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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-509

No. COA21-271

Filed 19 July 2022

Hoke County, No. 20 CVS 295

LAKISHA SMITH, Plaintiff,

v.

AUTOMONEY, INC., Defendant.

Appeal by Defendant from orders entered 11 December 2020 and 9 February 2021 by Judge Michael A. Stone in Hoke County Civil Superior Court. Heard in the Court of Appeals 8 February 2022.

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

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

WOOD, Judge.

¶ 1 AutoMoney, Inc. ("Defendant") appeals from orders denying its motion to dismiss under N.C. R. Civ. P. 12(b)(2) and 12(b)(6). On appeal, Defendant argues the trial court erred by 1) not enforcing the choice of law provisions within its loan agreements, and 2) asserting personal jurisdiction over it. Defendant petitions this Court by writ of certiorari to review the trial court's denial of its motion to dismiss

under Rule 12(b)(6). In our discretion, we grant Defendant's writ of certiorari. After careful review of the record and applicable law, we affirm the trial court's orders.

I. Factual and Procedural Background

¶ 2 Defendant is a licensed South Carolina corporation with its principal place of business in Charleston, South Carolina, who provides loans to its customers. Defendant makes loans to individuals by securing a borrower's motor vehicle, which is commonly known as a "car title loan." Defendant is a supervised lender under South Carolina law, and its consumer lending activities are regulated by the South Carolina State Board of Financial Institutions, Consumer Finance Division.

¶ 3 Lakisha Smith ("Plaintiff"), is a citizen and resident of Hoke County, North Carolina. In or about 2017, Plaintiff acquired a car title loan from Defendant at its office in Dillon, South Carolina. Plaintiff had learned about Defendant from a friend, and subsequently called Defendant from North Carolina to inquire about a loan. During this phone call, Defendant's employee asked Plaintiff if she had a car with a clear title, inquired about the year, make, model, mileage and condition of her vehicle, and questioned Plaintiff as to how much money she wanted to borrow. Plaintiff did not recall the "exact amount I told them" but believed "I told them around $700." When asked by Defendant's employee if she wanted the loan, Plaintiff responded in the affirmative and was directed to come to one of Defendant's stores in South Carolina with her car, car title, driver's license, proof of insurance, a second vehicle

key, and proof of residency.

¶ 4 On June 3, 2017, Plaintiff drove to Defendant's office in Dillon, South Carolina and finalized and signed a loan agreement there. The loan agreement provided Plaintiff would receive a loan for $720.00 at an interest rate of 158.041%. Defendant perfected its security interest by applying for and obtaining a lien on Plaintiff's vehicle through the North Carolina Department of Motor Vehicles ("DMV"). Plaintiff made payments on the loan from North Carolina using MoneyGram and successfully paid off this loan.

¶ 5 Subsequently, Plaintiff took out a second loan with Defendant on October 9, 2018. Per this loan agreement, Plaintiff received loan proceeds in the amount of $1,520.00 at an interest rate of 179.039%. Again, this loan agreement between Plaintiff and Defendant was finalized and executed in South Carolina. Defendant perfected its security interest by applying for and obtaining a lien through the North Carolina DMV. Both of Plaintiff's loan agreements with Defendant contained a choice of law provision, designating South Carolina as the governing forum should a dispute occur:

> 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.

¶ 6 Plaintiff fell behind in making payments on this second loan; thereafter, Defendant repossessed Plaintiff's vehicle from a location in North Carolina and sold it. On May 13, 2020, Plaintiff filed a complaint in Hoke County Superior Court asserting three causes of action for violations of the North Carolina Consumer Finance Act (N.C. Gen. Stat. § 53-164 et. seq.), the North Carolina Deceptive and Unfair Trade Practices Act (N.C. Gen. Stat. § 75-1.1), and North Carolina usury laws (N.C. Gen. Stat. § 24-1.1 et. seq.). On June 30, 2020, Defendant filed a motion to dismiss pursuant to (1) N.C. Gen. Stat. §1A-1, Rule 12(b)(6) for failure to state a claim based upon Plaintiff's loan agreements containing a South Carolina choice-of-law provision, and (2) N.C. Gen. Stat. §1A-1, Rule 12(b)(2) for lack of personal jurisdiction.

