IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-436

No. COA20-662

Filed 17 August 2021

Durham County, No. 19 CVS 3400

TAMMY LOWREY, Plaintiff,

v.

CHOICE HOTELS INTERNATIONAL, INC., MANOJKUMAR (AKA "MANOJ") MOHANLAL GANDHI, MONA GANDHI, MM SHIVAH, LLC, MM VAIBHAVLAXMI, LLC; CI HOTELS, LLC and WS HOTELS, LLC, Defendants.

Appeal by Defendant Choice Hotels International, Inc. from orders entered 12 December 2019 and 3 March 2020 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 27 April 2021.

Kennedy Kennedy Kennedy & Kennedy, LLP, by Harvey L. Kennedy and Harold L. Kennedy, III, The Law Offices of John McCabe, by Ruth Sheehan, and The Francis Law Firm, PLLC, by Charles T. Francis, for Plaintiff-Appellee.

Yates, McLamb & Weyher, LLP, by Christopher J. Skinner and Joshua D. Neighbors, for Defendant-Appellant Choice Hotels International, Inc.

Brown, Crump, Vanore & Tierney, LLP, by Skylar J. Gallagher and O. Craig Tierney, Jr., and Daughtry Woodard Lawrence & Starling, LLP, by N. Leo Daughtry and Luther D. Starling, Jr., for Defendants-Appellants Manojkumar Mohanlal Gandhi, Mona Gandhi, MM Shivah, LLC, MM Vaibhavlaxmi, LLC, CI Hotels LLC, and WS Hotels LLC.

INMAN, Judge.

¶ 1 Defendant Choice Hotels International, Inc. ("Choice Hotels") appeals from two orders denying motions to change venue from Durham County. Choice Hotels contends that the trial court erred in denying its motion to change venue without notice and an opportunity to be heard based on misrepresentations of fact by counsel for the other parties in the litigation at a previous change of venue hearing. After careful review, we agree with Choice Hotels that its motion was improperly denied without a proper notice and hearing, reverse the trial court's order summarily denying Choice Hotels motion to change venue, and remand for a hearing on the motion's merits.

I. FACTUAL AND PROCEDURAL HISTORY

1. Initial Pleadings and Competing Motions to Change Venue

¶ 2 Plaintiff Tammy Lowrey filed this action in Durham County Superior Court in July 2019, alleging that she was sexually assaulted at a Choice Hotels franchise in Johnston County by one of its owner-operators. Named as defendants are Choice Hotels, Manojkumar and Mona Gandhi (the "Gandhis"), and the Gandhis' corporate entities, MM Shivah, LLC, MM Vaibhavlaxmi, LLC, CI Hotels LLC, and WS Hotels LLC (together with the Gandhis as the "Gandhi Defendants"). Ms. Lowrey is a resident of Johnston County. Her complaint alleges that the Gandhis are residents of Johnston or Wake County, and their corporate entities are headquartered in Wake County. Choice Hotels is headquartered in Rockville, Maryland. Plaintiff's complaint

alleges that venue is proper in Durham County following this Court's decision in *Terry v. Cheesecake Factory Rests., Inc.*, 253 N.C. App. 216, 799 S.E.2d 415 (2017),[1] because Choice Hotels "usually does business, and at all relevant times herein usually did business in Durham County."

¶ 3 The Gandhi Defendants responded to Ms. Lowrey's complaint by filing a combined answer and motion to change venue to Johnston County, asserting that Durham County was not the proper venue and, in the alternative, that the convenience of witnesses and ends of justice would be promoted by a transfer to Johnston County. Choice Hotels filed a separate combined answer and motion to change venue to Wake County expressly denying that Durham County is a proper venue for this action.

