Opinion issued August 2, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00832-CV

INTERNATIONAL ALLIANCE GROUP AND TRITEN CORPORATION, Appellants

V.

KOCH INDUSTRIES, INC., KOCH ENGINEERED SOLUTIONS, LLC, AND DAVID DOTSON, Appellees

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On Appeal from the 215th District Court
Harris County, Texas
Trial Court Case No. 2020-35773

MEMORANDUM OPINION

Appellants, Triten Corporation ("Triten") and International Alliance Group ("IAG"), file this interlocutory appeal from the trial court's orders sustaining the special appearances of appellees, Koch Industries, Inc. ("Koch Industries"), Koch

Engineered Solutions, LLC ("KES"), and David Dotson ("Dotson") (collectively, the "Koch Defendants"), and dismissing all claims brought by Triten and IAG against them.[1] Because we conclude that the Koch Defendants made general appearances by violating the due-order-of-hearing requirement of Texas Rule of Civil Procedure 120a, and thus waived their special appearances, we reverse the orders of the trial court granting the special appearances and remand for further proceedings.

Background and Procedural History

Triten is a Texas-based company involved in the energy, steel, and heavy construction industries. In 1995, Triten formed its Houston-based engineering subsidiary, IAG, which plans, optimizes, and executes capital projects primarily for clients in the energy and construction industries. Over the past ten years, Koch Industries and its affiliates have been one of Triten's "most important clients" and frequently hired Triten on large construction projects.

Dotson, a resident of Kansas, is the President of KES, a Delaware corporation with its principal place of business in Wichita, Kansas, and Vice President of Operations and Compliance for Koch Industries, a Kansas corporation with its principal place of business also in Wichita. According to Triten and IAG, Dotson "has watched Triten successfully control costs and timely complete projects,

[1] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(7); TEX. R. APP. P. 120a.

something that Koch Industries and its affiliates have sometimes been unable to accomplish without Triten's assistance." Because of this success, in 2016, Dotson, on behalf of KES and Koch Industries, sought to acquire IAG from Triten for $10 million. But Triten rejected the offer.

Because the Koch Defendants were unable to purchase IAG from Triten, Triten and IAG allege that the Koch Defendants "conceived of a ploy to take the IAG business for themselves" by "convinc[ing] current IAG employees to leave IAG and, in a breach of their noncompete and confidentiality obligations, go to work for the Koch Defendants as part of a newly created entity known as Koch Project Solutions[, LLC] ['KPS'] that would use IAG's personnel and know-how to compete directly with IAG." KPS was formed on April 16, 2019 and is registered to do business in Texas.

In 2019, Dotson, with the assistance of Paul Switzer, IAG's former president, began recruiting additional Triten and IAG employees to work for KPS. Triten and IAG allege that the Koch Defendants and Switzer began utilizing KPS to "directly compete with Triten for Triten's former clients." In total, Triten and IAG allege that the Koch Defendants recruited five now-former employees of Triten and IAG—John Burrus, Price Chumley, Antoine Schellinger, Paul Switzer, and James Woodard. Each of those former employees are Texas residents, and Triten and IAG allege that they each now work for KPS in Houston.

This case began when Switzer sued Triten for contract and tort damages arising out of his separation from IAG. Triten responded with counterclaims against Switzer and third-party claims against the Koch Defendants for tortious interference, civil conspiracy, and unjust enrichment. On November 9, 2020, the Koch Defendants each filed special appearances challenging the trial court's personal jurisdiction over them. In their special appearances, the Koch Defendants argued that Triten and IAG could not establish a connection between the Koch Defendants' alleged recruiting activities and the alleged tortious interference because nothing in the former employees' employment agreements precluded recruitment of employees, only the former employees' solicitation of Triten and IAG's clients.

