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NO. COA12-1140  
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

NORTH CAROLINA BOARD OF PHARMACY,  
Plaintiff,

v.

Wake County  
No. 11 CVS 7970

RICHARD A. NAJARIAN d/b/a  
BRUCE MEDICAL SUPPLY,  
Defendant.

Appeal by defendant from order entered 5 June 2012 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 27 February 2013.

*Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Clinton R. Pinyan and D.J. O'Brien III, for plaintiff-appellee.*

*Bailey & Dixon, L.L.P., by Carson Carmichael, III, for defendant-appellant.*

GEER, Judge.

Defendant Richard A. Najarian d/b/a Bruce Medical Supply appeals from the trial court's order denying his motion to dismiss for lack of personal jurisdiction. Given the quantity, in terms of volume and dollar amount, of defendant's sales to North Carolina customers and its shipments into North Carolina,

we hold that the trial court properly determined that it had specific personal jurisdiction over defendant in this action.

Facts

On 23 May 2011, plaintiff North Carolina Board of Pharmacy filed an action against defendant seeking to enjoin defendant from delivering medical devices and medical equipment to customers within North Carolina without an active permit issued by plaintiff. In its complaint, plaintiff alleged that it is an occupational licensing board that is responsible for enforcing the North Carolina Pharmacy Practice Act and that defendant operates a sole proprietorship doing business as Bruce Medical Supply with a principal place of business in Waltham, Massachusetts.

The complaint alleged that defendant sells medical supplies through mail-order catalogs and an internet website to customers throughout the United States, including North Carolina, and offers products pertaining to, among other things, mobility, respiration, wound and skin care, urologicals, and diagnostics. The complaint further alleged that N.C. Gen. Stat § 90-85.22(a) requires any person or business -- whether located in-state or out-of-state -- that dispenses or delivers "devices" to users in North Carolina to register annually with plaintiff and obtain a device permit (if that person does not otherwise have a North

Carolina pharmacy permit). The complaint alleged that N.C. Gen. Stat. § 90-85.3(e) defines "device" to include "'an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent or other similar or related article . . . whose label or labeling bears the statement "Caution: federal law requires dispensing by or on the order of a physician."'"

In addition, the complaint alleged N.C. Gen. Stat. § 90-85.22(b) requires any person or business -- whether located in-state or out-of-state -- delivering "medical equipment" to users in North Carolina to register annually with plaintiff and obtain a medical equipment permit (if that person does not otherwise have a North Carolina pharmacy or device permit). N.C. Gen. Stat. § 90-85.3(11) generally defines "medical equipment" to include a device, ambulation assistance equipment, mobility equipment, rehabilitation seating, oxygen and respiratory care equipment, rehabilitation environmental control equipment, diagnostic equipment, and a bed prescribed by a physician to treat or alleviate a medical condition.

The complaint alleged that pursuant to N.C. Gen. Stat. § 90-85.22 and its implementing regulations, plaintiff issues Device and Medical Equipment Dispensing Permits ("DME permits") to qualified applicants. According to the complaint, defendant does not have and has never had a DME permit; nor has he ever

registered with plaintiff or submitted an application for a DME permit. The complaint asserted that defendant actively markets products that fall within the statutory definitions of "devices" and "medical equipment" through his website and catalogs and that defendant had customers in North Carolina to whom he had delivered devices and medical equipment. Finally, the complaint alleged that, beginning in January 2011, defendant contacted plaintiff regarding whether he was required to obtain a DME permit from plaintiff, that defendant was informed that he was required to do so prior to delivering devices or medical equipment to North Carolina customers, and that defendant nevertheless asserted "spurious arguments" about why he was not required to obtain the permit.

Defendant filed a motion to dismiss on 25 July 2011 and an amended motion to dismiss on 25 April 2012. Defendant's amended motion asserted that the trial court lacked personal jurisdiction over defendant pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure.

On 5 June 2012, the trial court entered an order denying defendant's amended motion to dismiss. The trial court found the following relevant facts. Defendant's website and mail-order catalogs offered medical supplies for sale nationwide, including to customers in North Carolina. The website allowed

customers to place an order for medical supplies, pay for the order on the website, receive payment confirmation from defendant, and receive the equipment at the furnished address. The website also offered to ship mail-order catalogs directly to customers nationwide, including customers in North Carolina, and directed customers to call, fax, or email customer service representatives.

The court further found that over a three-year period, defendant delivered medical supplies to North Carolina customers on 1,454 occasions totaling \$150,189.61, and plaintiff contended that some or all of those supplies constituted devices or medical equipment under North Carolina law. Beginning in January 2011, defendant contacted plaintiff on multiple occasions and was informed that he was required to obtain a DME permit before delivering devices or medical equipment to North Carolina customers.

