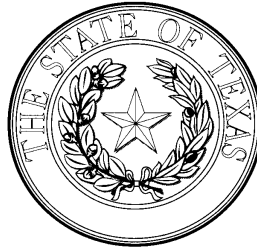


Opinion issued February 8, 2018



In The
Court of Appeals
For The
First District of Texas

NO. 01-17-00096-CV

SAMEER ABDULHUSSEIN, Appellant
V.
REZZ INVESTMENTS LTD., Appellee

On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Case No. 2016-22539

MEMORANDUM OPINION

This is an appeal from the trial court's interlocutory order granting a special appearance. Rezz Investments Ltd. filed the special appearance, contending that it is a Canadian company with no ties to Texas. Sameer Abdulhusein responded that he established that Rezz Investments is the alter ego of Salima and Amin Dhalla,

over whom the trial court has personal jurisdiction. Because sufficient evidence supports the trial court's determination that Rezz Investments is not subject to personal jurisdiction based on an alter ego theory, we affirm.

BACKGROUND

In April 2016, Abdulhussein sued Salima and Amin Dhalla and Rezz Investments, alleging breach of a September 2012 settlement agreement. Rezz Investments was not a party to the settlement agreement, but Abdulhussein alleged that the company was the alter ego of the Dhallas, who were using it to evade the settlement agreement's terms.

Rezz Investments is a Canadian corporation, located in Canada, and does business only in Canada. Abdulhussein does not dispute the company's lack of Texas contacts. He instead argues that the Dhallas's Texas contacts should be imputed to the Canadian company because they are investors in the company and exercise control over it.

After receiving evidence from both sides as to the Dhallas's relationship to Rezz Investments, the trial court granted the company's special appearance without making fact findings or conclusions of law.

DISCUSSION

Abdulhussein contends that the trial court erred in determining that it lacked personal jurisdiction over Rezz Investments.

A. Standard of review

Whether there is personal jurisdiction over a nonresident defendant is a question of law, which we review de novo. *Moncrief Oil Int'l v. OAO Gazprom*, 414 S.W.3d 142, 150 (Tex. 2013). However, a trial court often must resolve fact questions before deciding whether there is jurisdiction. *BMC Software Belgium v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). When, as here, the trial court does not issue findings of fact or conclusions of law, we imply the relevant fact findings necessary to support its ruling, so long as legally and factually sufficient evidence supports them. *Moncrief Oil*, 414 S.W.3d at 150; *BMC Software*, 83 S.W.3d at 795. We will affirm the trial court's ruling on any legal theory that has evidentiary support. *Hatzenbuehler v. Essig*, 526 S.W.3d 657, 662 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

B. Burden of proof

Ordinarily, the plaintiff bears the initial burden to plead factual allegations sufficient to confer personal jurisdiction over the defendant under Texas's long-arm statute. *Moncrief Oil*, 414 S.W.3d at 149; *Kelly v. Gen. Interior Constr.*, 301 S.W.3d 653, 658–59 (Tex. 2010). If the plaintiff meets that burden, then the burden shifts to the defendant to negate the bases for jurisdiction pleaded by the plaintiff. *Moncrief Oil*, 414 S.W.3d at 149. The defendant can negate jurisdiction either by disproving the plaintiff's allegations or by showing that the evidence is legally

insufficient to establish jurisdiction, taking the plaintiff's allegations as true. *Kelly*, 301 S.W.3d at 659. Texas law presumes that a corporate entity is legally distinct from its owners and officers; thus, a plaintiff who alleges alter ego for jurisdictional purposes bears also the burden of proof on that issue. *See BMC Software*, 83 S.W.3d at 798; *Cappuccitti v. Gulf Indus. Prods.*, 222 S.W.3d 468, 482 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Tri-State Bldg. Specialties v. NCI Bldg. Sys.*, 184 S.W.3d 242, 250 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

