NO. COA09-1135

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

PAUL D. PETERS, QUEZ D. LITTLE, DEBORAH B. SIGMON, JOANIE P. BUCHANAN, DAVID N. EBERT, BOBBY L. HILDEBRAN, LISA J. SHIELDS, BETTY N. STEPHENS, DIANE H. WOOD, GARY ABERNATHY, and ALICE LITTLE,

Burke County
No. 08 CVS 1773

Plaintiffs

v.

NORWALK FURNITURE CORPORATION, HICKORY HILL FURNITURE CORPORATION, and JAMES E. GERKEN,

Defendants

Appeal by defendant James E. Gerken from order entered 9 June 2009 by Judge Robert C. Ervin in Burke County Superior Court. Heard in the Court of Appeals 10 March 2010.

Patrick, Harper & Dixon, L.L.P., by Michael P. Thomas, for plaintiffs-appellees.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Brian M. Freedman and Sarah H. Roane, for defendant-appellant Gerken.

CALABRIA, Judge.

Paul D. Peters ("Peters"), Quez D. Little ("Little"), Deborah B. Sigmon ("Sigmon"), Joanie P. Buchanan, David N. Ebert, Bobby L. Hildebran, Lisa J. Shields, Betty N. Stephens, Diane H. Wood, Gary

Abernathy, and Alice Little (collectively "plaintiffs") filed a complaint in Burke County Superior Court, alleging that James E. Gerken ("Gerken"), Norwalk Furniture Corporation ("Norwalk"), and Hickory Hill Furniture Corporation ("Hickory Hill") (collectively "defendants") were in breach of contract by failing to pay plaintiffs an incentive package ("stay bonus") to remain employed at Hickory Hill's facility in Valdese, North Carolina ("the Valdese facility"). Gerken moved to dismiss the action for lack of personal jurisdiction, claiming he did not maintain sufficient minimum contacts with North Carolina. The trial court denied Gerken's motion, and Gerken appealed. We affirm.

I. BACKGROUND

On or about 3 October 2008, plaintiffs filed a complaint in Burke County Superior Court, alleging that defendants offered each of the plaintiffs a stay bonus to remain employed at the Valdese facility. In their complaint, plaintiffs alleged the following: (1) that they were citizens and residents of North Carolina; (2) that Norwalk was an Ohio corporation registered to do business in North Carolina, with a registered address in Valdese; (3) that Hickory Hill, a North Carolina corporation, was a wholly-owned subsidiary of Norwalk, and had its principal place of business in Valdese; (4) that Hickory Hill was under the direction and management of Norwalk and its officers and directors; and (5) that Gerken is a citizen and resident of Ohio and served as a shareholder, director, and officer of Norwalk and was personally

involved in the decisions concerning management and affairs of Hickory Hill.

According to the complaint, plaintiffs were employed at the Valdese facility. On 1 May 2008, plaintiffs were informed that although manufacturing operations would cease at the Valdese facility, plaintiffs would receive a stay bonus in exchange for remaining full time employees in good standing at the Valdese facility through their last regular day of employment. Plaintiffs who qualified for the stay bonus would receive a certain salary, benefits, and bonus package. Sigmon, the Corporate Human Resources Director for Hickory Hill, sent plaintiffs a memo outlining the details of the stay bonus. Plaintiffs worked at the Valdese facility until they were laid off on 2 September 2008.

The complaint further alleged that on 2 September 2008, defendants informed plaintiffs that their wages could no longer be guaranteed because of the likelihood defendants would file for bankruptcy protection. Therefore, plaintiffs were told not report to work. On 15 September 2008, defendants informed plaintiffs that they would not receive the stay bonus. Plaintiffs believed other previously laid off employees had been paid the stay bonus and vacation pay. Plaintiffs were never paid the stay bonus.

