IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-753

Filed: 15 September 2020

Mecklenburg County, No. 18 CVS 17224

HUBERT CONSTRUCTION & REAL ESTATE SERVICES, LLC, ANDRE THOMPSON AND CATHERINE P. BARR, Plaintiffs

v.

LENARD T. MYERS, II AND FORTRESS PROPRIETAS, P.C., Defendants

Appeal by Plaintiffs from Order entered 3 April 2019 by Judge F. Donald Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 March 2020.

Mauney PLLC, by Gary V. Mauney, for plaintiffs-appellants.

Hedrick Gardner Kincheloe & Garofalo LLP, by Luke P. Sbarra, for defendants-appellees.

HAMPSON, Judge.

Factual and Procedural Background

Hubert Construction & Real Estate Services, LLC (Hubert Construction), Andre Thompson (Thompson), and Catherine P. Barr (Barr) (collectively, Plaintiffs) appeal from the trial court's 3 April 2019 Order dismissing Plaintiffs' Complaint against

Lenard T. Myers, II (Myers) and Fortress Proprietas, P.C. (Fortress) (collectively, Defendants) for lack of personal jurisdiction. The Record before us tends to show the following:

On 30 August 2018, Plaintiffs filed a Complaint asserting a Professional Malpractice claim against Defendants. The Complaint alleged in November 2015 Hubert Construction, through Thompson its managing member, entered into an agreement to purchase real estate from their co-plaintiff Barr located on Cherokee Road in Charlotte, North Carolina. Thompson and Barr are both North Carolina residents, and Hubert Construction is a North Carolina limited liability company.

In order to finance the $855,000.00 purchase price, Thompson engaged Wendy Sweet (Sweet) of Carolina Hard Money, LLC (CHM), a South Carolina company, to broker a bridge loan. Sweet lined up financing from a private lender in Florida identified as Gail Poon. Around this time, Thompson was contacted by a third party named Vassily A. Thompson (V.A.), who identified himself as the principal of a Washington, D.C.-based real estate investment company named MFS Infrastructure Risk Management (MFS). V.A. expressed interest in Hubert Construction's Cherokee Road project and proposed a joint venture in which MFS would provide partial funding for the development of the Cherokee Road project once Hubert Construction closed on the sale of the property. As a condition of this joint venture, however, MFS required Hubert Construction to use MFS's chosen escrow agent for the Cherokee

Road closing. MFS proposed Defendants—Myers a Virginia attorney and resident and his law firm Fortress, a Virginia professional corporation—to serve as the escrow agent.

Plaintiffs alleged Thompson contacted Myers by telephone on or about 14 December 2015 and Myers agreed to serve as the escrow agent for the Cherokee Road closing the next day, 15 December 2015. Plaintiffs further alleged Sweet, the loan broker, also contacted Myers to discuss the flow of escrowed funds related to the Cherokee Road property. CHM and the actual lender, Poon, allegedly also agreed to permit Myers to serve as the escrow agent in connection with the Cherokee Road purchase. Prior to closing, the loan funds were wired to Myers's Fortress trust account. However, Plaintiffs alleged Myers did not disburse the funds for the real estate transaction and instead disbursed funds to several other individuals, including V.A., who were subsequently convicted on federal conspiracy to commit wire fraud charges. Additionally, Myers subsequently disbursed $8,500.00 to himself and also sent a wire for $77,500.00 to Thompson.

In response to Plaintiffs' Complaint, Defendants filed a Motion to Dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. Defendants alleged they had not had "sufficient minimum contacts" with North Carolina to confer personal jurisdiction over them in this State. Defendants supported their Motion with an affidavit from Myers. In his affidavit,

Myers attested he has never lived or been licensed to practice law in North Carolina. He further attested Fortress only markets its services to residents of Virginia and with one exception—a North Carolina resident who lives across the border of the two states and was involved in a consumer law matter in Virginia—did not have any clients or conduct any business in North Carolina.

