Affirmed and Opinion filed January 11, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00444-CV

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VESSEL ACQUISITION, L.L.C., Appellant

V.

MORGAN & MORGAN, Appellee

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 98-15983

O P I N I O N

This is an accelerated appeal from an order of the 281st District Court granting the special appearance filed by Morgan & Morgan. The trial court found that Morgan & Morgan proved it had insufficient contacts with Texas to warrant the exercise of personal jurisdiction. We affirm.

FACTUAL BACKGROUND

Vessel Acquisition, L.L.C. ("Vessel") entered into a Marine Affreightment Agreement with Premium Rice Trading, Inc. ("Premium Rice"). A dispute arose between these parties concerning the performance of that agreement. In connection with this dispute, Premium Rice, which has its principal place of business in Houston, Texas, gave a power of attorney to Morgan & Morgan, a Panamanian law firm. This power of attorney authorized Morgan & Morgan to file suit and take whatever steps necessary to seize Vessel's tugboat, the *Tillamook*, in the Republic of Panama. In connection with this grant of power of attorney, Morgan & Morgan received a retainer fee, drawn on a Texas bank, in the amount of $3,500.00.

To seize the *Tillamook*, Morgan & Morgan filed suit in the Maritime Tribunal of Panama. Following the Panamanian lawsuit, the *Tillamook* was seized and sold. Vessel then filed this lawsuit against Premium Rice and Morgan & Morgan, among others. Vessel asserted claims of demurrage against Premium Rice. Against Morgan & Morgan, Vessel sought to recover for tortious interference with a contract, conversion, fraud, conspiracy, conspiracy to commit fraud, and misrepresentation of material facts upon which Vessel relied in taking the *Tillamook* to Ecuador. Vessel alleged no facts in its live pleading regarding acts of Morgan & Morgan in the State of Texas.

Morgan & Morgan filed a special appearance alleging that the trial court had no personal jurisdiction over it. The trial court agreed and granted this special appearance, dismissing Morgan & Morgan from the lawsuit. Vessel appealed.

DISCUSSION AND HOLDINGS

Vessel failed to make jurisdictional allegations in its live pleading. Ordinarily, this would mean that in the special appearance hearing, Morgan & Morgan would negate all bases of jurisdiction by merely proving its non-residency. *See Siskand v. Villa Foundation*, 642 S.W.2d 434, 438 (Tex. 1982). However, Vessel finally did make sufficient jurisdictional allegations in its response to Morgan & Morgan's special appearance. "[T]he pleadings [do not] irrevocably etch the issues in stone." Louis S. Muldrow & Kendall M. Gray, *Treading the Mine Field: Suing and Defending Non-Resident Defendants in Texas State Courts*, 46 BAYLOR L. REV. 581, 606 (1994). In *Temperature*

Systems, Inc. v. Bill Pepper, Inc., the Dallas Court of Appeals found a basis for general jurisdiction over a defendant in an unpled ground for jurisdiction. 854 S.W.2d 669 (Tex. App.–Dallas 1993, writ dism'd). The court determined that, though the plaintiff failed to plead the ground on which the court ultimately found jurisdiction, the plaintiff did raise evidence at the special appearance hearing as to the trial court's general jurisdiction over the defendant. *Id*. at 673-74. The defendant did not object to this evidence, therefore the issue of general jurisdiction was tried by consent. *Id*. Consequently, the defendant had the burden of negating those bases for jurisdiction which the plaintiff pled as well as those which the plaintiff raised for the first time at the special appearance hearing. *Id*.

Similarly, Vessel failed to allege any jurisdictional facts in its live pleading. However, in its response to Morgan & Morgan's special appearance, Vessel produced evidence that Morgan & Morgan corresponded with the Houston-based Premium Rice and received a check for a retainer fee which was drawn on a Texas bank. Morgan & Morgan did not object to this unpled evidence.[1]

Under Texas law, Morgan & Morgan's failure to object to Vessel's attempt to prove unpled bases for jurisdiction augmented the scope of the special appearance to include those unpled bases. As a result, we must determine whether the trial court properly dismissed Morgan & Morgan from this lawsuit for lack of personal jurisdiction.

STANDARD OF REVIEW

Neither party to this appeal requested findings of fact or conclusions of law, and the trial court did

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[1] "[I]f a party acquiesces in the 'trial' of a matter, without objecting that no pleadings to support the proof exist, the pleading-proof disparity is *waived*." Louis S. Muldrow & Kendall M. Gray, *Treading the Mine Field*, 46 BAYLOR L. REV. at 607.

The problem with this result is, of course, that to object to the defective pleading, a defendant must file a motion to quash. TEX. R. CIV. P. 120a. Although Rule 120a provides a procedure where a motion to quash may be filed subject to the special appearance, that provision is inapplicable here. *Id*. In order for the objection to be operative in the special appearance hearing, the motion to quash necessarily must have been filed before the special appearance, and not made subject to it. Naturally, the result of such an objection is a general appearance, which would waive the special appearance altogether. *See Temperature Sys*., 854 S.W.2d at 677 (Kinkeade, J., dissenting).