On 19 December 2008, Gerken moved to dismiss plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) (2008) ("Rule 12(b)(2)") and Rule 12(b)(6) of the North Carolina Rules of Civil procedure for lack of personal jurisdiction and for failure to state a claim upon which relief could be granted. Gerken

supported his motion to dismiss by submitting an affidavit stating that he was: (1) a resident of Ohio, (2) president of "Norwalk Furniture" from 2000 to 2002 and that Norwalk Furniture was a separate entity from Norwalk, (3) CEO of Norwalk from 2002 to 2006, and Chairman of Norwalk from 2002 to 2008, and (4) Chairman of Hickory Hill from 2002 to 2008 and President of Hickory Hill from April 2008 to September 2008. Gerken also noted that Hickory Hill was an Ohio corporation registered to do business in North Carolina and was a subsidiary of Norwalk, that he traveled to North Carolina twice a year to attend the High Point Furniture Market on behalf of Norwalk, and that he traveled to Valdese in December 2006 and again in the spring of 2008 for Hickory Hill. Gerken further averred that he "occasionally exchanged electronic data and had telephone contact with employees of Hickory Hill" at the Valdese facility.

On 9 June 2009, after reviewing the pleadings and the evidence submitted by the parties, the trial court denied Gerken's motion to dismiss pursuant to Rule 12(b)(6) as moot. In addition, the trial court found that Gerken had sufficient contacts with North Carolina such that he was subject to the jurisdiction of the courts of North Carolina, and denied Gerken's motion to dismiss. Gerken only appeals the trial court's order denying his motion to dismiss pursuant to Rule 12(b)(2).

II. MOTION TO DISMISS FOR LACK OF JURISDICTION

Gerken argues the trial court erred in denying his motion to dismiss pursuant to Rule 12(b)(2) because he was not subject to

personal jurisdiction in the courts of North Carolina. We disagree.

As an initial matter, we note that the denial of a motion to dismiss is generally deemed interlocutory and therefore not subject to immediate appeal. However, "[t]he denial of a motion to dismiss for lack of jurisdiction is immediately appealable." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 614, 532 S.E.2d 215, 217 (2000) (citing N.C. Gen. Stat. § 1-277(b)).

In determining whether a North Carolina court has personal jurisdiction over a nonresident defendant, a two-step analysis applies: "'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. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005) (quoting *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986)). Since Gerken does not dispute the applicability of the long-arm statute, the sole issue before this Court is "whether plaintiffs' assertion of jurisdiction over defendant[] complies with due process." *Baker v. Lanier Marine Liquidators, Inc.*, 187 N.C. App. 711, 715, 654 S.E.2d 41, 44 (2007) (internal quotation and citation omitted).

"To satisfy the requirements of the due process clause, there must exist 'certain minimum contacts [between the non-resident defendant and the forum state] such that the maintenance of the

suit does not offend traditional notions of fair play and substantial justice.'" *Banc of Am. Secs. LLC*, 169 N.C. App. at 695, 611 S.E.2d at 184 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102, 66 S. Ct. 154, 158 (1945) (internal quotation marks omitted)).

> 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; the unilateral activity within the forum state of others who claim some relationship with a non-resident defendant will not suffice.

Tom Togs, 318 N.C. at 365, 348 S.E.2d at 786. "Instead, the 'relationship between the defendant and the forum must be such that he should reasonably anticipate being haled into court there.'" *Banc of Am. Secs. LLC*, 169 N.C. App. at 695-96, 611 S.E.2d at 184 (quoting *Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 786) (internal quotation and citation omitted).

"The United States Supreme Court has recognized two bases for finding sufficient minimum contacts: (1) specific jurisdiction and (2) general jurisdiction. Specific jurisdiction exists when 'the controversy arises out of the defendant's contacts with the forum state.'" *Id.* at 696, 611 S.E.2d at 184 (quoting *Tom Togs*, 318 N.C. at 366, 348 S.E.2d at 786). "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.'" *Id.* (quoting *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 145, 515 S.E.2d 46, 51 (1999)) (internal quotations

and citation omitted). Because our review of the record indicates that the trial court's order is supported by evidence of specific jurisdiction, we do not address the parties' arguments regarding general jurisdiction. *Id.*

"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.'" *Id.* (quoting *Tom Togs*, 318 N.C. at 366, 348 S.E.2d at 786).

> Our courts look at the following factors in determining 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 to the contacts, (4) the interest of the forum state, and (5) the convenience to the parties.

