In the Court of Common Pleas
Cuyahoga County, Ohio

BRYAN D. EYRING,	)	CASE NO. CV 12 781507
	)	
Plaintiff,	)	JUDGE ROBERT C. McCLELLAND
	)	
v.	)	
	)	**Journal Entry:**
KEVIN SISSON, *et al.*,	)	
	)	Opinion & Order on Motion to Dismiss
Defendant.	)	for Lack of Personal Jurisdiction

OPINION

Plaintiff Bryan D. Eyring, an Ohio resident, seeks various relief related to his purchase of a collectable watch from Defendants Kevin Sisson and Sisson & Son (collectively, "Sisson"), both California residents. Eyring asserts that four divisions of Ohio's long-arm statute, R.C. 2307.382, specifically divisions (1) through (4), confer personal jurisdiction over Sisson because the claims asserted arise either from Sisson's act of transacting business in Ohio or from committing tortious conduct within the state. (Compl., ¶4.)

Sisson now moves this Court for an order dismissing this action under Civ.R. 12(B)(2) for lack of personal jurisdiction, arguing that he does not have minimum contacts with the state such that the present suit does not offend traditional notions of fair play and substantial justice. Upon review of the briefs, the evidence submitted, and the law, the motion to dismiss is denied.

I. Allegations

Eyring alleges that Sisson placed a V.E. LaPorte pocket watch "up for auction on eBay, an internet auction site," on March 20, 2012. (Compl., ¶6.) Eyring discovered the auction and decided he would contact the seller with the proposition of selling it to him "outside of the eBay auction process." (Compl., ¶7.)

A week after Sisson posted the watch for auction, Eyring telephoned him to inquire about a direct sale. (Compl., ¶8.) Sisson allegedly "told Eyring that he would consider a direct sale at the right price." (Compl., ¶8.) Sisson accepted Eyring's $2,000 offer and removed the watch from the auction.

(Compl., ¶¶8-9.) They agreed that Eyring would transfer the money to Sisson's PayPal account, and Sisson "would ship the Watch via FedEx Overnight after the payment was received." (Compl., ¶9.) Sisson sent a PayPal invoice, and Eyring paid it. (Compl., ¶10.)[1] Thereafter, Sisson sent Eyring an e-mail confirming the shipment and providing the FedEx tracking number. (Compl., ¶11.)

The next morning, after the watch had arrived in Cleveland and FedEx loaded it onto a delivery truck, Sisson cancelled the shipment and asked FedEx to return the package to the California store. (Compl., ¶12.) About this time, Sisson allegedly contacted Eyring by telephone and told him that other prospective buyers had made "larger offers" and that Sisson "'couldn't leave that much money lying on the table.'" (*Id.*) Sisson refunded the purchase price into Eyring's PayPal account and, according to Eyring, has refused to speak with him or his counsel and has rejected Eyring's attempts to "re-transfer" the purchase price after the refund. (Compl., ¶¶12-14.)

The watch allegedly is a rare and unique, one-of-a-kind item. (Compl., ¶14.) Eyring seeks equitable remedies in the context of specific performance and replevin, and asks for damages for the breach of contract and for the tortious conversion of the watch.

II. Standard on motion to dismiss under Civ.R. 12(B)(2)

Upon Sisson's motion to dismiss for lack of personal jurisdiction, Eyring bears the burden to show that this court has personal jurisdiction over the claims asserted. *Kauffman Racing Equip. v. Roberts,* 126 Ohio St. 3d 81, 2010-Ohio-2551, 930 N.E.2d 784, ¶ 27. Because this Court is deciding the issue without an evidentiary hearing, Eyring need only make a prima facie showing of personal jurisdiction. *Id.* As such, this court must "view allegations in the pleadings and the documentary evidence in a light most favorable to the plaintiff[], resolving all reasonable competing inferences in [his] favor." *Goldstein v. Christiansen,* 70 Ohio St.3d 232, 236, 638 N.E.2d 541 (1994).

