



**IN THE
TENTH COURT OF APPEALS**

No. 10-15-00227-CV

**RYAN COMPANIES US, INC. DBA RYAN
MIDWEST CONSTRUCTION COMPANY,**

Appellant

v.

**THOMAS E. NOTCH, PE DBA NOTCH
ENGINEERING COMPANY,**

Appellee

**From the 13th District Court
Navarro County, Texas
Trial Court No. D12-21636-CV**

MEMORANDUM OPINION

Ryan Companies US, Inc. d/b/a Ryan Midwest Construction Company appeals the trial court's order granting Thomas E. Notch, PE d/b/a Notch Engineering Company's special appearance and dismissing Ryan's claims against Notch. Because we find the trial court has personal jurisdiction over Notch and that such jurisdiction does not offend traditional notions of fair play and substantial justice, we reverse the trial court's order and remand this case to the trial court to render an order denying

Notch's special appearance.

BACKGROUND

In 2004, Gander Mountain Company hired Ryan to design and build a Gander Mountain retail store in Corsicana, Texas. Ryan, in turn, hired Notch to be a part of the project's design team – to design structural elements for the project. Notch began working on the project pursuant to verbal authorization and on February 12, 2004, Ryan and Notch executed a written "Project Agreement." The Project Agreement called for Notch to perform structural engineering design services for the "Project: An approximately 87,663 square foot Retail facility to be constructed on a site located at Corsicana, TX." Notch was to be paid at least \$42,900.00 for the structural engineering design services called for by the Project Agreement. Some of the particular tasks Notch contracted to perform for the project included: (1) redesigning structural calculations to incorporate site specific design loads for Corsicana; and (2) design and detail the foundations to allow for drilled piers at panel joints to accommodate the expansive clay at the site. Ultimately, Notch prepared the structural plans for the project in Corsicana. Ryan built the project in 2004 using Notch's structural plans.

In January 2007, after Gander began notifying Ryan of various problems at the project, Ryan contacted Notch for assistance in diagnosing and resolving the problems at the project. On January 25, 2007, Notch provided Ryan with professional opinions regarding the causes of the post-construction problems at the project and recommended

procedures for repairing those problems. A few months later, on May 21, 2007, Notch traveled to Corsicana to observe and evaluate the problems at the project. After this inspection, Notch sent Ryan a formal report in which Notch provided his opinions regarding: (1) the reasons for and causes of the problems he observed at the project; and (2) methods to remedy those problems. In early July 2007, Notch analyzed roof joist failures at the project and contacted a third-party in Texas in an effort to develop a plan to repair those joists.

Ryan performed substantial repairs to the project through 2010. In 2012, Gander Mountain filed suit against Ryan seeking damages arising from: (1) the development, design, and construction of the project; and (2) the post-construction remediation and repairs to the project. Ryan answered and filed its third-party petition against parties that it alleged were substantially involved in or participated in the development, design, construction, and/or repairs to the project, including Notch. Notch specially appeared and objected to the trial court's jurisdiction. Ryan responded, and after a hearing, the trial court granted Notch's special appearance.

In one issue, Ryan asserts that the trial court erred in granting Notch's special appearance.

PERSONAL JURISDICTION

Pursuant to Rule 120a of the Texas Rules of Civil Procedure, a special appearance may be made by any party for the purpose of objecting to the jurisdiction of the court

over the person or property of the defendant on the ground that such person or property is not amenable to process issued by the courts of this State. TEX. R. CIV. P. 120a(1). Personal jurisdiction is a question of law which we review de novo. *Kelly v. General Interior Constr., Inc.*, 301 S.W.3d 653, 657 (Tex. 2010); *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). Texas courts have personal jurisdiction over a nonresident defendant when (1) the Texas long-arm statute provides for it, and (2) the exercise of jurisdiction is consistent with federal and state due process guarantees. *Spir Star AG v. Kimich*, 310 S.W.3d 868, 872 (Tex. 2010); *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007).

