

IN THE SUPERIOR COURT OF WHITFIELD COUNTY
STATE OF GEORGIA

HARRINGSON ZELAYA; and,
BRADY ZELAYA

Plaintiff,

v.

KING BIRD FIREWORKS, LLC,

Defendant.

Civil Action No.: 19CI00020

Babs Bailey
Babs Bailey, Clerk
Whitfield County, Georgia

PLAINTIFFS' SURREPLY TO DEFENDANT'S MOTION TO SET ASIDE DEFAULT
UNDER O.C.G.A. § 9-11-60(d)(1)

INTRODUCTION

If a company's business deliberately extends into Georgia (among other States), then Georgia courts can hold that company accountable for product malfunctioning there—even if the product been designed and made overseas and sold in Tennessee. *Ford Motor Co. v. Mont. Eight Judicial Dist. Court*, No. 19-368 and 19-369, 141 S. Ct. 1017, 1027 (March 25, 2021) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). King Bird deliberately extends its business into Georgia and the King Bird firework that blinded Mr. Zelaya malfunctioned in Georgia. This Court has specific jurisdiction over King Bird.

A nonresident, out-of-state defendant submits to the personal jurisdiction of a court when it seeks a ruling on the merits of the case. *Hoesch Am., Inc. v. Dai Yang Metal Co., Ltd.*, 217 Ga. App. 845, 848 (1995) (citing *Crawford v. Randle*, 191 Ga. App. 112, 115 (1989)). King Bird submitted to this Court's jurisdiction when it filed a Motion for Summary Judgment seeking a ruling on the merits of the case.

Because the Court has jurisdiction over King Bird *and* because King Bird submitted to the Court's jurisdiction, King Bird's motion should be denied.

FACTS

Plaintiff Harrington Zelaya bought a defective King Bird firework on July 4, 2018. Compl. ¶ 16a, 30. When that firework malfunctioned and struck Mr. Zelaya in his eye, eventually resulting in the loss of the eye. *Id.* at 40, 41.

King Bird markets and sells fireworks at multiple locations in Georgia. *See* Winco 30(b)(6) Dep., 46:12-47:4 (Ex. A); *see also* Georgia's Best Fireworks – King Bird (Ex. B); *see also* Winco 30(b)(6) Dep., 47:12-25. King Bird executive, Chen Shimei, has acknowledged that King Bird “see[s] larger demand from states in the south.” *See* 12/13/2016 News Article (Ex. C).

LAW & ARGUMENT

I. Georgia Courts have specific jurisdiction over King Bird because King Bird deliberately extends its business into Georgia.

If a company's business deliberately extends into State A (among other States), then courts in State A can hold that company accountable for product malfunctioning there—even if the product been designed and made overseas and sold in State B. *Ford Motor Co. v. Mont. Eight Judicial Dist. Court*, No. 19-368 and 19-369, 141 S. Ct. 1017, 1027 (March 25, 2021) (*citing World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). Stated differently, when a manufacturer makes efforts to sell products in States A and B (and other States) and a defective product from State B ends up in State A, the manufacturer can be sued in State A for injuries caused by the defective product. *Id.* (*citing World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

In this case, there is ample evidence showing that King Bird deliberately extends its business into Georgia. *See* Winco 30(b)(6) Dep., 46:12-47:4 (Ex. A) (noting that Winco sells King Bird fireworks in its brick-and-mortar store in Conyers); *see also* Georgia’s Best Fireworks – King Bird (Ex. B); *see also* Winco 30(b)(6) Dep., 47:12-25 (noting that King Bird fireworks are sold in brick-and-mortar stores in Milledgeville and Valdosta). Therefore, Georgia courts have specific jurisdiction over King Bird when its fireworks malfunction and injury person in Georgia—even if the defective firework was not sold in Georgia.

II. An out-of-state defendant consents to personal jurisdiction when it seeks a ruling on the merits.

In *Hoesch Am., Inc. v. Dai Yang Metal Co., Ltd.*, a Korean defendant sought to set aside its default judgment under O.C.G.A. 9-11-60(d)(1) for lack of personal jurisdiction. 217 Ga. App. 845, 846 (1995). In a long discussion about waiver of personal jurisdiction, the Georgia Court of Appeals noted that “a waiver results when a nonresident submits to the jurisdiction of the court by seeking a ruling from the court on the merits of the case.” *Id.* at 848 (citing *Crawford v. Randle*, 191 Ga. App. 112, 115 (1989)). However, because the Korean defendant in *Hoesch* “sought no rulings on the merits from the court,” the foreign defendant was “permitted to seek a ruling from the trial court on the question of jurisdiction.” *Id.* This case is different. Here, King Bird *has* sought a ruling on the merits from the Court. *See* Def.’s MSJ, pp. 5-6 (arguing the merits of the case). Therefore, King Bird has waived its right to contest this Court’s jurisdiction over its person.

