NO. COA12-1456
NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2013

GARY W. BRYANT,
Plaintiff,

v. Catawba County
No. 11-CVS-3106

AP INDUSTRIES, DANIEL BENJAMIN, and INVESTISSEMENTS GENERATIONS, INC.,
Defendants.

Appeal by Plaintiff from order entered 6 August 2012 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 10 April 2013.

Law Offices of Matthew K. Rogers, PLLC, by Matthew K. Rogers, for Plaintiff.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Stephen L. Palmer, Jeffrey T. Mackie, and Andrew J. Howell, for Defendants.

DILLON, Judge.

Defendant AP Industries (AP) is a furniture manufacturer based in Quebec, Canada. Defendant Investissements Generations, Inc. (IG) is the parent company of AP and is also based in Quebec. Defendant Daniel Benjamin (Benjamin), a resident of

Quebec, is the majority owner of IG and serves as both general manager of AP and president of IG. Gary W. Bryant (Plaintiff), a North Carolina resident, was employed by AP as a sales representative from 1997 until December 2010. Plaintiff brought the present action against AP, IG, and Benjamin, seeking damages arising from his employment with AP. The trial court granted AP's motion to dismiss for improper venue based on a forum selection clause included in an agreement between Plaintiff and AP and granted IP's and Benjamin's motions to dismiss for lack of personal jurisdiction. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Factual & Procedural Background

Plaintiff was hired as a sales representative for AP in March 1997. In the spring of 1998, Benjamin offered Plaintiff a position "to manage the Marketing and Sales office of the Company in the USA for adult furniture." The terms of Plaintiff's employment with AP were reduced to writing on 30 September 1998 (the 1998 Agreement). The 1998 Agreement provided that Plaintiff would "operate mainly out of his home in High Point, North Carolina"; that he would be offered the opportunity to purchase a 10 percent ownership interest in AP –

which he later learned was a 10 percent ownership interest in IG; and that he would receive a $20,000.00 bonus.

For the next several years, Plaintiff solicited furniture sales for AP throughout the southern United States, including North Carolina. Pursuant to the 1998 Agreement, Plaintiff's compensation increased each year through 2002, when his salary reached $183,230.88. Plaintiff alleges that beginning in March 2005 his compensation was reduced in contravention of the 1998 Agreement. Plaintiff further alleges that in 2007, Benjamin informed Plaintiff that Plaintiff was required to extend a loan to AP; and the record reflects a loan from Plaintiff to AP in the amount of $30,000.00. In 2009, Benjamin informed Plaintiff that Plaintiff's salary would be reduced by 50 percent. Plaintiff avers that he objected to this reduction in his pay. In May 2010, Benjamin notified Plaintiff that AP would no longer pay him a salary and that he was required to sell his 10 percent ownership interest back to AP. Plaintiff sold his ownership interest in exchange for $20,000.00 through a "Share Purchase Agreement" executed on 21 May 2010.

In an email dated 7 May 2010, Benjamin set forth "new conditions" of Plaintiff's employment, which were to take effect "on May 17th, 2010, when the documents [would] be signed[.]"

The email outlines a compensation plan for Plaintiff and his son, whom Benjamin had previously told Plaintiff he would hire. The email also appears to provide a means for reimbursing Plaintiff for the loan he had extended to AP in 2007.

On 17 October 2010, Plaintiff entered into a written agreement with AP (hereinafter, the 2010 Agreement) providing a separate commission structure for sales made by Plaintiff in the "contract market." The 2010 Agreement provided that Plaintiff's assigned geographic territory would be limited to four states, including North Carolina. The 2010 Agreement further provided that AP would pay Plaintiff a 4 percent commission for "contract sales," defined as follows:

> For purposes of this agreement, the contract [market] is a separate market from the Furniture Retail business and is defined by a sale made directly to the source without any contact or interaction with any of the established retail market or any of their partners.

The 2010 Agreement also included a forum selection clause, which designated Quebec City as the appropriate venue for any action arising out of the agreement.

