

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT
WEST PALM BEACH, FLORIDA

CASE NO.: 4D23-1400
L.T. No.: CACE20-008822 (13)

JEFF CHAUNCEY &
TWO C's MARINE
HOLDINGS, LTD.

v.

H.O. PENN MACHINERY
COMPANY, INC.

Appellant / Petitioner(s)

Appellee / Respondent(s)

**APPELLANTS, JEFF CHAUNCEY &
TWO C's MARINE HOLDINGS, LTD.
INITIAL BRIEF ON THE MERITS**

Appealed from the Circuit Court of the Seventeenth Judicial Circuit in and
for Broward County, Florida

Ludwin Law Group, P.A.
Counsel for Appellants
85 S.E. 4TH Avenue, Suite 108
Delray Beach, FL 33483
Office Phone: (561) 455-4455
Cell Phone: (561) 613-7392
Primary Email: adam@ludwinlaw.com
Secondary Email: shelley@ludwinlaw.com

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	3
STATEMENT OF THE CASE AND FACTS	4
STANDARD OF REVIEW	8
SUMMARY OF THE ARGUMENT	9
ISSUE I: This Court should find that Florida has jurisdiction over this matter pursuant to Florida Statute 48.193(1)(a)(6)(b)	9
ISSUE II: This Court should find that Florida has jurisdiction over this matter pursuant to § 48.193(2).....	13
ISSUE III: Appellee has minimum contacts sufficient to find that jurisdiction over this matter does not violate Appellee’s due process rights because Appellee purposefully availed itself of the privilege of conducting activities within the state of Florida, thus invoking the benefits and protections of its laws.....	15
ISSUE IV: The Court should find that jurisdiction over Appellee does not violate notions of fair play and substantial justice.....	17
CONCLUSION	19
CERTIFICATE OF FONT COMPLIANCE	19
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Aero Mechanical Electronic Craftsman, et. al. v. Parent, et. al.</i> 366 So.2d 1268 (Fla 4 th DCA 1979).	12
<i>Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc.,</i> 593 F.3d 1249, 1267 (11th Cir. 2010)	17
<i>Future Tech. Today, Inc. v. OSF Healthcare Sys.,</i> 218 F.3d 1247, 1251 (11th Cir. 2000)	3
<i>Hanson v. Denckla,</i> 357 U.S. 235, 253 (1958).	15
<i>Howard v. Waste Pro USA, Inc,</i> No. 620CV1339ORL31DCI, 2020 WL 7407232, at *7 (M.D. Fla. Nov. 30, 2020)	14
<i>Mallard v. Aluminum Co. of Canada, Ltd.,</i> 634 F.2d 236, 241 (5th Cir., Jan. 15, 1981)	9
<i>Madara v. Hall,</i> 916 F.2d 1510, 1514 (11th Cir.1990)	8
<i>Murante v. Pedro Land, Inc.,</i> 761 F. Supp. 786, 789 (1991)	10
<i>Patt v. Volkswagen Grp. of Am., Inc.,</i> No. 22-CV-21585, 2023 WL 5224294, at *4 (S.D. Fla. Aug. 15, 2023)....	10
<i>Plantation-Pioneer Industries Corp. v. Koehler,</i> 689 So.2d 1293 (1997)	11
<i>Robinson v. Giarmarco & Bill, P.C.,</i> 74 F.3d 253, 259 (11th Cir. 1996)	18

<i>Robinson Helicopter Co., Inc. v. Gangapersaud,</i> 346 So. 3d 134 (Fla. Dist. Ct. App. 2022).....	14
<i>Wendt v. Horowitz,</i> 822 So. 2d 1252, 1260 (Fla. 2002).....	14

<u>Statutes</u>	<u>Page</u>
§ 48.193(1)(a)(6)(b), Fla Stat. 2023	9
§ 48.193(2), Fla Stat. 2023	13

STATEMENT OF THE CASE AND FACTS

Statement of Facts

Appellant is a resident of Broward County, Florida, is the primary principle for co-plaintiff, TWO C's, and the beneficial owner of the vessel at issue, which is also located in Florida. [R. 402] [R. 592].

