

MARCHAND V. MARCHAND

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**JOSHUA MARCHAND, individually and
as personal representative of the ESTATE OF
ALFRED G. MARCHAND,
Plaintiff-Appellant,
v.
REBECCA L. MARCHAND, individually and
as personal representative of the ESTATE OF
ALFRED G. MARCHAND,
Defendant,
and
IN RE KREINDLER & KREINDLER, LLP,
Attorneys-Appellees.**

NO. 33,225

COURT OF APPEALS OF NEW MEXICO

December 17, 2015

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY, Carl Butkus, District
Judge

COUNSEL

Steven K. Sanders & Associates, LLC, Steven K. Sanders, Albuquerque, NM, for
Appellant

J. Robert Beauvais, Ruidoso, NM, for Defendant

Montgomery & Andrews, P.A., Andrew S. Montgomery, Lucas P. Conley, Santa Fe, NM,
for Appellees

JUDGES

TIMOTHY L. GARCIA, Judge. WE CONCUR: MICHAEL E. VIGIL, Chief Judge, LINDA
M. VANZI, Judge

AUTHOR: TIMOTHY L. GARCIA

MEMORANDUM OPINION

GARCIA, Judge.

{1} Plaintiff Joshua Marchand (Joshua) appeals the district court's order granting New York law firm Kreindler & Kreindler, LLP's (Kreindler) motion to quash the order to show cause previously directed to Kreindler in this matter. We affirm.

BACKGROUND

{2} We presume that the parties are familiar with the facts and extensive procedural history of this eleven-year-old case. Therefore, we reiterate only those facts relevant to the resolution of this appeal.

{3} Joshua's father, Alfred G. Marchand (Alfred), died in the September 11, 2001 terrorist attack on the World Trade Center in New York City (9/11 Attack). Alfred was a New Mexico resident at the time of his death and was survived by his wife Rebecca L. Marchand (Rebecca); his adult son from a previous marriage, Joshua; and his dependent stepson Trae Hale (Trae), who is Rebecca's son by a previous marriage. *Marchand v. Marchand*, 2008-NMSC-065, ¶ 1, 145 N.M. 378, 199 P.3d 281. Rebecca served as the initial personal representative of Alfred's estate in the probate action filed in Otero County, New Mexico.

{4} Separate from the probate proceedings, Rebecca hired Kreindler, a New York law firm, to help her apply to the September 11th Victim Compensation Fund (the Fund) created by Congress to provide federal relief to victims of the 9/11 Attack and their families. *Id.* ¶ 2; see Air Transportation Safety and System Stabilization Act, 115 Stat. 230, §§ 401-09 (2001) (the Act). Her application to the Fund resulted in a \$769,972 award that was to be distributed according to the Act, federal regulations, and the law of the decedent's domicile, which, in this case, is the State of New Mexico. See *Marchand*, 2008-NMSC-065, ¶¶ 7-8, 11.

{5} After learning of the award, Joshua filed this civil action against Rebecca in the Otero County District Court to determine his share of the award, which he believed to be more than the share that Rebecca intended to give him. The district court consolidated this action with the probate proceedings, and Rebecca retained New Mexico attorney Stevan Schoen to represent her in this consolidated action. On August 10, 2004, the district court ordered:

Any payments received from the United States Department of Justice September 11th Victims Compensation Fund, shall be administered by Rebecca Marchand, as the [p]ersonal [r]epresentative of the [e]state of Alfred G. Marchand, [d]eceased in a supervised administration and they shall be held in an interest bearing account, in the State of New Mexico, until further [o]rder of this [c]ourt.

{6} About a month after this order was issued, Kreindler, at the request of Rebecca and Mr. Schoen, released the entire award to Rebecca in the form of four checks: one in the amount of \$494,299 payable to Rebecca individually; another in the amount of \$123,575 payable to Rebecca as custodian for Trae; a third in the amount of \$1,789.86 payable to Rebecca as “Administratrix of the Estate for interest earned during the time the funds were in [Kreindler’s] special account”; and a fourth payable to Joshua and his attorney in the amount of \$70,000. Unbeknownst to the district court or to Joshua, Rebecca did not deposit any of these checks into an interest bearing account in the State of New Mexico. Instead, she gave the \$70,000 check to Joshua and invested the rest in mutual funds.

