

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA  
FIRST DISTRICT**

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**Case No.: 1D09-246**  
L.T. Case No.: 2008-CA-0001108

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EDWARD A. LABRY, III, WILLIAM B. BENTON JR,  
and J. KEVIN ADAMS  
Appellants,

v.

WHITNEY NATIONAL BANK  
Appellee.

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APPEAL FROM THE CIRCUIT COURT  
OF THE FIRST JUDICIAL CIRCUIT  
IN AND FOR WALTON COUNTY, FLORIDA

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**INITIAL BRIEF OF APPELLANT**

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## **PRELIMINARY STATEMENT**

In this brief, Appellants EDWARD A. LABRY, III, WILLIAM B. BENTON JR, and J. KEVIN ADAMS, will be referred to as “Labry,” “Benton,” and “Adams” individually and “Appellants” collectively. Appellee Whitney National Bank will be referred to as both “Whitney” and “Appellee.” The Appendix attached hereto is cited according to the tab and page number as App. Tab \_\_ at p. \_\_.

### **STATEMENT OF THE CASE AND OF THE FACTS**

On August 8, 2008, Whitney filed a Complaint in the Circuit Court in and for Walton County against Labry, Benton, and Adams seeking to recover under Limited Continuing Guaranties executed by each individual defendant related to an alleged default under a promissory note executed by defendant AB7G, LLC, a Florida Limited Liability Company. App. Tab 1 at p. 19-36. The only jurisdictional allegation made against Appellants in Whitney’s Complaint was that each “has engaged in business in Walton County, Florida, including without limitation, the transaction relating to the note and guaranty that is the subject of this litigation.” App. Tab 1 at p. 1- 2, ¶¶ 3, 4, & 5. On September 18, 2008, Appellants filed a Motion to Dismiss based on lack of personal jurisdiction and submitted individual affidavits in support. App. Tab 2 at p. 37.

The affidavits submitted by Labry, Benton, and Adams asserted the following facts:

- Each is a resident of Tennessee.
- At no time have they ever been residents of the State of Florida.
- The Limited Continuing Guaranties which are the subject of Whitney's Complaint were executed in the State of Tennessee and the Limited Continuing Guaranties do not provide for the performance of any act or obligation in the State of Florida.
- They have never operated, conducted, engaged in, or carried on a business or business venture or had an office or agency in the State of Florida in their personal capacities.
- They do not personally own any real property in the State of Florida.
- Other than executing the Limited Continuing Guaranties in the State of Tennessee, they did not have any personal dealings with Whitney involving the transactions alleged in the Complaint.
- Any visits to the State of Florida have been either for the purpose of vacationing or in their capacity as an officer of a corporation doing business for that company.

App. Tab 2 at p. 42-47.

On November 11, 2008, Whitney filed a Response to Labry, Benton, and Adams' Motion to Dismiss and attached an affidavit of Eric K. Sander (hereinafter referred to as "Sander"), Vice President of Whitney National Bank. App. Tab 3 at p. 48, 59. In the Sander's affidavit, the only facts asserted regarding the acts of Labry, Benton, and Adams were that each executed a Limited Continuing Guaranty and provided a certified financial statement to Whitney for the purpose of issuing the loan to defendant AB7G, LLC. After a hearing on the matter, Appellants' Motion to

Dismiss was denied by the Circuit Court by an Order dated January 5, 2009. App. Tab 4 at p. 104. Appellants filed a Notice of Appeal of Non-Final Order on January 14, 2009. App. Tab 5 at p. 106. This appeal follows.

### **SUMMARY OF THE ARGUMENT**

The Circuit Court erred in denying Appellants' Motion to Dismiss because Whitney failed to allege and subsequently prove sufficient jurisdictional facts to exert personal jurisdiction over Appellants under Florida's long arm statute. Additionally, Appellants lack sufficient minimum contacts with Florida to satisfy due process requirements.

