Reversed and Rendered and Memorandum Opinion filed June 30, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00639-CV

KUMON NORTH AMERICA INC., Appellant

V.

NGOC VINH NGUYEN, Appellee

On Appeal from the 458th District Court
Fort Bend County, Texas
Trial Court Cause No. 18-DCV-250981

MEMORANDUM OPINION

Ngoc Vinh Nguyen alleges she was injured when she slipped and fell in a math and reading center, Kumon Math and Reading Center of Rosenberg (Center). She sued the franchisor, Kumon North America Inc. (Kumon), but not the franchisee, Paramount Investments LLC (Paramount). Kumon filed a special appearance challenging the trial court's personal jurisdiction. On appeal, Kumon challenges the trial court's denial of its special appearance. We reverse the trial court's order denying the special appearance and render judgment in favor of

Kumon.

Background

Kumon has franchise agreements allowing its franchisees around the country to use the "Kumon Method" to teach math and reading. Kumon is incorporated in Delaware with its principal place of business in New Jersey. Under the franchise agreement between Kumon and Paramount, Paramount agreed to operate the Center. Kumon decided on the name of the Center, and Paramount is required under the agreement to (1) be trained in and comply with Kumon's educational method, (2) market and promote the Center with Kumon's materials, (3) "maintain a clean, sanitary, safe, and orderly Center," and (4) "immediately eliminate all safety hazards." Kumon is allowed to visit and inspect the Center "at reasonable times, with or without notice"; make copies of any materials relating to operation of the Center; contact employees, students, and their parents; and observe Paramount's instructional and management skills. Paramount may use the facilities only to operate a "Kumon Math and Reading Center." Under the agreement, Paramount is "the owner and operator of an independent business and not an employee or agent of Kumon." Paramount entered into a lease agreement for the Center's location. Kumon is not a party to the lease.

Nguyen alleges that she was injured when she tripped on a defective floor mat in the Center and fell. She sued Kumon as "Kumon North America, Inc. d/b/a Kumon Math and Learning Center." She filed this lawsuit, bringing claims for negligence, premises liability, and negligent hiring, training, supervising, and retaining employees. Kumon filed its special appearance challenging the trial court's personal jurisdiction. After a hearing, the trial court denied the motion.

Discussion

Kumon contends that the trial court erred in denying its special appearance because Texas courts do not have jurisdiction over Kumon related to Nguyen's claims. Whether a court has personal jurisdiction over a defendant is a question of law we review de novo. *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150 (Tex. 2013). When, as here, the trial court does not issue findings of fact or conclusions of law, we infer all facts necessary to support the trial court's ruling that are supported by the evidence. *Id*.

Personal jurisdiction over nonresident defendants satisfies the constitutional requirements of due process when the defendant has purposefully established minimum contacts with the forum state and the exercise of jurisdiction is consistent with traditional notions of fair play and substantial justice. *Id*.; *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009). A defendant establishes minimum contacts with a forum if the defendant has purposely availed itself of the privilege of conducting activities within the forum state, invoking the benefits and protections of its laws. *Moncrief*, 414 S.W.3d at 150; *Retamco*, 278 S.W.3d at 338. A defendant's minimum contacts may give rise to either general or specific jurisdiction. *Moncrief*, 414 S.W.3d at 150; *Retamco*, 278 S.W.3d at 338.

I. Alter Ego Not Established

General jurisdiction arises when a defendant's contacts with the forum state "'are so 'continuous and systematic' as to render [it] essentially at home in the forum State.'" *M & F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co.*, 512 S.W.3d 878, 885 (Tex. 2017) (quoting *Goodyear Dunlop Tires Operations, SA v. Brown*, 564 U.S. 915, 919 (2011)); *see also Daimler AG v. Bauman*, 571 U.S. 117, 138-39 (2014). General jurisdiction concerns a court's ability to exercise

jurisdiction over a nonresident defendant as to any claim, including claims unrelated to the defendant's contacts with the forum. *Bauman*, 571 U.S. at 138-39. The test for general jurisdiction requires substantial activities within the forum and is a "high bar." *Searcy v. Parex Resources, Inc.*, 496 S.W.3d 58, 72 (Tex. 2016). Even when a defendant's contacts may be continuous and systematic, they are insufficient to confer general jurisdiction if they fail to rise to the level of rendering a defendant "essentially at home in the forum [s]tate." *Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 565 (Tex. 2018).

Kumon argues that the trial court lacks general jurisdiction because Kumon is not organized under Texas law and does not have its principal place of business in Texas. *See Searcy*, 496 S.W.3d at 72 ("Courts do not have general jurisdiction over corporate defendants that are neither incorporated in the forum state nor have their principal place of business there, absent some relatively substantial contacts with the forum state."). Nguyen argues Kumon is doing business in Texas as an alter ego of its franchisee Paramount and thus Texas courts may exercise general jurisdiction over Kumon.