{7} Meanwhile, the district court granted summary judgment, finding that Joshua was entitled to an additional \$98,750 of the award, on top of the \$70,000 that he had already received, plus any interest that may have accrued on the additional amount. Our Supreme Court eventually reversed, concluding that Joshua was entitled to receive a total of about \$569,972 of the award. See *Marchand*, 2008-NMSC-065, ¶ 30. By the time jurisdiction was restored to the district court, the mutual fund accounts in which the award money was invested had significantly declined in value and Rebecca had made several withdrawals. Rebecca later filed for bankruptcy.

{8} In addition to attempting to hold Mr. Schoen responsible for the depletion of the award money, Joshua filed a motion for an order to show cause “why Kreindler . . . should not be held in contempt of [c]ourt for refusing to comply with the [district c]ourt’s [o]rder of August 10, 2004” concerning how Rebecca was to administer the award money. The district court initially granted the motion and entered an order to show cause. Kreindler responded by filing a motion to quash the order to show cause, asserting that the district court did not have personal jurisdiction over Kreindler because Kreindler did not conduct business or have sufficient minimum contacts in New Mexico. The district court concluded without holding an evidentiary hearing that it did not have personal jurisdiction over Kreindler and quashed the order to show cause.

Assertions on Appeal

{9} Joshua makes the following assertions pertinent to our resolution of this appeal:

- Kreindler subjected itself to personal jurisdiction of New Mexico’s state courts when it knowingly violated the federal special master’s order stating that the award was to be distributed to the personal representative of Alfred’s estate and the New Mexico district court’s order concerning how Rebecca was to administer the money awarded from the Fund.
- New Mexico state courts have general jurisdiction over Kreindler because Kreindler’s website states that “it represents clients ‘worldwide’; . . . it is the ‘World’s Leading Aviation Attorneys’; . . . it has tried cases in all 50 states; . . . it represented 350 families in the [September 11th Victim’s Compensation Fund] proceedings; . . . [its] attorney[s] have litigated in New Mexico”; and “its actions

cause[d] harm to a known New Mexico resident and beneficiary of [Alfred's estate]."

- New Mexico state courts have specific jurisdiction over Kreindler because Kreindler sent its retainer agreement to Rebecca in New Mexico where it was executed; Kreindler "said [it] would represent the children" when it "affirmatively stated in a letter addressed to [Joshua's attorney] . . . that 'Rebecca has and will continue to assert the claims for the benefit of all beneficiaries, including [Joshua]'; and Kreindler breached its fiduciary duty to Joshua when it "allowed Rebecca to embezzle the money to the harm of Joshua[.]" a New Mexico resident.

DISCUSSION

Standard of Review

{10} The issue whether a district court has personal jurisdiction over a non-resident defendant is a legal question we review de novo. *Santa Fe Techs. v. Argus Networks, Inc.*, 2002-NMCA-030, ¶ 12, 131 N.M. 772, 42 P.3d 1221.

If . . . a district court bases its ruling upon the parties' pleadings and affidavits, the applicable standard of review largely mirrors the standard that governs appeals from the award or denial of summary judgment. In this respect, both a district court and this appellate court must construe the pleadings and affidavits in the light most favorable to the complainant. The complainant need only make a prima facie showing that personal jurisdiction exists when a district court does not hold an evidentiary hearing.

Cronin v. Sierra Med. Ctr., 2000-NMCA-082, ¶ 10, 129 N.M. 521, 10 P.3d 845 (citations omitted). Even though only a prima facie showing of personal jurisdiction is required, when the party contesting personal jurisdiction "accompanies its motion with affidavits or depositions," the party asserting jurisdiction "must come forward with affidavits or other proper evidence detailing specific facts" supporting jurisdiction. *Doe v. Roman Catholic Diocese of Boise, Inc.*, 1996-NMCA-057, ¶ 10, 121 N.M. 738, 918 P.2d 17.

Legal Principles

{11} "[F]or the court to find personal jurisdiction, a plaintiff must allege an occurrence that falls within the long-arm statute, and the court must find the requisite minimum contacts to comport with due process." *Santa Fe Techs.*, 2002-NMCA-030, ¶ 13. New Mexico's long-arm statute provides in pertinent part:

Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts enumerated in this subsection thereby submits himself . . . to the jurisdiction of the courts of this state as to any cause of action arising from:

....
(3) the commission of a tortious act within this state[.]

