

Affirmed and Memorandum Opinion filed October 26, 2010.



In The

Fourteenth Court of Appeals

NO. 14-10-00325-CV

KENNETH I. PARKER, Appellant

V.

ROBERT RYAN REALTORS, INC., Appellee

**On Appeal from the 269th District Court
Harris County, Texas
Trial Court Cause No. 2009-31369**

M E M O R A N D U M O P I N I O N

In this interlocutory appeal from the trial court's denial of his special appearance, appellant Kenneth I. Parker claims that his contacts with Texas are insufficient to support personal jurisdiction. Finding no error in the trial court's interlocutory order, we affirm.

I. BACKGROUND

The underlying suit involves Houston property (the "Property") owned by several individuals, some of whom are related. Appellant and his sister, both Missouri residents, maintain individual ownership interests in the Property. In 2006, the siblings traveled to

Texas to sell the Property. They were unsuccessful in their effort to sell the Property because of various clouds on the title. Thereafter, appellee Robert Ryan Realtors, Inc. (“Ryan Realtors”) became involved in the sale of the Property. The parties dispute the way in which Ryan Realtors became involved and the scale of the company’s involvement: Ryan Realtors contends that appellant and his sister employed the company to (1) clear title to the Property and (2) broker the sale of the Property. Appellant contends that he, personally, did not employ Ryan Realtors, although his sister contended that she hired the company to assist in the sale of the Property.

Ryan Realtors claims that it executed a listing agreement, by mail, with appellant and his sister in November 2006. Under this agreement, Ryan Realtors had the exclusive right to list and sell the Property; the agreement also gave Ryan Realtors a brokerage fee, 6% of the sales price. Ryan Realtors then approached other owners holding an interest in the Property and attempted to acquire their interests. Ryan Realtors further claims that it executed an earnest money contract with appellant and his sister, offering to sell the Property to a prospective buyer in March 2007. The earnest money contract was executed by electronic and regular mail. In April 2007, appellant executed an affidavit of heirship to clear the title for sale. Despite these efforts, the Property was not sold.

In 2009, appellant’s sister filed suit against Ryan Realtors and Robert Cornelius Ryan, individually and in his capacity as a Texas real estate broker. She alleged fraud, Deceptive Trade Practices-Consumer Protection Act (“DTPA”) violations, and breach of fiduciary duty. Ryan Realtors filed a counterclaim against the sister and appellant, asserting various fraud and breach of contract claims on the exclusive listing agreement. Appellant filed a special appearance, contending that (1) he was not a Texas resident, (2) he had never conducted business in Texas, and (3) Ryan Realtors had failed to plead any facts subjecting appellant to the jurisdiction of a Texas court. Appellant also filed an answer, subject to his special appearance; both pleadings were filed on March 9, 2010. Appellant set the special appearance for hearing three days later, on March 12, 2010.

Ryan Realtors contested appellant's special appearance, claiming that appellant had "purposefully availed himself of the privilege of conducting activities in Texas" by (1) engaging Ryan Realtors to sell the Property, (2) executing a listing agreement granting Ryan Realtors the exclusive right to list and sell the Property, (3) executing a sales contract, and (4) attempting to sell Texas Property. Ryan Realtors attached affidavits and exhibits to support its jurisdictional facts; however, the exhibits were not incorporated into the response by reference.

On March 12, 2010, the trial court reset the hearing on the special appearance, citing inadequate notice to Ryan Realtors. Appellant amended his special appearance six days later with similar arguments but with additional facts in his affidavit. Ryan Realtors responded to the amended special appearance, also making arguments similar to those in its original response. Ryan Realtors attached Exhibit 9, an affidavit with eight incorporated exhibits, which was explicitly incorporated into the response by reference. The trial heard the special appearance thereafter and denied it. Appellant now appeals the trial court's ruling. In two issues, appellant contends that: (1) the trial court erroneously ruled on his original special appearance, not the amended pleading; (2) the trial court erroneously considered Ryan Realtors' Exhibit 9; and (3) the evidence is legally and factually insufficient to support the trial court's ruling.

