Affirmed and Opinion filed October 28, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-01413 -CV

A.V.W., Inc., Appellant

V.

C.E.K. DE CENTROAMERICA, S.A., Appellee

On Appeal from the 269th District Court
Harris County, Texas
Trial Court Cause No. 98-02228

O P I N I O N

In this products liability case, A.V.W., Inc. ("AVW") appeals the granting of a special appearance to C.E.K. de Centroamerica, S.A. ("CEK") on the grounds that: (1) CEK had sufficient contacts with the State of Texas to establish specific and general jurisdiction over it; (2) the trial court's findings of fact are not supported by the evidence; and (3) its conclusions of law are incorrect. We affirm.

Background

Atmaram Hararim, a Texas resident, was allegedly injured in a flash fire caused by an aerosol product. Hararim brought causes of action against Computer Expo, CEK, KEM Manufacturing Corp., S.A. d/b/a Kemcorp ("KEM"), Empire Trading International ("Empire"), and AVW. CEK, KEM, and Empire are Costa Rican companies that were involved in manufacturing and exporting the aerosol product that allegedly caused Hararim's injuries. AVW is a Florida corporation that distributed the product in the United States. Computer Expo is the Texas retailer from which Hararim purchased the product. AVW filed a cross-action against CEK, and CEK filed a special appearance. The trial court granted CEK's special appearance and filed findings of fact and conclusions of law.

Standard of Review

A Texas court may exercise jurisdiction over a nonresident if it is authorized by the Texas long-arm statute[1] and if it is consistent with federal and state constitutional due process guarantees. *See 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. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997). In addition to the acts specified, the long-arm statute provides that other, unspecified acts by a nonresident may also constitute "doing business." *See id.*[2] Moreover, the broad language of this "doing business" requirement permits the statute to reach as far as federal constitutional requirements of due process will allow. *See 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 does not constitute doing business. *See id.* As a practical matter, therefore, we need not analyze the

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1 *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041–.093 (Vernon 1997 & Supp. 1999).

2 The statute provides that 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. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997).

"doing business" requirement apart from the due process requirement since the scope of each is coextensive. *See 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 the courts of the state;[3] and (2) the exercise of jurisdiction must comport with fair play and substantial justice. *See Dawson-Austin v. Austin*, 968 S.W.2d 319, 326 (Tex. 1998). The minimum contacts requirement is satisfied if either general or specific jurisdiction exists. *See CSR*, 925 S.W.2d at 595*; Schlobohm v. Schapiro*, 784 S.W.2d 355, 357-58 (Tex. 1990). General jurisdiction is present where the defendant has had continuous and systematic contacts with Texas, even if the cause of action did not arise from the defendant's purposeful conduct in the state. *See CSR*, 925 S.W.2d at 595.[4] For specific jurisdiction to exist, the plaintiff's cause of action must arise out of or relate to the nonresident defendant's contacts with Texas and the defendant's activities must have been "purposefully directed" toward the forum state. *See id.*; *CMMC v. Salinas*, 929 S.W.2d 435, 439 (Tex. 1996).

"Purposefully directed" requires something more than a defendant merely placing his product into the stream of commerce. *See CMMC*, 929 S.W.2d at 438. Additional conduct of the defendant must indicate an intent or purpose to serve the market in the forum state, such as by designing the product for the market in the forum state, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state. *See id.* However, a defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state. *See CSR*, 925 S.W.2d

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[3] Minimum contacts are particularly important when the defendant is from a different country because of the unique and onerous burden placed on a party called upon to defend a suit in a foreign legal system. *See CMMC v. Salinas*, 929 S.W.2d 435, 440 (Tex. 1996).

[4] *See Zac Smith & Co., Inc. v. Otis Elevator Co.*, 734 S.W.2d 662 (Tex. 1987) (determining that a Florida corporation that entered into a joint venture for the construction of a hotel in Texas satisfied the test for minimum contacts).

at 595. Thus, a manufacturer cannot fairly be expected to litigate in every part of the world where its products may end up; rather, its contacts with the forum must be more purposeful. *See CMMC*, 929 S.W.2d at 440.[5]

To invoke the fair play and substantial justice prong of due process, a nonresident defendant must present a compelling case that the exercise of jurisdiction over it would be unreasonable. *See In re S.A.V.*, 837 S.W.2d 80, 85 (Tex.1992).[6] However, once minimum contacts have been established, the exercise of jurisdiction will rarely fail to comport with fair play and substantial justice. *See id*. at 86.

A defendant asserting lack of personal jurisdiction by special appearance has the burden of negating all bases of jurisdiction. *See CSR*, 925 S.W.2d at 596. However, if the plaintiff does not allege that the defendant performed a specific act in Texas, the defendant's evidence that he is a nonresident is enough to carry his burden of proof. *See Siskind v. Villa Found. for Educ., Inc.*, 642 S.W.2d 434, 437-38 (Tex.1982).

We have found no case in which the Texas Supreme Court has articulated whether the appropriate standard for reviewing personal jurisdiction is abuse of discretion, sufficiency of the evidence, *de novo* review, or otherwise. However, appeals courts have generally reviewed trial courts' challenged findings

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5 *Compare CMMC v. Salinas*, 929 S.W.2d 435 (Tex. 1996) (determining that a French corporation was not subject to the jurisdiction of Texas courts, even though the company knew the product was being shipped to Texas, because there had been no efforts to market the product in the forum and its reaching Texas was due to an isolated sale of the product); *CSR Ltd. v. Link*, 925 S.W.2d 591 (Tex. 1996) (holding that an Australian company was not subject to the jurisdiction of Texas courts because it had no connections with Texas and there was no direct evidence that it knew its product would be distributed in Texas); *with Keen v. Ashot Ashkelon, Ltd.*, 748 S.W.2d 91 (Tex. 1988) (concluding that an Israeli entity was subject to Texas jurisdiction because it delivered its product into the stream of commerce with a reasonable expectation that its product would enter Texas); *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199 (Tex. 1985) (holding that a Japanese corporation, which confirmed orders for millions of dollars of steel shipped to Texas annually, could reasonably expect its product would end up in Texas, subjecting it to the jurisdiction of Texas courts).

