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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-101

No. COA21-262

Filed 15 February 2022

Wake County, No. 18 CVS 9604

TARA DOW-REIN, Plaintiff,

v.

MELISSA JONES SARLE; PARAMOUNT SHOW STABLES INC., WILLIAM HAROLD SCHAUB; W. H. SCHAUB STABLES, INC. d/b/a OVER THE HILL FARM; ALLYSON JACOBY COLUCCIO; HIDDEN RIDGE INTERNATIONAL, INC.; EVAN COLUCCIO, EMC FARMS, INC. a/k/a EMC INTERNATIONAL STABLES or EMC INTERNATIONAL SALES; ANDREW KOCHER; and ANDY KOCHER LLC, Defendants.

Appeal by plaintiff from order entered 18 November 2020 by Judge Keith Gregory in Wake County Superior Court. Heard in the Court of Appeals 6 October 2021.

Ragsdale Liggett PLLC, by Amie C. Sivon, Dorothy Bass Burch, and Sandra Mitterling Schilder, for plaintiff-appellant.

Stam Law Firm, PLLC, by R. Daniel Gibson, for defendants-appellees Allyson Jacoby Coluccio, Hidden Ridge International, Inc., and Evan Coluccio.

DIETZ, Judge.

¶ 1

Plaintiff Tara Dow-Rein brought this action after buying two horses for her daughter, both of which Dow-Rein found unfit for their intended purpose. Dow-Rein

asserted fraud, breach-of-contract, and other related claims against a number of defendants, including Defendants Allyson Coluccio, Hidden Ridge International, and Evan Coluccio (the Coluccio Defendants), who sold her one of the horses.

¶ 2 As explained below, the trial court properly dismissed these defendants. As instructed by this Court after a prior appeal, the trial court made jurisdictional findings based on the existing record. Those findings, which are supported by at least some competent evidence in the record, demonstrate that the Coluccio Defendants did not purposefully avail themselves of the privilege of conducting activities in North Carolina. We therefore affirm the trial court's order.

Facts and Procedural History

¶ 3 In 2015, Plaintiff Tara Dow-Rein hired her North Carolina riding trainer, Defendant Melissa Sarle, to assist her in locating and purchasing a horse for Dow-Rein's 11-year-old daughter. With Sarle's assistance, Dow-Rein first purchased a horse named Season from other defendants in this action, but later discovered that Season was not suitable for Dow-Rein's intended use. Dow-Rein began looking for another horse.

¶ 4 In October 2016, Sarle arranged for Dow-Rein to travel to Virginia to test ride horses, including a horse named Fred who was offered for sale by the Coluccio Defendants. Later that month, Dow-Rein traveled to the Coluccios' farm in Virginia to look at Fred again.

¶ 5 On 2 November 2016, Dow-Rein purchased Fred for \$175,000, wiring the money to the Coluccio Defendants in accordance with Sarle’s instructions. The bill of sale for Fred included a written addendum signed by Allyson Coluccio, in which she warranted that Fred, upon delivery to Raleigh, North Carolina, “will behave in the same manner as when he was ridden at Hidden Ridge Middleburg, Va.” After Fred arrived in North Carolina, Dow-Rein began having concerns about Fred’s behavior. Dow-Rein contacted the Coluccios about her concerns, but they refused to take Fred back.

¶ 6 On 30 July 2018, Dow-Rein filed an unverified complaint asserting claims for fraud, negligence, unfair and deceptive trade practices, and breach of contract related to the sales of Season and Fred. In her complaint, Dow-Rein alleged that the Coluccio Defendants knew of Fred’s behavior issues and concealed that information from her to sell Fred for a higher price. Dow-Rein later amended the complaint. As alleged in the amended complaint, the Coluccio Defendants are residents of Virginia and Florida, and their corporate entities are Florida corporations with business locations in Virginia and Florida.

¶ 7 The Coluccio Defendants moved to dismiss the claims against them for lack of personal jurisdiction. In support of their motion to dismiss, the Coluccio Defendants filed sworn affidavits. Dow-Rein relied on undisputed allegations in the complaint.

¶ 8 The trial court heard Defendants’ motions to dismiss and entered an order

denying the motions. Defendants appealed. On 7 July 2020, this Court filed an opinion in that first appeal, vacating the trial court’s order and remanding the matter for the trial court to make necessary jurisdictional findings of fact “based on the appropriate evidence in the record”—specifically, the parties’ affidavits and any undisputed allegations from the unverified complaint. *Dow-Rein v. Sarle*, 272 N.C. App. 446, 843 S.E.2d 731, 2020 WL 3708309, at *3 (2020) (unpublished).

