Reversed and Opinion filed January 17, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00444-CV

AUSTIN & AUSTIN ENTERPRISES, INC., and ROBERT LEE AUSTIN, III, Appellants

V.

EQUINOX CAPITAL CORPORATION, Appellee

On Appeal from the County Civil Court No. 2
Harris County, Texas
Trial Court Cause No. 746,095

O P I N I O N

Austin & Austin Enterprises, Inc., ("Austin Enterprises") and Robert Lee Austin, III appeal from an interlocutory order denying their special appearance. Equinox Capital Corporation ("Equinox") filed suit in Harris County alleging breach of an equipment lease and of a personal guaranty. The trial court held a hearing on appellants' special appearance and overruled the challenge to personal jurisdiction. We reverse and render judgment dismissing the case for want of jurisdiction.

Background[1]

Austin Enterprises is a North Carolina business that operates a restaurant in North Carolina. Robert Austin, one of the corporate owners, is a resident of North Carolina. Neither Robert Austin nor any agent of Austin Enterprises has ever visited Texas to transact business. Equinox is a financing company doing business in Texas.

In July 1994, Austin Enterprises ordered restaurant equipment from Regency Equipment, a supplier located in North Carolina. Under the terms of a three-way deal between Austin Enterprises, Regency, and a financial services company in Texas called Corporate Funding Financial Group, Inc., (the predecessor in interest to Equinox) the equipment was to actually be purchased by Corporate Funding and then leased by it to Austin Enterprises. The equipment was purchased in North Carolina and delivered in North Carolina. Also in North Carolina, a check drawn on a North Carolina bank account was presented by Austin Enterprises to Regency. The check, however, was made payable to Corporate Funding, and served as a deposit on the lease.

Paragraph 25 of the lease states as follows:

> LAWS GOVERNING. Lessee(s) and Guarantor(s) each agree that the payment of all Rent Payments and Other Amounts that are due and payable under this Lease shall be governed by the laws of the State of Texas, and the performance of all other obligations under this Lease are performable in Harris County, Texas.

The paragraph was located on the back side of the lease agreement, among numerous other provisions, and in a very small point type. It was uncontested in the trial court that this paragraph is, at most, a choice-of-law provision and not a choice-of-forum provision.

On September 1, 1997, Corporate Funding assigned its interest in the lease to

---

[1] Since appellee has failed to file a brief, we are to accept as true the facts stated in appellants' brief, so long as supported by record references. TEX. R. APP. P. 38.1(f).

Equinox.[2] Equinox sued Austin Enterprises and Robert Austin in Texas, alleging that Austin Enterprises breached the lease in failing to make monthly payments and that Robert Austin breached his personal guaranty by also failing to make payments. Equinox further alleged conversion of the restaurant equipment and a suit on a sworn account. Appellants filed a special appearance to challenge personal jurisdiction, but the trial court rejected the challenge.

Standard of Review

Whether a Texas court may assert personal jurisdiction over a nonresident defendant is a question of law. *Abacan Technical Servs. Ltd. v. Global Marine Int'l Servs. Corp.*, 994 S.W.2d 839, 843 (Tex. App.—Houston [1st Dist.] 1999, no pet.). On appeal from a special appearance, we review all the evidence in the record to determine if the nonresident defendant met its burden of negating all possible grounds for personal jurisdiction. *Id.* (citing *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203 (Tex. 1985)).

The determination as to whether personal jurisdiction exists sometimes involves the resolution of underlying factual disputes. *C-Loc Retention Sys., Inc. v. Hendrix*, 993 S.W.2d 473, 476 (Tex. App.—Houston [14th Dist.] 1999, no pet.). We review the appropriateness of that resolution for factual sufficiency. *Id*. When the trial court does not file findings of fact in a special appearance, all fact determinations are presumed to support the judgment. *Garner v. Furmanite Austl. Pty., Ltd.*, 966 S.W.2d 798, 802 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). In the present case, although requested by appellants, the trial court issued no findings of fact or conclusions of law.

A Texas court may assert jurisdiction over a nonresident defendant only: (1) where

[2] The record is unclear as to whether Equinox or Corporate Funding is incorporated in Texas. The original petition states simply that Equinox is a corporation "doing business" in Texas. An Assignment of Interest in Lease, entered as an exhibit at the jurisdictional hearing, refers to both Equinox and Corporate Funding as Texas corporations. Given the absence of evidence to the contrary, we will assume the entities are Texas corporations.

the Texas long-arm statute authorizes such exercise of jurisdiction; and (2) where such exercise is consistent with the due process guarantees embodied in both the United States and Texas Constitutions. *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996) (orig. proceeding); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997) (Texas long-arm statute). In general, the long-arm statute's "doing business" requirement is considered quite broad and limited only by the requirements of federal due process guarantees. *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990). In the present case, appellants expressly concede that if the due process requirements of the second prong are met then the court below does have jurisdiction under the long-arm statute.

