NO. COA12-402

NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2012

BOBBY FIELDS,
Plaintiff,

v. Wayne County
No. 10 CVS 2430

CITY OF GOLDSBORO,
Defendant.

Appeal by Defendant from order entered 7 April 2011 and by Plaintiff from judgment entered 17 June 2011 by Judge Arnold O. Jones, II, in Wayne County Superior Court. Heard in the Court of Appeals 12 September 2012.

Strickland Law Firm, PLLC, by Gary E. "Gene" Britt, II, and Billy J. Strickland, II, for Plaintiff.

Everett, Womble, Lawrence & Brown, L.L.P., by Darrell K. Brown and Justin L. Minshew, for Defendant.

STEPHENS, Judge.

This appeal arises from the condemnation by Defendant City of Goldsboro ("the City") of a house located at 109 North Slocumb Street in Goldsboro ("the house") and owned by Plaintiff

Bobby Fields. By complaint filed 27 October 2010, Plaintiff sought damages on three tort claims, to wit, unlawful taking, trespass, and negligence *per se*, as well as for the City's alleged failure to salvage Plaintiff's real and personal property during demolition. On 6 January 2011, the City filed an answer and motion to dismiss Plaintiff's complaint. The answer and motion asserted numerous affirmative defenses, including sovereign immunity, and also moved to dismiss pursuant to Rule 12(b)(3) and (6). Following a hearing, by order entered 7 April 2011, the trial court denied the City's motion. On 12 April 2011, the City gave notice of "interlocutory appeal" from the denial of its motion to dismiss. On the same date, however, the City also filed a motion for summary judgment and a calendar request for a hearing on the summary judgment motion.

On 13 June 2011, the trial court held a hearing on the City's summary judgment motion, during which Plaintiff made an oral motion for summary judgment. On 17 June 2011, the court entered an order and judgment, denying Plaintiff's motion and granting summary judgment in favor of the City. Plaintiff entered his notice of appeal from this order and judgment on 14 July 2011. On 25 July 2011, the City entered another notice of appeal from the trial court's denial of its motion to dismiss.

Discussion

Effect of the City's 12 April 2011 Notice of Appeal

Before addressing the merits of the parties' arguments, we must resolve jurisdictional issues presented by the City's notices of appeal. While neither party has raised these issues, "the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008) (citation omitted).

As noted *supra*, the City entered a "notice of interlocutory appeal" from the denial of its motion to dismiss on various Rule 12(b)(6) grounds on 12 April 2011.

> As a general rule, once a party gives notice of appeal, such appeal divests the trial court of its jurisdiction, and the trial judge becomes *functus officio*. *Functus officio*, which translates from Latin as having performed his or her office, is defined as being without further authority or legal competence because the duties and functions of the original commission have been fully accomplished. Thus, when a court is *functus officio*, it has completed its duties pending the decision of the appellate court. The principle of *functus officio* stems from the general rule that two courts cannot ordinarily have jurisdiction of the same case at the same time.
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> It follows from the principle of *functus officio* that if a party appeals an immediately appealable interlocutory order,

> the trial court has no authority, pending the appeal, to proceed with the trial of the matter. Where a party appeals from a *non* appealable interlocutory order, however, such appeal does not deprive the trial court of jurisdiction, and thus the court may properly proceed with the case. A litigant cannot deprive the trial court of jurisdiction to determine a case on its merits by appealing from a nonappealable interlocutory order of the trial court.

RPR & Assocs. v. Univ. of N. Carolina-Chapel Hill, 153 N.C. App. 342, 346-47, 570 S.E.2d 510, 513-14 (2002) (citations and quotation marks omitted), *cert. denied and disc. review denied*, 357 N.C. 166, 579 S.E.2d 882 (2003). "The trial court has the authority . . . to determine whether or not its order affects a substantial right of the parties or is otherwise immediately appealable. Pursuant to Appellate Rule 8, a party may apply to the appellate courts for a stay when the trial court chooses to proceed with the matter." *Id.* at 348, 570 S.E.2d at 514.

In *RPR & Assocs.*, the defendant contended that its interlocutory appeal from an order denying its motion to dismiss based on sovereign immunity was immediately appealable because the order affected a substantial right. *Id.* at 346, 570 S.E.2d at 513. However, after the interlocutory appeal was heard in this Court, but before a decision was filed, the merits of the matter came before the trial court which heard evidence and

entered judgment. *Id.* Both parties appealed from that judgment, and the defendant argued that the trial court lacked jurisdiction over the matter following entry of its interlocutory notice of appeal. *Id.* We rejected this argument, noting that

> [b]ecause the trial court had the authority to determine whether its order affected [the] defendant's substantial rights or was otherwise immediately appealable, the trial court did not err in continuing to exercise jurisdiction over this case after [the] defendant filed its notice of appeal. The trial court's determination that the order was nonappealable was reasonable in light of established precedent and the repeated denials by the appellate courts of this State to stay proceedings. Although this Court ultimately held that [the] defendant's appeal affected a substantial right, it also held that defendant was not immune to suit. [The d]efendant states no grounds, nor has it produced any evidence to demonstrate how it was prejudiced by the trial court's exercise of jurisdiction over this case.

Id. at 349, 570 S.E.2d at 515.

