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NO. COA01-1421

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

MICHAEL JOLLY,
by and through his guardian,
David Jolly,
Plaintiff-appellee,

v.

Brunswick County
No. 01 CVS 884

GARCIA'S INC. a South
Carolina Corporation,
Defendant-appellant.

Appeal by defendant from order entered 6 August 2001 by Judge James F. Ammons, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 5 June 2002.

The Del Re' Law Firm, by Benedict J. Del Re', Jr., for plaintiff-appellee.

Hudson & Gentry, LLC, by J. Dwight Hudson, for defendant-appellant.

BRYANT, Judge.

Defendant appeals from an order denying its motion to dismiss for lack of in personam jurisdiction. Defendant, Garcia's Inc., is a South Carolina Corporation that operates Garcia's Restaurant in Myrtle Beach, South Carolina. Plaintiff is a minor who resides with his father in Calabash, which is in Brunswick County, North Carolina. In his complaint, plaintiff alleges that on 4 May 2000, plaintiff and his employer, Jeffrey Dwayne Leonard [Leonard], finished work and drove to Garcia's at approximately 6:30 p.m.

Defendant's bartender served them each up to ten alcoholic beverages in just over one hour. Plaintiff and Leonard then returned home. After crossing into North Carolina, Leonard lost control of the vehicle and collided with a culvert. Plaintiff suffered severe physical injuries as a result of the accident.

Plaintiff commenced this action on 2 May 2001, alleging that defendant's employees failed to stop serving plaintiff and Leonard alcoholic beverages after it was obvious that they were physically and mentally impaired. Plaintiff also alleges that defendant's employees failed to prevent them from operating a vehicle. On 8 June 2001, defendant filed a motion to dismiss for lack of in personam jurisdiction. On 6 August 2001, the trial court filed an order denying defendant's motion. Defendant appealed.

Defendant argues that: 1) the trial court erred in finding facts without a sufficient basis; 2) plaintiff failed to meet his burden of establishing that the court had in personam jurisdiction; and 3) the exercise of in personam jurisdiction over defendant violates its due process rights. We disagree and affirm the trial court's order denying defendant's motion to dismiss for lack of in personam jurisdiction.

I.

We first note that this appeal is from an interlocutory order. "An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the

entire controversy.'" *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) (quoting *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995)). Generally, there is no right to appeal from an interlocutory order. *Id.* However, an appeal from an interlocutory order may be taken under two circumstances: 1) the order is final as to some but not all the parties and there is no just reason to delay the appeal; or 2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed. *Id.*; see N.C.G.S. §§ 1-277(a), 7A-27(d) (2001). An order denying a motion to dismiss for lack of in personam jurisdiction is immediately appealable because it affects a substantial right. N.C.G.S. § 1-277(b); *Duke Univ. v. Bryant-Durham Elec. Co., Inc.*, 66 N.C. App. 726, 311 S.E.2d 638 (1984).

II.

We next determine whether the trial court erred in making several findings of fact leading to its conclusion that the court had in personam jurisdiction over defendant. The plaintiff has the burden of establishing by a preponderance of the evidence that the trial court has jurisdiction over the defendant. *Church v. Carter*, 94 N.C. App. 286, 289, 380 S.E.2d 167, 169 (1989). The judge is not required to make findings of fact to support a ruling on a motion to dismiss, unless requested by the parties. *Id.*; see N.C.G.S. § 1A-1, Rule 52(a)(2) (2001). If requested, the findings of fact and conclusions of law "must be sufficiently detailed to allow meaningful review." *Andrews v. Peters*, 318 N.C. 133, 138,

347 S.E.2d 409, 412 (1986). The standard of reviewing findings of fact by a trial court sitting without a jury is whether there is any competent evidence in the record to support the findings. *Hollerbach v. Hollerbach*, 90 N.C. App. 384, 387, 368 S.E.2d 413, 415 (1988).

Defendant specifically challenges the following findings of fact: 1) that plaintiff was served numerous drinks; 2) that *The Sun News* is local to North Carolina; 3) that defendant chose to solicit business or perform services in North Carolina by advertising in *The Sun News*; and 4) that defendant did business with multiple distributors or suppliers and that defendant dealt with food distributors in North Carolina.

Defendant first challenges the trial court's finding that plaintiff was served numerous drinks at defendant's restaurant. Plaintiff's evidence shows that he and Leonard were each served approximately ten alcoholic beverages in just over an hour. The bartender never determined that plaintiff was underage. Medical records indicate that Leonard's blood alcohol concentration was .20¹ when Leonard was treated some time after the accident. Medical records also indicate that no anesthesia was needed to set Leonard's fractured wrist due to his high level of intoxication. We conclude that there is competent evidence in the record in support of the trial court's finding.

