Circuit Court for Baltimore City
Case No. 24-C-09-006989

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 981

September Term, 2010

WILLIAM H. WHARTON, JR.

v.

TRANSLOGIC AUTO CARRIERS, LLC.

Fader, C.J.,
Leahy,
Reed,
JJ.

Opinion by Leahy, J.

Filed: May 29, 2019

In 2007, William H. Wharton, a Maryland resident and the appellant in this case, entered into two agreements with Translogic Auto Carriers, LLC ("Translogic"), the appellee, to lease a truck and to work as a truck-driver. The agreements were governed by the law of Michigan and named Michigan state and federal courts as the fora for any disputes arising from the agreements. A few weeks after Wharton began work, Translogic recalled him to Michigan, impounded his truck, and terminated their business relationship. In 2008, Translogic sued Wharton for money damages in the District Court of Maryland for Baltimore City. The catalyst for this lawsuit is unclear, but the record reflects that Translogic did not prosecute its claim beyond the initial filing, and the district court ultimately dismissed the case.

In 2009, Wharton filed suit against Translogic in the Circuit Court for Baltimore City for breach of the 2007 agreements. On March 9, the circuit court granted Wharton an order of default on the grounds that Translogic failed to plead. Later, at the damages hearing, however, the circuit court dismissed Wharton's entire claim, finding that the agreements named Michigan in their forum-selection clauses, and that Maryland lacked jurisdiction over Translogic. Wharton appealed that decision to this Court on July 1, 2010. We stayed the appeal after receiving notice that Translogic entered into an involuntary bankruptcy in federal bankruptcy court on March 2, 2010. Wharton's appeal proceeded in this Court in 2018 following the conclusion of the federal bankruptcy proceedings. He presents six issues, which we have reordered, rephrased, and consolidated:[1]

[1] The original questions presented are as follows:

1. Whether the trial court exceeded the bounds of its revisory power by dismissing Wharton's cause of action.

2. Whether the trial court erred by vacating the default judgment against Translogic because Translogic consented to, or waived any objection to, the personal jurisdiction of Maryland.

3. Whether the order and memorandum dismissing Wharton's case were issued without the requisite hearing to which Wharton was entitled under Md. Rule 2-311(e)-(f).

4. "Whether Maryland's Circuit Courts Have Subject Matter Jurisdiction to Render Judgments on Claims Governed by the 'Michigan Uniform Commercial Code-Leases.'"

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1. Whether the Trial Court's June 14, 2010 Order and Memorandum was an *Ex-Parte* Decision That Violated Md. Rule 2-311(e)-(f), the Plaintiff's Right to Procedural Due Process, and [was] Contrary to the Canons of Judicial Conduct.

2. Whether the Trial Court Exceeded the Scope of Its Authority by Revising the March 30, 2010 Enrolled Default Judgment, and/or in the Alternative, Whether the Trial Court Erred When its *Sub Curia* Motion and Decision Failed to Comply With the Standards of Maryland Rule 2-535.

3. Whether the Trial Court Committed Error by Vacating the March 30, 2010 Enrolled Default Judgment, and/or in the Alternative, Whether the Trial Court Erred When its *Sub Curia* Motion and Decision Failed to Comply With the Standards of Maryland Rule 2-613.

4. Whether the Defendant's Waiver of Maryland Rule 2-322(a) Defense and Voluntary Consent to Jurisdiction in the State of Maryland Precluded the Trial Court from Relying Upon Improper Venue or Jurisdiction Over the Person Defenses as the Basis for its Decision to Set Aside the March 30, 2010 Enrolled Default Judgment and Dismiss the Plaintiff's Complaint.

5. Whether Maryland's Circuit Courts Have Subject Matter Jurisdiction to Render Judgments on Claims Governed by the "Michigan Uniform Commercial Code-Leases."

