

# Tex. Capital Bank, N.A. v. Garden World of Holiday, Inc.

United States District Court for the Eastern District of Texas, Sherman Division

August 3, 2009, Decided; August 4, 2009, Filed

Case No. 4:09-CV-223

## Reporter

2009 U.S. Dist. LEXIS 76928

TEXAS CAPITAL BANK, N.A. v. GARDEN WORLD OF HOLIDAY, INC., and WILLIAM E. GERRELL

**Subsequent History:** Adopted by, Motion denied by Tex. Capital Bank, N.A. v. Garden World of Holiday, Inc., 2009 U.S. Dist. LEXIS 76567 (E.D. Tex., Aug. 27, 2009)

**Counsel:** [\*1] For Texas Capital Bank, N.A., Plaintiff: Jenny LaNell Martinez, LEAD ATTORNEY, Godwin Pappas Ronquillo LLP - Dallas, Dallas, TX; Brian Craig Rutt, Jon Bernard Schwartz, GodwinRonquillo PC-Dallas, Dallas, TX.

William E. Gerrell, Defendant, Pro se, Dade City, FL.

**Judges:** AMOS L. MAZZANT, UNITED STATES MAGISTRATE JUDGE. Judge Schneider.

**Opinion by:** AMOS L. MAZZANT

## Opinion

### REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pending before the Court is Defendant's Motion to Dismiss (Dkt. # 6).<sup>1</sup> Having considered the relevant pleadings, the Court is of the opinion that Defendant's motion should be DENIED.

### BACKGROUND

On November 27, 2007, ACC Capital Corporation ("ACC") and Defendant Garden World of Holiday, Inc. ("Garden World") entered into a lease agreement, which provided that ACC would provide Garden World with equipment for use in Garden World's floral business. On November 28, 2007, in accordance with an executed guaranty agreement, Defendant William E. Gerrell ("Gerrell") individually and unconditionally guaranteed to pay any and all debts arising from the lease. On

December 28, 2007, ACC assigned all of its rights and interests in the [\*2] lease and guaranty to Texas Capital Bank ("TCB"). According to TCB, almost immediately after executing a Notice of Assignment on January 9, 2008, Defendants began defaulting on their payment obligations. TCB alleges that the Defendants misrepresented to TCB that payments would be made on certain dates in order to prevent TCB from exercising its rights to the equipment. TCB employees were in constant contact with the Defendants in an attempt to collect the debt.

On June 12, 2008, Garden World took out an Auto Policy and named TCB as Additional Insured and Loss Payee. In addition to many phone calls between Gerrell and TCB, Gerrell executed two Authorization Agreements for Automatic Withdrawals on November 13, 2008, and March 3, 2009, allowing TCB to initiate debits on Garden World's bank accounts. Gerrell was the authorized signatory as President of Garden World. Gerrell and his representatives sent various email correspondence to TCB regarding Defendants' alleged failure to pay TCB. TCB made demands for payment in writing and by phone, but Defendants failed to honor the lease and guaranty agreements. Therefore, TCB revoked Garden World's possessory interest in the equipment. TCB recovered [\*3] some of the equipment, but alleges that Defendants are unlawfully hiding the equipment from TCB and refuse to disclose the location of the equipment.

On May 12, 2009, TCB filed suit against Garden World and Gerrell for breach of contract, conversion, and violations of the Texas Theft Liability Act. On June 8, 2009, Gerrell filed an Answer, including a Motion to Dismiss, arguing a lack of personal jurisdiction. On June 19, 2009, TCB filed a response.

### STANDARD

Defendants seek dismissal for lack of personal jurisdiction pursuant to Rule 12(b)(2). FED. R. CIV. P.

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<sup>1</sup> Defendant's Motion is contained within Defendant's Answer (Dkt. # 6).

