

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-3456
STATE OF WISCONSIN

Cir. Ct. No. 00-CV-86

**IN COURT OF APPEALS
DISTRICT III**

PALMER JOHNSON INC.,

PLAINTIFF-RESPONDENT,

v.

**BEST CAR CO., INC., A FOREIGN CORPORATION AND
LON J. NEUVILLE,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Door County:
PETER C. DILTZ, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Best Car Co., Inc., and Lon J. Neuville appeal from a summary judgment in favor of Palmer Johnson, Inc. Palmer Johnson began this action to collect its commission on the sale of a yacht owned by Best Car. Best Car, acting through Neuville, entered into an exclusive listing agreement with Palmer Johnson to sell the yacht. Neuville had previously listed the yacht with

another broker and the sales agreement with that broker was still in effect when Neuville contracted with Palmer Johnson. Soon after Neuville listed the yacht with Palmer Johnson, the first broker sold the yacht. Palmer Johnson sought to recover its commission under the terms of the exclusive listing agreement. After determining it had jurisdiction over Best Car and Neuville, the circuit court granted Palmer Johnson's summary judgment motion, awarding it a commission of \$37,693.40.

¶2 On appeal, Neuville and Best Car challenge the court's finding of jurisdiction, its choice of law to resolve the dispute and its grant of summary judgment to Palmer Johnson. We determine the court properly found jurisdiction over Neuville and Best Car and correctly granted summary judgment to Palmer Johnson. We therefore affirm the trial court's judgment.

BACKGROUND

¶3 Lon Neuville is the majority shareholder of Best Car, an automobile dealership with its principal office in Burton, Michigan. In addition, he owns Port Plaza Auto, also an automobile dealership, located in Green Bay. In October 1999, Neuville telephoned Anthony Peot, a broker for Palmer Johnson in Sturgeon Bay, to discuss the sale of a yacht, the "Boo Boo," owned by Best Car. During their conversation, Neuville told Peot he had listed the yacht with Bay Harbor Marina in Bay City, Michigan. Peot told Neuville if he chose to list with Palmer Johnson, he would have to sign an exclusive listing. Neuville agreed and said he would cancel the Bay Harbor listing. Peot faxed Neuville the blank listing agreement. In the space provided for the name of the yacht's owner, Neuville wrote "Lon J. Neuville/Best Car Co."

¶4 The terms of the listing gave Palmer Johnson “the exclusive right to sell” the yacht as well as the right to a ten percent commission if the yacht was sold “through the services and efforts of the Broker, Seller, or any other persons” during the contract’s term. Peot placed the yacht on Palmer Johnson’s for sale list and traveled to Bay City later in October to inspect the yacht in order to prepare a complete listing. Palmer Johnson eventually listed the yacht on its Internet site, in its brochures and in advertisements in boating magazines.

¶5 In November, Bay Harbor Marina located a buyer for the yacht and helped close the sale. The selling price was \$376,933.96 and Neuville paid Bay Harbor a ten percent commission. Bay Harbor continued to receive further inquiries from persons interested in the “Boo Boo,” and one of Bay Harbor’s brokers contacted Peot in December because he noticed Palmer Johnson was listing a similar boat. After a brief discussion, Peot realized Bay Harbor had sold the “Boo Boo.”

¶6 In January 2000, Palmer Johnson, through counsel, demanded payment of its commission from Neuville. After receiving no response, Palmer Johnson filed suit against Best Car and Neuville. In August, Best Car and Neuville appeared specially to contest personal jurisdiction, arguing they both lacked sufficient contacts with Wisconsin and that Neuville had no liability in the matter because Best Car owned the yacht.

¶7 The court denied the motion, finding both had sufficient contacts with Wisconsin and the court’s exercise of jurisdiction would not violate due process. In addition, the court determined Neuville was personally liable on the transaction because he failed to disclose Best Car’s corporate status to Palmer

Johnson. The court then granted Palmer Johnson's summary judgment motion and awarded a \$37,693.40 commission. Neuville and Best Car appeal.

DISCUSSION

¶8 Neuville and Best Car raise four arguments on appeal: (1) the circuit court did not have personal jurisdiction over Neuville and Best Car; (2) the court improperly granted summary judgment to Palmer Johnson; (3) the court should have applied Michigan law; and (4) the court should have granted summary judgment to Neuville and Best Car.

I. Personal jurisdiction

¶9 Neuville and Best Car first argue the circuit court improperly found it had personal jurisdiction. Whether personal jurisdiction over a defendant exists is a question of law we review de novo. *Brown v. LaChance*, 165 Wis. 2d 52, 65, 477 N.W.2d 296 (Ct. App. 1991). In order for a Wisconsin court to have jurisdiction over a person, there must be a statutory basis and the application of that statute to the individual must meet the requirements of due process. *Lincoln v. Seawright*, 104 Wis. 2d 4, 10, 310 N.W.2d 596 (1981). Due process requires that in order for a court to have jurisdiction over the defendant, there must be sufficient contact between the defendant and the forum state to make it fair that the defendant have to defend the action in that state. *International Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945). Because WIS. STAT. § 801.05,¹ Wisconsin's "long-arm statute," represents an attempt to codify the rules regarding

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

minimum contacts for personal jurisdiction established in *International Shoe*, compliance with a section of this statute is “prima facie compliance” with due process requirements. *Lincoln*, 104 Wis. 2d at 10. However, a defendant may rebut the presumption. *Id.* at 10-11.

