AFFIRMED in part; REVERSE and REMAND in part; Opinion Filed May 28, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01134-CV

DAVID HANSCHEN, TRUSTEE OF THE DAVID HANSCHEN HERITAGE TRUST TWO AND TRUSTEE OF THE ARGUS STAMP COMPANY, MPT; MICHAEL HANSCHEN, AND RYAN HANSCHEN, Appellants

V.

JAMES HANSCHEN, INDIVIDUALLY AND IN HIS CAPACITY AS THE TRUSTEE OF THE VIER SOHNE PROGENY TRUST, FORMER MANAGER OF NBR-C2, LLC. AND NBR-C3, LLC, ET AL., Appellee

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-04371

MEMORANDUM OPINION

Before Justices Bridges, Pedersen, III, and Evans
Opinion by Justice Evans

Appellants David Hanschen, trustee of the David Hanschen Heritage Trust Two and trustee of the Argus Stamp Company, MPT, Michael Hanschen and Ryan Hanschen appeal the trial court's granting of appellee James Hanschen's special appearance. In two issues, David, Michael and Ryan (the "family")[1] contend that

[1] Because all parties' surnames are Hanschen, we will refer to the family and James.

the trial court (1) incorrectly granted the special appearance when James was personally served with a citation and petition while physically present in Texas, and (2) failed to issue findings of fact and conclusions of law and thus James is not entitled to presumptions to support the order granting the special appearance. We reverse in part and affirm in part.

BACKGROUND

On March 27, 2019, the family sued James Hanschen, individually and as the trustee of the Vier Sohne Progeny Trust ("Progeny Trust"), former manager of the NBR-C2, LLC ("NBR-C2") and NBR-C3, LLC ("NBR-C3"), and former general partner of NBR-Needham 2 Partnership ("NBR-Needham"). In the petition, the family alleged that James failed to provide an accounting for the Progeny Trust and misapplied funds as trustee. The family also alleged that James failed to maintain the good standing of the entities, failed to provide an accounting, and misappropriated funds. The family asserted claims against James for breaches of fiduciary duties for which they sought exemplary damages.

On March 29, 2019, James traveled to Dallas to attend a meeting regarding the Progeny Trust. While James was in Texas, the family personally served him with the petition and citation. The citation of service was addressed to "James Hanschen." After James's answer deadline passed, the family moved for an interlocutory default judgment against James in all capacities. On May 24, 2019, the trial court granted appellant's motion for default judgment ("May 24 Order").

The May 24 Order also granted the family's request for an accounting and appointed an auditor with respect to the Progeny Trust, NBR-C2, NBR-C3, and NBR-Needham. On June 21, 2019, James filed a special appearance and, subject thereto, a motion for new trial and to set aside the default judgment. The trial court held a hearing and granted the special appearance by order dated August 29, 2019 ("August 29 Order"). The family requested that the trial court file findings of fact and conclusions of law with regard to the August 29 Order. After a timely reminder of past-due findings and conclusions, the trial court did not enter findings of fact and conclusions of law. The family then filed this appeal.

ANALYSIS

A. Standard of Review

Whether a court can exercise personal jurisdiction over nonresident defendants is a question of law, and thus we review de novo the trial court's determination of a special appearance. *See Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 657 (Tex. 2010).

B. Personal Service

In their first issue, the family contends that the personal service affected on James in Texas was sufficient to confer personal jurisdiction in both his individual and representative capacities. Generally, a trial court may exercise jurisdiction over a nonresident defendant when (1) the Texas long-arm statute authorizes the exercise of jurisdiction and (2) the exercise of jurisdiction is consistent with federal and state

constitutional guarantees of due process. *Stallworth v. Stallworth*, 201 S.W.3d 338, 343 (Tex. 2006).

1) Individual capacity

With respect to personal jurisdiction, the United States Supreme Court has held that the "short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'" *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 619 (1990); *see also Stallworth*, 201 S.W.3d at 344 ("An assertion of personal jurisdiction based on physical presence alone constitutes due process."). In this case, the family personally served James with the petition and citation while he was in Texas. The family concedes they "have never asserted that Texas has general jurisdiction over James or that the traditional minimum contacts analysis would be met in the absence of his physical presence." They are correct and the case law is clear that a trial court has authority to exercise in personam jurisdiction over a nonresident where the court's jurisdiction grew out of the personal service of citation upon the nonresident within the state. *See Flores v. Melo-Palacios*, 921 S.W.2d 399, 402 (Tex. App.—Corpus Christi 1996, writ denied). A nonresident, merely by reason of his nonresidence, is not exempt from a court's jurisdiction if he voluntarily comes to the state and thus is within the territorial limits of such jurisdiction and can be duly served with process. *Id.*

Here, James was personally served with a citation addressed to "James Hanschen" within the State of Texas. The family argues this is all that is necessary for the trial court to have personal jurisdiction over James in his individual capacity. James admits he was served individually, but argues, "[T]here were zero causes of action asserted against [James] in his individual capacity in the Petition. And, the Interlocutory Default Judgment was entered *only* against the entities and [James] in the business capacities." From this James concludes the trial court lacks personal jurisdiction over him. We disagree with James's conclusion that he is not individually subject to jurisdiction in this case.

