

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001185-MR

LINDA KERN CUMMINGS

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 98-CI-00150

JOHN BROOKS PITMAN, EXECUTOR OF THE
ESTATE OF BETTY KERN MILLER; R. ANDREW
BOOSE, INDIVIDUALLY AND AS TRUSTEE; THE
GUIDE DOG FOUNDATION FOR THE BLIND, INC.;
AND STEVEN KERN SHAW

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

TAYLOR, JUDGE: Linda Kern Cummings appeals from a July 10,

2003, Order of the Boyle Circuit Court granting R. Andrew

Boose's motion for partial summary judgment based on the court's

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

lack of personal jurisdiction over Boose in his capacity as trustee of the Betty Kern Miller Literary Trust. We affirm.

Cummings is the daughter of Betty Kern Miller. Miller was the only child of noted songwriter Jerome Kern.² Miller apparently married a man from Kentucky and moved to Danville in the late 1970's or early 1980's. At that time, Harriet Pipel, an attorney from New York, represented Miller and administered Miller's extensive literary property rights.³ Following Pipel's death in 1991, Boose began representing Miller.⁴

Pursuant to Miller's will of June 12, 1990, Cummings and her brother, Steven Kern Shaw, were to receive all of Miller's literary property. Two codicils to Miller's will were subsequently executed. Relevant to this appeal is the codicil witnessed by Boose and executed on April 28, 1995. At the same time, Miller executed a trust agreement that created a foreign trust to administer the copyrights and royalties for the benefit of family members.⁵ The 1995 codicil provided for distribution of the copyrights and royalties to the trust upon Miller's

² Jerome Kern's "credits include the music to Showboat and songs such as 'Smoke Gets In Your Eyes.' Jerome Kern owned over 800 copyrights and royalties producing contracts." Appellee's Brief at 2.

³ Harriet Pipel was an attorney practicing in New York, New York with the firm of Weil Gotshal. Pipel continued to represent Miller until Pipel's death in 1991.

⁴ R. Andrew Boose is an attorney and practices with the New York firm of Kay, Collyer and Boose, LLP. Boose and Pipel had previously practiced with the same firm but at the time of Pipel's death, were not practicing together.

⁵ The Betty Kern Miller Literary Trust is a New York trust and has been administered by Boose from his office in New York.

death. Miller died testate on April 5, 1996. On April 17, 1996, Miller's will and both codicils were admitted to probate in Boyle District Court. The trust was subsequently funded via distribution of the copyrights and royalties.

On April 14, 1998, Cummings filed a complaint in the Boyle Circuit Court against, *inter alios*, Boose, individually and as trustee of the Betty Kern Miller Literary Trust. Cummings alleged that Miller suffered from diminished capacity and that Boose exercised undue influence over Miller causing her to execute a codicil "transferring all her right, title and interest to literary works, including management thereof, to this Trust in which [Boose] was to have sole authority." Cummings further alleged that Boose engaged in the unauthorized practice of law and that his actions constituted a conflict of interest.

Boose filed an answer and admitted that the court had personal jurisdiction over him in his individual capacity. Boose denied that the court had personal jurisdiction over him as trustee. Boose subsequently filed a motion for partial summary judgment. Therein, Boose argued that there is a distinction between the claims against him in his individual capacity concerning the services he rendered as Miller's attorney and the claims against him in his capacity as trustee.

Boose asserted that the court lacked personal jurisdiction over him as trustee.

By order entered July 10, 2003, the circuit court granted Boose's motion for partial summary judgment on the issue of personal jurisdiction only. Therein, the circuit court stated as follows:

[T]here is a distinction between R. Andrew Boose in his individual capacity as an attorney, or as an individual . . . and R. Andrew Boose acting as a trustee of the trust The Court hereby finds that in his capacity as trustee, Mr. Boose does not have minimum contacts with the Commonwealth of Kentucky as required by the Kentucky long-arm statute

. . . .

