

Not Reported in F.Supp., 1995 WL 555581 (E.D.La.)  
(Cite as: 1995 WL 555581 (E.D.La.))



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United States District Court, E.D. Louisiana.  
Jeffrey Hunter CONDALARY

v.

Linda CAMPBELL, et al.

Civ. A. No. 95-664.

Sept. 18, 1995.

\*1 Before the Court is a Motion to Set Aside Default and a Motion and to Dismiss for Lack of Personal Jurisdiction filed on behalf of defendant, Allen Bitter. Determining in its discretion that oral argument was not necessary, the Court CANCELLED the hearing previously scheduled for September 6, 1995. Having reviewed the pleadings, the memoranda and the applicable law, the Court finds the Motion to Set Aside Default meritorious. The Court further finds the Motion to Dismiss devoid of merit.

## I. BACKGROUND

At its most rudimentary, this case involves alleged damages resulting from the purchase of “diseased” dairy goats. Plaintiff has alleged causes of action based upon: (1) tort; (2) breach of contract; (3) civil fraud; and (4) breach of warranty.

Specifically<sup>FNI</sup>, in August, 1994, Allen Bitter (herein “Bitter”), a dairy goat farmer in New York, received a call from Mr. **Charles Leary** (herein “Leary”) of Mt. Herman, Louisiana. Leary told Bitter that he was assisting plaintiff, Jeff Condalary, in establishing a dairy goat herd and requested Bitter’s assistance in locating dairy goats.

After negotiations, Bitter agreed to provide between fifty and fifty-five adult female dairy goats, three adult male dairy goats and two Maremma guard dogs. Plaintiff paid Bitter the amount due, \$14,600, as was required by their agreement.

At the same time, plaintiff was negotiating with Linda Campbell, a Virginia resident, for the purchase of additional dairy goats. Campbell, Bitter and plaintiff agreed that Campbell would be responsible for the

shipment of the goats. Plaintiff contends that the goats were unfit upon arrival in Louisiana.

On March 10, 1995, Mr. Bitter received via certified mail return receipt requested, a letter dated March 6, 1995 from Deonne DuBarry’s law office, the Summons and Complaint in this action, and a Notice of Lawsuit and Request for Waiver of Service of Summons. The Request for Waiver of Service of Summons stated that it “is not a formal summons or notification from the court.” The Request further stated that if Mr. Bitter failed to return a signed waiver by March 26, 1995, plaintiff’s attorney “will take appropriate steps to effect formal service.” Bitter did not return a signed Request for Waiver of Service of Summons. No further service of any type was made upon Mr. Bitter.

On May 5, 1995, the Clerk of Court entered a default against Mr. Bitter and Ms. Campbell for failure to plead, answer or otherwise defend this action.

Bitter contends that the entry of default must be set aside because service was improper. Bitter further contends that he lacks “minimum contacts” with Louisiana rendering this Court devoid of personal jurisdiction.

## I. DEFAULT JUDGMENT

[Federal Rule of Civil Procedure 55\(a\)](#) provides for entry of default only where a party has failed to plead or otherwise defend pursuant to the Federal Rules of Civil Procedure. An entry of default must be set aside if service is improper. See [Aetna Business Credit, Inc. v. Universal Decor & Interior Design, Inc.](#), 635 F.2d 434 (5th Cir. 1981).

\*2 In the instant case, Bitter contends he was not properly served as is set out by the Federal Rules of Civil Procedure. Those rules include a provision allowing a defendant to “waive” service. If a defendant, however, fails to sign a waiver, proper service must thereafter be effected. Specifically, [Federal Rule of Civil Procedure 4\(e\)\(1\)](#) permits service to be effected on one who fails to sign a waiver pursuant to the law of the state in which the district court is located. The Louisiana Long-Arm Statute, [Revised Statute](#)

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[13:3204](#), allows service upon an out-of-state defendant by mailing a certified copy of the citation and complaint certified or registered mail. Such service is deemed complete when the defendant signs the return receipt.

In the instant case, it is clear that the service made on Bitter by Deonne DuBarry's office was not proper pursuant to the Federal Rules of Civil Procedure. Specifically, Bitter was mailed a copy of the complaint coupled with a Request for Waiver of Service of Summons. Bitter, however, failed to sign such waiver. Therefore, it was incumbent upon counsel for plaintiff to thereafter serve Bitter according to the Federal Rules of Civil Procedure. This was not done. Nothing further was ever served on Bitter. Thus, the default must necessarily be set aside.

Because the Court determines that Bitter was not properly served<sup>FN2</sup>, we need not address the merits of Bitter's arguments in defense of the instant suit.

## II. PERSONAL JURISDICTION

Jeff Condalary, as the party seeking to invoke the jurisdiction of this court, bears the burden of making a *prima facie* showing of sufficient contacts to establish jurisdiction over the nonresident defendant. [Bullion v. Gillespie](#), 895 F.2d 213, 217 (5th Cir. 1990). As stated in [Clark v. Moran Towing & Transp. Co., Inc.](#), 738 F. Supp. 1023, 1026 (E.D. La. 1990),

In determining whether the plaintiff has established a *prima facie* case of personal jurisdiction, uncontroverted allegations in the complaint must be taken as true. Additionally all conflict between the fact contained in the parties' affidavits must be resolved in favor of the plaintiff.

