STATE OF MICHIGAN

COURT OF APPEALS

PELLESTAR, LIMITED,

Plaintiff-Appellee,

v

MICHIGAN PROMOTIONS, LIMITED, and GARRETT JONES,

Defendants,

and

BLACKHAWK FOUNDRY AND MACHINE COMPANY,

Defendant-Appellant.

UNPUBLISHED
September 25, 2001

No. 219013
Marquette Circuit Court
LC No. 97-034102-CK

Before: Hoekstra, P.J., and Whitbeck and Cooper, JJ.

PER CURIAM.

On remand from the Supreme Court,[1] appellant Blackhawk Foundry and Machine Company (Blackhawk), an Iowa corporation, challenges the circuit court's jurisdiction to require it to appear at a show cause hearing regarding why it should not be held in contempt for allegedly violating an injunction and to produce documents. Blackhawk claims that the circuit court's order should be reversed because it was not properly made a party to this lawsuit by issuance of service of process and no subpoena for the documents was issued. We affirm.

The instant lawsuit commenced in November 1997, when plaintiff Pellestar, Ltd., filed a complaint naming Michigan Promotions, Ltd., and Garrett Jones[2] defendants.[3] Plaintiff alleged that defendants had violated the terms of the non-compete portion of a "Consultant Agreement"

[1] 459 Mich 975; 593 NW2d 546 (1999).

[2] It appears from the record that Garrett Jones is a former president of Michigan Promotions, Ltd.

[3] Throughout this opinion, any reference to "defendants" only refers to Michigan Promotions and Garrett Jones.

and the agreement's confidentiality clause. The agreement provided that Michigan Promotions would offer consulting services for plaintiff's recycling business, which recycles air-bag inflation cartridges used in the automobile industry and produced by TRW-VSSI, a Michigan corporation. In return, plaintiff would pay Michigan Promotions commissions. According to plaintiff, defendants violated the agreement by directly and indirectly competing with plaintiff when defendants began negotiating independently with TRW-VSSI to recycle the cartridges and by providing specific confidential information to TRW-VSSI. Plaintiff sought relief under theories of "tort[i]ous interference with prospective advantageous economic relations" and breach of contract.

On the same day that plaintiff filed its complaint, it moved for a temporary restraining order to prevent "defendants, their agents, servants, employees, and attorneys, and those persons in active concert and participation with them from revealing confidential information concerning plaintiff's business and from recycling those products generated by TRW-VSSI pending a hearing and disposition of plaintiff's motion for a preliminary injunction." The circuit court denied plaintiff's motion for a temporary restraining order, but on January 7, 1998, it granted a preliminary injunction and ordered that

> defendants Michigan Promotions, Ltd., and Garrett Jones, their agents, servants, employees, and *such persons who act in concert with them who receive actual notice of this order be and they hereby are prohibited and enjoined from interfering with Plaintiff's business relations with TRW-VSSI and from revealing to any third party confidential business information concerning the Plaintiff which the Defendants may have acquired during the course of their contractual relationship with the Plaintiff*. [Emphasis supplied.]

Thereafter, plaintiff moved for default judgment against defendants and default was entered on February 4, 1998, for failure to plead or otherwise defend. Approximately one month later, on March 6, 1998, the circuit court granted a permanent injunction, ordering that

> defendants Michigan Promotions, Ltd. and Garrett Jones, their agents, servants, employees, and *such persons who act in concert with them who receive actual notice of this order (including, but not limited to Blackhawk Foundries)* be and they hereby are permanently prohibited and enjoined from interfering with Plaintiff's business relations with TRW-VSSI and from revealing to any third party confidential business information concerning the Plaintiff which the Defendants may have acquired during the course of their contractual relationship with the Plaintiff. [Emphasis supplied.]

From our review of the record, the reference in the permanent injunction to "Blackhawk Foundries," i.e., Blackhawk Foundry and Machine Company (Blackhawk), is the first mention of Blackhawk in the lawsuit.

Apparently Blackhawk became aware of the injunctions when plaintiff sent letters to Blackhawk advising them of the injunctions. Thereafter, Blackhawk, through a special appearance, on March 30, 1998, moved to contest jurisdiction and the entry of the permanent injunction enjoining Blackhawk from interfering with plaintiff's business relations. Blackhawk

alleged that it was not a party to the action and that it never received notice of the complaint, the request for a temporary injunction, nor the request for a permanent injunction. According to Blackhawk, the failure to provide it notice of the injunctions violated its due process rights under Michigan law and the Fourteenth Amendment to the United States Constitution. Thus, Blackhawk requested that the trial court rescind the permanent injunction as it relates to Blackhawk.[4] On May 29, 1998, the circuit court entered an order requiring plaintiff to strike from the language of the permanent injunction "any reference to Blackhawk" and to draft a new permanent injunction pursuant to MCR 6.435 reflecting that change. Nearly one month later, on June 24, 1998, plaintiff filed and the circuit court entered a revised permanent injunction order that made no reference to Blackhawk.

