

2014 WL 463300

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

Ninoska MARTINEZ, individually and as
Administratrix of The Estate of Francisco
Martinez, Plaintiffs–Respondents,

v.

Garbharan AMRIT, Peter Birdsall, Hasan
Torna, Cardo Limited and Barnwell House
of Tires, Inc., Defendants–Respondents,
and

JTK Maintenance, Inc., Defendant–Appellant.

Garbharan Amrit and Roseline
Amrit, Plaintiffs–Respondents,

v.

Ninoska Martinez, as Administratrix of the Estate of
Francisco Martinez, Cardo Limited, Hasan Torna,

Peter Birdsall, Andrea Birdsall ¹ and Barnwell
House of Tires, Inc., Defendants–Respondents,
and

JTK Maintenance, Inc., Defendant–Appellant.

William Talbot, Plaintiff–Respondent,

v.

Peter Birdsall, Garbharan Amrit, Hasan Torna,
Cardo Limited, Ninoska Martinez, Administratrix
of the Estate of Francisco Martinez and Barnwell
House of Tires, Inc., Defendants–Respondents,

and

JTK Maintenance, Inc., Defendant–Appellant.

Estate of Khamrhaj Samsouandar, by
his Administrator ad Prosequendum,
Dyanand Samundar, Plaintiff–Respondent,

v.

Hasan Torna, Cardo Limited, James Helmick,
Jr., Amrit Garbharan, Francisco Martinez,
Peter Birdsall, PSE & G and Barnwell House
of Tires, Inc., Defendants–Respondents,

and

JTK Maintenance, Inc., Defendant–Appellant.

James Helmick, Plaintiff–Respondent,

v.

Hasan Torna, Cardo Limited, Barnwell
House of Tires, Inc., Andrea Birdsall, Peter
Birdsall, Amrit Garbharan and Francisco
Martinez, Defendants–Respondents,

and

JTK Maintenance, Inc., Defendant–Appellant.

Argued Jan. 6, 2014.

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Decided Feb. 6, 2014.

Synopsis

Background: Motorists and motorists' estates brought actions against non-resident maintenance company, arising from multi-vehicle, fatal accident in neighboring forum state involving equipment failure in tractor-trailer inspected and certified as road-safe by company. Company moved to dismiss for want of personal jurisdiction. The Superior Court, Law Division, Bergen County, denied motion to dismiss and denied company's subsequent motion for reconsideration. On leave granted, company appealed.

Holdings: The Superior Court, Appellate Division, held that:

[1] company's contacts with forum state were sufficient to establish specific jurisdiction;

[2] compelling company to defend itself in forum state would not offend notions of fair play and substantial justice; and

[3] company waived defense of want of personal jurisdiction in action by one motorist's estate.

Affirmed.

West Headnotes (3)

[1] **Courts**
🔑 **Automobile Accidents; Nonresident
Motorists**

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In;“Long-Arm” Jurisdiction

106k13.5 Particular Contexts and Causes of Action

106k13.5(5) Automobile Accidents; Nonresident Motorists

Non-resident maintenance company purposefully availed itself of benefits and privileges of neighboring forum state, and thus company's contacts with forum state were sufficient to establish specific jurisdiction over company in actions by motorists and motorists' estates against company, arising from multi-vehicle, fatal accident in forum state involving equipment failure in tractor-trailer inspected and certified as road-safe by company; a substantial portion of company's business was maintenance and inspection of heavy-duty commercial trucks with 48-state operating authority, company had every reason to believe that such trucks inevitably would traverse forum state's nearby highways and routes, and tractor-trailer would not have been allowed to travel legally on forum state's roads without inspection sticker issued by company. R. 4:4-4(a)(6).

[Cases that cite this headnote](#)

[2] Courts

🔑 [Automobile Accidents;Nonresident Motorists](#)

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In;“Long-Arm” Jurisdiction

106k13.5 Particular Contexts and Causes of Action

106k13.5(5) Automobile Accidents; Nonresident Motorists

Compelling non-resident maintenance company to defend itself in neighboring

forum state against actions by motorists and motorists' estates, arising from multi-vehicle, fatal accident in forum state involving equipment failure in tractor-trailer inspected and certified as road-safe by company, would not offend traditional notions of fair play and substantial justice, consistent with forum state's exercise of specific jurisdiction over company; interest of forum state in fully, fairly, and efficiently resolving claims arising from vehicular accidents within its borders and interest of motorists and estates in obtaining relief in their home state rendered exercise of jurisdiction reasonable, and litigation in forum state imposed no undue burden on company, which operated only nine miles from forum state. R. 4:4-4(a)(6).

