

SUPREME COURT OF LOUISIANA

No. 00-C-3255

A&L ENERGY, INC.

v.

PEGASUS GROUP, ET AL.

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND
CIRCUIT, PARISH OF CADDO**

KIMBALL, J., Dissenting.

I respectfully disagree with the majority's conclusion that the actions of the foreign defendants here were sufficient to make them subject to personal jurisdiction in Louisiana. In my view, the majority overlooks the importance of the fact that the business relationship between the parties began when the Louisiana resident reached out from this forum to contact the foreign defendants.

La. R.S. 13:3201, the statutory basis for Louisiana's exercise of personal jurisdiction over nonresidents, provides in pertinent part as follows:

A. A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from any one of the following activities performed by the nonresident:

(1) Transacting any business in this state.

* * *

B. In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States.

This court recently confirmed that, under La. R.S. 13:3201(B), the Louisiana long-arm statute and constitutional due process are coextensive, such that "the sole inquiry into jurisdiction over a nonresident is a one-step analysis of the constitutional due process

requirements.”” *Ruckstuhl v. Owens Corning Fiberglass Corp.*, 98-1126 (La. 4/13/99), 731 So.2d 881 (quoting *Petroleum Helicopters, Inc. v. Avco Corp.*, 513 So.2d 1188, 1192 (La. 1987)).

Ruckstuhl, this court’s most recent pronouncement on the issue of personal jurisdiction, provides the framework for analyzing the issue of personal jurisdiction over a nonresident defendant. In *Ruckstuhl*, we employed a two-step analysis: (1) First, the plaintiff must establish that the defendant had sufficient minimum contact with the forum, by which he purposefully avails himself of the privilege of conducting activities within the forum; (2) If the plaintiff proves the defendant had sufficient contact with the forum, a presumption of reasonableness of jurisdiction arises, and the burden shifts to the defendant to show that the assertion of jurisdiction based on the defendant’s contacts with the forum would be unreasonable in light of traditional notions of fair play and substantial justice. 731 So.2d at 885-86 (citing United States Supreme Court cases).

The facts of this case are neither substantially disputed nor particularly complex. Defendant Pegasus Group (Pegasus), a California company, advertised in the Wall Street Journal for the sale of Texas real estate.¹ Plaintiff A&L Energy, Inc. (A&L), a Louisiana corporation, saw the advertisement and called Pegasus. There was then a period of negotiation between Pegasus and A&L involving telephone, fax and mail communication, after which the parties agreed to the sale of the Texas real estate. The parties executed a contract for the sale of the property, which contract provided that Louisiana law would govern any dispute. Funds were then transferred from A&L’s Louisiana accounts to Texas and California banks.

1. Two other California entities, Central Self Storage Investors and CSS-Hempstead, are also involved. For the sake of convenience and brevity, I have referred herein to the California defendants collectively as “Pegasus.”

In concluding that Pegasus had sufficient minimum contacts with Louisiana, the majority rests its decision on several of these facts. First, the majority points to Pegasus' advertisement in the central edition of the Wall Street Journal, "presumably designed to target consumers in the central United States, in relatively close proximity to the real estate for sale in Texas." (Slip op. at p.7.) Next, the majority cites Pegasus' negotiations with A&L after A&L had contacted Pegasus to answer the advertisement. Finally, the majority notes that the contract for sale of the property included a "choice-of-law" section providing that Louisiana law would govern any dispute between the parties.

The majority finds that these three factors, when considered together, constitute sufficient minimum contacts by Pegasus with Louisiana. In support of this finding, the majority cites three decisions of the courts of appeal which purportedly "align" with the majority decision. (Slip op. at pp. 8-9.) Close examination of these cases and others, though, reveals an important distinction: The cases finding sufficient contacts between the foreign defendants and this forum each involved a defendant who reached into Louisiana for the specific purpose of making contact with a resident or residents of this state.

In *Griffith v. French*, 97-2635 (La.App. 1 Cir. 12/28/98), 723 So.2d 1140, a Wisconsin attorney filed a class action in New York on behalf of investors, some 70 individuals in 23 states (one of which was Louisiana), in a Texas real estate scheme. When class certification was denied, the Wisconsin attorney solicited the Louisiana plaintiffs individually about representation. He mailed the Louisiana plaintiffs a retainer agreement, which they executed in Louisiana and returned to the attorney, along with a \$500.00 fee. During his representation of plaintiffs, the Wisconsin attorney corresponded with them by mail and solicited additional legal fees. He was never

physically present in Louisiana.

The district court sustained the Wisconsin attorney's exception of lack of personal jurisdiction, and the court of appeal reversed. The court found that the attorney had solicited business in the state, and thus availed himself of the benefit of doing business in Louisiana. What distinguishes *Griffith* from the instant case is the fact that the Wisconsin attorney in *Griffith* personally contacted the Louisiana plaintiffs to solicit them as clients, while here the Louisiana plaintiffs contacted the defendants based on an advertisement in a national publication.

In *Traigle v. Imhoff*, 96-325 (La.App. 5 Cir. 10/1/96), 683 So.2d 766, Louisiana plaintiffs invested money with a Louisiana defendant as part of an ostrich egg venture. When the deal soured, plaintiffs sued defendant, and defendant filed a third party demand against an Arizona ostrich ranch, asserting that the ranch had converted plaintiffs' funds. The ranch was organized as an Arizona corporation and had no offices or registered agent for service of process in Louisiana. The ranch filed an exception of lack of personal jurisdiction, arguing that, while there was a contract in effect between the ranch and the plaintiffs, neither the ranch nor the ostriches were ever in Louisiana, and the ranch thus had no minimum contacts with this state.

