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Court of Appeals of Indiana.
BALBOA CAPITAL CORPORATION, Appellant–Plaintiff,
v.
Brad APPLE, Appellee–Defendant.

No. 49A02–1101–CC–15.
May 31, 2011.

Appeal from the Marion Superior Court; The Honorable Patrick L. McCarty, Judge; Cause No. 49D03–0802–CC–7436.
Michael J. Alerding, Scott A. Kreider, Aldering Castor Hewitt, LLP, Indianapolis, IN, Attorneys for Appellee.

Robert S. Grimm, Alvin J. Katzman, Katzman & Katzman, P.C., Indianapolis, IN, Attorneys for Appellant.

MEMORANDUM DECISION—NOT FOR PUBLICATION

BARNES, Judge.

Case Summary

***1** Balboa Capital Corporation ("Balboa") appeals the trial court's judgment for Brad Apple on Balboa's complaint to domesticate a foreign judgment. We reverse and remand.

Issues

Balboa raises several issues. We find one issue dispositive and restate that issue as whether the trial court properly granted Apple's motion for summary judgment and request for attorney fees.

Facts

In September 2006, Balboa, as assignee of Flex Lease, Inc., filed a complaint against Quest Building Services, Inc. ("Quest"), Gregory Pyle, and Brad Apple in Orange County, California. Balboa alleged that Quest is an Indiana corporation doing business in Marion County, Indiana, and that Apple resided and did business in Marion County, Indiana. Balboa alleged that Quest had leased equipment from Flex Lease and that Pyle and Apple had executed personal guarantees to the lease. The lease guaranty provided:

> I consent to the jurisdiction of the Courts of Orange County, California and/or the United States District Court for the Central District of California, Santa Ana division, at your sole option, for the determination of all disputes related to the lease or this guaranty. I agree that this guaranty shall be governed by the laws of the State of California.

Appellant's App. p. 49. The lease guaranty is signed by "Brad D. Apple." *Id.* Balboa alleged that Quest had defaulted on the lease. On February 22, 2007, the California court granted a default judgment against Quest, Pyle, and Apple in the amount of $53,076.24.

In February 2008, Balboa filed a complaint on foreign judgment against Apple in Marion County, Indiana. Apple filed a notice of defenses and answer pursuant to Indiana Code Section 34–54–11–2(e),[FN1] alleging in part that the California court lacked personal jurisdiction over him. Balboa filed a response to the notice of defenses and argued that Apple failed "to present any valid defenses that would bar the enforcement of the California Judgment," that the California judgment was entitled to full faith and credit, and that Balboa was entitled to judgment. *Id.* at 31.

> FN1. Indiana Code Chapter 34–54–11, the Enforcement of Foreign Judgments Act, was substantially amended by Public Law No. 63–2010, section 3, which was effective on July 1, 2010. However, Balboa's action was filed in 2008, and we apply the version of the Act in effect at that time.

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Apple interpreted Balboa's response as a motion for summary judgment and filed a reply and a cross motion for summary judgment. In support of his cross motion, Apple designated his affidavit, the California complaint, and the lease agreement. Apple's affidavit provided:

8. I have reviewed the Lease Agreement (the “Lease”) attached as Exhibit 1 to the complaint filed against me in California.

9. The name “Brad D. Apple” appearing on the Lease is not my signature.

10. I did not sign the Lease nor did I authorize anyone to sign my name on the Lease.

11. I was not aware that my name had been placed on the Lease until I received a copy of the Lease which was attached to the complaint filed in California.

Id. at 65–66.

Balboa filed a response to Apple's cross motion for summary judgment. In the response, Balboa disputed Apple's assertion that it had filed a motion for summary judgment. Balboa also responded to Apple's cross motion for summary judgment. Balboa contended that Apple had consented to personal jurisdiction in California by way of the lease guaranty and that Apple's argument that he did not sign the lease guaranty went to the merits of the judgment rather than to personal jurisdiction. According to Balboa, Apple was prohibited from challenging the merits of the California judgment. In support of its response, Balboa designated the California complaint, including the lease and lease guaranty, proof of service of the California complaint, the complaint on foreign judgment, other pleadings in the instant action, and an affidavit from Michelle Chiongson, which concerned the California action and personal service of the California complaint. Apple filed a reply brief, arguing that the California judgment was void because Apple never agreed to personal jurisdiction in California.

