

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

April 2019 Term

Red Oak Apartment Homes, LLC

v.

Holmes Carpet Center, LLC et al.

Case No.: 2019-0012

BRIEF OF APPELLANT RED OAK APARTMENT HOMES, LLC

RULE 7 MANDATORY APPEAL

FROM DECISION OF THE HILLSBOROUGH COUNTY SUPERIOR
COURT, NORTHERN DISTRICT

Respectfully submitted,
Red Oak Apartment Homes,
LLC
By and through its counsel,
Jon N. Strasburger, Esq.
[NH Bar #16499]

Bossie, Wilson & Strasburger,
PLLC
25 Bay Street
Manchester, NH 03104
(603) 629-9500

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QUESTIONS PRESENTED

1. Did the trial court err in granting Defendant Strategis Floor & Décor, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction when the Plaintiff alleged facts sufficient to satisfy the “stream of commerce plus” test? See Final Hearing Transcript¹, at pp, 9-13.

¹ Hereinafter “TR”

STATEMENT OF THE CASE AND FACTS

This case involves an appeal by the Plaintiff, Red Oak Apartment Homes, LLC (hereinafter “Red Oak”) from a final decision on the merits of the Hillsborough County Superior Court, Northern District (Messer, J.) granting the Defendant Strategis Floor & Décor, Inc.’s (hereinafter “Strategis”) Motion to Dismiss for Lack of Personal Jurisdiction. See Appendix² at pp. 45-55.

Red Oak is in the business of renting residential dwelling units and owns approximately 1,500 residential rental units throughout New Hampshire. Red Oak prides itself on providing quality apartment homes for tenants throughout several New Hampshire communities. App. at 5. Several years ago, the management of Red Oak began exploring options to replace the flooring in many of its apartments with a flooring material that would provide the look of hardwood flooring yet would provide years of maintenance free use. Id. Red Oak had a long standing relationship with the Defendant Holmes Carpet Center, LLC (hereinafter “Holmes”) having used Holmes for flooring projects for many years. Holmes recommended the installation of certain vinyl plank flooring to meet Red Oak’s needs. Red Oak then contracted with Holmes to install plank style vinyl floating flooring in approximately 195 of its apartment units. Id. The flooring was sold with a fifty (50) year warranty for residential applications. After the flooring was installed, tenants and Red Oak staff began noticing that the flooring was shifting and large gaps were appearing between the flooring planks. Large gaps were observed near walls and doorway thresholds. App. at 5-6.

² Hereinafter “App.”

After unsuccessful attempts to have Holmes repair the defective floors, Red Oak filed a Complaint against Holmes in the Hillsborough County Superior Court, Northern District on November 11, 2016 alleging breach of contract and Consumer Protection Act (RSA Chapter 358-A) claims. App. at 4-8. Thereafter, Holmes named other potentially responsible parties in its DeBenedetto disclosure including various subcontractors, N.R.F. Distributors, Inc., which was the flooring distributor that sold the flooring to Holmes, and an entity in Canada that provided the flooring to N.R.F Distributors, Inc. Further inspection also revealed that the flooring at issue might have been defective. On or about October 18, 2017 Red Oak filed an Assented-to Motion to Amend Complaint to Include Additional Defendants and an Amended Complaint which named the various subcontractor installers, N.R.F. Distributors, Inc. and Strategis who is the company that sold the vinyl plank flooring at issue in this case to N.R.F. Distributors, Inc. App. at 9-23. The Amended Complaint asserted claims of violation of the Consumer Protection Act, Breach of Express Warranty, and Breach of Implied Warranty against Strategis. App. at 13-23. The trial court granted the motion and Strategis was later served via the Hague Convention process.