II. RULING ON LIVE PLEADING

In appellant's first issue, he argues that the trial court erroneously ruled on his original special appearance and not his amended special appearance, the live pleading at the time of the second hearing. The record, however, does not support appellant's argument. Appellant filed his original special appearance on March 9, 2010 and set the hearing for March 12, 2010. The trial court reset the hearing because appellant had not provided adequate notice to Ryan Realtors. On March 18, 2010, appellant filed an amended special appearance, making substantially similar arguments to those raised in the original special appearance and supplementing his original affidavit with

jurisdictional facts. The trial court eventually heard argument on the pleading on March 26, 2010; the docket sheet for the hearing date reflects:

Hearing on Third-Party Defendant's Amended Special Appearance: Farris appeared for Third-Party Plaintiff. Boze appeared for Third-Party Defendant. Issue is minimum contacts under specific jurisdiction. Court to rule promptly.

The trial court clearly identified the amended special appearance as the pleading upon which it ruled. Furthermore, the trial court indicated in its order that it had “consider[ed] . . . [appellant's] special appearance, the pleadings, the affidavits, and arguments of counsel.” Thus, the order suggests that the trial court considered the amended special appearance—a pleading on file at the time the order was signed. *See Retzlaff v. Tex. Dep't of Criminal Justice*, 135 S.W.3d 731, 737–38 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (interpreting trial court's statement that it had considered “the argument and pleadings of the parties filed herein” to mean the trial court had considered all pleadings filed prior to the date of the judgment). We conclude that the trial court considered and ruled on appellant's amended special appearance. Accordingly, his argument is without merit. We overrule appellant's first issue to the extent that he erroneously asserts the trial court's failure to rule on the live pleading.

III. ADMISSIBILITY OF EXHIBIT 9: INCORPORATION BY REFERENCE

Appellant also argues in his first issue that the trial court erroneously considered Exhibit 9 attached to Ryan Realtors' response to the amended special appearance. Specifically, appellant argues that because Ryan Realtors did not properly incorporate Exhibit 9 into its response, it is not competent evidence. While appellant is correct that a party must incorporate an exhibit by reference to place the exhibit before the court as evidence,¹ the record reveals that Ryan Realtors properly incorporated Exhibit 9 by reference into its response to appellant's amended special appearance.

¹ *See Rangel v. Lapin*, 177 S.W.3d 17, 21 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (acknowledging that exhibits are properly before the court as evidence when referred to or incorporated

Exhibit 9, the affidavit of Robert C. Ryan, was attached to Ryan Realtors' response to appellant's amended special appearance. The affidavit incorporated eight exhibits, Exhibits 1 through 8, into Ryan's affidavit by reference. Furthermore, Ryan Realtors' response incorporated Exhibit 9 into the pleading by reference. Accordingly, the affidavit and its incorporated exhibits were properly incorporated into Ryan Realtors' response to the amended special appearance and were properly before the court as evidence. We overrule appellant's first issue in its entirety.

IV. PERSONAL JURISDICTION

In appellant's second issue, he contends that the evidence is legally and factually insufficient to sustain the trial court's personal jurisdiction ruling. We disagree.

A. Standard of Review

Whether a trial court has personal jurisdiction over a defendant is a question of law we review *de novo*. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007). In a challenge to personal jurisdiction, a plaintiff and defendant bear shifting burdens of proof. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 793 (Tex. 2002). The plaintiff bears the initial burden to plead sufficient allegations to bring a nonresident defendant within the reach of the Texas long-arm statute. *Id.*; *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 807 (Tex. 2002). If the plaintiff pleads sufficient jurisdictional allegations, the nonresident defendant then assumes the burden of negating all bases of jurisdiction in those allegations. *Moki Mac*, 221 S.W.3d at 574; *Marchand*, 83 S.W.3d at 793. However, if the plaintiff does not plead sufficient jurisdictional facts, the defendant meets his burden to negate jurisdiction by proving he is not a Texas resident. Furthermore, the plaintiff's pleadings are not dispositive of the jurisdictional dispute; thus, both parties can present evidence either

into the motion); *cf. Speck v. First Evangelical Lutheran Church of Houston*, 235 S.W.3d 811, 816 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (“[Appellant] did not . . . incorporate the affidavits by reference. The affidavits attached to [appellant's] pleading are therefore not . . . evidence.”).

proving or disproving the allegations. *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 659 (Tex. 2010).

