Affirmed and Opinion filed December 21, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-00-00423-CV

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PREUSSAG ENERGIE, GMBH, Appellant

V.

WELL CONSTRUCTION TEAMS, INC., Appellee

On Appeal from the 11th District Court
Harris County, Texas
Trial Court Cause No. 99-46582

O P I N I O N

This an appeal of the trial court's overruling of Preussag Energie, GMBH's special appearance. We determine whether Texas courts may assert in personam jurisdiction over Preussag, a German corporation with no physical presence in Texas, for acts alleged against it in a tortious interference with contract and breach of contract claims by Well Construction Teams, Inc. (WCT). We affirm.

Background

There are three primary participants in this case: (1) Preussag is a German corporation engaged in petroleum drilling outside the United States; (2) WCT is a drilling consulting firm incorporated in and with

its principal place of business in Texas; and (3) Arthur Williford was a Texas resident when he began working as an independent contractor consultant for WCT in 1995 until approximately 1999. At that time, WCT and Williford entered into an Independent Contractor Agreement (ICA) under which Williford was prohibited from inducing any customer of WCT from terminating its relationship with WCT. Further, the ICA prohibited Williford from engaging in business with any customer of WCT for twelve months following the termination of the ICA.

Later in 1995, WCT assigned Willford to work with Preussag pursuant to a consulting agreement between WCT and another German company, Deutag. Though Williford was based in Houston, nearly all of his work for Preussag was performed outside the U.S. Preussag was billed for Williford's services to WCT through Deutag. In 1997, WCT and Preussag entered into a consulting agreement under which the two parties could deal directly with each other. That agreement prohibited Preussag from directly contracting with any WCT associate for twelve months after its termination. The agreement stipulated it was to be construed under English law. Beginning in 1997, Preussag wired payments for Williford's services to WCT's Houston bank. In February 1999, Preussag notified WCT it was releasing Williford and terminating its agreement with WCT. The following month, Williford notified WCT that Preussag had released him. However, in June 1999, WCT learned that Williford had moved from Texas to Venezuela and was working directly for Preussag.

WCT then sued Preussag for tortious interference with contract and breach of contract. It also sued Williford, who is not a party to this appeal, for breach of contract. Preussag specially appeared, stating via the affidavit of its general counsel that it does not have a registered agent in Texas, does not hold a certificate to do business in Texas, does not engage in business in Texas, nor does it have any employees or agents here. With regard to specific jurisdiction, the affidavit tersely reads, "Preussag Energie GMBH, having no presence in Texas, has performed no acts in Texas in connection with Plaintiff's claims." The trial court overruled the special appearance and Preussag brings this interlocutory appeal of the ruling.

Standard of Review

We begin with the presumption that the court has jurisdiction over the parties. *See Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203 (Tex. 1985). Further, in interposing a special

appearance, it is the defendant's burden to negate all bases for jurisdiction. *See National Indus. Sand Ass'n v. Gibson,* 897 S.W.2d 769, 772 (Tex.1995).

The scope of review of a ruling on a special appearance includes all evidence in the record. *See Vosko v. Chase Manhattan Bank, N.A.*, 909 S.W.2d 95, 99 (Tex. App.–Houston [14th Dist.] 1995, writ denied). The existence of personal jurisdiction is a question of law. *See B.H.P. de Venezuela a/k/a B.H.P. Veneca v. Casteig,* 994 S.W.2d 321, 326 (Tex. App.–Corpus Christi 1999, pet. denied). The standard for review of a trial court's decision regarding a plea to the jurisdiction is that of factual sufficiency. *See Cadle v. Graubart,* 990 S.W.2d 469, 471 (Tex. App.--Beaumont 1999, no pet.). In this case, there was no live testimony and the facts were materially undisputed. If a special appearance is based on undisputed or otherwise established facts, an appellate court shall conduct a *de novo* review of the trial court's order. *See Conner v. ContiCarriers and Terminals, Inc.*, 944 S.W.2d 405, 411 (Tex. App.--Houston [14th Dist.] 1997, no writ).[1]

