Affirm and Opinion Filed January 5, 2022

In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00526-CV

MARTY G. RINGHAM AND PREMIERE PLUS REALTY COMPANY, Appellants
V.
CRAIG BERNSTEIN AND VARNA BERNSTEIN, Appellees

On Appeal from the County Court at Law No. 5
Dallas County, Texas
Trial Court Cause No. CC-21-01369-E

MEMORANDUM OPINION

Before Justices Reichek, Nowell, and Carlyle
Opinion by Justice Carlyle

In this interlocutory appeal, Florida real estate agent Marty G. Ringham and Florida real estate broker Premiere Plus Realty Company (Premiere) challenge the trial court's order denying their special appearances in a lawsuit filed by a Texas client they solicited. We affirm in this memorandum opinion. *See* TEX. R. APP. P. 47.4.

Background

The live petition states that in about early 2020, Texas resident Craig Bernstein listed a Florida condominium unit he owned (the property) for sale with a Florida real estate broker not involved in this lawsuit. That listing expired in March 2020. Within the next several months, Mr. Bernstein "received a written solicitation letter" (the letter) from Mr. Ringham and Premiere. The letter was addressed to and received by Mr. Bernstein at his Plano, Texas home and signed by Mr. Ringham. Prior to receiving this "completely unsolicited" letter, Mr. Bernstein "had no knowledge of Premiere or Ringham" and "had no contact whatsoever with them." The letter contained a "Real Estate Market Update" for the Florida area where the property is located and asked Mr. Bernstein to not hesitate to contact Mr. Ringham for assistance with his real estate needs. Mr. Bernstein did not contact Mr. Ringham.

About a week later, Mr. Bernstein received a phone call from Mr. Ringham at his Dallas workplace. During the call, Mr. Ringham "solicited [Mr. Bernstein] to enter into a listing contract with Premiere to sell the Property." Mr. Bernstein signed a listing contract with Premiere in early May 2020. The listing contract was emailed to Mr. Bernstein by Mr. Ringham and described Mr. Ringham as the "Listing Licensee." Mr. Bernstein "negotiated and signed the Listing Contract in Dallas" and emailed it back to Mr. Ringham from his Dallas office. Mr. Bernstein also signed an October 29, 2020 listing contract amendment.

Between April 2020 and April 2021, Mr. Ringham sent Mr. Bernstein at least eighty email communications. The purpose of most of these emails was to keep Mr. Bernstein updated on the showings of the property and the feedback Mr. Ringham received from other realtors. Mr. Bernstein also answered any questions Mr. Ringham had regarding the property that were expressed in the emails. Mr. Bernstein never communicated or conducted business with Mr. Ringham from outside of Texas. The property went under contract in February 2021 and the sale closed in May 2021.

Mr. Bernstein and his wife, Varna, filed this lawsuit against Mr. Ringham and Premiere on April 13, 2021. The Bernsteins alleged Mr. Ringham and Premiere failed to deal with Mr. Bernstein honestly and fairly regarding the sale of the property. Specifically, (1) the defendants "failed to advise [Mr. Bernstein] and keep him abreast of the changing market value of real property and conditions in Collier County, Florida and never suggested to him that he should withdraw the Property from the market to see if the price increased," and (2) though Mr. Ringham "was aware that [Mr. Bernstein] lived in Texas, and . . . was married," he "never addressed the community property issue with [Mr. Bernstein]."

The Bernsteins requested a declaratory judgment that the listing contract and its amendment "are void and unenforceable because they were not signed by Varna." They also asserted claims for (1) common-law fraud against Mr. Ringham based on "false representations when [Mr. Bernstein] entered the Listing Contract, Listing

Contract Amendment and the Sales Contract," and (2) "fraud by nondisclosure," breach of contract, breach of fiduciary duty, "breach of the DTPA," negligence, gross negligence, and negligent misrepresentation against both defendants for those and other alleged misrepresentations and "fail[ure] to disclose material facts to [Mr. Bernstein] related to market conditions and market value in the area."

