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NO. COA01-1290

NORTH CAROLINA COURT OF APPEALS

Filed: 01 October 2002

COMPREHENSIVE BUSINESS  
SERVICES, INC.,  
Plaintiff

v.

Guilford County  
No. 00 CVS 0076

BONNIE HAGEMAN, KATHY L. COX,  
SUSAN I. HARMON, MICHAEL THOMAS,  
ROBERT E. SHEAHAN and COMPLIANCE  
BUSINESS SERVICES, INC.,  
Defendants

Appeal by James A. Shields from order entered 29 March 2001 by Judge Henry Frye, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 30 September 2002.

*Wyatt, Early, Harris & Wheeler, by Stanley F. Hammer, for plaintiff-appellee.*

*Richard A. Manger, for intervenor-appellant James A. Shields.*

THOMAS, Judge.

On 2 March 2000, plaintiff Comprehensive Business Services, Inc. (hereinafter, "plaintiff" or "Comprehensive"), by its purported President, Michael Fox, filed this action alleging claims for conversion, conspiracy to commit conversion, breach of contract, fraud and concealment, constructive fraud, breach of fiduciary duty, breach of duty of loyalty, negligence, interference with business relationship, interference with contractual

relationship, violation of the Trade Secrets Act, unfair and deceptive trade practices and unfair competition.

Defendants answered, denied plaintiff's allegations and, as a defense, claimed that plaintiff lacked corporate capacity to sue and that plaintiff was not the real party in interest. Specifically, defendants claimed Comprehensive was not a properly organized North Carolina corporation.

On 30 November 2000, appellant James A. Shields moved to intervene as a defendant, claiming to be the sole owner of Comprehensive, and alleging that the lawsuit was filed without his knowledge or permission. Shields filed a motion to dismiss contemporaneously with his motion to intervene.

On 2 January 2001, Comprehensive moved for partial summary judgment, arguing that it existed as a corporation, and that defendants were estopped from denying its existence as a corporation. On 3 January 2001, defendant Robert E. Sheahan moved to dismiss, alleging plaintiff's lack of capacity to sue and Fox's lack of authority to institute and maintain the lawsuit. On 22 January 2001, defendant Compliance Business Services, Inc. ("Compliance") moved for summary judgment. On 7 February 2001, Shields withdrew his motions to intervene and to dismiss. Both plaintiff's and Compliance's motions for summary judgment were denied. On 28 February 2001, defendant Sheahan's motion to dismiss was denied.

On 16 March 2001, Shields, purporting to act for Comprehensive, filed a notice of voluntary dismissal with prejudice

of plaintiff's complaint. On 29 March 2001, the trial court entered an order vacating the dismissal. Shields gave notice of appeal.

The threshold issue to consider is whether Shield's appeal is premature, and therefore, not properly before this Court. "An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). This Court has stated:

There are only two means by which an interlocutory order may be appealed: (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C.R. Civ. P. 54(b) or (2) 'if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.'

*Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) (quoting *Bartlett v. Jacobs*, 124 N.C. App. 521, 524, 477 S.E.2d 693, 695 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 161 (1997)); see also N.C. Gen. Stat. § 1-277(a) (1999); N.C. Gen. Stat. § 7A-27(d) (1) (1999).

Here, Shields appeals from an order vacating an order of dismissal. Orders setting aside a judgment of dismissal are not immediately appealable. *Yang v. Three Springs, Inc.*, 142 N.C. App. 328, 330-31, 542 S.E.2d 666, 667 (2001). Furthermore, we conclude the order does not affect a substantial right. Shields cites its:

substantial right to prevent the conversion of Comprehensive . . . and the . . . substantial right to control and direct the activities and litigation in which [Comprehensive] becomes involved. Further, the corporation has a substantial right to prevent itself from becoming involved in any litigation initiated on its alleged behalf at the direction of Michael Fox, whose assertion of control over the corporation is not supported by compliance with the organizational requirements of [North Carolina Statute].

However, the issue of whether Shields or Fox is the legitimate person to represent Comprehensive is central to the case and has not been determined.

Accordingly, because there is no final judgment in this case, and there are no substantial rights of the parties affected, we hold that this appeal is premature and dismiss it as interlocutory.

DISMISSED.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).