NO. COA05-525

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2006

GLOVER CONSTRUCTION CO., INC.,
Plaintiff,

v. Perquimans County
No. 02 CVS 118

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION,
Defendant.

Appeal by Defendant from order entered 19 August 2004 by Judge Jerry R. Tillett in Superior Court, Perquimans County. Heard in the Court of Appeals 20 February 2006.

Vandeventer Black L.L.P., by Norman W. Shearin, Jr., Neil S. Lowenstein and David P. Ferrell, for plaintiff-appellee.

Roy Cooper, Attorney General, by Joseph E. Herrin, Special Deputy Attorney General, for the State.

WYNN, Judge.

N.C. Gen. Stat. § 136-29 (2005) permits contractors to sue the North Carolina Department of Transportation ("NCDOT") for claims denied by the State Highway Administrator. In this case, NCDOT argues, *inter alia*, that Glover Construction did not file its complaint and serve the summons on NCDOT within six months as required under N.C. Gen. Stat. § 136-29. Because Glover Construction's action was filed in compliance with the North Carolina Rules of Civil Procedure, we uphold the trial court's denial of NCDOT's motion to dismiss.

This matter arises from a NCDOT contract with Glover Construction to widen US 17 from two to four lanes. Following completion of the project, Glover Construction sought (by verified claim) $1,359,365.00 in additional compensation for alleged extra work on the project. Thereafter, the NCDOT Verified Claims Review Board conducted a hearing on 29 January 2002, which resulted in a denial of the claim by the State Highway Administrator on 1 February 2002.

On 23 July 2002, Glover Construction brought this action seeking *de novo* review of the State Highway Administrator's denial of its verified claim, as provided in section 136-29(c) of the North Carolina General Statutes. The summons, issued on 31 July 2002, was served on 12 August 2002 on Sarah Mitchell, secretary to the North Carolina Board of Transportation, and was directed to the North Carolina State Highway Administrator; however, the designated agents for service of process were not served.

After securing an extension of time in which to answer, NCDOT moved to dismiss the complaint on 10 October 2002, based on sovereign immunity grounds and Rules 12(b)(1) (lack of subject matter jurisdiction), (b)(2) (lack of personal jurisdiction), (b)(3) (filing in the improper division), (b)(4) (insufficiency of process), (b)(5) (insufficiency of service of process), (b)(6) (failure to state a claim for which relief can be granted) and (h)(3) (attacking the original summons as void) of the North Carolina Rules of Civil Procedure.

On 16 October 2002, Glover Construction issued alias and pluries summons directed to each of the designated agents of service for the North Carolina Department of Transportation, which were received on 21 October 2002. Subsequently, NCDOT amended its motion to dismiss the complaint, attacking the alias and pluries summons as void under Rule 41(b) of the North Carolina Rules of Civil Procedure. Thereafter, Glover Construction filed "Plaintiff's Opposition Brief to Defendant's Motions to Dismiss (as amended)" and "Plaintiff's Alternative Motion to Amend Summons."

NCDOT's Motion to Dismiss and Glover Construction's Alternative Motion to Amend Summons were heard before the Honorable Jerry R. Tillett in Superior Court, Perquimans County on 4 August 2003. In an order denying NCDOT's motion to dismiss and permitting amendment of Glover Construction's summons, the trial court found that (1) the complaint had been timely commenced, (2) NCDOT had actual notice of the action, timely responded, and due to the lack of prejudice, justice warranted allowing amendment of process to cure any defects, (3) the action, even if it abated, was revived upon the issuance of the summons on 31 July 2002, and (4) good cause existed to justify the court, in its discretion, to enlarge the time for issuance of the summons so that it would be deemed issued within five days of the filing of the complaint. NCDOT appeals to this Court.

Preliminarily, we note the denial of a motion to dismiss is interlocutory, from which no immediate appeal generally lies. *See*

Block v. County of Person, 141 N.C. App. 273, 276, 540 S.E.2d 415, 418 (2000). However, where a defendant bases the appeal on sovereign immunity, it involves a substantial right warranting immediate appellate review. *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 403, 442 S.E.2d 75, 77, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994). Accordingly, this appeal is properly presented for our review.