¶ 4 On 31 October 2019, Ms. Lowrey served all Defendants with a notice of hearing calendaring "Defendant's Motion to Transfer Venue and Plaintiff's Motion to Amend Complaint" for 12 December 2019. The notice of hearing did not indicate which of the two motions to transfer venue would be heard, but the Durham County Superior Court's civil calendar listed "Defendant's motion to transfer venue *to Johnston County*" for hearing and identified the Gandhi Defendants' counsel as the movant.

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[1] In *Cheesecake Factory*, we held that a domestic corporation "maintains a place of business" for purposes of venue where it "conducts business activities" and "owns some equipment, fixtures and furnishings" in the county at issue. 253 N.C. App. at 221, 799 S.E.2d at 419.

(Emphasis added).

¶ 5 Before the hearing, Ms. Lowrey filed two affidavits opposing the Gandhi Defendants' motion to change venue. The first affidavit attested that eight Choice Hotels properties are located in Durham County and that one or more of the Gandhi Defendants own four properties there. This affidavit did not attest that Choice Hotels—a franchisor—owned or directly operated any hotels in Durham County. Plaintiff's second affidavit attested that she received psychological and other medical care in Durham County and that several anticipated witnesses are located there.

¶ 6 Also before the hearing, the Gandhi Defendants served the parties with a brief in support of their motion to change venue. In that brief, the Gandhi Defendants expressly conceded that "Durham County is presently a proper venue," and clarified that they were only seeking to change venue "to promote the convenience of witnesses and the ends of justice" pursuant to N.C. Gen. Stat. § 1-83 (2019).

2. The 12 December 2019 Hearing

¶ 7 Counsel for all parties appeared at the 12 December 2019 hearing and, consistent with the final civil calendar issued by the trial court, the Gandhi Defendants and Ms. Lowrey immediately informed the trial court that the Gandhi Defendants' motion to change venue to Johnston County was the only venue motion noticed for hearing. The Gandhi Defendants' counsel also expressly abandoned the argument that Durham County was an improper venue and informed the trial court

that they were moving only to change venue to Johnston County for the convenience of witnesses.[2] Thus, the motion before the trial court did not concern whether Durham County was a proper venue as a matter of law.

¶ 8 Despite the limited nature of the venue dispute before the trial court at the hearing, the Gandhi Defendants' counsel and attorneys for Ms. Lowrey contended that Durham County was proper based on their shared—but factually unsupported—belief that Choice Hotels owned the Durham County hotels identified in Ms. Lowrey's affidavit. Counsel for the Gandhi Defendants told the trial court that "Choice Hotels owns . . . two, three, maybe four hotels [in Durham County]. *Choice Hotels is the franchisor*." (Emphasis added). Ms. Lowrey's counsel listed nine different hotels in Durham County that Choice Hotels purportedly "own[ed] and operate[d]" before stating, "venue is more than proper here in Durham County, as one of the defendants owns and operates a business located within the confines of the county lines of

[2] The transcript reveals that counsel for the Gandhi Defendants stated at the outset of the hearing that "the plaintiff has noticed the motion to change venue that I filed in my answer. . . . It's two parts. One is whether Durham County is a proper venue, and the second part is I have moved to move venue to Johnston County for convenience of witnesses." Counsel for Ms. Lowrey responded, "[i]f Your Honor please, he is correct." The Gandhi Defendants' counsel then clarified that his clients were no longer asserting Durham as an improper county and instead were "moving on the convenience of witnesses that this be moved to Johnston County. . . . [W]e are moving today under the convenience of witnesses in the ends of justice to keep this in Johnston County." Later in the hearing, counsel for the Gandhi Defendants noted that "this is a discretionary motion." *Cf., e.g., Stern v. Cinoman*, 221 N.C. App. 231, 232, 728 S.E.2d 373, 374 (2012) ("[T]he trial court has no discretion in ordering a change of venue and it appears that the action has been brought in the wrong county." (cleaned up)).

Durham County. All these hotels are owned by Choice Hotels."

