NORTH AMERICAN WINDOW & DOOR CO., INC.,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-3216-07T3
Plaintiff-Respondent,	:	
Vs.	:	Civil Action
AMERICAN PROPERTIES REALTY, INC., And AMERICAN PROPRTIES AT DEMAREST, LLC,	:	On Appeal From: Superior Court of New Jersey Law Division, Middlesex County
Defendants-Appellants,	:	Sat Below: Hon. Fred Kieser, Jr., J.S.C.
	:	Docket No. Below: DJ-300871-07

REPLY BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT, NORTH AMERICAN WINDOW & DOOR CO., INC.

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PROCEDURAL HISTORY

On June 7, 2007, North American Window & Door Co., Inc. ("North American") filed a Complaint against American Properties Realty, Inc., and American Properties at Demarest LLC (collectively "American Properties"), in the Court of Common Pleas of Chester County, Pennsylvania ("Pennsylvania Court") to recover the unpaid balance of $59,808.74 due and owing for the custom manufacture and delivery of doors to American Properties. (Da1). American Properties, through its appellate counsel, acknowledged receiving the Complaint and requested an extension of time to answer. (Da 63). American Properties never filed an answer to the Complaint.

On September 20, 2007, the Pennsylvania Court entered default judgment in favor of North American and against American Properties in the amount of $59,808.74 with interest at 1.5% per month from November 12, 205 together with costs of suit. (Da15).

On December 5, 2007, North American docketed the Pennsylvania judgment with the Superior Court of New Jersey pursuant to the Uniform Enforcement of Foreign Judgment Act, N.J.S.A. 2A:49A-27-28. (Pa1). The Clerk of the Superior Court of New Jersey then issued written notification to American Properties informing of the docketing of the Pennsylvania judgment. (Da20).

On December 13, 2007, American Properties filed a motion in the Superior Court of New Jersey objecting to the entry of the Pennsylvania judgment and seeking to vacate it based on a claim of lack of personal jurisdiction in the forum state of Pennsylvania. (Da21). At or about the same time, American Properties also filed a petition before the Pennsylvania Court seeking to vacate the Pennsylvania judgment. (Pa21). North American opposed both applications.

On February 1, 2008, the Superior Court of New Jersey conducted oral argument on American Properties' motion to vacate the Pennsylvania judgment predicated on lack of personal jurisdiction over them in Pennsylvania. The Superior Court of New Jersey denied American Properties' motion, finding that personal jurisdiction exists over Appellants in Pennsylvania. The trial court's findings are memorialized in separate orders dated February 1, 2005 (Da 74a) and February 5, 2008 (Da66). On or about February 29, 2008, American Properties filed the within appeal. (Da76).

On or about March 7, 2008, American Properties filed a motion to stay enforcement of the Pennsylvania judgment, or alternatively for relief from the Pennsylvania judgment pursuant to R. 4:50-1(f). (Da88). In response, North American filed a cross-motion for turnover of $81,667.84 resulting from a bank

levy carried out by the Bergen County Sheriff. (Da116). The trial court denied American Properties' motion to vacate and granted North American's cross-motion for turnover. Orders were entered on April 11, 2008(Da137; Da139). On April 11, 2008, the trial court verbally ordered that the turnover would be stayed for 30 days conditioned on American Properties posting of security in the amount of $81,667.84. American Properties did post the required security within this 30-day period.

By Order entered on May 21, 2008, the Pennsylvania Court denied American Properties' petition to vacate the Pennsylvania judgment predicated on the Superior Court of New Jersey's decision which the Pennsylvania Court concluded was *res judicata*. (Pa75). In addition, the Pennsylvania Court determined that American Properties did not satisfy the criteria to vacate a default judgment under Pennsylvania law. (Id.).

COUNTER-STATEMENT OF FACTS

North American is a Pennsylvania corporation with a principal place of business located in West Chester, Pennsylvania. (Da1, at ¶2). For the past 32 years North American has operated as a regional distributor of high-end doors and

windows for estate homes, country clubs and commercial establishments. (Da28, at ¶3).

American Properties Realty, Inc. is a New Jersey corporation with a principal place of business located in Iselin, New Jersey. (Id.). American Properties at Demarest, LLC is a New Jersey limited liability company with a principal place of business also located in Iselin, New Jersey. (Id., at ¶3).[1] According to Mapquest.com, the distance between North American's West Chester, Pennsylvania headquarters and American Properties' Iselin, New Jersey headquarters is 97.04 miles with a driving time of one hour and forty eight minutes. (Da32, at ¶36).

Commencing in February 2005 and continuing thereafter, American Properties engaged in a series of discussions and contract negotiations with North American to purchase custom doors for a high-end real estate construction project that American Properties was building in Demarest, New Jersey. (Da29, at ¶11). These communications included numerous telephone calls and faxes. (Id. at ¶6). During these preliminary discussions, North American provided American Properties with a quote for fiberglass doors and provided a sample door. (Id. at ¶7). Although North American recommended that American Properties purchase fiberglass doors as being more weather resistant,

1 Collectively, Appellants are referred to as "American Properties".

American Properties elected to purchase wood doors and specified that the sills for the doors be wood rather than aluminum as North American had recommended. (Id. at ¶¶8-10). American Properties also specified that the doors should be those manufactured by Architectural Doors, Inc. which is based in New Jersey. (Da30, at ¶25). During the parties' preliminary discussions, Appellants communicated their intent to transact additional future business with North American. (Da30, at ¶21).

