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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-284

Filed 18 June 2024

Forsyth County, No. 22-CVS-1172

OMAR KHOURI, Plaintiff,

v.

AFFORDABLE AUTO PROTECTION, LLC
and GUSTAV RENNY, Defendants.

Appeal by Defendants from order entered 29 August 2022 by Judge Richard L. Doughton in Forsyth County Superior Court. Heard in the Court of Appeals 19 September 2023.

Cranfill Sumner LLP, by Stephen J. Bell, for the defendants-appellants

Omar Khouri, pro se, plaintiff-appellee

STADING, Judge.

Defendants Affordable Auto Protection, LLC (Affordable) and Gustav Renny (collectively, “Defendants”) appeal the trial court’s denial of their 12(b)(2) motion to dismiss for lack of personal jurisdiction. For the reasons below, we conclude that the trial court properly denied Affordable’s motion; however, the trial court erred in its denial pertaining to Renny. Thus, we affirm in part, reverse in part and remand.

I. Background

On 10 January 2022, Omar Khouri (Plaintiff), a Forsyth County resident, received an unsolicited phone call despite his phone number's federal Do-Not-Call registration. Plaintiff was transferred to "Edward" in the corporate caller's "Auto Warranty Division." Edward refused to identify his company and transferred Plaintiff to multiple other "specialists," none of whom identified the company until Plaintiff spoke to James Keller. Keller told Plaintiff they could reinstate his Audi warranty for \$5,505. After Plaintiff agreed to a \$165 down payment, Keller told Plaintiff that he worked for a division of Audi that underwrote its factory warranty policies. Keller provided Plaintiff with a phone number of 888-678-0697. After Plaintiff's \$165 payment processed, Keller said that the company was called "Advanced Auto Protection."

Plaintiff later received confirmation of his extended warranty policy (Exhibit A). Although it repeated Keller's 888 phone number, the confirmation identified the originating entity only as "AAP" and listed "1300 Old Congress Rd" as its corporate address. Plaintiff found an online Better Business Bureau (BBB) profile listing "Affordable Auto Protection, LLC" as the 888 number's owner (Exhibit B). This profile, in turn, listed Renny as Affordable's principal and manager. Plaintiff then found Renny's personal website, which listed the address "1300 N Congress Avenue" (Exhibit C).

On 10 March 2022, Plaintiff sued Affordable and Renny. Defendants answered with a 12(b)(2) motion to dismiss for lack of personal jurisdiction and served supporting affidavits. In relevant part, Defendants attested to never interacting with Plaintiff nor having any role in calling him. Plaintiff responded with his own affidavit and copies of Exhibits A through C. The trial court denied Defendants' motion to dismiss. Defendants timely appealed.

II. Jurisdiction

Under N.C. Gen. Stat. § 1-277(b) (2023), a party may “immediate[ly] appeal from an adverse ruling as to” a trial court’s personal jurisdiction over him. *See, e.g., Eaker v. Gower*, 189 N.C. App. 770, 772, 659 S.E.2d 29, 31 (2008) (citing § 1-277(b)).

III. Analysis

Defendants raise two issues on appeal: (1) whether they are subject to personal jurisdiction in North Carolina based on Plaintiff’s allegations, and (2) whether this Court may subject them to its personal jurisdiction because of a single telephone call. “The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court.” *Parker v. Town of Erwin*, 243 N.C. App. 84, 95, 776 S.E.2d 710, 720 (2015) (citations and quotations omitted). “[I]f the 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.” *Id.* at 96, 776 S.E.2d at 721 (alterations in original) (internal quotation marks

omitted). Thus, where “the parties submit dueling affidavits[,] the court may hear the matter on affidavits presented by the respective parties, or the court may direct that the matter be heard wholly or partly on oral testimony or depositions.” *Id.* at 97, 776 S.E.2d at 721 (citations omitted). “If the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror.” *Id.* (citations omitted). “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.” *Banc of Am. Sec. L.L.C. v. Evergreen Int’l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005) (citations omitted); see *Toshiba Glob. Commerce Sols., Inc. v. Smart & Final Stores L.L.C.*, 381 N.C. 692, 699, 873 S.E.2d 542, 548 (2022).

