

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-10-00266-CV**

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**QUARTZ CASTLE, INC. D/B/A GENERATOR JOE, Appellant**

**V.**

**JADE CONSOLIDATED MANAGEMENT, INC., Appellee**

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**On Appeal from the 9th District Court  
Montgomery County, Texas  
Trial Cause No. 08-10-10141 CV**

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**MEMORANDUM OPINION**

In the wake of Hurricane Ike, Jade Consolidated Management, Inc., a Texas corporation, rented a generator from Quartz Castle, Inc., d/b/a Generator Joe, a California corporation. Jade later sued Quartz. Quartz filed a special appearance, which the trial court denied. Quartz filed this interlocutory appeal to challenge the denial of its special appearance, and argues that (1) Jade's pleadings are insufficient to invoke jurisdiction, and (2) the trial court lacks both general jurisdiction and specific jurisdiction over Quartz. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(7) (West 2008). We affirm the trial court's order.

## Standard of Review and Applicable Law

“Because the question of a court’s exercise of personal jurisdiction over a nonresident defendant is one of law, we review a trial court’s determination of a special appearance *de novo*.” *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007). When the trial court does not issue findings of fact and conclusions of law, “we infer ‘all facts necessary to support the judgment and supported by the evidence . . . .’” *Id.*; *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002).

Before a Texas court may assert *in personam* jurisdiction over a nonresident defendant, the exercise of jurisdiction must be: (1) authorized by the Texas long-arm statute; and (2) “consistent with federal and state constitutional due-process guarantees.” *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 337 (Tex. 2009) (quoting *Moki Mac*, 221 S.W.3d at 574).

“The plaintiff bears the initial burden of pleading sufficient allegations to bring a nonresident defendant within the provisions of the long-arm statute.” *BMC Software*, 83 S.W.3d at 793. The Texas long-arm statute authorizes the exercise of jurisdiction over a nonresident defendant who does business in Texas if he: (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state; (2) commits a tort in whole or in part in this state; or (3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state. Tex. Civ. Prac. & Rem. Code Ann. § 17.042 (West 2008). “Once

the plaintiff has pleaded sufficient jurisdictional allegations, the defendant filing a special appearance bears the burden to negate all bases of personal jurisdiction alleged by the plaintiff.” *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 658 (Tex. 2010).

“[T]he Texas long-arm statute’s broad doing-business language ‘allows the statute to reach as far as the federal constitutional requirements of due process will allow.’” *Retamco*, 278 S.W.3d at 337; *Moki Mac*, 221 S.W.3d at 575. Due process authorizes the exercise of jurisdiction over a non-resident defendant when: (1) “the non-resident defendant has established minimum contacts with the forum state”; and (2) “the assertion of jurisdiction complies with ‘traditional notions of fair play and substantial justice.’” *Retamco*, 278 S.W.3d at 338; *Moki Mac*, 221 S.W.3d at 575 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)).

“A defendant establishes minimum contacts with a state when it ‘purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.’” *Retamco*, 278 S.W.3d at 338 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)). Three aspects are relevant to whether a non-resident defendant’s acts are purposeful: (1) “only the defendant’s contacts with the forum are relevant, not the unilateral activity of another party or a third person”; (2) “the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated”; and (3) the “defendant must seek some benefit, advantage or profit by ‘availing’ itself of the jurisdiction.”” *Moki Mac*, 221 S.W.3d at

575 (quoting *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005)).

A non-resident defendant's contacts may give rise to either specific or general jurisdiction. *See id.* at 575-76. "General jurisdiction arises when the defendant's contacts with the forum are continuous and systematic." *Retamco*, 278 S.W.3d at 338. The focus is on "a showing of substantial activities in the forum state." *Guardian Royal Exch. Assur., Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 228 (Tex. 1991). Specific jurisdiction arises when "the defendant purposefully avails itself of conducting activities in the forum state"; and the "cause of action arises from or is related to [the non-resident defendant's] contacts or activities." *Retamco*, 278 S.W.3d at 338. The focus is on the "relationship among the defendant, the forum and the litigation." *Guardian*, 815 S.W.2d at 228.

