Affirmed and Opinion on Remand filed June 1, 2000.

In The

Fourteenth Court of Appeals

NO. 14-96-00350-CV

BYRON K. VARME, Appellant

V.

GFTA TRENDANALYSEN B.G.A. HERRDUM GMBH & COMPANY, K.G., and GEORGE HERRDUM, Appellees

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On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 91-44275

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

This appeal comes to us on remand from the Texas Supreme Court to address those points of error concerning the merits of the foreign defendants' special appearance. We hold that the trial court properly granted the special appearance. Accordingly, we affirm the judgment of the trial court.

I.

Procedural History

GFTA Trendanalysen B.G.A. Herrdum GMBH & Co. K.G. (GFTA) specially appeared to challenge the trial court's jurisdiction on multiple grounds, and the trial court sustained GFTA's motion. In our original unpublished opinion, we reversed and remanded the case to the trial court, holding that GFTA's challenge to the method of service converted its special appearance into a general appearance. *See* No. 14-96-00350-CV (Tex. App. —Houston [14th Dist.] 1997). On petition for review, the Texas Supreme Court reversed our judgment and remanded the cause to this court, holding that GFTA's pleadings did not invoke the jurisdiction of the trial court. *See* 991 S.W.2d 785 (Tex. 1999).

II.

Factual Background

The following factual recitation is taken from the Texas Supreme Court's rendition of the facts. Byron K. Varme and Trans-Atlantic Properties, Inc., sued GFTA and George Herrdum, among others, in district court in Texas. GFTA is a German limited partnership with its sole place of business in Switzerland. Herrdum is a German citizen. The Texas Secretary of State attempted service of process on both defendants, to a Swiss address the plaintiffs provided. Certificates for both defendants came back to the Secretary of State marked "Return to Sender."

GFTA filed an instrument entitled "Verified Special Appearance and, and, Subject to Special Appearance, Its Motion to Dismiss." In this document, GFTA contested personal jurisdiction because it lacked minimum contacts with Texas consistent with due process. GFTA also argued it was not amenable to service or suit because the method of service of citation violated the Due Process and Supremacy clauses of the United States Constitution, the Hague Service Convention, Swiss law, German law, and Texas Rules of Civil Procedure. The instrument asked the trial court to dismiss the suit for want of jurisdiction.

The trial court sustained the special appearance on all grounds and dismissed the suit against GFTA and Herrdum. Its order contains detailed findings of facts and conclusions of law about the defendants' lack of minimum contacts and the deficiencies of service. Relying on *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199 (Tex. 1985) (per curiam), we held that by challenging the method of service

within the special appearance, GFTA converted its special appearance into a general appearance and thereby consented to jurisdiction. On review, the Texas Supreme Court recognized that while a mere challenge to the method of service fails as a special appearance and constitutes a general appearance, a party does not waive a due process challenge for want of minimum contacts by challenging the method of service in the special appearance. *See* 991 S.W.2d at 786. Accordingly, the Court held that GFTA did not consent to personal jurisdiction by including in its special appearance a challenge to the method of serving citation. *Id*. at 787. Therefore, we proceed on remand to review the propriety of the trial court's order granting GFTA's special appearance.

III.
Standard of Review

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. *See Conner v. ContiCarriers & Terminals, Inc.*, 944 S.W.2d 405, 411 (Tex. App. —Houston [14th Dist.] 1997, no writ). Here we have findings of fact and conclusions of law. The trial court's findings of fact are reviewed under the factual sufficiency standard. *See Hotel Partners v. KPMG Peat Marwick,* 847 S.W.2d 630, 632 (Tex. App. — Dallas 1993, writ denied). Conclusions of law, however, are reviewed *de novo*. *See Ball v. Bingham,* 990 S.W.2d 343, 347 (Tex. App. — Amarillo 1999, no pet.). As the trier of fact, the trial court may draw reasonable inferences from the evidence. *See Hotel Partners,* 847 S.W.2d at 632. If a legal sufficiency challenge is brought, where there is at least some evidence of probative force to support the finding, it is binding on the appellate court. *See Valencia v. Garza*, 765 S.W.2d 893, 896 (Tex. App. — San Antonio 1989, no writ). When a factual sufficiency challenge is made against the trial court's findings of fact, the appellate court must consider all of the evidence, and the finding will be upheld unless it is so against the overwhelming weight of the evidence as ts to be clearly and manifestly wrong. *See id*. We may not disregard the trial court's findings of fact on appeal if the record contains some evidence to support them. To be disregarded, the findings must be so contrary to the overwhelming weight of the evidence as to be manifestly wrong. *See id*. Here, Varme challenges two of the trial court's eighteen findings of fact. Therefore, we will analyze

these two findings to determine if there is some evidence of probative value in the record to support them. *See id.*