Id. (citation omitted). "No single factor controls; rather, all factors 'must be weighed in light of fundamental fairness and the circumstances of the case.'" *Corbin Russwin, Inc. v. Alexander's Hdwe., Inc.*, 147 N.C. App. 722, 725, 556 S.E.2d 592, 595 (2001) (quoting *B.F. Goodrich Co. v. Tire King of Greensboro, Inc.*, 80 N.C. App. 129, 132, 341 S.E.2d 65, 67 (1986)). "[T]he Court should take into account (1) whether defendant[] purposefully availed [himself] of the privilege of conducting activities in North Carolina, [] (2) whether defendant[] could reasonably anticipate being brought into court in North Carolina, [] and (3) the existence of any choice-of-law provision contained in the parties' agreement." *First Union Nat'l Bank of Del. v. Bankers Wholesale*

Mortgage, LLC, 153 N.C. App. 248, 253, 570 S.E.2d 217, 221 (2002) (citations omitted).

"[P]ersonal jurisdiction over an individual officer or employee of a corporation may not be predicated merely upon the corporate contacts with the forum." *Robbins v. Ingham*, 179 N.C. App. 764, 771, 635 S.E.2d 610, 615 (2006) (citing *Godwin v. Walls*, 118 N.C. App. 341, 348, 455 S.E.2d 473, 479 (1995)), *disc. review denied*, 361 N.C. 221, 642 S.E.2d 448 (2007). "[P]laintiffs may not assert jurisdiction over a corporate agent without some affirmative act committed in his individual official capacity." *Godwin*, 118 N.C. App. at 348, 455 S.E.2d at 479. "To base personal jurisdiction on the bare fact of a defendant's status as, *e.g.*, corporate officer or agent, would violate his due process rights." *SAFT Am., Inc. v. Plainview Batteries, Inc.*, 189 N.C. App. 579, 595, 659 S.E.2d 39, 49 (2008) (Arrowood, J., dissenting), *reversed for reasons stated in dissent*, 363 N.C. 5, 673 S.E.2d 864 (2009). "[W]here a defendant is an officer and principal shareholder of a corporation, the North Carolina Supreme Court has explicitly directed that we consider his corporate actions in determining personal jurisdiction[.]" *Id.* at 598, 659 S.E.2d at 51. "[U]nder North Carolina precedent the determination of whether personal jurisdiction is properly exercised over a defendant <u>does not</u> exclude consideration of defendant's actions merely because they were undertaken in the course of his employment." *Id.* at 599, 659 S.E.2d at 52 (2008).

<u>A. Quantity, Nature, and Quality of the Contacts</u>

In the instant case, the affidavits of Gerken, Sigmon, and Little provide evidence of the quantity, nature, and quality of Gerken's contacts with North Carolina. The parties dispute whether Hickory Hill is a resident corporation. However, Hickory Hill admitted that its principal place of business is in North Carolina, and that it is a wholly-owned subsidiary of Norwalk. Further, Gerken admitted that he previously served as a director of Norwalk. Gerken traveled to North Carolina twice a year to attend the High Point Furniture Market on behalf of Norwalk and Hickory Hill, and "traveled to Valdese, North Carolina, in December 2006 and in March or April 2008 on business for Hickory Hill Furniture Company." While Gerken worked in Ohio, he "occasionally exchanged electronic data and had telephone contact with employees of Hickory Hill Furniture Corporation at its Valdese, North Carolina, location[.]"

In 2008, Gerken made at least two trips to North Carolina on behalf of Norwalk and Hickory Hill. One trip was for the purpose of attempting to locate a showroom for Norwalk and Hickory Hill. On the other trip, Gerken attended the Furniture Market on behalf of Hickory Hill and Norwalk, and met with representatives of Morris Anderson, a business hired by Gerken to supervise the winding up of Hickory Hill's affairs. After attending the Furniture Market, Gerken arrived at the Valdese facility to meet with Charles Rice ("Rice") and Little "concerning the plan to close the Valdese facility and to consolidate Norwalk and Hickory Hill." As a result of conversations during those meetings, Little understood that

Gerken was the "driving force behind the decision to close the North Carolina facility."

Little averred that on 24 April 2008, Gerken called and told him that the North Carolina facility was to be closed, that Gerken was the new president of Hickory Hill, that he wanted Little to "stay on through the summer to help in the transition," and that Gerken directed the company to offer Little an incentive package to encourage him to stay. According to Little, Gerken stated that another company representative, working under Gerken's direction and control, would be contacting Little to work out the specifics of the incentive package. Furthermore, Gerken knew of and approved the other stay bonuses provided to the other plaintiffs. Morris Anderson was required to seek Gerken's approval before spending any additional funds. Finally, Little averred that Gerken's refusal to provide additional collateral to Norwalk and Hickory Hill caused them to "go under," which resulted in the non-payment of all stay bonuses. Gerken knew that the bonuses would not get paid without providing more collateral.