Meanwhile, on May 19, 1998, plaintiff moved for an order to show cause why Blackhawk should not be held in contempt of court for violation of both the preliminary injunction and the permanent injunction. The record contains proof of service of the motion, the supporting brief, a proposed order to show cause, and a notice of presentment on Blackhawk's president and its attorney by first-class mail. Blackhawk objected to plaintiff's motion on the grounds that, among other things, plaintiff failed to establish the circuit court's jurisdiction over Blackhawk. At oral argument, Blackhawk asserted that the circuit court lacked in personam jurisdiction because Blackhawk was not a party to the lawsuit, had not purposely availed itself of Michigan jurisdiction, and because plaintiff failed to show that the circuit court could exercise jurisdiction. Nonetheless, on the same day that the circuit court entered the revised permanent injunction that made no reference to Blackhawk, i.e., June 24, 1998, the circuit court granted plaintiff's motion for an order to show cause ordering that Blackhawk show cause with respect to plaintiff's motion to hold Blackhawk in contempt of court and enjoin Blackhawk from interfering with plaintiff's business relations with TRW-VSSI. Added in handwriting to the order to show cause is the language "This will be a scheduling conference only."

Blackhawk objected to the entry of the circuit court's order to show cause. Blackhawk argued that it had continually objected to the circuit court's assertion of jurisdiction over it as a nonparty and that the circuit court's order to show cause, ordering the parties to appear before the court for an initial scheduling conference, was error. According to Blackhawk, plaintiff failed in its burden to establish the jurisdictional facts because plaintiff had not shown that Blackhawk met the requirements for a court's assertion of in personam jurisdiction under MCL 600.711 (general jurisdiction) or MCL 600.715 (long-arm statute). Blackhawk asserted that to allow jurisdiction would violate the Due Process Clause of the Fourteenth Amendment. However, the circuit court denied Blackhawk's motion to object to jurisdiction and to dismiss the order to show cause, citing *Jeffrey v Rapid American Corp,* 448 Mich 178; 529 NW2d 644 (1995), and concluding that plaintiff had established a prima facie case of jurisdiction and that jurisdiction cannot be avoided simply because a corporation lacked physical presence in Michigan.

On September 16, 1998, the circuit court entered an "Early Scheduling Conference Order per MCR 2.401," which stated: "Without deciding whether Black[hawk] is a party by virtue of

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[4] In April 1998, an exemplification of record notifying the Scott County, Iowa, District Court of the injunction was entered and filed in that court.

the order to [show cause], Black[hawk] must respond to the interrogatories, production request but not the request for admissions." Later, the circuit court struck the requirement that Blackhawk respond to interrogatories. During a January 22, 1999 hearing, the circuit court again addressed the jurisdictional issue and clarified that Blackhawk is not a party, but that it had jurisdiction over Blackhawk only with regard to the show cause order. In early February 1999, the circuit court granted plaintiff's motion to compel discovery and ordered that Blackhawk answer plaintiff's requests for production of documents.

The circuit court scheduled a show cause hearing for April 19, 1999. However, Blackhawk moved for a stay of proceedings pending its appeal to this Court. The circuit court denied the motion, and this Court denied Blackhawk's application for leave to appeal. Blackhawk next sought review by the Supreme Court, which entered an order on April 16, 1999, granting the stay and remanding to this Court for consideration as on leave granted. *Pellestar, Ltd v Michigan Promotions, Ltd,* 459 Mich 975; 593 NW2d 546 (1999). In a subsequent action, the Supreme Court granted in part a motion for reconsideration "to clarify that the proceeding stayed was the show cause hearing set for April 19, 1999." The Supreme Court further clarified that "[t]hat stay is without prejudice to (1) plaintiff [Pellestar] pursuing discovery concerning appellant Blackhawk in Iowa in accordance with MCR 2.305(D), and (2) plaintiff serving Blackhawk with process, as Blackhawk has advocated is necessary for a Michigan court to have jurisdiction over it." *Pellestar, Ltd v Michigan Promotions, Ltd,* 460 Mich 852; 595 NW2d 858 (1999).

On appeal to this Court, Blackhawk contends that the circuit court could not exercise jurisdiction over it. We review a lower court's rulings on jurisdictional issues de novo. *Jeffrey, supra* at 184; *Comm'r of Ins v Albino*, 225 Mich App 547, 557; 572 NW2d 21 (1997). Upon review of the record, we conclude that Blackhawk is entitled to no relief for the reasons stated below.

