

IN THE SUPREME COURT OF THE STATE OF NEVADA

AFFINITY NETWORK INC. D/B/A ANI NETWORKS,

Appellant/Cross-Respondent,

vs.

MICHAEL SCHRECK, INDIVIDUALLY, AND AS HEAD OF SPECIAL

SITUATIONS GROUP OF YORKVILLE ADVISORS, LLC; AND WILLIAM

GARDNER, INDIVIDUALLY, AND AS SENIOR COUNSEL, SPECIAL

SITUATIONS GROUP OF YORKVILLE ADVISORS, LLC,

Respondents/Cross-Appellants,

and

YORKVILLE ADVISORS, LLC,

Respondent.

No. 60355

FILED

OCT 31 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Hingerson*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a district court order, certified as final under NRCP 54(b), dismissing certain defendants from the underlying action for lack of jurisdiction and denying attorney fees. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Appellant/cross-respondent Affinity Network, Inc. (Affinity), entered into a service agreement with CloseCall America, Inc. (CloseCall), to provide wholesale telecommunication carrier services (the Service Agreement). Affinity is a California corporation with its principal place of business in Las Vegas, Nevada. Later, CloseCall's parent company, MobilePro Corp. (MobilePro), defaulted on a loan made by Y.A. Global Investments, L.P. (YA Global). As a result, respondent/cross-appellant Yorkville Advisors, LLC (Yorkville), arranged for some of CloseCall's assets to be sold off to Birch Communications, Inc. (Birch), to satisfy the

debt. Yorkville is a Delaware corporation with a principal place of business in New Jersey. On the day the transaction was scheduled to close, Affinity sent a letter to CloseCall stating that CloseCall had failed to pay for services under the Service Agreement and that Affinity was terminating the agreement. This action placed MobilePro's transaction with Birch in jeopardy. Respondents William Gardner and Richard Schreck, who are employees of Yorkville, contacted Affinity by telephone and e-mail the same day to request it resume service. Affinity alleges that during those conversations, Yorkville agreed to pay CloseCall's delinquent amount. Additionally, Affinity alleges that Gardner and Schreck personally guaranteed payment of CloseCall's future debts under the Service Agreement. Yorkville denies that a contract was ever formed and evidence showed that CloseCall, not Yorkville, wired the delinquent amount of \$85,000 to Affinity.

Affinity resumed service and the Birch transaction closed successfully. Three months passed and CloseCall accrued another delinquent balance. When CloseCall did not respond to Affinity's requests for payment, Affinity filed a complaint in the Eighth Judicial District Court against eleven different defendants, alleging breach of contract and unjust enrichment. At Yorkville's request, the district court dismissed the action against it for lack of personal jurisdiction. The district court also granted Schreck and Gardner's subsequent motion to dismiss, but denied their request for attorney fees. Affinity now appeals the orders dismissing the complaint against Yorkville, Schreck, and Gardner and argues that the allegations of a contract and personal guarantee created a prima facie case for personal jurisdiction. Schreck and Gardner filed a cross-appeal, arguing that the district court abused its discretion by refusing to award

attorney fees because Affinity unreasonably maintained an action against them even though their employer was dismissed for lack of personal jurisdiction.

The district court did not err in concluding that it lacked personal jurisdiction over Yorkville, Schreck, and Gardner

We review a district court's dismissal of an action for lack of personal jurisdiction de novo when the facts are not disputed. *Baker v. Eighth Judicial Dist. Court*, 116 Nev. 527, 531, 999 P.2d 1020, 1023 (2000). The plaintiff has the burden of establishing a prima facie showing of personal jurisdiction by "competent evidence of essential facts." *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 692, 857 P.2d 740, 743 (1993). The district court does not act as fact-finder during this stage and instead "accepts properly supported proffers of evidence by the plaintiff as true." *Id.* at 693, 857 P.2d at 744. However, the plaintiff may not simply rely on the allegations of the complaint and therefore must introduce "some evidence" supporting the exercise of personal jurisdiction. *Id.* When factual disputes arise, they are resolved in favor of the plaintiff. *Id.*

NRS 14.065(1), Nevada's long-arm statute, "permits the exercise of personal jurisdiction over a nonresident defendant unless the exercise of jurisdiction would violate due process." *Consipio Holding, BV v. Carlberg*, 128 Nev. ___, ___, 282 P.3d 751, 754 (2012). Due process requires that "minimum contacts" exist "between the defendant and the forum state 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Id.* at ___, 282 P.3d at 754 (quoting *Trump*, 109 Nev. at 698, 857 P.2d at 747). The defendant "should reasonably anticipate being haled into court" in the forum state due to its conduct and connection there. *Id.* at ___, 282 P.3d

at 754 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

The parties agree that specific, not general, personal jurisdiction is at issue here. The requirements for personal jurisdiction are encompassed in a three-part inquiry: (1) whether the defendant purposefully availed itself to the privilege of conducting business in the state, (2) whether the cause of action arises out of the defendant's forum-related activities, and (3) whether the exercise of jurisdiction over the defendant is reasonable. *See id.* at ___, 282 P.3d at 755; *see also Roth v. Garcia Marquez*, 942 F.2d 617, 620-21 (9th Cir. 1991).

Parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another state" purposefully avail themselves to the personal jurisdiction of the courts in that state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985). Such contacts must be "significant" and "substantial," and not "random," "fortuitous," or "attenuated." *Munley v. Second Judicial Dist. Court*, 104 Nev. 492, 495-96, 761 P.2d 414, 416 (1988). The quality of the contacts, not the quantity, is the touchstone of personal jurisdiction analysis. *Trump*, 109 Nev. at 700, 857 P.2d at 749.

