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NO. COA12-1036  
NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2013

BELL & WATSON TELCOM CONSULTING  
GROUP, INC., KEVIN E. WALL AND  
ASSOCIATES, LLC AND KEVIN WALL,  
Plaintiffs,

v.

Catawba County  
No. 11 CVS 2328

JEFF KNAUS, DAVID SANBORNE,  
FREEDOM PROFIT RECOVERY, INC., FPR  
HOLDING, L.P. AND FPR TELECOM,  
LLC,  
Defendants.

Appeal by plaintiff from order entered 2 April 2012 by  
Judge Timothy S. Kincaid in Catawba County Superior Court.  
Heard in the Court of Appeals 27 February 2013.

*Attorney Matthew K. Rogers for plaintiff-appellant.*

*Sigmon, Clarke, Mackie, Hanvey & Ferrell, by Forrest A.  
Ferrell and Stephen L. Palmer, for defendant-appellees.*

*Parker Poe Adams & Bernstein, LLP, by Charles E. Raynal,  
IV, for defendant-appellant.*

BRYANT, Judge.

Where defendants made multiple visits to conduct business  
and attempted to enter into a contract with plaintiff within the

forum state, thereby purposefully availing themselves of the privilege of conducting activities within the forum state, we reverse the trial court's dismissal of plaintiff's actions for lack of personal jurisdiction.

*Facts and Procedural History*

Plaintiff Kevin Wall ("Wall"), a resident of Catawba County, North Carolina, is the sole shareholder and senior officer of both Bell & Watson Telecom Consulting Group, Inc. ("Bell & Watson"), a North Carolina corporation, and Kevin E. Wall and Associates, LLC ("Associates"), a North Carolina limited liability company. Wall uses his companies to provide telecommunication audit and consulting services. Wall conducts analyses of telecommunications data and provides consulting services for clients, typically over a period of time between two and twelve months, before receiving payment for his services. All computers, bookkeeping, and business operations are located at Wall's office in Hickory, North Carolina.

Defendant Jeff Knaus ("Knaus") is a citizen of California. Defendant David Sanborne ("Sanborne") is a citizen of Arizona. Knaus and Sanborne came to know and interact with Wall through their employment with defendants Freedom Profit Recovery, Inc., FPR Holdings, L.P. and FPR Telecom, LLC (collectively "FPR"), all companies operating from the state of Texas.

Wall and Sanborne first met in December 2009 when Wall visited Arizona to meet with Sanborne to seek a partnership with FPR. An agreement between FPR and Bell & Watson was executed on 25 January 2010, when Wall signed the agreement evidencing a two-year contract to provide telecommunication analysis and consulting services to FPR clients. Except for sales solicitations, all work pursuant to the contract was to be performed in Hickory, North Carolina. Sometime later, Sanborne introduced Wall to Knaus, a sales consultant for FPR who was responsible for soliciting business for FPR's services, which then included Wall's telecommunications services. Prior to August 2010, Knaus and Sanborne communicated with Wall more than 80 times via email and telephone to discuss telecommunications services for customers of FPR.

In July 2010, officers of FPR offered to buy Wall's business. The offer gave no indication that the officers envisioned that Wall would provide telecommunication services from any location other than his office in Hickory. Sanborne, acting independently of his FPR employers, advised Wall not to sell his company because FPR intended to steal his intellectual property. Thereafter, Knaus and Sanborne visited Wall in North Carolina, purportedly to help Wall negotiate a deal with FPR that was more favorable to Wall. However, at some point, Wall,

Knaus and Sanborne began discussions about entering into their own business agreement. Knaus and Sanborne visited Wall in Hickory, North Carolina in August, September and October 2010, for the purpose of discussing a business venture between the three of them. During one of their visits, Knaus and Sanborne each provided Wall with a personal check in the amount of \$12,000. Meanwhile, Knaus and Sanborne instructed Wall on how to amend his service contract with FPR, ultimately causing Wall to ask officials of FPR for a new agreement. FPR notified Wall in December 2010 that the agreement between FPR and Wall had effectively been terminated.