In addition, Little attached copies of emails to his affidavit demonstrating Gerken's involvement in the affairs of Hickory Hill and Norwalk. On 21 April 2008, Rice emailed Gerken and stated, "we need to be making some decisions immediately on [Hickory Hill's] plans." Rice added, "With the uncertainty we are losing some of our key people, and it is, and will be, a near impossible challenge if we don't act quickly. If the plan is to close [the Valdese facility], then we need to begin the process[.] [I]f it is to use

it, then use it." On 15 August 2008, Charles Rowe ("Rowe") emailed Little and Peters, the Vice President of Sales and Marketing for Hickory Hill, stating that Norwalk terminated him as Chief Restructuring Officer, and that "any future communications that relate to the company's business" are to be directed to Gerken. On 16 August 2008, Gerken sent an email to "Everyone-Norwalk," confirming that Rowe was no longer Chief Restructuring Officer of Norwalk, and adding, "Until further notice, please direct *any* matters to Jim Gerken, Chairman." (emphasis added). Also on 16 August, Gerken sent an email to Little and Peters, stating that Norwalk "intends to continue discussions with its creditors and its efforts to restructure. We remain very optimistic during these difficult times. We will continue to keep everyone updated as developments arise."

Sigmon averred that, as Corporate Human Resources Director for Hickory Hill, she signed the letter offering the stay bonus to herself and most of the other plaintiffs. In the process of drafting the letter, Sigmon worked closely with Bob Wanat ("Wanat"), an employee of Morris Anderson. Sigmon further averred that Wanat was required to get the approval of the Norwalk executive management team, including Gerken, at each stage of drafting of the letter. Before Sigmon was authorized to sign and distribute the letter, Wanat specifically presented the letter to the executive management team, including Gerken, in order to get its approval.

The affidavits of Gerken, Little and Sigmon show that Gerken had numerous and significant contacts with North Carolina in his capacity as a corporate officer for Norwalk and Hickory Hill, and these contacts were aimed at taking affirmative steps to keep the Valdese facility operational, including offering plaintiffs a stay bonus.

B. The Source and Connection of the Cause of Action to the Contacts

"As this Court has previously held: 'Which party initiates the contact is taken to be a critical factor in assessing whether a nonresident defendant has made 'purposeful availment' [of the privilege of conducting activities within the forum State].'" *Banc of Am. Secs. LLC*, 169 N.C. App. at 698, 611 S.E.2d at 185 (quoting *CFA Med., Inc. v. Burkhalter*, 95 N.C. App. 391, 395, 383 S.E.2d 214, 216 (1989)). In the instant case, the cause of action is breach of contract. Defendants failed to pay plaintiffs' wages for remaining at the Valdese facility as full-time employees until they were laid off. The affidavits of Sigmon and Little show that Gerken was instrumental in offering the stay bonus to plaintiffs. Sigmon was required to get Gerken's approval before signing the letter offering the stay bonus to herself and most of the other plaintiffs. Gerken's email on 16 August 2008 to "Everyone-Norwalk," confirming that Rowe was no longer Chief Restructuring Officer of Norwalk, and adding, "Until further notice, please direct *any* matters to Jim Gerken, Chairman," supports a conclusion

that the alleged breach of contract was related to Gerken's contacts with North Carolina in his corporate capacity.

C. The Interest of the Forum State & The Convenience to the Parties

"Even when the trial court concludes that a defendant has purposefully established minimum contacts within the forum State, the court must also consider those contacts in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Banc of Am. Secs. LLC*, 169 N.C. App. at 699, 611 S.E.2d at 186 (internal quotations and citations omitted). "In making this determination, the North Carolina appellate courts have considered (1) the interest of North Carolina and (2) the convenience of the forum to the parties." *Id.* (citation omitted). This State has an "interest in providing a forum for resolution of conflicts arising in North Carolina." *Id.*; *see also Baker*, 187 N.C. App. at 716, 654 S.E.2d at 45 ("It is generally conceded that a state has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. Thus, North Carolina has a 'manifest interest' in providing the plaintiff[s] 'a convenient forum for redressing injuries inflicted by' defendant, an out-of-state merchant.") (internal quotations and citation omitted).

