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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-413

Filed: 7 January 2020

Mecklenburg County, No. 18-CVS-11381

SUMMIT & CROWNE CAPITAL PARTNERS, LLC, Plaintiff,

v.

KORTH DIRECT MORTGAGE, LLC; J.W. KORTH & COMPANY LIMITED PARTNERSHIP; JAMES W. KORTH; GLOBAL DISTRIBUTION CENTER, LLC and J. ANTHONY MARKS a/k/a Jerry Anthony Marks, Defendants.

Appeal by Defendants from order entered 18 December 2018 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 October 2019.

*No brief filed for Plaintiff-Appellee.*

*Thurman, Wilson, Boutwell & Galvin, P.A., by Alexander W. Warner and James P. Galvin, for Defendants-Appellants.*

DILLON, Judge.

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Defendants, Korth Direct Mortgage, James W. Korth & Company, and James Korth, appeal from an order denying their motion to dismiss for lack of personal jurisdiction (altogether, “Defendants”).<sup>1</sup> We affirm in part and reverse in part.

I. Background

This action involves a dispute over a loan broker commission. The issue on appeal is whether the trial court correctly determined that North Carolina has personal jurisdiction over Florida Defendants.

Plaintiff is a commercial real estate *loan* broker who maintains its principle office in North Carolina. (A loan broker, as opposed to a real estate broker, is *not* paid for locating real estate, but rather is paid for locating financing sources for those who are purchasing or refinancing real estate.) Plaintiff’s principal performs much of his work from the North Carolina office, but Plaintiff is also licensed in Florida.

Defendant Global Distribution Center, LLC, (“Landowner”) is located in Ohio and owns property in North Carolina (the “NC Property”).<sup>2</sup>

Landowner had a loan secured by its NC Property that was coming due and, therefore, engaged Plaintiff to locate a lender who would be willing to fund a loan to pay off the existing loan.

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<sup>1</sup> Defendant J. Anthony Marks works with Florida Lender primarily involved on Florida Lender’s behalf in the matters covered in this matter. However, he is not a party to this appeal.

<sup>2</sup> Defendants state in their brief that the property in question is located in Pennsylvania. However, the Pennsylvania property was listed as the collateral for the loan given to pay off the default on North Carolina property. Therefore, the actual property in question is the property in North Carolina.

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As Plaintiff was working on locating loan options for Landowner, Plaintiff received a marketing email from Defendant Korth Direct Mortgage (“Florida Lender”). Florida Lender is a lender which provides financing for real estate loans. Defendant James W. Korth & Company is Florida Lender’s parent company, owned by Defendant James Korth (referred to collectively herein as the “Parent”).

Shortly after sending out its marketing email, Florida Lender followed up with Plaintiff by calling Plaintiff’s North Carolina office, again soliciting loan business.

Plaintiff told Florida Lender about Landowner’s loan need. Florida Lender expressed interest and indicated to Plaintiff that it would pay Plaintiff a loan brokerage fee equal to 2% of the loan amount if Florida Lender made a loan to Landowner.

Plaintiff went to work to facilitate the loan transaction between Florida Lender and Landowner. The loan eventually did close, with Florida Lender securing its loan, *not* with Landowner’s NC Property, but with real estate owned by Landowner in Ohio, where Landowner’s home office is located.

In any event, Florida Lender never paid Plaintiff the 2% origination fee. Plaintiff sued Defendants in North Carolina. Defendants filed a Motion to Dismiss

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for lack of personal jurisdiction.<sup>3</sup> The trial court denied this motion, and Defendants timely appealed.<sup>4</sup>

## II. Appellate Jurisdiction

The trial court's order is interlocutory in nature, and the trial court did not certify the matter for immediate appeal. Accordingly, it is Defendants' burden on appeal to show that the trial court's order affects a substantial right. *See* N.C. Gen. Stat. § 7A-27(b)(3) (2017).

Our Court has held that "motions to dismiss for lack of personal jurisdiction affect a substantial right and are immediately appealable." *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 257-58, 625 S.E.2d 894, 898 (2006) (citing N.C. Gen. Stat. § 1-227(b) (2017)). Therefore, this is a statutorily preserved appeal, and we proceed to the merits of the case.

## III. Analysis

"The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Parker v. Town of Erwin*, 243 N.C. App. 84, 95, 776 S.E.2d 710, 720 (2015) (citation and quotation marks omitted). Normally, personal jurisdiction issues are presented in one of three ways by the parties: "(1) the defendant makes a motion to dismiss

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<sup>3</sup> Landowner filed an answer to the complaint and is not challenging personal jurisdiction through the filed Motion to Dismiss. Therefore, Landowner is not a party to this appeal.

<sup>4</sup> The trial court's order did not affect Defendant J. Anthony Marks.