¶ 7 In support of its motion to dismiss, Defendant filed the Affidavit of Linda Derbyshire, ("Derbyshire") the owner, executive officer, and manager of Defendant. Therein, Derbyshire attested to the following: Defendant has never registered to do business in North Carolina and does not have offices, real property, agents for service, employees, a mailing address, a telephone number, or a bank account in North Carolina. As a requirement under its supervised lender license, Defendant only enters into loan agreements with customers if they physically travel to one its stores in South Carolina. Defendant only accepts loan applications while customers are physically at a store in South Carolina and can only inspect a car if it is also physically

present at one of its stores in South Carolina. Defendant does not advertise through radio, televisions, or billboards within North Carolina and does not directly market into North Carolina. Derbyshire attested that the "only way a loan payment can be made is via one of [Defendant's] . . . South Carolina locations" with payments accepted "in person, by mail, or by card over the phone."

¶ 8 Defendant maintains a website which is accessible by anyone, regardless of their residency, but the website prevents customers from submitting loan applications over the internet. Additionally, this website's homepage states: "Title loan transactions are prohibited within the State of North Carolina," and before anyone may enter the website, they must read the term and conditions which state the same.

¶ 9 Plaintiff subsequently filed affidavits in opposition to Defendant's motion to dismiss. Plaintiff attested Defendant mailed her loan solicitation letters and flyers to her North Carolina address and offered her payment through "referral fees" if she sent Defendant "new North Carolina borrowers." Additionally, Plaintiff submitted an authenticated page from Defendant's website featuring an advertisement which specifically addressed North Carolina residents:

> Are you a North Carolina resident? We've got you covered! You are just a short drive away from getting the cash you need! Do you live in the Charlotte area? What about Fayetteville or Wilmington? How about Hendersonville, Lumberton, Monroe, or Rockingham? There is a [sic]

> [AutoMoney] Title Loans right across the border with a professional and courteous staff ready to help you get the cash you need. Is it worth the drive? Our thousands of North Carolina customers would certainly say it is.

¶ 10 A former assistant manager for Defendant attested, "[d]uring certain times of the year [Defendant] . . . would mail loan solicitation flyers into North Carolina" and would mail the materials to current and former borrowers. Additionally, a representative of Steals & Deals Southeastern LLC [Steals & Deals], an advertisement magazine that is headquartered and mainly published in North Carolina, along with four counties in South Carolina, explained in his affidavit that from February 2013 through May 2019, Defendant ran a weekly advertisement in the magazine. Affidavits from customers of Defendants, who were also North Carolina residents, attested to hearing radio advertisements, watching television ads, viewing an advertisement for Defendant in Steals & Deals, and subsequently contacting Defendant while in North Carolina. A manager of Associates Asset Recovery, LLC, a North Carolina business, stated between January 1, 2016 to October 7, 2020, the business recovered 442 motor vehicles in North Carolina for Defendant.

¶ 11 On December 11, 2020, Defendant's motion to dismiss came on for hearing. At the conclusion of this hearing, Defense counsel requested the trial court to make findings of fact in the forthcoming order, to which the trial court judge replied "[t]he [c]ourt, in its discretion, is going to not make findings of fact." The trial court entered

an order the same day denying Defendant's motion to dismiss under Rule 12(b)(2) and Rule 12(b)(6). This order did not contain findings of fact. On December 15, 2020, Plaintiff filed a motion to amend the December 11, 2020 order, requesting that the trial court incorporate findings of fact and conclusions of law in connection with the court's denial of the motion based upon lack of personal jurisdiction. Plaintiff also submitted a proposed amended order. On January 5, 2021, Defendant filed a notice of appeal of the December 11, 2020 order. Approximately two weeks later, Defendant filed an opposition to Plaintiff's motion to amend the order, opposing the entry of Plaintiff's proposed amended order.