Specific Jurisdiction

Minimum Contacts

For a Texas court to exercise jurisdiction over a nonresident defendant, the Texas long-arm statute must authorize the exercise of jurisdiction, and the exercise of jurisdiction must be consistent with federal and state due-process guarantees. *See Schlobohm v. Schapiro,* 784 S.W.2d 355, 356 (Tex. 1990). The long-arm statute states: "a nonresident does business in this state if the nonresident: (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state; (2) commits a tort in whole or in part in this state; or (3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997). The statute also permits the exercise of personal jurisdiction where the nonresident is "doing business" in Texas by "other acts." *Id*. The broad language of the statute's "doing business" requirement permits the statute to reach as far as the federal constitutional

[1]Preussag argues that because it requested findings of fact and conclusions of law from the court and the court failed to file them, any questions of fact that may exist cannot be presumed to support the court's judgment. This is incorrect. Though the record indicates Preussag made an intial request for findings, it nonetheless failed to follow up with the required second request when the trial court did not comply. *See* TEX. R. CIV. P. 297.

requirements of due process will allow. *See Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991).

To comply with the federal constitutional standard, Texas uses the following test: (1) The nonresident defendant must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, the act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation. *See Schlobohm*, 784 S.W.2d at 358.

The first prong of the jurisdictional analysis is to determine whether the nonresident defendant purposefully established minimum contacts with the state. *See Guardian Royal*, 815 S.W.2d at 230. In establishing minimum contacts, a court may have general or specific jurisdiction over the defendant. *Id*. Specific jurisdiction exists where the injury to the plaintiff arises out of the minimum contacts with the forum state. *Id*. Specific jurisdiction may arise without the nonresident defendant setting foot upon the forum state's soil or may arise from the commission of a single act directed at the forum. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 471, 475-76 (1985). Mere foreseeability of causing injury in another state is not a sufficient benchmark for exercising personal jurisdiction. Rather, "the foreseeability that is critical to due process analysis that the defendant's conduct in connection with the forum state are such that he should reasonably anticipate being haled into court there." *Burger King*, 471 U.S. at 476 (quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980)). If a cause of action arises from or is related to the nonresident defendant's contacts with the state, a case for exercising jurisdiction over a nonresident defendant will be much more compelling. *See Beechem v. Pippin*, 686 S.W.2d 356, 361 (Tex. App.–Austin 1985, no writ).

At the outset, we focus on Preussag's affidavit, which is the only proof it offers to negate the existence of specific jurisdiction. The single statement in the affidavit pertaining to WCT's causes of action is, "Preussag Energie GMBH, having no presence in Texas, has performed no acts in Texas in connection with Plaintiff's claims." First, we observe that Preussag's statement that it "performed no acts in Texas in

connection with Plaintiff's claims," is not unequivocal, but is qualified by a vague assertion of it "having had no presence in Texas." Second, this qualifying clause, read with Preussag's nebulous statement that it "performed no acts in Texas in connection with Plaintiff's claims," fails to provide facts sufficient to meet the jurisdictional allegations against it.[2] The issue is in this case is not necessarily whether Preussag physically performed any acts in Texas, but whether it performed any acts purposefully directed toward Texas or Texas residents that might justify haling it into a Texas court. *Cf. Burger King*, 471 U.S. at 475-76; *Worldwide Volkswagen*, 444 U.S. at 297; *Calder v. Jones*, 465 U.S. 783 (1984) (holding that physical presence in the forum state is not necessarily required for personal jurisdiction to attach). However, Preussag's affidavit begs this question. Rather, it essentially makes a circular statement or a legal conclusion that, because it has had no "presence"[3] in Texas, it has not performed any act in Texas with regard to WCT's claims.[4] In this light, we hold that Preussag's affidavit was insufficient to negate the existence of specific jurisdiction in this case.