6. Whether the Plaintiff is Entitled to Damages for the Whole Lease Contracts or any Unperformed Balances.

5. Whether Wharton is "entitled to damages for the whole lease contracts or any unperformed balances."

We hold that the circuit court properly dismissed Wharton's case for lack of jurisdiction because Wharton failed to demonstrate that Translogic waived or consented to personal jurisdiction in the State of Maryland and Wharton signed agreements that named Michigan in their forum-selection clauses. Consequently, we do not reach the remaining questions, and affirm the judgment of the circuit court.

BACKGROUND

A. The Short-Lived Agreements

On February 5, 2007, Wharton, an over-the-road truck driver[2] residing in Baltimore, Maryland, and Translogic, a freight shipping and trucking company based in Bad Axe, Michigan, met at Translogic's headquarters to enter into two agreements. Under the first agreement, entitled "Independent Contractor Equipment Lease Agreement" ("Lease Agreement"), Translogic agreed to lease Wharton a truck for $1,300 per week for two years, with an option to renew for an additional two years. After the expiration of the primary two-year term, Wharton would have the option to purchase the truck for the sum of $156,244.98.

By its terms, the Lease Agreement could be terminated: "(i) upon expiration of the term of th[e] Lease, (ii) purchase of the Equipment by Lessee [Wharton], and (iii) at the

[2] "[O]ver-the-road [] drivers haul freight between terminals in different cities[,]" as opposed to local transport drivers, who haul freight "in and about the city in which their assigned terminal is located[.]" *United States v. E. Texas Motor Freight, Inc.*, 643 F.2d 304, 305 (5th Cir. 1981).

sole election of Lessor [Translogic]." The parties agreed to mediate all disputes, and if mediation was unsuccessful, to submit such disputes to binding arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association. The Lease Agreement provided, generally, that it was to be interpreted under and governed by the laws of the State of Michigan and specified that any arbitration proceedings were to be held in Michigan. A non-waiver of rights clause specified that "[f]ailure of either party to exercise any rights under this agreement shall not constitute a waiver of such rights."

Under the second agreement, entitled "Contractor Service Operation Agreement" ("Service Agreement," together with the Lease Agreement as the "Agreements"), Wharton agreed to provide transport services for Translogic as an independent contractor, using the truck leased under the Lease Agreement. For a term of two years, which would continue for subsequent one-year periods unless the Agreement was terminated, Wharton would be compensated for each trip taken on Translogic's behalf. Compensation would be determined by a "trip rate listed on the company rate schedules attached from time to time," to be incorporated by reference into the Service Agreement. Accordingly, Wharton would be paid a percentage of the gross revenue of each trip.

The Service Agreement provided that it could be terminated by either party by providing 30 days' written notice. Should Translogic breach the agreement, Wharton's "sole remedy" would be money damages; "[i]n no event" would Translogic be "liable for consequential damages." The Service Agreement, by its terms, was also to be "interpreted under the law of the State of Michigan, which law [would] apply in the event of any conflict of law[.]" Further, "[j]urisdiction and venue for all disputes relating to th[e] [Service

Agreement] [is] proper in the courts of Michigan for Bad Axe, Michigan, and/or the United States District Court for the district that encompasses Bad Axe, Michigan." The Service Agreement incorporated the Lease Agreement by reference.

B. Alleged Breach

In testimony provided in the circuit court, Wharton explained the conflict precipitating the underlying case. Less than six weeks after the parties signed the Agreements, Wharton took issue with his compensation. Wharton asked Translogic to see copies of the freight contracts Translogic had entered into, so that he could ascertain whether his compensation was commensurate with the percentage of the freight bills owed to him. Wharton alleged that Translogic subsequently requested that he return to Michigan for a shipment.