As to personal jurisdiction, the live petition asserted that the trial court's assumption of jurisdiction over the defendants "will not offend traditional notions of fair play and substantial justice and will be consistent with the constitutional requirement of due process." The petition stated:

> The [letter] was a directed, purposeful, intentional, unsolicited, targeted marketing attempt by Defendants sent to Craig in Texas advertising Ringham and Premiere's services in Florida to a Texas resident. The telephone call from Ringham to Craig at his office in Dallas, Dallas County, Texas was another direct, purposeful, intentional, unsolicited targeted marketing attempt directed to Craig in Texas with Ringham advertising his services and Premiere's to Craig in Dallas, Dallas County, Texas and verbally soliciting Craig to enter into the Listing Contract from which this dispute directly arises. The activity of purposefully, intentionally, targeting and soliciting Craig is directly related to and directed at Texas. Ringham purposefully and intentionally reached out to Craig in Texas as the owner of a house in Naples, Florida in anticipation that Ringham could entice Craig to enter into the Listing Contract. Ringham continuously telephoned and sent e-mails to Craig at his office in Dallas, Dallas County, Texas from April 14, 2020, until shortly before the date the Property was sold, May 5, 2021.
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> . . . .
>
> This Court has personal jurisdiction over Defendant Premiere . . . because Ringham, Premiere's duly authorized agent, engaged in business in Texas by intentionally and purposefully soliciting and contracting with a Texas resident on his and Premiere's behalf.

The petition's attachments included the listing contract and a "completely unsolicited" letter Mr. Bernstein "received in or about the Spring of 2021" at his Texas home "from Marie Orlando, also associated with Premiere" (the Orlando letter). According to the petition, though Mr. Bernstein was unable to locate Mr. Ringham's spring 2020 letter at the time the petition was filed, the Orlando letter and Mr. Ringham's letter were "identical" except as to "the specific senders of each letter and the updated information contained in the 'Real Estate Market Update.'"

Mr. Ringham and Premiere jointly filed May 7, 2021 special appearances.[1] They contended (1) "Texas courts do not have specific jurisdiction over Defendants because Defendants did not purposefully direct any activities toward Texas and Plaintiffs' asserted causes of action do not arise from or relate to Defendants' activities within Texas," and (2) any contacts by them with Texas were "random, isolated, and fortuitous." They stated, "In this case the fortuitous contact was that the owner of a Florida residence, [Mr. Bernstein], lives in Texas. Defendants did not purposefully avail themselves of contact with Texas." They also asserted:

> Bernstein's jurisdictional allegations come down to two coincidental facts: he signed the Listing Agreement (and extensions thereof) while in Texas and any communications by Defendants to him were made while he was in Texas. An abundance of case law confirms that this is not enough for this Court to exercise personal jurisdiction over Defendants.

[1] At the same time, Mr. Ringham and Premiere filed motions to dismiss based on a forum selection clause and forum non conveniens. Though the trial court denied those motions in the challenged order, those rulings are outside the scope of this interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(7).

On that same date, the defendants filed an affidavit of Mr. Ringham in which he stated, among other things:

> 1. . . . The facts stated herein are within my personal knowledge and are true and correct.
> 2. I am an Associated Realtor for [Premiere] and other realty companies in Naples, Florida. [Premiere] has offices in Collier County, Florida and operates exclusively in south Florida.
> . . . .
> 5. I do not advertise in Texas. I had not, until Mr. Bernstein, represented a Texas resident in a real estate transaction, at least certainly that I recall. I never traveled to Texas in connection the [sic] listing of Mr. Bernstein's home. In fact, I have been to Texas only once, about eight years ago, for a real estate conference in the Dallas area. Neither I nor [Premiere] maintain an office in Texas. Neither I nor [Premiere] have any employees in Texas. Neither I nor [Premiere] own property in Texas.
> 6. I am a Florida real estate agent that assists buyers and sellers of Florida real estate. I live and work in Florida. I have never intentionally solicited business in Texas or specifically from Texas residents. I have read the Special Appearance filed in the above-styled lawsuit on my behalf and I hereby verify that all facts contained therein are true and correct.

The Bernsteins filed a response to the defendants' special appearances in which they restated their assertions described above and contended, among other things, (1) the defendants "have established sufficient minimum contacts with Texas to confer jurisdiction in Texas courts" and (2) Mr. Ringham "does not say in his affidavit that maintaining the lawsuit in Dallas County, Texas would offend the traditional notions of fair play and substantial justice." They also asserted that the special appearances "fail[] as a matter of law" because they were not properly verified as required by Texas Rule of Civil Procedure 120a. *See* TEX. R. CIV. P. 120a.

