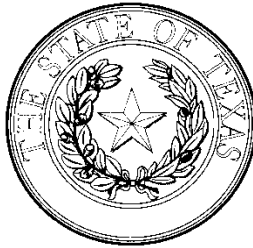


Opinion issued December 1, 2011.



**In The
Court of Appeals
For The
First District of Texas**

NO. 01-11-00380-CV

MORRIS INDUSTRIES, INC., Appellant

V.

TRIDENT STEEL CORPORATION, Appellee

**On Appeal from the 215th Judicial District Court
Harris County, Texas
Trial Court Case No. 2009-57578**

MEMORANDUM OPINION

In this interlocutory appeal, Morris Industries, Inc., appeals the trial court's order denying its special appearance.¹ Trident Steel Corporation sued Morris, a New Jersey corporation, alleging claims for breach of

¹See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (West 2011) (authorizing interlocutory appeal of order denying special appearance).

contract and breach of warranty. Morris filed a special appearance subject to its answer, which the trial court denied. Morris appeals, contending that it lacks the minimum contacts with Texas required for a Texas court to exercise jurisdiction over it. Finding no error, we affirm the trial court's order.

Background

Morris is a New Jersey corporation headquartered in New Jersey. Morris makes and distributes pipes, casings, and other items used in the oil and gas industry. In February 2008, Trident, a Missouri corporation with offices in Texas, began ordering oilfield couplings from Morris for delivery to its Houston location.

Pursuant to its contract with Trident, Morris shipped couplings to the Port of Houston. Upon their arrival, Morris paid and arranged for the couplings to be offloaded from the ships and trucked to threading facilities designated by Trident. Morris retained title to the couplings and bore the risk of their loss until this point; possession and title to the couplings transferred to Trident at the threading facilities. In November 2008, Trident became dissatisfied with Morris's couplings, asserting that they had failed testing performed by Trident and Trident's customers. Trident began rejecting Morris's deliveries.

In September 2009, Trident sued Morris in Harris County, alleging claims for breach of contract and breach of warranty. Morris specially appeared, asserting that it was not subject to personal jurisdiction in Texas. Trident moved for a continuance before the special appearance hearing. The trial court, without ruling on Trident's motion for continuance, denied Morris's special appearance. Morris then appealed the trial court's ruling to this Court. On appeal, we held that Morris had negated Trident's jurisdictional allegations, but remanded the case to the trial court to consider Trident's request for jurisdictional discovery, pending at the time the trial court denied Morris's motion. *Morris Indus., Inc. v. Trident Steel Corp.*, No. 01-09-01094-CV, 2010 WL 4484351, at *5 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, no pet.) (mem. op). On remand, Trident adduced additional jurisdictional facts relevant to Morris's contacts with Texas.

Morris maintains offices in New Jersey, New York, Pennsylvania, and Connecticut. Morris has no offices in Texas, no employees in Texas and no agent in Texas for service of process. Morris sells its products via a toll-free number listed on its website and through Iron Angeles of Colorado, Inc., an independent distributor located in Colorado.

Peter Brebach, a sales agent for Iron Angeles, brokers sales between Morris and its customers. Brebach conducts research on behalf of Morris, locates Texas buyers interested in purchasing steel couplings, and communicates the results of his research to Morris. For the contracts at issue in this case, Brebach negotiated purchase orders with Trident on behalf of Morris; Morris paid Brebach a commission for these sales pursuant to a “formal agreement.” Brebach routinely copied corporate representatives from Morris and Trident on his correspondence. In some instances, Morris directly communicated to Trident its progress in performing the orders.