Wharton said that when he arrived, Translogic "locked [him] inside of the yard[,]" and then sent him a fax demanding the return of his leased truck. He returned the truck, even though he believed that he was not obligated to under the Agreements, because to keep it, he would have had to have "drive[n] through their property, destroy[ing] thing[s] because everything was locked." Wharton explained to the circuit court his theory that "because [he] asked for [copies of the freight contracts] and [Translogic] knew [it was] illegally charging [him] . . . [it] decided to just breach the contract, go into default, and take the truck back." Because, he alleged, "by giving [him] those documents [the fraud] would [have been] discovered." The fax sent by Translogic demanding return of the truck read:

> This is to verify that the working relationship between William Wharton and TransLogic Auto Carriers is terminated as of today, 3-16-2007. Truck 567 is to be turned into the Flat Rock facility in Michigan and is considered

> returned to the company once that is done. . . . Upon an inspection and complete inventory of the wheel straps that the company purchased for your use, a credit will be added to your final settlement. . . . You will be treated professionally during this exit period and the company will expect the same respect in return.

Wharton responded by fax that same day. His fax recounted the events leading to Translogic repossessing the leased truck, adding that Translogic "did not state a basis for terminating the lease agreement" and that he had neither voluntarily terminated the Agreements nor abandoned the vehicle. On March 22, 2007, Wharton sent a follow-up letter by certified mail reconfirming that he had not voluntarily terminated the Agreements.

Translogic sent a reply by fax.[3] In addition to confirming termination of the parties' working relationship, and reiterating the provision in the Lease Agreement that "the Lessor may terminate the contract at its sole election[,]" Translogic presented Wharton the option of buying the leased truck outright:

> As title holder of [the leased truck], [Translogic] has no obligation to any person or company to give any piece of equipment without verifiable funds. If a legitimate offer of $180,000 is submitted, the company, upon verification of funds would then turn over possession of [the leased truck] and would also include [the leased trailer] as well.

C. Maryland Actions

1. Translogic's Suit in the District Court of Maryland

Translogic, represented by a Maryland attorney, filed a contract claim against Wharton in the District Court of Maryland for Baltimore City on December 10, 2008. It claimed $1,810.33 in damages, plus $516.91 in interest, but its standard-form complaint

[3] The fax was undated and entitled "Re: Fax received 3-19-07 from fax # 410-685-3078."

did not specify the basis for its suit. Wharton filed a notice to defend in the district court on February 18, 2009, in which he explained that Translogic "failed to submit the dispute to arbitration as required by paragraph 17 of the contract between the parties." The district court ordered mediation to take place in Maryland, although whether the mediation occurred is unclear. After languishing on the docket for another year, the district court dismissed the case on August 26, 2010.

2. Circuit Court for Baltimore City and Federal Bankruptcy Court

On October 27, 2009, Wharton filed a complaint in the Circuit Court for Baltimore City claiming $750,000 in damages for breach of the Agreements. On November 13, 2009, he moved for declaratory judgment, alleging that Translogic had waived its contractual right to mediation by filing a civil claim in the district court, thereby "voluntarily submitt[ing] to the jurisdiction and venue of the State of Maryland." The circuit court held a hearing on January 29, 2010, and denied Wharton's motion for declaratory judgment in a brief written order. On February 5, 2010, Wharton moved for an order of default, as Translogic had never filed an answer or otherwise responded to his complaint.[4]

In an order signed on February 23 and entered on March 9, 2010, the circuit court granted Wharton's motion for order of default and request for sanctions, finding that Translogic had indeed failed to plead. On March 30, Wharton filed a motion for judgment

[4] On March 2, 2010, creditors of Translogic initiated an involuntary Chapter 7 bankruptcy in the United States Bankruptcy Court of the Eastern District of Michigan. Wharton was not among the petitioning creditors, nor did he file a notice of appearance. *See In Re: TransLogic Auto Carriers LLC*, Case No. 1:10-BK-20759 (Bankr. E.D. Mich. June 22, 2010). Apparently, the bankruptcy filing was not brought to the attention of the circuit court.

of default along with a supporting memorandum and request for a hearing on damages. The Court responded by signing an order on the same day (entered on March 31) ("Carrion Order"), stating, *inter alia*, that:

> This Court finds that [Translogic] has defaulted in this action pursuant to the Order of Default dated February 23, 2010 (Docket Entry #9001) [entered March 9, 2010].
>
> * * *
>
> It is further ORDERED, that the Clerk of the Court shall schedule this matter for a damages hearing upon expiration of the time limits set forth in Maryland Rule 2-613(d).

