COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00006-CV

COMPOSITE COOLING SOLUTIONS, L.P. — APPELLANT

V.

LARRABEE AIR CONDITIONING, INC. D/B/A KAR & LARRABEE MECHANICAL CONTRACTORS — APPELLEE

FROM THE 67TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 067-281269-15

MEMORANDUM OPINION[1]

I. INTRODUCTION

The sole issue we address in this appeal is whether Appellee Larrabee Air Conditioning, Inc. d/b/a KAR & Larrabee Mechanical Contractors waived its special appearance. Because we answer this issue in the affirmative, we will

[1]*See* Tex. R. App. P. 47.4.

reverse the trial court's order sustaining Larrabee's special appearance and remand this case to the trial court.

II. FACTUAL AND PROCEDURAL BACKGROUND

Appellant Composite Cooling Solutions, L.P. (CCS) brought suit against Larrabee for tortious interference with a contract and for a declaratory judgment that CCS did not owe a back charge to Larrabee.[2] Larrabee filed a special appearance. The trial court signed an October 13, 2016 order sustaining Larrabee's special appearance and ordering CCS's suit against Larrabee dismissed with prejudice. Fifteen days later, on October 28, 2016, Larrabee filed with the trial court "Defendant's Motion for Attorneys' Fees and Costs (Subject to Special Appearance)."

Larrabee's motion alleged that "CCS brought this lawsuit in an effort to extort attorneys' fees from Larrabee" and requested that the trial court award Larrabee $32,508 in reasonable and necessary fees and costs incurred "in defending itself from CCS's claims pursuant to the Uniform Declaratory Judgment[s] Act." Larrabee explained:

> 4. In "any proceeding" under the UDJA, "the court may award costs and reasonable and necessary attorney's fees as are equitable and just." Tex. Civ. Prac. & Rem. Code [Ann.] § 37.009. The UDJA "entrusts attorney fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the

[2]CCS also filed suit against Mount Sinai but subsequently dropped Mount Sinai from the lawsuit after Mount Sinai paid CCS the damages CCS alleged that it owed.

additional requirements that fees be equitable and just, which are matters of law.

5. CCS may argue that attorneys' fees cannot be awarded because there was not a determination that Larrabee was the prevailing party, because there was no final judgment[,] or because the Court does not have jurisdiction. All of these arguments however fail.

6. The award of attorney[s'] fees is not dependent on a finding that the party "substantially prevailed." Instead, a trial court may award attorney[s'] fees to a non[]prevailing party as are equitable and just.

7. Moreover, the statute does not require a judgment on the merits of the dispute as a prerequisite to a fee award. [Citations omitted.]

The attorneys' fees affidavit attached to Larrabee's motion provided, in part,

4. I am the lead attorney for the Defendant in Cause No. 067-281269-15; *Composite Cooling Solutions, L.P. v. Larrabee Air Conditioning, Inc. d/b/a KAR & Larrabee Mechanical Contractors;* In the 67th Judicial District Court, Tarrant County, Texas (collectively (the "Litigation").

. . . .

15. Based [on] my experience as an attorney, the facts and opinions set forth in this affidavit, and the Billing Records, a reasonable and necessary attorney fee in this Litigation for defending against Plaintiff's declaratory[-]judgment action through October 27, 2016[,] is $33,925.00. It is my opinion that additional reasonable and necessary attorneys' fees in the amount of $2,500 will be incurred through November 3, 2016, the date set for hearing Defendant's Motion for Costs and Attorneys' fees.

The trial court conducted a hearing on Larrabee's motion for attorneys' fees and costs and denied it. CCS subsequently filed a motion for reconsideration of the order sustaining Larrabee's special appearance. CCS

asserted that by filing and obtaining a hearing on its motion for attorneys' fees and costs, Larrabee had waived its special appearance by invoking the judgment of the trial court on a question other than the court's jurisdiction, by recognizing by its conduct that an action against it was properly pending, and by seeking affirmative relief from the trial court. The trial court denied CCS's motion for reconsideration and for new trial.

CCS perfected this appeal from the order sustaining Larrabee's special appearance.

