NO. COA08-1383

NORTH CAROLINA COURT OF APPEALS

Filed: 4 August 2009

PROFESSIONAL VENDING
SERVICES, INC.,
Plaintiff,

v.

Brunswick County
No. 07 CVD 628

MICHAEL D. SIFEN, INC.,
MICHAEL D. SIFEN and
MARC SIFEN,
Defendants.

Appeal by Defendants from order entered 14 January 2008 and orders entered 21 July 2008 by Judge Marion R. Warren in Brunswick County District Court. Heard in the Court of Appeals 6 May 2009.

SMITH MOORE LEATHERWOOD LLP, by Sidney S. Eagles, Jr., Elizabeth Brooks Scherer, and Kelly T. Ensslin, and CROSSLEY, MCINTOSH, COLLIER, HANLEY & EDES, PLLC, by Clay Allen Collier, for Defendants.

No brief for Plaintiff.

ERVIN, Judge.

Michael D. Sifen, Inc., Michael D. Sifen, and Marc Sifen (collectively, Defendants) appeal from an order entered 14 January 2008 granting the motion of Professional Vending Services, Inc., (Plaintiff) for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, and from orders entered 21 July 2008 granting Plaintiff's motion to strike Defendants' affidavits; denying Defendants' motion for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60; denying Defendants' motion to alter or amend

judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(e); and denying Defendants' motion for attorneys fees pursuant to N.C. Gen. Stat. § 1A-1, Rule 56(g). After careful consideration, we conclude that the trial court's order denying Defendants' motion for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) should be reversed and that this case should be remanded to the trial court for the entry of orders granting Defendants' motion for relief from judgment, vacating the trial court's order granting summary judgment in favor of Plaintiff, and dismissing this case without prejudice.

Factual Background

On 27 March 2007, Plaintiff filed an unverified complaint against Defendants seeking either (1) recovery of two vending machines and damages for loss of use of the vending machines in question or (2) damages in the amount of the value of the vending machines in question and for loss of use of those vending machines. Plaintiff alleged that Defendants were Virginia residents and stated, without further elaboration, that jurisdiction in North Carolina was proper pursuant to N.C. Gen. Stat. § 1-75.4. Plaintiff further alleged that Defendants possessed two of Plaintiff's vending machines which were worth a total of $3,950.00 and which contained inventory worth $300.00. According to Plaintiff, Defendants deprived Plaintiff of the use of these vending machines after 15 January 2007; the vending machines would allegedly have generated income of approximately $20.00 per day.

The complaint and summons directed to Defendant Michael D. Sifen, Inc., were served on the Defendant corporation's registered agent in Virginia Beach, Virginia, on 28 March 2007.[1] Although Plaintiff filed Returns of Service indicating that the summons and complaint were served on Defendants Michael D. Sifen and Marc Sifen at 500 Central Drive, Suite 106, Virginia Beach, Virginia 23454, the delivery confirmation receipts are signed by Karen O'Donnell. None of the Defendants filed an answer to Plaintiff's complaint.

On 3 April 2007, R. Edward Bourdon, Jr. (Bourdon), an attorney licensed to practice in Virginia who represented Defendants and served as registered agent for Defendant Michael D. Sifen, Inc., wrote Plaintiff's attorney, Matthew G. Nestor (Nestor), as follows:

> I have confirmed that neither Michael D. Sifen, Inc., Michael D. Sifen, nor Marc Sifen owns any property, real or personal, which is located anywhere within the State of North Carolina.
>
> Neither Michael D. Sifen, Inc., Michael D. Sifen nor Marc Sifen have possession of any "Asset" or "Thing of Value" which is or was ever within the State of North Carolina. In addition, neither Michael D. Sifen, Inc., Michael D. Sifen nor Marc Sifen is in possession of any vending machines or inventory of [Plaintiff] located in any jurisdiction.