¶ 9 The remainder of the hearing focused on the Gandhi Defendants' argument that Johnston County was a more convenient forum. Following rebuttal from Ms. Lowrey's attorney, the trial court denied the motion to change venue and declined a request from the Gandhi Defendants' that any ruling be without prejudice.

¶ 10 Counsel for Choice Hotels remained silent throughout the hearing on the Gandhi Defendants' motion. After the trial court orally ruled on that motion, Choice Hotels' attorney addressed the court to raise "two quick housekeeping matters that aren't technically on the calendar"—a motion to substitute for prior counsel and a consent protective order.

¶ 11 The trial court entered its order denying "Defendants' Motion to Change Venue" on the same day as the hearing. In the order, the trial court decreed that "the Court, in its discretion and based in large part on *Terry v. The Cheesecake Factory Restaurants, Inc.*, . . . finds that venue is proper in Durham County."

3. Choice Hotels' Venue Motion and Hearing

¶ 12 Following the hearing on the Gandhi Defendants' motion to change venue, Choice Hotels filed a notice of hearing for its motion to change venue. It also filed an affidavit executed by its assistant general counsel, who attested that Choice Hotels "does not maintain a place of business in Durham County [and] . . . does not own real property or improvements in Durham." Counsel further attested that the hotels

identified in Ms. Lowrey's earlier affidavit "are owned and operated by franchisees of Choice Hotel[s] . . . . Choice Hotels . . . does not own these properties, does not employ any individuals at these properties and does not own any of the improvements at these properties. . . . Choice Hotels . . . does not own any other properties in Durham County."

¶ 13 The Gandhi Defendants also filed and noticed for hearing motions to amend or reconsider the trial court's 12 December 2019 venue order pursuant to Rules 54(b) and 60(a) of the North Carolina Rules of Civil Procedure.

¶ 14 Ms. Lowrey responded to the parties' notices of hearing by filing an "Objection to Hearing Defendants' Rule 60(b) Motions,"[3] contending that the 12 December 2019 order denying the Gandhi Defendants' motion to change venue fully resolved *all* pending venue motions and any further consideration was barred by Defendants' failure to timely appeal that order.

¶ 15 Choice Hotels then filed an amended affidavit from its assistant general counsel. The amended affidavit largely repeated the contents of the prior affidavit and denied any ownership of real property in Durham, but it stated in its list of denials that "Choice Hotels . . . *did own* th[e] properties [listed in Ms. Lowrey's affidavit], *did not* employ any individuals at these properties and *did not* own any of

[3] Although Ms. Lowrey's objection opposed the calendared motions under Rule 60(b), no party filed a motion under that rule.

the improvements at these properties. Further, Defendant Choice Hotels . . . does not own any other properties or improvements in Durham County." (Emphasis added).[4]

¶ 16 Defendants' motions and Plaintiff's objections were heard on 24 February 2020. At the hearing, the trial court declared that it had resolved all prior venue motions—including Choice Hotels' motion—at the 12 December 2019 hearing. On 3 March 2020, the trial court entered a written order declining to reconsider or alter its 12 December 2019 venue order, concluding that Rules 54 and 60 were unavailable to Defendants in light of their failure to timely appeal that decision. Choice Hotels petitioned this Court for certiorari review of both the 12 December 2019 and 3 March 2020 orders, and this Court granted that petition.[5]

II. ANALYSIS

¶ 17 Choice Hotels presents two arguments on appeal: (1) the trial court erred in

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[4] At oral argument before this Court, counsel for Choice Hotels offered that this internal contradiction and inconsistency with Choice Hotels' prior affidavit was the result of a typographical error.

