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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-515

No. COA21-249

Filed 19 July 2022

Guilford County, No. 20 CVS 5460

BRENDA WARLEY, Plaintiff,

v.

AUTOMONEY, INC., Defendant.

Appeal by Defendant from Order entered 23 November 2020 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 8 February 2022.

Brown, Faucher, Peraldo & Benson, PLLC, by James R. Faucher and Jeffrey K. Peraldo, for plaintiffs-appellees.

Womble Bond Dickinson (US) LLP, by Michael Montecalvo and Scott D. Anderson, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Automoney, Inc. (Defendant) appeals from an Order entered 23 November 2020 denying Defendant's Motion to Dismiss under N.C.R. Civ. P. 12(b)(2), (b)(3) and (b)(6). The Record before us—including the factual allegations contained in Plaintiff's Complaint—tends to reflect the following:

¶ 2 Defendant is a South Carolina corporation who makes consumer car title loans to residents of North Carolina. Plaintiff is a resident of Guilford County, North Carolina. On 30 June 2018, Plaintiff entered into a loan agreement with Defendant in the amount of $1,020.00 with an annual percentage rate of 179.041%. Defendant placed a lien on Plaintiff's vehicle to secure the loan and registered the lien with the North Carolina Department of Motor Vehicles. The loan agreement included a choice-of-law provision that read, in relevant part:

> As Lender is a regulated South Carolina consumer finance company and you, as Borrower, have entered into this Agreement in South Carolina, this Agreement shall be interpreted, construed, and governed by and under the laws of the State of South Carolina, without regard to conflicts of law rules and principles . . . that would cause the application of the laws of any jurisdiction other than the State of South Carolina.

¶ 3 On 22 June 2020, Plaintiff filed a Complaint in Guilford County Superior Court alleging three causes of action against Defendant for violations of N.C. Gen. Stat. § 53-165 et. seq.—the North Carolina Consumer Finance Act (NCCFA)—, N.C. Gen. Stat. § 75-1.1—Unfair and Deceptive Trade Practices Act (UDTPA)—, and alternatively, N.C. Gen. Stat. § 24-1.1, et seq.—Usury. Specifically, Plaintiff alleged Defendant violated the NCCFA by charging Plaintiff an annual interest rate that far exceeded the maximum annual rate of interest allowed by the statute; alternatively, violated the usury laws by soliciting Plaintiff for the loan, discussing and negotiating the loans, offering to make Plaintiff the loan, and receiving each Plaintiff's acceptance

to the loan while Plaintiff was in the State of North Carolina; and violated the UDTPA by knowingly extending usurious loans to a North Carolina resident. Plaintiff alleged under N.C. Gen. Stat. § 1-253, et seq. she was "entitled to a declaration of the Court that the loan identified herein and the security interest thereon are void and unenforceable." Plaintiff also requested to recover all statutory damages and attorney fees.

¶ 4 Moreover, in her Complaint, Plaintiff alleged:

> 3. This Court has jurisdiction over Defendant pursuant to N.C. G.S. § 1-75.4 in that at all times relevant to the events and transactions alleged herein, Defendant, via the internet, cellular telephone and other media and communication methods solicited, marketed, advertised, offered, accepted, discussed, negotiated, facilitated, collected on, threatened enforcement of, and foreclosed upon automobile title loans with Plaintiff and other North Carolina citizens . . . Plaintiff further allege that, for a considerable amount of time prior to the events and transactions with Plaintiff as alleged herein, Defendant had regular, ongoing, continuous and systematic contacts with the State of North Carolina and its citizens . . . such that this Court has personal jurisdiction over Defendant.
>
> 6. Defendant has knowingly and intentionally constructed and engineered its internet advertising to ensure that Defendant's South Carolina office locations appear as internet search results when a North Carolina consumer conducts an internet search for a "car title loan" or terms similar thereto.
>
> 7. Defendant has purposefully established its business locations just across the North Carolina-South Carolina state line to avoid the application of North Carolina law to loan contracts Defendant enters into with North Carolina residents, such as Plaintiff.