When a foreign defendant seeks a ruling on the merits, the assertion of a personal jurisdiction defense does not prevent waiver. *Crawford* establishes that when a nonresident defendant asserts a defense on the merits *after* the resident defendant has been dismissed, then

the nonresident defendant waives any jurisdictional defense. *See Crawford v. Randle*, 191 Ga. App. 112, 114 (1989) (en banc) (“Want of jurisdiction is waived when after dismissal of the resident co-defendant, the non-resident defendant invokes rulings of the court on the merits of the case.”). It *does not* establish that a nonresident defendant can seek a ruling on the merits of the case and maintain jurisdictional defenses. *See id.* Rather, a nonresident defendant waives jurisdiction by seeking a ruling on the merits of the case—even if it has already raised and continues to maintain jurisdictional defenses—because, by seeking a ruling on the merits of the case, the nonresident defendant has tacitly agreed that the court has the authority to rule on the merits of the case. *See Chambers v. McDonald*, 155 Ga. App. 56, 57-58 (1980). It is that tacit agreement that waives jurisdiction—not a parties’ failure to raise or maintain a jurisdictional defense. *Id.* (“[I]f the nonresident defendants [takes] some affirmative action, the trial court [can] find that want of jurisdiction of the person is waived and jurisdiction of the person is admitted. . . . an example of an affirmative action by a defendant, . . . , would be the invoking of a ruling by the court on the merits of the case.”) (citing *Berger v. Noble*, 81 Ga. App. 759, 761 (1950) (holding that jurisdiction can be waived “either expressly or impliedly by the conduct of the defendant.”)). That is what happened here.

King Bird waived its personal jurisdiction argument as soon as it sought a ruling on the merits *after* the resident defendant, Exit 1-A, was dismissed. Exit 1-A was dismissed on April 23, 2019. *See* 04/23/2019 Order. King Bird sought a ruling on the merits on September 27, 2019 when it filed its Motion for Summary Judgment. *See* Def.’s MSJ, pp. 5-6 (arguing the merits of the case). By seeking a ruling on the merits from this Court, King Bird tacitly agreed that this Court has the authority to rule on the merits of the case. Therefore, it is immaterial that King Bird raised a jurisdictional defense before and when it sought a ruling on the merits.

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendant's Motion to Set Aside for Lack of Personal Jurisdiction because this Court has personal jurisdiction over King Bird and because King Bird submitted to this Court's jurisdiction when it sought a ruling on the merits of the case.

Respectfully submitted this 1st day of June 2021.

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**IN THE SUPERIOR COURT OF WHITFIELD COUNTY
STATE OF GEORGIA**

HARRINGSON ZELAYA; and,
BRADY ZELAYA

Plaintiff,

v.

KING BIRD FIREWORKS, LLC,

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Civil Action No.: 19CI00020

CERTIFICATE OF SERVICE

I hereby certify the foregoing **Plaintiffs' Surreply to Defendant's Motion to Set Aside Default Under O.C.G.A. § 9-11-60(d)(1)** was served upon all parties via PeachCourt which will automatically send notification to the following attorneys of record:

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Respectfully submitted this 1st day of June 2021.

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ATTORNEYS FOR PLAINTIFF

EXHIBIT A

IN THE SUPERIOR COURT OF WHITFIELD COUNTY
STATE OF GEORGIA

HARRINGSON ZELAYA and
BRADY ZELAYA,

Plaintiffs,

v.

Case No. 19C100020

JIANGXI WANZAI GOLDEN PEAK
FIREWORKS CORPORATION; KING BIRD
FIREWORKS, LLC; WINCO FIREWORKS
INTERNATIONAL, LLC; EXIT 1-A
FIREWORKS, LLC; and JOHN DOES #1-5,

Defendants.

VIDEOTAPED DEPOSITION OF MICHAEL COLLAR

Pursuant to Notice, the videotaped
deposition of MICHAEL COLLAR, a witness, was taken
on behalf of the Plaintiff, on May 15, 2019, at:

PAYNE AND JONES, CHARTERED
11000 King Street
Overland Park, Kansas

before Lynn R. Hicks, RPR, CCR, Certified in
Kansas and Missouri.



2741 Pangborn Road
Decatur, Georgia 30033
404-856-0966

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APPEARANCES

For the Plaintiff:

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For the Defendant King Bird Fireworks, LLC:

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For the Defendant Winco Fireworks International,
LLC:

MR. THOMAS B. WARD
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1355 Peachtree Street NE, Suite 300
Atlanta, Georgia 30309

Videography provided by:

MR. MARK RIFFEY
TELE-BUSINESS COMMUNICATIONS, INC.
6632 Raytown Road, Suite B
Raytown, Missouri 64133

1 **A. Right, yeah.**

2 Q. Okay. Where all did Winco distribute
3 the fireworks that it acquired from Golden Peak,
4 King Bird, or Sesame Chen?

5 **A. Just throughout the United States.**

6 Q. Did Sesame Chen know Winco was
7 distributing them throughout the United States?

8 **A. I assume.**

9 Q. Okay. Is that something you all ever
10 talked about?

11 **A. No.**

12 Q. Did she know Winco to be a distributor
13 of fireworks?

14 **A. Yes.**

15 Q. And she obviously knew you were in the
16 United States, because she visited you in Kansas;
17 right?

18 **A. Correct. Or Missouri. Missouri is**
19 **where she visited, but yes.**

20 Q. Okay. Does Winco have stores in
21 Georgia?

22 **A. We have one store in Georgia.**

23 Q. Is it called Pyro City in Conyers,
24 Georgia?

25 **A. It is.**

1 Q. Does Winco sell King Bird slash --
2 well. Does Winco sell King Bird branded fireworks
3 from Golden Peak at that location?