D. Damages Hearing and Dismissal

Wharton appeared pro se before the circuit court on May 12, 2010. Translogic was neither present nor represented by counsel. Wharton recounted the events leading to Translogic's repossession of his leased truck, and iterated that he had not had any contact with Translogic or its representatives since its breach of the Agreements.

Wharton further explained how the terms of the Agreements were honored the first six weeks. He stated that Translogic deducted $250 per week from his paychecks for a $3,000 security deposit owed on the leased truck, in addition to the regular lease payments. He stopped making lease payments as soon as Translogic repossessed the truck. Nevertheless, Wharton argued, Translogic owed him damages equivalent to the earnings he would have made over the term of the Lease Agreement. As an independent contractor, Wharton predicted that he "would have been receiving 80 percent" of the weekly gross revenue. At the very least, he averred, Translogic's termination of the Service Agreement should not have led to the termination of the Lease Agreement, under which he could have

operated his own business and purchased the truck after four years. At the conclusion of the hearing, Judge John Miller stated that he needed further time to review Wharton's filings before issuing a ruling.

In a memorandum opinion and order entered June 25, 2010 ("Miller Order"), Judge Miller rejected Wharton's claim for damages, as well as the claim in its entirety. His opinion cited paragraph 30 of the Service Agreement containing the forum-selection clause that named Michigan state and federal courts as the fora for all disputes related to the Agreements. Judge Miller concluded that

> [t]he Order of Default in this matter was properly entered because [Translogic] had failed to plead. Nevertheless, without jurisdiction, this matter cannot proceed to judgment. Accordingly, this Court will deny [Wharton's] request for relief and dismiss[] the Complaint, without prejudice, finding that it lacks jurisdiction to resolve this matter.

Wharton filed a timely notice of appeal on July 1, 2010. This Court stayed the appeal on July 14, 2011, after receiving notice that on March 2, 2010, creditors of Translogic initiated an involuntary Chapter 7 bankruptcy in the United States Bankruptcy Court of the Eastern District of Michigan. The bankruptcy proceeding concluded on June 22, 2017. *In Re: TransLogic Auto Carriers LLC*, No. 1:10-BK-20759 (Bankr. E.D. Mich. June 22, 2010).

On December 14, 2017, this Court issued a show-cause order directing the parties to explain why the stay in this Court should be lifted and why the appeal should not be dismissed. In his January 16, 2018 response to this Court, Wharton stated that Translogic's bankruptcy petition did not include him among the list of creditors, and that as a result, he is "not subject to any of the orders, agreements, and settlements entered and negotiated in

the bankruptcy court." On February 16, we entered an order stating that Wharton showed sufficient cause for the appeal to proceed.

DISCUSSION

Wharton presents two principal arguments: the first regarding default judgments and the circuit court's power to dismiss an order of default, and the second regarding Maryland's exercise of personal jurisdiction over Translogic. Translogic filed no brief.

STANDARD OF REVIEW

A trial court has broad discretion to review an interlocutory order of default, and that "discretion should be exercised so as to ensure that justice is done." *Holly Hall Publ'ns, Inc. v. Cty. Banking & Trust Co.*, 147 Md. App. 251, 265 (2002). Maryland rules and jurisprudence express "a preference for a determination of claims on their merits; they do not favor imposition of the ultimate sanction absent clear support." *Id.* at 267. "In the interest of justice," Maryland courts of appeal review "a hearing court's decision to vacate a default order liberally." *Att'y Grievance Comm'n of Md. v. Ward*, 394 Md. 1, 20 (2006).

