In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00427-CV

T.R.E., INC., Appellant

V.

DARREN BREAUD AND ANNE BREAUD, INDIVIDUALLY AND/OR D/B/A B&B FABRICATION, L.L.C., Appellees

---

On Appeal from the 75th District Court
Liberty County, Texas
Trial Cause No. CV1002906

MEMORANDUM OPINION

T.R.E., Inc. sued Darren Breaud and Anne Breaud, individually and/or d/b/a B&B Fabrication, L.L.C. for breach of contract, unjust enrichment, negligent misrepresentation, fraud, and conversion. Appellees are Tennessee residents. Each appellee filed a special appearance, which the trial court granted. In its findings of fact and conclusions of law, the trial court found that appellees were not subject to either specific jurisdiction or general jurisdiction in Texas. In one appellate issue, T.R.E.

contends that the trial court erred by granting the special appearances. We affirm the trial court's judgment.

Factual Background

At the special appearance hearing, Jack Taylor Lastor, III, T.R.E.'s president, testified that T.R.E. purchased a Chevy Cobalt race car from B&B in 2007. Lastor subsequently decided to sell the Cobalt, and he testified that B&B agreed to help with the sale, and that the Cobalt was taken to B&B's shop in Tennessee at B&B's suggestion. Anne Breaud ("Anne"), owner and managing member of B&B, stated that Lastor contacted B&B about selling the Cobalt and expressed interest in having B&B build a new race car with proceeds from the sale of the Cobalt. Anne explained that B&B agreed to help sell the Cobalt, and B&B agreed to store the Cobalt at its shop at Lastor's request.

In September 2008, Lastor moved from Tennessee to Texas, moved T.R.E.'s shop to Texas, and registered T.R.E. in Texas. Lastor stated that Paul Barham contacted him in November 2008 about purchasing the Cobalt. Barham offered to pay $40,000 cash and trade a Camaro for the Cobalt, but Lastor had reservations about the offer.

In March 2009, Darren Breaud ("Darren") visited T.R.E.'s Texas facility and stayed in an R.V. on T.R.E.'s property. Darren testified that he traveled to Texas to have T.R.E. repair a motor that T.R.E. had worked on in Tennessee. He also brought a car to race at a local track, but did not race the car. He explained that he only came to Texas because Lastor had moved to Texas. Lastor testified that, during this trip, he expressed

his reservations about Barham's offer to Darren. According to Lastor, Darren said he had a buyer for Barham's Camaro and Lastor testified that, based on Darren's representations, he decided to accept Barham's offer. T.R.E. employees Matthew Alvarado and Jerry Shepard stated that they were present during these conversations and that Darren agreed to help sell the Camaro.

Darren denied discussing Barham during this trip. According to Darren, he spoke to Barham after the trip and discussed the sale with Lastor via telephone. Danny Allen, who traveled with Darren to Texas, stated that Lastor and Darren never discussed the sale during this trip. Barham stated that he did not contact Lastor until April or May of 2009.

According to Anne, Lastor and T.R.E. agreed to sell the Cobalt to Barham in exchange for the Camaro, a transmission, and $42,000 in cash. Anne stated that Lastor asked B&B to "handle" the sale, but Lastor stated that it was the Breauds who wanted to handle the transaction. Anne stated that B&B picked up the Camaro, transmission, and a $2,000 deposit from Barham in Virginia, returned to Tennessee, and mailed a $2,000 money order to Lastor. She stated that Barham picked up the Cobalt from B&B's shop. B&B found a buyer for the Camaro, and according to Anne, Lastor and T.R.E. agreed that the proceeds from the sale of the Camaro would be used as a deposit on a new race car. B&B delivered the Camaro to the buyer and collected $15,000. Lastor testified that he was to receive $20,000 from the sale of the Camaro, but has not been paid in full.

Darren stated that his only involvement with T.R.E. was in his capacity as an employee of B&B. Darren testified that he lived and worked in Texas several years ago, but is currently a resident of Tennessee. Darren explained that he is an employee of B&B, has no ownership interest in B&B, and has never owned real or personal property in Texas, filed a lawsuit in Texas, owned a business in Texas, advertised or solicited business in Texas, or had an ownership interest in a business organized under Texas law. Anne stated that her only involvement in the transaction with T.R.E. was in her capacity as owner and managing member of B&B. Anne stated that she is a resident of Tennessee and has never been a resident of Texas, owned personal or real property in Texas, conducted business or worked in Texas, or filed a lawsuit in Texas.

Anne further stated that B&B is a limited liability company organized under Tennessee law, has its principal place of business in Tennessee, has never been organized under Texas law or maintained an office or place of business in Texas, has no Texas address or telephone number, does not own or operate property in Texas, does not have a registered agent in Texas, has no bank accounts or leases in Texas, and does not pay Texas taxes. She explained that B&B does not advertise or conduct business in Texas and has no employees in Texas. According to Anne, B&B sometimes fabricates and sells vehicles to Texas residents, but those vehicles are manufactured and picked up in Tennessee. Darren testified that B&B has some Texas clients, and he has visited Texas

on behalf of B&B to service those clients. Lastor testified that the Breauds have attended yearly races in Texas to conduct business for B&B.

