
Abbey L. Sharp

Plaintiff / Respondent

vs.

Gregory K. Sharp

Defendant / Appellant

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2164-99-T5

Civil Action

On appeal from A Final Judgment of the
Superior Court of New Jersey, Chancery
Division, Family Part, Mercer County.

Sat below:
Hon. Gerald J. Council, JSC

Defendant's Brief and Appendix

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¹ Counsel for both parties appeared before the court on September 10, 1999, however the transcript reveals only the judge setting his decision on the record. Apparently, the additional dialogue between counsel and the Court was held off the record.

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Procedural History

The parties married in California in 1973 (Da 5). They are the parents of Jennie Suzanne Sharp, born March 5, 1980 (Da 5). The parties divorced in California in 1982 (Da 5). Plaintiff and the child shortly thereafter moved to New Jersey. Defendant remained in California.

Defendant's child support obligation was thereafter modified and enforced in California through the Uniform Reciprocal Enforcement of Support Act, N.J.S.A. 2A:4-30.1 et seq., with the State of New Jersey as the petitioner and defendant as respondent (Da 42). Prior to the application leading to the instant appeal, neither plaintiff nor the State of New Jersey ever attempted to file an action against defendant in New Jersey, in spite of the obvious benefits this would have brought plaintiff (automatic triennial review, direct wage garnishment, higher child support guidelines, less delay in the processing and delivery of support payments).

On August 5, 1999, plaintiff filed a "motion for a hearing pursuant to Newburgh v. Arrigo." The motion was filed in Mercer County, New Jersey, returnable September 10, 1999 (Da 1). There is no indication in the record that a complaint of any type was ever filed; only this motion. Notably, the motion did not seek to have the court address the ultimate issue of defendant's liability; it sought only that a hearing be ordered.

Defendant, who lives in California, was unable to

immediately locate a New Jersey attorney and did not file a timely response to the motion seeking to establish the hearing. The trial court placed its decision on plaintiff's motion on the record and ordered defendant to submit financial information within 60 days (1T 2-1 to 2-12). In the Order, the Court specifically "reserves its decision on the issue of whether or not Defendant must contribute to the college expenses of the parties' daughter, Jennie Suzanne Sharp." (Da 72-73). Although the Notice of Motion sought only a hearing as to defendant's liability for college costs (Da 1), the resulting Order compelled the production of financial information and does not rule on plaintiff's application for a hearing (Da 72-73).

Prior to the expiration of the 60 day period provided in the Order for the submission of financial information, defendant filed a motion seeking to have the matter dismissed as New Jersey does not have *in personam* jurisdiction over him (Da 39). Defendant included a brief setting forth the legal grounds for this relief (Da 44-47). Plaintiff filed a cross-motion seeking to have defendant sanctioned (Da 48-62).

On November 5, 1999, both motions were denied (Da 75, 2T).

In denying defendant's motion, the trial Court determined that defendant's motion was in fact seeking reconsideration pursuant to R. 4:49-2, and that the court's September 10 Order which "reserves its decision on the issue of whether or not Defendant must contribute to the college expenses of the parties'

daughter, Jennie Suzanne Sharp" (Da 72-73) was a final (as opposed to interlocutory) Order and that defendant's motion was therefore subject to the 20 day time limit contained in the rule.

Although Judge Council stated that he "had not" reviewed the merits of the jurisdiction issue (2T 5-4 to 5-5) the Court also stated that defendant had waived the jurisdiction argument as he had not raised it earlier (2T 2-14 to 2-23). However, as noted above, defendant's motion to dismiss on jurisdictional grounds was the first and only pleading filed by defendant, and followed a motion which proclaimed only to be seeking a hearing, not a default judgement nor an adjudication as to the jurisdiction issue.

This appeal followed.

Statement of Facts

The record below establishes that defendant has been to New Jersey three times in a 15 year period for brief (1-2 days) vacations and that he has no other ties to the state (Da 41). He was not served with process in New Jersey (Da 3). These facts were never contested by plaintiff (Da 1-76, 1T, 2T).

