IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-9054

LAURA CIANCI,

Plaintiff-Appellant,

v.

VECO INTERNATIONAL, INC. and
BILL J. ALLEN, d/b/a Anchorage Times,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CV-370-G)

(July 26, 1994)

Before KING, JOLLY and DAVIS, Circuit Judges.

PER CURIAM:[*]

Laura Cianci appeals the district court's dismissal of defendants Veco International, Inc. and Bill H. Allen for lack of personal jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(2). Finding no error, we affirm.

---

[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

Veco International, Inc. (Veco) is a Delaware corporation with its principal place of business in Anchorage, Alaska. Its primary business is oil field support services. In 1990, Veco formed an Alaskan subsidiary, H.W.A. Acquisition Corp. (HWA) to acquire the assets of the Anchorage Times (the Times), a local newspaper. Subsequently, HWA changed its name to Times Publishing Co. (TPC).

In April 1992, TPC negotiated to hire Laura Cianci, a former reporter with the Dallas Times-Herald, to be a reporter with the Times beginning in July 1992. However, in May 1992, a decision was made to cease publication of the Times because of continuing economic losses. Shortly thereafter, TPC withdrew its employment offer to Cianci.[1]

On February 23, 1993, Cianci filed a diversity action in the United States District Court for the Northern District of Texas against Veco and Bill J. Allen, Veco's president [collectively, "the defendants"]. In her complaint she alleged that the defendants were liable to her for breach of an employment contract and intentional infliction of emotional distress.

The defendants moved to dismiss for lack of personal jurisdiction, pursuant to Federal Rule of Civil Procedure

[1] The defendants (appellees) state that negotiations were still in progress with Cianci when TPC's offer was withdrawn. Cianci, however, states that she had sent her acceptance to the Times by express mail on May 26, 1992, and that later that same day, the personnel supervisor for the Times telephoned her to tell her that the offer had been withdrawn.

12(b)(2), or, in the alternative, to transfer venue to Alaska. On October 13, 1993, the district court granted the defendants' motion to dismiss, rejecting Cianci's argument that the court had personal jurisdiction over the defendants because TPC was the alter ego of Veco and that Veco itself was the alter ego of Allen. This appeal ensued.

II.

In a diversity suit, a non-resident defendant is amenable to personal jurisdiction to the extent permitted by a state court in the state in which the federal court is located. Wilson v. Belin, 20 F.3d 644, 646 (5th Cir. 1994); Bullion v. Gillespie, 895 F.2d 213, 215 (5th Cir. 1990). Thus, a federal court sitting in diversity may assert personal jurisdiction over a non-resident defendant if (1) the non-resident defendant is amenable to service of process under the long-arm statute of the forum state and (2) the exercise of jurisdiction under state law comports with the Due Process Clause of the Fourteenth Amendment. Wilson, 20 F.3d at 646-47; Bullion, 895 F.2d at 215. Because the Texas long-arm statute extends to the limits of federal due process, see Schlobohm v. Schapiro, 784 S.W.2d 355, 357 (Tex. 1990); Hall v. Helicopteros Nacionales de Columbia, S.A., 638 S.W.2d 870, 872 (Tex. 1982), rev'd on other grounds, 466 U.S. 408 (1984), we need only inquire whether an assertion of jurisdiction over a non-resident defendant by a federal district court sitting in Texas

would comport with federal due process. See Wilson, 20 F.3d at 647; Bullion, 895 F.2d at 216.

The exercise of personal jurisdiction over a non-resident defendant comports with due process if (1) the defendant purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws by establishing "minimum contacts" with that state and (2) such an exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. Wilson, 20 F.3d at 647 (quotations and citations omitted). Minimum contacts with a forum state may give rise to "specific" or "general" personal jurisdiction. Bullion, 895 F.2d at 216. Specific jurisdiction is appropriate when the defendant's "contacts with the forum state arise from, or are directly related to, the cause of action." Wilson, 20 F.3d at 644; see Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985); Villar v. Crowley Maritime Corp., 990 F.2d 1489, 1496 (5th Cir. 1993), cert. denied, 114 S. Ct. 690 (1994). General jurisdiction is invoked when the non-resident defendant maintains "continuous and systematic" contacts with the forum state, even if those contacts are not directly related to the cause of action. Wilson, 20 F.3d at 647; Bullion, 895 F.2d at 213.