Strategis is a corporation organized and existing under the laws of the Province of Quebec, Canada. App. at 25. Strategis imports various types of flooring from Asia and sells them to distributors in Canada and the United States. Id. After being served, Strategis filed a Motion to Dismiss for Lack of Personal Jurisdiction on or about March 13, 2018. App. at 24-34. Red Oak objected. App. at 35-43. A non-evidentiary motions hearing on Strategis' motion as well as a Partial Motion for Summary Judgment filed by Holmes was held on July 30, 2018 before the Honorable Kenneth C. Brown. Judge Brown raised an issue during

the hearing indicating that he may have met someone employed by N.R.F. Distributors, Inc. as a result of his relationship with owners of certain flooring retailers. Judge Brown did not believe this required recusal. TR pp. 19-20. Judge Brown then issued an order dated July 31, 2018 recusing himself from further involvement in the matter and ordered that the case be assigned to another Judge who would review the transcript of the July 30th hearing and would issue an order on the pending motions. App. at 44.

The Honorable Amy B. Messer issued an order dated September 19, 2018 granting Strategis' Motion to Dismiss for Lack of Personal Jurisdiction. App. at 45-55. Following the trial court's denial of the Plaintiff's timely filed Motion for Reconsideration and Request for Rehearing, Red Oak filed a Partially Assented-to Motion Pursuant to Superior Court Rule 46 and to Stay Proceedings Pending Appeal. Specifically, Red Oak requested that the Court deem its order granting Strategis' Motion to Dismiss for Lack of Personal Jurisdiction as a Final Decision on the Merits for purposes of appeal and that the proceedings be stayed as to the remaining defendants pending appeal to this Court. App. at 79-84. The trial court granted the Plaintiff's motion in an order dated January 2, 2019. App. at 88-90. This appeal followed.

STANDARD OF REVIEW

The Plaintiff bears the burden of demonstrating facts sufficient to establish personal jurisdiction. The Lyme Timber Co. v. DSF Investors, LLC, 150 N.H. 557, 559 (2004); citing Staffing Network v. Pietropaolo, 145 N.H. 456, 457 (2000). Unless a full evidentiary hearing is held, the plaintiff need make only a prima facie showing of jurisdictional facts to defeat a defendant's motion to dismiss. Id. citing Metcalf v. Lawson, 148 N.H. 35, 37 (2002).

Under the prima facie standard, the inquiry is whether the plaintiff "has proffered evidence which, if credited, is sufficient to support findings of all facts essential to personal jurisdiction." New Hampshire v. N. Atl. Ref. Ltd., 160 N.H. 275, 281 (2010); quoting Phillips v. Prairie Eye Center, 530 F.3d 22, 26 (1st Cir.2008), cert. denied, __ U.S. __, 129 S.Ct. 999, 173 L.Ed.2d 298 (2009). To make a prima facie showing, the plaintiff "ordinarily cannot rest upon the pleadings, but is obliged to adduce evidence of specific facts." Id.; quoting Foster-Miller, Inc. v. Babcock & Wilcox Canada, 46 F.3d 138, 145 (1st Cir.1995); see Thomas v. Telegraph Publ'g Co., 151 N.H. 435, 437, 859 A.2d 1166 (2004).

The trial court's role, and the role of the Court in *de novo* review, is "not as a factfinder, but as a data collector. That is to say, the court ... must accept the plaintiff's (properly documented) proffers as true for the purpose of determining the adequacy of the prima facie jurisdictional showing." Id.; quoting Foster-Miller, 46 F.3d at 145 (citation omitted). Additionally, the court must construe the plaintiff's evidentiary proffers "in the light most congenial to the plaintiff's jurisdictional claim." Id.; quoting Phillips, 530 F.3d at 26.

SUMMARY OF THE ARGUMENT

Strategis' combined efforts to establish a distribution relationship with N.R.F. serving the New Hampshire market, its print advertising directed toward New England, its provision of written warranties to New Hampshire consumers all constitute purposeful availment of the privilege of conducting activities here, thereby invoking the benefits and the protection of New Hampshire laws and making Strategis' presence before this State's courts foreseeable. The foregoing voluntary conduct satisfies the "stream of commerce plus" theory adopted by this Court in Vermont Wholesale Bldg. Prod. v. J.W. Jones Lumber Co., 154 N.H. 625 (2006).

