REVERSE and DISMISS; and Opinion Filed November 15, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01257-CV

JOHN W. PRILLER, INDIVIDUALLY AND D/B/A JOHN PRILLER & ASSOCIATES, Appellant
V.
MORGAN COX, III AND DM FOREST CREEK LLC, Appellees

On Appeal from the 219th Judicial District Court
Collin County, Texas
Trial Court Cause No. 219-04089-2014

MEMORANDUM OPINION

Before Justices Francis, Stoddart, and Schenck
Opinion by Justice Stoddart

This is an interlocutory appeal from an order denying the special appearance filed by John W. Priller, Individually and d/b/a John Priller & Associates (Priller) in a lawsuit filed by Morgan Cox, III and DM Forest Creek LLC. In a single issue, Priller asserts the trial court erred by denying his special appearance. We reverse the trial court's order and render judgment dismissing the cause against him for lack of personal jurisdiction.

BACKGROUND

This lawsuit arose from a dispute over an appraisal that Priller performed for DM Forest Creek and payment for Priller's services. Cox and DM Forest Creek sued Priller and his

attorney, Edsel Matthews,[1] for breach of contract, negligence, and common law and statutory unfair debt collection practices. Cox also sought a declaratory judgment that he is not a party to any contract with Priller and is not liable for Priller's invoices.

Cox is a member of DM Forest Creek, a Florida limited liability company with its principal office in Texas. DM Forest Creek owns an apartment complex in Florida. Cox contacted Priller, a Florida appraiser, and retained him to appraise the complex. Priller performed the appraisal in Florida and mailed the appraisal report and invoice to DM Forest Creek's office in Texas. When the invoice was not paid, Priller hired Matthews, a Florida attorney, to collect the amount owed. Matthews sent a letter to Cox and DM Forest Creek asking that they pay the invoice and enclosed a proposed complaint to be filed in a Florida court for collection of the past due amount. Matthews received a letter in return from Cox and DM Forest Creek's counsel enumerating several complaints about the appraisal and stating if Priller did not withdraw his demand for payment his clients would sue. Matthews replied by letter. Appellees allege that in this letter, Matthews engaged in unfair debt collection practices.

Appellees sued Priller in Texas and he filed a special appearance supported by an affidavit. Following a hearing, the trial court denied Priller's special appearance and concluded Priller is subject to the court's jurisdiction under the doctrine of specific jurisdiction. The trial court noted that appellees conceded there are no grounds for finding jurisdiction under the doctrine of general jurisdiction. This appeal followed.

LAW & ANALYSIS

Whether a trial court has personal jurisdiction over a nonresident defendant is a question of law. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007). We review a

[1] Priller and Matthews each filed a special appearance and the trial court denied both of them. Although they both appealed the trial court's order, Matthews subsequently dismissed his appeal and only Priller's arguments are before us.

trial court's determination of a special appearance de novo. *Id.* Texas courts may exercise personal jurisdiction over a nonresident defendant only if (1) the Texas long-arm statute permits the exercise of jurisdiction, and (2) the jurisdiction satisfies constitutional due-process guarantees. *Id.* Our long-arm statute allows jurisdiction over a nonresident that does business in Texas. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (West 2015). The Texas long-arm statute includes a list of acts that may constitute doing business in this state, including contracting with a Texas resident where either party is to perform the contract in whole or in part in Texas or committing a tort in whole or in part in Texas. *Id.* § 17.042(1), (2). The "broad doing-business language allows the statute to reach as far as the federal constitutional requirements of due process will allow." *Moki Mac*, 221 S.W.3d at 575 (internal quotation omitted).

Constitutional due process permits a state to exercise jurisdiction only when a nonresident defendant has sufficient minimum, purposeful contact with the state, and the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *Stull v. LaPlant*, 411 S.W.3d 129, 133 (Tex. App.—Dallas 2013, no pet.). The "touchstone" of jurisdictional due process is "purposeful availment." *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 784 (Tex. 2005). Thus, it is "essential in each case that there be some act by which the *defendant purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). When determining purposeful availment, we consider (1) the defendant's own actions but not the unilateral activity of another party, (2) whether the defendant's actions were purposeful rather than random, isolated, or fortuitous, and (3) whether the defendant sought some benefit, advantage, or profit by availing itself of the privilege of doing business in Texas. *Jani-King Franchising v. Falco Franchising, S.A.*, No. 05-15-00335-CV, 2016 WL 2609314, at *3 (Tex. App.—Dallas May 5, 2016, no pet.) (citing

Michiana, 168 S.W.3d at 785). The defendant's activities must justify a conclusion that the defendant could reasonably anticipate being called into a Texas court. *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002) (citing *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). The "quality and nature of the defendant's contacts, rather than their number" governs the inquiry in the minimum contacts analysis. *Id*.

