NO. COA06-248

NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2007

WESTWOOD INDUSTRIES, INC.,
Plaintiff,

v. Catawba County
No. 01 CVS 2552

AESTHETIC, INC., ENTEVOR AB,
KATHY FALK, and LENNART FALK,
Defendants.

Appeal by Defendant Entevor AB from order entered 9 December 2005 by Judge Timothy S. Kincaid in Catawba County Superior Court upon the decision contained in the transcript of a motions hearing held 22 June 2004 before Judge Marcus L. Johnson in Catawba County Superior Court. Heard in the Court of Appeals 24 August 2006.

Patrick, Harper & Dixon L.L.P., by Stephen M. Thomas and Michael P. Thomas, for Plaintiff-Appellee.

Trachtman Law Firm, PLLC, by James B. Trachtman, for Defendant-Appellant.

STEPHENS, Judge.

Entevor AB ("Defendant"), a Swedish corporation, appeals from an order of the trial court denying its motion to dismiss a complaint filed by Westwood Industries, Inc. ("Plaintiff"). Defendant contends on appeal that the trial court lacked personal jurisdiction over Defendant and therefore erred in denying its motion to dismiss. After careful consideration, we agree that the

trial court's determination is not supported by competent evidence and, consequently, does not support its conclusion that Defendant was subject to the jurisdiction of the court. Accordingly, we reverse the order of the trial court denying Defendant's motion to dismiss.

Facts

On 27 July 2001, Plaintiff filed a complaint against several parties, including Defendant, in Catawba County Superior Court. The complaint acknowledged that Defendant is a corporation organized under the laws of Sweden, with its principal office and place of business there. By its complaint, Plaintiff sought recovery of a debt allegedly owed it by defendant Aesthetic, Inc., and guaranteed by defendants Kathy and Lennart Falk. Plaintiff further alleged that Defendant also had guaranteed the debt. Defendant filed a motion to dismiss Plaintiff's complaint against it for lack of personal jurisdiction. This motion was heard by the trial court on 22 June 2004.

In support of its motion, Defendant submitted an affidavit of Gert Edvard Karlsson ("Karlsson"), the owner and a member of the Board of Directors of Defendant, averring that Defendant had no offices, employees, or agents in North Carolina, conducted no business in North Carolina, and that service of process occurred in Stockholm, Sweden. Karlsson further averred that Defendant had no knowledge of the guaranty agreement Plaintiff sought to enforce, and that Lennart Falk ("Falk"), the person who allegedly signed the guaranty agreement on behalf of Defendant, was not a director,

employee, officer, or agent of Defendant at the time he purportedly executed the guaranty agreement. Karlsson further denied all knowledge of a "Per Johansson" whose name appears on the guaranty agreement under the title of Defendant's "Secretary," and noted that Swedish corporations have no such corporate officer.

In rebuttal to Defendant's evidence, Plaintiff submitted several documents, including a copy of the guaranty agreement dated 2 August 1999 and signed by Falk, allegedly on behalf of Defendant as its "President." Also appearing on the guaranty agreement is the printed name and signature of "Per Johansson," listed as "Secretary" for Defendant. The parties to the agreement stipulated that North Carolina law would govern any disputes arising from the contract, and that the parties would submit themselves to the jurisdiction of the North Carolina courts.

In addition to the guaranty agreement, Plaintiff submitted a copy of an international business information report regarding Defendant prepared by the business information company Dun & Bradstreet, which lists a "Per Erik Jonsson" as a "Deputy" for Defendant as of 17 February 2000.

Thirdly, Plaintiff submitted a copy of an 8 March 2000 decision by the Fourth District Court of Appeal of Florida, *Home Furniture Depot, Inc. v. Entevor AB*, 753 So. 2d 653 (Fla. Dist. Ct. App. 2000). In its recitation of the facts of that case, which, under a summary judgment standard, were stated from a view most favorable to the plaintiff, the Florida Court described Falk as a "principal" of Defendant in 1997. It also noted that Falk was a

director and vice-president for the plaintiff in the case, Home Furniture Depot, Inc.