[5] Choice Hotels and the Gandhi Defendants also noticed separate appeals from these orders in *Lowrey v. Choice Hotels Int'l, Inc.*, 2021-NCCOA-___, COA20-649 (2021) (unpublished) and *Lowrey v. Choice Hotels Int'l, Inc.*, 2021-NCCOA-___, COA20-782 (2021) (unpublished). We take judicial notice of the contents of the records filed in those appeals as the parties, issues, and orders appealed are identical to those involved here. *See West v. G.D. Reddick, Inc.*, 302 N.C. 201, 202, 274 S.E.2d 221, 223 (1981) ("[A] court may take judicial notice of its own records in another interrelated proceeding where the parties are the same, the issues are the same and the interrelated case is referred to in the case under consideration.").

concluding that Choice Hotels' motion to change venue to Wake County had been heard and determined against Choice Hotels in the 12 December 2019 order; and (2) the trial court erred in determining that the existence of Choice Hotels franchisees in Durham County, standing alone, is sufficient to establish that county as a proper venue under N.C. Gen. Stat. §§ 1-79(a) and 1-82 (2019).

¶ 18 We agree with Choice Hotels that its motion to change venue was neither noticed nor heard at the 12 December 2019 hearing. As a result, we vacate the trial court's 3 March 2020 order and remand for a hearing on that motion consistent with this opinion. We further vacate the trial courts 12 December 2019 order to the extent that it determined Durham County to be a proper venue as a matter of law. We decline to address Choice Hotels' remaining arguments.

1. Standard of Review

¶ 19 A party may move to change venue based on several grounds under the applicable statute, N.C. Gen. Stat. § 1-83, and our standard of review is dependent upon the particular ground alleged by the movant. If a party moves for a change of venue on the basis that "the county designated for that purpose is not the proper one," N.C. Gen. Stat. § 1-83(1), the motion and order entered thereon concern a question of law that this Court reviews *de novo*. *Stern*, 221 N.C. App. at 232, 728 S.E.2d at 373. If the county in question is determined to be improper, the matter must be transferred to a proper venue. *Kiker v. Winfield*, 234 N.C. App. 363, 365, 759 S.E.2d 372, 373

(2014). Such a transfer is mandatory, as "the trial court has no discretion as to removal." *Id.* at 364, 759 S.E.2d at 373.

¶ 20 The above standard does not, however, apply to orders entered on motions to change venue for convenience of witnesses and the ends of justice pursuant to N.C. Gen. Stat. § 1-83(2). Such a motion and order does not concern a question of law, and instead "is a matter firmly within the discretion of the trial court and will not be overturned unless the court manifestly abused that discretion." *Centura Bank v. Miller*, 138 N.C. App. 679, 683, 532 S.E.2d 246, 249 (2000).

2. Choice Hotels' Motion to Transfer Has Not Been Heard and Was Not Adequately Noticed for the 12 December 2019 Hearing

¶ 21 In its first argument, Choice Hotels contends that the trial court erred in denying its motion to change venue on the ground that it was previously resolved at the 12 December 2019 hearing. Based on our review of the general rules of practice, applicable law, and the record below, we agree.

¶ 22 The right to notice and a hearing on a motion is fundamental to the fair and orderly administration of justice. *See, e.g., Pask v. Corbitt*, 28 N.C. App. 100, 104, 220 S.E.2d 378, 382 (1975) (noting that notice "is critically important to the non-movant and cannot be considered an insubstantial or inconsequential omission on the part of the movant and the court"). Motions in civil cases "may be heard and determined either at the pre-trial conference *or on motion calendar*," Gen. R. Pract. Super. and

Dist. Ct. 6 (emphasis added), and "in civil cases filed in North Carolina, the calendar is set by the court and not by the lawyers." *Scruggs v. Chavis*, 160 N.C. App. 246, 248, 584 S.E.2d 879, 880 (2003). Our General Rules of Practice provide that "[t]he Senior Resident Judge and Chief District Judge of each judicial district shall be responsible for the calendaring of all civil cases and motions for . . . hearing in their respective jurisdictions." Gen. R. Pract. Super. and Dist. Ct. 2(a). Durham County's local rules provide that "[t]he calendar for the disposition of civil cases in the Fourteenth Judicial District Superior Court Division shall be set by Trial Court Administration in accordance with these rules *and under the supervision of the Senior Resident Superior Court Judge*." 14 Jud. Dist. Case Mgmt. Sys. 1.4 (emphasis added). Thus, as a general matter and pursuant to the general and local rules, only those motions actually calendared for hearing by the trial court may be heard and resolved on a given date. *See Scruggs*, 160 N.C. App. at 249, 584 S.E.2d at 881 (reversing a trial court's order because the motion was never calendared according to the applicable general and local rules).