On appeal, NCDOT argues the trial court erroneously denied its motion to dismiss because Glover Construction did not file the complaint and serve the summons on NCDOT within six months as required under section 136-29 of the North Carolina General Statutes. Specifically, NCDOT contends Glover Construction's claims are barred on grounds of sovereign immunity. We disagree.

"Sovereign immunity ordinarily grants the state, its counties, and its public officials, in their official capacity, an unqualified and absolute immunity from law suits." *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). However, "[w]aiver of sovereign immunity may not be lightly inferred[,] and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. State Ports Auth.*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983). Our Supreme Court has held that the Highway Commission, the predecessor agency of NCDOT, "is not subject to suit except in the manner expressly authorized by

statute." *William v. N.C. State Highway Comm'n*, 252 N.C. 772, 773-74, 114 S.E.2d 782, 784 (1960).

Section 136-29 of the North Carolina General Statutes is the statutory ground for contractors to sue NCDOT for claims denied by the State Highway Administrator. *Battle Ridge Cos. v. N.C. Dep't of Transp.*, 161 N.C. App. 156, 157-58, 587 S.E.2d 426, 427 (2003). Section 136-29(c) provides:

> (c) As to any portion of a claim that is denied by the State Highway Administrator, the contractor may, in lieu of the procedures set forth in subsection (b) of this section, *within six months* receipt of the State Highway Administrator's final decision, *institute a civil action for the sum he claims to be entitled to under the contract by filing a verified complaint and the issuance of a summons in the Superior Court of Wake County or in the superior court of any county where the work under the contract was performed*. The procedure shall be the same as in all civil actions except that all issues shall be tried by the judge, without a jury.

N.C. Gen. Stat. § 136-29(c) (2005) (emphasis added).

Once the State is sued, it occupies the same position as any other litigant. *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976) (holding "whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract."); *Barrus Constr. Co. v. N.C. Dep't of Transp.*, 71 N.C. App. 700, 703, 324 S.E.2d 1, 2 (1984) (holding that the State has consented to suits on highway contract claims). Indeed, the plain language of section 136-29 provides, "[t]he procedure shall be the same as in all civil

actions except that all issues shall be tried by the judge, without a jury." N.C. Gen. Stat. § 136-29(c). Thus, the North Carolina Rules of Civil Procedure apply to actions brought under section 136-29 of the North Carolina General Statutes.

Rule 3(a) of the North Carolina Rules of Civil Procedure provides:

> A civil action is commenced by filing a complaint with the court. The clerk shall enter the date of the filing on the original complaint, and such entry shall be prima facie evidence of filing . . . When the complaint is filed, it shall be served in accordance with the provisions of Rule 4 . . .

N.C. Gen. Stat. § 1A-1, Rule 3(a) (2005).

The record shows that Glover Construction received a letter from the State Highway Administrator denying its claim on 5 February 2002. Under section 136-29 of the North Carolina General Statutes, Glover Construction had until 5 August 2002 to file a verified complaint in superior court. Glover Construction filed its complaint, clearly designated in its heading to be filed in Superior Court, Perquimans County, on 23 July 2002. The court clerk filed Glover Construction's complaint in district court based solely on the fact that Glover Construction enclosed with the complaint a check for $60.00, the filing fee for complaints filed in district court, rather than the $75.00 filing fee for superior court. As soon as Glover Construction received notice that the action had been filed in district court, Glover Construction paid the additional $15.00, and the clerk properly filed the complaint in superior court. We hold that for statute of limitations

purposes under section 136-29, the relevant date is the date of filing, and not receipt of a filing fee. *See* N.C. Gen. Stat. § 1A-1, Rule 3(a) (providing "[a] civil action is commenced by filing a complaint with the court."). Thus, Glover Construction timely filed its complaint against NCDOT on 23 July 2002.

As it relates to NCDOT's argument that the complaint was improperly "transferred" from district court to superior court, we conclude that there was no "transfer" of this action. Glover Construction correctly filed and designated the complaint as a superior court action. Subsequently, the clerk's office assigned the case a district court civil action number solely based upon the amount of the filing fee paid. Once Glover Construction paid the additional money for filing, the clerk's office corrected the error and filed the action in superior court.

