

21-1542-CV

In The United States Court of Appeals
For the Second Circuit

UNITED STATES EX REL. TZAC, INC.,

Plaintiff-Appellant,

-against-

CHRISTIAN AID

Defendant-Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

PLAINTIFF-APPELLANT BRIEF

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Jurisdictional Statement

This is an appeal from a judgement entered by the United States District Court for the District of New York (Judge Castel) dismissing Plaintiff-Appellant's ("TZAC") Amended Complaint on a motion pursuant to F.R.C.P. 12(b)(2) and denying it leave to amend. The District Court held that TZAC had not established personal jurisdiction over the Defendant.

As set forth in more detail below, the pleading did establish personal jurisdiction.

The District Court's Judgement was entered on June 9, 2021 and denied further leave to amend. TZAC timely filed a Notice of Appeal on June 21, 2021.

Issues Presented

1. Whether personal jurisdiction reaches an organization which is not located in the United States, but which contracts with the United States government after reaching out and forming such a contract, and the claim at issue arises from such contract.

Statements of Fact & Procedural History

This matter arises from legal activism aimed to challenge the Defendant's fraudulent certification that it had not supplied material aid to support terror, and subsequently receiving USAID funding through that fraudulent certification. (A-019, Amended Complaint Para. 1).

As set forth in more detail below, the Defendant, an international organization, contracted with the United States government in order to receive funding, and in order to be eligible for that funding, Defendant fraudulently signed that it had not given material support to terror within the past ten years. (A-019, Amended Complaint Para. 2, A-021, Amended Complaint Para. 8).

Plaintiff, TZAC Inc. is a New York corporation with its principal place of business located in New York. (A-019, Amended Complaint Para. 4). Defendant Christian Aid is based out of Britain and does international work, and regularly transacts business in the United States and New York. (A-109, Amended Complaint Para. 2).

In recent years, Christian Aid has received substantial USAID funding. (A-021, Amended Complaint Para. 8). In order to be eligible for funding, Christian Aid had to execute certifications indicating that it had not provided material support or resources to terrorist persons or entities in the last 10 years. (*Id.*). These certifications were false, (A-019, Amended Complaint Para. 1), and TZAC filed a complaint under seal pursuant to the False Claims Act on May 30, 2017. (A-002). The United States declined to intervene and on September 9, 2020, the District Court ordered the complaint to be unsealed after 30 days. (A-011). Defendant filed a pre-motion letter on November 19, 2020, (A-002), and TZAC replied on November 25, 2020 and asked the Court for permission to amend the

complaint; permission to amend was granted. (A-013). Plaintiff filed its amended complaint on December 18, 2020.

Defendant filed a 12(b)(2) motion to dismiss on February 12, 2021, (A-003), Plaintiff filed its opposition on March 11, 2021, (*Id.*), and Defendant filed its reply on March 26, 2021. (A-004). The Court granted the motion to dismiss on June 9, 2021, based on lack of personal jurisdiction and did not reach the merits of the 12(b)(6) arguments. (A-004). The court ruled that because much of the actions of Christian Aid took place outside the United States, with the exception that the contract was formed with the United States government, there is not adequate personal jurisdiction. (District Court Docket No. 27, Def. Memorandum of Law p. 7-8).

There is, however, adequate personal jurisdiction.

Summary of Argument

Christian Aid, is an organization that regularly transacts business in the United States and New York; it reached out to the United States government, and formed a contract, and is thus subject to personal jurisdiction under the False Claims Act for claims arising out of that contract.

Argument

I. Standard of Review

TZAC is entitled to *de novo* review of the Court's grant of a Rule 12(b)(2) motion to dismiss. *Licci v. Lebanese Canadian Bank*, 732 F.3d 161, 167 (2d Cir. 2013).

II. There is Specific Jurisdiction

In the instant case, TZAC pled specific jurisdiction. Defendant is subject to jurisdiction because the False Claims Act allows for nationwide service of process, defendant does business in New York, defendant reached out to the United States government in order to form a contract with it, and this lawsuit arises out of a breach of that contract. All these elements together give rise to specific personal jurisdiction. *Waldman v. Palestine Liberation Organization*, 835 F.3d 317, 327 (2d Cir. 2016).

