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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1207

Filed: 19 November 2019

Union County, No. 18 CVS 00559

JAMES DIPASUPIL, Plaintiff,

v.

HAROLD KENNETH NEELY, JR., Defendant.

Appeal by Defendant from order entered 12 September 2018 by Judge Lori Hamilton in Union County Superior Court. Heard in the Court of Appeals 10 April 2019.

McIlveen Family Law Firm, by Chelsea M. Chapman, for Plaintiff-Appellee.

James, McElroy & Diehl, P.A., by Gena G. Morris, for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from an order denying his motion to dismiss Plaintiff's claim for alienation of affections. Because the trial court lacked subject matter jurisdiction over the claim, we reverse.

I. Background and Procedural History

James Dipasupil (“Plaintiff”) and Heather Wong (“Ms. Wong”) were married in 1997; six children were born of the marriage. They lived together in Minnesota until Plaintiff moved to Union County, North Carolina for work in May 2013. Ms. Wong remained in Minnesota with their children. Ms. Wong initiated divorce proceedings against Plaintiff on 29 August 2014. In November 2014, Ms. Wong and their children moved to Union County and lived with Plaintiff.

In late February 2015, Ms. Wong contacted Harold Kenneth Neely, Jr., (“Defendant”) on LinkedIn to evaluate her employment prospects. At the time, Defendant was a Wealth Management Advisor in Fairfax, Virginia, and had been a Virginia resident for over five years. Ms. Wong and Defendant first met in 1996 while attending Yale University and were friends when they worked as interns in New York City at the same time. Defendant responded to Ms. Wong’s message on 9 March 2015. On 3 April 2015, Defendant and Ms. Wong stayed together at a hotel and engaged in sexual intercourse.

On 22 April 2015, Ms. Wong separated from Plaintiff and returned to Minnesota with their three youngest children. Ms. Wong then moved for an *ex parte* domestic violence protective order on 1 May 2015 in Hennepin County, Minnesota, citing domestic abuse. The motion was heard on 7 May 2015 in Hennepin County district court; at the hearing, the parties stipulated to a permanent order for protection that expired on 1 May 2017.

In May 2015, Plaintiff found multiple provocative pictures and intimate text messages on Ms. Wong's phone that had been exchanged between Ms. Wong and Defendant prior to the 22 April 2015 separation. Ms. Wong subsequently blocked Plaintiff's access to family phone records. Plaintiff and Ms. Wong's divorce was finalized on 28 November 2016, and the children lived with Ms. Wong in Minnesota. Ms. Wong and the children relocated to Fairfax, Virginia, on 29 June 2018. Ms. Wong and Defendant have a child together and were in a relationship during the time of the trial court's proceedings in this action. Plaintiff is now a resident of Wesley Chapel, Florida.

Plaintiff filed a verified complaint in Union County against Defendant on 6 March 2018 alleging alienation of affections and criminal conversation. On 18 July 2018, Defendant filed a motion to dismiss for lack of subject matter jurisdiction under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), and lack of personal jurisdiction under N.C. Gen. Stat. § 1A-1, Rule 12(b)(2). The motion was accompanied by sworn affidavits of Ms. Wong and Defendant, as well as supporting documentation from Hennepin County, Minnesota. Defendant subsequently filed a motion for protective order to stay discovery pending a decision on his motion to dismiss. Plaintiff filed an unverified response to Defendant's motion to dismiss and did not submit any affidavits.

Defendant's motion to dismiss was heard on 20 August 2018. Neither party presented additional evidence. By written order entered 12 September 2018, the trial court granted the motion as to Plaintiff's claim for criminal conversation, and denied the motion as to Plaintiff's claim for alienation of affections. Defendant timely appealed.

II. Discussion

Defendant contends on appeal that the trial court erred by denying his motion to dismiss his alienation of affections claim because the trial court lacked subject matter jurisdiction over the claim and lacked personal jurisdiction over Defendant.

We first address this Court's jurisdiction to hear the issues on appeal. The trial court's denial of Defendant's motion to dismiss is an interlocutory order from which there is generally no right of immediate appeal. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, an interlocutory order may be immediately appealed when it "[a]ffects a substantial right," N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)(a) (2018), or makes an adverse ruling as to personal jurisdiction, N.C. Gen. Stat. § 1-277(b) (2018). This right of immediate appeal of an order denying a motion to dismiss for lack of personal jurisdiction "is limited to rulings on minimum contacts questions." *Credit Union Auto Buying Serv., Inc. v. Berkshire Props. Grp. Corp.*, 243 N.C. App. 12, 14, 776 S.E.2d 737, 739 (2015) (internal quotation marks and citation omitted).