"The existence of personal jurisdiction is a question of law." *Pinner v. Pinner*, 240 Md. App. 90, 103 (2019) (internal quotations omitted). As we review *de novo* a trial court's "interpretation and application of Maryland constitutional, statutory, or case law," we review the trial court's dismissal of a claim for lack of personal jurisdiction without deference. *Schisler v. State*, 394 Md. 519, 535 (2006) (internal quotations omitted).

I.

Default Judgment

Wharton argues that Judge Miller erred in treating the Carrion Order as "an interlocutory order of default" because Judge Miller had, in fact, "vacate[ed] a final, enrolled judgment[,]" an action exceeding the bounds of his revisory power.

Maryland's procedure for default judgment has two steps: first, the party seeking the default judgment must move for an order of default under Maryland Rule 2-613(b). An order of default "is interlocutory in nature and can be revised by the court at any time up until the point a final judgment is entered." *Bliss v. Wiatrowski*, 125 Md. App. 258, 265 (1999). Second, the party must then obtain "a judgment by default that includes a determination as to liability and all relief sought" under Rule 2-613(f). This second step disposes of the entire claim. *Md. Bd. of Physicians v. Geier*, 451 Md. 526, 555 (2017); Judge Kevin F. Arthur, FINALITY OF JUDGMENTS AND OTHER APPELLATE TRIGGER ISSUES 27-28 (3d. ed. 2018). The "*entry of default judgment* is a final judgment[.]" *Bliss*, 125 Md. App. at 265 (emphasis added). The court may enter the default judgment if "it is satisfied [] that it has jurisdiction to enter the judgment[.]" Md. Rule 2-613(f).

An order of default is merely the first step in a two-step process. Md. Rule 2-613(b). The order of default noted by Judge Carrion was the first step, and Judge Miller's entry of the judgment was the second. Judge Miller examined whether the circuit court had jurisdiction to enter the judgment as required by Rule 2-613(f) and determined that it did not. This was no error; in fact, Judge Miller was required to confirm that Maryland had jurisdiction over Wharton's claims. Md. Rule 2-613(f).

II.

Personal Jurisdiction

Wharton argues that Translogic "voluntarily consent[ed] to jurisdiction in Maryland" when it filed the district court action, thereby waiving the right to litigate in Michigan. Moreover, he insists that Translogic bore the burden of establishing lack of jurisdiction, a defense Wharton claims is waived unless raised in a preliminary motion.

To determine whether Wharton has established that Maryland may exercise personal jurisdiction over Translogic, we look to both Maryland's long-arm statute and the Due Process Clause of the Fourteenth Amendment, which "limits the power of state courts to exercise personal jurisdiction over out-of-state defendants." *Stisser v. SP Bancorp, Inc.*, 234 Md. App. 593, 615 (2017) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 311, 321 (1945)).

Out-of-state corporations submit to the jurisdiction of Maryland under one of two modalities: general or specific personal jurisdiction. Both types of jurisdiction require that a corporation "maintain sufficient minimum contacts with the forum such that the exercise of jurisdiction meets the general test of essential fairness." *Pinner*, 240 Md. App. at 106 (internal quotations omitted). Courts have general jurisdiction over a corporation if the corporation is "at home" in the state. *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (reaffirming the principle that general jurisdiction exists for corporate defendants only where the defendants are "at home"). A corporation is "at home" in the state of its principal place of business and in the state in which it is incorporated. *Stisser*, 234 Md. App. at 616 (citing *BNSF Ry. Co.*, 137 S. Ct. at 1558).