However, by letter dated 3 December 2010, Benjamin informed Plaintiff that Plaintiff's employment arrangement with AP was no longer "working the way [AP was] hoping it would" and terminated

Plaintiff's employment with AP as of that day.

On 5 October 2011, Plaintiff filed a complaint in Catawba County Superior Court asserting claims against AP, Benjamin, and IG. Plaintiff's complaint alleged, *inter alia*, that Defendants had unilaterally reduced his compensation without consideration and asserted claims for fraud, breach of the covenant of good faith and fair dealing, withholding commissions, and engaging in unfair trade practices. On 9 December 2011, AP filed a Rule 12(b)(3) motion to dismiss Plaintiff's claims for improper venue, citing the forum selection clause set forth in the 2010 Agreement. Additionally, Benjamin and IG filed Rule 12(b)(2) motions to dismiss Plaintiff's claims for lack of personal jurisdiction, contending that they had insufficient minimum contacts with the State of North Carolina. Defendants submitted a verified affidavit from Benjamin in support of their motions to dismiss on 8 March 2012. On 9 March 2012, Plaintiff filed a memorandum in opposition to Defendants' motions to dismiss and his own verified affidavit in support of his position.

Defendants' motions to dismiss came on for hearing in Catawba County Superior Court on 12 March 2012. After hearing arguments from both sides, the trial court orally granted Defendants' motions to dismiss. On 15 March 2012, Plaintiff

filed a motion requesting that the trial court make findings of fact in support of its ruling. On 6 August 2012, the trial court entered a written order containing findings of fact reflecting the court's decision to grant Defendants' motions to dismiss. From this order, Plaintiff appeals.

II. Analysis

A. Venue

Plaintiff contends that the trial court erred in dismissing his claims against AP for improper venue. We agree.

The trial court cited the forum selection clause included in the 2010 Agreement as its basis for granting AP's motion to dismiss. The forum selection clause in the 2010 Agreement provided as follows:

> This contract will be govern [sic] by the laws of the province of Quebec. Any litigation between the parties will be heard in the jurisdiction of Quebec city [sic].

Our review of Plaintiff's complaint, however, reveals that Plaintiff's claims pertain primarily to the 1998 Agreement, which does not include a forum selection clause, and to representations made by Benjamin to Plaintiff prior to the execution of the 2010 Agreement. Plaintiff does not expressly assert any claims under the 2010 Agreement in his complaint. Moreover, there is no indication that the parties intended for

the 2010 Agreement to supersede or terminate the terms of the 1998 Agreement,[1] and we note counsel for Defendants' statement at the 12 March 2012 hearing that the "1998 contract seems to be the formative contract that's *still valid and enforceable*." Accordingly, we conclude that the trial court erred in dismissing Plaintiff's claims on the basis of the 2010 Agreement's forum selection clause, as that clause had no bearing on Plaintiff's claims arising out of the 1998 Agreement or stemming from conduct that was otherwise outside the scope of the 2010 Agreement.

To the extent that Plaintiff's claims do pertain to the 2010 Agreement, we are cognizant that "mandatory forum selection clauses recognized by our appellate courts have contained words such as "exclusive" or "sole" or "only" which indicate that the contracting parties intended to make jurisdiction exclusive." *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 568, 566 S.E.2d 160, 162 (2002). We believe that the language in the

[1] Provision 4 of the 1998 Agreement, entitled "DURATION OF AGREEMENT," provides that "[t]he agreement is open ended and shall be in effect until terminated by either party in accordance with Chap. 5 below." Provision 5, in turn, sets forth various circumstances that would result in termination of the 1998 Agreement, none of which apply here. Clause 17 prescribes the procedure for amending the 1998 Agreement; however, there is nothing in the record to suggest that the 1998 Agreement was ever amended.

