Opinion issued March 10, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00446-CV

TURNER WAYNE BOGART AND TMW & ASSOCIATES, INC., Appellants

V.

STAR BUILDING SYSTEMS, A DIVISION OF ROBERTSON CECO II CORPORATION, Appellee

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On Appeal from the 269th District Court
Harris County, Texas
Trial Court Case No. 2009-68696

MEMORANDUM OPINION

In this interlocutory appeal, appellants Turner Wayne Bogart ("Bogart") and TMW & Associates, Inc. ("TMW") challenge the trial court's order denying their

special appearance[1] in a suit filed against them by appellee, Star Building Systems, a Division of Robertson CECO II Corp. ("Star"). We affirm.

Background

TMW, a California corporation with its principal office located in Stockton, California, entered into a contract with Star, a Delaware corporation, whereby Star agreed to sell and deliver pre-engineered metal building components for a building project in California for Pizzagoni Family, Inc. Bogart, a California resident and the president and owner of TMW, executed the contract as both president of TMW and as an individual guarantor. Under the terms of the contract, appellants agreed to tender payments to Star "at its principal office in Houston, Harris County, TX," they expressly consented to jurisdiction in Houston, Harris County, Texas, they agreed that venue was proper in Houston, Harris County, Texas and that all disputes relating to the contract would be brought in state court in Houston, Harris County, Texas and governed by Texas law, and they acknowledged that the "agreement [was] performable in Houston, Harris County, TX."

After TMW ordered and accepted delivery of the building components sent by Star pursuant to the contract and failed to pay the full amount due, Star filed suit against Bogart and TMW in state court in Houston, Harris County, Texas, alleging

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[1] TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (West 2008) (providing that parties may challenge by interlocutory appeal trial court orders regarding special appearances).

breach of contract, breach of warranty, quantum meruit, and unjust enrichment.[2] In its petition, Star contends that there are two separate bases for the exercise of personal jurisdiction over appellants: (1) appellants consented to jurisdiction in Texas by virtue of the contract's forum-selection clause, and (2) specific jurisdiction exists because the events or omissions giving rise to the cause of action arose or occurred in Houston, Harris County, Texas. Appellants responded by filing a special appearance, and subject thereto, a motion to dismiss on forum-non-conveniens grounds, a motion to abate proceedings, and an original answer. In their special appearance, appellants argue that they are not amenable to personal jurisdiction in Texas because TMW and Bogart are not Texas residents and have no purposeful contacts with Texas. Appellants further contend that the contract's forum-selection clause is unenforceable because it is the product of overreaching and Texas is such an inconvenient forum that the enforcement of the clause would deprive appellants of their day in court.

The evidence before the trial court consisted of a copy of the contract containing the forum-selection clause, an affidavit from Bogart attesting to the fact that both he and TMW are California residents with no contacts with the State of

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[2] Six days before filing the Texas suit, Star also filed suit in Superior Court in Contra Costa County, California seeking to foreclose on a mechanic's lien Star had placed on Pizzagoni Family, Inc.'s property and seeking a judgment against TMW and Pizzagoni Family, Inc., in the event the proceeds from the sale did not satisfy the debt.

Texas, pleadings from the California suit filed by Star, bills of lading showing that Star shipped products from a California address to the building site in Contra Costa County, California, and discovery responses indicating that some of the witnesses (the property owner, architect, etc.) are located in California, and outside the subpoena power of the Harris County court. The contract is a two-page document. The forum-selection clause and the other terms and conditions of sale are set forth on the second page in the same font size. Bogart signed both pages of the contract.

After a hearing, the trial court denied appellants' special appearance, motion to dismiss, and motion to abate. Appellants are only appealing the denial of their special appearance. No findings of fact or conclusions of law were made by the trial court.

Discussion

We understand appellants' argument on appeal to be that the trial court erred in denying their special appearance because appellants met their burden of negating both bases for the assertion of personal jurisdiction—consent and specific jurisdiction—and the evidence is insufficient to support the trial court's order.

A. Burdens of Proof and Standards of Review

1. *Special Appearances*

A plaintiff bears the initial burden of pleading sufficient allegations to establish personal jurisdiction over a defendant. *BMC Software Belg., N.V. v.*

Marchand, 83 S.W.3d 789, 793 (Tex. 2002). However, when a nonresident defendant challenges jurisdiction through a special appearance, the defendant must negate all grounds for personal jurisdiction alleged by the plaintiff in order to prevail. *See id*.