Finally, Plaintiff submitted the testimony of Falk's wife, Kathy Falk ("Kathy"). Kathy testified that the signature appearing on the guaranty agreement was that of her husband. However, when asked whether Falk was associated with Defendant in July or August of 1999, when the guaranty agreement at issue here was signed, Kathy replied, "He told me he was, yes." Defendant objected on hearsay grounds, which the trial court sustained for purposes of substantive evidence, but overruled "for purposes of explaining her conduct only[.]" When shown the Florida decision describing Falk as a principal of Defendant and asked whether this position continued into 1999, Kathy responded, "My husband had indicated that to me, yes." Defendant again objected, and the trial court ruled her statement would be allowed "for corroborative purposes but not substantive." Kathy testified she had no knowledge of a person named "Per Johansson" as listed on the guaranty agreement or the "Per Erik Jonsson" appearing in the Dun & Bradstreet report. Kathy stated she knew of no activity performed by her husband on behalf of Defendant, although she noted that "he went to Florida for [the] lawsuit." She explained that "[Defendant] was a company that was not anywhere near us, so [Falk] was not active that I saw in any way on a daily basis or anything in Sweden . . . ." Throughout her direct and cross-examination, Kathy repeatedly confirmed that she had no first-hand knowledge of Falk's

involvement with Defendant, and that her only information came from her husband, who did not testify in person or by affidavit.

Upon consideration of the evidence submitted and the arguments of the parties, the trial court determined that Defendant was subject to North Carolina jurisdiction and denied Defendant's motion to dismiss.

Issues

On appeal, Defendant argues there was no competent evidence to support the trial court's determination that personal jurisdiction existed over Defendant and, therefore, the court erred in denying its motion to dismiss.

We observe initially that although the denial of a motion to dismiss is generally interlocutory and not immediately appealable, a party has the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person. N.C. Gen. Stat. § 1-277(b) (2005); *Wyatt v. Walt Disney World, Co.*, 151 N.C. App. 158, 565 S.E.2d 705 (2002). We also note that all other defendants to this lawsuit are no longer involved. Defendant's appeal is thus properly before this Court.

Upon appeal of a denial of a motion to dismiss for lack of personal jurisdiction, we must ascertain whether the trial court's findings of fact are supported by competent evidence. *Strategic Outsourcing, Inc. v. Stacks*, ___ N.C. App. ___, 625 S.E.2d 800 (2006). Where competent evidence supports the findings of fact, this Court must affirm the decision of the lower court. *Id.* "However, the record may clearly reveal that the court erred in its

legal conclusions from the facts." *Hardaway Constructors, Inc. v. North Carolina Dep't of Transp.*, 80 N.C. App. 264, 267, 342 S.E.2d 52, 54 (1986) (citation omitted), *aff'd*, 318 N.C. 689, 351 S.E.2d 298 (1987). "Either party may request that the trial court make findings regarding personal jurisdiction, but in the absence of such request, findings are not required." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217 (citations omitted), *appeal dismissed and disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000). "Where no findings are made, proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings." *Id.* at 615, 532 S.E.2d at 217-18 (citation omitted).

In this case, the trial court made no specific findings of fact in its order denying Defendant's motion to dismiss, nor does the record reveal that either party requested such findings. We therefore review the evidence before the trial court to determine whether competent evidence existed to support its determination that personal jurisdiction existed over Defendant.