¶ 23 There are exceptions to the above precepts. It is "well settled in this jurisdiction that a party entitled to notice of a motion may waive such notice." *Brandon v. Brandon*, 10 N.C. App. 457, 460, 179 S.E.2d 177, 179 (1971). Our Supreme Court has observed that "[a] party ordinarily does this by attending the hearing of the motion and participating in it." *Collins v. Highway Comm'n*, 237 N.C.

277, 283, 74 S.E.2d 709, 714-15 (1953). Examples of participation giving rise to waiver include entering into stipulations pertaining to the motion under consideration and presenting oral argument during the hearing. *See, e.g., Raintree Corp. v. Rowe*, 38 N.C. App. 664, 667-68, 248 S.E.2d 904, 907 (1978) (holding the plaintiff waived notice of a summary judgment hearing when its counsel appeared at the hearing, stipulated to the consideration of particular documents, and offered oral argument in opposition to the motion).

¶ 24 The record below, viewed in light of the above caselaw, demonstrates that Choice Hotels' motion to change venue was not noticed or heard at the 12 December 2019 hearing, and the trial court erred in concluding to the contrary in its 3 March 2020 order.[6] The notice of hearing served on the parties by Ms. Lowrey did not identify which of the two pending motions to transfer were calendared for 12 December 2019, but the final calendar published by the trial court plainly stated that the Gandhi Defendants' motion to transfer venue to Johnston County was the only venue motion for consideration at that hearing. This was also expressly confirmed by counsel for Ms. Lowrey and the Gandhi Defendants, who told the trial court judge

[6] Ms. Lowrey suggests that Choice Hotels' transfer motion was heard on 24 February 2020 and resolved on the merits in the subsequent 3 March 2020 order. That order establishes otherwise, stating that Ms. Lowrey's objection to hearing Choice Hotels' motion on the merits was being "upheld" to avoid a "collateral[] attack [on] said [12 December 2019] Order."

at the outset of the hearing that only the Gandhi Defendants' venue motion was calendared. The notice of hearing, the final published court calendar, and the statements of counsel for the other parties at the hearing demonstrate that Choice Hotels' motion to change venue was not calendared for or heard on 12 December 2019. That motion cannot be—and should not have been—resolved against Choice Hotels without proper notice and an opportunity to be heard. *See, e.g., Scruggs,* 160 N.C. App. at 249, 584 S.E.2d at 881 (holding a motion could not be resolved against a party when the record did not disclose proper notice or calendaring of the motion).

¶ 25 We are not deterred from this holding by Ms. Lowrey's arguments to the contrary. She first contends that Choice Hotels must have known the issue of Durham County's status as a proper venue was subject to determination at the 12 December 2019 hearing because the Gandhi Defendants' motion was unquestionably noticed and calendared for that date. However, as set forth in the recitation of the factual and procedural history above, the Gandhi Defendants served all parties with a brief *prior to the hearing* that expressly conceded Durham to be a proper county and limited the Gandhi Defendants' motion to the discretionary issue of witness convenience. The hearing transcript likewise shows that the Gandhi Defendants abandoned any dispute as to whether Durham County was a proper venue. And, while the question of whether Durham was the proper county was discussed by counsel for the Gandhi Defendants and Ms. Lowrey at the hearing, both parties

agreed that venue was proper under our decision in *Cheesecake Factory*. In other words, the Gandhi Defendants expressly eschewed any motion to transfer venue on the ground that Durham County was not a proper venue prior to and at the hearing. Under these circumstances, it was not unreasonable for Choice Hotels to rely on the *movant's* repeated assertions that *their own motion* did not call into question Durham County's status as a proper venue or seek to transfer the matter to Johnston County on that ground.

