NO. COA11-1465
NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2012

HOMESHIELD VINYL SIDING & WINDOWS, INC.,
Plaintiff,

v.

Wake County
No. 10 CVS 7754

PARKER & ORLEANS HOMEBUILDERS, INC., MIN SHI, PENG LI, LING XIANG, NILESH RANADIVE, NEHA RANADIVE, TIANWU WANG, JINGYI ZHAO, THIYAGARAJAN NATARAJAN, KAVITHA KRISHNAN, SUNIL KUMAR GANESAN, MAHALAKSHMI SUNILKUMAR, DINESH KUMAR PERUMAL, HEMA GOVINDARAJULU, HEMACHANDER JANARDHAN, ANITHA SUNDARAVEL, SRINIVAS CHAMARTHY, KRISHNAVENI CHAMARTHY, DEEPAK BHASKARAN, RAMYA BALAN, ALLY BANK CORP., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., and COASTAL FEDERAL CREDIT UNION,
Defendants.

Appeal by plaintiff from order entered 20 September 2011 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 26 April 2012.

Safran Law Offices, by Brian J. Schoolman, for plaintiff-appellant.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell and Christopher C. Finan, for defendants-appellees.

GEER, Judge.

HomeShield Vinyl Siding and Windows, Inc. appeals from an order granting defendants' second motion to dismiss. HomeShield argues on appeal that because the second motion to dismiss was based on substantially the same arguments as the first motion, which had been denied, the superior court judge hearing the second motion was prohibited from granting that motion. We agree. We hold that the second superior court judge, when allowing the second motion to dismiss, effectively overruled the superior court judge who had denied the first motion to dismiss. We, therefore, vacate the order allowing the second motion to dismiss.

Facts

HomeShield entered into a contract with Parker and Orleans Homebuilders, Inc. ("P&O") to provide labor and materials for, among other things, the installation of exterior vinyl siding on 10 homes in Cary, North Carolina. The work was completed on each home between 10 November 2009 and 4 December 2009. The homes were sold by P&O to the individual defendants between 24 November 2009 and 31 December 2009.

P&O filed for Chapter 11 bankruptcy on 1 March 2010. On 10 March 2010, HomeShield filed a lien on the real property of defendants Min Shi and Peng Li and filed liens on the other nine properties at issue on 15 March 2010.

On 7 May 2010, HomeShield filed suit to enforce the liens pursuant to N.C. Gen. Stat. § 44A-13. Although the complaint identified P&O as a defendant, HomeShield also asserted in the complaint:

> P&O is currently under protection of the United States Bankruptcy Court for the District of Delaware. P&O is named as a nominal defendant in this act[ion], but no relief is sought from P&O, nor is an answer or any other responsive pleading expected to be filed. To the extent required, HomeShield hereby requests that this Court stay any and all proceedings as against P&O in observance of the automatic stay.

On 10 June 2010, defendants other than P&O filed a motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. In their motion, defendants argued that HomeShield had "wrongfully commenced this action in violation of the Federal automatic stay imposed by 11 U.S.C. § 362" and that, under Delaware law and precedent of the Third Circuit Court of Appeals, "actions taken in violation of the stay are void." Defendants then argued: "[P&O] is the party with whom Plaintiff allegedly contracted and is a necessary party to this action. Plaintiff must establish the liability of [P&O] in order to

enforce any lien against the real property of the Movants, and Plaintiff has failed to obtain the necessary relief from the automatic stay of 11 U.S.C. § 362 in order to allow them to do so."

Following a hearing on the motion to dismiss, Judge Robert H. Hobgood entered an order on 20 September 2010 denying the motion and providing:

> 1. So long as there is no attempt to collect the debt from [P&O], the bankrupt debtor, the action against the property of the individual owners is not subject to the bankruptcy stay. Accordingly, the Individual Property Owners' Motion to Dismiss is DENIED.
>
> 2. The Plaintiff is ORDERED to seek relief from the Delaware bankruptcy court from the automatic stay provisions of 11 U.S.C. § 362 to properly join P&O as a party to this action.
>
> 3. Plaintiff shall file its motion for leave with the Bankruptcy Court not later than 20 days from the entry of this Order, and shall report to this Court the filing of said motion within ten (10) days following the filing.