NMSA 1978, § 38-1-16(A) (1971). “For purposes of the long-arm statute, a ‘tortious act’ can occur in New Mexico when the actual harmful act originates outside the state, but the injury itself occurs inside New Mexico.” *Santa Fe Techs.*, 2002-NMCA-030, ¶ 15.

{12} The due process prong of the personal jurisdiction test requires that a non-resident defendant have “minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Id.* ¶ 16 (internal quotation marks and citation omitted). “There must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws, and the case must arise from these activities.” *Id.* (internal quotation marks and citation omitted). In other words, “the non-resident’s activities in the forum state should be such that he or she should reasonably anticipate being haled into court there.” *Id.* (alteration, internal quotation marks, and citation omitted).

{13} The minimum contacts sufficient for the forum to assert personal jurisdiction over a non-resident defendant “depends on whether the jurisdiction asserted is general (all-purpose) or specific (case-linked).” *Gallegos v. Frezza*, 2015-NMCA-101, ¶ 6, 357 P.3d 408 (internal quotation marks and citation omitted). General jurisdiction may be asserted over a non-resident defendant “when its affiliations with the state are so continuous and systematic as to render it essentially at home in the forum state.” *Id.* (internal quotation marks and citation omitted). In contrast, “specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.” *Id.* (internal quotation marks and citation omitted).

Analysis

1. Tortious Act

{14} The first question is whether Joshua “allege[d] an occurrence that falls within the long-arm statute[.]” *Santa Fe Techs.*, 2002-NMCA-030, ¶ 13. In the district court, Joshua alleged that Kreindler’s actions of releasing the award money to Rebecca individually allowed her to “remove that money from her personal account during the pendency of this action[.]” which caused harm to Joshua, a New Mexico resident. Joshua asserts that Kreindler’s actions constituted “a tortious act within this state” because its actions constituted a breach of its fiduciary duties to Joshua as beneficiary of Alfred’s estate and because the resultant harm to Joshua occurred in New Mexico. See § 38-1-16(A)(3). Kreindler asserts, on the other hand, that Joshua has not identified the tort that Kreindler allegedly committed, nor has Joshua ever pleaded a tort claim against Kreindler. To the extent that Kreindler’s alleged breach of its fiduciary duties to Joshua is sufficient to allege a tortious act, Kreindler argues that any fiduciary duty it owed to Joshua ended when Rebecca’s and Joshua’s relationship turned adversarial.

{15} In *Leyba v. Whitley*, our Supreme Court held “that an attorney handling a wrongful death case owes to the statutory beneficiaries of that action a duty of reasonable care to protect their interest in receiving any proceeds obtained.” 1995-NMSC-066, ¶ 2, 120 N.M. 768, 907 P.2d 172. The Court went on to recognize

that when recognition of a duty running from an attorney to the third party would burden the attorney’s duty to the client in a wrongful death action—as when an adversarial relationship develops between the client and the third party—as a matter of public policy the attorney’s duty to the third party should end. The fact that an attorney identifies a conflict, actual or potential, should not, however, in itself negate the duty owed to the statutory beneficiaries. Should a conflict arise, the adversarial exception negates duty only if the third party knows or should know that he or she cannot rely on the attorney to act for his or her benefit.

Id. ¶ 27. Although Joshua and Rebecca were adversaries in this case at the time that Kreindler issued the checks, Rebecca was represented by Mr. Schoen in this case and nothing in the record indicates that Kreindler gave any notice to Joshua that it could no longer rely on Kreindler to act for his benefit. See *id.* ¶ 26 (“We . . . believe that any such conflict should be resolved by notice to the nonclient that the latter cannot rely on the attorney to act for his or her benefit.”). Therefore, we conclude that Joshua adequately alleged that Kreindler committed a tortious act that injured him, and this allegation concerned “an occurrence that falls within the long-arm statute[.]” *Santa Fe Techs.*, 2002-NMCA-030, ¶¶ 13, 15 (“For purposes of the long-arm statute, a ‘tortious act’ can occur in New Mexico when the actual harmful act originates outside the state, but the injury itself occurs inside New Mexico.”); see § 38-1-16(A)(3).

