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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-714

No. COA21-74

Filed 21 December 2021

Buncombe County, No. 18 CVS 4674

PATRICIA RICE, Plaintiff,

v.

RUTLEDGE ROAD ASSOCIATES, LLC, GULFSTREAM CAPITAL CORPORATION, KENNETH GREGORY JACKSON, SR., KENNETH JACKSON, JR., ROBERT S. WALTERS, and JOEL BERKOWITZ, Defendants.

Appeal by plaintiff Stephen Rice from order entered 12 February 2020 by Judge William H. Coward in Buncombe County Superior Court.<sup>1</sup> Heard in the Court of Appeals 6 October 2021.

*No brief filed for plaintiff-appellee Patricia Rice.*

*Holman Law, PLLC, by E. Thomison Holman, for plaintiff-appellant Stephen Rice.*

*Burt Langley, P.C., by Katherine Langley, for defendants-appellees Gulfstream Capital Corporation and Joel Berkowitz.*

*Matney & Associates, P.A., by David E. Matney, III, for defendants-appellees Rutledge Road Associates, LLC, Kenneth Gregory Jackson, Sr., Kenneth Jackson, Jr., and Robert S. Walters.*

ZACHARY, Judge.

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<sup>1</sup> Mr. Rice is a party-plaintiff in this action, joined as a necessary party by the trial court for the reasons explained herein.

¶ 1 Plaintiff Stephen Rice appeals from an order denying his motion to dismiss and aligning him as a party-plaintiff. On appeal, Mr. Rice argues that the trial court erred in denying his motion to dismiss for lack of personal jurisdiction. We disagree and affirm.

***Background***

¶ 2 Mr. Rice spent approximately 15 years in the North Carolina real estate business, and developed the “Poplar Ridge” subdivision of about 150 lots in Buncombe County. Through the Stephen D. Rice Living Trust, Mr. Rice organized MMR Properties, LLC (“MMR”), a North Carolina limited liability company, which owned the Buncombe County real estate. Mr. Rice later worked with Defendant Kenneth Jackson, Sr., to create Defendant Rutledge Road Associates, LLC (“RRA”), a North Carolina limited liability company. MMR owned 50% of RRA, and Mr. Rice managed both companies for some time.

¶ 3 By 2013, Mr. Rice had moved to Oklahoma and filed for bankruptcy in that state. To advance RRA’s interest in purchasing MMR’s share of RRA, and Defendant Gulfstream Capital Corporation’s (“Gulfstream”) interest in satisfying its bankruptcy claim against Mr. Rice, in July 2013, Gulfstream and RRA allegedly entered into a settlement agreement (the “Agreement”) with Mr. Rice and his wife, Plaintiff Patricia

Rice.<sup>2</sup> Mr. Rice’s attorney drafted two versions of the Agreement, both of which were executed by Mr. and Mrs. Rice, with Mr. Rice signing in his individual capacity.

¶ 4

On 19 October 2018, Mrs. Rice filed the instant action in Buncombe County Superior Court alleging, *inter alia*, breach of contract by RRA and Gulfstream, and tortious interference with contract by Kenneth Jackson, Sr., Kenneth Jackson, Jr., Robert S. Walters, and Joel Berkowitz (collectively, “Defendants”). Kenneth Jackson, Sr., Kenneth Jackson, Jr., and Robert S. Walters are associated with RRA. Joel Berkowitz is an agent of Gulfstream.

¶ 5

When Mrs. Rice filed her complaint, the Rices were residents of South Carolina. To demonstrate that she had “performed all of her obligations under the [Agreement],” Mrs. Rice described in her complaint activities performed by an unnamed individual; the trial court later found that the unnamed individual was Mr. Rice. Defendants maintained that Mr. Rice was an “undisclosed agent” whose role was “integral” to the underlying events, as well as a party to the Agreement, and on 21 December 2018, Defendants moved to dismiss the action for failure to join a necessary party, pursuant to Rule 12(b)(7) of the North Carolina Rules of Civil Procedure. On 24 May 2019, Judge R. Gregory Horne entered an order concluding

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<sup>2</sup> The trial court made no determination as to whether the parties reached an agreement, which is disputed.

that Mr. Rice was a necessary party and ordering that he be brought into the case as a party, pursuant to Rule 19(a).

