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NO. COA01-597

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

GUY M. TURNER, INCORPORATED,
Plaintiff,

v.

Guilford County
No. 99 CVS 1816

COMMERCIAL PLANT RELOCATORS, INC.,
Defendant
and Third-Party Plaintiff,

v.

ROBAR INDUSTRIES, INC.,
Third-Party Defendant.

Appeal by defendant and third-party plaintiff from judgment entered 19 February 2001 by Judge Russell G. Walker, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 21 February 2002.

Forman, Rossabi, Black, Marth, Iddings & Slaughter, P.A., by Amiel J. Rossabi, for defendant and third-party plaintiff-appellant.

Fisher, Clinard & Craig, PLLC, by John O. Craig, III, for third-party defendant-appellee.

HUDSON, Judge.

Commercial Plant Relocators, Incorporated ("CPR") appeals from an order dismissing its complaint against Robar Industries, Incorporated ("Robar") for lack of personal jurisdiction. We affirm.

The facts and procedural history relevant to this appeal are as follows. In 1998, Robar, a Michigan company, contracted through Lenawee Industrial Machine, Incorporated ("Lenawee") for the purchase of two industrial machines from the Robert Bosch Corporation ("Bosch"). The machines were located at Bosch's plant in South Carolina and were to be shipped to Lenawee's facility in Michigan.

CPR was engaged to ship the machines from South Carolina to Michigan. CPR is a South Carolina corporation, which is authorized to do business in North Carolina. CPR subcontracted with Guy M. Turner, Incorporated ("Turner"), a North Carolina corporation, to transport the machines.

The machines were loaded onto Turner trucks for transport, but Bosch refused to let the trucks depart because the check from Lenawee given in payment for the machines had been returned for insufficient funds. CPR informed Robar that it would not be able to transport the machines. Robar, which had already paid Lenawee for the machines, then negotiated with Bosch to purchase the machines. Robar attempted to negotiate directly with Turner for shipment of the machines, to no avail. Eventually, the machines were removed from the Turner trucks and transported to Michigan by another shipper. Lenawee subsequently filed for bankruptcy. Robar later attempted to sell one of the machines, which was never used.

On 18 August 1999, Turner filed a complaint against CPR in the Guilford County Superior Court. CPR filed an answer and counterclaim against Turner, and additionally, CPR filed a third-

party complaint against Robar alleging claims for breach of contract and unjust enrichment. Robar moved for dismissal due to lack of personal jurisdiction. See N.C.R. Civ. P. 12(b)(2). The court granted the motion, and CPR appeals.

A court must engage in a two-part inquiry in order to determine whether it has personal jurisdiction over a non-resident defendant. See *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 500, 462 S.E.2d 832, 833 (1995). First, the court must determine whether the North Carolina "long-arm" statute authorizes jurisdiction over the defendant. If it does, the court must then determine whether the exercise of jurisdiction over the defendant is consistent with due process. See *id.* The burden is on the plaintiff to establish that one of the statutory grounds for jurisdiction is applicable. See *Stallings v. Hahn*, 99 N.C. App. 213, 215, 392 S.E.2d 632, 633 (1990).

CPR maintains that jurisdiction in North Carolina is authorized by the following provisions of the long-arm statute:

A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j), Rule 4(j1), or Rule 4(j3) of the Rules of Civil Procedure under any of the following circumstances:

(1) Local Presence or Status. -- In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:

. . . .

d. Is engaged in substantial activity within this State,

whether such activity is wholly interstate, intrastate, or otherwise.

. . . .

(4) Local Injury; Foreign Act. -- In any action for wrongful death occurring within this State or 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 either:

a. Solicitation or services activities were carried on within this State by or on behalf of the defendant

N.C. Gen. Stat. § 1-75.4 (1999). A requirement for application of subsection (4)(a) is that the action alleges injury to person or property within this State. The third-party complaint here alleges injury consisting of breach of contract and unjust enrichment in a transaction between a South Carolina corporation and a Michigan corporation for the delivery of equipment from South Carolina to Michigan. CPR has not alleged any injury that occurred in North Carolina. Therefore, N.C.G.S. § 1-75.4(4)(a) does not apply to confer jurisdiction over Robar.

Subsection (1)(d) of the long-arm statute requires that the party over whom jurisdiction is asserted was "engaged in substantial activity" within the State when service of process was made. Our Supreme Court has stated that "[b]y the enactment of G.S. 1-75.4(1)(d), it is apparent that the General Assembly intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process. Thus,

we hold that G.S. 1-75.4(1)(d) . . . grants the courts of North Carolina the opportunity to exercise jurisdiction over defendant to the extent allowed by due process." *Dillon v. Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630-31 (1977) (citation omitted). We therefore turn to the second inquiry: whether the exercise of jurisdiction over Robar comports with due process.

