

Opinion issued August 9, 2001 withdrawn; Affirmed and Majority and Dissenting Opinions filed August 23, 2001.



In The
Fourteenth Court of Appeals

NO. 14-00-01225-CV

P.V.F., INC., Appellant

V.

PRO METALS, INC., Appellee

**On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 00-32194**

SUBSTITUTED MAJORITY OPINION

The opinions issued in this case on August 9, 2001 are withdrawn and the following opinions are issued in their place.

In this interlocutory appeal,¹ P.V.F., Inc. (“PVF”) challenges the denial of its special appearance on the grounds that it does not have sufficient contacts with the State of Texas to establish specific or general jurisdiction over it. We affirm.

¹ See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon Supp. 2001) (permitting interlocutory appeal of an order granting or denying a special appearance).

Background

PVF is a Delaware corporation with its principal place of business in Delaware, and Pro Metals, Inc. (“Pro Metals”) conducts its business in Texas. At various times from November of 1998 to December of 1999, PVF orally purchased goods from Pro Metals on credit. After PVF failed to pay Pro Metals for goods purchased in two of these transactions, Pro Metals brought suit in Texas for payment. PVF filed a special appearance, which the trial court denied.

The trial court’s findings of fact state that: (1) since October of 1998, PVF placed thirty separate purchase orders to Pro Metals at its offices in Texas; (2) the orders consisted of pipe and pipe fittings, including components manufactured in Texas; (3) the goods were taken from Pro Metals’s Texas inventory; (4) the goods were shipped “F.O.B.” Houston;² (5) PVF remitted payment (on the orders not in question) to Pro Metals’s offices in Texas; and (6) although the evidence is disputed as to which party initiated the original contact with the other, the evidence is undisputed that PVF knew it was purchasing goods from Texas. The trial court’s conclusions of law were that: (1) minimum contacts may be satisfied by isolated and occasional contacts with Texas if the cause of action arises from or relates to those contacts; (2) Pro Metals’s claim arose from and related to PVF’s contacts with Texas; and (3) the ongoing and continuous nature of PVF’s purchases in Texas make them more than random or fortuitous. PVF does not challenge the trial court’s findings of fact, but only the application of law to them to conclude that a Texas court could exercise personal jurisdiction over it.

Standard of Review

We are aware of no case in which the Texas Supreme Court has specified whether the appropriate standard for reviewing a decision on personal jurisdiction is abuse of discretion, sufficiency of the evidence, *de novo* review, a combination of these, or

² “F.O.B.” at the place of sale means the purchaser will pay the freight and assume the risk of loss during shipment. TEX. BUS. & COM. CODE ANN. § 2.319(a)(1) (Vernon 1994).

otherwise. However, appeals courts have generally reviewed trial courts' challenged findings of fact on the existence or lack of personal jurisdiction for sufficiency of the evidence, and their conclusions of law on that issue, *de novo*.³

A Texas court may exercise jurisdiction over a nonresident if doing so is: (1) authorized by the Texas “long-arm” statute;⁴ and (2) consistent with federal and state constitutional due process guarantees. *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996). The Texas long-arm statute authorizes the exercise of jurisdiction over nonresidents “doing business” in Texas. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997). In addition to the acts it specifies, the long-arm statute provides that other, unspecified acts by a nonresident may also constitute doing business. *Id.*⁵ However, the broad language of this doing business requirement permits the statute to reach as far as federal constitutional requirements of due process will allow. *CSR*, 925 S.W.2d at 594. Because the doing business concept extends as far as due process will allow, it follows that any activity or contact which satisfies due process also constitutes doing business, and that any activity or contact which does not satisfy due process cannot constitute doing business.

³ See, e.g., *Carlidge v. Hernandez*, 9 S.W.3d 341, 346 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *C-Loc Retention Sys., Inc. v. Hendrix*, 993 S.W.2d 473, 476 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Conner v. ContiCarriers and Terminals, Inc.*, 944 S.W.2d 405, 411 (Tex. App.—Houston [14th Dist.] 1997, no writ); *Linton v. Airbus Industrie*, 934 S.W.2d 754, 757 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *Hotel Partners v. KPMG Peat Marwick*, 847 S.W.2d 630, 632 (Tex. App.—Dallas 1993, writ denied); see generally *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991) (noting that a trial court’s findings of fact are reviewed for legal and factual sufficiency of the evidence); W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY’S L.J. 351 (1998).

⁴ See TEX. CIV. PRAC. & REM. CODE ANN. § 17.041-.093 (Vernon 1997).

⁵ In addition to other, unspecified acts, 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. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997).