Standard of Review and Applicable Law

Personal jurisdiction is a question of law that an appellate court reviews de novo. *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 337 (Tex. 2009). The exercise of personal jurisdiction must be authorized by the Texas long-arm statute. *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 657 (Tex. 2010). The Texas long-arm statute authorizes the exercise of jurisdiction over a nonresident defendant who does business in Texas if the defendant:

> (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). The plaintiff must plead sufficient allegations to bring the nonresident defendant within the reach of Texas's long-arm statute. *Kelly*, 301 S.W.3d at 658. If the plaintiff fails to do so, the defendant need only prove that it does not live in Texas to negate jurisdiction. *Id.* at 658-59. If the plaintiff pleads sufficient jurisdictional allegations, the defendant must negate all bases of personal jurisdiction alleged by the plaintiff. *Id.* at 658.

Moreover, the exercise of personal jurisdiction must not violate federal and state constitutional due process guarantees. *Id.* at 657. "[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 (quoting *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575 (Tex. 2007)). The exercise of jurisdiction over a non-resident defendant satisfies the requirements of due process when: (1) the defendant established minimum contacts with the forum state; and (2) the assertion of jurisdiction does not violate traditional notions of fair play and substantial justice. *Id.* at 338. A defendant establishes minimum contacts with a state by purposefully availing itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of that state's laws. *Id.* at 337. "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 Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 231 (Tex. 1991).

A non-resident defendant's contacts may give rise to either specific or general jurisdiction. *Retamco*, 278 S.W.3d at 338. Specific jurisdiction exists when the defendant purposefully avails itself of conducting activities in the forum state, and the cause of action arises from or is related to those contacts or activities. *Id*. The focus is on the "relationship among the defendant, the forum[,] and the litigation." *Guardian*, 815 S.W.2d at 228. General jurisdiction arises when the defendant's contacts with the forum

state 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*, 815 S.W.2d at 228.

Rendition of Judgment

We first address T.R.E.'s argument that the trial judge had a ministerial duty to sign an order denying the special appearances. According to the record, Judge C.T. "Rusty" Hight conducted the special appearance hearing, but did not rule on the special appearances at the hearing. At a subsequent telephonic conference, Judge Hight indicated his intent to deny the special appearances. Judge Hight's successor subsequently held a hearing, at which no testimony was presented, and later granted the special appearances.

"Rendition of judgment is the judicial act by which the court declares the decision of the law upon the matters at issue." *W.C. Banks, Inc. v. Team, Inc.*, 783 S.W.2d 783, 785 (Tex. App.—Houston [1st Dist.] 1990, no pet.). "Rendition occurs when the judge's decision is officially announced, either orally in open court or by signed memorandum filed with the clerk." *Id.* After the court has rendered judgment, the subsequent reduction of the judgment to a writing signed by the court is a purely ministerial act. *Id.*

The record does not indicate that Judge Hight officially announced his decision to deny the special appearances either orally in open court or in a signed memorandum filed with the clerk. Because Judge Hight had not rendered judgment, the successor judge was not limited to the ministerial duty of signing a written judgment. *See id.*

Jurisdiction

In its pleadings, T.R.E. alleged that appellees engaged in or have engaged in business in Texas and that the lawsuit arises out of business done in Texas. According to T.R.E., its agreement with B&B regarding the sale of the Cobalt to Barham occurred in Texas; misrepresentations and fraudulent statements were made and relied on in Texas; the Camaro, transmission, and cash were to be delivered to Texas; and T.R.E. sustained damages in Texas. T.R.E. also alleged that Darren has pre-suit contacts with Texas and was in Texas during relevant discussions and negotiations, and that the Breauds have transacted business in Texas. T.R.E. satisfied its initial burden of pleading allegations sufficient to bring appellees within the Texas long-arm statute. *See Kelly*, 301 S.W.3d at 658. Thus, the burden shifted to appellees to negate all bases of personal jurisdiction. *Id.*

We first address whether a Texas court may exercise specific jurisdiction over appellees, *i.e.*, whether appellees purposefully availed themselves of conducting activities in Texas and T.R.E.'s causes of action arise from or relate to appellees' activities. *See Retamco*, 278 S.W.3d at 338. The purposeful availment inquiry requires us to consider conduct beyond the particular business transaction at issue and consider additional conduct that may indicate an intent or purpose to serve the Texas market. *Moki Mac*, 221 S.W.3d at 577. Such additional conduct includes advertising and establishing channels of regular communication to customers in the forum state. *Id.* Three aspects are relevant to the purposeful availment inquiry: (1) only the defendant's contacts, not the unilateral

activity of another party or a third person, are relevant; (2) the defendant's contacts must be purposeful, not random, fortuitous, or attenuated; and (3) the defendant must seek a benefit, advantage, or profit by availing itself of the forum state's jurisdiction. *Id.* at 575.

