53 Cal.App.5th 632
Court of Appeal, First District, Division 3, California.

T.A.W. PERFORMANCE, LLC, Plaintiff and Appellant,
v.
BREMBO, S.P.A., Defendant and Respondent.

A157400, A157841
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Filed 8/17/2020
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Synopsis

Background: Distributor brought action against brake system manufacturer, an Italian corporation, alleging wrongful termination of parties' exclusive distributor agreement without cause. The Superior Court, Sonoma County, No. SCV263262, Jennifer V. Dollard, J., granted manufacturer's motion to quash service of summons for lack of personal jurisdiction and denied distributor's motion for reconsideration. Distributor appealed.

[Holding:] The Court of Appeal, Ioana Petrou, J., held that trial court lacked specific personal jurisdiction over manufacturer.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Quash; Motion for Reconsideration.

West Headnotes (18)

[1] **Constitutional Law**Non-residents in general

The Due Process Clause of the Fourteenth Amendment constrains a state's authority to bind a nonresident defendant to a judgment of its courts. U.S. Const. Amend. 14.

[2] **Constitutional Law**Non-residents in general

Under the Due Process Clause, although a nonresident's physical presence within the territorial jurisdiction of the court is not required for personal jurisdiction, the nonresident generally must have certain minimum contacts such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. U.S. Const. Amend. 14.

More cases on this issue

[3] **Courts**Presumptions and Burden of Proof as to Jurisdiction

When a defendant moves to quash service of process on jurisdictional grounds, the plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction; once facts showing minimum contacts with the forum state are established, however, it becomes the defendant's burden to demonstrate that the exercise of jurisdiction would be unreasonable.

More cases on this issue

[4] **Appeal and Error**Personal jurisdiction

When there is conflicting evidence, trial court's factual determinations regarding personal jurisdiction are not disturbed on appeal if supported by substantial evidence.

[5] **Appeal and Error**Personal jurisdiction
CourtsDetermination of questions of jurisdiction in general

When no conflict in the evidence exists, question of personal jurisdiction is purely one of law, and reviewing court engages in independent review of the record.

1 Case that cites this headnote

[6] **Courts**Corporations and business organizations

A court may assert general personal jurisdiction over foreign sister-state or foreign-country corporations to hear any and all claims against them when their affiliations with the state are so

continuous and systematic as to render them essentially at home in the forum state.

[7] **Courts** Related contacts and activities; specific jurisdiction

Specific personal jurisdiction depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum state and is therefore subject to the state's regulation.

[8] **Courts** Related contacts and activities; specific jurisdiction

In contrast to general, all-purpose jurisdiction, specific personal jurisdiction is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.

[9] **Courts** Related contacts and activities; specific jurisdiction

When determining whether specific personal jurisdiction exists, courts consider the relationship among the defendant, the forum, and the litigation.

[10] **Constitutional Law** Non-residents in general
Courts Related contacts and activities; specific jurisdiction

A court may exercise specific personal jurisdiction over a nonresident defendant only if: (1) defendant has purposefully availed himself or herself of the forum benefits; (2) the controversy is related to or arises out of the defendant's contacts with the forum; and (3) assertion of personal jurisdiction would be reasonable in that it would comport with fair play and substantial justice.

More cases on this issue

[11] **Courts** Related contacts and activities; specific jurisdiction

Where a forum seeks to assert specific personal jurisdiction over an out-of-state defendant who has not consented to suit there, the "fair warning" requirement is satisfied if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities.

1 Case that cites this headnote

[12] **Courts** Related contacts and activities; specific jurisdiction

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the specific personal jurisdiction requirement of contact with the forum state; the application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

[13] **Appeal and Error** Correct decision below based on incorrect grounds or reasoning

Trial court's ruling must be affirmed even if given for a wrong reason, and if right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.

3 Cases that cite this headnote

[14] **Courts** Related contacts and activities; specific jurisdiction

Analysis of minimum contacts test for specific personal jurisdiction is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite affiliating circumstances are present.

[15] **Courts** Contract disputes

In ascertaining whether specific personal jurisdiction may be exercised over a foreign corporation in commercial contract litigation, court applies highly realistic approach that recognizes that a contract is ordinarily but an

intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.

