Affirmed and Opinion filed October 26, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-00-00151-CV

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SANTOS LTD., Appellant

V.

C. BARRY GIBSON, Appellee

On Appeal from the 334th District Court
Harris County, Texas
Trial Court Cause No. 98-44074

O P I N I O N

This is an accelerated appeal from the denial of the special appearance of Santos Ltd ("Santos"). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon Supp. 2000). The underlying suit involves a dispute between appellant Santos, the parent corporation of Santos USA ("SUSA"), and appellee Gibson, a former employee of SUSA, over the alleged wrongful termination and defamation of Gibson by subsidiary Santos USA . In two points of error, Santos argues that the trial court's denial of its special appearance was erroneous. We affirm.

Background

Beginning in 1995, Appellee Barry Gibson was employed by SUSA, an oil and gas company located in Houston. On March 2, 1998, SUSA terminated Gibson's employment. The following day, Michael Frost, an employee of the Austrailian-based Santos and interim president of SUSA, made a conference call to several of the employees of SUSA. Making this call from Adelaide, Australia, Frost informed the Santos USA staff of his new status as their interim president. Frost also allegedly defamed Gibson during this call, saying that Gibson had been terminated for his poor performance. Gibson then filed suit against Santos and SUSA for wrongful termination and slander. On October 6, 1998, Santos was served with process and subsequently presented a claim for defense of the suit with its insurer, Zurich International ("Zurich").

Pursuant to the contract of insurance between Santos and Zurich, Robert Selby, the claims manager for Zurich, contacted attorney Richard Griffin at Jackson Walker L.L.P. on October 21, 1998 and instructed him to file an answer on behalf of Santos. Griffin expeditiously carried out this request and on October 22, 1998 filed an original answer consisting of a general denial not subject to special appearance. On November 11, 1999, however, Griffin filed a Motion to Withdraw and/or Strike Unauthorized Original Answer, claiming that Zurich was without authority to appoint a legal representative for Santos. After a hearing on Santos's Motion to Strike and its special appearance, the trial court denied both. Santos now appeals.

Standard of Review

The plaintiff has the initial burden of pleading sufficient allegations to bring the nonresident defendant within the provisions of the Texas long-arm statute. *See C-Loc Retention Systems Inc. v. Hendrix*, 993 S.W.2d 473, 476 (Tex. App.–Houston [14th Dist.] 1999, pet. denied). At the special appearance hearing, the nonresident defendant bears the burden of negating all bases of personal jurisdiction. *See National Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 772 (Tex. 1995). If the plaintiff does not plead jurisdictional allegations, i.e., that the defendant has committed any act in Texas, the defendant can satisfy its burden by presenting evidence that it is a nonresident. *See Hendrix*, 933 S.W.2d at 473.

Whether the court has personal jurisdiction over a nonresident defendant is a question of law, but the proper exercise of such jurisdiction is sometimes preceded by the resolution of underlying factual disputes. *Id*. The reviewing court considers all the evidence in the record. *id*. Except where the special appearance is based upon undisputed and established facts, the standard of review for determining the appropriateness of the resolution of facts is a factual sufficiency review of the evidence. *Id*. Under the factual sufficiency standard, we may only reverse the decision of the trial court if its ruling is so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. *See In re King's Estate*, 150 Tex. 662, 664-65, 244 S.W.2d 660, 661 (1951).

Here, although requested by the parties, the trial court made no findings of fact and conclusions of law. All questions of fact, therefore, are presumed to be found in support of the judgment. *See Billingsley Parts & Equip., Inc. v. Vose*, 881 S.W.2d 165, 168-69 (Tex. App.–Houston [1st Dist.] 1994, writ denied); *Temp. Sys., Inc. v. Bill Pepper, Inc.*, 854 S.W.2d 669, 672 (Tex. App.–Dallas 1993, writ dism'd by agr.). Additionally, because the parties disagree on the facts of the case, namely, whether Zurich issued a reservation of rights letter, we apply a factual sufficiency standard. Accordingly, we must affirm the judgment of the trial court on any legal theory finding support in the evidence. *See Temp. Sys., Inc.*, 854 S.W.2d at 673.

Special Appearance Denial

In its first point of error, Santos challenges the trial court's denial of its special appearance. In support, Santos argues that it lacks the requisite minimum constitutional contacts with Texas for either general or specific personal jurisdiction and that subjecting it to the jurisdiction of Texas courts violates traditional notions of fair play and substantial justice. As discussed below, however, we do not reach the merits of this claim.

Texas law prescribes the method by which a party may challenge the jurisdictional authority of a court. This method, codified under Texas Rules of Civil Procedure, provides that:

> a special appearance may be made by any party either in person or by attorney . . . on the ground that such party or property is not amenable to process issued by the courts of this

> State . . . . Such special appearance shall be made by sworn motion filed prior to motion to transfer venue or any other plea, pleading, or motion. . . . Every appearance, prior to judgment, not in compliance with this rule is a general appearance.