[Cases that cite this headnote](#)

[3] Courts

🔑 [Time of Making Objection](#)

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k37 Waiver of Objections

106k37(2) Time of Making Objection

Non-resident maintenance company waived defense of want of personal jurisdiction in action by motorist's estate against company, arising from multi-vehicle, fatal accident in neighboring forum state involving equipment failure in tractor-trailer inspected and certified as road-safe by company, where company neither raised the defense in its answer to estate's complaint nor filed a separate motion asserting the defense until over one year after filing its initial answer. R. 4:4-4(a)(6), 4:6-1(a), 4:6-2, 4:6-3, 4:6-7.

[Cases that cite this headnote](#)

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3719-11.

Attorneys and Law Firms

[Jerald J. Howarth](#) argued the cause for appellant JTK Maintenance, Inc. (Howarth & Associates, attorneys; Mr. Howarth and Purnima D. Ramlakhan, on the briefs).

[David A. Mazie](#) argued the cause for respondents Ninoska Martinez and Estate of Francisco Martinez (Mazie Slater Katz & Freeman, attorneys; Mr. Mazie, of counsel and on the brief; [David M. Estes](#) and [David M. Freeman](#), on the brief).

[Sheri A. Breen](#) argued the cause for respondent Estate of Khamrhaj Samsouandar (Law Offices of Rosemarie Arnold, attorneys; [Joseph Lennon](#), on the brief).

[E. Carter Corrison](#) argued the cause for respondent William Talbot (Breslin and Breslin, attorneys; Mr. Corrison, on the brief).

[Robert H. Wolff](#) (Rosenberg, Minc, Falkoff & Wolff) argued the cause for respondents Garbharan Amrit and Roseline Amrit (Mr. Wolff and [Arthur O. Tisi](#), on the brief).

McElroy, Deutsch, Mulvaney & Carpenter, attorneys for respondent Barnwell House of Tires, Inc., join in the briefs of all other respondents.

Before Judges [PARRILLO](#), [HARRIS](#) and [KENNEDY](#).

Opinion

PER CURIAM.

*1 On leave granted, defendant JTK Maintenance, Inc. (JTK), appeals from the Law Division's interlocutory orders denying its motion to dismiss plaintiffs' complaints for want of personal jurisdiction and its motion for reconsideration. Since we conclude that defendant had minimum contacts with New Jersey, and that to subject defendant to jurisdiction in this State would not offend notions of fair play and substantial justice, we affirm.

The following facts are derived from the limited record before the Law Division on the motions to dismiss and for reconsideration. On December 24, 2010, there was a multi-vehicle accident on the New Jersey Turnpike resulting in two fatalities. One of the tires as well as the tire rim came off a tractor-trailer, striking plaintiff Garbharan Amrit's vehicle, disabling it. Khamrhaj Samsouandar, who was

a passenger in that car, exited the vehicle. Then, a car driven by Francisco Martinez rear-ended Amrit's disabled vehicle, which was pushed forward, hitting Samsouandar. Thereafter, a car operated by defendant Peter Birdsall hit both Martinez, who had exited his car, and Amrit's stopped vehicle, again pushing it forward and further striking Samsouandar. Both Samsouandar and Martinez died from injuries sustained in this series of crashes.

The tractor-trailer whose tire had become dislodged was registered in the State of New York and had a New York license plate. Just two-and-one-half-months before the accident, on October 13, 2010, the vehicle was inspected by JTK, a New York corporation with its principal place of business in Long Island City.² JTK issued a sticker for the tractor-trailer, certifying that it passed inspection and was road-safe.

JTK performs vehicle maintenance and repairs, although it did not service the tractor-trailer in question. The operation is also licensed by the State of New York to perform inspections in accordance with New York law, *see* New York State Department of Motor Vehicles, Motor Vehicle Inspection Regulations, *N.Y.C.R. § 79* (June 2010), and to that end, holds a New York State Inspector's License. This license allows JTK to inspect "group 2" vehicles, which include heavy duty trucks, *i.e.*, "anything over 8800 pounds up to 80,000 pounds." In fact, about ninety percent of JTK's business involves the servicing and inspection of heavy duty commercial trucks. Many of the vehicles on which JTK performs inspections have forty-eight-state operating authority, a federal credential issued by the United States Department of Transportation. JTK performs inspections on vehicles registered in New York as well as in other states.