III. Evidence

Both parties submit personal affidavits in support of their respective positions. According to Sisson, he has worked as the manager of Sisson & Son, a California company, for 33 years. (Motion, Ex. A, Affidavit of Kevin Sisson, 8/27/12 ("Sisson Aff."), ¶¶8-9.) He asserts that the company has no customers, offices, employees, property, or bank accounts in Ohio. (*Id.* at ¶¶5 & 10.) And other than the transaction with Eyring, the company had not contracted with Ohio residents in the past 20 years. (*Id.* at ¶¶4 & 11.)

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[1] Although Eyring's complaint references two attached exhibits, neither is attached to the complaint.

Eyring, who represents himself as "well-versed in the particularities of eBay commerce" and a frequent user of Paypal, took issue with Sisson's representation that Sisson & Son had only a single transaction with an Ohio resident in twenty years. (Opp. Br. & Motion for Limited Discovery ("Opp."), Ex. 1 (Affidavit of Bryan D. Eyring ("Eyring Aff.")), ¶¶2 & 7.) According to Eyring, the company is a "Top-rated" eBay seller and "had 2,151 items up for auction on eBay through their eBay store" on September 21, 2012. (Eyring Aff. at ¶¶3 & 4.) A Top-rated seller, Eyring explains, is a title given by eBay only to "merchants who have at least 100 transactions and $1,000 in sales with US buyers during the last 12 months, have a positive Feedback rating of at least 98%, and upload tracking to their buyer's My eBay within their promised handling time for at least 90% of their transactions with US buyers in the last 3 months." (*Id.* at ¶4.) Eyring states that, given Sisson had obtained a "Top-rated seller title with 100% positive feedback and 8053 reviews," he "felt confident" that Sisson would perform the contract "and complete the sale of the Watch to me in Ohio." (*Id.* at ¶5.)

Sisson, in a second affidavit, later explained that he had prepared his original affidavit based on his personal involvement with over-the-phone retail sales and national wholesale sales. (Brief Opposing Discovery and Reply in Support of Dismissal ("Reply"), Ex. A., Affidavit of Kevin Sisson, 10/9/12 (Sisson Aff. II"), ¶6.) He had not assessed the company's "eBay activity to prepare that affidavit," but later did so to provide "complete information" and provide some answers to Eyring's discovery requests. (*Id.*)

After his investigation, Sisson learned that, during the twenty-month period from February 1, 2011 to October 9, 2012, the company "completed no more than 9,383 transactions through PayPal," 269 of which involved Ohio residents. (Sisson Aff. II, ¶4.) Of the top two shipping services used by the company, the 31-day history on the company's United States Postal Service account revealed only five transactions, none of which involved shipment to Ohio. (*Id.*, ¶5a.) The accessible FedEx shipment information, which stretched back "to the beginning of 2011," listed a single Ohio transaction, "the one that pertained to the aborted shipment to Mr. Eyring." (*Id.*, ¶5b.) As the transaction did not occur through eBay, Sisson further explained that "eBay transactions are counted separately through an eBay account. Thus, these are additional transactions not completed through eBay for which we have used the Post Office or FedEx." (*Id.*, ¶5c.)

III. Personal jurisdiction

Determining whether this Court has personal jurisdiction over a nonresident defendant requires a two-step analysis. *Kauffman,* 126 Ohio St.3d 81, ¶28. First, it must consider whether the long-arm statute, R.C. 2307.382, and the applicable rule of civil procedure, Civ.R. 4.3, confer jurisdiction. *Id.* If so, then this Court must consider "whether the exercise of jurisdiction would deprive the nonresident defendant of the right to due process of law under the Fourteenth Amendment to the United States Constitution." *Id.*

A. *Ohio's long-arm statute and civil rule*

The pertinent sections of R.C. 2307.382(A) raised by the parties allow a court to "exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's":

> (1) Transacting any business in this state;
>
> (2) Contracting to supply services or goods in this state;
>
> (3) Causing tortious injury by an act or omission in this state;
>
> (4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state; * * *.