"Under NRS 14.065(2)(a), the courts of Nevada may exercise personal jurisdiction over nonresident defendants who transact any business in Nevada." *Levinson v. Second Judicial Dist. Court*, 103 Nev. 404, 406, 742 P.2d 1024, 1025 (1987). However, merely contracting with a Nevada resident is not enough to establish specific personal jurisdiction, even if the contract is partially performed in Nevada. *See S & D Trading Academy, LLC v. AAFIS, Inc.*, 494 F.Supp.2d 558, 565 (S.D. Tex. 2007). Instead, the contract must create a "substantial connection" with the

forum. *Burger King*, 471 U.S. at 475. In analyzing such a contract, four factors are relevant: (1) prior negotiations, (2) contemplated future consequences, (3) the terms of the contract, and (4) the parties' actual course of dealing. *Id.* at 479. As a contract, these principles also apply to guarantees as well. *See Abbott v. Second Judicial Dist. Court*, 90 Nev. 321, 324, 526 P.2d 75, 76 (1974) (concluding that personal jurisdiction existed over nonresident defendant stockholder who was the head of an executive committee formed to address the corporation's financial difficulties, helped procure a bank loan, and gave a personal guarantee in the event of default).

Use of the telephone and e-mail can be sufficient to establish personal jurisdiction over a non-resident defendant. *See Peccole v. Eighth Judicial Dist. Court*, 111 Nev. 968, 971, 899 P.2d 568, 570 (1995) (“[U]se of the telephone can be sufficient for ‘purposeful availment.’”); *see also Burger King*, 471 U.S. at 476 (“Jurisdiction . . . may not be avoided merely because the defendant did not *physically* enter the forum state.”); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264-67 (6th Cir. 1996) (holding that personal jurisdiction existed over out-of-state defendant whose internet-based transactions with the forum state included sending regular e-mails). However, we conclude that Yorkville’s and its employees’ contacts with Nevada did not amount to a substantial connection given the quality of the communications. Taking Affinity’s allegations in the complaint as true by assuming that Yorkville and its employees guaranteed the payment of CloseCall’s debts, Affinity’s evidence shows that: (1) prior negotiations were limited to Yorkville and its employees acting as intermediaries between Affinity and CloseCall to resolve the conflict over the Service agreement; (2) this exchange included a

statement by either Schreck or Gardner indicating that they would “make sure it happens,” which was not memorialized by a written agreement as required by the Statue of Frauds; and (3) the parties had no contact following the events of December 16, 2010. Further, Yorkville and its employees were not involved in procuring the underlying Service Agreement. See *Abbott*, 90 Nev. at 324, 526 P.2d at 76. Even though enforcement of the guaranty would have effects in Nevada, these effects were not substantial because they only would have involved sending money into Nevada. See *Basic Food Indus., Inc. v. Eighth Judicial Dist. Court*, 94 Nev. 111, 114, 575 P.2d 934, 936 (1978) (the mere signing of a guaranty in another state by itself does not subject the guarantor to personal jurisdiction even though the guarantee caused effects inside the state). Further, Affinity failed to present evidence that Schreck and Gardner were personally liable on the guaranty. Therefore, we conclude that the district court did not err in dismissing the action against Yorkville, Schreck, and Gardner for lack of personal jurisdiction.

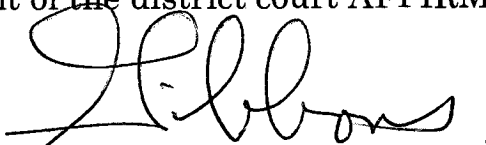
The district court did not manifestly abuse its discretion by refusing to award Schreck and Gardner attorney fees

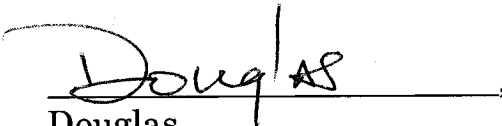
We review a district court’s order denying attorney fees for manifest abuse of discretion. *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). NRS 18.010(2)(b) provides that attorney fees may be awarded when a claim is “brought or maintained without reasonable ground or to harass the prevailing party.”

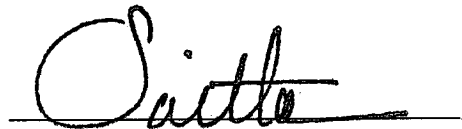
We conclude that the district court did not manifestly abuse its discretion by refusing to award attorney fees to Schreck and Gardner. Affinity alleged that Schreck and Gardner made a personal guarantee, a claim which could have survived even when the district court determined it lacked personal jurisdiction over their employer. This separate

allegation provided reasonable grounds to maintain the action against Schreck and Gardner even after the complaint was dismissed as to Yorkville. Further, Schreck and Gardner did not present evidence showing that Affinity intentionally made false allegations or disregarded the truth in retaining them in as defendants. *See Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996, 860 P.2d 720, 725 (1993) (factors for awarding attorney fees under NRS 18.010 include whether the plaintiff made false allegations, disregarded the truth, or proceeded in bad faith). Therefore, we conclude that the district court did not abuse its discretion when it refused to award attorney fees to Schreck and Gardner. Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Saitta

cc: Hon. David B. Barker, District Judge
Robert F. Saint-Aubin, Settlement Judge
Pisanelli Bice, PLLC
Lewis & Roca, LLP/Las Vegas
Eighth District Court Clerk

¹We have considered the parties' remaining arguments and conclude that they are without merit.