

REVERSED AND RENDERED and Opinion Filed July 29, 2020



**In the
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-19-00759-CV

**FIFTH THIRD BANK, Appellant
v.
ERICSSON INC., Appellee**

**On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-00127**

MEMORANDUM OPINION

Before Justices Whitehill, Osborne, and Carlyle
Opinion by Justice Carlyle

Fifth Third Bank, an Ohio banking corporation, appeals from the trial court's order denying its special appearance. We reverse and render judgment dismissing the case in this memorandum opinion. *See* TEX. R. APP. P. 47.4.

In 2013, Fifth Third extended a line of credit to Georgia corporation Avion Systems, Inc. As security, Fifth Third received "a continuing and unconditional first priority security interest in any and all of" Avion's present and future property, as well as a continuing guaranty from Avion's owner, Georgia resident Kanchana Raman.

Avion defaulted on its obligations, and as part of a series of modifications to a forbearance agreement, it agreed to give Fifth Third 100% of any amounts it collected on a receivable purportedly owed by Texas resident Ericsson, Inc. Saddled with debt, Avion ceased operations, and in the spring of 2015, Ms. Raman started a new business providing similar services.

In February 2016, Avion initiated an arbitration against Ericsson in Texas, seeking to collect the receivable. A month later, Fifth Third sued Avion and Ms. Raman in Georgia. The Georgia court entered a consent order allowing Fifth Third access to records and information about the Ericsson receivable. Fifth Third's lawyers, located in Georgia and North Carolina, emailed Avion's Texas lawyers to request information about the arbitration, which the Texas lawyers provided. The Texas lawyers also asked Fifth Third to confirm it did not object to their continuing engagement with Avion.

In September 2016, Fifth Third settled the Georgia lawsuit with Avion and Ms. Raman. As part of the settlement, Avion and Ms. Raman executed a consent judgment for more than \$6.4 million that Fifth Third could enter upon a default under the settlement agreement. The agreement required Avion and Ms. Raman to pay Fifth Third \$1.2 million plus any proceeds Avion received from the Ericsson arbitration. The agreement also: (1) acknowledged Avion retained the Texas law firm to prosecute the arbitration; (2) required Avion to cooperate with the Texas law firm and continue to prosecute the arbitration in good faith; (3) required Avion to

pay the Texas law firm's monthly fees, as well as any third-party fees related to the arbitration; (4) provided Fifth Third's consent to the Texas law firm retaining 20% of any arbitration proceeds as a contingency fee; (5) required Fifth Third's consent to any settlement of the arbitration; and (6) allowed Fifth Third to contact the Texas law firm "regarding the status of the Arbitration as well as to verify any amounts owed to the Texas Law Firm or third parties in connection with the Arbitration."

As the arbitration progressed, Fifth Third's out-of-state lawyers periodically emailed Avion's lawyers to request updates. These emails did not discuss substantive issues or strategy; they primarily involved questions about when Fifth Third could expect a ruling from the panel. That ruling came in October 2017, when the panel issued a take-nothing award against Avion and awarded Ericsson its fees as the prevailing party.

Ericsson filed the underlying suit to confirm the award in January 2018. After Avion failed to pay Ericsson's fee award, Ericsson added Fifth Third as a defendant, alleging causes of action for confirmation of the award, actual and constructive fraud under the Texas Fraudulent Transfer Act, conspiracy to commit fraud, and tortious interference with a contract.

Ericsson alleged the court had personal jurisdiction over Fifth Third because Fifth Third:

- "perpetuated a fraud on Ericsson through its behind-the-scenes participation and dominant control over the Arbitration Proceeding";

- “meddled in a Texas Arbitration by conspiring with Ms. Raman to deceive Ericsson and the Arbitration Panel by initiating and directing the Arbitration Proceeding through a defunct entity without disclosing it”;
- “injured Ericsson (a Texas resident) by directing fraudulent transfers of funds from Avion Systems, the nominal plaintiff in the Arbitration Proceeding, to ensure that there would be no assets for Ericsson to recover”;
- “had Ms. Raman serve as its agent to pursue the arbitration on its behalf in Texas and was the real party in the Arbitration Proceeding”;
- “thwarted Avion Systems’ other legitimate creditors by conspiring with Ms. Raman to wind up Avion Systems’ business affairs and direct fraudulent transfers to [a] new entity, Avion Networks”;
- “tortiously interfered with the [contract] between Avion Systems and Ericsson”; and
- “controlled . . . the internal business operations and affairs of Avion Systems” to a greater degree than “normally associated with a lender-borrower relationship.”

Fifth Third filed a verified special appearance, contending the court lacked personal jurisdiction because Fifth Third neither conducted business in Texas nor engaged in any Texas activity connected to the allegations in Ericsson’s petition. Fifth Third denied Ms. Raman acted as its agent and asserted it did not participate in or control the arbitration in any way.