¶ 12 Subsequently, the trial court entered an amended order denying Defendant's motion to dismiss on February 9, 2021. Therein, the court found Defendant "has purposefully availed itself of the privilege of conducting business in North Carolina," and Plaintiff's claims "arise from or relate to Defendant's activities in North Carolina," so that "[t]he exercise of personal jurisdiction is constitutionally reasonable." The court also found "[t]he State of North Carolina has a strong interest in the enforcement of its consumer protection law and in protecting its citizens from what under North Carolina law are usurious loan rates." Defendant filed a timely notice of appeal of this order. Defendant also petitions this court by a writ of certiorari to review the trial court's denial of its motion to dismiss under Rule 12(b)(6)

based on the loan agreement's choice of-law provision.[1]

II. Jurisdiction

¶ 13 Defendant appeals from the trial court's denial of both its Rule 12(b)(2) and Rule 12(b)(6) motions to dismiss. "[T]he denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature." *Can Am South, LLC v. State*, 234 N.C. App. 119, 122, 759 S.E.2d 304, 307 (2014) (quoting *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007)). A party may not appeal from "an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974) (citations omitted); *see also* N.C. Gen. Stat. § 1-277 (2021). Therefore, since Defendant's appeal from the trial court's order denying its motion to dismiss is interlocutory, we first determine whether this appeal affects a substantial right.

¶ 14 Turning first to Defendant's Rule 12(b)(2) motion, "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)

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[1] On September 23, 2021, Plaintiff filed a motion with this Court to dismiss Defendant's appeal pertaining to the trial court's denial of its Rule 12(b)(6) motion. Plaintiff also requested an expedited ruling. This motion was referred to this panel.

(citations omitted); *see* N.C. Gen. Stat. § 1-277(b) ("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 . . . ."); *Can Am South, LLC*, 234 N.C. App. at 122, 759 S.E.2d at 307; *State ex rel. Cooper v. Ridgeway Brands Mfg.*, LLC, 188 N.C. App. 302, 304, 655 S.E.2d 446, 448 (2008). Thus, Defendant's appeal from the order denying its Rule 12(b)(2) motion is properly before us on appeal.

¶ 15 Regarding Defendant's Rule 12(b)(6) motion, Defendant petitions us by a writ of certiorari to review the denial of its motion. We have held "it is an appropriate exercise of this Court's discretion to issue a writ of certiorari in an interlocutory appeal where there is merit to an appellant's substantive argument, and it is in the interests of justice to treat an appeal as a petition for writ of certiorari." *Cryan v. Nat'l Council of YMCA of the United States*, 280 N.C. App. 309, 2021-NCCOA-612, ¶ 17 (cleaned up) (quoting *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 606, 596 S.E.2d 285, 289 (2004)). Particularly, we have issued a writ of certiorari when the issue in question is significant, important, and will promote judicial economy. *Id.* at ¶ 18. The issue raised by Defendant's motion to dismiss under Rule 12(b)(6) in the present case is significant as it raises the critical question of whether our State legislation prohibiting predatory title lending constitutes a fundamental public policy. Likewise, granting Defendant's petition for writ of certiorari will promote judicial economy as this appeal represents one of thirty-two proceedings against Defendant in North

Carolina courts, seven of which are currently before this Court. Therefore, in our discretion, we grant Defendant's petition for writ of certiorari to review its motion to dismiss under Rule 12(b)(6).

III. Discussion

¶ 16 Defendant raises several issues on appeal; each will be addressed in turn.

A. Personal Jurisdiction

¶ 17 Defendant first contends the trial court erred by denying its Rule 12(b)(2) motion to dismiss. Specifically, Defendant contends the trial court erred by concluding minimum contacts existed between it and North Carolina. We disagree.