A. Statutory Basis

Our courts engage in a two-step analysis of personal jurisdiction over a defendant. First, North Carolina’s long-arm statute, N.C. Gen. Stat. § 1-75.4 (2023), must grant them statutory authority to exercise the personal jurisdiction. *Stein v. E.I. du Pont de Nemours & Co.*, 382 N.C. 549, 556 (2022). Second, the exercise of personal jurisdiction must accord with federal constitutional protections under the Fourteenth Amendment’s Due Process Clause. *Id.* (citations omitted). Here, § 1-75.4(1) grants the trial court at least statutory personal jurisdiction over Defendants because Plaintiff alleges sufficient facts of “substantial activity within” North

Carolina by soliciting unwanted business and entering into a contract over the phone with him. § 1-75.4(1)(d). *Cf. Shaw Food Servs. Co. v. Morehouse Coll.*, 108 N.C. App. 95, 422 S.E.2d 454 (1992) (affirming trial court’s denial of dismissal motion based on defendant solicitation and further contract entrance).

B. Constitutional Basis

Like the statutory prong, the constitutional analysis is a fact-intensive inquiry. “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. Wash.*, 326 U.S. 310, 316 (1945)). “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) (citation omitted).

“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.” *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 260, 625 S.E.2d 894, 899 (2006) (citing *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 679, 231 S.E.2d 629, 632 (1977)). “In determining minimum contacts, the court

looks at several factors, including: (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.” *Id.* (citation omitted). “These factors are not to be applied mechanically; rather, the court must weigh the factors and determine what is fair and reasonable to both parties. No single factor controls: rather, all factors must be weighed in light of fundamental fairness and the circumstances of the case.” *Id.* Even if the parties submit contradictory filings, the “documentary evidence may include any allegations in the complaint not controverted by the defendant’s affidavit.” *Id.* at 556, 879 S.E.2d at 542 (internal quotation marks and ellipses omitted). When a defendant challenges the court’s jurisdiction under Rule 12(b)(2), the burden falls on plaintiff to establish that jurisdiction exists. *Williams v. Inst. for Computational Stud. at Colo. State Univ.*, 85 N.C. App. 421, 424, 355 S.E.2d 177, 179 (1987).

As presented to the trial court, Plaintiff’s allegations were deemed sufficient to warrant the denial of Defendant’s 12(b)(2) motion to dismiss for lack of personal jurisdiction. The transcript from the trial court is replete with discussion regarding the parties dueling affidavits—centering around the identity of “AAP.” However, the trial court did not make findings of fact in its order denying Defendant’s motion to dismiss and the record is absent of indication that the parties requested from the trial court a production of specific findings of fact. “When the record contains no findings of fact, “[i]t is presumed . . . that the court on proper evidence found facts to support

its judgment.” *Banc of Am. Sec. L.L.C.*, 169 N.C. App. at 694–95, 611 S.E.2d at 183 (quoting *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524 (1981)) (internal quotations and citations omitted).

We must, therefore, presume that the trial judge made factual findings sufficient to support her ruling in favor of plaintiff. It is this Court’s task to review the record to determine whether it contains any evidence that would support the trial judge’s conclusion that the North Carolina courts may exercise jurisdiction over defendants without violating defendants’ due process rights. We are not free to revisit questions of credibility or weight that have already been decided by the trial court.

Id.