On the other hand, Rule 120a instructs the trial court to "determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony." TEX. R. CIV. P. 120a(3).

not file any. Thus, it is implied that the trial court made all necessary findings of fact and conclusions of law in support of its judgment. *Cartlidge v. Hernandez*, 9 S.W.3d 341, 345 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (citing *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990)). Accordingly, we must affirm if the judgment can be upheld on any legal theory supported by the evidence. *See id*.

In reviewing a special appearance where, as here, neither party disputes any of the underlying or established facts upon which the trial court granted the special appearance, an appellate court shall conduct a *de novo* review of the trial court's order granting the special appearance. *Id*. at 346.

JURISDICTION OF TEXAS STATE COURTS

A Texas court may exercise jurisdiction over a non-resident where both of the following exist: (1) the Texas long-arm statute authorizes the exercise of jurisdiction; and (2) the exercise of jurisdiction is compatible with federal and state constitutional guarantees. *Schlobohm v. Schapiro*, 784 S.W.2d 355, 356 (Tex. 1990); *Shearson Lehman Bros., Inc., v. Hughes, Hubbard & Reed*, 902 S.W.2d 60, 63 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

The Texas long-arm statute authorizes Texas courts to exercise jurisdiction over a non-resident that is doing business in this state. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997). The statute's broad language with regard to its "doing business" requirement enables the statute to reach as far as the federal constitutional requirements allow. *Guardian Royal Exch. Assurance v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991). Accordingly, to determine whether a Texas state court may exercise jurisdiction over a non-resident, we look to federal due process requirements. *See id*.

Federal due process requirements limit a state's power to assert personal jurisdiction over non-resident defendants. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 413-14, 104 S.Ct. 1868, 1871-72, 80 L.Ed.2d 404 (1984). The United States Supreme Court determines whether due process is satisfied in a state court's exercise of personal jurisdiction by deciding (1) whether the non-resident defendant has purposely established minimum contacts with the forum state; and (2) if so, whether the exercise of jurisdiction comports with traditional notions of "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76, 105 S.Ct. 2174, 2183-84, 85 L.Ed.2d 528 (1985).

In essence, the minimum contacts analysis turns on a determination of whether the non-resident defendant "purposely availed" itself of the privilege of doing business in a forum, which, in turn, invokes the benefits and protections of its laws. *Guardian Royal*, 815 S.W.2d at 226. The "purposeful availment" requirement ensures that a nonresident defendant cannot be haled into a jurisdiction for merely random, attenuated, or fortuitous contacts, or for the unilateral act of another party or other person. *Id*.

There are two types of jurisdiction: general and specific. *See Schlobohm v. Schapiro*, 784 S.W.2d 355, 358 (Tex. 1990). Vessel only appeals the trial court's determination that it did not have specific jurisdiction over Morgan & Morgan. For a court to exercise specific jurisdiction over a non-resident defendant, the cause of action must arise out of, or relate to, the non-resident defendant's contact with the forum state. *Guardian Royal* 815 S.W.2d at 227. Otherwise, the "minimum contacts" requirement is left unsatisfied. *Id*. "When specific jurisdiction is asserted, the minimum contacts analyses focuses on the relationship among the defendant, the forum and the litigation." *Id*. at 228.

APPLICATION OF THE LAW TO THE FACTS

A dispute arose between Premium Rice and Vessel with respect to their Marine Affreightment Agreement. As a result, Premium Rice had Vessel's tugboat, the *Tillamook*, seized. At the time of the seizure, the *Tillamook* was located in Panama. Premium Rice needed legal assistance to lawfully seize the tugboat, so it contacted the Panamanian law firm of Morgan & Morgan. In connection with this, Premium Rice and Morgan & Morgan exchanged phone calls, e-mail, faxes, and other correspondence. Given that Premium Rice's principal place of business is in Houston, Texas, this correspondence was made to and from Texas. Premium Rice also sent Morgan & Morgan its retainer fee from a Texas bank. These contacts, Vessel contends, (1) caused the seizure of the *Tillamook*; (2) formed the underlying basis for this lawsuit; and (3) gave rise to specific jurisdiction over Morgan & Morgan in Texas.

Morgan & Morgan undoubtedly helped Premium Rice seize the *Tillamook*. That is what the law firm was hired to do. The seizure, however, took place in Panama. Premium Rice, alone, initiated the contacts with Morgan & Morgan, a law firm which does no business in Texas, and is not a resident of

Texas. We cannot agree that these contacts were sufficient minimum contacts with Texas such that Morgan & Morgan should reasonably expect to be haled into court in this state.

Vessel alleges for the first time on appeal, without any supporting information in the record, that it is a Texas corporation. Under the Texas long arm statute, a non-resident does business in this state if it commits a tort in whole or in part in this state. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997). Vessel argues that because of its Texas residency, it felt the effects of the alleged tortious interference with a contract and alleged misrepresentations in Texas. Since there is no evidence in the record that Vessel is a Texas resident, we cannot hold that jurisdiction can be based on the effects of a tort occurring in Texas.

CONCLUSION

We conclude from a review of all the evidence that Morgan & Morgan proved in the special appearance an absence of minimum contacts with the state of Texas that would support specific jurisdiction. Accordingly, we affirm.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed January 11, 2001.

Panel consists of Justices Yates, Fowler, and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).