¶ 18 When reviewing the denial of a motion to dismiss for lack of jurisdiction, we determine whether "the findings of fact by the trial court are supported by competent evidence in the record . . . ." *Lab. Corp. of Am. Holdings v. Caccuro*, 212 N.C. App. 564, 567, 712 S.E.2d 696, 699 (2011) (quoting *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005)). The trial court's conclusions of law are reviewed *de novo*. *Id.*; *see Beroth Oil Co. v. N.C. DOT*, 367 N.C. 333, 338, 757 S.E.2d 466, 471 (2014).

¶ 19 This Court utilizes a two-step analysis to determine whether personal jurisdiction exists over a non-resident defendant: "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." *Banc of Am. Sec. LLC*, 169 N.C. App. at 693, 611 S.E.2d at 182 (cleaned up) (citing *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986)); *see Lab. Corp. of Am. Holdings*, 212 N.C. App. at 566, 712 S.E.2d at 699. *But see Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 785 ("We have also held in considering N.C.G.S. § 1-75.4 that the requirements of due process, not the words of the long-arm statute, are the ultimate test of jurisdiction over a non-resident defendant."). Because Defendant does not challenge on appeal the applicability of our long-arm statute, we confine our analysis to whether the trial court's conclusion it had personal jurisdiction over Defendant violated the requirements of due process.

¶ 20 The Due Process Clause of the Fourteenth Amendment to the United States Constitution "prevents states from rendering valid judgments against nonresidents." *In re F.S.T.Y.*, 374 N.C. 532, 534, 843 S.E.2d 160, 162 (2020) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S. Ct. 559, 564, 62 L. Ed. 2d 490, 497 (1980)). A defendant must "be given adequate notice of the suit . . . and be subject to the personal jurisdiction of the court[] . . . ." *World-Wide Volkswagen Corp.*, 444 U.S. at 291, 100 S. Ct. 564, 62 L. Ed. 2d at 497 (citation omitted); *accord In re F.S.T.Y.*, 374 N.C. at 534, 843 S.E.2d at 162.

¶ 21 Under the due process clause, *minimum contacts* must exist between the forum state and nonresident such that "the maintenance of the suit does not offend

traditional notions of fair play and substantial justice." *Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 786 (cleaned up) (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945)). In other words, "there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws[] . . . ." *Id.*; s*ee also World-Wide Volkswagen Corp.*, 444 U.S. at 297, 100 S. Ct. at 567, 62 L. Ed. 2d at 501 ("[I]t is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."); Cherry *Bekaert & Holland v. Brown*, 99 N.C. App. 626, 632, 394 S.E.2d 651, 655 (1990). However, "our minimum contacts analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden v. Fiore*, 571 U.S. 277, 285, 134 S. Ct. 1115, 1122, 188 L. Ed. 2d 12, 20 (2014) (internal quotation marks omitted).

¶ 22 There are two types of personal jurisdiction recognized by our Supreme Court sufficient for establishing minimum contacts: general and specific jurisdiction. *Beem USA Limited-Liability Ltd. P'ship v. Grax Consulting, LLC*, 373 N.C. 297, 303, 838 S.E.2d 158, 162 (2020). "General jurisdiction is applicable in cases where the defendant's affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State." *Id.* (cleaned up); *see also Lab. Corp. of Am. Holdings*, 212 N.C. App. at 569, 712 S.E.2d at 701 ("General jurisdiction may be

asserted over a defendant even if the cause of action is unrelated to defendant's activities in the forum as long as there are sufficient continuous and systematic contacts between defendant and the forum state." (internal quotation marks omitted)). Specific jurisdiction exists when "the controversy arises out of the defendant's contacts with the forum state . . . ." *Tom Togs, Inc.*, 318 N.C. at 366, 348 S.E.2d at 786; *see Beem USA Limited-Liability Ltd. P'ship*, 373 N.C. at 303-04, 838 S.E.2d at 162.

¶ 23 In the case *sub judice*, Plaintiff asserts Defendant is subject to a suit in North Carolina under specific jurisdiction. As such, we limit our analysis to whether this State has specific jurisdiction over Defendant.

