute and that that act gave rise to the cause of action sued upon. April Industries, Inc. vs. Levy, 411 So.2d 303 (Fla. 3rd D.C.A. 1982). It is the plaintiff's burden to allege in the complaint jurisdictional facts sufficient to establish personal jurisdiction over the defendant. Newton vs. Bryan, 433 So.2d 577 (Fla. 5th D.C.A. 1983); Bank of Wessington vs. Winters Government Securities Corp., 361 So.2d 760 (Fla.4th D.C.A. 1978). Further, the long-arm statute must be strictly construed. Esberger vs. First Florida Business Consultants, Inc., 338 So.2d 561 (Fla. 2nd D.C.A. 1976).

As discussed in ACIA's Statement of the Case and Facts, Plaintiff's Amended Complaint simply fails to allege any facts establishing that ACIA conducted business in the State of Florida or that ACIA had an office or agency in this state. Also, there are no pleaded facts establishing the ACIA either knew or had any reason to know that Plaintiff was planning to become a resident of Florida.

In addition, Plaintiff's Amended Complaint fails to allege any facts establishing the ACIA contracted to insure any person, property, or risk located within Florida at the time of contracting. As discussed in ACIA's Statement of the Case and Facts, the Amended Complaint simply alleges that: (1) ACIA was a foreign corporation authorized and licensed to do business in Michigan; (2) Plaintiff was a resident of Michigan at the time of the Florida accident; and (3) Plaintiff was insured under an ACIA policy providing PIP benefits pursuant to Michigan law. Since there is no allegation describing exactly when the insurance contract was entered into or where the "person, property, or risk" was located at that time, Plaintiff has failed to establish personal jurisdiction over ACIA under subsection (1)(d) of the Florida long-arm statute.

If it is to be assumed that the Plaintiff, while a Michigan resident, purchased the policy in Michigan, then

there is no basis for personal jurisdiction over ACIA under subsection (1)(d) of the long-arm statute. See Nettles (2nd D.C.A.); Kight (5th D.C.A.). But see Fondren (4th D.C.A.). To hold that personal jurisdiction exists under subsection (1)(d) would be to ignore the strict construction mandate set forth in Esberger.

At this juncture it should be noted that Fondren is factually distinguishable from the instant case because Fondren, like Kight, involves liability coverage or third party benefits. Certainly, a liability carrier's actual and anticipated contacts with a foreign jurisdiction will be greater than those of a personal injury protection benefit carrier's due to the fact that the liability carrier is contractually bound to both defend in the foreign jurisdiction and satisfy any judgment rendered therein. Thus, while the holdings in Fondren and Kight may expressly conflict "on the same question of law", the unique facts of the instant case actually present a different issue for judicial resolution. The Second District's holding herein can be reconciled with the holdings of either Fondren or Kight.

In addition, in the instant case, ACIA, a personal injury protection benefit carrier for the purpose of this particular action, had an expectation that the forum would be Michigan regardless of the place of the accident.

This is so because the Plaintiff is listed on the declaration sheet as a Michigan resident and was a Michigan resident at the time of the accident. Thus, even if the accident occurred in a foreign jurisdiction, the clear expectation would be that the Plaintiff would return to Michigan to litigate any claim for personal injury protection benefits. ACIA would not have the same expectation if the instant case involved liability coverage. In that event, ACIA would legitimately have to expect to appear in any foreign jurisdiction in which an accident occurred. The choice of the forum would be determined more by a fortuitous event (i.e., where the accident happened) than by a planned circumstance (i.e., voluntary change of residence).


CONCLUSION

From the foregoing discussion, it is clear that Plaintiff's Amended Complaint fails to establish a factual basis for long-arm jurisdiction over ACIA. Therefore, the Second District was correct in reversing the trial court's denial of ACIA's motion to dismiss for lack of personal jurisdiction under the Florida long-arm statute, section 48.193 Florida Statutes (1983).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Answer Brief on the Merits has been furnished by U. S. Mail, to C. Samuel Newman, Esquire, L. D. Beltz & Associates, Post Office Box 16008, St. Petersburg, FL 33733, on this 10th day of April, 1985.



WILLIAM RUTGER