Knaus sent Wall a new confidential binding agreement dated 12 November 2010 that set forth Knaus's intention to form a new company with Wall. The document stated that Knaus and Wall, along with Bell & Watson and Associates, would form "either a Delaware limited liability company or a Delaware C Corporation." In January 2011, Knaus sent Wall an addendum to their November agreement, which Wall signed in North Carolina and returned. According to Wall, previously agreed upon payments were withheld from Wall after he signed every document Knaus requested. In May 2011, Knaus informed Wall of his intent to dissolve their agreement.

On 28 July 2011, Wall filed suit in Catawba County Superior Court naming as defendants, Knaus, Sanborne and FPR, and alleging numerous breach of contract and tort claims. On 7 October 2011, defendants Knaus and Sanborne filed a motion to dismiss for improper venue and lack of personal jurisdiction. Defendant FPR filed a motion to dismiss for improper venue on 2 November 2011. FPR also filed an answer and counterclaim to Wall's complaint, as well as a cross-claim against Knaus and Sanborne. Knaus and Sanborne then filed a motion to dismiss FPR's cross-claim for improper venue and lack of personal jurisdiction. Both Plaintiff Wall and Defendant FPR, asserting that venue and jurisdiction in North Carolina were proper, filed memoranda in opposition to Knaus and Sanborne's motions to dismiss. After a 12 March 2012 hearing concerning the motions, the trial court granted Knaus and Sanborne's motions to dismiss for lack of personal jurisdiction. Plaintiff Wall and defendant FPR entered separate notices of appeal.

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On appeal, Wall raises one main issue: whether the trial court erred by granting defendants' motion to dismiss for lack of personal jurisdiction by failing to find defendants Knaus and Sanborne had sufficient minimum contacts with North Carolina and that, therefore, exercising personal jurisdiction over

defendants would not violate their due process rights. Defendant FPR cross appeals, also asserting that the trial court erred in finding North Carolina did not have personal jurisdiction over defendants Knaus and Sanborne.

When determining whether a North Carolina court can exercise jurisdiction over non-resident defendants, a two-step analysis is utilized. *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 259, 625 S.E.2d 894, 898 (2006). We look first at our long-arm statute, General Statutes, section 1-75.4(1)(d), which provides for the exercise of jurisdiction over a party who "engage[s] in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." See N.C. Gen. Stat. § 1-75.4(1)(d) (2011). If the statute confers personal jurisdiction over the defendant, we then determine whether the exercise of personal jurisdiction over the defendant violates defendant's due process rights. *A.R. Haire, Inc.*, 176 N.C. App. at 259, 625 S.E.2d at 899.

"When personal jurisdiction is alleged to exist pursuant to the long-arm statute, the question of statutory authority collapses into one inquiry—whether the defendant has the minimum contacts with North Carolina necessary to meet the requirements of due process." *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 143, 515 S.E.2d 46, 49 (1999). In order for a

defendant to be properly subject to personal jurisdiction that comports with due process, he must "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, 66 S. Ct. 154, 158 (1945) (quoting from *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 343 (1940)). "In each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986).

The court commonly looks to several factors to determine whether a non-resident party established minimum contacts with a forum state: (1) the quantity of the contacts; (2) the nature and quality of the contacts; (3) the source and connection of the cause of action with those contacts; (4) the interest of the forum state; and (5) the convenience of the parties. *A.R. Haire, Inc.*, 176 N.C. App. at 260, 625 S.E.2d at 899. These factors are not to be applied mechanically, but should be balanced based on the facts of each individual case to ensure fairness among the parties. *Id.* "If a defendant has

'purposefully directed' activities towards the state's residents, it has 'fair warning' that it may be sued in this forum, and the assertion of specific jurisdiction is proper." *Replacements, Ltd.*, 133 N.C. App. at 144, 515 S.E.2d at 50 (citations omitted).

The determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum is a question of fact. The standard of review of an order determining personal 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.

*Id.* at 140-41, 515 S.E.2d at 48 (internal citations omitted).

"Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Nat'l Util. Review, LLC v. Care Ctrs., Inc.*, 200 N.C. App. 301, 303, 683 S.E.2d 460, 463 (2009) (internal quotation marks omitted).

In its order dismissing the case, the trial court made the following findings of fact and conclusions of law:

1. Defendant Jeff Knaus is a citizen and resident of the State of California and does not have sufficient minimum contacts with the State of North Carolina for it's [sic] courts to exercise jurisdiction over him.
2. Defendant David Sanborne is a citizen and resident of the State of Arizona and does not have sufficient minimum contacts



with the State of North Carolina for it's [sic] courts to exercise jurisdiction over him.

BASED ON THE FOR[E]GOING, the Court concludes that Defendants' Motions should be allowed.

IT IS THEREFORE ORDERED, that the Plaintiff's Complaint against Defendants Jeff Knaus and David Sanborne should be dismissed and hereby is dismissed pursuant to N.C.R.P. 12(b)(2).

IT IS FURTHER ORDERED, that Defendants Freedom Profit Recovery, Inc., FPR Holdings, L.P. and FPR Telecom, LLC's Cross-Claims against Defendants Jeff Knaus and David Sanborne should be and they hereby are dismissed pursuant to N.C.R.P. 12(b)(2).

In findings acknowledged in open court, but not included in the written order, the trial court noted that Sanborne came to North Carolina on four occasions, Knaus came to North Carolina on three occasions, and that no contracts were formed during the first three visits. In addition, the court noted that "[t]here were emails and telephone calls also made."

Wall argues that the undisputed facts presented to the trial court were sufficient to support the assertion of jurisdiction over defendants. We agree.

We look first to the (1) quantity, and (2) nature and quality of Knaus and Sanborne's contacts by assessing the uncontroverted facts presented to the trial court:

- Wall is a citizen of North Carolina,

and at all relevant times resided in Hickory, and his two companies Bell & Watson Telecom Consulting Group, Inc. and Kevin E. Wall and Associates, LLC are headquartered in the state of North Carolina.

- August 2010: At Wall's request, Knaus and Sanborne flew to North Carolina to discuss a business partnership with their employers FPR. No agreements or contracts were executed at this meeting.

- Prior to their August 2010 meeting, Knaus sent Wall more than 50 emails and made more than 50 phone calls regarding FPR business to be performed in North Carolina. Sanborne sent Wall more than 30 emails and made more than 30 phone calls regarding FPR business to be performed in North Carolina.

- September 2010: Knaus and Sanborne traveled to North Carolina to discuss a possible business relationship. No agreements or contracts were executed at this meeting.

- October 2010: Knaus and Sanborne traveled to North Carolina to meet with Wall. No business agreements or contracts were executed during this meeting.

- 21 October 2010: Knaus (using an alias email account provided by FPR under the name Jeff Smith) emailed Wall instructing Wall how to cancel agreement with FPR.

- During one of the three above visits, Knaus and Sanborne told Wall that he needed more office space at his North Carolina office for them to use when they visited.

- September or October 2010: Knaus and Sanborne personally delivered checks in the amount of \$12,000 to Wall while they were in

North Carolina.

- On each of the trips to North Carolina, Knaus and Sanborne discussed the future of the business, promised the financing for the business's growth, and promised there would be enough money to pay each of the newly formed company's employees, all of whom were to be based in North Carolina.
  
- Knaus wanted Wall and two of Wall's current employees to provide telecommunications services from North Carolina, and stated that he wanted Barbara Frye, another current employee for Wall in North Carolina, to be the office manager in the parties' Newco Agreement.
  
- 12 November 2010: Knaus presented Wall with "Bell & Watson Newco Confidential Binding Agreement" document that laid out the terms of ownership, compensation, and agreements between Knaus and Wall to form a new company together. Knaus mailed the document to Wall in North Carolina. Wall was told he must sign the document and return it to receive payments that Knaus and Sanborne had promised him. Sanborne was not a signatory to this agreement.
  