Morris purchased couplings from a Chinese foundry and shipped them from China F.O.B. the Port of Houston. Once the couplings arrived, Morris hired a local trucking company to pick up each order from a shipyard facility and transport the couplings to Trident’s designated “threading” facilities. Craig Laine, a purchasing agent for Morris, travelled to Houston during the product delivery process to familiarize himself with the threading facilities and to determine how to transport Morris’s couplings to those facilities. It was Laine who arranged for trucks to deliver Morris’s products from the Port of Houston to the Houston threading facilities. Morris owned the couplings until their delivery to the threading facilities; Morris therefore bore the risk of loss from the time it shipped the couplings until it transferred

possession to Trident at the threading facilities. After delivering each order, Morris prepared and sent Trident an invoice for expenses.

After Trident notified Morris of the alleged defects, Morris attempted to cure its imperfect tender. Morris leased a storage facility in Houston so that Laine and Mike Stern, Morris's Vice President, could inspect the couplings. Laine travelled to Houston approximately six times on business related to the contracts between Morris and Trident. While in Houston, he personally segregated the couplings by heat number. Once Laine segregated the couplings, he arranged for two Houston companies to test them for defects. One company tested the couplings on behalf of both Trident and Morris, but the other tested the couplings solely at Morris's direction. Despite Morris's efforts to cure, Trident rejected the couplings and filed this suit.

Apart from Morris's contracts with Trident, Morris has filled sixty-two purchase orders from Texas residents, shipping goods to fifteen different customers in Texas. Some orders indicate Morris delivered its products by common carrier, while others reveal Morris arranged for trucks to deliver goods within Texas.

Standard of Review

We review de novo a trial court's exercise of personal jurisdiction as a question of law, but the resolution of underlying factual disputes may precede that conclusion. *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 805–06 (Tex. 2002); *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). When the trial court issues findings of fact, we review them for legal and factual sufficiency. *BMC Software Belg., N.V.*, 83 S.W.3d at 795. When, as here, the trial court does not issue fact findings, “we presume that the trial court resolved all factual disputes in favor of its ruling.” *Glatty v. CMS Viron Corp.*, 177 S.W.3d 438, 445 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *Am. Type Culture Collection*, 83 S.W.3d at 805–06); *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007).

Discussion

Texas courts may exercise personal jurisdiction over a non-resident defendant if the requirements of the Due Process Clause of the United States Constitution² and the Texas long-arm statute³ are both satisfied. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104

²U.S. CONST. AMEND. XIV, § 1.

³*See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (West 2011).

S. Ct. 1868, 1872 (1984); *Am. Type Culture Collection*, 83 S.W.3d at 806. The long-arm statute provides that Texas may assert personal jurisdiction over non-resident defendants who conduct business in the state. It provides in relevant part, “In addition to other acts that may constitute doing business, a nonresident does business in this state if the nonresident contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state.” TEX. CIV. PRAC. & REM. CODE ANN. § 17.042. “Because the Texas long-arm statute reaches ‘as far as the federal constitutional requirements of due process will allow,’ the statute is satisfied if the exercise of personal jurisdiction comports with federal due process.” *Preussag Aktiengesellschaft v. Coleman*, 16 S.W.3d 110, 113 (Tex. App.—Houston [1st Dist.] 2000, pet. dism’d w.o.j.) (quoting *CSR, Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996)). We thus examine whether a Texas court’s exercise of jurisdiction over Morris comports with the requirements of federal due process. *See id.*

To comply with federal due process requirements, “the nonresident defendant must have purposefully established such minimum contacts with the forum state that it could reasonably anticipate being sued there.” *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2183 (1985)). “If the nonresident defendant has purposefully availed

itself of the privileges and benefits of conducting business in a state, it has sufficient contacts to confer personal jurisdiction.” *Id.* (citing *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183). The defendant’s activities must justify the conclusion that the defendant could anticipate being sued in a Texas court. *Am. Type Culture Collection*, 83 S.W.3d at 806. A defendant is not subject to jurisdiction in Texas if its contacts with the state are “random, fortuitous, or attenuated.” *Id.* “Nor can a defendant be haled into a Texas court for the unilateral acts of a third party.” *Id.*

