

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE,

AUG 29 1989

CLERK, SUPREME COURT

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VENETIAN SALAMI COMPANY, )  
 a foreign corporation, )  
 )  
 Petitioner, )  
 )  
**vs .** )  
 )  
 T. S. PARTHENAIS, )  
 )  
 Respondent. )

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CASE NO.: 73,848

APPEAL FROM THE DISTRICT COURT OF APPEAL  
 FIRST DISTRICT OF FLORIDA  
 APPEAL NO. 88-1414

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REPLY BRIEF OF PETITIONER,  
 VENETIAN SALAMI COMPANY, a foreign corporation

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STATEMENT OF THE CASE **AND** FACTS

The Record on Appeal will be referred to with the abbreviation "R" and then the page number of the Record.

The Petitioner, Venetian Salami Company, hereinafter sometimes referred to as "Venetian", is a Canadian corporation located in Montreal. Venetian is not licensed to do business in the State of Florida. The Respondent, J. S. Parthenais, hereinafter sometimes referred as "Parthenais", is a resident of Alachua County, Florida.

## SUMMARY OF ARGUMENT

Long arm jurisdiction over a non-resident corporation requires more than merely pleading a breach of an oral contract to pay money in Florida. Constitutional due process requires the defendant to have certain minimum contacts with the forum state. Thus, the test to determine long arm jurisdiction is a two step process. Florida trial courts must determine compliance with statutory requirements and then, additionally, determine whether the defendant has sufficient contact with Florida so that it would be fair and just to make him defend himself in a Florida Court.

## ARGUMENT

FLORIDA LONG ARM JURISDICTION OVER A FOREIGN CORPORATION REQUIRES COMPLIANCE WITH FLORIDA STATUTE 48.193 AND SUFFICIENT MINIMUM CONTACTS WITH FLORIDA BY THE FOREIGN DEFENDANT TO MEET THE DUE PROCESS REQUIREMENTS OF FAIR PLAY AND SUBSTANTIAL JUSTICE.

In his Answer Brief, Parthenais baldly states that the Florida Long Arm Statute, as drafted, meets constitutional requirements. He goes on to argue that it is wrong to require a two-step process (compliance with the statute and a review of minimum contacts) to determine if a non-resident defendant should be haled into a Florida Court. What Parthenais is saying is this:

Forget about fairness. What is all this nonsense about "minimum contacts"? The statute says all you have to do is allege breach of a contract to pay money in Florida. We allege that, so we should win.

Parthenais supports this position by saying three Florida District Courts (First, Third, and Fifth) have followed this rationale. The Fifth District, however, in Unger vs. Publisher Entry Service, Inc., 513 S.2d 674 (Fla. 5th DCA 1987) says this at page 675:

In determining whether long arm jurisdiction is appropriate in a given case, two inquiries must be made. First, it must be determined that the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of the statute; and if it does, the next inquiry is whether sufficient "minimum contacts" are demonstrated to satisfy due process requirements.

The opinion goes on to point out that when a contract forms the basis of long arm jurisdiction:

. . . the Court must evaluate the parties prior negotiations and contemplated future consequences, the terms of the contract, and the parties actual course of dealing to determine whether a defendant purposely established minimum contacts with a forum. (Citations omitted).

Even the Fifth District acknowledges the two-step process required to obtain long arm jurisdiction. The actual decision of the Court in the Unger case was, however, incorrect. In his dissent to the Unger decision, Judge Cowart succinctly put the issue in question here:

Is the failure to pay money in Florida a sufficient "contact" with the State of Florida to permit a Florida Court to acquire in personam jurisdiction over a non-resident defendant . . . ?

Judge Cowart, quite correctly, decided it was not.

Parthenais tries to distinguish the U. S. Supreme Court decision in Burger King Corp. vs. Rudzewicz, 471 US 462, 105 S.Ct. 2174 (1985) from this case by saying that the Supreme Court's statement at page 479, that:

An individual's contract with an out of state party along cannot automatically establish sufficient minimum contacts in the other party's home forum.

did not apply to this case because the allegation of a breach of a contract not just the allegation of the existence of a contract is required to obtain jurisdiction. This "argument" fails to mention, of course, that the Burger King case, dealt with the breach of the franchise agreement, not just the fact of its existence.

Parthenais also points out that the U. S. Supreme Court has

allowed jurisdiction over non-resident defendants when they had no significant contacts with the forum state. Calder vs. Jones, 465 US 781, 104 S.Ct. 1482 (1984). This case involves the intentional tort of defamation, not a contract action as in this case, and the "minimum contacts" found by the Supreme Court were the intentional actions of the Defendants, aimed at the Plaintiff in the forum state, and the harm that was suffered by the Plaintiff in the forum state.

The Calder case is an example of the need for a case by case analysis of the facts in order to determine the fairness of long arm jurisdiction. Any hard and fast rule (such as Parthenais supports) cannot possibly be flexible enough to meet the due process requirements set forth by the U. S. Supreme Court. Florida statute section 48.193 (1)(g) is not unconstitutional so far as it goes. However, an unwillingness to look beyond the mere requirements of the statute to the facts and circumstances surrounding the relationship of the parties can make the application of the long arm statute unconstitutional. The Trial Court in this case realized the unfairness of requiring Venetian to defend itself in Alachua County, Florida. Unfortunately, the First District Court of Appeal is willing to test due process requirements without looking at all the facts but merely by applying the first step of a two-step process.

## CONCLUSION

The District Courts of Appeal for the Second, Fourth, and Fifth Districts agree with the U. S. Supreme Court that long arm jurisdiction requires more than technical compliance with the wording of a State's long arm statute. The ''substance'' of due process and fairness must be looked to over and above the "form" of statutory compliance. The Venetian Salami Company has no contacts with the State of Florida, and does not seek the benefits and privileges of doing business within this State. Mr. Parthenais may have a cause of action against the Venetian Salami Company, but he has merely brought it, if it exists, in the wrong forum.

This honorable Court should reverse the decision of the First District Court of Appeal with instructions to reinstate the Order of the Trial Court dismissing this action for lack of jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of August, 1989, a true and correct copy of the above and foregoing Reply Brief of Petitioner, Venetian Salami Company, a foreign corporation, was placed in the United States mail, with postage prepaid thereon, to: Mr. Kenneth S. Davis, 515 N. Main Street, No. 300, Gainesville, Florida 32601, attorney for Respondent.

  
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