According to the Bernsteins, "Although Ringham states that he has read the Special Appearance and he verifies that all facts are true and correct, he does not state that he has personal knowledge of those facts." Additionally, the Bernsteins filed an affidavit of Mr. Bernstein in which he testified to the facts set out in the live petition.

The trial court heard the special appearances "by submission" on June 11, 2021.[2] Earlier that morning, the Bernsteins filed objections to and a motion to strike Mr. Ringham's affidavit to the extent it pertained to Premiere. On that same date, the trial court sustained those objections and denied the defendants' special appearances.[3]

Standard of review and applicable law

Whether a court has personal jurisdiction over a defendant is a question of law we review de novo. *TV Azteca v. Ruiz,* 490 S.W.3d 29, 36 n.4 (Tex. 2016) (citing *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150 (Tex. 2013)). The plaintiff bears "the initial burden of pleading allegations sufficient to confer jurisdiction," and the burden then shifts to the defendant "to negate all potential bases for personal jurisdiction the plaintiff pled." *Id*. (quoting *Moncrief Oil,* 414 S.W.3d at 149). A defendant can negate jurisdiction either legally or factually. *Id*. (citing *Kelly v. Gen. Interior Constr., Inc.,* 301 S.W.3d 653, 659 (Tex. 2010)).

[2] The appellate record contains no reporter's record.

[3] Appellants timely requested findings of fact and conclusions of law, which the trial court declined to issue.

Legally, the defendant can show that the plaintiff's alleged jurisdictional facts, even if true, do not meet the personal jurisdiction requirements. *Id*. Factually, the defendant can present evidence that negates one or more of the requirements, controverting the plaintiff's allegations. *Id*. The plaintiff can then respond with evidence supporting the allegations. *Id*. If the parties present conflicting evidence that raises a fact issue, we will resolve the dispute by upholding the trial court's determination. *Id*. (citing *Retamco Operating, Inc. v. Republic Drilling Co*., 278 S.W.3d 333, 337 (Tex. 2009)). "When, as here, the trial court does not issue findings of fact and conclusions of law, we imply all relevant facts necessary to support the judgment that are supported by evidence." *Id*. (quoting *Moncrief Oil*, 414 S.W.3d at 150).

Texas's long-arm statute extends Texas courts' personal jurisdiction as far as the federal constitutional requirements of due process will permit. *M&F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co.*, 512 S.W.3d 878, 885 (Tex. 2017). A state's exercise of jurisdiction comports with federal due process if the nonresident defendant has "minimum contacts" with the state and the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *Id*.

A defendant's minimum contacts with a forum are established when 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*. at 886 (quoting *Retamco*, 278 S.W.3d at 338). When determining whether a nonresident

purposefully availed itself of the privilege of conducting activities in Texas, we consider three factors:

> First, only the defendant's contacts with the forum are relevant, not the unilateral activity of another party or a third person. Second, the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated. Thus, sellers who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to the jurisdiction of the latter in suits based on their activities. Finally, the defendant must seek some benefit, advantage or profit by availing itself of the jurisdiction.

Moncrief Oil, 414 S.W.3d at 151. This analysis assesses the quality and nature of the contacts, not the quantity. *Retamco*, 278 S.W.3d at 339.

A defendant's contacts with the forum may give rise to either general or specific jurisdiction. *M&F Worldwide*, 512 S.W.3d at 885. When, as here, specific jurisdiction is alleged, we focus the minimum-contacts analysis on the relationship among the defendant, the forum, and the litigation. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575–76 (Tex. 2007). Specific jurisdiction is established if the defendant's alleged liability arises out of or is related to an activity conducted within the forum. *Id*. at 576. For 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*. at 585. "The operative facts are those on which the trial will focus to prove the liability of the defendant who is challenging jurisdiction." *Leonard v. Salinas Concrete, LP*, 470 S.W.3d 178, 188 (Tex. App.—Dallas 2015, no pet.). Specific jurisdiction must be established on

a claim-by-claim basis unless all the asserted claims arise from the same forum contacts. *M&F Worldwide*, 512 S.W.3d at 886.

