

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA06-146

NORTH CAROLINA COURT OF APPEALS

Filed: 5 September 2006

PARKER & ORLEANS HOMEBUILDERS, INC.,
Plaintiff-appellant

v.

Mecklenburg County
No. 05 CVS 9146

JERRY L. WHITSON and ELIZABETH B.
WHITSON,
Defendants-appellees

Appeal by plaintiff from order entered 25 October 2005 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 August 2006.

John W. Taylor, P.C., by John W. Taylor and Haley Mathews Jonas, for plaintiff-appellant.

Weaver, Bennett & Bland, P.A., by Michael David Bland, for defendants-appellees.

CALABRIA, Judge.

Parker & Orleans Homebuilders, Inc. ("plaintiff") appeals from an order transferring venue of this action from Mecklenburg County, North Carolina to Union County, North Carolina. We reverse and remand to the Union County Superior Court to transfer venue to Mecklenburg County Superior Court.

On 18 May 2005, plaintiff filed a complaint in Mecklenburg County against Jerry L. Whitson and Elizabeth B. Whitson

(collectively "defendants") seeking to recover \$19,890.00 for breach of contract or unjust enrichment. Plaintiff alleged in the complaint that it "is a corporation organized and existing pursuant to the laws of the State of Delaware and authorized to conduct business in the State of North Carolina." Plaintiff also alleged that both defendants were citizens and residents of Union County, North Carolina.

On 19 July 2005, defendants filed a motion to dismiss the complaint pursuant to N.C. R. Civ. P. 12(b)(3) (2005) for improper venue, asserting that N.C. Gen. Stat. § 1-82 (2005) "requires the action be tried in Union County, North Carolina where the [d]efendants reside." Subsequently, in an affidavit filed on 17 October 2005, plaintiff's president asserted that plaintiff: (1) "is a corporation registered with the North Carolina Department of the Secretary of State and conducts business in the state of North Carolina[;]" (2) "maintains a registered office in North Carolina, which is located" in Raleigh, North Carolina; and (3) "maintains a place of business in Mecklenburg County, North Carolina."

In its 25 October 2005 order, the trial court made the following findings of fact:

1. It is alleged Defendants are citizen[s] and residents of Union County, North Carolina.
2. It is alleged Plaintiff is a Delaware Corporation authorized to do business in North Carolina.
3. It is alleged Plaintiff built and sold Defendants a home located in Union County, North Carolina.
4. The Complaint does not allege that the

Defendant[s] maintain[] any place of business
in Mecklenburg County.

The trial court then concluded that venue was improper but rather than dismissing the case, the trial court ordered that the case be transferred to Union County, North Carolina for trial. See *McClure Estimating Co. v. H.G. Reynolds Co., Inc.*, 136 N.C. App. 176, 183, 523 S.E.2d 144, 149 (1999) (“[w]here a defendant makes a Motion to Dismiss for Lack of Venue and indicates that venue is proper elsewhere, and venue is indeed proper elsewhere, the trial court should treat the Motion to Dismiss as a Motion for a Change of Venue”). From the trial court’s order, plaintiff appeals.

The sole issue before this Court is whether the trial court erred by transferring venue. Although defendants contend this appeal is interlocutory and should be dismissed, the disposition of a motion asserting a statutory right to venue affects a substantial right and is therefore immediately appealable. *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980). See also N.C. Gen. Stat. §§ 1-277, 7A-27 (2005).

North Carolina General Statutes § 1-82 (2005), applicable in this case, is a residual venue clause that states all other cases “must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement.” Plaintiff states that it is a domestic corporation within the meaning of N.C. Gen. Stat. § 1-79(b) (2005), and thus, its residence is determined by the following provision:

For the purpose of suing and being sued the
residence of a domestic corporation, limited
partnership, limited liability company, or

registered limited liability partnership is as follows: . . .

(2) Where the corporation, limited partnership, limited liability company, or registered limited liability partnership maintains a place of business[.]

N.C. Gen. Stat. § 1-79(a) (2005). Relevant to this statutory provision, in its order, the trial court found that “[t]he Complaint does not allege that the Defendant[s] maintain[] any place of business in Mecklenburg County.” However, this finding is not determinative because there is no requirement in our Rules of Civil Procedure that a plaintiff make such a statement in the complaint. See N.C. Gen. Stat. § 1A-1, Rule 8 (2005) (stating the requirements for valid pleadings).

In the case *sub judice*, plaintiff filed an affidavit specifically stating that it maintains a place of business in Mecklenburg County, and there is nothing in the record or trial court order to contradict this assertion. Thus, it is uncontroverted on the record before us that venue was proper in the county in which plaintiff filed suit. The trial court does not have discretion to transfer venue to another county where the county in which plaintiff filed suit was a proper venue, and defendant had not filed an answer and a motion for change of venue pursuant to N.C. Gen. Stat. § 1-83(2) (2005). See *Hawley v. Hobgood*, __ N.C. App. __, __, 622 S.E.2d 117, 119 (2005) (standing for the proposition that the trial court is without discretion to change venue if venue is statutorily proper in a certain county (assuming no 1-83 motion has been made)). See also *Godley Constr. Co., Inc. v. McDaniel*, 40 N.C. App. 605, 607, 253 S.E.2d 359, 360

(1979) ("Unlike motions for change of venue based upon allegations of improper venue, which must be made a part of the answer or filed as separate motions prior to answering, motions for change of venue made pursuant to G.S. 1-83(2) are properly made only after an answer has been filed"). Accordingly, on the record before us, we hold venue was proper in Mecklenburg County, and we reverse and remand to the Union County Superior Court for venue to be transferred to the Mecklenburg County Superior Court.

Reversed and remanded.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).