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[1] The Federal Express receipt attached to the Return of Service showing service on the registered agent for Defendant Michael D. Sifen, Inc., indicates that it was signed for by "N. Jervis." The record does not indicate the relationship, if any, between the registered agent for Defendant Michael D. Sifen, Inc., and "N. Jervis." However, Defendants have not challenged the sufficiency of the manner in which the summons and complaint were served on Defendant Michael D. Sifen, Inc., before the trial court or on appeal. As a result, we will assume that the summons and complaint were properly served on Defendant Michael D. Sifen, Inc., for purposes of this appeal.

As a result, Bourdon indicated that he and his clients "look[ed] forward to receiving confirmation that this baseless Complaint has been dismissed."

Nestor replied to Bourdon's 3 April 2007 letter on 22 May 2007, by means of a letter sent by facsimile machine stating that "Professional Vending Services, Inc., has two vending machines located at 1060 Lynnhaven Parkway, Virginia Beach, Virginia in space previously occupied by I.C. Grand Buffet[.]" Although he disputed Bourdon's contention that the North Carolina courts lacked personal jurisdiction over Defendants, Nestor indicated that Plaintiff is "agreeable to dismiss the Complaint if arrangements are made to pick up the equipment today and your client agrees to pay legal fees." Attached to Nestor's letter was a copy of a "Vending Location Agreement" involving the placement of "Single Ball" and "Speed King" machines at "I.C. Grand Buffet," 1060 Lynnhaven Parkway, Virginia Beach, Virginia 23452.

In a response transmitted by facsimile machine later that day, Bourdon reiterated his contention that Defendants did not possess any vending machines or inventory belonging to Plaintiff in any jurisdiction. Furthermore, Bourdon stated that he had passed on the information concerning the location of the two vending machines to Don Smith (Smith) of Sifen Development Company, Inc. (Sifen Development), and that either Bourdon or Smith would be in touch with Plaintiff after Smith had returned to Virginia Beach and had an opportunity to review certain information provided by Nestor relating to the ownership and location of the vending machines.

Bourdon concluded by stating that none of the Defendants "will be agreeing to pay any legal fees or other costs your client may have incurred in pursuing a legally baseless and patently frivolous lawsuit."

On 4 January 2008, Plaintiff filed a motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, and attached an affidavit by Perry Johnston, Plaintiff's President (Johnston), in which Johnston stated that the Defendants had denied him and his employees the right of access to a building located at 1060 Lynnhaven Parkway, Virginia Beach, Virginia, in which vending machines owned by Plaintiff were located. On 9 January 2008, Bourdon wrote Nestor again; indicated that he had received a calendar request, Johnston's affidavit, and the summary judgment motion; and stated that "[it] is a fraud on the Court for you to continue to assert that the General Court of Justice District Court Division in Brunswick County, North Carolina[,] has jurisdiction over any of my three clients based on [N.C. Gen. Stat. § 1-75.4]." According to Bourdon, "[n]one of the parties you have named in your client's suit" were involved in the operation of the business to whom the vending machines in question were provided, and Defendants have not "held title to the real property" specified in Johnston's affidavit. Moreover, Bourdon informed Nestor that:

> A check of the public records in the Clerk's Office of the Circuit Court of the City of Virginia Beach readily reveals the fact that the property located at 1060 Lynnhaven Parkway, Virginia Beach, Virginia, is and has been titled in the name of Sifen Development Co., Inc.[,] for many years.

Bourdon also told Nestor that Smith had "confirmed that [Sifen Development Co., Inc., is] in possession of two (2) vending machines which they have had in storage for some time" and that Plaintiff should contact Smith at a phone number specified in Bourdon's letter in order to verify the ownership of the machines and pick them up if the machines were, in fact, owned by Plaintiff.

On 14 January 2008, the trial court heard Plaintiff's motion for summary judgment. Defendants did not appear at the hearing. On that date, the trial court entered an order granting Plaintiff's motion for summary judgment and awarding Plaintiff $11,530.00 in damages plus the costs.