- Knaus sent the "Bell & Watson Newco Confidential Binding Agreement" to Wall in North Carolina, where Wall signed it and returned the contract to Knaus in California, where Knaus signed it.
  
- 29 November 2010: Knaus emailed Wall, digitally attaching his proposed edits to the service contract Wall was negotiating with FPR (The Wall-FPR agreement was terminated by FPR in December).
  
- 28 January 2011: Knaus sent the "Addendum to the Bell & Watson Newco

Agreement" to Wall in North Carolina, which Knaus signed and returned.

- February 2011: Sanborne hired a business consultant to travel to North Carolina to review Wall's business and books. Sanborne paid the consultant to do the work and paid for his travel to North Carolina.

- April 2011: Sanborne made a final trip to North Carolina to meet with Wall to determine how Wall and Knaus could terminate their business relationship.

- 16 May 2011: Knaus responded to Wall's proposal to resolve issues between Wall, Knaus, and Sanborne, stating that the parties needed to break up their new company. Knaus stated his plan to dissolve the company; asked for access to Wall's financial bookkeeping records, which were located in North Carolina; and alleged Wall had committed multiple violations of the "Bell & Watson NewCo Confidential Binding Agreement."

- 10 June 2011: Knaus called Matthew Rogers, attorney for Wall, located in Hickory, North Carolina. Rogers told Knaus that he should speak to Knaus' counsel. Knaus stated that he had not retained counsel.

- 9 June 2011 - 16 February 2012: Knaus called Rogers at least eight times and sent Rogers at least 40 emails pertaining to the subject matter of the lawsuit which was pending in Superior Court in Catawba County, North Carolina.

- 14 June 2011 - 3 August 2011: Sanborne emailed Rogers more than eight times. One email indicates his request to have a

separate agreement from Knaus because Sanborne did not sign many of the documents executed between Wall and Knaus.

- January 2011 - August 2011: Wall received at least 100 emails and 100 phone calls from Sanborne regarding the subject matter of the lawsuit.

Next, we look to (3) the source and connection of the cause of action with defendants' contacts. Knaus and Sanborne assert that Wall's first meeting with Sanborne in 2009 prior to establishing any contractual relationship with FPR was the source of the cause of action. However, based on the complaint along with other documents contained in the record before us, it is clear that the causes of action alleged in the complaint arise from Knaus and Sanborne's efforts to induce Wall to terminate his agreement with FPR and to enter into a separate venture with Knaus and Sanborne after the FPR agreement was terminated.

As for factor (4) - the interest of the forum state - North Carolina clearly has an interest in exercising jurisdiction over tort actions alleged to have occurred within this state. See *Cooper v. Shealy*, 140 N.C. App. 729, 735, 537 S.E.2d 854, 858 (2000) ("in light of the powerful public interest of a forum state in protecting its citizens against out-of-state tortfeasors, the court has more readily found assertions of

jurisdiction constitutional in tort cases.”) (internal citations omitted). Factor (5), concerning convenience of the parties, appears to significantly weigh in favor of the exercise of jurisdiction since all of Wall’s business operations are in North Carolina, including books and financial records. Three of Wall’s North Carolina employees – Mr. Terrell, Ms. Frye, and Mr. Herrin – who met with defendants at the Hickory, North Carolina office and who were guaranteed future employment by defendants, will be witnesses at trial. Further, in an affidavit and memo opposing the motion to dismiss, Wall alleges his North Carolina businesses are small and, due to defendant’s tortious conduct, Wall is not financially capable of litigating in an out-of-state forum.

Based on the foregoing, we find Knaus and Sanborne’s contacts with North Carolina sufficient to satisfy the requirements of North Carolina’s long-arm statute and to comport with due process. Maintaining this lawsuit in North Carolina does not offend “traditional notions of fair play and substantial justice,” as Knaus and Sanborne have purposefully availed themselves of the privilege of conducting activities within this state. We therefore reverse the order of the trial court and remand for further proceedings.

Reversed and remanded.

Judges ELMORE and ERVIN concur.

Report per Rule 30(e).