C. Applicable law

Another party's contacts with the forum may be imputed to a nonresident defendant if that defendant is the other party's alter ego. *See BMC Software*, 83 S.W.3d at 798–99; *Cappuccitti*, 222 S.W.3d at 481–82. For jurisdictional purposes, a corporation is the alter ego of another when that other controls the corporation's business operations and affairs to an atypical degree, exerting authority greater than that normally associated with ownership and directorship. *PHC-Minden L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 175 (Tex. 2007). The evidence must show that the nonresident corporation and the party over which there is jurisdiction ceased to be separate, so that the trial court should disregard the corporate fiction to prevent fraud or injustice. *Id.* Conflicting jurisdictional evidence about the degree of control exercised by others presents a question of fact for the trial court. *See BMC Software*,

83 S.W.3d at 798–800; *Capital Fin. & Commerce v. Sinopec Overseas Oil & Gas*, 260 S.W.3d 67, 85 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

D. Analysis

Abdulhussein contends that the Dhallas’s dominion over Rezz Investments is evidenced by (1) their direction of a Canadian lawsuit filed against him by the company; and (2) the company’s failure to observe corporate formalities, such as the failure to pass a board resolution authorizing the Dhallas to direct the company’s litigation. Abdulhussein also relies on an arbitrator’s December 2015 finding that the Dhallas used the company to evade their obligations under the September 2012 settlement agreement.

In support of its special appearance, Rezz Investments proffered two affidavits from Shaheen Kassam, the company’s president and chair of its board of directors. Kassam averred that she has always chaired the company’s board, and she and her husband exercised control over the company, its officers and agents, and its litigation. Since the company’s formation, it has always had its own bank account, which remained under Kassam’s control. At the time of its formation, the company had four directors: Kassam, her husband, and the Dhallas; however, Kassam averred that the Dhallas resigned their directorships six days after the company’s formation in September 2007 and more than five years before the company filed its Canadian lawsuit against Abdulhussein in July 2013. After the Dhallas’s resignation of their

directorships, they remained passive investors in the company, with the Khassams and Dhallas each owning 50 percent of it. In October 2015, the Dhallas sold their ownership interest.

According to Kassam, she asked Salima Dhalla to be the “point person” in communicating with Rezz Investments’s attorneys as to the Canadian lawsuit. But all litigation decisions were made by the company’s board of directors, which Salima had not been a part of since her resignation from that position in 2007. Since the sale of their ownership interest in the company in October 2015, neither of the Dhallas has participated in the Canadian lawsuit against Abdulhussein.

Rezz Investments also submitted affidavits made by Salima Dhalla and Amin Dhalla. Both affirmed that they have not served as directors of the company since September 2007. They characterized their former shares in the company as having been held in trust by the company’s remaining directors, the Kassams. And they stated that they had provided information to the company’s attorneys in connection with the Canadian lawsuit.

Abdulhussein contends that evidence in the record belies Rezz Investments’s contention that Salima Dhalla acted merely as the company’s contact person in the Canadian litigation. He emphasizes an affidavit that Salima made in the Canadian suit, in which she averred that the company authorized her to “instruct its legal counsel,” arguing that it demonstrates that she controlled the litigation. Salima’s

representation as to her authority to instruct the company's attorneys, however, does not contradict Kassam's averment that the company's board devised those instructions.

Abdulhussein further contends that the absence of a board resolution authorizing Salima to act in an intermediary capacity refutes Kassam's averment about Salima's status as an intermediary. But the company's by-laws did not require the board to adopt a resolution to appoint an agent. Rather, Section 6.05 of the by-laws empowered the board to appoint agents to act on the company's behalf.

Abdulhussein highlights evidence from the Canadian suit that conflicts with the evidence submitted by Rezz Investments in support of its special appearance. He notes that Salima Dhalla and the Khassams represented in the Canadian litigation that Salima and her husband resigned their company directorships in July 2008 rather than September 2007. According to Abdulhussein, this evidentiary conflict shows that the Dhallas effectively continued to function as directors for several months after September 2007. He also contends that there is little or no evidence that the Dhallas's shares in Rezz Investments were held in trust after they resigned their directorships.