On 23 January 2008, Defendants filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), (2), and (5); a motion for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60; a motion to alter or amend the judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(e); and a motion for attorneys fees pursuant to N.C. Gen. Stat. § 1A-1, Rule 56(g). On 29 January 2008, Defendants filed the affidavits of Bourdon, Defendant Michael D. Sifen, and Defendant Marc Sifen. In his subsequently stricken affidavit, Bourdon described his communications with Nestor, including his assertions that the North Carolina courts lacked jurisdiction over Defendants, that Defendants were not in possession of Plaintiff's vending machines, that Defendants did not own the building in which the vending machines were currently located, that the contract provided by Plaintiff relating to the vending machines was not signed by any of the Defendants, and that

Plaintiff could pick up its vending machines by contacting Smith. The subsequently stricken affidavits of Defendants Michael D. Sifen and Marc Sifen stated that they did not conduct business in North Carolina, that they had not contracted with Plaintiff, and that they had no interest in the business that rented the vending machines from Plaintiff or in the property at which the vending machines were located. On 26 February 2008, Plaintiff filed a motion to strike the affidavits filed by Defendants on the grounds that they were not served contemporaneously with the motions as required by N.C. Gen. Stat. § 1A-1, Rule 6(d).

All pending motions came on for hearing before the trial court at the 17 March 2008, session of the Brunswick County District Court. On 21 July 2008, the trial court entered orders denying each of Defendants' motions and granting Plaintiff's motion to strike Defendants' affidavits. The trial court based these decisions on determinations that the affidavits were "untimely served[;]" that "[t]he complaint in this action was . . . served upon all defendants[;]" that "Defendants did not appear or otherwise answer the complaint[;]" that "Defendants did not appear or otherwise defend the motion [for summary judgment][;]" and that "[a]ll parties were properly before the Court" and "[t]he Court has jurisdiction in the matter." On 19 August 2008, Defendants gave notice of appeal to this Court from the trial court's orders.

Personal Jurisdiction

On appeal, Defendants contend that the trial court erred in denying their motion for relief from the summary judgment order on

the grounds that the trial court did not have personal jurisdiction over any of the Defendants at the time that summary judgment was granted. After careful consideration of the record and the applicable law, we agree.

"A challenge to the court's jurisdiction over the person . . . concerns whether the court has power, assuming it is properly invoked, to require the defendant to come into court to adjudicate the claim . . . .'" *Love v. Moore*, 305 N.C. 575, 579, 291 S.E.2d 141, 145 (1982). "If the court has no personal jurisdiction over the defendant, it has no right to require the defendant to come into court." *Moore*, 305 N.C. at 579, 291 S.E.2d at 145. As a result, the existence of jurisdiction over the person of Defendants was critical to the entry of a valid judgment in favor of Plaintiff.

Unlike the case of subject-matter jurisdiction, which even an appellate court may review *sua sponte*, N.C. Gen. Stat. § 1A-1, Rule 12(h) provides that "[a] defense of lack of jurisdiction over the person . . . is waived" if not timely raised in the answer, a responsive pleading, or by motion. As a general proposition, "Rule 12 of the North Carolina Rules of Civil Procedure requires that certain defenses must be raised by a pre-answer motion or in a responsive pleading." *In re Howell*, 161 N.C. App. 650, 655, 589 S.E.2d 157, 159 (2003) (citing N.C. Gen. Stat. § 1A-1, Rule 12(h) (2001)). A defendant over which the trial court lacks personal jurisdiction is not, however, without remedy even if he or she fails to file an answer or motion to dismiss on the grounds of lack

of personal jurisdiction since "he can [still] seek relief under Rule 60." *Autec, Inc. v. Southlake Holdings, Inc.*, 169 N.C. App. 232, 234, 609 S.E.2d 485, 486 (2005).