ARGUMENT

I. Strategis' efforts to establish a distributorship through N.R.F. Distributors, Inc. to serve the New England market and its advertising efforts directed to the New England market constitute voluntary actions designed to serve the New Hampshire market satisfying the "stream of commerce plus" test.

Determining whether a defendant is subject to personal jurisdiction involves a two party analysis. The Lyme Timber Co., 150 N.H. at 559. "First, the State's long-arm statute must authorize such jurisdiction. Second, the requirements of the Federal Due Process clause must be satisfied." Id. quoting Metcalf, 148 N.H. at 37. The New Hampshire Supreme Court has construed the State's long-arm statute as permitting the exercise of jurisdiction to the extent permissible under the Federal Due Process clause, accordingly the primary analysis relates to due process. Id.

A New Hampshire court may exercise personal jurisdiction over a non-resident defendant if the defendant has certain minimum contacts with New Hampshire such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice. Id. Jurisdiction can either be "general" where the defendant's contacts with New Hampshire are "continuous and systematic," or "specific" where the cause of action arises out of or related to the defendant's New Hampshire based contacts. Id. quoting Staffing Network v. Peitropaolo, 145 N.H. 456, 458 (2000). General jurisdiction exists when the litigation is not caused by the defendant's forum-based contacts but the defendant nevertheless has engaged in continuous and systematic activity in the forum state. Vermont Wholesale Bldg. Prod. v. J.W. Jones Lumber Co., 154 N.H. 625, 628 (2006). Where specific contacts with a forum state

are the basis for personal jurisdiction, whether those contacts are constitutionally sufficient requires an analysis of the relationship between the defendant, the forum and the litigation. Alacron v. Swanson, 145 N.H. 625, 628 (2000). That inquiry focuses not only upon whether the defendant's contacts might have caused injury in New Hampshire, but whether the contacts should have given the defendant notice that it should reasonably have anticipated being haled into court here. Id.

In the case at bar, a finding of specific personal jurisdiction is appropriate as Strategis' forum based contacts with New Hampshire are what has given rise to the litigation. In determining if the exercise of personal jurisdiction comports with due process, the court examines whether: 1) the contacts relate to the cause of action, 2) the defendant has purposefully availed itself of the protections of New Hampshire law; and 3) it would be fair and reasonable to require the defendant to defend the suit in New Hampshire. The Lyme Timber Co., 150 N.H.at 560. With respect to the second element, the Defendant's in state contact must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and the protection of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable. Fellows v. Colburn, 162 N.H. 685, 694 (2011).

"Purposeful availment requires both foreseeability and voluntariness." Id. Voluntariness requires that each of the Defendant's contacts with the forum state proximately result from the actions by the Defendant." Id. "Foreseeability requires that the contacts also must be of a nature that the Defendant could reasonably anticipate being haled into court there." Id. In products liability cases, New Hampshire courts

employ the “stream of commerce plus theory” established by the U.S. Supreme Court in Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987). New Hampshire v. N. Atl. Ref. Ltd., 160 N.H. 275, 284 (2010). This theory stands for the proposition that the “placement of a product in the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.” Asahi, 480 U.S. at 112. There must be some additional conduct that indicates an intent or purpose to serve the market in the forum state. Id.

