

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5953-08T2

FIRST AMERICAN TITLE
INSURANCE COMPANY,

Plaintiff-Appellant,

v.

JORDAN W. KAPCHAN, ESQUIRE,

Defendant-Respondent.

Argued January 27, 2010 - Decided April 12, 2010

Before Judges Sabatino and J. N. Harris.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1082-09.

Robert L. Grundlock, Jr., argued the cause for appellant (Rubin, Ehrlich & Buckley, P.C., attorneys; William McConnell, on the brief).

Christopher J. Carey argued the cause for respondent (Graham Curtin, P.A., attorneys; Mr. Carey, of counsel; David M. Blackwell and Daniel J. DiMuro, on the brief).

PER CURIAM

This appeal arises from the Law Division's dismissal of a legal malpractice case against defendant Jordan W. Kapchan, Esq., for lack of in personam jurisdiction. The lawsuit stems

from Kapchan's involvement in the closing of a mortgage loan secured by a residence in Princeton, New Jersey, and his alleged failure to properly disburse funds pursuant to the real estate closing agreement. Because we are satisfied that there are sufficient minimum contacts with New Jersey presented in the record to justify the fair exercise of this State's jurisdiction over Kapchan, we reverse the Law Division's order and remand for further proceedings.

I.

Although no jurisdictional discovery was taken in this case and the record consequently is not exhaustive, the following facts and circumstances bearing upon our analysis may be gleaned from the parties' submissions.

As noted, the litigation grows out of a mortgage loan on property containing a single-family house, located in Princeton Borough, at Lot 25, Block 17.01. The record owner of the Princeton real estate was Gertrude G. Banks, a resident of Washington, D.C. In connection with the transaction, Gertrude Banks sought to borrow \$400,000 from the lender, Accredited Home Lenders, Inc. ("Accredited"). Accredited is a California corporation, with offices in San Diego.

Title insurance for the refinancing transaction was procured through Allstates Title Service, Inc. ("Allstates").¹ It is undisputed that Allstates is a New Jersey corporation, with its offices in Mercerville (Hamilton Township) in Mercer County. The title insurer was plaintiff, First American Title Insurance Company ("plaintiff" or "First American"). First American is incorporated in California, with its principal offices located in that state.

Defendant Kapchan is an attorney licensed to practice law in the State of New York. According to the certification he filed in support of his motion to dismiss the complaint for lack of in personam jurisdiction, Kapchan maintains a law office on Park Avenue in New York City. He asserts that he does not maintain offices in New Jersey, nor does he advertise or "actively solicit" clients in this State. He is not licensed to practice law in New Jersey.

As Kapchan describes it in his certification, he functioned as a "settlement agent" in connection with the instant loan transaction between Gertrude Banks (as the mortgagor/borrower) and Accredited (as the mortgagee/lender). The funding for the

¹ Counsel advised us at oral argument that Allstates was not the actual title insurer or underwriter, but rather served as an agent.

transaction passed through Kapchan's mortgage trust account in a bank in New York City.

In connection with his role in the transaction, Kapchan received a set of written lenders' instructions, specifying how the funds generated from the loan were to be disbursed. Among other things, the instructions stated that five of Gertrude Banks' relatives—specifically, Clyde L. Banks, Emmet L. Banks, Isaac S. Banks, Phyllis Banks Hunt, and Bertha Banks Whitted (collectively "the Banks Five")—were each to receive \$30,000 from the proceeds.

The Banks Five, who respectively reside in Virginia and North Carolina, are all grandchildren of Bertha Hill Brandon, who formerly owned the Princeton property and who died in 1969. Gertrude Banks is the surviving spouse of James Banks, who was the sixth grandchild of Brandon and the executor of Brandon's will.² James Banks died in October 2004. The Banks Five claimed an interest as tenants-in-common in the Princeton premises, apparently based on contentions that Gertrude Banks had improperly divested their interests as tenants-in-common. The \$30,000 per-person payout to each member of the Banks Five was explicitly specified in an addendum to the lenders'

² The original executor of the will, Langston Banks, the son of Brandon, died in 1981, passing the title of executor on to his son, James.

instructions, signed by Gertrude Banks on May 12, 2005, and also by Kapchan as the "closing officer" on May 13, 2005.

