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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-356

Filed: 7 January 2020

Guilford County, No. 16 CVS 5433

THE TRUSTEE FOR TRADEWINDS AIRLINES, INC., TRADEWINDS HOLDINGS, INC., AND COREOLIS HOLDINGS, INC., Plaintiffs,

v.

SOROS FUND MANAGEMENT LLC, AND C-S AVIATION SERVICES, INC., Defendants.

Appeal by plaintiffs from order entered 27 November 2018 by Judge Eric C. Morgan in Guilford County Superior Court. Heard in the Court of Appeals 13 November 2019.

Tuggle Duggins P.A., by Daniel D. Stratton, J. Nathan Duggins III, H. Vaughn Ramsey and Alan B. Felts, and Bailey & Glasser, LLP, by Brian A. Glasser and Jennifer S. Fahey admitted pro hac vice, for the Trustee for TradeWinds Airlines, Inc.

Carruthers & Roth, P.A., by Kenneth R. Keller, J. Patrick Haywood and Rachel S. Decker, and Ressler & Ressler, by Bruce J. Ressler and Ellen R. Werther admitted pro hac vice, for Coreolis Holdings, Inc. and TradeWinds Holdings, Inc.

Ellis & Winters LLP, by Paul K. Sun, Jr., Curtis J. Shipley and Kelly Margolis Dagger, and Willkie Farr & Gallagher LLP, by Martin Klotz admitted pro hac vice, and Butler, Fitzgerald, Fiveson & McCarthy, PC, by Raymond Fitzgerald admitted pro hac vice for Soros Fund Management LLC.

Opinion of the Court

TYSON, Judge.

The Trustee for TradeWinds Airlines, Inc., TradeWinds Holdings, Inc. and Coreolis Holdings, Inc. (“Plaintiffs”) appeal from an order entered granting Soros Fund Management LLC’s (“Defendant”) motion to dismiss for lack of personal jurisdiction. We affirm.

I. Background

Defendant is chartered as a Delaware limited liability company with its principal place of business in New York. Defendant is engaged in the investment advisory business. Defendant is owned by three members: George Soros, Robert Soros, and Jonathan Soros. C-S Aviation served as the management company for aircraft leasing businesses from 1994 until 2003. The aircraft leasing company owned holding companies, which themselves owned a series of special purpose entities, as the beneficial owners of the leased aircraft.

C-S Aviation had entered into written management agreements with and acted as the disclosed agent of the owners of the individual aircraft. The day-to-day operations between the owners of the aircraft and the lessees were managed by C-S Aviation. C-S Aviation’s sole shareholder is Dr. Purnendu Chatterjee.

The aircraft leasing company had the following investors: Quantum Investment Partners LDC, S-C Aviation Investments, Inc. and Winston Funds. Defendant acted as investment advisor to Quantum Industrial Partners, LDC.

Opinion of the Court

In December 1998, George Soros and Dr. Chatterjee entered into a restructuring agreement. The agreement delegated the control of the management of aircraft leasing-related business entities to Defendant, but not the control of C-S Aviation. Dr. Chatterjee, the sole shareholder of C-S Aviation, also assigned control of his personal investment in C-S Aviation to Defendant.

After the restructuring agreement became effective, C-S Aviation continued to manage the aircraft leasing business and employed between eight and twenty-two full-time employees. C-S Aviation maintained separate financial records for itself, the holding companies and for the aircraft owners. C-S Aviation filed its own tax returns, maintained separate office space, and did not receive financial support from or comingle funds with Defendant.

A. TradeWinds Leases

Plaintiff TradeWinds Airlines was a North Carolina-based air cargo carrier, which leased aircraft from the aircraft owners. On 31 December 2001, C-S Aviation negotiated, administered, and began servicing these leases. Defendant was not a party to, did not administer, and did not service these leases.

In 2002, TradeWinds complained to C-S Aviation about purported aircraft engine performance problems and about C-S Aviation's alleged refusal to honor a promise to provide the most favored customer lease pricing to TradeWinds.

Opinion of the Court

In 2003, the aircraft owners defaulted on loans giving the creditor, Deutsche Bank AG, the right to foreclose as successor to Bankers Trust Company. On 25 July 2003, the holding companies, C-S Aviation, the aircraft owners, and Deutsche Bank entered into an Acceptance Agreement, wherein the holding companies and owners agreed to turn over all of their assets to Deutsche Bank.

