Opinion issued August 11, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-08-00637-CV

ERIC BRANCKAERT, Appellant

V.

VALERIE OTOU, Appellee

On Appeal from the 312th District Court
Harris County, Texas
Trial Court Case No. 2006-17541

MEMORANDUM OPINION

Appellant, Eric Branckaert, appeals from the trial court's order denying his motion for new trial after appellee, Valerie Otou, received a default judgment against him establishing parentage and assessing child support. In eight issues,

Branckaert contends that the trial court did not have personal jurisdiction over him, and, even if the trial court had jurisdiction, the court nevertheless abused its discretion by refusing to grant his motion for new trial. We reverse and remand.

BACKGROUND

Otou filed suit in Harris County, Texas, on March 17, 2006 to establish a parent-child relationship between Branckaert, a resident of Rome, Italy, and Otou's daughter, O.O.B. After service of citation by publication, the court appointed an attorney ad litem to represent Branckaert.[1] Branckaert's appointed attorney filed an original answer on July 20, 2007, and a motion to dismiss for lack of jurisdiction and an unverified special appearance on August 14, 2007. On the day he filed his motion to dismiss for lack of jurisdiction and special appearance, the court revoked the first attorney at litem's appointment and appointed a second attorney ad litem to represent Branckaert. No hearing was ever held on Branckaert's special appearance.

The matter was set for trial on February 4, 2008. Rather than proceeding with the trial, the court issued an agreed order allowing Branckaert's second appointed attorney to withdraw from the representation. At that time, Branckaert's newly retained counsel, Richard Tholstrup, filed a motion for continuance in which

[1] *See* TEX. R. CIV. P. 244 (requiring appointment of "an attorney to defend the suit in behalf of the defendant" after service has been made by publication).

he argued that that a continuance was necessary because paternity testing had not been done in the case and Branckaert denied being O.O.B.'s father. The court granted the motion. Trial was reset for March 24, and then postponed to April 7, 2008. On April 1, 2008, Branckaert's counsel, Tholstrup, filed a motion to withdraw claiming an inability to "effectively communicate with [Branckaert] in a manner consistent with good attorney-client relations." Tholstrup's motion to withdraw included information about the April 7, 2008 trial date and stated that a copy of the motion had been delivered to Branckaert. Tholstrup's motion stated that, although Branckaert's mailing address was unknown, he was generally reachable by email.

On April 7, 2008, the day of trial, the court first considered Tholstrup's motion to withdraw. Tholstrup's associate, Christine Thrash, represented to the court that Branckaert had received a copy of the motion to withdraw, and that he had responded by e-mail acknowledging such receipt. Otou's counsel then had Thrash confirm on the record that Branckaert had been notified about the trial date.

The trial court then granted Tholstrup's motion to withdraw and immediately proceeded to try the case on its merits, without Branckaert being present or represented by counsel. At the trial, Otou testified that Branckaert was O.O.B's father, and that no other man could possibly be the father. Otou also testified about Branckaert's employment, income, and lack of contact with O.O.B.

In addition, Otou testified that the trial court had previously ordered a paternity test, but that Branckaert had failed to show up for the DNA test.

One week later, the court issued an order in which it adjudicated Branckaert to be the father of O.O.B., named Otou sole managing conservator of the child, denied Branckaert visitation, and ordered Branckaert to pay child support, attorney's fees, and court costs. Thereafter, Branckaert retained a new attorney, Cheryl Alsandor, who filed a Motion for New Trial, which was denied after a hearing. This appeal ensued.

PERSONAL JURISDICTION

In his eighth issue on appeal, Branckaert argues that the trial court erred in not granting a new trial because it lacked personal jurisdiction over him. Because this issue goes to jurisdiction, we address it first.

Law Applicable to Special Appearances

Under Rule 120a, a special appearance, properly entered, enables a non-resident defendant to challenge personal jurisdiction in a Texas court. TEX. R. CIV. P. 120a. Rule 120a requires strict compliance, and a non-resident defendant will be subject to personal jurisdiction in Texas courts if the defendant enters a general appearance. *Morris v. Morris*, 894 S.W.2d 859, 862 (Tex. App.—Fort Worth 1995, no writ); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14, 105 S. Ct. 2174, 2182 n.14 (1985) ("[T]he personal jurisdiction requirement is a waivable

right."). Rule 120a states that "[e]very appearance, prior to judgment, not in compliance with this rule is a general appearance." TEX. R. CIV. P. 120a(1); *see also Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 201 (Tex. 1985). In this appeal, we consider (1) whether Braenckaert properly filed a special appearance contesting jurisdiction, and, if he did, (2) whether he waived that special appearance by making a general appearance.