“Ordinarily, an order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and is not immediately appealable.” *Church v. Carter*, 94 N.C. App. 286, 288, 380 S.E.2d 167, 168 (1989). However, because subject matter jurisdiction is a prerequisite to personal jurisdiction, our Court immediately reviews a challenge to subject matter jurisdiction where, as here, there is an accompanying challenge to personal jurisdiction. *Id.* at 288, 380 S.E.2d at 168 (holding that when a defendant challenges both subject matter jurisdiction and personal jurisdiction, the trial court was required to “decide the issue [the defendant] ha[d] raised concerning subject matter jurisdiction”)¹; *see also Tart v. Prescott’s Pharmacies*, 118 N.C. App. 516, 519, 456 S.E.2d 121, 124 (1995) (addressing the court’s subject matter jurisdiction in conjunction with plaintiff’s personal jurisdiction challenge because “[s]ubject matter jurisdiction is a prerequisite to the exercise of personal jurisdiction.” (citing *Church*, 94 N.C. App. at 288, 380 S.E.2d at 168)). Accordingly, we have jurisdiction to hear Defendant’s appeal of the denial of his motion to dismiss based on lack of both subject matter and personal jurisdiction.

¹ Although this Court has dismissed appeals from the denial of a 12(b)(1) motion for lack of subject matter jurisdiction when appealed alongside a 12(b)(2) motion for lack of personal jurisdiction, those cases involved sovereign immunity or governmental immunity, which were determined to be matters of personal jurisdiction. *See Providence Volunteer Fire Dep’t v. Town of Weddington*, 253 N.C. App. 126, 131-32, 800 S.E.2d 425, 430 (2017) (distinguishing *Church*, 94 N.C. App. at 288, 380 S.E.2d at 168, from *Can Am S., LLC v. State*, 234 N.C. App. 119, 759 S.E.2d 304 (2014) and *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 545 S.E.2d 243 (2001)).

Defendant first argues that the trial court erred by denying his motion to dismiss the alienation of affections claim for lack of subject matter jurisdiction.

A motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure represents a challenge to the trial court's subject matter jurisdiction over a plaintiff's claims. N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2018). "Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (2018).

The trial court "need not confine its evaluation of a Rule 12(b)(1) motion to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998) (quotation marks, brackets, and citations omitted); see *Tart v. Walker*, 38 N.C. App. 500, 502, 248 S.E.2d 736, 737 (1978) ("[M]atters outside the pleadings . . . may be considered and weighed by the court in determining the existence of jurisdiction over the subject matter."). Where, as 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." *Bruggeman v. Meditrust*

Acquisition Co., 138 N.C. App. 612, 615, 532 S.E.2d 215, 217-18 (2000).² “Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding. *Eley v. Mid/East Acceptance Corp. of N.C., Inc.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005) (internal quotation marks and citations omitted). This Court reviews de novo the legal conclusions made in an order denying a Rule 12(b)(1) motion. *Privette*, 128 N.C. App. at 493, 495 S.E.2d at 397.

“The elements of an alienation of affections action are: (1) a marriage with genuine love and affection; (2) the alienation and destruction of the marriage’s love and affection; and (3) a showing that defendant’s wrongful and malicious acts brought about the alienation of such love and affection.” *Heller v. Somdahl*, 206 N.C. App. 313, 315, 696 S.E.2d 857, 860 (2010). “A [wrongful and] malicious act, in the context of an alienation of affection claim, has been loosely defined to include any intentional conduct that would probably affect the marital relationship.” *Jones v. Skelley*, 195 N.C. App. 500, 508, 673 S.E.2d 385, 391 (2009) (citation and quotation marks omitted).

A claim for alienation of affections is a transitory tort because it is based on transactions that can take place anywhere and that harm the marital relationship. The substantive law applicable to a transitory tort is the law of the state where the tortious injury occurred, and not the substantive law of the forum state. The issue of where the tortious injury occurs . . . is based on where the alleged alienating conduct occurred, not the locus of the plaintiff’s

² “Findings of fact and conclusions of law are necessary on decisions of any motion . . . only when requested by a party.” N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2018).