On May 24, 2005, American Properties issued a series of purchase orders to North American totaling $190,651.60. (Da34 to Da41). American Properties mailed and faxed their $190,651.60 order to North American's office in Pennsylvania. (Da29, at ¶12). On June 27, 2005, North American received a deposit check from American Properties in the amount of $63,550.51. (Id. at ¶15). Thereafter, on July 26, 2005 American Properties changed the product specifications and approved the shop drawings which resulted in North American issuing a change order in the amount of $2,883.20. (Id. at ¶16). American Properties mailed and faxed the change order to North American's offices in Pennsylvania. (Id.; Da42 to Da49).

The custom doors ordered by American Properties were not manufactured until all details between the parties had been finalized on July 26, 2006. (Da30, at ¶18). At American

Properties' specific request, the doors were to be delivered to New Jersey in three separate shipments - the first to occur on December 12, 2005, the second to occur on February 24, 2006, and the third to occur on March 6, 2006. (Id., at ¶20).

The doors were ready to be shipped to American Properties on December 12, 2005 at which time North American invoiced American Properties. (Id. at ¶19; Da59 to Da59). Because the units at American Properties' construction project were not selling as anticipated, American Properties requested that North American delay shipments of the custom doors. (Id. at ¶22). North American accommodated American Properties' request by storing the March 6, 2006 shipment of doors in a warehouse in Pennsylvania. (Id. at ¶23).

American Properties failed to pay North American the agreed upon prices set forth in the purchase orders and invoices. In addition to the original deposit of $63,550.51, American Properties made subsequent payments to North American Window of $24,298.74 on February 21, 2006 and $45,876,81 on April 10, 2006. Although American Properties made no further payments, they ultimately installed the doors at their condominium project in Bergen County, New Jersey and sold the properties for approximately two million dollars per unit. (Id. at ¶24,¶¶31-32).

American Properties maintains a website with a domain address of www.americanproperties.net. (Pa5, at ¶10).2 As of January 31, 2008, American Properties appeared in the online business directory of www.hotfrogusa.com with the following Pennsylvania business listing, which includes the same telephone number and domain:

American Properties
77 Pole Ct. Rd
Glen Mills, PA 19342
Tel: (732) 283-9700
www.americanproperties.net

(Pa6, at ¶11; Pa69 to Pa70).3 In addition, as of January 31, 2008 American Properties advertised its business in an online Philadelphia wedding & real estate directory having a website

2 On February 1, 2008, counsel for North American filed a Certification with the Superior Court of New Jersey based on Internet research conducted on January 31, 2008 which revealed that American Properties Realty, Inc., one of the named appellants, maintains a Pennsylvania business address and appears in several online directories targeted to a Pennsylvania audience, including a Pennsylvania wedding directory. (Pa3). The trial court judge declined to consider this Certification which was presented on the morning of oral argument before the court on American Properties' initial motion objecting to the entry of the Pennsylvania judgment. The information contained in this Certification was never rebutted by American Properties in any subsequent court filings.

3 Whereas on January 31, 2008 American Properties Realty, Inc. maintained a business listing on Hot Frog USA with a Pennsylvania address, as of November 14, 2008 their business listing was changed to a New Jersey address of 517 Route One South, Suite 2100, Iselin, New Jersey 08830. This updated listing can be viewed at http://www.hotfrog.com/Companies/American-Properties-Realty-Inc.

address of http://philadelphia.1weddingsource.com/real-estate. This same advertisement presently remains.4

STANDARD OF APPELLATE REVIEW

A decision to vacate a judgment lies within the sound discretion of the trial judge, guided by principles of equity. Housing Authority of Town of Morristown v. Little, 135 N.J. 274, 283 (1994).

A trial court's findings of fact are binding on appeal if supported by adequate, substantial and credible evidence in the record. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 *N.J.* 474, 484 (1974). An appeals court will not disturb a trial court's findings of fact unless they are "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Ibid. However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 *N.J.* 366, 378 (1995). Thus, the trial court's determinations of legal issues are subject to *de novo* review. Id. When addressing jurisdictional issues, which are matters of law, the standard of

4 As of November 14, 2008, American Properties continues to advertise its business in this online Philadelphia wedding & real estate directory.

review is also *de novo*. Mastondrea v. Occidental Hotels Mgmt., 391 N.J.Super. 261, 268 (App.Div.2007).