N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) allows the trial court to "relieve a party . . . from a final judgment" if "the judgment is void." N.C. Gen. Stat. § 1A-1, Rule 60(b)(4). "'[A] judgment or order . . . rendered without an essential element such as jurisdiction or proper service of process . . . is void.'" *Van Engen v. Que Scientific, Inc.*, 151 N.C. App. 683, 689, 567 S.E.2d 179, 184 (2002) (quoting *County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 157, 323 S.E.2d 458, 461 (1984)). "If a judgment is void, it is a nullity and may be attacked at any time[;] Rule 60(b)(4) is an appropriate method of challenging such a judgment." *Burton v. Blanton*, 107 N.C. App. 615, 616-17, 421 S.E.2d 381, 383 (1992) (citations omitted).

"[A] motion under Rule 60(b) is left to the sound discretion of the trial court, and the trial court's ruling will not be disturbed on appeal without a showing that the court abused its discretion." *Harris v. Harris*, 307 N.C. 684, 687, 300 S.E.2d 369, 372 (1983). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). For that reason, "a motion under Rule 60(b) has a much higher burden to overturn a decision on appeal

than Rule 12(b) . . ." *Autec*, 169 N.C. App. at 235, 609 S.E.2d at 487.

The existence of personal jurisdiction is a question of fact for the trial court. *Hiwassee Stables v. Cunningham*, 135 N.C. App. 24, 27, 519 S.E.2d 317, 320 (1999). "[F]indings [of fact] are not required," and "[w]here 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." *Strategic Outsourcing, Inc. v. Stacks*, 176 N.C. App. 247, 249, 625 S.E.2d 800, 802 (2006) (quoting *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217-18 (2000), *disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000)). However, "[t]he conclusions of law made by the judge upon the facts found by him are reviewable on appeal." *Norton v. Sawyer*, 30 N.C. App. 420, 422, 227 S.E.2d 148, 151, *cert. denied*, 291 N.C. 176, 229 S.E.2d 689 (1976) (citing *Moore v. Deal*, 239 N.C. 224, 79 S.E.2d 507 (1954)); *see also County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 161, 323 S.E.2d 458, 463 (1984) (holding that "*in personam* jurisdiction was not obtained over the defendant," which rendered the trial court's order void, so the court "therefore abused his discretion by denying the defendant's Rule 60(b)(4) motion").

"It is well established that a court may obtain personal jurisdiction over a defendant only by the issuance of summons and service of process by one of the statutorily specified methods." *Glover v. Farmer*, 127 N.C. App. 488, 490, 490 S.E.2d 576, 577

(1997) (citation omitted). "Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed." *Farmer*, 127 N.C. App. at 490, 490 S.E.2d at 577 (citation omitted). Although some issues concerning the adequacy of service on certain of the Defendants are discussed in Defendants' brief,[2] we do not believe that it is necessary for

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[2] Defendants Michael D. Sifen and Marc Sifen denied having been personally served with a copy of the summons and complaint. "[A] defendant that is not properly served may not have notice to answer or move for dismissal under Rule 12(b)." *Autec, Inc.*, 169 N.C. App. at 234, 609 S.E.2d at 486. According to the record, the summonses and complaints directed to Defendant Michael D. Sifen and Marc Sifen were addressed to 500 Central Drive, Virginia Beach, Virginia 23454 and were actually received by someone named Karen O'Donnell. Plaintiff's use of Federal Express to effectuate service on Defendants Michael D. Sifen and Marc Sifen suggests that Plaintiff attempted to serve the individual Defendants pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)c. According to N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)c, service may be made "[b]y depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt." In instances involving service made pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)c, proof of service shall be made "by affidavit of the serving party averring" "[t]hat a copy of the summons and complaint was deposited [with a designated delivery service]," "[t]hat it was in fact received as evidenced by the attached [delivery] receipt or other evidence satisfactory to the court of delivery to the addressee," and "[t]hat the genuine receipt or other evidence of delivery is attached." N.C. Gen. Stat. § 1-75.10. "The affidavit together with the return or delivery receipt or copy of the proof of delivery provided by the United States Postal Service signed by the person who received the mail or delivery if not the addressee raises a presumption that the person who received the mail or delivery and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process or was a person of suitable age and discretion residing in the addressee's dwelling house or usual place of abode." N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2). As a result of the fact that we reverse the trial court's orders on the basis of a lack of jurisdiction pursuant to the long arm statute in addition to a lack of the required minimum contacts, it is not necessary for us to reach the issue of whether Defendants Michael D. Sifen and Marc Sifen were properly served.

