

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-1352

NORTH CAROLINA COURT OF APPEALS

Filed: 3 July 2007

C. WAYNE McDONALD  
CONTRACTOR, INC., a North  
Carolina Corporation,  
Plaintiff-Appellee,

v.

Davidson County  
No. 02 CVS 3158

ALEXANDER M. GENDELMAN,  
Individually, and CENTURY  
TEXTILE MFG., INC., a  
North Carolina Corporation,  
Defendants-Appellants.

Appeal by Defendants from orders entered 5 June and 26 June 2006 by Judge Christopher M. Collier in Superior Court, Davidson County. Heard in the Court of Appeals 23 May 2007.

*Law Offices of J. Calvin Cunningham, by J. Calvin Cunningham and Nicholas D. Wilson, for Plaintiff-Appellee.*

*Biesecker, Tripp, Sink & Fritts, L.L.P., by Joe E. Biesecker and Christopher A. Raines, for Defendants-Appellants.*

McGEE, Judge.

C. Wayne McDonald Contractor, Inc. (Plaintiff) filed a complaint in District Court on 31 October 2002 against Alexander M. Gendelman (Mr. Gendelman) and Century Textile Mfg., Inc. (Century Textile) (collectively Defendants), alleging claims for trespass. Plaintiff alleged the following: Plaintiff contracted to sell real estate (the building) to Mr. Gendelman and, as provided by the

contract, Plaintiff delivered possession of the building to Mr. Gendelman prior to the closing date. On the date set for closing, Plaintiff demanded that Mr. Gendelman close on the purchase of the building. However, Mr. Gendelman failed to close, and Plaintiff alleged that this failure amounted to a breach of the contract. Mr. Gendelman subsequently forwarded to Plaintiff a rejection of the building. Plaintiff further alleged in its complaint that Mr. Gendelman "caused to be moved into [the building] a corporation named Century Textile" and that Defendants refused to close on the purchase of the building, or to move Century Textile from the building.

Plaintiff filed an amendment to its complaint on 5 November 2002, adding claims for breach of contract, unfair and deceptive trade practices, and a *de facto* materialman's lien. Mr. Gendelman filed a verified motion for a temporary restraining order on 7 November 2002, seeking access to the building to remove personal property belonging to Century Textile. The District Court entered a preliminary injunction order on 13 November 2002, ordering that Plaintiff allow Mr. Gendelman to enter the building to remove the personal property of Century Textile.

Defendants filed motions, an answer, and counterclaims in District Court on 6 January 2003, including a motion to transfer the matter to Superior Court and a motion to dismiss Plaintiff's complaint. Defendants answered Plaintiff's allegations and brought counterclaims for conversion, breach of contract, and unfair and deceptive trade practices. Plaintiff filed a reply to Defendants'

counterclaims on 7 March 2003. The District Court entered an order transferring the matter to the Superior Court on 20 August 2003.

Plaintiff filed a motion on 2 December 2005 for partial summary judgment as to Defendants' damages claim for lost sales and profits. Plaintiff alleged that "[t]he parties [had] engaged in substantial discovery, and throughout the discovery process, . . . Defendants [had] produced no documentary evidence of lost sales or profits."

Mr. Gendelman filed an affidavit on 9 January 2006 in which he stated that, as a result of being evicted from the building by Plaintiff, he lost a contract for the sale of fabric. Mr. Gendelman alleged that he lost between \$70,000.00 and \$80,000.00 in profits, along with the cost of the fabric. The record on appeal also contains an affidavit of Ronald Watford, who stated that he worked for Mr. Gendelman and detailed some of the damages allegedly suffered by Defendants.

Plaintiff filed a second motion on 6 February 2006 for partial summary judgment as to Defendants' damages claim for a replacement building. Plaintiff alleged that "[t]he parties [had] engaged in substantial discovery, and throughout the discovery process, . . . Defendants [had] produced no documentary evidence of expending any 'time and/or money to find a replacement building.'"

Plaintiff filed a third motion on 16 February 2006 for partial summary judgment on Defendants' damages claim for incremental costs of doing business. Plaintiff alleged that "[t]he parties [had] engaged in substantial discovery, and throughout the discovery

process, . . . Defendants [had] produced no documentary evidence of 'incremental costs of doing business.'"

