

"Lawyers Hunt For Foreign Defendants Here and Leave"

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When two residents of Oregon were murdered by rebels while on safari in Uganda, lawyers started hunting in Chicago for some juicy foreign defendants.

One foreign corporation was nailed by waiver (because it submitted a request to admit on damages before moving to quash service of summons). And another foreign defendant was tagged because of the amount of business it gets from an Illinois affiliate. *Haubner v. Abercrombie & Kent International, Inc.*, 2004 WL 1468931 (1st Dist., June 30).

The defendants include numerous corporations that are part of the Abercrombie & Kent group of firms. The "foreign A&K defendants" are A&K Uganda, A&K Kenya, plus A&K Luxembourg. And the "Illinois A&K defendants" - headquartered in DuPage County - are A&K International, A&K Overseas, and A&K Travel.

According to a complaint filed in Cook County Circuit Court, the defendants were negligent in failing to warn and protect the decedents while they were on vacation at Gorilla Forest Camp, in Uganda's Bwindi Impenetrable Forest National Park.

An attempt to remove the case to federal court was unsuccessful, and the case was remanded to state court. But, in a serious misstep, one of the foreign defendants submitted a request to admit - concerning the amount of damages claimed by the plaintiffs - before the remand petition was filed.

On remand from federal court, the foreign A&K defendants moved to quash service of summons. The motion was granted, and the plaintiffs appealed.

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Here are some highlights from Justice Thomas E. Hoffman's opinion (with various omissions not noted in the quoted text).

"An Illinois court can assert *in personam* jurisdiction over a non-resident defendant pursuant to section 2-209 of the [Illinois Code of Civil Procedure] if the defendant is, *inter alia*, transacting business in Illinois (735 ILCS 5/2-209(a)(1)) or 'doing business' in Illinois (735 ILCS 5/2-209(b)(4)). The burden rests with the plaintiff to establish a *prima facie* basis for exercising *in personam* jurisdiction over a non-resident defendant.

"A plaintiff's *prima facie* case may be overcome by uncontradicted evidence by the defendant which defeats jurisdiction. Where the circuit court's determination of jurisdiction is based solely upon documentary evidence, our standard of review is *de novo* ."

Waiver

"Our discussion begins," Hoffman noted, "with A&K Luxembourg and a finding that A&K Luxembourg waived any objection to the Circuit Court's jurisdiction. An Illinois court obtains personal jurisdiction over a defendant once service is effectuated or when the defendant enters a general appearance.

"Any action taken by a defendant which recognizes the cause of action as being in court constitutes a general appearance unless the action is taken for the sole purpose of objecting to the court's jurisdiction over a defendant's person.

"An exception to the general appearance rule is provided by Rule 201(1) which allows a defendant to conduct limited discovery regarding the issue of personal jurisdiction without submitting to the general jurisdiction of the court or waiving any objection thereto. However, a defendant's discovery must be limited to the issue of the court's jurisdiction over the person of the defendant, for engagement of discovery not limited to the issue of the court's *in personam* jurisdiction constitutes a general appearance and a waiver of any jurisdictional objection.

"Here, the record shows that A&K Luxembourg served a request to admit upon the plaintiffs. The request to admit dealt with the amount in controversy and while potentially bearing on the issue of the District Court's subject matter jurisdiction, it had no relation to the Circuit Court's *in personam* jurisdiction. As such, the request to admit did not fall under Rule 201(1) and, therefore, constituted a general appearance and a waiver of any objection to the Circuit Court's *in personam* jurisdiction that A&K Luxembourg may have had.

"Further, we note that, at the time the request to admit was filed, the Circuit Court still retained jurisdiction over the cause as A&K Luxembourg had not yet filed its notice of removal with the clerk of the court. Therefore, by filing a request to admit before the court was divested of jurisdiction over the cause, A&K Luxembourg submitted to the jurisdiction of the Circuit Court and waived any objection to the court's *in personam* jurisdiction."