LEGAL ARGUMENT

POINT 1: THE TRIAL COURT PROPERLY DETERMINED THAT DEFENDANTS ARE SUBJECT TO PERSONAL JURISDICTION IN PENNSYLVANIA

There is a strong presumption in favor of retaining jurisdiction where the plaintiff, as is the case here, is a resident who has chosen his home forum (Pennsylvania). *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 n. 24, 102 S.Ct. 252, 266 n. 24, 70 L.Ed.2d 419, 436 n. 24 (1981). When a defendant challenges an action for lack of personal jurisdiction, the plaintiff "need only establish a *prima facie* case of personal jurisdiction and the plaintiff is entitled to have its allegations taken as true and all factual disputes drawn in its favor." *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 97 (3rd Cir.2004)(citing *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 368 (3rd Cir.2002)).

A. Pennsylvania Long-Arm Statute

A proper analysis of whether Appellants' subjected themselves to personal jurisdiction in Pennsylvania must begin

with the Pennsylvania long-arm statute,5 which provides in pertinent part as follow:

> (a) General rule.--A tribunal of this Commonwealth may exercise personal jurisdiction over a person (or the personal representative of a deceased individual who would be subject to jurisdiction under this subsection if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person:
>
> (1) Transacting any business in this Commonwealth . . .
>
> i. The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.
>
> ii. The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.
>
> * * *
>
> (4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.

42 Pa. C.S.A. § 5322 (emphasis added).

Pennsylvania's long arm statute provides for personal jurisdiction over a nonresident "to the fullest extent allowed

5 Appellants' Brief contains a fatal flaw in that Appellants completely ignore any discussion of the Pennsylvania long-arm statute.

under the Constitution of the United States." 42 Pa. C.S.A. § 5322(b). *Kubik v. Letteri*, 614 A.2d 1110 (Pa. 1992). Thus, parties with constitutionally sufficient minimum contacts with Pennsylvania are subject to suit in Pennsylvania. The Court must therefore determine "whether the defendant had minimum contacts with the forum such that it would have reasonably anticipated being haled into court there," and if so, "whether the assertion of personal jurisdiction would comport with fair play and substantial justice." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). (citations and quotations omitted).

The United States Third Circuit Court of Appeals has outlined the approach district courts should take in determining whether personal jurisdiction should be exercised in cases involving contracts:

> In contract cases, court should inquire whether the defendant's contacts with the forum were instrumental in either the formation of the contract or its breach. Parties who reach out beyond [their] state and create continuing relationships and obligations with citizens of another state are subject to the regulations of their activity in that undertaking. Courts are not reluctant to find personal jurisdiction is such instances. [M]odern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

General Elec. Co. v. Deutz AG, 270 F.3d 144, 150 (3rd Cir. 2001)(quotations and citations omitted). In Deutz, the Third Circuit clarified that "it is not significant that one or the other party initiated the relationship," because "[i]n the commercial milieu, the intention to establish a common venture extending over a substantial period of time is a more important consideration." Id. at 151 (emphasis noted).

Appellants assert that their contacts with Pennsylvania were random, fortuitous, and attenuated. In *Fidelity Leasing, Inc. v. Limestone Co. Bd. of Education*, 758 A.2d 1207, 1211 (Pa. Super. 2000), the Pennsylvania Superior Court explained:

> "It is well-settled that an individual's contract with a non-resident party *alone* cannot automatically establish sufficient minimum contacts in the other party's home state. Rather, the totality of the circumstances, including the parties' prior negotiations, their contemplated future consequences, their actual course of dealing and the terms of the contract must be evaluated in order to determine whether the non-resident defendant is subject to the Commonwealth's forum. It is necessary that the defendant's contacts are purposeful and voluntary and give rise to the cause of action."

Ibid.

By not challenging jurisdiction in Pennsylvania, Appellants waived the opportunity to raise the question of *forum non*

convenient as permitted under Pennsylvania law. 42 Pa. C.S.A. § 5322(e); see generally Searles v. Estrada, 856 A.2d 85, 92 n.5 (Pa. Super. 2004), appeal denied, 871 A.2d 192 (2005).

The Pennsylvania Superior Court explained part of the rationale of the Pennsylvania long-arm statute in these words:

> Moreover, where individuals purposefully derive benefits from their interstate activities, *Kulko v. California Superior Court*, 436 U.S. 84, 96, 98 S. Ct. 1690, 1699, 56 L.Ed 2d 132 (1978), it may well be unfair to allow them to escape having to account to other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded to avoid inter-state obligations that have been voluntarily assumed."

Colt Plumbing Co. Boisseau, 645 A.2d 1350, 1355 (Pa. Super. 1994).

Pennsylvania courts may exercise two types of *in personam* jurisdiction over a non-resident defendant: (1) general jurisdiction; and (2) specific jurisdiction. Hall-Woolford Tank Co., Inc. v. R.F. Kilns, Inc., 698 A.2d. 80 (Pa. Super. 1997). "General jurisdiction is founded upon a defendant's general activities within the forum which evidence continuous and systematic contacts with the state." Id. at 82. "Specific jurisdiction has a more narrow scope and is focused upon the

particular acts of the defendant which gave rise to the underlying cause of action." Id.

