

This decision generously provided by



Social Law Library members can access a
comprehensive database of
keyword searchable
Business Litigation Session decisions,
at

<http://www.sociallaw.com>

Not a member and need access to the BLS databases?

[Join Social Law Today!](#)

Citation: 478 Mass. 324

Parties: SCVNGR, INC.[1] vs. PUNCHH, INC

County: Suffolk

Hearing Date: September 6, 2017

Decision Date: November 8, 2017

Judges: GANTS, C.J., LENK, GAZIANO, BUDD, CYPHER, & KAFKER, JJ.

Practice, Civil, Motion to dismiss. Jurisdiction, Personal, Nonresident, Long-arm statute. Due Process of Law, Jurisdiction over nonresident.

This court concluded that a judge, prior to exercising personal jurisdiction over a nonresident defendant in a civil action, must determine that doing so comports with the long-arm statute prior to considering whether doing so comports with the requirements of the United States Constitution, given that the long-arm statute imposes specific constraints on the exercise of personal jurisdiction that are not coextensive with the parameters of due process, and given that determining first whether the long-arm statute's requirements are satisfied is consonant with the duty to avoid unnecessary decisions of constitutional issues. [328-331]

CIVIL ACTION commenced in the Superior Court Department on February 19, 2016.

A motion to dismiss was heard by Mitchell H. Kaplan, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Brian C. Carroll for the plaintiff.

Jeffrey J. Pyle for the defendant.

LENK, J. Plaintiff SCVNGR, Inc., doing business as LevelUp (LevelUp), is a Massachusetts-based company that develops software applications for restaurants. Punchh, Inc. (Punchh), is a California-based company that develops competing applications. LevelUp filed a complaint in the Superior Court against Punchh alleging that, in 2015 and 2016, Punchh repeatedly made knowingly false statements about LevelUp to LevelUp's clients and potential clients, causing it harm. Punchh appeared specially, moving under Mass. R. Civ. P. 12 (b) (2), 365 Mass. 754 (1974), to dismiss the complaint on the grounds that it had insufficient contacts with Massachusetts to permit the exercise of personal jurisdiction. Focusing upon whether it would comport with due process to hale Punchh into a Massachusetts court, the parties

478 Mass. 324

[325]

disputed the proper application of two United States Supreme Court cases that partially define the constitutional parameters guiding the exercise of personal jurisdiction over a nonresident defendant.[2]

Concluding that the constitutional analysis resolved the jurisdictional question in Punchh's favor, a Superior Court judge allowed Punchh's motion to dismiss. The judge noted that, because of the parties' focus on due process, he had not determined whether the Massachusetts long-arm statute would permit the exercise of personal jurisdiction over Punchh. LevelUp appealed, and we transferred the case to this court on our own motion.

Prior to exercising personal jurisdiction over a nonresident defendant,

a judge must determine that doing so comports with both the forum's long-arm statute and the requirements of the United States Constitution. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 290 (1980). Because the long-arm statute imposes specific constraints on the exercise of personal jurisdiction that are not coextensive with the parameters of due process, and in order to avoid unnecessary consideration of constitutional questions, a determination under the long-arm statute is to precede consideration of the constitutional question. See, e.g., *Morrill v. Tong*, [390 Mass. 120](#), 133 (1983). See also *Beeler v. Downey*, [387 Mass. 609](#), 613 n.4 (1982) (recognizing "duty to avoid unnecessary decisions of serious constitutional issues"). Because the requisite statutory analysis did not occur, we remand the matter to the Superior Court for further proceedings.

1. Background.[3] a. Factual history. LevelUp is a Delaware

478 Mass. 324

[326]

corporation headquartered in Massachusetts, and designs and markets applications (apps) that run on customers' cellular telephones. LevelUp's apps enable customers to earn and redeem rewards at restaurants, and to make purchases, by scanning a code on their cellular telephones at the point of sale. These apps are designed to help restaurants both engage with their customers and gather information about customer behavior. As of 2016, all but four of LevelUp's ninety employees were based in Massachusetts.