While we may agree with James that the default judgment granted relief against the entities for which it would be necessary for Texas courts to have jurisdiction over James in representative capacities, the family's petition pleaded causes of action against James individually for breaches of fiduciary duties arising from his role as trustee of the Progeny Trust and his roles in NBR-C2, NBR-C3, and NBR-Needham. The family seeks exemplary damages against James for these alleged breaches of fiduciary duties. James does not make a specific argument why these claims are not pleaded against him personally. In Texas, generally an agent is personally liable for his own tortious conduct. *See Miller v. Keyser*, 90 S.W.3d 712,

717 (Tex. 2002) ("Texas' longstanding rule [is] that a corporate agent is personally liable for his own fraudulent or tortious acts.").[2]

For these reasons, we agree with the family that James was personally served with process in Texas, so the trial court has personal jurisdiction over him in that capacity. *See Burnham*, 495 U.S. at 619; *Stallworth*, 201 S.W.3d at 344. Accordingly, we sustain that portion of the family's first issue regarding personal jurisdiction over James individually and we reverse the trial court's granting of James's special appearance with regard to his individual capacity.

2) Representative capacity

The family also contends that the trial court should have denied James's special appearance because "he was personally served in his 'representative' capacity while present in Texas." The family's petition complains about James both as an individual and in the roles he held as a trustee, a former manager, and a former general partner.[3] The family argues that service of process was sufficient because they are not seeking liability of an entity; they are only seeking personal liability in James's multiple roles and that all of his roles are bases for his personal liability. Thus, the family contends that "a straightforward application of *Burnham* requires a

[2] James does not challenge his amenability to service personally while in Texas based on the corporate shield doctrine—a concept in minimum contacts analysis—so we do not consider this alternative argument.

[3] James contends that some or all of these capacities are ongoing, but we need not resolve this factual dispute to decide the issues before us.

finding of personal jurisdiction over James (in all capacities) because he was served while physically present in the state of Texas."

We have held, "[t]he capacity in which a non-resident has contact with a forum state must be considered in the jurisdictional analysis." *Stauffer v. Nicholson*, 438 S.W.3d 205, 212 (Tex. App.—Dallas 2014, no pet.) (individual who signed consent to jurisdiction without indicating he did so in capacity as trustee was not subject to consent jurisdiction in Texas as trustee); *see generally Stull v. LaPlant,* 411 S.W.3d 129, 134 (Tex. App.—Dallas 2013, no pet.) (personal jurisdiction over nonresident in capacity in which nonresident sued may be challenged in special appearance). James was not served with a citation directed to him in any representative capacity; only "JAMES HANSCHEN WHEREEVER HE MAY BE FOUND." At oral argument, the family argued the listing of all the parties in the citation was sufficient to constitute service on James in each representative capacity he was listed as a defendant.[4] We reject this contention and the family's counsel acknowledged in oral argument a citation addressed to one defendant inadvertently served on a different, unrelated defendant would not constitute good service of process merely because all defendants' names were in the list of

[4] The citation listed all the plaintiffs, "Said Plaintiff being DAVID HANSCHEN, TRUSTEE OF THE DAVID HANSCHEN HERITAGE TRUST TWO AND TRUSTEE OF THE ARGUS STAMP COMPANY MPT; MICHAEL HANSCHEN AND RYAN HANSCHEN." Then after stating when the petition was filed, it listed all the defendants, "JAMES HANSCHEN, INDIVIDUALLY AND IN HIS CAPACITY AS THE TRUSTEE OF THE VIER SOHNE PROGENY TRUST, FORMER MANAGER OF NBR-C2, LLC AND NBR-C3 LLC, AND FORMER GENERAL PARTNER OF NBR- NEEDHAM 2 PARTNERSHIP."

defendants in the style of the lawsuit. More specifically, a citation addressed to "Deutsche Bank National Trust Company as Trustee Company" when the defendant named in the lawsuit is "Deutsch Bank, National Trust Company, as Trustee Morgan Stanley ABS Capital 1 Inc. Trust 2006–NC5 Mortgage Pass Through Certificates Series 2006–NC5," is defective citation and service and cannot sustain a default judgment. *See Deutsche Bank, Nat'l Tr. Co. v. Kingman Holdings, LLC*, No. 05-14-00855-CV, 2015 WL 6523712, at *1–2 (Tex. App.—Dallas Oct. 5, 2015, pet. denied). The citation in this case completely omitted any indication of representative capacity so it did not accomplish service on James in a representative capacity.