For specific jurisdiction, the Due Process Clause's demands are met if the defendant has "carr[ied] on 'a part of its general business' "in the forum state sufficient to put the defendant on notice that it "should reasonably anticipate being haled into court there." Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780, 104 S.Ct. 1473, 1481, 79 L.Ed.2d 790 (1984) (quoting Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 438, 72 S.Ct. 413, 414, 96 L.Ed. 485 (1952)); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980)). The amount of business need not be great; there must, however, "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." Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958).

In a number of cases, Pennsylvania courts interpreting the state's long-arm statute have found significant two factors: (1) that the defendant reached out beyond the boundaries of its home state to negotiate and contract with a Pennsylvania corporation, and (2) that defendant's refusal to make payment under the

contract caused foreseeable injuries to the Pennsylvania corporation. Both of these factors are present here.

Four cases illustrate the extent of Pennsylvania's long-arm statute. In Kubik, supra, 614 A.2d 1110 (Pa. 1992), the Pennsylvania Supreme Court expressly adopted the minimum contacts test advocated by the United States Supreme Court in Burger King supra. The Kubik Court held that a Pennsylvania resident who sold his home in Pennsylvania and moved to Arizona could be sued in Pennsylvania in a dispute arising out of the isolated sale of a private residence.

In GMAC v. Keller, 737 A.2d 279 (Pa. Super. 1999), the Pennsylvania Superior Court held that a Florida resident who purchased a vehicle from a dealer located in Pennsylvania with the transaction financed by GMAC could be sued in Pennsylvania even though he did not physically enter the state as all negotiations took place with the dealer in Florida and the dealer delivered the vehicle to him in Florida. The defendant, however, completed the application for financing in Florida provided for him by the dealer and returned it to GMAC. The GMAC Court stated:

> For some reason, be it the rate of interest offered by GMAC, the service the company provided, the availability of funds, or merely the whim of the purchaser, the appellee chose to finance his automobile

> purchase through GMAC. He clearly had the option to seek financing with a bank or banks in any number of other states.

737 A.2d at 282. The actions of Keller knowingly created obligations with a Pennsylvania company. The court concluded that Keller "purposefully directed his activities toward a Pennsylvania resident and thereby availed himself of the opportunity to do business there. See Burger King Corp., 471 U.S. at 479,482, 105 S.Ct. at 2185, 2187, 85 L.Ed 3d at 545, 547 ...." 737 A.2d at 282.

In a case that is virtually identical to the within appeal, in Aventis Pasteur, Inc. v. Alden Surgical Co., Inc., 848 A.2d 996 (Pa. Super. 2004), the Pennsylvania appeals court found personal jurisdiction existed over a New York corporation (Alden) who in a two month period placed 16 separate purchase orders with Aventis, a Delaware corporation with a principal office located in Pennsylvania.6 The purchase orders totaled $924,364,80, each purchase order was procured by a telephone call from Alden to Aventis, the goods were manufactured at Aventis' facility in Pennsylvania, and all shipments of goods were made to Alden's place of business in New York.

6 Appellants also placed a series of purchase orders with plaintiff over a 2 month period. (Da34 - Da49).

Alden paid only $10,000 to Aventis, thus prompting Aventis to file suit in its home state of Pennsylvania for the unpaid balance. In response, Alden filed a preliminary objection claiming, among other defenses, that the Pennsylvania court lacked personal jurisdiction over it (a New York corporation) on the basis that it conducted no business in Pennsylvania. The trial court found no merit to Alden's claim that the Pennsylvania court lacked personal jurisdiction over it, and consequently dismissed Alden's preliminary objection. Specifically, the trial court concluded that Alden's conduct in placing 16 telephone orders from New York to Pennsylvania over a two-month period established that Alden "reached out to Pennsylvania". 848 A.2d at 1000. The matter then proceeded to a non-jury trial and the court found in Aventis' favor.

Alden then appealed, claiming that the trial court erred in concluding that it could properly assert personal jurisdiction over a New York corporation that did not transact business in Pennsylvania. In the appeal, Alden argued that a series of telephone orders over a two-month period did not constitute "doing business" under Pennsylvania's long-arm statute, that it lacked sufficient contacts with Pennsylvania to justify the exercise of personal jurisdiction over it based on breach of contract, and that it was merely a "passive purchaser, rather

than a foreign corporation doing business in Pennsylvania." 848 A.2d. at 999, n 2.

The Pennsylvania appellate court rejected Alden's arguments and affirmed the trial court's judgment. The appellate court concluded that Alden purposely and voluntarily initiated the contacts with Pennsylvania, and continued those contacts on a regular and continuous basis for two months, that such contacts formed the basis of Aventis' cause of action, and that the parties' contract was performed in Pennsylvania where the product was manufactured and prepared for shipping to Alden. The Pennsylvania appeals court also agreed with the following statement of the trial court:

> Pennsylvania has an important interest in protecting the businesses within its borders from nonpayment of goods delivered. Also, as [Alden] was an active purchaser, [Alden] should not reap the rewards of a Pennsylvania corporation while not being subject to the laws of Pennsylvania.