us to decide those service-related issues given our resolution of the fundamental personal jurisdiction issue raised by Defendants' appeal as set out below.

"The inquiry for determining whether a nonresident defendant is subject to *in personam* jurisdiction is two-fold: (1) whether the North Carolina long-arm statute allows jurisdiction over the defendant; and (2) whether the exercise of jurisdiction comports with due process requirements of the Fourteenth Amendment." *N.C. Farm Bureau Mut. Ins. Co. v. Holt*, 154 N.C. App. 156, 159, 574 S.E.2d 6, 8 (2002) (citing *Fraser v. Littlejohn*, 96 N.C. App. 377, 386 S.E.2d 230 (1989)). As a result, we will initially examine the record before the trial court in light of the provisions of N.C. Gen. Stat. § 1-75.4 for the purpose of ascertaining if any statutory basis existed for the trial court's conclusion that it had jurisdiction of the person of Defendants.

A: Long Arm Statute

According to Defendants, none of the provisions of N.C. Gen. Stat. § 1-75.4 authorize the exercise of jurisdiction in this case. After a careful review of the relevant statutory provisions, we are compelled to agree with this contention.

"North Carolina's long arm statute 'is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process.'" *Lulla v. Effective Minds, LLC*, 184 N.C. App. 274, 277, 646 S.E.2d 129, 132 (2007) (quoting *Jaeger v. Applied Analytical Indus. Deutschland GMBH*, 159 N.C. App. 167, 171, 582 S.E.2d 640, 644 (2003) (internal citations and quotations

omitted)). "The burden is on plaintiff to establish *prima facie* that one of the statutory grounds applies." *Marion v. Long*, 72 N.C. App. 585, 586, 325 S.E.2d 300, 302, *disc. review denied and appeal dismissed,* 313 N.C. 604, 330 S.E.2d 612 (1985).

Plaintiff's complaint merely asserted that the District Court of Brunswick County had personal jurisdiction over the Defendants under N.C. Gen. Stat. § 1-75.4 without identifying a specific subsection under which it contended that the trial court was entitled to assert personal jurisdiction over the Defendants. In addition, Plaintiff did not file a brief with this Court. As a result, we simply do not know the statutory basis under which Plaintiff contends that the trial court had jurisdiction over the person of Defendants. In order to avoid unfair prejudice to Plaintiff, we have, therefore, undertaken our own examination of the record and those statutory provisions that we conclude could conceivably be relevant to this case for the purpose of analyzing the jurisdictional claim asserted by Defendants on appeal.

N.C. Gen. Stat. § 1-75.4 provides that the General Court of Justice has jurisdiction over the person of prospective defendants in the following instances, among others:

> (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 . . . 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;

b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade; or

c. Unsolicited bulk commercial electronic mail was sent into or within this State by the defendant using a computer, computer network, or the computer services of an electronic mail service provider in contravention of the authority granted by or in violation of the policies set by the electronic mail service provider. Transmission of commercial electronic mail from an organization to its members shall not be deemed to be unsolicited bulk commercial electronic mail.

(5) Local Services, Goods or Contracts. -- In any action which: . . .

c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or

d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction[.]

> . . .
>
> (6) Local Property. -- In any action which arises out of: . . .
>
> c. A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this State at the time the defendant acquired possession or control over it[.]