To establish jurisdiction under an alter ego theory, the plaintiff must prove the parent controls the internal business operations and affairs of the subsidiary. *Wormald v. Villarina*, 543 S.W.3d 315, 322 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (citing *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 175 (Tex. 2007)). The parent must exert "such domination and control over its subsidiary that they do not in reality constitute separate and distinct corporate entities but are one and the same corporation for purposes of jurisdiction." *PHC-Minden*, 235 S.W.3d at 173.

We must examine all relevant facts and circumstances to determine whether a franchisor and franchisee are two separate entities. *See Tampa Bay Marine*

Towing & Serv., Inc. v. Moyer, No. 05-08-01727-CV, 2009 WL 3956450, at *4 (Tex. App.—Dallas Nov. 20, 2009, no pet.) (mem. op.) (citing *PHC-Minden*, 235 S.W.3d at 173). Our sister court has held that "the control of marketing schemes, methods of operation, uniforms, vehicles, logos, suppliers and other necessary forms of franchise operations are common between franchisors and franchisees. Retention of such control . . . is not sufficient to support a determination that a franchisor 'operates' the franchisee or its premises" for purposes of general jurisdiction. *Id*. at *4 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464–65 (1985)). The level of control must "be so great that the two entities have ceased to be separate." *Id*. We agree.

Nguyen contends that Paramount is an alter ego of Kumon because under the franchise agreement, Kumon controls the name of the business, hours of operation, fee structure, corporate structure, location, advertising, certain operating procedures, and instructional measures of the Center. Kumon acknowledges these aspects of the franchise agreement but presented evidence that (1) under the express terms of the franchise agreement, Paramount is "an independent business and not an employee or agent of Kumon"; (2) the lease agreement for the Center and the franchise agreement both require *Paramount* to maintain a safe premises; (3) Kumon does not direct the manner in which Paramount is required to maintain a safe premises; and (4) Kumon does not own the Center, have any ownership interest in Paramount, "control Paramount's day-to-day operations," or "hire, train, supervise, or pay Paramount's employees."

Nguyen has pointed to no authority showing that Kumon and Paramount had more than a typical franchisor and franchisee relationship, in which the franchisor controls certain aspects of the franchise to maintain the quality of its brand and consistency among franchises. *See id*. We cannot say under these circumstances

that the degree of control exercised by Kumon is so great that the two entities have ceased to be separate. *See id*. Paramount still controls (1) hiring, training, supervising, and retaining its employees; (2) daily operation of the Center; and (3) maintenance of the Center in a safe condition. The evidence does not show that Kumon and Paramount are "one and the same [entity] for purposes of jurisdiction." *See Wormald*, 543 S.W.3d at 322 (citing *PHC-Minden*, 235 S.W.3d at 173).

Nguyen also argued below that Kumon was doing business in Texas because it had a registered agent for service of process here. Although we consider maintaining a registered agent in Texas as a factor in the general jurisdiction analysis, this factor is "not dispositive of whether Texas courts can constitutionally exercise general jurisdiction." *See Waterman Steamship Corp. v. Ruiz*, 355 S.W.3d 387, 418 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (citing *All Star Enter., Inc. v. Buchanan*, 298 S.W.3d 404, 419 (Tex. App.—Houston [14th Dist.] 2009, no pet.)).

Nguyen has not established on this record that Kumon is an alter ego of Paramount. And the fact that Kumon had a registered agent in Texas is not enough to confer general jurisdiction on the trial court. *See id*. Neither of Nguyen's asserted bases are sufficient to show the trial court may exercise general jurisdiction over Kumon. We turn to specific jurisdiction.

II. Claims Not Arising from or Related to Texas Contacts

Specific jurisdiction exists when the cause of action arises from or is related to purposeful activities within the state. *Moncrief*, 414 S.W.3d at 150. When specific jurisdiction is asserted, our analysis focuses on the relationship among the defendant, Texas, and the litigation to determine whether the plaintiff's claim arises from Texas contacts. *Id*. We analyze minimum contacts for specific jurisdiction on a claim-by-claim basis unless all claims arise from the same forum

contacts. *Id*. at 150-51. Here, Nguyen's claims are all based on the same purported contacts with Texas, so we analyze the claims together.

We assess the quality and nature of the contacts, not the quantity. *Id*. at 151. Jurisdiction is proper when the contacts proximately result from actions by the defendant that create a substantial connection with the forum state. *Id*. The unilateral activity of another party cannot create jurisdiction. *Id*. at 152. Ultimately, we seek to determine whether a nonresidents' conduct and connection to a forum are such that it could reasonably anticipate being haled into court there. *Id*.

Nguyen alleges that she was injured when "she tripped over a warped and defective floor mat used by [Kumon] in the waiting area of the Center." She contends the employees of Paramount were negligently hired, trained, supervised, and retained, and their negligence in not warning her of a defective floormat or making the premises safe led to her injuries.