Myers's affidavit further stated his only client in connection with this transaction was an entity named Montana Film Studios, LLC (coincidentally, or not, also known by its initials "MFS"). Myers's affidavit acknowledged he initiated a 14 December 2015 phone call with Thompson but asserted this phone call "was only to confirm the accuracy of the wiring instructions given to me by my former client Montana Film Studios, verifying the amount to be wired to [Thompson] and his account number, all in the performance of my duties to my former client, Montana Film Studios." Myers further averred:

> I did not accept $855,000 from [Thompson] and [Hubert Construction's] lender for the purpose of closing the Cherokee Road transaction. I did not participate in a December 14, 2015 phone call with [Thompson] during which I was advised about the mechanics of the Cherokee Road closing scheduled for December 15, 2015 and I did not agree to perform the role of escrow agent for the Cherokee Road transaction. [Thompson] did not tell me that my law firm would receive an $855,000 wire and that I would be expected to wire this money to a Charlotte title attorney.

Myers's affidavit concluded: "In connection with the subject transaction, I made no promise to any of the plaintiffs to deliver or receive within the State of North

Carolina, or to ship from the State of North Carolina or to the State of North Carolina, any goods, documents of title, or other things of value."

Countering Myers's affidavit, Plaintiffs submitted affidavits from Thompson, Sweet, and Plaintiffs' counsel in opposition to the Motion to Dismiss. Specifically, with respect to the alleged 14 December 2015 phone call, Thompson's affidavit described his version of events:

> During the call, Myers agreed to perform the role of escrow agent for the Cherokee Road transaction.
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> 9. I[, Thompson,] told Myers that Fortress would receive an $855,000 wire from my lender on the morning of December 15, 2015, and that Myers would be expected to wire that $855,000 that same afternoon to the Charlotte title attorney that would be closing the Cherokee Road transaction. . . . At the close of the telephone call, Myers assured me that he would coordinate and promptly turn around the outgoing closing wire of $855,000 necessary to close the Cherokee Road transaction. There was no misunderstanding about what was to take place.
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> 10. During the December 14, 2015 telephone call with Myers, I went over the memorandum of understanding between my firm and MFS . . . . That memorandum (1) contained Myers's wiring information at Fortress, (2) referenced the "Cherokee Road Residential Project," and (3) stated that "[Hubert Construction's] lender will hold a first mortgage on the property." Myers told me during the December 14, 2015 telephone [call] that he would forward (or have [V.A.] forward) a document containing his wiring information that could be used for circulation purposes with the other parties to the Cherokee Road closing. On or about that same day, I received that wiring instruction document, which

> contains [Fortress's] trust account and wiring information at Monarch Bank in Virginia.[1]

In Sweet's affidavit, Sweet attested she contacted Myers by phone on 14 December 2015 to discuss the flow of the escrowed funds for the Cherokee Road project. Sweet's affidavit stated:

> Myers and I discussed the fact that CHM's lender would be wiring the $855,000 to [Fortress] to close the Cherokee Road transaction on December 15, [2015]. Myers and I then discussed the fact that Fortress would need to fund the Cherokee Road closing in Charlotte by wire from his trust account the very same day. Myers and I discussed the particulars of how this would all take place. Myers indicated that this would be no problem. There was no misunderstanding about what was supposed to occur.

Plaintiff's counsel also submitted an affidavit attaching an excerpt from Myers's testimony before a federal grand jury, in which he was asked, "And this was in connection with funds taken from a project out of North Carolina. Were you familiar with that in 2015?" To which, Myers replied, "Yes, I am familiar with it. Yes."

Following a 19 February 2019 hearing based on the parties' competing affidavits, the trial court entered its Order dismissing Plaintiffs' Complaint for lack of personal jurisdiction on 3 April 2019. On 1 May 2019, Plaintiffs timely filed Notice of Appeal.