#### Pleading Requirement

In issue one, Quartz contends that Jade failed to plead sufficient allegations to bring Quartz within the scope of the Texas long-arm statute.

To determine whether Jade satisfied its pleading burden, we consider the pleadings and Jade's response to Quartz's special appearance. *See Flanagan v. Royal Body Care, Inc.*, 232 S.W.3d 369, 374 (Tex. App.—Dallas 2007, pet. denied). Quartz contends that Jade's original petition or, at most, Jade's first amended petition was the live pleading on

file at the time the trial court ruled on its special appearance. Jade contends that its fourth amended petition was the live pleading considered by the trial court.

Quartz's special appearance was set for submission. After the submission date, Jade filed its first amended petition. Thereafter, on March 6, 2009, Quartz's proposed order on its special appearance was re-filed, with the word "Denied" hand-written in two separate places on the order. The order was not signed. The docket sheet and a LexisNexis case history both indicate that the special appearance was denied on March 6. Moreover, at a subsequent hearing, the trial court reiterated that the special appearance had been heard on submission and denied.<sup>1</sup> Quartz later filed a motion to sign an order on the special appearance. On May 10, 2010, the trial court signed an order denying the special appearance.<sup>2</sup> Jade's fourth amended petition was on file at this time.

The record supports the conclusion that the trial court ruled on the special appearance motion on March 6, 2009. *See generally Alcantar v. Okla. Nat'l Bank*, 47

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<sup>1</sup> Quartz contends that, at this hearing, the trial court reconsidered its ruling on the special appearance. We disagree. Quartz had previously filed a motion to dismiss on grounds that its agreement with Jade contained a forum selection clause. The trial court granted the motion, but later vacated its order and denied the motion to dismiss. Quartz filed a motion to reconsider, again addressing enforcement of the forum selection clause. At a hearing on this motion, the forum selection clause served as the main topic and the trial court reiterated that the special appearance had been denied and was "again [] denied." Because the trial court did not have before it a motion to reconsider the special appearance, we do not construe the hearing as a reconsideration of its prior ruling denying the special appearance.

<sup>2</sup> A May 7, 2010 hearing was set to address Quartz's motion to sign an order, but the record does not indicate that the hearing occurred.

S.W.3d 815, 821 (Tex. App.—Fort Worth 2001, no pet.) (“Judgment is rendered when the trial court officially announces its decision in open court or by written memorandum filed with the clerk.”). At that time, Jade’s first amended petition was the live pleading on file with the trial court. We do not find in the record any allegations of surprise or prejudice or any indication that the trial court did not consider Jade’s first amended petition. *See Nichols v. Bridges*, 163 S.W.3d 776, 783 (Tex. App.—Texarkana 2005, no pet.); *see also* Tex. R. Civ. P. 63.

The trial court’s subsequent signing of the May 2010 order denying the special appearance was merely ministerial. *See Alcantar*, 47 S.W.3d at 821. This date determines when a party’s notice of appeal must be filed; it “does not affect or change the date of the rendition of the judgment.” *Id.* For this reason, we will consider the first amended petition, which was the live pleading on file at the time the trial court rendered judgment denying the special appearance.<sup>3</sup>

In its first amended petition, Jade alleged that Quartz is a California corporation that “engages or has engaged in business in [] Texas.” Jade claimed that Quartz price-gouged and took advantage of a disaster situation.

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<sup>3</sup> The jurisdictional allegations in Jade’s first amended petition mirror those in its fourth amended the petition. The difference between the two pleadings is that the fourth amended petition contains (1) additional allegations and causes of action against Romano; (2) an assertion that the contract was verbal, of which the website terms were not a part; (3) more detailed explanations of its claims; and (4) a request for a declaratory judgment.

Jade alleged specific jurisdiction on grounds that: (1) Quartz contracted with Jade, a Texas corporation, and contracted with other Texas entities or residents in connection with Quartz's transaction with Jade; (2) the contracts were performable in whole or part in Texas; (3) Quartz violated the Deceptive Trade Practices Act by its conduct and acts in Texas and directed at Jade in Texas, including taking advantage of a disaster situation; and (4) Quartz committed fraud by its conduct and acts directed at Jade in Texas.