According to the record, the parties' agreement regarding the sale of the Cobalt originated in Tennessee when all parties were Tennessee residents. After Lastor and T.R.E. became Texas residents, Lastor communicated Barham's offer to Darren and the parties agreed that B&B would help with the sale, which included finding a buyer for Barham's Camaro. Whether this agreement was discussed and reached during Darren's trip to Texas or via telephone, the record demonstrates that Lastor initiated discussions regarding the sale of the Cobalt to Barham. Unilateral activity, however, does not satisfy the requirement of contact with the forum state. *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 787 (Tex. 2005). Regarding any representations made by Darren, the Texas Supreme Court has rejected jurisdiction based solely on a non-resident defendant's having "directed a tort" toward a Texas resident. *See id.* at 791-92. While the place of a plaintiff's reliance may determine the choice of law, the minimum-contacts analysis focuses solely on the defendant's actions and reasonable expectations. *Id.* at 790.

Finally, appellees' entry into an agreement with a Texas resident, mailing payment to Texas, and communicating with T.R.E. regarding the execution and performance of the agreement are insufficient to establish the minimum contacts necessary to support the

exercise of specific jurisdiction over appellees. *See Freudensprung v. Offshore Tech. Servs.*, 379 F.3d 327, 344 (5th Cir. 2004). Aside from this agreement, B&B has fabricated race cars for some Texas customers, and the Breauds have traveled to Texas for business on occasion. However, these contacts do not amount to advertising or establishing channels of regular communication to customers in Texas. *See Moki Mac*, 221 S.W.3d at 577; *see also Michiana*, 168 S.W.3d at 785. Nor does the record contain evidence establishing that B&B derives a substantial amount of business from Texas. *See Moki Mac*, 221 S.W.3d at 578.

Under the circumstances of this case, we conclude that appellees have not purposefully availed themselves of the privilege of conducting activities in Texas, thereby invoking the benefits and protections of Texas's laws.[1] *See Retamco*, 278 S.W.3d at 338. For this reason, we need not determine whether T.R.E.'s contacts arise from or relate to appellees' contacts with Texas. *See* Tex. R. App. P. 47.1.

Next, we consider whether a Texas court may exercise general jurisdiction over appellees, *i.e.*, whether appellees' contacts with Texas are continuous and systematic. *See Retamco*, 278 S.W.3d at 338. We do not view each contact in isolation, as all contacts must be carefully investigated, compiled, sorted, and analyzed for proof of a pattern of continuing and systematic activity. *Am. Type Culture Collection, Inc. v.*

[1] Because B&B lacks sufficient contacts to support the exercise of specific jurisdiction, we need not determine whether the fiduciary shield doctrine applies to the Breauds. *See* Tex. R. App. P. 47.1.

Coleman, 83 S.W.3d 801, 809 (Tex. 2002). We are concerned with the quality of appellees' contacts, not the quantity of contacts. *Id*. at 809-10.

Appellees admittedly have Texas customers, but the cars sold to those customers are manufactured in Tennessee and picked up by the purchaser in Tennessee. The record contains some evidence suggesting that the Breauds have visited Texas on occasion to attend races, at which they service Texas customers, but the record does not show the extent of the services provided. Nor does the record indicate that appellees advertise in Texas or maintain a physical presence in Texas. Other contacts with Texas include the time period in which Darren lived and worked in Texas, but these contacts occurred many years ago. More recently, Darren traveled to Texas to have T.R.E. repair a motor. It was within this timeframe that Lastor approached Darren with Barham's offer and Darren agreed to help with the transaction. This agreement, however, stems from the agreement regarding the Cobalt, which originated in Tennessee when all the parties were Tennessee residents. In carrying out this agreement, appellees mailed a deposit to Texas and communicated with Lastor in Texas, but the Cobalt remained in Tennessee, repairs made to the Cobalt occurred in Tennessee, the Camaro was taken to Tennessee, and Barham picked up the Cobalt in Tennessee.

We conclude that appellees' contacts with Texas are not so substantial as to be continuous and systematic. *See Retamco*, 278 S.W.3d at 338; *Guardian*, 815 S.W.2d at 228. "Usually, 'the defendant must be engaged in longstanding business in the forum

state, such as marketing or shipping products, or performing services or maintaining one or more offices there; activities that are less extensive than that will not qualify for general in personam jurisdiction.'" *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 168 (Tex. 2007) (quoting 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1067.5 (2007)). The record does not suggest that appellees have engaged in the type of longstanding business in Texas that is sufficient to invoke general jurisdiction.[2] *See id.* at 168, 170-71 (Finding that trips to Texas, payments to Texas vendors, and contracts with Texas entities did not subject non-resident defendant to general jurisdiction).

In summary, we conclude that appellees' contacts with Texas do not give rise to either specific jurisdiction or general jurisdiction. Because the trial court properly granted appellees' special appearances, we overrule T.R.E.'s sole issue and affirm the trial court's judgment.

AFFIRMED.

_____

STEVE McKEITHEN
Chief Justice

Submitted on May 9, 2012
Opinion Delivered May 24, 2012

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

[2] Because B&B does not have sufficient contacts to support the exercise of general jurisdiction, we need not determine whether the fiduciary shield doctrine applies to the Breauds. *See* Tex. R. App. P. 47.1.