2010 Agreement is sufficiently restrictive to designate Quebec City as the exclusive forum for resolving claims arising under the 2010 Agreement, as we are also able to discern no meaningful distinction between the reference to "*any litigation . . . will be heard*" and language such as "[a]ny action . . . shall only be instituted in [the designated forum,]" which this Court has previously held to be sufficiently restrictive, *Perkins v. CCH Computax*, 333 N.C. 140, 141, 423 S.E.2d 780, 781 (1992). This determination, however, does not end our inquiry.

Plaintiff argues that the 2010 Agreement's forum selection clause is void under N.C. Gen. Stat. § 22B-3, which provides as follows:

> Except as otherwise provided in this section, any provision in a contract *entered into in North Carolina* that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable.

N.C. Gen. Stat. § 22B-3 (2011) (emphasis added). Accordingly, "[t]he threshold question for determining if the contract's forum selection clause violates North Carolina law . . . is a determination of where the instant contract was formed." *Szymczyk v. Signs Now Corp.*, 168 N.C. App. 182, 186-87, 606 S.E.2d 728, 732-33 (2005). Defendants contend that N.C. Gen.

Stat. § 22B-3 is inapplicable in the present case because Plaintiff presented insufficient evidence that the 2010 Agreement was entered into in North Carolina.

> "[T]he test of the place of a contract is as to the place at which *the last act was done by either of the parties essential to a meeting of minds*. Until this act was done there was no contract, and upon its being done at a given place, the contract became existent at the place where the act was done. Until then there was no contract."

Bundy v. Commercial Credit Co., 200 N.C. 511, 515, 157 S.E. 860, 862 (1931) (citations omitted) (emphasis added). Thus, in the instant case, the contract was entered into where the contract was last signed. *See id.*; *Fortune Insurance Co. v. Owens*, 351 N.C. 424, 428, 526 S.E.2d 463, 466 (2000) (providing that "the substantive law of the state where the last act to make a binding contract occurred . . . controls the interpretation of the contract"). If Plaintiff was the last party to sign the 2010 Agreement and he signed the agreement in North Carolina, then the contract was entered into in North Carolina and N.C. Gen. Stat. § 22B-3 applies; if, on the other hand, Carl Benjamin (on behalf of AP) was the last party to sign *and* he signed the agreement in Quebec, then the contract was entered into in Quebec, and N.C. Gen. Stat. § 22B-3 does not apply. Although the record reveals some evidence relating to this issue, the

trial court did not make any findings concerning where and by whom the 2010 Agreement was last signed. Absent such findings, we cannot determine whether the forum selection clause applies, and, therefore, whether the trial court correctly dismissed Plaintiff's claims under the 2010 Agreement for improper venue.

Moreover, we note that a finding by the trial court that the 2010 Agreement was finalized in Quebec would not necessarily render the forum selection clause controlling. Our Supreme Court has held – even prior to the enactment of N.C. Gen. Stat. § 22B-3 – that forum selection clauses will not be enforced in instances "of fraud or unequal bargaining power" or where it would otherwise be "unfair or unreasonable" to do so. *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 146, 423 S.E.2d 780, 784 (1992). Again, however, while the record before us reveals some evidence concerning this issue, the trial court's findings are insufficient to permit a determination as to whether application of the forum selection clause in the present case would be unfair or unreasonable.

Accordingly, we reverse the trial court's order granting AP's motion to dismiss Plaintiff's claims and remand the matter to the trial court for additional findings consistent with this opinion.

B. Personal Jurisdiction

Plaintiff contends that the trial court erred in dismissing his claims against Defendants Benjamin and IG for lack of personal jurisdiction.[2] We conclude that the trial court correctly granted IG's motion to dismiss, but erred in granting Benjamin's motion to dismiss.

"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." *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999).

"Whether the courts of this State may exercise personal jurisdiction over a nonresident defendant involves a two-prong analysis: '(1) Does a statutory basis for personal jurisdiction exist, and (2) If so, does the exercise of this jurisdiction violate constitutional due process?' The assertion of personal jurisdiction over a defendant comports with due process if defendant is found to have sufficient minimum contacts with the forum state to confer jurisdiction." *Golds v. Cent. Express, Inc.*, 142 N.C. App. 664, 665-66, 544 S.E.2d 23, 25 (2001)

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[2] Defendant AP did not contest personal jurisdiction below.