Jade alleged general jurisdiction on grounds that Quartz does business through an interactive website directed nationwide to every state, including Texas. Jade alleged that Quartz's website performs the following functions:

[D]eclares that [Quartz's] business is "nationwide";

[H]eavily promotes [Quartz's] products and services;

[I]s readily available to Texans and solicits sales and credit applications in Texas;

[S]olicits customers (including Texans) for online registration to its products and services to facilitate and encourage sales, rentals and leases;

[S]olicits customer credit applications (including from Texans) on-line through a finance company for [Quartz's] products and services;

[S]olicits and facilitates email transmissions on-line with customers and potential customers (including Texans);

[P]ermits, facilitates and encourages customers (including Texans) to interactively track customer orders; and

[A]dvertises a customer list which lists two or more customers located in . . . Texas.

Based on Quartz's customer list, Jade alleged that Quartz has two or more Texas customers, has transacted business with Texas, and continues doing so, has purposely availed itself of the privilege of doing business in Texas, and has sufficient contacts with Texas to confer jurisdiction.

In its response to Quartz's special appearance motion, Jade alleged: (1) specific jurisdiction "based on the transaction, acts and conduct at issue in this case"; and (2) general jurisdiction based on Quartz's website and customer list, which allegedly show "extensive business in Texas," including the "supplying of temporary generators in disaster and emergency situations in Texas. . ." Jade alleged that its DTPA (price-gouging) and breach of contract allegations arose out of its pre-paid order with Quartz. Jade alleged that Quartz breached its contract and took advantage of a disaster situation in Texas.

In summary, Jade's pleadings allege that Quartz has done business in Texas through its website, contracted with a Texas resident, and, in the course of its transaction with Jade, committed fraud and deceptive acts in Texas, allegedly price-gouging. *See* Tex. Civ. Prac. & Rem. Code Ann. § 17.042. Jade satisfied its initial burden of pleading allegations sufficient to bring Quartz within the Texas long-arm statute and shifted the burden to Quartz to negate all jurisdictional bases. *See Kelly*, 301 S.W.3d at 656, 559-61; *see also 2007 E. Meadows, L.P. v. RCM Phoenix Partners, L.L.C.*, 310 S.W.3d 199, 204 (Tex. App.—Dallas 2010, pet. denied). We overrule issue one.



## Specific Jurisdiction

In issue three, Quartz contends that the exercise of specific jurisdiction is improper because its contacts with Texas are random, fortuitous, and attenuated and there is no substantial connection between its contacts and Jade's causes of action.<sup>4</sup>

In its special appearance, Quartz denied committing "any tort, in whole or in part, within the state" or purposefully availing itself of the privilege of conducting business in Texas. According to Quartz, Jade initiated contact and Quartz responded to Jade's request for information.

Joseph Romano, owner of Quartz, explained that Susan Skinner, on Jade's behalf, contacted him to ask about renting a generator. Romano told Skinner that a generator, located in California, was available for rent, and Romano emailed the terms and conditions to Skinner. That same day, Skinner again contacted Romano. She stated that she was aware of the terms and conditions, and wanted to rent the generator. Skinner used a credit card to pay the first month's rent and out-transportation charges. The generator was delivered to Jade.

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<sup>4</sup> In its recitation of facts and arguments regarding specific jurisdiction, Quartz often refers to evidence that was not before the trial court at the time of its March 2009 ruling on the special appearance. Jade also relies on such evidence in its brief. Our review, however, is limited to "all the evidence that was *before the trial court*, including pleadings, any stipulations, affidavits, exhibits, the results of discovery, and any oral testimony." *Michel v. Rocket Eng'g Corp.*, 45 S.W.3d 658, 668 (Tex. App.—Fort Worth 2001, no pet.) (emphasis added).

