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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1037

Filed 21 November 2023

Iredell County, No. 22 CVS 858

KEVIN SULLIVAN and INFINITE WEALTH ADVISORS, LLC, Plaintiffs,

v.

DEBORAH KARLIN and DANIEL KARLIN, Defendants.

Appeal by Defendants from order entered 1 September 2022 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 9 August 2023.

Dozier Miller Law Group, by Adam S. Hocutt, for Defendants-Appellants.

TLG Law, by Michael M. Avitan-Lasry, Tyler A. Rhoades and David G. Redding, for Plaintiffs-Appellees.

CARPENTER, Judge.

Deborah Karlin and Daniel Karlin (collectively, “Defendants”) appeal from an order denying their motions to dismiss pursuant to Rules 12(b)(2) and 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we hold the trial court erred by denying Defendants’ motion to dismiss for lack of personal jurisdiction. Accordingly, we reverse. As Defendants’ interlocutory appeal invokes a substantial

right, and we reverse solely on that basis, we dismiss Defendants’ Petition for Writ of Certiorari (“PWC”) as moot.

I. Factual and Procedural Background

Infinite Wealth Advisors, LLC (“IWA”), a North Carolina limited liability company, and IWA’s principal, Kevin Sullivan, (collectively, “Plaintiffs”) provided financial services to Deborah Karlin, beginning in 2010. Throughout May 2020, Deborah completed and signed the necessary paperwork to invest in a Nationwide Annuity to help finance the cost of an assisted-living facility in New York. Deborah permanently moved from North Carolina to New York on 15 May 2020. On 6 June 2020, Deborah funded the Nationwide Annuity plan by mailing a check for \$200,000 to Plaintiffs.

On 28 December 2021, Plaintiffs terminated their relationship with Deborah for her failure to communicate with IWA regarding her 2021 year-end required minimum distributions. On 30 December 2021, Deborah, with the purported assistance of her son, Daniel Karlin, submitted written communications to three financial entities seeking to reverse the annuity so she could access her money. These three financial entities (collectively, “the Entities”) included: (1) Nationwide Mutual Insurance Co. in Columbus, Ohio; (2) Naples Asset Management Co. in Naples, Florida; and (3) the Financial Industry Regulatory Authority in Washington, D.C., who forwarded the communications to the New York State Department of Financial

Services in Albany, New York.

On 11 April 2022, Plaintiffs filed a libel *per se* and tortious interference with a contract action against Defendants, both residents of New York, in Iredell County Superior Court. Plaintiffs' complaint alleged Defendants knowingly or intentionally published false and misleading statements in their communications to the Entities resulting in damages "in an amount exceeding \$25,000." The alleged libelous statements included:

- (1) Sullivan "invested all of [Deborah's] assets in annuities";
- (2) Sullivan "initiated and completed a non-qualified funds variable annuity with Nationwide while [Deborah] was living in New York State";
- (3) Sullivan "knew that [Deborah] had moved to Rochester prior to [Deborah] signing the Application";
- (4) Sullivan stated in the Application that [Deborah] "did not own any annuities or life insurance policies"; and
- (5) Deborah "never authorized [Sullivan] to have discretionary use of [her] signature."

On 5 July 2022, Defendants moved to dismiss Plaintiffs' complaint under Rules 12(b)(2) and 12(b)(6) of the North Carolina Rules of Civil Procedure. After a hearing on 29 August 2022, Judge Crosswhite denied Defendants' motions by order filed on 1 September 2022. Defendants timely filed a written notice of appeal on 12 September 2022 and a PWC as to the 12(b)(6) motion on 16 December 2022.

II. Jurisdiction

Despite the interlocutory nature of Defendants' appeal, this Court has jurisdiction to consider the merits of the personal-jurisdiction issue, because a motion

to dismiss on this basis invokes a substantial right. N.C. Gen. Stat. § 1-277(b) (2021) (“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.”); *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 257–58, 625 S.E.2d 894, 898 (2006) (“[M]otions to dismiss for lack of personal jurisdiction affect a substantial right and are immediately appealable.”).

III. Issues

Defendants raised the following issues on appeal: (1) whether the trial court erred by denying Defendants’ motion to dismiss for lack of personal jurisdiction; and (2) whether the trial court erred by denying Defendants’ motion to dismiss for failure to state a claim upon which relief can be granted regarding Plaintiffs’ libel *per se* and tortious interference with a contract claims.

IV. Analysis

A. Personal Jurisdiction

When this Court reviews a decision as to personal jurisdiction, it considers only “whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.” *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140–41, 515 S.E.2d 46, 48 (1999). When the record contains no findings of fact, “‘[i]t is presumed . . . that the court on proper evidence found facts to support its judgment.’” *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524 (1981) (quoting *Sherwood v. Sherwood*, 29 N.C. App.

