Filed 11/29/16 Broulidakis v. Adler CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ANDREW BROULIDAKIS, Plaintiff and Appellant, v. CHARLOTTE ADLER, Defendant and Respondent.	G051814 (Super. Ct. No. 30-2014-00747285) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Craig L. Griffin, Judge. Affirmed.

Velasco Law Group, Paul D. Velasco, and Richard J. Radcliffe for Plaintiff and Appellant.

The Hastings Appellate Project, Stephen Tollafield, Gary A. Watt, and Tiffany J. Gates for Defendant and Respondent.

* * *

Plaintiff Andrew Broulidakis appeals from the court's order granting nonresident defendant Charlotte Adler's motion to quash service of summons and to dismiss plaintiff's complaint.[1] We affirm the court's order.

FACTS

Allegations of Plaintiff's Complaint

Plaintiff's complaint alleged a single cause of action for invasion of privacy. He alleged defendant intentionally caused a listening and recording device in Laguna Beach to be used to eavesdrop and record in another location a private conversation between plaintiff and his son; that defendant e-mailed a transcript of the private conversation to a third party in California, without plaintiff's consent, in violation of Penal Code section 637,[2] and that, as a result, defendant had threatened to reduce or extinguish plaintiff's custody of his son, causing plaintiff damages exceeding $80,000. Plaintiff sought treble damages of $240,000 under section 631, subdivision (a), or, alternatively, $10,000 under section 637.2, subdivision (a)(1).

Defendant's Motion to Quash and Dismiss

Defendant specially appeared and moved to quash service of summons and to dismiss the complaint based on lack of personal jurisdiction. Defendant's supporting declaration stated the following.

Defendant is a citizen and full-time resident of the United Kingdom (the U.K.). Plaintiff is also a citizen of the U.K.

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[1] The order is appealable under Code of Civil Procedure section 904.1, subdivision (a)(3).

[2] All statutory references are to the Penal Code unless otherwise stated.

For around 10 years, defendant and plaintiff were in a relationship, although they were never married. They lived together in the U.K. in a house in Surrey they both owned (the Surrey house). Their son was born in the U.K. in 2009.

In June 2013, the couple split. Their son now resides full-time with defendant in the U.K. Defendant is their son's primary caretaker.

Plaintiff owns and resides at the Surrey house, as well as living temporarily at a house in Laguna Beach, California owned by his girlfriend. Plaintiff's visits with his girlfriend are temporary and intermittent due to his visitor visa requirements.

Defendant is an attorney in the U.K., and does not conduct any business in California, nor does she own any property in California or the United States. She has visited the United States seven times in her life and only three of those visits were to California. Her most recent trip to California was in January 2009, to celebrate the New Year with friends.

On August 1, 2014, their then five-year-old son was visiting plaintiff at his girlfriend's house in Laguna Beach. Plaintiff initiated a Skype call with defendant, who was at her home in the U.K., so their son could speak with her. After their son and defendant finished talking, and while the Skype call was still "live," plaintiff started making disparaging comments about defendant to their son. Concerned that plaintiff's comments to their son were inappropriate, defendant recorded them on her iPhone. Defendant heard plaintiff's girlfriend in the background walking in and out of the room as plaintiff made the disparaging comments.

Because the method of communication between defendant and plaintiff was by e-mail through the girlfriend as an intermediary, defendant sent a message to the girlfriend's e-mail account, around September 5, 2014, addressed to the girlfriend and plaintiff. Defendant attached a transcript of the August 1, 2014 Skype call comments. Defendant's e-mail stated plaintiff manipulated their son, made disparaging comments about defendant to him, and encouraged their son "to keep it a secret."

Defendant believed it would be unreasonable to require her to conduct a defense in California.

Plaintiff's Opposition to Defendant's Motion

In support of his opposition to defendant's motion, plaintiff declared the following. He currently resided in Laguna Beach and had "been doing so at all times mentioned in [his] complaint . . . ." On or about August 1, 2014, defendant intentionally caused a listening and recording device in Laguna Beach to be used to eavesdrop and record in her location the private conversation between plaintiff and his son, without plaintiff's knowledge or consent. In an e-mail sent around September 5, 2014, defendant admitted the eavesdropping and recording. Defendant sent the e-mail to a third party whom she knew was a California resident.