Kapchan prepared the requisite HUD-1 Settlement Statement ("HUD-1") for the transaction. The handwritten notations on the HUD-1 includes a specification that the aggregate sum of \$150,000 was due and payable to the Banks Five. The Addendum to the HUD-1, stated that it is "a true and accurate statement of all receipts and disbursements made . . . in [the] transaction."

There apparently was not an in-person "closing" session performed at a lawyer's office, where the mortgage transaction was consummated in its entirety. Instead, the transactional documents were sent from Kapchan to Gertrude Banks in Washington, D.C., where an unidentified attorney or other individual apparently met with her and obtained her signatures on the necessary closing documents that Kapchan had prepared.³

According to the HUD-1, Kapchan charged a fee of \$895.00 for his services in the transaction, which was paid out of the closing proceeds. On May 21, 2005, Kapchan sent a letter on his law firm stationery to Allstates in New Jersey, enclosing the

³ The HUD-1 does refer to an entity named CII Title, LLC ("CII Title") as the recipient of a \$550.00 "[s]ettlement or [c]losing [f]ee." Kapchan's brief contends that CII Title was "hired to conduct the closing in Washington, D.C." but the record provides no confirmation of that. Nor does the record tell us who hired CII Title, or what exactly CII Title did.

executed closing documents as well as his invoice. The letter read as follows:

May 21, 2005

BY FED-EX

Allstates Title Service, Inc.
2882 East State Street Ext.
Mercerville, NJ 08619

Attn.: Closing Department

Re: Title No. 105-205-12225
Gertrude G. Banks
with
Accredited Home Lenders,
Inc.

First Mortgage Loan in
the Amount of \$400,000-

Dear Sir, Madam:

Enclosed please find the closing title package with regard to the above-referenced mortgage loan transaction. Included in this package is a title bill payment check, a mortgage for recording, a marked-up title report and the the [sic] title affidavit.

Also enclosed is my invoice for the handling of this title closing transaction in Allstates [sic] behalf.

Thank you for your attention and cooperation.

Very truly yours,

/s/ Jordan W. Kapchan

JORDAN W. KAPCHAN

[(Emphasis added).]

As part of the transaction, Kapchan made out and signed checks to each of the Banks Five. The five checks were all in the amount of \$29,400.00⁴ and dated May 18, 2005. The checks were never deposited or endorsed by any of the Banks Five, but instead were reportedly returned to Kapchan. The record contains a typewritten communication to Kapchan from an individual named Vivian Prince, who claimed to be acting on Gertrude Banks's behalf. Referring to a conversation she had with Kapchan the previous day, May 31, 2005, Prince stated on the typewritten document that Gertrude Banks had requested that he "send one check made out in her name (Gertrude G. Banks) in exchange for the checks I'm forwarding [to] you today." Prince further requested that the \$147,000 check be sent to Gertrude Banks's residence in Washington, D.C. Prince also noted that, as she allegedly had previously mentioned to Kapchan, Gertrude Banks "will be refinancing the property as soon as the repairs are done and of course your services will be needed."⁵

⁴ The record is not entirely clear why each check was \$600.00 short of the specified \$30,000 amount for each recipient but that is inconsequential to our jurisdictional analysis.

⁵ No address for Prince is supplied in the record, but we presume that Prince did not reside in New Jersey since plaintiff does not argue that she did.

Consistent with Prince's direction, Kapchan subsequently issued a check to Gertrude Banks, drawn on his attorney mortgage trust account in the amount of \$147,000, i.e., five times \$29,600, or the combined amount of the separate checks previously issued to each of the Banks Five. This new check was dated June 6, 2005. Gertrude Banks endorsed that check and received the proceeds.

Eventually, Gertrude Banks failed to pay the monthly sums due on the mortgage loan. In January 2008, Accredited, through its nominee Mortgage Electronic Registration Systems, Inc. ("MERS"), a California corporation, filed a foreclosure complaint in the Chancery Division in Mercer County, seeking sale of the Princeton property to satisfy the outstanding mortgage balance, as well as damages, and costs.

Subsequently, the Banks Five intervened in the foreclosure action, alleging that the deed conveying the property to Gertrude Banks had been fraudulently prepared, and that Gertrude Banks had improperly deprived the Banks Five of their ownership interests in the property when she obtained the mortgage loan in May 2005. The Banks Five further noted that Gertrude Banks had filed a separate action in the Chancery Division in Mercer County in January 2006, seeking a partition of the interests of

the Banks Five, thereby reflecting her recognition that the Banks Five had legitimate claims to the property.