Based on its findings, the court concluded that it had jurisdiction over defendant as follows:

20. By soliciting sales from, and selling products to, customers in North Carolina on 1,454 occasions totaling \$150,189.61 between June 2, 2008 and June 21, 2011, Defendant has purposefully availed himself of the privilege of conducting activities within the State of North Carolina with the benefits and protection of its laws.

21. Defendant's sales of medical supplies to customers in North Carolina are directly related to the basis of Plaintiff's claim for injunctive relief. Plaintiff's Complaint contends that some or all of these medical supplies are "devices" and/or "medical equipment," that require Defendant to obtain a DME permit from the Board. Stated differently, this controversy arises out of Defendant's contacts with North Carolina.

22. Defendant has sufficient minimum contacts with North Carolina necessary to meet the requirements of both the North Carolina Long Arm Statute, N.C. Gen. Stat. § 1-75.1 et seq., and due process.

Defendant appealed the denial of his motion to dismiss to this Court.

#### Discussion

Initially, we note that defendant's appeal is from an interlocutory order. This Court nonetheless has jurisdiction because "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . . ." N.C. Gen. Stat. § 1-277(b) (2011). See *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 614, 532 S.E.2d 215, 217 (2000) (holding denial of motion to dismiss for lack of jurisdiction is immediately appealable).

"In order to determine whether North Carolina courts have personal jurisdiction over a nonresident defendant, a court must

apply a two-step analysis: 'First, the transaction must fall within the language of the State's "long-arm" statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution.'" *Wells Fargo Bank, N.A. v. Affiliated FM Ins. Co.*, 193 N.C. App. 35, 39, 666 S.E.2d 774, 777 (2008) (quoting *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986)).

This Court recognized in *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005) that,

[t]ypically, the parties will present personal jurisdiction issues in one of three procedural postures: (1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues.

This case falls within the third category.

"When both parties submit affidavits, 'the court may hear the matter on affidavits presented by the respective parties, . . . [or] the court may direct that the matter be heard wholly or partly on oral testimony or depositions.'" *Wells Fargo Bank*, 193 N.C. App. at 40, 666 S.E.2d at 777 (quoting *Banc of Am.*

*Secs.*, 169 N.C. App. at 694, 611 S.E.2d at 183). "If the court decides the matter based solely on the affidavits submitted by the parties, 'the plaintiff has the initial burden of establishing *prima facie* that jurisdiction is proper.'" *Id.* (quoting *Banc of Am. Secs.*, 169 N.C. App. at 694, 611 S.E.2d at 183). However, "[t]his procedure does not relieve the plaintiff of its burden of proving personal jurisdiction by a preponderance of the evidence at trial." *Id.*

"The determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum is a question of fact." *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140, 515 S.E.2d 46, 48 (1999). Although it is ordinarily this Court's duty to determine whether the findings of fact are supported by competent evidence, *id.* at 140-41, 515 S.E.2d at 48, here, defendant does not contest the trial court's findings and they are therefore presumed to be supported by competent evidence and are binding on appeal, *Wells Fargo Bank*, 193 N.C. App. at 40, 666 S.E.2d at 777-78. Consequently, "our review is limited to a determination as to whether the findings of fact support the conclusions of law." *Id.*, 666 S.E.2d at 778.

Defendant challenges only the trial court's determination that he has sufficient contacts with the forum to be subject to



personal jurisdiction under federal due process requirements and does not dispute the applicability of North Carolina's long-arm statutory authority. Accordingly, we address only whether the trial court's assertion of jurisdiction over defendant would violate due process. See *Dailey v. Popma*, 191 N.C. App. 64, 69, 662 S.E.2d 12, 16 (2008) ("Since neither plaintiff nor defendant disputes the applicability of the long-arm statute, the sole issue before this Court is whether the trial court properly concluded that asserting jurisdiction over defendant would violate due process.").

"To satisfy the due process prong of the personal jurisdiction analysis, there must be sufficient 'minimum contacts' between the nonresident defendant and our state 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Skinner v. Preferred Credit*, 361 N.C. 114, 122, 638 S.E.2d 203, 210 (2006) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102, 66 S. Ct. 154, 158 (1945)). "Application of the 'minimum contacts' rule 'will vary with the quality and nature of the defendant's activity, but it 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.'" *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 705, 208 S.E.2d 676, 679 (1974) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298, 78 S. Ct. 1228, 1240 (1958)). The "relationship between the defendant and the forum must be 'such that he should reasonably anticipate being haled into court there.'" *Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 786 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501, 100 S. Ct. 559, 567 (1980)).

"The United States Supreme Court has recognized two bases for finding sufficient minimum contacts: (1) specific jurisdiction and (2) general jurisdiction." *Wells Fargo Bank*, 193 N.C. App. at 45, 666 S.E.2d at 780. "Specific jurisdiction exists when 'the controversy arises out of the defendant's contacts with the forum state.'" *Id.* (quoting *Tom Togs, Inc.*, 318 N.C. at 366, 348 S.E.2d at 786). "General jurisdiction may be asserted over a defendant 'even if the cause of action is unrelated to defendant's activities in the forum as long as there are sufficient continuous and systematic contacts between defendant and the forum state.'" *Id.* (quoting *Replacements*, 133 N.C. App. at 145, 515 S.E.2d at 51).