Preussag has failed to negate an additional basis for personal jurisdiction. That is, even if it did not physically enter the state, it may still be amenable to the jurisdiction of Texas courts under the "effects doctrine," which was articulated in *Calder v. Jones*, 465 U.S. 783 (1984) (holding that publisher who did not set foot in forum state but caused libelous article to be published there was amenable to jurisdiction of the courts in that state). Under this doctrine, personal jurisdiction can be based upon: (1) intentional

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[2]Rule 120a, which governs special appearances, provides affidavits shall "set forth specific facts as would be admissible in evidence. . . ." TEX.R.CIV.P. 120a(3)*;* Further, the affidavit must be direct, unmistakable, and unequivocal as to the facts sworn to, so that perjury can be assigned upon it. *See Burke v. Satterfield*, 525 S.W.2d 950, 955 (Tex.1975); *International Turbine Service, Inc. v. Lovitt*, 881 S.W.2d 805 (Tex. App.--Fort Worth 1994, writ denied).

[3] To the extent Preussag may have intended its not having a "presence" in Texas to have a legal meaning, it is of course a legal conclusion without any probative force. *See* TEX.R.CIV.P. 120a(3); *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex.1984) (holding that affidavit must set forth facts, not mere legal conclusions).

[4] Though the record clearly establishes Preussag hired Williford within the prohibited twelve-month period, Preussag's affidavit fails, for example, to address in any way matters such as how and where these parties discussed Williford's hiring, the circumstance of his hiring, or who contacted whom. The affiant also fails to demonstrate how he had any personal knowledge of the specific facts of this case.

actions, (2) expressly aimed at the forum state, (3) causing harm, the brunt of which is suffered-and which the defendant knows is likely to be suffered-in the forum state. *See Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998) (citing *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1486 (9th Cir.1993)); s*ee also Simon v. Philip Morris, Inc.*, 86 F.Supp.2d 95, 132 (E.D.N.Y.2000) (where intentional misconduct is at issue, the wrongdoer should reasonably anticipate being called to answer for its conduct wherever the results of that conduct are felt); *EFCO Corp. v. Aluma Systems, USA, Inc.*, 983 F.Supp. 816, 821 (S.D.Iowa 1997) (holding that under *Calder*, the defendant's act must be intentional and not merely negligent).

In support of its special appearance, Preussag cites *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763 (5th Cir. 1988). Southmark, a Georgia corporation with its principal place of business in Texas, sued USLICO, an out-of-state corporation, in Texas for tortious interference with a contract it alleged it formed with Life Investors, an Iowa corporation. Southmark argued that jurisdiction over USLICO was proper because USLICO committed an intentional tort knowing Southmark was a Texas resident. The court disagreed, noting that though Southmark's principal place of business was in Texas, it was a Georgia corporation. *Id*. at 772-73. It also observed that all other parties involved were from outside Texas. *Id*. The court held that the fact that Southmark's principal place of business was in Texas, standing alone, was not sufficient to cause USLICO to anticipate being haled into a Texas court. *Id*. at 773. *See also Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254 (3d Cir.1998) (tortious interference case in which defendant foreign corporation sent letters to plaintiff's investment company in New York and plaintiff's subsidiary in Italy, all of which were forwarded to plaintiff in New Jersey, held insufficient to confer New Jersey with jurisdiction over defendant).

In contrast to these cases, there are a variety of federal cases in which a defendant's intentional torts outside the forum state have subjected them to jurisdiction there. *See Union Carbide Corp. v. UGI Corp.*, 731 F.2d 1186, 1189 (5th Cir. 1984) (held that jurisdiction in Texas court was properly grounded on defendant's out-of-state acts tortiously interfering with plaintiff's contract with another corporation; out-of-state acts gave rise to injury[5]); *see also Lake v. Lake*, 817 F.2d 1416, 1423 (9th

[5]Preussag claims that *Union Carbide* is distinguishable from our case because the acts of the defendant in that case (meetings with AmeriGas) physically occurred in Texas. Though the *Union*