If defendant had minimum contacts with New Jersey such that this state were the appropriate forum to address this issue, every material fact relating to the relationship between defendant and his daughter is contested, necessitating a hearing pursuant to Newburg v. Arriqo, 88 N.J. 529 (1982) to determine what, if any,

liability defendant should have toward the post-secondary education of his daughter. Plaintiff did not even dispute the obvious need for such a hearing (Da 1).

Even if jurisdiction were appropriate in New Jersey, the trial court overstepped its authority and violated defendant's right to due process by addressing the ultimate question of defendant's responsibility for college tuition costs when such a request was not even placed before the court. However, this court need not even reach this issue as the trial's court erred in its conclusions that New Jersey has in personam jurisdiction over defendant and that defendant waived this defense. The trial Court's errors mandate reversal and remand with instructions to enter an Order dismissing the matter.

☺

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO DISMISS THE MATTER AS NEW JERSEY LACKS JURISDICTION OVER DEFENDANT.

A. New Jersey lacks in personam jurisdiction over defendant

The Due Process clause of the United States Constitution requires that a defendant have minimum contacts with a forum such that he can reasonably expect to be hailed into a state's Court.

The "minimum contacts" test is met where a defendant has acted affirmatively and purposefully to establish contacts with the forum state. Asahi Metal Industry Company v. Superior Court of California, 480 U.S. 102, 107 S.Ct. 1026 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98, 100 S.Ct. 559, 567-68, 62 L.Ed.2d 490, 501-02 (1980); Kulko v. Superior Court of California, 436 U.S. 84, 91, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132, 140-41 (1978); Lebel v. Everglades Marina, Inc., 115 N.J. 316, 322 (1989)(citing International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945); Avdel Corp. v. Mecure, 58 N.J. 264, 268 (1971)).

Federal constitutional principles are binding upon the Family Court. Katz v. Katz, 310 N.J.Super. 25 (1998), citing Jaworowski v. Kube, 276 N.J.Super. 474, 478 (App.Div. 1994).

As the Court in Katz stated:

[J]urisdictional fundamentals are, moreover, fully applicable in matrimonial litigation. Personal obligations deriving from the marital relationship or its termination, including, among other things, support and alimony, are dependent for adjudication on the court's acquisition of either personal jurisdiction over

defendant or quasi in rem jurisdiction over property in which he has an alienable interest. Id. at 31, citing Drobney v. Drobney, 146 N.J. Super. 317, 323, 369 A.2d 963 (App.Div. 1977).

It was undisputed in the Court below that Defendant's contacts with New Jersey are limited to three very brief (1-2 days) vacations to New Jersey during the last fifteen years (Da 41). Plaintiff alleged no facts to the contrary in her application to the court (Da 5-9).

In no published case decided by this Court, by the trial level Courts, nor by any of the federal courts has this level of contact been sufficient to establish *in personam* jurisdiction over a defendant. See, e.g., Genoe v. Genoe, 205 N.J. Super. 6 (App.Div. 1985); Ali v. Ali, 279 N.J. Super. 154 (Ch.Div. 1994); El-Maksoud v. El-Maksoud, 237 N.J. Super. 483 (Ch.Div. 1989); Squitieri v. Squitieri, 196 N.J. Super. 76 (Ch.Div. 1984); Hann v. Hann, 175 N.J. Super. 608 (1980); Ring v. Ring, 146 N.J. Super. 373 (Ch.Div. 1977); Wright v. Wright, 114 N.J. Super. 439 (Ch.Div. 1971).

When plaintiff filed his original motion (Da 1), he set forth in certification form a reliance on Black v. Walker, 295 N.J. Super. 244, 263, (App.Div. 1996) to address the obvious jurisdictional question (Da 4-9). The trial court erred in accepting this argument.

The Black decision does not even address the issue of jurisdiction, it is a choice of law case where the Court was

interpreting which state's law should be applied to an agreement (not a judgment of divorce) between the parties. As the United States Supreme Court held, "the fact that a state may be the center of gravity for choice-of-law purposes does not mean that the state can obtain personal jurisdiction over the defendant." Kulko v. Superior Court of California, 436 U.S. at 98 (1978).

