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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-469

Filed: 6 June 2017

Carteret County, No. 15 CVD 769

LAUREL FRANCES ANDERSON, Plaintiff,

v.

BEN LOGAN ANDERSON, Defendant.

Appeal by defendant from orders entered 17 September 2015 and 2 October 2015 by Judge Karen A. Alexander in Carteret County District Court. Heard in the Court of Appeals 22 February 2017.

*Valentine & McFadyen, P.A., by Stephen M. Valentine, for defendant-appellant.*

*No brief filed for plaintiff-appellee.*

ELMORE, Judge.

Upon the parties' separation, plaintiff filed a complaint against defendant in Carteret County seeking divorce from bed and board, post-separation support, alimony, child custody, child support, and equitable distribution. Defendant filed motions to dismiss plaintiff's claims for lack of personal jurisdiction, to dismiss the

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custody action for lack of subject matter jurisdiction, and for the district court judge to recuse herself from the case. The trial court denied all three motions.

On appeal, defendant argues that the trial court erred in exercising personal jurisdiction over defendant, assuming subject matter jurisdiction over the custody action, and denying his motion to recuse. Upon review, we hold that defendant had sufficient contacts with the state such that the trial court's exercise of personal jurisdiction over defendant satisfies due process. Because he has failed show that the interlocutory orders affect a substantial right beyond the exercise of personal jurisdiction, we dismiss his other arguments. Affirmed in part and dismissed in part.

**I. Background**

Laurel Frances Anderson (plaintiff) is a resident of Carteret County and has been a citizen of North Carolina since her birth. Ben Logan Anderson (defendant), is a citizen of Florida and was living in Newport County, Rhode Island, when this action was filed. On 30 December 1998, plaintiff and defendant were married in Carteret County. Their daughter, L.G.A., was born the following year at the Cherry Point Marine Base Hospital. The parties owned a residence in North Carolina from 1999 until 2001 or 2002, and continued to live in the state until 2004.

The parties moved frequently to accommodate defendant's naval career. In July 2014, they moved to Newport County, Rhode Island, where defendant enrolled in the U.S. Naval War College. In February 2015, he received orders to transfer to

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Virginia, where defendant told plaintiff they would buy a house. They signed a purchase contract shortly thereafter and were scheduled to close at the end of July. Plaintiff began packing their belongings that summer to prepare for the move.

On 19 June 2015, the parties left Rhode Island in separate cars and drove to Beaufort to visit plaintiff's mother. Defendant towed his boat, motor, and trailer during the trip and left them at his mother-in-law's home. The Navy, meanwhile, transported the parties' personal effects to Virginia for placement into temporary storage. Plaintiff and L.G.A. planned on staying in Beaufort until they moved to Virginia in August.

On 21 June 2015, shortly after arriving in Beaufort, defendant drove back to Rhode Island alone. He stayed in a two-bedroom apartment that he had rented temporarily. Defendant was scheduled to return to Beaufort in July for a family vacation with plaintiff and L.G.A. before they moved to Virginia. On 7 July 2015, however, he sent plaintiff an e-mail indicating that their marriage was over and that plaintiff should stay in Beaufort with their daughter.

On 10 July 2015, plaintiff filed a complaint against defendant in Carteret County seeking divorce from bed and board, post-separation support, alimony, child custody, child support, and equitable distribution. Defendant was personally served via Fed-Ex in Rhode Island. He, in turn, filed motions to dismiss pursuant to Rules 12(b)(1) and 12(b)(2) of the North Carolina Rules of Civil Procedure, arguing that the

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trial court lacked subject matter jurisdiction over the custody action and lacked personal jurisdiction over defendant. He also filed a complaint in Rhode Island seeking absolute divorce, child custody, child support, and equitable distribution.

On 16 September 2015, Carteret County District Court Judge Karen A. Alexander held a recorded telephonic conference with Judge Francis J. Murray Jr. in Rhode Island to discuss subject matter jurisdiction over the child custody action. *See* N.C. Gen. Stat. § 50A-110 (2015). Although the parties did not participate in the communication, they had consented to the conference during a prior meeting in chambers. They were also provided an opportunity to prepare a narrative of facts and arguments setting forth their respective positions on jurisdiction.

On 17 September 2015, Judge Alexander entered an order assuming subject matter jurisdiction over the custody action. Although Rhode Island was L.G.A.'s "home state" immediately before the commencement of the custody action, the Rhode Island court declined to exercise jurisdiction on the grounds that North Carolina was the more convenient forum and defendant may have engaged in "unjustifiable conduct." *See* N.C. Gen. Stat. §§ 50A-102(7), -201, -207, -208 (2015). Defendant filed a motion to recuse after the order was entered, arguing in part that Judge Alexander did not allow the parties to present *legal* arguments on subject matter jurisdiction before ruling on the issue.