Cir. 1987) (attorney who wrongfully obtained ex parte order in California had "purposeful contacts" with Idaho where effects of order would be felt there where plaintiffs resided); *Panavision Int'l v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998) (holding that defendant who attempted to extort money from a California corporation from outside of California held to have directed his activities toward that state); *Kumarelas v. Kumarelas*, 16 F.Supp.2d 1249 (D. Nevada 1998) (while in California, defendant coercively influenced the decedent to change the terms of a trust thus causing plaintiff/beneficiary residing in Nevada to suffer losses; jurisdiction held proper in Nevada under the "effects test" because defendant "must have known" that it was likely that plaintiff would feel the effects of defendant's wrongful conduct in Nevada); *National Occupational Health Servs., Inc. v. Advanced Indus. Care*, 50 F.Supp.2d 1111 (N.D. Okla. 1998) (California subcontractor who interfered with Oklahoma contract amenable to personal jurisdiction in Oklahoma even though all its acts occurred outside the state; held that party who tortiously interferes with contract of another is subject to jurisdiction in the state where the property rights under the contract exist); *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F.Supp. 659, 666-67 (D.N.H.1977) (though defendant's tortious acts occurred outside of New Hampshire, they were aimed specifically at corporation who resided there, thus jurisdiction held proper).

In this case, Preussag is alleged to have purposefully directed its activities toward Texas and Texas residents in three ways: (1) it breached its contract with a Texas resident, WCT; (2) it interfered with a different contract between two Texas residents, WCT and Williford; and (3) for approximately two years, Preussag wired payments for Williford's services to WCT's Houston bank. Here, unlike in *Southmark*, Preussag obviously knew WCT was a Texas resident because it directly contracted with WCT and it terminated its contract with WCT by sending a letter to Houston. *Southmark* is further distinguishable in that we can readily infer from the facts that Preussag must have known it was likely that WCT would have felt the effects in Texas, where WCT resides. It is also obvious that the subject of the interference, Williford, was a Texas resident who had contracted with another Texas resident. Williford's city of

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Carbide court does not state specifically where the acts occurred, it clearly holds that the acts giving rise to jurisdiction occurred out-of-state. *Id.* at 1189.

residence was reflected in his time records submitted to Preussag. Conversely, in *Southmark*, the subjects of the tortious interference resided outside the forum state. *Southmark*, 851 F.2d at 773.[6]

Finally, unlike in *Southmark*, Preussag, while breaching its own contract with WCT, is alleged to have knowingly induced one Texas resident to breach its contract with another Texas resident, thus directly giving rise to litigation between the two parties in a lawsuit properly brought in Texas. In sum, we think it eminently foreseeable and reasonable that a corporation facing the above-discussed allegations of intentional conduct directed at Texas and Texas residents, causing injury in Texas, and causing litigation between Texas residents should expect to be haled into a Texas court to answer for that conduct.

Yet another ground for holding Preussag is amenable to the jurisdiction of Texas courts is that it directly recruited a Texas resident, Willford, for employment outside Texas. *See* TEX. CIV. PRAC. & REM. CODE ANN. 17.042 . Clearly, there is evidence in the record that: (1) Preussag agreed not to hire any of WCT's consultants for twelve months after the termination of their agreement; (2) Williford agreed not to go to work for any of WCT's clients for twelve months after the termination of their contract; (3) Preussag hired Williford, a WCT consultant, within this period of time for employment in Venezuela. This evidence is sufficient to show Preussag directly recruited a Texas resident for employment outside Texas.

In view of the discussion above, we find that: (1) Preussag has failed to produce sufficient proof to meet its burden to negate all bases of jurisdiction; (2) there is ample evidence in the record that Preussag

