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NO. COA05-1146

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2006

JOINT REDEVELOPMENT COMMISSION
OF THE COUNTY OF PASQUOTANK AND
THE CITY OF ELIZABETH CITY,
NORTH CAROLINA,
Plaintiff,

v.

Pasquotank County
No. 00 CVS 641

MARY F. JACKSON-HEARD and
BARBARA B. SEAFORTH,
Defendants.

Appeal by Defendants from order entered 13 April 2005 by Judge J. Richard Parker in Superior Court, Pasquotank County. Heard in the Court of Appeals 20 March 2006.

Mary F. Jackson-Heard and Barbara B. Seaforth, pro se defendant-appellants.

R. Michael Cox, Pasquotank County Attorney, for plaintiff-appellee Pasquotank County.

WYNN, Judge.

Generally, there is no right to appeal from an interlocutory order. See N.C. Gen. Stat. § 1A-1, Rule 54(b) (2005). In this case, the order dismissing Defendants' counterclaim against Pasquotank County did not fully resolve the pending action. Because the order in this case is a non-final, interlocutory order and we find no substantial right would be lost in delaying the

appeal until a final order or judgment, we dismiss this appeal as interlocutory.

On 11 September 2000, the Joint Redevelopment Commission of the County of Pasquotank and City of Elizabeth ("the Commission") initiated condemnation proceedings upon a 4,012-square-foot parcel of land owned by Defendants in Pasquotank County, North Carolina. Defendants filed an answer on 15 November 2000. More than four years later, on 19 November 2004, Defendants filed a "Counterclaim" against the Commission, naming as additional counterclaim-defendants Pasquotank County, the Pasquotank County Board of Commissioners, Elizabeth City and the City Counsel of Elizabeth City. In their counterclaim, Defendants alleged a conspiracy among the counterclaim-defendants "to make the property lose its economic value as residential rental property" in violation of their rights under the United States Constitution and the Civil Rights Act of 1866. See 42 U.S.C. § 1981 (2003). Defendants did not seek leave of court before filing their counterclaim and thus failed to satisfy the procedures for amending their answer under Rules 13(f) and 15(a) of the North Carolina Rules of Civil Procedure.

Pasquotank County moved to dismiss the counterclaim under Rule 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure for lack of personal and subject matter jurisdiction and for failure to state a claim for which relief could be granted. After a hearing on 18 January 2005, the trial court granted Pasquotank County's motion. In its order, the court found that: (1) Pasquotank County was not a party to the action, inasmuch as

the Plaintiff Commission was "a separate and distinct entity . . . [that] may sue and be sued in its own capacity[;]" (2) Defendants failed to allege in their counterclaim that Pasquotank County had waived its sovereign immunity by purchasing liability insurance; and (3) Defendants filed their counterclaim four years after filing their answer but failed to "file a Motion Seeking an Order from this Court allowing the filing of a counterclaim by amendment upon showing . . . oversight, inadvertence or excusable[] neglect." Based on these findings, the trial court dismissed the counterclaim against Pasquotank County for want of personal and subject matter jurisdiction, failure to state a claim for which relief could be granted, see N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), and (6) (2005), and for non-compliance with Rule 13(f) of the North Carolina Rules of Civil Procedure. Defendants filed timely notice of appeal.

The dispositive issue on appeal is whether this appeal is interlocutory. An order 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 rights of all parties involved in the controversy. See *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950); *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002). Because it did not fully resolve the pending action, the order dismissing Defendants' counterclaim against Pasquotank County is a non-final, interlocutory order.

Generally, there is no right to appeal from an interlocutory order. See N.C. Gen. Stat. § 1A-1, Rule 54(b) (2005); *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. But there are two instances where a party may appeal interlocutory orders: (1) when there has been a final determination as to one or more of the claims and the trial court certifies that there is no just reason to delay the appeal, and (2) if delaying the appeal would prejudice a substantial right. See *Liggett Group Inc. v. Sunas*, 113 N.C. App. 19, 23-24, 437 S.E.2d 674, 677 (1993).

Here, the trial court made no such certification. Thus, Defendants are limited to the second route of appeal, namely where "the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995). In such cases, we may review the appeal under sections 1-277(a) and 7A-27(d)(1) of the North Carolina General Statutes. See *id.* "The moving party must show that the affected right is a substantial one, and that deprivation of that right, if not corrected before appeal from final judgment, will potentially injure the moving party." *Flitt*, 149 N.C. App. at 477, 561 S.E.2d at 513.

In their statement of grounds for appellate review, Defendants rely upon a conclusory assertion of a substantial "right to avoid another trial involving the same issues," and cite to *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). Our Supreme Court explained further in *Green* that "[o]rdinarily the

possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Id.* at 608, 290 S.E.2d at 596. This Court has interpreted the language of *Green* as creating a two-part test "requiring a party to show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *Page*, 119 N.C. App. at 735-36, 460 S.E.2d at 335. The complaint at issue deals with a condemnation proceeding while the counterclaim alleges conspiracy and a violation of rights under the United States Constitution and the Civil Rights Act of 1866. Therefore, Defendants fail to show that the same factual issues would be present in both trials or that the possibility of inconsistent verdicts in the two proceedings exists. *See id.* Therefore, we see no substantial right that would be lost in denying Defendants an immediate appeal.

Accordingly, we dismiss this appeal as interlocutory.¹

¹ We note further that Defendants have violated Rules 10(c) and 28(b)(6) of the North Carolina Rules of Appellate Procedure. Defendants have failed to include in the record on appeal a proper assignment of error. Under Rule 10(c) of the North Carolina Rules of Appellate Procedure, assignments of error must "state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C. R. App. P. 10(c). Here, Defendants assign error to the dismissal of their counterclaim solely on the ground that "it prevents the defendants from asserting the claim that their rights were violated under the United States Constitution and under the Civil Rights Act of 1866." While Defendants allege a consequence of Judge Parker's ruling, they do not state or imply any legal basis for challenging the ruling.

Moreover, in violation of Rule 28(b)(6) of the North

Dismissed.

Judges McGEE and HUNTER concur.

Report per Rule 30(e).

Carolina Rules of Appellate Procedure, Defendants' argument in support of their assignment of error consists primarily of allegations unsupported by evidence of record or by citations to legal authority or the record on appeal. Although Defendants cite sections of Chapter 160A of the North Carolina General Statutes to support their assertion that they "question the legitimacy of the Joint Redevelopment Commission[,]" they neither show that they raised this issue in the trial court nor include any evidence in the record to support their challenge.