TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-05-00150-CV

Veeco Services, Inc., Appellant

v.

J. L. Wilson d/b/a/ Suntan Supply Company, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT
NO. GN301409, HONORABLE SUZANNE COVINGTON, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Veeco Services, Inc., appeals the denial of its special appearance, claiming that the evidence was both legally and factually insufficient to support the trial court's conclusions that Veeco's contacts with the forum established specific and general jurisdiction. Because the record reflects no competent evidence in support of the trial court's findings of fact or conclusions of law, we reverse the order denying Veeco's special appearance and render judgment dismissing all claims against it for want of jurisdiction.

BACKGROUND

Veeco, a New Jersey corporation that warehouses goods for other companies, was brought into the underlying breach-of-contract dispute as a third-party defendant because it

warehoused the goods at issue—tanning beds—prior to their shipment to the Texas plaintiff, Trina Marie Draughon d/b/a Simple Pleasures Tanning and Sundries.

Simple Pleasures, an Austin tanning salon, entered into a contract with J. L. Wilson d/b/a Suntan Supply Company to purchase tanning equipment and supplies. Ultimately, Simple Pleasures sued Suntan Supply for breach of contract, deceptive trade practices, and negligent misrepresentation, claiming that four of the tanning beds purchased from Suntan Supply were defective. Simple Pleasures also named Enco Electronic, S.A. (the Spanish manufacturer of the beds) and Spanish Sun Corporation (the Delaware-based American distributor of the beds) as defendants.

Suntan Supply then filed a third-party petition against Spanish Sun, Veeco, and BAX Global, Inc. (the New Jersey freight carrier that shipped the beds from Veeco's New Jersey warehouse to Simple Pleasures's Austin location). Suntan Supply claimed that "miscommunications" between the third-party defendants resulted in the wrong beds being shipped to Simple Pleasures and, therefore, they should be responsible for paying any damages. Suntan Supply averred that personal jurisdiction existed over the third-party defendants in Texas "because the tanning beds were shipped to Austin, Texas."

Veeco filed a special appearance challenging both specific and general jurisdiction, which was supported by an affidavit from Michael Cleary, Veeco's general manager and controller. Cleary attested that Veeco is incorporated in New Jersey with its principal place of business in Secaucus, New Jersey, and that Veeco is not authorized to do business in Texas; conducts no business in Texas; has no offices, business records, employees, agents, or representatives in Texas;

and does not advertise or recruit in Texas. Regarding the underlying dispute, Cleary attested that Veeco's only involvement was a contract with Enco and BAX Global, both nonresidents of Texas, to warehouse the tanning beds in New Jersey, but that Veeco otherwise had no contract with any Texas resident regarding the beds, did not hold title to the beds, and performed no acts in Texas. Cleary averred that Veeco did not purposefully avail itself of the privilege of conducting activities within Texas because it did not decide to ship the beds to Texas; rather, Enco directed Veeco to release the beds to BAX Global for shipment to Texas. Suntan Supply did not file a response to Veeco's special appearance.

A special appearance hearing occurred in which both parties presented argument. Veeco urged that it was improper for a Texas court to exercise specific or general jurisdiction over it, given that Veeco was "merely a repository" for the beds, that its only actions were performed in New Jersey, that it had no contacts with Texas related to the underlying dispute, and that it lacked continuous and systematic contacts with Texas.

Suntan Supply argued that Veeco purposefully availed itself of the privilege of conducting activities within Texas by arranging for BAX Global to ship the beds to Texas. Although no evidence was introduced or admitted at the hearing, and the record does not otherwise reflect that any evidence was filed with the clerk,[1] Suntan Supply claimed to have in its possession the following in support of its contentions: an application from the United States Department of Transportation showing that Veeco transports goods to forty-eight states; an affidavit attesting that Veeco frequently

[1] *See Michiana Easy Livin' Country, Inc. v. Holten*, No. 04-00162005, 2005 Tex. LEXIS 420, at *4-5 (Tex. May 27, 2005) (discussing that special appearance evidence may be introduced at hearing or filed with clerk).

ships goods to Dallas, San Antonio, and Houston; and a printout from Veeco's website showing that it ships to forty-eight states. Veeco objected that the trial court could not rely on any of Suntan Supply's alleged evidence because it was not offered seven days prior to the hearing and urged that Suntan Supply's claims were merely "speculation and hearsay" that were insufficient to overcome Veeco's sworn testimony.