III. WAIVER OF ABSENCE OF PERSONAL JURISDICTION

The concept of personal jurisdiction flows from the Due Process Clause of the Fourteenth Amendment to the United States Constitution and refers to the court's power to bind a particular person or party to a judgment. *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996); *see* U.S. Const. amend. XIV, § 1. The personal-jurisdiction requirement recognizes and protects an individual liberty interest in that it protects a defendant against the burdens of litigating in a distant or inconvenient forum. *See Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10, 102 S. Ct. 2099, 2104 n.10 (1982). Because the requirement of personal jurisdiction represents an individual right, it can, like other such rights, be waived. *Id*. at 703, 102 S. Ct. at 2105; *Trenz v. Peter Paul Petroleum Co.*, 388 S.W.3d 796, 800 (Tex. App.—Houston [1st Dist.] 2012, no pet.) ("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." (citing *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 379 (Tex. 2006))).

A defendant may submit to the personal jurisdiction of a court otherwise lacking such jurisdiction over him in a variety of ways, for example, by a contractual forum selection clause or by a stipulation. *See Ins. Corp. of Ir., Ltd.*, 456 U.S. at 703–04, 102 S. Ct. at 2105. In such circumstances, the defendant has waived the court's absence of personal jurisdiction over him. *Reata*, 197 S.W.3d at 379.

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 that challenge. *See* Tex. R. Civ. P. 120a; *Trenz*, 388 S.W.3d at 800. A party availing himself 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."); *First Oil PLC v. ATP Oil & Gas Corp.*, 264 S.W.3d 767, 776 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

A party enters a general appearance that is not in compliance with rule 120a and therefore waives the party's right to specially appear for the limited purpose of asserting a lack of personal jurisdiction by the trial court when he (1) invokes the judgment of the court on any question other than the court's

jurisdiction, (2) recognizes by his acts that an action is properly pending, or (3) seeks affirmative relief 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, 322 (Tex. 1998) ("A party enters a general appearance whenever it invokes the judgment of the court on any question other than the court's jurisdiction; if a defendant's act recognizes that an action is properly pending or seeks affirmative action from the court, that is a general appearance." (quoting *Moore v. Elektro–Mobil Technik GmbH*, 874 S.W.2d 324, 327 (Tex. App.—El Paso 1994, writ denied))), *cert. denied*, 525 U.S. 1067 (1999).

IV. LARRABEE MADE A GENERAL APPEARANCE AFTER THE TRIAL COURT SUSTAINED ITS SPECIAL APPEARANCE; LARRABEE THEREBY WAIVED ITS SPECIAL APPEARANCE

CCS's first issue asserts that by filing a motion seeking a judgment for attorneys' fees under the UDJA after the trial court had sustained its special appearance, Larrabee generally appeared, voluntarily submitted itself to the jurisdiction of the trial court, and waived its special appearance. We examine the three examples of waiver-of-special-appearance conduct enunciated by the Texas Supreme Court in *Trejo* and *Dawson-Austin* as applied to the facts before us to determine whether Larrabee made a general appearance that waived its right to contest the trial court's personal jurisdiction over it.

A. Larrabee invoked the judgment of the trial court on a question other than personal jurisdiction over Larrabee

After the trial court had sustained Larrabee's special appearance, Larrabee filed a motion seeking an award of "reasonable and necessary" attorneys' fees for "defending itself from CCS's claims pursuant to the Uniform Declaratory Judgment[s] Act." As set forth above, paragraph number four of Larrabee's motion seeking an award of attorneys' fees asks the trial court to exercise its discretion to award attorneys' fees, to make a legal finding that an award of attorneys' fees to Larrabee is equitable and just, and to engage in its fact-finding function as to the reasonableness and necessity of the amount—$33,925—of attorneys' fees sought by Larrabee. Larrabee also requested, obtained, and participated in a hearing on its motion.