¶ 26 To the extent the trial court did determine Durham County to be a proper venue as a matter of law in its 12 December 2019 order, that ruling was without adequate notice to Choice Hotels. A party seeking to change venue for convenience of witnesses under Subsection 1-83(2) raises a fundamentally different question than a party arguing a particular venue is improper under Subsection 1-83(1), as evidenced by the distinct procedural requirements and standards of review applicable to each. A party moving under Subsection 1-83(2) may seek such a transfer after an answer has been filed, and the trial court may deny such a motion in its sound discretion. *ITS Leasing, Inc.*, *v. RAM DOG Enterprises, LLC*, 206 N.C. App. 572, 576, 696 S.E.2d 880, 883 (2010). Indeed, a trial court may deny such a motion even if it finds such a transfer would promote the convenience of witnesses and the interests of justice. *See Godley Construction Co. v. McDaniel*, 40 N.C. App. 605, 608, 253 S.E.2d 359, 361 (1979) ("[W]hen the trial court finds that the convenience of witnesses and the ends

of justice would be promoted by a change of venue, [Subsection] 1-83(2) permits but does not require the trial court in its discretion to order such change of venue." (citation omitted)). By contrast, a motion challenging the current venue as improper as a matter of law under Subsection 1-83(1) must be filed before or with the answer, *McCullough v. Branch Banking & Trust Co.,* 136 N.C. App. 340, 350, 524 S.E.2d 569, 575 (2000), and such a motion presents a legal question over which the trial court has no discretion whatsoever. *Kiker*, 234 N.C. App. at 364-5, 759 S.E.2d at 373. In light of these critical differences, this Court has rightly observed that:

> it is imperative that a party filing a motion for change of venue clearly state the legal basis of the motion and file the motion in a timely manner as appropriate for the type of motion; in ruling on the motion, the trial court should also clearly identify the legal basis for its order allowing or denying a motion for change of venue.

Dunn v. Cook, 204 N.C. App. 332, 338, 693 S.E.2d 752, 756 (2010).

¶ 27 In this case, though the Gandhi Defendants' written motion to change venue asserted grounds for removal under both Subsections 1-83(1) and (2), their pre-hearing brief made clear that their motion was *not* challenging venue as a matter of law under Subsection 1-83(1) and instead sought to change venue only pursuant to the trial court's discretionary authority found in Subsection 1-83(2). Counsel for the Gandhi Defendants confirmed this limited basis for transfer in arguments at the 12 December 2019 hearing. Choice Hotels could rely on the Gandhi Defendants' pre-

hearing briefing and oral arguments—as they were the movants of the motion noticed and calendared for hearing—in concluding that the 12 December 2019 hearing did not involve a motion to transfer challenging Durham County's status as a proper venue under Subsection 1-83(1). *Cf. Harrington Mfg. Co. v. Powell Mfg. Co.*, 44 N.C. App. 347, 349, 260 S.E.2d 814, 816 (1979) (holding that "removal as a matter of right from an improper county as provided for in [N.C. Gen. Stat. § 1-83(1)] is not at issue" on appellate review where the party seeking removal "concedes that [the challenged venue] is proper under [N.C. Gen. Stat. §] 1-83").

¶ 28 Because Choice Hotels had every indication prior to and during the hearing that the Gandhi Defendants had conceded Durham County as a proper venue and were not pursuing transfer on that basis,[7] we hold the trial court erred in deciding the issue—without adequate notice to Choice Hotels—to the extent that its 12 December 2019 order did so.[8]

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[7] That the Gandhi Defendants did not consider the 12 December 2019 hearing as encompassing the proper venue issue under Subsection 1-83(1) is supported by their answer to Ms. Lowrey's amended complaint, filed *after* the 12 December 2019 hearing, which moved to transfer venue under that subsection.