The trial court ruled from the bench that Veeco "does have sufficient contacts with Texas to confer jurisdiction, and I will deny the Special Appearance at this time" and then signed an order stating that it had specific and general jurisdiction over Veeco. Upon Veeco's request, the trial court entered findings of fact and conclusions of law. In support of its conclusions that it had specific and general jurisdiction over Veeco, the trial court found that:

1. [Veeco] is a New Jersey corporation with its corporate headquarters at 675 New County Road, Secaucus, New Jersey.

2. [Veeco] warehouses cargo in the New Jersey area and provides transportation for the cargo to 48 states.

3. [Veeco] has a United States Department of Transportation number 106812 for transporting cargo interstate.

4. [Veeco] has transported cargo and/or subcontracted the transportation of cargo to Texas on a continual basis.

5. [Veeco] advertises on the internet and with major trucking directories that it provides transportation services to 48 states.

6. [Veeco] provides quotes to Houston companies to provide shipping to Houston, Texas.

7. [Veeco] participated in the shipping of four tanning beds that were ordered by J. L. Wilson [d/b/a Suntan Supply] and shipped to Simple Pleasures Tanning Salon in Austin, Texas on behalf of Spanish Sun Corp.

On appeal, Veeco challenges findings of fact 2-7 on the grounds that they are manifestly erroneous, without any support in the record, and against the great weight and preponderance of the evidence. Because the conclusions of law were based on these findings, Veeco urges that the trial court lacked legally and factually sufficient evidence on which it could determine that Veeco was subject to personal jurisdiction in Texas. Veeco also contends that it would violate the traditional notions of fair play and substantial justice to subject it to specific or general jurisdiction in Texas. Suntan Supply did not file a brief in this appeal.

ANALYSIS

Standard of Review

In attempting to subject a nonresident defendant to jurisdiction in Texas, the plaintiff bears the initial burden of pleading sufficient allegations to satisfy the Texas long-arm statute. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 793 (Tex. 2001); *see* Tex. Civ. Prac. & Rem. Code Ann. § 17.042 (West 1997) (jurisdiction proper upon showing that defendant is "doing business" in Texas). To avoid litigating in Texas, the nonresident defendant must file a special appearance. Tex. R. Civ. P. 120a. The burden then shifts to the defendant to affirmatively negate all bases of jurisdiction asserted by the plaintiff. *Id*. If the plaintiff fails to plead jurisdictional allegations, i.e., that the defendant has committed any act in Texas, then the defendant can satisfy its burden by presenting evidence that it is a nonresident. *Zamarron v. Shinko Wire Co.*, 125 S.W.3d 132, 137 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

According to Rule 120a, the trial court shall base its decision to grant or deny the special appearance on "the pleadings, any stipulations made by and between the parties, such

affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony." Tex. R. Civ. P. 120a(3). The rule also mandates that the "affidavits, if any, shall be served at least seven days before the hearing." *Id*.

A trial court's order granting or denying a special appearance is subject to interlocutory appeal, in which we review the entire record *de novo* to determine whether the trial court has jurisdiction over the nonresident defendant. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(7) (West Supp. 2004-05); *BMC Software*, 83 S.W.3d at 794.

If the trial court issued specific findings of fact, as here, the appellant may challenge the legal and factual sufficiency of those findings. *BMC Software*, 83 S.W.3d at 794. A legal sufficiency challenge will only succeed upon proof that not even a scintilla of evidence can be found in the record to support the fact finding. *Id.* at 795. "More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair minded people to differ in their conclusions." *Walker Ins. Servs. v. Bottle Rock Power Corp*., 108 S.W.3d 538, 548 (Tex. App.—Houston [14th Dist.] 2003, no pet.). A factual sufficiency challenge requires proof that, considering the entire record, the trial court's finding was "so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust." *Alenia Spazio, S.P.A. v. Reid*, 130 S.W.3d 201, 209 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *Goodenbour v. Goodenbour*, 64 S.W.3d 69, 75 (Tex. App.—Austin 2001, pet. denied).

Personal Jurisdiction

A Texas court may exercise personal jurisdiction over a nonresident defendant if it is authorized by the Texas long-arm statute and if it comports with the constitutional guarantees of

due process. *Schlobohm v. Schapiro*, 784 S.W.2d 355, 356 (Tex. 1990); *see* Tex. Civ. Prac. & Rem. Code Ann. § 17.042 (listing various activities that constitute "doing business" in state for jurisdictional purposes). The broad language of the Texas statute allows it to reach as far as the federal Constitution permits and, thus, the due process analysis under state law is consistent with the federal test. *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991).

Accordingly, a three-prong test must be satisfied in order to subject a nonresident defendant to personal jurisdiction in Texas: (i) the defendant must establish minimum contacts by purposefully doing some act or consummating some transaction in the forum state; (ii) the cause of action must arise from or be connected with such act or transaction, as to support specific jurisdiction, or the defendant's contacts with Texas must be continuing and systematic, as to support general jurisdiction; and (iii) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice. *Schlobohm*, 784 S.W.2d at 358.