By its motion and conduct, Larrabee invoked the judgment of the trial court on a question other than the court's exercise of personal jurisdiction over Larrabee. *See, e.g.*, *Klingenschmitt v. Weinstein*, 342 S.W.3d 131, 134 (Tex. App.—Dallas 2011, no pet.) (holding defendant's motion to dismiss for failure to state a cause of action invoked trial court's judgment on issue "not related to his special appearance"); *Beistel v. Allen*, Nos. 01-06-00246-CV, 01-06-00247-CV, 2007 WL 1559840, at *3 (Tex. App.—Houston [1st Dist.] May 31, 2007, no pet.) (mem. op.) (holding defendant's counsel's objection to evidence at hearing on termination of wage-withholding order invoked trial court's judgment on "question other than the court's jurisdiction"). Because Larrabee invoked the trial court's

judgment on a question other than the court's exercise of personal jurisdiction over it, Larrabee made a general appearance, voluntarily submitted to the trial court's jurisdiction, and waived its previously-sustained special appearance. *See Trejo*, 142 S.W.3d at 304; *Dawson-Austin*, 968 S.W.2d at 322; *Beistel*, 2007 WL 1559840, at *3 (holding Beistel's general appearance, made after special appearance had been sustained, made Beistel a party to the suit).

B. Larrabee recognized by its request for attorneys' fees that a declaratory-judgment action was properly pending

Larrabee's pleading seeking an award of attorneys' fees pursuant to a Texas statute—Texas Civil Practice and Remedies Code section 37.009—constitutes an action by Larrabee recognizing that a declaratory-judgment action was or had been properly pending against Larrabee in the Texas trial court. As detailed above, Larrabee's motion characterized Larrabee as the nonprevailing party in CCS's declaratory-judgment action filed by CCS in Cause No. 067-281269-15 in the 67th District Court of Tarrant County and sought attorneys' fees for "defending against" CCS's declaratory-judgment action. By these contentions, Larrabee recognized that CCS's declaratory-judgment action was or had been properly pending against Larrabee; that is, if no declaratory-judgment action was or had been properly pending against Larrabee in the Texas trial court because the Texas trial court lacked personal jurisdiction over Larrabee, then the trial court could not have granted a judgment in Larrabee's favor for UDJA attorneys' fees. *See CSR Ltd*., 925 S.W.2d at 594 ("A court must possess both

subject[-]matter jurisdiction over a case and personal jurisdiction over a party to issue a binding judgment.").[3] Although the trial court had sustained Larrabee's special appearance, Larrabee's subsequent motion seeking a judgment for UDJA attorneys' fees implicitly, if not explicitly, recognized that a declaratory-judgment action was or had been properly pending against Larrabee in the Texas trial court. Because Larrabee recognized by its request for UDJA attorneys' fees that a declaratory-judgment action was or had been properly pending in the trial court against Larrabee, Larrabee made a general appearance, voluntarily submitted to the trial court's jurisdiction, and waived its previously-sustained special appearance. *See Trejo*, 142 S.W.3d at 304; *Dawson-Austin*, 968 S.W.2d at 322.

C. Larrabee sought affirmative relief from the trial court

Larrabee's motion seeking attorneys' fees and costs under the UDJA sought affirmative relief from the trial court unrelated to Larrabee's jurisdictional challenge. *See, e.g.*, *Town of Flower Mound v. Upper Trinity Reg'l Water Dist.*, 178 S.W.3d 841, 844 (Tex. App.—Fort Worth 2005, no pet.) ("A request for attorney's fees made in accordance with civil practice and remedies code section 37.009 is a claim for affirmative relief."); *Falls Cty., Tex. v. Perkins & Cullum*, 798 S.W.2d 868, 871 (Tex. App.—Fort Worth 1990, no writ) ("We hold that a request for attorney's fees made in a [UDJA] case is a claim for affirmative relief."). The

[3]At the hearing on its motion for UDJA attorneys' fees, Larrabee argued that "even if the Court doesn't have [personal] jurisdiction, [it] can award [attorneys'] fees."

