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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2009-2010

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Mark Ryder

v.

James F. Mabry

**Appeal from Jefferson Circuit Court
(CV-07-2614)**

BRYAN, Judge.

Mark Ryder, the defendant below, appeals from a default judgment entered in favor of the plaintiff below, James F. Mabry. Because we conclude that the trial court lacked in personam jurisdiction over Ryder, we reverse and remand with

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instructions.

On July 27, 2007, Mabry sued Ryder, a resident of Virginia, alleging that Ryder had fraudulently induced him to buy units in People in Profit Systems, Inc. ("PIPS"), that those units constituted securities under Alabama law, and that they were part of a Ponzi scheme, which had resulted in Mabry's losing the \$42,022.67 he had paid for the PIPS units. Mabry stated claims of conversion, fraud, and violation of the Alabama statutes governing the sale of securities.

Ryder, acting pro se, filed an answer denying liability and asserting, as an affirmative defense, that the trial court lacked in personam jurisdiction over him because he had not had sufficient contacts with the State of Alabama. Upon completion of discovery, the trial court set the action for trial on July 14, 2008.

On May 23, 2008, Ryder moved the trial court to dismiss the action on the ground that it lacked in personam jurisdiction over him. Specifically, Ryder's motion to dismiss asserted that Mabry had admitted in his responses to Ryder's discovery requests that Ryder's only contacts with the State of Alabama were four telephone calls that Mabry had made to

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Ryder while Ryder was in Virginia. Ryder's motion also cited the specific responses on which he was relying. Ryder did not attach copies of Mabry's discovery responses to his motion to dismiss; however, copies of those discovery responses were already on file in the trial court.

Contemporaneously with the filing of his motion to dismiss, Ryder filed a motion for a summary judgment. As one of the grounds of his summary-judgment motion, Ryder asserted that the trial court lacked in personam jurisdiction, and he adopted his motion to dismiss as his statement of that ground.

In response to Ryder's motion to dismiss, Mabry asserted that the motion was untimely because, Mabry said, Rule 12(b), Ala. R. Civ. P., required that a motion to dismiss on the ground of lack of personal jurisdiction be made before Ryder filed his answer. In the alternative, Mabry asserted that, because he had received Ryder's offer to sell securities while he was in Alabama and had accepted that offer while he was in Alabama, the Alabama courts had personal jurisdiction over Ryder. Mabry did not file any evidence in opposition to Ryder's motion to dismiss and did not file either a pleading or any evidence in opposition to Ryder's summary-judgment

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motion.

The trial court did not rule on Ryder's motions before the trial. Several days before the trial, Ryder informed the trial court by letter that he would not be appearing at the trial and that he had previously asserted that the trial court lacked in personam jurisdiction over him in his answer and two motions. When Ryder did not appear at the trial, the trial court entered an order on July 16, 2008, denying Ryder's motion to dismiss "[d]ue to the lack of proper evidentiary submissions in support of [that motion]," granting the oral motion for a default judgment that Mabry had made after Ryder failed to appear at trial, and setting a hearing on the issue of damages for August 18, 2008. The trial court did not expressly rule on Ryder's summary-judgment motion; however, the trial court's July 16, 2008, order is inconsistent with an intent to grant that motion.

Ryder did not appear at the August 18, 2008, hearing. On March 2, 2009, the trial court entered a default judgment against Ryder and awarded Mabry the full amount of the damages he had sought. The judgment stated that the trial court had denied both Ryder's motion to dismiss and his motion for

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summary judgment "for lack of proper evidentiary support." Ryder timely filed a postjudgment motion in which he again asserted that the trial court lacked in personam jurisdiction over him. On June 22, 2009, the trial court entered an order denying Ryder's postjudgment motion. Ryder then timely appealed to the supreme court, which transferred the appeal to this court on the ground that the appeal was within this court's jurisdiction.

The dispositive issues are whether Ryder's summary-judgment motion asserting the defense of lack of in personam jurisdiction was supported by proper evidence and, if so, whether the trial court erred in denying that motion.¹ In pertinent part, Rule 56(c)(1), Ala. R. Civ. P., provides:

"The motion [for a summary judgment] shall be supported by a narrative summary of what the movant contends to be the undisputed material facts; that narrative may be set forth in the motion or may be attached as an exhibit. The narrative summary shall be supported by specific references to pleadings,

¹Although we do not review the denial of a summary-judgment motion after there has been a trial on the merits, see Beiersdoerfer v. Hilb, Rogal & Hamilton Co., 953 So. 2d 1196, 1205 (Ala. 2006) ("[W]e do not review a trial court's denial of a summary-judgment motion following a trial on the merits." (quoting Mitchell v. Folmar & Assocs., LLP, 854 So. 2d 1115, 1116 (Ala. 2003))), there has been no trial on the merits in this action.

portions of discovery materials, or affidavits and may include citations to legal authority. Any supporting documents that are not on file shall be attached as exhibits. If the opposing party contends that material facts are in dispute, that party shall file and serve a statement in opposition supported in the same manner as is provided herein for a summary of undisputed material facts."