This court reviews de novo a district court's determination that personal jurisdiction can be exercised over a non-resident defendant when the facts are not disputed. Wilson, 20 F.3d at 647-48; Bullion, 895 F.2d at 216. When the facts are disputed,

the plaintiff seeking "to invoke the jurisdiction of the district court bears the burden of establishing contacts by the non-resident defendant sufficient to invoke the jurisdiction of the court." Bullion, 895 F.2d at 216-17 (quoting WNS, Inc. v. Farrow, 884 F.2d 200, 203 (5th Cir. 1989)); see Stuart v. Spademan, 772 F.2d 1185, 1192 (5th Cir. 1985). If the district court does not hold an evidentiary hearing on the personal jurisdiction question, the plaintiff need only present facts which constitute a prima facie showing that personal jurisdiction is proper. Wilson, 20 F.3d at 648; Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1165 (5th Cir. 1985). In making its determination, the district court may consider not only affidavits from the parties but also interrogatories or any combination of recognized discovery methods. Stuart, 772 F.2d at 1192; Thompson, 755 F.2d at 1165. "'[U]ncontroverted allegations in the plaintiff's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in the plaintiff's favor for purposes of determining whether a prima facie case for personal jurisdiction exists.'" Wilson, 20 F.3d at 648 (quoting Bullion, 895 F.2d at 217); see Thompson, 755 F.2d at 1165.

III.

The parties do not dispute that by negotiating with Cianci in Texas, TPC was "doing business" in Texas and therefore had sufficient minimum contacts with Texas to satisfy due process

requirements for the exercise of specific personal jurisdiction over it. See TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1986) (providing that a non-resident does business in Texas if it recruits a Texas resident for employment inside or outside the state). Moreover, the parties do not dispute that, notwithstanding the conduct of TPC toward Cianci, neither Veco nor Allen had any contacts with Texas sufficient to support a finding of specific or general jurisdiction. Hence, in support of the district court's exercise of personal jurisdiction over Veco and Allen, Cianci asserts that TPC is the alter ego of Veco and that Veco is the alter ego of Allen. Under the alter ego theory, according to Cianci, TPC's "minimum contacts" are attributable to Veco and Allen, and thus both Veco and Allen have sufficient contacts with Texas to satisfy due process requirements. We therefore review the district court's determination that Cianci did not meet her burden of showing prima facie that TPC's contacts are attributable to Veco and Allen under the alter ego theory.

A. VECO AND TPC

An alter ego situation exists when a corporation is organized and operated as a mere tool or business conduit of another corporation or an individual. See Western Horizontal Drilling v. Jonnett Energy Corp., 11 F.3d 65, 67 (5th Cir. 1994) (discussing Texas law). "Generally, a foreign parent corporation is not subject to the jurisdiction of a forum state merely because its subsidiary is present or doing business there."

Hargrave v. Fibreboard Corp, 710 F.2d 1154, 1159 (5th Cir. 1983); see 2 JAMES W. MOORE & JO D. LUCAS, MOORE'S FEDERAL PRACTICE, ¶ 4.41SQ1[6], at 4SQ370 (2d ed. 1994). It is well recognized, however, that, under the facts of a specific case, a close relationship between a parent and its subsidiary may justify a determination that the parent "does business" in the forum state through the activities of its subsidiary under the alter ego theory. See Hargrave, 710 F.2d at 1159. For the alter ego theory to be applicable, those facts must indicate that the parent "exerts such dominion and control over the subsidiary corporation that they do not in reality constitute separate and distinct corporate entities but are one and the same corporation for purposes of jurisdiction." See 2 MOORE & LUCAS at 4SQ372; Hargrave, 710 F.2d at 1159.

The Texas Supreme Court in Castleberry v. Branscum, 721 S.W.2d 270, 272 (Tex. 1986), agreed with this rationale and established that the alter ego theory is applicable "when there is such unity between corporation and individual [or subsidiary corporation and parent] that the separateness of the [subsidiary] corporation has ceased." Castleberry also established that this separateness or lack thereof is shown "from the total dealings of the corporation and the individual, including the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual

maintains over the corporation, and whether the corporation has been used for personal purposes." Id.

In 1989, however, in response to Castleberry, the Texas legislature amended its Business Corporation Act to read in pertinent part:

> A. A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted shall be under no obligation to the corporation or to its obligees with respect to:
> . . . . . .
>
> (3) any contractual obligation of the corporation on the basis of the failure of the corporation to observe any corporate formality, including without limitation: (a) the failure to comply with any requirement of this Act or of the articles of incorporation or bylaws of the corporation; or (b) the failure to observe any requirement prescribed by this Act or by the articles of incorporation or bylaws for acts to be taken by the corporation, its board of directors, or its shareholders.

