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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-623

Filed: 7 April 2020

Franklin County, No. 18 CVS 603

ECO TERRA PRODUCTS, INC., Plaintiff,

v.

DAYSTAR HOLDINGS, LLC and DAVID C. CAREY, SR., Defendants.

Appeal by defendants from order entered 18 February 2018 by Judge James Hardin, Jr. in Franklin County Superior Court. Heard in the Court of Appeals 18 February 2020.

Anderson Jones, PLLC, by Todd A. Jones, Peyton D. Mansure and Lindsey E. Powell, for plaintiff-appellee.

Ellis and Winters, LLP, by Thomas H. Segars and Cameron T. Kirby, for defendant-appellants.

YOUNG, Judge.

This appeal arises out of an order denying a Motion to Dismiss pursuant to 12(b)(2) and 12(b)(3). The trial court did not err in finding that North Carolina has personal jurisdiction over the Appellants or that North Carolina is a proper and convenient forum, therefore we affirm.

I. Factual and Procedural History

Plaintiff-Appellee Eco Terra Products, Inc. (“Eco Terra”) is a Florida corporation and is duly authorized to transact business in North Carolina. Defendant-Appellant DayStar Holdings, LLC (“DayStar”) is a Florida limited liability company. Defendant-Appellant David C. Carey, Sr. (“Carey”) is an individual and a Florida resident (“DayStar” and “Carey” collectively referred to as “Appellants”). Carey was the sole member, manager, and/or officer of DayStar.

In 2017, Eco Terra sought to sell real property that it owned in Louisburg, North Carolina (“the property”). Eco Terra retained a real estate broker and North Carolina licensed attorney to assist in the sell and closing of the property. Upon closing, the proceeds from the sale were to be transferred directly into Eco Terra’s account.

DayStar served as the agent for and acted on behalf of Eco Terra in conducting the sale of the property. DayStar also authorized the North Carolina broker to sign certain closing documents on behalf of Eco Terra in order to finalize the sale and collect the proceeds. On 26 June 2017, the day before closing was scheduled to occur, without Eco Terra’s knowledge or consent, Carey contacted the real estate broker and attorney and instructed them to wire the proceeds from the sale directly into DayStar’s account.

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On 27 June 2017, the property sold for \$216,618.36, and the proceeds were diverted into DayStar's account. Eco Terra at no time directed, authorized, or otherwise consented to Carey's diversion and retention of the proceeds. Upon discovery of the diverted funds, Eco Terra made multiple demands on Appellants to return the proceeds, but they failed to do so.

Eco Terra filed this action in Franklin County, North Carolina, asserting conversion and breach of fiduciary duty. In lieu of an answer, Appellants moved to dismiss the complaint. On 11 February 2019, the trial court heard arguments and denied the motion to dismiss. Appellants filed timely written notice of appeal.

II. Personal Jurisdiction

a. Standard of Review

"[I]mmediate 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) (quotation marks omitted). "Any 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. . . ." N.C. Gen. Stat. § 1-277(b) (2011). "[T]he right of immediate appeal of an adverse

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ruling as to jurisdiction over the person, under [N.C. Gen. Stat. § 1-277(b)], 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).

b. Analysis

Appellants contend that the trial court erred by finding that it has personal jurisdiction over Carey and DayStar. We disagree.

There is a two-step process to determine whether our courts have personal jurisdiction over a person: “First, the transaction must fall within the language of the State’s ‘long-arm’ statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution.” *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986) (internal citations omitted). Moreover, our State’s long-arm statute should be “liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process.” *Lulla v. Effective Minds, LLC*, 184 N.C. App. 274, 277, 646 S.E.2d 129, 132 (2007). “Accordingly, . . . the question of statutory authorization collapses into the question of whether the defendant has the minimum contacts with North Carolina necessary to meet the requirements of due process.” *Id.*

In determining whether sufficient minimum contacts exist to exercise jurisdiction over a defendant, a court should consider: “(1) the quantity of contacts between the defendants and North Carolina; (2) the nature and quality of such

contacts; (3) the source and connection of the plaintiff's cause of action to any such contacts; (4) the interest of North Carolina in having this case tried here; and (5) convenience to the parties." *Lulla*, 184 N.C. App. at 278, 646 S.E.2d at 133.

c. Quantity of Contacts

Appellants contend that because there was only one email thread between Carey and the North Carolina attorney, the contact was insufficient for Appellants to reasonably anticipate being sued in North Carolina. We disagree.

