In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-14-00517-CV

LYNN DEGEORGE, Appellant

V.

KIMBERLY LUEDIKE/FABEL, INDIVIDUALLY AND HEIR TO THE ESTATE OF KENNETH FABEL, Appellees

---

On Appeal from the 410th District Court
Montgomery County, Texas
Trial Cause No. 13-04-04502 CV

MEMORANDUM OPINION

This is an appeal from a trial court's order granting a special appearance, which was filed by two Florida residents who listed and then sold a Model T through the use of the Internet to an individual who resides in Montgomery County, Texas. In the appeal, the Texas resident argues that the trial court erred in dismissing his suit for lack of jurisdiction. We conclude the court lacked jurisdiction over the sale of the Model T under the pleadings and facts that were

before the court when it ruled, and we hold the trial court did not err in granting the special appearance.

Background

In 2011, Lynn DeGeorge, the appellant, purchased a 1925 Model T from Kenneth Fabel, who advertised the Model T for sale on an Internet website. When the Model T arrived in Texas, DeGeorge was not satisfied that the description of the car that he viewed on the Internet matched the Model T's actual condition; subsequently, DeGeorge sued Kenneth and Kimberly Luedike/Fabel (the Fabels), who were residents of Florida,[1] in Texas, complaining about misrepresentations that he alleged occurred in connection with his purchase of the Model T. In his suit, DeGeorge sued the Fabels for misrepresenting the Model T's condition in the information he saw about the car on the Internet, and he also asserted that he discovered damages to the Model T after it was delivered that were not disclosed to him in the sale. In his suit, DeGeorge based the claims that he made in his suit on theories of breach of contract, fraud, deceptive trade practices, and rescission.

[1] After the defendants answered DeGeorge's original petition, Kimberly Luedike/Fabel filed a suggestion of death, advising the trial court that Kenneth Fabel died without a will and that she was his sole heir. Kimberly continued to reside in Florida following her husband's death. In the opinion, despite Kenneth's death, we have referred to the parties as the Fabels because Kimberly was sued individually and is also acting as the representative of his estate for the limited purpose of defending the claims against Kenneth's estate that DeGeorge has raised in his suit.

In response to the suit, the Fabels filed an unverified special appearance. *See* Tex. R. Civ. P. 120a(1) (requiring that a special appearance be made "by sworn motion"). Approximately sixteen months later, the Fabels amended their special appearance to include a notary's acknowledgement that Kimberly Luedike was the person who signed the special appearance. In the amended special appearance, the Fabels asserted that they had never entered Texas, had never signed a contract in Texas, and had done no business in Texas. According to the Fabels' amended special appearance, the sale of the Model T car was "conducted in the State of Florida." The amended special appearance also alleged that the Fabels made the Model T available for sale in Florida, and that the Fabels had not arranged for the Model T to be shipped after it was sold. On the date the Fabels filed their amended special appearance, they also filed a motion for continuance, asking the trial court to continue the impending trial. The Fabels' motion indicates that they wanted the court to continue the case so that they could complete the discovery they were seeking from DeGeorge in the case.

DeGeorge opposed the Fabels' motion for leave to amend their special appearance, complaining their request to amend was untimely. According to DeGeorge, the motion was untimely because the Fabels had not made a more timely effort to cure the defect in the original special appearance, which they had

filed more than one year earlier. Importantly, DeGeorge did not complain that the amended special appearance was not properly verified, and he also did not complain that the amended special appearance failed to comply with Rule 120a's requirement that special appearances be made by sworn motion.[2] DeGeorge also filed a motion opposing the Fabels' request to continue the case, asserting that he had placed his answers to the Fabels' outstanding discovery requests in the mail. The record does not show that the trial court ruled on the motion for continuance, but the docket sheet reflects that approximately one week after DeGeorge filed his motion opposing the Fabels' request for a continuance, the trial court set a hearing to resolve whether it could exercise jurisdiction over the parties' dispute.

[2] In the brief that DeGeorge filed to support his appeal, he has not complained that the Fabels failed to swear to the facts that are alleged in their special appearance. DeGeorge's complaints about these defects in the amended special appearance were waived, as complaints that concern the form of a defendant's special appearance are required to be raised and ruled on in the trial court to be considered on appeal. Tex. R. App. P. 33.1 (preserving error for appellate review requires the complaining party to show that he presented his complaint to the trial court in a timely request, objection, or motion and that the trial court ruled on the request); *Dukatt v. Dukatt*, 355 S.W.3d 231, 237 (Tex. App.—Dallas 2011, pet. denied) (holding that where the trial court granted the special appearance based on a special appearance that was not verified, the trial court's order could not be reversed on that basis where no objections were lodged in the trial court that the defendant's special appearance was not sworn); *Haddad v. ISI Automation Intl., Inc*., No. 04-09-00562-CV, 2010 WL 1708275, at *2 (Tex. App.—San Antonio Apr. 28, 2010, no pet.) (holding that a complaint that the special appearance was not properly verified was waived where the appellee failed to complain about that defect in the trial court).