Analysis

In two issues, appellants challenge the trial court's (1) sustaining of appellees' June 11, 2021 objections to Mr. Ringham's affidavit[4] and (2) denial of appellants' special appearances. We need not address appellants' first issue because we conclude below that even if their special appearances were properly verified and Mr. Ringham's entire affidavit is considered as evidence, the trial court did not err by denying their special appearances.

Appellants' second issue asserts the trial court erred by denying their special appearances because the evidence demonstrated the trial court lacks personal jurisdiction over them.[5] They contend:

> Appellants are Florida real estate professionals that assisted a homeowner that just happened to be a Texas resident with the sale of his Florida home. The mere fact that they mailed a solicitation to Texas does not change the fact that the operate [sic] facts occurred in Florida and the Texas courts do not have personal jurisdiction over Appellants.

Appellants also assert (1) "Appellees' only evidence and argument is that Ringham sent a solicitation letter to Bernstein and then called Bernstein, resulting in the execution of the Listing Agreement," and (2) "the evidence supports the

[4] Based on appellants' appellate briefing, we construe their first issue to also assert that the trial court erred to the extent it concluded Mr. Ringham's affidavit did not satisfy rule 120a's special appearance verification requirement. *See* TEX. R. APP. P. 38.1(f).

[5] The Bernsteins did not allege in the trial court, and do not assert on appeal, that the trial court has general jurisdiction over appellants. We address only specific jurisdiction.

inference that Appellants randomly send out solicitations to individuals who happen to own Florida real property."

Additionally, in their appellate reply brief, appellants contend (1) "[m]arketing and solicitations must be directed to the forum, not the individual," and (2) "[e]verything that Appellants did to effect the sale of Appellees' Florida residence was done in Florida and everything for which Appellants [sic] are suing them occurred in Florida."

Mr. Ringham's affidavit stated in part: "I do not advertise in Texas. . . . I have never intentionally solicited business in Texas or specifically from Texas residents." But Mr. Bernstein testified in his affidavit that he received two letters mailed to his Texas home from Premiere affiliates Mr. Ringham and Ms. Orlando, marketing real estate services and soliciting his business. Mr. Ringham also called Mr. Bernstein to solicit his business.

To the extent appellants argue their solicitations were "random" and not "directed to the forum," we disagree. Though appellants' solicitations involved the sale of Florida property, they knew from Mr. Bernstein's mailing address that they were soliciting a Texas resident who was thus subject to Texas laws, including property-ownership laws. Appellants had a "say in the matter" as to whether to reach out to solicit business in Texas. *See Moncrief Oil*, 414 S.W.3d at 153; *see also Retamco*, 278 S.W.3d at 339 (purposeful availment analysis assesses quality and nature of contacts, not quantity).

We also cannot agree with appellants' assertion in their appellate brief that "this set of facts falls squarely within the Texas cases that hold this is an insufficient availment for specific jurisdiction." Appellants rely heavily on *Bryan v. Gordon*, 384 S.W.3d 908 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Though *Bryan* similarly involved a Texas resident's lawsuit against an out-of-state realtor who allegedly made misrepresentations in handling the sale of out-of-state real property, the parties in *Bryan* disputed which one of them had initiated contact with the other. *See id*. at 911. The trial court in that case granted the realtor's special appearance and the court of appeals affirmed. The court of appeals concluded "the evidence is sufficient to support a finding that [the realtor] did not initially target [the property owner] as a client." *Id*. at 915. Thus, the record supported a conclusion that "it was fortuitous that [the property owner] resided in Texas when [the realtor] responded to her initial request for contact from an Oregon real estate agent to sell her Oregon property and pursued the opportunity to do business with her." *Id*. Here, unlike in *Bryan*, Mr. Bernstein made no initial request for contact. Instead, appellants "initially target[ed]" Mr. Bernstein, whom they knew to be a Texas resident, as a client. Thus, we do not find *Bryan* instructive.