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residence or marriage. Accordingly, where the defendant's involvement with the plaintiff's spouse spans multiple states, for North Carolina substantive law to apply, a plaintiff must show that the tortious injury occurred in North Carolina.

Id. at 506, 673 S.E.2d at 389-90 (internal citations, quotation marks, brackets, and ellipses omitted). "Establishing that the defendant's alienating conduct occurred within a state that still recognizes alienation of affections as a valid cause of action is essential to a successful claim since most jurisdictions have abolished the tort." *Hayes v. Waltz*, 246 N.C. App. 438, 443, 784 S.E.2d 607, 613 (2016) (citing *Darnell v. Rupplin*, 91 N.C. App. 349, 353-54, 371 S.E.2d 743, 746-47 (1988)).³ Thus, in order to confer jurisdiction of an alienation of affections claim upon a North Carolina court, a plaintiff must show that the alienating conduct occurred in North Carolina.

In his verified complaint, Plaintiff made the following allegations potentially relevant to alleged alienating conduct and where such conduct occurred:

1. The Plaintiff is a citizen and resident of Wesley Chapel, Florida, and resided in Union County, North Carolina from May 2013 through February 2016.

³ Alienation of affections is recognized in six United States jurisdictions: Hawaii, North Carolina, Mississippi, New Mexico, South Dakota, and Utah. *See Hunt v. Chang*, 594 P.2d 118, 123-24 (Haw. 1979) (adopting standards governing alienation of affections claims); *Fitch v. Valentine*, 959 So.2d 1012, 1020 (Miss. 2007) (declining to abolish the common law alienation of affections cause of action); *Padwa v. Hadley*, 981 P.2d 1234, 1240 (N.M. Ct. App. 1999) (indicating that the common law alienation of affections cause of action exists, but is heavily disfavored); *Hayes v. Waltz*, 246 N.C. App. 438, 443, 784 S.E.2d 607, 613 (2016) (reciting the elements of an alienation of affections claim); *Richardson v. Richardson*, 906 N.W.2d 369, 380 (S.D. 2017) (noting that "the South Dakota Legislature has not abolished the tort of alienation of affections."); *Heiner v. Simpson*, 23 P.3d 1041, 1043 (Utah 2001) (recognizing the continued validity of the alienation of affections cause of action).

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2. Upon information and belief, Defendant is a citizen and resident of Fairfax, Virginia. Furthermore, Defendant is a registered financial advisor in North Carolina, where he conducts business.

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5. That the Court has subject matter jurisdiction over the claims contained in this Complaint.

....

8. Plaintiff and his former wife, Heather Wong (referred to herein as “Ms. Wong”), were married on June 21, 1997, and there were six (6) children born of the marriage between Plaintiff and Ms. Wong.

9. Plaintiff and Ms. Wong separated on April 22, 2015.

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14. Prior to April 22, 2015, Defendant, with actual knowledge of the marital relationship of Plaintiff and his wife, began to willfully and intentionally seduce, entice and alienate the affections of Plaintiff’s wife from Plaintiff, and to wrongfully and maliciously deprive Plaintiff of the warmth, companionship, consortium, society, financial contributions and services of his wife.

15. Defendant engaged in acts of intimate conversation and sexual intercourse with Plaintiff’s wife and developed an intimate and emotional relationship with her over a period of several years.

16. Plaintiff first suspected Defendant’s adulterous affair with his wife in the Spring of 2014 when Ms. Wong acted out of character by discouraging Plaintiff to visit Ms. Wong and their children when Plaintiff was working in North Carolina. At the time, Ms. Wong was living in

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Minnesota to allow the children to finish school while a new home was being built in Waxhaw, North Carolina.

17. Plaintiff subsequently suspected Defendant's adulterous affair with his wife in September 2014 when Ms. Wong insisted on staying in Minnesota despite the custom home she designed and built in North Carolina was closing at the end of that month.

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19. In November 2014, Plaintiff and [Ms. Wong] moved to North Carolina with their children.

20. During Plaintiff and Ms. Wong's divorce proceedings, Ms. Wong testified that in March 2015, Defendant met her to have sexual intercourse.