Following the special appearance hearing, the trial court gave the Fabels permission to file their amended special appearance, found that it did not have jurisdiction over the parties' dispute, and dismissed DeGeorge's suit for lack of jurisdiction. DeGeorge filed a timely notice of appeal from the trial court's order dismissing his suit for lack of jurisdiction.

Standard of Review

During the special appearance hearing, the trial court resolved the Fabels' special appearance based on the pleadings, as neither party filed affidavits or evidence that was relevant to the special appearance. *See* Tex. R. Civ. P. 120a(3) (requiring the court to determine the special appearance based on the pleadings, any stipulations between the parties, the affidavits and attachments the parties filed, the results of any discovery, and the oral testimony, if any). In resolving special appearances filed by a defendant to contest a court's jurisdiction over the defendant's persons, "the plaintiff and the defendant bear shifting burdens of proof[.]" *Kelly v. Gen. Interior Constr. Inc.*, 301 S.W.3d 653, 658 (Tex. 2010).

In cases that involve special appearances, the plaintiff bears the initial burden of pleading sufficient facts to bring the nonresident defendants within the provisions of the Texas long-arm statute. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 793 (Tex. 2002); Tex. Civ. Prac. & Rem. Code Ann.

§§ 17.001-.093 (West 2015). However, once the Fabels filed their amended special appearance, which indicates that they are Florida residents and that the sale and delivery of the Model T occurred in Florida, the burden of proof shifted to DeGeorge to prove that the Fabels' allegations were untrue. *Kelly*, 301 S.W.3d at 659 (noting that after the defendant negates plaintiff's allegations regarding jurisdiction, "[t]he plaintiff can then respond with its own evidence that affirms its allegations, and it risks dismissal of its lawsuit if it cannot present the trial court with evidence establishing personal jurisdiction").

On appeal, the question of whether a trial court possessed personal jurisdiction over a nonresident defendant is reviewed as a question of law. *See Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 805-06 (Tex. 2002). Therefore, we use a de novo standard to review the trial court's conclusion that the Fabels were not amenable to DeGeorge's suit over the sale of the Model T that he filed in Texas. *See BMC Software*, 83 S.W.3d at 794.

Waiver

DeGeorge raises two issues in his appeal. In issue one, he asserts the Fabels waived their right to obtain a ruling on their special appearance by failing to seek a timely hearing on their special appearance and by seeking a continuance of the trial. According to DeGeorge, the Fabels waived their special appearance because

they did not set a hearing on their special appearance for approximately seventeen months after they filed their special appearance.

As to when a special appearance hearing must occur, Rule 120a requires that a defendant's challenge to the court's jurisdiction over the case be heard and determined "before" "any other plea or pleading may be heard." Tex. R. Civ. P. 120a(2). Otherwise, Rule 120a(2) does not impose a deadline by which the trial court must hear the special appearance. Here, the record shows the trial court did not agree with DeGeorge that the Fabels' request for a hearing was untimely, as it considered and ruled on the Fabels' special appearance.

DeGeorge relies primarily on *Brown v. Brown*, 520 S.W.2d 571 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd) to support his argument that the approximate seventeen month delay resulted in a waiver by the Fabels of their right to have their special appearance heard. However, in *Brown*, the Fourteenth Court of Appeals addressed circumstances that showed that the nonresident defendant never obtained a pretrial ruling or a hearing on his special appearance, and the Fourteenth Court concluded for this, and other reasons not relevant to this case, that the nonresident defendant's failure to obtain both a hearing and a pretrial ruling resulted in the nonresident's waiver of his special appearance under the

particular circumstances that existed in that case.[3] *Id*. at 575. We conclude that *Brown* is not relevant when the trial court does not find that a waiver occurred, and we hold that the delay at issue in this case did not result in the Fabels' waiver of their right to rely on their special appearance. *See Horizon Shipbuilding, Inc. v. Blyn II Holding, LLC*, 324 S.W.3d 840, 846 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (concluding that a delay of approximately one year before obtaining a hearing on a party's special appearance did not result in a waiver).

