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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-911

Filed: 7 July 2020

Wake County, No. 18-CVS-9604

TARA DOW-REIN, Plaintiff,

v.

MELISSA JONES SARLE; PARAMOUNT SHOW STABLES, INC.; WILLIAM HAROLD SCHAUB; W.H. SCHAUB STABLES, INC. d/b/a OVER THE HILL FARM; ALLYSON JACOBY COLUCCIO; HIDDEN RIDGE INTERNATIONAL, INC.; EVAN COLUCCIO, EMC FARMS, INC. a/k/a EMC INTERNATIONAL, INC. d/b/a EMC INTERNATIONAL STABLES or EMC INTERNATIONAL SALES; ANDREW KOCHER; and ANDY KOCHER LLC, Defendants.

Appeal by defendants from order entered 8 April 2019 by Judge Keith Gregory in Wake County Superior Court. Heard in the Court of Appeals 15 April 2020.

Ragsdale Liggett PLLC, by Dorothy Bass Burch, John W. (“Bo”) Walker, and Sandra Mitterling Schilder, for plaintiff-appellee.

Young Moore and Henderson, P.A., by Walter E. Brock, Jr. and David W. Earley, for defendants-appellants William Harold Schaub and W.H. Schaub Stables, Inc. d/b/a Over the Hill Farm.

Stam Law Firm, PLLC, by R. Daniel Gibson, for defendants-appellants Allyson Jacoby Coluccio, Hidden Ridge International, Inc., and Evan Coluccio.

DIETZ, Judge.

Tara Dow-Rein bought two horses for her daughter from sellers in Virginia and

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Florida. The horses had health and behavioral issues. Dow-Rein sued her local riding trainer and horse broker, who arranged the sales on her behalf, and the sellers of the horses, who reside in other states.

The out-of-state defendants moved to dismiss for lack of jurisdiction. Both sides submitted affidavits containing jurisdictional facts, and the parties conducted some jurisdictional discovery. After a hearing, the trial court denied the motions.

As explained below, in ruling on a Rule 12(b)(2) motion to dismiss with competing affidavits, the trial court “must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror” and make findings of fact that resolve jurisdictional fact disputes. *Banc of Am. Sec. LLC v. Evergreen Int’l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005). That did not occur here, where the court’s findings are based largely on allegations in the unverified complaint that are disputed by sworn affidavits. Moreover, where there are legitimate fact disputes in the record, we cannot discern whether the trial court weighed the evidence and made credibility determinations or, again, relied on unverified allegations in the complaint. We therefore vacate the trial court’s order and remand for findings of fact, and corresponding conclusions of law, based on the appropriate evidence in the record.

Facts and Procedural History

In 2015, Plaintiff Tara Dow-Rein engaged the services of Defendant Melissa

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Sarle, her riding trainer and an equine sales broker, to assist Dow-Rein in locating and purchasing a horse for her young daughter. In December 2015, Dow-Rein travelled to Florida to see horses for sale. During the visit to Florida, Sarle arranged a meeting with Defendant William Schaub, who showed Dow-Rein a horse named Season. Dow-Rein communicated with Schaub through Sarle regarding Season's health, veterinary records, and arrangements for the sale. Later that month, Dow-Rein purchased Season. Dow-Rein alleges that, after purchasing Season, she discovered that the horse suffered from chronic lameness.

Dow-Rein later began looking for a replacement horse. In October 2016, Sarle arranged for Dow-Rein to meet with Schaub in Virginia to test ride horses. Schaub showed Dow-Rein a horse named Fred who was for sale by Defendants Allyson and Evan Coluccio. A few days later, Dow-Rein traveled to the Coluccios' farm in Virginia for a second showing. Dow-Rein communicated with the Coluccios through Sarle to negotiate the sale of Fred. In November 2016, Dow-Rein purchased Fred. Dow-Rein alleges that, after buying Fred, the horse displayed behavioral issues that caused the horse to spook and throw off its rider.

In 2018, Dow-Rein filed a complaint against Sarle, Schaub, and the Coluccios, as well as each of their respective corporate entities.¹ Dow-Rein asserted claims for fraud, negligence or negligent misrepresentation, unfair and deceptive trade

¹ For ease of reference, we refer collectively to all the out-of-state defendants who are parties to this appeal as "Defendants."

practices, and breach of contract.