When, as here, the trial court does not issue findings of fact and conclusions of law with its special appearance ruling, all facts necessary to uphold the ruling and supported by the evidence are implied. *Marchand*, 83 S.W.3d at 795. However, these implied findings are not conclusive and may be challenged for legal and factual sufficiency when this court has a complete record—the reporter’s and clerk’s—on appeal. *Id.*; see also *Cerbone v. Farb*, 225 S.W.3d 764, 767 (Tex. App.—Houston [14th Dist.] 2007, no pet.). Although the trial court in this case held a hearing on appellant’s special appearance and considered the pleadings, evidence filed with the district clerk, and arguments of counsel, there is no reporter’s record. Therefore, we will presume that the special appearance hearing was non-evidentiary and that the trial court considered only the evidence filed with the district clerk. See *Michiana Easy Livin’ Country, Inc., v. Holten*, 168 S.W.3d 777, 784 (Tex. 2005); *Info. Servs. Group, Inc. v. Rawlinson*, 302 S.W.3d 392, 397 n.3 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

B. Personal Jurisdiction

A Texas court may exercise personal jurisdiction over a nonresident defendant if (1) the defendant has minimum contacts with Texas, and (2) the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. *Marchand*, 83 S.W.3d at 795. Minimum contacts are sufficient for personal jurisdiction when the nonresident defendant purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *Moki Mac*, 221 S.W.3d at 575. There must be either minimum contacts sufficient to confer specific jurisdiction or continuous and systematic contacts sufficient to confer general jurisdiction. *Coleman*, 83 S.W.3d at 806–07.

When specific jurisdiction is asserted, as in this case, the following requirements must be met: (1) the defendant’s contacts must be purposeful; and (2) the cause of action

must arise from or relate to those contacts. *Id.* at 806. In analyzing specific jurisdiction, we must focus on the relationship among the defendant, the state of Texas, and the cause of action. *See Guardian Royal Exch. Assur., Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 228 (Tex. 1991); *see also Barnhill v. Automated Shrimp Corp.*, 222 S.W.3d 756, 762 (Tex. App.—Waco 2007, no pet.). The contacts relied upon must be purposeful, rather than random, fortuitous, or attenuated, and the defendant must seek some benefit, advantage, or profit by availing himself of the jurisdiction. *See Moki Mac*, 221 S.W.3d at 575. Furthermore, foreseeability is an important consideration, although not determinative, in deciding whether the nonresident defendant has purposefully established “minimum contacts” with the forum. *Marchand*, 83 S.W.3d at 795; *Huynh v. Nguyen*, 180 S.W.3d 608, 616 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

C. Appellant’s Contacts with Texas

The record reflects that appellant made the following purposeful contacts with Texas: (1) traveled to Texas in 2006 to sell the Property and (2) executed a listing agreement, earnest money contract, and affidavit of heirship, all of which were mailed to Texas in an effort to sell the Property. In 2006, appellant and his sister traveled to Texas to sell the Property. However, Ryan Realtors was not involved in the sale of the Property at that time, and this contact did not form the basis of Ryan Realtors’ fraud or breach of contract counterclaim in the underlying suit. Accordingly, this contact weighs against personal jurisdiction.

Regarding the listing agreement, although it is not part of our record, the affidavits of Robert Ryan and attorney Jeffrey Dorrell reflect the following: the listing agreement was sent to appellant from Texas to Missouri. In Missouri, appellant signed the agreement, as a seller, and the document was mailed back to Ryan Realtors in Texas. As the seller in the listing agreement, appellant employed Ryan Realtors—exclusively—to list and sell the Property. For this service, the listing agreement required appellant (and his co-seller) to pay a brokerage fee, 6% of the sales price, to Ryan Realtors. This fee

was to be paid to Ryan Realtors in Harris County, Texas. Furthermore, the agreement specifically stated that the contract was enforceable in Texas.