2. Minimum Contacts

{16} The next question is whether Kreindler had the requisite minimum contacts with New Mexico such that Kreindler “should reasonably anticipate being haled into court [here].” *Santa Fe Techs.*, 2002-NMCA-030, ¶ 16 (internal quotation marks and citation omitted).

a. General Jurisdiction

{17} We are not persuaded by Joshua’s assertion that Kreindler subjected itself to general jurisdiction in New Mexico by virtue of its website stating that it represented clients worldwide and that “[its] attorney[s] have litigated in New Mexico.” This Court has recognized that “[e]stablishment of a passive website that can be viewed internationally is not sufficient to support general personal jurisdiction absent some showing that the website targeted New Mexico.” *Zavala v. El Paso Cnty. Hosp. Dist.*, 2007-NMCA-149, ¶ 20, 143 N.M. 36, 172 P.3d 173. In *Frezza*, this Court recently concluded that a non-resident doctor’s website did not subject him to general personal jurisdiction in New Mexico where the website “list[ed] his New Mexico medical license and includ[ed] testimonials by New Mexico residents[.]” 2015-NMCA-101, ¶ 17. In reaching this conclusion, we recognized that the doctor’s website also stated that he was licensed in

states other than New Mexico and “the fact that a testimonial was written by a New Mexico resident does not necessarily make it particularly compelling to other New Mexicans.” *Id.* ¶ 18. We also recognized that the website was not “sufficiently interactive” to demonstrate that the doctor purposefully targeted New Mexico because nothing in the record indicated that information was passed back and forth through the website. *Id.* ¶ 22.

{18} Here, like *Frezza*, Joshua points out that Kreindler’s website not only mentions that its lawyers “have litigated in New Mexico[,]” but also claims to “represent[] clients ‘worldwide’” and that “it has tried cases in all 50 states[.]” Joshua has not sufficiently shown that Kreindler’s website targeted New Mexico specifically or that it was sufficiently interactive to show that Kreindler’s contacts with New Mexico were “continuous and systematic” so as to subject Kreindler to the general jurisdiction of New Mexico courts. *Id.* ¶¶ 20, 22.

b. Specific Jurisdiction

{19} “A state has specific jurisdiction over a nonresident defendant if that defendant’s contacts do not rise to the level of general jurisdiction, but the defendant nevertheless purposefully established contact with New Mexico.” *Sproul v. Rob & Charlie’s, Inc.*, 2013-NMCA-072, ¶ 16, 304 P.3d 18 (internal quotation marks and citation omitted). “The central feature of minimum contacts, . . . is . . . purposeful availment”—whether the non-resident defendant purposefully availed itself of the privilege of conducting activities within New Mexico, thus invoking the benefits and protections of New Mexico law. *Id.* “To determine ‘purposeful availment,’ we look at what activities the defendant directed toward New Mexico.” *Id.*

{20} Kreindler contends that New Mexico courts do not have specific jurisdiction over Kreindler in this case because, in *DeVenzeio v. Rucker, Clarkson & McCashin*, 1996-NMCA-064, ¶ 17, 121 N.M. 807, 918 P.2d 723 (alteration, internal quotation marks, and citation omitted), this Court stated that “tortious rendition of personal services” such as legal or medical services is not “a portable tort which can be deemed to have been committed wherever the consequences foreseeably were felt[.]” In *DeVenzeio*, the plaintiffs were New Mexico residents who contacted and hired a California law firm to represent them in litigation in California and Arizona. 1996-NMCA-064, ¶ 2. The law firm had no offices, property, or business interests in New Mexico. *Id.* ¶ 4. It performed all services on behalf of the plaintiffs in California or Arizona and the only contacts the firm made in New Mexico were through telephone calls and letters mailed to the plaintiffs at their New Mexico residence to inform them of the progress of the litigation. *Id.* This Court concluded that the California law firm did not subject itself to personal jurisdiction of New Mexico courts when it agreed to represent a New Mexico resident in actions in California and Arizona because its communications with the plaintiffs in New Mexico were merely “ancillary to this primary function.” *Id.* ¶ 12. In doing so, it noted that “New Mexico’s only connection with the case is its concern that justice be done for its residents. There is no reason to suspect that a California court will not accomplish this.” *Id.* ¶ 20.