When, as here, only specific jurisdiction is at issue, we focus on the relationship among the defendant, the forum, and the litigation. *Mitchell v. Freese & Goss, PLLC*, No. 05-15-00868-CV, 2016 WL 3923924, at *3 (Tex. App.—Dallas July 15, 2016, pet. filed) (mem. op.) (citing *Moncrief Oil Int'l, Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150 (Tex. 2013)). Specific jurisdiction exists only if the alleged liability arises out of or is related to the defendant's activity within the forum. *Id.* (citing *Moncrief Oil*, 414 S.W.3d at 150, 156). "[F]or a nonresident defendant's forum contacts to support an exercise of specific jurisdiction, there must be a substantial connection between those contacts and the operative facts of the litigation." *Id.* (quoting *Moncrief Oil*, 414 S.W.3d at 156). "The operative facts are those on which the trial will focus to prove the liability of the defendant who is challenging jurisdiction." *Id.* (citing *Leonard v. Salinas Concrete, LP*, 470 S.W.3d 178, 188 (Tex. App.—Dallas 2015, no pet.)).

Our special appearance jurisprudence dictates that the plaintiff and the defendant bear shifting burdens of proof in a challenge to personal jurisdiction. *Id.*; TEX. R. CIV. P. 120a. The plaintiff bears the initial burden to plead sufficient allegations to invoke jurisdiction under the Texas long-arm statute. *Jani-King Franchising*, 2016 WL 2609314, at *3 (citing *Moki Mac*, 221 S.W.3d at 574). If the plaintiff has pleaded sufficient jurisdictional allegations, then a defendant who contests the trial court's exercise of personal jurisdiction bears the burden of negating all bases of jurisdiction alleged by the plaintiff. *Id.* (citing *Moki Mac*, 221 S.W.3d at 574). Priller does not argue that appellees failed to meet their initial burden.

The record shows that Priller is a licensed appraiser in Florida where he maintains his only office. Appellees initiated contact with Priller in Florida and asked him to appraise a property in Florida that was owned by DM Forest Creek, a Florida limited liability company. Appellees allege a contract exists between Priller and DM Forest Creek. Priller performed all of the appraisal-related services in Florida and did not travel to Texas in the course of conducting the appraisal. Priller's and Matthews's contacts with appellees were limited to a phone call, two letters, and emails, including Priller's appraisal and requests for payment. Assuming a contract exists between Priller and DM Forest Creek, these contacts do not constitute purposeful availment in Texas. *See Michiana*, 168 S.W.3d at 791; *see also KC Smash 01, LLC v. Gerdes, Hendrichson, Ltd, L.L.P.*, 384 S.W.3d 389, 393 (Tex. App.—Dallas 2012, no pet.) (contacts via phone and email and "the sending of payments" to a party in Texas were not contacts demonstrating purposeful availment); *Olympia Capital Associates, L.P. v. Jackson*, 247 S.W.3d 399 (Tex. App.—Dallas 2008, no pet.) ("The existence of a contract between the nonresident defendant and a resident of the forum and engaging in communications related to the execution and performance of that contract are insufficient to establish the minimum contacts necessary to support the exercise of specific personal jurisdiction over the nonresident defendant."); *Alenia Spazio, S.p.A. v. Reid*, 130 S.W.3d 201, 213 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) ("numerous telephone and facsimile communications with people in Texas relating to an alleged contract do not establish minimum contacts").

