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Said v. Maria Invs., Inc.

Court of Appeals of Texas, First District, Houston

February 11, 2010, Opinion on Rehearing Issued

NO. 01-08-00962-CV

Reporter

2010 Tex. App. LEXIS 959

ASIF SAID and ASMA SAID, Appellants v. **MARIA INVESTMENTS, INC.**, CHINASIA, INC., TAASCO PRIVATE, LTD., VENOPAC, S.A., MERRYSAMAN, INC., AFAS LTDA. DE C.V., AZSA IMPORTADORES ORIENTALES, LTDA. DE C.V., AZA LIMITADA, IMPORTACIONES ORIENTALES LUSAFE S.A. DE C.V., NOOR IMPORTS, INC., and ALIA IMPORTS, INC., Appellees

Subsequent History: Petition for review denied by [Said v. Said, 2010 Tex. LEXIS 581 \(Tex., Aug. 20, 2010\)](#)

Prior History: [*1] On Appeal from the 151st District Court, Harris County, Texas. Trial Court Cause No. 2006-34130.

[Said v. Maria Invs., Inc., 2009 Tex. App. LEXIS 9421 \(Tex. App. Houston 1st Dist., Dec. 10, 2009\)](#)

Core Terms

special appearance, companies, trial court, allegations, personal jurisdiction, contacts, negate, jurisdictional, residents, days, opposing party, prescribed

Case Summary

Procedural Posture

Appellant minority owners sought review of orders from the 151st District Court, Harris County (Texas), which granted appellee companies' special appearances in a suit alleging breach of fiduciary duty and other causes of action arising from the minority owners' exclusion from the business.

Overview

One week before the hearing on the special appearances, the companies served upon the minority owners, by facsimile delivery, affidavits in support of

their special appearances. The trial court denied the minority owners' motions to strike the affidavits based on untimely service. The court held that the requirement of [Tex. R. Civ. P. 120a\(3\)](#) for service of affidavits at least seven days before the hearing had been increased to 10 days pursuant to [Tex. R. Civ. P. 21a](#) because the companies used facsimile delivery as the method of service. The court determined that a party opposing a special appearance had the right or was required to do some act within a prescribed period after service, within the meaning of [Rule 21a](#), because such a party had the right to present evidence and objections. Accordingly, the companies' affidavits were untimely served. Without the untimely filed affidavits, the companies' statements in their special appearance did not fully negate the jurisdictional allegations, which had some support in deposition testimony about ongoing business relationships with a Texas corporation. Consequently, the trial court erred in granting the special appearances.

Outcome

The court reversed the portions of the trial court's orders that had granted the special appearances.

LexisNexis® Headnotes

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Long Arm Jurisdiction

HN1 Due process allows a state court to exercise personal jurisdiction over a defendant only if the defendant has some minimum, purposeful contacts with the state, and the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN2 Personal jurisdiction exists if the nonresident

defendant's minimum contacts in the state give rise to either specific jurisdiction or general jurisdiction. A Texas court can exercise specific jurisdiction over a defendant if the defendant's alleged liability arises from or is related to an activity conducted within the state. In contrast, general jurisdiction exists when a defendant's contacts in a forum are continuous and systematic so that the forum may 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.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

HN3 The procedure for challenging personal jurisdiction through a special appearance is set forth in [Tex. R. Civ. P. 120a](#), while the type and quantum of proof required is governed by the state and federal constitutions as interpreted by the common law. [Rule 120a\(3\)](#) requires the trial court to determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

HN4 The special-appearance jurisprudence of Texas dictates that the plaintiff and the defendant bear shifting burdens of proof in a challenge to personal jurisdiction. The plaintiff bears the initial burden of pleading jurisdictional facts sufficient to bring the defendant within the reach of the Texas long-arm statute. Because the plaintiff defines the scope and nature of the lawsuit, the defendant's corresponding burden is tied to the allegations in the plaintiff's pleading. The defendant can discharge its burden to negate those allegations on either a factual or legal basis. Factually, the defendant can present evidence that it has no contacts with Texas, effectively disproving the plaintiff's allegations. The plaintiff can then respond with its own evidence that affirms its allegations, and it risks dismissal of its lawsuit if it cannot present the trial court with evidence establishing personal jurisdiction. Legally, the defendant can show that even if the plaintiff's alleged facts are true, the evidence is legally insufficient to establish jurisdiction; the defendant's contacts with Texas fall short of purposeful availment; for specific jurisdiction, that the claims do not arise from the contacts; or that traditional notions of fair play and substantial justice are offended by the exercise of jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

HN5 If a party challenging personal jurisdiction intends to rely on any proof in the form of affidavits, those affidavits shall be served at least seven days before the hearing. [Tex. R. Civ. P. 120a\(3\)](#). [Rule 120a\(3\)](#) gives the trial court the discretion to continue a special appearance hearing and thereby extend the time in which evidence may be served, but this power applies only to a party opposing the special appearance who avers that he cannot adequately prepare for the special appearance hearing.