(citations omitted). Because Defendants have not advanced any argument based on the application of the long-arm statute, we proceed to the issue of whether Defendants had sufficient minimum contacts with North Carolina to confer jurisdiction. See *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 671, 541 S.E.2d 733, 736 (2001) (explaining that "[w]hen personal jurisdiction is alleged to exist pursuant to the long-arm statute, the question of statutory authority collapses into one inquiry — whether defendant has the minimum contacts necessary to meet the requirements of due process").

The following factors are relevant in determining whether minimum contacts exist: "(1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) the convenience to the parties." *Replacements, Ltd.*, 133 N.C. App. at 143, 515 S.E.2d at 49 (quotation marks and citations omitted). "No single factor controls; rather, all factors 'must be weighed in light of fundamental fairness and the circumstances of the case.'" *Corbin Russwin, Inc. v. Alexander's Hardware, Inc.*, 147 N.C. App. 722, 725, 556 S.E.2d 592, 595 (2001) (citation omitted).

1. Defendant Benjamin

The trial court granted Benjamin's motion to dismiss on the grounds that Benjamin lacked sufficient minimum contacts with the State of North Carolina. The court based this determination on its findings that Benjamin's contacts with North Carolina were exclusively "in his capacity as General Manager of AP," including traveling to North Carolina "two times per year to attend trade shows [in High Point]." Plaintiff argues that Benjamin is not shielded from jurisdiction because his contacts with North Carolina were solely made on behalf of AP, and not in his individual capacity. We agree.

While "personal jurisdiction over an individual officer or employee of a corporation may not be predicated merely upon the corporate contacts with the forum," *Robbins v. Ingham*, 179 N.C. App. 764, 771, 635 S.E.2d 610, 615 (2006), our Supreme Court has held that "the corporate actions of a defendant who is also an officer and principal shareholder of a corporation may be imputed to him for the purpose of deciding the issue of personal jurisdiction." *Saft Am., Inc. v. Plainview Batteries, Inc.*, 363 N.C. 5, 5, 673 S.E.2d 864, 864 (2009); *see also Calder v. Jones*, 465 U.S. 783, 790 (1984) (explaining that although the defendants' contacts with the forum state were "not to be judged according to their employer's activities there[,] . . . their

status as employees [did] not somehow insulate them from jurisdiction"). Thus, "under North Carolina precedent the determination of whether personal jurisdiction is properly exercised over a defendant *does not* exclude consideration of defendant's actions merely because they were undertaken in the course of his employment." *Saft Am., Inc. v. Plainview Batteries, Inc.*, 189 N.C. App. 579, 595, 659 S.E.2d 39, 49 (2008) (Arrowood, J., dissenting), *reversed for reasons stated in dissent*, 363 N.C. 5, 673 S.E.2d 864 (2009).

Applying the totality of the relevant factors in the present case, we conclude that the trial court had jurisdiction over Benjamin. The undisputed evidence reveals that Benjamin purposefully availed himself of the privilege of conducting activities in North Carolina. Benjamin is the General Manager of AP, which engages in business in North Carolina, and President of IG, which is AP's holding company. Benjamin visits North Carolina at least twice a year to attend the furniture show in High Point, North Carolina. Benjamin recruited Plaintiff to work for AP in 1997, and he offered Plaintiff an enhanced position within the company, company stock, and a $20,000.00 bonus in 1998. "As this Court has previously held: Which party initiates the contact is taken to be a critical

factor in assessing whether a nonresident defendant has made 'purposeful availment' [of the privilege of conducting activities within the forum State]." *Banc of Am. Secs. LLC*, 169 N.C. App. 690, 698, 611 S.E.2d 179, 185 (2005) (citation and quotation marks omitted). Benjamin later retained Plaintiff under a new set of terms initiated via Benjamin's personal email to Plaintiff dated 7 May 2010.