In this case, Plaintiff had the burden of making a *prima facie* showing that the trial court had jurisdiction of the persons of the Defendants pursuant to one or more of the subsections of N.C. Gen. Stat. § 1-75.4.[3] *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 188 N.C. App. 302, 306, 655 S.E.2d 446, 449 (2008) (stating that "in any challenge to personal jurisdiction, 'plaintiff has the burden of proving *prima facie* that a statutory basis for jurisdiction exists'") (quoting *Godwin v. Mills*, 118 N.C. App. 341, 347, 455 S.E.2d 473, 479 (1995); *Long*, 72 N.C. App. at 586, 325 S.E.2d at 302 (stating that "[t]he burden is on plaintiff to establish *prima facie* that one of the statutory grounds applies"); *see also Gro-Mar Public Relations, Inc. v. Billy Jack Enterprises, Inc.*, 36 N.C. App. 673, 677, 245 S.E.2d 782, 784 (1978) (stating that "[t]he burden is on plaintiff to establish itself within some ground for the exercise of personal jurisdiction over defendant"). In determining whether a plaintiff has made the necessary *prima facie* showing that the trial court had personal jurisdiction over a defendant under N.C. Gen. Stat. § 1-75.4, this Court has

[3] We have omitted certain subsections of N.C. Gen. Stat. § 1-75.4 relating to situations we deem irrelevant to this case from the quotation set out in the text.

frequently focused on the allegations of the plaintiff's complaint. *Ridgeway Brands*, 188 N.C. App. at 306, 655 S.E.2d at 449 (holding that "plaintiff[']s conclusory allegation in the Second Amended Complaint is insufficient to establish that Trevally is the alter ego of Ridgeway for purposes of determining whether the courts of North Carolina have jurisdiction over Trevally"); *Gro-Mar Public Relations*, 36 N.C. App. at 677-78, 245 S.E.2d at 784-85 (addressing a personal jurisdiction issue on the basis of the allegations of the complaint).[4]

In its complaint, Plaintiff alleged that:

> 1. Plaintiff is a corporation organized and existing under the laws of the State of North Carolina with its principal place of business located in Brunswick County, North Carolina.
>
> 2. Defendant Michael D. Sifen, Inc.[,] is, upon information and belief, citizens and residents of the State of Virginia.
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> 3. Defendants Michael D. Sifen and Mark Sifen are, upon information and belief, citizens and residents of the State of Virginia.

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[4] Although the trial court made a limited number of factual findings in its order denying Defendants' motion for relief from judgment, those findings are focused on the extent to which Defendants had notice of Plaintiff's summary judgment motion and their failure to appear at the summary judgment hearing. As a result of the fact that the trial court did not make any findings of fact that are directly relevant to the issue of whether N.C. Gen. Stat. § 1-75.4 provided any basis for the assertion of personal jurisdiction over Defendants, the issue for this Court is whether there is any information in the record which would preclude a conclusion that the trial court did not abuse its discretion by concluding that Defendants' challenge to the trial court's exercise of personal jurisdiction over them should be rejected. *Strategic Outsourcing,* 176 N.C. App. at 249, 625 S.E.2d at 802.

> 4. Jurisdiction in this Court is proper pursuant to N.C.G.S. § 1-75.4.[5]
>
> 5. Defendants have in their possession two (2) vending machines of the value of three thousand nine hundred fifty dollars ($3,950.00), the property of the Plaintiff. Plaintiff is entitled to immediate possession of the same but defendants have refused at least three demands by the Plaintiff to deliver the same to Plaintiff.
>
> 6. Defendants have in their possession inventory located inside the aforementioned vending machines that has a value, upon information and belief, of $300.00. Plaintiff is entitled to immediate possession of the same but defendants have refused on at least three occasions to deliver same to Plaintiff.
>
> 7. Defendants have unlawfully kept possession of the property above described, upon information and belief, from and after Monday, January 15, 2007 and has thereby deprived the Plaintiff of its use, which generates income of approximately $20.00 per day.
>
> Wherefore plaintiff demands judgment against defendants for the recovery of possession of the property above described and for the sum of twenty dollars per day from and after January 15, 2007, or alternatively, judgment for the value of the machines, the inventory and twenty dollars per day from and after January 15, 2007, interest and costs, including reasonable attorney fees, and any other such recovery as the Court seems just.