In the Acceptance Agreement, C-S Aviation waived its right to receive sixty days' notice prior to termination of its aircraft management agreements and released any of its claims against the holding companies and the aircraft owners. C-S Aviation received a release from the holding companies and the aircraft owners and funds for severance payments for its employees. C-S Aviation went out of business after executing the Acceptance Agreement.

B. 2003 North Carolina Action

In 2002, TradeWinds stopped making lease payments for the aircraft. Deutsche Bank sued TradeWinds Airlines' parent company, TradeWinds Holdings and TradeWinds Holdings' parent company, Coreolis Holdings, for nonpayment of rents due under these leases.

Plaintiffs answered the suit, filed counterclaims against Deutsche Bank, and asserted third-party claims against C-S Aviation and the aircraft owners. None of Plaintiffs' claims were brought or asserted against Defendant. C-S Aviation did not answer or appear to defend the third-party claims. In 2004, the North Carolina

Opinion of the Court

Business Court entered a default against C-S Aviation. Plaintiffs settled and dismissed with prejudice all claims against Deutsche Bank and the third-party defendants, except those subject to the default judgment against C-S Aviation.

Plaintiffs sued George Soros and Dr. Chatterjee personally in the United States District Court for the Southern District of New York. In 2008, Plaintiffs returned to North Carolina's courts and obtained a default judgment against C-S Aviation. C-S Aviation appeared to defend itself and moved to set aside the entry of default and default judgment.

The North Carolina Business Court denied C-S Aviation's motion to set aside the entry of default but vacated the default judgment and ordered a new trial on damages only. Following the trial, Plaintiffs obtained a judgment, subject to trebling, against C-S Aviation for \$16,111,403 for TradeWinds Airlines and \$11,544,000 for Coreolis Holdings and Tradewinds Holdings.

On 25 July 2008, TradeWinds filed a petition under Chapter 11 of the United States Bankruptcy Code in the Southern District of Florida. This petition was converted to a Chapter 7 proceeding and remains pending.

After the North Carolina default judgment was entered, the litigation in the United States District Court for the Southern District of New York continued. That court granted summary judgment to George Soros and Dr. Chatterjee. *TradeWinds Airlines, Inc. v. Soros*, 101 F. Supp. 3d 270, 272 (S.D.N.Y. 2015). The federal district

Opinion of the Court

court held Plaintiffs had presented no evidence tending to show the “single economic entity’ prong of the veil-piercing analysis” that “a rational trier of fact could not return a verdict in Plaintiffs’ favor because they have failed to show that Soros and Chatterjee personally dominated C-S Aviation.” *Id.* at 283.

C. North Carolina Veil Piercing Action

Plaintiffs filed this action on 26 May 2016, seeking to pierce Defendant’s corporate veil, and to enforce C-S Aviation’s default judgments against Defendant. Defendant moved to dismiss for lack of personal jurisdiction.

The trial court found none of the subsections of the North Carolina long-arm statutes, N.C. Gen. Stat. §§ 1-75.4(1)(d), 1-74.4(4), or 1-75.4(5)(d) (2017), provided a statutory basis for jurisdiction. The trial court held “Plaintiffs had not satisfied their burden to demonstrate, by a preponderance of the evidence, that the long-arm statute authorizes jurisdiction” or “that the exercise of jurisdiction . . . would be consistent with the Due Process Clause.” The trial court concluded: “Under either theory, Plaintiffs failed to meet their burden to establish, by a preponderance of the evidence, that [Defendant] had sufficient minimum contacts giving rise to this action to warrant the exercise of personal jurisdiction over it consistent with due process.”

The court granted Defendant’s motion to dismiss. Plaintiffs appealed.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 1-277(b) (2017).

Opinion of the Court

III. Issue

Plaintiffs argue the trial court erred by granting Defendant's motion to dismiss under Rule 12(b)(2).

IV. Motion to Dismiss

A. Standard of Review

When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by evidence in the record . . . [w]e are not free to revisit questions of credibility or weight that have already been decided by the trial court. If the findings of fact are supported by competent evidence, we conduct a *de novo* review of the trial court's conclusions of law and determine whether, given the facts found by the trial court, the exercise of personal jurisdiction would violate defendant's due process rights.

