NO. COA01-1212

NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2002

H. SLADE HOWELL,
Plaintiff

v. Watauga County
No. 01 CVS 13

RICHARD W. FURMAN; HAROLD N. FRAZIER; and WATAUGA SURGICAL GROUP, P.A.,
Defendant

Appeal by plaintiff from orders entered 31 May 2001 and 11 July 2001 by Judge Timothy S. Kincaid in Watauga County Superior Court. Heard in the Court of Appeals 22 May 2002.

Carruthers & Roth, PA, by Kenneth R. Keller and Norman F. Klick, Jr., for plaintiff.

Wilson & Iseman, LLP, by C. Philip Ginn and S. Ranchor Harris, III, for defendants Richard W. Furman and Harold N. Frazier.

BRYANT, Judge.

On 8 January 2001, Dr. H. Slade Howell (plaintiff), a licensed physician employed with Watauga Surgical Group, P.A., filed a complaint against Watauga Surgical Group and Drs. Richard W. Furman and Harold N. Frazier (also employees of Watauga Surgical Group). As against Drs. Furman and Frazier, the complaint alleged tortious interference with plaintiff's prospective economic advantage, and defamation. As against all three named defendants, the complaint

alleged civil conspiracy. In addition, as against Watauga Surgical Group, the complaint presented a demand for accounting, a claim of respondeat superior for Drs. Furman and Frazier's alleged tortious acts, and plaintiff sought declaratory judgment as to the enforceability of certain covenants contained in his employment agreement.

Defendants filed a motion to dismiss the complaint pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6). In addition, defendants moved to compel arbitration of all the claims based on certain covenants contained in plaintiff's employment contract.

Following a 17 April 2001 hearing on defendants' motions, and by order filed 31 May 2001, defendants' motion to compel arbitration was allowed as to the claims against Watauga Surgical Group, and denied as to claims against Drs. Furman and Frazier. The order stated "the instant litigation between plaintiff and defendant Watauga Surgical is stayed pending completion of the arbitration." In addition, in an accompanying order filed on 31 May 2001, defendants' motion to dismiss was granted only as to claims against Drs. Furman and Frazier.

On 9 May 2001 (after rulings on defendants' motions were announced in open court, but before the entry of the order), plaintiff filed motions to amend his complaint and seek relief from the 31 May 2001 order as related to the dismissal of his claims against Drs. Furman and Frazier. Plaintiff brought these motions pursuant to N.C.G.S. § 1A-1, Rules 59(e), 60, and 15. By order filed 11 July 2001, plaintiff's motions were denied. Plaintiff

appeals both the 11 July 2001 order and portions of the 31 May 2001 order dismissing (without prejudice) his claims as against Drs. Furman and Frazier.

Defendants Furman and Frazier have filed a motion to dismiss this appeal as interlocutory. For the following reasons, we grant defendants' motion to dismiss.

I.

A judgment is either interlocutory or a final determination of the rights of parties. N.C.G.S. § 1A-1, Rule 54(a) (2001); *see Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). An order is interlocutory if it is entered during the pendency of an action and does not dispose of the case, but requires further action by the trial court to finally determine the rights of all the parties involved in the controversy. *Veazey* at 362, 57 S.E.2d at 381; *see, e.g., Alford v. Catalytica Pharmaceuticals, Inc.*, ___ N.C. App. ___, 564 S.E.2d 267 (2002); *Flitt v. Flitt*, ___ N.C. App. ___, 561 S.E.2d 511 (2002); *Country Club of Johnston County, Inc. v. U.S. Fidelity and Guar. Co.*, 135 N.C. App. 159, 519 S.E.2d 540 (1999), *review denied*, 351 N.C. 352, 542 S.E.2d 207 (2000). Generally, there is no right to appeal from an interlocutory order. *See* N.C.G.S. § 1A-1, Rule 54(b) (2001). Our courts, however, have recognized that two avenues exist for appealing interlocutory orders.

Rule 54(b)

Under N.C.G.S. § 1A-1, Rule 54(b), when multiple parties are

involved in an action and a court enters a final judgment that adjudicates one or more of the claims or parties, such judgment, although interlocutory in nature, may be appealed if the trial judge *certifies* that there is no just reason for delay. *See Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993); *see, e.g., Alford* at ___, 564 S.E.2d at ___; *Flitt* at ____, 561 S.E.2d at 513; *Country Club* at 162, 519 S.E.2d at 543; *Hoots v. Pryor*, 106 N.C. App. 397, 401, 417 S.E.2d 269, 272 (1992). In this case, the trial court did not certify the 12(b)(6) dismissal as immediately appealable pursuant to Rule 54(b); therefore, the underlying 12(b)(6) dismissal may not be appealed pursuant to Rule 54(b).