In addition, Johnston's affidavit, which we set out in its entirety, states that:

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[5] This assertion is, obviously, a legal conclusion rather than a factual statement that this Court must consider in ascertaining whether the trial court abused its discretion by denying Defendant's motion for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(4).

1. I am the president of the plaintiff in the above-entitled action and that the following statements are made of personal knowledge and belief.

2. That the defendants, Michael D. Sifen, Inc., Michael D. Sifen and Mark Sifen have denied me and my employees right of access to a building owned by one or all of them.

3. Machines owned by the Plaintiff are located inside the building, the machines being a Single Ball (machine has toys in capsules) and a Speed King (gum ball machine with NASCAR Logo).

4. My employees have been denied access from and after January 15, 2007.

5. The facts stated in the complaint remain true to my best knowledge and belief.

6. To the best of my knowledge and belief, the defendants are not in military service, incompetent or infant.

A careful examination of these materials demonstrates that Plaintiff has failed to make a *prima facie* showing that the trial court had jurisdiction over Defendants pursuant to any provision of N.C. Gen. Stat. § 1-75.4. Plaintiff did not allege or show that Defendants "engaged in substantial activity within this State[;]" that "[s]olicitation or services activities were carried on within this State by or on behalf of the [D]efendant[;]" that "[p]roducts, materials or thing processed, serviced or manufactured by the [D]efendant were used or consumed, within this State in the ordinary course of trade;" that "[u]nsolicited bulk commercial electronic mail was sent into or within this State by the [D]efendant using a computer, computer network, or the computer services of an electronic mail service provider in contravention of

the authority granted by or in violation of the policies set by the electronic mail service provider[;]" that the action "[a]rises out of a promise, made anywhere to the [P]laintiff or to some third party for the [P]laintiff's benefit, by the [D]efendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value[;]" that the action "[r]elates to goods, documents of title, or other things of value shipped from this State by the [P]laintiff to the [D]efendant on his order or direction[;]" or that the action arises from "[a] claim that the [D]efendant return, restore, or account to the [P]laintiff for any asset or thing of value which was within this State at the time the [D]efendant acquired possession or control over it[.]" N.C. Gen. Stat. § 1-75.4. A careful reading of the complaint and Johnston's affidavits demonstrates that Plaintiff has simply failed to allege or show any occurrence within or involving contact with North Carolina which might confer jurisdiction pursuant to N.C. Gen. Stat. § 1-75.4. For example, Plaintiff did not allege or show that the parties entered into a contract in North Carolina, that the vending machines were delivered to Defendants from North Carolina, that Defendants had engaged in substantial activities in North Carolina, or that any other event which might justify an assertion of personal jurisdiction over Defendants pursuant to N.C. Gen. Stat. § 1-75.4 had ever occurred. As a result, we conclude that Plaintiff has failed to make a *prima facie* showing that the trial court had jurisdiction over the person of Defendants under North Carolina's long arm statute. *See*

Ridgeway Brands, 188 N.C. App. at 306, 655 S.E.2d at 449 (concluding that because the plaintiff's statement intended to establish personal jurisdiction pursuant to N.C. Gen. Stat. § 1-75.4(6)(c) was merely a "conclusory allegation," it did not constitute a *prima facie* showing of personal jurisdiction); *Uniprop Manufactured Housing Communities Income Fund II v. Home Owners Funding Corp.*, 753 F. Supp. 1315, 1321 (W.D.N.C. 1990) (stating that, "[a]lthough the Court can speculate[,] . . . the burden on Plaintiff in establishing in personam jurisdiction requires more than conjecture on the Court's part[,] [and] [a]ccordingly, the Court believes that Plaintiff has failed to establish that the North Carolina long-arm statute confers jurisdiction on this Court. . . ."). Finally, the total absence of information tending to show any basis for the assertion of personal jurisdiction over Defendants necessitates a conclusion that the trial court abused its discretion by denying Defendants' motion for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(4). In other words, we are simply unable to discern any reasoned basis upon which the trial court could have made adequately supported findings sufficient to justify any conclusion other than that the trial court lacked jurisdiction over the person of the Defendants and that the summary judgment order previously entered against Defendants was void. As a result, we hold that the trial court abused its discretion by denying Defendants' motion for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(4).