¶ 24 A specific jurisdiction inquiry analyzes "the relationship among the defendant, the forum state, and the cause of action . . . ." *Tom Togs, Inc.*, 318 N.C. at 366, 348 S.E.2d at 786; *see Banc of Am. Sec. LLC*, 169 N.C. App. at 696, 611 S.E.2d at 184. "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden*, 571 U.S. at 284, 134 S. Ct. at 1121, 188 L. Ed. 2d at 20. This Court has established several factors to consider when evaluating whether minimum contacts exist: "(1) the quantity of the contacts; (2) the nature and quality of the contacts; (3) the source and connection of the cause of action with those contacts; (4) the interest of the forum state; and (5) the convenience to the parties." *A.R. Haire, Inc. v. St. Denis*, 176 N.C.

App. 255, 260, 625 S.E.2d 894, 899 (2006) (citation omitted); *see Sherlock v. Sherlock*, 143 N.C. App. 300, 304, 545 S.E.2d 757, 761 (2001); *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 617, 532 S.E.2d 215, 219; *Cherry Bekaert & Holland*, 99 N.C. App. at 632, 394 S.E.2d at 655.

¶ 25 The evidence presented in this present case shows Defendant's conduct created a substantial connection with North Carolina. Defendant contacted North Carolina residents through the following methods: 1) online advertisements; 2) advertisements in Steals & Deals, a local North Carolina publication; 3) telephone calls between Defendant and North Carolina residents while the residents were in North Carolina; 4) perfection of its security interest with North Carolina Department of Motor Vehicles; 5) offers of referral bonuses to North Carolina residents for referring new North Carolina customers; 6) receipt of loan payments from North Carolina residents within North Carolina; 7) repossession of vehicles located within North Carolina; and 8) written solicitation letters sent to North Carolina residents.

¶ 26 Regarding Defendant's online advertisements, this court in *Havey v. Valentine* outlined the following tests to determine whether an Internet website warrants the exercise of personal jurisdiction:

> [A] State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates,

> in a person within the State, a potential cause of action cognizable in the State's courts.

Havey v. Valentine,172 N.C. App. 812, 816-17, 616 S.E.2d 642, 647 (2005). Notably, at least one of Defendant's internet advertisements directly targeted North Carolina:

> Are you a North Carolina resident? We've got you covered! You are just a short drive away from getting the cash you need! Do you live in the Charlotte area? What about Fayetteville or Wilmington? How about Hendersonville, Lumberton, Monroe, or Rockingham? There is a [sic] [AutoMoney] Title Loans right across the border with a professional and courteous staff ready to help you get the cash you need. Is it worth the drive? Our thousands of North Carolina customers would certainly say it is.

This advertisement is clearly a "manifested intent" to engage in business within North Carolina by recruiting our residents and providing them with information on how to acquire loans. Defendant's high interest car title loans would be void as a matter of public policy if offered by a company within North Carolina. Because Defendant attempts to circumvent North Carolina's predatory lending laws by operating from South Carolina while directly marketing to North Carolina residents, Defendant's internet advertisements satisfy the test for personal jurisdiction over internet communications stated in *Havey*.

¶ 27 Moreover, Defendant ran an advertisement in a North Carolina publication for six consecutive years. Although running an advertisement in a national publication is not sufficient, standing alone, to establish personal jurisdiction, this Court has yet

to address whether advertisements in a local publication can give rise to personal jurisdiction. *See Stallings v. Hahn*, 99 N.C. App. 213, 216, 392 S.E.2d 632, 634 (1990); *Marion v. Long*, 72 N.C. App. 585, 587, 325 S.E.2d 300, 303 (1985). Certainly, placing an advertisement in a publication which primarily circulates in a single state only is sufficient for a defendant to reasonably anticipate being haled into that State's court. *See World-Wide Volkswagen Corp.*, 444 U.S. at 297, 100 S. Ct. at 567, 62 L. Ed. 2d at 501.