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[6] The *Southmark* court also factored into its decision the fact that the *plaintiff* failed to show the defendant knew the effect of its conduct would be felt in the forum state. *See Southmark*, 851 F.2d at 772-73 In this connection, we note that the rules in state and federal court differ with regard to burden of proof in special appearance cases and may play a significant role in their disposition. That is, under federal law, the burden is on the plaintiff to establish jurisdiction. *See, e.g., Familia De Boom v. Arosa Mercantil, S.A.*, 629 F.2d 1134, 1138 (5th Cir.1980); *cf. Columbraria Ltd v. Pimienta*, 110 F.Supp.2d 542, 545 (S.D.Tex. 2000) (Federal courts are presumptively without jurisdiction over civil actions and the burden of establishing the contrary rests upon the party asserting jurisdiction). However, under state law, it is the defendant's burden to negate all bases for jurisdiction. *See, e.g., National Indus. Sand*, 897 S.W.2d at 772. In *Southmark*,*Imo*, and other federal cases, courts have based their decision to dismiss in part on the plaintiffs' failure to produce sufficient evidence to prove the existence of jurisdiction. *See Imo Indus., Inc.*, 155 F.3d at 267-68; *Southmark*, 851 F.2d at 772-73. Conversely, in state cases, we must find the existence of personal jurisdiction where, as here, the defendant fails to negate all bases for it. As such, when construing federal cases that turn in some measure on the plaintiffs' failure to carry their burden to prove the existence of personal jurisdiction, we must take care to read those decisions in reference to the applicable burden of proof placed on the defendant in Texas state court.

committed a tort in the state, as articulated under the effects doctrine; and (3) Preussag recruited a Texas resident for employment outside the state. Accordingly, we hold that Preussag has minimum contacts with Texas to justify the exercise of jurisdiction over it.

Fair Play and Substantial Justice

We next determine whether the exercise of jurisdiction over Preussag would offend the notion of fair play and substantial justice. To defeat the fair play and substantial justice prong of due process, a nonresident defendant must present a compelling case that the exercise of jurisdiction would be unreasonable. *See In re S.A.V.*, 837 S.W.2d 80, 85 (Tex. 1992). Only in rare instances 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. *See Guardian Royal Exch.*, 815 S.W.2d at 231. This is true because the minimum contacts analysis encompasses so many considerations of fairness. *See Schlobohm*, 784 S.W.2d at 357-58.

In determining whether the exercise of jurisdiction comports with the traditional notions of fair play and substantial justice, the court considers, among other things: (1) the burden on the defendant; (2) the interest of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; and (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies. *See Guardian Royal*, 815 S.W.2d at 228.

Preussag contends the exercise of jurisdiction by a Texas court in this case would not comport with fair play and substantial justice because the burden on it would be substantial. Preussag argues that its representatives who might be called as a witness reside outside the U.S. and all documentary evidence is in Germany. However, this is only supported by argument. Other than stating it is a German corporation with no physical presence in Texas, Preussag provides no real proof it faces a substantial burden in defending a lawsuit in Texas. *See Guardian Royal Exch.*, 815 S.W.2d at 231 (holding that distance alone ordinarily insufficient to defeat jurisdiction). Preussag also points out the agreement between it and WCT requires arbitration and is governed by English law. However, those provisions presumably would only apply to the contract claim and do not necessarily address choice of law and method of dispute resolution for the tortious interference claim. In any case, we do not believe that the choice of law and arbitration provisions are of consequence with regard to the burden placed on Preussag.

We also observe that Texas has a significant interest in resolving a dispute where the aggrieved party is a Texas resident and the interference was with one of its consultants who was also based in Texas. Further, WCT, operating from the state of Texas, has chosen Texas as the forum obtaining the most convenient and effective relief. Under these circumstances, the equities weigh in favor of Preussag defending the claim in Texas rather than forcing WCT to prosecute its claim in Germany or another foreign state.

In light of the relevant factors, we hold that Preussag failed to make a compelling case that a finding of specific jurisdiction over it would offend traditional notions of fair play and substantial justice. We therefore find that the trial court did not err in denying Preussag's special appearance based on specific jurisdiction and, accordingly, we overrule Preussag's specific jurisdiction issue. Because this is dispositive of Preussag's special appearance, we need not determine whether Texas courts may exercise general jurisdiction over Preussag. *See* TEX. R. APP. P. 47.1.

The judgment of the trial court is affirmed.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed December 21, 2000.

Panel consists of Justices Yates, Frost, and Lee.*

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

*Senior Justice Norman R. Lee sitting by assignment.