Under the Texas long-arm statute, the plaintiff has the initial burden to plead sufficient allegations to confer jurisdiction. *Kelly*, 301 S.W.3d at 658; *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 337 (Tex. 2009); *American Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 807 (Tex. 2002). The defendant seeking to avoid being sued in Texas then has the burden to negate all potential bases for jurisdiction pled by the plaintiff. *See id.* When, as here, the trial court does not make findings of fact and conclusions of law in support of its ruling, "all facts necessary to support the judgment and supported by the evidence are implied." *Retamco*, 278 S.W.3d at 337 (quoting *BMC Software*, 83 S.W.3d at 795 (citations omitted)). However, the rule of implied findings of fact in support of the judgment cannot be invoked when the evidence establishes as a matter of law the issue to be determined. *Zac Smith & Co. v.*

Otis Elevator Co., 734 S.W.2d 662, 666 (Tex. 1987).

STEP ONE—THE LONG ARM STATUTE

The Texas long-arm statute provides, in relevant part:

In addition to other acts that may constitute doing business, a nonresident does business in this state if the nonresident:

(2) commits a tort in whole or in part in this state;

TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (West 2014). The statute's broad doing-business language "allows the statute to reach as far as the federal constitutional requirements of due process will allow." *Retamco*, 278 S.W.3d at 337 (quoting *Moki Mac*, 221 S.W.3d at 575 (citations omitted)); accord *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 788 (Tex. 2005). Therefore, we only analyze whether Notch's acts would bring him within Texas' jurisdiction consistent with constitutional due process requirements. See *Moki Mac*, 221 S.W.3d at 575 (citations omitted).

STEP TWO—CONSTITUTIONAL DUE PROCESS GUARANTEES

Under a constitutional due-process analysis, personal jurisdiction exists when (1) the non-resident defendant has established minimum contacts with the forum state, and (2) the assertion of jurisdiction complies with "traditional notions of fair play and substantial justice." *Moki Mac*, 221 S.W.3d at 575 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). We focus on the defendant's activities and expectations when deciding whether it is proper to call the defendant before a Texas court. *Int'l Shoe Co.*, 326 U.S. at 316.

Minimum Contacts

A defendant establishes minimum contacts with a state when the defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958) (citing *Int'l Shoe Co.*, 326 U.S. at 319). Purposeful availment requires a defendant to seek some "benefit, advantage, or profit by 'availing' itself of the jurisdiction." *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005). Further, the "defendant's activities, whether they consist of direct acts within Texas or conduct outside Texas, must justify a conclusion that the defendant could reasonably anticipate being called into a Texas court." *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)).

A nonresident's contacts can give rise to either specific or general jurisdiction. *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009); *Am. Type Culture Collection*, 83 S.W.3d at 806. Here, only specific jurisdiction over Notch is at issue. A court has specific jurisdiction over a defendant if the defendant's alleged liability arises from or is related to an activity conducted within the forum. *Spir Star AG v. Kimich*, 310 S.W.3d 868, 873 (Tex. 2010); *CSR Ltd. v. Link*, 925 S.W.2d 591, 595 (Tex. 1996). In such cases, "we focus on the 'relationship among the defendant, the forum[,] and the litigation.'" *Spir Star AG*, 310 S.W.3d at 873 (quoting *Moki Mac*, 221 S.W.3d at

575-76). Thus, specific jurisdiction is appropriate when (1) the defendant's contacts with the forum state are purposeful, and (2) the cause of action arises from or relates to the defendant's contacts. *Spir Star AG*, 310 S.W.3d at 873.

Allegations and Jurisdictional Contacts

Ryan alleged in its Third-Party Petition that Gander sued Ryan for alleged design and construction defects at the Corsicana project. Ryan sued the third-party defendants, which included Notch and five others, for contribution, negligence, breach of express and implied warranties, breach of contract, and indemnity. Ryan alleged that, with respect to Notch and the project, Notch purposely directed its business activities toward the State of Texas and that matters at issue in the lawsuit arose out of or were related to the business activities of Notch that were directed toward Texas. Specifically, Ryan alleged that Notch designed the structural aspects of the project, reviewed shop drawings and testing reports, inspected the installation of the structural work on the project, and was involved in efforts to repair the project. There was no dispute, and evidence before the trial court supports the proposition, that Notch knew the structural design plans were for a facility in Corsicana, Texas.

