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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-655

Filed: 18 February 2020

Wake County, No. 17 CVS 4340

MCGRATH RENTCORP d/b/a TRS-RENTELCO, Plaintiff,

v.

TCI TRIANGLE, INC. and TOWERCOMM, LLC, Defendants.

TCI TRIANGLE, INC., Cross-Claim Plaintiff,

v.

TOWERCOMM, LLC, Cross-Claim Defendant,

TCI TRIANGLE, INC., Third-Party Plaintiff,

v.

BANYAN EQUITY INVESTORS II, INC., BANYAN MEZZANINE FUND II, L.P., JAMES “JIM” DAVIDSON, ACM CAPITAL FUND I, LLC, ACM CAPITAL ADVISORS GP, LLC, ACM AVIATION STAFFING, LLC, JAMES “JIM” MARTIN, DA THREE, DE ANDA CAPITAL, LLC, CENTRAL ILLINOIS ANESTHESIA SERVICES LTD. PROFIT SHARING PLAN, MICHAEL DE ANDA, and PROVIDENCE WIRELESS, LLC, Third-Party Defendants,

MCGRATH RENTCORP d/b/a TRS-RENTELCO, Plaintiff,

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v.

BANYAN EQUITY INVESTORS II, INC., BANYAN MEZZANINE FUND II, L.P., JAMES “JIM” DAVIDSON, ACM CAPITAL FUND I, LLC, ACM CAPITAL ADVISORS GP, LLC, ACM AVIATION STAFFING, LLC, JAMES “JIM” MARTIN, DA THREE, DE ANDA CAPITAL, LLC, CENTRAL ILLINOIS ANESTHESIA SERVICES LTD. PROFIT SHARING PLAN, MICHAEL DE ANDA, and PROVIDENCE WIRELESS, LLC, Third-Party Defendants.

Appeal by third-party defendants from order entered 13 May 2019 by Judge Stephan Futrell in Wake County Superior Court. Heard in the Court of Appeals 5 December 2019.

Williams Mullen, by Camden R. Webb and Lauren E. Fussell, for defendants-appellees.

Parker Poe Adams & Bernstein LLP, by Melanie Black Dubis and Brian D. Darer, for third-party defendants-appellants.

YOUNG, Judge.

Where affidavits constituted substantial evidence that appellants availed themselves of the privilege of doing business in North Carolina, the trial court did not err in determining that it possessed personal jurisdiction over appellants. Where appellants cannot show a substantial right that would be impacted absent review prior to a final judgment on the merits, and failed to show that the claim against them was moot, we dismiss their interlocutory argument. We affirm in part and dismiss in part.

I. Factual and Procedural Background

On 11 April 2017, McGrath RentCorp d/b/a TRS-RenTelco (TRS) filed a complaint against TCI Triangle, Inc. (TCI) and TowerComm, LLC (TowerComm), alleging that TCI and TowerComm (collectively, defendants) leased equipment from TRS but failed to make payments thereupon. TRS alleged breach of contract and sought damages accordingly.

On 23 June 2017, TCI filed its answer, including a crossclaim against TowerComm. TCI alleged that it formed TowerComm, that all of TRS' dealings from February of 2009 on were with TowerComm, and that TowerComm improperly implied that TRS had contracted with TCI, when in fact it had not. TCI therefore alleged indemnification against TowerComm, and sought either dismissal of TRS' claim against TCI, or that TowerComm be liable for any damages.

On 10 January 2018, TCI filed an amended answer, crossclaim, and third-party claims. TCI alleged that TowerComm had acquired assets from TCI subject to an asset purchase agreement, which included an indemnification clause. TCI therefore alleged indemnification, and further breach of contract based on the failure to indemnify. TCI also sought a declaratory judgment stating its right to immediate indemnification. In addition, TCI brought a third-party claim against TowerComm's members, successor-in-interest, and others (collectively, appellants). TCI alleged that these entities were alter egos of TowerComm, and therefore sought to pierce the

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corporate veil and hold them directly responsible for indemnification. TCI also alleged successor liability, the voidability of fraudulent transfer, and civil conspiracy to defraud creditors.

On 16 January 2018, TRS filed an amended complaint, reasserting its claim for breach of contract against TCI and TowerComm, but adding a third-party complaint against appellants for the same causes raised by TCI in its third-party complaint (alter ego, successor liability, fraudulent transfer, civil conspiracy), plus unfair and deceptive trade practices.