Even assuming *arguendo* the clerk's removal of this action from district court to superior court was improper, the trial court's order of 2 July 2004 effectively transferred the case from district court to superior court, stating, "The filing in the District Court . . . [was a] clerical or scrivener error[] and therefore the captioned action should be ordered transferred to the Superior Court Division[.]" This transfer was a proper exercise of the court's discretion and authority. Thus, we conclude Glover Construction properly filed its complaint in superior court on 23 July 2002, which was within the six-month statutory period for filing an action under section 136-29. Accordingly, NCDOT's assignment of error is rejected.

NCDOT next contends the trial court erroneously allowed Glover Construction to amend its summons. NCDOT argues that the designation "the North Carolina State Highway Administrator" on the summons as its "registered agent" is a jurisdictional defect that warrants the dismissal of the complaint. We disagree.

Rule 4(b) of the North Carolina Rules of Civil Procedure provides, in pertinent part, that a summons "shall be directed to the defendant or defendants[.]" N.C. Gen. Stat. § 1A-1, Rule 4(b) (2005). "The purpose of a service of summons is to give notice to the party against whom a proceeding is commenced to appear at a certain place and time and to answer a complaint against him." *Harris v. Maready*, 311 N.C. 536, 541, 319 S.E.2d 912, 916 (1984). Rule 4 of the North Carolina Rules of Civil Procedure, which governs process and the service of process, is intended to provide notice of the commencement of an action and "'to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit.'" *Id.* at 541-42, 319 S.E.2d at 916 (quoting *Wiles v. Welparnel Constr. Co.*, 295 N.C. 81, 84, 243 S.E.2d 756, 758 (1978)).

Here, although the 31 July 2002 summons lists NCDOT as the defendant and is addressed to NCDOT's principal office and registered agent address, the summons was issued to the "North Carolina State Highway Administrator," an entity that is not a named defendant in the action. NCDOT argues that because the summons was issued to the North Carolina State Highway Administrator, and the summons was served upon an administrative

assistant of the North Carolina State Highway Administrator, and not a registered agent for NCDOT, the summons was improper and was not issued in accordance with the requirements of Rule 4 of the North Carolina Rules of Civil Procedure.

Our Supreme Court in *Hazelwood v. Bailey* held:

> Where there is a defect in the process itself, the process is generally held to be either voidable or void. Where the process is voidable, the defect generally may be remedied by an amendment because the process is sufficient to give jurisdiction. Where the process is void, however, it generally cannot be amended because it confers no jurisdiction. (Citation omitted).

Hazelwood v. Bailey, 339 N.C. 578, 581, 453 S.E.2d 522, 523 (citing *Harris v. Maready*, 311 N.C. 536, 542, 319 S.E.2d 912, 916 (1984)).

In *Harris*, the trial court granted an individual defendant's motion to dismiss on grounds of insufficiency of process and insufficiency of service of process because the defendant was served with process addressed to another defendant in the action. Relying on its decision in *Wiles v. Welparnel Constr. Co.*, 295 N.C. 81, 243 S.E.2d 756 (1978), our Supreme Court held that the requirements for service of process prescribed in Rule 4 had been met and that the court had obtained jurisdiction over the defendant, stating:

> [t]his Court held in *Wiles* that any ambiguity in the directory paragraph of the summons was eliminated by the complaint and the caption of the summons and that "the possibility of any substantial misunderstanding concerning the identity of the party being sued in this situation is simply unrealistic." (Citation omitted). Similarly, we are persuaded that there was no substantial possibility of confusion in this case about the identity of

> [the defendant] as a party being sued. [The defendant] was personally served with a summons, the caption of which listed his name first among the defendants being sued. In fact, his name appeared twice in the caption as he was named both individually and as a part of the law firm. Any person served in this manner would make further inquiry personally or through counsel if he had any doubt that he was being sued and would be required to answer the complaint when it was filed. Such further inquiry would have revealed the existence of a summons directed to him and purporting on its face to have been served upon him and would have established his duty to appear and answer.

Harris, 311 N.C. at 584, 319 S.E.2d at 917.