[16] **Courts** Contract disputes

Italy-based manufacturer did not purposefully avail itself of the benefits and protections of the laws of California such that it had fair warning and should have anticipated being brought into California to defend a lawsuit, and thus, the trial court lacked specific personal jurisdiction over manufacturer in distributor's action alleging wrongful termination of exclusive distribution agreement without cause; instead, manufacturer made concerted effort to alleviate risk of burdensome litigation in California by limiting dispute resolution to New York through agreement's choice of law and forum selection clauses, and although its products were resold in California, they were shipped to distributor's principal place of business in North Carolina and resold throughout the United States.

1 Case that cites this headnote
More cases on this issue

[17] **Constitutional Law** Non-residents in general
Courts Related contacts and activities; specific jurisdiction

While the foreseeability of causing injury in another state should be sufficient to establish sufficient contacts in that state when policy considerations so require, this kind of foreseeability is not a sufficient benchmark for exercising specific personal jurisdiction; instead, the foreseeability that is critical to due process analysis is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. U.S. Const. Amend. 14.

[18] **Contracts** Legal remedies and proceedings
Courts Corporations and business organizations

Choice-of-law and forum selection clauses, standing alone, are not dispositive, and may be discounted in the specific personal jurisdiction analysis where a foreign corporation's other minimum contacts establish jurisdiction in the forum state; however, they may reinforce whether or not a foreign corporation has made such a deliberate affiliation with the forum state as to support a conclusion that it should have reasonably foreseen possible litigation there.

Witkin Library Reference: 2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 174 [Illustrations: Jurisdiction Denied.]

3 Cases that cite this headnote

****773** Trial Court: Sonoma County Superior Court, Trial Judge: Hon. Jennifer V. Dollard (Sonoma County Super. Ct. No. SCV263262)

Attorneys and Law Firms

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Opinion

Petrou, J.

****774** ***637** Plaintiff T.A.W. Performance, LLC (TAW), appeals from the trial court's (1) grant of defendant Brembo, S.p.A.'s (Brembo) motion to quash service of the summons for lack of personal jurisdiction; and (2) denial of TAW's motion for reconsideration. We affirm.

I. Background

On July 1, 2014, Brembo, an Italian joint stock corporation with its headquarters in Italy, and TAW, a California limited liability company with its principal office in North Carolina, entered into a written "Exclusive Distribution Agreement" (hereinafter the agreement). Brembo manufactured brake systems for vehicles (hereinafter referred to as products), which were exported for international sale. Under the

agreement, TAW was appointed as the sole and exclusive distributor of Brembo's products to be resold by TAW to third parties within the "Territory" of the United States, Canada, and Mexico.

The agreement had a five-year term, from July 1, 2014, to June 30, 2019. Early termination could be effectuated by either party giving at least one (1) year's notice in writing. In the event of a dispute not resolved by mediation, the parties consented "to the exclusive jurisdiction of the state and federal courts of the State of New York for all disputes or controversies which may arise between the Parties out or in connection with this Agreement or its construction, interpretation, effect, performance or non-performance, or the consequences thereof. Each Party agrees that such courts, to the exclusion of all other courts, tribunals and administrative bodies, shall have exclusive jurisdiction with respect to any and all such disputes and controversies and that any and all such disputes and controversies shall be determined only by litigation in one of such courts ...." The parties also agreed that the agreement and "any dispute or claim arising out of or in connection with it or its subject matter or formation" would be governed by the laws of the State of New York.

On August 1, 2016, Brembo sent a termination notice letter to TAW at its North Carolina address providing that the agreement would terminate in one ***638** year's time, on July 31, 2017. Both parties filed lawsuits in advance of the agreement's termination date. TAW first filed in New York federal court but then voluntarily dismissed its lawsuit. In July 2017, Brembo filed a New York State lawsuit seeking damages for TAW's alleged failure to pay for products shipped to TAW in North Carolina. TAW filed a counterclaim seeking damages based on Brembo's alleged failure to enforce the agreement's exclusivity provisions against other distributors and its termination of the agreement without explanation. In its counterclaim, TAW confirmed it had specifically consented to the exclusive jurisdiction of the New York courts for all disputes arising between the parties in connection with the agreement.