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[1] The "memorandum of understanding" was attached to Thompson's affidavit. It perhaps bears mentioning while the memorandum contains a "MFS Infrastructure Risk Management" header, the actual text refers to a "MFS Media Exports."

Issue

The dispositive issue on appeal is whether the trial court's Findings of Fact adequately resolve the factual disputes related to personal jurisdiction to support its dismissal of Plaintiffs' Complaint.

Analysis

"The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). "Typically, 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." *Id.* In this case, the parties submitted dueling affidavits in support of their respective jurisdictional arguments; therefore, this case falls into the third category. *See id.*

If the parties "submit dueling 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." *Id.* at 694, 611 S.E.2d at 183 (alteration in original) (citations and quotation marks omitted); *see*

also Bruggeman v. Meditrust Acquisition Co., 138 N.C. App. 612, 615, 532 S.E.2d 215, 217 (2000) ("If the exercise of personal jurisdiction is challenged by a defendant, a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits." (citation omitted)). In addition, where "defendants submit some form of evidence to counter plaintiffs' allegations, those allegations can no longer be taken as true or controlling and plaintiffs cannot rest on the allegations of the complaint." *Bruggeman*, 138 N.C. App. at 615-16, 532 S.E.2d at 218 (citations omitted). Where the court elects to decide the motion to dismiss on competing affidavits, "the plaintiff has the initial burden of establishing *prima facie* that jurisdiction is proper. Of course, this procedure does not alleviate the plaintiff's ultimate burden of proving personal jurisdiction at an evidentiary hearing or at trial by a preponderance of the evidence." *Id.* at 615, 532 S.E.2d at 217 (citations omitted). "If the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Banc of Am. Secs. LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183 (alterations, citation, and quotation marks omitted).

In determining whether nonresident defendants are subject to the exercise of personal jurisdiction by North Carolina courts, our courts employ 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." *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986) (citation omitted). Here, the trial court's Order appears to presume (without expressly deciding) this case falls within the language of North Carolina's long-arm statute found at N.C. Gen. Stat. § 1-75.4. Further, Defendants raise no argument otherwise.

Rather, both the trial court and the parties train their focus on the question of whether the exercise of personal jurisdiction is consistent with the Due Process Clause. "To satisfy the requirements of the due process clause, there must exist 'certain minimum contacts [between the non-resident defendant and the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Banc of Am. Secs. LLC*, 169 N.C. App. at 695, 611 S.E.2d at 184 (alteration in original) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945)). "The United States Supreme Court has recognized two bases for finding sufficient minimum contacts: (1) specific jurisdiction and (2) general jurisdiction." *Id.* at 696, 611 S.E.2d at 184.

In its Order, the trial court concluded Defendants did not have the type of "systematic and continuous" contacts with North Carolina to subject them to general jurisdiction. Plaintiffs concede this is not a general jurisdiction case and do not challenge this conclusion. Instead, Plaintiffs contend the trial court erred in

determining Defendants' alleged actions specifically giving rise to this case did not create the existence of specific jurisdiction.

"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). "For specific jurisdiction, 'the relationship among the defendant, the forum state, and the cause of action is the essential foundation for the exercise of *in personam* jurisdiction.' " *Id*. (quoting *Tom Togs, Inc.*, 318 N.C. at 366, 348 S.E.2d at 786). In this case, it is precisely the relationship between Defendants, North Carolina, and Plaintiffs' alleged cause of action that is the key jurisdictional factual dispute raised by the parties' competing affidavits.

In Defendants' version of events, any relationship between Defendants, the transaction, and North Carolina was attenuated at best. Defendants claim the transaction, as far as their involvement, had nothing to do with a North Carolina real estate transaction but rather merely involved the disbursement of funds pursuant to the instructions of their client "Montana Film Studios" and, at most, their contacts with North Carolina were limited to two phone calls, including confirming wiring instructions, and then wiring a portion of the funds to North Carolina.[2] As Defendants put it, they were "strangers to [the Cherokee Road] transaction."