6 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. *See In re S.A.V.*, 837 S.W.2d at 86.

of fact for sufficiency of the evidence,[7] and their conclusions of law, including the existence or lack of jurisdiction, *de novo*.

Specific Jurisdiction

AVW asserts that the evidence presented to the trial court established that CEK had specific contacts with Texas through its exclusive distribution agreement (the "agreement"). Under the agreement, AVW would distribute in the United States the aerosol product manufactured by CEK. The agreement contemplated sales and distribution of more than 60,000 units of the product. AVW argues that CEK's actions in manufacturing so large a quantity of its product for distribution in the United States presupposes a foreseeability that some of its product would be distributed in Texas and sold to Texas consumers, thus constituting sufficient activities directed to this forum to establish specific jurisdiction.

However, specific jurisdiction rests on activities *purposefully* directed at the forum state. *See CMMC*, 929 S.W.2d at 439-40. The agreement was not negotiated or executed in Texas, nor does it directly concern or even mention Texas. It is between a Costa Rican company and a Florida corporation and specifies that Florida law governs the agreement and that Florida would provide the venue for any disputes concerning the agreement.[8] Nowhere does the agreement suggest any specific action directed towards Texas. Also, as set forth in Finding of Fact No. 16, CEK had no specific knowledge of any sales of its product in Texas.[9] Thus, AVW has failed to show that CEK did more than merely place its product

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7 *See, e.g., De Prins v. Van Damme*, 953 S.W.2d 7, 13 (Tex. App.—Tyler 1997, pet. denied); *Fish v. Tandy Corp.*, 948 S.W.2d 886, 892 (Tex. App.—Fort Worth 1997, writ denied); *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* W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351 (1998).

8 CEK argues that the agreement cannot provide a basis for specific jurisdiction because AVW's claims do not arise from a dispute regarding the agreement's terms. We believe the more relevant consideration is simply the activities directed to the forum state, whether arising under a particular agreement or otherwise.

9 *See CSR*, 925 S.W.2d at 595 (finding that specific jurisdiction did not exist because title to the product passed to a third-party company in Australia and the defendant company was not part of the decision to ship to Texas; also recognizing that foreseeability alone did not establish specific jurisdiction and

into the stream of commerce. Accordingly, we overrule its challenge to the trial court's finding of no specific jurisdiction.

General Jurisdiction

To establish the requisite contacts for general jurisdiction, AVW claims that CEK looked to Texas for raw materials, training, product labels, product information and formulas. AVW also claims that goods purchased through the Carroll Company ("Carroll") were shipped to CEK, even though KEM was sending the purchase orders. The record reflects the following contacts: (1) on three occasions CEK paid royalties due under the licensing agreement KEM had with Carroll; (2) the president of Carroll stated that he had done business with CEK since 1991 or 1992 and did not know of KEM until 1994; (3) CEK representatives attended a convention in Dallas in 1997; (4) CEK has sent approximately six inquiries to Carroll requesting labels and product information; (5) a CEK representative visited Carroll in 1994. Additionally, CEK asserts that the invoices and related documents indicating that it had placed orders with and received shipments from Carroll were the result of a clerical error by Carroll and that CEK never ordered or purchased anything from Carroll.

CEK's contacts with Texas, such as occasional requests for product information or employee visits to trade shows, were sporadic and too attenuated to establish general jurisdiction. CEK never had offices, employees, or property in Texas.[10] It did not advertise or solicit the sale of its product in Texas. Nor did CEK create, control, or employ AVW's distribution system. There is no evidence that CEK ever accepted any checks drawn on a Texas bank, that it ever sent employees to Texas for training, or that it ever purchased equipment in Texas. Also, CEK has never sought protection from Texas courts. Although, there is evidence that CEK sent a small amount of correspondence to Texas, these contacts are insufficient to allow a Texas court to assert general jurisdiction over CEK.

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that a nonresident defendant must take an action purposefully directed toward the forum state or other indication that it intended to serve the Texas market).

10 *See CSR*, 925 S.W.2d at 595 (finding that because the defendant company had no offices, employees or bank accounts in Texas, had not paid taxes in Texas, owned no property in Texas and had not solicited business in Texas, the company did not have sufficient contacts to establish general jurisdiction).

AVW argues that CEK had contracted for and made routine sales, paid invoices, and received raw materials and supplies from Carroll. However, the trial court's findings of fact Nos. 23 through 30 and 33 through 37 state that the relevant documents showed only a relationship between Carroll and KEM, that any reference in the documents to CEK resulted from a record-keeping error created and repeated by Carroll employees, and that contacts CEK did have with Carroll were random and attenuated. These findings are supported by the record.

Conclusion

Because there is insufficient evidence to establish that CEK's activities were purposefully directed towards Texas or to reflect contacts which are continuous and systematic enough to establish general jurisdiction, we overrule appellant's points of error and need not consider whether the exercise of jurisdiction would comport with fair play and substantial justice. Accordingly, the judgment of the trial court is affirmed.

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Richard H. Edelman
Justice

Judgment rendered and Opinion filed October 28, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig.

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