***2** In May 2010, Apple filed a motion to dismiss pursuant to Indiana Trial Rule 41(E) for failure to prosecute and a motion for attorney fees pursuant to Indiana Code Section 34–52–1–1, and the trial court set a hearing date for the matter. In June 2010, Apple filed a motion to convert the hearing on the Rule 41(E) motion to a hearing on his motion for summary judgment. Apple also filed supplemental argument on his motion for summary judgment and a motion to withdraw his earlier motion to dismiss for failure to prosecute. Apple continued requesting attorney fees pursuant to Indiana Code Section 34–52–1–1.

The trial court held a hearing on Apple's motion for summary judgment in August 2010. The trial court then issued an order: (1) granting Apple's motion to convert the hearing to a hearing on his motion for summary judgment; (2) granting Apple's motion to withdraw his motion to dismiss; and (3) denying Apple's motion to submit supplemental authority. The trial court also granted Apple's motion for summary judgment and granted Apple's motion for attorney fees. The trial court's order provided: “Plaintiffs claims are dismissed with prejudice and the Court decrees that the California judgment is void for want of personal jurisdiction.” *Id.* at 139. The trial court later entered final judgment on Balboa's complaint.

Balboa filed a motion to correct error. In support of its motion, Balboa submitted documents to demonstrate that it spoke with Apple regarding the **equipment lease**, that Apple provided a copy of his driver's license, that it verified Apple's status as a shareholder, vice president, and director of Quest, and that it ran a credit check of Apple. Apple filed a motion to strike Balboa's documents, which the trial court granted. The trial court also denied Balboa's motion to correct error. Balboa now appeals.

Analysis

I. Motion for Summary Judgment

Balboa appeals the trial court's grant of Apple's motion for summary judgment. Our standard of review for summary judgment is the same standard used by the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Sheehan Constr. Co. v. Cont'l Cas. Co.,* 938 N.E.2d 685, 688 (Ind.2010). All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party. *Sheehan,* 938 N.E.2d at 688. Also, review of a summary judg-

ment motion is limited to those materials designated to the trial court. *Id.*

Once the moving party has sustained its initial burden of proving the absence of a genuine issue of material fact and the appropriateness of judgment as a matter of law, the party opposing summary judgment must respond by designating specific facts establishing a genuine issue for trial. *Id.* at 689. If the opposing party fails to meet its responsive burden, the court shall render summary judgment. *Id.*

***3** In his motion for summary judgment, Apple argued that the California trial court never had personal jurisdiction over him because he did not sign the lease guaranty and, thus, the California judgment was void. According to Balboa, Apple's challenge to his signature on the lease guaranty is an impermissible collateral attack rather than a challenge to the California trial court's personal jurisdiction.

Under the Full Faith and Credit Clause of the Constitution of the United States, the courts of this state are obligated to enforce a judgment of the courts of a sister state. *Tom–Wat Inc. v. Fink,* 741 N.E.2d 343, 347 (Ind.2001). However, that is true only if the court rendering the judgment had jurisdiction over the party against whom the judgment is sought to be enforced. *Id.* at 348. A judgment of a foreign court is open to collateral attack for want of personal jurisdiction or subject matter jurisdiction. *American Mgmt., Inc. v. Riverside Nat'l Bank,* 725 N.E.2d 930, 933 (Ind.Ct.App.2000). A judgment that is void in the state where it is entered is also void in Indiana. *Id.* However, "[m]ere errors of law do not deprive a court of its jurisdiction or open its judgment to collateral attack; such are voidable, not void, and can only be corrected by direct appeal." *Id.* (quoting *D.L.M. v. v. .E.M.,* 438 N.E.2d 1023, 1028 (Ind.Ct.App.1982)). A judgment debtor may not utilize an action in Indiana to collaterally attack the merits of a facially valid foreign judgment. *Id.* Consequently, resolution of this argument depends on whether Apple's challenge was a personal jurisdiction challenge or a collateral attack of the judgment.