Later that same day, after the special appearances were filed, the Koch Defendants filed special exceptions "[s]ubject to their special appearances," which included the following:

1. Special Exception No. 1: IAG and Triten Fail to Sufficiently Plead a Viable Tortious Interference with Contract Claim.
2. Special Exception No. 2: IAG and Triten Still Improperly Rely on Collective Allegations.
3. Special Exception No. 3: IAG and Triten Still Do Not Plead a Viable Conspiracy Claim.
4. Special Exception No. 4: IAG and Triten's Unjust Enrichment Claim is Not Based on Unjust Conduct.

In their special exceptions, the Koch Defendants included language arguing that Triten and IAG's various claims "should be dismissed" or "stricken," and requesting that the trial court "strike the non-compliant paragraphs."

The Koch Defendants set both their special appearances and their special exceptions, as well as a motion for protection related to requested discovery, for a December 9, 2020 hearing (the "December 9 hearing"). At the December 9 hearing, the Koch Defendants argued "the motion for protection and the special exceptions at the same time" as the special appearance "[b]ecause they're connected." The Koch Defendants argued that "[t]hey involve a lot of the same issues, a lot of the same facts" and, therefore, it would "be easier for everybody if we do it all together." Counsel for the Koch Defendants then proceeded to argue the substance of each motion, beginning with the special appearances. The Koch Defendants did not ask for or receive a ruling on their special appearances before moving onto the substantive arguments related to their special exceptions. At the conclusion of the December 9 hearing, the trial court did not issue a ruling from the bench on any of the motions but took the matter under advisement. The trial court issued its orders granting the Koch Defendants' special appearances later that same day. Triten and IAG timely filed this interlocutory appeal from those orders.

Personal Jurisdiction

In three issues, Triten and IAG argue that the trial court erred in granting the Koch Defendants' special appearances. First, Triten and IAG argue that the Koch Defendants entered general appearances, and thus waived their special appearances, by requesting affirmative relief from the trial court on a non-jurisdictional issue before the trial court heard and determined the special appearances. Second, Triten and IAG argue that the trial court had specific jurisdiction over the Koch Defendants. And third, Triten and IAG argue that the trial court abused its discretion by granting the Koch Defendants' special appearances without first allowing jurisdictional discovery.

A. Standard of Review

Whether a trial court has personal jurisdiction over a nonresident defendant is a question of law that we review de novo. *Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 558 (Tex. 2018) (citing *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150 (Tex. 2013)). When, as here, the trial court did not issue findings of fact and conclusions of law, all relevant facts that are necessary to support the judgment and supported by evidence are implied. *Id.* (citing *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002)).

B. Waiver of Special Appearance

Unlike subject-matter jurisdiction, which concerns a court's jurisdiction to hear a case and cannot be waived, personal jurisdiction concerns a court's jurisdiction over a particular party and can be waived. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 379 (Tex. 2006); *Trenz v. Peter Paul Petroleum Co.*, 388 S.W.3d 796, 800 (Tex. App.—Houston [1st Dist.] 2012, no pet.). A party waives the absence of personal jurisdiction by making a general appearance in the case or by failing to timely object to the court's jurisdiction. *Reata Constr. Corp.*, 197 S.W.3d at 379; *Trenz*, 388 S.W.3d at 800. A party enters a general appearance when it (1) invokes the judgment of the court on any question other than the court's jurisdiction, (2) recognizes by its acts that an action is properly pending, or (3) seeks affirmative action from the court. *Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 304 (Tex. 2004); *Dawson–Austin v. Austin*, 968 S.W.2d 319, 321 (Tex. 1998). 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. "The relevant inquiry is not what a court does in response to the defendant's action, but whether a defendant truly seeks any affirmative action from the court by that action." *Global Paragon Dallas, LLC v. SBM Realty, LLC*, 448 S.W.3d 607, 612 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (internal quotation omitted).