On 12 July 2018, most of appellants¹ filed a motion to dismiss TRS' amended complaint and TCI's third-party claims, alleging that neither TRS nor TCI had demonstrated a basis for personal jurisdiction over appellants. Appellants asserted that they conduct no business in North Carolina and lack substantial contacts in the State.

On 3 August 2018, TCI voluntarily dismissed its third-party claims against ACM Capital Advisors GP, LLC, and Providence Wireless, LLC. TRS likewise dismissed its claims against these two parties. Further, on 12 February 2019, TRS voluntarily dismissed, with prejudice, its claims against TCI and appellants.

On 25 February 2019, appellants filed a motion for judgment on the pleadings and dismissal of TCI's claims. Appellants alleged that, because TCI's potential

¹ ACM Capital Advisors GP, LLC, and Providence Wireless, LLC, did not join in the filing of the motion.

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liability to TRS was extinguished by TRS' dismissal of its claim against TCI, TCI's crossclaims against TowerComm – and by extension, against appellants – were moot. Separately, on 29 March 2019, appellants filed an answer to TCI's crossclaim and third-party claims, and a motion to dismiss, alleging failure to state a claim for which relief could be granted and lack of personal jurisdiction.

On 13 May 2019, the trial court entered an order on appellants' motions for judgment on the pleadings and dismissal. The court determined that issues of fact required resolution, and therefore denied the motion for judgment on the pleadings. The court further held that personal jurisdiction existed as to each of appellants, and therefore denied the motion to dismiss.

From the order denying their motions, appellants appeal.

II. Motion to Dismiss

In their first argument, appellants contend that the trial court erred in denying their motion to dismiss for lack of personal jurisdiction. We disagree.

A. Standard of Review

The denial of a motion to dismiss is an interlocutory order, and is not generally subject to an immediate right of appeal. *See S. Unif. Rentals, Inc. v. Iowa Nat'l Mut. Ins. Co.*, 90 N.C. App. 738, 741, 370 S.E.2d 76, 78 (1988) (holding that “[t]he refusal to dismiss an action generally does not or will not impair any of defendant’s rights that could not be corrected on appeal after final judgment”). However, with regard

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to the denial of a motion to dismiss for lack of personal jurisdiction, our General Statutes provide a right of immediate appeal. N.C. Gen. Stat. § 1-277(b) (2017) (“[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant”). Our Supreme Court has held that “the right of immediate appeal of an adverse ruling as to jurisdiction over the person, under that statute, is limited to rulings on ‘minimum contacts’ questions, the subject matter of Rule 12(b)(2).” *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982).

“The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.” *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999).

B. Analysis

Appellants contend that the trial court erred in dismissing the complaint for lack of personal jurisdiction. They further contend that, in fact, TCI failed to properly allege jurisdiction over appellants in its second amended third-party complaint.

We disagree. Although TCI, in describing the parties in the “Parties” section of the third-party complaint, does not allege that any appellants are residents of North Carolina or have substantial connections to this State, the remainder of TCI’s third-party complaint goes into detail describing appellants’ business dealings. TCI

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notes that “entities owned [and] controlled by Davidson, de Anda, and later Martin, were the senior secured lenders of TowerComm,” that those entities “invested capital (i.e. equity) into TowerComm,” and that, “in substance,” those entities “hold equity in TowerComm and not debt.” The complaint further outlines how appellants exercised control of TowerComm.

This Court has recognized that a difference exists between general and specific jurisdiction.

Specific jurisdiction exists if the defendant has purposely directed its activities toward the resident of the forum and the cause of action relates to such activities. This inquiry focuses on whether the defendant “purposefully availed itself of the privilege of conducting activities in-state, thereby invoking the benefits and protections of the forum state’s laws,” and jurisdiction may be proper even if the defendant has never set foot in the forum state. General jurisdiction exists where the defendant has continuous and systematic contacts with the forum state, even though those contacts do not relate to the cause of action.

Wyatt v. Walt Disney World Co., 151 N.C. App. 158, 165, 565 S.E.2d 705, 710 (2002) (citation omitted). In the instant case, TCI did not allege general jurisdiction – that is, that appellants had “continuous and systematic contacts” with this State. Rather, TCI alleged specific jurisdiction – that appellants, in wielding TowerComm as an instrumentality, “directed [their] activities toward the residents of the forum[.]” and that TCI’s cause of action against TowerComm “relate[d] to such activities.”