Appellee is a foreign corporation based in New York. [R. 408].

Appellee is registered to conduct business with the Florida Department of Corporations, and maintains a registered agent in the State of Florida; [R. 466];

Appellee also maintains a full-time employee within the State of Florida; [R. 466];

Appellee advertises on its website for a Florida Corporation, Life Associates, INC., d/b/a The Center for Managing by Values; [R. 466];

Appellee is part of Caterpillar Inc. (“CAT”) manufacturer’s nationwide “distribution and product support system” [R. 466] [R. 588-591].

Plaintiff purchased the vessel at the heart of this action brand new in 2006 and the vessel is professionally maintained by a full- time captain.

On or about July 17, 2017, mid-voyage from Fort Lauderdale to Long Island, New York, Plaintiff observed abnormal vibrations and an oil light indicator warning. [R. 408]

Out of an abundance of caution, Plaintiff contacted the local CAT authorized service, Appellee to inspect the vessel, resolve any issues and advise if it was ok to continue to operate the engines. [R. 471]

At this point, the parties entered the first of two written agreements regarding the inspection and assessment of the engine. [R. 520] [R. 408, ¶32] [R. 485, ¶119].

The agreement was sent to Appellant in the State of Florida via email. [R.466]

The **agreement invokes Florida law** regarding permissible interest rates of “One and a Half Percent (1½%) per month on the unpaid portion of any balance...,” a rate which would be usury in the state of New York. [R. 467]

Following Appellee's inspection, which took place in New York, Appellee advised that there was nothing wrong, and negligently advised Appellant that the Vessel could continue to be operated without the risk of damage, and Appellee continued to operate the vessel. [R. 472]

Appellant relied on the professional advice of Appellee and continued to operate the vessel, however, the problems with the engine progressed to become an major problem. [R. 472]

Appellant called Appellee to come back for a subsequent inspection, and Appellee determined that the after-cooler on the starboard engine had failed and the engine had to be overhauled. [R. 472]

The vessel, now inoperable, was left in New York and Appellant returned to his home in the State of Florida when Appellee emailed Appellant a copy of the second agreement in Florida. [R. 466] [R. 594]

The second agreement provides for a 6 month unlimited warranty. [R. 467] [592-93].

Appellee has acknowledged that Appellant would not have to return the vessel to New York for warranty work, which results in the warranty work having to be performed in the state of Florida. [R. 501] [592-93].

Appellant accepted the agreement from Florida and H.O. PENN performed the in-frame overhaul at an expense of \$128,971.33. [R. 473]

Less than 2 months after the repairs were completed, the same engine suffered a catastrophic failure in South Carolina, while headed back to Florida. [R. 473]

Appellant was directed to contact the local CAT servicer in South Carolina, Blanchard, who inspected the vessel and attributed the failure to negligent repairs by Appellee, and another overhaul was required. [R. 473]

After Blanchard overhauled the engine, the same engine had another catastrophic failure which was also attributed to Appellee and a second overhaul was required, which resulted in a third overhaul after additional defects were discovered by Blanchard. [R. 474]

On December 1, 2017, after the third overhaul, the vessel returned to Florida. However, the engine began to leak oil on the return trip through Florida, which caused the vessel to leak oil into the Florida waterways. [R. 469]

The oil leak in the Florida waterways was also attributed to Appellee's negligent workmanship. [R. 469]

The Florida authorized CAT repair facility Pantropic, concluded that the vessel's engine had to be overhauled a fourth time. [R. 475]

Appellee's engine was overhauled a total of five times. [R. 476]

Appellant has filed claims against Appellee, Blanchard, Caterpillar and Pantropic, four companies operating in three different states, whom all were involved in the negligent servicing of same engine. [R.464-496]

STANDARD OF REVIEW

The standard of review regarding a dismissal for lack of jurisdiction when the trial court does not conduct an evidentiary hearing, appellate review of an order on a motion to dismiss for lack of personal jurisdiction is strictly *de novo*.