As a result of this multi-vehicle accident, separate lawsuits, later consolidated, were filed in the Law Division, Bergen County, by five individual plaintiffs, including the estates of the two decedents, against, amongst others, JTK, which plaintiffs alleged negligently performed the safety inspection on the tractor-trailer.³ The first lawsuit was filed by Martinez's estate on April 25, 2011. JTK answered but did not assert the defense of lack of *in personam* jurisdiction. In fact, JTK never raised the jurisdictional issue in the Martinez matter until its August 22, 2012 motion to dismiss, well beyond the ninety-day time limit required by *Rule 4:6*.⁴

*2 The motion was ultimately denied by the court on October 4, 2012, finding the circumstances here were sufficient to establish personal jurisdiction over JTK. Specifically, the judge reasoned:

New Jersey properly asserted jurisdiction over JTK in this matter. JTK performs maintenance and repairs on vehicles that engage in interstate travel and which are registered with the United States Department of Transportation. The Court finds that this is sufficient minimum contacts with the state of New Jersey in order to allow New Jersey to assert personal jurisdiction over Defendant JTK. Further, it is not unfair or unreasonable to assert jurisdiction over JTK in light of the facts and circumstances of this case and JTK's involvement with the inspection of the [tractor-trailer] at issue.

The court subsequently denied JTK's motion for reconsideration of the October 4th order. In its April 10, 2013 decision, the court first held that JTK did not meet the standard for reconsideration, stating

the arguments made by Defendant JTK Maintenance in support of the motion for reconsideration and in support of a dismissal on the basis of lack of personal jurisdiction are identical to the arguments made to this Court in October 2012, wherein this Court denied that application. JTK Maintenance does not point to new or additional information which this Court was unable to consider during the course of the first hearing on this motion, and JTK has failed to demonstrate that this Court made its decision on a palpably incorrect or irrational basis, as required by the standard for reconsideration. JTK has not specified how this Court erred, and instead, it appears that JTK raises

the same legal arguments that were rejected by this Court a few months ago. On its face, JTK fails to meet the standard for this Court to reconsider its decision.

Moreover, the court found that the motion for reconsideration also failed on the merits. Citing the Court's decision in *Roche v. Floral Rental Corp.*, 95 N.J. Super. 555, 232 A.2d 162 (App.Div.1967), *aff'd o.b.*, 51 N.J. 26, 237 A.2d 265 (1968), the motion court noted that "it is not unfair or unreasonable to assert jurisdiction where a defendant has maintained and repaired vehicles engaged in interstate travel and which are registered with the United States Department of Transport[ation] as interstate carriers." The court determined

here JTK Maintenance performed [a] mandated inspection on the [tractor-trailer] at issue, and the Court's reliance on its registration with the Department of Transportation to service interstate carriers was proper because it is clearly probative of whether JTK could reasonably anticipate that it was inspecting vehicles engaged in interstate commerce and subject to the jurisdiction of other forums.... It is clear to this Court that under a minimum contacts analysis, JTK Maintenance purposefully availed itself of the privileges of conducting business in New Jersey through the inspection and service of interstate carriers which almost inevitably must travel through New Jersey, and JTK could reasonably anticipate being subject to litigation in New Jersey for the foreseeable risk arising from vehicle accidents. Therefore, the minimum contacts standard is satisfied under these facts, and personal jurisdiction is properly asserted by this Court over JTK Maintenance.

I.

*3 On appeal, JTK argues against personal jurisdiction in New Jersey because it lacks “minimum contacts” with this State, did not “purposefully avail” itself of the privileges of conducting business herein, and could not “foresee” being “haled into court” in New Jersey. We find these arguments unpersuasive.

As a threshold matter, our review of the trial court's ruling on a motion to dismiss for lack of jurisdiction at the inception of the case is de novo. *Mastondrea v. Occidental Hotels Mgmt. S.A.*, 391 N.J.Super. 261, 268, 918 A.2d 27 (App.Div.2007).

New Jersey courts may exercise personal jurisdiction over a non-resident defendant “consistent with due process of law.” R. 4:4–4(a)(6); *Avdel Corp. v. Mecure*, 58 N.J. 264, 268, 277 A.2d 207 (1971). This “long-arm” jurisdiction extends “to the uttermost limits permitted by the United States Constitution.” *Avdel Corp.*, *supra*, 58 N.J. at 268, 277 A.2d 207.