Punchh is a Delaware corporation with its principal place of business in California; it also provides apps to restaurants. Punchh's clients include businesses that, while headquartered outside Massachusetts, own restaurants in the Commonwealth. LevelUp asserts that Punchh regularly markets its apps within Massachusetts and to businesses operating restaurants here, and derives substantial revenue from the use of its apps in Massachusetts.[4] Punchh has not directly contradicted LevelUp's claims concerning such contacts with Massachusetts. Punchh maintains, however, that it is not registered to do business in Massachusetts and does not have an office, employees, or property in the Commonwealth, and that no Punchh employee has ever traveled to Massachusetts for business.

In 2014, the two companies entered into an agreement whereby LevelUp allowed Punchh to incorporate LevelUp's payment technology into Punchh-developed apps for use by Punchh clients. LevelUp claims that, in September, 2014, Punchh made knowingly false statements to LevelUp clients; in response, LevelUp terminated the companies' agreement. LevelUp informed Punchh that it had no plans to take legal action at that time.

According to LevelUp, in October, 2015, Punchh resumed making defamatory statements about LevelUp to LevelUp clients. LevelUp confronted Punchh about the alleged misrepresentations, and demanded that Punchh cease making them. LevelUp also requested a list of the entities to which Punchh made the

478 Mass. 324

[327]

allegedly false statements about LevelUp. Punchh responded that the statements were made to three LevelUp clients, all of which are headquartered outside Massachusetts. Punchh subsequently said that it had made the statements to one other entity, which was not a client of LevelUp, and whose identity Punchh did not disclose. Punchh stated that it would cease making the statements that LevelUp alleged to be false, and LevelUp responded that it would take no further action.

LevelUp asserts, however, that in early 2016, Punchh resumed making

knowingly false statements about LevelUp to at least one LevelUp client, and to several potential clients. According to LevelUp, Punchh's misrepresentations contributed to or caused the termination of at least one client relationship, and resulted in damage to LevelUp's business.

b. Prior proceedings. In February, 2016, LevelUp filed an unverified complaint in the Superior Court seeking damages and an injunction enjoining Punchh from continuing to make allegedly false statements about LevelUp to LevelUp's clients and prospective clients. The complaint asserted five claims: defamation, commercial disparagement, intentional interference with prospective business relations, and violations of G. L. c. 93A, §§ 2 and 11, and Cal. Bus. & Prof. Code §§ 17200 et seq.

Following service of the complaint, and before Punchh's special appearance for the purpose of moving to dismiss for lack of personal jurisdiction, LevelUp sought discovery in the form of seven interrogatories and three requests for production of documents. The first four interrogatories, and the documents requested, solicited information regarding the entities to which Punchh made the allegedly defamatory statements, as well as Punchh's basis for claiming that those statements were true. The last three interrogatories probed the scope of Punchh's business conducted in Massachusetts, and of revenue derived from those services rendered. Specifically, LevelUp asked Punchh to identify the entities with locations in Massachusetts that either use Punchh apps or whose business Punchh has solicited, and disclose the number of Massachusetts residents that utilize Punchh apps.

In April, 2016, without answering LevelUp's complaint or responding to the discovery requests, Punchh moved to dismiss for lack of personal jurisdiction. LevelUp, having not received the information it requested from Punchh, sought to stay the motion to dismiss pending discovery. Punchh, in turn, moved to stay discovery.

478 Mass. 324

[328]

The matter was resolved when the judge conducted a nonevidentiary hearing in May, 2016, and ordered Punchh to respond to the first of LevelUp's seven interrogatories, which requested a list of the entities to whom Punchh allegedly misrepresented information about LevelUp.[5] Punchh's response revealed that the statements were made to eighteen companies, all headquartered outside Massachusetts.

Following supplemental briefing, the judge allowed Punchh's motion to dismiss, concluding that the limits of due process would not permit the exercise of personal jurisdiction over Punchh. While recognizing that "typically a Superior Court [judge] presented with a Rule 12 (b) (2) argument begins with an analysis of whether the requirements of the long-arm statute have been met," the judge did not address the long-arm statute because "in this case both parties have focused their arguments on Federal due process considerations."

LevelUp appealed to the Appeals Court, and we transferred the case to this court on our own motion.