Moreover, because the trial did not conduct an evidentiary hearing on the motions, the plaintiff must establish a prima facie case of personal jurisdiction over the nonresident defendants. *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir.1990). A prima facie case is established if the plaintiffs present enough evidence to withstand a motion for directed verdict. *Id.* The Court must accept the facts alleged in the complaint as true, to the extent the allegations are uncontroverted by the defendants' affidavits. *Id.* Where the plaintiffs' complaint and the defendants' affidavits

conflict, the district court must construe all reasonable inferences in favor of the plaintiffs. *Id.*

SUMMARY OF THE ARGUMENT

Florida's long-arm statute recognizes personal jurisdiction over a non-resident defendant via general jurisdiction and specific jurisdiction. Fla. Stat. §§ 48.193(2)-(6). The following analysis will be confined to specific jurisdiction.

ISSUE I. Specific Jurisdiction under Florida Statute 48.193(1)(a)(6)(b)

Florida's Long-Arm Statute, in relevant part, exerts jurisdiction over any nonresident who causes injury to persons or property in Florida by act or omission in another state, if products, materials or things that the nonresident processed, serviced or manufactured cause injury during use or consumption in Florida. *See Mallard v. Aluminum Co. of Canada*, 634 F.2d 236, 241 (5th Cir. 1981) See Florida Statute 48.193(1)(a)

Specifically, Florida Statute § 48.193, entitled, "Acts subjecting person to jurisdiction of courts of state.", states in pertinent part:

(1)(a) A person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural

person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from any of the following acts: ...

6. Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury ...

b. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

It is undisputable that Appellee negligently serviced Appellant's vessel outside of the state of Florida and that damage was caused to persons or property within the state and repairmen who perform out of state repairs, which fail in the state of Florida are commonly subject to jurisdiction under Florida's long arm statute under facts alleged similar to the instant action. "Where, for example, a car has been repaired out-of-state and some time later the repairs fail during an in-state sojourn causing injury, personal jurisdiction over the out-of-state repairman is concededly present under this statute." *Patt v. Volkswagen Grp. of Am., Inc.*, No. 22-CV-21585, 2023 WL 5224294, at *4 (S.D. Fla. Aug. 15, 2023) quoting *Mallard v. Aluminum Co. of Canada, Ltd.*, 634 F.2d 236, 241 (5th Cir., Jan. 15, 1981); see, e.g.,

Murante v. Pedro Land, Inc., 761 F. Supp. 786, 789 (1991) (applying the products liability provision when defendants sold fireworks in South Carolina, a consumer transported them to Florida, and injury occurred in Florida). Similar to the *Patt* case, Appellee repaired the vessel out of state and sometime later, the repairs failed causing injury in Florida, so personal jurisdiction is concededly present under Florida's Long Arm Statute.

"The statute's use of the term "serviced" connotes some hands-on contact with the product before it comes into the possession of the ultimate consumer. For example, in *Jack Pickard Dodge, Inc. v. Yarbrough*, 352 So.2d 130 (Fla. 1st DCA 1977), a North Carolina auto dealer performed repair work on a vehicle pursuant to a Chrysler recall notice." *Plantation-Pioneer Industries Corp. v. Koehler*, 689 So.2d 1293 (1997)

There is no question Appellee "serviced" the vessel when it performed an engine overhaul.

Now we turn to whether the vessel was "used or consumed within this state in the ordinary course of commerce, trade, or use" This Court has long held: "... the phrase in the ordinary course of commerce to mean that the non-resident must at least have some reason to anticipate that his product will reach another state in the ordinary course of interstate commerce." *Aero Mechanical Electronic Craftsman, et. al. v. Parent, et. al.*

366 So.2d 1268 (Fla 4th DCA 1979).

It is undisputed that Appellee had “at least have some reason to anticipate that his product will reach another state in the ordinary course of interstate commerce” for all of the following reasons:

- a. Appellee contracted with a Florida individual to repair a vessel that was based in Florida, where Appellant resides, and the agreement has a Florida address for Appellant listed on it [R. 594];
- b. A week later Appellee sent the second agreement to Appellant in the State of Florida, via email, when appellant was physically located in the State of Florida [R. 592-93]; and
- c. Appellee gave a 6-month unlimited warranty, which solely identifies Appellee “H.O. PENN” as the warrantor and explicitly promised Plaintiff that the warranty would apply to repairs to be performed within the state of Florida. (Appellee’s affidavit confirms that Appellee anticipated having to honor its warranty obligations in the State of Florida stating “Plaintiff would not have to come to New York to enforce the ... warranty” [R. 501], [R. 592-93].