12(b)(2). Under the Federal Rules of Civil Procedure, a federal court sitting in diversity may exercise jurisdiction over a non-resident defendant only if permitted under state law. *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 214 (5th Cir. 2000)(citing FED. R. CIV. P. 4(e)(1), 4(h)(1), 4(k)(1)). The reach of a state court's jurisdiction is defined by: (1) the state's long-arm statute; and (2) the Due Process Clause of the Fourteenth Amendment. *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 609 (5th Cir. 2008). The Texas long-arm statute authorizes the exercise of jurisdiction over non-residents "doing business" in Texas. [\*4] *Gundle Lining Constr. Corp. v. Adams County Asphalt, Inc.*, 85 F.3d 201, 204 (5th Cir. 1996) (citing TEX. CIV. PRAC. & REM. CODE § 17.042). The Texas Supreme Court has interpreted the "doing business" requirement broadly, allowing the long-arm statute to reach as far as the federal Constitution permits. *Id.* (citing *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990)). Thus, the two-step inquiry is actually one federal due process analysis. *Johnston*, 523 F.3d at 609.

Plaintiff bears the burden of establishing that the non-resident Defendant has contacts with the forum state sufficient to invoke the jurisdiction of this Court. *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419, 424 (5th Cir. 2005). If there is no evidentiary hearing on a motion to dismiss for lack of personal jurisdiction, the party asserting jurisdiction is merely required to present facts sufficient to constitute a prima facie case of personal jurisdiction. *Freudensprung v. Offshore Technical Servs., Inc.*, 379 F.3d 327, 342-43 (5th Cir. 2004). The prima facie showing may be established by the pleadings, depositions, affidavits, or exhibits of record. See *Guidry v. U.S. Tobacco Co., Inc.*, 188 F.3d 619, 625 (5th Cir. 1999). [\*5] The Court must accept as true the plaintiff's uncontroverted allegations and resolve any factual conflicts in favor of the plaintiff. *Freudensprung*, 379 F.3d at 343. However, the Court is not required to credit conclusory allegations, even if uncontroverted. *Cent. Freight Lines, Inc. v. APA Transport Corp.*, 322 F.3d 376, 380 (5th Cir. 2003).

A court's exercise of personal jurisdiction over a non-resident defendant comports with constitutional due process requirements when (1) the defendant "purposefully availed" itself of the benefits and protections of the forum state by establishing "minimum contacts" with that state, and (2) the exercise of personal jurisdiction does not offend traditional notions of "fair play and substantial justice." *Moncrief Oil Int'l, Inc. v. OAO Gazprom*, 481 F.3d 309, 311 (5th Cir. 2007) (citing

*Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). Both prongs must be satisfied in order for a court to exercise personal jurisdiction over the defendant. *Id.*

The "minimum contacts" prong is further subdivided into contacts that confer "specific jurisdiction" and those that confer "general jurisdiction." General jurisdiction exists when a non-resident defendant's contacts [\*6] with the forum state are "substantial, continuous, and systematic." *Johnston*, 523 F.3d at 609 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-19, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)). The defendant's contacts with the forum state are evaluated "over a reasonable number of years" up to the date the lawsuit was filed, and are to be reviewed in total rather than in isolation from one another. *Id.* at 610. When general jurisdiction exists, the forum state may exercise jurisdiction over the defendant on any matter, even if the matter is unrelated to the defendant's contacts with the forum. *Id.* at 613.

When a plaintiff asserts specific jurisdiction over a non-resident defendant, the Court must determine (1) whether "the defendant purposefully directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there," and (2) whether "the controversy arises out of or is related to the defendant's conduct with the forum state." *Freudensprung*, 379 F.3d at 343. The fact that a Texas plaintiff suffered some harm in Texas is insufficient to establish specific jurisdiction. *Revell v. Lidov*, 317 F.3d 467, 473 n. 41 (5th Cir. 2002). Rather, the focus [\*7] of the specific jurisdiction inquiry is on "the relationship between the defendant, the forum, and the litigation." *Freudensprung*, 379 F.3d at 343. Contacts that are "random, fortuitous, or attenuated" do not satisfy the minimum contacts requirement. *Moncrief*, 481 F.3d at 312.