Conflicts in the jurisdictional evidence as to control of Rezz Investments were for the trial court to resolve, *see BMC Software*, 83 S.W.3d at 794; *Capital Fin.*, 260 S.W.3d at 84, and we must presume that the trial court resolved this conflict against

a finding of alter ego. *See First Oil v. ATP Oil & Gas Corp.*, 264 S.W.3d 767, 785 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). In this regard, whether the Dhallas ceased acting as directors in 2007 or 2008, they indisputably did so several years before the September 2012 settlement at the heart of this suit. They were not directors when the Canadian suit against Abdulhussein was filed in July 2013. Under these circumstances, the trial court reasonably could have found that any possibility that the Dhallas's acted as directors through mid-2008 was too distant in time to be relevant to the issue of alter ego in this case. Their former status as directors of Rezz Investments is not enough to support a finding of alter ego. *See Cappuccitti*, 222 S.W.3d at 482. Similarly, whether or not the Dhallas's stock was held in trust, their stock ownership cannot support a finding of alter ego on its own. *See Commonwealth Gen. Corp. v. York*, 177 S.W.3d 923, 925 (Tex. 2005) (per curiam) (company's status as sole shareholder of another not sufficient to show an alter-ego relationship). In sum, the evidence does not demonstrate abnormal control or disregard for corporate formalities that could support a finding of alter ego as a matter of law; thus, we defer to the trial court's resolution of this issue. *See BMC Software*, 83 S.W.3d at 799 (alter ego requires proof of control over the internal business operations and affairs of the company beyond the degree of control normally associated with ownership and directorship).

Finally, Abdulhussein relies on a Texas arbitrator's December 2015 finding

that the Dhallas used Rezz Investments and the Canadian lawsuit against Abdulhussein to evade the September 2012 settlement. But he does not contend that this finding is a matter of res judicata or collateral estoppel. Nor could it support the application of either theory: Rezz Investments was not a party to that arbitration or to the settlement agreement. When Abdulhussein subsequently sought confirmation of the arbitration award, he initially tried to have it enforced against Rezz Investments, but eventually nonsuited his claims against the company. Even assuming that the arbitrator's finding satisfied the element of privity required to impose res judicata or collateral estoppel, the arbitrator relied on substantive veil piercing. A finding that substantive veil piercing is warranted cannot serve as a basis for jurisdictional veil piercing because the two doctrines require different elements of proof. *See PHC-Minden*, 235 S.W.3d at 174.

Even without a showing to support the offensive use of collateral estoppel, Abdulhussein urges that we rely on the arbitrator's finding as conclusive evidence of alter ego. But factual findings made in arbitration or court proceedings cannot be used as proof of the truth of those facts in a later proceeding against a party who was present in the prior suit, absent a showing that the elements of estoppel, res judicata, judicial notice, or other evidentiary hurdle have been met. *See In re Shifflet*, 462 S.W.3d 528, 539 (Tex. App.—Houston [1st Dist.] 2015, orig. proceeding) (trial court erred to extent that it took judicial notice of truth of adjudicative fact findings

in temporary order and credited them as evidence); *see also Kenny v. Portfolio Recovery Assocs.*, 464 S.W.3d 29, 34 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (trial court could not take judicial notice of truth of factual statements in documents in its file).

Based on the record before us, we conclude that Abdulhussein did not introduce conclusive evidence that overcomes the trial court’s implied finding that Rezz Investments was not the alter ego of the Dhallas for jurisdictional purposes. *See Capital Fin.*, 260 S.W.3d at 89–90 (rejecting alter ego because plaintiff failed to carry its burden of proof). Accordingly, we hold that the trial court did not err in granting the company’s special appearance.

CONCLUSION

We affirm the order of the trial court granting Rezz Investments’s special appearance.

Jane Bland
Justice

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