As for the convenience of the parties, there is no evidence in the record that would indicate that it is more convenient for the

parties to litigate this matter in a different forum. "Litigation on interstate business transactions inevitably involves inconvenience to one of the parties. When [t]he inconvenience to defendant of litigating in North Carolina is no greater than would be the inconvenience of plaintiff[s] of litigating in defendant's state] . . . no convenience factors . . . are determinative[.]" *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 635, 394 S.E.2d 651, 657 (1990)(internal quotations, citations, and brackets omitted). Furthermore, the record shows that there are multiple North Carolina plaintiffs who would have to travel to another jurisdiction if North Carolina were not the forum state. "We also observe that the United States Supreme Court has stressed that once the first prong of purposeful minimum contacts is satisfied, the defendant will bear a heavy burden in escaping the exercise of jurisdiction based on other factors." *Banc of Am. Secs. LLC*, 169 N.C. App. at 701, 611 S.E.2d at 187.

D. Purposeful Availment

"'[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 705, 208 S.E.2d 676, 679 (1974) (quoting *Hanson v. Denckla*, 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958)).

> It is the clear, consistent rule that knowledge of the location of the work is relevant and does matter for a purposeful availment analysis. *See, e.g., Tom Togs*, 318 N.C. at 367, 348 S.E.2d at 787 (defendant's awareness "that the contract was going to be

> substantially performed in this State" was relevant to whether defendant purposefully availed itself of state's benefits).

Nat'l Utility Review v. Care Centers, ___ N.C. App. ___, ___, 683 S.E.2d 460, 464-65 (2009).

In the instant case, the record shows Gerken initiated numerous contacts with Hickory Hill and plaintiffs, as chairman and president of Hickory Hill and as chairman of Norwalk. These contacts were aimed at taking affirmative steps to keep the Valdese facility operational, including offering plaintiffs a stay bonus. In the process of establishing this relationship with plaintiffs, Gerken purposefully invoked the benefits and protection of the laws of North Carolina. Gerken had access to the courts of this State to enforce the rights growing out of the transactions between himself and plaintiffs.

E. Whether Gerken Could Reasonably Anticipate Being Brought into Court in North Carolina

"Defendant's knowledge that plaintiff is located in North Carolina and that the services expected from plaintiff were to be performed in North Carolina enabled it to 'reasonably anticipate being brought into court in North Carolina.'" *Nat'l Utility Review*, ___ N.C. App. at ___, 683 S.E.2d at 465 (quoting *First Union Nat'l Bank of Del.*, 153 N.C. App. at 253, 570 S.E.2d at 221).

In the instant case, Gerken knew plaintiffs were in North Carolina. Gerken had traveled to North Carolina on numerous occasions in his corporate capacity as an officer for Norwalk and Hickory Hill. In 2008, after attending the Furniture Market,

Gerken arrived at the Valdese facility to meet with Rice and Little "concerning the plan to close the Valdese facility and to consolidate Norwalk and Hickory Hill." On 24 April 2008, Gerken called Little and told him that the North Carolina facility was to be closed, that Gerken was the new president of Hickory Hill, that he wanted Little to "stay on through the summer to help in the transition," and that Gerken directed the company to offer Little an incentive package to encourage him to stay. Therefore, Gerken's contacts with North Carolina are such that he should have reasonably anticipated being brought into court in this State.

F. Choice-of-law Provisions

In the instant case, there is no evidence of a choice-of-law provision in the alleged contract between Gerken and plaintiffs.

Therefore, after examining the ongoing relationship between the parties, the nature of their contacts, the interest of the forum state, the convenience of the parties, and the cause of action, we conclude Gerken has "purposely availed" himself of the benefits of doing business in North Carolina and "should reasonably anticipate being haled" into a North Carolina court. We hold that Gerken has sufficient minimum contacts with North Carolina to justify the exercise of personal jurisdiction over him without violating the due process clause.

III. CONCLUSION

The evidence in the record supports the trial court's conclusion that Gerken had sufficient contacts with the State of North Carolina to subject him to personal jurisdiction in North

Carolina. The trial court's order denying Gerken's motion to dismiss pursuant to Rule 12(b)(2) for lack of personal jurisdiction is affirmed.

Affirmed.

Judges HUNTER, Robert C. and HUNTER, Jr., Robert N. concur.

Report per Rule 30(e).