. . . Defendant, R. Andrew Boose, in his capacity as trustee's, motion for partial summary judgment based on lack of personal jurisdiction over him is hereby GRANTED. Defendant R. Andrew Boose, in his capacity as trustee, is hereby DISMISSED, WITH PREJUDICE, as a defendant from this case.

This order was made final and appealable by inclusion of Ky. R. Civ. P. (CR) 54.02 language in an order entered June 2, 2004. This appeal follows.

Cummings contends the circuit court erred by entering summary judgment in favor of Boose. Summary judgment is proper when there exists no material issue of fact and movant is entitled to judgment as a matter of law. Steelvest, Inc. v.

Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991).

Cummings specifically asserts that the circuit court erroneously concluded it lacked personal jurisdiction over Boose as trustee.

Boose is a resident of New York and is not subject to the jurisdiction of the courts of this Commonwealth without application of our long arm statute, Kentucky Revised Statutes (KRS) 454.210. KRS 454.210(2) states, in relevant part:

(2) (a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

1. Transacting any business in this Commonwealth;
2. Contracting to supply services or goods in this Commonwealth;
3. Causing tortious injury by an act or omission in this Commonwealth

KRS 454.210 permits "the exercise of personal jurisdiction over nonresident defendants while complying with federal constitutional requirements of due process." Friction Materials Co. v. Stinson, 833 S.W.2d 388, 390 (Ky.App.

1992)(citation omitted.) In Friction Materials, a panel of this Court held:

Inherent in the proper exercise of personal jurisdiction is the requirement that the nonresident defendant have certain minimum contacts with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" " International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945), quoting Milliken v. Meyer, 311 U.S.

457, 463, 61 S. Ct. 339, 342- 43, 85 L. Ed. 278 (1940); see also Mohler, 675 S.W.2d at 405. To determine the outer limits of personal jurisdiction, the following three-part test has been put forth:

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.

Southern Machine Co. v. Mohasco Industries, Inc., 401 F.2d 374, 381 (6th Cir.1968), citing McGee v. International Life Insurance Co., 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957), and Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958). See also Perry v. Central Bank & Trust Co., Ky.App., 812 S.W.2d 166 (1991).

Id. at 390. With this three-part test as our guide, we will determine whether Boose, in his capacity as trustee, had sufficient minimum contacts with Kentucky such that maintenance of the suit will not offend "traditional notions of fair play and substantial justice."

Initially, we must consider whether Boose purposely availed himself of the privilege of acting in Kentucky or causing a consequence here. The only activity in Kentucky that Boose engaged in as trustee was signing the trust document. Boose's duties as trustee did not begin until the trust was

funded upon Miller's death in 1996.⁶ Boose rendered his services as trustee from New York, maintained bank accounts in New York, and generated fees as trustee in New York; fees that were paid based upon a New York statute. With the exception of signing the trust document, all of Boose's activities as trustee occurred in New York.

Based upon the foregoing, we cannot conclude that Boose, as a trustee for the trust, purposely availed himself of the privilege of acting in this Commonwealth or caused a consequence here. We also note that the trust is not a party to this litigation nor could a Kentucky court have obtained personal jurisdiction over the trust. The fact that Boose is properly before the court in Kentucky for his actions as an attorney does not constitute a legal basis to obtain judgment over him as a trustee or over the trust itself. Any challenge to the trust or the actions of Boose as trustee must be made in New York. Thus, we believe the circuit court properly determined that it lacked jurisdiction over Boose as trustee and properly dismissed Boose, in his capacity as trustee from this case.

⁶ Although, the trust document provides that Betty Kern Miller transferred \$10.00 to the trust at the time of its creation in 1995, we view this as nominal or *de minimis* at best. The trust assets over which Boose assumed control were delivered to the trust under the codicil upon Miller's death in 1996.

For the foregoing reasons, the Order of the Boyle
Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR
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