112, 113–14, 223 S.E.2d 509, 510–11 (1976)). In this scenario, “our role on appeal is to review the record for competent evidence to support these presumed findings.” *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217 (2000).

“Personal jurisdiction analysis involves two steps. ‘First, the court must determine if the North Carolina long-arm statute’s (N.C. Gen. Stat. § 1-75.4) requirements are met. If so, the court must then determine whether such an exercise of jurisdiction comports with due process.’ ” *Hundley v. AutoMoney, Inc.*, 284 N.C. App. 378, 383, 876 S.E.2d 765, 771 (2022) (quoting *Cooper v. Shealy*, 140 N.C. App. 729, 732, 537 S.E.2d 854, 856 (2000)).

When a trial court is presented with a motion to dismiss under Rule 12(b)(2), the proper analysis turns on the procedural context before the court. Where a defendant “supplements his motion to dismiss with an affidavit or other supporting evidence, the ‘allegations [in the complaint] can no longer be taken as true or controlling and plaintiff [] cannot rest on the allegations of the complaint.’ ” *Banc of Am. Sec. LLC v. Evergreen Int’l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005) (quoting *Bruggeman*, 138 N.C. App. at 615–16, 532 S.E.2d at 218). “In order to determine whether there is evidence to support an exercise of personal jurisdiction, the court then considers (1) any allegations in the complaint that are not controverted by the defendant’s affidavit and (2) all facts in the affidavit (which are

uncontroverted because of the plaintiff's failure to offer evidence)." *Id.* at 693–94, 611 S.E.2d at 182–83.

1. Long Arm Statute

First, we examine whether North Carolina's long-arm statute provides for personal jurisdiction over Defendants. North Carolina's long-arm statute states that personal jurisdiction extends to persons in an action which "[a]rises out of services actually performed . . . for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant." N.C. Gen. Stat. § 1-75.4(5)(b) (2021). An additional basis for personal jurisdiction under the long-arm statute applies "in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury . . . services activities were carried on within this State by or on behalf of the defendant." *Id.* § 1-75.4(4)(a). "The long-arm statute is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process." *Birtha v. Stonemor, N.C., LLC*, 220 N.C. App. 286, 289, 727 S.E.2d 1, 4–5 (2012).

Here, Plaintiffs argue Defendants' conduct satisfies subsection 1-75.4(5)(b) of the long-arm statute because the action arises out of a contract between IWA and Deborah. Defendants, however, allegedly made and published the statements from New York *after* IWA's termination of the contract. In addition, Plaintiffs assert the one-week gap between the termination of the parties' contract and the alleged

defamation satisfies subsection 1-75.4(4)(a), based on its “at or about” language. Although this is a close question, we must construe our long-arm statute liberally. *See Birta*, 220 N.C. App. at 289, 727 S.E.2d at 4–5. Based on this premise, we agree with Plaintiffs that they were carrying on financial services “at *or about*” the time of the alleged injury. N.C. Gen. Stat. § 1-75.4(4)(a) (emphasis added). Therefore, the trial court properly applied our long-arm statute in denying Plaintiffs’ motion to dismiss for lack of personal jurisdiction.

2. Due Process

Having determined the requirements of our long-arm statute were satisfied, we next examine whether the assertion of personal jurisdiction over Defendants comports with the Fourteenth Amendment Due Process Clause. Defendants argue that traditional notions of fair play and substantial justice are offended by Plaintiffs bringing suit in North Carolina. We agree. Both Plaintiffs’ Complaint and Defendants’ Affidavits establish this controversy does not arise out of sufficient minimum contacts between Defendants and North Carolina at any time relevant to this action.

“The assertion of personal jurisdiction over a defendant comports with due process if defendant is found to have sufficient minimum contacts with the forum state to confer jurisdiction.” *Golds v. Cent. Express, Inc.*, 142 N.C. App. 664, 665–66, 544 S.E.2d 23, 25 (2001). “To satisfy the requirements of the due process clause, there must exist ‘certain minimum contacts [between the non-resident defendant and the

forum] such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice.’ ” *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945)).

The Supreme Court of the United States has recognized two types of personal jurisdiction: (1) specific jurisdiction and (2) general jurisdiction. *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., S.F. Cnty.*, 582 U.S. 255, 262, 137 S. Ct. 1773, 1779–80, 198 L. Ed. 2d 395, 403 (2017). An individual is subject to general jurisdiction in the forum where they are domiciled; therefore, general jurisdiction is not applicable to the instant case. *See id.* at 262, 137 S. Ct. at 1780, 198 L. Ed. 2d at 403. An exercise of specific jurisdiction, on the other hand, is only appropriate where “the *suit*” arises out of or relates to a defendant’s contacts with a forum. *Id.* at 262, 137 S. Ct. at 1780, 198 L. Ed. 2d at 403 (emphasis in original); *see also Banc of Am. Sec. LLC.*, 169 N.C. App. at 696, 611 S.E.2d at 184 (“For specific jurisdiction, the relationship among the defendant, the forum state, and the cause of action is the essential foundation for the exercise of *in personam* jurisdiction.”). Accordingly, “specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.” *Bristol-Myers Squibb*, 582 U.S. at 262, 137 S. Ct. at 1780, 198 L. Ed. 2d at 403.