In order to assert long-arm jurisdiction over a non-resident defendant, a plaintiff must allege specific jurisdictional facts in its complaint. The sole jurisdictional allegation in Whitney's Complaint is that Labry, Benton, and Adams "engaged in business in Walton County, Florida, including without limitation, the transaction relating to the note and guaranty that is the subject of this litigation." Without specifically citing the long-arm statute, Whitney appears to assert long-arm jurisdiction under Section 48.193(1)(a), Florida Statutes, which provides for personal jurisdiction for causes of action arising out of the non-resident defendant's "[o]perating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state." In their Motion to Dismiss for lack of personal jurisdiction, Appellants submitted affidavits contesting the jurisdictional

allegations of Whitney's Complaint. The burden of proof shifted then to Whitney to prove their jurisdictional allegations through sworn proof by the preponderance of the evidence. The affidavit submitted by Whitney failed to do so. Whitney has not submitted any sworn evidence to contradict Appellants' contention that they have not engaged in business in Florida. The fact that Appellants executed Limited Continuing Guaranties in the State of Tennessee for the obligations of a Florida company is not sufficient to establish jurisdiction under the long-arm statute.

Additionally, to the extent that Labry, Benton, and Adams have visited the State of Florida while conducting or engaging in business, it was done in the capacity of an officer of a company doing business for that company. Thus, the "corporate shield" doctrine precludes them from being forced to defend suit in Florida in their individual capacity.

Assuming *arguendo*, that Whitney has alleged sufficient jurisdictional facts to satisfy the first prong of the personal jurisdiction inquiry, Appellants lack sufficient minimum contacts with the State of Florida such that to exercise personal jurisdiction over them would violate due process and offend the traditional notions of fair play and substantial justice. Therefore, the Circuit Court erred when it denied Appellants' Motion to Dismiss for lack of personal jurisdiction, and the order below should be REVERSED.

## STANDARD OF REVIEW

The standard of review for a trial court's ruling on a motion to dismiss based on a question of law, such as a finding of the existence or lack of personal jurisdiction is *de novo* review. See Execu-Tech Bus. Sys. v. New Oji Paper Co., 752 So. 2d 582, 584 (Fla. 2000); Ganiko v. Ganiko, 826 So. 2d 391, 393 (Fla. 1st DCA 2002) (“The review of a trial court's determination of the existence or non-existence of personal jurisdiction involves evaluating the same documentary evidence relied on by the trial court and making an independent determination as to the correct principle of law. This is the *de novo* standard of review”).

## ARGUMENT

A two prong analysis is necessary when determining if a plaintiff has sufficiently established personal jurisdiction over a non-resident of Florida. First, the court must determine if the plaintiff's complaint alleges sufficient jurisdictional facts to bring the action within Florida's long-arm statute, Section 48.193, Florida Statutes. If so, the court must then determine if the defendant has sufficient minimum contacts with Florida to satisfy due process requirements. Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 502 (Fla. 1989).

**I. Whitney failed to allege and prove sufficient jurisdictional facts to bring Appellants under the personal jurisdiction of Florida courts pursuant to Florida's long-arm statute.**

“In order to assert long-arm jurisdiction over a non-resident defendant, a

plaintiff must allege specific facts in his complaint, sufficient to fall within the language of the statute. Failure to allege such specific facts constitutes grounds for granting the defendant's motion to dismiss the cause of action.” Renda v. Peoples Fed. Sav. & Loan Assoc., 538 So. 2d 860, 862 (Fla. 1st DCA 1988) (holding that a complaint merely alleging breach of guaranty and attaching a copy of said guaranty is insufficient to establish defendant was conducting business in Florida and falling within long-arm statute ). “[A] plaintiff seeking to subject a nonresident defendant to the jurisdiction of the court via the long-arm statute does not satisfy the requirement of Section 48.193, Florida Statutes, by alleging facts which show only a possibility of jurisdiction.” Holton v. Prosperity Bank of St. Augustine, 602 So. 2d 659, 661 (Fla. 5th DCA 1992).

In Whitney’s Complaint, the sole basis upon which it alleges personal jurisdiction exists over Labry, Benton, and Adams is that each “has engaged in business in Walton County, Florida, including without limitation, the transaction relating to the note and guaranty that is the subject of this litigation.” App. Tab 1 at p. 1-2. Without specifically citing the long-arm statute in its Complaint, Whitney appears to assert that Florida courts have long-arm jurisdiction pursuant to Section 48.193(1)(a), Florida Statutes. Florida’s long arm-statute, section 48.193(1)(a) provides:

(1) Any person, whether or not a citizen or resident of this state, who *personally*

or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

- (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

(emphasis added).