Ericsson’s response focused on its theory that Fifth Third used Ms. Raman and Avion as its agents to pursue the Texas arbitration on its behalf. Ericsson pointed to evidence suggesting Fifth Third advised Ms. Raman to close Avion’s operations, Avion appointed Fifth Third its “attorney-in-fact” for purposes of preserving collateral, Avion agreed to pay Fifth Third any money collected from Ericsson, Fifth

Third contractually required Avion to continue pursuing the arbitration, and Fifth Third reserved the right both to communicate with Avion’s Texas lawyers and to approve any arbitration settlement.

After a hearing, the trial court denied Fifth Third’s special appearance, and Fifth Third filed this interlocutory appeal. Fifth Third contends the trial court erred by concluding Ericsson established specific jurisdiction over it. We review that issue *de novo*. *See Old Republic Nat’l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 558 (Tex. 2018). Because the trial court did not issue findings of fact and conclusions of law, we imply all relevant facts necessary to support the judgment if they are supported by the evidence. *Id.*

Texas courts may exercise personal jurisdiction over a nonresident only if (1) the Texas long-arm statute permits, not at issue here, and (2) consistent with constitutional due process. *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 337 (Tex. 2009). Due process requires both that the defendant have sufficient minimum contacts in the state and that exercising jurisdiction would not offend traditional notions of fair play and substantial justice. *Id.* at 337–38.

To establish sufficient minimum contacts, a nonresident must purposefully avail itself of the privilege of conducting activities in Texas, thus invoking the benefits and protections of Texas law. *Id.* at 338. Whether the defendant’s activities take place in or out of Texas, they must “justify a conclusion that the defendant could reasonably anticipate being called into a Texas court.” *Id.* Three principles guide our

purposeful availment inquiry: (1) only the defendant’s contacts with Texas are relevant, not the unilateral activities of others; (2) the defendant’s contacts “must be purposeful rather than random, fortuitous, or attenuated”; and (3) the defendant must seek some advantage, benefit, or profit through its Texas contacts. *Id.* (quoting *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575 (Tex. 2007)).

Specific jurisdiction exists only if “the defendant’s liability arises from or relates to the forum contacts,” meaning there must be a substantial connection between the defendant’s purposeful Texas contacts and the operative facts of the litigation. *See TV Azteca v. Ruiz*, 490 S.W.3d 29, 41 (Tex. 2016). “The operative facts are those on which the trial will focus to prove the liability of the defendant who is challenging jurisdiction.” *Leonard v. Salinas Concrete, LP*, 470 S.W.3d 178, 188 (Tex. App.—Dallas 2015, no pet.). Accordingly, our specific jurisdiction analysis focuses on the relationship among the defendant, the state, and the litigation. *TV Azteca*, 490 S.W.3d at 41.

Avion and Ms. Raman were not Fifth Third’s agents

Ericsson first contends personal jurisdiction exists because Avion and Ms. Raman acted as Fifth Third’s agents in pursuing the Texas arbitration. “An agent is one who is authorized by a person or entity to transact business or manage some affair for the person or entity.” *McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820, 829 (Tex. App.—Dallas 2010, no pet.). “[W]hen an agent represents [a] principal in Texas, the principal is doing business in Texas.” *Celanese Corp. v. Sahagun*, No.

05-16-00868-CV, 2017 WL 3405186, at *4 (Tex. App.—Dallas Aug. 19, 2017, pet. denied) (mem. op.) We do not presume agency, “and the party asserting the relationship has the burden of proving it.” *Id.* “The critical element of an agency relationship is the principal’s right to control both the means and details of the process by which the agent is to accomplish his task.” *Id.*; see *McAfee*, 316 S.W.3d at 829.

To support its contention that Avion and Ms. Raman acted as Fifth Third’s agents, Ericsson relies primarily on *SITQ E.U., Inc. v. Reata Restaurants, Inc.*, 111 S.W.3d 638 (Tex. App.—Fort Worth 2003, pet. denied). In *SITQ*, various foreign companies purchased a Texas building through limited partnerships formed for that purpose. *Id.* at 643. After a tornado damaged the building, the owner’s Texas-based representative told the building’s tenants over a period of several months that the owner would renovate the building and reopen it for occupancy. *Id.* at 644. At the same time, the representative negotiated an insurance settlement intending to abandon the renovations. *Id.* at 644, 649. After the owner accepted the settlement, distributed the proceeds primarily to the limited partners, abandoned the renovations, and terminated the tenants’ leases, the tenants sued. *Id.* at 644, 650.

