

Reversed and Rendered and Memorandum Opinion filed May 18, 2021.



In The

Fourteenth Court of Appeals

NO. 14-19-00570-CV

WFG NATIONAL TITLE COMPANY OF CALIFORNIA, Appellant

V.

MARCUS SCHULTZ, Appellee

**On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Cause No. 18-DCV-253719-B**

MEMORANDUM OPINION

Appellant WFG National Title Company of California files this interlocutory appeal challenging the trial court's denial of its special appearance. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(7) (interlocutory appeal from denial of special appearance). Concluding the trial court erred by denying the special appearance, we reverse the trial court's order and render judgment dismissing appellant Marcus Schultz's claims against WFG for want of personal jurisdiction.

I. BACKGROUND

Schultz, a Texas resident, entered into an agreement with several other parties to finance a sports bar called Sammy's Grill. One of the parties to the agreement, nonresident American Film Studios, Inc., entered into a separate agreement with nonresident WFG to provide escrow services for the transaction. Schultz later sued numerous defendants involved in the Sammy's Grill transaction, including asserting claims against WFG for breach of contract, promissory estoppel, fraud, negligence, conversion, breach of fiduciary duty, and violation of the Deceptive Trade Practices–Consumer Protection Act.¹

WFG filed a special appearance challenging the trial court's personal jurisdiction. Tex. R. Civ. P. 120a. The trial court denied the special appearance, and WFG filed this interlocutory appeal. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(7).

II. GOVERNING LAW

Whether a trial court has personal jurisdiction over a defendant is a question of law that we review de novo, although the trial court frequently must resolve questions of fact in order to decide the issue. *Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 558 (Tex. 2018); *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). When, as here, a trial court does not issue findings of fact and conclusions of law with its ruling on a special appearance, all findings necessary to support the ruling and supported by the evidence are implied, although the sufficiency of the evidence to support those findings may be challenged on appeal. *BMC Software*, 83 S.W.3d at 795. A trial court should resolve a party's special appearance based on the pleadings, any stipulations

¹ See Tex. Bus. & Com. Code Ann. §§ 17.41–.63.

between the parties, affidavits and attachments filed by the parties, relevant discovery, and any oral testimony put forth before the court. Tex. R. Civ. P. 120a(3).

The broad “doing business” language in the Texas long-arm statute allows the exercise of personal jurisdiction to “reach[] as far as the federal constitutional requirements of due process will permit.” *U-Anchor Advert., Inc. v. Burt*, 553 S.W.2d 760, 762 (Tex. 1977) (interpreting former Revised Statutes art. 2031b, Act of Mar. 18, 1959, 56th Leg., R.S., ch. 43, § 4, 1959 Tex. Gen. Laws 85, 85–86) (amended 1979) (current version at Tex. Civ. Prac. & Rem. Code § 17.042). Due process is satisfied when the nonresident defendant has established minimum contacts with the forum state and the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

A nonresident defendant’s minimum contacts can create either general or specific jurisdiction. *TV Azteca v. Ruiz*, 490 S.W.3d 29, 37 (Tex. 2016). Minimum contacts exist when the nonresident defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Michiana Easy Livin’ Country, Inc. v. Holten*, 168 S.W.3d 777, 784 (Tex. 2005). There are three components to the “purposeful availment” inquiry. *Id.* First, the relevant contacts are those of the defendant, not the unilateral activity of another party or a third person. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Second, the contacts must be purposeful rather than random, fortuitous, isolated, or attenuated. *Id.* Third, the defendant must seek some benefit, advantage, or profit by availing itself of the jurisdiction. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

A trial court has specific jurisdiction over a nonresident defendant when

(1) the defendant's contacts with the forum state are purposeful and (2) the cause of action arises from or relates to those contacts. *Burger King*, 471 U.S. at 472. In conducting a specific-jurisdiction analysis, we focus on the relationship among the defendant, the forum, and the litigation. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984). Specific jurisdiction is established when the defendant's alleged liability "aris[es] out of or [is] related to" an activity conducted within the forum. *Id.* at 414 n.8. The nonresident defendant must take action that is purposefully directed at the forum state. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 577 (Tex. 2007). To determine whether the nonresident defendant purposefully directed action toward Texas, we examine the nonresident defendant's conduct indicating an intent or purpose to serve the Texas market. *Id.*