Here, plaintiff contends that defendant's contacts with the forum subject defendant to specific jurisdiction. Plaintiff seeks to enjoin defendant from shipping certain merchandise,

which plaintiff argues constitutes medical equipment and devices, to North Carolina customers without a DME permit. Plaintiff alleged in its complaint that defendant's prior sales of medical supplies to North Carolina customers are precisely what subject him to permitting by plaintiff. Thus, as concluded by the trial court, "[d]efendant's sales of medical supplies to customers in North Carolina are directly related to the basis of Plaintiff's claim for injunctive relief" such that "this controversy arises out of Defendant's contacts with North Carolina."

The issue before us is, therefore, specific jurisdiction and we need not address plaintiff's additional argument that general jurisdiction exists here. *See id.* ("Because plaintiff's contentions regarding [the nonresident defendant insurance broker's] minimum contacts relate to the events giving rise to this cause of action, we need not address whether general jurisdiction exists. The issue before us is specific jurisdiction.").

This Court has previously used the test employed by the Fourth Circuit to determine whether activity conducted over an out-of-state defendant's internet website presents the minimum contacts necessary for specific jurisdiction. *Havey v. Valentine*, 172 N.C. App. 812, 816-17, 616 S.E.2d 642, 647-48

(2005) (employing test set out in *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002)). In *ALS Scan*, the Fourth Circuit itself adopted the approach laid out in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). *ALS Scan*, 293 F.3d at 713.

The Fourth Circuit explained that the *Zippo* Court adopted a "'sliding scale' for defining when electronic contacts with a State are sufficient" such that "'the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.'" *Id.* (quoting *Zippo*, 952 F. Supp. at 1124). The Fourth Circuit elaborated:

"At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the

exchange of information that occurs on the Web site."

*Id.* at 713-14 (emphasis added) (quoting *Zippo*, 952 F. Supp. at 1124).

The Fourth Circuit then "adopt[ed] and adapt[ed] the *Zippo* model" to establish the following test:

[A] State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts. Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received. Such passive Internet activity does not generally include directing electronic activity into the State with the manifested intent of engaging [in] business or other interactions in the State thus creating in a person within the State a potential cause of action cognizable in courts located in the State.

*Id.* at 714.

Here, defendant does not dispute that, during a roughly three-year period, he made 1,454 sales to North Carolina customers through his website, which generated total revenue of \$150,189.61. Defendant thus directed his activity to North Carolina by accepting nearly 1,500 orders from North Carolina residents -- from his website, catalogs, or both -- and then

shipping the ordered items to the North Carolina addresses furnished by the customers. See *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 114-15, 516 S.E.2d 647, 650-51 (1999) (holding out-of-state defendant purposefully availed itself of privilege of conducting business within this State through defendant's activity of "soliciting sales and selling products within North Carolina" by mailing at least 1,937 sales catalogs to North Carolina residents in the fall of 1997, selling products to 239 North Carolina residents in that season, and generating over \$12,000.00 in sales).

Moreover, for electronic purchases, defendant sent North Carolina customers electronic receipts upon acceptance of the orders. It was these sales of items that plaintiff alleged constituted devices or medical equipment that gave rise to this lawsuit. On these facts, all of the criteria of the Fourth Circuit's adopted *Zippo* test are met.

Defendant nonetheless cites *H. V. Allen Co. v. Quip-Matic, Inc.*, 47 N.C. App. 40, 49, 266 S.E.2d 768, 772 (1980), where the Court held that there was no personal jurisdiction over the defendant. In *H. V. Allen*, a breach of contract case, the Court explained that the defendant's only contacts with the forum consisted of filling orders for six North Carolina companies for a total value of \$6,200.00, making seven long-distance calls to

North Carolina, corresponding with three firms in North Carolina, and executing a written contract with a North Carolina company naming it the defendant's manufacturer's representative and sending the representative some sales materials. *Id.* at 46, 266 S.E.2d at 771. Although the Court did not specify whether its analysis was directed to general or specific jurisdiction, the Court's discussion of facts which were unrelated to the cause of action, including the six filled orders for \$6,200.00 and the designation of a manufacturer's representative, indicate the Court was addressing whether the defendant had sufficient contacts to be subject to general jurisdiction in North Carolina. *Id.* Accordingly, *H. V. Allen* is irrelevant to the specific jurisdiction analysis here.

We conclude that, on the facts of this case, the trial court properly determined that defendant purposefully availed himself of the privilege of conducting business activities in North Carolina. We, therefore, affirm the order denying defendant's motion to dismiss.

Affirmed.

Judges STEELMAN and ROBERT N. HUNTER, JR. concur.

Report per Rule 30(e).