Civ.R. 4.3(A) mirrors the long-arm statute and allows service of process outside the state upon a nonresident where that person, who acted directly or through an agent, "has caused an event to occur out of which the claim that is the subject of the complaint arose, from the person's":

> (1) Transacting any business in this state;
>
> (2) Contracting to supply services or goods in this state;
>
> (3) Causing tortious injury by an act or omission in this state, including, but not limited to, actions arising out of the ownership, operation, or use of a motor vehicle or aircraft in this state;
>
> (4) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state; * * * .

See also R.C. 2307.382 (C) ("When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.").

Sisson specifically does not challenge the jurisdictional provisions of R.C. 2307.382(A) (1) through (3). While he does contend that the complaint does not support personal jurisdiction under paragraph (A)(4), he acknowledges that, since the other three paragraphs arguably apply, this Court need consider only whether the exercise of jurisdiction would deprive Sisson of the right to due process of law under the Fourteenth Amendment to the United States Constitution.

B. *Due process under the Fourteenth Amendment*

1. General or Specific Jurisdiction

"The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has 'certain minimum contacts . . . such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" *Calder v. Jones*, 465 U.S. 783, 788, 104 S.Ct. 1482, 79 L. E. 3d 804 (1984), quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339; 85 L. Ed. 278 (1940); *accord State ex rel. Toma v. Corrigan*, 92 Ohio St.3d 589, 593, 752 N.E.2d 281 (2001). Courts consider personal jurisdiction in the context of whether it is general or specific, which "depend[s] upon the nature of the contacts that the defendant has with the forum state." *Kauffman*, 126 Ohio St.3d 81 at ¶ 46.

"'General jurisdiction is proper only where "a defendant's contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contact with the state."'" *Kauffman*, 126 Ohio St.3d 81 at ¶ 46, quoting *Bird v. Parsons*, 289 F.3d 865, 873 (6th Cir. 2002), quoting *Third Natl. Bank in Nashville v. WEDGE Group, Inc.*, 882 F.2d 1087, 1089 (6th Cir. 1989). "Specific jurisdiction applies when 'a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum.'" *Id.* at ¶ 47, quoting *Helicoperos Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 n.8, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). The parties here argue whether an Ohio court has specific jurisdiction over the transaction and incidents alleged.

2. Two-pronged test

In general, "[t]he minimum-contacts requirement [of *International Shoe*] is met when a nonresident defendant 'purposefully avails [himself] of the privilege of conducting activities within the forum State." *Kauffman*, 126 Ohio St.3d 81 at ¶ 46 (first alteration added), quoting *Hanson v. Denkla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). But the question whether maintenance of the suit does not offend traditional notions of fair play and substantial justice warrants consideration of a number of factors which "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would be required." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477, 105 S.Ct. 2174, 85 L. Ed. 2d 528 (1985). Factors may include the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. *Id.*, quoting *World-Wide*

Volkswagen Corp v. Woodson, 444 US 286, 100 S.Ct. 559, 62 L.Ed. 2d 590 (1980) (quotations omitted). But in those situations "where a defendant who purposefully directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Id.*

3. Considering the due process inquiry in three parts

The Supreme Court of Ohio has adopted a three-part test outlined in *Southern Machine Company v. Mohasco Industries, Inc.,* 401 F.2d 374, 381 (6th Cir. 1968), which the Sixth Circuit reiterated in *Bird v. Parsons,* 289 F.3d 865, 873 (6th Cir. 2002), to determine whether specific jurisdiction exists:

> "'First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.'" [*Kauffman,* 126 Ohio St.3d 81 at ¶¶ 49-50.]

a. *Part one: purposeful availment or causing a consequence*

When considering the first part of the test (i.e.,"whether the defendant purposefully availed himself of the privilege of acting in the forum state or causing a consequence in the forum state"), a court looks to the defendant's "conduct and connection with the forum" and considers whether ""'it is such that defendant should reasonably anticipate being haled into court there.'"" *Kauffman,* 126 Ohio St.3d 81 at ¶ 51, quoting *Burger King,* 471 U.S. at 474, quoting *World-Wide Volkswagen,* 444 U.S. at 297. "'Purposeful availment' is present when the defendant's contacts with the forum state 'proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State.'" *Id.,* quoting *Burger King,* 471 U.S. at 475. "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.'" *Burger King,* 471 U.S. at 475 (citations omitted). "So long as it creates a 'substantial connection' with the forum, even a single act can support jurisdiction." *Id.* at 475 n. 18.