In 2018, while Brembo's New York State lawsuit was pending, TAW filed this California lawsuit seeking monetary damages based on Brembo's alleged wrongful termination of the agreement without cause. In its first amended complaint (FAC), TAW alleged it was a "California limited liability Company, formerly headquartered in Sonoma California, currently located in Cramerton, North Carolina with offices in Sonoma, California" and that "Richard Martin is the principal and controlling member of [TAW]. He is a United Kingdom citizen and non-immigrant alien, living ****775** in the United States pursuant to a valid E-2 Visa, who at all relevant times has been residing in Sonoma, California." TAW further alleged Brembo was "an Italian corporation located in Italy that does business in the State of California by and through subsidiaries and California based distributors."

The FAC included causes of action for breach of contract and violations of the **California's Franchise Relations Act** (Bus. & Prof. Code § 20001, subds. (a)–(c)) (Franchise Act). As to the Franchise Act, TAW alleged the parties' agreement met the elements of a franchise agreement, and Brembo's termination violated the Franchise Act as: (a) no franchisor may terminate a franchise prior to the expiration of its term except for good cause; and (b) "any condition, stipulation or provision purporting to bind any person to waive compliance with any provision" of the franchise law "is contrary to public policy and void." According to TAW, Brembo's termination of the agreement pursuant to its provision allowing for unilateral termination upon one-year's notice did not constitute good cause for termination under the Franchise Act.

II. The Motion to Quash Service of Summons for Lack of Personal Jurisdiction Was Properly Granted

A. The Motion to Quash Service

Brembo moved to quash service of summons on the ground it did not have sufficient contacts with California for the court to exercise either general or specific jurisdiction.

***639** Relying on a declaration of its in-house chief legal and corporate affairs officer, Umberto Simonelli, Brembo asserted the court had no basis to exercise general jurisdiction for the following reasons: Brembo was an Italian corporation with its principal place of business and corporate headquarters in Italy; it was not authorized to do business in California; it maintained no offices in California; no current

employees resided in California; it had no assets in California; and it paid no taxes in California. Additionally, Brembo designed and manufactured self-branded design equipment for motorcycles and motor vehicles in Italy; it did not manufacture any equipment in California; it did not sell products to the general public in California but instead sold equipment to distributors; it did not maintain a dealer network in California; and it did not engage in marketing efforts directed at California. Brembo had one United States subsidiary, Brembo North America, Inc., which was a distinct and separate entity, incorporated in Delaware with a principal place of business in Plymouth, Michigan.

Brembo further asserted the court had no basis to exercise specific jurisdiction for numerous reasons, including that TAW had moved its principal place of business to North Carolina prior to entering into the agreement and Brembo's act of contracting with a California entity was not sufficient to support specific jurisdiction. TAW's contacts with California were likewise insufficient as all purchase orders were sent by TAW to Brembo in Italy and Brembo did not ship any products to TAW in California. Further, the parties had agreed New York was to be the exclusive forum for dispute resolution and never looked to California as shown by TAW's earlier dismissed federal lawsuit and its counterclaim filed in Brembo's pending New York State lawsuit.

In opposition, TAW asserted it did not need to establish general jurisdiction over Brembo because TAW could "easily" establish Brembo had "minimum contacts" to support specific jurisdiction since it had entered into an agreement with TAW (a California resident) to resell its products in ****776** California, and TAW now claimed damages based on Brembo's breach of that agreement. Relying on a declaration from its managing member, Richard Martin, TAW also asserted Brembo had "many" other contacts with California supporting an exercise of specific jurisdiction: (1) Brembo purposefully directed its activities at California by creating a continuing obligation between itself and a California resident to resell large amounts of its products in California, over many years; (2) TAW had sold more than $2.7 million of Brembo's products in California over the past three years; (3) California accounted for 28.7 percent of TAW's sales of Brembo's products in the United States; (4) before TAW moved to North Carolina, Brembo shipped its products directly to California, handled warranties in California, and directly marketed its products in California; (5) TAW's California lawsuit arose out of Brembo's ***640** forum-related activities, namely, Brembo's wrongful termination of the 2014 agreement, which out-of-state forum selection clause was expressly void under the Franchise Act.

In reply, Brembo noted TAW conceded Brembo was not subject to general jurisdiction by failing to make any argument in support of that basis for jurisdiction. Brembo further asserted that evidence of certain events that preceded the 2014 agreement or that occurred after Brembo's alleged breach of the 2014 agreement, and its general activities in California, were not related to the wrongful termination claim and therefore could not support specific jurisdiction.