Here, we reach the same conclusion: that the trial court did not err in continuing to exercise its jurisdiction over the case and proceeding to enter a judgment on the merits. We acknowledge that, unlike the sovereign immunity issue raised in *RPR & Assocs.*, Plaintiff's failure to assert the City's waiver of governmental immunity in his complaint concerned well-

established law and an interlocutory appeal would have resulted in a reversal of the trial court's order:

> Sovereign immunity ordinarily grants the state, its counties, and its public officials, in their official capacity, an unqualified and absolute immunity from law suits. The rule of sovereign immunity applies when the governmental entity is being sued for the performance of a governmental, rather than proprietary, function.[1] . . . In order to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action.
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> . . . . This Court has consistently disallowed claims based on tort against governmental entities when the complaint failed to allege a waiver of immunity.

Paquette v. County of Durham, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (citations omitted, footnote added), *cert. denied*, 357 N.C. 165, 580 S.E.2d 695 (2003).

However, unlike the defendant in *RPR & Assocs.*, the City never perfected its purported interlocutory appeal and never sought a stay of the proceedings from this Court. Further, the City filed a motion for summary judgment and a calendar request bearing the same time and date file stamp as the notice of

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[1]The condemnation of a person's property for use as a dwelling is a governmental function. *Dale v. Morganton*, 270 N.C. 567, 571, 155 S.E.2d 136, 140-41 (1967).

interlocutory appeal. These motions actively sought to have the trial court proceed to resolution of the merits of the case. In addition, the City never mentioned its notice of interlocutory appeal at the summary judgment hearing or objected to the proceeding. Finally, the City, unlike the defendant in ***RPR & Assocs.***, did not raise this issue on appeal. For these reasons, we hold that the trial court was not unreasonable in proceeding as though the City had abandoned its purported appeal, and did not err in continuing to exercise jurisdiction over this case after entry of the City's 12 April 2011 notice of appeal. Accordingly, we consider the parties' arguments on appeal.

Denial of the City's Motion to Dismiss

On appeal, the City argues that the trial court erred in denying its motion to dismiss Plaintiff's claims. Specifically, the City attempts to bring forward various arguments that Plaintiff's complaint failed to state a claim pursuant to Rule 12(b)(6). We must dismiss.

It is "well established that the denial of a Rule 12(b)(6) motion to dismiss is not reviewable upon an appeal from a final judgment on the merits." *Shadow Group, L.L.C. v. Heather Hills Home Owners Ass'n*, 156 N.C. App. 197, 199, 579 S.E.2d 285, 286 (2003); *see also Concrete Serv. Corp. v. Investors Group, Inc.*,

79 N.C. App. 678, 682-83, 340 S.E.2d 755, 758-59 ("[W]here an unsuccessful motion to dismiss is grounded on an alleged insufficiency of the facts to state a claim for relief, and the case thereupon proceeds to judgment on the merits, the unsuccessful movant may not on an appeal from the final judgment seek review of the denial of the motion to dismiss."), *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986). Accordingly, we dismiss the City's appeal.

Summary Judgment in Favor of the City

Plaintiff argues that the trial court erred in granting summary judgment to the City and denying Plaintiff's motion for summary judgment. We disagree.

> The standard of review for an order of summary judgment is firmly established in this state. We review a trial court's order granting or denying summary judgment *de novo*. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party. The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense . . . .

Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC, __ N.C. App. __, __, 723 S.E.2d 744, 747 (2012) (citations and quotation marks omitted). Further, "[i]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

As noted *supra*, municipalities engaged in governmental functions are entitled to governmental immunity from tort claims, absent waiver. *Paquette*, 155 N.C. App. at 418, 573 S.E.2d at 717. Waiver of governmental immunity may be statutory, express, or by purchase of insurance. *See Fabrikant v. Currituck County*, 174 N.C. App. 30, 39, 621 S.E.2d 19, 25 (2005).

Here, the City asserted governmental immunity in its answer. Plaintiff's complaint contains no factual allegation that the City waived its governmental immunity, whether expressly, by statute, or through purchase of insurance. No evidence at the summary judgment hearing suggested any waiver by the City. The City was entitled to sovereign immunity from Plaintiff's tort claims, and thus, entitled to a judgment as a

matter of law. Accordingly, the trial court properly granted summary judgment to the City on those claims.

In his fourth claim, Plaintiff also asserted that the City failed to salvage his property prior to demolition and to apply the proceeds of the sale of any salvaged property against Plaintiff's bill for the demolition. "If [a] dwelling is removed or demolished by [a] public officer, he shall sell the materials of the dwelling, and any personal property, fixtures or appurtenances found in or attached to the dwelling, and shall credit the proceeds of the sale against the cost of the removal or demolition[.]" N.C. Gen. Stat. § 160A-443(6)(c) (2011). This requirement to salvage applies even where the condemnation and demolition were proper. *See Town of Hertford v. Harris*, 169 N.C. App. 838, 841, 611 S.E.2d 194, 196 (2005).

Here, Plaintiff's complaint contains a bare assertion that the "City failed to salvage the demolished real and personal property of 109 N. Slocumb St. Goldsboro[.]" In his complaint, Plaintiff did not allege what property the City failed to salvage and did not specify the value of any such property. Plaintiff also failed to present any evidence of same at the summary judgment hearing. Plaintiff having failed to forecast any evidence that his property was not salvaged by the City as

required by section 160A-443(6)(c), there was no genuine issue of material fact on this issue before the trial court and the City was entitled to a judgment as a matter of law. *Compare Town of Hertford*, 169 N.C. App. at 841, 611 S.E.2d at 196 (reversing summary judgment where the property owners "alleged in their complaint and in an affidavit . . . that the removed mobile homes and their contents had a value in excess of $5000 [while] the town contend[ed] that there was no salvageable material on [the] property when the mobile homes were removed"). Accordingly, the court did not err in granting summary judgment for the City on Plaintiff's fourth claim.

AFFIRMED IN PART; DISMISSED IN PART.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).