The court in *SITQ* held the evidence was sufficient to conclude the Texas-based representative acted as an agent for the foreign limited partners, “at least with regard to the insurance settlement,” because there was evidence suggesting: (1) the limited partners could control the representative’s decision whether to settle or

renovate the building; (2) the limited partners authorized the Texas representative to negotiate the settlement; (3) the limited partners agreed with the representative on a negotiating strategy; and (4) one of the limited partners directly controlled the representative. *Id.* at 652. The court went on to note that the plaintiffs based their claims in part on leases terminated “as the direct result of an insurance settlement in which [the limited partners] actively participated.” *Id.* at 653.

Here, there is no evidence supporting a conclusion that Fifth Third “actively participated” in the Texas arbitration. Though Fifth Third, like the foreign limited partners in *SITQ*, had the right to veto any settlement negotiated by its purported agents, there is no evidence of such a settlement here. Moreover, unlike the limited partners in *SITQ*, there is no evidence Fifth Third either controlled or had the right to control Avion’s and Ms. Raman’s actions in Texas.

At most, the evidence shows Fifth Third contracted for the right to request updates about the arbitration from Avion’s Texas lawyers, the right to demand Avion’s continued good faith participation in the arbitration, the right to receive Avion’s proceeds from any arbitration award, and the right to veto any potential arbitration settlement. None of those rights included the right to control the means and details of Avion’s conduct in the arbitration, such that we could impute Avion’s Texas contacts to Fifth Third. *See McAfee*, 316 S.W.3d at 829; *Olympia Capital Assocs., L.P. v. Jackson*, 247 S.W.3d 399, 413 (Tex. App.—Dallas 2008, no pet.).

Fifth Third did not purposefully avail itself of the benefits of conducting activities in Texas

Ericsson also contends personal jurisdiction exists because Fifth Third purposefully availed itself of the benefits of conducting activities in Texas by requiring Avion to pursue the Texas arbitration for its benefit, by exchanging emails with Avion's Texas counsel, by controlling the Texas lawyers' compensation, and by directing a fraudulent transfer against Ericsson.

Specific jurisdiction requires minimum purposeful Texas contacts that are substantially connected to the operative facts of the litigation, and none are present here. *See TV Azteca*, 490 S.W.3d at 41. Fifth Third did nothing in Texas connected to Ericsson's claims. And neither Fifth Third's emails seeking status updates from Avion's Texas lawyers nor its potential influence over those lawyers' compensation establishes purposeful availment in Texas. *See KC Smash 01, LLC v. Gerdes, Hendrichson, Ltd., L.L.P.*, 384 S.W.3d 389, 393 (Tex. App.—Dallas 2012, no pet.); *Olympia Capital Assocs.*, 247 S.W.3d at 417–18.

As to the assertion that Fifth Third directed a fraudulent transfer against Ericsson, the evidence could support an implied finding that Fifth Third instructed Ms. Raman to shut down Avion's operations, perhaps contributing to Ericsson's inability to collect its fee award. But there is no evidence suggesting Fifth Third's instruction had a connection to Texas. *See Niehaus v. Cedar Bridge, Inc.*, 208 S.W.3d 575, 582 (Tex. App.—Austin 2006, no pet.) (“[E]ven if we assume that

appellants engaged in the allegedly fraudulent transfer, it is undisputed that none of the related activity occurred in Texas.”). Not only is there no evidence suggesting Fifth Third directed its instruction at Ericsson, there is no evidence suggesting Avion transferred any assets from Texas. To the contrary, Ms. Raman testified she began operating her new company in Georgia almost a full year before Avion filed the arbitration in Texas and more than two years before Ericsson obtained its fee award.

Likewise, Fifth Third did not purposefully avail itself when it accepted the assignment of any proceeds Avion might receive in the Texas arbitration. *See Old Kent Leasing Servs. Corp. v. McEwan*, 38 S.W.3d 220, 230–31 (Tex. App.—Houston [14th Dist.] 2001, no pet.). As Avion’s assignee, Fifth Third had “no obligation to do anything except receive the benefits assigned to it.” *Id.* at 230. It did not agree to perform any activities in Texas, and it did not agree to accept any of Avion’s obligations under its contract with Ericsson. Fifth Third could not reasonably anticipate being called into a Texas court. *See id.* at 231.

Fifth Third’s Texas contacts are insufficient to establish personal jurisdiction. We reverse the trial court’s order denying Fifth Third’s special appearance and render judgment dismissing Ericsson’s claims for lack of jurisdiction.

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/Cory L. Carlyle/

CORY L. CARLYLE
JUSTICE



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

FIFTH THIRD BANK, Appellant

No. 05-19-00759-CV V.

ERICSSON INC., Appellee

On Appeal from the 134th Judicial
District Court, Dallas County, Texas
Trial Court Cause No. DC-18-00127.
Opinion delivered by Justice Carlyle.
Justices Whitehill and Osborne
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** that:

Ericsson Inc.'s claims are dismissed for lack of jurisdiction.

It is **ORDERED** that appellant Fifth Third Bank recover its costs of this appeal from appellee Ericsson Inc.

Judgment entered this 29th day of July, 2020.