

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

FRANK J. BOTTIGLIERI, M.D.,

Petitioner,

CASE NO.: 2015-CA-000426-O

Lower Case No.: 2014-CC-000126-O

v.

LAW OFFICES OF W. RILEY ALLEN, P.A.

f/k/a ALLEN & MURPHY, P.A.,

Respondent.

Petition for Writ of Certiorari, from the County Court,
in and for Orange County, Florida,
Adam McGinnis, County Judge.

Justine S. Anagnos, Esquire, for Petitioner.

J. Scott Murphy, Esquire, for Respondent.

Before APTE, ROCHE, and O’KANE, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner, Frank J. Bottiglieri, M.D. (“Dr. Bottiglieri”), seeks review of the trial court’s non-final Order on Defendants Motion to Dismiss entered on November 13, 2014, in favor of Respondent, Law Offices of W. Riley Allen, P.A. f/k/a/ Allen & Murphy, P.A. (“Allen P.A.”) that denied Dr. Bottiglieri’s Motion to Dismiss for Lack of Personal Jurisdiction. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(2). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Summary of Facts and Procedural History

This action arises from a dispute related to an alleged expert witness services agreement between Dr. Bottiglieri and Allen, P.A.. Dr. Bottiglieri is a medical doctor residing and practicing medicine in the State of Maryland who was retained by Allen, P.A. in 2005 to provide expert witness and consultant services in a medical malpractice case in this Circuit. According to Allen P.A., the initial plan was for Dr. Bottiglieri to travel to Orlando to testify, but thereafter it was decided to have him appear at the trial via videoconference from Maryland. In order to secure Dr. Bottiglieri's appearance at trial, on November 23, 2009, Allen P.A. sent Dr. Bottiglieri two checks made payable to him individually in the amount of \$4,500.00 for pretrial preparation and \$6,000.00 for his video trial testimony. Thereafter, as alleged by Allen, P.A., Dr. Bottiglieri notified Allen, P.A. that he was ill and his testimony would have to be rescheduled. The testimony was not rescheduled as the malpractice case was subsequently settled. Thus, Bottiglieri's trial appearance was never required. However, according to Allen P.A., Dr. Bottiglieri did not refund the money paid to him for the trial preparation or for the trial testimony, despite multiple requests for a refund of the money. Subsequently, on January 3, 2014, Allen P.A. filed a Complaint against Dr. Bottiglieri, individually, for breach of contract seeking the refund of the money paid to him.

On February 17, 2014, Dr. Bottiglieri filed a Motion to Dismiss the Complaint for Lack of Personal Jurisdiction arguing that Allen, P.A. could not meet its burden under the two-prong test to determine personal jurisdiction over a non-resident defendant set out by the Florida Supreme Court in *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499 (Fla. 1989). Dr. Bottiglieri claimed that Allen, P.A. failed to plead sufficient specific or general jurisdictional facts to bring the action within the ambit of the long-arm statute and failed to demonstrate that he had sufficient minimum contacts to satisfy the due process requirements. In support of his Motion to

Dismiss, Dr. Bottiglieri submitted an Affidavit with statements that: 1) all contact between him and Allen, P.A. occurred in the scope of his employment with Bottiglieri, P.A.; 2) all services were performed in Maryland; and 3) it was never intended by either party that he perform his services in Florida.

On April 28, 2014, Allen, P.A. filed its Response to the Motion to Dismiss along with attachments including correspondence with Dr. Bottiglieri, the transcript of Dr. Bottiglieri's deposition, Dr. Bottiglieri's Affidavit, and the Affidavit of J. Scott Murphy, Esquire, ("Murphy").

On April 30, 2014, a hearing was held on the Motion to Dismiss. At the hearing, Dr. Bottiglieri's counsel discussed the corporate shield doctrine and argued that the acts of a corporate employee performed in a corporate capacity do not form the basis for jurisdiction over a corporate employee in his individual capacity. Also, the Affidavits of Dr. Bottiglieri and Murphy were presented. At the end of the hearing, Dr. Bottiglieri's counsel requested an evidentiary hearing under the authority of *Venetian Salami*, which requires the court to hold an evidentiary hearing in instances where conflicting affidavits and testimony exist in determining personal jurisdiction. Per this request, the trial court instructed Dr. Bottiglieri's counsel to provide the court with said case law by 4:00 p.m. that same day. Dr. Bottiglieri's counsel timely complied with the court's request.