848 A.2d at 1000.

Similarly, in Mickleburgh Machinery Co., Inc. v. Pacific Economic Development Co., 738 F.Supp. 159 (E.D.Pa. 1990), the United States District Court concluded that Pennsylvania had specific jurisdiction over a California corporation who initiated contractual negotiations with the Pennsylvania plaintiff, communicated at frequent intervals including

telephone calls, and sent written correspondence to plaintiff's Pennsylvania headquarters on at least ten occasions.

Applying Pennsylvania law to the facts of this case, it is easy to understand why the trial court correctly concluded that Pennsylvania's long-arm statute confers jurisdiction. Appellants and their affiliated companies having constructed over 15,000 units over the past thirty years are experienced and sophisticated, just like the accountant in Burger King, supra. The protracted discussions and contract negotiations with North American occurred over a six month period of time during which time both sides were able to carefully review the proposed transaction. As the trial court properly concluded, Appellants purposely directed their activities toward a Pennsylvania resident and availed themselves of the opportunity to do business there. (Da 83 to Da87).

As North American amply demonstrated to the trial court, when Appellants placed their initial custom orders it was promised that future orders would be placed with North American. The Affidavit of John Hanrahan sets forth a series of contacts over a period of six months that included two fax orders to North American for the total sum of $193,534.80. (Da28) Appellants could have purchased the custom doors from manufacturers and suppliers located in New Jersey. (Da31, at ¶

27). Instead, Appellants solicited North American and proceeded to engage in communications with North American over a six month period culminating in their placing two orders with North American for custom manufactured doors. These contacts by Appellants were purposeful and voluntary. Since Appellant failed to pay the total amount, the non-payment of $59,808.74 gave rise to the cause of action.

Furthermore, North American presented the trial court with proofs of Appellant's online advertising in a Pennsylvania wedding directory and another online directory which provided a business listing for Appellants in Pennsylvania. (Pa69 to Pa71). Although the trial court did not find it necessary to consider this evidence, this Court has the right to do so pursuant to the *de novo* review standard.

B. New Jersey Long-Arm Statute

A New Jersey court may exercise *in personam* jurisdiction over a non-resident defendant "consistent with due process of law." *R.* 4:4-4(b)(1). New Jersey courts' interpretation of the "minimum contacts" test is in accord with Burger King, supra, and International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95, 102 (1945), by permitting service on non-resident defendants to the outermost limits permitted by the

United States Constitution. Avdel Corp. v. Mecure, 58 N.J. 264, 268 (1971). As the New Jersey Supreme Court recently reiterated:

> [T]he test for "due process requires only that in order to subject a defendant to a judgment in personam, if he [or she] be not present within the territory of the forum, he [or she] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice .' "

Blakey v. Continental Airlines, Inc., 164 *N.J.* 38, 66 (2000) (quoting International Shoe, supra)(quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278, 283 (1940)).

Because "minimum contacts" requires that the contacts supporting jurisdiction result from the defendant's purposeful conduct and not the unilateral actions of the plaintiff, New Jersey courts have found it significant to identify the initiator of the commercial contact. Bayway Ref. v. State Util., 333 N.J.Super. 420, 428-430 (App.Div. 2000), certif. denied, 165 N.J. 605 (2000)(citing Avdel, supra, 58 N.J. at 272-73; Elizabeth Iron Works v. Kevon Const. Corp., 155 N.J. Super. *175, 179 (App.Div.*1976); Resin Research Labs., Inc. v. Gemini Roller Corp., 105 N.J. Super. 401, 404 (App.Div.1969). In the instant case, Appellants do not dispute that they initiated the commercial contact with North American.

Another factor that New Jersey courts consider in determining a defendant's minimum contacts is the entry of a contract in the forum state. See Creative Business Decisions, Inc. v. Magnum Communications Ltd., Inc., 267 N.J. Super. 560, 570 (App. Div. 1993)(citing In re Rehabilitation of Mutual Benefit Life Ins. Co.,258 N.J. Super. 356, 370 (App. Div. 1992). "While such a contract will not automatically establish sufficient minimum contacts with the forum state, it will be examined in the context of the overall business transactions related to and surrounding the agreement and the parties' relationship." Rehabilitation of Mutual Benefit Life Ins. Co., 258 N.J. Super. at 370.

A good example of applying a "totality of the circumstances" approach to determine whether personal jurisdiction exists in another forum over a New Jersey resident is J.W. Sparks & Co. v. Gallo, 47 N.J. 295 (1966), where the New Jersey Supreme Court held that personal jurisdiction existed in New York resulting from an individual defendant's purchase of over-the-counter stock from the New Jersey office of a New York brokerage firm. As the New Jersey Supreme Court explained:

> It must be borne in mind that the transaction here involved the purchase and sale of stock on a New York exchange or market, a type of transaction in which New York may properly assert a special interest.