Rule 120a of the Texas Rules of Civil Procedure recognizes a procedure for a "special appearance"—a means by which a party may make a limited appearance in the case for the purpose of challenging personal jurisdiction without making a general appearance that will waive the challenge. TEX. R. CIV. P. 120a; *First Oil PLC v. ATP Oil & Gas Corp.*, 264 S.W.3d 767, 776 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). A party availing itself of Rule 120a's special appearance procedure must strictly comply with the Rule's terms because failure to do so results in waiver. *See* TEX. R. CIV. P. 120a(1) ("Every appearance, prior to judgment, not in compliance with this rule is a general appearance."); *see also Silbaugh v. Ramirez*, 126 S.W.3d 88, 93 (Tex. App.—Houston [1st Dist.] 2002, no pet.) ("Rule 120a requires strict compliance."); *SBG Dev. Servs., L.P. v. NuRock Group, Inc.*, No. 02-11-00008-CV, 2011 WL 5247873, at *2–4 (Tex. App.—Fort Worth Nov. 3, 2011, no pet.) (mem. op.) ("Strict compliance with rule 120a is required[.]"). Rule 120a dictates the order in which pleadings must be filed with respect to the filing of a special appearance—the due-order-of-pleading requirement. *See* TEX. R. CIV. P. 120a(1); *First Oil PLC*, 264 S.W.3d at 776. It also dictates the order in which motions must be heard with respect to a special appearance—the due-order-of-hearing requirement. *See* TEX. R. CIV. P. 120a(2); *First Oil PLC*, 264 S.W.3d at 776.

The due-order-of-hearing requirement mandates that a special appearance motion "shall be heard and determined before a motion to transfer venue or any other

plea or pleading may be heard." TEX. R. CIV. P. 120a(2); *Exito Elecs.*, 142 S.W.3d at 303. Under this requirement, a party waives its special appearance by seeking affirmative action from the trial court inconsistent with its assertion that the court lacks jurisdiction before the special appearance is both heard and determined. *Global Paragon Dallas*, 448 S.W.3d at 612–13 ; *Trenz*, 388 S.W.3d at 802–03; *SBG Dev. Servs.*, 2011 WL 5247873, at *2–4; *Klingenschmitt v. Weinstein*, 342 S.W.3d 131, 134–35 (Tex. App.—Dallas 2011, no pet.); *Landry v. Daigrepont*, 35 S.W.3d 265, 267–68 (Tex. App.—Corpus Christi 2000, no pet.). Even if the party obtains a hearing on its special appearance, if it seeks affirmative action from the court on an inconsistent motion before obtaining a ruling on its special appearance, the party waives its challenge to personal jurisdiction. *Global Paragon Dallas*, 448 S.W.3d at 609, 612–13; *Trenz*, 388 S.W.3d at 801, 803; *SBG Dev. Servs.*, 2011 WL 5247873 at *1, *3; *Landry*, 35 S.W.3d at 267–68.

C. Analysis

Triten and IAG contend that the Koch Defendants waived their special appearances in two ways. First, Triten and IAG contend the Koch Defendants invoked the trial court's jurisdiction on a non-jurisdictional question by asking it to dismiss Triten and IAG's claims on the merits in their special exceptions. The Koch Defendants disagree. They contend that because special exceptions are not "merits-based motion practice," they do not amount to a request for dismissal on the

merits that could result in a wavier of a special appearance. They argue that they did not seek a dismissal on the merits, but merely "asked the trial court to sustain their special exceptions."

Considering the substance of the Koch Defendants' special exceptions pleading, we agree with Triten and IAG. *See State Bar of Tex. v. Heard*, 603 S.W.2d 829, 833 (Tex. 1980) ("We look to the substance of a plea for relief to determine the nature of the pleading, not merely at the form of title given to it."). The Koch Defendants' special exceptions requested affirmative relief from the trial court by requesting more than just a ruling sustaining their special exceptions. The Koch Defendants also expressly requested that the trial court "dismiss[]" or "strike" Triten and IAG's causes of action. For instance, the Koch Defendants argued that Triten and IAG's tortious interference claim should be dismissed because they "fail[ed] to specifically identify the language setting forth the basis for the tortious interference claim" and "fail[ed] to plead any contractual term tortiously interfered with." The Koch Defendants also challenged Triten and IAG's conspiracy claim, stating that claim should "be stricken" because Triten and IAG "plead[ed] that a conspiracy took place between parties that cannot legally conspire with one another [concerning] a scheme that is neither illegal nor contractually impermissible[.]" And the Koch Defendants argued that the unjust enrichment claim "should be dismissed" because Triten and IAG alleged no unjust conduct and "unjust enrichment is not a viable