¶ 28 Because Defendant had direct contact with North Carolina through its business operations, internet advertisements, and local publication advertisements, Defendant purposefully "avail[ed] [it]self of the privilege of conducting activities within" North Carolina. *Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 786 (citation omitted). In other words, the sum and quality of Defendant's contacts with this State, paired with Defendant's obvious intent to recruit North Carolina clients, is sufficient to establish personal jurisdiction. Accordingly, we hold the trial court did not err by denying Defendant's Rule 12(b)(2) motion to dismiss.

B. Rule 12(b)(6) Motion

¶ 29 Defendant next asserts the trial court erred by denying its motion to dismiss under Rule 12(b)(6). After a careful review of the record and applicable law, we conclude the trial court committed no error.

¶ 30 We review a trial court's ruling on a motion to dismiss under Rule 12(b)(6) *de*

novo. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003), *aff'd per curiam,* 357 N.C. 567, 597 S.E.2d 673-74 (2003); *see Grich v. Mantelco*, LLC, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013). A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency of the complaint." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citing *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970)). When "ruling on . . . [a Rule 12(b)(6)] motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback*, 297 N.C. at 185, 254 S.E.2d at 615 (citing *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976)); *see Sutton*, 277 N.C. at 103, 176 S.E.2d at 166 ("[A] complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim."); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80, 84 (1957), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

¶ 31 Here, Defendant argues the trial court should have granted its Rule 12(b)(6) motion because of the South Carolina choice of law provision within its loan agreements mandating the application of South Carolina law and, thus, precluding Plaintiff's claims arising from North Carolina law. As a general rule, a "court interprets a contract according to the intent of the parties to the contract." *Cable Tel*

Servs. v. Overland Contr., 154 N.C. App. 639, 642, 574 S.E.2d 31, 33 (2002) (citing *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 631, 518 S.E.2d 205, 209 (1999)); *see Duke Power Co. v. Blue Ridge Electric Membership Corp.*, 253 N.C. 596, 602, 117 S.E.2d 812, 816 (1961). However, the intent of the parties must not "require the performance of an act prohibited by law." *Duke Power Co.*, 253 N.C. at 602, 117 S.E.2d at 816. When "parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect." *Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980); *see Bueltel*, 134 N.C. App. at 631, 518 S.E.2d at 209 ("[I]t is apparent that when a choice of law provision is included in a contract, the parties intend to make an exception to the presumptive rule that the contract is governed by the law of the place where it was made."). A choice of law provision is binding "on the interpreting court as long as they had a reasonable basis for their choice and the law of the chosen State does not violate a fundamental public policy of the state or otherwise applicable law." *Torres v. McClain*, 140 N.C. App. 238, 241, 535 S.E.2d 623, 625 (2000) (quoting *Behr v. Behr*, 46 N.C. App. 694, 696, 266 S.E.2d 393, 395 (1980)); *see also Tanglewood Land Company*, 299 N.C. at 262, 261 S.E.2d at 656.

¶ 32 Plaintiff asserts that regardless of the choice of law provision, Defendant is subject to North Carolina law under N.C. Gen. Stat. § 53-190. As such, we must determine whether N.C. Gen. Stat. § 53-190 constitutes a "fundamental public policy"

or "otherwise applicable law" as to invalidate Defendant's choice of law provision. *See Torres*, 140 N.C. App. at 241, 535 S.E.2d at 625.

1. N.C. Gen. Stat. § 53-190 is a Fundamental Public Policy

¶ 33 N.C. Gen. Stat. § 53-190 states:

> (a) No loan contract made outside this State in the amount or of the value of fifteen thousand dollars ($15,000) or less, for which greater consideration or charges than are authorized by . . . [N.C. Gen. Stat. §§] 53-173 and . . . 53-176 of this Article have been charged, contracted for, or received, shall be enforced in this State. Provided, the foregoing shall not apply to loan contracts in which all contractual activities, including solicitation, discussion, negotiation, offer, acceptance, signing of documents, and delivery and receipt of funds, occur entirely outside North Carolina.
>
> (b) If any lender or agent of a lender who makes loan contracts outside this State in the amount or of the value of fifteen thousand dollars ($15,000) or less, comes into this State to solicit or otherwise conduct activities in regard to such loan contracts, then such lender shall be subject to the requirements of this Article.
>
> (c) No lender licensed to do business under this Article may collect, or cause to be collected, any loan made by a lender in another state to a borrower, who was a legal resident of North Carolina at the time the loan was made. The purchase of a loan account shall not alter this prohibition.