[2] In their briefing to this Court, Defendants seem to concede the wiring of this portion of the funds was, in fact, related to the Cherokee Road closing, arguing: "While the Defendants do not dispute the fact of the $77,500 wire into North Carolina as part of the Cherokee Road closing, wiring of money

This is at odds with Plaintiffs' version of events. Plaintiffs contend Defendants not only took part in the real estate transaction as an escrow agent but did so after purposefully and affirmatively agreeing to serve as the escrow agent specifically for the Cherokee Road transaction with full knowledge funds were to be disbursed into North Carolina. Plaintiffs assert Defendants' contacts with North Carolina in connection with the Cherokee Road transaction are evidenced by the phone calls and Myers's own correspondence, along with the fact Defendants did wire funds related to the transaction into North Carolina.

Indeed, in Conclusion of Law 8, the trial court identified the crux of this factual dispute—"Plaintiffs contend Defendants knew the proceeds for the subject loan should have been wired to the closing account of a Charlotte, North Carolina[,] real estate attorney for use in the closing of the Cherokee Road property. Defendants contend a client unrelated to the Cherokee Road closing, Montana Film Studios, LLC, instructed Defendants to wire the money to the recipients of the wire." The trial court's Findings of Fact, however, fail to resolve the key jurisdictional factual disputes presented by the parties' competing affidavits—facts that could likely determine whether Defendants are subject to personal jurisdiction. *See, e.g.*, *Tom Togs, Inc.*, 318 N.C. at 367, 348 S.E.2d at 786-87 (citations omitted).

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into a forum is precisely the sort of 'random, fortuitous, or attenuated' contact that courts have refused to consider in the personal jurisdiction calculus."

Rather, the trial court's Order contains six Findings of Fact, which merely recite the generally uncontested facts—Thompson sought to purchase the Cherokee Road property from Barr; V.A. and Thompson agreed to enter into a joint venture on the Cherokee Road project; Poon wired $850,000.00 to Fortress on 15 December 2015; on 16 December 2015, Fortress wired the majority of this money to five recipients; and on 16 December 2015, Fortress deposited $8,500.00 into its operating account.

Rather than grapple with the central factual disputes with respect to the identity of Defendants' client and what Defendants were instructed to do with the escrowed funds and by whom, the trial court appears to attempt to avoid weighing the competing affidavits and assigning credibility to one side over the other. Instead, the trial court's conclusions attempt to use the largely uncontroverted facts to weigh different factors while giving equal weight to each party's narrative. The two narratives, however, are wholly incompatible. As a result, the trial court's Order on one hand acknowledges in its conclusions the case is one where Defendants "agreed to serve as escrow agent in connection with the sale of a tract of real property[,]" while on the other hand treating Defendants' actions as being entirely divorced from any connection to North Carolina.

Because the trial court did not decide the key jurisdictional factual issues of Defendants' actual connections, if any, to North Carolina specific to this transaction, we, in turn, cannot decide the jurisdictional question as a matter of law. *See Banc of*

Am. Secs. LLC, 169 N.C. App. at 694, 611 S.E.2d at 183 ("If the trial court chooses to decide the motion based on affidavits, *the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror*." (emphasis added) (alterations, citation, and quotation marks omitted). Accordingly, we vacate the trial court's Order and remand to the trial court for appropriate findings of fact based on the parties' competing affidavits resolving the disputed jurisdictional facts and for corresponding conclusions of law to determine whether Plaintiffs met their burden of proof to establish a prima facie case for personal jurisdiction. *See Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 217 (citation omitted). The trial court, in its discretion, may also permit the parties to conduct any further necessary jurisdictional discovery and hold an evidentiary hearing to decide the jurisdictional question. *See id.* (citation omitted).

Conclusion

Accordingly, for the foregoing reasons, we vacate the trial court's Order and remand this matter to the trial court for additional proceedings on the question of personal jurisdiction.

VACATED AND REMANDED.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).