Did Unverified Special Appearance Adequately Contest Jurisdiction?

Rule 120a of the Texas Rules of Civil Procedure provides that a "special appearance shall be made by sworn motion . . . and may be amended to cure defects." TEX. R. CIV. P. 120a(1). A special appearance that is unsworn or unverified is defective; however "an amendment that adds a verification cures the special appearance." *Dawson–Austin v. Austin*, 968 S.W.2d 319, 321–22 (Tex. 1998). The amended special appearance may be filed anytime before a general appearance is made. *Id.* at 322.

The record shows that Branckaert's first appointed counsel filed an unverified special appearance. However, neither of his two appointed attorneys or his retained attorney, Tholstrup, ever attempted to cure the defective special appearance by adding the required verification. And, although Branckaert's second retained attorney, Alsandor, argued a lack of personal jurisdiction in the motion for new trial, she never sought to amend the unverified special appearance. An

unsworn special appearance is ineffective to challenge in personam jurisdiction. *Id.* at 321–22. Because Branckaert never verified his special appearance, he never adequately challenged personal jurisdiction.

Was Special Appearance Waived?

Outo contends that, even if Branckaert's unverified special appearance adequately challenged personal jurisdiction, he waived his special appearance when his retained attorney filed a motion for continuance for the purpose of obtaining DNA testing. We agree.

"A party enters a general appearance whenever it invokes the judgment of the court on any question other than the court's jurisdiction; if a defendant's act recognizes that an action is properly pending or seeks affirmative action from the court, that is a general appearance." *Id.* at 322 (quoting *Moore v. Elektro–Mobil Technik GmbH*, 874 S.W.2d 324, 327 (Tex. App.—El Paso 1994, writ denied)). The test for a general appearance is whether a party requests affirmative relief inconsistent with an assertion that the trial court lacks jurisdiction. *Dawson–Austin*, 968 S.W.2d at 323.

Relying on *Dawson–Austin*, Branckaert contends that a motion for continuance will never constitute a general appearance. *Dawson–Austin*, however, is distinguishable. In that case, the defendant filed a special appearance, contemporaneously with a motion to quash service, plea to the jurisdiction, and

plea in abatement. 968 S.W.2d at 321. The plaintiff sought to set the defendant's motions for a hearing, and the defendant moved for a continuance, arguing that (1) she did not have adequate notice of the hearing, (2) counsel had just been newly retained and was in a jury trial, and (3) discovery was needed on her special appearance and motion to quash. *Id.* at 323. The court concluded that the defendant was entitled to request additional time to prepare for her special appearance, which was set by the plaintiff, and that her request to postpone other matters was required if the special appearance hearing was delayed. *Id.* at 324.

In contrast, in his motion for continuance, Branckaert expressly denied paternity and argued to the court that the trial should be reset in order to give the parties time to conduct paternity testing. The issues raised in Branckaert's motion have nothing to do with the court's jurisdiction, but indicate Branckaert's intention to defend the case of the merits by obtaining DNA testing to disprove paternity. Branckaert's motion for continuance, with its request for time to perform DNA testing, "recognizes that an action is properly pending" and "seeks affirmative action from the court." *Dawson–Austin*, 968 S.W.2d at 322. Thus, he has entered a general appearance in the case and waived his previously filed special appearance. *See Fridl v. Cook*, 908 S.W.2d 507, 515 (Tex. App.—El Paso 1995,

writ dism'd w.o.j.) ("A party generally appearing in case waives any complaints as to personal jurisdiction").[2]

MOTION FOR NEW TRIAL

Having determined that Branckert made a general appearance, we next consider whether the trial court erred in overruling his motion for new trial.

Standard of Review

We review a trial court's denial of a motion for new trial for abuse of discretion. *In re R.R.*, 209 S.W.3d 112, 114 (Tex. 2006); *Champion Int'l Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1988) (orig. proceeding). A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner, or if it acts without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). A trial court's clear failure to analyze or apply the law correctly constitutes an abuse of discretion. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding); *Cayton v. Moore*, 224 S.W.3d 440, 445 (Tex. App.—Dallas 2007, no pet.).

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[2] Our conclusion that Branckaert made a general appearance is based solely on the actions of his retained counsel in filing the above-referenced motion for continuance, not on the actions of the attorney appointed pursuant to Rule 244 in filing an answer.