Additionally, the listing agreement forms the basis of Ryan Realtors' counterclaim: the company claims that appellant committed fraud by misrepresenting his "fee simple" ownership in the property and breached the listing agreement by failing to pay the brokerage fee. Accordingly, appellant's contacts with Texas surrounding the listing agreement are both purposeful and form the basis of Ryan Realtors' causes of action. Furthermore, appellant made other contacts with Texas that are related to Ryan Realtors' counterclaims. Appellant executed an earnest money contract with Ryan Realtors to sell the Property. The earnest money contract was returned to Ryan Realtors in Texas and provided that the company was entitled to a brokerage fee. Appellant executed an affidavit of heirship, styled in Harris County, Texas, in his efforts to sell the Property.

Moreover, there is sufficient evidence that appellant's sister acted as his agent in the sale of his interest in the Property and dealings with Ryan Realtors. And in a principal-agent relationship, the contacts of the agent may be imputed to the principal for the purposes of personal jurisdiction. *Greenfield Energy, Inc. v. Duprey*, 252 S.W.3d 721, 733 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *see also Coleman v. Klockner & Co. AG*, 180 S.W.3d 577, 588 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Appellant's sister apparently took the lead in selling both her and appellant's interest in the Property after employing Ryan Realtors. Emails between Ryan Realtors and appellant's sister reflect that she was the contact person for appellant regarding the sale of the Property, as appellant was "hard to contact sometimes." In these emails, the sister also discusses having conferred with appellant concerning the sales price and having him sign documents to sell the Property. Appellant even signed an email acknowledging his approval of a sales contract.² Because there is sufficient evidence of his sister acting as

² Furthermore, although appellant claims that he never communicated directly with Ryan Realtors, his signature is indisputably on the earnest money contract and a printout of one of Ryan

appellant's agent regarding the sale of the Property, and those acts are substantially connected to the operative facts in the underlying litigation, the sister's contacts with Texas can be imputed to appellant for purposes of finding personal jurisdiction. *See Duprey*, 252 S.W.3d at 733; *Coleman*, 180 S.W.3d at 588. Based on the foregoing contacts, we conclude that sufficient minimum contacts exist between appellant and the forum state.

D. Traditional Notions of Fair Play and Substantial Justice

Likewise, finding specific jurisdiction over appellant comports with fair play and substantial justice. We consider (1) the burden on the nonresident defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the most efficient resolution of controversies; and (5) the shared interest of the several states of furthering substantive social policies. *Pulmosan Safety Equip. Crop. v. Lamb*, 273 S.W.3d 829, 841–42 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Only the rare case will fail the fair-play analysis after it has been determined that minimum contacts exist. *Id.* at 842.

Appellant contends that this facet of our personal jurisdiction analysis weighs in his favor because he is in “ill-health,” “in his declining years,” and does “not want to travel to Houston, Texas to litigate this matter.” Appellant also contends that Ryan Realtors can collect any damages it is entitled to, if successful, solely from his sister. Besides the blanket statement that he is in “ill health” and in “his declining years,” appellant makes no showing that such *conditions* render him incapable of traveling to Texas. Appellant fails to detail why his age or health would make it a burden or unreasonable to travel to Houston. Appellant simply has not demonstrated any burden of litigating in Texas.

Realtors' emails to his sister. Other evidence reflects that appellant executed an exclusive listing agreement with Ryan Realtors. If appellant did not directly communicate with Ryan Realtors, presumably a third-party agent acted on his behalf in the execution of these documents and his signing the email approving the sales contract.

On the other hand, the original suit was filed by his sister in Texas; the affected parties are already litigating in Texas in a related suit. The original suit and counterclaim arise out of a transaction involving real estate located in Texas—Texas obviously has an interest in resolving controversies concerning property in its territory. We conclude that the exercise of personal jurisdiction over appellant would not offend traditional notions of fair play and substantial justice and overrule appellant’s second issue.

We affirm the trial court’s judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Yates and Sullivan.