> . . The defendant's account was with a New York brokerage firm and, although he placed his purchase order with the firm's Morristown branch office, his order was to make the purchase on the New York over-the-counter market. He was aware that the plaintiff, acting as his agent, would engage in a transaction of purchase and sale in New York, and . . . he purposefully availed himself of the privilege of conducting activities, through his agent, within that state....

47 N.J. at 677. Cf. Elizabeth Iron Works, supra, where in a strikingly similar situation the Appellate Division held that a Pennsylvania corporation who purchased goods from a New Jersey corporation was subject to personal jurisdiction in New Jersey.

In Elizabeth Iron Works, plaintiff, a New Jersey supplier of structural steel, entered into a contract to sell customized steel beams to the defendant Kevon Construction Corp, a Pennsylvania corporation, for a project located in Pennsylvania. Kevon signed the purchase order in Pennsylvania with plaintiff executing the same in New Jersey, and plaintiff delivered the goods to Pennsylvania. Kevon established that it had no connection to New Jersey other than this single contract, owned no property in New Jersey, did not have an office in New Jersey, none of its officers, employees or shareholders resided in New Jersey or ever entered New Jersey for any business purpose. Notwithstanding, the Appellate Division found that a single

contractual transaction was sufficient to satisfy New Jersey long-arm jurisdiction over the Pennsylvania corporation.

One New Jersey Supreme court case cited by Appellants actually supports Respondent's position. In Blakey v. Continental Airlines, supra,164 N.J. 38, (2000), the New Jersey Supreme Court cited United Coal Co. v. Land Use Corp., 575 F.Supp. 1148, 1157 (W.D.Va. 1983) as a case in support of its decision where "'telephone conversations, telexes and letters traveled to and from state, establishing an agreement' considered as part of the contacts sustaining jurisdiction of the forum." The Blakey Court also cited two federal cases decided in 1980 interpreting Pennsylvania law as not allowing jurisdiction. But these two cases predated Burger King, supra, and GMAC v. Keller, supra. Thus the Blakey Court would not consider it improper to assert jurisdiction based upon the facts asserted in this case to support the long arm jurisdiction of Pennsylvania. The Blakey court said, "It would a paradox if electronic communication, with their instantaneous messaging, would lessen the jurisdictional power of a court." 164 N.J. at 68.

Fifteen years before Blakey, the Supreme Court in Burger King commented that:

> It is an inescapable fact of modern commercial life that a substantial amount of commercial business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.

471 U.S. at 476.

Appellants misplace reliance on the Appellate Division's unpublished decision of McKesson Corp. v. Hackensack Medical Imaging, 2008 WL 382669 (App Div. 2008), certif. granted, 195 N.J. 518 (2008).7 McKesson is factually distinguishable from the case at bar on a number of significant grounds. First, McKesson Corp. is a Texas corporation located in Dallas, whereas North American is incorporated in nearby Pennsylvania with its headquarters located less than 100 miles from Appellants' Iselin, New Jersey office. Second, McKesson Corp. initiated the contacts with the New Jersey corporation, Hackensack MRI, by sending Hackensack MRI a catalogue and promotional materials advertising its products. Thus, the McKesson Court viewed Hackensack MRI as a passive buyer. Third, the Court noted that "[P]laintiff did not manufacture its products according to detailed specifications required by Hackensack MRI." (Da114). And Fourth, the record did not reflect that Hackensack MRI

7 Appellants' Brief neglects to mention that the New Jersey Supreme Court granted certification in McKesson Corp. v. Hackensack Medical Imaging, supra.

intended to conduct future business transactions with McKesson Corp.

In the case at bar, Appellants communicated their intent to enter into future business transactions with North American, a critical distinction from the relationship of the parties in McKesson. As previously noted, the Appellate Division's decision in McKesson is presently on appeal before the New Jersey Supreme Court. In sum, Appellants' narrowly focused argument regarding application of McKesson - "that one could simply switch the names of the parties and States (from Texas to Pennsylvania)" is completely flawed. (Db 20)

Distributors perform an important economic function in providing markets for the manufacturer. North American was able to pay the manufacturer in full before final delivery. American Properties was only required to pay a one-third deposit. Although the doors were manufactured in New Jersey and two of the three shipments to American Properties were shipped directly from the factory, this does not help American Properties' cause. In United Coal Co., supra, none of the coal was shipped through Virginia nor was the contract executed in Virginia but the federal district court held that the long arm statute of Virginia conferred jurisdiction on the court.

It would be paradoxical if New Jersey did not recognize North American's Pennsylvania judgment but would confer jurisdiction on its own courts based upon the same set of facts relied upon to support the Pennsylvania judgment. It would also be a violation of the good faith and credit clause of the United States Constitution.

POINT II: THIS APPEAL SHOULD BE DISMISSED BASED ON THE DOCTRINE OF COMITY BECAUSE DURING THE COURSE OF THIS APPEAL THE PENNSYLVANIA COURT DENIED APPELLANTS' MOTION TO VACATE THE PENNSYLVANIA JUDGMENT.