On March 28, 2019, the court granted Brembo's motion to quash service as TAW had not met its burden of demonstrating that Brembo had a sufficient nexus with California to support personal jurisdiction. In so concluding, the court explained that TAW conceded there was no general jurisdiction. As to specific jurisdiction, the court found TAW failed to satisfy its burden to demonstrate Brembo's contacts with California for a variety of reasons that fundamentally boiled down to the agreement being between "a company doing business in Italy, and one doing business in North Carolina, who had agreed to settle any claims per New York law" and TAW's failure to demonstrate Brembo had any special connection with California that would support the exercise of jurisdiction over Brembo.

In light of its determination that Brembo was not subject to specific jurisdiction, the trial court did not address whether the exercise of personal jurisdiction over Brembo would be reasonable. Nor did the court address Brembo's request to either stay or dismiss the action on the ground that California is an inconvenient forum for the action.

TAW timely appealed the March 28 order.

B. Guiding Principles

[1] [2] Under Code of Civil Procedure section 410.10, our courts are authorized "to exercise jurisdiction on any basis not inconsistent with the Constitution of the United States or

the Constitution of California. 'The Due Process Clause of the Fourteenth Amendment constrains a State's authority to bind a nonresident defendant to a judgment of its courts. [Citation.] Although a nonresident's physical presence within the territorial jurisdiction of the court is not required, the nonresident generally must have "certain minimum contacts ... such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " ' " (***641** *Halyard Health, Inc.* v. *Kimberly-Clark Corp.* (2019) 43 Cal.App.5th 1062, 1069, 256 Cal.Rptr.3d 915 (*Halyard Health*), quoting in part ****777** *Walden v. Fiore* (2014) 571 U.S. 277, 283, 134 S.Ct. 1115, 188 L.Ed.2d 12; *Internat. Shoe Co. v. Washington* (1945) 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 and *Milliken v. Meyer* (1940) 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278.) "Personal jurisdiction may be either general or specific." (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 445, 58 Cal.Rptr.2d 899, 926 P.2d 1085 (*Vons*).)

[3] [4] [5] "When a defendant moves to quash service of process on jurisdictional grounds, the plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction. [Citation.] Once facts showing minimum contacts with the forum state are established, however, it becomes the defendant's burden to demonstrate that the exercise of jurisdiction would be unreasonable. [Citation.] When there is conflicting evidence, the trial court's factual determinations are not disturbed on appeal if supported by substantial evidence. [Citation.] When no conflict in the evidence exists, however, the question of jurisdiction is purely one of law and the reviewing court engages in an independent review of the record. [Citation.]" (*Vons, supra,* 14 Cal.4th at p. 449, 58 Cal.Rptr.2d 899, 926 P.2d 1085.)

C. General Jurisdiction

[6] "A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State. [Citation.]" (*Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011) 564 U.S. 915, 919, 131 S.Ct. 2846, 180 L.Ed.2d 796 (*Goodyear*).)

In *Daimler AG v. Bauman* (2014) 571 U.S. 117, 134 S.Ct. 746, 187 L.Ed.2d 624 (*Daimler*), the high court explained that "*Goodyear* made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose [general] jurisdiction there" (*id.* at p. 137, 134 S.Ct. 746), and " 'for a corporation, ...' the place of incorporation and principal place of business [are the] 'paradig[m] ... bases for general jurisdiction' " (*ibid*). In other words, "the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so "continuous and systematic" as to render [it] essentially at home in the forum State.' " (*Daimler, supra,* 571 U.S. at pp. 138-139, 134 S.Ct. 746, fn. omitted, quoting *Goodyear, supra,* 564 U.S. at p. 919, 131 S.Ct. 2846.)

Our de novo review is limited to issues which have been adequately raised and supported in the trial court and in TAW's briefs. Neither in the trial court nor on appeal does TAW make any attempt, by substantive argument or ***642** evidence, to demonstrate that Brembo was subject to general jurisdiction based on such continuous or systematic affiliations with California so as to render it essentially at home in California. And, indeed, no such argument could be made on this record as the common bases for general jurisdiction over Brembo do not exist: at all relevant times, Brembo was a joint stock company incorporated in Italy with its principal place of business in Italy and its North American subsidiary was a corporation incorporated in Delaware with its principal place of business in Plymouth, Michigan.