The Court's Ruling

The court granted defendant's motion to quash service of process and to dismiss the case, finding that plaintiff failed to meet his burden of showing defendant purposefully availed herself of the benefits of California, and that, even if plaintiff had met his burden, defendant had "made a compelling case that it would be unreasonable for California to exercise personal jurisdiction over her in the circumstances of this case."

DISCUSSION

Plaintiff contends California has specific jurisdiction over defendant based on her purposeful contacts with the state, and, alternatively, because defendant caused injurious effects in California "'of a nature that the [s]tate treats as exceptional and subject to special regulation.'"

"When a defendant moves to quash service of process on jurisdictional grounds, the plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction. [Citation.] Once facts showing minimum contacts with the forum state are established, however, it becomes the defendant's burden to demonstrate that the exercise of jurisdiction would be unreasonable." (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Ca1.4th 434, 449 (*Vons*); *International Shoe Co. v. State of Washington, Etc*. (1945) 326 U.S. 310, 316 [due process requires nonresident defendant subjected to a judgment in personam to have "minimum contacts" with the forum].) When there is no conflicting evidence, "the question of jurisdiction is purely one of law and the reviewing court engages in an independent review of the record." (*Vons*, at p. 449.)

To be subject to a forum's specific jurisdiction, (1) a defendant must have "purposefully availed himself or herself of forum benefits" (*Vons*, *supra*, 14 Cal.4th at p. 446); (2) the controversy must be related to or arise out of the defendant's contacts with the forum (*ibid*.); and (3) the assertion of personal jurisdiction must comport with fair play and substantial justice (*id*. at p. 447). "'The purposeful availment inquiry . . . focuses on the *defendant's* intentionality. [Citation.] This prong is only satisfied when the defendant purposefully and voluntarily directs his activities *toward the forum* so that he should expect, by virtue of the benefit he receives, to be subject to the court's jurisdiction based on' his contacts with the forum." (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269 (*Pavlovich*), italics added.)

A "*plaintiff's* contacts with the forum State cannot be 'decisive in determining whether the *defendant's* due process rights are violated' by the purported exercise of jurisdiction." (*Walden v. Fiore* (2014) ___U.S.___ [134 S.Ct. 1115, 1119] (*Walden*), italics added.) "Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant — not the convenience of plaintiffs or third parties." (*Id.* at p. 1122.) The United States Supreme Court has

"consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." (*Ibid.*)

Furthermore, the focus is on "the defendant's contacts with the *forum State* itself, not the defendant's contacts with *persons who reside there*." (*Walden*, *supra*, 134 S.Ct. at p. 1122, italics added.) "[T]he plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." (*Ibid.*) The "'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, [citations], or of the 'unilateral activity of another party or a third person,' [citation]." (*Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 475.)

Applying these principles to the instant case, it is clear that, upon this record, defendant's sole links to California are plaintiff's unilateral action of having a girlfriend who resides in California, and the attenuated fortuities that their son visited plaintiff at the girlfriend's house, the ongoing method of communication between defendant and plaintiff was by e-mail through the girlfriend, and plaintiff initiated a Skype call to defendant and allowed the call to remain "live" upon its completion. Surely, these "contacts" by defendant with California are manifestly insufficient to subject defendant to the jurisdiction of a California court. Plaintiff has failed to meet his burden to demonstrate facts showing defendant has the requisite minimum contacts with California to justify haling her into the state. Consequently, the burden never shifted to defendant to demonstrate that California's exercise of jurisdiction would be unreasonable.

But plaintiff — relying on *Jamshid-Negad v. Kessler* (1993) 15 Cal.App.4th 1704 (*Jamshid*) — contends defendant should be subjected to California's jurisdiction because California treats torts such as illicit recording and publication as

"'exceptional and subject to special regulation.'" He quotes section 630, which provides in relevant part: "The Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society."[3]

In *Jamshid*, *supra*, 15 Cal.App.4th at pages 1706-1707, the appellate court held, "in light of the Legislature's intent to protect California citizens from the wilful misconduct of minors by specifically regulating parental supervision, . . . nonresident parents who send their minor child to obtain an education at a public institution cause a sufficient effect in California to enable its courts to exercise specific personal jurisdiction over them." The plaintiffs in *Jamshid* alleged the defendants' intoxicated son had tried to break into the plaintiffs' apartment. (*Id.* at p. 1707.) The appellate court acknowledged the only effect intentionally caused in California by the defendants' allowing and paying for their son to attend a California university "was his unsupervised presence" there. (*Id.* at p. 1709.)