We apply a two-part test to determine the extent to which courts can assert personal jurisdiction over out-of-state residents: (1) “due process requires only that in order to subject a defendant to a judgment *in personam* ... he have certain minimum contacts with [the forum],” and (2) the minimum contacts must be of a nature “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L. Ed. 95, 102 (1945) (quoting *Miliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L. Ed.2d 278, 283 (1940)).

When performing the minimum contacts analysis, “the requisite quality and quantum of contacts is dependent on whether general or specific jurisdiction is asserted[.]” *Citibank, N.A. v. Estate of Simpson*, 290 N.J.Super. 519, 526, 676 A.2d 172 (App.Div.1996). When the cause of action is not related to the defendant's contact with the forum, the court's jurisdiction is general. *Mische v. Bracey's Supermarket*, 420 N.J.Super. 487, 491 (App.Div.2011). General jurisdiction requires that the defendant have “continuous and substantial” contacts with the forum state. *Jacobs v. Walt Disney World, Co.*, 309 N.J.Super. 443, 452, 707 A.2d 477 (App.Div.1998).

By contrast, the more easily-satisfied specific jurisdiction standard is available when, as here, the “cause of action arises directly out of a defendant's [alleged] contacts with the forum state.” *Waste Mgmt., Inc. v. Admiral Ins. Co.*, 138 N.J. 106, 119, 649 A.2d 379 (1994), *cert. denied sub nom.*, *WMX Techs. v. Canadian Gen. Ins. Co.*, 513 U.S. 1183, 115 S.Ct. 1175, 130 L. Ed.2d 1128 (1995). Thus, for specific jurisdiction, the minimum contacts analysis focuses on the “ ‘relationship among the defendant, the forum, and the litigation.’ ” *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 323, 558 A.2d 1252 (1989) (quoting *Shaffer v. Heitner*, 443 U.S. 186, 204, 97 S.Ct. 2569, 2579, 53 L. Ed.2d 683, 698 (1977)). Thus, for specific jurisdiction to be obtained, “ ‘it is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefit and protection of its laws.’ ” *Waste Mgmt.*, *supra*, 138 N.J. at 120, 649 A.2d 379 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L. Ed.2d 1283, 1298 (1958)). This analysis looks to prevent an out-of-state defendant from being haled into court based on “random, fortuitous, or attenuated contacts or as a result of the unilateral activity of some other party.” *Id.* at 121, 649 A.2d 379.

*4 “So long as a commercial actor's efforts are ‘purposefully directed’ toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184, 85 L. Ed.2d 528, 543 (1985). Thus, “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 Mgmt.*, *supra*, 138 N.J. at 126, 649 A.2d 379.

The United States Supreme Court recently looked at “purposeful availment” in *J. McIntyre Mach., Ltd. v. Nicastro*, — U.S. —, 131 S.Ct. 2780, 180 L. Ed.2d 765 (2011) (*Nicastro*). In *Nicastro*, *supra*, the Court emphasized that “purposeful availment” is the primary inquiry when assessing whether jurisdiction exists in the forum state. *Id.* at 2788, 180 L. Ed.2d at 775 (“The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign.”). The Court further noted that foreseeability is not sufficient by itself to justify imposing jurisdiction. *Ibid.* (“The defendant's transmission of goods permits the exercise of jurisdiction only where the

defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.”). The Court emphasized that “jurisdiction is in the first instance a question of authority rather than fairness....” *Id.* at 2789, 180 L. Ed.2d at 776.

After an examination of the defendant's minimum contacts with the state, the court must determine whether “the assertion of jurisdiction affect[s] traditional notions of fair play and substantial justice.” *Blakey v. Cont'l Airlines*, 164 N.J. 38, 69, 751 A.2d 538 (2000). Ultimately, the presence or absence of personal jurisdiction must be determined “on a case-by-case basis.” *Bayway Refining Co. v. State Utils., Inc.*, 333 N.J. Super. 420, 429, 755 A.2d 1204 (App.Div.), *certif. denied*, 165 N.J. 605, 762 A.2d 219 (2000). 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, 558 A.2d 1252. 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.”

[*Ibid.* (quoting *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 113, 107 S.Ct. 1026, 1033, 94 L. Ed. 2d 92, 105 (1987)).]

See also *N.J. Auto. Full Ins. Underwriting Ass'n v. Independent Fire Ins. Co.*, 253 N.J. Super. 75, 80–81, 600 A.2d 1243 (Ch.Div.1991).