Balboa relies on *Riverside* for the proposition that Apple's argument is an improper collateral attack on the California judgment. In *Riverside,* the defendant argued that he was not "personally liable for the Florida judgment because he allegedly signed the relevant documents only in a representative capacity." *Riverside,* 725 N.E.2d at 933. The defendant specifically did not "challenge either subject matter jurisdiction or personal jurisdiction" of the Florida court. *Id.* We concluded that the defendant could not collaterally attack the Florida judgment. *Id.* Here, Apple has specifically challenged the California court's personal jurisdiction. Apple designated evidence that he did not sign the lease guaranty, which contained the forum selection clause upon which personal jurisdiction was based. Consequently, we find *Riverside* distinguishable and address the personal jurisdiction issue.

"Personal jurisdiction is a question of law." *LinkAmerica Corp. v. Albert,* 857 N.E.2d 961, 965 (Ind.2006). As with other questions of law, a determination of the existence of personal jurisdiction is entitled to de novo review by appellate courts. *Id.* We do not defer to the trial court's legal conclusion as to whether personal jurisdiction exists. *Id.* However, personal jurisdiction turns on facts, typically the contacts of the defendant with the forum, and findings of fact by the trial court are reviewed for clear error. *Id.*

***4** California law governs the personal jurisdiction of that state's courts over Apple. *See Tom–Wat,* 741 N.E.2d at 348. Apple had the burden of establishing that California did not have jurisdiction over him. *See id.* California courts have held that due process permits the exercise of personal jurisdiction over a nonresident defendant in the following four situations: (1) where the defendant is domiciled in the forum state when the lawsuit is commenced; (2) where the defendant is personally served with process while he or she is physically present in the forum state; (3) where the defendant consents to jurisdiction; and (4) where the defendant has sufficient "minimum contacts" with the forum state, such that the exercise of jurisdiction would not offend "traditional notions of fair play and substantial justice." *Muckle v. Superior Court,* 102 Cal.App. 4th 218, 226, 125 Cal.Rptr.2d 303, 309 (Cal.Ct.App.2002). There is no allegation here that California had personal jurisdiction over Apple based on his domicile, that the complaint was served on him while he was physically present in California, or that he had sufficient minimum contacts with California. Rather, the sole allegation is that Apple consented to personal jurisdiction in California by way of the forum selection clause in the lease guaranty.

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Like Indiana, California courts have held that due process permits the exercise of personal jurisdiction over a nonresident defendant when the defendant consents to jurisdiction. *Szynalski v.. Superior Court,* 172 Cal.App. 4th 1, 7, 90 Cal.Rptr.3d 683, 688 (Cal.Ct.App.2009). A person's consent to jurisdiction "may be expressed by words or by conduct." *Id.* Express consent to a court's jurisdiction will occur by generally appearing in an action or by a valid forum-selection clause designating a particular forum for dispute resolution regardless of residence. *Nobel Floral Inc. v. Pasero,* 106 Cal.App. 4th 654, 658, 130 Cal.Rptr.2d 881, 885 (Cal.Ct.App.2003). California courts "will enforce forum selection clauses contained in a contract freely and voluntarily negotiated at arm's length unless enforcement would be unfair or unreasonable." *Hunt v. Superior Court,* 81 Cal.App. 4th 901, 908, 97 Cal.Rptr.2d 215, 219 (Cal.Ct.App.2000). A court should set aside a forum selection clause if the agreement was affected by fraud, undue influence, or overwhelming bargaining power, if enforcement of the agreement would be unreasonable and unjust, or if proceedings in the contractual forum will be so gravely difficult and inconvenient that the resisting party would for all practical purposes be deprived of his day in court. *Alan v. Superior Court,* 111 Cal.App. 4th 217, 230, 3 Cal.Rptr.3d 377, 388 (Cal.Ct.App.2003).

In his motion for summary judgment, Apple designated an affidavit in which he stated:

> 8. I have reviewed the Lease Agreement (the "Lease") attached as Exhibit 1 to the complaint filed against me in California.
>
> ***5** 9. The name "Brad D. Apple" appearing on the Lease is not my signature.
>
> 10. I did not sign the Lease nor did I authorize anyone to sign my name on the Lease.
>
> 11. I was not aware that my name had been placed on the Lease until I received a copy of the Lease which was attached to the complaint filed in California.

Id. at 65–66.[FN2] Consequently, Apple designated evidence that he did not sign the lease guaranty and, thus, did not consent to personal jurisdiction in California. Apple's argument is proper and not an impermissible collateral attack on the merits of the judgment.