Moreover, we disagree with Defendants' contention that because "no specific findings were made concerning Defendant Benjamin's corporate activities as directed at Plaintiff or North Carolina, the unchallenged findings are binding and support the trial court's determination that personal jurisdiction did not exist as to Defendant Benjamin."

> Where unverified allegations in the plaintiff's complaint meet plaintiff's initial burden of proving the existence of jurisdiction and defendant does not contradict plaintiff's allegations in its sworn affidavit, such allegations are accepted as true and deemed controlling [.] However, where the defendant submits an affidavit in support of his motion to dismiss for lack of personal jurisdiction, the court will look to the uncontroverted allegations in the complaint and the uncontroverted facts in the sworn affidavit in its determination of the issue.

Brown v. Refuel Am., Inc., 186 N.C. App. 631, 634, 652 S.E.2d 389, 392 (2007) (citations and quotation marks omitted)

(alteration in original). Based upon our review of the allegations raised in Plaintiff's complaint, and upon the statements in Plaintiff's affidavit that were not disputed through Benjamin's countering affidavit, we conclude that Benjamin had sufficient minimum contacts with the State of North Carolina as a matter of law.

Finally, exercising jurisdiction over Benjamin would not be constitutionally unreasonable. *See Brickman v. Codella*, 83 N.C. App. 377, 384, 350 S.E.2d 164, 168 (1986) (providing that "[w]hen an individual 'who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable'" (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 477 (1985))). The trial court found as fact that Benjamin travels to North Carolina twice annually to attend furniture trade shows in High Point, and the evidence reveals that Benjamin made these trips each year for fifteen years (from 1997 through 2011). The evidence also indicates that Benjamin has financial resources superior to those of Plaintiff, who states in his affidavit that "[d]ue in part to the financial damages caused by Defendants . . . it would be financially and logistically impossible for me to

litigate these matters in more than one state at the same time." In other words, while Benjamin, armed with substantial resources, consistently engages in business in North Carolina and visits North Carolina at least twice each year, Plaintiff would be at a severe disadvantage if forced to litigate his claims in Quebec. Upon considering the relevant factors as applied in this case, we conclude that it is fair and reasonable for the courts of North Carolina to exercise jurisdiction over Defendant Benjamin. Accordingly, we reverse the trial court's order granting Benjamin's motion to dismiss.

2. Defendant IG

The trial court also granted IG's motion to dismiss on the grounds that IG does not have sufficient minimum contacts with the State of North Carolina. In support of this determination, the trial court found as fact that IG "is a holding company that is not authorized to do business in the State of North Carolina and does not do, and has never done, any business in the state of North Carolina"; that "[a]t no point in time has [IG] received funds, in the form of a loan or otherwise, from [Plaintiff]"; that IG "has never owned or rented property in North Carolina"; and that IG "manufactures no products and, therefore, has no products that have been purchased or used in

the State of North Carolina." These findings, which we conclude are supported by competent evidence in the record, are sufficient to support the trial court's conclusion that IG does not have sufficient minimum contacts with North Carolina to subject IG to the jurisdiction of our Courts.[3] Accordingly, we affirm the trial court's order granting IG's motion to dismiss.

III. Conclusion

For the foregoing reasons, we reverse the portion of the trial court's order dismissing Plaintiff's claims against AP and remand for further proceedings consistent with this opinion. Moreover, we reverse the portion of the trial court's order dismissing Plaintiff's claims against Benjamin, but affirm the portion of the order dismissing Plaintiff's claims against IG.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges CALABRIA and ERVIN concur.

Report per Rule 30(e).

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[3] We note Plaintiff's contention that AP and IG are essentially the same entity, and, thus, because AP is subject to jurisdiction in North Carolina, IG must also be subject to jurisdiction in North Carolina. Plaintiff points to evidence of "alter ego contacts" in the record in support of this contention. While there are obviously similarities between AP and IG – for instance, Benjamin's leadership positions within both companies – the trial court's findings establish that AP and IG are separate entities, and there is competent evidence in the record supporting these findings. We accordingly overrule this contention.