Civil Procedure > ... > Service of Process > Methods of Service > Electronic Means

Civil Procedure > ... > Service of Process > Methods of Service > Mail

Civil Procedure > ... > Service of Process > Time Limitations > General Overview

HN6 See [Tex. R. Civ. P. 21a](#).

Governments > Courts > Rule Application & Interpretation

HN7 Courts of appeals are bound to follow the Texas Rules of Civil Procedure as they are promulgated by the Texas Supreme Court.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

Civil Procedure > ... > Service of Process > Methods of Service > Electronic Means

Civil Procedure > ... > Service of Process > Methods of Service > Mail

Civil Procedure > ... > Service of Process > Time Limitations > General Overview

HN8 [Tex. R. Civ. P. 120a](#) contemplates that a party opposing a special appearance has the right to present by affidavit facts essential to justify his opposition, and gives the trial court the authority to continue the hearing so that the opponent can obtain any discovery necessary to support its position. [Rule 120a\(3\)](#). The party opposing the special appearance also has the right to interpose timely objections to the specially appearing party's affidavits and other evidence. Because [Rule 120a](#) recognizes that the party opposing a special appearance has the right to present its own evidence to counter the proponent's evidence and to object to the proponent's special appearance evidence by the prescribed hearing date, [Tex. R. Civ. P. 21a](#)

applies.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN9 Sellers who reach out beyond one state and create continuing relationships and obligations with citizens of another state are purposeful rather than fortuitous.

Judges: Panel consists of Chief Justice Radack and Justices Bland and Massengale.

Opinion by: Jane Bland

Opinion

MEMORANDUM OPINION ON REHEARING

Appellees *Maria Investments*, Inc.; Chinasia, Inc.; Taasco Private, Ltd., Venopac, S.A.; Merryman, Inc.; Afas Ltda, de C.V.; Azsa Importadores Orientales, Ltda., de C.V.; Aza Limitada; Importaciones Orientales Lusafe SA de CV; Noor Imports, Inc., and Alia Imports, Inc. (the companies) have moved for rehearing. We grant rehearing to incorporate the Texas Supreme Court's newly issued opinion in *Kelly v. General Interior Construction, Inc.* in our analysis. [No. 08-0669, 301 S.W.3d 653, 2010 Tex. LEXIS 32, 2010 WL 143985 \(Tex. Jan. 15, 2010\)](#). We withdraw our opinion and judgment of December 10, 2009, and issue the following in their stead. Our disposition of the case remains unchanged.

Asif Said and Asma Said (the Sais) appeal the trial court's orders granting special appearances to the companies--all defendants that the Sais sued along with Asif's brother, Azhar Said. The Sais claim that Azhar reneged on a partnership agreement he made with Asif, and seek damages to compensate the Sais for Asif's alleged partnership [*2] interest. ¹ The Sais contend that the trial court abused its discretion in granting the special appearances. Holding that had no evidence properly before the trial court supports the special appearances, we reverse the portions of the trial court's orders granting the special appearances.

BACKGROUND

Azhar, through the companies, among other entities, manages the business, which operates carpet stores

located in Texas, California, Georgia, and Florida, as well as Mexico, Venezuela, Colombia, and Pakistan. Asif began working with his brother in 1977. In mid-2006, a disagreement arose between them which culminated in Asif's exclusion from the business.

The Sais brought this suit against Azhar and the entities used to operate the business, asserting numerous causes of action, including breach of fiduciary duty, stockholder oppression, conversion, theft, and unjust enrichment.

In June 2007, the companies all specially appeared. They denied doing business in Texas or committing any of the alleged acts in Texas, but did not attach any affidavits or other proof to their special [*3] appearance, or refer to any evidence previously on file.

On November 19, 2008, the trial court signed orders granting the special appearances. Later, after finding the special appearances had not yet been submitted, the court vacated the orders and set the special appearances for hearing on December 9, 2008. Before the close of business on December 2, 2008, the companies served the Sais, by facsimile delivery, affidavits in support of their special appearances. The affidavits are the only evidence supporting the companies' special appearances.

The Sais moved to strike the affidavits based on untimely service under [Texas Rule of Civil Procedure 21a](#). They also moved for a continuance on that ground and also for time to obtain additional discovery pertinent to the issue of the companies' contacts with Texas, both direct and through an alter ego theory. The companies opposed the Sais' motions.

The trial court denied the Sais' motions at the December 9 hearing and then proceeded to hear the special appearances. On December 31, 2008, the trial court granted the special appearances.