"A court may exercise specific personal jurisdiction over a nonresident defendant acting outside of the forum when the defendant has intentionally directed his tortious conduct toward the forum state . . ." *Havey v. Valentine*, 172 N.C. App. 812, 818, 616 S.E.2d 642, 648 (2005).

Here, it is undisputed that Appellants' contact with North Carolina was limited to one email thread. However, that single contact was sufficient to give North Carolina personal jurisdiction. Appellants intentionally directed their conduct at North Carolina in order to intercept and divert the proceeds from the sale, received proceeds from the sale of real property in North Carolina, and used a North Carolina real estate broker and attorney to accomplish the diversion of the proceeds. Such conduct should have led Appellants to reasonably anticipate being sued in North Carolina. This single tortious act is sufficient for North Carolina to have personal jurisdiction over Appellants consistent with due process.

d. Nature and Quality of Contacts

Appellants contend that Carey's contacts with North Carolina were remote and undertaken on behalf of his employer, and therefore, North Carolina does not have personal jurisdiction. We disagree.

It is irrelevant that Carey was in Florida when he sent the email instructing the proceeds to be sent to a different account. Courts have consistently held that physical presence is not the determining factor in the jurisdiction analysis. Instead, the inquiry is focused more on the nature of the contact. *See Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 334 S.E.2d 91 (1985); *Lab. Corp. of Am. Holdings v. Caccuro*, 212 N.C. App. 564, 712 S.E.2d 696 (2011); *Century Data Systems, Inc. v. McDonald*, 109 N.C. App. 425, 428 S.E.2d 190 (1993).

The nature of the contact was to divert the proceeds from going into Eco Terra's bank account and directed the proceeds into DayStar's account. "The tort of conversion is well defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Peed v. Burleson's Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956). "As a general rule, the claim [for conversion] accrues . . . when the unauthorized assumption and exercise of ownership occurs." *Stratton v. Royal Bank of Can.*, 211 N.C. App. 78, 83, 712 S.E.2d 221, 227 (2011). The

location where the conversion occurred, therefore, would clearly be a proper venue. *See* N.C. Gen. Stat. § 1-80 (2019).

Here, the conversion and breach of fiduciary duty occurred in North Carolina. The email Carey sent to instruct the diversion of the proceeds was directed to North Carolina, the proceeds arose out of the sale of property in North Carolina, and the proceeds were in North Carolina at the time they were converted.

Additionally, Carey contends that he acted on behalf of his employer. However, “[i]t has long been established that an officer of a corporation who commits a tort is individually liable for that tort, even though the officer may have acted on behalf of the corporation in committing the wrongful act.” *Esteel Co. v. Goodman*, 82 N.C. App. 692, 697-98, 348 S.E.2d 153, 157 (1986). Therefore, North Carolina has personal jurisdiction over the Appellants in this matter consistent with due process.

e. Source and Connection

Appellants contend that Eco Terra’s complaint is not about the impropriety in the sale of the property. Rather the appellants contend that Eco Terra’s complaint is limited to DayStar’s failure to transfer the proceeds to Eco Terra. We disagree.

Eco Terra’s complaint specifically alleged conversion and breach of fiduciary duty, which derived from the diversion of the proceeds from the sale of the property. Appellants contend that the alleged wrongdoing was the failure of DayStar to transfer the funds to Eco Terra, which occurred after the money was already

transferred to Florida, in an attempt to divest North Carolina of personal jurisdiction. As stated above, the conversion occurred in North Carolina. Therefore, North Carolina has personal jurisdiction over the Appellants in this matter consistent with due process.

f. State's Interest

Appellants contend that North Carolina has no interest in resolving a dispute between a Florida plaintiff and a Florida citizen over money held in a Florida bank account belonging to a Florida limited liability company. We disagree.

“North Carolina follows the *lex loci delicti* rule in resolving choice of law for tort claims.” *Terry v. Pullman Trailmobile, Div. of Pullman, Inc.*, 92 N.C. App. 687, 690, 376 S.E.2d 47, 49 (1989). “The law of the place where the injury occurs controls tort claims, because an act has legal significance only if the jurisdiction where it occurs recognizes that legal rights and obligations ensue from it.” *Id.* “The plaintiff’s injury is considered to be sustained in the state where the last act occurred giving rise to the injury.” *Harco Nat. Ins. Co. v. Grant Thornton LLP*, 206 N.C. App. 687, 694, 698 S.E.2d 719, 724 (2010).

Here, for the reasons provided above Eco Terra’s injury arises out of North Carolina because that is the state where the conversion and breach of fiduciary duty occurred. Appellants have failed to offer any viable argument to the contrary.