Cox and DM Forest Creek assert jurisdiction is proper because they were to perform the contract in Texas by sending payment to Priller in Florida from their office in Texas. We have stated that a defendant "[s]ending payments to Texas does not establish minimum contacts." *See KC Smash*, 384 S.W.3d at 393 (citing *Freudensprung v. Offshore Technical Servs., Inc.*, 379 F.3d 327, 344 (5th Cir. 2004)). Had appellees sent a payment from Texas to Priller, that

unilateral action would not have shown that Priller directed his activity to Texas and would not have been a contact by Priller in Texas. *See id.* at 394 (citing *Michiana*, 168 S.W.3d at 787); *see also Mitchell*, 2016 WL 3923924, at *4; *Furtek & Assocs., L.L.C. v. Maxus Healthcare Partners, LLC*, No. 02-15-00309-CV, 2016 WL 1600850, at *6 (Tex. App.—Fort Worth April 21, 2016, no pet.) (citing *Myers v. Emery*, 697 S.W.2d 26, 32 (Tex. App.—Dallas 1985, no writ)).

Likewise, the torts alleged by appellees do not establish specific jurisdiction. There is not a substantial connection between Priller's contacts with Texas and the operative facts of the litigation. *See Mitchell*, 2016 WL 3923924, at *3. If Priller negligently performed the appraisal, then the facts relating to that allegation all arose in Florida: the property is in Florida and the appraisal was performed in Florida by a Florida appraiser. The bases of the unfair debt collection claims are that Matthews, acting on Priller's behalf, sent correspondence from Florida to a Florida entity's Texas office in an effort to collect a debt incurred in Florida and thereby committed a tort in Texas. Sending two letters seeking payment of invoices for an appraisal conducted in Florida is not sufficient to establish purposeful availment. *See Michiana*, 168 S.W.3d at 791-92; *KC Smash*, 384 S.W.3d 390-994 (fraudulent or negligent misrepresentations made through electronic media do not establish specific jurisdiction).

Appellees assert that Priller knew his appraisal report and invoices would be sent to Texas and payment for those services would come from Texas and that knowledge shows purposeful availment. "However, if the facts themselves fail to establish minimum contacts and purposeful availment, the defendant's knowledge of the relationship to Texas will not make the defendant amendable to jurisdiction." *See KC Smash*, 384 S.W.3d at 394. The Texas Supreme Court's opinion in *Michiana* is relevant to this analysis. In *Michiana*, the plaintiff ordered an RV from an Indiana company that did not market or regularly sell its products in Texas. *Michiana*, 168 S.W.3d at 784. The plaintiff later sued the company for breach of contract and fraud. The

supreme court concluded the Indiana company's only contact with Texas was the Texas plaintiff's decision to place his order from Texas, which was insufficient to warrant the imposition of jurisdiction over the company. *Id*. at 794. The court never stated the company's knowledge that the plaintiff lived in Texas, the RV would be shipped to Texas, and any damages would occur in Texas affected the minimum-contacts and purposeful-availment analyses.

Additionally, the record shows that Priller did not "seek some benefit, advantage, or profit by 'availing' itself of the jurisdiction" in Texas. *Michiana*, 168 S.W.3d at 785; *see also KC Smash*, 384 S.W.3d at 394. At most, Priller entered into an agreement to appraise an apartment complex in Florida and receive payment for those services. *See KC Smash*, 384 S.W.3d at 394. All of the operative facts underlying the litigation arose in Florida.

We conclude Priller satisfied his burden to show he did not purposefully avail himself of the privilege of conducting activities in Texas and there is no substantial connection between his contacts and the operative facts of the litigation. Priller did not invoke the benefits and protections of Texas laws. Based on these conclusions, we need not consider the other portions of the special appearance analysis. *See* TEX. R. APP. P. 47.1. We conclude the trial court erred by denying Priller's special appearance. We sustain Priller's sole issue.

CONCLUSION

We reverse the trial court's order denying Priller's special appearance, and we render judgment dismissing the cause against him for want of jurisdiction.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOHN W. PRILLER, INDIVIDUALLY AND D/B/A JOHN PRILLER & ASSOCIATES, Appellant

No. 05-15-01257-CV V.

MORGAN COX, III AND DM FOREST CREEK LLC, Appellees

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Opinion delivered by Justice Stoddart.
Justices Francis and Schenck participating.

In accordance with this Court's opinion of this date, the trial court's order denying the special appearance of John W. Priller, Individually and d/b/a Priller & Associates is **REVERSED** and judgment is **RENDERED** dismissing the case against him for want of jurisdiction.

It is **ORDERED** that appellant recover his costs of this appeal from appellees Morgan Cox, III and DM Forest Creek LLC.

Judgment entered this 15th day of November, 2016.