Whitney's Complaint and subsequent affidavit filed in support thereby fail to establish that Labry, Benton, or Adams were conducting business in Florida and that Whitney's cause of action against them arose therefrom. "A defendant wishing to contest the allegations of the complaint concerning jurisdiction or to raise a contention of minimum contacts must file affidavits in support of his position." Venetian Salami Co., 554 So. 2d at 502. Therefore, in response to Whitney's Complaint, Labry, Benton, and Adams filed a Motion to Dismiss for lack of personal jurisdiction and submitted individual affidavits. The affidavits established the following facts:

- Each is a resident of Tennessee.
- At no time have they ever been residents of the State of Florida.
- The Limited Continuing Guaranties which are the subject of Whitney's Complaint were executed in the State of Tennessee and the Limited Continuing Guaranties do not provide for the performance of any act or obligation in the State of Florida.
- They have never operated, conducted, engaged in, or carried on a business or business venture or had an office or agency in the State of Florida in their personal capacities.

- They do not personally own any real property in the State of Florida.
- Other than executing the Limited Continuing Guaranties in the State of Tennessee, they did not have any personal dealings with Whitney involving the transactions alleged in the Complaint.
- Any visits to the State of Florida have been either for the purpose of vacationing or in their capacity as an officer of a corporation doing business for that company.

App. Tab 2 at p. 42-47.

After Labry, Benton, and Adams submitted sworn proof contesting the jurisdictional allegations of Whitney's Complaint, the burden of proof shifted to Whitney to submit sworn proof in support of their jurisdictional allegations. See Norwest Bank Minneapolis, N.A. v. American Centennial Ins. Co., 493 So. 2d 101, 102 (Fla. 4th DCA 1986). The only sworn proof submitted by Whitney in support of their jurisdictional allegations was the affidavit of Sander. App. Tab 3 at p. 59-61. The basic facts asserted in Sander's affidavit related to Labry, Benton, and Adams were that each executed a Limited Continuing Guaranty and provided a certified financial statement to Whitney for the purpose of issuing the loan to defendant AB7G, LLC.

Sander's affidavit does not refute the testimony provided in Appellants' affidavits and does not assert any facts supporting the allegations in Whitney's Complaint that Appellants engaged in business in Walton County, Florida. Although

Appellants executed Guaranties for a loan made by Whitney to a Florida limited liability company, the Guaranties in question were executed in the State of Tennessee and on their face do not provide for the performance of any act or obligation in the State of Florida. App. Tab 1 at p. 19-36. The record reflects that other than executing the Limited Continuing Guaranties in the State of Tennessee and providing financial statements to Whitney, Appellants did not have any personal dealings with Whitney involving the transactions alleged in the Complaint. Therefore, Sander's affidavit does not prove sufficient facts to support the allegation that Appellants engaged in business in the State of Florida and that Whitney's cause of action arose out of that business in order to establish long-arm personal jurisdiction pursuant to Section 48.193(1)(a), Florida Statutes.

The mere fact that Appellants executed the Limited Continuing Guaranties in the State of Tennessee to guaranty the obligations of a Florida company does not establish that they engaged in business in the State of Florida pursuant to Section 48.193(1)(a), Florida Statutes. In Edwards v. Geosource, Inc., 473 So. 2d 36, 37 (Fla. 1st DCA 1985), this Court held that a non-resident's execution of a guaranty for the obligations of a Florida corporation, in and of itself, is insufficient to confer personal jurisdiction. See also Renda, 538 So. 2d at 862. Even where a non-resident executes a guaranty in favor of a bank in Florida and the underlying note is to be paid in Florida, it is not sufficient, by itself, to subject a non-resident guarantor to the jurisdiction of a

Florida court. Holton, 602 So. 2d at 663. In other words, “a guarantor’s mere obligation to honor a payment obligation of another, even if that obligation is required to be made in Florida is not a substantial activity to subject the nonresident guarantor to the jurisdiction of a Florida court.” Id. at 662-63; Hotchkiss v. FMC Corp., 561 So. 2d 1261 (Fla. 2nd DCA 1990). Therefore, Appellants signing of the Guaranties for the obligations of a Florida company is not sufficient to establish personal jurisdiction.