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On 2 October 2015, the trial court entered an order denying defendant's motions to dismiss. The court asserted personal jurisdiction over defendant with respect to each of plaintiff's claims and, in reference to its previous order, concluded that "North Carolina has already asserted jurisdiction over the issue of custody of the minor child in this present action." In the same order, the court denied defendant's motion to recuse.

Defendant appeals from the trial court's interlocutory orders assuming personal jurisdiction over defendant and subject matter jurisdiction over the custody action.

## **II. Discussion**

### **A. Personal Jurisdiction**

Defendant first argues that the trial court erred in denying his motion to dismiss for lack of personal jurisdiction because he did not have minimum contacts with this state.

The trial court's order denying defendant's motion to dismiss for lack of personal jurisdiction is an interlocutory order. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citations omitted). "Generally, there is no right of immediate appeal from

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interlocutory orders and judgments.” *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Immediate appellate review of an interlocutory order may nevertheless be permissible if the appellant successfully demonstrates that “the order affects a substantial right that would be jeopardized in the absence of review prior to a final determination on the merits.” *Burton v. Phoenix Fabricators & Erectors, Inc.*, 185 N.C. App. 303, 305, 648 S.E.2d 235, 237 (2007) (citing *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 569 (2007)), *disc. review allowed and remanded*, 362 N.C. 352, 661 S.E.2d 242 (2008); *see also* N.C. Gen. Stat. § 7A-27(b)(3)(a) (2015).

As defendant correctly notes, an order denying a motion to dismiss for lack of personal jurisdiction is immediately appealable. *See* N.C. Gen. Stat. § 1-277(b) (2015) (“Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person . . . 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.” (citing N.C. Gen. Stat. § 1-277(b); *Retail Investors, Inc., v. Henzlik Inv. Co.*, 113 N.C. App. 549, 552, 439 S.E.2d 196, 198 (1994))). “This right of immediate appeal,” however, “is limited to rulings on “minimum contacts” questions.’” *Credit Union Auto Buying Serv., Inc. v. Berkshire Props. Grp. Corp.*,

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\_\_\_ N.C. App. \_\_\_, \_\_\_, 776 S.E.2d 737, 739 (Sept. 15, 2015) (No. COA15-187) (quoting *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982)).

The power of a court to hear a case depends upon proper assumption of personal jurisdiction, subject matter jurisdiction, and venue. Personal jurisdiction involves a two-part inquiry. *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006). First, the court must have “a statutory basis for the assertion of personal jurisdiction.” *Sherlock v. Sherlock*, 143 N.C. App. 300, 301–02, 545 S.E.2d 757, 759 (2001) (citing *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 541 S.E.2d 733 (2001); *Cooper v. Shealy*, 140 N.C. App. 729, 537 S.E.2d 854 (2000); *Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986)). If such a basis exists, the court must then determine “whether the exercise of personal jurisdiction complies with the due process requirements of the Fourteenth Amendment.” *Id.* at 302, 545 S.E.2d at 759 (citing *Bates v. Jarrett*, 135 N.C. App. 594, 521 S.E.2d 735 (1999); *Powers v. Parish*, 104 N.C. App. 400, 409 S.E.2d 725 (1991)).

North Carolina’s long-arm statute outlines specific actions in which a court of this state may assert personal jurisdiction over an out-of-state defendant, including:

(2) Special Jurisdictional Statutes.—In any action which may be brought under statutes of this State that specifically confer grounds for personal jurisdiction.

....

(12) Marital Relationship.—In any action under Chapter 50 that arises out of the marital relationship within this

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State, notwithstanding subsequent departure from the State, if the other party to the marital relationship continues to reside in this State.

N.C. Gen. Stat. § 1-75.4(2), (12) (2015).

As a “special jurisdictional statute,” N.C. Gen. Stat. § 52C-2-201 provides in relevant part:

(a) In a proceeding to establish or enforce a support order . . . a tribunal of this State may exercise personal jurisdiction over a nonresident individual . . . if:

.....

(3) The individual resided with the child in this State;

.....

(5) The child resides in this State as a result of the acts or directives of the individual;

(6) The individual engaged in sexual intercourse in this State and the child may have been conceived by that act of intercourse; or

.....

(8) There is any other basis consistent with the constitutions of this State and the United States for the exercise of personal jurisdiction.

N.C. Gen. Stat. § 52C-2-201(a)(3), (5), (6), (8) (2015).

The trial court found, and defendant does not challenge, that the facts in this case fall within the circumstances outlined in the long-arm statute. The issue is



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whether the trial court's assertion of personal jurisdiction is constitutional, i.e., whether it complies with the Due Process Clause of the Fourteenth Amendment.