TEX. REV. CIV. STAT. ANN. art. 2.21A(3) (Vernon Supp. 1993). We have determined that this amendment overruled Castleberry to the extent that a failure to observe corporate formalities is no longer a factor in proving the alter ego theory in contract claims. Jonnett, 11 F.3d at 68; see Villar, 990 F.2d at 1496 n.8; Fidelity & Deposit Co. of Maryland v. Commercial Cas. Consultants, Inc., 976 F.2d 272, 275 (5th Cir. 1992).[2]

[2] We have also recognized that the Texas Supreme Court seems to be ignoring the amendment to article 2.21 and continues to permit a failure to observe corporate formalities as a means of proving alter ego. Jonnett, 11 F.3d at 69 n.5. Further, we made it clear that "because we find the amendments to article 2.21 clear and unambiguous, our interpretation of the statute starts and finishes there." Id.

The evidence before the district court in the instant case consisted of (1) Cianci's pleadings; (2) affidavits from Cianci, Allen, Roger ChansQthe chief financial officer of Veco, and James H. SlacksQthe former general manager of TPC; and (3) telephone depositions of Allen and Chan, taken by Cianci. This evidence shows undisputedly that Veco caused the incorporation of TPC, that Veco and TPC had the same directors and the same chief financial officer, that Veco owned all the common stock of TPC, and that Veco and TPC filed consolidated financial statements and tax returns.

Cianci does not, however, set forth a prima facie showing that this unity between TPC and Veco was such that the separateness of TPC ceased to exist and that consequently TPC's contacts are attributable to Veco. Although Cianci makes the flat assertion that TPC was never capitalized, Chan testified that Veco was initially capitalized with a capital stock issue, and Cianci offers no facts to contradict this statement. Moreover, although Cianci asserts that Veco and TPC had common business operations, the only facts set forth by Cianci to support this assertion are that TPC's financial recordsSQwhich, according to Chan's testimony, were maintained completely separately from Veco'sSQwere once kept at the Times but are now located at Veco's headquarters and that Chan served as chief financial officer for both Veco and TPC.

Cianci also sets forth no facts on which to base her assertions that Veco used TPC property as its own, that TPC's

directors and officers took orders from Veco and acted in Veco's interest, and that the daily operations of the two corporations were not kept fully separate, except the fact that the decision to cease publishing the Times was made by Allen and the Veco board because "ongoing losses were not to threaten Veco's own financial condition." However, statements made by Allen, Chan, and Slack in their affidavits and by Allen and Chan in their depositions make it clear (1) that Veco used a few TPC assets only after TPC ceased publishing the Times; (2) that Veco played no part in the day-to-day operations of TPC or the Times, except for Allen's approval on editorial opinions; (3) that Veco played no part in the hiring of TPC or Times personnel, except for the managing editorial staff; and (4) that TPC had its own publishing and advertising business which it had acquired from the former owners of the Times, business which was not provided by or related to Veco's business. Cianci moreover admits that she can set forth no facts to indicate that there was any involvement of any Veco employee, officer, or director with respect to the negotiations conducted with her concerning employment with the Times. She makes it clear that she negotiated her employment with Cathy Walters, the personnel supervisor for the Times.

The facts set forth thus do not indicate that Veco controlled the internal affairs of TPC but that Veco's role with TPC, and thus with the Times, was to provide capital and loans to its wholly owned subsidiary. The facts also indicate that TPC generally employed all of its own personnel, that day-to-day

operational decisions were performed by TPC employees, and that neither Veco nor its managers played any part in the employment negotiations with Cianci.

We thus agree with the district court that Cianci has not satisfied her burden of showing prima facie that TPC is the alter ego of Veco. Consequently, she has not shown that Veco has the requisite minimum contacts with Texas to sustain an exercise of personal jurisdiction over Veco. We therefore need not consider whether assertion of jurisdiction over Veco comports with the principles of fair play and substantial justice. See Burger King, 471 U.S. at 476; Wilson, 20 F.3d at 650 n.7. We conclude that the district court did not err in dismissing Veco pursuant to Federal Rule of Civil Procedure 12(b)(2).

B. Veco and Allen

Because Cianci has not shown prima facie that TPC is the alter ego of Veco, it is irrelevant for purposes of this appeal whether Veco is the alter ego of Allen. Hence, we conclude that the district court did not err in dismissing Allen pursuant to Federal Rule of Civil Procedure 12(b)(2).

IV.

For the foregoing reasons, we AFFIRM the judgment of the district court.