The federal due process clause protects, among other things, a person's liberty interest in not being subject to the binding judgments of a forum with which the nonresident has established no meaningful contacts, ties, or relations. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985). With respect to personal jurisdiction, federal due process mandates: (1) that the nonresident have purposefully established "minimum contacts" with the forum state; and (2) that the exercise of jurisdiction over the nonresident comport with "traditional notions of fair play and substantial justice." *CSR Ltd.*, 925 S.W.2d at 594; *Old Kent Leasing Servs. Corp. v. McEwan*, 38 S.W.3d 220, 226-27 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

A nonresident establishes minimum contacts in Texas by purposefully availing himself of the privileges and benefits inherent in conducting business within the state. *CSR Ltd.*, 925 S.W.2d at 594. The contact must have resulted from the nonresident defendant's purposeful conduct and not the unilateral activity of the plaintiff or others. *Guardian Royal Exch. Assur., Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 227 (Tex. 1991). Random, fortuitous, or attenuated contacts with the forum are not sufficient. *Id*. at 226. If the court concludes that minimum contacts with the forum state exist, the court then proceeds to evaluate those contacts in light of various factors to determine if the assertion of jurisdiction comports with traditional notions of fair play and substantial justice. *Id*. at

228.

A defendant's minimum contacts with the forum state can produce either general or specific jurisdiction. *CSR Ltd*., 925 S.W.2d at 595. There is no evidence or allegation in the present case that the appellants' contacts with Texas were of a "continuous and systematic" nature such as to give rise to general jurisdiction. *See id*. We will, therefore, focus our analysis on the issue of specific jurisdiction. Specific jurisdiction exists when the alleged liability "arises from or is related to" the nonresident's contacts with the forum state. *Guardian,* 815 S.W.2d at 230. A single contact with the state, of a substantial quality and nature, may be sufficient to establish specific jurisdiction when the cause of action arises from that contact. *See Burger King*, 471 U.S. at 475-76; *Mem'l Hosp. Sys. v. Fisher Ins. Agency, Inc.*, 835 S.W.2d 645, 650 (Tex. App.—Houston [14th Dist.] 1992, no writ). Although not a separate component, foreseeability is an important consideration in determining whether a nonresident's ties to a forum create a substantial connection. *C-Loc Retention*, 993 S.W.2d at 477-78. The nonresident must reasonably anticipate being haled into a Texas court to answer for its actionable conduct. *Cartlidge v. Hernandez,* 9 S.W.3d 341, 348 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

Analysis

We begin our analysis of specific jurisdiction by determining whether appellants purposefully established minimum contacts with Texas and whether the plaintiff's cause of action arose out of those contacts. *See Guardian,* 815 S.W.2d at 230. In doing so, we must focus on the relationship between the defendants, the forum state, and the conduct. *Schlobohm*, 784 S.W.2d at 357.

In reviewing a special appearance, we consider all the evidence that was before the trial court, including the pleadings, any stipulations, affidavits and exhibits, the results of discovery, and any oral testimony. *McCulley Fine Arts Gallery, Inc. v. X Partners*, 860 S.W.2d 473, 480 (Tex.App.—El Paso 1993, no writ). In the present case, the trial court had

plaintiff's petition, an affidavit by Robert Austin, and live testimony from Glen L. Graves, president of both Equinox and Corporate Funding.[3] There were also certain stipulations made by counsel for Equinox that were favorable to appellants.

The alleged conduct resulting in the lawsuit was the failure to make monthly payments under the equipment leasing agreement. The lease application was received by Austin Enterprises in North Carolina. The completed lease agreement was also received by Austin Enterprises in North Carolina, and it executed the agreement there. According to Robert Austin's affidavit, he returned the completed form to Regency and did not send it directly back to Texas. Graves admitted that there was no evidence to dispute this assertion, although someone did send the form to Texas from North Carolina.