Thereafter, while waiting on the trial court's ruling on the Motion to Dismiss or an order requiring an evidentiary hearing, Allen, P.A. unilaterally re-set the same Motion to be heard again on November 13, 2014. In response, Dr. Bottiglieri filed a Motion for Protective Order objecting to the re-setting of the hearing, and argued that an evidentiary hearing should be held as was requested at the prior hearing. Dr. Bottiglieri's counsel contacted the trial court to set the Motion for Protective Order for hearing and was advised by the court that the Motion could not

be heard until the November 13, 2014 hearing. Thereafter, at that hearing, the trial court acknowledged previously denying the Motion to Dismiss, but had not docketed the Order or sent it to the parties. Thus, the trial court entered the Order that denied the Motion to Dismiss in its entirety and required Dr. Bottiglieri to answer the Complaint in 20 days. Dr. Bottiglieri timely filed an appeal that, pursuant to this Court's Order dated January 13, 2015, will now be treated as a Petition for Writ of Certiorari.

Summary of Arguments

Dr. Bottiglieri argues that the trial court erred: 1) when it summarily denied his Motion to Dismiss for Lack of Personal Jurisdiction without hearing all of his arguments and without performing the two-prong legal analysis to determine if Allen P.A.'s Complaint pled sufficient jurisdictional facts to invoke Florida's long-arm jurisdiction and if it established sufficient minimum contacts with Florida to satisfy due process requirements, and 2) by failing to conduct an evidentiary hearing to resolve the issues of fact relating to personal jurisdiction as required by *Venetian Salami*.

Conversely, Allen, P.A. argues: 1) Dr. Bottiglieri is subject to the long-arm jurisdiction of the court pursuant to section 48.193 of the Florida Statutes, as the Complaint alleges sufficient jurisdictional facts and after consideration of the evidence presented, the trial court correctly determined that Dr. Bottiglieri was subject to the personal jurisdiction of the court; 2) the exercise of personal jurisdiction over Dr. Bottiglieri comports with federal due process; and 3) the trial court properly ruled on the Motion to Dismiss without an evidentiary hearing.

Standard of Review

“For an appellate court to review a non-final order by petition for certiorari, the petitioner must demonstrate that the trial court departed from the essential requirements of the law, thereby causing irreparable injury which cannot be adequately remedied on appeal following final judgment.” *Belair v. Drew*, 770 So. 2d 1164, 1166 (Fla. 2000). The Court in *Clement v. Lipson*, 999 So. 2d 1072, 1074 (Fla. 5th DCA 2008)(citing *Wendt v. Horowitz*, 822 So. 2d 1252, 1256-57. (Fla. 2002)) explains:

A lower court’s ruling on a motion to dismiss for lack of personal jurisdiction is reviewed de novo and involves a two-step analysis. The first inquiry is whether the complaint alleges sufficient jurisdictional facts to bring the non-resident defendants within the ambit of the long-arm statute. The second is whether sufficient minimum contacts exist to satisfy the Fourteenth Amendment’s due process requirements.

Further, whether an evidentiary hearing was required by *Venetian Salami* is also a question of law that is reviewed de novo.

Analysis

We begin our analysis by looking at the relevant allegations of the parties’ pleadings and affidavits. In pertinent part, Allen P.A.’s complaint alleges as follows:

5. Defendant, BOTTIGLIERI, is subject to the long arm jurisdiction of the courts in Florida pursuant to §48.193, Fla. Stat., as he has breached a contract and agreement by failing to perform acts required within the state. In addition, BOTTIGLIERI engaged in business within this state as an expert witness and consultant to lawyers and law firms, including the Plaintiff, representing clients within the state of Florida, thereby agreeing to appear in Florida courts and have his testimony considered and received by those same courts.