independent cause of action." Finally, in their prayer for relief, the Koch Defendants did not ask the trial court to sustain their special exceptions, but instead requested that the trial court "strike the non-compliant paragraphs."

Likewise, in their reply in support of their amended special exceptions, the Koch Defendants claimed that Triten and IAG's pleadings were "internally inconsistent as to the precise claims asserted; and if there is imprecision and confusion, the most appropriate course is to grant the special exception and dismiss the claim or require the party to replead." Accordingly, we do not agree that the Koch Defendants merely asked the trial court to sustain their special exceptions and allow Triten and IAG to replead.

We find similar cases from other courts of appeals involving motions to strike or motions to dismiss following special exceptions to be instructive here. For example, in *SBG Development Services*, one of the defendants filed a special appearance and, subject thereto, special exceptions to the plaintiff's petition. *SBG Dev. Servs.*, 2011 WL 5247873, at *1. After the trial court granted the special exceptions and an amended petition was filed, the defendant filed a motion to strike the plaintiff's petition and motion for sanctions. *Id.* At a hearing on the special appearance, motion to strike, and motion for sanctions, defendant's counsel told the trial court that he wanted to argue his motion to strike first, then the special appearance, and then the motion for sanctions. *Id.* On appeal from the order granting

the special appearance, the court of appeals stated that the allegations in the motion to strike were "not limited to allegations requesting that [the plaintiff] plead additional jurisdictional facts pertaining to [the defendant's] contacts with Texas or the purported basis for the trial court's in personam jurisdiction over him." *Id.* at *3. The court of appeals also noted that "[a] pleading asserting special exceptions or asserting a motion to strike based on a failure to satisfy special exceptions does not constitute a challenge to the trial court's jurisdiction." *Id.* Accordingly, because the defendant "specifically requested and prayed for affirmative relief from the trial court inconsistent with his position that the trial court possessed no personal jurisdiction over him," in the form of "an order or judgment dismissing all of [the plaintiff's] claims against him for reasons other than the trial court's purported lack of jurisdiction over him," the appellate court held that the defendant waived his special appearance. *Id.*

Likewise, in *Klingenschmitt*, the defendant filed a special appearance followed by an answer subject to that special appearance, which contained special exceptions. 342 S.W.3d at 132. After the trial court sustained the defendant's special exceptions, the defendant moved to dismiss with prejudice all of the plaintiffs' claims against him on the basis that the plaintiffs failed to comply with the trial court's order to amend their pleadings. *Id.* The defendant also sought dismissal of the plaintiffs' claims of "imminent violence based on Sections 22.01 and 22.07 of

the Texas Penal Code because they do not authorize any civil cause of action." *Id.* at 134. After the trial court denied the defendant's motion to dismiss following a hearing, the defendant set his special appearance for hearing. The trial court found that the defendant waived his special appearance, and the Dallas Court of Appeals agreed. The court of appeals concluded that the defendant sought affirmative relief in the form of a dismissal with prejudice of the plaintiffs' claims, which was inconsistent with and unrelated to the defendant's special appearance. *Id.* In addition, the court of appeals concluded that the defendant's "request for dismissal of the claims of imminent violence was not related to his special appearance but was, instead, based on his assertion that those are not valid civil causes of action." *Id.* at 134. Accordingly, the court of appeals held that because the defendant "sought affirmative relief inconsistent with his special appearance prior to the hearing and determination of his special appearance," the defendant waived his special appearance. *Id.* at 135.