N.C. Gen. Stat. § 53-190 (2021). In other words, N.C. Gen. Stat. § 53-190 aims to protect North Carolina residents from predatory lending by nonresident, predatory loan corporations that infiltrate North Carolina through the contractual activities listed above.

¶ 34 In making today's determination whether N.C. Gen. Stat. § 53-190 encompasses a fundamental public policy of North Carolina, we are guided by our case law concerning predatory lending. In *State ex rel. Cooper v. NCCS Loans, Inc.*, defendant offered immediate cash advances under the guise of an internet store wherein the customer was required to sign a year-long contract for "internet access." *State ex rel. Cooper v. NCCS Loans, Inc.*, 174 N.C. App. 630, 635-36, 624 S.E.2d 371, 375 (2005). The customers were charged "100 times more" for internet access compared to legitimate internet providers and a high interest rate on the cash advanced. *Id.* at 637-38, 624 S.E.2d at 376-77. The trial court granted summary judgment against defendants for usury, violation of the North Carolina Consumer Finance act, and unfair and deceptive trade practices. *Id.* at 633, 624 S.E.2d at 373-74. On appeal, defendant challenged, among other things, the trial court's entry of summary judgment on plaintiff's claim of unfair and deceptive trade practices. *Id.*, at 640, 624 S.E.2d at 378. We agreed with the trial court, stating "it is a 'paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws.' " *Id.* at 641, 624 S.E.2d at 378; *see* N.C. Gen. Stat. § 24-2.1(g) (2021); *Odell v. Legal Bucks, LLC*, 192 N.C. App. 298, 319, 665 S.E.2d 767, 780 (2008).

¶ 35 Moreover, a review of North Carolina's General Assembly's legislative action regarding predatory lending within our State further guides our decision. On

December 20, 2006, our Supreme Court in *Skinner v. Preferred Credit*, addressed whether North Carolina had personal jurisdiction over the 1997-1 Trust, a nonresident defendant who held high interest loans. 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006). In a 4 to 3 decision, Justice Paul Newby writing for the majority concluded "North Carolina courts lack personal jurisdiction over a nonresident trust that has no connections to this state other than holding mortgage loans secured by deeds of trust on North Carolina property." *Id.* at 127, 638 S.E.2d at 213. Justice Timmons-Goodson strongly dissented, writing the "Court's decision today aids in the exploitation of our state's most vulnerable citizens[,]" and "the majority's decision effectively undermines the right of unwitting victims of predatory lending practices . . . ." *Id.* (Timmons-Goodson, J., dissenting).

¶ 36 Less than four months after the decision in *Skinner*, our General Assembly enacted House Bill 1374 overturning the *Skinner* case. The bill was entitled "An Act to Overturn the Shepard Case and Amend the Limitation Regarding Actions to Recover for Usury; *To Overturn The Skinner Case* And Amend The Long-Arm Statute To Allow North Carolina Courts to Exercise Personal Jurisdiction Over Certain Nonresident Defendants; To Require That a Notice of Foreclosure Contain Certain Information; And to Provide for Mortgage Debt Collection and Servicing." 2007 NC Session Laws, H.B. 1374 (emphasis added). In addition to House Bill 1374, our General Assembly proceeded to pass four other bills addressing consumer mortgage

lending in the summer of 2007. Susan E. Hauser, *Predatory Lending, Passive Judicial Activism, and the Duty to Decide*, 86 N.C.L. Rev. 1501, 1555 (2008).

¶ 37 Based upon our General Assembly's legislation prohibiting predatory lending, its swift response to *Skinner*, and our case law governing predatory lending practices within the State of North Carolina, the issue of predatory lending is clearly a question of fundamental public policy for this State. Thus, since N.C. Gen. Stat. § 53-190 protects North Carolina citizens from predatory lending and our conclusion it constitutes a fundamental public policy of this State, we next determine whether Defendant violated this statute.