We question the continued viability of the "exceptional" tort and "special regulation" rationale of the *Jamshid* opinion in light of subsequent developments in the law, particularly the emphasis in *Pavlovich* and other cases on the "'purposeful availment inquiry.'" (*Pavolvich*, *supra*, 29 Cal.4th at p. 269.) "'This prong is only satisfied when the defendant purposefully and voluntarily directs his activities *toward the forum* so that

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[3] In his reply brief, plaintiff raises the issue that defendant has offered "no alternative forum that could or would apply California's specific regulatory or statutory scheme to this set of facts," and has not explained "how or if a UK court could or would apply California's special regulatory scheme." "[W]e will not address arguments raised for the first time in the reply brief . . . ." (*Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1295.)

he should expect, *by virtue of the benefit he receives*, to be subject to the court's jurisdiction based on' his contacts with the forum." (*Ibid*., italics added.) Quite apart from the "special regulation" rationale, the *Jamshid* court observed the defendants there had invoked the "benefits and protections of California law in connection with their son's residency. By acquiescing in [their son's] choice of university and paying his tuition, the [defendants were] taking advantage of the state's establishment of quality public higher education." (*Jamshid*, *supra*, 15 Cal.App.4th at p. 1709.) In contrast, the record before us does not suggest defendant's conduct was intended or expected to provide any comparable benefit under California law. Furthermore, by enacting section 630 et seq., the Legislature intended "to protect the right of privacy of the people of this state." Plaintiff (a U.K. citizen) claimed to be a California resident "at all times mentioned in the complaint," i.e., two days in total.

Plaintiff also relies on *Schlussel v. Schlussel* (1983) 141 Cal.App.3d 194 (*Schlussel*), where the Court of Appeal reversed the trial court's order quashing service of summons for lack of jurisdiction. (*Id.* at p. 199.) The plaintiffs, a married couple who resided in California, sued the defendant, a New York resident who was the husband's ex-wife, "for intentional infliction of emotional distress for numerous obscene and threatening telephone calls [the defendant] allegedly made to them." (*Id.* at p. 196.) *Schlussel* stressed that "California has a stated interest in protecting its citizens from annoying and obscene telephone calls," as reflected in a criminal statute. (*Id.* at pp. 197-198.) The Court of Appeal stated that "where the crime is instituted outside the state but the results of the acts are intended or can reasonably be expected to have effects within the state, our courts possess jurisdiction to provide relief." (*Id.* at p. 198.) The appellate court viewed "the placing of a criminal telephone call to California as being no different than shooting a gun into the state." (*Ibid.*)

As with *Jamshid*, we question the continued viability of *Schlussel* in light of subsequent developments in the law, particularly our Supreme Court's holding in

Pavlovich that the effects test requires "express aiming or intentional targeting" at the forum state (*Pavlovich*, *supra*, 29 Cal.4th at p. 273): The "effects test requires intentional conduct *expressly aimed at or targeting* the forum state in addition to the defendant's knowledge that his intentional conduct would cause harm in the forum." (*Id.* at p. 271.) Thus, our "analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." (*Walden*, *supra*, 134 S.Ct. at p. 1122.) We also observe that *Schlussel* was decided in 1983, the year before the United States Supreme Court decided *Calder v. Jones* (1984) 465 U.S. 783, the seminal case on the use of an "effects" test for determining purposeful availment. As summarized in *Walden*, "*Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum. Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." (*Walden*, *supra*, 134 S.Ct. at p. 1125.)

Finally, in *Schlussel*, "there [was] no evidence in the record . . . to support the [trial] court's conclusion the forum was inconvenient . . . ." (*Schlussel*, *supra*, 141 Cal.App.3d at p. 199.) Here, in contrast, the court applied "a seven-factor test" to conclude defendant had "made a compelling case that it would be unreasonable for California to exercise personal jurisdiction over her in the circumstances of this case." The factors examined by the court included the burden on defendant to defend in California; the conflict with the U.K.'s sovereignity; and the efficiency of judicially resolving the controversy in the U.K. (where defendant and their son live full-time, plaintiff lives at least part of the year, and litigation is ongoing over the parties' custody and care of their son).

The court did not err by granting defendant's motion to quash service of summons and to dismiss the complaint.

DISPOSITION

The order is affirmed. Defendant shall recover her costs incurred on appeal.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.