¶ 6

Mr. Rice subsequently filed a motion to dismiss pursuant to Rule 12(b)(2) and (6) of the North Carolina Rules of Civil Procedure. His motion came on for hearing before the Honorable William H. Coward in Buncombe County Superior Court on 16 December 2019. Mr. Rice argued that neither Mrs. Rice nor Defendants had raised claims against him, and therefore, the North Carolina courts could not properly exercise personal jurisdiction over him. The trial court disagreed, and made the following findings of fact in support of its exercise of jurisdiction:

39. The main thrust of [Mrs. Rice]’s claims is that [D]efendants have breached the terms of the Agreement, by failing to pay her money, and by failing to convey to her (or her designee) lot 140 of a development in Buncombe County known as “Poplar Ridge”.

40. Certain terms of the Agreement would have required the Rices to obtain a metes and bounds description of a lot (140) that would comply with the Buncombe County Planning and Subdivision Ordinance (according to one iteration of the Agreement) or conform to “an official government survey” (according to another) such that said lot could be conveyed to “Patricia Rice or her designee” under the terms of the Agreement.

. . . .

43. The Agreement further created the obligation of RRA to create a property owners’ association to take over the sewer pump system for a property located in Buncombe

County, and execute a hold harmless agreement in favor of Mr. Rice.

. . . .

45. Mr. Rice agreed to “use his best efforts [to] take all necessary actions” as to the MMR-to-RRA sale.

46. [Mrs. Rice] has asserted in response to interrogatories that “all obligations owed by Mr. Rice . . . under the agreement were timely performed”.

47. The obligations performed by Mr. Rice included travelling to North Carolina in 2013, meeting with Gillian Phillips from the Buncombe County Planning & Zoning Commission and his land planner Bob Grasso, presenting documents in North Carolina . . . , hiring a North Carolina surveyor, . . . and travelling to North Carolina on another occasion to remove personal items from real property pursuant to the Agreement.

. . . .

49. Mr. Rice was a party to the alleged Agreement.

¶ 7

The trial court concluded that North Carolina had both general and specific jurisdiction over Mr. Rice, and denied Mr. Rice’s motion to dismiss. The court further ordered that Mr. Rice be aligned as a party-plaintiff in the action. Mr. Rice timely filed notice of appeal.

### ***Appellate Jurisdiction***

¶ 8

Mr. Rice appeals the trial court’s denial of his motion to dismiss for lack of personal jurisdiction. This order is interlocutory “because it is not a judgment that

‘disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.’” *Snyder v. Learning Servs. Corp.*, 187 N.C. App. 480, 482, 653 S.E.2d 548, 550 (2007) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381 (1950)). As a general rule, interlocutory orders are not immediately appealable. See N.C. Gen. Stat. § 1A-1, Rule 54(b) (2019).

¶ 9 Nevertheless, this Court has jurisdiction to hear this matter. Where the order affects a substantial right, immediate appeal of an interlocutory order is permitted. *Id.* § 1-277(a). It is well settled 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); accord *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 614, 532 S.E.2d 215, 217 (“The denial of a motion to dismiss for lack of [personal] jurisdiction is immediately appealable.”), *appeal dismissed and disc. review denied*, 333 N.C. 261, 546 S.E.2d 90 (2000).