It is undisputed that Regency, the equipment supplier, was based in North Carolina, that the equipment was purchased in North Carolina, and that checks for purchase of the equipment by Corporate Funding and for the deposit on the lease by Austin Enterprises were both delivered to Regency in North Carolina. Graves testified to a number of telephone conversations between Texas and North Carolina. Several calls were apparently made by Corporate Funding to Robert Austin and others in North Carolina to verify credit information. A "telephone audit" was also made by Corporate Funding, whereby a representative called Robert Austin to make sure he had received the equipment and was satisfied with it. Graves also stated that Robert Austin called Corporate Funding to provide credit information and to ask why the process was taking so long.[4] Initially, the lease

---

[3] Robert Austin's affidavit does not appear in the clerk's record; however, appellants have attached a copy of the affidavit to their brief as Appendix C. This copy has a file stamp on it from the County Clerk's office, which includes a facsimile of the clerk's signature. The date in this file mark is the same as in the file mark on the Special Appearance and the time indicated is six minutes later. The Special Appearance references an attached affidavit, and counsel for both sides referenced the affidavit during the special appearance hearing. Given that appellee does not contest the validity of the affidavit, we will consider it as properly presented evidence in this case.

[4] Appellants deny that any telephone calls were made by Robert Austin to Texas, and they argue that Graves's testimony on this issue is not credible. Judging the credibility of the testimony, however, was solely a matter for the trial judge. *See Rusk v. Rusk*, 5 S.W.3d 299, 310-11 (Tex. App.—Houston [14th Dist.]

agreement specified that payment was to be sent to Texas, but Graves acknowledged that Austin Enterprises was later asked to send payments to Florida and Massachusetts and perhaps Georgia. There is no evidence indicating where payment was to be sent at the time the alleged breach occurred.

Texas courts have consistently rejected the notion that merely contracting with a Texas company is sufficient to satisfy the minimum contacts requirement. *See, e.g.*, *Old Kent Leasing*, 38 S.W.3d at 230; *TeleVentures, Inc. v. International Game Tech.*, 12 S.W.3d 900, 908-09 (Tex. App.—Austin 2000, pet. denied). Nor is partial performance of that contract in the state a determinative factor. *See, e.g.*, *U-Anchor Adver., Inc. v. Burt*, 553 S.W.2d 760, 762-63 (Tex. 1977); *Magnolia Gas Co. v. Knight Equip. & Mfg. Corp.*, 994 S.W.2d 684, 691-92 (Tex. App.—San Antonio 1998, no pet.).

Furthermore, although the existence of a choice-of-law clause, as was contained on the back of the lease form in this case, may be a consideration regarding jurisdiction, it does not by itself establish consent to litigation in a particular forum.[5] *Preussag Aktiengesellschaft v. Coleman*, 16 S.W.3d 110, 125 (Tex. App.—Houston [1st Dist.] 2000, pet. filed) (citing *Burger King*, 471 U.S. at 482). At most, it merely establishes consent to the application of that forum's laws. *See Interfirst Bank Clifton v. Fernandez*, 844 F.2d 279, 284 (5th Cir. 1988). In *Interfirst Bank*, the court held that the combination of a Texas choice-of-law provision, a Texas loan agreement, and the fact that the personal property at the heart of the case was situated in Texas and was sold in Texas was sufficient to support personal jurisdiction. *Id*. It is distinguishable from the present case by virtue of the fact that the property at the heart of the present matter is in North Carolina and the choice-of-law provision is considerably less comprehensive.

1999, pet. denied). Since the judge did not render findings of fact, we view this evidence as favoring the denial of the special appearance. *See Garner*, 966 S.W.2d at 802.

[5] We make no holding as to whether this was a valid and enforceable choice-of-law provision.

In *3-D Electric Co. v. Barnett Construction Co.*, 706 S.W.2d 135 (Tex. App.—Dallas 1986, writ ref'd n.r.e.), the defendant's contacts with Texas consisted of telephone calls, correspondence, and payments, as well as some preliminary work and research in Texas, and the sending of some materials from Texas. The court found such contacts to be insufficient to support jurisdiction. *Id*. at 145-46.

In *Magnolia Gas*, 994 S.W.2d 684, Oklahoma defendants assumed a contract with the Texas plaintiff to refurbish a gas plant in Arkansas. The court found a lack of substantial contacts where some payments were made into Texas, one of the parties was from Texas, communications were made to Texas, and the contract was partially performed in Texas by the Texas company. *Id*. at 691-92.