D. Specific Jurisdiction

[7] [8] [9] In contrast to general jurisdiction, specific jurisdiction "depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the ****778** forum State and is therefore subject to the State's regulation. [Citations.] In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.' [Citation.]" (*Goodyear, supra,* 564 U.S. at p. 919, 131 S.Ct. 2846.) In other words, "[w]hen determining whether specific jurisdiction exists, courts

consider the ' " 'relationship among the defendant, the forum, and the litigation.' " ' " (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269, 127 Cal.Rptr.2d 329, 58 P.3d 2 (*Pavlovich*), quoting *Helicopteros Nacionales de Colombia v. Hall* (1984) 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (*Helicopteros*), quoting *Shaffer v. Heitner* (1977) 433 U.S. 186, 204, 97 S.Ct. 2569, 53 L.Ed.2d 683 (*Shaffer*).)

[10] Thus, "[a] court may exercise specific jurisdiction over a nonresident defendant only if: (1) 'the defendant has purposefully availed himself or herself of the forum benefits' (*Vons, supra*, 14 Cal.4th at p. 446, 58 Cal.Rptr.2d 899, 926 P.2d 1085); (2) 'the "controversy is related to or 'arises out of' [t]he defendant's contacts with the forum" ' (*ibid.*, quoting *Helicopteros, supra*, 466 U.S. at p. 414, 104 S.Ct. 1868); and (3) ' "the assertion of personal jurisdiction would [be reasonable in that it would] comport with 'fair play and substantial justice.' " ' (*Vons, supra*, 14 Cal.4th at p. 447, 58 Cal.Rptr.2d 899, 926 P.2d 1085, quoting *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 472-473, [105 S. Ct. 2174, 85 L.Ed.2d 528] (*Burger King*))." (*Pavlovich, supra*, 29 Cal.4th p. 269, 127 Cal.Rptr.2d 329, 58 P.3d 2.)

[11] In addressing the purposeful availment prong, the high court has explained that, under the Due Process Clause, individuals are entitled to a " 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,' " thereby giving potential defendants the ability " 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.' " (*Burger King Corp. v. Rudzewicz, supra*, 471 U.S. at p. 472, 105 S.Ct. 2174, quoting ***643** *Shaffer, supra*, 433 U.S. at p. 218, 97 S.Ct. 2569 (Stevens. J., concurring in judgment) & *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (*World-Wide Volkswagen*).) "Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, [citation], and the litigation results from alleged injuries that 'arise out of or relate to' those activities, [citation]." (*Burger King, supra*, at pp. 472-473, 105 S. Ct. 2174, fns. omitted.) By " 'purposefully avail[ing] itself of the privilege of conducting activities within the forum State,' [citation], [a defendant] has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. " (*World-Wide Volkswagen, supra*, at p. 297, 100 S.Ct. 559.)

[12] "In defining when it is that a potential defendant should 'reasonably anticipate' out-of-state litigation, [the high court] frequently has drawn from the reasoning of *Hanson v. Denckla* [(1958) 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 ¶)]: [¶] 'The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each ****779** case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' " (*Burger King, supra*, 471 U.S. at p. 474, 105 S.Ct. 2174.)

1. TAW's Contentions

TAW argues that its jurisdictional arguments are supported by either (1) facts that were not challenged in the trial court, (2) facts to which the court overruled Brembo's evidentiary objections, and (3) facts to which the court "simply erred in its application of law by refusing to consider an otherwise sound fact based solely on relevance."

[13] [14] In reviewing the trial court's ruling, we need not separately address TAW's specific challenges to the court's reasons for its ruling as a trial court's ruling must be affirmed even if " 'given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' " (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19, 112 Cal.Rptr. 786, 520 P.2d 10.) Our analysis " 'is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present' " ***644** (*Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1061, 29 Cal.Rptr.3d 33, 112 P.3d 28 (*Snowney*)), and " ' "[t]his determination is one in which few answers will be written 'in black and white, [with] [t]he

greys ... dominant and even among them the shades are innumerable' " ' " (*Pavlovich, supra,* 29 Cal.4th at p. 268, 127 Cal.Rptr.2d 329, 58 P.3d 2, quoting *Kulko v. California Superior Court* (1978) 436 U.S. 84, 92, 98 S.Ct. 1690, 56 L.Ed.2d 132, (quoting *Estin v. Estin* (1948) 334 U.S. 541, 545, 68 S.Ct. 1213, 92 L.Ed. 1561).)