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Therefore, North Carolina has personal jurisdiction over the Appellants in this matter consistent with due process.

g. Convenience of Parties

Appellants contend that North Carolina is an inconvenient forum for the parties because all parties to the action are Floridians, and that Carey is terminally ill and would not be able to appear for trial. In weighing all the factors to determine whether minimum contacts exist to exercise jurisdiction over a defendant, it is clear that North Carolina has personal jurisdiction over the Appellants in this matter consistent with due process.

III. Forum Selection Clause

a. Standard of Review

“Immediate appeal is available from an interlocutory order or judgment which affects a substantial right.” *Sharpe*, 351 N.C. at 161-62, 522 S.E.2d at 579. “Although denial of a motion to dismiss is an interlocutory order, where the issue pertains to applying a forum selection clause, our case law establishes that [a] defendant may nevertheless immediately appeal the order because to hold otherwise would deprive him of a substantial right.” *Parson v. Oasis Legal Fin., LLC*, 214 N.C. App. 125, 128, 715 S.E.2d 240, 242 (2011). “Because the disposition of forum selection matters is highly fact-specific, an appellate court employs the abuse-of-discretion standard to review a trial court’s decision concerning clauses on venue selection.” *Id.*

b. Analysis

While we acknowledge that this appeal is interlocutory, it affects a substantial right, and thus we review the Appellants' argument. As provided above, North Carolina has personal jurisdiction over this matter; however, Appellants contend that despite having jurisdiction, North Carolina is not the forum best suited to adjudicate the case. Appellants argue that the parties' forum selection clause requires this litigation to be brought in Florida. We disagree.

Eco Terra and DayStar entered into a Service Agreement that outlined the services DayStar would provide to Eco Terra. Assuming the Service Agreement is valid and enforceable, and the purported forum selection clause is mandatory, the forum selection clause still does not apply for two reasons. First, because Carey, individually, is not a party to the Service Agreement and cannot invoke the protection of the forum selection clause. Second, Carey's intentional torts would be outside of the scope of the forum selection clause. No party alleges a breach of the Service Agreement. Eco Terra's claims are for conversion and breach of fiduciary duty, both of which are tort claims unrelated to the Service Agreement. Because Carey's torts are independent and unrelated to the Service Agreement, the trial court's decision to deny Appellants' motion to dismiss was supported by reason. Accordingly, the trial court did not abuse its discretion or err in denying Appellants' motion to dismiss.

c. Forum Non Conveniens

a. Standard of Review

A trial court's determination on a motion to dismiss based on the doctrine of forum non conveniens is reviewed for abuse of discretion. *Motor Inn Management, Inc. v. Irvin-Fuller Dev. Co.*, 46 N.C. App. 707, 711, 266 S.E.2d 368, 370 (1980).

b. Analysis

Appellants also contend that the trial court abused its discretion by denying Appellants' motion to dismiss based on forum non conveniens. We disagree.

In determining a motion to dismiss pursuant to the common-law doctrine of forum non conveniens, the trial considers the facts and circumstances of the case against certain relevant factors including:

[1] convenience and access to another forum; [2] nature of case involved; [3] relief sought; [4] applicable law; [5] possibility of jury view; [6] convenience of witnesses; [7] availability of compulsory process to produce witnesses; [8] cost of obtaining attendance of witnesses; [9] relative ease of access to sources of proof; [10] enforceability of judgment; [11] burden of litigating matters not of local concern; [12] desirability of litigating matters of local concern in local courts; [13] choice of forum by plaintiff; [and 14] all other practical considerations which would make the trial easy, expeditious and inexpensive.

Motor Inn Mgmt., 46 N.C. App. at 713, 266 S.E.2d at 371. The balance of these factors does not so strongly favor the Appellants that Eco Terra's choice of forum should be ignored. While Eco Terra and Appellants are in Florida, North Carolina is still a convenient forum. Eco Terra owned the property in North Carolina, which led to the

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issue before us, and at least two of the witnesses—the closing attorney and the real estate agent—are in North Carolina. Both North Carolina and Florida are convenient and accessible forums. However, Eco Terra chose to bring this action in North Carolina, and Appellants cannot establish that the choice of forum should be set aside. The trial court’s order denying Appellant’s motion to dismiss pursuant to the doctrine of forum non conveniens was supported by reason. Therefore, the trial court did not err.

AFFIRMED.

Judges STROUD and INMAN concur.

Report per Rule 30(e).