Affirmed in Part and Dismissed in Part and Opinion filed May 18, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-01255-CV

**ROYAL SOLARIS CARIBE HOTEL & MARINA,
VILLAS INTERNACIONALES DEL CARIBE, S.A. de C.V.
and VILLAS SOLARIS S.A. de C.V., Appellants**

V.

**DAVID RANSELM, LEIGH ANN RANSELM, JEFF POSEY AND JANA POSEY,
Appellees**

**On Appeal from the 269th District Court
Harris County, Texas
Trial Court Cause No. 98-40231**

O P I N I O N

This interlocutory appeal arises from the trial court's denial of the virtually identical special appearances filed by Royal Solaris Caribe Hotel & Marina ("the Hotel"), Villas Internacionales del Caribe, and Villas Solaris (collectively referred to as "Solaris Caribe"). After it struck the only affidavit filed in support of the special appearances as discovery sanctions against Solaris Caribe, the trial court denied the special appearances. It made no findings of fact in support of its judgment.

BACKGROUND

The lawsuit underlying this appeal was filed after David Ranselm and Jana Posey were attacked by crocodiles while on vacation with their spouses in Cancun, Mexico. The attack occurred at night while the two couples were swimming in the Hotel's marina, a place which Hotel employees told them was a safe place to swim after dark. The Ranselms and Poseys, appellees in this appeal, filed a lawsuit in Texas against Solaris Caribe, the Hotel, and other defendants. After being served, Solaris Caribe and the Hotel filed special appearances, alleging they had no minimum contacts with Texas. In support of their special appearances, Solaris Caribe and the Hotel attached the affidavit of Juan Gerardo Aceves Cid, the director general of Solaris Caribe. The affidavit was in Spanish and no translation was furnished.

A discovery dispute arose regarding the appellees' desire to depose Aceves Cid. The appellees noticed his deposition, which was to take place in Cancun, and were notified by the attorney for Solaris Caribe and the Hotel that everything "was set." On the date the deposition was scheduled, however, Solaris Caribe failed to produce Aceves Cid. He did appear the next day, after appellees paid his travel expenses, but refused to allow himself to be questioned. Frustrated in their attempts to depose Aceves Cid, the appellees filed a motion to compel and a motion for sanctions. In response, the trial court ordered Solaris Caribe and the Hotel to produce Aceves Cid for a deposition in Houston. When they failed to comply with the order, the trial court struck Aceves Cid's affidavit as sanctions for failing to comply with its order and denied the special appearances of Solaris Caribe and the Hotel. Both ruling were contained in a single order.

On interlocutory appeal, Solaris Caribe and the Hotel challenge the trial court's imposition of sanctions against them, claiming that because the sanctions were effectively "death penalty" sanctions, we can review the order on an interlocutory appeal. The appellees, however, contend that we lack appellate jurisdiction to perform an interlocutory review of the trial court's discovery sanctions. We agree with the appellees.

ANALYSIS

As we have noted before, "a Texas appellate court has jurisdiction to hear an appeal only if it is

from a final judgment or it is specifically permitted under the statutory list of appealable interlocutory orders." *Goodchild v. Bombardier-Rotax GMBH Motorenfabrick*, 979 S.W.2d 1, 4-5 (Tex. App.–Houston [14th Dist.] 1998, pet. denied) (citing *Gathe v. Cigna Healthplan, Inc.*, 879 S.W.2d 360, 362 (Tex. App.–Houston [14th Dist.] 1994, writ denied). This list allows a defendant to appeal the trial court's interlocutory order denying a special appearance. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon Supp. 2000). Discovery sanction orders, even "death penalty" sanctions, are not appealable interlocutory orders. *See id.*; *Markel v. World Flight, Inc.*, 938 S.W.2d 74, 78 (Tex. App.–San Antonio 1996, no writ). Rather, mandamus is the only method of obtaining interlocutory review of "death penalty" discovery sanctions. *See Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992).

Here, though all three issues raised by appellant concern the propriety of the trial court's sanctions, we find that we are without jurisdiction to address them. Even though the trial court's sanctions deprived appellants of their ability to present their motions to compel, such "death penalty" sanctions are not subject to an interlocutory appeal. *See Grant v. Austin Bridge Constr. Co.*, 725 S.W.2d 366, 369 (Tex. App.–Houston [14th Dist.] 1987, no writ) (sanctions striking pleadings for failure to comply with discovery order not reviewable by interlocutory appeal). Assuming, however, that any of appellants' appellate arguments could be construed as challenging the denial of the special appearance, we will only address that issue because that is the only question properly before us. *See Goodchild*, 979 S.W.2d at 5-6 (court severed out appealable portion of order from part that was not subject to an interlocutory appeal); *Markel*, 938 S.W.2d at 78 (same).

The grant or denial of a special appearance is subject to a factual sufficiency review of all of the evidence presented on the jurisdictional question. *See Hotel Partners v. KPMG Peat Marwick*, 847 S.W.2d 630, 632 (Tex. App.–Dallas 1993, writ denied). Under this standard, we may reverse the decision of the trial court only if its ruling is so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. *See In re Estate of Judd*, 8 S.W.3d 436, 441 (Tex. App.–El Paso 1999, no pet. h.). In a special appearance, the defendant has the burden of negating all bases of personal jurisdiction. *See C.S.R. Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex.1996). The court can

consider the pleadings, stipulations, affidavits, discovery responses, and oral testimony in determining whether to grant or deny the special appearance. *See* TEX. R. CIV. P. 120a(3). If this evidence supports the judgment on any theory, we cannot reverse. *See Estate of Judd*, 8 S.W.3d at 441.

The record in this case only contains the pleadings and the affidavit struck by the trial court. The affidavit, however, provided the only verification for the special appearances and, once struck by the trial court, rendered the motions unverified. Because the motion was unverified, the court properly denied it for failure to comply with the Rules of Civil Procedure. *See* TEX. R. CIV. P. 120a(1); *see also Dawson-Austin v. Austin*, 968 S.W.2d 319, 321-22 (Tex. 1998). Further, because the affidavit was presented to the trial court in Spanish without translation, the trial court did not err by failing to consider it. *See Gendebein v. Gendebein*, 668 S.W.2d 905, 908 (Tex. App.–Houston [14th Dist. 1984, no writ).

Moreover, we do not find appellants presented sufficient evidence to negate all bases of jurisdiction. For example, appellees invoked the alter ego and single business enterprise doctrines for all defendants. The appellants, however, presented no evidence to contradict these theories, even though a trial court can assert jurisdiction over a foreign defendant based upon either of them. *See Conner v. Conticarriers and Terminals, Inc.*, 944 S.W.2d 405, 419 (Tex. App.–Houston [14th Dist.]1997, no writ).

Accordingly, we find the trial court did not abuse its discretion in denying appellants' special appearances. We affirm its decision and dismiss appellants' other points of error for want of jurisdiction.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed May 18, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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