With these considerations in mind, we now address TAW's contentions.

2. Analysis

[15] In ascertaining whether specific jurisdiction may be exercised over a foreign corporation in commercial contract litigation, we are guided by high court decisions which "long ago rejected the notion that personal jurisdiction might turn ... on 'conceptualistic ... theories of the place of contracting or of performance.' [Citation.] Instead, [the high court applies] a 'highly realistic' approach that recognizes that a 'contract' is 'ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.' [Citation.]" (*Burger King, supra,* 471 U.S. at pp. 478-479, 105 S.Ct. 2174, and cases cited therein.) Pertinent to the matter before us, the *Burger King* court specifically found that a choice of law provision by which the parties stipulated "in advance to submit their controversies for resolution" in a specific jurisdiction may be germane to the jurisdictional analysis. (*Id.* at p. 472, fn. 14, 105 S.Ct. 2174; see *Id.* at pp. 482-483, 105 S.Ct. 2174 [*Burger King* court admonished Court of Appeals for failure to give adequate consideration to choice of law provision in parties' franchise agreement in determining question of personal jurisdiction over defendant franchisee].)

TAW argues Brembo should have anticipated being brought into a California court to defend this lawsuit based on the following "key relevant" factors: (1) Brembo profited from TAW's resale of Brembo products in California, which accounted for almost one-third of TAW's United States sales, as an expected and foreseeable consequence of the agreement; (2) Brembo ****780** knew it was entering into an agreement with a California entity; (3) Brembo negotiated with the managing member of TAW and TAW's attorney, who were both located in California; (4) Brembo knowingly and expressly transacted millions of dollars of business with a California entity; (5) Brembo maintained regular communication with TAW staff and management in California; (6) Brembo clearly targeted the California market by (a) appointing TAW as the exclusive distributor for Brembo products in California; (b) marketing its products in California through its interactive website and trade shows; (c) making direct sales to customers in California with an obligation under the ***645** agreement to reimburse TAW for those sales; and (d) issuing warranties for its products purchased by California customers and thereby creating continuing obligations to thousands of California residents; and (7) the bulk of harm to TAW will be felt in California which accounts for TAW's largest United States sales of Brembo's products.

[16] We agree with the trial court that the record does not show that Brembo purposefully availed itself of the benefits and protections of the laws of California such that it had "fair warning" and should have anticipated being brought into a California court to defend this lawsuit. While the parties had a prior relationship in California, six months before and at the time of the execution of the 2014 agreement the parties' relationship was no longer "California-directed in any meaningful sense." (*Halyard Health, supra,* 43 Cal.App.5th at p. 1076, 256 Cal.Rptr.3d 915.) TAW had moved its principal place of business to North Carolina and the distribution agreement was not limited to California but included the entirety of the United States, Canada, and Mexico. Under the agreement, Brembo shipped its products to TAW's principal place of business in North Carolina. Of particular significance given the 2014 agreement's anticipation of nationwide and international distribution of Brembo products through resales by TAW, Brembo made a commercially reasonable effort "to alleviate the risk of burdensome litigation" in any portion of the designated distribution territory by including choice of law and forum selection clauses limiting the forum in which TAW could file a lawsuit to New York. (*World-Wide Volkswagen, supra,* 444 U.S. at p. 297, 100 S.Ct. 580.)

We see no merit to TAW's assertion that Brembo's shipment of its products to North Carolina is insignificant, compared to where the products were eventually resold by TAW (i.e., California), because pursuant to the California Uniform Commercial Code title to the goods passed to TAW in California where TAW was required to pay state excise taxes

on the products it resold in the state. As our high court has admonished, we do not look at TAW's contacts with California, but instead limit our analysis to an evaluation of Brembo's contacts with the state. Even assuming title to the goods passed to TAW in California, we fail to see how that circumstance demonstrates that Brembo purposefully availed itself of the benefits and protections of the laws of California. Simply put, TAW's unilateral resale of Brembo's products in California is not sufficient to demonstrate that Brembo purposefully availed itself of the privilege of conducting business in California. (*Hanson v. Denckla, supra*, 357 U.S. at p. 253, 78 S.Ct. 1228 ["[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State"].)