In this case, Strategis undertook specific actions designed to serve the New Hampshire market. As the Honorable Court’s order correctly noted, in order to satisfy the “stream of commerce plus” test there must be some additional conduct on the part of the defendant indicating an intent or purpose to serve the New Hampshire market. Such conduct could include “designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or ***marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.***” Asahi, 480 U.S. at 112. (emphasis added). At all times relevant hereto, Strategis sold its flooring in the New England market through the defendant N.R.F. Distributors, Inc. (hereinafter “N.R.F.”). N.R.F. is among the nation’s 10 largest flooring distributors and services all of the New England states and New York. App. at 61. Strategis formally sought to establish a distribution relationship with N.R.F. in order to sell Strategis flooring products in the market served by N.R.F. The Plaintiff provided an exhibit at the July 30, 2018 hearing which consisted of interrogatory answers provided by N.R.F. App. at 91-96. Interrogatory number 4 asked: “Please set forth a description of how you learned of Strategis Floor & Décor, Inc.’s flooring brands and how

you came to distribute Strategis Floor & Décor, Inc. flooring brands.” N.R.F. answered under oath: “NRF was contacted by William Friend, Vice President of Strategis Floor & Décor, to distribute their products in NRF’s distribution area.” It is commonly understood in the flooring community in New England that N.R.F. services hundreds of flooring retailers in New Hampshire. N.R.F. is New England’s largest flooring distributor. TR at p. 11, lines 1-3. In fact, N.R.F. is specifically registered with the New Hampshire Secretary of State’s office to conduct business here as a foreign corporation. Accordingly, the Plaintiff produced prima facie evidence establishing that Strategis undertook actions to establish a distribution relationship serving the New Hampshire market. The Plaintiff submits that this is a significant factor that the trial court should have considered when determining whether Strategis had purposefully availed itself of the protections of New Hampshire law under the “stream of commerce plus” theory. However, the fact that Strategis affirmatively established a distribution relationship with N.R.F. to serve the New England market is not referenced anywhere in the Honorable Court’s September 19, 2018 order granting Strategis’ Motion to Dismiss. Establishing a distribution relationship with a distributor that serves a forum state is exactly the kind of voluntary conduct that the United States Supreme Court in Asahi opined would satisfy the “stream of commerce plus” test.

Strategis also developed advertising materials for its flooring lines directed at the northeast region which necessarily includes New Hampshire. Strategis designed print advertising for several of its flooring lines which instructed customers in the Northeast region to “Contact your NRF Representative” again alluding to the sales agent relationship that it had established with N.R.F. See print advertising, App. at 67-68.

Under the “stream of commerce plus” test established in Asahi, advertising in the forum state is also conduct that is considered purposeful availment.

Strategis has also publically announced that it sells its flooring products to the United States market through flooring distributors such as N.R.F. instead of direct to consumer sales. The October 12, 2009 article from the Floor Trends publication which is available online, quotes Strategis’ National Key Accounts Manager Jeff Feller as saying: “Unlike what some companies are doing, going into a direct mode, we believe the flooring industry was built on relationships with distributors and that should continue. The industry has seen a lot of changes, but we think traditional distribution is still the best way to do business.” See October 12, 2009 article: Strategis eyes U.S. distribution for Trillium bamboo floors, Flooring Trends attached App. at 70-71. This article was also provided to the trial court with Red Oak’s Motion for Reconsideration and Request for Rehearing. This further supports the notion that Strategis’ efforts to align themselves with the largest flooring distributor in New England represents an intent to serve the New Hampshire market.

It is significant to note that given the amount of flooring product that Strategis has sold to New Hampshire customers through the relationship it established with N.R.F., it is foreseeable that Strategis could be haled into court in here. N.R.F.’s interrogatory answers which were provided to the Court as an exhibit confirmed that it sold approximately 18,000 cartons of Strategis LVT flooring and 13,000 cartons of Strategis wood flooring to New Hampshire customers through N.R.F. App. at 92. Strategis was able to sell this amount of product to New Hampshire consumers due to the relationship it established with

N.R.F. acting as the sales agent and distributor. It is certainly foreseeable that Strategis could be haled into court in here given the large quantities of flooring sold to New Hampshire consumers through N.R.F.