Illinois Transactions

"As for A&K Uganda and A&K Kenya," Hoffman explained, "the plaintiffs first argue that jurisdiction is proper under section 2-209(a)(1) of the code. We disagree.

"Jurisdiction predicated upon this section is only proper where a defendant commits one of the enumerated acts described in subsection (a) and where the cause of action arises directly from the commission of the enumerated act.

"In the case at bar, the plaintiff's cause of action does not arise from any of A&K Uganda or A&K Kenya's transactions in Illinois. Instead, the plaintiffs are asserting wrongful-death and survival actions that arose from actions which took place in Uganda, Kenya, and possibly the decedent's purported home state of Oregon. Accordingly, based upon the facts of this case, *in personam* jurisdiction over A&K Uganda and A&K Kenya is improper under section 2-209(a)(1)."

Doing Business in Illinois

"In addition to the transaction of business under section 2-209(a)(1)," the justice continued, "Illinois courts may exercise *in personam* jurisdiction over non-resident corporate defendants who are 'doing business' in Illinois. "There is no precise test for determining whether a foreign corporation is 'doing business' in Illinois. Rather, a court must perform a case-by-case analysis to determine if a corporation is conducting business of such character and extent as to warrant the inference that the corporation as subjected itself to the jurisdiction and laws of the forum state. The corporation must transact its business within the state 'not occasionally or casually, but with a fair measure of permanence and continuity'.

"The 'doing business' standard is quite high, but once satisfied, a corporation is considered a resident of Illinois, and may be sued on any cause of action, regardless of whether it arose out of the corporation's contacts with the state.

"Our 'doing business' analysis begins with an examination of A&K Uganda. The undisputed facts show that A&K Uganda was a tour operator based in Uganda which organized and arranged various travel services. As part of its course of business, employees from A&K Uganda communicated with employees from A&K International [in Illinois] regarding various tours and excursions offered by both corporations in Africa.

"The general manager of A&K Uganda also visited the offices of A&K International [in DuPage County] on one occasion. Further, A&K Uganda derived 30 percent of its revenue from business it conducted with A&K International in Illinois, and A&K International issued a refund to one individual on behalf of A&K Uganda. We find that these facts, when viewed as a whole, demonstrate that A&K Uganda was 'doing business' in Illinois.

"We believe this finding is in line with our previous decision in *Gaidar v. Tippecanoe Distribution Service Inc.*, 299 Ill.App.3d 1034 (1998). In *Gaidar*, the plaintiff brought a negligence action in an Illinois court following an automobile accident in Indiana with a truck driven by an Indiana resident and owned by an Indiana trucking corporation. The facts showed that the defendant corporation conducted a majority of its business in the Midwest, with less than 2 percent of its monthly trucking business originated or terminating in Illinois and less than 10 percent of its total monthly mileage driven in Illinois.

"The frequency of the defendant corporation's business contacts with Illinois were further described as *fewer than 30 times a year* in relation to one Illinois client, and *from time to time* with several other Illinois clients. Further, the defendant corporation did not directly advertise in Illinois, but rather belonged to several associations that had directories listing its name. Nevertheless, we held in *Gaidar* that the plaintiff proved a *prima facie* case of *in personam* jurisdiction based on section 2-209(b)(4) of the code.

"In so holding, we declared: '[The defendant corporation's] contacts with Illinois may not have been numerous, but its contacts were not random, fortuitous, or attenuated. The relatively small percentage of trips made to Illinois is not determinative; it is whether business in Illinois was fairly regular. [The defendant corporation's] business in Illinois was sufficiently regular to satisfy section 2-209(b)(4).

"The evidence that [the defendant corporation] did not have an office in Illinois, did not advertise in Illinois, that less than 2 percent of shipments were for Illinois customers, that about 10 percent of the total miles were driven in Illinois, and that [the defendant corporation] did not have any "big" customers in Illinois was not sufficient to overcome the *prima facie* case of jurisdiction. We conclude that [the defendant corporation] was doing sufficient business in Illinois to subject it to jurisdiction in Illinois courts under [section 2-209(b)(4)].

