

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-890

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

LEDYARD W. ROSS,
Plaintiff,

v.

Pitt County
No. 02 CVS 1386

LANDEX, INC., TERRA ALTA
DEVELOPMENT GROUP, L.L.C., WILLIAM
J. BURK, JAMES EDWARD BURRELL,
HERMAN D. TOMER, DALE E. GENTLE,
WILLIAM W. MEROW, JR., CONCORD
DEVELOPMENT GROUP, L.L.C., and
INTERSTATE COMBINED VENTURES, a
North Carolina Partnership,
Defendants.

Appeal by defendants from order entered 1 March 2006 by Judge Clifton W. Everett, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 7 March 2007.

The Blount Law Firm, PA, by Rebecca C. Blount, and Marvin K. Blount, III, for plaintiff-appellee.

Koehler & Cordes, PLLC, by David C. Cordes, for defendant-appellant William Merow; and Garlitz & Williamson, PLLC, by F. Lane Williamson, for defendant-appellant Dale Gentle.

PER CURIAM.

Defendants (Dale Gentle and William Merow) appeal from the denial of their motion to dismiss plaintiff's first amended complaint. We dismiss as interlocutory.

The pertinent facts are summarized as follows: On 23 May 2002 plaintiff filed a complaint against defendants Landex, Inc., Terra Alta Development Group, L.L.C., William J. Burk, James Edward Burrell, and Herman D. Tomer. Plaintiff sought recovery based on claims of breach of contract, fraud, constructive fraud, conversion, unfair and deceptive trade practices, and violation of securities regulations.

Defendant Burk subsequently filed for bankruptcy. On 13 August 2003 Judge W. Russell Duke, Jr., entered an order noting the possibility that plaintiff would obtain relief in the bankruptcy proceedings, and directing that the case "be removed from the pending trial list, and . . . from the active docket . . . with leave to any party to reinstitute the same by motion in the cause[.]"

Several months later plaintiff moved for permission to file an amended complaint. The trial court granted his motion in an order entered 10 November 2003. Plaintiff filed his first amended complaint in November 2003. The amended complaint included new factual allegations, and added defendants Dale E. Gentle, William W. Merow, Jr., Concord Development Group, L.L.C., and Interstate Combined Ventures. Defendants Merow and Gentle each filed answers, and the parties engaged in discovery for more than eighteen months following the filing of plaintiff's amended complaint.

On 8 April 2005 defendants Gentle and Merow filed a joint motion to dismiss plaintiff's amended complaint, on the grounds that it had been filed in violation of the 2003 order removing the

case from the active docket list. The trial court denied their motion in an order entered 1 March 2006. From this order defendants Gentle and Merow have appealed.

Defendants have appealed from a pre-trial order denying their motion to dismiss plaintiff's amended complaint. We address the interlocutory nature of this order.

An order is "either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a) (2005). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. 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." *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted).

In the instant case, defendants appeal from an interlocutory order. "Generally, there is no right of immediate appeal from interlocutory orders and judgments[.]" *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999). However, interlocutory orders are immediately appealable if "delaying the appeal will irreparably impair a substantial right of the party." *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999).

"It is well established that the appellant bears the burden of showing to this Court that the appeal is proper. First, when an appeal is interlocutory, the appellant must include in its statement of grounds for appellate review sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right. N.C. R. App. P., Rule 28(b)(4). . . . Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed." *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005) (internal quotation marks and citation omitted).

Defendants herein contend that the order is immediately appealable on the grounds that it "affects substantial rights." However, defendants fail to identify any "right" at issue, or why the unidentified right is "substantial." Defendants also assert that they are appealing from an "[a]dverse ruling[] concerning personal jurisdiction." This is inaccurate, as neither defendant objected to the court's exercise of personal jurisdiction over them.

Plaintiff has not filed a motion for sanctions against the appellants and/or their attorneys pursuant to N.C. R. App. P., Rule 34 for taking this interlocutory appeal, and we have elected not to do so on our motion. We are hard-pressed to recall another interlocutory appeal with less merit than that presented in this matter. It is facially apparent that this appeal was not "well grounded in fact and warranted by existing law or a good faith

argument for the extension, modification, or reversal of existing law[.]” Rule 34(a)(1). And it appears that this appeal was taken for the purpose of causing “unnecessary delay or needless increase in the cost of litigation[.]” Rule 34(a)(2).

We conclude that defendants have failed to articulate any basis for immediate review of the trial court’s order, and that their appeal must be

Dismissed.

Panel Consisting of: Judges McCULLOUGH, BRYANT and LEVINSON.

Report per Rule 30(e).