Defendants moved to dismiss under Rule 12(b)(2) for lack of personal jurisdiction, and Schaub and his corporate entity also moved to dismiss under Rule 12(b)(3) for improper venue based on a forum selection clause in the bill of sale for Season. Defendants submitted affidavits in support of their motions from William Schaub, Allyson Coluccio, and Evan Coluccio. Defendants also responded to jurisdictional discovery. Dow-Rein submitted a counter-affidavit from a paralegal at her counsel's firm.

The trial court heard argument on the motions to dismiss. The court considered the motions on the existing record without additional testimony or evidence at the hearing. The court announced at the conclusion of the hearing that it would deny the motions to dismiss, and later entered a written order with findings of fact and conclusions of law. Defendants timely appealed.²

Analysis

Defendants challenge the trial court's denial of their Rule 12(b) motions to dismiss for lack of personal jurisdiction. "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. Sec. LLC v. Evergreen Int'l Aviation, Inc.*,

² This is a permissible interlocutory appeal. "[A]n adverse ruling as to the jurisdiction of the court over the person or property of the defendant" is immediately appealable under N.C. Gen. Stat. § 1-277(b). *Smith Architectural Metals, LLC v. Am. Railing Sys., Inc.*, 207 N.C. App. 151, 153, 698 S.E.2d 752, 754 (2010).

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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.*

This case falls into the third category, with both sides relying on affidavits or sworn discovery responses to support their jurisdictional arguments. “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.” *Id.* at 694, 611 S.E.2d at 183. Moreover, if “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 v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615–16, 532 S.E.2d 215, 218 (2000).

The trial court’s order is inconsistent with these precedents. This is partly due to the parties’ affidavits being akin to proverbial ships passing in the night. Dow-Rein’s affidavit focused on Defendants’ general contacts with our State. Defendants’ affidavits disputed some of those facts but focused primarily on facts concerning the sale of the horses at issue in this case.

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In its order, the trial court made some findings concerning the dispute over general jurisdiction, but most findings address the issue of specific jurisdiction. Those findings appear largely based on unverified allegations in the complaint that are disputed in sworn affidavits from Defendants.

For example, one of the key issues is where the contracts for the sale of these horses were formed. The court found that the contracts were “North Carolina contracts” that were “enter[ed] into” or “executed” in North Carolina. But Defendants all testified in sworn affidavits that the contracts were entered into or executed in other states. There are no counter-affidavits or other evidence in the record on appeal on this question; there are only the allegations in the unverified complaint.

Similarly, another key issue is whether Defendants delivered the horses to Dow-Rein in North Carolina. The trial court found that they did. But, again, Defendants’ sworn affidavits state that they delivered the horses in other states, and that Dow-Rein or her agents took possession and transported them to North Carolina. And, again, there are no counter-affidavits or other evidence in the record on appeal on this question; there are only the allegations in the unverified complaint.

Finally, the trial court made findings concerning Defendants’ contacts with the forum state, primarily in the form of telephone, email, and facsimile communications. There are fact disputes about the nature of those communications and whether they were initiated by Defendants or instead by Dow-Rein or her agents. In light of the

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trial court's reliance on unverified allegations in the complaint with respect to other findings, we cannot discern whether the court made credibility determinations on these disputed issues, based on evidence in the record, or instead accepted allegations in the complaint in the face of disputed sworn affidavits. *See Banc of Am. Sec. LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183.

Were this a case where there were no disputed facts at all, we could decide the jurisdictional question as a matter of law. But among the affidavits, records submitted through jurisdictional discovery, and undisputed jurisdictional allegations in the unverified complaint, there are disputes of fact. We are an appellate court and "cannot find facts." *Pharr v. Atlanta & C. Air Line Ry. Co.*, 132 N.C. 418, 423, 44 S.E. 37, 38 (1903). We therefore vacate the trial court's order and remand for findings of fact, and corresponding conclusions of law, based on the appropriate evidence in the record, applying the test for jurisdictional evidence described in *Banc of Am. Sec. LLC*, 169 N.C. App. at 696, 611 S.E.2d at 184.

Because we vacate on this ground, we need not address the alternative arguments concerning the forum selection clause, which may be mooted by the trial court's new findings on remand.

Conclusion

We vacate the trial court's order and remand for further proceedings.

VACATED AND REMANDED.

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Judges TYSON and MURPHY concur.

Report per Rule 30(e).