Reverse and Render; Dismiss and Opinion Filed March 9, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01097-CV

BARBARA O'DAIRE, Appellant
V.
ROWAND RECOVERY, LLC, Appellee

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-01749

MEMORANDUM OPINION

Before Justices Francis, Lang-Miers, and Whitehill
Opinion by Justice Whitehill

This is an interlocutory appeal from an order denying appellant Barbara O'Daire's special appearance. The pivotal question is whether her emails and telephone calls with a Texas company constitute "purposeful availment" that would support a Texas court's exercising personal jurisdiction over her. Because the facts and binding precedents compel the conclusion that she did not purposefully avail herself of the privilege of conducting activities in Texas, we issue this memorandum opinion and reverse.

I. BACKGROUND

The facts are well-known to the parties. Therefore, we recite the facts to the limited extent necessary to decide this case. We draw the facts from the parties' pleadings and special-appearance evidence.

At all relevant points in time, O'Daire has been a Virginia citizen and resident and Bay Capital Management Group, LLC's president. BCMG was an entity formed under Virginia law with its principal place of business in Virginia.

Appellee Rowand Recovery, LLC is a debt collection company based in Dallas, Texas.

Rowand found BCMG's website while searching for consumer debt portfolios to buy. Rowand's attorney and agent, Hershel Chapin, contacted BCMG about buying Texas consumer debts. Rowand ultimately bought a portfolio of accounts from BCMG. BCMG employee Barbara Helmandollar handled the negotiations for BCMG, but O'Daire signed the contract for BCMG.

After paying the purchase price, Rowand told BCMG that it was dissatisfied with the chain of title documents BCMG sent. About a month after the contract was executed, O'Daire began communicating with Chapin by telephone and email about the alleged defects in BCMG's performance. On some occasions, she emailed Chapin files relating to the account purchase, but Rowand contends these efforts did not cure the defects. Rowand alleges that on one occasion O'Daire emailed Rowand a corrected bill of sale from BCMG's predecessor in interest that was a "complete fabrication." Rowand further alleges that O'Daire later sent a revised bill of sale that contained false representations. Rowand alleges that it ultimately discovered that it never acquired title to any of the accounts it bought because BCMG itself never had title to them.

A few months after O'Daire's last communication, Rowand sued her in Dallas County, asserting warranty and Texas Deceptive Trade Practices Act claims.[1]

O'Daire filed a special appearance challenging Texas's personal jurisdiction over her, to which Rowand responded with evidence attached. O'Daire replied with evidence attached.

[1] Rowand separately pursued an arbitration against BCMG in Virginia and prevailed.

The trial court held a hearing and denied the special appearance. The order recites that "specific personal jurisdiction exists over Defendant in this forum for all claims alleged in Plaintiff's original petition."[2] No findings of fact were requested or made.

O'Daire timely appealed. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(7).

II. ANALYSIS

A. Applicable Law

Whether a court can exercise jurisdiction over a nonresident is a question of law. *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 657 (Tex. 2010). We thus review de novo a trial court's order granting or denying a special appearance. *M&F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co., Inc.*, No. 15-0083, 2017 WL 889938, at *5 (Tex. Mar. 3, 2017); *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007).

Texas's long arm statute permits a Texas court to exercise personal jurisdiction over a nonresident who does business or commits a tort in Texas. TEX. CIV. PRAC. & REM. CODE § 17.042(1), (2). Jurisdiction under the Texas statute, however, reaches as far as the Due Process Clause allows. *Cornerstone Healthcare Grp. Holding, Inc. v. Nautic Mgmt. VI, L.P.*, 493 S.W.3d 65, 70 (Tex. 2016) Accordingly, Texas can exercise personal jurisdiction over O'Daire if (i) she has minimum contacts with Texas and (ii) the exercise of jurisdiction comports with traditional notions of fair play and substantial justice.[3] *See id*.