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without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing personal jurisdiction issues.” *Id.* at 96, 776 S.E.2d at 720.

This case falls under the third option listed above. The Plaintiff’s pleadings were verified pleadings; and, therefore, they, in effect, become like an affidavit. Defendants accompanied their Motion to Dismiss with several affidavits attached concerning their personal jurisdiction argument. And when parties submit dueling affidavits “the court may hear the matter on affidavits presented by the respective parties, . . . [or] the court may direct that the matter be heard wholly or partly on oral testimony depositions.” *Id.* at 97, 776 S.E.2d at 721 (alteration in original) (citation and quotation marks omitted).

Here, though, the trial court only considered “the pleadings and arguments of counsel.” The order does not reflect that the trial court considered any of Defendants’ affidavits or other evidence offered by Plaintiff.

A. Parent

Plaintiff’s sworn pleading alleges facts that give rise to a finding that North Carolina has personal jurisdiction over Parent. For example, Plaintiff alleges that Parent is the alter ego of Florida Lender.

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Parent, however, presented sworn testimony that, if believed, would suggest that North Carolina has no personal jurisdiction over Parent.

It was the duty of the trial court to consider *both* sets of information before coming to a decision. It was reversible error for the trial court not to do so. Accordingly, with respect to the denial of Parent’s motion, we remand with instructions to reconsider Parent’s Rule 12(b)(2) motion in light of all the affidavits.

B. Florida Lender

Defendants argue that the record fails to show that Florida Lender has “minimum contacts” with North Carolina sufficient to confer specific jurisdiction over Florida Lender. We conclude that Plaintiff’s sworn pleading alleges facts which give rise to a finding that North Carolina has personal jurisdiction over Florida Lender. We further conclude that any error by the trial court in failing to consider any of Defendants’ materials was harmless as to Florida Lender. Even taking the Defendants’ materials as true, they do not give rise to a finding that North Carolina lacks personal jurisdiction over Florida Lender.

To analyze the sufficiency of a party’s minimum contacts, we look at several factors: “(1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties.” *New Bern Pool v. Graubart*, 94 N.C. App. 619, 624, 381 S.E.2d 156, 159, *aff’d per curiam*, 326 N.C. 480, 390 S.E.2d 137

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(1989) (citation omitted). “Minimum contacts do not arise *ipso facto* from actions of a defendant having an effect in the forum state. . . . There must be some act or acts by which the defendant purposefully availed himself of the privilege of business there[.]” *Id.* at 624, 381 S.E.2d at 159 (citations omitted).

The uncontradicted facts from the verified complaint and the affidavits in the record show that (1) Florida Lender reached out to Plaintiff by email and by telephone on a number of occasions while Plaintiff was in North Carolina, including the call in which Florida Lender agreed to pay Plaintiff a 2% commission for brokering the loan between Florida Lender and Landowner; (2) Plaintiff’s phone number has a “704” area code, a code associated with western North Carolina; (3) Plaintiff’s emails identify its place of business as being in North Carolina; (4) the public record from the Office of Financial Regulation of the State of Florida identifies Plaintiff as a loan broker licensed in Florida with its office in North Carolina; and (5) Plaintiff acted as a “go-between”, facilitating the loan transaction between Florida Lender and Landowner while in North Carolina.

It is true, as Defendants point out, that there is no evidence Florida Lender has any office in North Carolina or had anyone physically step foot in North Carolina. And it is true, as Defendants point out, that Florida Lender made a loan to an Ohio entity secured by property located in Ohio.

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However, the relationship at issue before us is *not* the borrower-lender relationship between Florida Lender and Ohio Landowner. The relationship at issue here is the lender-loan broker relationship between Florida Lender and Plaintiff. And based on the uncontradicted evidence in the record, we conclude that Florida Lender had sufficient minimum contacts in North Carolina to afford North Carolina with personal jurisdiction over Florida Lender with regard to its contract with Plaintiff.

We note that our Supreme Court has held where the plaintiff accepted the offer in North Carolina, that fact, in and of itself, can provide enough of a connection to the State to obtain personal jurisdiction over the defendant. *See Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 367, 348 S.E.2d 782, 786-87 (1986) (“Although a contractual relationship between a North Carolina resident and an out-of-state party alone does not *automatically* establish the necessary minimum contacts with this State, nevertheless, a single contract may be a sufficient basis for . . . [personal] jurisdiction if it has a substantial connection with this State.”).

IV. Conclusion

We hold that the trial court erred in disregarding the affidavits of both parties in considering Parent’s personal jurisdiction in the matter. However, we also find that the trial court did not err in denying Defendants’ Motion to Dismiss for lack of personal jurisdiction for Florida Lender. Florida Lender created sufficient minimum contacts with this State to allow for personal jurisdiction to be established.



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AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges DIETZ and YOUNG concur.

Report per Rule 30(e).