(Emphasis added.) Ryder's summary-judgment motion adopted his motion to dismiss as his statement of why he was entitled to a summary judgment with regard to his defense of lack of in personam jurisdiction. Ryder's motion to dismiss had stated the undisputed facts upon which Ryder based his contention that the trial court lacked in personam jurisdiction, i.e, the nonexistence of any contacts between him and the State of Alabama except for four telephone conversations that Mabry had initiated when Ryder was in Virginia. Moreover, Ryder's motion to dismiss cited specific responses Mabry had made to Ryder's discovery requests that supported those undisputed facts. Because Mabry's summary-judgment motion adopted the recitation of undisputed facts and the citation of evidence supporting those facts in his motion to dismiss, Mabry's summary-judgment motion met the requirement of Rule 56(c)(1) that he state the undisputed facts supporting his summary-judgment motion and that he cite the evidence establishing those undisputed facts.

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Moreover, because Mabry's responses to Ryder's discovery requests were already on file when Ryder filed his motion to dismiss and his motion for a summary judgment, Ryder's summary-judgment motion was supported by proper evidence. See Rule 56(c)(1).

The evidence cited by Ryder in his motion to dismiss and adopted in his motion for a summary judgment established that the only contact between Ryder and the State of Alabama was four telephone conversations, all of which were initiated by Mabry.

"Due-process concerns are satisfied when a nonresident defendant has 'certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."' International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). Alabama's long-arm rule, Rule 4.2, Ala. R. Civ. P., 'extends the personal jurisdiction of Alabama courts to the limits of due process under the federal and state constitutions.' Elliott v. Van Kleeef, 830 So. 2d 726, 729 (Ala. 2002). A party's contacts with the forum state can be either general or specific.

""General contacts, which give rise to general personal jurisdiction, consist of the defendant's contacts with the forum state that are unrelated to the cause of action and that are both 'continuous and systematic.' Helicopteros Nacionales de

Colombia, S.A. v. Hall, 466 U.S. 408, 414 n. 9, 415, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) [citations omitted]. Specific contacts, which give rise to specific jurisdiction, consist of the defendant's contacts with the forum state that are related to the cause of action. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-75, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Although the related contacts need not be continuous and systematic, they must rise to such a level as to cause the defendant to anticipate being haled into court in the forum state. Id."'

"Elliott, 830 So. 2d at 730."

Ex parte Puccio, 923 So. 2d 1069, 1073 (Ala. 2005). Moreover,

"[t]he use of an interstate facility (i.e., telephone) is an ancillary factor and does not, alone, provide the requisite minimum contacts. Steel Processors, Inc. v. Sue's Pumps, Inc. Rentals, 622 So. 2d 910 (Ala. 1993). Furthermore, the unilateral activity of one claiming a relationship with a nonresident defendant will not satisfy the requirement of minimum contacts with the forum state. Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)."

Kittle Heavy Hauling v. Gary A. Rubel, Inc., 647 So. 2d 743, 744 (Ala. Civ. App. 1994). Accordingly, Ryder's motion for a summary judgment shifted the burden to Mabry to produce evidence establishing the existence of a genuine issue of material fact with respect to Ryder's defense of lack of in personam jurisdiction. See American Gen. Life & Accident Ins.

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Co. v. Underwood, 886 So. 2d 807, 811-12 (Ala. 2004) ("If the movant meets his burden of production by making a prima facie showing that he is entitled to a summary judgment, 'then the burden shifts to the nonmovant to rebut the prima facie showing of the movant.' Lucas v. Alfa Mut. Ins. Co., 622 So. 2d 907, 909 (Ala. 1993).").

"'In order to rebut such a prima facie showing, the nonmovant must show "substantial evidence" that creates a genuine issue of material fact. Substantial evidence is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance of Florida, 547 So. 2d 870, 871 (Ala. 1989).'"

American Gen. Life & Accident Ins. Co. v. Underwood, 886 So. 2d at 812 (quoting Lucas v. Alfa Mut. Ins. Co., 622 So. 2d at 909). Mabry did not file any evidence in opposition to Ryder's summary-judgment motion. Consequently, because the evidence in support of Ryder's summary-judgment motion established that the trial court lacked in personam jurisdiction over him, Ryder was entitled to a summary judgment. See Rule 56(c)(3), Ala. R. Civ. P. ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

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affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."). Therefore, we reverse the trial court's judgment and remand the action with instructions for the trial court to enter a summary judgment in favor of Ryder.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Pittman, Thomas, and Moore, JJ.,
concur.