"Here, we find that, similar to the defendant corporation in *Gaidar*, A&K Uganda's contacts with Illinois were not random, fortuitous, or attenuated and that its business in Illinois was sufficiently permanent and continuous to satisfy section 2-209(b)(4).

"Just as the lack of a corporate office or direct advertising in Illinois were insufficient factors to defeat jurisdiction in *Gaidar*, they fail to establish that A&K Uganda was not 'doing business' in Illinois. Moreover, while the defendant corporation in *Gaidar* derived a small percentage of its business from Illinois and could not be said to have a 'big' client in Illinois, the opposite is true here: A&K Uganda derived a substantial amount of its revenue from A&K International.

"Further, the record positively rebuts the foreign A&K defendants' assertion that A&K Uganda did not advertise or promote their products in Illinois. Employees of A&K Uganda communicated with employees of A&K International, both through electronic means and in person, in relation to their sole business purpose of selling safari tours.

"This promoting and marketing with A&K International clearly bore fruit, as 30 percent of A&K Uganda's revenue originated from sales of its products through A&K International. Moreover, the marketing and promotional materials the plaintiffs submitted to the circuit court show a common marketing approach by the 'A&K Group of Companies' meant to promote and benefit each branch of the A&K family.

"Finally, although the foreign A&K defendants are correct that even substantial revenues from sales in non-product liability cases are insufficient to satisfy the 'doing business' standard, this argument fails to recognize that a determination of whether a court possesses *in personam* jurisdiction is made on a case-by-case basis after examining all of the relevant circumstances.

"Here, as discussed above, in addition to the continued and substantial revenues generated from the sale of its products in Illinois, A&K Uganda's direct relationship with A&K International and its implicit marketing and promotion in this state demonstrates that A&K Uganda's activities in Illinois were regular, continuous, and systematic such that it was *doing business* in Illinois.

"In a manner similar to the *Gaidar* court, we find here that A&K Uganda was conducting its business in Illinois with such a measure of permanence and continuity to warrant the inference that it has subjected itself to the jurisdiction and laws of Illinois pursuant to section 2-209(b)(4) of the code.

"Finally, we note that *in personam* jurisdiction may also be asserted over A&K Luxembourg pursuant to *Maunder v. DeHavilland Aircraft of Canada Ltd.*, 102 Ill.2d 342 (1984). According to *Maunder*, it is appropriate to assert jurisdiction over a parent corporation if a subsidiary corporation is acting as the parent corporation's Illinois agent in the sense of conducting the parent's business rather than its own. *Maunder* relies on the fact that parents of wholly owned subsidiaries necessarily control, direct, and supervise subsidiaries to some extent.

"An Illinois court may not assert *in personam* jurisdiction over a parent company, however, if the subsidiary is conducting its own business.

"Here, the evidence shows that A&K Luxembourg existed as a holding company doing business through its subsidiaries such as A&K Uganda and the Illinois A&K defendants. There is no evidence that A&K Luxembourg existed for any other purpose. Viewing the evidence as a whole, we believe that A&K Uganda and the Illinois A&K defendants were mere conduits through which A&K Luxembourg did business.

"As we stated in *Alderson v. Southern Co.*, 321 Ill.App.3d 832, 846 (2001), the application of *Maunder* to a holding company under facts such as these is consistent with *Maunder's* underlying principle that a corporation should not be allowed to shield itself from the jurisdiction of a state in which it does business by the simple act of separately incorporating its sales force or other operations within that state.

"For the foregoing reasons, we affirm the Circuit Court's finding that it lacked *in personam* jurisdiction over A&K Kenya, reverse its jurisdictional findings in relation to A&K Luxembourg and A&K Uganda, and remand this cause for further proceedings. * Article Reprinted with the Permission of the *Chicago Daily Law*

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