Nguyen points to several terms of the franchise agreement in an attempt to establish specific jurisdiction: (1) Kumon would approve a "Corporation Instructor" to be "personally responsible for operation of the Center," the Corporation instructor would "own at least 51% of the Corporation/LLC and . . . have the power, by himself or herself, to direct and control its affairs"; (2) Paramount was required to "maintain a clean, sanitary, safe, and ordinary Center" and eliminate all safety hazards; (3) Kumon would "select and [deliver] to [the] Center the furniture and fixtures needed to open and initially operate [the] Center"; and (4) Kumon could inspect the Center. The franchise agreement does not show that Kumon was responsible for hiring, training, supervising, or retaining Paramount's employees. In fact, it shows the opposite: the Corporation Instructor was to be "personally responsible for operation of the Center" and would "have the power, by himself or herself, to direct and control its affairs." Similarly,

Paramount, not Kumon, was required to "maintain a clean, sanitary, safe, and ordinary Center" and eliminate all safety hazards. Under the franchise agreement, Kumon was to select the furniture and fixtures and could inspect the premises, but Paramount would be responsible to maintain the premises in a safe condition. Nguyen has not shown a substantial connection between these aspects of the franchise agreement and her injury.

As discussed, Kumon also presented evidence that it does not "control Paramount's day-to-day operations" and does not "hire, train, supervise, or pay Paramount's employees." Paramount's lease agreement for the Center shows that Kumon is not a party to the lease agreement and that Paramount is responsible for keeping the premises in a "clean, sanitary, and safe condition," keeping the fixtures and other property of Paramount in "good repair and working order," and keeping the premises "in good and constant repair."

Nguyen points to several other facts in an attempt to establish specific jurisdiction: (1) the Center bore the Kumon name as required under the franchise agreement, Kumon required strict compliance with its teaching methods and required the use of its materials and phone system, and Kumon owned student information; (2) the franchise agreement was for a five-year term, and Kumon received royalty payments and other fees from Paramount; and (3) Kumon had a registered agent in Texas. None of these facts support a finding of specific jurisdiction.

As to the first group of purported contacts, Nguyen has not shown how Kumon's controlling the name of the Center, teaching methods, materials, phone system, and student information is substantially connected to her injuries. These aspects of the franchise agreement have no bearing on her claims.

As to the five-year term of the franchise agreement and payments required to

Kumon, we initially note that the length of the term is of no moment in our analysis and a contract with a Texas resident, standing alone, does not establish jurisdiction. *See Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 786 (Tex. 2005). Executing a contract in Texas likewise does not give rise to jurisdiction when the contract is not the basis for specific jurisdiction. *Moncrief*, 414 S.W.3d at 157. Nguyen did not present evidence showing that the franchise agreement was executed in Texas, but even if she had, she has not shown that Kumon's entering into the franchise agreement is the basis for her negligence claims. *See id*. As to Kumon's receiving payments from Paramount, "[s]omething other than payments must tie the defendant to the forum." *See Jutalia Recycling, Inc. v. CNA Metals Ltd.*, 542 S.W.3d 90, 98 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

Finally, presuming that having a registered agent in the state shows contact with Texas, Nguyen is still required to show a substantial connection between this contact and the operative facts of the litigation. *See, e.g., Wormald*, 543 S.W.3d at 325 (holding individual's act of listing himself as a registered agent of service for Texas corporations did not establish a substantial connection between that Texas contact and the operative facts of the litigation). This contact, standing alone, does not confer specific jurisdiction on the trial court.[1] *See id*.

We conclude that Nguyen's claims are based on the unilateral activity of Paramount. Paramount was solely responsible for hiring, training, supervising, and paying its employees. Paramount was solely responsible for keeping the Center in a safe condition. Nguyen has not shown her claims arise from or relate to Kumon's contacts with Texas. *See Megadrill Servs. Ltd. v. Brighouse*, 556 S.W.3d 490, 500

[1] Maintaining a registered agent in Texas is relevant to a general jurisdiction analysis. *See Waterman Steamship Corp.*, 355 S.W.3d at 418. Nguyen has not shown how that fact would be relevant to specific jurisdiction.

(Tex. App.—Houston [14th Dist.] 2018, no pet.) (holding trial court erred when it denied nonresident defendant's special appearance "[b]ecause the record conclusively show[ed] that [the plaintiff's] alleged slip and fall accident does not arise out of or relate to" the defendant's contacts with Texas). The facts here establish that Kumon does not have sufficient minimum contacts with Texas to confer specific jurisdiction over Nguyen's claims.

Conclusion

Having concluded that the trial court lacks jurisdiction over Kumon, we reverse the trial court's order denying Kumon's special appearance and render judgment against Nguyen for want of jurisdiction.[2]

/s/ Frances Bourliot
Justice

Panel consists of Justices Jewell, Bourliot, and Zimmerer.

[2] Accordingly, we need not address whether the exercise of jurisdiction would be consistent with traditional notions of fair play and substantial justice. *See Chevron Thailand Expl. & Prod., Ltd. v. Taylor*, No. 14-18-00540-CV, 2019 WL 6483116, at *6 n.8 (Tex. App.—Houston [14th Dist.] Dec. 3, 2019, no pet.) (mem. op.).