“[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted). The existence of “minimum contacts” with the forum state depends upon the “quality and nature of the defendant’s activity, but it 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.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (citing *Int’l Shoe Co.*, 326 U.S. at 319). The relationship between the forum state and the nonresident defendant must be such that the defendant “should reasonably anticipate being haled into court there.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). “Where the controversy arises out of the defendant’s contacts with the forum state, the state is said to be exercising ‘specific’ jurisdiction,” the foundation of which turns on the extent of the defendant’s contact with the forum state and the relationship between those contacts and the plaintiff’s claim. *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 366, 348 S.E.2d 782, 786 (1986).

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A review of defendant's contacts with North Carolina, as found by the trial court, reveals that the court's assertion of personal jurisdiction in this action satisfies due process. The parties were lawfully married on 30 December 1998 in Beaufort. Their daughter, L.G.A., was conceived and born in the state at the Cherry Point Marine Base Hospital when the parties were living in Carteret County. They owned real property in North Carolina during their marriage, from 1999 until 2001 or 2002. After the birth of their daughter, the parties continued to live in the state until 2004. Defendant returned to North Carolina during most summers for vacation and some holidays from 2004 until 2015. Defendant towed his boat, motor, and trailer to his mother-in-law's home in Beaufort to remain indefinitely. Most recently, in July 2015, defendant abandoned plaintiff and their daughter in Beaufort, opting to move to Virginia alone. Based on his contact with the state, defendant should have reasonably anticipated being haled into court in North Carolina to answer plaintiff's claims arising out of their separation.

The trial court's findings also indicate that its exercise of personal jurisdiction was reasonable and not so inconvenient to be unfair to defendant. Plaintiff is currently residing in North Carolina with L.G.A. and intends to remain in the state. Although defendant is a citizen of Florida currently living in Rhode Island, he suggested in his e-mail to plaintiff that his domestic claim could have been handled in North Carolina: "I did not want to file in RI without discussing it with you first,

and wasn't sure if it would be easier to file in NC." Our state also has a strong interest in resolving the action in the present forum where the parties were married, their daughter was born, and plaintiff resides with their daughter. To the same end, the state's substantive social policies would be best served if the domestic issues underlying the action were resolved in the present forum. We conclude, therefore, that the trial court properly exercised personal jurisdiction over defendant and denied his Rule 12(b)(2) motion to dismiss.

### **B. Subject Matter Jurisdiction**

Next, defendant challenges the trial court's subject matter jurisdiction over the custody action and the denial of his Rule 12(b)(1) motion to dismiss.

"A trial judge's order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable." *Shaver v. N.C. Monroe Constr. Co.*, 54 N.C. App. 486, 487, 283 S.E.2d 526, 527 (1981) (citations omitted), *cited with approval by Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 326–27, 293 S.E.2d 182, 184 (1982); *see also Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 246 (2001) ("[T]he denial of a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately appealable." (citations omitted)).

Because defendant has failed to allege any substantial right affected by the court's assumption of subject matter jurisdiction in the custody action, we do not

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address the merits of his argument. *See Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 189 (2011) (“If a party attempts to appeal from an interlocutory order without showing that the order in question is immediately appealable, we are required to dismiss that party’s appeal on jurisdictional grounds.” (citing *Pasour v. Pierce*, 46 N.C. App. 636, 639, 265 S.E.2d 652, 653 (1980))).

**C. Recusal**

Defendant also argues that the trial court erred in denying his motion to recuse.

Again, defendant has failed to demonstrate how the court’s denial of his motion to recuse affects a substantial right or is otherwise immediately appealable. The North Carolina Supreme Court recently affirmed our long-standing position that the appellant has the burden of establishing a “substantial right” to justify immediate review of an interlocutory order. *Hanesbrands Inc. v. Fowler*, \_\_\_ N.C. \_\_\_, \_\_\_, 794 S.E.2d 497, 499–500 (Dec. 21, 2016) (No. 438A15).

“It is the appellant’s burden to present appropriate grounds for . . . acceptance of an interlocutory appeal, . . . and not the duty of this Court to construct arguments for or find support for appellant’s right to appeal[.]” Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed.

*Id.* at \_\_\_, 794 S.E.2d at 499 (quoting *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff’d per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005)).

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In his statement of grounds for appellate review, defendant merely asserts: “The trial court’s denial of the Defendant’s motion to recuse also affects a substantial right and is immediately appealable.” Defendant’s brief contains no further argument or legal support for his claim. Our case law is clear that “appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right.” *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277–78, 679 S.E.2d 512, 516 (2009) (citing *Johnson*, 168 N.C. App. at 518, 608 S.E.2d at 338). Because defendant has failed to carry his burden on this issue, we decline to reach the merits.

**III. Conclusion**

The trial court did not err in denying defendant’s motion to dismiss for lack of personal jurisdiction. Defendant had sufficient contacts with this state and the court’s exercise of personal jurisdiction comports with due process requirements. Because defendant has failed to demonstrate a substantial right affected beyond this issue, we dismiss his other arguments.

AFFIRMED IN PART; DISMISSED IN PART.

Judges DIETZ and TYSON concur.

Report per Rule 30 (e).