Along with denying he was a resident of Texas, conducted business in Texas, had any contacts in Texas, or had committed any tort in Texas, Notch denied that he designed the facility in Corsicana. Notch stated in his affidavit in support of his special appearance that he “retained a Texas licensed professional engineer for *full structural*

design, review, approval and stamping of the structural engineering plans for the Gander Mountain facility at issue in this lawsuit. [He] did not stamp the structural engineering plans...." No evidence was attached to his special appearance, his affidavit, or his reply which would support these statements.

Ryan, however, attached evidence in its response to Notch's special appearance which contradicted Notch's denial. Notch sent various emails and letters to officials at Ryan stating that he or his company, "have been working on this project [Gander Mountain retail store in Corsicana] with an earlier verbal authorization," "designed and detailed the project [Gander Mountain retail store in Corsicana] appropriately," and "prepared the structural plans for the Gander Mountain retail store in Corsicana." Further, Notch agreed in a written document signed by him to prepare a complete set of certified structural design documents (calculations, plans and specifications) for the building foundation and structural systems and make one field observation (excluding punch list inspections) at the project site. In accordance with the written agreement, Notch made that one field observation at the site in Corsicana after the problems to the foundation and structure arose. Notch also contacted P.J. Moran, "at the Texas plant where the joists were produced," for Moran's thoughts on Notch's suggestions for joist and wall repair at the Corsicana site. He asked Moran to look at the provided correspondence and to call Notch to discuss it further. Notch informed Moran that Ryan would compensate Moran for his time in assisting Notch and Ryan.

Notch contends that we cannot consider whether his conduct was “directed or aimed at” Texas or whether the effects were in Texas, and thus, Ryan’s claims fail because that was all Notch’s contacts were. We agree that we do not evaluate jurisdiction on the basis of whether a defendant “directed a tort” toward a Texas party, or knew “that the brunt of the injury would be felt by a particular resident” in Texas. *Michiana Easy Livin’ Country, Inc. v. Holten*, 168 S.W.3d 777, 788-91 (Tex. 2005). Jurisdiction turns on the contacts themselves, not on whether those contacts were tortious. *See id.* 792.

But this case is not like those cases where the contacts were not sufficient even though defendant may have “directed a tort” toward a Texas party or the “brunt” of the injury may have been felt in Texas. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980) (foreseeability of accident in forum state was not sufficient for jurisdiction over seller of vehicle); *Michiana Easy Livin’ Country, Inc. v. Holten*, 168 S.W.3d 777 (Tex. 2005) (single telephone contact by Texan not sufficient to support jurisdiction even though RV was delivered and used in Texas); *CMMC v. Salinas*, 929 S.W.2d 435, (Tex. 1996) (no jurisdiction over foreign manufacturer who made no effort to market its winepress equipment in Texas, made only one other sale in Texas, and did not initiate the sale at issue to a Texas buyer). It is not that Notch prepared plans for Gander generally and that those plans ultimately were used on the Corsicana project. Rather, Notch contracted to prepare, and did prepare, designs

specifically for the Corsicana project. Notch worked on the Corsicana project, visited the project site as required by his contract with Ryan, and initiated contact with at least one person in Texas who assisted in the construction of the project in order to determine a solution for the structural problems suffered at the project. And although he may have been paid by Ryan, he benefited from designing the structural plans for the Corsicana project. These are not just fortuitous occurrences.

Jurisdiction when there are no or little physical ties to Texas is not a foreign concept. The Texas Supreme Court has found jurisdiction over nonresidents with no physical ties to Texas when an out-of-state contract was formed "for the sole purpose of building a hotel in Texas." *Zac Smith & Co., Inc. v. Otis Elevator Co.*, 734 S.W.2d 662, 665-66 (Tex. 1987). As in *Zac Smith*, the sole purpose of Notch's contract with Ryan was to build a Gander Mountain retail store in Corsicana.