¶ 38 In pertinent part, N.C. Gen. Stat. § 53-190 prohibits predatory loans made elsewhere unless "all contractual activities, including solicitation, discussion, negotiation, offer, acceptance, signing of documents, and delivery and receipt of funds, occur entirely outside North Carolina." § 53-190(a). "Negotiation" is defined as "deliberation, discussion, or conference upon the terms of a proposed agreement, or as the act of settling or arranging the terms of a bargain or sale." *Cooper v. Henderson*, 55 N.C. App. 234, 235, 284 S.E.2d 756, 757 (1981) (citation omitted). "Discussion" is defined as "[t]he act of exchanging views on something; a debate." *Discussion*, Black's Law Dictionary (10th ed. 2014).

¶ 39 Here, Defendant negotiated and discussed the terms of the loan agreement with North Carolina residents while they were in North Carolina. Plaintiff, in her

deposition, recounted the following:

> I called AutoMoney from North Carolina. . . . The AutoMoney employee I spoke with asked me if I had a car with a clear title. They also asked me for information about my car like the year, make and model. . . . The AutoMoney employee asked me how much money I was looking to borrow. I don't recall now the exact amount I told them but I think I told them around $700. I do know that over the phone the employee told me that AutoMoney could make me that loan and asked me if I wanted the loan. I said yes and was told to come to the store in South Carolina. They told me to bring my vehicle and the title as well as my driver's license, proof of residency, registration, proof of employment, proof of insurance and my second key.

Per Plaintiff's affidavit, Defendant discussed details of the loan amount and the security interest for the loan with her. Furthermore, Derbyshire, in her deposition, stated Defendant would provide information about its business to potential borrowers who contacted Defendant. Because Defendant's business was providing high interest loans, these details would naturally be included in "information abouts its business."

¶ 40 We pause to note Defendant contends the February 9, 2020 order lacked findings of fact or conclusions of law to support a finding its choice of law provision should not be enforced. We are unpersuaded by this argument. Within this order, the trial court made specific findings of fact regarding Plaintiff's experience with Defendant as stated above. The trial court made further findings of fact that Defendant called other North Carolina residents to discuss a loan, discuss the details of the loan, offer a loan, and receive acceptances of a loan. As such, we conclude the

trial court's order contained sufficient findings of fact. Furthermore, the trial court made the following, relevant conclusions of law to support its denial of Defendant's Rule 12(b)(6) motion:

> 19. The State of North Carolina has a strong interest in the enforcement of its consumer protection law and in protecting its citizens from what under North Carolina law are usurious loan rates.
>
> 20. It is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws.

Accordingly, we hold the trial court made sufficient conclusions of law to support its denial of Defendant's Rule 12(b)(6) motion and, thereby, concluding Defendant's choice of law provision should not be enforced.

¶ 41 By discussing its business and the terms of its contract by the phone with North Carolina residents, Defendant discussed and negotiated loans within North Carolina as defined by N.C. Gen. Stat. § 53-190. Therefore, we conclude Defendant violated N.C. Gen. Stat. § 53-190, and in turn, violated a fundamental public policy of North Carolina. As such, we hold the choice of law provision within Defendant's loan agreements is void as a matter of public policy and the trial court properly denied Defendant's Rule 12(b)(6) motion.

IV. Conclusion

¶ 42 For the foregoing reasons, Defendant is subject to personal jurisdiction in North Carolina, and as such, the trial court did not err by denying Defendant's motion

to dismiss under Rule 12(b)(2). Furthermore, Defendant's actions violated N.C. Gen. Stat. § 53-190; thus, the trial court did not err by denying Defendant's motion to dismiss under Rule 12(b)(6). The order of the trial court is affirmed. It is so ordered.

AFFIRMED.

Judges HAMPSON and GORE concur.

Report per Rule 30(e).