6. In that regard, Defendant, BOTTIGLIERI, purposely availed himself of the right and privilege to serve as an expert witness in this state, thereby subjecting himself to the personal jurisdiction of the Florida courts by virtue of his voluntary application and receipt of certification as a "Medical Doctor Expert Witness" pursuant to §458.3175, Fla. Stat. As such, Defendant is engaged in substantial, and not isolated activity within this state and is therefore subject to the jurisdiction of the courts of this state pursuant to §48.193(2), Fla. Stat. as well.

A person is subject to the jurisdiction of the court if the statutory requirements of Florida's long-arm statute are satisfied. § 48.193, Fla. Stat. (2014). However, to satisfy the constitutional issues involving jurisdiction over non-residents, a two-prong test as explained in *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499 (Fla. 1989) must be applied. The court must determine whether the non-resident is subject to the jurisdiction of the court pursuant to section 48.193; and if so, the court must then determine if the non-resident has minimum contacts within the forum state. *Id.* at 502. If there are conflicting affidavits and documents on the jurisdiction issue, the court must hold an evidentiary hearing. *Id.* at 503.

The allegations in the Complaint allege that: 1) Dr. Bottiglieri breached the agreement by failing to perform acts required within the state; 2) he engaged in business within this state as an expert witness; 3) he purposely availed himself of the right and privilege to serve as an expert witness in this state by his voluntary application and receipt of certification as an medical doctor expert witness; and 4) he engaged in substantial activity within this state. In addition, the record demonstrates that Allen, P.A.'s checks are made payable to "Frank J. Bottiglieri M.D." and the correspondence is addressed to "Frank J. Bottiglieri M.D." Neither of these documents reveal that they are addressed or were payable to the corporation. Also, there was no evidence in the record revealing whether the checks were deposited into the corporate account or into Dr. Bottiglieri's personal account.

The reports from Expert Research On-Demand also reveal that Dr. Bottiglieri provided expert witness services in nine cases in Florida. A portion of the colloquy of Dr. Bottiglieri's deposition in the subject malpractice case was about his testimony in other Florida cases. Dr. Bottiglieri also testified at the deposition that he would come to Florida to testify at the trial if requested. Furthermore, Murphy's Affidavit states that Dr. Bottiglieri was requested and expected to attend the Florida trial of the malpractice matter.

However, Dr. Bottiglieri alleged in his Affidavit that 1) any deposition or trial testimony that he was scheduled to give in the subject malpractice case was to take place only in Maryland; 2) all work he did and any agreements were carried out by him in his corporate capacity on behalf of Frank J. Bottiglieri, M.D., FACOG, P.A.; 3) all monies he received by Allen, P.A. were deposited into the corporation's account; 4) he does not regularly conduct business in the State of Florida; 5) he has never solicited to be an expert witness in the State of Florida or any other state; and 6) he has only been in the State of Florida a total of three times over the past ten years.

As demonstrated by the record, there is conflicting evidence pertaining to both prongs of the long-arm jurisdiction analysis as revealed in the conflicting Affidavits and other documents. Furthermore, from review of the record, the trial court did not fully address either prong of the analysis, but instead only briefly addressed the issue pertaining to whether Dr. Bottiglieri was acting in his individual or corporate capacity. Accordingly, an evidentiary hearing is necessary to address the conflicting evidence and the two-prong analysis of the long-arm jurisdiction. *Venetian Salami*, 554 So. 2d at 503.

Based on the forgoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Frank J. Bottiglieri, M.D.'s Petition for Writ of Certiorari is **GRANTED** and the trial court's Order on Defendants Motion to Dismiss entered on November 13, 2014 is **QUASHED** and **REMANDED** to the lower court for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, this 18th day of December, 2015.

/S/ _____
ALAN S. APTE
Presiding Circuit Judge

ROCHE and O'KANE, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Justine S. Anagnos, Esquire**, Loreen I. Kreizinger, P.A., 110 Tower-20th Floor, 110 SE Sixth Street, Fort Lauderdale, Florida 33301; **J. Scott Murphy, Esquire**, Paul & Perkins, P.A., 3117 Edgewater Drive, Orlando, Florida 32804; and **The Honorable Adam McGinnis, The Honorable Tina L. Caraballo**, 425 N. Orange Avenue, Orlando, Florida 32801, on this 18th day of December, 2015.

/S/ _____
Judicial Assistant