Like in *SBG Development Services*, the Koch Defendants did not limit their arguments in support of their special exceptions to allegations that Triten and IAG should be required to plead additional facts pertaining to the Koch Defendants' contacts with Texas or the trial court's in personam jurisdiction over them. Rather, like the defendant's motion to dismiss in *Klingenschmitt*, the Koch Defendant's

arguments supporting their dismissal request go to the merits of Triten and IAG's claims and their ability to bring those claims as a matter of law.[2]

We also reject the Koch Defendants' argument that there would have been no ruling on the merits because Triten and IAG would have been able to replead their claims even if the trial court had sustained the special exceptions.[3] First, the relevant

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[2] We acknowledge that, procedurally, the facts here differ slightly from *SBG Development Services* and *Klingenschmitt* in that the defendants in those cases received a ruling sustaining their special exceptions before they moved to strike or dismiss the plaintiffs' causes of action. However, we see this as a distinction without a difference for a few reasons. One, the Fort Worth Court of Appeals noted in *SBG Development Services* that neither a "pleading asserting special exceptions" (what we have here) nor a "motion to strike based on a failure to satisfy special exceptions" (what was at issue there) is a challenge to the trial court's personal jurisdiction over the defendant. 2011 WL 5247873, at *3. Two, the Koch Defendants' special exceptions were substantively like the motion to strike in *SBG Development Services* and the motion to dismiss in *Klingenschmitt* because they affirmatively sought dismissal of Triten and IAG's causes of action, including on the ground that unjust enrichment is not a viable independent cause of action, and not just an order from the trial court sustaining the special exceptions and allowing Triten and IAG to replead.

[3] The Koch Defendants contend that only after Triten and IAG were given an opportunity to replead would the Koch Defendants have been able to seek a "merits ruling with a separate motion for summary judgment that challenged Triten [and IAG]'s deficient pleadings or a motion to strike a deficient amendment." While this may be the proper procedure by which to seek dismissal based on special exceptions, that does not change the fact that the Koch Defendants expressly requested that the trial court dismiss and strike Triten and IAG's claims in their special exceptions themselves and, therefore, does not impact our waiver analysis. *See SBG Dev. Servs., L.P. v. Nurock Group, Inc.*, No. 02-11-00008-CV, 2011 WL 5247873, at *5 (Tex. App.—Fort Worth Nov. 3, 2011, no pet.) (mem. op.) (holding that defendant waived special appearance by seeking affirmative relief in motion to strike inconsistent with special appearance and violating due-order-of-hearing requirement of Rule 120a, but also holding that trial court erred in granting motion to strike because defendant did not obtain ruling on special exceptions prior to entry of order striking pleadings).

inquiry for determining whether a defendant entered a general appearance is not whether the defendant requested a ruling on the merits. Instead, the question is whether the defendant invokes the judgment of the court on any question other than the court's jurisdiction or seeks affirmative relief inconsistent with an assertion that the trial court lacks jurisdiction. *Exito Elecs. Co.*, 142 S.W.3d at 304; *Dawson–Austin*, 968 S.W.2d at 321, 323.

Second, although the Koch Defendants are correct that, "[g]enerally, when the trial court sustains special exceptions, it must give the pleader an opportunity to amend the pleading[,]" repleading is not required if "the pleading defect is of a type that amendment cannot cure." *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007). In such case, the court may render a judgment dismissing the case. *Neff v. Brady*, 527 S.W.3d 511, 528 (Tex. App.—Houston [1st Dist.] 2017, no pet.). By arguing that Triten and IAG's claims were not supported as a matter of law (conspiracy) or not a viable independent cause of action (unjust enrichment), and requesting the trial court strike or dismiss those causes of action, the Koch Defendants essentially asserted that these were incurable pleading defects.[4] We do