[Clark](#), 738 F. Supp. at 1026, citing [Bullion](#), 895 F.2d at 217; [Asarco, Inc. v. Glenara, Ltd.](#), 912 F.2d 784 (5th Cir. 1990) (citing [Travelers Indemnity Co. v. Calvert Fire Ins. Co.](#), 798 F.2d 826, 831 (5th Cir. 1986), *modified on other grounds*, 836 F.2d 850 (1988).

Where a non-resident defendant is amenable to service of process under the forum state's long-arm statute and the exercise of jurisdiction comports with the due process clause of the fourteenth amendment, personal jurisdiction attaches. [Asarco](#), 912 F.2d at 786. Because the Louisiana long-arm statute extends

personal jurisdiction over non-residents to the same limits allowed by federal due process, the inquiry as to whether this Court can exercise jurisdiction over Bitter collapses into one. [International Shoe Co. v. Washington](#), 326 U.S. 310, 316 (1945); [Pedelahore v. Astropark, Inc.](#), 745 F.2d 346, 348 (5th Cir. 1984), *rehearing denied, en banc*, 751 F.2d 1258 (5th Cir. 1984).

\*3 It is irrefutable that minimum contacts with a forum state may arise incident to either a federal court's "specific jurisdiction" or "general jurisdiction." [Bullion v. Gillespie](#), 895 F.2d at 216. A court may exercise specific jurisdiction when a cause of action arises out of a defendant's purposeful contact with the forum. [Asarco](#), 912 F.2d at 786. In this instance, Condalary's claims against Bitter arise out of Bitter's contact with Louisiana, so the Court will perform a specific jurisdiction analysis.

The Court recognizes that courts have found that the unilateral activity of the plaintiff seeking to invoke the court's jurisdiction is not determinative. [Stuart v. Spademan](#), 772 F.2d 1185, 1190 (5th Cir. 1985). In addition the *Stuart* court found "an exchange of communications between a resident and a non-resident in developing a contract is insufficient of itself to be characterized as purposeful activity invoking the benefits and protection of the forum state's laws." *Id.* at 1193.

However, [Burger King Corp. v. Rudzewicz](#), 105 S. Ct. 2174, 2185 (1985), instructs that while a contract alone cannot establish sufficient minimum contacts, the court in making its determination must take

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." ... It is these factors -- prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing--that must be evaluated in determining whether the defendant purposefully established minimum contacts with the forum.

*Id.*

In a more recent decision, the Fifth Circuit held

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that “a single act by the defendant directed at the forum state...can be enough to confer personal jurisdiction if that act gives rise to the claim being asserted.” [Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.](#), 9 F.3d 415, 419 (5th Cir. 1993). The *Ruston* court went on to affirm the Fifth Circuit's position which interprets [World-Wide Volkswagen Corp. v. Woodson](#), 100 S. Ct. 559, 567 (1980) to hold that “mere foreseeability or awareness [is] a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum state while still in the stream of commerce.” [Ruston](#), 9 F.3d at 419 (citing [Asahi Metal Indus. Co. v. Superior Court](#), 107 S. Ct. 1026, 1031 (1987)).

Under the *World-Wide Volkswagen* test and the Fifth Circuit's recent caselaw on the subject, Bitter's contacts with Louisiana are more than enough to justify an exercise of personal jurisdiction. See [Irving v. Owens-Corning Fiberglas Corp.](#), 864 F.2d 383, 386 (5th Cir.), cert denied sub nom. [Jugometal Enters. for Import and Export of Ores and Metals v. Irving](#), 110 S. Ct. 83 (1989) (noting that the “stream-of-commerce” doctrine applies in the Fifth Circuit).

\*4 As to the second factor, whether exercising jurisdiction comports with “fair play and substantial justice,” this court

must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. [The Court] must also weigh in its determination “the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

[Asahi](#), 107 S. Ct. at 1033.

Louisiana has an interest in adjudicating this dispute since it involves a Louisiana resident claiming injury as a result of the actions of the defendant. It would be unfair to allow a non-resident, such as Bitter, who has directly benefitted financially because of the efforts of a Louisiana resident, to disavow his contacts with this state, particularly since those contacts with plaintiff produced financial gain to Bitter.

Based on the facts and circumstances reviewed by the Court, if Bitter had been properly served, the Court

finds that it would have jurisdiction over Bitter, and the exercise of that jurisdiction would be fair.

Accordingly,

IT IS ORDERED that the motion to set aside default filed by Allen Bitter is GRANTED.

IT IS FURTHER ORDERED that the motion to dismiss for lack of personal jurisdiction filed by Allen Bitter is DENIED.

[FN1](#). The following facts are extrapolated from the Complaint and Bitter's affidavit.

[FN2](#). Condalary's argument that this Court deemed service proper relying on a Minute Entry dated July 17, 1995 is without merit. That minute entry simply indicates that some type of “return of service” was filed into the record. It does not speak to the legal validity of such service.

E.D.La., 1995.

Condalary v. Campbell

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