There are three requirements to determine if personal jurisdiction is met. First, there must be proper service of process on defendant. Second, statutory basis for personal jurisdiction and third, it needs to accord with constitutional due process principles. *Id.* (quoting *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 674 F.3d 50, 59–60 (2d Cir. 2012)).

Here, clearly there was proper service of process on defendant, and defendant is subject to personal jurisdiction under the statute which states that,

“[a]ny action under [the False Claims Act] may be brought in any judicial district in which the defendant . . . can be found, resides, [or] transacts business A summons shall be issued by the appropriate district court and served at any place within or outside the United States.” 31 U.S.C. 3732(a). Also, under Rule 4(k)(1)(C), Fed. R. Civ. P., “serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: when authorized by federal statute.” Here, defendant transacts business in New York, A-020, and does not contest personal jurisdiction under the service of process or statutory personal jurisdiction. Rather, defendant argues that there is no due process because those business transactions are not related to the current lawsuit. As set forth in more detail below, there is due process in holding Christian Aid liable for its fraud on the United States government.

The second requirement, that of due process is met here as well. In order to determine specific jurisdiction, (which is alleged here), the due process inquiry is two steps: whether there is minimum contacts and reasonableness. Here, there is minimum contacts because “[i]n certain circumstances, the ‘commission of certain “single or occasional acts” . . . may be sufficient to render a corporation answerable in that [location] with respect to those act[s]’” *Waldman*, 835 F.3d at 331; see *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220 (1957) (upholding personal jurisdiction based on one contract, because there was sufficient minimum

contacts); *see also Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 787 (2d Cir. 1999) (internal citation omitted). Here, the act of reaching out to the United States government and entering voluntarily into a transaction with the United States is a prime example of when a single act should be enough to constitute minimum contacts.

The District Court has denied personal jurisdiction partially because “[t]he allegedly fraudulent [anti-terror certifications] were signed by Christian Aid executives in cities outside of the United States. The allegedly terrorist-affiliated program was put on in Lebanon.” However, the Supreme Court has said that “jurisdiction may not be avoided merely because the defendant did not *physically* enter the forum State.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

Defendant argues that the contacts between the United States and Christian Aid were unrelated to the lawsuit; however, there is one very important contact with the United States government which is of fundamental importance to the lawsuit: the act of reaching out and contracting with the United States government. Previously, in a contract case, personal jurisdiction was found by the Supreme Court when the defendant reached out to contract with plaintiffs in the forum. *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220 (1957). Here, unlike in *McGee*, the United States government is a party to the suit, thus it is even more reasonable to hold defendants liable in the United States.

Personal jurisdiction clearly comports with due process; because Defendant “purposely avail[ed] itself of the privilege of conducting activities within the [United States], thus invoking the benefits and protection of its laws,” as well as liability in the United States. *J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion). Defendant “availed itself” by reaching out to the United States government to apply for a grant and receive money from the government, and it received “benefit” in the form of monetary aid. It was expected and reasonably foreseeable that if defendant was to breach that contract or violate any provision within the contract, that the United States government would hail it into court in the United States. It would be preposterous for Christian Aid to argue that it thought that the United States government would be willing to form a contract with it without any way of enforcing it or holding Christian Aid to account in the United States court system. Even commentators, such as a blog on Arnold & Porter Kaye Scholar’s website has written that “the outcome of the case . . . seems counterintuitive; is it really possible that a contractor who received funds from the US government while allegedly committing a fraud has not directed its activities at the United States?”¹

¹ <https://www.arnoldporter.com/en/perspectives/blogs/fca-qui-notes/posts/2021/06/sdny-dismisses-fca-suit-against-foreign-entity>

Defendant purposely availed itself by entering not into just one contract, but into numerous contracts which bound defendant to many different obligations. Those contracts give rise to personal jurisdiction because “where the defendant ‘deliberately’ has ... created ‘continuing obligations’ between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by ‘the benefits and protections’ of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.” *Burger King*, 471 U.S. at 476 (internal citation omitted). Here, defendant entered into contracts with the United States government, thus availing itself of the numerous benefits of doing business with the United States government.