[ARGUMENT NOT RAISED BELOW]8

In Yancoskie v. Delaware River Port Auth., 78 N.J. 321 (1978), the New Jersey Supreme Court held that when an action, essentially identical to one brought in New Jersey, is pending in another state, "our proper course under comity principles is not to exercise jurisdiction but to adhere to the general rule that the court which first acquires jurisdiction has precedence in the absence of special equities." Id. at 324. Yancoskie involved a wrongful death action in which the New Jersey Supreme Court deferred to an earlier filed Pennsylvania action. The New Jersey Supreme Court applied "the general rule that the court

8 This argument and those set forth in Points III and IV infra were not raised below because when this appeal was filed in February 2008 the Pennsylvania Court had yet to rule on Appellants' companion motion to vacate the Pennsylvania judgment. The Pennsylvania Court issued its ruling on May 21, 2008.

which first acquires jurisdiction has precedence in the absence of special equities." The Court said that there were no special equities favoring prosecution of the matter in New Jersey, noting that the defendant was a bi-state agency, the plaintiffs were Pennsylvania residents, the accident occurred on the Pennsylvania side of the Delaware River, and the action was being prosecuted under the Pennsylvania wrongful death statute. Id. at 323-24.

The reasoning behind what has become known as the Yancoskie rule was further explained in Cogen Technologies v. Boyce Eng'g, 241 N.J. Super. 268, 272 (App. Div. 1990), certif. denied, 122 N.J. 358 (1990):

> We do not distrust the proceedings of the courts of our sister states as we once did. It has become necessary and commonplace in a national economy for courts to interpret and enforce the laws of other jurisdictions. In these circumstances, there is ordinarily no reason to entertain subsequent local litigation paralleling an already instituted action in another state. And this is so whether the later New Jersey action is brought by plaintiff or defendant in the earlier case....

In American Home Prods. v. Adriatic Ins. Co., 286 N.J. Super. 24 (App. Div. 1995), the Appellate Division articulated a test that relies on factors similar to those used by federal courts considering a comity stay or dismissal in deference to a

parallel foreign proceeding. The difference is basically procedural dealing with the allocation of burden of proof. In American Home Products, the Appellate Division placed the initial burden on the moving party to establish that (1) there is a first-filed action in another state; (2) both cases involve the same parties, the same claims and the same legal issues; and (3) the plaintiff will have the opportunity for adequate relief in the prior jurisdiction. Id. at 37. Once these requisites have been established, the moving party enjoys a "clear entitlement to comity-stay relief" and the burden falls upon the plaintiff to demonstrate that "special equities" exist that are sufficiently compelling to permit the action to proceed. Ibid.

Each of the aforesaid elements to apply the doctrine of comity is met with respect to the instant appeal. First, the Pennsylvania action was filed prior to the New Jersey action (the New Jersey case merely representing a docketing of the judgment of the sister state of Pennsylvania). Second, the Pennsylvania action and this appellate action involve the same parties with identical claims and issues. And third, Appellants consciously chose to pursue vacation of the Pennsylvania judgment by filing an independent application to the Pennsylvania Court which was denied on May 21, 2008. (Pa75).

Accordingly, this appeal should be dismissed pursuant to the doctrine of comity.

POINT III: THE PENNSYLVANIA COURT'S MAY 21, 2008 ORDER DENYING APPELLANTS' MOTION TO VACATE THE PENNSYLVANIA DEFAULT JUDGMENT CONSTITUTES RES JUDICATA AS TO THE FINALITY OF SUCH JUDGMENT.

[ARGUMENT NOT RAISED BELOW]

In Points II through IV of their appellate brief, Appellants argue out of desperation that the trial court erred in refusing to vacate the default judgment against American Properties because neither they nor North American were parties to the underlying contractual transactions, and no proofs were submitted to substantiate the 1.5% monthly finance charges added to the invoice amounts. This Honorable Court need not address these meritorious defense arguments if the Court affirms the trial court's threshold determination that personal jurisdiction lies over American Properties in Pennsylvania. Assuming *arguendo* that this Honorable Court is inclined to independently review Appellant's meritorious defenses to the underlying Pennsylvania judgment, it is respectfully submitted that the Pennsylvania Court's decision and Order entered on May 21, 2008 denying Appellant's motion to vacate the Pennsylvania judgment is *res judicata*.

"The term '*res judicata*' refers broadly to the common-law doctrine barring relitigation of claims or issues that have already been adjudicated." Velasquez v. Franz, 123 N.J. 498, 505 (1991). Three elements must be met for *res judicata* to apply: "[1] the judgment relied upon must be valid, final and on the merits; [2] the parties in the two actions must be either identical or in privity with one another; [3] the claims [in the subsequent case] must grow out of the same transaction or occurrence." Olds v. Donnelly, 291 N.J. Super. 222, 232 (App. Div. 1997), aff'd, 150 N.J. 424 (1997) (citing Watkins v. Resorts Int'l Hotel and Casino, Inc., 124 N.J. 398 (1991)).