filing of a pleading seeking attorneys' fees under the UDJA is a request for affirmative relief that is inconsistent with an assertion that the trial court lacks personal jurisdiction over the person or entity filing the counterclaim. *Cf. In re C.A.W.P.*, No. 13-12-00382-CV, 2014 WL 4402201, at *3 (Tex. App.—Corpus Christi Sept. 4, 2014, pet. denied) (mem. op.); *Velco Chems., Inc. v. Polimeri Europa Americas, Inc.*, No. 14-03-00395-CV, 2004 WL 1965643, at *2 (Tex. App.—Houston [14th Dist.] Sept. 7, 2004, no pet.) (mem. op.). Likewise, by appearing in court and arguing its motion seeking attorneys' fees, Larrabee made a general appearance. *In re D.M.B.*, 467 S.W.3d 100, 104 (Tex. App.—San Antonio 2015, pet. denied) (explaining that by participating in hearing by making arguments and objecting to evidence, party who had not been served made general appearance).

Because Larrabee filed a motion seeking a judgment against CCS for attorneys' fees and costs under the UDJA and appeared in court to present and argue that motion, Larrabee sought affirmative relief from the trial court, made a general appearance, voluntarily submitted to the trial court's jurisdiction, and waived its previously-sustained special appearance. *See Trejo*, 142 S.W.3d at 304; *Dawson-Austin*, 968 S.W.2d at 322.

D. Larrabee's Contentions

Larrabee argues that its request for attorneys' fees does not constitute a general appearance and did not waive its special appearance because (1) it complied with rule 120a's due-order-of-pleading requirement, (2) it filed its

request for attorneys' fees "subject to" its special appearance, (3) it sought only "defensive" attorneys' fees, and (4) it filed its motion for attorneys' fees *after* the trial court had signed a judgment.[4]

We first address Larrabee's arguments that its motion for attorneys' fees under the UDJA was not a general appearance because it did not violate rule 120a's due-order-of-pleading or due-order-of-hearing requirements. Rule 120a does impose a due-order-of-pleading requirement and a due-order-of-hearing requirement on a person or entity attempting to appear before a Texas court for the limited purpose of contesting personal jurisdiction. *See Trenz*, 388 S.W.3d at 800. But CCS does not contend, nor does the record reflect, that Larrabee failed to comply with rule 120a's due-order-of-pleading or due-order-of-hearing requirements. Instead, as set forth above, by filing its post-dismissal-judgment motion for UDJA attorneys' fees, Larrabee invoked the judgment of the court on a question other than the court's jurisdiction, recognized that CCS's declaratory-judgment action against it was or had been properly pending, and sought affirmative relief from the trial court; thus, Larrabee made a general appearance that waived its jurisdictional complaint. *See Trejo*, 142 S.W.3d at 304; *Dawson-Austin*, 968 S.W.2d at 322. Contrary to Larrabee's position, compliance with rule 120a's procedural due-order-of-pleading and due-order-of-hearing requirements

[4]Larrabee asserts that it "did not retroactively waive i[t]s special appearance by seeking defensive attorney[s'] fees after the trial court entered judgment dismissing the suit for lack of jurisdiction[] because the motion [for attorneys' fees and costs] fully comported with Rule 120a."

does not defeat a substantive challenge that a specially-appearing party has invoked the judgment of the trial court on a question other than the court's jurisdiction, has recognized that a proceeding against it is properly pending, or has sought affirmative relief from the court. *See Beistel*, 2007 WL 1559840, at *3; *see also Branckaert v. Otou*, No. 01-08-00637-CV, 2011 WL 3556949, at *3 (Tex. App.—Houston [1st Dist.] Aug. 11, 2011, no pet.) (mem. op.) (recognizing motion for continuance may or may not constitute general appearance waiving objection to personal jurisdiction depending on substance of motion).

Larrabee contends that its request for attorneys' fees did not constitute a general appearance because it was made "subject to" Larrabee's special appearance. The use or non-use of the words "subject to" does not magically transform appearances into or out of compliance with rule 120a. *See, e.g.*, *Dawson-Austin*, 968 S.W.2d at 322–23 (explaining that nothing in the language of rule 120a mandates the use of "subject to" phraseology); *Hotel Partners v. Craig*, 993 S.W.2d 116, 123 (Tex. App.—Dallas 1994, writ denied) (rejecting proposition that "subject to" phraseology is required by rule 120a). Instead, it is the substance of the appearance—whether it invoked the judgment of the trial court on a question other than the court's jurisdiction, recognized that a proceeding against the specially-appearing party was properly pending, or sought affirmative relief from the court—that determines whether an appearance constitutes a general appearance that waives a party's special appearance.