Deer Corp. v. Carter, 177 N.C. App. 314, 321, 629 S.E.2d 159, 165 (2006) (quotations and citations omitted).

B. Analysis

Plaintiffs argue the trial court erred by concluding it did not obtain nor could it exercise personal jurisdiction over Defendant.

Our Supreme Court has long employed a two-step analysis to determine whether a non-resident defendant is subject to personal jurisdiction in North Carolina. First, jurisdiction over the defendant must be authorized by N.C. Gen. Stat. § 1-75.4 (2017). *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 675, 231 S.E.2d 629, 630 (1977). Second, if jurisdiction is authorized by N.C. Gen. Stat. § 1-75.4, the

Opinion of the Court

exercise of jurisdiction over the defendant must not violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. *Id.* Plaintiffs bore the burden of showing compliance with both parts of the analysis. *Skinner v. Preferred Credit*, 361 N.C. 114, 123, 638 S.E.2d 203, 210-11 (2006).

1. Long-Arm Jurisdiction Statutes

North Carolina's long-arm jurisdiction statute, N.C. Gen. Stat. § 1-75.4 provides, in relevant part:

(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;

....

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

Opinion of the Court

- a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or
- b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or
- 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; or
- e. Relates to goods, documents of title, or other things of value actually received by the plaintiff in this State from the defendant through a carrier without regard to where delivery to the carrier occurred.

Before the trial court, Plaintiffs argued personal jurisdiction exists because of Defendant's substantial activity and direct contacts with North Carolina. *See* N.C. Gen. Stat. § 1-75.4. Plaintiffs also argued C-S Aviation's contacts with North Carolina are imputed to Defendant under North Carolina's corporate veil-piercing law.

Plaintiffs failed to challenge any of the trial court's findings or conclusions that no statutory basis for personal jurisdiction had been proven by Plaintiffs. These findings are binding upon appeal. *See* N.C. R. App. P. 28(b)(6). Plaintiffs have not carried their burden to show this ruling was erroneous. Instead, they abandon their

Opinion of the Court

theory before the trial court and argue a different theory for the first time before this Court: “it is agency principles, not corporate veil piercing principles, that must determine the propriety of personal jurisdiction over [Defendant].”

This Court in *USA Trouser, S.A. de C.V. v. Williams*, held that an appellant “cannot assert a new theory for the first time on appeal” that was not asserted before the trial court. *USA Trouser, S.A. de C.V. v. Williams*, 258 N.C. App. 192, 200, 812 S.E.2d 373, 379 (2018) (citation omitted). This new theory was not raised before the trial court for ruling and cannot be raised “for the first time on appeal.” *Id.*

2. Rule 2 of the North Carolina Rules of Appellate Procedure

In their reply brief, Plaintiffs ask this Court to “exercise its discretion to consider Plaintiffs’ arguments in the interests of justice.” Plaintiffs cite to *Barber v. Babcock & Wilcox Const. Co.*, 98 N.C. App. 203, 390 S.E.2d 341 (1990) and *LaValley v. LaValley*, 151 N.C. App. 290, 564 S.E.2d 913 (2002). In *LaValley*, this Court utilized Rule 2 of the North Carolina Rules of Appellate Procedure to suspend the rules to consider an argument not previously raised on appeal in a child custody case. *Id.* at 292 n.2, 564 S.E.2d at 914 n.2. In *Barber*, this Court addressed issues not raised by a party at the hearing “in our discretion.” *Barber*, 98 N.C. App. at 206, 390 S.E.2d at 343. This Court made no mention of Rule 2 in *Barber*, nor provided a citation or rule for its justification to review. *Id.*

Opinion of the Court

These cases are not applicable. Plaintiffs carry the burden to establish jurisdiction in their pleading. *See Williams v. Inst. for Computational Studies*, 85 N.C. App. 421, 424, 355 S.E.2d 177, 179 (1987). Rule 2 cannot be utilized to establish jurisdiction where it does not exist, or be used to reach the merits of an appeal in the event of an unwaived jurisdictional default. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). Plaintiffs' argument is dismissed.

V. Conclusion

Plaintiffs have failed to show any reversible error in the trial court's judgment. We affirm the trial court's order granting Defendant's motion to dismiss for lack of personal jurisdiction. *It is so ordered.*

AFFIRMED.

Judges COLLINS and YOUNG concur.

Report per Rule 30(e).