IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2670
Summary Calendar

ALISON LELAND, Individually and as next friend of JARET LELAND, CAMERON LELAND and AUSTIN LELAND minor children, ET AL.,

Plaintiffs-Appellants

v.

DE HAVILLAND AIRCRAFT COMPANY OF CANADA, LTD., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-91-2704)

(February 26, 1993)

Before GARWOOD, JONES, and EMILIO GARZA, Circuit Judges.*

EDITH H. JONES, Circuit Judge:

This is an appeal of the district court's granting of the appellees' motion to dismiss for lack of personal jurisdiction. Preliminarily, Appellants assert that the trial court erroneously found that it had subject matter jurisdiction over the parties pursuant to 18 U.S.C. § 1332(a)(3). Appellants then contend that if the court did have jurisdiction, it was nevertheless incorrect

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

in dismissing the case for lack of personal jurisdiction over Boeing of Canada, Ltd. (BOC) and Boeing Canada Technology, Ltd.[1] (BCT). Because we find that the district court's decision to be well founded, we affirm.

BACKGROUND

This cause of action arose on August 7, 1989 when a De Havilland DHC-6 Twin Otter aircraft crashed in Ethiopia killing thirteen passengers and three crew members. Tragically, one of the passengers was Congressman George Thomas "Mickey" Leland. On August 6, 1991, the surviving family of Congressman Leland, his wife Alison Leland and his three children, Jarrett, Cameron, and Austin filed suit in state court in Houston, Texas, against, among others, the manufacturer of the plane, Boeing of Canada (BOC), the Boeing Company (the parent corporation of Boeing of Canada) and the governments of Canada and Ethiopia.

On September 12, the case was removed to federal court by the Boeing Company and BOC. On September 20, 1991, an Ethiopian citizen, Tesfaye Negash, the son of one of the pilots, intervened in the lawsuit. Later in the year, all of the plaintiffs voluntarily dismissed or non-suited the Dominion of Canada, the Relief and Rehabilitation Commission of Ethiopia and The Boeing Co. (the parent corporation) from the lawsuit, and asked for remand, which was denied. On January 3, 1992, the same plaintiffs filed a similar suit in the Probate Court of Harris County which was also

[1] The appellants identified BCT by its predecessor's name "The de Havilland Aircraft of Canada, Ltd." BCT is a wholly-owned subsidiary of BOC.

removed and consolidated with its predecessor in the federal district court.

On May 7, 1992, Judge Black dismissed all defendants for lack of personal jurisdiction. The following facts were relevant to this conclusion. The Twin Otter aircraft involved in the crash was manufactured in 1980 by the De Havilland Aircraft Company of Canada in Downsview, Ontario. It was delivered in 1980 to Jersey European Airways, a commuter operator based in the Channel Islands. In 1985, Jersey European sold the aircraft to RRC, which operated aircraft in Ethiopia. The particular aircraft was never owned by a resident of Texas, never operated in Texas and had no contacts with Texas or the United States.

BOC is incorporated in Delaware. It has very few contacts with Texas. It is not a Texas corporation. It has never been licensed or otherwise chartered by the law of Texas to do business. It does not have a registered agent or office in Texas. It does not hold a license, charter or permit issued by the state of Texas. It does not pay taxes to the state or subdivision of the state of Texas. It does not maintain a bank account in the state of Texas; nor any offices, manufacturing, distribution, sales or warehouse facilities; nor does it lease any plants or real property. BOC has never sold an aircraft in Texas nor entered into maintenance contracts for any aircraft based in Texas. Its contacts have been limited to advertising in publications that are distributed in Texas and the third-party operation of several of the aircraft sold by BOC in Texas. Because of this fact, and

pursuant to Federal Aviation Regulations, BOC has sent various mailings to Texas to ensure that its aircraft are properly operated and maintained.

BCT is a wholly owned subsidiary of BOC. It has absolutely no contacts with the State of Texas. It does not engage in advertising or mailings to reach Texas.