Larrabee contends that the filing of its motion for attorneys' fees and costs and its appearance in court to argue that motion did not constitute a general appearance because it sought only "defensive attorney[s'] fees" under the UDJA.[5] Larrabee's categorization of its attorneys' fees as "defensive" is a meaningless distinction in the present context. Larrabee has not cited, and we have not located, authority for the proposition that "defensive" attorneys' fees are treated any differently than "offensive" attorneys' fees in our analysis of whether such request constitutes a general appearance because it seeks affirmative relief, invokes the judgment of the court on any question other than the court's jurisdiction, or constitutes an act in recognizing that an action is properly pending.[6]

Larrabee contends that because rule 120a provides that "[e]very appearance, prior to judgment, not in compliance with this rule is a general appearance[,]" an appearance *after* judgment cannot be a general appearance for purposes of violating rule 120a. *See* Tex. R. Civ. P. 120a. This language in rule 120a, however, does not foreclose the possibility that a general appearance

[5]On appeal, Larrabee defines "defensive" attorneys' fees as fees "premised on Larrabee's successful showing that the trial court lacked personal jurisdiction."

[6]Larrabee does cite *Tex. Dep't of Criminal Justice v. McBride*, 317 S.W.3d 731, 732 (Tex. 2010), but this case holds that TDCJ's request for attorney's fees does not waive the defendant-governmental entity's sovereign immunity. *See id.* Larrabee is not a governmental entity and is asserting a lack of personal jurisdiction, not sovereign immunity.

can be made after judgment is entered. *See Kaminetzky v. Newman*, No. 01-10-01113-CV, 2011 WL 6938536, at *6 (Tex. App.—Houston [1st Dist.] Dec. 29, 2011, no pet.) (mem. op.); *Beistel*, 2007 WL 1559840, at *3. A party may, even after dismissal of the claims against it, voluntarily submit itself to the jurisdiction of the trial court and thereby waive its right to challenge the trial court's exercise of personal jurisdiction over it from that point forward. *Cf. Mays v. Perkins*, 927 S.W.2d 222, 225 (Tex. App.—Houston [1st Dist.] 1996, no writ) (holding defendant who appeared after he was dismissed from suit had submitted to jurisdiction of trial court); *CIGNA Ins. Co. v. TPG Store, Inc*., 894 S.W.2d 431, 435 (Tex. App.—Austin 1995, no writ) (same); *Davis v. Outdoor Equip. Co.*, 551 S.W.2d 72, 73 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ) (same).

E. Disposition

We hold that by filing a motion requesting an award of $33,925 in attorneys' fees under the UDJA, by obtaining a hearing on the motion, and by appearing in court and arguing the merits of the motion, Larrabee invoked the judgment of the trial court on an issue other than personal jurisdiction, recognized that a declaratory-judgment action had been properly pending against it, and sought affirmative relief from the trial court—all of which constituted a general appearance in the trial court made after the claims against Larrabee had been dismissed. Consequently, Larrabee made a general appearance, voluntarily submitted itself to the jurisdiction of the trial court, and waived its individual liberty interest (protected by the Due Process Clause) in avoiding the

burdens of litigating in a distant or inconvenient forum. We sustain CCS's first issue.[7]

V. CONCLUSION

Having sustained CCS's first issue, we reverse the trial court's judgment sustaining Larrabee's special appearance. We remand this cause to the trial court for further proceedings consistent with this opinion.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: WALKER, KERR, and PITTMAN, JJ.

DELIVERED: July 13, 2017

[7]Having sustained CCS's first issue, we need not address its second issue. *See* Tex. R. App. P. 47.1 (requiring appellate court to address only issues necessary to the disposition of the appeal).