One consideration in determining whether the contacts were purposeful is whether the defendant's actions toward the forum state were of such a nature that would make it reasonably foreseeable to the nonresident that those contacts could result in him being called into the forum to litigate. *American Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002). Thus, contacts that are random, fortuitous, or attenuated are insufficient to establish jurisdiction over the nonresident. *Id*. The purposeful availment requirement also insures that the nonresident will not be forced to litigate in this state based on the unilateral actions of a third party. *Michiana Easy Livin'*

Country, Inc. v. Holten, No. 04-00162005, 2005 Tex. LEXIS 420, at *15 (Tex. May 27, 2005); *Zamarron*, 125 S.W.3d at 138.

Jurisdiction over Veeco

The sole jurisdictional allegation pled by Suntan Supply was that "the tanning beds were shipped to Austin, Texas." This provides no evidence of a purposeful act by Veeco that was either taken in or directed at the forum because it alleges neither (1) a nexus between Veeco's action of warehousing the beds, the underlying claims, and the forum, or (2) continuous and systematic contacts by Veeco with the forum. Veeco merely needed to provide evidence of its nonresidency to defeat Suntan Supply's allegations. *See Zamarron*, 125 S.W.3d at 137. Veeco did this and more by providing Cleary's affidavit, which stated that Veeco did not and was not authorized to do business in Texas, and that Veeco did not decide to ship the beds to Texas and was not responsible for arranging or carrying out the shipment; Veeco merely released the beds to a third-party freight carrier (also based in New Jersey), per the instructions of Enco, the Spanish manufacturer of the beds. Suntan Supply did not provide any evidence to controvert the facts established by Cleary's testimony.

The trial court, however, entered findings of fact that Veeco is licensed by the department of transportation to ship cargo to forty-eight states, transports cargo to Texas on a continual basis, advertises its interstate transportation services on the internet and with major trucking directories, provides quotes to Houston companies to ship cargo to Houston, and participated in shipping the four tanning beds to Austin. The record only demonstrates one potential source for this information—the argument presented by Suntan Supply's attorney at the hearing. As

objected to by Veeco, this was not competent evidence on which the trial court could base its determinations. *See* Tex. R. Civ. P. 120a(3) (trial court can rely on pleadings, Rule 11 stipulations, affidavits and attachments filed seven days before hearing, results of discovery, and oral testimony). A permissible form of evidence under Rule 120a is oral testimony, but this means testimony of a sworn witness, not argument of counsel. Not even a scintilla of evidence can be found in the record to support findings of fact 2-7, and these findings are so contrary to the great weight of the evidence that they are manifestly erroneous.[2] *See Goodenbour*, 64 S.W.3d at 75. These findings, therefore, cannot support the trial court's legal conclusions that it has specific and general jurisdiction over Veeco. The only finding that remains is that Veeco is a New Jersey corporation headquartered in Secaucus, New Jersey, and this of course does not provide sufficient evidence on which to base personal jurisdiction over Veeco in Texas.

CONCLUSION

Considering the entire record, Veeco satisfied its burden of negating all jurisdictional facts alleged by Suntan Supply and demonstrated that the trial court lacked sufficient evidence upon which to conclude that it has personal jurisdiction over Veeco. Accordingly, we sustain Veeco's

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[2] One could argue that finding 7—that Veeco "participated" in shipping the beds—was supported by the record because Veeco warehoused the beds and then released them to BAX Global for shipping. Even interpreting "participation" broadly, however, Veeco's involvement occurred prior to the beds' shipment. Even if the record demonstrated that Veeco participated in shipping the beds, this would not provide evidence of sufficient minimum contacts on which to base personal jurisdiction. In *Michiana Easy Livin' Country, Inc. v. Holten*, the supreme court rejected the notion that a single shipment of goods into a forum was sufficient to establish purposeful contacts with the state. *See* 2005 Tex. LEXIS, at *20 n.44, *26 (citing *CSR Ltd. v. Link*, 925 S.W.2d 591, 595-96 (Tex. 1996) for proposition that, such allegations alone, absent some evidence that nonresident defendant participated in decision to ship goods to forum, was insufficient).

issues, reverse the trial court's order denying Veeco's special appearance, and render judgment dismissing all claims against Veeco for want of jurisdiction.

Jan P. Patterson, Justice

Before Chief Justice Law, Justices Patterson and Puryear

Reversed and Rendered

Filed: July 20, 2005