When reviewing a trial court's order denying a special appearance, we review the court's findings of fact for legal and factual sufficiency and its conclusions of law de novo. *Id.* at 794. Absent issuance of findings of fact and conclusions of law, all facts necessary to support the order and supported by the evidence are implied. *Id.* at 795.

2. *Validity and Enforceability of Forum Selection Clause*

We review the validity and enforceability of forum-selection clauses under an abuse-of-discretion standard. *CNOOC Se. Asia v. Paladin Res.*, 222 S.W.3d 889, 894 (Tex. App.—Dallas 2007, pet. denied). A trial court abuses its discretion if it acts without reference to any guiding principles, acts arbitrarily, or acts unreasonably, *Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241–42 (Tex. 1985), or fails to properly analyze or apply the law. *McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995). Under an abuse-of-discretion standard, legal and factual sufficiency of the evidence are relevant factors in determining whether the trial court abused its discretion. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991).

3. *Legal Sufficiency*[3]

When a party attacks the legal sufficiency of an adverse finding on an issue on which he has the burden of proof, he must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). In reviewing a "matter of law" challenge, the reviewing court must first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary. *Id.* If there is no evidence to support the finding, the reviewing court will then examine the entire record to determine if the contrary proposition is established as a matter of law. *Id.* The point of error should be sustained only if the contrary proposition is conclusively established. *Id.*

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[3] Appellants also contend that the evidence is factually insufficient to support the trial court's order denying their special appearance. An appellant's brief "must contain a clear and concise argument for the contentions made, with appropriate citations to the authorities and to the record." TEX. R. APP. P. 38.1(i). If the appellant does not do so, it waives the issue on appeal. *Holloway-Houston, Inc. v. Gulf Coast Bank & Trust Co.*, 224 S.W.3d 353, 361 n.3 (Tex. App.—Houston [1st Dist.] 2006, no pet.). In their brief, TMW and Bogart pose the following issue: "Where the evidence tends to show that (1) appellants have no contacts with Texas, (2) the underlying contract did not have any connection with Texas, and (3) that the forum selection clause should not be enforced, is the evidence factually insufficient to support the special appearance order." However, beyond this statement of the issue, appellant's brief does not present any argument as to why the evidence is factually insufficient. Appellants' brief does not set forth a standard of review for factual sufficiency, cite to any authority on this issue, or discuss how the law relating to factual sufficiency applies to the facts of this case. We conclude that TMW and Bogart have not properly briefed this issue and it is waived. *See* TEX. R. APP. P. 38.1(i); *Holloway*, 224 S.W.3d at 361.

B. Consent to Jurisdiction

In its petition, Star contends that appellants consented to jurisdiction in Texas by virtue of the fact that they executed the contract containing the forum-selection clause designating Houston, Harris County, Texas as the agreed upon forum. Appellants do not dispute Star's assertion that they voluntarily entered into the contract, nor do they contend that the evidence before the trial court was insufficient to support the court's implicit finding that they entered into the contract with Star. Rather, appellants contend that the clause is invalid and unenforceable, and thus, cannot be the basis for the court's exercise of personal jurisdiction over them. Appellants further contend that the evidence supporting the trial court's implicit finding that the forum-selection clause was not unenforceable is insufficient.

Personal jurisdiction is a waivable right and a party can expressly or implicitly consent to personal jurisdiction through a forum selection clause. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 105 S. Ct. 2174, 2182 (1985). When parties freely enter into agreements with forum-selection clauses, the clause is prima facie valid and enforceable unless the opponent establishes a compelling reason not to enforce it. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 92 S. Ct. 1907, 1913 (1972). The court in *M/S Bremen* required that a forum-selection clause be upheld unless: (1) there was strongly contravening precedent or statute in

the forum selected, (2) the enforcement would be unreasonable or unjust, to the extent a party's day in court would be denied due to grave difficulty or inconvenience, or (3) the clause was fraudulent or the product of overreaching. *See id.* at 15–19, 92 S. Ct. at 1916–17. The party challenging the forum-selection clause bears a "heavy burden of proof." *Id.* at 17, 92 S. Ct. at 1917.