It was Rowand's burden to plead sufficient facts to meet the above jurisdictional standards and O'Daire's burden to negate all jurisdictional bases Rowand alleged. *See Moki*

[2] Rowand filed an amended petition after the trial court ruled. Some Texas courts of appeals have held that such pleadings are untimely and cannot be considered. *See, e.g., Guam Indus. Servs., Inc. v. Dresser-Rand Co.*, No. 01-15-00842-CV, 2017 WL 219157, at *7 (Tex. App.—Houston [1st Dist.] Jan. 19, 2017, no pet. h.) ("[W]e may review only those pleadings on file at the time of the special appearance hearing . . . ."). Here, Rowand's amended petition dropped its warranty claim, added a negligent misrepresentation claim, and added allegations that Rowand relied on O'Daire's post-agreement representations. The changes do not affect the jurisdictional analysis, so we need not decide whether the amended petition is properly before us.

[3] Specific jurisdiction generally requires a claim-by-claim analysis, but here we need not analyze Rowand's claims separately because Rowand does not allege that its claims arise from different contacts. *See Moncrief Oil Int'l, Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150–51 (Tex. 2013).

Mac, 221 S.W.3d at 574. Because there are no fact findings, we infer all facts necessary to support the trial court's order and supported by the evidence. *Id*.

We focus on two prongs when considering the minimum contacts aspect of specific jurisdiction: (i) purposeful availment and (ii) relatedness. *See Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009).

A person has minimum contacts with a forum state if she purposefully availed herself of the privilege of conducting activities within the state, thus invoking the benefits and protections of its laws. *Cornerstone*, 493 S.W.3d at 70. Three principles guide our purposeful availment analysis: (i) only the defendant's forum contacts are relevant, not the unilateral activities of another; (ii) the defendant's contacts must be purposeful rather than random, isolated, or fortuitous; and (iii) the defendant must seek some benefit, advantage, or profit by availing herself of the forum such that she impliedly consents to suit there. *Id*. at 70–71.

We also focus on the relationship among the defendant, the forum, and the litigation. *Id*. To satisfy the minimum contacts test, "the defendant's suit-related conduct must create a substantial connection with the forum State," *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014), and not merely with persons who reside there, *see id*. at 1122–23.

B. Application of the Law to the Facts

In her sole issue, O'Daire contends that she negated all pleaded jurisdictional bases. For analysis purposes, we assume Rowand carried its pleading burden and assess whether the evidence negated jurisdiction. We hold that it did.

We begin with the purposeful availment prong. It is undisputed that O'Daire is a Virginia resident who lacks continuous and systematic Texas contacts. Thus, to show purposeful availment Rowand relied on evidence that:

- O'Daire executed the account purchase agreement on BCMG's behalf.

- After executing the contract, O'Daire communicated with Rowand by telephone and email about matters concerning BCMG's performance. These communications amounted to two or three telephone conversations and about eleven emails.

Rowand also argues that O'Daire's post-agreement communications were false and amounted to DTPA violations, but for jurisdictional purposes we do not consider whether the communications were tortious. We instead limit our focus to "the actions and reasonable expectations of the defendant." *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 790 (Tex. 2005) (footnote omitted).

O'Daire's affidavit furnished uncontradicted testimony that:

- She has never been in Texas aside from a personal trip about 25 years ago.
- She sent all her emails to Chapin from Virginia, and she was in Virginia during all of her telephone conversations with him.
- "Most, if not all, of [O'Daire's] communications with Mr. Chapin were in response to his inquiries about documents related to the Agreement."

First, we conclude that O'Daire's execution of the contract for BCMG does not show she purposefully availed herself of Texas. *See Univ. of Ala. v. Suder Found.*, No. 05-16-00691-CV, 2017 WL 655948, at *6 (Tex. App.—Dallas Feb. 17, 2017, no pet. h.) (mem. op.) ("Contracting with a Texas resident does not of itself constitute purposeful availment."); *Mitchell v. Freese & Goss, PLLC*, No. 05-15-00868-CV, 2016 WL 3923924, at *4 (Tex. App.—Dallas July 15, 2016, pet. pending) (mem. op.) ("Merely contracting with a Texas entity is insufficient to constitute purposeful availment for jurisdictional purposes, especially when the contractual obligations are performed outside the forum state."); *see also Stull v. LaPlant*, 411 S.W.3d 129, 137 (Tex. App.—Dallas 2013, no pet.) ("[W]hen an agent negotiates a contract for its principal in Texas, it is the principal who does business in this state, not the agent.") (internal quotations and citation omitted). Indeed, at the special appearance hearing Rowand conceded "it wasn't the transaction that created the jurisdiction over Barbara O'Daire."