*5 In *Roche, supra*, 95 N.J. Super. at 563–64, 232 A.2d 162, the Court held that a defendant who had installed a refrigeration box on a commercial truck in New York had the requisite “minimum contacts” to be subject to jurisdiction in New Jersey when an accident involving its unit occurred in this State because commercial trucks coming to and from New York frequently and “almost inevitably” had to enter New Jersey. Thus, the company was purposefully availing itself of New Jersey routes and it was fair to allow the suit to proceed in New Jersey. *Ibid.* (“[T]he normal usage of the product would almost inevitably bring it into New Jersey.”).

By contrast, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L. Ed.2d 490 (1980), in which the New York defendant could not reasonably foresee that a car it had sold in New York would be involved in an accident in Oklahoma while being driven to Arizona, thereby subjecting the defendant to jurisdiction in Oklahoma, neither the purposeful availment nor the fairness requirement could be met.

[1] Governed by these standards and precedents, we are satisfied that plaintiffs have met their burden of establishing a basis for exercising personal jurisdiction over JTK. *Blakey, supra*, 164 N.J. at 71, 751 A.2d 538.

A substantial portion of JTK's business was the maintenance and inspection of heavy-duty commercial trucks with forty-eightstate operating authority that JTK had every reason to believe were involved in interstate transportation, and that inevitably, and most certainly if headed either south or west, would traverse New Jersey's highways and routes. Indeed, without the inspection sticker issued by JTK, certifying the vehicle's road-worthiness, the tractor-trailer that caused the multi-car chain reaction collision would not have been allowed to travel legally on New Jersey's roads. JTK then not only benefited from its close proximity to New Jersey, but could reasonably anticipate, by virtue of this very circumstance, that it was inspecting vehicles engaged in interstate commerce and subject to the jurisdiction of a neighboring state.

In stark contrast, the contact in *World-Wide Volkswagen*, was “unilateral” and “fortuitous” because the only connection between the upstate New York-based defendant, whose market was the tri-state area, and Oklahoma—the situs of the accident—was the plaintiff driving defendant's product—a non-commercial vehicle—over 1500 miles to that distant state while en route to another destination (Arizona), an event not reasonably or likely foreseen by the defendant. Here, it is reasonably foreseeable that the services rendered by JTK would have a direct impact on the New York metropolitan region, including New Jersey, a market JTK purposefully availed itself of and benefited from.

[2] Having found these “minimum contacts” with New Jersey sufficient, we are further satisfied that the assertion of jurisdiction does not offend “traditional notions of fair play and substantial justice.” *Lebel, supra*, 115 N.J. at

328, 558 A.2d 1252. In other words, we do not find it unreasonable to subject JTK to suit in New Jersey if its allegedly defective services have there been the source of injury to others.

*6 Both the interests of the forum state in fully, fairly and efficiently resolving claims arising from vehicular accidents within its borders, as well as the interests of plaintiffs, most of whom live or have lived in New Jersey, in obtaining relief in their home state, render the exercise of personal jurisdiction reasonable in this instance. Additionally, we perceive no undue burden on JTK, which operated its business a mere nine miles from this State. But most significantly, JTK has been named as a defendant in all five cases consolidated for trial in Bergen County and its severance therefrom would undeniably defeat “the interstate judicial system’s interest in obtaining the most efficient resolution of [all these] controversies.” *Asahi Metal Indus. Co., supra*, 480 U.S. at 113, 107 S.Ct. at 1033, 94 L. Ed.2d at 105. Lastly, we presume both states share a mutual interest in preventing disparate results occasioned by the simultaneous litigation of dual proceedings.

In summary, we conclude that JTK’s contacts with New Jersey are neither random nor fortuitous but rather a purposeful availment of the benefits and privileges of this State, and hence are sufficient to establish specific jurisdiction. Additionally, allowing plaintiffs to compel JTK to defend against a New Jersey lawsuit does not, in our view, violate principles of fair play and substantial justice. We are therefore satisfied that the motion judge correctly found sufficient minimum contacts with the State of New Jersey for jurisdiction to exist.

II.

[3] With respect to plaintiff Estate of Martinez, there is yet another reason for the assertion of personal jurisdiction over JTK. Although the issue of waiver was not addressed below, because the facts permit no other conclusion, we are further persuaded that by failing to assert its objection in its answer or to timely move to dismiss thereafter, JTK waived the personal jurisdiction defense.