Substantial Right

An appeal may be allowed under the provisions of N.C.G.S. §§ 1-277, 7A-27, when an interlocutory order cannot otherwise be appealed under Rule 54(b). *Hoots* at 401, 417 S.E.2d at 272. N.C.G.S. §§ 1-277 and 7A-27 provide that an appeal may lie from an interlocutory order if a substantial right is affected, the order determines the action and prevents a judgment from which an appeal may be taken, or discontinues the action. *See* N.C.G.S. §§ 1-277, 7A-27 (2001); *Hoots* at 401, 417 S.E.2d at 272.

The right to immediate appeal under the substantial right exception is determined pursuant to a two step process. *Hoots* at 401, 417 S.E.2d at 272. The appellant must first show that: (1) the order affects a right that is indeed "substantial," and (2) "enforcement of that right, absent immediate appeal, [will] be

'lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order.'" *Country Club* at 162, 519 S.E.2d at 543; *see, e.g., Flitt* at ____, 561 S.E.2d at 513; *Dalton Moran Shook, Inc. v. Pitt Development Co.*, 113 N.C. App. 707, 710, 440 S.E.2d 585, 588 (1994); *Hoots* at 401, 417 S.E.2d at 272. The substantial right test is more easily stated than applied and resolving these questions must be done on a case by case basis. *Flitt* at ___, 561 S.E.2d at 513; *Country Club* at 162, 519 S.E.2d at 543; *Hoots* at 401, 417 S.E.2d at 272. In addition, our Supreme Court has held that the right to avoid the possibility of two trials on issues based on the same factual occurrences may trigger the substantial right exception, allowing for immediate appeal. *See Hoots* at 401, 417 S.E.2d at 272; *see, e.g., Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 376 S.E.2d 488 (1989) (stating that a substantial right may be affected when it is possible to have inconsistent verdicts on the same factual issues).

In the instant case, plaintiff argues that even though his claims against Drs. Furman and Frazier were dismissed without prejudice, his defamation claim would be barred upon refiling, pursuant to the statute of limitations. Plaintiff states that his non-defamation claims would not be barred upon refiling based on the statute of limitations. Plaintiff asserts that his defamation and non-defamation claims against the defendants all arise from the same factual transactions and occurrences. Because the possibility exists that multiple trials could result from the same factual transactions and occurrences, plaintiff argues that a substantial

right exists, entitling plaintiff to the right of immediate appeal of the Rule 12(b)(6) dismissal. We disagree.

Plaintiff cites *Robinson v. General Mills Restaurants,* 110 N.C. App. 633, 430 S.E.2d 696 (1993), as authority for his argument. In *Robinson*, the Court held that even though a voluntary dismissal without prejudice of a defamation claim is not an adjudication of the case, if, during the one—year period for refiling, the statute of limitations would have elapsed, and the defamation action could therefore not be resurrected, then the voluntary dismissal would act as a final judgment. *Robinson*, however, clearly applies to dismissals of defamation claims that are entered pursuant to Rule 41(a)- voluntary dismissals. Plaintiff, in this case, is appealing an *involuntary* dismissal.

Plaintiff has the burden of showing that the order affects a substantial right which will be lost or prejudiced absent immediate appeal. *Country Club* at 162, 519 S.E.2d at 543. Plaintiff has failed to even argue how the holding in *Robinson* applies to the involuntary dismissal, without prejudice, of the defamation claim in the instant case. Because plaintiff has failed to satisfy his burden, this assignment of error is overruled.

As to the remaining exceptions articulated in N.C.G.S. §§ 1-277 and 7A-27 for appealing an interlocutory order, we do not find that the order of the trial court determines the action and prevents a judgment from which an appeal may be taken. In addition, the trial court's order dismissing plaintiff's claims against Furman and Frazier did not discontinue the action pursuant

to N.C.G.S. §§ 1-277 and 7A-27. Although the claims against Furman and Frazier were dismissed, multiple claims remained pending against defendant Watauga Surgical. As the claims against Watauga Surgical were stayed pending arbitration, the action had not been discontinued. Therefore, we are precluded from addressing the merits of this assignment of error.

II.

Plaintiff also appeals the denial of his Rule(s) 59(e), 60 and 15 motion. Because neither the trial court certified the dismissal as being immediately appealable pursuant to Rule 54(b), nor has plaintiff met his burden of showing that a substantial right will be adversely affected if immediate appeal is not allowed, we are precluded from addressing the merits of this assignment of error.

DISMISSED.

Judges WALKER and McCULLOUGH concur.

Report per Rule 30(e).