Christian Aid understood that it was clearly doing business with the United States government and invoking its protection. In the anti-terror certifications, Defendant signed a certification which included the phrase: “the United States will have the right to seek judicial enforcement of these assurances.” While, this does not turn the argument into consent jurisdiction (as Christian Aid attempts to make it seem like TZAC is doing), it shows that Christian Aid understood that it would be subject to the jurisdiction of American courts, because it cannot reasonably argue that it believed that the United States government would sue it in England. Further, Christian Aid decided to sign certifications that it was complying with

certain provisions of United States law, and it would be subject to United States criminal prosecution if it makes a false certification. While this does not raise consent jurisdiction, it does show that Christian Aid consciously decided to contract with, and gain the benefits of doing business with a reliable partner, the United States government.

Waldman which the District Court invokes to deny personal jurisdiction, does not have bearing on the case at hand. There, the Second Circuit ruled that defendants had no specific contact with the United States, while in this case, there was specific contacts when the defendant reached out to the United States government.

Under the second due process prong, it is also reasonable to hail Christian Aid into court in the United States. There are five factors which the Supreme Court has said all fit into the reasonableness analysis. “(1) [T]he burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (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 the controversy; and (5) the shared interest of the states in furthering substantive social policies.” *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 164-165 (2d Cir. 2010) (quoting *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113-14, 107 S. Ct. (1987)). Here, the burden on the

defendant is minimal. The defendant is an international organization which works in numerous countries and has transacted business in New York and in the United States. Defendant cannot establish that it is “at a ‘severe disadvantage’ in comparison to his opponent” in litigating in the United States. *Burger King*, 471 U.S. at 478. Defendant reached out beyond the territory where it is located, in order to get the benefits of contracting with the United States government and should be required also to submit to the Courts therein.

The Plaintiff, here the United States, has an important interest in obtaining convenient and effective relief. It would be impractical to expect the United States government employees to learn the laws of hundreds of different countries and fly around in order to ensure that its contracts are not breached. The forum of the United States also has a strong interest in adjudicating this case. The United States Courts have a strong interest in ensuring that the United States government is not defrauded by any entity, especially entities that do work abroad. The *qui tam* provisions in the False Claims Act were passed to allow regular citizens to bring suit on behalf of the government for the very reason that the government has a uniquely strong interest in ensuring that it is not defrauded.

If the United States government would be unable to enforce its own contracts in its own courts, that would be an unprecedented shift in the American legal landscape and would put an untenable burden on the American government.

If this Court were to affirm the district court and render personal jurisdiction lacking, that would be a signal to current and future contractors of the United States government, that they can sign contracts with the United States government without fearing liability because the American courts do not retain jurisdiction over them. There are many organizations located abroad whose only contact with the United States government is through contracts, including USAID contracts. Organizations who want to form contracts would now know that they can commit brazen fraud without any fear of accountability, as long as they play the game right.

Such a precedent setting rule would cause severe problems for the United States government which would have to learn foreign laws and travel to hundreds of foreign countries to *try* to enforce its contracts. It is likely that in such a situation, the United States government would be unable to go to other countries to enforce its contracts, thus affirming the district court ruling would cause many organizations to play games and commit brazen fraud against the United States government. Furthermore, the False Claims Act was passed with treble penalties to incentivize organizations to not defraud the United States government; however, it is unclear if other countries would enforce such penalties, which would cause other organizations to take advantage. The United States agreed to these contracts with the expectation that American law would apply, not the law of foreign states

and Christian Aid could not have reasonably come into this contract assuming that the United States government would be unable to hail it into the United States court system.

Conclusion

For the foregoing reasons, it is respectfully submitted that the District Court's judgment should be reversed.

Respectfully submitted,



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Printing Certification

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