Rule 4:6–2 allows a defendant to raise a “lack of jurisdiction over the person” defense in one of two ways:

either in the initial answer, which must be served on the other party within thirty-five days after service of the complaint, (R. 4:6–1(a)), or in a separate motion. This motion “shall be made before pleading if a further pleading is to be made.” R. 4:6–2. Moreover, if raised in the answer, the defense must be “raised by motion within ninety days after service of the answer.” R. 4:6–3. Rule 4:6–7 makes it clear that failure to raise this defense within the answer or by motion constitutes waiver of the defense. R. 4:6–7 (“[The personal jurisdiction defense is] waived if not raised by motion pursuant to R. 4:6–3 or if omitted from a previously made motion to which R. 4:6–6 is applicable.”).

Here, JTK failed to raise the defense in its July 18, 2011 answer to the complaint filed by the Estate of Martinez. Nor did it file a separate, timely motion asserting the defense under Rule 4:6–3. JTK only raised the defense in its motion to dismiss of August 22, 2012, over a year after its initial answer, and certainly well outside the ninety-day time limit of Rule 4:6–3.

*7 The personal jurisdiction defense is waived if not timely asserted. To support its contrary contention, JTK relies on *Byrnes v. Landrau*, 326 N.J.Super. 187, 740 A.2d 1113 (App.Div.1999), certif. denied, 163 N.J. 78, 747 A.2d 286 (2000), which is clearly distinguishable. In *Byrnes, supra*, we held that New Jersey could not assert jurisdiction over a defendant who had not specifically and expressly pled the defense in his answer, but had rather included statements clearly suggestive of such:

This court lacks jurisdiction over the person of this Defendant by reason of insufficiency of process or service and this Defendant reserves the right to move for dismissal of the Complaint on that ground.

This Court lacks jurisdiction over the person of this Defendant by reason of Plaintiff’s failure to effect service upon this Defendant, and this Defendant reserves the right to move for dismissal on that ground.

[326 N.J.Super. at 189 n. 1]

Relying on the principle embodied in Rule 4:5–7 that “[a]ll pleadings shall be liberally construed in the interest of justice[.]” we found no waiver due to the fact that the personal jurisdiction defense had been mentioned in those two clauses, even if not fully articulated. *Byrnes, supra*, 326 N.J.Super. at 193, 740 A.2d 1113. However, we distinguished the facts in *Byrnes* from an earlier case,

Leon v. Febraro, 165 N.J.Super. 205, 397 A.2d 1129 (Law Div.1978), in which personal jurisdiction was not raised in either the answer or a motion filed within ninety days thereof, and therefore the defense was considered waived. *Byrnes, supra*, 326 N.J.Super. at 191–92, 740 A.2d 1113. Thus, *Byrnes* addressed the unique situation where a defense is indirectly raised but not properly articulated in the answer, not the situation where the answer fails to address the defense at all, as is the case here. As noted, in its answer to the Martinez complaint, JTK never asserted that New Jersey lacked jurisdiction.

Additionally, as *Rule 4:6–7* makes clear, the personal jurisdiction defense was intended to be waivable if not properly and timely asserted:

Defenses (b)(c) and (d) [including personal jurisdiction] in *R. 4:6–2* are waived if not raised by motion pursuant to *R. 4:6–3* or if omitted from a previously made motion to which *R. 4:6–6* is applicable. Defenses (e) and (f) and an objection of failure to state a legal defense to a claim may be made in any

pleading permitted or ordered, or by motion for summary judgment or at the trial on the merits. Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the matter except as otherwise provided by *R. 1:13–4*.

By purposefully and explicitly distinguishing the standard governing waiver of different defenses, *Rule 4:6–7* demonstrates an intent to allow the personal jurisdiction defense to be more liberally waived than others, including subject-matter jurisdiction. Under the present circumstances where it is undisputed and unexplained that JTK never properly or timely asserted the defense of personal jurisdiction in the *Martinez* matter, we deem the defense waived.

***8** Affirmed.

All Citations

Not Reported in A.3d, 2014 WL 463300

Footnotes

- 1 Caption has been changed to reflect the correct spelling of Peter Birdsall and Andrea Birdsall.
- 2 As of January 2, 2013, JTK is no longer in business.
- 3 We have been informed at oral argument that three other related lawsuits have since been filed and consolidated in Bergen County, for a total of eight matters, all arising from the same accident.
- 4 We have only been provided with copies of the Martinez and Samsouandar complaints. However, no other plaintiff, except Amrit, asserted that JTK did not properly plead its *in personam* defense in its answer. Because we have not been provided any corroboration for Amrit's claim, first raised at oral argument, we assume JTK timely raised the defense in all of the matters, except Martinez.