First American, as the title insurer on the loan transaction, investigated the situation and verified that the Banks Five had not been paid out of the loan proceeds at the time of closing. In order to eliminate the Banks Five's claims and a potential cloud on title, First American reached a settlement with the five relatives, agreeing to pay each of them \$30,000, or a total of \$150,000.⁶

In April 2009, First American filed the present lawsuit against Kapchan in the Law Division in Mercer County, seeking to recover the \$150,000 that it paid out to the Banks Five, plus its legal expenses and other damages. Among other things, First American asserted that Kapchan "failed to close the subject [May 2005] transaction in a professional manner meeting the standard of attorneys in New Jersey⁷ closing such transactions." In a

⁶ We have not been supplied with documentation confirming the ultimate outcome of the foreclosure action.

⁷ We have not been asked to decide, and do not resolve here, the choice-of-law issues relating to the pertinent standards of care and, in particular, whether Kapchan's conduct should be evaluated under New Jersey law or under the laws of some other state or jurisdiction. We also have not been asked to decide, and do not reach, whether Kapchan's extraterritorial activities amount to "the practice of law" and, if so, whether they were authorized under the New Jersey Rules of Professional Conduct. See RPC 5.5(a)(3)(iv) (authorizing attorneys admitted in another

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Second Count, First American alleges that Kapchan violated the Real Estate Settlement Procedures Act, 12 U.S.C.A. §§ 2601-17, and committed fraud in the course of a Federal Department of Housing and Urban Development transaction in violation of 18 U.S.C.A. §§ 1001 and 1010 "by failing to distribute the closing proceeds in accordance with the HUD-1"

In lieu of answering First American's complaint, Kapchan filed a motion to dismiss it for lack of in personam jurisdiction. Kapchan filed a supporting certification, maintaining that he does not have offices or own real property in New Jersey, and that he is not licensed to practice law in this State. He certified that he never physically entered New Jersey in connection with the subject loan transaction. He described his role in the transaction as a "settlement agent." His certification does not identify any client for whom he rendered legal services, except that he specifically denied that the Banks Five were ever his clients. According to Kapchan, "[a]ll of the work [he] performed in connection with the closing of the underlying transaction, by way of written or telephonic

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state to engage in certain practice activities in New Jersey for existing clients on an "occasional" basis, where the lawyer's disengagement would "result in substantial inefficiency, impracticality[, or detriment to the client]").

communications with the various parties involved in the transaction, took place while [he] was in New York."

First American did not pursue jurisdictional discovery from Kapchan. Instead, it filed extensive opposition to Kapchan's motion, attaching numerous documents relating to the loan transaction. The parties each filed memoranda of law addressing the jurisdictional issues.

After hearing oral argument, the motion judge granted Kapchan's application and dismissed the complaint for lack of in personam jurisdiction. In his oral ruling, the judge concluded that plaintiff had not established that Kapchan had "minimum contacts" with New Jersey with respect to the loan transaction. The judge noted that, although the subject property is in New Jersey as well as the title agent, Allstates, neither Gertrude Banks nor any of the Banks Five reside in New Jersey. The judge found insignificant Kapchan's interactions with Allstates, classifying his communications with Allstates as "ministerial," and observing that they did not "form the basis of the suit." The judge further noted that "the parties and money involved in this suit derive from outside of New Jersey and the closing occurred outside of New Jersey[.]"

First American now appeals, contending that the trial court erred in its jurisdictional analysis. It maintains that the

record sufficiently shows that Kapchan had minimum contacts with New Jersey with respect to the loan transaction, and that it would not offend constitutional principles of fair play and substantial justice to require Kapchan to defend this civil action in this State.

II.

A.

The jurisdictional principles that guide us are well settled. It has long been recognized that our State courts may exercise jurisdiction over a non-resident defendant "to the uttermost limits permitted by the United States Constitution." Avdel Corp. v. Mecure, 58 N.J. 264, 268 (1971); see also R. 4:4-4; Nicastro v. McIntyre Mach. Am., Ltd., 201 N.J. 48, 72 (2010).

In the progression of personal jurisdiction cases decided by the United States Supreme Court under the federal Due Process Clause, two cardinal principles have consistently applied, at least since 1945 when the Court decided International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). First, "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it[.]" Id. at 316, 66 S. Ct. at 158, 90 L. Ed. at 102. Second, the minimum contacts must be of a nature and extent

"such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Ibid. (quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 343, 85 L. Ed. 278, 284 (1940)); see also Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958); McGee v. Int'l Life Ins Co., 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957).