In a special appearance, the plaintiff and the defendant bear shifting burdens of proof. *Kelly v. Gen. Interior Const., Inc.*, 301 S.W.3d 653, 658 (Tex. 2010). The plaintiff bears the initial burden of pleading sufficient allegations to bring a nonresident defendant within the provisions of the Texas long-arm statute. *Id.*; see Tex. Civ. Prac. & Rem. Code Ann. § 17.042. If the plaintiff meets its initial burden, the burden then shifts to the defendant to negate all bases of personal jurisdiction alleged by the plaintiff. *Kelly*, 301 S.W.3d at 658. A defendant can negate jurisdiction on either a factual or a legal basis. *Kelly*, 301 S.W.3d at 659. "Factually, the defendant can present evidence that it has no contacts with Texas, effectively disproving the plaintiff's allegations." *Id.* Or the defendant can show that even if the plaintiff's alleged facts are true, the evidence is legally insufficient to establish jurisdiction. *Id.* If the defendant meets its burden of negating all alleged bases of personal jurisdiction, then the plaintiff must respond with evidence "establishing the requisite link with Texas." *See id.* at 660.

III. ANALYSIS

A. Personal jurisdiction

In its sole issue on appeal, WFG contends it negated all grounds for the trial court's exercise of personal jurisdiction. In his petition, while conceding that WFG is a nonresident, Schultz alleges that WFG engaged in "business in Texas through contacting and soliciting business from a Texas resident." Schultz also alleged that WFG "derived substantial revenue" from an agreement between other parties and a Texas entity, and that WFG "took specific and substantial actions in Texas to facilitate fraud on a Texas resident," among other allegations.

WFG does not contest the sufficiency of these allegations to satisfy Schultz's initial burden of pleading facts establishing personal jurisdiction. *See Kelly*, 301 S.W.3d at 658. Instead, WFG argues that it presented sufficient evidence to negate Schultz's jurisdictional allegations, relying on an affidavit from a senior escrow officer. The affidavit confirms the uncontested fact that WFG is a nonresident of Texas. The affidavit explains that WFG entered into an escrow agreement in California with American Film Studios, a Wyoming corporation with its principal place of business in California. The agreement was executed in California by a California resident on behalf of American Film Studios. The purpose of the escrow agreement was to facilitate the transaction concerning Sammy's Grill to which WFG itself was not a party. WFG's escrow services were performed in California, and all funds WFG received were deposited and held in WFG's bank accounts in California. The affidavit asserts that WFG did not solicit business in Texas or from any Texas resident, and that it did not undertake any business in Texas as part of this transaction.

We conclude this evidence is sufficient to meet WFG's burden to negate the jurisdictional facts alleged by Schultz. The evidence demonstrates that WFG did

not invoke the benefits and protections of Texas, law, but rather that WFG's contacts with Texas were merely fortuitous. In reaching this conclusion, we find instructive the supreme court's decision in *Michiana*, in which the court emphasized that analysis of the defendant's purposeful contacts with the forum state is the "touchstone" of jurisdictional due process. 168 S.W.3d at 784. In that case, a Texas resident reached out to Michiana, a vendor in Indiana, to purchase a product. *Id.* at 781. After the vendor took the resident's payment and sent the product to Texas, the resident, dissatisfied with the product, sued Michiana in Texas. *Id.* The supreme court held that Michiana had not purposely availed itself of the privilege of conducting activities within Texas; rather, Michiana's contacts with Texas were merely fortuitous. *Id.* at 786–87. As the supreme court explained, "Under [the resident plaintiff]'s theory, Michiana could be sued in any state or country from which he chose to place his call and take delivery. But as the Supreme Court stated, 'unilateral activity . . . cannot satisfy the requirement of contact with the forum State.'" *Id.* at 787 (quoting *World-Wide Volkswagen*, 444 U.S. at 298).

As in *Michiana*, WFG's evidence shows that WFG did not purposely avail itself of the privilege of conducting activities within Texas. It agreed to provide escrow services to American Film Studios, a nonresident. The agreement was executed and the services performed in California, not Texas, and WFG did not solicit business in Texas. WFG's contacts with Texas appear to be at least as attenuated as the contacts the supreme court determined were insufficient in *Michiana*. *See id.*