21. Prior to April 22, 2015, Plaintiff found Ms. Wong having a phone conversation in her truck while parked in the garage of their North Carolina home. When Plaintiff approached Ms. Wong and asked her when she was coming inside the house, Ms. Wong responded that she "needed to drop a book off at a friend's house." Ms. Wong refused to state which friend needed the book and drove off. She did not return for close to 2 hours. Upon belief, Ms. Wong went to rendezvous with Defendant who conducts business with clients in North Carolina. Prior to this event, Ms. Wong had never once lent a book to anybody let alone would personally deliver it.

22. As a direct and proximate result of the actions of Defendant, the genuine love and affection between Plaintiff and [Ms. Wong] was lost and destroyed and on April 22, 2015, the Plaintiff and Ms. Wong separated when Ms. Wong abandoned the Plaintiff and moved with their three youngest children to Minnesota. . . .

23. The alienation of Ms. Wong's affections was completed when the parties separated on April 22, 2015.

24. In May 2015, Plaintiff found multiple pictures of his wife that were sent to the Defendant before the parties separated. The photographs are of a scandalous nature and depict Ms. Wong naked and in provocative poses.

25. In May 2015, Plaintiff found multiple screen snapshots of text messages sent by the Defendant to Ms. Wong before the parties separated. The text messages were of an intimate and loving nature.

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27. In May 2015, Plaintiff found multiple screen snapshots of airline flights between Charlotte North Carolina and DC Airports as well as rental homes in the Washington DC/Virginia area.

28. In May 2015, Plaintiff found multiple pictures of Ms. Wong in the hotel room that the Defendant and Ms. Wong stayed at in March 2015 when they had their sexual relations.

29. In May 2015, Plaintiff found a bar of soap from the hotel that the Defendant and Ms. Wong stayed at in March 2015 when they had sexual relations.

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33. During Plaintiff and Ms. Wong's divorce proceedings, Ms. Wong testified that she had a sexual relationship with the Defendant during the parties' marriage and before the date of separation.

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FIRST CAUSE OF ACTION

ALIENATION OF AFFECTIONS

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39. That Plaintiff repeats, reiterates and realleges each and every allegation contained in Paragraph One (1) through Paragraph Thirty-Eight (38) hereinabove and incorporates the same herein by reference.

.....

42. Defendant's alienation of Ms. Wong's [sic] occurred within the jurisdiction of North Carolina.

None of Plaintiff's allegations assert alienating conduct by Defendant that occurred in North Carolina.

Paragraph 20 alleges that Ms. Wong testified that Defendant met her in March 2015 to have sexual intercourse, and paragraphs 28 and 29 refer to discovered evidence of this meeting; but none of these paragraphs allege Ms. Wong and Defendant met in North Carolina.⁴ Paragraph 21 alleges Ms. Wong was on the telephone while in North Carolina, but does not allege she was on the telephone with Defendant; moreover, it alleges Ms. Wong went to rendezvous with Defendant, who has clients in North Carolina, but does not allege she went to rendezvous with Defendant in North Carolina.

Paragraph 24 alleges the discovery of photographs sent by Ms. Wong to Defendant, and paragraph 27 refers to screenshots discovered, but neither paragraph

⁴ Plaintiff's claim for criminal conversation based on this March 2015 tryst was dismissed for lack of subject matter jurisdiction where the trial court considered Defendant and Ms. Wong's sworn statements that it occurred at a hotel in Washington, D.C. Plaintiff did not appeal the dismissal of that claim, and agreed at the hearing with the trial court's decision. ("I think that based on the information that we had it is hard to find [subject matter jurisdiction for the criminal conversation claim] and I would come down with the Court on that side of the argument.")

alleges conduct by Defendant, much less conduct by Defendant in North Carolina. Paragraph 25 alleges the discovery of screenshots of texts Defendant sent to Ms. Wong, but does not allege Defendant or Ms. Wong were in North Carolina when the texts were sent, and does not allege the texts were sent or received on dates when Defendant or Ms. Wong were in North Carolina.