Appellants contend that the forum-selection clause is invalid and should not be enforced because (1) the clause is a product of overreaching and (2) the clause is unreasonable and unjust because Texas is such an inconvenient forum that the enforcement of the clause would deprive them of their day in court.

Bogart and TMW have failed to meet their heavy burden to establish that the forum-selection clause is either unjust or unreasonable. By agreeing to the forum-selection clause, appellants represented to Star that the agreed forum would *not* be so inconvenient that enforcing the clause would deprive appellants of their day in court. *See In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 234 (Tex. 2008). To avoid enforcement of its agreements and the clauses, appellants must prove that special and unusual circumstances developed after the contract was executed and that litigation in Texas would now be so gravely difficult and inconvenient that appellants would for all practical purposes be deprived of their day in court. *Id.* at 234; *In re AIU Ins. Co.*, 148 S.W.3d 109, 113 (Tex. 2004). This record does not demonstrate such proof.

The evidence offered by appellants demonstrates that appellants are not Texas residents and have no contacts with the state and that some of the evidence and witnesses are located in California and beyond the court's subpoena power. While certainly a trial in California is more convenient for a California resident, nothing in the record establishes that Bogart and TMW could not proceed in Texas. At most, the record demonstrates that it would be inconvenient for appellants to do so. Mere assertions of inconvenience, however, are not sufficient to prove that a forum is so gravely inconvenient as to deprive the party of its day in court. *See In re Laibe Corp.*, 307 S.W.3d 314, 317 (Tex. 2010); *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d at 234 ("If merely stating that financial and logistical difficulties will preclude litigation in another state suffices to avoid a forum-selection clause, the clauses are practically useless."). Moreover, it is not a special or unusual circumstance for many, or even most, of the fact witnesses in a lawsuit to reside somewhere other than in the area where the suit is brought. *See In re Int'l Profit Assocs.*, 274 S.W.3d 672, 680 (Tex. 2009). Accordingly, Bogart and TMW have failed to establish that the forum-selection clause is unjust or unreasonable.

Similarly, Bogart and TMW have failed to establish that the clause is the product of overreaching. Overreaching in this context is defined as a contract that results in an unfair surprise or oppression to the party alleging the overreaching. *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d at 233. Bogart and TMW presumably read

the contract prior to signing it. *See id.* at 232 (stating "[a] party who signs a document is presumed to know its contents"). They do not argue that they were unaware of the forum-selection clause in the contract or that Star fraudulently induced them to agree to the forum-selection clause. At most, appellants contend that the contract's terms and conditions of sale, which include the forum-selection clause, are written in such tiny print that they are hardly legible. Appellants have produced no evidence that the forum-selection clause was a surprise or was the result of fraud or other oppressive measure that would render it invalid and unenforceable. *See In re Int'l Profit Assocs*., 274 S.W.3d at 678. As a result, appellants have not met their burden of proving that enforcement of the forum-selection clauses should be barred on the basis of overreaching.

The evidence in the record demonstrates that the parties executed a contract containing a mandatory forum-selection clause. *See id.* (mandatory forum-selection clauses are presumptively valid and enforceable). Having failed to establish that the clause is the product of overreaching or is unjust and unreasonable, Bogart and TMW have failed to conclusively establish that the forum-selection clause is invalid as a matter of law. Accordingly, the evidence is legally sufficient to support the court's implied finding that the clause is not unenforceable. *See Dow Chem. Co.*, 46 S.W.3d at 242. Finding no evidence in the record to overcome the presumption that the forum-selection clause included in the

contract executed by the parties is valid, we conclude that the trial court did not abuse its discretion in denying Bogart's and TMW's special appearance. *See CNOOC Se. Asia*, 222 S.W.3d at 897 (affirming denial of special appearance based upon valid and enforceable forum-selection clause).

C. Specific Jurisdiction

Having determined that the trial court did not abuse its discretion when it found that the forum-selection clause was valid and enforceable and that the evidence is legally sufficient to support the court's implied findings of fact on this issue, we need not address whether the trial court's denial of appellants' special appearance could also be affirmed on the basis of specific jurisdiction.

Conclusion

We affirm the trial court's order denying appellants' special appearance.

Jim Sharp
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.