Courts have specific jurisdiction over a corporation if the corporation has "purposefully availed" itself of the benefits of that state. *Id.* at 617, 628. Maryland's long-arm statute provides:

> *In general.* — A court may exercise personal jurisdiction over a person, who directly or by an agent:
>
> (1) Transacts any business or performs any character of work or service in the State;
>
> (2) Contracts to supply goods, food, services, or manufactured products in the State;
>
> (3) Causes tortious injury in the State by an act or omission in the State;
>
> (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State;
>
> (5) Has an interest in, uses, or possesses real property in the State; or
>
> (6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation, or agreement located, executed, or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.

Maryland Code (1973, 2006 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 6-103(b).[5]

In considering the reach of Maryland's long-arm statute, we apply a three-pronged inquiry to determine whether the exercise of specific jurisdiction over a defendant comports with due process. *Stisser*, 234 Md. App. at 628; *see also Beyond Sys., Inc. v. Realtime Gaming Holding Co., LLC,* 388 Md. 1, 22 (2005) ("Because we have consistently held that the reach of the long arm statute is coextensive with the limits of personal jurisdiction delineated under the due process clause . . . , our statutory inquiry merges with

[5] This version of Maryland's Long Arm Statute was in effect at the time Wharton filed in the circuit court. The current version is substantially the same.

our constitutional examination.") (citation omitted). Those factors are "(1) the extent to which the defendant has purposefully availed [itself] of the privilege of conducting activities in the State; (2) whether the plaintiff's claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable." *Pinner*, 240 Md. App. at 107 (citation omitted). "In determining what is [constitutionally] reasonable under the Due Process Clause and would not offend 'traditional notions of fair play and substantial justice,' we consider several factors." *Stisser*, 234 Md. App. 593, 617 (2017) (quoting *Int'l Shoe Co.*, 326 U.S. at 316). The Supreme Court has identified the following relevant factors: "the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, 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." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (internal quotation marks omitted) (quoting *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

As we did in *Stisser*, we "emphasize that when based on specific jurisdiction, a court's adjudicatory authority is limited to those 'issues deriving from, or connected with, *the very controversy* that establishes jurisdiction.'" 234 Md. App. at 618 (quoting *Goodyear Dunlap Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). The burden to establish "the propriety of the exercise of personal jurisdiction" is the plaintiff's. *Pinner*, 240 Md. App. at 103 (quoting *CSR, Ltd. v. Taylor*, 411 Md. 457, 462 n.2 (2009)).

Wharton attempts to establish that Maryland courts have personal jurisdiction over Translogic due to waiver because Translogic filed an action in the district court against Wharton. Under Maryland Rule 2-322, which establishes mandatory and permissive preliminary motions, the defense of lack of personal jurisdiction can be waived. Md. Rule 2-322(a). The rule states that the defense of lack of personal jurisdiction is a mandatory motion that must "be made by motion to dismiss filed before the answer, if an answer is required[.]" *Id*. If such a motion is not timely made before the answer is filed, the defense is waived. *Id.*; *see also* Paul V. Niemeyer et al., MARYLAND RULES COMMENTARY 265 (4th ed. 2014).

We find our recent decision in *Pinner* instructive here. 240 Md. App. at 112. In *Pinner*, we held, *inter alia*, that the circuit court erred by exercising personal jurisdiction over an out-of-state defendant who had previously prosecuted a case in Maryland. *Id.* There, the Husband and Wife plaintiffs residing in North Carolina sued Husband's former employers and other defendants in Maryland, alleging that Husband was exposed to asbestos dust in the course of his employment ("Asbestos Case"). *Id.* at 98-99. When Husband died, Wife listed the Asbestos Case as property of Husband's estate and amended the complaint to include a claim of wrongful death. *Id.* at 99-100. The defendants moved to dismiss the wrongful death claim of the amended complaint because Wife "failed to name [Stepson] as a use plaintiff." *Id.* at 100. Wife then added Stepson as a use plaintiff and served him with the amended complaint. *Id.*

About two years later, Stepson sued Wife for failing to timely name him as a use-plaintiff. *Id.* at 101. He served Wife in North Carolina, but she failed to plead. *Id.* at 102.