[17] Nor are we persuaded by TAW's assertion that Brembo knew that TAW resold Brembo's products in California for "millions of dollars." While ***646** the "foreseeability ****781** of causing *injury* in another State should be sufficient to establish" sufficient contacts in that state "when policy considerations so require, ... this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction. [Citation.] Instead, 'the foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.' [Citation.]" (*Burger King, supra*, 471 U.S. at p. 474, 105 S.Ct. 2174, fn. omitted.) Brembo's mere knowledge that TAW would resell Brembo products in California, without Brembo having some significant control over the ultimate distribution of its products, does not "establish purposeful availment under the effects test." (*Pavlovich, supra*, 29 Cal.4th at p. 276, 127 Cal.Rptr.2d 329, 58 P.3d 2; see *Ibid.* [" '[t]he fact that a defendant's actions in some way set into motion events which ultimately injured a California resident' cannot, by itself, confer jurisdiction over that defendant"].)

We similarly find no merit to TAW's argument that the agreement's choice-of-law and forum selection clauses are irrelevant. As recognized with approval by the high court, choice-of-law and forum selection provisions are frequently used in commercial contracts as mechanisms allowing " 'potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will or will not render them liable to suit.' " (*Burger King, supra*, 471 U.S. at p. 472 & fn. 14, 105 S.Ct. 2174, quoting *World-Wide Volkswagen, supra*, 444 U.S. at p. 297, 100 S.Ct. 580.) Regarding the relevance of choice-of-law provisions, the *Burger King* court explained that a "choice-of-law *analysis* – which focuses on all elements of a transaction, and not simply on the defendant's conduct – is distinct from minimum-contacts jurisdictional analysis – which focuses at the threshold solely on the defendant's purposeful connection to the forum. Nothing in our cases, however, suggests that a choice-of-law *provision* should be ignored in considering whether a defendant has 'purposefully invoked the benefits and protections of a State's law' for jurisdictional purposes." (*Burger King, supra*, 471 U.S. at pp. 481-482, 105 S.Ct. 2174; fn. omitted, original italics.)

[18] Choice-of-law and forum selection clauses, "standing alone", are not dispositive, and may be discounted where a foreign corporation's other minimum contacts establish jurisdiction in the forum state. However, they may "reinforce[ ]" whether or not a foreign corporation has made such "a deliberate affiliation with the forum State" as to support a conclusion that it should have reasonably foreseen "possible litigation there." (*Burger King, supra*, 471 U.S. at p. 482, 105 S.Ct. 2174; see *ibid.* [*Burger King* court found nonresident defendant franchisee was required to defend against plaintiff franchisor's lawsuit in Florida where, among other things, defendant had " 'purposefully availed himself of the benefits and protections of Florida's laws' by entering into contracts expressly providing that those laws would govern franchise disputes" at issue in lawsuit].)

***647** Here, Brembo's contacts with the United States were already directed away from California before the parties entered into the agreement. TAW had moved its principal place of business to North Carolina, Brembo was shipping its products to North Carolina, and TAW's resale of Brembo's products was expanded to include the entirety of the United States, Canada, and Mexico. Given these circumstances, Brembo made a concerted effort to "alleviate the risk of burdensome litigation" (*World-Wide Volkswagen, supra*, 444 U.S. at p. 297, 100 S.Ct. 580) by limiting ****782** dispute resolution to New York. The agreement's choice of law and forum selection clauses reinforces our finding that Brembo did not have fair warning and could not have reasonably anticipated being brought into a California court to defend against TAW's lawsuit concerning the termination of the

agreement. To conclude otherwise would appear to conflict with the high court's admonishment that a state should not interfere with a foreign corporation's reasonable efforts " ' to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.' " (*Daimler, supra*, 571 U.S. at p. 139, 134 S.Ct. 746, quoting in part *Burger King, supra*, 471 U.S. at p. 472, 105 S.Ct. 2174; see also *Halyard Health, supra*, 43 Cal.App.5th at p. 1076, 256 Cal.Rptr.3d 915 [appellate court rejected plaintiff's argument that parties' execution of distribution agreement was "California-directed" where, among other factors, parties' choice of law selection reflected "a deliberate affiliation" with both parties' state of incorporation (Delaware), and not California].)