“When evaluating whether minimum contacts with the forum exists, a court typically evaluates the quantity and nature of the contact, the relationship between

the contact and the cause of action, the interest of the forum state, the convenience of the parties, and the location of the witnesses and material evidence.” *Berrier v. CareFusion 203, Inc.*, 231 N.C. App. 516, 527, 753 S.E.2d 157, 165 (2014) (*purgandum*). “In each case, 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.” *Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 786. Therefore, the “relationship between the defendant and the forum must be ‘such that he should reasonably anticipate being haled into court there.’ ” *Id.* at 365, 348 S.E.2d at 786 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L.Ed.2d 490, 501 (1980)).

Plaintiffs’ argument, pursuant to *Calder v. Jones*, 465 U.S. 783, 789, 104 S. Ct. 1482, 1486–87, 79 L. Ed. 2d 804, 812 (1984), that the “effects” of Plaintiffs’ intentional conduct being disproportionately felt in North Carolina are sufficient to confer specific personal jurisdiction here, is unavailing. In *Calder*, a national magazine located in Florida with its largest circulation in California (600,000 copies per issue), published an allegedly libelous story about a California entertainer. *See id.* at 784, 104 S. Ct. at 1484, 79 L. Ed. 2d at 809. Because “California [was] the focal point both of the story *and* of the harm suffered,” jurisdiction was “proper in California based on the ‘effects’ of [the magazine’s] Florida conduct in California.” *Id.* at 789, 104 S. Ct. at 1486–87, 79 L. Ed. 2d at 812 (emphasis added).

Regarding the nature and quantity of Defendants’ contacts, Deborah had

pervasive North Carolina contacts during her time as a North Carolina resident and perhaps beyond, including an ongoing business relationship with Plaintiffs for a period of ten years. *See Berrier*, 231 N.C. App. at 527, 753 S.E.2d at 165. But for Defendants' North Carolina contacts, this dispute may never have arisen; however, due process requires something more to justify an exercise of personal jurisdiction over an out-of-state defendant. The primary cause of action in this case arises out of allegedly defamatory speech uttered or published in New York, and directed towards Ohio, Florida, and Washington D.C. In other words, the controversy in this case is Defendants' speech, not, for example, Defendants' breach of a longstanding North Carolina contract. Under such circumstances, we cannot agree that Plaintiffs' cause of action relates to Defendants' former North Carolina contacts. *See id.* at 527, 753 S.E.2d at 165.

Unlike *Calder*, Deborah's communications were neither directed towards nor disproportionately felt in North Carolina, relative to other states. *Bristol-Myers Squibb*, 582 U.S. at 262, 137 S. Ct. at 1780, 189 L. Ed. 2d at 403. While North Carolina certainly has an interest in providing a forum for redress of Plaintiffs' claims, our interest is no stronger than the interest of New York, where the statements were made and republished, or the other forums where they were originally published to the Entities. *See Berrier*, 231 N.C. App. at 527, 753 S.E.2d at 165. Notably, North Carolina is not a convenient forum for an infirm, elderly woman in assisted living, and given the statements were distributed electronically, there is

neither a disproportionate amount of evidence nor witnesses located in North Carolina. *See id.* at 527, 753 S.E.2d at 165.

In our view, a New York resident would not reasonably anticipate being haled into a North Carolina court for consumer-related speech typed on a computer located in New York and sent to Ohio, Florida, and Washington D.C. Traditional notions of fair play and substantial justice would be satisfied, and better served, by bringing this action in New York, where the statements were made, or in a state where one of the Entities is located. *See Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 786. Accordingly, we reverse the trial court's denial of Defendants' motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure.

B. Failure to State a Claim

Because we hold the trial court lacks personal jurisdiction over Defendants, we do not reach Defendants' argument regarding Plaintiffs' alleged failure to state a claim upon which relief can be granted. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(2), (6) (2021).

V. Conclusion

After careful review, we hold the trial court erred by denying Defendants' motion to dismiss for lack of personal jurisdiction. Although the requirements of our long-arm statute were satisfied, the instant dispute over Defendants' speech does not sufficiently relate to their North Carolina contacts to support an exercise of specific

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personal jurisdiction consistent with due process. Consequently, we reverse. Further, we dismiss Defendants' PWC with respect to Defendants' 12(b)(6) motion as moot.

REVERSED.

Judges TYSON and FLOOD concur.

Report per Rule 30(e).