Stepson then moved for an order of default. *Id.* The circuit court entered a notice of default, and Wife, through a third-party without personally appearing in Maryland, moved to vacate the order, which the court denied. *Id.* at 102. At a subsequent damages hearing, the court determined that it had personal jurisdiction over Wife and ordered her to pay Stepson half of the settlement proceeds from the wrongful death action. *Id.* at 102-03. Wife appealed to this Court, arguing that the circuit court lacked personal jurisdiction over her because "her only contact with Maryland was the filing and prosecution of the Asbestos Case and that that was insufficient to confer jurisdiction." *Id.* at 104-05. Stepson retorted that Wife "purposely . . . availed herself of the privilege of conducting activities" in Maryland, subjecting her to the jurisdiction of the circuit court. *Id.* at 105. Moreover, she had waived the defense of lack of personal jurisdiction by failing to assert it by motion under Rule 2-322(a). *Id.*

We first dispensed with Stepson's claim that Wife had waived the defense of lack of personal jurisdiction. *Id.* at 106. We noted that Rule 2-322(a) mandates that the defense be asserted in a motion "*filed before the answer*, if an answer is required[,]" and that "[i]f not so made *and the answer is filed*," the defense is waived. *Id.* Thus, "[h]aving never filed an answer, [Wife] did not waive her right to assert the defense of lack of personal jurisdiction by her failure to assert it below." *Id.* (citation omitted).

Next, we determined "whether [Wife's] conduct of the Asbestos Case g[ave] rise to specific personal jurisdiction." *Id.* at 107. We considered the three factors governing the reach of Maryland's long-arm statute: "(1) the extent to which the defendant has purposefully availed [herself] of the privilege of conducting activities in the State; (2)

whether the plaintiff's claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable." *Id*. at 107 (citation omitted).

Regarding the first factor, we noted that "the filing of a lawsuit does not constitute regularly doing business in Maryland and is not a persistent course of conduct in Maryland," and that the "only contact [Wife] is alleged to have had with Maryland is the filing and prosecution of the Asbestos Case." *Id.* at 107, 110. Moreover, the "factual and legal issues underlying" the Asbestos Case claims "b[ore] no relation to the claims raised by [Stepson] in his suit for negligent breach . . . and for breach of fiduciary duty[.]" *Id.* at 109-10. The extent of Wife's purposeful availment, then, was low.

Second, we examined "whether the plaintiff's claims arise out of those activities directed at the State." *Id.* at 111. We concluded that the "connection between [Wife's] [alleged] breach of fiduciary duty . . . and maintenance of the Asbestos Case [w]as tenuous." *Id.* Lastly, we considered "whether the exercise of jurisdiction is constitutionally reasonable." *Id.* We noted that there was "no allegation that [Wife] travelled to Maryland at any time during the prosecution of the Asbestos Case," and that she "rel[ied] instead upon her attorneys to act on her behalf here." *Id.* at 111. Because Stepson also lived in North Carolina, it would not be difficult for him to prosecute his case there. *Id.* at 111-12. Additionally, "Maryland . . . ha[d] no interest in adjudicating the breach of fiduciary duty claims premised on North Carolina probate law." *Id.* at 112. "On balance," then, "we conclude[d] that the factors weigh[ed] against the constitutional

reasonableness of causing [Wife] to defend [Stepson's] suit in Maryland[,]" and we held that the circuit court erred by exercising personal jurisdiction over Wife. *Id.*

We proceed here as we did in *Pinner*, by dispensing at the outset Wharton's argument that Translogic waived the defense of lack of personal jurisdiction by failing to bring it by preliminary motion. Like Wife in *Pinner*, Translogic did not file an answer to Wharton's complaint. *Id.* at 106. Thus, "[h]aving never filed an answer, [Translogic] did not waive [its] right to assert the defense of lack of personal jurisdiction by [its] failure to assert it below." *Id.* In fact, Translogic has not participated at all in the underlying litigation or ensuing appeal. *See* Md. Rule 2-322(a). Wharton's argument that Translogic waived personal jurisdiction in the underlying circuit court action simply because it filed a separate action in the district court, over an unknown claim which it did not prosecute, finds no support in the law.

