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349-5437

June 30, 1981

Hon. Wix Unthank  
Judge, U. S. District Court  
Eastern District of Kentucky  
United States Courthouse  
Pikeville, KY

Re: Paul Salyer and Clyde Salyer vs. Jamie Pero, et al

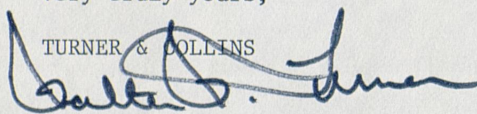
Dear Judge Unthank:

On June 30, 1981, I failed to appear for oral argument at 9:00 A.M. in the above referenced case. In all candor, I must state that I do not have any legitimate excuse for my non-appearance. Very simply, the matter was omitted from my office calendar through oversight.

In the course of preparing our Memorandum Brief, heretofore filed, I went over the Memorandum Opinion and Order of the Court dated March 13, 1981 on many occasions and was fully aware that oral argument was set for June 30, 1981 by that Order. Between the preparation of the Brief and the time set for hearing, the hearing date passed from my memory and as it did not appear on my office calendar my memory was not jogged. Although I do not personally keep my office calendar, I am ultimately responsible for it and therefore place myself at the mercy of the Court. I apologize to the Court and opposing counsel for any inconvenience my neglect may have caused.

Very truly yours,

TURNER & COLLINS

  
Walter W. Turner

WWT:sg

cc: Hon. Will Kendrick  
Francis, Kazee & Francis  
Attorneys at Law  
Prestonsburg, KY 41653

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

CIVIL ACTION NO. 80-168

PAUL SALYER, ET AL

PLAINTIFFS

V.

MEMORANDUM OPINION AND ORDER

JAMIE PERO, ET AL

DEFENDANTS

\* \* \* \* \*

This action is one for recovery upon an unpaid account for purchase of coal. The plaintiffs are a Kentucky coal company which delivered the coal to the defendants. The defendants are an Illinois corporation, three individuals from Illinois, and an Illinois limited partnership. The complaint alleges that the individual defendants have dealt with the plaintiffs as and through the limited partnership, but that the limited partnership is not properly formed, and is merely a sham to disguise what is actually personal dealing by the individual defendants as partners. The plaintiff also seeks to add a Kentucky corporation as an additional defendant.

The action was originally filed in Magoffin Circuit Court, and was later removed to this Court. Shortly after the removal, the plaintiff moved to amend the complaint by adding the Kentucky corporation. Subsequent to the plaintiffs' motion to amend, the defendants filed a motion for summary judgment as to the individual defendants, and a motion for dismissal of the individual defendants. All three motions are pending.

As to the defendants' two motions, the Court is of the opinion that neither motion can be sustained. The motion for summary judgment is based upon the grounds that the individual defendants transacted the deal upon which this suit is based as officers and employees of the limited partnership, and its corporate general partner--and not as partners. Personal liability, therefore, could not have attached. Such argument fails at this

point of the action, however, because the plaintiffs have alleged that the individual defendants misled the plaintiffs as to the existence of the limited partnership, and thereby misleading the plaintiff as to the party or parties ultimately liable upon the contract. Misrepresentation of fact being a cause of action under Kentucky law, Keck v. Wacker, 413 F.2d 1377 (6th Cir. 1976), the plaintiff should be allowed a chance to prove their allegations. Whether the plaintiffs can so prove that they detrimentally relied upon the assertions of the defendants remains to be seen. But, the device of summary judgment is not to be used as a substitute for trial on the merits where it is not clear what the true facts are, giving the benefit of doubt to the opponent of the motion. Rogers v. Peabody Coal Company, 342 F.2d 749 (6th Cir. 1965). The Court finds that a genuine issue of material fact exists as to the personal liability of the individual defendants, and the motion for summary judgment is DENIED.

The Court has reviewed the affidavits and the accountant's report filed by the defendants in support of the motions. While said filings go far toward absolving the individual defendants from liability, the defendant deserves the chance to cross-examine them.

The defendants also move to dismiss the action as to the individual defendants upon grounds that this Court lacks personal jurisdiction over them. The defendants cite K.R.S. 454.210(2)(a)1. That subsection allows Kentucky courts to exercise jurisdiction over persons who transact business in Kentucky and thereby cause a claim to arise. Defendant cites various cases for the proposition that officers of corporations cannot be properly served under a "transacting business" statute where the corporation is the proper party. While that proposition may well be sound, the Court finds that the defendant has cited the wrong subsection. The proper section is 454.210(2)(a)4 which states:

Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he 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 Commonwealth, provided that the tortious injury occurring in this Commonwealth arises out of the doing or soliciting

of business or a persistent course of conduct  
or derivation of substantial revenue within  
the Commonwealth;

The Court is of the opinion that the above language is the appropriate language to control personal jurisdiction herein.

Judge Swinford's opinion in Miller v. Trans World Airlines, Inc., 302 F. Supp. 174 (E.D.Ky. 1969) is dispositive. Therein, the Kentucky long-arm statute, 454.210(2)(a)4 in particular, was construed. Judge Swinford found that Kollsman Instruments Corporation, the manufacturer of instruments used in TWA's aircraft, was subject to personal jurisdiction in Kentucky under the above cited language even though the corporation had no office, plant, warehouse, salesmen, agent, or any other physical contact with Kentucky. The fact that many aircraft flew into the state carrying Kollsman instruments, a fact which Kollsman knew, or should have known, and that Kollsman thereby derived substantial revenue from Kentucky, was sufficient to attach personal jurisdiction under the cited language. Miller v. Trans World Airlines, supra at 177. "Doing business," per se, was not found to be a necessary showing.