We apply three principles to determine whether a non-resident defendant has purposefully availed himself of the privileges and benefits of conducting business in Texas. *See Michiana Easy Livin’ Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005). First, only the defendant’s actions may constitute purposeful availment; a defendant may not be haled into a jurisdiction based on the unilateral activities of a third party. *Id.* (citing *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2174). Second, the defendant’s acts must be purposeful; a showing of random, isolated, or fortuitous contacts is insufficient. *Id.* (citing *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183, and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S. Ct. 1473, 1479 (1984)). Third, a defendant must seek some benefit, advantage, or profit through his purposeful availment, because

jurisdiction is based on notions of implied consent; that is, by seeking the benefits and protections of a forum's laws, a non-resident consents to suit there. *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567 (1980)). The purposeful availment test focuses on "the defendant's efforts to avail itself of the forum" and not "the form of the action chosen by the plaintiff." *Moki Mac*, 221 S.W.3d at 576. Due process also requires that the exercise of personal jurisdiction over a nonresident defendant "comport with fair play and substantial justice." *Preussag Aktiengesellschaft*, 16 S.W.3d at 114.

Minimum-contacts analysis is further divided into general jurisdiction and specific jurisdiction. *Preussag Aktiengesellschaft*, 16 S.W.3d at 114. Personal jurisdiction exists if the nonresident defendant's minimum contacts give rise to either general or specific jurisdiction. *Helicopteros Nacionales de Colombia*, 466 U.S. at 413–14, 104 S. Ct. at 1872. In determining whether a nonresident defendant purposefully established minimum contacts with Texas, a court should consider the "quality and nature of the defendant's contacts, rather than their number." *Am. Type Culture Collection*, 83 S.W.3d at 806.

Morris contends that the trial court does not have general jurisdiction over it because Morris does not have systematic and continuous contacts

with Texas. Morris also contends that the trial court does not have specific jurisdiction because it conducted no activity in Texas. For reasons set forth below, we conclude that Morris's contacts with Texas demonstrate Morris purposefully availed itself of the privilege of conducting activities in Texas and that Trident's suit against Morris arises out of those contacts. We thus do not examine whether Morris's contacts give rise to general jurisdiction.

Specific Jurisdiction

A court may exercise specific personal jurisdiction over a non-resident defendant if: (1) the non-resident purposely directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there, and (2) the controversy arises out of or is related to the non-resident's contacts with the forum state. *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 343 (5th Cir. 2004); *see Moki Mac*, 221 S.W.3d at 576. The non-resident defendant's purposeful conduct, not the plaintiff's unilateral acts, must have caused the contact. *See Helicopteros Nacionales de Colombia*, 466 U.S. at 414, 104 S. Ct. at 1872; *see also Michiana*, 168 S.W.3d at 788.

1) Purposeful availment

Morris contends that its contacts with the forum state do not confer specific jurisdiction, because Trident initiated them. Morris argues that its

few contacts with Texas—inspecting and testing the couplings—occurred after Trident complained of defects. We disagree.

Peter Brebach of Iron Angeles serves as a sales agent for various steel suppliers, including Morris. Brebach solicited Trident’s business in Texas on behalf of Morris. Trident asks this Court to impute Brebach’s contacts to Morris.

Texas contacts of an agent are attributable to the principal. *See Walker Ins. Servs. v. Bottle Rock Power Corp.*, 108 S.W.3d 538, 549 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *see also Schott Glas v. Adame*, 178 S.W.3d 307, 315 (Tex. App.—Houston [14th Dist.] 2005, pet. denied), *abrogated on other grounds by PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 169 (Tex. 2007). An “agent” is one who is authorized by a person or entity to transact business on behalf of the person or entity. *Bottle Rock Power Corp.*, 108 S.W.3d at 549. The defining feature of an agency relationship is the principal’s control over the agent. *Id.* Whether an agency relationship exists is a question of fact. *Schott Glas*, 178 S.W.3d at 315. The trial court did not expressly conclude that Brebach acted as Morris’s agent, but we presume that the trial court impliedly found all facts necessary to support its judgment. *Glatty*, 177 S.W.3d at 445.