The other cases appellants cite are also materially distinguishable. *See N803RA, Inc. v. Hammer*, 11 S.W.3d 363, 368 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (trial court did not err by granting Florida plane refurbisher's special appearance in Texas plane owner's lawsuit regarding deficient refurbishing work,

where parties disputed who initiated negotiations and all work was done while plane was located in Florida); *Goodman v. Melch*, No. 05-03-00188-CV, 2003 WL 22351416, at *2 (Tex. App.—Dallas Oct. 16, 2003, no pet.) (mem. op.) (in lawsuit by Texas shareholder alleging Florida defendants helped shareholder's family members deprive her of corporate shares, trial court did not err by granting defendants' special appearance where agreement between Texas corporation and defendants was negotiated and executed in Florida, defendants performed their obligations under it in Florida, and, though defendants traveled to Texas, it was at direction of their employer, who was unconnected to the litigation); *Gordon & Doner, P.A. v. Joros*, 287 S.W.3d 325, 333 (Tex. App.—Fort Worth 2009, no pet.) (concluding Florida law firm that referred Florida resident's case to Texas lawyer for filing in New York was not subject to Texas personal jurisdiction in Florida resident's professional negligence lawsuit against Florida and Texas lawyers).

Instead, Texas case law supports a conclusion of purposeful availment here. *See Silbaugh v. Ramirez*, 126 S.W.3d 88, 96 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (where nonresident Silbaugh solicited business with Texas resident Ramirez from outside Texas while Ramirez was in Texas, Silbaugh made alleged misrepresentations to Ramirez in phone call to encourage him to enter into contract with her regarding financial investment, and Ramirez executed contract while in Texas and performed his part of contract from Texas, trial court did not err by concluding Silbaugh was subject to personal jurisdiction in Texas lawsuit asserting

breach of contract and tort claims related to investment); *see also Bissbort v. Wright Printing & Publ'g Co.*, 801 S.W.2d 588, 588–89 (Tex. App.—Fort Worth 1990, no writ) (where Iowa printing company Wright initiated contact with Texas printing press repairer Bissbort, parties contracted for repairs while Bissbort was in Texas, and Wright wired portion of payment to Bissbort in Texas, trial court erred by concluding it did not have personal jurisdiction over Wright in Bissbort's lawsuit to recover remaining payments due under contract).

As to the required "substantial connection" between the minimum contacts and the operative facts of the litigation, we consider what each of the plaintiffs' claims "is principally concerned with, whether the contacts will be the focus of the trial and consume most if not all of the ligation's attention, and whether the contacts are related to the operative facts of the claim." *TV Azteca*, 490 S.W.3d at 52 (quotations and citations omitted). Though appellants contend "everything" for which they are being sued "occurred in Florida," the record shows the Bernsteins' claims are directly based on alleged misrepresentations appellants made during the solicitations and the resulting contract allegedly induced by those misrepresentations. Thus, appellants' contacts are substantially connected to the litigation's operative facts. *See id*.

Additionally, appellants state in their appellate brief, "If the defendants show that there was no purposeful availment . . . then the defendant need not show that the exercise of personal jurisdiction would offend traditional notions of fair play and

substantial justice." Appellants did not specifically negate the "fair play and substantial justice" requirement in the trial court and do not address that requirement on appeal. Thus, the Bernsteins carried their burden on that requirement by pleading it and addressing it in Mr. Bernstein's affidavit. *See id*. at 36 n.4.

On this record, we affirm the portion of the trial court's order denying appellants' special appearances.

/Cory L. Carlyle//
CORY L. CARLYLE
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MARTY G. RINGHAM AND PREMIERE PLUS REALTY COMPANY, Appellants	On Appeal from the County Court at Law No. 5, Dallas County, Texas Trial Court Cause No. CC-21-01369-E.
No. 05-21-00526-CV V.	Opinion delivered by Justice Carlyle. Justices Reichek and Nowell participating.
CRAIG BERNSTEIN AND VARNA BERNSTEIN, Appellees	

In accordance with this Court's opinion of this date, the portion of the trial court's order denying appellants' special appearances is **AFFIRMED**.

It is **ORDERED** that appellees CRAIG BERNSTEIN AND VARNA BERNSTEIN recover their costs of this appeal from appellants MARTY G. RINGHAM AND PREMIERE PLUS REALTY COMPANY.

Judgment entered this 5th day of January, 2022.