

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA10-221

NORTH CAROLINA COURT OF APPEALS

Filed: 18 January 2011

GUY C. LEE BUILDING MATERIALS
OF SMITHFIELD, INC.,
Plaintiff-Appellant,

v.

Wayne County
No. 07 CvS 2330

HARRIS CONSTRUCTION & DEVELOPMENT,
LLC; FLOYDIE R. HARRIS; RHONDA K.
HARRIS; PATEL INVESTMENTS, LLC;
AJIT N. PATEL; and INDIRA PATEL,
Defendants-Appellees.

Appeal by Plaintiff from order entered 2 September 2009 by Judge Arnold O. Jones, II in Superior Court, Wayne County. Heard in the Court of Appeals 15 September 2010.

Daughtry, Woodard, Lawrence, and Starling, by Luther D. Starling, Jr. and Annette C. Chancy, for Plaintiff-Appellant.

McGuire Woods, LLP, by Monica E. Webb, for Defendants-Appellees Patel Investments, LLC; Ajit N. Patel; and Indira Patel.

No brief filed for Defendants Harris Construction & Development, LLC, Floydie R. Harris and Rhonda K. Harris.

McGEE, Judge.

Guy C. Lee Building Materials of Smithfield, Inc. (Plaintiff), a subcontractor of Harris Construction & Development, LLC (the Builder), alleged in a complaint filed 17 September 2007 that Plaintiff provided materials for use in the construction of a residence on the real property of Patel Investments, LLC.

Plaintiff sought to recover payment for those materials provided to the Builder and Patel Investments, LLC, to enforce filed claims of lien, and to recover attorney's fees. Plaintiff's complaint alleged the following six claims for relief: (1) breach of contract, (2) quasi-contract, (3) lien on funds, (4) lien pursuant to N.C. Gen. Stat. § 44A-20, (5) subrogation lien, and (6) breach of guaranty/credit application.

Patel Investments, LLC, filed an answer to Plaintiff's complaint and a cross-claim against the Builder on 16 November 2007. The Builder, along with Floydie R. Harris and Rhonda K. Harris (the Guarantors), did not file an answer to Plaintiff's complaint and, on 5 December 2007, an Assistant Clerk of Superior Court entered default judgment in favor of Plaintiff against the Builder and the Guarantors. Patel Investments, LLC, moved for entry of default against the Builder and the Guarantors on their cross-claim, and an Assistant Clerk of Superior Court entered default against those parties on 9 January 2008.

Plaintiff filed an amended complaint on 18 November 2008, also naming as defendants Ajit N. Patel and Indira Patel, as owners of Patel Investments, LLC (collectively, the Owners). Plaintiff's amended complaint set forth the following ten claims for relief: (1) breach of contract against the Builder, (2) unjust enrichment against the Builder, (3) lien on funds against the Owners, (4) lien pursuant to N.C. Gen. Stat. § 44A-20, against the Owners, (5) subrogation lien against the Owners, (6) breach of guaranty/credit application against the Builder and the Owners, (7) partnership

liability against the Owners, (8) joint-venture liability against the Owners, (9) third-party beneficiary of contract between the Owners and the Builder, against the Owners, and (10) unjust enrichment against the Owners. The record is unclear as to whether the Builder and the Guarantors were served with the amended complaint, but counsel for the Owners accepted service on 1 December 2008.

The Owners filed an answer to the amended complaint, along with a cross-claim against the Builder on 5 January 2009. The Owners filed a motion for summary judgment on 23 July 2009 as to Plaintiff's claims five through nine. In an order filed 2 September 2009, the trial court granted summary judgment in favor of the Owners as to those claims. Plaintiff appeals.

Interlocutory Appeal

The Owners filed a motion to dismiss Plaintiff's appeal as interlocutory because the trial court's order granting summary judgment only disposed of five of Plaintiff's claims. An order is interlocutory when it "'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.'" *Moose v. Nissan of Statesville*, 115 N.C. App. 423, 425, 444 S.E.2d 694, 696 (1994) (citation omitted). "Generally, there is no right of appeal from an interlocutory order." *Id.* In the present case, Plaintiff's claims three, four, and ten remain to be decided and, therefore, the trial court's order granting summary judgment is interlocutory. However, an appeal from an interlocutory order may be heard if the

order from which appeal is taken "affects a substantial right claimed in any action or proceeding." N.C. Gen. Stat. § 1-277(a) (2009).

Plaintiff argues that its appeal should not be dismissed as interlocutory because "[t]he facts and circumstances surrounding this case and the pending cases . . . affect a substantial right of . . . Plaintiff." Specifically, Plaintiff contends that dismissal of its appeal "could result in two different trials on the same issues." Plaintiff further asserts that "[t]he appellate courts have also held that a plaintiff's right to have all his claims heard before the same jury affects a substantial right."