It is also fair and reasonable for Strategis to defend suit here. In order for the Court to determine if it would be fair and reasonable for Strategis to have to defend suit here, the Court must look to the five “gestalt factors”: 1) the burden on the defendant; 2) the forum State’s interest in adjudicating the dispute; 3) the plaintiff’s interest in obtaining convenient and effective relief; 4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and 5) the shared interest of the several States in furthering fundamental substantive social policies. N. Atl. Ref. Ltd., 160 N.H. at 285-286.

The New Hampshire Supreme Court has noted that Canadian companies doing business close to the New Hampshire border where a case is pending have the “lightest burden.” Id. The United States Supreme Court has also noted that a Canadian defendant bears a substantially lighter burden as compared to most other foreign defendants. Id. citing Asahi, 480 U.S. at 114. New Hampshire has a significant interest in adjudicating product and warranty claims that arise from the purchase of products within the State of New Hampshire to residents of this State.

Red Oak’s interest in obtaining convenient and effective relief is also clearly supported by the trial court exercising personal jurisdiction over Strategis. Red Oak is based in New Hampshire, all of the floors at issue in this case are located at Red Oak real estate in New Hampshire. All of Red Oak’s staff familiar with this case who would testify are located in New Hampshire. The Defendant Holmes Carpet Center, LLC is a New

Hampshire limited liability company that operates in New Hampshire. Holmes Carpet Center management and staff are located within New Hampshire. It would be immensely inconvenient for the Plaintiff and the other defendants in this case to have to litigate this case in a Canadian court.

Red Oak also submits that gestalt factors four and five are also served by exercising personal jurisdiction in New Hampshire. Factor four is generally considered a wash, unless the Court perceives the threat of "piecemeal litigation." N. Atl. Ref. Ltd., 160 N.H. at 287. As there was no evidence before the trial court that exercising personal jurisdiction in New Hampshire would lead to piecemeal litigation, it should not have great weight in this Court's analysis.

The last gestalt factor involves "the substantive social policies of the affected governments." New Hampshire has an interest in protecting its consumers from damages caused by poorly manufactured, substandard flooring and in providing the State with a convenient forum to adjudicate their complaints. As the Court announced in North Atlantic New Hampshire has a policy interest in providing foreign companies, "the incentive of liability to ensure their reasonable care" in producing and designing products (in that case gasoline). Id. at 287.

The case at bar is markedly similar to the facts in North Atlantic. In that case, this Court found sufficient minimum contacts to support specific personal jurisdiction over a Canadian company engaged in the fuel refinery business even when it found that the company had no employees, offices, property, bank accounts or assets in New Hampshire, was not registered to do business in New Hampshire and had never advertised or solicited sales in New Hampshire. N. Atl. Ref. Ltd., 160 N.H. 275 (2010). The Court found sufficient contacts where the refiner

had produced gasoline with the understanding that the primary market would be the northeastern United States (which necessarily includes New Hampshire) and where 37 shipments of gasoline it produced were sent to New Hampshire. Id. at 283-285. In the case at bar, Strategis shipped large quantities of its flooring to N.R.F. with the expectation that the flooring would be sold to the New England market which specifically includes New Hampshire. Due to the relationship that Strategis sought out with N.R.F., 18,000 cartons of its wood flooring and 13,000 cartons of its vinyl plank flooring were sold to New Hampshire consumers. The knowledge that N.R.F. primarily served the New England market is sufficient to establish purposeful availment under the North Atlantic decision.

It is presumed that Strategis will rely heavily on this Court's opinion in Vermont Wholesale Bldg. Prod. v. J.W. Jones Lumber Co., 154 N.H. 625, 628 (2006). However, that case is entirely distinguishable from the case at bar. In that case, the Defendant, J.W. Jones Lumber was a North Carolina corporation that manufactures and sells lumber products. The plaintiff, Vermont Wholesale Building Products, Inc., purchases specialty lumber and distributes it in four states: Massachusetts, New Hampshire, Vermont and New York. Id. at 627. The facts suggest that Vermont Wholesale purchased flooring from Jones Lumber and then sold it to Central Building Supply, a retail store located in Littleton, New Hampshire. Central sold the flooring to Mark Yourison, a contractor, who installed it in Michelle and Walter Westberry's home, located in Whitefield, New Hampshire. Id. The case began when the Westberrys brought suit against the contractor alleging that the flooring was defective. The contractor brought a third party action against Vermont Wholesale, who in turn brought actions against Central and

Jones Lumber. Jones Lumber moved to dismiss for lack of personal jurisdiction which was denied by the trial court and Jones Lumber appealed.