Id. As a practical matter, therefore, we need not analyze the doing business requirement apart from the due process requirement since the scope of each is coextensive. *Id.*

In order for a court's assertion of jurisdiction over a nonresident defendant to comport with due process, (1) the defendant must have purposefully established minimum contacts with the forum state such that it could reasonably anticipate being sued in that state; and (2) the exercise of jurisdiction must comport with fair play and substantial justice. *Dawson-Austin v. Austin*, 968 S.W.2d 319, 326 (Tex. 1998). A defendant's contacts with a forum state can give rise to either specific or general jurisdiction. *CSR*, 925 S.W.2d at 595.

Specific jurisdiction is established where the alleged liability arises from activity conducted within, or "purposefully directed" toward, the forum state and involves a less demanding minimum contacts analysis than general jurisdiction. *CSR*, 925 S.W.2d at 595. Although the existence of jurisdiction will vary with the quality and nature of a defendant's activity, it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985) (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The unilateral activity of those who claim a relationship with a nonresident defendant cannot satisfy this requirement. *Id.*

Conversely, general jurisdiction exists where the defendant has had continuous and systematic contacts with the forum state, even if the cause of action did not arise from the defendant's purposeful conduct in that state. *CSR*, 925 S.W.2d at 595.⁶ However, because

⁶ To prevail in a special appearance, a nonresident defendant must negate all bases of personal jurisdiction by demonstrating that it: (1) had no systematic and continuous contacts with Texas; (2) did not purposefully direct any act toward Texas; and (3) took no action within Texas that gave rise to the plaintiff's cause of action. *CSR*, 925 S.W.2d at 596.

we conclude below that PVF's contacts are sufficient to support specific jurisdiction, we need not address general jurisdiction.⁷

To invoke the fair play and substantial justice prong of the due process requirement, a nonresident defendant must present a compelling case that the exercise of jurisdiction over it would be unreasonable.⁸ *In re S.A.V.*, 837 S.W.2d 80, 85 (Tex. 1992). However, once minimum contacts are established, the exercise of jurisdiction will rarely fail to comport with fair play and substantial justice. *Id.* at 86.

Existence of Jurisdiction

PVF contends that two unpaid invoices for goods that were ordered from Texas, partly manufactured in Texas, shipped F.O.B. from Texas, and required to be paid for in Texas, are not sufficient to support specific jurisdiction.⁹

Cases, such as this, in which a Texas seller sues an out-of-state buyer often present a tenuous due process analysis, and “[n]arrow factual distinctions will often suffice to swing the due process pendulum.” *U-Anchor Adver., Inc. v. Burt*, 553 S.W.2d 760, 764 (Tex. 1977). Factors the courts have relied upon in determining whether a Texas court has

⁷ PVF's assertion that it lacks the continuous and systematic contacts required to support a finding of general jurisdiction is based on the affidavits of Yuki Uzuki, President of PVF, which state that PVF: (1) does not have offices outside Delaware; (2) sells almost all its goods to residents of Delaware, Pennsylvania, and Maryland; (3) has never *sold* goods to any company in Texas; (4) has never maintained an office or other place of business in Texas; (5) does not maintain any agents, servants or employees in Texas; (6) does not hold a certificate of authority to do business in Texas; (7) has never solicited business in Texas; (8) does not advertise in Texas; (9) does not own property or have assets in Texas; and (10) received a solicitation from Pro Metals describing its products.

⁸ The factors to be considered include: (1) the burden on the defendant; (2) the interests 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 social policies. *In re S.A.V.*, 837 S.W.2d at 86.

⁹ In opposing PVF's special appearance, Pro Metals submitted affidavits showing that: (1) PVF placed thirty separate purchase orders with Pro Metals; (2) many of the pipe and pipe fitting components were manufactured in Texas; (3) the goods were purchased from Pro Metals's Texas inventory; (4) PVF was responsible for the payment of freight because the goods were shipped "F.O.B. Houston;" (5) payment of goods was made to Pro Metals's office in Texas; and (6) PVF initiated contact with Pro Metals by requesting information about its products.

personal jurisdiction over a nonresident buyer have included: (1) the state in which the agreement was solicited (and by whom), negotiated, consummated, and performed;¹⁰ (2) whether, after entering into the agreement, the nonresident directed communications to Texas in furtherance of the transaction(s); (3) whether the nonresident earned a profit in Texas from the transaction(s); (4) whether the nonresident paid the cost to ship the goods from Texas; (5) whether the nonresident placed follow-up orders; (6) whether Texas law governed the transactions;¹¹ and (7) whether payments were sent or to be sent to Texas.¹²

¹⁰ However, if unilateral activity by a Texas resident cannot constitute purposeful availment by a nonresident, the fact that the Texas resident performs his part of the contract in Texas would seem to be of little consequence in the due process analysis.

¹¹ But the fact that a state's law governs a dispute does not necessarily confer upon its courts jurisdiction over the parties. *Shaffer v. Heitner*, 433 U.S. 186, 215 (1977).