A. Personal jurisdiction over Neuville

¶10 Neuville and Best Car first argue the trial court improperly found jurisdiction over Neuville because (1) he is not personally liable on the contract and (2) he does not possess sufficient contacts with Wisconsin to subject him to jurisdiction. Neuville contends he is not personally liable under the listing agreement because Best Car held the title to the “Boo Boo” and he was merely acting as Best Car’s agent when he signed the contract. Palmer Johnson argues Neuville did not disclose Best Car’s corporate status at signing, making him personally liable.

¶11 In *Benjamin Plumbing, Inc. v. Barnes*, 162 Wis. 2d 837, 470 N.W.2d 888 (1991), our supreme court held an agent who contracts on behalf of a corporation and who fails to disclose the principal’s corporate status can become personally liable on the contract. *Id.* at 843. There, a corporate director contracted with Benjamin for plumbing work. *Id.* at 844. When the director signed the contract, he failed to put “Inc.,” “Incorporated” or otherwise disclose his principal’s corporate status to Benjamin. *Id.* at 844-45. The supreme court, adopting the “partially disclosed principal” rule from the law of agency, said an agent must disclose the principal’s corporate status to avoid becoming personally liable on any contracts entered into on the principal’s behalf. *Id.* at 850-51. This is because of a corporation’s unique liability of and the consequences it can have for parties contracting with it. *Id.* at 849-50. Placing the burden on the agent

creates no hardship, and it is not the duty of the other party to inquire into the principal's corporate status. *Id.* at 851.

¶12 Here, Neuville signed the listing agreement “Lon J. Neuville/Best Car Co.” He did not use “Inc.” or “Incorporated” to identify Best Car as a corporation. There is no other evidence he ever disclosed Best Car's corporate status. Neuville argues Palmer Johnson was aware of Best Car's corporate status because it filed suit against Best Car in its corporate name. The relevant time for disclosure, however, is when the agent binds the principal, not when litigation begins. Neuville is personally liable under the listing agreement.

¶13 In addition, the circuit court correctly determined it had jurisdiction over Neuville. The court found the statutory basis for its jurisdiction existed under WIS. STAT. § 801.05(1)(d).² When finding jurisdiction under this subsection, the court must examine the person's general contacts with the state rather than the contacts arising out of the transaction at issue. *See Nagel v. Crain Cutter Co.*, 50 Wis. 2d 638, 646, 184 N.W.2d 876 (1971) (interpreting then WIS. STAT. § 262.05(1) (1971), renumbered § 801.05(1)). Neuville owns an automobile dealership in Green Bay. He travels there every “four to five” months to look in

² WISCONSIN STAT. § 801.05(1)(d) provides:

Personal jurisdiction, grounds for generally. ...

(1) LOCAL PRESENCE OR STATUS. In any action whether arising within or without this state, against a defendant who when the action is commenced:

....

(d) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

on the business, which is managed by his sons. He is licensed in Wisconsin as an automobile dealer and he has used the state's courts to litigate claims involving worthless checks the dealership received. Neuville has substantial contacts with Wisconsin under § 801.05(1)(d).

¶14 We also agree with the trial court's determination that exercising jurisdiction over Neuville does not violate due process. In order to determine if a defendant's contact is consonant with "fair play" and "substantial justice," the court considers the quantity, nature, and quality of the contacts; the source of the cause of action and its connection with those contacts; the interest of Wisconsin in the action; and convenience to the parties. *Zerbel v. H.L. Federman & Co.*, 48 Wis. 2d 54, 64-66, 179 N.W.2d 872 (1970).

¶15 Neuville's actions satisfy *Zerbel's* five factors. His deposition testimony revealed he has had numerous contacts with Wisconsin and his relationship is ongoing through his business dealings here. He has also availed himself of the state's court system through his business. Wisconsin has a significant interest in providing a forum for the resolution of a dispute involving Palmer Johnson, one of its domestic corporations. While Neuville's general contacts with Wisconsin are not related to the litigation at issue, the extent of his contacts outweigh this factor. Finally, we note Neuville lives in Michigan, a neighboring state, and he comes to Wisconsin fairly regularly, mitigating any inconvenience he might have suffered defending this suit.

B. Personal jurisdiction over Best Car

¶16 The trial court determined statutory jurisdiction over Best Car existed under WIS. STAT. § 801.05(5)(a) and (b).³ We agree. Section 801.05(5)(a) grants jurisdiction over a defendant who promises “to pay for services to be performed in this state by the plaintiff.” This is exactly what Best Car did. Acting through Neuville, Best Car agreed to have Palmer Johnson try to sell its yacht. Best Car seems to suggest the parties did not contemplate Palmer Johnson performing any services in Wisconsin because the yacht was stored in Michigan. Even if this were the case, statutory jurisdiction would also be found under § 801.05(5)(b), which allows jurisdiction when these services are actually performed in Wisconsin. Palmer Johnson listed the yacht in its brochures, on its website and in magazine advertisements. These actions were all done in Wisconsin.