2. Discussion. Personal jurisdiction over an out-of-State defendant is proper only where both the forum State's long-arm statute and the requirements of due process allow it. *World-Wide Volkswagen Corp.*, 444 U.S. at 290. Massachusetts's long-arm statute, G. L. c. 223A, § 3, provides that "[a] court may exercise personal jurisdiction over a person ... as to a cause of action in law or equity arising from the person's" one or more specific acts or omissions, as enumerated in the statute. In contrast to the

long-arm statutes of some States, the Massachusetts statute does not purport to extend jurisdiction as far as due process would allow. Compare Cal. Civ. Proc. Code § 410.10 (West 2004) ("A court of this [S]tate may exercise jurisdiction on any basis not inconsistent with the Constitution of this [S]tate or of the United States"). "Where the words of a statute are clear on their face, we deem them conclusive as to legislative intent." *Care & Protection of Jamison*, [467 Mass. 269](#), 276 (2014).

The Massachusetts long-arm statute enumerates eight specific grounds on which a nonresident defendant may be subjected to personal jurisdiction by a court of the Commonwealth. See G. L. c. 223A, § 3. Only four of them appear to have any potential

478 Mass. 324

[329]

bearing on the matter at hand.[6] The long-arm statute first provides that a Massachusetts court may exercise personal jurisdiction over a cause of action arising from a nonresident person's business transactions within the Commonwealth.[7] G. L. c. 223A, § 3 (a). Second, a nonresident must submit to personal jurisdiction with respect to a cause of action arising out of its "contracting to supply services or things in this [C]ommonwealth." G. L. c. 223A, § 3 (b). Third, Massachusetts courts have jurisdiction over torts committed within the Commonwealth. G. L. c. 223A, § 3 (c). Fourth, the Massachusetts long-arm statute will reach a defendant who has caused injury within the Commonwealth through a tort occurring elsewhere, so long as that defendant "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 [C]ommonwealth." G. L. c. 223A, § 3 (d).[8]

We have long held that the long-arm statute "asserts jurisdiction over the person to the constitutional limit only when some basis for jurisdiction enumerated in the statute has been established." *Good Hope Indus., Inc. v. Ryder Scott Co.*, [378 Mass. 1](#), 6 (1979) (*Good Hope*). Accordingly, a judge would "be required to decline to exercise jurisdiction if the plaintiff was unable to satisfy at least one of the statutory prerequisites" of G. L. c. 223A, § 3. *Good Hope*, supra. See *Intech, Inc. v. Triple "C" Marine Salvage, Inc.*, [444 Mass. 122](#), 125 (2005) (basis for jurisdiction listed in statute must be established). "The inquiry into jurisdiction is thus twofold" *Hahn v. Vermont Law Sch.*, 698 F.2d 48, 50 (1st Cir. 1983). The requirements of G. L. c. 223A, § 3,

478 Mass. 324

[330]

may not be circumvented by restricting the jurisdictional inquiry to due process considerations.[9]

Our jurisprudence since *Good Hope* also makes clear that courts should consider the long-arm statute first, before approaching the constitutional question. See *Roberts v. Legendary Marine Sales*, [447 Mass. 860](#), 865 (2006), quoting *Morrill*, 390 Mass. at 133 ("Having concluded that the long-arm statute does not provide a basis for conferring personal jurisdiction over the defendant, 'we need not inquire into the constitutional constraints on the exercise of jurisdiction under the statute' "); *Morris v. Morris*, [403 Mass. 1001](#), 1001 (1988) ("We need consider only the first [jurisdictional] inquiry"). In this regard, it is canonical that courts should, where possible, avoid unnecessary constitutional decisions. *Commonwealth v. Guzman*, [469 Mass. 492](#), 500 (2014). Determining first whether the long-arm statute's requirements are satisfied is consonant with the "duty to avoid unnecessary decisions of serious constitutional issues. ... [W]e cannot let the actions of private litigants force us to decide unnecessarily a serious

question of constitutional law." Beeler, 387 Mass. at 613 n.4.