[8] At the hearing, the trial court stated that "the Court *in its discretion* does find that Durham is a proper county," and the written order repeated that "the Court, *in its discretion* . . . finds that venue is proper in Durham County." (Emphasis added). Since a motion to transfer challenging the propriety of the present venue under Subsection 1-83(1) raises a legal question over which the trial court has no discretion, the oral ruling and written order entered by the trial court do not disclose that the trial court determined Durham County to be a proper venue as a matter of law under that subsection. The trial court's failure to "clearly identify the legal basis for its order allowing or denying a motion for change of

¶ 29 We are also not convinced by Ms. Lowrey's argument that Choice Hotels waived notice of a hearing on its motion by attending the hearing on the Gandhi Defendants' motion. To waive notice, a party must both "attend[] the hearing of the motion *and* . . . participat[e] in it." *Collins*, 237 N.C. at 283, 74 S.E.2d at 714-15 (emphasis added). Choice Hotels' counsel did not speak—let alone offer any argument or evidence—during the hearing of the Gandhi Defendants' motion. *Cf. Anderson v. Anderson*, 145 N.C. App. 453, 456-57, 550 S.E.2d 266, 269 (2001) (holding a defendant waived notice of a summary judgment motion seeking dismissal of her equitable distribution claim when she submitted pre-hearing materials to the trial court in support of her claim, the trial court announced in open court at the beginning of the hearing that the summary judgment motion challenging her claim was pending, and she continued to fully participate in the hearing and argue the issue without objection). Choice Hotels' counsel did not raise any issues until *after* the trial court had announced its ruling on venue, and he limited his participation to the entry of: (1) an order substituting him for prior counsel; and (2) a consent protective order. On these facts, we decline to hold that Choice Hotels' mere appearance, without actual participation in the substantive hearing on the Gandhi Defendants' motion,

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venue," *Dunn*, 204 N.C. App. at 338, 693 S.E.2d at 756, lends further support to our holding that Choice Hotels lacked adequate notice of any challenge to Durham County as an improper venue under Subsection 1-83(1).

waived its right to notice that the issue of proper venue under Subsection 1-83(1) was subject to determination at the 12 December 2019 hearing.

¶ 30 Ms. Lowrey also asks us to affirm the trial court's orders on the basis that the Gandhi Defendants' concession that Durham County was a proper venue amounted to a binding admission which the trial court was free to accept in concluding that venue was proper. However, the Gandhi Defendants were unequivocal in asserting that they conceded Durham County to be proper strictly because they believed Choice Hotels owned hotels there, a claim that Ms. Lowrey's counsel on appeal acknowledges was unsupported by the evidence introduced at the 12 December 2019 hearing[9] and, as unsubstantiated statements by counsel, should not have been considered by the trial court. *See, e.g., State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996) ("[I]t is axiomatic that the arguments of counsel are not evidence."). And, in any event, the Gandhi Defendants' factual concessions about Choice Hotels do not preclude Choice Hotels from later contesting those facts or the legal conclusion that Durham County is a proper venue. *See Barclays Am. v. Haywood*, 65 N.C. App. 387, 389, 308 S.E.2d 921, 923 (1983) ("Facts admitted by one defendant are not binding on

[9] While Ms. Lowrey's counsel contended at oral argument that Choice Hotels' ownership of the hotels in Durham County is a disputed issue of fact based on Choice Hotels' amended affidavit filed in advance of the 24 February 2020 hearing, it remains true that there was no record evidence before the trial court *at the 12 December 2019* hearing establishing Choice Hotels' ownership of those properties.

a co-defendant." (citations omitted)); *Bryant v. Thalhimer Bros.*, 113 N.C. App. 1, 14, 437 S.E.2d 519, 527 (1993) ("A stipulation as to the law is not binding on the parties or the court.").