DISCUSSION

Because both of the issues here relate to the issues of jurisdiction we review the district court's findings de novo where, as here, the material facts are undisputed. Command-Aire Corp. v. Ontario Mechanical Sales, 963 F.2d 90, 93 (5th Cir. 1992) (personal jurisdiction); Voluntary Purchasing Group v. Reilly, 889 F.2d 1380, 1384-85 (subject matter jurisdiction). The first question is whether Leland's motion for remand was proper. The motion was based on alleged lack of subject matter jurisdiction owing to a lack of diversity of the parties. Appellants assert that because there are aliens on both sides of the case diversity cannot exist. This may be true for the purposes of 28 U.S.C. § 1332(a)(2)[2], however it is not true as regards § 1332(a)(3). See Transure, Inc. v. Marsh & McLennan, Inc., 766 F.2d 1297-98 (9th Cir. 1985); Goar v. Compania Peruana de Vapores, 688 F.2d 417, 420 n.6 (5th Cir. 1982) ("Section 1332(a)(3) may also have the effect of retaining federal jurisdiction when there is complete diversity between United States citizens involved in the action but there are foreign

[2] The cases cited by the plaintiffs make this point. It has no application, however, to § 1332(a)(3) which was pled here.

subjects among the parties on both sides."); 13B C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure § 3604 at 390 (1984).

In the alternative appellants seem to claim that because BOC's principal place of business is in Canada, it cannot be held to be a citizen of a state for the purposes of § 1332(a)(3) and therefore must be judged by the standard of § 1332(a)(2). This counterintuitive proposition has no support in the case law and was directly rejected by the Eleventh Circuit Court of Appeals in Cabalceta v. Standard Fruit Co., 883 F.2d 1553 (11th Cir. 1989). In that case, the court stated:

> [i]f, upon inquiry, the court determines that a domestic corporation's worldwide principal place of business is not in the United States . . . then the foreign principal place of business cannot be considered for diversity jurisdiction purposes. We are convinced that Congress has never intended to strip a domestic corporation of its citizenship for any purpose, nor has Congress intended to create a situation of dual citizenship and punish a domestic corporation which operates on an international basis. To the contrary, Congress has most often encouraged world-wide trade with the strength and financial stability of the corporation, the foreign country and the United States.

Id. at 1561.[3]

As to the issue of personal jurisdiction, the constitutional standard is two-pronged. There must be (1) minimum contacts between the defendant and the forum and (2) no offense to traditional motions of fair play and substantial justice if the

[3] Appellant's argument that this holding does not specifically comport with the U.S. Constitution is without merit.

case proceeds in the forum state. Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 105, 107 S. Ct. 1026, 1028, 94 L.Ed.2d 92 (1988). The first prong of the test cannot be fulfilled unless the defendant has purposefully availed itself of the privileges of conducting its activities in the state and has invoked the benefits and protections of its laws. 408 U.S. at 108-09, 107 S. Ct. at 1030. Further, to have general personal jurisdiction[4], the defendant must have continuous and systematic contacts with the state. Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 445, 72 S. Ct. 413, 418, 96 L.Ed. 485 (1952).

Whether the first prong of the constitutional test was satisfied is answered squarely by the recent case of Wenche Siemer v. Lear Jet Acquisition Corp., 966 F.2d 179 (5th Cir. 1992). Seimer involved an almost identical factual situation to the instant case. The court in a thorough analysis of subject matter jurisdiction held that no sufficient minimum contacts existed between the aircraft manufacturer and the forum.

Appellants' contend that Siemer can be distinguished on the ground that, in that case, Texas did not have a compelling interest in the litigation. This argument lacks merit and shows that appellants misunderstand the threshold requirement of the minimum contacts test. Appellants assert that because it is fairer

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[4] "Specific" jurisdiction contrasts with "General" jurisdiction, pursuant to which "a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum." Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, n.9, 104 S. Ct. 1868, 1872, n.9, 80 L.Ed.2d 404 (1984). Appellants concede a lack of specific jurisdiction.

and more just to allow Texas plaintiffs to pursue this case in Texas than to allow foreign plaintiffs to sue in Seimer, there ought to be a finding that sufficient minimum contacts existed. However, there are two elements of the constitutional test for personal jurisdiction; appellants' argument goes to the second, "fair play" prong rather than to the minimum contacts criterion. If minimum contacts are not established, there can be no personal jurisdiction regardless of the equities of the situation. Siemer stands for the proposition that on facts such as these, there are not enough contacts of an aircraft manufacturer to support a finding of general jurisdiction under the first prong of the test. Appellants have adduced no contrary authority. We must therefore hold that no personal jurisdiction exists.

For the foregoing reasons, we **AFFIRM** the district court's dismissal of the complaint.