On appeal this Court found that Jones Lumber's mere knowledge that its products might end up in New Hampshire was insufficient to satisfy the "stream of commerce plus" theory. Id. at 635. The Court noted that satisfaction of the test requires "something more" than merely placing a product into the stream of commerce. Id. at 636. When the stream of commerce plus theory is applied, a defendant's awareness that its product may or will reach the forum state alone is not sufficient to establish that the defendant purposefully availed itself of the protection of that state's laws. The Court in Vermont Wholesale remanded the case to apply the stream of commerce plus analysis to determine in the first instance whether Jones Lumber purposefully availed itself of the protection of New Hampshire's laws. Id. at 637.

In the Vermont Wholesale case, it was undisputed that Jones Lumber did no advertising in New England or New Hampshire. There was no evidence to suggest that the Jones Lumber sought to establish the distribution relationship with Vermont Wholesale evincing an intent to serve New Hampshire. The facts simply suggest that Vermont Wholesale made the decision to purchase lumber from Jones Lumber. There was also no evidence indicating that Vermont Wholesale sold any other lumber from Jones Lumber to a New Hampshire resident or entity other than the flooring lumber at issue in that case. Finally, there were no facts to suggest that Jones Lumber provided any warranties or other contracts to consumers in New Hampshire.

The facts in the present case starkly differ. It is undisputed that Strategis undertook the effort to establish the distribution relationship

with N.R.F. knowing that N.R.F. is New England's largest flooring distributor. This is voluntary conduct on the part of Strategis in an effort to serve the New Hampshire market. Strategis also developed print advertising marketed in the New England area in an effort to market its flooring products here. Finally, Strategis provided a written warranty to the end user in each carton of flooring it sold in New Hampshire. Establishing a contractual relationship with consumers in New Hampshire through a written warranty constitutes purposeful availment of the protections of New Hampshire laws.

Simply put, there is far more evidence of voluntary conduct on the part of Strategis to satisfy the "stream of commerce plus theory" than was present in Vermont Wholesale making the case distinguishable.

CONCLUSION

Based upon the foregoing, the Appellant, Red Oak Apartment Homes, LLC, respectfully requests that this Honorable Court:

- A. Reverse the decision of the trial court and find that the Appellant met its burden of establishing sufficient prima facie evidence making the assertion of personal jurisdiction over Strategis proper; and
- B. Grant such further relief as may be just and appropriate.

REQUEST FOR ORAL ARGUMENT

The Appellant respectfully requests no more than fifteen (15) minutes oral argument to be presented by Jon N. Strasburger, Esq. before the full court.

CERTIFICATION

I hereby certify that the foregoing Brief of Appellant has on this day been forwarded to all counsel of record via the Court's electronic filing system. Defendants who are not represented by counsel were sent a copy of the Brief of Appellant via First Class U.S. Mail.

I hereby certify that the decisions appealed from are in writing and are contained in the Appendix to the Appellant's Brief at pp. 45-55 and pp. 72-78 respectively.

Respectfully Submitted,
Red Oak Apartment Homes, LLC,
By and through its attorneys,
BOSSIE, WILSON & STRASBURGER,
PLLC

Dated: April 30, 2019

By: /s/ Jon N. Strasburger
Jon N. Strasburger, Esq.
N.H. Bar #16499
25 Bay Street
Manchester, NH 03104
(603) 629-9500