In light of the purposes of Rule 4(b) and our Supreme Court's rationale in *Wiles* and *Harris*, we conclude that listing the North Carolina State Highway Administrator as the registered agent in the summons in this case did not render the summons void. While the summons incorrectly listed the North Carolina State Highway Administrator, the summons and complaint correctly noted that NCDOT was the defendant in the action. Therefore, NCDOT had notice of the commencement of an action against it in Superior Court, Perquimans County, and the complaint alerted NCDOT that the action was an exercise of Glover Construction's right to file suit under section 136-29 of the North Carolina General Statutes.

Moreover, any entity served in this manner would make further inquiry personally or through counsel if it had any doubt as to whether it was the proper defendant in this lawsuit. NCDOT did, in fact, do this as evinced by its filing a request for an extension of time in which to file an answer to this lawsuit on 11 September 2002. Thus, there was no substantial possibility of confusion in

this case, as NCDOT was clearly on notice of the commencement of this action and the need to respond. The incorrect designation in the summons amounted to an irregularity or error in form which the trial court properly corrected in its discretion by amendment under Rule 4(i) of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 4(i) (providing "[a]t any time, before or after judgment, in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued."). We, therefore, reject NCDOT's assignment of error.

NCDOT next argues the trial court erroneously denied its motion to dismiss for Glover Construction's failure to issue a summons within five days of the complaint as required under Rule 4(a) of the North Carolina Rules of Civil Procedure. NCDOT contends the trial court did not have jurisdiction to enlarge the time for issuing the summons under Rule 4(i) because Glover Construction never issued proper summons. As we have already determined that the summons issued on 31 July 2002 was proper, NCDOT's argument is without merit.

Summons must be issued "forthwith, in any event within 5 days," under the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 4(a). If summons is not issued by the court clerk within five days of the filing of the complaint, the action abates. *Roshelli v. Sperry*, 57 N.C. App. 305, 308, 291

S.E.2d 355, 357 (1982). Once the action abates, the action can be revived as of the date of the issuance of a proper summons. *See Stokes v. Wilson and Redding Law Firm*, 72 N.C. App. 107, 112, 323 S.E.2d 470, 474 (1984), *review denied*, 313 N.C. 612, 332 S.E.2d 83 (1985) (action abated for failure to issue timely summons revived upon issuance of summons).

In this case, Glover Construction filed the complaint on 23 July 2002. Under Rule 4(a), the action was subject to dismissal upon motion by NCDOT after 30 July 2002, but before the issuance of proper summons. As we previously determined, proper summons was issued in this case on 31 July 2002. The effect of the issuance of the 31 July 2002 summons was to revive and commence a new action on the date of issue, which was prior to the 5 August 2002 deadline for Glover Construction to file its action against NCDOT under section 136-29 and before NCDOT filed its motion to dismiss on 10 October 2002. *See Roshelli,* 57 N.C. App. at 308, 291 S.E.2d at 357 (holding "[t]he action abated upon failure to issue proper summons within five days of filing the complaint, but the action revived upon the issuance and service of summons on defendant."). As we can discern no abuse of discretion or material prejudice to NCDOT in the trial court's order enlarging the time in which Glover Construction issued and served the summons under Rule 4(i), and proper summons was issued within the statutory mandate of section 136-29, we affirm the trial court's order granting Glover Construction's motion to amend summons. *See* N.C. Gen. Stat. § 1A-1, Rule 4(i) (providing "[a]t any time, before or after judgment,

in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued."). NCDOT's assignment of error is, therefore, rejected.

Because we have already determined Glover Construction's action against NCDOT commenced with the filing of its complaint on 23 July 2002, Glover Construction properly issued summons on 31 July 2002, and the trial court did not abuse its discretion in amending the summons and enlarging the time in which Glover Construction could issue and serve the 31 July 2002 summons, we need not address NCDOT's remaining assignment of error relating to Glover Construction's issuance of alias and pluries summonses under Rule 4(d) of the North Carolina Rules of Civil Procedure.

Accordingly, we find no error in the trial court's order denying NCDOT's motion to dismiss and granting Glover Construction's motion to amend summons.

Affirmed.

Chief Judge MARTIN and Judge STEPHENS concur.

Report per Rule 30(e).