"Whether jurisdiction will be found is a determination sensitive to the particular facts of each case," Morrill, 390 Mass. at 129, and the record before us lacks sufficient information for us to reach a determination under G. L. c. 223A, § 3. To the extent that, here, the jurisdictional questions were decided out of order, discovery may have been prematurely limited to facts relevant to the constitutional inquiry. On remand, consideration should be given to appropriate discovery aimed at determining whether the long-arm statute permits the exercise of personal jurisdiction.[10] Should the judge, as a result of the statutory analysis, conclude that the requirements of G. L. c. 223A, § 3, are satisfied, the constitutional determination then would be made on a presum-

478 Mass. 324

[331]

ably fuller record.

3. Conclusion. The matter is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

Footnotes

[page 324]

[1]Doing business as LevelUp.

[page 325]

[2]See *Calder v. Jones*, 465 U.S. 783 (1984) (*Jones*), and *Walden v. Fiore*, 134 S. Ct. 1115 (2014). The United States Supreme Court in *Jones* concluded that a California court properly could exercise jurisdiction over nonresident defendants accused of defaming an in-State plaintiff because "their intentional, and allegedly tortious, actions were expressly aimed at California." *Jones*, supra at 789. Distinguishing its decision in *Jones*, the Court determined that a Nevada court could not exercise jurisdiction over a nonresident whose allegedly unlawful seizure of money elsewhere caused harm to plaintiffs living in Nevada. *Walden*, supra at 1123-1124.

[3]The facts are taken from the Superior Court judge's order and the documents that were before him, including the unverified complaint filed by SCVNGR, Inc., doing business as LevelUp (LevelUp); affidavits signed by LevelUp's chief operating officer and the founder of Punchh, Inc. (Punchh); and Punchh's response to one interrogatory. When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of adducing facts on which jurisdiction may be found. *Droukas v. Divers Training Academy, Inc.*, [375 Mass. 149](#), 151 (1978). In considering a motion to dismiss for lack of personal jurisdiction, "[w]e accept as true the essential uncontroverted facts that were before the judge." *Miller v. Miller*, [448 Mass. 320](#), 321 (2007).

[page 326]

[4]These claims are supported by a declaration signed by LevelUp's chief operating officer, stating only his belief in their truth. As will be discussed, discovery on the extent of Punchh's business conducted in Massachusetts, and of revenue derived from such services rendered, was

not ordered. See part 1.b, *infra*.

[page 328]

[5] We infer that the exclusive focus on due process considerations brought about this limitation on the discovery that Punchh was compelled to provide. The first interrogatory sought information especially pertinent to the constitutional inquiry, whereas the last three seem to pertain more to the statutory analysis.

[page 329]

[6]The remaining provisions of G. L. c. 223A, § 3, authorize the exercise of personal jurisdiction over a cause of action arising from a nonresident defendant's interest in real property in Massachusetts; contract to insure a person, property, or risk located in the Commonwealth; domicil located in Massachusetts, if the defendant is a party to a relationship giving rise to certain domestic relations disputes; or "having been subject to the exercise of personal jurisdiction of a court of the [C]ommonwealth which has resulted in" one of several types of domestic relations orders. See G. L. c. 223A, § 3 (e), (I), (g), (h).

[7]General Laws c. 223A, § 1, defines "person" to include a corporation such as Punchh.

[8]Although the judge expressly did not reach the question whether the long-arm statute was satisfied, he noted that on the facts then before him, G. L. c. 223A, § 3 (c), appeared to be the only provision that could be relevant. Were the facts to expand upon remand and further discovery, however, this could well alter the assessment of which subsections of the long-arm statute are applicable. See note 10, *infra*.

[page 330]

[9]To the extent that "Automatic" Sprinkler Corp. of Am. v. Seneca Foods Corp., [361 Mass. 441](#), 443 (1972), identifies "the function of the long arm statute as an assertion of jurisdiction over the person to the limits allowed by the Constitution of the United States," we take this opportunity to clarify that, in accordance with Good Hope Indus., Inc. v. Ryder Scott Co., [378 Mass. 1](#), 6 (1979), the long-arm statute's reach is not coextensive with what due process allows.

[10]By way of example, such discovery might target the scope of Punchh's alleged business conducted in Massachusetts, and of revenue derived from such services, facts that would be integral to the assertion of personal jurisdiction under G. L. c. 223A, § 3 (d).