In the present case, appellants did not actively seek out the Texas company to transact business. They simply went to a North Carolina equipment supplier to obtain restaurant equipment to be used in North Carolina. The supplier then connected appellants to Corporate Funding, which happened to be a Texas company, for leasing of the equipment. The execution of the agreement by appellants occurred in North Carolina, as did the payment of the deposit. Any telephone calls made by appellants to Texas were mere follow-ups or inquiries regarding the progress of the transaction and were only incidental to the leasing of the equipment and did not involve negotiations regarding the terms of the lease. Payments were made into Texas, but also into several other states. There is no evidence to indicate that the equipment has ever been anywhere except North Carolina. We find that the evidence, even viewed in a light most favorable to the court's ruling, does not reveal a sufficient nexus between appellants' actions and Texas such that personal jurisdiction would attach. *See Guardian*, 815 S.W.2d at 227-28 (requiring a "substantial connection").

Furthermore, even if we found the contact to be sufficient, we find that a positive determination of jurisdiction would offend traditional notions of fair play and substantial justice. Various factors are commonly considered, when applicable to such cases, including: (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; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Burger King*, 471 U.S. at 477.

Robert Austin's affidavit stated that he has never been to Texas to transact business and that no representative of Austin Enterprises has ever been to Texas to transact business. Austin Enterprises simply runs a local restaurant in North Carolina. The burden on appellants to defend litigation in Texas would be considerable. *See Magnolia Gas*, 994 S.W.2d at 693. Certainly, assuming that Equinox is a Texas corporation, Texas does have an interest in adjudicating the dispute. There is also a possibility in this case that the choice-of-law provision in the lease may mean that Texas substantive law would apply even if the case is tried in North Carolina. Texas has an interest in interpreting its own laws, but this consideration is far from a controlling factor. *See Burger King*, 471 U.S. at 483-84. Given that the transaction at issue in this case largely occurred in North Carolina and that the *situs* of the equipment is North Carolina, Texas's interest in the actual dispute is not very great.

As for the plaintiff's interest in obtaining convenient and effective relief, if Equinox wishes to recover its property, *i.e.*, the restaurant equipment, then it may eventually need to go into a North Carolina court to enforce the judgment, irrespective of where the underlying dispute is adjudicated. This concern is particularly raised here given Equinox's conversion claim.[6] This same analysis applies to the interstate justice system's interest in obtaining the most efficient resolution of controversies. Since the equipment is in North Carolina, many of the potentially key witnesses from Austin Enterprises and Regency are in North Carolina, and Equinox may well have to go into a North Carolina court anyway, it does not behoove the system to force appellants first into a Texas court. *See Magnolia Gas*, 994 S.W.2d at

[6] Additionally, Graves deemed Corporate Funding to be a "national company." Although there is no testimony directly stating so, it is logical to surmise that Equinox, Corporate Funding's successor in interest, is also a national company. This suggests, however minimally, that Equinox was in a position to expect to become involved in litigation in foreign jurisdictions.

693. Lastly, as for social policy interests, this factor turns to some degree in favor of Texas as the proper forum. Both Texas and North Carolina have an interest in seeing their own citizens or corporations litigate in their own courts, but Texas additionally has an interest in interpreting and applying its own laws. This interest, however, is far from a controlling factor. *See Burger King*, 471 U.S. at 483-84 (resolution of conflicting social policies "can usually be accommodated by choice-of-law rules").[7] In sum, these factors suggest that the assertion of Texas jurisdiction over this lawsuit would offend traditional notions of fair play and substantial justice. *CSR Ltd.*, 925 S.W.2d at 594.

Based on the foregoing analysis, we find that appellants did not purposefully establish minimum contacts with Texas and that the exercise of jurisdiction over appellants would not comport with traditional notions of fair play and substantial justice. *See CSR Ltd.*, 925 S.W.2d at 594. The trial court erred in holding that it had personal jurisdiction over appellants. Accordingly, appellants' sole point of error is sustained.

We reverse the order of the trial court and render judgment dismissing the case for want of jurisdiction.

/s/ Joe L. Draughn
Senior Justice

Judgment rendered and Opinion filed January 17, 2002.
Panel consists of Justices Yates, Edelman, and Draughn.[8]
Do Not Publish — TEX. R. APP. P. 47.3(b).

---

[7] In *Burger King*, the court discussed this point as a factor in determining whether to accept jurisdiction in a state not identified by an applicable choice-of-law provision. *Id.*, 471 U.S. at 483-84. The consideration, however, appears equally applicable in determining whether to accept jurisdiction in the choice-of-law state.

[8] Senior Justice Joe L. Draughn sitting by assignment.