4 A. We do.

5 Q. Is there anywhere that Sesame Chen or
6 King Bird or Golden Peak ever said not to
7 distribute their fireworks?

8 A. No, not to my knowledge.

9 Q. Well, we've already used these
10 questions. Didn't put them in the right spot.

11 I wanted to ask you about
12 something a little different. I'll show you now
13 what I'll mark as Plaintiff's Exhibit No. 19.

14 (Plaintiff's Exhibit No. 19 was
15 marked for identification.)

16 Q. (By Mr. Butler) I'll represent to you
17 this is a web page from Georgia's Best Fireworks.
18 Do you see that at the center top there?

19 A. Yes.

20 Q. And at the bottom it gives some
21 locations in Milledgeville and Valdosta; right?

22 A. Correct.

23 Q. It lists two different types of King
24 Bird branded fireworks for sale; right?

25 A. Correct.

EXHIBIT B

Type here...



FIREWORKS MILLEDGEVILLE

FILTERS Sort by price: high to low Show 25 Per page

PRODUCT CATEGORIES

Select a category



MULTI SHOTS
COLOR THUNDER 36 SHO
KING BIRD
\$8.99



FIRECRACKERS
JUMBO M CRACKER
KING BIRD
\$1.99



MILLEDGEVILLE

Georgia's Best Fireworks Flagship store: 10,000 sq feet, close to 1,000 different items.



VALDOSTA

Georgia's Best Fireworks: South, over 5000 sq feet. Best Prices, best selection!

EXHIBIT C

Home / Business / Industries

Exporters hope to set global market for fireworks on fire

By Zhu Wenqian | China Daily | Updated: 2016-12-13 08:02



Fireworks light up a castle of the Shanghai Disney Resort. [Photo/China Daily]

Chinese producers of fireworks and firecrackers are hoping to make tremendous gains overseas and expand global market share amid growing demand.

As the largest producer and exporter of fireworks and firecrackers, China considers the products a national intangible cultural heritage. China produces and exports 90 percent of fireworks and firecrackers in the world.

Globally, the annual value of these products stands at \$12 billion. The United States, Germany, India and Vietnam also produce some fireworks products, according to the China Fireworks and Firecrackers Association.

Golden Peak Fireworks Corp is one of the largest manufacturers of the products in Wanzai, Jiangxi province, where about 60 percent of factories focus solely on exporting. The company exports all its fireworks, and it netted sales revenues of \$10 million a year, surging 150 percent over 15 years.

With a booming business in the US, Golden Peak launched a wholesale outlet in the state of Indiana. It usually rents a large retail space for one month in July every year, the busiest season with Independence Day celebrations, and its products carry price tags ranging from \$3 to \$700.

"Americans like large-scale fireworks. There is a considerable growth potential in the US market with strong seasonal features. Our company sells the biggest amount of products on July 4, followed by Christmas and New Year," said Chen Shimei, general manager of Golden Peak.

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"American consumers are excited about buying fireworks, and they can spend several thousand dollars on the products. I think they are more excited about fireworks than Chinese," she said.

This shows every indication of growth, she added. "I see larger demand from states in the south. Many kids still save money to buy it."

Golden Peak also exports to South America, especially Brazil and Argentina, in addition to Southeast Asian countries, including Thailand and Indonesia, as fireworks are used on religious and public holidays.

In the next few years, the manufacturer plans to further expand in Europe, for instance, in Germany, Spain and Italy. It attends the Spielwarenmesse International Toy Fair in Germany every year, to attract more international buyers.

Wanzai Shuangyu Fireworks Manufacturing Co Ltd, another major fireworks exporter in Wanzai, said it now mainly exports to the United Kingdom, Kazakhstan and Southeast Asia.

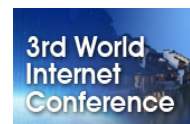
This year, the company saw sales growth of 30 percent in Indonesia year-on-year.

Wanzai Shuangyu highlighted the need to increase branding efforts, and the company plans to expand the markets in Africa and the Middle East, where the use of fireworks is becoming more frequent.

Producers plan to strengthen their research and development in China, develop new products, and further raise their competitive advantages.

Qian Xiongfei, an official at the security administration of the Ministry of Public Security, said: "We need to integrate the resources in China and grow together, and raise our international competitiveness."

Special



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caroluque wrote 2017-12-5 22:06

It's so true! Every day there are more and more orders, and managing them can be a headache if you do not have a good server. I recommend using DeliveryBy.com

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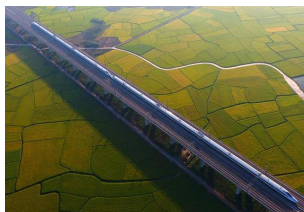
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