TEX. R. CIV. P. 120a. Once a party enters an appearance by filing an answer without challenging jurisdiction, he is before the court for all purposes. *See Morris v. Morris*, 894 S.W.2d 859, 862 (Tex. App.–Fort Worth 1995, no writ); *West v. City Nat'l Bank of Birmingham*, 597 S.W.2d 461, 464 (Tex. Civ. App.–Beaumont 1980, no writ). In the case *sub judice*, the record demonstrates that Santos entered an appearance before the trial court by filing a general denial prior to any jurisdictional challenge. Applying Rule 120a and Texas case law, Santos appears to have waived its jurisdictional challenge. Accordingly, unless Santos can show that its original answer was unauthorized, we must hold that the trial court correctly denied its special appearance.

Motion to Strike Appellant's Original Answer

We now turn to Santos's argument that the trial court erred in denying its Motion to Strike Original Unauthorized Answer of October 22, 1998. Under Texas law, appellate courts have jurisdiction to consider immediate appeals of interlocutory orders only if a statute *explicitly* provides appellate jurisdiction. *See Stary v. DeBord*, 967 S.W.2d 352, 352-53 (Tex. 1998) (emphasis added). The Texas statute detailing such jurisdiction lists eight instances in which an appellate court may exercise jurisdiction over interlocutory orders, none of which consist of the denial of a motion to strike an unauthorized answer. *See* Tex. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (Vernon Supp. 2000). However, to the extent that the subject matter of the non-appealable interlocutory order may affect the validity of the appealable order, the non-appealable order may be considered. *See Letson v. Barnes*, 979 S.W.2d 414, 417 (Tex. App.–Amarillo 1998, pet. denied); *Texas R.R. Comm'n v. Air Prods. & Chems., Inc.*, 594 S.W.2d 219, 221-22 (Tex. Civ. App.–Austin 1980, writ ref'd n.r.e.).

After a review of the record, it appears that the trial court based its denial of Santos's special appearance on its findings denying Santos's motion to strike. Stated differently, the trial court appears to have found that Santos waived its special appearance based on its finding that Santos's initial answer was authorized. Accordingly, the trial court's finding on Santos's motion to strike issue affects the validity of

its finding on the special appearance. Under this "pendent" interlocutory jurisdiction, then, we now examine Santos's second point of error. In this point, Santos argues that the trial court erred in finding that Zurich had authority to appoint the law firm of Jackson Walker as its legal representative. More precisely, Santos argues that because Zurich had appointed Santos's legal counsel while operating under a reservation of rights, Zurich lost its authority under the terms of the policy to conduct its insured's (Santos's) defense. Because Zurich was without authority to conduct its defense, Santos argues, the general denial filed by attorney Richard Griffin of Jackson Walker was unauthorized. We disagree.

A well established presumption of law in Texas is that the attorney appearing for a party is duly authorized, and such presumption will prevail until it has been conclusively shown that the attorney was not authorized to appear for the litigant. *West*, 597 S.W.2d at 463; *Hidalgo County Drainage Dist. No. 1 v. Magnolia Petroleum Co.*, 47 S.W.2d 875, 876 (Tex. Civ. App.–San Antonio 1932, writ ref'd). The Texas Supreme Court also recognizes that a liability policy may grant the insurer the right to take complete and exclusive control of the insured's defense. *See State Farm Mut. Auto Ins. Co., v. Traver*, 980 S.W.2d 625, 627 (Tex. 1998). Conversely, Texas courts concede that, upon receiving notice of an insurer's reservation of rights under a policy, the insured may properly refuse the tender of defense and defend the suit personally. *See American Eagle Ins. Co. v. Nettleton*, 932 S.W.2d 169, 174 (Tex. App.–El Paso 1996, writ denied).

After reviewing the record, we hold that the evidence adduced at the hearing was sufficient to sustain a finding that the general denial filed by Richard Griffin on behalf of Santos was authorized. The language of the insurance contract between Zurich and Santos provided that "[Zurich] will proceed to conduct the defence [sic] of any claim made against an insured," with the policy defining a "claim" as "a written or oral notice which has been addressed to or served upon the insured . . . ." In accordance with *Traver*, then, the policy issued to Santos allowed Zurich to take complete and exclusive control of Santos's defense. *See Traver*, 980 S.W.2d at 627.

In reaching this holding, we are not persuaded by Santos's claim that Zurich, after issuing a reservation of rights, forfeited its right under the policy to conduct a defense of the claim in question. Other

than Santos's testimony at the hearing, it produced no proof that Zurich ever issued a reservation of rights for the claim in question. Moreover, a communication from Robert Selby, Zurich's claim manager, states that Zurich's "previous communication containing an apparent reservation of rights was in error and that full coverage under the policy remained undisturbed." Judging from the tenor of this communication, the reservation of rights, if indeed there was such a reservation, was never effective. Because Zurich's reservation of rights was never effective, no coverage dispute existed; thus, Zurich possessed authority to conduct Santos's defense. Accordingly, Richard Griffin, the attorney hired by Zurich to conduct Santos's defense, was duly authorized to file the general denial and waive Santos's jurisdictional challenge. Based upon this finding, the trial court correctly concluded that Santos waived its special appearance. We overrule

Appellant's two points of error and affirm the order of the trial court.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed October 26, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).