¶17 We also determine the trial court’s finding of jurisdiction over Best Car complies with due process. The facts of this case are similar to those in *Zerbel*. In that case, Federman and Co., a New York company, contracted with

³ WISCONSIN STAT. § 801.05(5)(a) and (b) provides:

(5) LOCAL SERVICES, GOODS OR CONTRACTS. In any action which:

(a) Arises out of a promise, made anywhere to the plaintiff or to some 3rd party for the plaintiff’s benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff; or

(b) Arises out of services actually performed for the plaintiff by the defendant within this state, or services actually performed for the defendant by the plaintiff within this state if such performance within this state was authorized or ratified by the defendant.

Zerbel, a Milwaukee firm, to prepare a financial report of a company in which Federman was considering making an investment. *Zerbel*, 48 Wis. 2d at 56. When Federman did not pay, Zerbel brought suit in Wisconsin to collect. *Id.* at 57. Our supreme court upheld a finding of personal jurisdiction over Federman, despite the fact the only contacts it had with Wisconsin were through Zerbel. *Id.* at 67. Applying the standards of *Zerbel*, Best Car, acting through Neuville, initiated the transaction in Wisconsin that resulted in this litigation. Although this transaction appears to be Best Car's only contact with Wisconsin, we note one contact may be enough if it otherwise is consonant with fair play and substantial justice to bring the nonresident into court. *Id.* at 63. Best Car purposely availed itself of the privilege of conducting business activities in Wisconsin. Had Palmer Johnson breached the agreement, Best Car could have brought suit in Wisconsin. We again note the interest of Wisconsin in providing a forum for resolution as well as the minimal inconvenience to Best Car in defending the suit.

II. Palmer Johnson's summary judgment motion

¶18 Neuville and Best Car argue the court improperly granted Palmer Johnson's summary judgment motion. When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08. Here, the only applicable law is the interpretation of the listing agreement. We must enforce an unambiguous contract as written. *Old Tuckaway Assocs. Ltd. P'ship v. City of Greenfield*, 180 Wis. 2d 254, 280, 509 N.W.2d 323 (Ct. App. 1993).

¶19 The trial court properly granted summary judgment. The listing agreement entitles Palmer Johnson to a ten percent commission if the boat is sold “through the services and efforts of the Broker, Seller, or any other persons.” The terms of this contract are unambiguous. Upon the sale of the yacht, Palmer Johnson is entitled to its commission, regardless of whose efforts result in the sale. A broker with an exclusive listing agreement is entitled to a commission upon the sale, even if another person effects the sale. See *Niemann v. Severson*, 246 Wis. 636, 638, 18 N.W.2d 338 (1945).

¶20 Neuville and Best Car make several arguments why the court should not have granted summary judgment. They contend the contract does not create an exclusive listing agreement. Instead, they suggest Palmer Johnson would earn a commission only if Palmer Johnson effectuated the sale. We disagree.

¶21 The plain language of the agreement entitles Palmer Johnson to a commission if the boat is sold through “any” person’s efforts. Neuville and Best Car also seem to suggest because Palmer Johnson was aware of the other listing agreement, it should not receive a full commission. At best, they argue, Palmer Johnson is entitled only to split the commission with Bay Harbor. Neuville and Best Car point to a clause in the listing agreement which says if a sale results from the joint efforts of Palmer Johnson and another firm, then the commission will be split as agreed by the firms. Neuville and Best Car do not, however, offer any evidence of a joint selling effort or agreement by Palmer Johnson and Bay Harbor. Finally, Neuville and Best Car argue Palmer Johnson did not make any effort to sell the yacht, as required under the agreement. We have already discussed Palmer Johnson’s efforts in listing the yacht, and also note it was sold soon after these activities began, making it impossible for Palmer Johnson to continue these efforts.

III. Michigan law

¶22 Neuville and Best Car also contend the court should have applied Michigan law to resolve the dispute. We do not agree. First, they raise this issue for the first time on appeal. Generally, we will not consider issues raised for the first time on appeal. *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). Further, Neuville and Best Car have not shown there is any conflict between Wisconsin and Michigan law on this matter. In a conflict of law situation, the first step is to determine whether a conflict exists, that is, will the choice of one law compared to another affect the outcome. *Lichter v. Fritsch*, 77 Wis. 2d 178, 182, 252 N.W.2d 360 (1977).

IV. Neuville and Best Car are entitled to summary judgment

¶23 Finally, Neuville and Best Car argue the trial court should have granted them summary judgment based on their proffered interpretation of the listing agreement that Palmer Johnson would only be entitled to a commission had it directly effectuated the sale. We have already rejected this interpretation and, therefore, reject Neuville's and Best Car's claim they are entitled to summary judgment.

By the Court.—Judgment affirmed.

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