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Appellants contend that the original cause of action was TRS' complaint for TCI's and TowerComm's alleged breach of contract. While that may be true, TCI also filed a crossclaim against TowerComm for indemnification and breach of indemnification agreement. TCI's claims against appellants allege that appellants used TowerComm as an alter ego, and therefore share in its liabilities. Indeed, TCI's allegations set out a factual basis under which a court could determine that appellants directed the operations of TowerComm specifically to frustrate creditors, including TRS.

In support of its position, TCI submitted affidavits of four former TowerComm employees. Steven B. Wall, a resident of North Carolina and co-owner of TCI, averred that appellants managed the TowerComm board and personally attended meetings in North Carolina. Ellen Graney, a resident of North Carolina and former employee of TowerComm, averred that TowerComm had one main office, in North Carolina, and that appellants managed TowerComm's business affairs and board. Cornelius Lamar Stokes, a resident of North Carolina and former executive at TowerComm, averred that appellants were heavily involved in TowerComm's financials. And Glenn Asaff, a resident of Florida and former TowerComm employee, averred that the TowerComm board, which was comprised of appellants, managed the company, and met quarterly in North Carolina. These affidavits, collectively, show that appellants were knowingly, actively involved in the management and control of a

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North Carolina company, to the point that several of them attended meetings held in North Carolina personally to further that interest.

Appellants also submitted affidavits to the court. This Court has held that, where both parties submit affidavits with respect to personal jurisdiction, “a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits.” *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217 (2000). “If the trial court chooses to decide the motion based on affidavits, ‘[t]he trial judge must determine the weight and sufficiency of the evidence [presented in the affidavits] much as a juror.’ ” *Banc of Am. Sec. LLC v. Evergreen Int’l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005) (quoting *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524, *disc. review denied*, 303 N.C. 314, 281 S.E.2d 651 (1981)). When the trial court is not required to make findings of fact and does not do so, “it is presumed that the judge, upon proper evidence, found facts sufficient to support his judgment.” *Holcomb v. Holcomb*, 192 N.C. 504, 504, 135 S.E. 287, 288 (1926).

Given the presumption that the trial court found facts sufficient to support its judgment, the question remaining is whether TCI’s affidavits adequately demonstrated that appellants “purposefully availed” themselves of “the privilege of conducting activities in-state, thereby invoking the benefits and protections of the forum state’s laws.” We hold that the affidavits before the trial court tended to

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establish that appellants, through their control of a company they knew to be located in North Carolina, did purposefully avail themselves of the benefits of doing business in this State. Accordingly, we hold that this evidence supports the trial court's determination of personal jurisdiction over appellants, and affirm the order denying appellants' motion to dismiss.

III. Judgment on the Pleadings

In their second argument, appellants contend that the trial court erred in denying their motion for judgment on the pleadings. For the reasons below, we dismiss this argument.

A. Standard of Review

The denial of a motion for judgment on the pleadings is an interlocutory order. Normally, appeal does not lie from the denial of such a motion. *Whitaker v. Clark*, 109 N.C. App. 379, 381, 427 S.E.2d 142, 143 (1993). However, "immediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (citations and quotation marks omitted).

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“It is not the duty of this Court to construct arguments for or find support for appellant’s right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.” *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

B. Analysis

After TRS and TCI filed their respective motions to dismiss in this case, the only remaining claims were TRS’ claim against TowerComm for breach of contract, and TCI’s various claims against appellants. In their motion for judgment on the pleadings and on appeal, appellants contend that the dismissal of TRS’ claim against TCI renders TCI’s claim for indemnification against appellants moot.

This matter is, however, interlocutory. Appellants, recognizing this, allege that the denial of their motion impacts a substantial right, in that the denial of the motion “has the effect of requiring [appellants] to litigate their liability as alleged indemnifiers even though [TRS’] dismissal of all claims against TCI renders it a legal impossibility for there to be any damages to indemnify.” Notably, appellants do not offer a legal basis for this argument.

Notwithstanding appellants’ contention, our Supreme Court has held that “[t]he avoidance of one trial is not ordinarily a substantial right.” *Green v. Duke*

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Power Co., 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). Nor have appellants alleged that they would suffer some injury, other than the expense of trial itself, were this matter not corrected prior to a final judgment on the merits.

For these reasons, we hold that this issue is interlocutory, that appellants have failed to show a substantial right, and that the matter is not moot. We therefore dismiss this argument.

AFFIRMED IN PART, DISMISSED IN PART.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).