In support of issue one, DeGeorge also argues that the Fabels waived their special appearance under Rule 120a by seeking a continuance before the date they obtained a hearing on their special appearance. In *Dawson–Austin v. Austin*, 968 S.W.2d 319, 323 (Tex. 1998), the Texas Supreme Court explained why a nonresident's conduct in seeking a continuance is not conduct inconsistent with Rule 120a's requirement that the special appearance be determined before other pleas or pleadings. In *Austin*, the Court explained that a continuance asks that a

[3] DeGeorge also cites *Milacron Inc. v. Performance Rail Tie, L.P.*, 262 S.W.3d 872 (Tex. App.—Texarkana 2008, no pet.) to support his argument that the trial court should have found the Fabels waived their special appearance. However, in *Milacron*, the appeals court affirmed a trial court's finding that the defendant waived its special appearance by waiting to request a hearing after the parties made opening statements in the trial. *Id*. at 876. In the case at bar, the Fabels obtained a pretrial ruling on their special appearance before the trial on the merits of the case commenced; therefore, the Fabels' conduct is consistent with Rule 120a's requirement that the special appearance be heard before hearing other matters involving a party's request seeking affirmative relief.

court defer action on all matters before it, and it is not a motion asking for affirmative relief that is inconsistent with the requirements of Rule 120a. *Id*.

With respect to the Fabels' motion for continuance, their motion specifically stated that their special appearance had not yet been heard. Given that the Fabels' motion seeking a continuance did not seek relief that is inconsistent with the Fabels' claim that they are not amenable to suit in Texas over the sale at issue, DeGeorge's argument regarding waiver as it relates to the motion to continue is without merit. *Id*. We overrule issue one.

Jurisdiction

In issue two, DeGeorge argues the court had jurisdiction over his suit because his suit arose from and was related to the Fabels' contacts with Texas. A court's exercise of personal jurisdiction over a nonresident defendant is constitutionally permissible only if (1) the defendant has established minimum contacts with the forum state, and (2) 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); *BMC Software*, 83 S.W.3d at 795. In determining whether a court's exercise of jurisdiction is fair and just, courts are required to determine whether the nonresidents purposefully availed themselves of the benefits of the laws of the forum state. *See Michiana Easy Livin' Country, Inc. v. Holten*,

168 S.W.3d 777, 784 (Tex. 2005) (noting that the touchstone of jurisdictional due process turns on "purposeful availment"). The due process analysis requires courts to examine factors in cases such as the nonresidents' contacts with the forum, whether those contacts were purposeful rather than fortuitous, and whether the nonresidents sought some benefit, advantage, or profit by seeking the protection of Texas law. *Id*. at 785-86 (noting that a nonresident that directs marketing efforts to Texas in hope of soliciting sales here is subject to suit here, but concluding that a seller of a recreational vehicle located in Indiana that sold the RV to a Texas resident was not subject to being sued in Texas when the nonresident had not designed, advertised or distributed the vehicle in Texas even though the resident alleged that the vehicle had been misrepresented in discussions the Texas resident had with the nonresident on the telephone).

The subject of the parties' dispute in this case concerns the sale of an antique car. It is settled that a Texas resident's mere negotiation and entry into a contract with nonresidents is insufficient to establish the minimum contacts required to show that a Texas court possesses jurisdiction over the nonresident involving a contract dispute. *See IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 597-98 (Tex. 2007) (holding that a Texas resident's contract for services, which were to be performed in California, was insufficient to satisfy the minimum contacts test); *Weatherford*

Artificial Lift Sys., Inc. v. A & E Sys. SDN BHD, 470 S.W.3d 604, 615 (Tex. App.—Houston [1st Dist.] 2015, no pet.) ("An individual's contract with an out-of-state party alone cannot automatically establish sufficient minimum contacts in the other party's home forum."). With respect to DeGeorge's allegation that the Fabels misrepresented and failed to disclose information about the Model T based on the information he viewed concerning the car on the Internet, these allegations, even if true, are not sufficient to show that the Fabels directed their marketing of the Model T at residents of Texas with the intent to sell it to a Texas resident. *See Michiana*, 168 S.W.3d at 791 (explaining that an allegation or evidence that a nonresident made misrepresentations about a recreational vehicle by phone was insufficient to demonstrate that a Texas court could exercise specific jurisdiction over nonresident that sold the vehicle). Moreover, by failing to file an affidavit to support the allegations of his complaint, DeGeorge wholly failed to prove that any tort in connection with the transaction to sell the Model T occurred within the borders of the State of Texas. *See Kelly*, 301 S.W.3d at 659.

In conclusion, the pleadings before the trial court failed to demonstrate that the Fabels had sufficient minimum contacts with Texas to allow a court to exercise jurisdiction over the dispute, which concerned the sale of the Model T, delivered to DeGeorge in Florida. We overrule issue two. Because the trial court did not err by

ordering DeGeorge's suit dismissed for lack of jurisdiction, we affirm the order granting the Fabels' special appearance.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on June 23, 2015
Opinion Delivered April 28, 2016

Before Kreger, Horton, and Johnson, JJ.