Further, the return of citation states that "JAMES HANSCHEN" was served without any mention of his roles as a trustee, a former manager, and a former general partner. The service was deficient as to James in any representative capacity because the return of service failed to properly name those capacities. Our sister court has previously noted as follows:

> In two of the citations issued in this case, one was issued to "Phyllis Price, Individually" and the second was issued to "Phyllis Price, Trustee of the Melba Depriest King Trust." The sheriff's returns, attached to the citations, indicate that in both instances, process was served by delivering to "Phyllis Price." Although the return of service on the second citation indicates that it was served on Price, it does not indicate that Price was served in her capacity as trustee for the trust and it also fails to identify the Melba Depriest King Trust as the defendant. A return of service in this form does not establish that the defendant was served.

Price v. Dean, 990 S.W.2d 453, 454–55 (Tex. App.—Corpus Christi 1999, no pet.). In the *Price* case, the court concluded that it never acquired jurisdiction over the trustee or the trust because appellee failed to comply with Texas Rule of Civil Procedure 106. *Id.* at 454. In this case, James was not served with citations which were returned to the court clerk stating he had been served in his representative capacities. Any failure to comply with the rules regarding service of process renders the attempted service of process invalid, and the trial court acquires no personal jurisdiction over the defendant. *See Lytle v. Cunningham*, 261 S.W.3d 837, 840 (Tex. App.—Dallas 2008, no pet.). A default judgment based on improper service is void. *Id*. Accordingly, the trial court did not have personal jurisdiction over James in his representative capacities.

Finally, we decline to extend the Supreme Court's holding in *Burnham* to find personal jurisdiction over James in all of his capacities simply because he was served in his individual capacity while present in Texas. Such a holding would conflict with the consistent position taken by Texas courts that actions taken by an individual in a representative capacity are separate and distinct from actions taken in an individual's personal capacity. *See Stauffer*, 438 S.W.3d at 212; *Stull,* 411 S.W.3d 134; *Elizondo v. Tex. Nat. Res. Conservation Comm'n*, 974 S.W.2d 928, 931 (Tex. App.—Austin 1998, no pet.); *In re Spivey*, No. 06-98-00134-CV, 2000 WL 4397, at *2 (Tex. App.—Texarkana Jan. 5, 2000, no pet.). For these reasons, we overrule that portion of the family's first issue challenging the trial court's determination that

it did not have personal jurisdiction over James in his representative capacities and we affirm the trial court's granting of James's special appearance with regard to his representative capacities.

C. Findings of Fact & Conclusions of Law

In their second issue, the family contends that James is not entitled to any presumptions to support the August 29 Order because the trial court did not file any findings of fact or conclusions of law. The family requests that this Court remand the case for entry of findings of fact and conclusions of law if this Court declines to enter a judgment denying the special appearance.

However, findings of fact and conclusions of law are unnecessary when the trial court has decided the case based solely on the pleadings and arguments of counsel. *See Awde v. Dabeit*, 938 S.W.2d 31, 33 (Tex. 1997); *CMS Partners, Ltd. v. Plumrose USA, Inc.*, 101 S.W.3d 730, 736–37 (Tex. App.—Texarkana 2003, no pet.). The Supreme Court has held that in cases where judgment is rendered based on the pleadings or without an evidentiary hearing, findings of fact and conclusions of law can have no purpose. *See IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 443 (Tex. 1997). In this case, the facts at issue were not contested—James was served with service of process in the State of Texas and the citation and return were in the clerk's file both stating "James Hanschen" was served. As the trial court decided the case based solely on the pleadings and the arguments of counsel and without an evidentiary hearing, findings of fact and conclusions of law

would not serve a purpose and there is no need to remand the case to the trial court for entry of findings of fact and conclusions of law. For this reason, we overrule the family's second issue.

CONCLUSION

The parties briefed matters pertaining to the merits of the case, such as the trial court could not grant an accounting of the entities when James was only personally before the trial court. But this appeal only pertains to whether the trial court correctly granted the special appearance as to all defendants and we decline the invitation to provide an advisory opinion as to substantive matters on remand. On the record of this case, we reverse that portion of the August 29 Order which granted James's special appearance in his personal capacity, and we affirm that portion of the August 29 Order which granted James's special appearance in his representative capacities.

/David Evans/
DAVID EVANS
JUSTICE

191134F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAVID HANSCHEN, TRUSTEE OF THE DAVID HANSCHEN HERITAGE TRUST TWO AND TRUSTEE OF THE ARGUS STAMP COMPANY MPT; MICHAEL HANSCHEN, AND RYAN HANSCHEN, Appellants

No. 05-19-01134-CV   V.

JAMES HANSCHEN, INDIVIDUALLY AND IN HIS CAPACITY AS THE TRUSTEE OF THE VIER SOHNE PROGENY TRUST, FORMER MANAGER OF NBR-C2, LLC. AND NBR-C3, LLC, ET AL., Appellee

On Appeal from the 101st Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-19-04371.
Opinion delivered by Justice Evans. Justices Bridges and Pedersen, III participating.

In accordance with this Court's opinion of this date, the trial court's Order Granting Defendant's Special Appearance is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the order granting a special appearance to appellee James Hanschen in his personal capacity. In all other respects, the trial court's judgment is **AFFIRMED**. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered May 28, 2020.