The trial court reasonably could have concluded that Brebach acted as Morris's agent in these transactions. Morris exercised control over Brebach and paid him a commission for the sales pursuant to a "formal agreement" between Morris and Brebach. Laine testified that Brebach conducted research on behalf of Morris, communicated the results of his research to Morris, and entered into contracts with Texas clients on behalf of Morris. In an affidavit in the trial court, the President of Trident averred that when Brebach first approached Trident, Brebach represented that Morris retained him to develop business in the Gulf Coast. Thus, some evidence shows that Morris worked directly with Brebach, dictating the means and details of where to target business on Morris's behalf.

In these particular transactions, Brebach located Trident as a customer for Morris's couplings. Brebach negotiated and executed the sales agreements with Trident; Brebach had actual authority to enter into and negotiate these contracts on behalf of Morris. After Brebach solicited Trident's business, Morris paid Brebach a commission for his sales. Based on this evidence, the trial court could have found that Morris exercised a degree of control over Brebach sufficient to make Brebach Morris's sales agent in these transactions. *Cf. Schott Glass*, 178 S.W.3d at 315–16 (concluding no agency relationship existed between parent company and

Texas distributor to impute contacts for general jurisdiction where agent alone decided how to conduct sales). These marketing contacts reveal that Morris purposefully availed itself of Texas by soliciting coupling sales from Trident. “A nonresident defendant that directs marketing efforts to Texas in the hope of soliciting sales is subject to suit here for alleged liability arising from or relating to that business.” *Moki Mac*, 221 S.W.3d at 576; *accord IRA Res. v. Griego*, 221 S.W.3d 592, 597 (Tex. 2007) (“[T]argeting marketing efforts in a state to generate business there suffices to justify jurisdiction in disputes arising from that business.”).

Morris also purposefully availed itself of Texas by performing parts of the underlying contracts in Texas. Morris delivered couplings to the Port of Houston. Morris then paid and arranged for the couplings to be offloaded and trucked to Houston threading facilities. Morris sent its corporate representative to Houston to investigate the threading facilities and directly arrange for transportation to those facilities. The companies Morris hired to deliver the couplings all operated within Texas. Morris maintained title and possession throughout the delivery process, transferring ownership to the couplings in Texas. Morris therefore bore the risk of loss for the transactions until it delivered the couplings to Trident at the threading facilities. We conclude that these contacts demonstrate Morris partially

performed its contracts with Trident in Texas and purposefully availed itself of the privileges of conducting business here. See *Max Protetch, Inc. v. Herrin*, 340 S.W.3d 878, 886–88 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (finding delivery to Houston, regular communication, and visit to Houston to inspect product conferred specific jurisdiction); *Nogle & Black Aviation, Inc. v. Faveretto*, 290 S.W.3d 277, 283 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (finding specific jurisdiction in a negligence action based on plane defect where defendant chose to hire Texas resident to perform engineering work on plane); *Fleischer v. Coffey*, 270 S.W.3d 334, 338 (Tex. App.—Dallas 2007, no pet.) (finding specific jurisdiction where buyer of German Shepherd knew dog was trained in Texas, travelled twice to Texas to oversee training, and picked up dog in Texas).