¶ 31 Ms. Lowrey next suggests that even if Choice Hotels owned no hotels in Durham County, the trial court could still conclude that venue was proper in that county because the Gandhi Defendants own and perhaps lease out residential properties in Durham. Assuming this argument has merit, it does not cure the lack of notice and hearing for Choice Hotels. Also, Ms. Lowrey overlooks two key facts that preclude affirming the trial court's orders on this ground.

¶ 32 First, the Gandhis individually are natural persons and, as a result, may be sued in Johnston County where they physically reside. *See, e.g., Jenkins ex rel Hajeh v. Hearn Vascular Surgery, P.A.*, 217 N.C. App. 118, 123, 719 S.E.2d 151, 155 (2011) (recognizing that, for natural persons, "the appropriate question for purposes of venue is the place of residence" (citation omitted)). Their residency, unlike a domestic corporation, is not determined by where their office is located or where they conduct business. *Compare* N.C. Gen. Stat. § 1-82 (providing that venue is proper "in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement") *with* N.C. Gen. Stat. § 1-79(a) (providing that a domestic corporation is a resident for venue purposes where their registered office is located, where they maintain a place of business, or, failing either of the former, where the

entity is regularly engaged in carrying on business). Second, the evidence before the trial court at the 12 December 2019 hearing disclosed only that the individual Gandhi Defendants "and/or [Defendant] MM Shivah, LLC . . . own four properties in Durham County." That a corporation owns a building, standing alone, is not evidence that the corporation "maintains a place of business . . . [or] is regularly engaged in carrying on business" at that property within the meaning of N.C. Gen. Stat. § 1-79. Ms. Lowrey's speculation that the residential properties owned by one of the corporate Gandhi Defendants in Durham County may be leased to tenants does not bridge this evidentiary gap.[10]

¶ 33 Ms. Lowrey presents a final contention, offered for the first time at oral argument before this Court, that the appeals from the trial court's orders are moot. Specifically, Ms. Lowrey contends that, following this Court's holding in *LendingTree, LLC v. Anderson*, 228 N.C. App. 403, 747 S.E.2d 292 (2013), Choice Hotels' participation in discovery automatically served to waive any objection to venue. Ms. Lowrey overstates the effect of *LendingTree*; although we held that a defendant had waived any venue challenge in that case, we emphasized that "*we do not base our instant decision solely on Defendant's discovery participation*, [and] we recognize that

[10] Notably, Ms. Lowrey's complaint did not assert that any of the Gandhi Defendants were residents of Durham County, and it staked its venue allegation on the sole claim that Choice Hotels "usually does business . . . in Durham County."

his limited discovery participation is *one factor indicating* waiver." 228 N.C. App. at 412, 747 S.E.2d at 299 (emphasis added). In other words, *LendingTree* announced no bright-line rule that participation in discovery serves to waive a party's objections to venue. Ms. Lowrey's reliance on *LendingTree* is misplaced, and we therefore decline to hold that Choice Hotels' appeal is moot.

III. CONCLUSION

¶ 34 For the foregoing reasons, we vacate the trial court's 3 March 2020 order and the 12 December 2019 order to the extent that it concluded Durham County to be a proper venue as a matter of law. We remand the matter to the trial court to receive additional evidence and hear Choice Hotels' motion to transfer venue on the merits. Consistent with N.C. Gen. Stat. § 1-85 (2019), the parties may submit affidavits in support of their competing positions. Because we remand the matter to the trial court for further proceedings consistent with this opinion, we decline to resolve the parties' remaining arguments.

VACATED AND REMANDED WITH INSTRUCTIONS.

Judges GORE and GRIFFIN concur.

Report per Rule 30(e).