Where a defendant presents a personal jurisdiction challenge, the plaintiff has the initial burden of proving the existence of a statutory basis for jurisdiction. *Wyatt*, 151 N.C. App. at 162-63, 565 S.E.2d at 708. Where the allegations of a plaintiff's complaint meet the plaintiff's initial burden of proving the existence of jurisdiction, and where the defendant does not contradict such allegations, they are accepted as true and deemed controlling. *Id.*

> However, when a defendant supplements its motion with affidavits or other supporting evidence, the allegations of the plaintiff's complaint "can no longer be taken as true or controlling and [the] plaintiff[] cannot rest on the allegations of the complaint," but must respond "by affidavit or otherwise . . . set[ting] forth specific facts showing that the court has jurisdiction."

Id. (quoting *Bruggeman*, 138 N.C. App. at 615-16, 532 S.E.2d at 218). After this second shift of the burden, the plaintiff once again has the "burden of establishing *prima facie* that grounds for personal jurisdiction exist[.]" *Bruggeman*, 138 N.C. App. at 616, 532 S.E.2d at 218 (citation omitted).

Here, the complaint alleged that Defendant had entered into a guaranty agreement with Plaintiff, a corporation doing business in North Carolina. The guaranty agreement provided that all disputes arising from the agreement would be decided under North Carolina law, and that the parties agreed to subject themselves to North Carolina jurisdiction. This allegation was sufficient for Plaintiff to meet its initial burden regarding the existence of personal jurisdiction over Defendant under N.C. Gen. Stat. § 1-75.4(5) (personal jurisdiction arising over local services, goods or contracts). That is, Plaintiff carried its initial burden of proving personal jurisdiction by virtue of its allegation that Defendant, through Falk, its agent, entered into the guaranty agreement. *See* N.C. Gen. Stat. § 1-75.2(3) (2003) ("'Defendant' means the person named as defendant in a civil action, . . . [and] the reference includes any person's act for which the defendant is legally responsible. In determining for jurisdictional purposes

the defendant's legal responsibility for the acts of another, the substantive liability of the defendant to the plaintiff is irrelevant"). Defendant then submitted evidence tending to show that Defendant never entered into the guaranty agreement, had no other connection to North Carolina, and that Falk, the person who allegedly signed on Defendant's behalf, had no actual or apparent authority from Defendant to do so. The burden thus shifted again to Plaintiff to establish, *prima facie*, the existence of personal jurisdiction by showing specific facts demonstrating that Falk had actual or apparent authority to enter into the guaranty agreement on behalf of Defendant. We conclude that Plaintiff failed to carry this burden.

The evidence submitted by Plaintiff at the hearing did not support its contention that Falk had any authority to execute the guaranty agreement on behalf of Defendant. Plaintiff concedes that the guaranty agreement in itself cannot establish Falk's authority, but contends that the supplemental evidence supports the trial court's determination that Falk acted on behalf of Defendant. Plaintiff first relies upon the decision of the Florida Court noting that Falk was a principal of Defendant. The decision of the Florida Court, however, specifies that Falk was a principal of Defendant in 1997. It is silent on whether Falk was a principal on 2 August 1999, when the guaranty agreement was signed. Although Kathy testified that Falk traveled to Florida for the lawsuit, it is unclear whether Falk appeared on behalf of Defendant, or on behalf of Home Furniture Depot, Inc., the plaintiff in that case,

of which, according to the decision, he was a director and vice-president. Notably, the affidavit submitted by Karlsson does not aver that Falk was *never* an agent for Defendant, but rather that he had no connection to the company at the time the guaranty agreement was signed. It is entirely possible that Falk was, as noted by the Florida Court, a principal of Defendant in 1997. The Florida decision does not, however, establish that Falk was an agent of Defendant on the relevant date of 2 August 1999.