We also see no merit to TAW's reliance on the fact that its lawsuit is premised on a violation of the Franchise Act. In *Shaffer, supra*, 433 U.S. 186, 97 S.Ct. 2569, the high court specifically rejected the plaintiff's assertion that "if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute." (*Id.* at p. 215, 97 S.Ct. 2569.) In other words, even if a forum state's law governs the obligations of a defendant, such a finding "does not demonstrate that [the defendant has] 'purposefully avail[ed itself] of the privilege of conducting activities within the forum State,' ... in a way that would justify bringing [it] before" the forum state. (*Id.* at p. 216, citation omitted 97 S.Ct. 2569.) Whether or not the enforceability of the parties' 2014 agreement is governed by California law "has nothing to do with whether enforceability may be determined by a California court. The required relationship among [Brembo, California, and this lawsuit] cannot be based on what [TAW's] argument assumes, i.e., that California substantive law applies." (*Halyard Health, supra*, 43 Cal.App.5th at p. 1072, fn. 7, 256 Cal.Rptr.3d 915 [*Halyard Health* court found that plaintiff's assumption that California law would apply "is not one that leaps off the pages" of the contract in which the parties agreed that the contract " 'shall be governed by and construed and enforced in accordance with the substantive laws of the State of Delaware and the ***648** federal laws of the United States of America applicable therein, as though all acts and omissions related hereto occurred in Delaware' "].)

Lastly, we are not persuaded by TAW's assertions that the trial court abused its discretion by refusing to consider Brembo's direct sales, marketing, advertising, and issuance of warranties for its products that were resold by TAW to California consumers as relevant factors. Such evidence would not be relevant, let alone material, to the subject of this lawsuit, Brembo's alleged wrongful termination of the agreement. The controversy therefore lacks any substantial connection to Brembo's purported contacts with California through its direct sales, marketing and advertising activities and its issuance of warranties for its products sold in California. (Cf. *Snowney, supra*, 35 Cal.4th p. 1070, 29 Cal.Rptr.3d 33, 112 P.3d 28 [plaintiff who filed lawsuit based on defendant hotels' failure to provide notice of energy surcharges during reservation process and in their advertising met the relatedness requirement as "the injury allegedly suffered by plaintiff in this case relates *directly* to the content of defendants' advertising in California" (original italics)].) The fact that TAW resold Brembo products in California for millions of dollars and therefore the termination could have ****783** an effect on TAW in California "does not establish the requisite connection between [Brembo,] this forum and the specific claim[ ] at issue in this suit. [Citation.]" (*Halyard Health, supra*, 43 Cal.App.5th at p. 1073, 256 Cal.Rptr.3d 915; see *Id.* at p. 1069, 256 Cal.Rptr.3d 915 [specific jurisdiction not demonstrated where, among other factors, defendant foreign corporation's California "sales" in the millions were not sufficiently connected to the gist of plaintiff's declaratory relief action concerning the meaning and enforceability of an indemnification clause in the parties' agreement].)

In sum, we conclude an affirmance is required because TAW has not shown on this record that Brembo had minimum contacts with California justifying an exercise of either general or specific jurisdiction over it. Accordingly, we do not reach whether an exercise of personal jurisdiction would be reasonable or whether California would be a convenient forum for this lawsuit.

III., IV.[**] [NOT CERTIFIED FOR PUBLICATION]

V. DISPOSITION

The separate appeal from the June 28, 2019 order is dismissed. The March 28, 2019 order granting the motion to quash service of summons and the June ***649** 28, 2019 order insofar as it denied the motion for reconsideration are affirmed. Defendant and respondent Brembo S.p.A. is awarded costs on appeal.

Fujisaki, Acting P. J., and Jackson, J., concurred.

Appellant's petition for review by the Supreme Court was denied December 9, 2020, S264694.

All Citations

53 Cal.App.5th 632, 267 Cal.Rptr.3d 771, 20 Cal. Daily Op. Serv. 8620, 2020 Daily Journal D.A.R. 8924

Footnotes

[*] Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of Parts III. and IV.

[**] See footnote, ante, page 632.