Although Plaintiff alleges that “Defendant’s alienation of Ms. Wong’s [sic] occurred within the jurisdiction of North Carolina[,]” this conclusory allegation was insufficient to allege alienating conduct occurring in North Carolina. *Good Hope Hosp., Inc. v. N.C. DHHS, Div. of Facility Servs.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005) (noting in the 12(b)(6) context, where the Court also construes the complaint liberally and accepts all allegations as true, that the Court is not required “to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences”). Moreover, although Plaintiff alleges “[t]hat the Court has subject matter jurisdiction over the claims contained in this Complaint[,]” such allegation is of no legal significance where subject matter jurisdiction is a legal conclusion that must be determined by the court. *See, e.g., Alford v. Shaw*, 327 N.C. 526, 533 n.1, 398 S.E.2d 445, 448 n.1 (1990) (“Parties cannot stipulate to give a court subject matter jurisdiction when such jurisdiction does not exist.”) (citation omitted); *Dep’t of Transp. v. Tilley*, 136 N.C. App. 370, 374, 524 S.E.2d 83, 86 (2000) (“Defendants correctly point out that subject matter jurisdiction cannot be consented

to or stipulated to.”) (citing *Stanley v. Dept. Conservation & Development*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)).

In support of his motion to dismiss, Defendant submitted sworn affidavits of Ms. Wong and himself. Ms. Wong averred, *inter alia*,

24. I have never engaged in sexual relations with [Defendant] in North Carolina.

25. I have never met with [Defendant] in North Carolina.

26. I have never been in the presence of [Defendant] in North Carolina.

Likewise, Defendant averred, *inter alia*,

25. I have never engaged in sexual relations with [Ms. Wong] in North Carolina.

26. I have never met with [Ms. Wong] in North Carolina.

27. I have never been in the presence of [Ms. Wong] in North Carolina.

Plaintiff submitted no affidavits and filed an unverified response to Defendant’s motion to dismiss, generally denying some of the substantive allegations and specifically stating:

9. . . . Plaintiff’s complaint alleges that Defendant established affirmative conduct within the state of North Carolina by:

- a. Conducting business with clients within the state of North Carolina;
- b. Meeting Ms. Wong in North Carolina;

- c. Having phone conversations with Ms. Wong while she was within the state of North Carolina;
- d. Sending Ms. Wong intimate and loving text messages while she was within the state of North Carolina.

.....

13. . . . Plaintiff's complaint alleges that Defendant induced or initiated contact with Ms. Wong in North Carolina by:

- a. Meeting her in North Carolina;
- b. Having phone conversations with her while she was within the state of North Carolina;
- c. Sending her intimate and loving text messages while she was within the state of North Carolina.

Factual allegations in an unverified answer are not competent evidence. *See Brown v. Refuel Am., Inc.*, 186 N.C. App. 631, 634, 652 S.E.2d 389, 392 (2007) (“Factual allegations in Defendants’ unverified answer are not competent evidence; therefore, we assume the trial court did not consider these [when ruling upon a motion to dismiss for lack of personal jurisdiction] and do not consider them on appeal.”) (citing *Spinks v. Taylor*, 303 N.C. 256, 278 S.E.2d 501 (1981) (holding, in context of summary judgment proceeding, that verified complaint may be treated as affidavit)); *Excel Staffing Serv., Inc. v. HP Reidsville, Inc.*, 172 N.C. App. 281, 283, 616 S.E.2d 349, 351 (2005) (“Filing an unverified answer to a complaint does not

constitute a response to requests for admissions[.]”); *Hill v. Hill*, 11 N.C. App. 1, 10, 180 S.E.2d 424, 430 (1971) (“An unverified complaint is not an affidavit or other evidence.”). Even if the trial court considered Plaintiff’s unverified response, however, it does not provide evidence of Defendant’s conduct in North Carolina but rather mischaracterizes the allegations in Plaintiff’s complaint. Contrary to Plaintiff’s characterization, and as explained above, none of the allegations in Plaintiff’s complaint allege alienating conduct by Defendant that occurred in North Carolina.

In order to deny Defendant’s motion to dismiss for lack of subject matter jurisdiction, the trial court would have had to have found that alienating conduct by Defendant occurred in North Carolina. However, our review of the record reveals no competent evidence to support such a finding. *See Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 217-18. Accordingly, the trial court lacks subject matter jurisdiction over Plaintiff’s claim for alienation of affections, and we thus reverse the trial court’s denial of Defendant’s motion to dismiss. In light of this decision, we need not address the denial of Defendant’s motion to dismiss for lack of personal jurisdiction.

REVERSED.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).