NO. COA05-998

NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2006

KRISPY KREME DOUGHNUT CORPORATION,
Plaintiff

v.

Forsyth County
No. 05 CVS 446

FAIRMONT SIGN COMPANY,
Defendant

Appeal by defendant from order entered 24 May 2005 by Judge Judson D. DeRamus, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 11 January 2006.

Kilpatrick Stockton, L.L.P., by Richard J. Keshian, for plaintiff-appellee.

Wilson & Iseman, L.L.P., by G. Gray Wilson, S. Ranchor Harris, III, and Edward T. Shipley, III, for defendant-appellant.

CALABRIA, Judge.

Fairmont Sign Company ("defendant") appeals from an order of the trial court, denying defendant's motions to dismiss or stay the underlying action. We affirm the trial court's denial of the motion to dismiss, and we dismiss, as interlocutory, the appeal of the trial court's denial of the motion to stay the underlying action.

Defendant is a Michigan company that manufactures outdoor signs and has no agents or property in North Carolina. In December 2000, Krispy Kreme Doughnut Corporation ("plaintiff") contacted defendant, requesting a quotation on outdoor signs. Defendant made multiple phone calls to plaintiff in North Carolina, and the parties subsequently negotiated costs and conditions. During the course of the negotiations, four meetings took place in North Carolina, and defendant sent at least six representatives to North Carolina. Defendant also sent samples to North Carolina for plaintiff's approval. The trial court found, "The objective of Fairmont Sign's telephone calls, face to face meetings, and shipment of product to North Carolina was to secure purchase orders from [plaintiff]."

Plaintiff and defendant signed a purchasing agreement (the "agreement") in April of 2004. Defendant then sent invoices to plaintiff in North Carolina, and plaintiff paid defendant from its North Carolina bank account. Defendant subsequently terminated the agreement in August 2004 and sent plaintiff a disputed invoice. Specifically, plaintiff denied placing an order for the inventory listed on the invoice. The inventory was located in Michigan and California.

Defendant continued to demand payment for the inventory, and on 11 January 2005, plaintiff received an e-mail from defendant's president, stating an intention to file suit within seven days unless plaintiff paid the invoice. Defendant did not file suit in that time span, and on 19 January 2005, plaintiff filed suit in

Forsyth County Superior Court. Since the filing of plaintiff's complaint, defendant has filed suit in Michigan.

In response to the 19 January 2005 declaratory judgment action instituted by plaintiff, defendant filed motions to dismiss for lack of personal jurisdiction or to stay the action pursuant to N.C. Gen. Stat. § 1-75.12 (2005). The trial court denied both motions. From the denial of these motions, defendant appeals.

I. Denial of Defendant's Motion to Dismiss

Defendant initially argues the trial court erred in denying its motion to dismiss because it does not have sufficient minimum contacts with North Carolina sufficient for our courts to exercise jurisdiction. We affirm the trial court's denial of defendant's motion.

"The standard of review of an order determining jurisdiction is 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." *Tejal Vyas, LLC v. Carriage Park Ltd. P'ship*, 166 N.C. App. 34, 37, 600 S.E.2d 881, 884 (2004) (citations omitted). North Carolina courts utilize a two-prong analysis in determining whether personal jurisdiction against a non-resident is properly asserted. *Id.* Under the first prong of the analysis, we determine if statutory authority for jurisdiction exists under our long-arm statute. *Id.* *See also* N.C. Gen. Stat. § 1-75.4 (2005). If statutory authority exists, we consider under the second prong whether exercise of our jurisdiction comports with standards of due process. *Tejal Vyas, LLC*, 166 N.C. App. at 37, 600 S.E.2d at 884.

In the case *sub judice*, defendant did not assign error to the trial court's conclusion that "North Carolina['s] 'long-arm' statute authorizes jurisdiction over Fairmont Sign." Accordingly, without an assignment of error, we deem conclusively established that the long-arm statute authorizes jurisdiction. N.C. R. App. P. 10(a) (2005) ("the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal"). *See also In re J.W.J.*, 165 N.C. App. 696, 698-99, 599 S.E.2d 101, 102-03 (2004) (standing for the proposition that personal jurisdiction may be waived).

We, therefore, consider the second prong of the analysis, whether exercise of jurisdiction over defendant comports with due process requirements. Under the Due Process Clause of the Fourteenth Amendment, the pertinent inquiry is whether defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). "To generate minimum contacts, the defendant must have purposefully availed itself of the privilege of conducting activities within the forum state and invoked the benefits and protections of the laws of North Carolina." *Tejal Vyas, LLC*, 166 N.C. App. at 38, 600 S.E.2d at 885. Specifically, we consider whether the defendant could "reasonably anticipate being hauled into a North Carolina court." *Id.*, 166 N.C. App. at 39, 600 S.E.2d at 886 (citations omitted).