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[4] In addition to the language quoted above, the Koch Defendants also argued in their reply in support of their special exceptions that Triten and IAG "still have not—*because they cannot*—cure their convoluted pleadings to provide fair notice as to which party has a claim for inducement, what conduct amounted to inducement, what term was breached, under which agreement, and by which former employee/consultant." (Emphasis added). They also argued that Triten and IAG

not need to determine whether these alleged pleading defects were in fact incurable and properly subject to dismissal, or whether the trial court should have sustained the special exceptions or dismissed the causes of action. "The relevant inquiry is not what a court does in response to the defendant's action, but whether a defendant truly seeks any affirmative action from the court by that action." *Global Paragon Dallas*, 448 S.W.3d at 612 (internal quotation omitted). By requesting that the trial court strike or dismiss these causes of action for reasons other than the purported lack of personal jurisdiction—and not simply asking the trial court to sustain their special exceptions and require Triten and IAG to plead additional jurisdictional facts—the Koch Defendants sought affirmative relief from the trial court inconsistent with their special appearances.[5]

"cannot in good faith plead a viable claim based on any actual contractual provision, and after two attempts, they still fail to do so."

[5] As evidence that they requested that the trial court give Triten and IAG an opportunity to replead, the Koch Defendants point to their proposed order submitted in advance of the December 9 hearing. In that order, the Koch Defendants note that they asked the trial court to sustain their special exceptions and included space for the trial court to set a deadline by which Triten and IAG could attempt to "cure the deficiencies set forth" in any "sustained special exceptions." The sentence to which the Koch Defendants are referring reads in its entirety: "If applicable, Third-Party Plaintiffs shall amend the Amended Petition within ___ days of the date of this Order to cure the deficiencies set forth in the sustained Special Exceptions." The inclusion of the phrase "[i]f applicable," indicates there may be circumstances when the requirement to amend or replead is inapplicable, for example, when "the pleading defect is of a type that amendment cannot cure." *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007).

Because the Koch Defendants sought affirmative relief from the trial court and proceeded to argue the special exceptions at the December 9 hearing before the trial court "heard *and determined*" the special appearances, we agree with Triten and IAG that the Koch Defendants violated the due-order-of-hearing requirement of Rule 120a(2). As noted above, Rule 120a requires strict compliance and mandates that a special appearance motion "shall be heard *and determined* before a motion to transfer venue or any other plea or pleading may be heard." TEX. R. CIV. P. 120a(2) (emphasis added); *see also Exito Elecs.*, 142 S.W.3d at 303. By choosing to have their special exceptions, which sought affirmative relief in the form of striking or dismissing causes of action on non-jurisdictional grounds, heard before a determination on their special appearances, the Koch Defendants violated the due-order-of-hearing requirement and entered a general appearance. *See SBG Dev. Servs.*, 2011 WL 5247873, at *3; *Klingenschmitt*, 342 S.W.3d at 134–35; *see also Landry*, 35 S.W.3d at 267–68 (holding defendant waived special appearance by arguing merits of motion for new trial based on invalid substituted service before obtaining ruling on special appearance).

The Koch Defendants acknowledge the due-order-of-hearing requirement but argue that this requirement only prohibits parties from seeking affirmative relief that is inconsistent with the assertion that the trial court lacks jurisdiction, not any affirmative relief whatsoever. Citing this Court's decision in *First Oil PLC*, the Koch

Defendants contend that their special exceptions were inextricably intertwined with their jurisdictional objections and, therefore, it was "particularly appropriate" for them to argue special exceptions that could "affect the evidence and arguments relating to the court's determination of the special appearance motion." *See First Oil PLC*, 264 S.W.3d at 779.

