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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-293

Filed: 15 December 2015

Currituck County, No. 12 CVS 334

SWAN BEACH COROLLA, L.L.C., et al., Plaintiffs,

v.

COUNTY OF CURRITUCK, et al., Defendants.

Appeal by Defendants from order entered 25 November 2014 by Judge Cy A. Grant in Currituck County Superior Court. Heard in the Court of Appeals 10 September 2015.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster, for the Plaintiff-Appellees.

County of Currituck, by Currituck County Attorney Donald I. McRee, Jr., for the Defendants-Appellants.

Simonsen Law Firm, P.C., by Lars P. Simonsen, for Amicus Curiae, the Northern Currituck Outer Banks Association.

Roger W. Knight, P.A., by Roger W. Knight, for Amicus Curiae, the Fruitville Beach Civic Association.

DILLON, Judge.

The County of Currituck, the Currituck County Board of Commissioners, and members of that Board (“Defendants”) appeal from the trial court’s order denying

Opinion of the Court

their motion to set aside entry of default. For the following reasons, we affirm in part and dismiss in part.

I. Background

This appeal is the second appeal to this Court in this matter. Facts relevant to the issues raised by this second appeal follow, and other information concerning this litigation is available for reference in our decision in Defendants' prior appeal. *See Swan Beach Corolla, L.L.C. v. Cnty. of Currituck*, ___ N.C. App. ___, ___, 760 S.E.2d 302, 305-07 (2014) ("*Swan Beach I*").

Plaintiffs are the owners of certain real property in Currituck County, which they wish to develop commercially. Defendants are local government entities and officials opposing the development.

After Plaintiffs were informed that certain of Defendants would refuse to allow development, Plaintiffs filed their complaint in this action asserting three claims regarding Defendants' refusal to approve the Plaintiffs' proposed development:

- (1) Plaintiffs have common law vested rights to develop the property (the "Vested Rights Claim");
- (2) Defendants were violating Plaintiffs' rights to due process and equal protection under the federal Constitution (the "Equal Protection Claim"); and
- (3) Plaintiffs' right to taxation by uniform rule as guaranteed by Article V, Section 2 of the North Carolina Constitution had been violated (the "Uniform Tax Claim").

Opinion of the Court

Defendants did not file an answer but rather moved to dismiss all three claims pursuant to Rule 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure. After a hearing on the matter, the trial court entered an order granting Defendants' motion to dismiss Plaintiffs' three claims. Plaintiffs appealed, which was the first appeal to this Court and which resulted in our opinion in *Swan Beach I*.

In *Swan Beach I*, we affirmed the court's dismissal of the Uniform Tax Claim. However, we reversed the trial court's dismissal of the Vested Rights Claim and the Equal Protection Claim and remanded the matter to the trial court for further proceedings on these remaining two claims. *Id.* at ___, 760 S.E.2d at 313.

After twenty days had passed from the issuance of our mandate in *Swan Beach I*, Plaintiffs moved the clerk of court to enter default based on Defendants' failure to file a timely responsive pleading as to their Vested Rights Claim and Equal Protection Claim.¹ The clerk entered default against Defendants.

Thereafter, Defendants moved the trial court to set aside the clerk's entry of default. Following a hearing on the matter, the trial court denied Defendants' motion. Defendants timely appealed the trial court's order.

II. Appellate Jurisdiction

¹Plaintiffs based their motion for entry of default on Rule 12(a)(1)(a) of the North Carolina Rules of Civil Procedure, which requires that the responsive pleading "shall be served within 20 days after notice of the court's action in ruling on [a defendant's motion to dismiss]."

Opinion of the Court

At the outset, we note that the trial court's order is merely *a denial to set aside the clerk's entry of default*; it is not a *default judgment*. The order being appealed is, therefore, interlocutory. *Duncan v. Duncan*, 102 N.C. App. 107, 111, 401 S.E.2d 398, 400 (1991) (holding that a mere "entry of default is not a final order or a final judgment").