In accordance with Judge Hobgood's order, HomeShield petitioned the Bankruptcy Court on 8 October 2010 for relief from the automatic stay. In the motion to the Bankruptcy Court, HomeShield indicated that it had two actions pending -- one in Wake County and one in Durham County -- and that relief was necessary so that HomeShield "may enforce and foreclose on

mechanics liens on property that is not property of the Debtors' bankruptcy estates." The motion also explained that P&O was a necessary party because HomeShield "must establish [P&O's] liability in order to enforce its liens against" the individual homeowners. HomeShield argued that it would be prejudiced by a lack of relief from the automatic stay because, without the liens, it "would be left with a general unsecured claim against [P&O], which may well be worthless in this case."

HomeShield then requested

> the entry of an order granting it relief from the automatic stay imposed by Section 362(a) of the Bankruptcy Code to permit HomeShield to amend the complaints in the North Carolina Actions [Durham and Wake] to name [P&O] as a defendant and prosecute the North Carolina Actions against [P&O] and the owners of the Subject Property. HomeShield requests this relief only so that it may enforce its lien rights against the Subject Property, which is not property of the Debtors' estates. HomeShield is not seeking relief from [the] stay to enforce any rights against any of the Debtors or any property of the Debtors' estates, nor is it seeking to collect any judgment against any of the Debtors.

The Bankruptcy Court granted the motion for relief on 8 November 2010. The order authorized HomeShield to amend the complaints in the lien enforcement actions to add P&O as a defendant. However, the order also required that the actions be stayed immediately upon the filing of the amended complaints.

HomeShield filed the amended complaint on 10 December 2010. The amended complaint noted that relief had been obtained from the Bankruptcy Court and added a claim against P&O for breach of contract, seeking "the principal amount of $71,950.00, along with interest, costs, and attorney fees, as provided and permitted by law." In accordance with the Bankruptcy Court order, the amended complaint requested that the trial court stay all proceedings against P&O. On 13 April 2011, following confirmation of P&O's plan of reorganization, the Bankruptcy Court entered an order allowing prosecution of the lien enforcement actions.

On 30 June 2011, the individual defendants moved to dismiss the amended complaint pursuant to Rules 12(b)(6) and 12(b)(7) of the Rules of Civil Procedure. The motion argued that "notwithstanding any prior orders of this Court or subsequent orders of the Delaware Bankruptcy Court, [HomeShield] has failed to commence an action against all necessary parties within the time mandated under N.C. Gen. Stat. § 44A-13. Accordingly, [HomeShield's] First Amended Complaint fails to state a claim upon which relief may be granted and the same should be dismissed by the Court."

Judge Henry W. Hight, Jr. entered an order on 20 September 2011, granting the motion to dismiss pursuant to Rule 12(b)(7).

The order also directed that "the following liens of record shall be and are HEREBY dismissed and discharged of record: [listing the Wake County File Numbers for the 10 liens]." HomeShield appealed to this Court.

Discussion

We must first address this Court's jurisdiction to hear HomeShield's appeal. HomeShield concedes that this appeal is interlocutory, but argues that an immediate appeal is proper because Judge Hight's order granting the motion to dismiss effectively determines the action.

As our Supreme Court has held, "[i]n general, a party may not seek immediate appeal of an interlocutory order." *Dep't of Transp. v. Rowe*, 351 N.C. 172, 174, 521 S.E.2d 707, 709 (1999). Nevertheless, it has long been the rule that "an appeal does lie from interlocutory orders when it puts an end to the action." *Skinner v. Carter*, 108 N.C. 106, 109, 12 S.E. 908, 909 (1891) (internal quotation marks omitted). This principle has since been codified by statute. *See* N.C. Gen. Stat. § 1-277(a) (2011) (providing that "appeal may be taken from every judicial order or determination of a judge of a superior or district court . . . which in effect determines the action"); N.C. Gen. Stat. § 7A-27(d) (2011) (allowing appeal "[f]rom any interlocutory order or

judgment of a superior court . . . which . . . (2) [i]n effect determines the action . . .").