Based on the foregoing, the Court should find the trial court properly has jurisdiction under the Florida Long Arm Statute. However, due process will still have to be satisfied, which is discussed below.

ISSUE II. Specific Jurisdiction under Florida Statute 48.193(2)

Florida Statute 49.193(2) provides for jurisdiction over a party who commits a tortious act within this state.

Appellant has alleged Defendant has committed tortious acts within this state by:

- a. Making material misrepresentations to Appellant that it was appropriate to continue to operate his vessel and then inducing Appellant to enter an agreement with H.O. Penn to repair Appellee's vessel engine, when the catastrophic failure of the engine was caused by Appellee's misrepresentation to Appellant regarding whether it was safe to continue to operate the vessel without risk of damage; [R. 472] and
- b. Negligently servicing Appellee's vessel in the state of New York, which resulted in damage in the State of Florida when the vessel returned to its home port in Florida leaking oil into the local waterways through the compromised rear housing seals. [R. 468]

Even though Defendant is located within the state of New York, "[A] defendant's physical presence," however, is not required "in order to

‘commit a tortious act’ in Florida.” *Wendt v. Horowitz*, 822 So. 2d 1252, 1260 (Fla. 2002).

The rule that the commission of a tortious act for the purposes of long-arm jurisdiction can occur through the nonresident defendant's telephonic, electronic, or written communications into Florida is applied when the tort involves some sort of communication directed into the state for purpose of fraud, slander, or other intentional tort. *Robinson Helicopter Co., Inc. v. Gangapersaud*, 346 So. 3d 134 (Fla. Dist. Ct. App. 2022). Fla. Stat. Ann. § 48.193(1)(a)22.

Appellant has alleged that Appellee committed fraud in the inducement when it emailed the agreement for repairs to the engine to Appellant, who was physically located in the state of Florida. [R. 478]

Based on the foregoing, the Court should find the trial court properly has jurisdiction under the Florida Long Arm Statute. However, due process will still have to be satisfied, which is discussed below.

Due Process

If the Court determines that the defendants' conduct is within the parameters of the long-arm statute, the Court must entertain the due process question. The due process analysis involves a two-part inquiry: the Court first considers whether the defendant engaged in minimum contacts

with the state of Florida and then considers whether the exercise of personal jurisdiction over the defendant would offend traditional notions of fair play and substantial justice. *Howard v. Waste Pro USA, Inc.*, No. 620CV1339ORL31DCI, 2020 WL 7407232, at *7 (M.D. Fla. Nov. 30, 2020), *report and recommendation adopted sub nom. Howard v. Waste Pro USA, Inc.*, No. 620CV1339ORL31DCI, 2020 WL 7396977 (M.D. Fla. Dec. 17, 2020).

ISSUE III. Minimum contacts

To possess minimum contacts with a forum state, a defendant must have performed “some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). 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” with the forum state.

Appellee clearly acted in a purposeful manner or with such knowledge as to make its deeds the equivalent of having purposefully availed itself of the privilege of conducting activities within our state, thus invoking the benefits and protections of its laws as follows:

1. In Appellee's first agreement entered with Appellant, Appellee availed itself to the benefits and protections provided by Florida State law § 687.02, regarding usury interest rates, by including an interest rate for any unpaid fees due at 18%, *per anum*, when the State of New York caps its interest at 16%, per annum (Gen. Oblig. §5-501(1)). [R. 467]
2. Appellee entered an agreement with Appellant in the State of Florida when Appellee emailed Appellant, a Florida resident, the second agreement while Appellant was located in the state of Florida [R. 466]; *and*
3. The Agreement includes a 6-month unlimited warranty which the parties doer not dispute requires performance to occur in the state of Florida [R. 467]
4. H.O. PENN's agreement with Plaintiff provides for a mechanic's lien that would be secured by a Vessel located in the State of Florida, which would require H.O. PENN to avail itself to the jurisdiction of the State of Florida in order to enforce its lien rights. [R. 467]
5. H.O. PENN is registered to conduct business with the Florida Department of Corporations. [R. 466]