The Full Faith and Credit Clause, U.S. Const. Art. IV, requires that courts "give to a foreign judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it." Durfee v. Duke, 375 U.S. 106, 109, 84 S.Ct. 242, 244, 11 L.Ed.2d 186, 190 (1963); See also Kram v. Kram, 98 N.J. Super. 274, 278 (App. Div. 1968), aff'd, 52 N.J. 545 (1968).

Here, the elements for application of *res judicata* are clearly established. First, Appellants presented the exact same argument before the Pennsylvania Court; namely, that the judgment should be vacated on the grounds that they did not have a contractual relationship with North American. (Pa31, §D). The

Pennsylvania Court rejected Appellant's motion by concluding that they failed to establish the criteria necessary to vacate a default judgment under Pennsylvania law. (Pa76). Consequently, the Pennsylvania judgment remains a final judgment under Pennsylvania law. Second, the parties and issues before the Pennsylvania action are identical to the within appeal. And third, the meritorious defenses now raised on appeal arise out of the exact same transaction as litigated in the Pennsylvania case. Therefore, this Honorable Court should apply the doctrine of *res judicata* to prevent Appellants from using this appeal as an attempt to take a "second bite at the apple".

Going one step further, although this appeal is not from an order denying a motion to vacate a default judgment, if this Court were to treat the appeal as such and evaluate Appellant's meritorious defense claims it becomes readily apparent that Appellants accepted the goods and have unjustly refused to pay for same. Appellants ordered doors from North American which were subsequently manufactured by Architectural Doors, Inc. and delivered to Appellants in three separate shipments. On the dates of delivery Appellants had the opportunity to count, measure and inspect the merchandise. Presumably they did so and were satisfied because they installed the doors on the newly constructed homes in New Jersey.

American Properties failed to utilize their right to reject goods pursuant to 13 Pa.C.S.A. § 2601 which they now claim are defective for some unstated reason. As a matter of fact, American Properties failed to present any form of written evidence to the Superior Court of New Jersey to support their claim that the doors were defective. See Beaver Valley Alloy Foundry v. Therma-Fab, 814 A.2d 817 (Pa. Super., 2002). Acceptance of goods occurs when the buyer fails to reject or commits any act inconsistent with seller's ownership. 13 Pa. C.S.A. § 2606(a)(2)-(3); Beaver Valley, supra; and Marblelite Co. v. City of Philadelphia, 40 Pa D&C 2d 347 (1966) aff. 222 A.2d 443 (Pa. Super., 1966). Therefore it significant that American Properties installed the doors in the condominiums they constructed in New Jersey. Appellants' act of permanently installing the doors is an act inconsistent with seller's ownership and constitutes undisputed evidence of American Properties' acceptance. Having accepted the doors by installing them, Appellants forfeited their right to revoke acceptance. 13 Pa. C.S.A. § 2607(b).

POINT IV: ALTERNATIVELY, THE DOCTRINE OF COLLATERAL ESTOPPEL PRECLUDES RELITIGATION OF APPELLANTS' MERITORIOUS DEFENSES TO THE UNDERLYING DEFAULT JUDGMENT ENTERED IN PENNSYLVANIA.

[ARGUMENT NOT RAISED BELOW]

Whereas *res judicata* is generally defined in terms of claim preclusion, collateral estoppel is generally referred to in terms of issue preclusion. In Hennessey v. Winslow Township, 183 N.J. 593 (2005), the New Jersey Supreme Court outlined the requirements to foreclose relitigation of an issue. The Court explained that "the party asserting the bar" must show that: (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

For the same reasons and principles governing application of the doctrine of *res judicata* as discussed in Point III, supra, the Court should reject Appellants' meritorious defense arguments challenging the validity of the underlying Pennsylvania judgment. In point of fact, this Court previously held that "if a defendant challenges the jurisdiction of the

court over him and the court rejects his challenge and finds it has jurisdiction, the issue may not be raised in a second state in an action to enforce the judgment rendered in the first state." Hupp v. Accessory Distribs., Inc., 193 N.J. Super. 701, 709 (App. Div. 1984). See also Sontag Reporting Serv., Ltd. V. Ciccarellil, 374 N.J. Super. 533, 538 (App. Div. 2005("Trial courts of sister states may inquire into defenses of lack of jurisdiction in the foreign court . . . provided that those issues have not been litigated in the forum court.").

CONCLUSION

Based on the foregoing reasons and authorities, North American respectfully requests that the trial court's judgment be affirmed. Appellants have not sustained their burden of proof to overturn the sound reasoning of the trial court's factual findings and legal conclusions of law establishing the existence of personal jurisdiction over Appellants in Pennsylvania.

Further, the equitable doctrines of comity, *res judicata, and* collateral estoppel preclude Appellants from sustaining their challenge as to the underlying merits of the default judgment in Pennsylvania. During the course of this appeal, on May 21, 2008, the Pennsylvania Court rejected Appellant's application to vacate the Pennsylvania default judgment. The

Pennsylvania Court's ruling is entitled to full faith and credit in New Jersey. Accordingly, this appeal should be denied.

Respectfully submitted,

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Dated: November 13, 2008