In the present case, Blackhawk argues that the circuit court could not exercise jurisdiction over it, a nonparty to the lawsuit, without service of process and an amendment to the complaint.[5] While Blackhawk undertakes this specific argument before this Court, we note that

[5] To the extent that Blackhawk argues that plaintiff seeks to hold it, a nonparty to the lawsuit, "in contempt for violating an injunction that does not purport to control Blackhawk's conduct but was entered by default against Michigan Promotions and Garrett Jones," its argument is without merit. Contrary to Blackhawk's assertion, the language of the injunction does purport to control Blackhawk's conduct to the extent that "such persons who act in concert with [defendants] who receive actual notice of this order be and they hereby are prohibited and enjoined from interfering with Plaintiff's business relations with TRW-VSSI and from revealing to any third party confidential business information concerning the Plaintiff which the Defendants may have acquired during the course of their contractual relationship with the Plaintiff." Further, it is apparent from the record that Blackhawk received actual notice of the order because plaintiff sent Blackhawk letters advising it of the injunctions. A court can issue an injunction that is binding on persons other than the actual parties to the litigation. MCR 3.310(C) plainly states that one having actual notice of an injunction and acting in concert or participation with the parties or the other listed individuals is bound by the injunction. In other words, a person need not be a party to the lawsuit in which the injunction was issued to be bound by the injunction.

it did not address this argument in the circuit court when arguing its "motion to object to jurisdiction and motion to dismiss the show cause order filed and entered June 24, 1998." Rather, in its brief and at oral argument before the circuit court, Blackhawk addressed whether jurisdiction was proper under specific statutory provisions, MCL 600.711 (general jurisdiction concerning corporations) and MCL 600.715 (long-arm statutory provision pertaining to limited personal jurisdiction of corporations), and under constitutional due process considerations, see *Int'l Shoe Co v Washington*, 326 US 310, 319; 66 S Ct 154; 90 L Ed 95 (1945). In the order from which Blackhawk now appeals, the circuit court addressed these arguments and, apparently likening the current situation to that of a motion for summary disposition for lack of jurisdiction, MCR 2.116(C)(1), and relying on *Jeffrey, supra*, found that plaintiff presented a prima facie case for limited jurisdiction over Blackhawk. Later, the circuit court attempted to clarify the previous ruling,[6] explaining that Blackhawk was not a party and that "the jurisdictional question only went to the issue of whether or not they were required to appear and answer on the order to show cause." It was not until Blackhawk filed its motion to stay, which is not on appeal here, that it brought forth an argument concerning lack of proper service of process. Thus, the issue argued before this Court is not properly preserved because Blackhawk neither raised the issue before the circuit court at the appropriate time, nor did the trial court address this issue. *Camden v Kaufman*, 240 Mich App 389, 400, n 2; 613 NW2d 335 (2000); *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997); *Garavaglia v Centra, Inc*, 211 Mich App 625, 628; 536 NW2d 805 (1995).

We have struggled to answer the question argued on appeal, but there is not a proper record made for us to review. See *Miller, supra.* Further, because the Supreme Court has ordered that the stay is without prejudice to plaintiff serving Blackhawk with process, we are in no position to address this issue because it may be moot if plaintiff has served Blackhawk with process since the Supreme Court's order. "Moreover, this Court does not ordinarily render advisory opinions," *People v Wilcox*, 183 Mich App 616, 620; 456 NW2d 421 (1990), and we do not believe that the issue presented here warrants such an opinion, *id*.

Despite this unsuccessful appeal, we believe Blackhawk is still entitled to pursue its jurisdictional objection in the circuit court. The circuit court ruling was limited and merely concluded that a prima facie case showing of jurisdiction was made to the extent that Blackhawk was not entitled to summary disposition of the matter. But as the *Jeffrey* Court noted, sufficient jurisdictional facts must be proven to establish limited jurisdiction. See *Jeffrey, supra* at 206 (Our Supreme Court concluded "that the plaintiff has alleged sufficient jurisdictional facts, *which, if proven, will establish limited jurisdiction* over this defendant for the actions of [its predecessor] pursuant to MCL 600.715.") (emphasis supplied). We believe that Blackhawk remains entitled to contest jurisdiction at a hearing on the merits.

Blackhawk also argues that the circuit court erred in ordering Blackhawk to allow plaintiff to enter onto its property and review documents because plaintiff has not complied with

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[6] Because a substitution of attorneys for Blackhawk necessitated that the original judge disqualify himself, a different judge presided at the latter hearing and attempted to clarify the ruling from the previous judge.

Michigan's rules of discovery. Specifically, Blackhawk contends that plaintiff failed to properly serve the request for documents pursuant to the court rules. Again, from the record presented to us it appears that Blackhawk failed to raise this issue before the circuit court in the proceedings resulting in the order being appealed, but rather only mentioned it in its motion to stay. Thus, this issue is not properly preserved for appeal. *Camden, supra*; *Miller, supra*. Additionally, we conclude that in light of the Supreme Court's order indicating that discovery may be sought in Iowa in accordance with MCR 2.305(D), this issue also may be moot if plaintiff already has pursued discovery in Iowa and has received the documents. Because this issue is unpreserved and may be moot, we decline to address it.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Jessica R. Cooper