In the present litigation, plaintiff invokes a "specific" jurisdictional nexus between defendant Kapchan and the State of New Jersey arising out of the subject loan transaction, rather than asserting that this State has "general" jurisdiction over Kapchan by virtue of any "'continuous and substantial' contacts with the forum." Jacobs v. Walt Disney World Co., 309 N.J. Super. 443, 452 (App. Div. 1998) (quoting Accura Zeigel Mach. Corp. v. Timco, Inc., 305 N.J. Super. 559, 565 (App. Div. 1997)); see also Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 n.9, 104 S. Ct. 1868, 1872 n.9, 80 L. Ed. 2d 404, 411 n.9 (1984) (concerning general jurisdiction); Waste Management, Inc. v. The Admiral Ins. Co., 138 N.J. 106, 119 (1994) (same). Thus, we need not consider how frequently Kapchan, who has offices in Manhattan, may travel to New Jersey for any purposes independent of the instant loan transaction.

A "minimum contacts inquiry must focus on 'the relationship among the defendant, the forum, and the litigation.'" Bayway Ref. Co. v. State Utilities, Inc., 333 N.J. Super. 420, 429 (App. Div.), certif. denied, 165 N.J. 605 (2000) (quoting Lebel v. Everglades Marina, Inc., 115 N.J. 317, 323 (1989)). "In determining whether the defendant's contacts are purposeful, a court must examine the defendant's 'conduct and connection' with the forum state and determine whether the defendant should 'reasonably anticipate being haled into court [in the forum state].'" Ibid. (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490, 501 (1980)). Additionally, "the existence of minimum contacts turns on the presence or absence of intentional acts of the defendant to avail itself of some benefit of a forum state." Waste Management Inc., supra, 138 N.J. at 126.

The presence or absence of personal jurisdiction must be determined "on a case-by-case basis." Bayway Ref. Co., supra, 333 N.J. Super. at 429. This analysis requires a judicial examination of several elements in an effort to satisfy the notions of "fair play and substantial justice." Lebel, supra, 115 N.J. at 328. Specifically, the court must consider:

the burden on the defendant, the interests of the forum [s]tate, and the plaintiff's interest in obtaining relief. It 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 [s]tates in furthering fundamental substantive social policies."

[Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal., 480 U.S. 102, 113, 107 S. Ct. 1026, 1033, 94 L. Ed. 2d 92, 105 (1987) (quoting World-Wide Volkswagen, supra, 444 U.S. at 292, 100 S. Ct. at 564, 62 L. Ed. 2d at 498).]

On appeal, the Law Division's application of these legal principles to the factual record is "not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995). A ruling on jurisdictional issues is reviewed de novo, as the question of in personam jurisdiction is a question of law. Mastondrea v. Occidental Hotels Mgmt. S.A., 391 N.J. Super. 261, 268 (App. Div. 2007) (citing Vetrotex Certainteed Corp. v. Consol. Fiber Glass Prods. Co., 75 F.3d 147, 150 (3d Cir. 1995)). Such de novo review is particularly warranted in contexts such as the present one, in which the motion judge made his ruling based upon the documentary submissions without an evidentiary hearing or evaluating the credibility of witnesses. Cf. Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 483-84 (1974).⁸

⁸ Indeed, we by no means fault the motion judge for deciding the jurisdictional motion here without an evidentiary hearing, as no such hearing was apparently requested by plaintiff, and no
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B.

Assessed by these standards, we conclude that the record contains sufficient indicia of minimum contacts to justify the Superior Court's exercise of in personam jurisdiction over Kapchan in connection with this particular real estate matter.

We begin with a recognition that the real estate that was at the core of the loan transaction, and which provided the necessary and sole security for the mortgage loan, is located in Princeton, New Jersey. It is true that the record owner of those premises, Gertrude Banks, was not a New Jersey resident, nor were her five relatives, who also claimed an interest in the property. Even so, the real estate itself provides a very tangible and central nexus between Kapchan, who prepared all or most of the transactional documents, including the HUD-1, and the State of New Jersey. The Princeton residence, in essence, served as a nidus, from which the loan transaction and the ensuing disputes developed.