¶ 9 On 28 October 2020, the trial court held a new hearing on the Coluccio Defendants’ motion to dismiss. Dow-Rein sought to introduce additional evidence at the new hearing that was not before the court at the first hearing. The trial court ruled that it would not consider any additional evidence because this Court’s mandate instructed the trial court to make additional findings on remand based on the “evidence in the record.”

¶ 10 On 25 November 2020, the trial court entered a written order granting the Coluccio Defendants’ motion to dismiss. Dow-Rein appealed.¹

Analysis

I. Personal jurisdiction over the Coluccio Defendants

¶ 11 Dow-Rein first argues that the trial court erred by granting the Coluccio

¹ The trial court also entered a written order denying a motion to dismiss filed by other defendants in this action. That order is the subject of a separate, related appeal in this matter. *See Dow-Rein v. Sarle*, No. COA21-267.

Defendants’ motion to dismiss for lack of personal jurisdiction.

¶ 12 In civil proceedings, the plaintiff “bears the burden of proving, by a preponderance of the evidence, grounds for exercising personal jurisdiction over a defendant.” *Bauer v. Douglas Aquatics, Inc.*, 207 N.C. App. 65, 68, 698 S.E.2d 757, 761 (2010). As we noted in the first appeal from this case, this personal jurisdiction issue involves fact questions addressed through affidavits of the parties. *Dow-Rein v. Sarle*, 272 N.C. App. 446, 843 S.E.2d 731, 2020 WL 3708309, at *2–3 (2020) (unpublished). In this circumstance, “the 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). We are bound by the trial court’s determination of the “credibility or weight” of the facts presented in the affidavits. *Id.* at 695, 611 S.E.2d at 183.

¶ 13 In a case like this one, involving what is known as “specific jurisdiction,” courts examine whether the defendants had “fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign, so that they may structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”² *Mucha v. Wagner*, 378 N.C. 167, 2021-NCSC-

² There is no dispute concerning the application of North Carolina’s long-arm statute and no argument that the Coluccio Defendants have sufficient contacts with North Carolina to subject them to general jurisdiction.

82, ¶ 10. The acts necessary to provide this fair warning are described as “purposeful availment” because courts examine whether the defendants purposefully availed themselves of the privilege of conducting activities in North Carolina. *Id.* ¶ 11. Identifying which party initiates the contact with the forum state is “a critical factor in assessing whether a nonresident defendant has made ‘purposeful availment.’” *CFA Medical, Inc. v. Burkhalter*, 95 N.C. App. 391, 395, 383 S.E.2d 214, 216 (1989). “For jurisdiction to vest in a particular forum state under the purposeful direction test, the defendant must expressly aim his or her conduct at that state” or “must have targeted the forum state specifically.” *Mucha*, ¶¶ 16, 20.

¶ 14 In our opinion in the earlier appeal, we instructed the trial court to make findings of fact and conclusions of law based on the appropriate evidence in the record—in this case the affidavits, plus any allegations in the complaint that are not disputed by the affidavits. *Dow-Rein*, 272 N.C. App. 446, 843 S.E.2d 731, 2020 WL 3708309, at *2–3. Specifically, we asked the trial court to determine the “key issues” of “where the contracts for the sale of these horses were formed,” “whether Defendants delivered the horses to Dow-Rein in North Carolina,” and “Defendants’ contacts with the forum state,” including “the nature of those communications and whether they were initiated by Defendants or instead by Dow-Rein or her agents.” *Id.*

¶ 15 On remand, the trial court found that the Coluccio Defendants’ affidavits were

credible. Based on those affidavits, the trial court found that, although “the Coluccio Defendants were aware [Dow-Rein] was from North Carolina and would be taking Fred to North Carolina,” the contract for the sale of Fred “was not formed or performed in North Carolina”; that Dow-Rein took possession of Fred in Virginia, and the Coluccio Defendants did not ship Fred to North Carolina; that the Coluccio Defendants “did not intentionally direct any actions to North Carolina” and never “directed any communication to North Carolina”; and that the Coluccio Defendants “never took any action in North Carolina related to the transactions or occurrences alleged in the complaints.”