Here the record reveals that a phone call was made by an alleged employee of Defendant’s to Plaintiff and a webpage purportedly linking Defendants to the number used to contact Plaintiff. In his initial complaint, Plaintiff expressly identifies at least two other possible entities, notwithstanding Defendants, from which the call may have originated. Those entities were identified to Plaintiff during the call upon asking for which company the caller represented—the respective entities were speculatively Audi AG, or Advanced Auto Protection. Plaintiff’s initial complaint further pleads: “There is no company in the United States called ‘Advanced Auto Protection.’” Plaintiff’s allegations and evidentiary exhibits, although vague as applied to Defendants, ordinarily would suffice to survive dismissal. *See Chidnese v. Chidnese*, 210 N.C. App. 299, 310, 708 S.E.2d 725, 734 (2011) (“[M]ere vagueness or lack of detail is not ground for a motion to dismiss. . . .”) (discussing N.C. R. Civ. P.

12(b)(1)–(7)). While Plaintiff’s complaint clearly alleges that he received a phone call soliciting an extended auto warranty and he purchased it; the trial court correctly noted during the hearing that discovery of additional facts is required to properly access the party’s identity and any contact they may have had with North Carolina.

Plaintiff pleads and Defendants assert that Affordable is a Florida LLC with a principal address in Florida, and that Renny is a Florida resident. Defendants maintain that they have taken no action to avail themselves of North Carolina’s jurisdiction and Plaintiff’s only offer of proof is an “888” phone number purportedly linked to them, and a confirmation receipt labeled with Defendants’ information. The persons whom Plaintiff spoke with during the call “never provided [him] with the true name of the company for which they worked [for] throughout the telephone call. . . .”

Plaintiff’s evidentiary exhibits A through C consist of an extended warranty confirmation from AAP (or Audi), a webpage printout of Affordable’s BBB profile, and a webpage printout of Renny’s personal website homepage. Even though both the “888-678-0697” phone number and “1300 Old Congress Rd” address appear in full on the confirmation and disclaims that “APP and the Logo are registered trademarks of AAP,” the logo itself is undefined and unclear. Defendants expressly reject that they answer to the “888” number and point out that those on its other end have repeatedly denied any connection to Defendants—facts Plaintiff admits in his own filings. Further, Plaintiff’s BBB printout expressly disclaims in its fine print any reliability as evidence by refusing to “guarantee the accuracy of any information in [its]

Business Profiles.” As previously noted, the BBB printout includes the “1300 Old Congress Ave” address and lists Renny as the manager of Affordable Auto Protection. Defendant’s counsel maintained at the hearing that AAP was, in fact, merely a fictitious name for a completely different Florida company: Pelican Investment Holdings, LLC. However, defendant’s counsel also admitted to a connection between Renny and Pelican Investment Holdings, LLC.

Ultimately, these facts—at least at this preliminary stage of the litigation—support the exercise of personal jurisdiction over Affordable. The trial court’s denial of the pre-answer motion to dismiss should be affirmed as to Affordable and this case remanded for additional proceedings to allow the parties to pursue further discovery and dispositive motions.

Last, Renny’s status as a corporate officer of Affordable, alone, does not warrant a grant of personal jurisdiction in North Carolina—even if his employer corporation is subject to suit in a particular forum. *See Calder v. Jones*, 465 U.S. 783, 790, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984) (“Petitioners[] . . . contacts with California are not to be judged according to their employer’s activities there.”); *see also Robbins v. Ingham*, 179 N.C. App. 764, 771, 635 S.E.2d 610 (2006) (“[P]laintiffs may not assert jurisdiction over a corporate agent without some affirmative act committed in his individual official capacity.”) (quoting *Godwin v. Walls*, 118 N.C. App. 341, 348, 455 S.E.2d 473 (1995)). Plaintiff has not alleged facts or presented any evidence sufficient to support the exercise of personal jurisdiction against Renny

in his individual capacity. We therefore reverse the trial court's order denying Renny's motion to dismiss for lack of personal jurisdiction.

IV. Conclusion

For the reasons discussed above, we hold that the trial court did not err by denying Affordable's Rule 12(b)(2) motion to dismiss. However, we reverse the trial court's denial of Renny's Rule 12(b)(2) motion to dismiss and remand to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Judges HAMPSON and THOMPSON concur.

Report per Rule 30(e).