The Black decision also limited its application by conditioning its ruling on that fact that "there is no sister-state support order involved..." Id. at 260. In the case before the court there is a sister-state judgement and several sister-state Orders involved (Da 42-43), and there are no minimum contacts to establish *in personam* jurisdiction. Moreover, there are obviously no state law cases that would purport to overrule the explicit pronouncements of the United States Supreme Court set forth above.

The Black case is completely inapplicable and the trial court erred by failing to distinguish between the fundamentally different legal concepts of choice of law versus *in personam* jurisdiction.

The matter must be dismissed as defendant lacks the requisite ties with New Jersey to justify the exercise of *in personam* jurisdiction over him.

B. Defendant did not waive this defense

On November 5, the trial court rejected defendant's application to dismiss plaintiff's motion and complaint² based on a lack of *in personam* jurisdiction. While stating that it had not considered the merits of the application (2T 4-6), the court also held that defendant had waived the jurisdiction defense (2T 3-14 to 3-23). In so holding, the trial Court stated:
The Court will note that when this motion was initially filed, there was no affirmative defense raised by way of the jurisdiction issue. That was the appropriate time to bring it up. (2T 2-18 to 2-23).

The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence. See, e.g., Pascale v. Pascale, 113 N.J. 20, 33, (1988) (quoting Gallo v. Gallo, 66 N.J.Super. 1, 5, (App.Div.1961)), Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974). However when, as here, there is nothing in the record to support a trial court's assertion, the resulting Order cannot stand.

The court's September 10 Order states explicitly that no one appeared (Da 73). No "answer" had been filed as no complaint was ever served on defendant. In fact, the first and only motion filed by defendant was the application to dismiss based on a lack of personal jurisdiction. As the trial Court stated, "that [the

² It is assumed that a complaint was filed in New Jersey or that the California judgement was domesticated, however neither of these were established at the trial level and this issue was not raised below.

first application] was the appropriate time to bring it up." Had the trial court set a hearing date, determined thereon that defendant had been properly served with a complaint and had failed to appear, a default judgment could have been entered against him that might not be subject to challenge on the grounds of a lack of *in personam* jurisdiction. If defendant had filed an answer and not raised the jurisdiction issue, it could have been waived. See Insurance Corp. v. Compagnie Des Bauxites, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982), Security Benefit Life Insurance Company v. TFS Insurance Agency, Inc. 279 N.J.Super. 419 (App.Div. 1995), See also Lahue v. Pio Costa, 263 N.J.Super. 575 (App. Div.), cert. denied. 134 N.J. 477 (1993). In the case *sub judice*, the only appearance by defendant was a motion to dismiss asserting the defense of a lack of *in personam* jurisdiction. This application was filed subsequent to the granting of a motion which sought only to establish that a *hearing* be held (Da 9). The trial court erred by finding a waiver under these circumstances.

C. The trial Court erred by considering defendant's October 20 motion to dismiss as a motion for reconsideration and by thereafter applying the 20 day time limit to a motion to reconsider an interlocutory order.

The trial court's September 10 Order stated that the Court "reserves its decision on the issue of whether or not Defendant must contribute to the college expenses of the parties' daughter, Jennie Suzanne Sharp" (Da 72-73). An interlocutory Order is one that does not dispose of all issues as to all parties. Greco v. Zecchino, 285 N.J. Super. 418 (App. Div. 1995). The trial court erred by holding that this Order was final (2T 6-5 to 6-9). After holding that the Order was final, the trial Court held that defendant's motion raising the *in personam* jurisdiction issue was in fact seeking reconsideration of a final order and was therefore subject to the 20 day time limit contained in R. 4:42-9 (2T 4-7 to 4-23).

The trial court erred by holding that the motion was one for reconsideration and that the issue of jurisdiction was therefore a waived affirmative defense not subject to revival via a motion for reconsideration. Lahue v. Pio Costa, 263 N.J. Super. 575 (App. Div.), cert. denied. 134 N.J. 477 (1993).

The trial court should have considered the application on its merits, reached the jurisdiction issue and dismissed plaintiff's application. Its failure to do so constituted reversible error.

Conclusion

For the foregoing reasons, this court should reverse the Orders entered below and remand with instructions for the trial court to enter an Order dismissing the matter.

Respectfully submitted,

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Attorney for defendant