¹ In North Carolina, one who drives a motor vehicle with a blood alcohol concentration of .08 or more is Driving While Impaired. N.C.G.S. § 20-138.1 (2001). Leonard's blood alcohol concentration was two-and-a-half times the legal limit.

Defendant next challenges the trial court's finding that *The Sun News* is local to North Carolina. The trial court found that *The Sun News* serves Horry County, South Carolina (Myrtle Beach), and Brunswick County, North Carolina. The paper is regularly delivered to the Calabash and Carolina Shores areas in Brunswick County via home and box delivery. Plaintiff's attorney, through affidavit, stated that *The Sun News* is available in most areas of heavy pedestrian traffic in Brunswick County, including convenience stores and shopping malls. Further, plaintiff presented evidence that *The Sun News* has a section entitled '*Local & the Carolinas.*' A sample clipping from this section features articles about North Carolina schools and government. Based on the evidence in the record, we conclude that there is competent evidence in support of the trial court's findings that *The Sun News* serves Brunswick County.

Defendant also challenges the trial court's finding that defendant chose to solicit business or perform services in North Carolina by advertising in *The Sun News*. The trial court found that defendant's advertisements were "a solicitation to do business with the Defendant as contemplated by . . . the Long Arm Statute for the State of North Carolina." The trial court further found that defendant also does business with at least one food supplier or distributor in North Carolina.

In support of its argument, defendant presented an affidavit of Gene LeDuc, a co-owner of Garcia's Restaurant. In his affidavit, LeDuc states that defendant "does not do any advertising

campaigns directed at any citizens and residents of the State of North Carolina." LeDuc further states that defendant "does not do any specific advertising campaigns earmarked for citizens and residents of Brunswick County." Rather, LeDuc states that "[t]he only advertising done by [defendant] is through publication in the *Sun News*[,] a newspaper published in Myrtle Beach, South Carolina on a periodical basis." We disagree. Although *The Sun Times* is a Myrtle Beach publication, it is clear that the newspaper services Brunswick, a border county in North Carolina. The newspaper is distributed in various areas in Brunswick County and has a section devoted to local news, including North Carolina news. Accordingly, this assignment of error is overruled.

Finally, defendant argues that the trial court erred in finding that defendant did business with multiple distributors or suppliers and that defendant dealt with food distributors in North Carolina. In its order denying defendant's motion to dismiss for lack of personal jurisdiction, the trial court found:

That the Defendant does other business with the State of North Carolina in the form of food distribution with North Carolina Suppliers or Distributors. That Defendant's Affidavit confirms at least one North Carolina State supplier or distributor. That said contacts invoke the protection of the laws of the State of North Carolina.

The trial court specifically found that defendant did business with "at least one" supplier or distributor in North Carolina. As such, we find it unnecessary to address this argument further.

Based on the above, we conclude that there is competent evidence in the record in support of the trial court's findings of

fact and hold that the trial court did not err in making such findings.

III.

We next address whether plaintiff met his burden of establishing that the court had in personam jurisdiction over defendant. As we stated above, the plaintiff has the burden of establishing in personam jurisdiction by a preponderance of the evidence. *Church v. Carter*, 94 N.C. App. 286, 289, 380 S.E.2d 167, 169 (1989). A two-step analysis applies when determining whether a court may exercise in personam jurisdiction over a non-resident defendant. First, is there statutory authority that confers jurisdiction on the court? *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 675, 231 S.E.2d 629, 630 (1977). This is determined by looking at North Carolina's "long arm" statute. *Id.* (referring to N.C.G.S. § 1-75.4 (2001)). Second, if statutory authority confers in personam jurisdiction over the defendant, does the exercise of in personam jurisdiction violate the defendant's due process rights? *Id.*

We first address the issue of statutory authority. N.C.G.S. § 1-75.4(4) provides in pertinent part that a North Carolina court has in personam jurisdiction over a defendant for a foreign act resulting in a local injury. A court has jurisdiction

[i]n 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 either:

- a. Solicitation or services activities were carried on within

this State by or on behalf of the
defendant

N.C.G.S. § 1-75.4(4)a (2001). "Subject to the limitations imposed by due process, [our long arm statute] should be liberally construed in favor of finding personal jurisdiction." *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 365, 276 S.E.2d 521, 522 (1981) (citing *Telerent Leasing Corp. v. Equity Assocs.*, 36 N.C. App. 713, 245 S.E.2d 229 (1978); *Dillon v. Numismatic Funding Corp.*, 29 N.C. App. 513, 225 S.E.2d 137 (1976), *rev'd on other grounds*, 291 N.C. 674, 231 S.E.2d 629 (1977)).