When the New Jersey realty later became the object of foreclosure litigation in the Superior Court, a complaint in intervention was filed by the Banks Five. They asserted that,

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depositions of Kapchan or any other potential jurisdictional witnesses were pursued.

as a result of improper disbursements made by Kapchan, they had been wrongfully deprived of their respective shares in the value of the property. The complaint in intervention thereby interfered with what otherwise appears to have been a routine foreclosure action by a lender against a delinquent borrower. Plaintiff's cause of action turns on the supposition that, but for Kapchan's acquiescence to the contrary direction of Prince, the five \$30,000 checks would otherwise have been paid to the Banks Five, consistent with the original lender's instructions and the stated entries on the HUD-1. Instead, Kapchan disbursed the funds to Gertrude Banks herself, thereby setting up a potential cloud on the title, or an unfunded liability when and if an eventual foreclosure action was filed.

Our courts have found that, "due process is satisfied when a forum asserts jurisdiction over a defendant who undertakes affirmative acts which the defendant should reasonably foresee would lead to economic damages within the forum." Jacobs, supra, 304 N.J. Super. at 461. Such reasonable foreseeability exists here. Moreover, jurisdiction may be asserted regardless of whether the tortious act is negligent or intentional. See Knight v. San Jacinto Club, Inc., 96 N.J. Super. 81, 89-90 (Law Div. 1967).

We also draw significance from Kapchan's interactions with Allstates, the New Jersey-based title company. Kapchan communicated with Allstates at its Mercerville office. He delivered a mortgage governed by New Jersey law to Allstates for recordation in the Mercer County Hall of Records. At the same time, Kapchan provided to Allstates his invoice "for the handling of this title closing transaction in Allstates['] behalf," presumably receiving the \$895.00 in payment for his services that was called for under the HUD-1 form.

Kapchan contends that he did not select Allstates, or any other New Jersey entity, to be involved in this transaction. Whether or not that is true, Kapchan acted as the "closing agent" (or "settlement agent"), and he sought payment for the "handling" of the transaction "in Allstates['] behalf." Although Kapchan denies an attorney-client relationship with Allstates (or, for that matter, with any party in the loan transaction), it is readily apparent that he at least had a business relationship with Allstates, as evidenced by his May 21, 2005 correspondence to Allstates enclosing the completed transactional documents and his bill for services. In this regard, we part company with the motion judge's classification of Kapchan's interactions with Allstates as simply "ministerial."

At the very least, the interactions with Allstates strengthen Kapchan's connection with this State, in a transaction that already involved a New Jersey parcel. We need not ascertain who selected Allstates in order to glean significance from Kapchan's interactions with Allstates, no more than we would need to know in a personal jurisdiction case involving the sale of goods which sales agent or other intermediary had identified a potential New Jersey account to an out-of-state vendor.

Kapchan argues that he never set foot in New Jersey to perform any acts relating to the loan transaction. These arguments about physical presence are not, however, dispositive under the law.

As the United States Supreme Court has recognized, "it is an inescapable fact of modern commercial life that a substantial amount of 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." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 105 S. Ct. 2174, 2184, 85 L. Ed. 2d 528, 543 (1985); see also Lebel, supra, 115 N.J. at 328.

We appreciate that the loan transaction here involved and affected a number of persons and entities outside of New Jersey,

including a lender and title company in California, a borrower in Washington, D.C., a bank in New York, and claimants to the New Jersey property (or its proceeds) residing in Virginia and in North Carolina. Nevertheless, we are satisfied, as a matter of law that, on balance, the constitutional requirement of Kapchan's "minimum contacts" with New Jersey is fulfilled, and that the exercise of our courts' jurisdiction does not offend "traditional notions of fair play and substantial justice." The factors governing a "fair play" assessment do not compel a different outcome, and we discern no great hardship to defendant or incursion upon the sovereign interests of the respective states by requiring Kapchan to travel to this neighboring state to defend his conduct. We reach that determination on the discrete facts before us, and find it unnecessary to reach whether a per se rule extending jurisdiction to all settlement agents in the refinancing of a mortgage loan secured by New Jersey realty are subject to this State's long-arm jurisdiction.

C.

The trial court's order dismissing the complaint for lack of in personam jurisdiction is consequently reversed, and the matter is remanded for further proceedings on the merits.⁹

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

⁹ Nothing in this opinion should be construed, of course, as a disposition or even an indication of any views on the merits of the litigation.