### ***Standard of Review***

¶ 10 “The determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum is a question of fact.” *Wells Fargo Bank, N.A. v. Affiliated FM Ins. Co.*, 193 N.C. App. 35, 40, 666 S.E.2d 774, 777 (2008) (citation omitted). “Although it is ordinarily this Court’s responsibility to determine whether the trial court’s findings of fact are supported by competent evidence,” in the

instant case, Mr. Rice does not challenge “the trial court’s findings of fact, but rather only challenge[s] the trial court’s conclusions of law. Consequently, the trial court’s findings are presumed to be correct, and our review is limited to a determination as to whether the findings of fact support the conclusions of law.” *Id.* at 40, 666 S.E.2d at 777–78 (citations and internal quotation marks omitted). We review de novo whether a trial court’s findings of fact support its conclusion of law that the court has personal jurisdiction over a party. *Cohen v. Cont’l Motors, Inc.*, 2021-NCCOA-449, ¶ 21.

### ***Discussion***

¶ 11 On appeal, Mr. Rice argues that the trial court erred by denying his motion to dismiss for lack of personal jurisdiction, which he made notwithstanding the fact that the trial court had previously aligned him as a party-plaintiff in the action. We disagree, and conclude that the trial court properly exercised jurisdiction over Mr. Rice.

#### *I. Availability of Personal-Jurisdiction Defense*

¶ 12 As a preliminary matter, we note that the trial court added Mr. Rice as a party-plaintiff in this proceeding, based on the court’s determination that he and Mrs. Rice were united in interest in this matter. Despite being aligned as a plaintiff below, Mr. Rice is not barred from asserting the defense of lack of personal jurisdiction.

¶ 13 Defendants contend that Mr. Rice, as a party-plaintiff, may not raise any Rule 12 defenses, including that of lack of personal jurisdiction. Indeed, a plaintiff generally consents to the exercise of personal jurisdiction by filing an action in the courts of that state. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 86 L. Ed. 2d 628, 642 (1985); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779–80, 79 L. Ed. 2d 790, 800–01 (1984).

¶ 14 However, in the present case, Mr. Rice did not file a complaint; the trial court added Mr. Rice as a party-plaintiff without his consent. Regardless, a court must have personal jurisdiction over one who has been joined as a necessary party. Alan D. Woodlief, Jr., *Shuford N.C. Civil Practice & Procedure with Appellate Advocacy*, §§ 12:7, 19:2 (6th ed. 2020); *see also Brown v. Miller*, 63 N.C. App. 694, 698–99, 306 S.E.2d 502, 505 (1983) (holding that the trial court properly dismissed the plaintiff’s complaint seeking “to have [a] deed declared null and void” because she failed to join the equitable owner of the property, a necessary party pursuant to Rule 19, and “the court would have to have jurisdiction over the parties necessary to convey good title”), *appeal dismissed and disc. review denied*, 310 N.C. 476, 312 S.E.2d 882 (1984). “A ‘necessary’ party is one whose presence is required for a complete determination of the claim, . . . and is one whose interest is such that no decree can be rendered without affecting the party.” *Brown*, 63 N.C. App. at 699, 306 S.E.2d at 505 (citation omitted) (explaining that “[s]ince the deed cannot be set aside without the presence of [the



equitable owner], the trial court could not grant the relief [the] plaintiff sought”); *see also Boone v. Rogers*, 210 N.C. App. 269, 272, 708 S.E.2d 103, 105–06 (2011) (vacating and remanding a real-property judgment where the relevant property was owned by a husband and wife in a tenancy by the entirety, and the plaintiff failed to join the defendant-husband’s wife as a necessary party to the action).

¶ 15 Accordingly, we conclude that Mr. Rice’s status as a non-consenting party-plaintiff does not preclude him from asserting the defense of lack of personal jurisdiction.

## *II. Personal Jurisdiction*

¶ 16 The determination of whether North Carolina courts have personal jurisdiction over a nonresident party requires a two-step analysis. “First, the transaction must fall within the language of the [s]tate’s ‘long-arm’ statute. Second, the exercise of jurisdiction must not violate the due process clause of the [F]ourteenth [A]mendment 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).