¶ 5 On 3 August 2020, Defendant filed a Motion to Dismiss alleging: (1) Defendant was not subject to personal jurisdiction in North Carolina and the action should be dismissed pursuant to N.C.R. Civ. P. 12 (b)(2); (2) venue was improper in Guilford County under N.C.R. Civ. P. 12(b)(3); and, (3) the Complaint failed to state a claim on which relief under North Carolina law could be granted under N.C.R. Civ. P. 12(b)(6) based on the choice-of-law clauses in the Plaintiff's loan agreement. In support of its Motion to Dismiss, Defendant also filed the Affidavit of Linda Derbyshire, (Derbyshire) the owner, executive officer, and manager of Defendant. Derbyshire denied Plaintiff's allegations that Defendant solicited, marketed, advertised, offered, accepted, discussed, negotiated, facilitated, or otherwise made any title loans in North Carolina. Defendant also attached Plaintiff's loan agreement showing the choice-of-law provision.

¶ 6 Plaintiff subsequently filed Affidavits in opposition to Defendant's Motion to Dismiss. In these affidavits, Plaintiff rebuffed Derbyshire's claim that Defendant had no contacts with North Carolina. For example, Plaintiff submitted, *inter alia*, an authenticated page from Defendant's website that specifically targeted North Carolina residents and claimed to have made "thousands" of loans to North Carolinians and be the "trusted name in title loans" in North Carolina; an affidavit from an assistant manager and loan officer for Defendant who stated Defendant mailed loan solicitation flyers into North Carolina to both current and former

borrowers and regularly engaged in phone conversations with North Carolina residents regarding Defendant's loans; an affidavit from the Owner and Managing Member of the North Carolina publication "Steals & Deals" who—from February 2013 to May 2019—ran a weekly advertisement for Defendant's title loans to residents of North Carolina; and a manager of Associates Asset Recovery, LLC, a North Carolina business, who recovered 442 motor vehicles for Defendant in North Carolina over the course of four years.

¶ 7 On 23 November 2020 the trial court entered an Order denying Defendant's Motions to Dismiss. Defendant filed Notice of Appeal on 11 December 2020.

Appellate Jurisdiction

¶ 8 Here, the trial court's Order constitutes three separate interlocutory rulings denying Defendant's Motion to Dismiss alleging lack of personal jurisdiction, improper venue, and failure to state a claim. However, on appeal, Defendant does not contend the trial court erred in denying Defendant's Motion to Dismiss for improper venue, and thus, we do not address this ruling. "Generally, the denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature." *McClennahan v. N.C. School of the Arts*, 177 N.C. App. 806, 808, 630 S.E.2d 197, 199 (2006) (citation and quotation omitted). "An interlocutory order is one made during the pendency of an action, which does not dispose of the

case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* "However, N.C. Gen. Stat. § 1-277 allows a party to immediately appeal an order that either (1) affects a substantial right or (2) constitutes an adverse ruling as to personal jurisdiction." *Id.*

¶ 9 The denial of Defendant's Motion asserting lack of personal jurisdiction is immediately appealable under Section 1-277(b). *See Cohen v. Cont'l Motors, Inc.*, 279 N.C. App. 123, 2021-NCCOA-449, ¶ 16-17, *disc. rev. denied*, 868 S.E.2d 859 (2022); *see also A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 257–58, 625 S.E.2d 894, 898 (2006) ("motions to dismiss for lack of personal jurisdiction affect a substantial right and are immediately appealable").

¶ 10 However, immediate appealability of the denial of Defendant's Motion to Dismiss under Rule 12(b)(6) based on the assertion of a choice-of-law clause is less clear. Nevertheless, in several other cases involving choice-of-law related issues, this Court has elected to review the matter under writ of certiorari. *Harco Nat. Ins. Co. v. Grant Thornton LLP*, 206 N.C. App. 687, 691, 698 S.E.2d 719, 722 (2010); *Stetser v. TAP Pharm. Prod., Inc.*, 165 N.C. App. 1, 12, 598 S.E.2d 570, 579 (2004); *United Virginia Bank v. Air-Lift Assocs., Inc.*, 79 N.C. App. 315, 319, 339 S.E.2d 90, 92 (1986). Defendant here has also filed a Petition for Writ of Certiorari in the event we determine there is no immediate right to appeal. Given our prior practice, the fact the choice of law issue is related to the issue of personal jurisdiction which is properly