We agree that a party may obtain rulings on certain motions related to its special appearance prior to the trial court hearing its special appearance without violating Rule 120a(2). For instance, a party may assert, and obtain rulings on, discovery motions that are related solely to discovery on its special appearance. *See Exito Elecs.*, 142 S.W.3d at 306–07. A party may also assert a motion for continuance of the special appearance hearing without waiving its special appearance. *Dawson–Austin*, 968 S.W.2d at 322. Also, in *First Oil PLC*, this Court held that when a plaintiff amends its petition to add a new party and then files a motion for continuance of the hearing on a defendant's special appearance based on the addition of the new party, the defendant can move to strike the amended pleadings in opposition to the motion for continuance, since the motion to strike is intertwined with the hearing on the special appearance and the plaintiff's justification for continuing that hearing. 264 S.W.3d at 777–78. This Court explained why the affirmative relief requested by the defendant in *First Oil PLC* was not inconsistent with its special appearance, and thus, not waiver:

> Here, the affirmative relief is the request that the court *not* defer the special appearance hearing by not allowing [plaintiffs'] motion for continuance of the special appearance hearing. Intertwined with First Oil's argument against the continuance was its motion that the amended pleadings should be stricken, which was First Oil's response to [plaintiffs'] assertion that First Oil would not be prejudiced by the continuance because the case would not be resolved by the special appearance hearing now that Suttie was an added party. Although First Oil received some limited affirmative relief by the trial court's striking the amended pleadings that added Suttie as a party, that relief was not inconsistent with the assertion that the court lacked jurisdiction. The relief was entirely consistent with the assertion of lack of jurisdiction because, if Suttie was not struck as an additional party, [plaintiffs] would have persisted in arguing to the trial court that the court should delay the hearing on the special appearance motion because the delay would not prejudice First Oil.
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> . . . Here, if First Oil did not argue the motion to strike the amended pleadings that added Suttie, First Oil's only option would be to remain silent as [plaintiffs] pursued their motion for continuance of the special appearance hearing that claimed First Oil would not be prejudiced by the delay. The only way for First Oil to defend against the claim that it would not be prejudiced by the delay was for First Oil to argue against the amended pleadings that added Suttie. Thus, under these circumstances that show that the motion for continuance of the special appearance hearing was intertwined with the motion that sought limited affirmative relief consistent with the special appearance, the limited affirmative relief does not waive the special appearance.

Id. at 778–79 (internal citations omitted).

One of the common threads of those motions is that, under the facts of each case, obtaining a ruling on the motion was necessary for the proper consideration of the special appearance. Although the Koch Defendants contend that their special exceptions were "inextricably intertwined" with their special appearances, they did not argue below or on appeal that the trial court was required to consider their special

exceptions before it could properly determine their special appearances. Unlike the defendant in *First Oil PLC* who would have had no way to defend against the plaintiffs' claim that delaying the special appearance hearing would not prejudice the defendant unless it argued against the pleadings adding the additional party, the Koch Defendants raise no argument that their special exceptions presented a threshold issue requiring resolution by the trial court before it could proceed to determine the merits of the special appearance. Instead, they contend that the resolution of their special appearances required a careful assessment of the jurisdictional contacts and operative facts alleged by Triten and IAG but that such assessment was hampered by Triten and IAG's vague jurisdictional allegations, and that it was this lack of clarity that was the focus of their special exceptions argument at the December 9 hearing. But to the extent the special exceptions and special appearances raised overlapping factual issues, the Koch Defendants could have conveyed their understanding of the problems with Triten and IAG's factual allegations and the impact of those problems on the jurisdictional analysis without asserting its special exceptions. *See, e.g.*, *Walmart, Inc. v. Fintiv, Inc.*, No. 06-20-00071-CV, 2021 WL 3572728, at *10 (Tex. App.—Texarkana Aug. 13, 2021, no pet.) (mem. op.) (rejecting defendant's claim that its motion to dismiss based on forum selection clause was so related to its special appearance that defendant could violate due-order-of-hearing requirement without waiving special appearance

because, although existence of forum-selection clause is relevant to purposeful-availment analysis, it is not dispositive and defendant "could easily convey to the court its understanding of the forum selection clause and how it impacted the purposeful-availment analysis without asserting its motion to dismiss).