In Whitney’s Response to the Motion to Dismiss, it pointed to Kane v. American Bank of Merritt Island, 449 So. 2d 974 (Fla. 5th DCA 1984) in support of its contention that signing a guaranty for the obligations of a Florida company is sufficient to establish personal jurisdiction. However in Kane, unlike the instant case, the plaintiff asserted long-arm jurisdiction under Section 48.193(1)(g), Florida Statutes. Section 48.193(1)(g) provides long-arm jurisdiction where the cause of action arises from the breach of a contract in Florida by a failure to perform acts required by the contract to be performed in Florida. Whitney did not assert this jurisdictional basis in its Complaint and is precluded from raising this for the first time in its Response to the Motion to Dismiss or on appeal.

Moreover, Kane is contrary to First District precedent and it is questionable whether it is the current view of the Fifth District. First, Kane is in conflict with this Court’s decisions in Edwards v. Geosource, Inc. and Renda v. Peoples Fed. Sav. & Loan Assoc.. In Renda, this Court specifically held that even where the underlying

loan is issued for the purpose of buying property in Florida, a non-resident maker of a guaranty for that loan is not subject to personal jurisdiction pursuant to Section 48.193(1)(g), Florida Statutes, if the guaranty does not require the performance of any acts in the State of Florida. 538 So. 2d at 863-64. A review of the record and the plain language of the Limited Continuing Guaranties in this case indicate that the Guaranties do not require the performance of any acts in the State of Florida. Thus, even if Whitney could assert jurisdiction at this stage under Section 48.193(1)(g), the record in this case does not support it under First District precedent.

Second, given the Fifth District's subsequent holding in Holton v. Prosperity Bank of St. Augustine, 602 So. 2d 659 (Fla. 5th DCA 1992), the persuasive weight of Kane is questionable. In Holton, the Fifth District held the plaintiff bank's reliance on the guaranty alone attached to its complaint was not sufficient to prove long-arm jurisdiction. The court further held that even if a non-resident executes a guaranty in favor of a bank in Florida and the underlying note is to be paid in Florida, it is not sufficient, by itself, to subject a non-resident guarantor to the jurisdiction of a Florida court. Holton, 602 So. 2d at 663.

When the defendant controverts by affidavit the long-arm jurisdictional allegations of the plaintiff's complaint, the "burden shift[s] to [the plaintiff] to show, by a preponderance of the evidence, that [the defendant is] subject to jurisdiction in this state pursuant to those statutes." Passy v. Lewis, 553 So. 2d 223, 224 (Fla. 1st

DCA 1989). Where a plaintiff alleges that the defendant engaged in business in Florida as the basis for jurisdiction, the defendant controverts that assertion by affidavit, and the plaintiff fails to file an affidavit demonstrating that indeed the defendant has engaged in business in Florida, the plaintiff fails to meet his burden of proof and the complaint must be dismissed for lack of personal jurisdiction. Horowitz v. Rose Printing Co, Inc., 664 So. 2d 325, 327 (Fla. 1st DCA 1995). In this case, Whitney has simply failed to provide any sworn proof, much less met a preponderance of evidence standard, that Labry, Benton, or Adams have engaged in business in the State of Florida and that its claims arose from that business.

Even if Whitney had provided sworn evidence that Labry, Benton, or Adams had engaged in some business in the State of Florida, Appellants' affidavits assert that such activity was done in their capacity as an officer of a company doing business for that company. App. Tab 2 at p. 42-47. Under these circumstances, the "corporate shield" doctrine precludes jurisdiction over a corporate representative in his individual capacity. See Doe v. Thompson, 620 So.2d 1004 (Fla. 1993). "Acts of a nonresident corporate employee performed in his corporate capacity do not form the basis of jurisdiction over the employee in an individual capacity under Florida's long-arm statute." Schnetzler v. Cross, 688 So. 2d 445, 446 (Fla. 1st DCA 1997).