Compliance with Rule 10 of the Texas Rules of Civil Procedure

In his first issue, Branckaert contends he did not have adequate notice of the trial setting or the motion to withdraw. Specifically, Branckaert argues that his counsel sent him an e-mail notice of his motion to withdraw and of the upcoming trial setting, rather than sending him such notice by certified and regular mail, as required by Rule 10 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 10. We agree.

Rule 10 governs the withdrawal of counsel in civil cases provides as follows:

> An attorney may withdraw from representing a party only upon written motion for good cause shown. If another attorney is to be substituted as attorney for the party, the motion shall state: the name, address, telephone number, telecopier number, if any, and State Bar of Texas identification number of the substitute attorney; that the party approves the substitution; and that the withdrawal is not sought for delay only. *If another attorney is not to be substituted as attorney for the party, the motion shall state: that a copy of the motion has been delivered to the party; that the party has been* ***notified in writing*** *of his right to object to the motion; whether the party consents to the motion;* ***the party's last known address*** *and all pending settings and deadlines.* If the motion is granted, the withdrawing attorney shall immediately notify the party in writing of any additional settings or deadlines of which the attorney has knowledge at the time of the withdrawal and has not already notified the party. The Court may impose further conditions upon granting leave to withdraw. ***Notice*** *or delivery to a party* ***shall be*** *either made to the party in person or* ***mailed to the party's last known address by both certified and regular first class mail.*** If the attorney in charge withdraws and another attorney remains or becomes substituted, another attorney in charge must be designated of record with notice to all other parties in accordance with Rule 21a.

"The rules governing withdrawal contain provisions which are obviously placed there to protect the client's interest." *Moss v. Malone,* 880 S.W.2d 45, 50 (Tex. App.—Tyler 1994, writ denied) (op. on reh'g). "A fundamental element of due process is that every litigant is entitled to be heard in court by counsel of his own selection." *Id.* "This is a valuable right and an unwarranted denial of it is fundamental error where the litigant without negligence or default on his part is deprived of the right of counsel on the eve of trial." *Id.* Thus, courts have held that a trial court abuses its discretion when it grants a motion to withdraw that does not comply with the mandatory requirements of Rule 10. *Sims v. Fitzpatrick,* 288 S.W.3d 93, 100 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *Williams v. Bank One, Texas, N.A.*, 15 S.W.3d 110, 114 (Tex. App.—Waco 1999, no pet.) (citing *Moss,* 880 S.W.2d at 51).

Here, the motion fails to comply with Rule 10 because it does not contain Branckaert's last known address, but rather avers that Branckaert's last known address is "unknown" to his own counsel and provides only Branckert's email address. And, although the motion alleges that Branckaert was "notified" in writing of his right to object to the motion, such notice was not by "both certified and regular first class mail" as required by Rule 10. Instead, counsel for

Branckaert made clear at the hearing on the motion for new trial that the motion had been emailed to Branckaert.[3]

When a statute or court rule—such as Rule 10—provides the method by which notice shall be given in a particular instance, the notice provision must be followed with reasonable strictness. *John v. State*, 826 S.W.2d 138, 141 n.4 (Tex. 1992); *Misium v. Misium*, 902 S.W.2d 195, 197 (Tex. App.—Eastland 1995, writ denied) (applying same to Rule 10).

Because the motion to withdraw did not comply with Rule 10, the trial court abused its discretion in granting counsel's motion to withdraw.

Harmless Error

"However, the court can render such error harmless by giving the party time to secure new counsel and time for the new counsel to investigate the case and prepare for trial." *Williams*, 15 S.W.3d at 114; *Moss*, 880 S.W.2d at 51. Here,

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[3] At the hearing on the motion to withdraw, the following exchange took place:

> [Trial Court]: All right. Go right ahead, Ms. Thrash.
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> [Branckaert's counsel]: Your, Honor, we have noted [sic] Eric Branckaert. He has acknowledge[d] *via e-mail* that he did receive the Motion to Withdraw [containing the trial setting information] and he's not here today to contest it. And so based on instant communication, Your Honor, it would not involve any other proofs from communication on other issues that we're having on that file, we're requesting to withdraw. And I do have an order to present to the court today.

Brankaert was not given any additional time to obtain new counsel or to prepare for trial. Immediately after granting counsel's motion to withdraw, the trial court proceeded to a trial at which Brankaert was neither present nor represented by counsel. Under these circumstances, we cannot say that the trial court's error in granting the motion to withdraw, which did not comply with Rule 10, was harmless.

We sustain Branckaert's first issue on appeal.

CONCLUSION

We reverse the trial court's judgment and remand for further proceedings.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Bland and Sharp.

Justice Sharp, concurring. Concurring opinion to follow.