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldstone v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, our Supreme Court has held that a right to an immediate appeal from an interlocutory order exists where the order "deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." *Travco Hotels, Inc. v. Piedmont Natural Gas Co., Inc.*, 332 N.C. 288, 292, 420 S.E.2d 426, 428 (1992). Further, the appellants have the burden "of showing this Court that the [trial court's interlocutory] order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

Here, Defendants argue that we have jurisdiction over this appeal because the trial court's order denying their motion to set aside the entry of default deprives them of certain substantial rights. We agree.

Opinion of the Court

To determine the threshold question of our jurisdiction, we must determine (1) whether any right identified by Defendants is, indeed, “substantial” and (2) whether the interlocutory order is of the type which would deprive Defendants of this right. *See Frost v. Mazda Motors of America, Inc.*, 353 N.C. 188, 192, 540 S.E.2d 324, 327 (2000). However, in answering this threshold jurisdictional question, “we do not reach the *merits* of [Defendant’s] claim to that substantial right.” *Neusoft Med. Sys., USA, Inc. v. Neuisys, LLC*, ___ N.C. App. ___, ___, 774 S.E.2d 851, 855 (2015). To do so would, in the words of the United States Supreme Court, “conflat[e] the jurisdictional question with the merits of the appeal.” *Arthur Andersen, LLC v. Carlisle*, 556 U.S. 624, 628, 129 S. Ct. 1896, 1900 (2009). *See also Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 681 S.E.2d 770 (2009).²

Here, Defendants *claim* that their defenses of governmental immunity and of collateral estoppel will be deprived by the trial court’s order. Our Supreme Court has recognized that both governmental immunity and collateral estoppel are “substantial” rights. *See Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009) (governmental immunity); *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (collateral

² In *Turner*, the defendants moved to dismiss the plaintiffs’ claims based on collateral estoppel. The trial court denied the defendants’ motion. The defendants immediately appealed, though the trial court’s denial was an interlocutory order. Our Supreme Court held that it had jurisdiction over the appeal, concluding collateral estoppel was a substantial right, and, therefore, did not dismiss the appeal. *Then*, the Court addressed the merits of the defendants’ collateral estoppel defense, concluding that there was no merit to the defense. Accordingly, the Court affirmed the trial court.

Opinion of the Court

estoppel). Again, whether there is any merit to these claimed defenses is not relevant to our determination of the threshold issue of our jurisdiction.

Next, we must determine whether the trial court's order denying Defendants' motion to set aside the entry of default is of the type which would deprive Defendants of their claimed substantial rights, assuming there is merit to Defendants' claim of these rights. We note that each right claimed by Defendants involves the right not to have to proceed with further litigation. *See Craig*, 363 N.C. at 337, 678 S.E.2d at 354 (recognizing that governmental immunity is "an immunity from suit rather than a mere defense to liability"); *Turner*, 363 N.C. at 558, 681 S.E.2d at 773 (stating that collateral estoppel involves "a substantial right to avoid litigating issues that have already been determined"). This Court has held that a trial court's order which denied a defendant's request for leave to amend its answer a year into the litigation in order to assert governmental immunity as a defense was immediately appealable. *Mabrey v. Smith*, 144 N.C. App. 119, 121, 548 S.E.2d 183, 185 (2001) (stating that the "denial of dispositive motions such as motions to dismiss, for judgment on the pleadings, and to amend pleadings that are grounded on governmental immunity affect a substantial right and are immediately appealable"). This is so because, absent an immediate appeal, the party claiming governmental immunity would be forced to continue defending the claim asserted against it.

Opinion of the Court

Similar to the trial court's action in *Mabrey*, the trial court's action here deprives Defendants of an opportunity to file an answer and assert therein governmental immunity as an affirmative defense. Following *Mabrey*, we must conclude we have jurisdiction over this appeal and turn to consider the *merits* of Defendants' arguments.

III. Analysis

A. Governmental Immunity

Defendants argue that the trial court's order affects their substantial right of governmental immunity with respect to Plaintiffs' two surviving claims: the Vested Rights Claim and the Equal Protection Claim. We disagree and conclude that Defendants' argument has no merit.