B: Minimum Contacts

Defendants further contend that the trial court's conclusion that it had personal jurisdiction over Defendants failed to "comport[] with due process requirements of the Fourteenth Amendment." *N.C. Farm Bureau Mut. Ins. Co. v. Holt*, 154 N.C. App. 156, 159, 574 S.E.2d 6, 8 (2002) (citing *Fraser v. Littlejohn*, 96 N.C. App. 377, 386 S.E.2d 230 (1989)). Because North Carolina's "long arm statute 'is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process[,]'" *Lulla v. Effective Minds, LLC*, 184 N.C. App. 274, 277, 646 S.E.2d 129, 132 (2007), we conclude that we should examine Defendant's alternative due process argument as well. After careful consideration of the record and briefs, we conclude that the trial court's assertion of jurisdiction over Defendants contravened the requirements of the due process clause of the Fourteenth Amendment as well.

"[D]ue process requires only that in order to subject a [nonresident] defendant to a judgment *in personam*, . . . he have 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, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278, 283 (1940)). "[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." *Hanson v.*

Denckla, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298 (1958). A critical component of this inquiry is whether the defendant had reason to expect that he might be subjected to litigation in the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980). This Court has listed five factors to be considered in determining whether a defendant has had sufficient minimum contacts with the forum state: "(1) quantity of the contacts between the defendant and the forum state, (2) quality and nature 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 of the parties." *Baker v. Lanier Marine Liquidators, Inc.*, 187 N.C. App. 711, 715, 654 S.E.2d 41, 44-45 (2007).

After a thorough review of the information in the record, we conclude that Plaintiff's complaint and Johnston's affidavit simply do not establish the requisite minimum contacts required to support the trial court's assertion of personal jurisdiction over Defendants. As we have already noted, the record simply contains no evidence that Defendants have had any contacts with North Carolina or that North Carolina has any interest in this litigation. The mere fact that Defendants allegedly denied a North Carolina corporation access to personal property held at a location in Virginia, without more, is simply insufficient to support a conclusion that Defendants have ever "purposefully avail[ed] [themselves] of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its

law." *Hanson*, 357 U.S. at 253, 2 L. Ed. 2d at 1298. We further conclude, given the absence of any information in the record tending to show that Defendants have ever had any contacts with North Carolina, and the absence of any basis upon which the trial court could have made sufficient factual findings tending to show that its decision to exercise personal jurisdiction over Defendants was consistent with the due process clause of the Fourteenth Amendment, we must necessarily conclude that the trial court abused its discretion by denying Defendants' motion for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(4). As a result, we hold that the trial court erred by denying Defendants' motion for relief from judgment for this reason as well.

Conclusion

Thus[6], for the reasons set forth above, the trial court's order denying Defendants' motion for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(4), is hereby reversed, and this case is remanded to the District Court of Brunswick County for the entry of an order allowing Defendants' motion for relief from judgment, vacating the trial court's summary judgment order, and dismissing this case without prejudice.

REVERSED and REMANDED.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).

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[6] In light of our holding that the evidence presented by Plaintiff was insufficient to support a finding that the District Court of Brunswick County had jurisdiction over the persons of Defendants in this case, we need not consider whether the trial court abused its discretion by striking the affidavits submitted by Defendants in support of their post-judgment motions.