In this case, following entry of Judge Hight's order, only the breach of contract claim against P&O remained. Because of the bankruptcy proceedings, however, HomeShield cannot actually recover anything from P&O in this action. Therefore, the dismissal of the individual defendants and the lien claims effectively determined the action. We, therefore, hold that we have jurisdiction over HomeShield's appeal.

Defendants have also moved to dismiss the appeal on the grounds of mootness. According to defendants, even if HomeShield were to prevail on appeal, Judge Hight's order directed a discharge of the liens, and HomeShield failed to obtain a stay of that order. Defendants contend that, as a result, no liens exist to be enforced.

Defendants have overlooked the principle that "[i]f one trial judge enters an order that unlawfully overrules an order entered by another trial judge, such an order must be vacated, including any award of fines or costs." *Crook v. KRC Mgmt. Corp.*, 206 N.C. App. 179, 184, 697 S.E.2d 449, 453, *disc. review denied*, 364 N.C. 607, 703 S.E.2d 442 (2010). *See also Cail v. Cerwin*, 185 N.C. App. 176, 187, 648 S.E.2d 510, 518 (2007) (holding that when judge enters order "effectively overruling"

earlier order on same issue, the second order and civil penalty are vacated), *disc. review denied*, 365 N.C. 75, 705 S.E.2d 743 (2011).

"When something is 'vacated,' it is nullified and made void." *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 602, 646 S.E.2d 826, 830 (2007). *See also Adkins v. Stanly Cnty. Bd. of Educ.*, 203 N.C. App. 642, 652, 692 S.E.2d 470, 476 (2010) ("Because we vacate [the trial court's] order granting summary judgment, that order is a nullity and is void and of no effect." (internal quotation marks omitted)). Vacating an order also "vacates all that transpired [after the trial court's judgment] which adversely affected [the appellant's] interests." *Harris v. Aycock*, 208 N.C. 523, 526, 181 S.E. 554, 555 (1935).

If this Court vacates Judge Hight's order allowing the motion to dismiss, then discharge of the liens would also be vacated. Consequently, the liens would be reinstated. Because HomeShield failed to obtain a stay of the discharge, issues may arise if anyone, during the pendency of this appeal, relied upon the absence of recorded liens. However, there is nothing in the record to indicate that such reliance occurred, and, therefore, we cannot conclude that HomeShield's claims are moot. Defendants' motion to dismiss the appeal is denied.

Turning to the merits of HomeShield's appeal, our Supreme Court has recognized:

> [I]t is well established in our jurisprudence that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action. When the above-noted situation arises, the second judge may reconsider the order of the first judge only in the limited situation where the party seeking to alter that prior ruling makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter.

State v. Woolridge, 357 N.C. 544, 549-50, 592 S.E.2d 191, 194 (2003) (internal citations and quotation marks omitted).

Defendants do not argue that there was a substantial change in circumstances between Judge Hobgood's denial of their motion to dismiss the original complaint and Judge Hight's granting of the motion to dismiss the amended complaint. Instead, defendants contend that the rulings were made on different bases -- that Judge Hobgood denied a Rule 12(b)(6) motion to dismiss, while Judge Hight allowed a motion to dismiss pursuant to Rule 12(b)(7) of the Rules of Civil Procedure.

We agree with defendants that the doctrine prohibiting one superior court judge from overruling another applies only when

"precisely the same issue" is involved. *Madry v. Madry*, 106 N.C. App. 34, 38, 415 S.E.2d 74, 77 (1992). It is equally well established, however, that the label a party places on a motion is not controlling in our analysis. The question before this Court is whether "[t]he materials and arguments considered . . . were essentially the same arguments and materials considered" in the earlier motion. *Id.* How a party labels its motion or the trial judge his or her order does not change its character. *See id.* ("Despite the fact that Judge Morelock's order is denominated a summary judgment, the legal issue decided by that judgment . . . was precisely the same issue decided to the contrary by Judge Fullwood's earlier order denying defendant's motion to amend. The materials and arguments considered by Judge Morelock were essentially the same arguments and materials considered by Judge Fullwood. Simply labeling the order a summary judgment did not change its essential character nor authorize Judge Morelock to overrule Judge Fullwood.").