IV.
Personal Jurisdiction

A court may assert personal jurisdiction over a nonresident defendant only if the requirements of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and the Texas long-arm statute are satisfied. *See CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex.1996); *see also Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 413-14, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). The Texas long-arm statute allows a court to exercise personal jurisdiction over a nonresident defendant who does business in Texas. In addition to a short list of activities that constitute doing business in Texas,[1] the statute provides "other acts" by the nonresident can satisfy the requirement. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 17.042 (Vernon 1997); *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991). The Texas Supreme Court has repeatedly interpreted this broad statutory language " 'to reach as far as the federal constitutional requirements of due process will allow.' " *CSR*, 925 S.W.2d at 594 (quoting *Guardian Royal*, 815 S.W.2d at 226); *see also U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 762 (Tex.1977). Thus, the requirements of the Texas long-arm statute are satisfied if the exercise of personal jurisdiction comports with federal due process limitations. *See CSR*, 925 S.W.2d at 594.

In his two points of error challenging the trial court's findings, Varme addresses whether GFTA was "doing business" in the state of Texas when the acts complained of occurred. In Varme's fourth point of error, he asserts GFTA's alleged agent, Leonard Gordon, committed a tort in this state. Thus, Varme attempts to obtain jurisdiction over GFTA by utilizing the "commission of a tort" section of the long arm

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[1] The activities specifically identified as "doing business" in Texas include the following:

(1) contracting 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) committing a tort in whole or in part in this state;
(3) recruiting Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state.

TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997).

statute. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042(2) (Vernon 1997). If we were to agree with Varme, we would hold the trial court has *specific* jurisdiction over GFTA. Alternatively, in Varme's fifth point of error, he asserts the trial court also has jurisdiction over GFTA because GFTA maintains substantial contacts with the state. This argument differs from the first in that here, Varme alleges the trial court has *general* jurisdiction over GFTA.

V.

Minimum Contacts

The United States Constitution permits "a state court [to] take personal jurisdiction over a defendant only if it has some minimum, purposeful contacts with the state, and the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice." *Dawson-Austin v. Austin*, 968 S.W.2d 319, 326 (Tex.1998); *CMMC v. Salinas*, 929 S.W.2d 435, 437 (Tex.1996). A nonresident defendant that has purposefully availed itself of the privileges and benefits of conducting business in the foreign jurisdiction has sufficient contacts with the forum to confer personal jurisdiction. *See CSR*, 925 S.W.2d at 594, citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985). However, a defendant should not be subject to the jurisdiction of a foreign court based upon "random," "fortuitous," or "attenuated" contacts. *CSR*, 925 S.W.2d at 595 (quoting *Burger King*, 471 U.S. at 475-76). A defendant's contacts with a forum can give rise to either general or specific jurisdiction. General jurisdiction is present when a defendant's contacts are continuous and systematic, allowing the forum to exercise personal jurisdiction over the defendant even if the cause of action did not arise from or relate to activities conducted within the forum state. *See CSR*, 925 S.W.2d at 595; *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990). General jurisdiction requires a showing the defendant conducted substantial activities within the forum, a more demanding minimum contacts analysis than for specific jurisdiction. *See CSR*, 925 S.W.2d at 595; *Guardian Royal*, 815 S.W.2d at 228. On the other hand, specific jurisdiction is established if the defendant's alleged liability arises from or is related to an activity conducted within the forum. *See CSR*, 925 S.W.2d at 595; *see also Happy Indus. Corp. v. American Specialties, Inc.*, 983 S.W.2d 844, 848 (Tex.App.—Corpus Christi 1998, pet. dism'd w.o.j.). It requires a substantial connection between the nonresident's action or conduct directed toward Texas and the cause of action in Texas. *See Memorial Hosp. Sys. v. Fisher Ins. Agency, Inc.*, 835

S.W.2d 645, 650 (Tex. App.—Houston [14th Dist.] 1992, no writ). When specific jurisdiction is asserted, the minimum contacts analysis focuses on the relationship among the defendant, the forum and the litigation. *See id*.