Defendant assigns error to the trial court's conclusion that it "has sufficient minimum contacts with the State of North Carolina to satisfy due process and give the Court personal jurisdiction over Fairmont Sign." In determining whether minimum contacts exist, we consider: "(1) quantity of the contacts, (2) 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) convenience to the parties." *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 632, 394 S.E.2d 651, 655 (1990) (citations omitted).

We initially consider the quantity, quality, and nature of the contacts. Although plaintiff sent defendant the initial request for a quotation, after negotiations began, defendant "made numerous telephone calls" to plaintiff. Additionally, defendant sent at least six representatives to North Carolina and conducted four meetings with plaintiff. Defendant also routinely sent samples to North Carolina for plaintiff's approval. The trial court found, and defendant does not contest, that "[t]he objective of [defendant's] telephone calls, face to face meetings, and shipment of product to North Carolina was to secure purchase orders from [plaintiff]." The parties entered into an agreement, which was signed by defendant in Michigan and returned to plaintiff in North Carolina. After defendant had rendered services, it sent invoices to plaintiff, and plaintiff paid these invoices from its North Carolina bank account. Under our case law, these activities are sufficient to establish minimum contacts with North Carolina. *See,*

e.g., *Carson v. Brodin*, 160 N.C. App. 366, 372, 585 S.E.2d 491, 496 (2003) ("By negotiating within the state and entering into a contract with North Carolina residents, defendant purposefully availed himself of the privilege of conducting activities within North Carolina with the benefits and protection of its laws" (citations omitted)).

Regarding convenience, the trial court found, "Witnesses as to the parties' contract formation are located in both North Carolina and Michigan. All of defendant's witnesses and documents are located in Michigan. All of plaintiff's witnesses and documents are located in North Carolina." The trial court also concluded, "[Defendant] has failed to establish that it would work a substantial injustice for the foregoing action to be tried in North Carolina. . . . It would be just as convenient to try this matter in North Carolina as it would be to try this matter in Michigan." Defendant challenges both this finding and conclusion. Our review of the record and briefs establish that this finding is supported by competent evidence. Furthermore, this finding supports the conclusion. *See Cherry Bekaert & Holland*, 99 N.C. App. at 635, 394 S.E.2d at 657 ("[l]itigation on interstate business transactions inevitably involves inconvenience to one of the parties. When the inconvenience to defendant of litigating in North Carolina is no greater than would be the inconvenience of plaintiff of litigating in [defendant's state] . . . no convenience factors . . . are determinative" (citations and quotations omitted)).

Lastly, we note that "North Carolina has a legitimate interest in the establishment and *operation of enterprises* and trade within its borders and the protection of its residents in the making of contracts with persons and agents who enter the state for that purpose." *Cherry Bekaert & Holland*, 99 N.C. App. at 633, 394 S.E.2d at 656 (citations omitted).

For the foregoing reasons, we hold that the trial court did not err in determining that defendant had minimum contacts with North Carolina and properly denied defendant's motion to dismiss for lack of personal jurisdiction.

II. Denial of Motion to Stay this Action

Defendant next argues the trial court abused its discretion in denying defendant's motion to stay this action pursuant to N.C. Gen. Stat. § 1.75.11 (2005). Plaintiff responds that defendant "has no right to immediately appeal the trial court's denial of its motion to stay." A litigant is entitled to appeal either from a final judgment or from an interlocutory order which affects a substantial right. *Hart v. F.N. Thompson Constr. Co.*, 132 N.C. App. 229, 230, 511 S.E.2d 27, 28 (1999). An interlocutory order affects a substantial right when the order "deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991) (citation omitted). This Court has held that a "trial court's denial of [a] motion[] to stay is an interlocutory order from which no right to immediate appeal lies." *Howerton v. Grace*

Hosp., Inc., 124 N.C. App. 199, 201, 476 S.E.2d 440, 442 (1996). Moreover, defendant has failed to argue any substantial right that will be lost absent immediate review. *Id.* *See also* N.C. Gen. Stat. §§ 1-277(a); 7A-27(d)(1) (2005). As such, we deem defendant's appeal from the trial court's denial of its motion to stay interlocutory. Having determined this issue interlocutory, we need not address defendant's related assignments of error.

Affirmed in part; dismissed in part.

Judges BRYANT and SMITH concur.

Report per Rule 30(e).