6. H.O. PENN maintains a full-time employee within the State of Florida; [R. 466]

7. H.O. PENN advertises on its website for the Florida Limited Liability Company, Life Associates, INC., d/b/a The Center for Managing by Values. [R. 466]

Based on the foregoing, the Court should find that Appellee has sufficient minimum contacts to permit the State of Florida to exercise jurisdiction over Appellee.

ISSUE IV. Traditional notions of fair play and substantial justice

“[S]tates may exercise jurisdiction over only those who have established certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc.*, 593 F.3d 1249, 1267 (11th Cir. 2010).

The factors utilized in determining whether exercising personal jurisdiction over a defendant would comport with traditional notions of fair play and substantial justice include: **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. *Future Tech. Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247, 1251 (11th Cir. 2000).

1) The burden of Appellee of defending the suit in Florida is mitigated by “modern methods of transportation and communication,” especially in the post-covid world where Zoom hearings and depositions are the new standard.

2) Florida has a significant interest in adjudicating a dispute involving agreements which invoke their laws as Appellee does by invoking Florida’s beneficial usury interest rate of 18% *per anum*, which would otherwise be unenforceable in New York. [R. 520] Moreover, Florida has a significant interest in services provided by out-of-state professionals to its resident, concerning assets located within its borders. *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 259 (11th Cir. 1996) Appellee, an out of state professional, serviced a vessel which is located within Florida.

3) Appellant, an individual and Florida resident, has a great interest in the convenience of litigating in his home state. *Id.*

4) The interstate judicial system’s judicial system will benefits greatly by all controversies being resolved in Florida because Defendants are all corporations who are located in three different states, which would require

Appellant to carry on litigation regarding four companies, in potentially three different states, who all serviced the same engine and blame each other for negligent repairs, in order to fully resolve all controversies.

5) All states involved share a fundamental social interest in protecting consumers from negligent repairs, however, the consumer at issue is located in Florida, which has the strongest interest in resolving this matter.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse the trial court's order dismissing Appellant's complaint with prejudice due to lack of jurisdiction and remand this case to the trial court to for the parties to litigate the case on its merits, and for any further relief that this Honorable Court deems just and proper.

CERTIFICATE OF FONT COMPLIANCE

The undersigned counsel hereby certifies that the font and size used in this brief is (Arial 14-point font) and complies with the font requirements and word count limits set forth in Florida Rule of Appellate Procedure 9.045(b).

Respectfully Submitted,

By: /s/ Adam M. Ludwin
Adam M. Ludwin, Esq.
Florida Bar No. 101742
Ludwin Law Group, P.A.

85 S.E. 4TH Avenue, Suite 108
Delray Beach, FL 33483
Office Phone: (561) 455-4455
Primary Email: adam@ludwinlaw.com
Secondary Email: admin@ludwinlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of October, 2023, a true and correct copy of the foregoing document was served via electronic mail all parties of record in accordance with the email addresses set forth in the Service List provided below.

By: /s/ Adam M. Ludwin
Adam M. Ludwin, Esq.
Florida Bar No. 101742

Service List

Counsel for Appellee, H.O. PENN MACHINERY COMPANY, INC.,

Brooke Turetzky, Esq.
Mound Cotton Wollam & Greengrass LLP
100 East Broward Boulevard, Suite 610
Fort Lauderdale, FL 33301
bturetzky@moundcotton.com
cschmitt@moundcotton.com
Tel. (954) 467-5800
Fax (954) 467 5880

Steven A. Torrini Esq. (admitted pro hac vice)
Mound Cotton Wollam & Greengrass LLP
100 East Broward Boulevard, Suite 610
Fort Lauderdale, FL 33301
storrini@moundcotton.com
Tel. (954) 467-5800

Fax (954) 467 5880