DISCUSSION

Special appearances

HN1 Due process allows a state court to exercise personal jurisdiction over a defendant [*4] only if the defendant 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 \(Tex. 1998\)](#).

¹ Azhar and other defendant entities concede that they are subject to suit in Texas and are not parties to this appeal.

Personal jurisdiction

HN2 Personal jurisdiction exists if the nonresident defendant's minimum contacts in the state give rise to either specific jurisdiction or general jurisdiction. [BMC Software, Belgium, N.V. v. Marchand, 83 S.W.3d 789, 795 \(Tex. 2002\)](#). A Texas court can exercise specific jurisdiction over a defendant if the defendant's alleged liability arises from or is related to an activity conducted within the state. [Id. at 796](#). In contrast, general jurisdiction exists "when a defendant's contacts in a forum are continuous and systematic so that the forum may 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." [Id.](#) (citing [Guardian Royal Exch. Assur., Ltd. v. English China Clays, P.L.C., 815 S.W.2d 223, 226 \(Tex. 1991\)](#)).

Special appearance procedure

HN3 The procedure for challenging personal jurisdiction through a special appearance is set forth in [*5] [Texas Rule of Civil Procedure 120a](#), while the type and quantum of proof required is governed by the state and federal constitutions as interpreted by the common law. [Rule 120a](#) requires the trial court to "determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony." [TEX. R. CIV. P. 120a\(3\)](#).

HN4 Texas's "special-appearance jurisprudence dictates that the plaintiff and the defendant bear shifting burdens of proof in a challenge to personal jurisdiction." [Kelly v. Gen. Interior Constr., Inc., No. 01-08-0669, 301 S.W.3d 653, 2010 Tex. LEXIS 32, 2010 WL 143985, at *3 \(Tex. Jan. 15, 2010\)](#). The plaintiff bears the initial burden of pleading jurisdictional facts sufficient to bring the defendant within the reach of the Texas long-arm statute. [Id.](#) "Because the plaintiff defines the scope and nature of the lawsuit, the defendant's corresponding burden is tied to the allegations in the plaintiff's pleading." [Id.](#) The defendant can discharge its burden to negate those allegations

on either a factual or legal basis. Factually, the defendant can present evidence that [*6] it has no contacts with Texas, effectively disproving the plaintiff's allegations. The plaintiff can then respond with its own evidence that affirms its allegations, and it risks dismissal of its lawsuit if it cannot present the trial court with evidence establishing

personal jurisdiction. Legally, the defendant can show that even if the plaintiff's alleged facts are true, the evidence is legally insufficient to establish jurisdiction; the defendant's contacts with Texas fall short of purposeful availment; for specific jurisdiction, that the claims do not arise from the contacts; or that traditional notions of fair play and substantial justice are offended by the exercise of jurisdiction.

[2010 Tex. LEXIS 32, \[WL\] at *4](#).

As a threshold matter, therefore, we look to the record to determine the scope and nature of the Saims' lawsuit relevant to their jurisdictional allegations, as well as the companies' evidence and legal arguments to counter those allegations. The Saims' live pleading alleges that: "all Defendants reside in and/or do business with the State of Texas"; each of the companies "engaged in business in Texas"; and the companies and Azhar have such a unity of interest "that the separateness of the [*7] corporations has ceased, and observing the separateness of the corporations would result in an injustice." The Saims' pleadings do not allege any facts that would provide a basis for the exercise of specific jurisdiction. Accordingly, we consider only whether the companies met their burden to negate the allegations supporting the exercise of general jurisdiction.

In their June 2007 special appearances, the companies stated that they

- . do not maintain any executive offices in Texas;
- . are not incorporated in Texas;
- . do not maintain any manufacturing facilities or business operations in Texas; and
- . do not own any real property in Texas.

The December 2 affidavits contain additional statements negating the Saims' jurisdictional allegations, and the trial court considered them over the Saims' objections. Whether those affidavits support the trial court's ruling thus requires us to first consider the Saims' contention that the trial court improperly considered the companies' affidavits in granting their special appearances because the companies failed to timely serve the Saims.

HN5 If the party challenging personal jurisdiction intends to rely on any proof in the form of affidavits, those affidavits [*8] "shall be served at least seven days before the hearing" [TEX. R. CIV. P. 120a\(3\)](#). [Rule 120a\(3\)](#) gives the trial court the discretion to continue a

special appearance hearing and thereby extend the time in which evidence may be served, but this power applies only to a party opposing the special appearance who avers that he cannot adequately prepare for the special appearance hearing. [TEX. R. CIV. P. 120a\(3\)](#); [Tempest Broad. Corp. v. Imlay, 150 S.W.3d 861, 869-70 \(Tex. App.--Houston \[14th Dist.\] 2004, no pet.\)](#).