¶ 17 This Court has determined that North Carolina’s long-arm statute, N.C. Gen. Stat. § 1-75.4, should be

liberally construed to find personal jurisdiction over nonresident [parties] to the full extent allowed by due process. Accordingly, when evaluating the existence of personal jurisdiction pursuant to this statute, the question of statutory authorization collapses into the question of

whether the [party] has the minimum contacts with North Carolina necessary to meet the requirements of due process.

*Lulla v. Effective Minds, LLC*, 184 N.C. App. 274, 277, 646 S.E.2d 129, 132 (2007) (citation omitted).

*A. North Carolina’s Long-Arm Statute*

¶ 18 Mr. Rice first argues that the trial court erred in concluding that jurisdiction existed under North Carolina’s long-arm statute. The trial court based its exercise of personal jurisdiction, in part, on N.C. Gen. Stat. § 1-75.4(6)(a), which gives North Carolina courts personal jurisdiction over matters that arise out of a “promise, made anywhere to the plaintiff or to some third party for the plaintiff’s benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this [s]tate[.]”

¶ 19 Section 1-75.4(6)(a) supports the exercise of personal jurisdiction when three conditions are present: (1) the claim arises “out of a bargaining arrangement made with the defendant by or on behalf of the plaintiff”; (2) the promise “evidences the bargaining arrangement upon which [the] suit is brought”; and (3) “real property situated in the state” is the “subject matter of the arrangement[.]” *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 706, 208 S.E.2d 676, 680 (1974) (holding that North Carolina had personal jurisdiction over a nonresident defendant in a real property contract action requiring performance in North Carolina); *see also Wells Fargo*, 193 N.C. App. at 44,

666 S.E.2d at 780 (concluding that pursuant to § 1-75.4(6)(a), an out-of-state insurance broker was properly subject to the jurisdiction of North Carolina courts where the plaintiff-bank alleged that the defendant-broker breached the parties' contract by failing to procure insurance on property located in North Carolina).

¶ 20 In the instant case, the underlying action arises out of a breach of an alleged contract, the parties' Agreement. The trial court found as fact that "Mr. Rice was party to the alleged Agreement[.]" which is the "bargaining arrangement upon which [the] suit is brought." *Chadbourn*, 285 N.C. at 706, 208 S.E.2d at 680. Mr. Rice does not challenge this finding on appeal, and it is thus "presumed to be correct[.]" *Wells Fargo*, 193 N.C. App. at 40, 666 S.E.2d at 778.

¶ 21 In the Agreement, Defendants promised to convey real property in Buncombe County to "Patricia Rice or her designee[.]" By the terms of the Agreement, Mr. and Mrs. Rice were obligated to coordinate matters with Buncombe County zoning officials (a task that Mr. Rice completed in this state), and to provide a metes-and-bounds description of the relevant subdivision lot that conformed to local ordinances. In turn, Mr. and Mrs. Rice were given access to the home on lot 140 for 12 days in order to remove their personal property. Furthermore, RRA was obligated by the Agreement "to create a property owners' association to take over the sewer pump system [for the Buncombe County subdivision], and execute a hold harmless agreement in favor of Mr. Rice."

¶ 22 The Agreement thus plainly reveals that “real property situated in the state” was the “subject matter of the arrangement” to which Mr. Rice was a party. *Chadbourn*, 285 N.C. at 706, 208 S.E.2d at 680. Under these facts, the trial court properly exercised personal jurisdiction over Mr. Rice under the North Carolina long-arm statute, N.C. Gen. Stat. § 1-75.4(6)(a).

*B. Due Process*

¶ 23 Mr. Rice next contends that his contacts with North Carolina are insufficient to satisfy due-process requirements for specific jurisdiction. Again, we disagree.

¶ 24 “Since due process, and not the language of the statute, is the ultimate test of ‘long-arm’ jurisdiction over a nonresident, we must determine if [a party’s] contacts with this [s]tate are such that ‘traditional notions of fair play and substantial justice’ are offended by maintaining the suit here.” *Chadbourn*, 285 N.C. at 706, 208 S.E.2d at 680. “[T]here must be some act by which the [party] purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws[.]” *Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 786.