In her affidavit, Skinner stated that a “business associate” referred her to Quartz. Skinner contacted Quartz via cellular telephone, because she had no electricity, internet, or telephone service.<sup>5</sup> After a few telephone conversations, Skinner agreed to rent the generator and pre-paid rent and round-trip shipping charges. A carrier, not hired by Jade, delivered the generator to Jade in Texas. Skinner later learned that another generator company, located in California, owned the generator. At some point, Quartz emailed Skinner to ask about early return of the generator. Skinner wanted to be credited for early return of the generator. Romano refused and assessed additional shipping fees. Believing the fees to be excessive, Skinner told Romano that Jade would choose a carrier and return the generator to Quartz. According to Skinner, Quartz “hired a Houston attorney, threatened to file a lawsuit in Texas, contacted the local sheriff’s department, claimed the unit was stolen, hired a local wrecker service to block Jade’s driveway until Jade released the unit to the wrecker service and attempted to contract with Jade’s carrier to return the unit.” Skinner believed that Quartz hired the carrier to retrieve the generator from the wrecker yard and return the generator to Quartz. Skinner claimed that Quartz had “overcharged, and continues to overcharge, for the shipping and rental of the unit.” Prior to renting the generator, Jade had no communications with Quartz.

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<sup>5</sup> Skinner’s affidavit was signed by Jade’s attorney and filed the day before the submission date. *See* Tex. R. Civ. P. 14. Quartz contends that Jade’s counsel had no personal knowledge and was not competent to testify. We do not find in the record where Quartz objected in the trial court to the affidavit. This complaint is not preserved for appeal. *See* Tex. R. App. P. 33.1(a); *see also Stein v. Deason*, 165 S.W.3d 406, 413 (Tex. App.—Dallas 2005, no pet); *Int’l Turbine Serv. v. Lovitt*, 881 S.W.2d 805, 808 (Tex. App.—Fort Worth 1994, writ denied).

Merely contracting with a Texas resident will not establish minimum contacts. *See IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 597-98 (Tex. 2007). Likewise, the Texas Supreme Court has rejected “directed-a-tort jurisdiction.” *See Michiana*, 168 S.W.3d at 788-92. The relevant inquiry is whether (1) the non-resident defendant “purposefully avails itself of conducting activities in the forum state”; and (2) “the cause of action arises from or is related to those contacts or activities.” *Kelly*, 301 S.W.3d at 658 (quoting *Retamco*, 278 S.W.3d at 338).

“In determining whether the defendant purposefully directed action toward Texas, we may look to conduct beyond the particular business transaction at issue: ‘[a]dditional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State.’” *Moki Mac*, 221 S.W.3d at 577; *see also Asahi Metal Ind. Co. v. Superior Court of Cal.*, 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). “Examples of additional conduct that may indicate whether a defendant purposefully availed itself of a particular forum include advertising and establishing channels of regular communication to customers in the forum state.” *Moki Mac*, 221 S.W.3d at 577.

In *Michiana*, Holten, a Texas resident, purchased a recreational vehicle from Michiana, an Indiana RV dealer. *See Michiana*, 168 S.W.3d at 784. Holten later sued Michiana in Texas and alleged that Michiana made misrepresentations over the telephone. *Id.* Michiana had no employees or property in Texas, was not authorized to do business in Texas, did not advertise in Texas, and did not solicit business in Texas. *Id.*

The sale of the RV was initiated by Holten's telephone call to Michiana and the RV was shipped to Texas at Holten's request and expense. *Id.* Michiana had not placed large numbers of RVs in the stream of commerce, nor had Michiana designed, advertised, or distributed RVs in Texas. *Id.* at 786. Michiana had no choice regarding the place of delivery. *Id.* at 787. Holten paid for the RV in advance. *Id.* "Holten's decision to place his order from [Texas]" was Michiana's only contact with Texas; thus, Michiana's contacts were insufficient to establish specific jurisdiction. *Id.* at 788, 794.