¶ 16 Based on these findings, the trial court concluded that the conduct concerning the sale of Fred alleged in the complaint “does not have a substantial connection to North Carolina” and the Coluccio Defendants “did not intentionally avail themselves of the benefits of doing business in North Carolina.” Thus, the court concluded that North Carolina lacks specific personal jurisdiction over the Coluccio Defendants.

¶ 17 Dow-Rein argues that the trial court’s key findings of fact—that the contract was formed and performed outside North Carolina and that the Coluccio Defendants did not “intentionally direct” any actions to North Carolina—are not supported by competent evidence. But those findings are directly supported by statements in the Coluccio Defendants’ affidavits that the trial court, as fact finder, found to be credible. We are bound by those fact findings on appeal. *Banc of Am. Sec. LLC*, 169 N.C. App.

at 694, 611 S.E.2d at 183.

¶ 18 Dow-Rein also asserts that the warranty that Allyson Coluccio included as an addendum to the sale contract shows purposeful availment by the Coluccio Defendants and creates a substantial connection to North Carolina. In that addendum, the Coluccio Defendants warranted that Fred “will behave in the same manner” in North Carolina that the horse did when shown for sale in Virginia:

As per my agreement upon arrival at Paramount Show
Stables 3417 Old Milburnie Rd. Raleigh, NC 27616
Opening Nite aka Fred (horse) will behave in the same
manner as when he was ridden at Hidden Ridge
Middleburg Va. this includes him being quiet, honest and
brave for a child or amateur rider.

¶ 19 Although this warranty provision refers to North Carolina, that is not enough to create purposeful availment in light of the trial court’s other findings. This provision merely guarantees that Fred, upon the horse’s eventual delivery to Dow-Rein, would behave as the horse did when shown for sale. Nothing in this provision indicates that the Coluccio Defendants targeted North Carolina or availed themselves of our State’s law and protections. Thus, this provision in the contract does not contradict the trial court’s findings that the contract for the sale of Fred “was not formed or performed in North Carolina,” that the Coluccio Defendants “did not intentionally direct any actions to North Carolina,” and that the Coluccio Defendants “never took any action in North Carolina related to the transactions or occurrences

alleged in the complaints.” Accordingly, we hold that the trial court did not err in granting the Coluccio Defendants’ motion to dismiss for lack of personal jurisdiction. *Id.*

II. Additional evidence on remand

¶ 20 Dow-Rein also argues that the trial court erred by refusing her request to submit additional evidence on remand after the prior appeal.

¶ 21 Ordinarily, on remand for additional findings, the question of whether “a trial court receives new evidence or relies on previous evidence submitted is a matter within the discretion of the trial court.” *Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 414 (2003). But this general rule can be overridden by the mandate rule, which provides that upon “the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court.” *Bodie v. Bodie*, 239 N.C. App. 281, 284, 768 S.E.2d 879, 881 (2015).

¶ 22 Here, in the prior appeal, we vacated the trial court’s order and remanded “for findings of fact, and corresponding conclusions of law, *based on the appropriate evidence in the record*, applying the test for jurisdictional evidence described in *Banc of Am. Sec. LLC*, 169 N.C. App. at 696, 611 S.E.2d at 184.” *Dow-Rein v. Sarle*, 272 N.C. App. 446, 843 S.E.2d 731, 2020 WL 3708309, at *3 (2020) (unpublished) (emphasis added). In declining Dow-Rein’s request to submit new evidence, the trial

court ruled that it would “not allow the newly proffered evidence submitted by Plaintiff . . . as the undersigned reads the COA Opinion for the remand to be based solely on the evidence that was already in the record at the time of the appeal.”

¶ 23 We agree with the trial court’s reading of our mandate from the prior appeal. This Court specifically directed the trial court to make the required findings “based on the appropriate evidence in the record.” *Id.* The plain terms of our remand instructions to the trial court limited its consideration to the appropriate evidence already contained in the record—namely, the parties’ existing affidavits and any allegations from the unverified complaint not disputed by those affidavits. *Id.* at *2–3. The trial court was required to strictly comply with the terms of our mandate on remand, and it did so here. *Bodie*, 239 N.C. App. at 284, 768 S.E.2d at 881.

Conclusion

¶ 24 For the reasons discussed above, we affirm the trial court’s order.

AFFIRMED.

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).