If the plaintiff makes a prima facie showing of minimum contacts, then the burden shifts to the defendant to show that the Court's exercise of jurisdiction would not comply with "fair play" and "substantial justice." *Freudensprung*, 379 F.3d at 343. In making a fundamental fairness determination, the Court must consider: (1) the burden on the defendant; (2) the forum state's interests; (3) the plaintiff's interest in convenient and effective relief; (4) the judicial system's interest in efficient resolution of controversies; and (5) the several states' shared interest in furthering fundamental social policies. *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 487 (5th Cir. 2008).

## ANALYSIS

Gerrell argues that this Court does not have personal jurisdiction over him and that the case should be dismissed.<sup>2</sup> According to Gerrell, the transactions giving rise to this dispute occurred solely in Florida, the contracts were [\*8] signed in Florida, all equipment was manufactured in and delivered to Florida, and all payments were made to an address in Florida. Gerrell states that he does not do business in Texas, Garden World does not do business in Texas, and he has not traveled to Texas in at least five years. Additionally, Gerrell argues that venue is not proper in Texas.<sup>3</sup>

TCB argues that the Court has specific personal jurisdiction over the Defendants. TCB alleges that the notice of assignment, signed by Gerrell, is a contract that establishes minimum contacts with Texas because it constitutes doing business in Texas. Further, TCB argues that Gerrell, by allowing TCB to initiate debits [\*9] on Garden World's bank accounts, established minimum contacts with Texas because a material part of the Defendants' contractual duties were performed in Texas. TCB argues that the Court has personal jurisdiction over Defendants because the Defendants committed tortious acts in the state of Texas, including conversion and violations of the Texas Theft Liability Act. In the alternative, TCB asks that this case be transferred to Florida or Utah.

The Court finds that TCB's allegations are sufficient to raise a prima facie case of specific jurisdiction against the Defendants. Merely contracting with TCB, a Texas resident, is insufficient to establish the minimum contacts necessary for personal jurisdiction. *Moncrief*, 481 F.3d at 311. The exchange of communications between the Defendants and TCB in the course of carrying out the contracts does not, by itself, "constitute purposeful availment of the benefits and protections of Texas law." *Id.* However, Defendants' alleged communications with Texas establish personal jurisdiction because the actual content of the communications gives rise to the intentional tort of conversion, which alone constitutes purposeful availment. *Lewis v. Fresne*, 252 F.3d 352, 359 (5th Cir. 2001) [\*10] (citing *Wien Air Alaska, Inc. v. Brandt*, 195

F.3d 208, 213 (5th Cir. 1999)). TCB's complaint alleges the following relevant facts: "in order to prevent TCB from exercising its rights to the equipment, Defendants misrepresented to TCB that payments would be made on certain dates," and "Defendants are unlawfully hiding the equipment from TCB and refusing to disclose the location of such equipment." Defendants' actions, directed at the Plaintiff in Texas, are the basis of Plaintiff's conversion cause of action.

In *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208 (5th Cir. 1999), the defendant, a German attorney, provided legal services to the plaintiff, an Alaskan corporation based in Texas, to form several German companies. During these transactions, the defendant made several phone calls and sent faxes and letters to Texas, the forum state. Plaintiff alleged that these communications contained fraudulent misrepresentations. Plaintiff also alleged that the defendant made intentional, material misrepresentations while attending meetings in Texas. In addressing whether these allegations were sufficient to establish a prima facie case of personal jurisdiction against the defendant, the Fifth [\*11] Circuit stated, "[e]ven if the parties formed their relationship in Germany, however, a single act by Brandt directed toward Texas that gives rise to a cause of action by *Wien Air* can support a finding of minimum contacts." *Id.* at 211. In addition, "[w]hen the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment." *Id.* at 213.