Focusing on the relationship between the defendant, the forum, and the litigation, we find Notch's contacts with Texas were purposeful, and all claims alleged by Ryan in its Third-Party Petition arise out of or relate to those contacts. Thus, Notch's contacts are sufficient to support specific jurisdiction.

Traditional Notions of Fair Play and Substantial Justice

Having determined that Notch has minimum contacts with Texas sufficient to support specific jurisdiction, we must now determine whether an assertion of jurisdiction over Notch comports with "traditional notions of fair play and substantial

justice." *Guardian Royal Exchange Assur., Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 228 (Tex. 1991). "Only in rare cases, however, will the exercise of jurisdiction not comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the forum state." *Id.* at 231 (citing *Burger King*, 471 U.S. at 477). Nonetheless, we still consider: (1) the burden on the defendant; (2) the interests of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Moncrief Oil Int'l, Inc. v. OAO Gazprom*, 414 S.W.3d 142, 155 (Tex. 2013); *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 341 (Tex. 2009). To defeat jurisdiction, Notch must present "a compelling case that the presence of some consideration would render jurisdiction unreasonable." *Spir Star AG v. Kimich*, 310 S.W.3d 868, 878-879 (Tex. 2010).

Notch argues that it would be unfair and unjust for a Texas court to exercise personal jurisdiction over him because aside from a single visit to Texas, he had not had "in-person" contact with the project in Texas and he had not "purposely availed himself" of the privilege of conducting activities in Texas. But these are just arguments against a finding of minimum contacts which we have already found.

Notch further argues that it would be a substantial burden and inconvenience to

him because he has no agents, employees, or attorneys in Texas and would have to incur significant travel and lodging expenses. In other words, a trial in Texas is too far away.

Suit in Texas certainly imposes a burden on out-of-state residents. However, Notch had no problem traveling to Texas when it was required of him by contract, and distance alone cannot ordinarily defeat jurisdiction. *Moncrief Oil Int'l, Inc. v. OAO Gazprom*, 414 S.W.3d 142, 155 (Tex. 2013). Although there are no actual Texas residents involved in the primary suit between Ryan and Gander Mountain,¹ Ryan joined three Texas businesses and one Minnesota corporation registered to do business in Texas as third party defendants in the lawsuit along with Notch. Texas has an interest in adjudicating the claims against the Texas third party defendants, and Texas is a convenient forum for those litigants. *See Lewis v. Indian Springs Land Corp.*, 175 S.W.3d 906, 919 (Tex. App.—Dallas 2005, no pet.). Further, it would promote judicial economy and Ryan's interest in obtaining convenient and effective relief to litigate all claims as to all parties in one court. *Moncrief Oil Int'l, Inc. v. OAO Gazprom*, 414 S.W.3d 142, 155 (Tex. 2013). Litigating Ryan's third-party claims against four defendants in this State and one defendant in Minnesota is inefficient.

On the whole, the burden on Notch in litigating in Texas is outweighed by

¹ Ryan is a Minnesota company that is registered to do business in Texas. Gander Mountain is also a Minnesota company that operates a national retail network of stores and leases commercial retail property in Corsicana, Texas.

Texas's interest in litigating the entire dispute. Notch did not present a compelling case that the presence of some consideration would render jurisdiction in Texas unreasonable. Accordingly, we find that the exercise of specific jurisdiction over Notch by a Texas court does not offend traditional notions of fair play and substantial justice.

CONCLUSION

Because Notch's contacts are sufficient to support specific jurisdiction, the exercise of which does not offend traditional notices of fair play and substantial justice, Ryan's sole issue is sustained. The trial court's order granting Notch's special appearance and dismissing Ryan's claims against Notch is reversed, and this case is remanded to the trial court to render an order denying Notch's special appearance.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Reversed and remanded
Opinion delivered and filed March 3, 2016
[CV06]