Next, Plaintiff argues the testimony by Kathy establishes that Falk had authority to sign on behalf of Defendant. On the contrary, it is clear from her testimony that she had no personal knowledge of Falk's involvement with the company, and that any information she had came from her husband, who did not testify in any form. In response to Defendant's objections, the trial court ruled several times that Kathy's testimony would not be admitted for substantive purposes. As the evidence given by Kathy was not based on personal knowledge, it was not competent evidence and does not support a finding that Falk acted on behalf of Defendant in signing the guaranty agreement. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c) (2003) (defining hearsay evidence); *Patrick v. Cone Mills Corp.*, 64 N.C. App. 722, 308 S.E.2d 476 (1983) (reversing a decision by the Employment Security Commission where findings were not based on competent evidence, but rather on testimony of a witness who had no personal knowledge of critical facts); *accord* N.C. Gen. Stat. § 1A-1, Rule 56(e) (2003) (requiring affidavits supporting or opposing a motion for summary judgment to "be made on personal knowledge,

[and to] set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.").

Plaintiff argues, however, that because Defendant did not object every time Kathy testified outside her personal knowledge about Falk's relationship with Defendant, Defendant thereby waived its objections to her testimony on this issue. We disagree. Rule 46(a)(1) of the North Carolina Rules of Civil Procedure provides:

> When there is objection to the admission of evidence on the ground that the witness is for a specified reason incompetent or not qualified or disqualified, it shall be deemed that a like objection has been made to any subsequent admission of evidence from the witness in question. Similarly, when there is objection to the admission of evidence involving a specified line of questioning, it shall be deemed that a like objection has been taken to any subsequent admission of evidence involving the same line of questioning.

N.C. Gen. Stat. § 1A-1, Rule 46(a)(1) (2003). During the hearing, when Kathy initially testified regarding matters outside her personal knowledge, Defendant objected and the trial court ruled that her testimony would not be accepted as substantive evidence. Although Defendant did not object each time Kathy offered incompetent testimony, it was reasonable, based on the trial court's ruling and Rule 46(a)(1), for defense counsel to believe that he had preserved all of Kathy's incompetent testimony for appellate review. Further, under Rule 46, Defendant was not required to repeatedly object to Kathy's testimony for a continuing hearsay objection to be preserved. This argument has no merit.

Finally, Plaintiff contends the report by Dun & Bradstreet constitutes evidence tending to show that Falk acted on behalf of Defendant. This argument likewise has no merit. First, and significantly, the report makes no mention of Falk whatsoever. Moreover, the report lists a "Per Erik Jonsson" as a "Deputy" as of 17 February 2000. This provides no assistance regarding the identity of the "Per Johansson," whose name appears as "Secretary" for Defendant in August 1999 on the guaranty agreement. Karlsson specifically denied all knowledge of a "Per Johansson," and further indicated that Swedish companies have no such officer as "Secretary." Additionally, there is no evidence whatsoever as to how the identity of this individual as a "Deputy" of Defendant in February 2000 establishes that Falk was an agent of Defendant with authority to bind it to a guaranty agreement in August 1999. The Dun & Bradstreet report therefore provides no support for the trial court's determination that Falk acted with real or apparent authority.

Upon careful review, we conclude Plaintiff's evidence did not support its contention that Falk acted on behalf of Defendant when he signed the guaranty agreement. Defendant's evidence was therefore the only competent and relevant evidence before the trial court regarding the issue of personal jurisdiction. Defendant's evidence tended to show that Defendant had absolutely no connection to North Carolina that would establish personal jurisdiction over it. Because there was no competent evidence to support the trial court's determination that Falk acted on behalf of Defendant when

he signed the guaranty agreement, the trial court erred in concluding that Plaintiff made a *prima facie* showing that personal jurisdiction existed and in denying Defendant's motion to dismiss. *See H. V. Allen Co. v. Quip-Matic, Inc.*, 47 N.C. App. 40, 266 S.E.2d 768 (holding the trial court erred in denying the defendant foreign corporation's motion to dismiss where the defendant had insufficient minimum contacts with North Carolina to establish personal jurisdiction), *disc. review denied*, 301 N.C. 85, 273 S.E.2d 298 (1980). We therefore reverse the order of the trial court denying Defendant's motion to dismiss.

REVERSED.

Judges STEELMAN and LEVINSON concur.

Report per Rule 30(e).