Moreover, in addition to the alleged overlapping factual issues, the Koch Defendants' special exceptions also contained substantive, merits-based challenges to Triten and IAG's conspiracy[6] and unjust enrichment[7] causes of actions that were unrelated to the issue of whether the trial court had personal jurisdiction over the Koch Defendants. *See Global Paragon Dallas*, 448 S.W.3d at 613 (holding defendant waived special appearance, even though motion to vacate default judgment and motion for new trial contained arguments that overlapped to some extent with arguments in its special appearance, because its supplemental motion for new trial sought affirmative relief by addressing merits of default judgment's award of unliquidated damages and arguing that judgment provided a double recovery); *Shapolsky v. Brewton*, 56 S.W.3d 120, 140 (Tex. App.—Houston [14th Dist.] 2001,

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6 In their Special Exception No. 3, the Koch Defendants argued that Triten and IAG "plead[ed] that a conspiracy took place between parties that cannot legally conspire with one another [concerning] a scheme that is neither illegal nor contractually impermissible" and, therefore, "[t]he civil conspiracy claims—completely unaltered in the Amended Petition—should be stricken."

7 In their Special Exception No. 4, the Koch Defendants argued that "the unjust enrichment claim should be dismissed" because Triten and IAG alleged no unjust conduct and "because unjust enrichment is not a viable independent cause of action."

pet. denied), *disapproved of on other grounds by Michiana Easy Livin' Country v. Holten*, 168 S.W.3d 777, 788–89 (Tex. 2005) (holding party waived special appearance by seeking relief in motion for protection and sanctions "at least partially unrelated to" special appearance); *SBG Dev. Servs.*, 2011 WL 5247873, at *3 (holding party waived special appearance by choosing to have motion to strike pleadings heard first where motion was "not limited to" defects in jurisdictional allegations and sought dismissal for reasons other than trial court's purported lack of jurisdiction).[8]

In sum, the Koch Defendants, via their special exceptions, specifically requested and prayed for affirmative relief from the trial court inconsistent with their position that the trial court lacked personal jurisdiction over them—that being an order or judgment "striking all non-compliant paragraphs" and "dismiss[ing]" Triten and IAG's claims for reasons other than the trial court's purported lack of jurisdiction over them. And by choosing to have their special exceptions heard prior to having their special appearances heard *and* determined, the Koch Defendants

[8] Although the Koch Defendants did not specifically argue these special exceptions related to conspiracy and unjust enrichment at the December 9 hearing, they did not limit the setting of their hearing to only the special exceptions with overlapping facts. Nor did they request that the trial court only rule on those special exceptions that they contend are "inextricably intertwined" with their special appearances. To the contrary, the Koch Defendants' notice of hearing reflects no limitation on the special exceptions to be heard and considered by the trial court. Likewise, the Koch Defendants' proposed order on their special exceptions filed on December 9 reflects that they requested rulings on each of their four special exceptions, including those related to the conspiracy and unjust enrichment causes of action.

violated Rule 120a's due-order-of-hearing requirement and entered general appearances. TEX. R. CIV. P. 120a. Accordingly, we hold that by doing so, the Koch Defendants waived their special appearances. *Global Paragon Dallas*, 448 S.W.3d at 609, 612–13; *Trenz*, 388 S.W.3d at 801, 803; *SBG Dev. Servs.*, 2011 WL 5247873 at *1, *3; *Landry*, 35 S.W.3d at 267–68.

We sustain Triten and IAG's first issue. Having concluded that the Koch Defendants entered general appearances and waived their special appearances, we need not consider Triten and IAG's remaining issues related to the merits of the Koch Defendants' special appearances or whether they were entitled to jurisdictional discovery. *See* TEX. R. APP. P. 47.1.

Conclusion

We reverse the orders of the trial court granting the Koch Defendants' special appearances and remand for further proceedings.

Amparo Guerra
Justice

Panel consists of Justices Kelly, Goodman, and Guerra.