¶ 25 There are two types of personal jurisdiction: general and specific. *Skinner v. Preferred Credit*, 361 N.C. 114, 122, 638 S.E.2d 203, 210 (2006), *reh’g denied*, 361 N.C. 371, 643 S.E.2d 591 (2007). “General jurisdiction exists when the [party’s] contacts with the state are not related to the cause of action but the [party’s] activities in the forum are sufficiently ‘continuous and systematic.’” *Embark, LLC v. 1105 Media*,

*Inc.*, 231 N.C. App. 538, 544, 753 S.E.2d 166, 172 (2014) (citation omitted). “Where the particular controversy at issue arises out of the [party’s] contacts with the forum state, the state is said to be exercising specific jurisdiction.” *Howe v. Links Club Condo. Ass’n, Inc.*, 263 N.C. App. 130, 157, 823 S.E.2d 439, 458 (2018) (citation and internal quotation marks omitted).

¶ 26 Here, because the controversy arises out of the Agreement executed by Mr. Rice concerning North Carolina real property, specific jurisdiction is at issue. For specific jurisdiction to exist, a party must have “fair warning that he may be sued in a state for injuries arising from activities that he purposefully directed toward that state’s residents.” *Id.* at 157, 823 S.E.2d at 458–59 (citation and internal quotation marks omitted). “[A] single contract may be a sufficient basis for the exercise of *in personam* jurisdiction if it has a substantial connection with this [s]tate.” *Tom Togs*, 318 N.C. at 367, 348 S.E.2d at 786. “[P]urposeful activity centering on North Carolina property” can qualify as “sufficient minimum contacts with the State of North Carolina to permit the exercise of personal jurisdiction.” *Wells Fargo*, 193 N.C. App. at 48–49, 666 S.E.2d at 782–83.

¶ 27 In the present case, the trial court determined that the “main thrust of [Mrs. Rice]’s claims is that [D]efendants have breached the terms of the Agreement, by failing to pay her money, and by failing to convey to her (or her designee) lot 140 of a development in Buncombe County known as ‘Poplar Ridge.’” The Agreement

required that Mr. and Mrs. Rice “coordinat[e] with Buncombe County officials” and comply with the “controlling ordinances or law[.]” To satisfy these contractual obligations, Mr. Rice traveled to North Carolina on several occasions: he met with Buncombe County zoning officials, presented documents to the zoning officials in North Carolina, hired a North Carolina surveyor, and removed his personal property from the house on lot 140. Mr. Rice timely performed all of these obligations in this state in furtherance of the Agreement, the alleged breach of which is the basis of this cause of action. By “choosing to promise” to perform in North Carolina when he signed the Agreement, Mr. Rice “must reasonably have anticipated that [he] could be sued in North Carolina if [he] failed to meet [his] promise.” *Id.* at 47, 666 S.E.2d at 782. Moreover, “[t]he courts of this [s]tate are open to [Mr. Rice] for protection of his activities and to enforce valid obligations . . . assumed by reason of the contract.” *Chadbourn*, 285 N.C. at 707, 208 S.E.2d at 680.

¶ 28 Because Mr. Rice “engaged in purposeful activity centering on North Carolina property,” *Wells Fargo*, 193 N.C. App. at 48, 666 S.E.2d at 782, “traditional notions of fair play and substantial justice” are not offended by requiring that he submit to the jurisdiction of the courts of this state, *Chadbourn*, 285 N.C. at 706, 208 S.E.2d at 680. Accordingly, the trial court appropriately concluded that Mr. Rice’s “contacts with the [s]tate are sufficient to satisfy due process requirements.” *Id.* at 707, 208 S.E.2d at 680.

***Conclusion***

¶ 29 For the reasons stated herein, we affirm the trial court's order denying Mr. Rice's motion to dismiss for lack of personal jurisdiction.

AFFIRMED.

Judges CARPENTER and WOOD concur.

Report per Rule 30(e).