Plaintiff also filed a fourth motion on 16 February 2006 for partial summary judgment on Defendants' claim of damages resulting from the transfer of property to a new building. Plaintiff alleged that "[t]he parties [had] engaged in substantial discovery, and throughout the discovery process, . . . Defendants [had] produced no documentary evidence of damages for 'transferring property to a new building' or 'incurring substantial expense in hiring trucking companies.'"

Plaintiff filed a motion on 18 May 2006 seeking to strike portions of the affidavit testimony of Mr. Gendelman and Ronald Watford. Plaintiff argued that all of the statements in Mr. Gendelman's affidavit were unsworn and uncertified. Plaintiff argued that a substantial number of the statements in Ronald Watford's affidavit were not based upon personal knowledge. Plaintiff further argued that Ronald Watford's affidavit made numerous conclusions. The Superior Court entered an order on 5 June 2006 granting Plaintiff's motion to strike the affidavit testimony "as to those portions of the Affidavit of Ronald Watford which are (i) not based upon his personal knowledge, (ii) hearsay, and (iii) conclusionary, and all un-sworn and uncertified Affidavits of Alexander Gendelman in their entirety." The Superior Court entered an order on 26 June 2006 granting Plaintiff's motions for partial summary judgment as to Defendants' damages claims for costs to transfer property to a new building, and for the

incremental costs of doing business. In the same order, the Superior Court denied Plaintiff's motions for partial summary judgment as to Defendants' damages claims for lost profits and sales, and costs for a replacement building. Defendants appeal.

A judgment entered during the pendency of a case which does not dispose of the case in its entirety is an interlocutory judgment. *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999). As a general rule, interlocutory judgments are not immediately appealable. *Id.* However, immediate review of an interlocutory judgment is available in two limited circumstances: (1) where the trial court certifies, pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), that there is no just reason for delay of an appeal from a final judgment as to one or more, but not all, of the claims; and (2) where the interlocutory judgment affects a substantial right in accordance with N.C. Gen. Stat. § 1-277(a). *Sharpe*, 351 N.C. at 161-62, 522 S.E.2d at 579.

In the present case, Defendants attempt to appeal an order granting partial summary judgment to Plaintiff and an order striking certain affidavit testimony. Because these orders do not dispose of the case in its entirety, they are interlocutory. See *Giles v. First Virginia Credit Servs., Inc.*, 149 N.C. App. 89, 94, 560 S.E.2d 557, 561 (quoting *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993)), *disc. review denied*, 355 N.C. 491, 563 S.E.2d 568 (2002) (recognizing that "[a] grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no

right of appeal.'"); *see also Bank v. Olive*, 42 N.C. App. 574, 576, 257 S.E.2d 100, 101 (1979) (dismissing, as interlocutory and not affecting a substantial right, an appeal from various discovery orders, including an order granting a motion to strike interrogatories).

In the present case, the Superior Court did not certify this matter for immediate appeal. Therefore, Defendants argue that the interlocutory orders affect Defendants' substantial right to avoid the possibility of two trials on the same factual issues. An appellant bears the burden of demonstrating that an order will adversely affect a substantial right. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994).

In the present case, Defendants argue in their "Statement of Grounds for Appellate Authority" that they "face[] the possibility of multiple trials on the same factual issues if this appeal is not permitted now." Specifically, Defendants argue that "[their] claims for expenses in finding a replacement building, the costs of transferring property to a new building[,] and the incremental costs of doing business are essentially relocation expenses incurred by [Mr.] Gendelman and are consequential damages arising from the breach of contract by [P]laintiff." Defendants further argue that "[t]he prospect of multiple trials raises the possibility that one jury will conclude that some of these relocation expenses were in the reasonable contemplation of the parties, while another jury could conclude that they were not."

Defendants have failed to meet their burden to demonstrate

how, were we to dismiss this appeal as interlocutory, they would face the possibility of multiple trials on the same factual issues. While the Superior Court granted partial summary judgment to Plaintiff on Defendants' damages claims for costs to transfer property to a new building, and incremental costs, the Superior Court denied summary judgment as to Defendants' damages claims for lost profits and sales, and costs for a replacement building. The damages claims that remain raise different factual issues than the damages claims on which the Superior Court granted summary judgment. Therefore, we see no possibility of inconsistent verdicts. Accordingly, we dismiss this appeal.

Dismissed.

Judges LEVINSON and JACKSON concur.

Report per Rule 30(e).