Like Holten, Jade called Quartz in California, sent payment to California, and paid for delivery from California. *See id.* at 781. However, unlike Michiana, Jade's decision to place its order from Texas is not Quartz's only contact with Texas. Pursuant to its contract with Texas-based Jade, Quartz undertook a continuing liability with a Texas resident, which required Quartz to supply Jade with a generator for a specified period of time and accept payment for rental of the generator. Quartz's anticipated profit from its transaction with Jade required, under the circumstances in this case, ongoing contacts with the State of Texas. This fact is further evidenced by Quartz's actions taken to enter Texas with the purpose of regaining possession of the generator. Unlike the one-time purchase in *Michiana*, Quartz reached out beyond California to create a continuing relationship and at least some obligations with a Texas citizen. *See Zhang v. Med-Towel Enters., Ltd.*, No. 03-09-00457-CV, 2010 Tex. App. LEXIS 2526, at \*\*15-16 (Tex.

App.—Austin Apr. 8, 2010, no pet.) (mem. op.) (Non-resident defendant’s transaction with plaintiff “persisted longer than a single purchase.”).

Also unlike Michiana, Quartz operates a website. *See P.V.F., Inc. v. Pro Metals, Inc.*, 60 S.W.3d 320, 326 (Tex. App.—Houston [14th Dist] 2001, pet. denied) (“In order to determine whether litigation results from injuries that arise out of or relate to activities a defendant has purposefully directed to another state, *all of the activities* the defendant has so directed to that state must obviously be taken into consideration.”) (emphasis added). A non-resident defendant’s operation of an interactive website can amount to purposeful availment. *See Variant, Inc. v. Flexsol Packaging Corp.*, No. 6:08 CV 478, 2009 U.S. Dist. LEXIS 86839, at \*\*6-7 (E.D. Tex. Sept. 21, 2009). In *Variant*, Biltmore’s website allowed potential customers to book hotel rooms, purchase tickets or products, provide an e-mail address to receive special offers, and provide contact information so that a representative could respond to requests. *Id.* at \*6. The allegedly infringing website was interactive, used in Texas, and generated revenue from Texas residents. *Id.* “[T]hrough its website, Biltmore ha[d] the requisite minimum contacts with Texas to support specific jurisdiction.” *Id.* at \*\*6-7. In this case, by its own admission, Quartz is an “internet based business.” Quartz’s website allows potential customers to purchase products, submit contact information, and receive information from Quartz. Quartz’s online customer list suggests that it has two Texas customers. The record suggests that Quartz’s website is interactive and used in Texas. The fact that

Quartz serves Texas customers indicates that the website is a source of revenue from Texas. Thus, unlike Michiana, Quartz has an additional contact with Texas, through its website, which, together with its decision to rent a generator to be used in Texas, indicate purposeful availment. *See Moki Mac*, 221 S.W.3d at 577; *see also Asahi*, 480 U.S. at 112.

Accordingly, Quartz's internet contacts, combined with the contractual obligations entered into by Quartz and the actions taken by Quartz to regain possession of the generator, evidence an intent to serve the Texas market and an intent to purposefully avail itself of the privilege of conducting business in Texas, thereby invoking the benefits and protections of Texas law. *See Moki Mac*, 221 S.W.3d at 575; *see also Zhang*, 2010 Tex. App. LEXIS 2526, at \*\*15-16; *Variant*, 2009 U.S. Dist. LEXIS 86839, at \*\*6-7. These purposeful contacts give rise to the parties' dispute. Quartz's liability, if any, is directly related to its relationship with a Texas entity and to whether the terms found on Quartz's website were part of that transaction, a fact disputed by the parties. Jade's breach of contract, fraud, and DTPA claims arise out of Quartz's business contacts with Texas. *See Retamco*, 278 S.W.3d at 340-41.

“Only in rare cases . . . will the exercise of jurisdiction not comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the forum state.” *Guardian*, 815 S.W.2d at 231. In this case, Quartz has purposefully conducted business in Texas in such a way that the exercise of

specific jurisdiction will not offend traditional notions of fair play and substantial justice. We overrule issue three and need not address Quartz's second issue challenging the exercise of general jurisdiction. *See* Tex. R. App. P. 47.1.

#### Conclusion

Because a Texas court may properly exercise specific jurisdiction over Quartz, we affirm the trial court's order denying Quartz's special appearance.

AFFIRMED.

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STEVE McKEITHEN  
Chief Justice

Submitted on October 12, 2010  
Opinion Delivered December 16, 2010

Before McKeithen, C.J., Kreger and Horton, JJ.