**II. Whitney failed to allege and prove sufficient jurisdictional facts to satisfy the due process requirements of fair play and substantial justice.**

Assuming *arguendo* that Whitney had alleged and proved sufficient jurisdictional facts to establish jurisdiction over Appellants under Florida's long-arm statute, Whitney has failed to establish the second part of the personal jurisdiction inquiry which requires the Court to determine whether Appellants have sufficient minimum contacts to justify being subjected to the jurisdiction of Florida's courts. See Venetian Salami Co., 554 So. 2d at 499.

Whitney has not submitted any proof of Appellants' due process minimum contacts other than the execution of the Limited Personal Guaranties and submission of financial statements. A non-resident's execution of a guaranty for the obligations of a Florida corporation, in and of itself, is insufficient minimum contacts to confer personal jurisdiction. Renda v. Peoples Fed. Sav. & Loan Assoc., 538 So. 2d 860, 862 (Fla. 1st DCA 1988); Edwards v. Geosource, Inc., 473 So. 2d 36, 37 (Fla. 1st DCA 1985). Even if a non-resident executes a guaranty in favor of a bank in Florida and the underlying note is to be paid in Florida, it is not sufficient, by itself to establish minimum contacts. Holton v. Prosperity Bank of St. Augustine, 602 So. 2d 659, 663 (Fla. 5th DCA 1992).

Appellants do not have the requisite minimum contacts that would subject them to the personal jurisdiction of the courts of this state. Appellants have not purposefully

availed themselves of the privilege of conducting activities in Florida, such that they would anticipate being haled into court in Florida in their individual capacities. See Grogan v. Archer, 669 So. 2d 289, 293 (Fla. 5th DCA 1996) (“Courts have recognized that one component in analyzing whether a defendant possesses sufficient minimum contacts is the question of foreseeability. Courts should examine ‘whether the defendant's conduct and activities in the state are such that he should reasonably anticipate being haled into court there’”). In this case, the record is devoid of any evidence establishing such minimum contacts. To the extent Appellants have visited the State of Florida, such visits were made either for the purpose of vacationing or in the capacity as an officer of a corporation doing business for that company. App. Tab 2 at p. 42-47.

In addition to the cases cited herein dealing specifically with non-resident makers of guaranties, courts have held sufficient minimum contacts do not exist to exercise personal jurisdiction in other analogous cases. See Norwest Bank Minneapolis, N.A., 493 So. 2d at 102 (holding that national banking association with offices only in Minnesota and which was assigned mortgages on condominiums located in Florida as a result of solicitation of Minnesota mortgage broker, and which had never carried on business in Florida, lacked sufficient minimum contact under long-arm statute to be subject to courts personal jurisdiction); Dunn v. Upjohn Co, 350 So. 2d 127, 128-129 (Fla. 1st DCA 1977) (holding that pharmacist who filled a

prescription in Georgia and delivered it to a Florida resident in Georgia was not subject to jurisdiction in Florida even if the pharmacist knew that the recipient was a Florida resident); Grogan, 669 So. 2d at 293 (holding that sufficient minimum contacts did not exist with State of Florida even though Georgia trucking company had permits allowing it to travel to Florida, had traveled to Florida on business in the past, and one of company's trucks had driven to Miami); Ganiko, 826 So. 2d at 395 (nonresident did not have sufficient minimum contacts with State of Florida when nonresidents' only contacts with Florida had been entering into a contract with a Florida resident, agreeing to make payment in Florida, and making payments in Florida).

### CONCLUSION

The Circuit Court erred in denying Appellants' Motion to Dismiss and should be REVERSED.

Respectfully submitted this 27 day of January, 2009.



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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this appellate brief is being submitted in Times New Roman 14-point font in compliance with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been furnished, via U.S. Mail this 27 day of January, 2009, to: Linda A. Hoffman, Esq., Robert S. Rushing, Esq., 1300 West Main Street, Pensacola, Florida 32502.



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