

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-1453

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

ASPHALT EXPERTS, INC.,  
Plaintiff,

v.

Durham County  
No. 01 CVS 2789

BARNES PLUMBING, BOLIN  
CREEK INVESTMENTS, LLC,  
JOSEPH W. BARNES, TIMOTHY  
W. BARNES, DEBORAH BARNES,  
and REBECCA BARNES,  
Defendants.

Appeal by plaintiff from order entered 24 August 2001 by Judge Henry V. Barnette, Jr., in Durham County Superior Court. Heard in the Court of Appeals 1 July 2002.

*Bugg, Wolf & Wilkerson, P.A., by William J. Wolf, for plaintiff-appellant.*

*Law Office of Robert B. Jervis, P.C., by Robert B. Jervis, for defendant-appellees.*

BRYANT, Judge.

Defendant Bolin Creek Investments, L.L.C. (defendant Bolin) contracted with defendant Barnes Plumbing (defendant Barnes) for the construction of roadways, tennis courts and basketball courts on Bolin's property. Barnes, the general contractor, subcontracted with plaintiff Asphalt Experts, Inc. (plaintiff Asphalt), to supply labor, equipment and materials for the project. As a first tier

subcontractor, plaintiff Asphalt filed a notice of claim lien with the Clerk of Durham County Superior Court on 11 June 2001 and notified defendant Bolin of the lien. Plaintiff Asphalt filed a complaint against defendant Bolin, defendant Barnes and the individual partners of defendant Barnes on 12 June 2001 to recover damages for paving work it performed on defendant Bolin's property.

Defendant Bolin was served with process on 15 June 2001 through its registered agent. Defendant Bolin did not answer and on 23 July 2001, plaintiff moved for entry of default and default judgment. That same day, the clerk of Durham County Superior Court entered default and default judgment against defendant Bolin in the sum of \$70,441.81 plus costs and attorneys fees. The judgment also declared a lien against defendant Bolin's property. On 3 August 2001, defendant Bolin moved for relief from the judgment. The trial court entered an order setting aside the default judgment on 24 August 2001. Plaintiff appeals.

The order from which plaintiff appeals is interlocutory. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g. denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). An order setting aside a default judgment is interlocutory as "it does not finally dispose of the case and requires further action by the trial court." *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980). No appeal lies from an interlocutory order unless

it affects a substantial right and will result in injury if not reviewed before final judgment. N.C.G.S. § 1-277(a) (2001); N.C.G.S. § 7A-27(d) (2001); *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

Plaintiff contends our refusal to hear this appeal will deny a substantial right. Plaintiff submits that other subcontractors and suppliers have asserted claims pursuant to N.C.G.S. § 44A-19 (2001). Plaintiff argues that a dismissal of this appeal will result in irreparable harm to plaintiff in that plaintiff's claim "will be diluted by claims from other creditors pursuant to N.C.G.S. § 44A-21 if the judgment is not reinstated." We disagree. Plaintiff has not shown that its claim of lien filed 11 June 2001 affords it no relief as to defendant Bolin's assets. Accordingly, plaintiff has not shown that it will be deprived of a substantial right.

Here, plaintiff's objection to the order setting aside the default judgment is protected by its exception to the order. See *Bailey*, 301 N.C. at 210, 270 S.E.2d at 434 (holding that if appellant's rights "would be fully and adequately protected by an exception to the order that could then be assigned as error on appeal after final judgment[,] there is no right to an immediate appeal). Therefore, no right will be lost by delaying the appeal until after a final judgment is entered. Furthermore, avoidance of a trial is not a substantial right entitling plaintiff to an immediate appeal. See *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978). Because the appeal is premature,

it must be dismissed. *Bailey*, 301 N.C. at 210, 270 S.E.2d at 434. This Court, in its discretion, elects not to treat plaintiff Asphalt's appeal as a petition for writ of certiorari.

Appeal dismissed.

Judges MARTIN and HUNTER concur.

Report per Rule 30(e).