In analyzing minium contacts, it is not the number but rather the quality and nature of the nonresident's contacts with the forum state that is important. *See Memorial Hosp. Sys*., 835 S.W.2d at 650. The exercise of personal jurisdiction is proper when the contacts proximately result from actions of the nonresident defendant which create a substantial connection with the forum state. *See Guardian Royal*, 815 S.W. 2d at 226. The substantial connection between the nonresident defendant and the forum state necessary for a finding of minimum contacts must come about by action or conduct of the nonresident purposefully directed toward the forum state. *See id*. However, the constitutional touchstone remains whether the nonresident defendant purposefully established minimum contacts in the forum state. *See id*. (citing *Burger King*, 471 U.S. at 474.) This requirement that a defendant purposefully avail himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws, ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person. *See Burger King*, 471 U.S. at 475.

Foreseeability is also an important consideration in deciding whether the nonresident has purposefully established "minimum contacts" with the forum state. *See id*. The concept of foreseeability is implicit in the requirement that there be a substantial connection between the nonresident defendant and Texas arising from action or conduct of the nonresident defendant purposefully directed toward Texas. *See id*. If the tort-feasor knows that the brunt of the injury will be felt by a particular resident in the forum state, he must reasonably anticipate being haled into court there to answer for his actions. *See Memorial Hosp. Sys*., 835 S.W.2d at 650.

Minimum contacts are especially important when dealing with a nonresident defendant from a foreign country. *See CSR*, 925 S.W.2d at 595. Given the facts of the present case, GFTA is not subject to general or specific jurisdiction. First, the trial court found that GFTA does not have ongoing and systematic contacts with this state. Moreover, the trial court also found that GFTA did not commit any tort

in whole or in part in this state in connection with this litigation. There is evidence in the record that supports both of these findings.

First, in his affidavit, Peter Albisser, executive Vice-President of GFTA, stated that GFTA lacks continuous and systematic contacts with Texas, that it entered no contract with any Texas resident bearing any relation to this suit, that Gordon was not an employee of GFTA, and that GFTA committed no torts in Texas. Second, in his affidavit, Leonard Gordon also stated he was not an agent for GFTA during the relevant time period, nor did he make representations to anyone of an agency relationship between himself and GFTA. In support of his contention, Gordon noted a clause in his "Consulting Agreement" with GFTA that states Gordon is not authorized to act or make commitments on behalf of GFTA and that Gordon is an "independent contractor" and "not an employee of GFTA." Gordon also averred he never violated the provisions of his consulting agreement with GFTA. Together, these affidavits and the consulting agreement constitute some evidence to support the trial court's findings and its conclusion that it lacked personal jurisdiction over GFTA.

Further, the trial court's findings and conclusions are not against the great weight of the evidence because although Varme submitted affidavits, a letter, and a business card with both Leonard Gordon's and GFTA's names which lend support to his assertion of Gordon's agency relationship, GFTA submitted the above referenced affidavits and contract, all of which refute Varme's contention. In his brief, Varme asserts GFTA sought investors in Texas in an unrelated transaction; however, he fails to support this assertion by directing this Court to the relevant evidence in the record. *See Russell v. City of Bryan*, 919 S.W.2d 698, 706 (Tex. App. —Houston [14th Dist.] 1996, pet. denied) (holding the burden is on appellants to demonstrate the record supports their contentions and to make accurate references to the record to support their complaints on appeal).

Based on the record before this court, we cannot say that the trial court's findings, concerning GFTA's lack of minimum contacts, are so contrary to the overwhelming weight of the evidence as to be manifestly wrong. *See Hotel Partners*, 847 S.W.2d at 632. Having failed to establish GFTA's minimum contacts with the state, we do not reach the "fair play and substantial justice" prong of personal jurisdiction analysis. *See Guardian Royal*, 815 S.W.2d at 228 ("Once it has been determined that a

nonresident defendant purposefully established minimum contacts with the forum state, the contacts are evaluated in light of other factors to determine whether the assertion of personal jurisdiction comports with fair play and substantial justice.").

Therefore, we overrule Varme's points of error challenging the trial court's grant of GFTA's special appearance. Because our original holding affirming the dismissal of claims against George Herrdum was not disturbed, we need not again address appellant's points of error concerning Herrdum. Further, as our affirmance of the trial court's grant of GFTA's special appearance is dispositive, we need not address Varme's other points on appeal. *See* TEX. R. APP. P. 47.1 (The courts of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and *necessary to final disposition of the appeal*) (emphasis added).

Accordingly, we affirm the judgment of the trial court dismissing GFTA for lack of personal jurisdiction.

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John S. Anderson
Justice

Judgment rendered and Opinion on Remand filed June 1, 2000.

Panel consists of Justices Murphy, Anderson, and Edelman.

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