We turn, then, to whether Schultz has met his burden to respond with evidence "establishing the requisite link with Texas." *See Kelly*, 301 S.W.3d at 659. Schultz argues that WFG's contacts with Texas establish specific

jurisdiction.² Schultz first notes that WFG “served as escrow holder pursuant to a finance agreement executed by Sammy’s Grill, a Texas LLC, in exchange for a fee of \$2,550.00.” There is no evidence, however, that WFG was a party to this agreement, or that WFG performed any of its escrow services in Texas. *See Yfantis v. Balloun*, 115 S.W.3d 175, 182–83 (Tex. App.—Fort Worth 2003, no pet.) (agreements entered into between defendant and third party cannot form basis of specific jurisdiction) (collecting cases). Schultz also argues that WFG sent a document entitled “Third Party Deposit Instructions” to a Texas resident involved in the financing transaction. The instructions were then sent to Schultz, who executed and returned the instructions to WFG. The instructions, however, are not an agreement executed by WFG, and simply outline the steps for depositing money into the escrow account and the effect thereof. The fact that this document was sent to Texas was a fortuity stemming from the fact that the escrow was to be funded from Texas. *Cf. Riverside Exports, Inc. v. B.R. Crane & Equip., LLC*, 362 S.W.3d 649, 654 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (no personal jurisdiction when contacts “resulted from the mere fortuity that the customer happened to reside” in Texas).

Finally, Schultz points out that WFG accepted the funds he sent from Texas to the escrow account. In *Michiana*, however, the mere fact that the Indiana vendor accepted payment from a Texas resident did not confer personal jurisdiction. *See* 168 S.W.3d at 781. The authority Schultz cites does not convince us otherwise. While Schultz cites to *Glattly v. CMS Viron Corp.*, 177 S.W.3d 438, 449–50 (Tex. App.—Houston [1st Dist.] 2005, no pet.), which he contends stands for the proposition that “handling funds” from a Texas resident “under [an] escrow agreement” may confer personal jurisdiction, *Glattly* is part of a line of cases

² Schultz does not argue on appeal that Texas courts have general jurisdiction over WFG.

overruled by the supreme court's decision in *Michiana*. See *Julian v. Cadence McShane Constr. Co., LLC*, No. 01-15-00465-CV, 2015 WL 6755616, at *7 & n.2 (Tex. App.—Houston [1st Dist.] Nov. 5, 2015, no pet.) (mem. op.) (recognizing that analysis in *Glattly* traced back to First Court's overruled decision in *Michiana*). Moreover, one of our sister courts, citing *Michiana* in its decision, has concluded that the performance of an escrow agreement in another state by a nonresident did not confer personal jurisdiction. See *Nagle v. Oppedisano*, No. 05-05-01246-CV, 2006 WL 2348975, at *2–4 (Tex. App.—Dallas Aug. 15, 2006, no pet.) (mem. op.) (nonresident did not avail himself of Texas law by performing escrow services in Hawaii even though escrow services were provided to Texas resident).

Taken as a whole, Schultz's evidence does not establish that WFG had sufficient contacts with Texas to confer personal jurisdiction.³ We sustain WFG's issue one asserting that the trial court erred by denying WFG's special appearance.

B. Discovery sanctions

Schultz alternatively argues that WFG's special appearance was properly denied because WFG did not sufficiently participate in discovery relating to jurisdictional issues, citing cases in which parties have been sanctioned for hindering discovery. Schultz specifically requests that, in the event this court were to reverse the trial court's order, we should "remand for further proceedings, with direction that the trial court should grant a continuance to permit the completion of jurisdictional discovery." In essence, Schultz asks us to sanction WFG for its alleged discovery abuses by remanding for further proceedings even if we

³ Based on our conclusion, we need not address the parties' arguments as to whether fair play and substantial justice preclude personal jurisdiction despite sufficient minimum contacts. Tex. R. App. P. 47.1; see *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 231 (Tex. 1991).

determine on the merits that the trial court erred by denying WFG's special appearance.

Schultz supports this argument by explaining that WFG objected to many of his discovery requests. While there are references in the record to a motion to compel discovery filed by Schultz, there is no record of the trial court ruling on any such motion. Likewise, there is nothing in the record indicating that the trial court ruled on WFG's discovery objections. Because Schultz did not obtain a ruling relating to any purported discovery abuses by WFG before the trial court's decision on WFG's special appearance, we conclude this argument presents nothing for our review. Tex. R. App. P. 33.1(a); *see also Remington Arms Co., Inc. v. Caldwell*, 850 S.W.2d 167, 170 (Tex. 1993) (“[T]he failure to obtain a pretrial ruling on discovery disputes that exist before commencement of trial constitutes a waiver of any claim for sanctions based on that conduct.”).

IV. CONCLUSION

Having sustained WFG's sole issue, we reverse the trial court's order denying WFG's special appearance and render judgment dismissing Schultz's claims against WFG with prejudice for want of personal jurisdiction.

/s/ Charles A. Spain
Justice

Panel consists of Justices Wise, Bourliot, and Spain.