The district court found that personal jurisdiction was lacking, but the court of appeal reversed. The court of appeal found that the ranch had two key contacts with Louisiana: the ranch was involved in a joint venture with the LA defendant, and the ranch advertised its services in a national magazine with several subscribers in Louisiana. A&L here suggests that *Traigle* stands for the proposition that a foreign defendant can open himself to personal jurisdiction simply by advertising its services in a national magazine and then contracting with a Louisiana resident based on those advertisements, but there was more contact with Louisiana in *Traigle* than there was

here, *i.e.*, the existence of a joint venture between the ranch and the Louisiana defendant.

In *Bordelon, Hamlin, Theriot & Bourg v. Burlington Broadcasting*, 94-1839 (La.App. 4 Cir. 3/16/95), 652 So.2d 1082, a Louisiana attorney with expertise in FCC issues was contacted by an Iowa attorney whose client (an Iowa broadcaster) needed an experienced FCC lawyer. Negotiations between the attorneys was via telephone, fax and mail. The Louisiana attorney made one trip to Iowa, but the Iowa attorney never came to Louisiana. The Louisiana attorney did the substantive work on the case in New Orleans; the work and revisions were then sent back and forth between Iowa and New Orleans. The Louisiana attorney sued the Iowa attorney and the Iowa broadcaster for legal fees, and the Iowa defendants excepted to personal jurisdiction.

The city court maintained the defendants' exception of lack of personal jurisdiction, and the court of appeal reversed, finding that there were sufficient contacts between the Iowa defendants and Louisiana. While *Bordelon* is similar to the instant case in that the defendants never entered Louisiana, the key distinction is that the defendants in *Bordelon* reached into this forum to personally contact the Louisiana attorney; the Louisiana attorney did not call the Iowa defendants to offer his services.

Another analogous case cited by the majority is *Hunter v. Meyers*, 96-1075 (La.App. 1 Cir. 3/27/97), 691 So.2d 318, which involved the purchase of a horse by Louisiana residents from a New York resident. In *Hunter*, the New York seller retained a Florida broker to sell his racehorse. The broker contacted two trainers in Louisiana to notify them of the sale. One of the trainers was the trainer for the Louisiana purchasers, and he informed them about the horse for sale. The Florida broker eventually contacted the Louisiana purchasers directly, and negotiations were conducted via phone, fax and mail. A bill of sale was signed in Louisiana by the

purchasers and returned to the Florida broker. On learning that the horse had medical problems, the Louisiana purchasers sued to reduced the purchase price, and the defendants excepted to personal jurisdiction.

The district court granted the exception and the court of appeal reversed. The court of appeal focused on the existence of an ongoing relationship between the seller's broker and the Louisiana trainers, as well as the fact that the seller (through his agent) directly solicited the sale in Louisiana. Again, contrary to the instant case, the foreign defendants in *Hunter* purposefully reached into the forum to initiate contact with Louisiana residents.

What distinguishes the instant case from these earlier pronouncements on personal jurisdiction is the fact that here the Louisiana resident initiated contact with the foreign defendant. Pegasus did not reach into this forum to contact A&L to offer the Texas real estate for sale. Rather, Pegasus placed an advertisement in a newspaper of broad circulation, and A&L reached *out* from this forum to contact Pegasus. The business relationship between the parties was initiated by the Louisiana resident, A&L, and was based on a lone real estate sale. Lacking some purposeful availment by Pegasus of the privilege of doing business in this forum, I cannot agree with the majority that Pegasus had sufficient contact with Louisiana to subject it to personal jurisdiction here. *See Burger King Corp. v. Rudkiewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed. 2d 528 (1995).

Additional Louisiana and federal cases support the proposition that being contacted by a Louisiana resident to contract for property or services will be insufficient to subject a nonresident to personal jurisdiction in this forum. *See, e.g., Landry v. Gibbens*, 95-0379 (La.App. 4 Cir. 11/16/95), 665 So.2d 1176 (California heirloom seller, who advertised in specialized national magazine but had made no prior

sales in Louisiana, not subject to personal jurisdiction); *Dickson Marine, Inc. v. Panalpina, Inc.*, 961 F.Supp. 947 (E.D.La. 1997) (finding no personal jurisdiction over foreign ship repairer with no operations in this state where contact was initiated by Louisiana company); *St. Martin & Mahoney v. Patton*, 863 F.Supp. 311 (E.D.La. 1994) (finding no personal jurisdiction where Louisiana purchaser contacted Michigan seller to purchase his airplane, where seller had listed his plane with a national broker and advertised in a national publication, but had no contacts with Louisiana and was not a professional seller of airplanes).

The majority today essentially holds that a foreign defendant who negotiates and contracts with a Louisiana resident will always be subject to personal jurisdiction in this forum, even when the Louisiana resident reaches out from this forum to do business with the foreign defendant. In my view, this result is contrary to the “traditional notions of fair play and substantial justice” underlying the principle of long-arm jurisdiction. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154 (1945). As such, I respectfully dissent from the majority opinion and would affirm the judgment of the court of appeal, sustaining Pegasus’ exception of lack of personal jurisdiction and dismissing A&L’s suit.