b. *Part two: whether the claim arises from contacts with the forum state*

The second part of the test, determining whether the claim arises from those contacts with the forum state, requires the court to consider whether those contacts are related to the operative facts of the alleged controversy. *Kauffman*, 126 Ohio St.3d at ¶ 70. "This 'does not require that the cause of action formally "arise from" defendant's contacts with the forum; rather, this criterion requires only 'that the cause of action, of whatever type, have a substantial connection with the defendant's in-state activities.'" *Id.*, quoting *Third Natl. Bank*, 882 F.2d at 1091, quoting *S. Machine Co.*, 401 F.2d at 384, fn. 27. A "lenient standard . . . applies when evaluating the 'arising from' criterion." *Id.* quoting *Bird*, 289 F.3d at 875.

c. *Part three: the "reasonableness" inquiry*

The reasonableness inquiry under the third and final part of the *S. Machine* test contemplates traditional notions of fair play and substantial justice outlined in *Burger King* and *World-Wide Volkswagen*. *See Bird*, 289 F.3d at 875. When the first two elements of the *S. Machine* test are satisfied, "'an inference arises that this third factor also is present.'" *Kauffman*, 126 Ohio St.3d 81, ¶71, quoting *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1267 (6th Cir. 1996). "Only the unusual case will not meet this third criterion." *Id.* (quotations omitted).

III. Disposition

A. *Arguments*

1. Sisson's position

Sisson argues that the company has had few contacts with the state of Ohio and that the "typical case involving a single eBay sale will got give rise to jurisdiction because the seller does not control the location of the winning bidder." (Reply, p. 3.) Nor does the use of interstate means of communication to enter into an agreement, or the receipt in California of payment made in Ohio and subsequent refund from California to Ohio, establish minimum contacts sufficient to satisfy due process. (Motion, pp. 5-6; Reply, p. 5.)

With regard to the reasonableness of exercising jurisdiction, Sisson argues that this controversy involves less than $15,000 and will bemore expensive for him than for defendants to litigate here. Sisson also argues that Ohio has no interest in this litigation because the contacts – a few e-mails Eyring "sent to a California entity, . . . a few phone conversations with that entity's representative, . . . an agreement with that California entity," and a PayPal payment made to the entity – are not enough. (Reply, p. 7.)

2. Eyring's position

Eyring, however, contends that the company is not an "isolated 'mom and pop' coin shop" but "a sophisticated merchant that uses the internet to advertise and sell its merchandise to a worldwide audience." (Opp., p. 5.) The company is a "top-rated eBay seller[] with thousands of items up for auction . . . at any one time" which represents that it will sell to anyone in the United States. (Opp., p. 7.) According to Eyring, Sisson's single act of stopping the auction process in response to Eyring's inquiry and shipping the watch to him directly establishes specific jurisdiction. (*Id.*, citing *McGuire v. LaVoie,* N.D. Texas No. 3:03-CV-0161-BH (Aug. 19, 2003), 2003 U.S. Dist. LEXIS 24256).

Eyring asserts that "[t]his case involves much more than merely the use of interstate communication lines." (Opp., p. 8.) He points to his conversion claim based on Sisson's "decision to stop shipment of the Watch after title had passed to Plaintiff and it had entered Ohio." (*Id.*)

Eyring also argues that Ohio courts have a strong interest in ensuring that its citizens' rights are protected. He does not expect an "unreasonable amount of discovery" and accedes that any depositions, if necessary, could be done over the telephone. (Opp., p. 9.) As such, Sisson would not bear an unreasonable burden by litigating this case in Ohio.