Judge Swinford noted that Constitutional notions of "minimum contacts" cannot be avoided by a long-arm service. Id. Citing Hanson v. Denckla, 357 U.S. 235 (1958), he held that a foreign person has minimum contacts when he intentionally avails himself of the privilege of conducting activity within the state. Id. In Miller, that activity was selling instruments going into the state.

In the instant action, the facts easily fall within a Miller analysis. First, in a Constitutional sense, the defendants did come into Kentucky purposefully and avail themselves of the privilege of dealing here. Given that the deal involved coal, the defendants would be hard pressed to assert that they accidentally came into the state through normal business operations. They obviously were here intentionally. Second, the defendants did conduct an operation in Kentucky, i.e. a persistent course of conduct, from which they allegedly derive substantial revenue. And, according to the plaintiffs, such operation caused tortious injury. Thus, this case presents sufficient basis upon which to find personal jurisdiction. Starting a Kentucky business, and defrauding

Kentucky residents, by whatever means, from wherever, into supplying goods to the operation without the ability to pay for same, constitutes sufficient conduct upon which to base personal jurisdiction. Defendant's motion to dismiss DENIED.

The Court, in reaching its decision, in no way casts an opinion upon the merits of the action. This ruling is made pursuant to a motion to dismiss, and the scope of the ruling goes only far enough to resolve the motion. If facts are later adduced at trial which refute the bases upon which this ruling is made, the Court will thereupon take remedial action.

The third motion pending is a motion to file an amended complaint. The Court has reviewed the motion, and the tendered amended complaint, and finds that the purpose of the amendment is to join an additional party. That party, however, is a Kentucky corporation, the joinder of which would destroy jurisdiction. The Court is not convinced that it can take an action which destroys its jurisdiction. On the other hand, the party the plaintiff seeks to join is a vital link to the entire transaction out of which this suit arose. Consequently, the motion to amend the complaint is in reality a motion to join a necessary party within the contemplation of Rule 19 of the F.R.Civ.P.

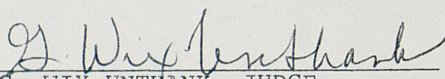
Rule 19 requires dismissal of the action if the Court is convinced that "in equity and good conscience" the action cannot proceed among the parties already before the Court. In this action the Court cannot determine at this stage whether the Kentucky corporation is, or is not a party of the type without which the action cannot proceed. The Kentucky corporation is alleged to be the general partner of the limited partnership with which the plaintiffs dealt. Inasmuch as the plaintiffs are alleging that the limited partnership was not properly formed, as well as the Kentucky corporation itself, the Court is unsure of the status of the corporation as respect the potential liability of the individual defendants. Notions of indemnity, surety, fiduciary duty, and other such relationships may compel the joinder of the corporation through which the individual defendants operated.

In other words, in an action in which it is sought to pierce a corporate veil, and to reach the shareholders individually, is the corporation an indispensable party within the contemplation of Rule 19.

The Court desires argument of counsel on the above defined issue. Accordingly, IT IS ORDERED that this action is set for oral argument upon defendants motion to amend the complaint on the 30th day of June, 1981 at the hour of 9:00 A.M. Said argument will be heard in the Courtroom of the United States Courthouse at Pikeville, Kentucky.

At least two weeks prior to said date, counsel for the respective parties will file a memorandum of law, not to exceed three pages, discussing the issue outlined above concerning joinder of the corporation sought to be avoided, and the effect of Rule 19 where such corporation, if joined, would destroy jurisdiction.

This the 13<sup>th</sup> day of March 1981.

  
G. WIX UNTHANK, JUDGE

SIR:

THIS HEARING INVOLVES ESSENTIALLY ONLY ONE QUESTION, I.E. ONE OF JURISDICTION. SPECIFICALLY, THE QUESTION IS, IN AN ACTION IN WHICH IT IS SOUGHT TO PIERCE THE CORPORATE VEIL, AND TO REACH THE SHAREHOLDERS INDIVIDUALLY, IS THE CORPORATION AN INDISPENSABLE PARTY WITHIN THE CONTEMPLATION OF RULE 19. IF CORPORATION IS INDISPENSABLE, THIS COURT HAS NO JURISDICTION.

MR. TURNER, COUNSEL FOR THE PLAINTIFF, HAS FILED A MEMORANDUM BRIEF AS ORDERED BY THE COURT. DEFENDANT HAS NOT COMPLIED WITH THE ORDER OF THE COURT.

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December 29, 1980

Hon. G. Wix Unthank, Judge  
United States District Court  
Eastern District of Kentucky  
Pikeville, Kentucky 41501

Re: CA NO. 80-168 - Paul Salyer, et al v. Jamie Pero, et al

Dear Sir:

There is pending in the above case a Motion upon behalf of the Plaintiffs to remand this case to the Magoffin Circuit Court. As I am going to be out of my office until January 4, 1981, on vacation, I would appreciate it if the Court did not set this Motion for a hearing until at least sometime around the last week of January or thereafter. I need this time in order to consult with my clients who are out-of-state Defendants, and to prepare any necessary pleadings on their behalf in regard to this case.

Therefore, if this does not greatly inconvenience the Court, I would respectfully request that the Motion not be set until sometime in the last week in January or afterwards.

Thank you for your attention to this matter.

Sincerely,

FRANCIS, KAZEE AND FRANCIS

*William S. Kendrick*

William S. Kendrick

WSK/rkc

cc: Hon. Walter Turner