> FN2. On appeal, Balboa challenges the admission of Apple's affidavit, claiming that Apple's affidavit is self-serving. Our review of the record does not reveal that Balboa made this argument to the trial court, filed a motion to strike Apple's affidavit, or challenged the admissibility of the affidavit in any way. As a result, we conclude that Balboa waived this argument. *McGill v. Ling,* 801 N.E.2d 678, 687 (Ind.Ct.App.2004) ("Generally, a party may not raise an issue on appeal that was not raised to the trial court, even in summary judgment proceedings."), *trans. denied.*

In response to Apple's motion for summary judgment, Balboa designated the California complaint, including the lease and lease guaranty, proof of service of the California complaint, the complaint on foreign judgment, other pleadings in the instant action, and an affidavit regarding the California action and personal service of the California complaint. The lease guaranty was signed by "Brad D. Apple." *Id.* at 49.

Although we conclude that Apple properly challenged the California court's personal jurisdiction, given his designation of his affidavit and Balboa's designation of the lease guaranty signed by "Brad D. Apple," we conclude that genuine issues of material fact exist regarding whether the California court had personal jurisdiction over Apple.[FN3] As a result, we conclude that the trial court erred by granting Apple's motion for summary judgment.[FN4] We remand for further proceedings to determine whether Apple consented to personal jurisdiction in California. Given our resolution of Apple's motion for summary judgment, we necessarily reverse the trial court's award of attorney fees to Apple.[FN5]

> FN3. To the extent that Balboa seems to argue the trial court should have considered documents attached to its motion to correct error in determining Apple's motion for summary judgment, we note that Balboa could have designated those documents in

response to Apple's motion for summary judgment, but it failed to do so. When a nonmoving party fails to respond to a motion for summary judgment within thirty days by either filing a response, requesting a continuance under Trial Rule 56(I), or filing an affidavit under Trial Rule 56(F), the trial court cannot consider summary judgment filings of that party subsequent to the thirty-day period. *Regalado v. Estate of Regalado,* 933 N.E.2d 512, 518 (Ind.Ct.App.2010) (citing *Borsuk v. Town of St. John,* 820 N.E.2d 118, 123 n. 5 (Ind.2005)). The filing of the documents seems to be a belated attempt to designate evidence to avoid summary judgment. We have held that a party is not entitled to submit evidence by way of a motion to correct error where the party failed to designate the evidence at the time of the summary judgment proceedings. *Babinchak v. Town of Chesterton,* 598 N.E.2d 1099, 1102 (Ind.Ct.App.1992). An exception to this rule is if the evidence was newly discovered. *Id.* There is no evidence or allegation that the documents were newly discovered. As a result, we conclude that the trial court did not abuse its discretion by granting the motion to strike. Moreover, even if the trial court had considered those documents in the context of Apple's motion for summary judgment, they merely would have established genuine issues of material fact regarding whether the California court had personal jurisdiction over Apple. We have already determined that genuine issues of material fact exist, and we have remanded to the trial court for further proceedings.

FN4. Balboa also claims that the trial court made a decision "on the merits" of its claim against Apple when it dismissed Balboa's claims with prejudice. Appellant's Br. p. 9. The trial court did not make a determination on the merits of Balboa's claims against Apple; rather, the trial court merely determined that the California judgment was not entitled to full faith and credit because the California court did not have personal jurisdiction over Apple.

FN5. If the attorney fee issue is again considered on remand, we note that "Indiana follows the 'American Rule,' whereby parties are required to pay their own attorney fees absent an agreement between the parties, statutory authority, or other rule to the contrary." *Smyth v. Hester,* 901 N.E.2d 25, 32 (Ind.Ct.App.2009), *trans. denied.* The trial court here apparently awarded attorney fees pursuant to Indiana Code Section 34–52–1–1(b), which provides:

> In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party:
>
> (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
>
> (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
>
> (3) litigated the action in bad faith.
>
> A claim or defense is not, however, groundless or frivolous merely because the party loses on the merits. *Smyth,* 901 N.E.2d at 33.

Conclusion

The trial court erred by granting Apple's motion for summary judgment because genuine issues of material fact exist regarding whether the California court had personal jurisdiction of him when it rendered its judgment. Because we are reversing the trial court's grant of summary judgment, we necessarily reverse the trial court's order for Balboa to pay Apple's attorney fees based on Indiana Code Section 34–52–1–1. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

RILEY, J., and DARDEN, J., concur.

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