Pointing to [Rule 21a](#), the Sais contend that the companies were required to add three days to the seven-day service period prescribed in [Rule 120a\(3\)](#) because they used facsimile delivery as the method of service. [Rule 21a](#) states that, **HN6** "[w]henver a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or telephonic document transfer, three days shall be added to the prescribed period." [TEX. R. CIV. P. 21a](#). **HN7** We are bound to follow the Texas Rules of Civil Procedure as they are promulgated by the Texas Supreme Court. [Sherrill v. Estate of Plumley, 514 S.W.2d 286, 297 \(Tex. Civ. App.--Houston \[1st Dist.\] 1974, writ ref'd n.r.e.\)](#).

To **[*9]** determine whether [Rule 21a](#) applies, we must consider whether the party opposing a special appearance "has the right or is required to do some act within a prescribed period" after service. **HN8** [Rule 120a](#) contemplates that the party opposing a special appearance has the right to "present by affidavit facts essential to justify his opposition," and gives the trial court the authority to continue the hearing so that the opponent can obtain any discovery necessary to support its position. See [TEX. R. CIV. P. 120a\(3\)](#). The party opposing the special appearance also has the right to interpose timely objections to the specially appearing party's affidavits and other evidence. See *id.* Because [Rule 120a](#) recognizes that the party opposing a special appearance has the right to present its own evidence to counter the proponent's evidence and to object to the proponent's special appearance evidence by the prescribed hearing date, we hold that [Rule 21a](#) applies. Thus, the companies could have served the affidavits seven days before the hearing if they had used hand delivery, but they were required to serve them at least ten days before the hearing if they used fax or first-class mail. Because the companies **[*10]** chose fax rather than hand delivery as the method of service, the companies sent their last-minute faxes three days too late.

Here, the Sais objected to the untimeliness of the affidavits by moving to strike them or, alternatively, for

continuance of the special appearance hearing and secured rulings from the trial court on these motions, thus preserving the issue for appellate review. See [TEX. R. APP. P. 33.1\(a\)](#). The trial court erred in denying those motions and, thus, in considering the late-filed affidavits in support of the special appearances. See [Tempest Broad. Corp., 150 S.W.3d at 870](#) (declining to consider late filed affidavit in determining whether appellee was entitled to special appearance).

The Sais' live pleading alleges that the companies reside and engage in business in Texas. The companies' special appearances negate the existence of certain activities that could constitute doing business in Texas for general jurisdiction purposes, but leave unaddressed other activities that constitute "doing business," relevant to the Sais' pleadings, such as contracting or partnering with Texas residents to conduct business in Texas, advertising to Texas residents, training employees **[*11]** in Texas, or hiring Texas residents. Without the untimely filed affidavits, the companies' statements in their special appearance do not fully negate these jurisdictional allegations.² On rehearing, the companies contend that excerpts from Azhar's deposition in the record "address[] the fact that several of the companies did not conduct business in [the] state of Texas . . . and constitute[] prima facie evidence of no jurisdiction over these companies." We read the cited deposition testimony as supporting the opposite conclusion. According to Azhar's testimony, Phoenician Imports, Inc., a defendant in the trial court and a Texas corporation, owns the inventory of and acts as wholesale supplier for some, if not all, of the companies. Those ongoing business relationships with Phoenician, a Texas resident, are relevant to whether Texas courts have personal jurisdiction over a foreign defendant. See [Moki Mac River Expeditions v. Drugg, 221 S.W.3d 569, 578 \(Tex. 2007\)](#) **HN9** ("Sellers who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are purposeful rather than fortuitous.") (quoting [Michiana Easy Livin' Country, Inc. v. Holten, 168 S.W.3d 777, 784, 785 \(Tex. 2005\)](#)). **[*12]** Because the

² Because of the companies' failure to meet their burden to negate these allegations, the Sais did not need to carry the burden to prove, alternatively, that actions in Texas should be imputed to the companies. The plaintiff also bears the burden to prove the contacts of another person or entity should be imputed to the defendant if it relies on those contacts to assert personal jurisdiction over the defendant. See [BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 798 \(Tex. 2002\)](#) (plaintiff bears burden of proving jurisdictional alter ego).

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companies did not rebut the allegations supporting the exercise of personal jurisdiction, the trial court erred in granting the special appearances.

CONCLUSION

The companies failed to timely serve proof negating the Salds' jurisdictional allegations, and thus the trial court erred in relying on the untimely proof in granting their

special appearances in the face of an objection to its lateness. We therefore reverse the portions of the trial court's December 31, 2008 orders that grant the special appearances.

Jane Bland

Justice