before us, and the fact that the two issues address vital preliminary questions impacting both this litigation and other related litigation pending in our Courts which would benefit from an early decision on these threshold matters, in our discretion we grant Defendant's Petition for Writ of Certiorari to ensure our appellate jurisdiction over the entirety of Defendant's appeal and turn to the merits of the appeal.

Issues

¶ 11 The issues on appeal are whether the trial court erred by denying Defendant's Motion to Dismiss pursuant to North Carolina Rules of Civil Procedure: (I) 12(b)(2) for lack of personal jurisdiction when Defendant purposefully availed itself of the privilege of doing business in North Carolina; and (II) 12(b)(6) for failure to state a claim when Plaintiffs' claims are based on North Carolina law and Plaintiffs' loan contracts contain a choice-of-law provision stating South Carolina law should apply.

Analysis

I. Personal Jurisdiction

¶ 12 Defendant asserts the trial court erred in denying Defendant's Motion to Dismiss under 12(b)(2) arguing Defendant did not have substantial contacts with North Carolina sufficient to confer personal jurisdiction in North Carolina over Defendant. This Court addressed Defendant's identical argument in *Wall v. Automoney,* Inc., ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (COA 21-419) (filed 19

July 2022). In *Wall*, we determined the trial court properly concluded the exercise of personal jurisdiction in North Carolina over Defendant does not offend the Due Process Clause of the Fourteenth Amendment because Defendant deliberately and systematically reached out beyond South Carolina to enter into loan agreements with thousands of North Carolina citizens. *Id.*

¶ 13 Here, the trial court's Order contains Findings of Fact regarding Defendant's contacts with North Carolina that are practically identical to the trial court's findings in *Wall*. Thus, because Defendant asserts the same arguments in the case *sub judice* as it did in *Wall*, for the reasons articulated in *Wall* we conclude the trial court in this case correctly determined Defendant's substantial contacts with North Carolina are sufficient to confer personal jurisdiction in North Carolina over Defendant. Consequently, the trial court did not err in denying Defendant's Motion under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure.

II. Choice-of-Law Provision and Failure to State a Claim

¶ 14 Next, Defendant contends the trial court erred in denying Defendant's Motion to Dismiss under Rule 12(b)(6). Defendant argues Plaintiff's contract contains a choice-of-law provision mandating the application of South Carolina law and, thus, precluding Plaintiff's claims arising from North Carolina law. Here again, this Court addressed Defendant's identical argument in *Wall v. Automoney,* Inc., ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (COA 21-419) (filed 19 July 2022). In *Wall*, we

determined the trial court properly concluded the plaintiffs' complaint contained sufficient allegations to support a claim under the NCCFA, UDTPA, and usury law despite the inclusion of a choice-of-law provision in plaintiffs' contracts stating South Carolina should apply because public policy rendered the choice-of-law provisions unenforceable. *Id.*

¶ 15 Here, Plaintiff's loan agreement includes the same choice-of-law provision as the plaintiffs' loan agreements in *Wall*. Moreover, Plaintiff's claims under the NCCFA, UDTPA, and usury law are identical to those in *Wall*. Thus, because Defendant asserts the same arguments in the case *sub judice* as it did in *Wall*, for the reasons articulated in *Wall* we conclude the trial court in this case correctly determined Plaintiff's Complaint contained sufficient allegations to support a claim under the NCCFA, UDTPA, and in the alternative, usury law. Consequently, the trial court did not err in denying Defendant's Motion under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

Conclusion

¶ 16 Accordingly, for the foregoing reasons, we affirm the trial court's Order denying Defendant's Motion to Dismiss pursuant to Rules 12(b)(2) and 12(b)(6).

AFFIRMED.

Judges WOOD and GORE concur.

Report per Rule 30(e).