Morris argues that the trial court erred in concluding that it had jurisdiction, relying mainly on *Michiana*. 168 S.W.3d at 787–88 (finding single product sale stemming from single phone call initiated by Texas buyer to non-resident defendant was not purposeful contact where buyer alone decided where to deliver RV and paid for shipping, and risk of loss for RV passed outside forum state). But, unlike the RV seller in *Michiana*, Morris did not only send products to Texas at its customer’s direction, but also solicited Trident’s business and performed its contracts in Texas by hiring

local companies to transport couplings within Texas. During their Texas transit, Morris maintained ownership of the goods and bore the risk of their loss. Because Morris directed Brebach to locate Texas customers on its behalf and hired local transportation companies to perform its contractual obligations, we conclude that Morris purposefully availed itself of Texas to form and perform its contracts with Trident.¹

2) *Contacts “arising out of” this dispute*

Even if a non-resident has purposefully availed himself of the benefits of conducting business in Texas, Texas courts do not have specific jurisdiction over the non-resident unless the cause of action “arises from or is related to an activity conducted within the forum.” *BMC Software Belg., N.V.*, 83 S.W.3d at 796. We focus our analysis on the relationship amongst the non-resident, the forum, and the litigation to determine if the alleged

¹ Trident contends that we should consider Morris’s further contacts with Texas after Trident rejected the couplings, because Morris stored and tested them for defects in Texas in an effort to cure the alleged problems. In opposition, Morris claims these curative measures do not confer jurisdiction. Attempting to fulfill its warranty obligations under the contract, Morris sent corporate representatives to Houston, stored couplings in Houston warehouses, and hired Houston companies to test them for defects. Trident sued Morris, in part, for failing to meet warranty obligations under the contract. Morris’s contacts with Houston after Trident claimed defective performance buttress the conclusion that Morris partially performed the underlying contracts in Texas. However, we need not rely on these particular contacts to hold that Morris purposefully availed itself of Texas because Morris paid Brebach to solicit Trident’s business and hired Texas companies to transport its products.

liability arises from or is related to an activity conducted in Texas. *Counter Intelligence, Inc. v. Calypso Waterjet Sys., Inc.*, 216 S.W.3d 512, 518 (Tex. App.—Dallas 2007, pet. denied). That is, the non-resident’s conduct must have either purposely been directed towards or occurred in the forum and must have a “substantial connection” with the litigation’s operative facts. *Moki Mac*, 221 S.W.3d at 584–85; *Glattly*, 177 S.W.3d at 447.

We conclude that Trident’s claims against Morris arose out of Morris’s business contacts with Texas. Trident’s breach of contract and breach of warranty claims all arise out of Morris’s delivery of non-conforming goods to Trident in Houston. Morris delivered the couplings to Houston at its own expense and attempted to fix the couplings here after Trident claimed imperfect tender. Accordingly, we hold that there is a substantial connection between Morris’s business contacts with Texas and the operative facts of the litigation.

Fair Play and Substantial Justice

Having found that Morris purposefully established minimum contacts with Texas, we must consider whether the exercise of personal jurisdiction over Morris comports with traditional notions of fair play and substantial justice. *See Glattly*, 177 S.W.3d at 447 (citing *Burger King*, 471 U.S. at 475-76, 105 S. Ct at 2183–84). Where appropriate, we consider: (1) the

burden on the defendant; (2) the interests of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in obtaining efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental, substantive social policies. *Guardian Royal Exch. Assurance Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 231 (Tex. 1991). Considering these factors, we hold that exercising personal jurisdiction over Morris comports with traditional notions of fair play and substantial justice. Morris sent products and corporate representatives to Texas in connection with the transactions that are the subject of this suit, supporting a finding that defending itself in Texas would not be unduly burdensome. Texas has a particular interest in resolving this dispute: its subject, defective oilfield couplings are located in Texas and were intended for use here. Texas has "a substantial interest in protecting its citizens against [the] harm from breach of contract." *Cappucitti v. Gulf Indus. Prods., Inc.*, 222 S.W.3d 468, 487 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Accordingly, we hold that the trial court's exercise of jurisdiction over Morris does not offend traditional notions of fair play and substantial justice.

Conclusion

We conclude that Morris has sufficient minimum contacts with Texas to confer specific jurisdiction in this case. We therefore hold that the trial court did not err in denying Morris's special appearance. Accordingly, we affirm the order of the trial court.

Jane Bland
Justice

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