Next, we consider the three factors bearing on the propriety of a court's exercise of specific personal jurisdiction. *Id.* First, we assess the extent of Translogic's purposeful availment of the privilege of conducting business activities in Maryland. We reiterate that "a lawsuit does not constitute regularly doing business in Maryland[,]" and note that the "only contact [Translogic] is alleged to have had with Maryland is the filing and prosecution" of a case in the District Court of Maryland. *Id.* at 107, 110. Additionally, like Wife in *Pinner*, Translogic relied on local attorneys to represent it in Maryland, and Wharton has not alleged that representatives of Translogic ever stepped foot in Maryland. *Id.* at 112.

Second, we determine "whether the plaintiff's claims arise out of those activities directed at the State." *Id.* at 111. On the record before us, we cannot determine whether Translogic's district court case relates at all to the subject of the case underlying Wharton's present appeal. The district court filing merely asserts a claim for money damages without stating the grounds for the damages. Wharton's defense of Translogic's district court claim—that Translogic "failed to submit the dispute to arbitration as required by paragraph 17 of the contract between the parties"—does not identify the contract(s) at issue. Wharton bore the burden of establishing "the propriety of the exercise of personal jurisdiction," and he failed to establish that the underlying suit arose out of the same dispute as Translogic's other litigation in Maryland. *Id*. at 103.

Because we have determined "that the defendant's contacts with Maryland do not satisfy the 'purposeful availment requirement, thus attaining sufficient minimum contacts with the State,' we need not move on to the third prong of the analysis to 'consider whether the exercise of personal jurisdiction would be constitutionally reasonable.'" *Stisser*, 234 Md. App. at 643 n.20 (quoting *CSR, Ltd.*, 411 Md. at 493). Nevertheless, we note that, although Maryland may have "a legitimate interest in adjudicating the breach of" contract claims, it has less of an interest when the contract is governed by Michigan law. *Pinner*, 240 Md. App. at 112 ("Maryland . . . has no interest in adjudicating the breach of fiduciary duty claims premised on North Carolina probate law."). Additionally, Wharton failed to establish the burden of litigating in Michigan, considering he already traveled to Michigan to enter into the Agreements that set Michigan as the venue to govern all disputes.

Finally, we note that the Lease Agreement contained a non-waiver of rights provision that limited both parties' ability to waive contractual provisions, including the forum-selection clause. Although the Court of Appeals has held that a party may waive contractual rights even when the contract contains a non-waiver provision, "a party claiming waiver must show a clear intent to waive both the non-waiver clause and the underlying contract provision." *Hovnanian Land Inv. Grp., LLC v. Annapolis Towne Ctr. at Parole, LLC*, 421 Md. 94, 117-18, 121-22, 129 (2011) (the non-waiver provision at issue read "[n]o purported or alleged waiver of any of the provisions of this Agreement shall be binding or effective unless in writing and signed by the party against whom it is sought to be enforced"). In this case, it was Wharton's burden to demonstrate that Translogic had "a clear intent to waive" both the non-waiver of rights clause of the Lease Agreement and the forum-selection provision of the Service Agreement (incorporated into the Lease Agreement). *See id.* He failed to do so here.

We reiterate that the burden to establish "the propriety of the exercise of personal jurisdiction" was Wharton's, and he has failed to do so. *Pinner*, 240 Md. App. at 103. Accordingly, we affirm the circuit court, and hold that the Agreements contained valid forum-selection clauses naming Michigan as the state in which the parties were bound to mediate and litigate any disputes between them, and that Wharton failed to demonstrate that Translogic waived or consented to personal jurisdiction in the State of Maryland in this case.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.