In this case, plaintiff alleged in his complaint and by affidavit in support of his complaint that on 4 May 2000, plaintiff and Leonard were served numerous drinks in the bar of Garcia's Restaurant in Myrtle Beach, South Carolina. On the way back to North Carolina, plaintiff and Leonard were involved in an automobile accident in which plaintiff sustained severe physical injuries. Leonard's blood alcohol concentration was two-and-a-half times the legal limit. Additionally, plaintiff's attorney stated in an affidavit that defendant purchased food from a North Carolina supplier. A co-owner of Garcia's verified in his affidavit that Garcia's purchases produce from Honeycutt Produce in North Carolina. Both parties presented affidavits stating that defendant advertises in *The Sun News*, a newspaper published in Myrtle Beach. Plaintiff presented evidence that *The Sun News* is distributed in North Carolina. Finally, defendant maintains a listing in the phone directory circulated in Brunswick County. Based on this evidence, we conclude that plaintiff met his burden of establishing

that the court had jurisdiction under N.C.G.S. § 1-75.4(4) of our long arm statute. "Where unverified allegations in the complaint meet plaintiff's 'initial burden of proving the existence of jurisdiction . . . and defendant[s] d[o] not contradict plaintiff's allegations in their sworn affidavit,' such allegations are accepted as true and deemed controlling." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 218 (quoting *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998)), *appeal dismissed and review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000). Accordingly, this assignment of error is overruled.

IV.

We next address whether the exercise of in personam jurisdiction over defendant violates due process. The exercise of in personam jurisdiction must comport with due process. To comport with due process, the defendant must have minimum contacts in the forum state. *Godwin v. Walls*, 118 N.C. App. 341, 353, 455 S.E.2d 473, 482 (1995). Minimum contacts must be such that the exercise of in personam jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)). The defendant must have invoked the benefits and protections of the laws of the forum state by purposely availing himself of the privilege of doing business in that state. *Godwin*, 118 N.C. App. at 353, 455 S.E.2d at 482. "This relationship between the

defendant and the forum must be 'such that he should reasonably anticipate being haled into court there.'" *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980)).

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. *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 530-31, 265 S.E.2d 476, 479 (1980); see *Corbin Russwin, Inc. v. Alexander's Hardware, Inc.*, 147 N.C. App. 722, 556 S.E.2d 592 (2001). 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. *Id.* at 531, 265 S.E.2d at 479 (citing *Farmer v. Ferris*, 260 N.C. 619, 625, 133 S.E.2d 492, 497 (1963)). No single factor controls; rather, all factors "must be weighed in light of fundamental fairness and the circumstances of the case." *B.F. Goodrich Co. v. Tire King of Greensboro, Inc.*, 80 N.C. App. 129, 132, 341 S.E.2d 65, 67 (1986).

As we stated above, the trial court found that defendant solicits business in *The Sun News*, which is regularly delivered to homes in the Calabash and Carolina Shores areas of Brunswick County, as well as other areas, and has a section covering local and North Carolina news. The trial court also found that defendant utilizes food suppliers or distributors in North Carolina.

Further, the trial court found that the advertising was sufficient to constitute solicitation and establish in personam jurisdiction under our long arm statute. We agree.

Defendant purchases some of its fresh produce used in its restaurant at a farm or produce stand in North Carolina. Further, defendant advertises its bar and restaurant in *The Sun Times*, which, although a "local" South Carolina publication, also serves border communities in Brunswick County, North Carolina. This service ranges from home and business delivery to a section in the paper that carries North Carolina news. Defendant advertises live music performers appearing at Garcia's and that there is no entry fee, an added enticement to visit the establishment. Defendant also has a listing in the Brunswick County telephone directory circulated throughout Brunswick County. By placing advertisements in a newspaper circulated in North Carolina, purchasing produce within North Carolina and maintaining telephone listings in a North Carolina telephone directory, defendant should reasonably anticipate being haled into court in this State. See *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490, 501 (1980)). Accordingly, this assignment of error is overruled.

Conclusion

Based on the foregoing, we conclude that there is competent evidence in the record in support of the trial court's findings and hold that the trial court did not err in concluding that plaintiff

had established in personam jurisdiction by a preponderance of the evidence.

AFFIRMED.

Judges WALKER and McCULLOUGH concur.

Report per Rule 30(e).