In *Lewis v. Fresne*, 252 F.3d 352 (5th Cir. 2001), Lewis alleged that defendant Rosenfeld participated in a phone conversation, between himself and Fresne, that was designed to convince Lewis to make a loan on the basis of several misrepresentations. Rosenfeld did not correct the misrepresentations and prepared and sent loan documents and stock certificates to Lewis in Texas that contained fraudulent misstatements regarding the asset that was to secure the loan. The Fifth Circuit found these allegations to be sufficient evidence of minimum contacts because a "single act by a defendant can be enough to confer personal jurisdiction if that act gives rise to the claim being asserted." *Id.* at 358-359.

<sup>2</sup> Gerrell files this motion on his own behalf and states that he is not counsel for Garden World, but notes that his objections should also apply to Garden World, an insolvent corporation.

<sup>3</sup> Venue is proper in the Eastern District of Texas because a substantial part of the events or omissions giving rise to TCB's claim occurred here. 28 U.S.C. § 1391(a)(2). Gerrell has not filed a Motion to Transfer Venue, therefore the Court is not required to determine the most convenient venue, only whether this district is a proper forum.

The Court sees no basis to distinguish this case from those above. TCB alleges acts [\*12] by the Defendants that are directed towards Texas which give rise to at least one of the claims asserted against the Defendants. TCB alleges that the Defendants misrepresented when payments would be made in order to prevent TCB from exercising rights to the equipment. Also, the Defendants allegedly hid the equipment from TCB. These alleged misrepresentations and actions are grounds for a conversion cause of action, an intentional tort that constitutes purposeful avilment of Texas laws. See *Calder v. Jones*, 465 U.S. 783, 789-90, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984) (finding a single tortious act "expressly aimed" at the forum state can establish minimum contacts); See also *Academy Homes of Tyler, LTD. v. Lakeside Park Homes, Inc.*, 2006 U.S. Dist. LEXIS 17513, 2006 WL \*3 (E.D. Tex. April 7, 2006) (holding representations made regarding ability to deliver housing units to forum state established minimum contacts for fraudulent inducement claims).

The Defendants' contacts were not random, fortuitous, or attenuated and did not result from TCB's unilateral activity. See *Moncrief*, 481 F.3d at 312. The Defendants purposefully aimed their conduct at TCB in Texas by making misrepresentations regarding payments and hiding equipment to which TCB had a [\*13] contractual right to exercise possession over. It is not a mere fortuity that the Defendants' conduct would cause injury to TCB in Texas. Also, Gerrell signed a guaranty agreement, acknowledging that he was contracting with a company based in Texas. Under these circumstances, the Court finds that the Defendants should reasonably have anticipated being hauled into a Texas court for making misrepresentations to a known creditor in Texas whose right to payment arises out of contracts with a connection to Texas. Viewed in totality, these contacts are sufficient to permit the Court to exercise specific personal jurisdiction over the Defendants.

Finally, the Defendants have not shown, let alone made a "compelling case," that assertion of personal jurisdiction "would offend traditional notions of fair play and substantial justice." *Wien Air*, 195 F.3d at 215. The

Defendants will be burdened by having to litigate this controversy in Texas, but the Court must weigh this burden against the other factors, including Texas's interest in providing effective means of redress for its residents. TCB has an interest in obtaining convenient and efficient relief, and nothing indicates that the Court cannot [\*14] resolve this controversy efficiently. The Defendants do not contend that their inconvenience in having to litigate in this forum exceeds the inconvenience TCB would face if forced to litigate elsewhere. Further, the Defendants give no argument that this Court's exercise of jurisdiction contravenes public policy. Therefore, the Defendants' inconvenience does not offend traditional notions of substantial justice and fair play.

### RECOMMENDATION

Based upon the findings and legal analysis discussed above, the Court RECOMMENDS that Defendant's motion to dismiss be DENIED. Within ten (10) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); [\*15] *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

**SIGNED this 3rd day of August, 2009.**

/s/ Amos L. Mazzant

AMOS L. MAZZANT

UNITED STATES MAGISTRATE JUDGE