Satisfaction of the requirements of due process generally requires that sufficient "'minimum contacts'" exist "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945)). In applying this standard, we distinguish between cases in which the court would exercise specific jurisdiction and those in which the court would exercise general jurisdiction. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8-9, 80 L. Ed. 2d 404, 411 nn.8-9 (1984). As we have explained,

different standards apply in cases where the contact with the state gives rise to the cause of action and where . . . plaintiff's claims arise totally outside of the state. The sufficiency of contacts threshold is elevated when the cause does not arise in the forum state or derive from the foreign corporation's transactions in the state.

Ash v. Burnham Corp., 80 N.C. App. 459, 460-61, 343 S.E.2d 2, 3 (citations omitted), *aff'd*, 318 N.C. 504, 349 S.E.2d 579 (1986) (per curiam). In the case of general jurisdiction, that is, where the cause of action does not arise in this State or derive from

transactions in this State, the defendant's contacts must be "of a 'continuous and systematic' nature." *Id.* at 461, 343 S.E.2d at 3 (quoting *Wolf v. Richmond County Hosp. Auth.*, 745 F.2d 904, 909 (4th Cir. 1984), *cert. denied*, 474 U.S. 826, 88 L. Ed. 2d 68 (1985)); see *Hall*, 466 U.S. at 415, 80 L. Ed. 2d at 411.

Here, CPR's cause of action against Robar did not arise in North Carolina, nor did it arise from any contacts Robar may have had with North Carolina. Thus, to withstand dismissal, CPR must allege contacts within the State that are "continuous and systematic." This CPR failed to do.

The only contacts with North Carolina that CPR attributes to Robar are the following: (1) Robar contacted Turner in an effort to negotiate for the delivery of the machines to Michigan; (2) Robar attempted to sell one of the machines in North Carolina; (3) Robar once did business with a North Carolina corporation and continues to list that corporation on its vendor list; and (4) Robar advertises in a national trade publication and regularly makes telephone calls and/or sends faxes into North Carolina.

Ronald Bargman, the president of Robar, explained at his deposition that he contacted Turner at CPR's suggestion, after CPR informed him that it could not deliver the machines. In the hopes of reducing his costs, Bargman attempted to negotiate directly with Turner to complete the shipment of the machines to Michigan. The negotiations failed. In response to questions about a series of telephone calls made from Robar to a North Carolina company, Bargman speculated that the calls were made in an attempt to sell

one of the machines. These contacts all resulted from a single transaction--a transaction that did not originate in North Carolina--and are not part of continuous and systematic dealings with the State.

Bargman explained the presence of the North Carolina company on Robar's vendor list as follows. Robar buys wire from Tru-Spec, a Chicago company. Usually, Tru-Spec arranges for the shipping from its warehouse to Robar's facility in Michigan, and the shipping cost is included in the cost of the wire. However, on one occasion, Tru-Spec directed Robar to pay the shipping cost directly to the shipper, which happened to be a North Carolina company. Due to the nature of Robar's accounting system, Robar had to add the North Carolina company to its vendor list in order to generate a check. Even if Robar had contracted directly with the North Carolina company for the wire shipment, this was an isolated occurrence, rather than "continuous and systematic" contacts.

Robar advertises in Thomas Register, which is a group of books containing a listing of manufacturing companies. Robar is also listed with Thomas Regional, which posts company profiles on the internet. With regard to the telephone calls and faxes to North Carolina, Bargman explained that he could not tell from the listings on the telephone bill whether a given call was an actual telephone call or a fax. He stated that companies often send "unsolicited requests for things, and we simply write on them 'no quote' and send them back to be polite." When asked about specific calls to North Carolina, Bargman speculated that most of them were

responses to such unsolicited requests; others may have been personal calls made by his employees or calls made by his attorney, who sometimes worked out of Bargman's office.

The advertising and telephone calls are insufficient to constitute "continuous and systematic" contacts. In *Ash*, we concluded that the defendant's contacts with North Carolina were insufficient on similar facts. See *Ash*, 80 N.C. App. at 464, 343 S.E.2d at 5. The non-resident defendant corporation in that case placed advertisements in several national magazines, and made about one-half percent of its total yearly sales in North Carolina. The defendant's sales were solicited by independent contractors acting as sales representatives for the defendant and other manufacturers. See *id.* at 461-62, 343 S.E.2d at 3-4. We held that "[t]he standard of 'continuous and systematic' general business contacts requires more." *Id.* at 462, 343 S.E.2d at 4.

We conclude that the exercise of personal jurisdiction over Robar would not comport with due process, given the nature of its contacts with the State of North Carolina. Accordingly, the trial court properly dismissed the third-party complaint against Robar.

Affirmed.

Judges MARTIN and CAMPBELL concur.

Report per Rule 30(e).