

Personal Jurisdiction, Consent, and the Law of Agency

I have long argued – in articles, blog posts, and amicus briefs – that it violates due process to invoke a forum selection clause to obtain personal jurisdiction over a defendant who was not a party to the agreement in which the clause appears. This position has not yet achieved universal acceptance. The state courts in New York, in particular, have repeatedly held that forum selection clauses can be used to assert personal jurisdiction over non-party defendants who are “closely related” to the parties or the transaction. In this blog post, I use a recent case—*Bandari v. QED Connect Inc.*—decided by Magistrate Judge Gary Stein (SDNY) to highlight some of the problems with the “closely related” test.

The dispute in *Bandari* grew out of a stock purchase agreement. The plaintiff, Jalandher Bandari, was a resident of Texas. He agreed to purchase shares in QED Connect, Inc., a New York holding company, from David Rumbold, a resident of Illinois. The sale was orchestrated by Nanny Katharina Bahnsen, the chief executive officer of QED and a resident of Colombia. There were three parties to the stock purchase agreement: Bandari, Rumbold, and QED. (Bahnsen signed the contract on behalf of QED.) The agreement contained an exclusive forum selection clause choosing the state and federal courts sitting in New York City.

Although Bandari tendered the purchase price (approximately \$150,000), he never received the shares he was promised. When Bandari asked for his money back, Bahnsen made excuses and eventually stopped responding to his emails. Bandari subsequently brought a lawsuit in federal court in New York against QED, Rumbold, and Bahnsen. After none of the defendants appeared to defend the suit, Bandari moved for a default judgment.

The federal courts in New York will not grant a default judgment until they determine that personal jurisdiction exists. The court quickly concluded that it had personal jurisdiction over Rumbold and QED because they had signed the contract containing the New York forum selection clause. The court then went on to conclude—wrongly, in my view—that Bahnsen was also subject to personal jurisdiction in New York because she had negotiated the sale and signed the contract on behalf of QED:

A party to a contract with a forum-selection clause may invoke that clause to establish personal jurisdiction over a defendant that is not party to the contract but that is “closely aligned” with a party, or “closely related” to the contract dispute itself, such as corporate executive officers. As the CEO of QED and the individual who negotiated the transaction with Bandari and signed the Agreement on behalf of QED, Bahnsen is “closely related” to both a party to the Agreement and to the dispute. Thus, she is also bound by the forum selection clause.

This conclusion is inconsistent with basic principles of agency law; an agent is not a party to a contract that the agent signs on behalf of a disclosed principal. It is inconsistent with basic principles of contract law; a person may not be bound by an agreement without their express consent. And it is inconsistent with basic principles of personal jurisdiction; a person who lacks minimum contacts with the forum is not subject to personal jurisdiction unless she consents. Nevertheless, the court concluded that Bahnsen was subject to personal jurisdiction in New York because she was “closely related” to the parties and the transaction.

This conclusion is made all the more jarring by that fact that the court also held that Bandari had failed to state a valid claim for breach of contract against Bahnsen *because she was not a party to the agreement*. In the court’s words:

[A]lthough Bandari’s breach of contract claim is asserted against all three Defendants, there is no basis for a finding of contract liability as to Bahnsen. Bahnsen is not a party to the Agreement and she signed the Agreement solely on behalf of QED. It is well established that a corporate officer who signs a contract on behalf of the corporation cannot be held personally liable for the corporation’s breach, absent a showing that the officer was the alter ego of the corporation. The Complaint does not adequately plead an alter ego theory of liability against Bahnsen and hence it does not state a viable breach of contract claim against her.

The court held, in other words, that Bahnsen (1) was subject to personal jurisdiction in New York by operation of the forum selection clause, but (2) could not be held liable for breach of contract because she was not a party to the agreement containing the forum selection clause. The hand that authored the personal jurisdiction section of the opinion was seemingly unaware of what the

hand that authored the breach of contract section of the opinion was doing.

One can, of course, reconcile these conflicting statements by taking the position that forum selection clauses are not subject to the usual rules of agency law, contract law, and personal jurisdiction. There are, however, constitutional problems with such an approach. Under this line of reasoning, a person residing in a foreign country (Colombia) is subject to personal jurisdiction in New York when she negotiates and signs a contract that contains a New York forum selection clause on behalf of the entity that employs her even though she is not the alter ego of the company and is not herself a party to the agreement. These actions are, in my view, insufficient to subject her to personal jurisdiction in New York.

Although the court declined to enter a default judgment against Bahnsen on the claim for breach of contract, it did enter a default judgment against her on the plaintiff's claims for securities fraud and common law fraud. A contract to which she was not a party, therefore, paved the way for the assertion of jurisdiction and the imposition of liability. New York has long sought to attract litigation business from around the world. It has been largely successful in those efforts. If that state continues to assert personal jurisdiction over foreign executives merely because they negotiate and sign contracts in their corporate capacity, however, one wonders whether these executives may start directing the company's attorneys to choose another jurisdiction.

[This post is cross-posted at Transnational Litigation Blog.]