Here, defendants identified their first motion to dismiss as being a Rule 12(b)(6) motion. That motion, however, argued that P&O was "a necessary party to this action" and that the action should be dismissed because HomeShield had "failed to obtain the necessary relief from the automatic stay of 11 U.S.C. § 362 in order to allow them" to establish the liability of P&O.

In their brief to the trial court in support of that motion, defendants argued:

> [B]ecause the instant action is a nullity as to P&O [due to the failure to seek relief from the automatic stay], and since P&O is a necessary party to the present action, even a subsequent attempt to seek relief from the automatic stay to bring the required claims against P&O necessary to establish the existence of a valid lien would be futile.
>
> While P&O could be added as a party solely based upon any contract damage claims by the Plaintiff, any lien enforcement action is now time barred. It follows that when a Plaintiff's failure to timely bring claims against such a necessary party renders an essential element of the cause of action absent, such a failure cannot be cured simply by later properly joining the necessary party to the action. As discussed herein, as P&O is an essential party to the present action and no valid claims were brought against it within 180 days of the Plaintiff's alleged last work on the Properties, as mandated by N.C. Gen. Stat. §44A-13, the Complaint fails to state a claim upon which relief may be granted and, therefore, the action should properly be dismissed.

Judge Hobgood necessarily rejected the argument that joining P&O would be futile when he denied defendants' motion to dismiss and ordered HomeShield to join P&O.

In their second motion to dismiss, defendants proceeded pursuant to both Rule 12(b)(6) and Rule 12(b)(7). Judge Hight's order, however, specified that "Defendants' Motion to Dismiss pursuant to Rule 12(b)(7) of the North Carolina Rules of Civil

Procedure should be allowed." Defendants argued in their motion that resulted in Judge Hight's order, that "*notwithstanding any prior orders of this Court* . . ., the Plaintiff has failed to commence an action against all necessary parties within the time mandated under N.C. Gen. Stat. §44A-13." (Emphasis added.) This motion, therefore, invited Judge Hight to disregard the prior order.

Then, in their brief in support of the second motion, defendants argued:

> [T]he Motion should be granted and the above-captioned civil action should be dismissed because the Plaintiff failed to join a party that has been determined to be necessary to this action -- [P&O] -- within the time mandated by N.C. Gen. Stat. §44A-13 (180 days from the alleged last date of furnishing of labor and/or materials). As a result, the Plaintiff's complaint seeking the enforcement of certain statutory liens under Chapter 44A of the General Statutes must fail, as a matter of law, as an *essential element* of the cause of action is absent -- namely, the commencement of an action within the time mandated.

Defendants' arguments in support of the first motion to dismiss before Judge Hobgood were essentially identical with their arguments in support of their second motion to dismiss before Judge Hight. Since Judge Hobgood rejected those arguments in denying the Rule 12(b)(6) motion, Judge Hight could not then grant the motion to dismiss simply by characterizing it

as a ruling under Rule 12(b)(7). As *Madry* explains, because the legal argument was identical before each judge, the label applied to the motion is immaterial.

We note, further, that Judge Hight could not, in any event, have granted the motion to dismiss the amended complaint "pursuant to Rule 12(b)(7)," which allows dismissal under certain circumstances for "[f]ailure to join a necessary party." Although the parties have debated whether P&O was a party to the original complaint, there is no dispute that P&O was a party to the amended complaint. The issue -- at that point -- was not whether a necessary party had been omitted, but rather whether the statute of limitations barred the claims against P&O. That issue had already been decided by Judge Hobgood when he ordered P&O's joinder.

"The proper method for obtaining relief from legal errors is by appeal . . . and not by application to another Superior Court. 'In such cases, a judgment entered by one judge of the Superior Court may not be modified, reversed or set aside by another Superior Court judge.'" *Nowell v. Neal*, 249 N.C. 516, 521, 107 S.E.2d 107, 110 (1959) (quoting *Davis v. Jenkins*, 239 N.C. 533, 534, 80 S.E.2d 257, 258 (1954)). While we express no opinion on the merits of Judge Hobgood's order, which is not

before us, we must vacate Judge Hight's order granting defendants' motion to dismiss.

Vacated.

Judges ELMORE and THIGPEN concur.

Report per Rule 30(e).