¹² Compare *U-Anchor Adver., Inc. v. Burt*, 553 S.W.2d 760, 761 (Tex. 1977) (holding no jurisdiction over nonresident customer where contract was solicited, negotiated, and consummated in Oklahoma for billboards to be built in Texas and erected in Oklahoma, payments were made to Texas, and defendant would not earn a profit from Texas and had no other contact with Texas); and *3-D Electric Co. v. Barnett Constr. Co.*, 706 S.W.2d 135, 143 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (holding that Texas lacked jurisdiction over a Tennessee general contractor which orally solicited and contracted with a Texas electrical contractor to perform electrical work in Colorado and which directed payments, telephone calls, and correspondence to Texas); with *Southwest Offset Inc. v. Hudco Publishing Co.*, 622 F.2d 149, 150 (5th Cir. 1980) (holding that jurisdiction existed over nonresident printing customer, despite the fact that Texas printer solicited the business in Alabama and nonresident sent no personnel to Texas, because nonresident: placed additional orders from which it expected to profit, sent payments to Texas, sent and received printing materials to and from Texas, paid for shipping of printed goods from Texas, and sent payments to Texas; the transactions were governed by Texas law; and substantial part of performance occurred in Texas); *Beechem v. Pippin*, 686 S.W.2d 356, 358 (Tex. App.—Austin 1985, no writ) (holding that jurisdiction existed over two Georgia residents who leased a machine from a Texas resident because they: (1) solicited and negotiated the lease agreement by two telephone calls to Texas; (2) sent correspondence and payments by mail to Texas; (3) paid for the transfer of the machine from Texas; and (4) caused their insurance agent to contact the Texas resident in Texas to arrange coverage for the machine); *Uvalde Rock Asphalt Co. v. Consol. Carpet Corp.*, 457 S.W.2d 649, 651-52 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.), cited with approval in *U-Anchor Adver.*, 553 S.W.2d at 764 (noting that jurisdiction existed over an Arizona wholesaler, even though the parties' contract was solicited in Arizona by the Texas manufacturer, because payments were to be made in Texas, the Arizona wholesaler placed several orders with the Texas manufacturer, the goods were delivered F.O.B. Houston, and some orders were to be delivered directly to Texas retailers, indicating the Arizona wholesaler's expectation of profits from Texas); and *J.D. Fields & Co. v. W.H. Streit, Inc.*, 21 S.W.3d 599, 604-05 (Tex. App.—Houston [1st Dist.] 2000, no

In this case: (1) the record is unclear whether the relationship was originally solicited in Texas, but there is no dispute that PVF placed subsequent orders with Pro Metals and that this lawsuit pertains to two of those orders that were initiated by PVF; (2) there is no indication whether PVF has earned or will earn a profit in Texas from its transactions with Pro Metals; (3) PVF paid to have the goods in question shipped from Texas; and (4) PVF sent payments on other orders to Texas. In addition, PVF allegedly submitted a credit application to Pro Metals so it could be invoiced by Pro Metals for its purchases.¹³ We believe that the foregoing circumstances, particularly PVF's alleged inducement of Pro Metals to sell to it on credit and PVF's subsequent placing of follow-up orders,¹⁴ constitute actions by which PVF purposefully availed itself of the privilege of conducting activities within Texas and thereby invoked the benefits and protections of its laws. Accordingly, we conclude the trial court's exercise of jurisdiction over PVF does not offend due process and affirm the judgment of the trial court.

Richard H. Edelman
Justice

Judgment rendered and Opinion filed August 23, 2001.

pet.) (holding that jurisdiction existed over nonresident guarantor of debt to Texas creditor based only on sending a guaranty agreement to Texas; and discussing the general pattern of Texas cases holding likewise).

¹³ Pro Metals's petition alleges that PVF's purchases were made on "credit extended to PVF" and refers to an attached document on PVF's letterhead entitled "Credit Reference," which states "please find below the information which you requested concerning our application for credit," followed by names and addresses of three "credit references." PVF has not disputed that it requested and received credit approval from Pro Metals or that the purchases at issue in this case were made pursuant to its request for credit.

¹⁴ We do not agree with PVF that the only activity we may consider in determining the "purposeful availment" requirement are the two transactions that are actually in dispute in this case. Instead, we believe the overall sequence of transactions that PVF has entered into with Pro Metals is the relevant context for deciding whether PVF's alleged liability arises from or is related to an activity conducted within Texas. See *CSR*, 925 S.W.2d at 595; *Southwest Offset*, 622 F.2d at 150 (basing jurisdiction on the overall business activities between the parties rather than only the transactions in dispute); *Uvalde Rock Asphalt*, 457 S.W.2d at 651-52 (same).

Panel consists of Justices Anderson, Edelman, and Frost. (Frost, J. dissenting).

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