B. *Application of* S. Machine

1. Part one: purposeful availment or causing a consequence

Although the parties focus their arguments on whether eBay or telephone transactions do or don't establish personal jurisdiction for a breach-of-contract claim, the present transaction is secondary, for purposes of specific jurisdiction, to Eyring's alleged claim of conversion. "'Conversion is the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights.'" *Toma,* 92 Ohio St.3d at 592, quoting *Joyce v. Gen. Motors Corp.* 49 Ohio St.3 93, 96, 551 N.E.2d 172 (1990); *see also Erie Ins. Exchange v. Lansberry,* 7th Dist. No. 07 CO 6, 2008-Ohio-1553, ¶¶ 65-67 (discussing conversion as an intentional tort). As the Supreme Court of Ohio has recognized, "the tort of conversion generally occurs where and when the actual injury takes place and not at the place of the economic consequences of the injury . . . ." *Toma,* 92 Ohio St.3d at 593.

The "conversion," as Eyring alleges, took place at Sisson's direction after FedEx delivered the watch to Cleveland and loaded it onto the truck for delivery. (Compl., ¶12.) Sisson also acknowledges that the delivery to Eyring was "aborted." (Sisson Aff. II, ¶5b.) Viewing the allegations and documentary evidence in a light most favorable to Eyring, one could reasonably conclude that

Sisson purposefully directed his actions, through FedEx, toward an Ohio resident over property within Ohio, thus "causing a consequence in the forum state." *Kauffman*, 126 Ohio St.3d 81, ¶ 49. As such, the first prong of the *S. Machine* test is satisfied. *Goldstein,* 70 Ohio St.3d at 232*; see Baker v. Greenlee*, 1st Dist. No. C-110779, 2012-Ohio-3760, ¶¶ 8 & 11 (concluding that the Ohio trial court had personal jurisdiction over Kentucky residents who allegedly came into Ohio from Kentucky and took the Ohio owner's truck without permission).

2. Part two: whether the claim arises from contacts with the forum state

The conversion claim, as alleged, also satisfies the second part of the *S. Machine* test. But the question remains whether the breach-of-contract and equitable claims also arise from contacts within the forum state. This court concludes that, under the lenient standard adopted in *Kauffman*, they do.

Indeed, the operative facts of the breach-of-contract, specific performance, and replevin claims center upon the same allegedly wrongful conduct: Sisson's purported dominion and control over Eyring's property, which he had purchased from Sisson, when that property was located in Ohio and subsequently returned to Sisson in California. (Compl., ¶¶16, 23, 25, 27 & 33-34.) Because each of these claims has a substantial connection with Sisson's alleged activity in Ohio, there are sufficient minimum contacts to exercise specific jurisdiction. *See U.S. Sprint Comm. Co. v. Mr. K's Foods, Inc.*, 68 Ohio St.3d 181, 188, 624 N.E.2d 1048 (1994).

3. Part three: the "reasonableness" inquiry

As noted above, when the first two parts of the *S. Machine* test are met, an inference arises that the third factor is satisfied. *Kauffman*, 126 Ohio St.3d 81, ¶71. Sisson has not overcome this inference nor has he presented a compelling case that, as someone who purposefully directed his activity at personal property in Ohio allegedly owned by an Ohio resident, some other consideration would render jurisdiction in Ohio unreasonable. *Burger King,* 471 U.S. at 477.

Indeed, Ohio "generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Id.* at 474. Nor does the relatively small dollar value of this case "make litigation 'so gravely difficult and inconvenient' that [Sisson] . . . unfairly is at a 'severe disadvantage in comparison to his opponent.'" *Id.* at 478, quoting *The Bremen v. Zapata Off-Shore-Co.*, 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972). Therefore, this Court cannot conclude that maintaining the suit in Ohio would offend traditional notions of fair play and substantial justice.

ORDER

Defendants Kevin Sisson and Sisson & Son's Motion to Dismiss for Lack of Personal Jurisdiction is denied. The motion to permit limited jurisdictional discovery is moot.

SO ORDERED:

Judge Robert C. McClelland

Date: 11/14/12

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