{21} Here, like *DeVenzeio*, Rebecca contacted Kreindler in New York for help in applying to the Fund resulting from the 9/11 Attack. See *id.* ¶ 2. Rebecca was the only New Mexico client it represented concerning the Fund. Kreindler does not have any offices, property, business interests, or attorneys licensed in New Mexico, and it does not advertise in New Mexico. See *id.* ¶ 4. Like *DeVenzeio*, Kreindler's written communications with Rebecca and Joshua in New Mexico were ancillary to the performance of its functions in New York, including its act of sending the retainer agreement to Rebecca in New Mexico and mailing the award money to her here. See *id.* ¶ 12. We know of no reason to suspect that a New York or federal court would not accomplish New Mexico's interest in achieving justice for Joshua. See *id.* ¶ 20. We decline Joshua's invitation to revisit our holding in *DeVenzeio* based on Illinois and Texas cases that have concluded otherwise. See *Ores v. Kennedy*, 578 N.E.2d 1139, 1144 (Ill. Ct. App. 1991) (concluding that a Texas attorney had sufficient minimum contacts with Illinois because he "directly corresponded and conversed on the telephone with [the plaintiffs] and Illinois banks many times while performing his fiduciary duties to the estate and the estate's executors"); *Carlidge v. Hernandez*, 9 S.W.3d 341, 345, 348 (Tex. App. 1999) (concluding that a Nevada attorney had sufficient minimum contacts with Texas because he sent his retainer agreements and case progress reports to the plaintiffs in Texas and because he represented 93 clients, including the plaintiff, in a products liability class-action litigated in Harris County, Texas, and filed 61 bankruptcy claims in Harris County, Texas).

{22} We do not read *DeVenzeio*, however, to mean that a tort committed in another state by a non-resident professional against a New Mexico resident can never be litigated in New Mexico courts. In *Frezza*, this Court recently recognized the possibility that a non-resident doctor, who was the only doctor authorized by the New Mexico Presbyterian Health Plan to perform bariatric surgery covered by the plan, had the kind of relationship with Presbyterian in New Mexico that would subject it to specific jurisdiction here. 2015-NMCA-101, ¶¶ 1, 38. In any event, Joshua has not raised sufficient facts showing that Kreindler purposefully availed itself of the benefits and protections of New Mexico law. See *Sproul*, 2013-NMCA-072, ¶ 16. He has not asserted that Kreindler represented any other New Mexicans in obtaining awards, that it has regularly litigated cases in New Mexico, that it has ever solicited legal work here including the work done for Rebecca, or that Kreindler had any kind of arrangement with New Mexico businesses or attorneys that resulted in the referral of Kreindler's firm to Rebecca. See *Frezza*, 2015-NMCA-101, ¶¶ 1, 38; *Cronin*, 2000-NMCA-082, ¶ 16 (concluding that specific jurisdiction existed where a non-resident hospital had solicited the New Mexico plaintiff's business); *Kathrein v. Parkview Meadows, Inc.*, 1984-NMSC-117, ¶ 3, 102 N.M. 75, 691 P.2d 462 (concluding that specific jurisdiction existed where an Arizona treatment center solicited business in New Mexico through its yellow page ads in Albuquerque, solicited New Mexico organizations to refer it to New Mexico patients, and invited the plaintiff to attend an event at its Arizona treatment center); see also *Carlidge*, 9 S.W.3d at 345, 348 (cited by Joshua and stating that one reason Texas courts had personal jurisdiction over a Nevada defendant attorney was because the attorney had represented 93 clients in a class-action filed in Texas, as well as 61 bankruptcy clients there).

{23} Finally, because Joshua provides no authority in support of his general assertion that Kreindler’s act of knowingly disregarding the orders of the federal special master and the New Mexico district court subjected it to personal jurisdiction in New Mexico courts, we decline to address it. See *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (“Issues raised in appellate briefs which are unsupported by cited authority will not be reviewed . . . on appeal.”).

CONCLUSION

{24} We affirm the district court’s ruling regarding personal jurisdiction over Kreindler and quashing the order to show cause.

{25} **IT IS SO ORDERED.**

TIMOTHY L. GARCIA, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

LINDA M. VANZI, Judge