In *Swan Beach I*, we held that Plaintiffs' Equal Protection Claim was not barred by sovereign immunity. *Id.* ___ N.C. App. at ___, 760 S.E.2d at 312 (holding that "[D]efendants are not protected from [the Equal Protection Claim] on the basis of sovereign immunity"). Our Supreme Court has long recognized that a decision by an appellate court on a prior appeal presenting the same legal questions and involving the same facts "constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal." *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974).

Opinion of the Court

Accordingly, Defendants' sovereign immunity argument fails based on our prior holding in *Swan Beach I*.

Concerning Plaintiffs' Vested Rights Claim, we note that Defendants conceded at oral argument that governmental immunity was not a meritorious defense to this claim. Our Supreme Court has observed that

[t]he 'vested rights' doctrine has evolved as a constitutional limitation on the state's exercise of its police power to restrict an individual's use of private property by the enactment of zoning ordinances. The doctrine is rooted in the 'due process of law' and the 'law of the land' clauses of the federal and state constitutions.

Godfrey v. Zoning Bd. of Adjustment of Union Cnty., 317 N.C. 51, 62, 344 S.E.2d 272, 279 (1986). *See also* N.C. Const. art. I, § 19 ("No person shall be . . . disseized of his freehold, . . . or in any manner deprived of his . . . property, but by the law of the land."). Further, the Supreme Court has held that "[t]he doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights [in Article I of our State Constitution.]" *Corum v. Univ. of North Carolina*, 330 N.C. 761, 785-86, 413 S.E.2d 276, 291 (1992). "Thus, when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Id.* at 786, 413 S.E.2d at 292. Accordingly, we hold that the trial court did not err in failing to conclude that the doctrine of governmental immunity precluded denying Defendants' motion to set aside entry of default.

Opinion of the Court

B. Collateral Estoppel

We hold that the trial court did not err in failing to conclude that collateral estoppel precluded denying Defendants' motion to set aside entry of default.

“Under the collateral estoppel doctrine, parties and parties in privity with them are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination.” *Turner*, 363 N.C. at 558, 681 S.E.2d at 773 (internal marks omitted).

Defendants essentially contend that collateral estoppel precludes Plaintiffs from challenging Defendants' refusal to allow them to develop their property where Plaintiffs failed to first exhaust their administrative remedies. However, we have already answered this question in the negative in Defendants' prior appeal, holding that Plaintiffs were not required to first exhaust administrative remedies before bringing their Vested Rights Claim, *see Swan Beach I*, ___ N.C. App. at ___, 760 S.E.2d at 309, or their Equal Protection Claim, *see id.* at ___, 760 S.E.2d at 312. Accordingly, we hold that the trial court did not err in failing to conclude that the doctrine of collateral estoppel precluded denying Defendants' motion to set aside the entry of default. *See Tennessee-Carolina Transp.*, 286 N.C. at 239, 210 S.E.2d at 183.

C. Other Arguments

Defendants assert that the facts of this case are exceptional and merit suspension of the appellate rules pursuant to N.C. R. App. P. 2. However, where an

Opinion of the Court

interlocutory order denies a motion on certain bases, only some of which are immediately appealable, our jurisdiction over the appeal is limited to the immediately appealable bases of the order being reviewed. *Lake v. State Health Plan for Teachers and State Emps.*, ___ N.C. App. ___, ___, 760 S.E.2d 268, 271 (2014). Furthermore, “suspension of the appellate rules under Rule 2 is not permitted for jurisdictional concerns.” *Bailey v. State*, 353 N.C. 142, 157, 540 S.E.2d 313, 323 (2000). Therefore, we do not reach the parties’ other arguments. Accordingly, Defendants’ other arguments are dismissed.

IV. Conclusion

We hold that we have jurisdiction to consider Defendants’ challenge to the trial court’s order denying their motion to set aside the entry of default; however, our jurisdiction is limited to Defendants’ arguments relating to governmental immunity and collateral estoppel. On the merits of these arguments, we affirm the court’s order. As to Defendants’ other arguments challenging the trial court’s order which do not involve any substantial right, we dismiss Defendants’ appeal without prejudice to any right Defendants may have to make these arguments at some later stage.

AFFIRMED IN PART; DISMISSED IN PART.

Judge DIETZ concurs and Judge HUNTER, JR. concurs in result only.

Report per Rule 30(e).