Next, as to the telephone calls and emails, *Jani-King Franchising, Inc. v. Falco Franchising, S.A.*, No. 05-15-00335-CV, 2016 WL 2609314 (Tex. App.—Dallas May 5, 2016, no pet.) (mem. op.), is dispositive. In that case, Texas company Jani-King granted a commercial cleaning franchise to Belgian company Falco. *Id*. at *1. Years later, Jani-King sued Falco and several European individuals who owned or worked for Falco, alleging that they misused Jani-King's personal property and confidential information to secretly form a competing business. *Id*. at *2. As to the individual defendants, Jani-King alleged that they committed fraud by misrepresenting Falco's revenues and the causes for Falco's poor performance, misleading Jani-King that Falco was dedicated to its relationship with Jani-King, and concealing their non-competition clause violations. *Id*. at *1, *2.

We held that personal jurisdiction was impermissible over one individual, David D'Hose, because Jani-King did not successfully plead jurisdictional facts against him. *Id*. at *4. Jani-King alleged that D'Hose sent reports and emails to Jani-King in Texas which contained fraudulent omissions and representations, but, unlike the other individual defendants, D'Hose never traveled to Texas or made statements or omissions while in the state. *Id*. We further said that "communications through telephone and email regarding negotiation *and performance* of a contract between Texas plaintiffs and a foreign defendant were not meaningful contacts of the foreign defendant with Texas." *Id*. (emphasis added).

Here, like D'Hose, O'Daire never came to Texas. She did not instigate the relationship with the Texas plaintiff. Her contacts with Texas were solely communications made from outside Texas. Moreover, those communications were made mostly or entirely in response to inquiries from Rowand. *See id*. at *4 (noting that one of D'Hose's alleged misrepresentations was made in response to a communication from Jani-King).

Rowand nonetheless argues that O'Daire's communications caused Rowand to forgo exercising certain contractual rights. Jani-King, however, involved a similar reliance claim. *See id*. at *2 ("Based on the Individual Defendant[s'] representations and non-disclosures, Jani-King abstained, for an extended period of time, from declaring Falco in default of the Agreement and from otherwise taking action to protect its business interests.").

Rowand also argues it is jurisdictionally significant that the events at issue concerned "accounts located in Texas" and "Texas debtors." We disagree. As to O'Daire, those facts were fortuitous and do not support a Texas court's exercising personal jurisdiction over her. *See Univ. of Ala.*, 2017 WL 655948, at *3 (defendant's Texas activities must be purposeful rather than "random, isolated, or fortuitous").

C. Conclusion

Because we conclude that O'Daire successfully negated purposeful availment and minimum contacts, we need not consider whether (i) there is a substantial connection between O'Daire's Texas contacts and the litigation's operative facts or (ii) the exercise of jurisdiction would offend fair play and substantial justice. Accordingly, we sustain O'Daire's sole issue on appeal.

III. DISPOSITION

We reverse the trial court's order denying O'Daire's special appearance and render judgment dismissing this case for lack of personal jurisdiction.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BARBARA O'DAIRE, Appellant

No. 05-16-01097-CV V.

ROWAND RECOVERY, LLC, Appellee

On Appeal from the 134th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-16-01749.
Opinion delivered by Justice Whitehill.
Justices Francis and Lang-Miers participating.

In accordance with this Court's opinion of this date, we **REVERSE** the trial court's order denying appellant Barbara O'Daire's special appearance and **DISMISS** the case for want of personal jurisdiction.

It is **ORDERED** that appellant Barbara O'Daire recover her costs of this appeal from appellee Rowand Recovery, LLC.

Judgment entered March 9, 2017.