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NO. COA05-737

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

NOVO NORDISK PHARMACEUTICAL  
INDUSTRIES, INC.,  
Plaintiff,

v.

Johnston County  
No. 04 CVS 2298

PROGRESS ENERGY, INC.,  
f/k/a CP&L ENERGY, INC.  
Defendant.

Appeal by defendant from order entered 10 January 2005 by Judge Knox V. Jenkins, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 8 May 2006.

*Cozen O'Connor, by T. David Higgins and Megan A. Lammon, for plaintiff-appellee.*

*Nelson Mullins Riley & Scarborough LLP, by Robert A. Meynardie and Christopher M. Kindel, for defendant-appellant.*

LEVINSON, Judge.

Defendant appeals from an order granting plaintiff's motion to amend its complaint and to allow the amended complaint to relate back to the date that plaintiff filed its original complaint. We dismiss the appeal as interlocutory.

Plaintiff, a North Carolina corporation, has a pharmaceutical manufacturing plant in Johnston County, North Carolina. Defendant Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc. ("CP&L"), is a North Carolina corporation that supplies

electric power to its customers. In 1992 plaintiff signed a contract with defendant for provision of electric service.

On 13 August 2004 plaintiff filed suit against "Progress Energy, Inc., f/k/a CP&L Energy, Inc." ("Progress Energy"), and asserted claims for breach of contract and negligence. Plaintiff sought compensation for damages arising from power failures occurring on 16 August 2001 and subsequent dates. Progress Energy answered, and moved for dismissal under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), on the grounds that Progress Energy was not a party to any contract with plaintiff. Progress Energy also filed a motion for summary judgment.

On 22 November 2004 plaintiff moved to amend its complaint to change the name of the defendant from Progress Energy to CP&L, which is a wholly owned subsidiary of Progress Energy. The trial court on 10 January 2005 entered an order denying defendant's motions for dismissal or summary judgment, granting plaintiff's motion to file an amended complaint, and ordering that the amended complaint would be "deemed to have been interposed at the time the original Complaint was filed." Plaintiff filed an amended complaint against defendant CP&L. In its answer, CP&L denied the material allegations of the complaint and raised various defenses.

Defendant has also appealed from the trial court's order allowing plaintiff to amend its complaint and granting plaintiff's request that the amended complaint be deemed to relate back to the date the first complaint was filed. We conclude that, even

assuming *arguendo* defendant has standing to appeal this order, its appeal should be dismissed as interlocutory.

Orders are "either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a) (2005). "'An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.'" *Estate of Spell v. Ghanem*, \_\_ N.C. App. \_\_, \_\_, 622 S.E.2d 725, 727 (2005) (quoting *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citations omitted)).

"Interlocutory orders are appealable before entry of a final judgment if . . . the order 'affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment.'" *McCutchen v. McCutchen*, 360 N.C. 280, 282, 624 S.E.2d 620, 623 (2006) (quoting *Dep't of Transp. v. Rowe*, 351 N.C. 172, 175, 521 S.E.2d 707, 709 (1999)) (citations omitted).

"In the instant case, the parties agree that the order allowing amendment of plaintiff['s] complaint is interlocutory, and that the dispositive issue is whether defendant's appeal implicates any substantial right that will be lost without immediate review." *Spell*, \_\_ N.C. App. at \_\_, 622 S.E.2d at 727. A substantial right is "'one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.'" *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (quoting *Blackwelder v. Dept. of Human Resources*, 60

N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983)). Defendant argues that without immediate review it will lose the right to raise the statute of limitations as an affirmative defense, resulting in the loss of a substantial right. We disagree.

First, if the trial court's order is not reviewed at this juncture, "[t]he only loss [defendant] will suffer will be the time and expense of trial. We note, however, that avoiding the time and expense of trial is not a substantial right justifying immediate appeal." *Lee v. Baxter*, 147 N.C. App. 517, 520, 556 S.E.2d 36, 37-38 (2001) (citing *Anderson v. Atlantic Casualty Ins. Co.*, 134 N.C. App. 724, 727, 518 S.E.2d 786, 789 (1999)). "In addition, we note that our Supreme Court has previously determined that a motion to dismiss 'based on a statute of limitations does not affect a substantial right and is therefore not appealable.'" *Lee*, 147 N.C. App. at 520, 556 S.E.2d at 37-38 (quoting *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401 (2000)).

Further, the statute of limitations is an issue that is properly raised at the trial level. "'A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim.'" *Spell*, \_\_ N.C. App. at \_\_, 622 S.E.2d at 727 (quoting *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 472 S.E.2d 778 (1996) (citation omitted)). The record indicates that, although CP&L asserted the statute of limitations in its answer, it did not file a N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motion on this basis, or otherwise seek a ruling from the trial court on this

issue. "Consequently, defendant's appeal is not only interlocutory in that it is brought before final judgment has been entered, but also attempts to obtain review of matters that defendant has not even preserved for appellate review were we now reviewing a final judgment." *Spell*, \_\_ N.C. App. at \_\_, 622 S.E.2d at 728. We conclude that no substantial right will be lost by failure to allow immediate review of the trial court's order allowing plaintiff to amend their complaint.

Defendant has also filed a petition for review by a writ of *certiorari*. Under N.C.R. App. P. 21(a)(1), a writ of *certiorari* "may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals . . . when no right of appeal from an interlocutory order exists[.]" In the instant case, we decline to exercise our discretion to grant review by *certiorari*.

We conclude that no substantial right will be lost by denying immediate review of this interlocutory order, and that defendant's appeal must be

Dismissed.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).