Plaintiff contends that the issues of fact in its surviving lien claims and its claim of unjust enrichment are the same issues that are involved in its subrogation lien claim, which is whether the Owners owe money to the Builder and the Guarantors. Our Court has held that "not only must the same issues be present in both trials, but it must be shown that a possibility of inconsistent verdicts may result before a substantial right is affected." *Moose*, 115 N.C. App. at 426, 444 S.E.2d at 697. Therefore, our Court must determine whether Plaintiff would be forced to undergo a trial twice on the same issues, and whether there is a possibility of inconsistent verdicts. *See id.* at 428, 444 S.E.2d at 697 (holding that the issues of liability for negligence and punitive damages for the same alleged negligence were separate issues, and an interlocutory order disposing of only one of those issues did not affect a substantial right justifying review).

We first note that, in its third claim for relief for a lien on funds, Plaintiff cites to N.C. Gen. Stat. § 44A-18-23, but no such statute exists. However, from the pleadings, it is clear that this claim is based on Plaintiff's direct lien on funds against the Owners. Plaintiff pleaded that it "hereby claims a lien . . . upon any and all funds owed by the Owners to the Builder[.]" Such a claim is governed by N.C. Gen. Stat. § 44A-18, which provides:

A first tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds that are owed to the contractor with whom the first tier subcontractor dealt and that arise out of the improvement on which the first tier subcontractor worked or furnished materials.

N.C. Gen. Stat. § 44A-18(1)(2009). Thus, Plaintiff's claim for a lien on funds is based on N.C.G.S. § 44A-18 and seeks to enforce the right of a subcontractor to secure funds owed by an owner to the contractor, based on the contractor's failure to pay the subcontractor. Plaintiff additionally asserts a lien pursuant to N.C. Gen. Stat. § 44A-20.

By way of contrast, Plaintiff's subrogation claim, which Plaintiff contends is directed to the same issues as the two lien claims discussed above, was based on N.C. Gen. Stat. § 44A-23. N.C.G.S. § 44A-23 provides:

A first tier subcontractor, who gives notice of claim of lien upon funds as provided in this Article, may, to the extent of this claim, enforce the claim of lien on real property of the contractor created by Part 1 of this Article. The manner of such enforcement shall be as provided by G.S. 44A-7 through 44A-16. The claim of lien on real property is perfected as of the time set forth

in G.S. 44A-10 upon filing of the claim of lien on real property pursuant to G.S. 44A-12. Upon the filing of the claim of lien on real property, with the notice of claim of lien upon funds attached, and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent.

N.C. Gen. Stat. § 44A-23(a) (2009). A subrogation lien brought pursuant to N.C.G.S. § 44A-23(a) is therefore based on a subcontractor's enforcement of a right belonging to the contractor against the owner of real property.

Each of these lien claims is a separate and unique claim, addressing varying rights of disparate parties. Our Court discussed the difference between the claims in *Mace v. Construction Corp.*, 48 N.C. App. 297, 269 S.E.2d 191 (1980):

Apart from the lien rights afforded by G.S. 44A-23, a lien upon realty may arise directly in favor of a first tier subcontractor under G.S. 44A-18(1) and G.S. 44A-20. The right to such a lien, unlike the right to a lien under G.S. 44A-23, may arise without regard to whether the general contractor has waived its own lien rights. G.S. 44A-18(1) provides that a first tier subcontractor who furnishes labor or materials at a job site is entitled to a "lien upon funds which are owed (by the owner of the improved real property) to the contractor with whom the first tier subcontractor dealt." Once the first tier subcontractor gives notice of his claim of lien upon funds to the owner, the owner is thereafter "under a duty to retain any funds subject to the lien or liens under (Article 2 of Chapter 44A) up to the total amount of such liens as to which notice has been received." G.S. 44A-20(a). Under G.S. 44A-20(b) and (d), the first tier subcontractor lien claimant may thereafter acquire a lien upon the improved real property by virtue of the property owner's wrongful payment after receiving notice.

Id. at 304, 269 S.E.2d at 195.

Thus, though the factual basis is the same, the issues in the various claims are separate and distinct. *See Moose*, 115 N.C. App. at 428, 444 S.E.2d at 698 ("Because the issues are separate, there is no possibility of inconsistent verdicts should plaintiff prevail on a later appeal."). Therefore, the trial court's order granting summary judgment in favor of the Owners does not affect a substantial right and we must dismiss Plaintiff's appeal as interlocutory.

Dismissed.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).