

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA12-496
NORTH CAROLINA COURT OF APPEALS

Filed: 20 November 2012

FRANK LILL & SON, INC.,
Plaintiff,

v.

Wake County
No. 11 CVS 5877

THE STATE OF NORTH CAROLINA;
THROUGH THE UNIVERSITY OF NORTH
CAROLINA at CHAPEL HILL and THE
NORTH CAROLINA DEPARTMENT OF
ADMINISTRATION.,
Defendants.

Appeal by the State from order entered 10 October 2011 by
Judge Howard E. Manning, Jr., in Wake County Superior Court.
Heard in the Court of Appeals 26 September 2012.

*Attorney General Roy Cooper, by Special Deputy Attorney
General Durwin P. Jones, for the State.*

*Conner Gwyn Schenck, P.L.L.C., by Paul E. Davis, and
Ernstrom & Drete, L.L.P., by Martha A. Connolly, for
plaintiff.*

ELMORE, Judge.

The State of North Carolina through the University of North
Carolina at Chapel Hill appeals from an order entered 10 October
2011 denying its motion to dismiss. After careful consideration
of the record in light of the applicable law, we conclude that

defendant's appeal is from an interlocutory order and must, for that reason, be dismissed.

I. Factual Background

On 15 April 2011, Frank Lill & Son, Inc. (plaintiff) filed a complaint in the Wake County Superior Court against the University of North Carolina at Chapel Hill (defendant) for breach of contract and breach of warranty, alleging \$8,700,000.00 in damages. Plaintiff asserted that defendant caused plaintiff to incur undue delays and unanticipated costs, thus preventing plaintiff from performing its contractual duties in a timely manner.

Prior to filing this action, plaintiff and defendant entered into a contract on 24 September 2004 for the construction of Phase 2A of the Manning Drive Steam Plant and Utility Distribution Tunnel. The contract required plaintiff to complete the construction project within 480 days from the issuance of the notice to proceed. In return, defendant was to pay plaintiff \$24,163,376.00. However, according to plaintiff, there were numerous disputed issues between the parties, including pending and disputed change orders, as the Phase 2A project neared completion. On 17 December 2009, the parties met to negotiate plaintiff's pending and disputed change orders.

However, the parties did not resolve their dispute at this time. At the end of the meeting defendant provided plaintiff with a letter summarizing its position of plaintiff's claims. Thereafter, the parties continued to attempt to renegotiate the terms of their agreement; however, negotiations failed and plaintiff demanded mediation of its dispute. The parties participated in mediation on 7 December 2010 but were again unable to resolve their dispute.

On 9 December 2010, plaintiff formally submitted its transmittal letter containing its verified claim to Gregory Driver, Director of the State Construction Office. On 19 January 2011, Driver denied plaintiff's claim because, based on his understanding, defendant had provided plaintiff with a final disposition of the claim on 17 December 2009. Therefore, he concluded that the plaintiff's verified claim was untimely as it was not submitted to his office within sixty days receipt of defendant's 17 December 2009 final statement, as required by N.C. Gen. Stat. § 143-135.3(c). Plaintiff asserts that the transmittal letter it received on 17 December 2009 merely summarized defendant's position and cannot be considered the final disposition of plaintiff's claim. Defendant contends that the letter acted as a final disposition and defendant

accordingly began running the applicable sixty day deadline as set out by the statute. See N.C. Gen. Stat. § 143-135.3 (c) (2012).

Plaintiff timely commenced this action within six months of receipt of Driver's denial, as required by N.C. Gen. Stat. § 143-135.3(d). Thereafter, defendant filed a motion to dismiss plaintiff's complaint based on lack of subject matter jurisdiction and/or personal jurisdiction, asserting that the complaint was barred by sovereign immunity. On 3 October 2011, the Wake County Superior Court heard arguments solely based on defendant's motion to dismiss, as a threshold jurisdictional issue. On 7 October 2011, the trial court denied defendant's motion to dismiss citing *Nello L. Teer Co. v. North Carolina Dept. of Transp.* as the controlling authority in its order. 175 N.C. App. 705, 625 S.E.2d 135 (2006). Defendant now appeals the entry of the trial court's order, asserting that the controlling precedent is *A.H. Beck Found. Co. v. Jones Bros.*, 166 N.C. App. 672, 603 S.E.2d 819 (2004), rather than *Nello Teer*.

II. Legal Analysis

A. Interlocutory Appeal

Defendant acknowledges that this appeal stems from an interlocutory order. However, defendant maintains that its

appeal is properly before this Court as the trial court's order deprives it of a substantial right. More specifically, defendant contends that it did not waive sovereign immunity because plaintiff failed to exhaust its administrative remedies.

Parties have an appeal of right to this Court "[f]rom any final judgment of a superior court[.]" N.C. Gen. Stat. § 7A-27(b) (2011).

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. City of Durham, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

[I]mmediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay. . . . Second, immediate appeal is available from an interlocutory order or judgment which

affects a substantial right.

Sharpe v. Worland, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (citations and quotations omitted).

In the instant case, plaintiff's claim for additional compensation under the parties' contract remains unsolved. Therefore, the trial court's order denying defendant's motion to dismiss is interlocutory as 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." *Veazey*, 231 N.C. at 361-62, 57 S.E.2d at 381 (citations omitted). Accordingly, we must determine if the interlocutory order is immediately appealable.

B. Substantial Right

An interlocutory order is immediately appealable when "the challenged order affects a substantial right." N.C.R. App. P. 28(b)(4) (2012). When determining whether an interlocutory order is immediately appealable "we utilize a two-part test, with the first inquiry being whether a substantial right is affected by the challenged order and the second being whether this substantial right might be lost, prejudiced, or inadequately preserved in the absence of an immediate appeal." *Hamilton v. Mortgage Info. Servs.*, ___ N.C. App. ___, ___, 711

S.E.2d 185, 189 (2011). "The appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hoke Cty. Bd. Of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009) (citation omitted) (emphasis in original).

Here, defendant contends that it is not required to expend considerable resources in defending complex construction litigation when plaintiff failed to strictly comply with the limited waiver of sovereign immunity under N.C. Gen. Stat. § 143-135.3(c). As such, defendant argues that its waiver of sovereign immunity is conditioned upon plaintiff's compliance with N.C. Gen. Stat. § 143-135.3(c). Accordingly, because plaintiff failed to exhaust the administrative remedies by filing its claim with the Director of the State Construction Office within sixty days of receiving a final statement, plaintiff failed to comply with N.C. Gen. Stat. § 143-135.3(c) and, thus, may no longer file a claim against the State.

Defendant's argument that a substantial right has been affected is without merit. "Sovereign immunity is waived whenever the State, 'through its authorized officers and agencies, enters into a valid contract[] [because] the State

implicitly consents to be sued for damages on the contract in the event it breaches the contract.'" *Welch Contracting, Inc. v. North Carolina Dept. of Transp.*, 175 N.C. App. 45, 51, 622 S.E.2d 691, 695 (2005) (quoting *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976)). The record indicates that the trial court considered *A.H. Beck* and *Nello Teer*, and opted to apply the law as set forth in *Nello Teer*. The trial court did not rule on the pending issues and limited its order to the jurisdictional issues, concluding that defendant's motion to dismiss should be denied. Accordingly, under *Nello Teer*, the administrative filing deadline shall not be a condition precedent to bringing an action, and failure to comply implicates a statute of limitations defense, not a sovereign immunity defense. See 175 N.C. App. at 711, 625 S.E.2d at 139.

As a result, defendant has not raised a sovereign immunity defense affecting a substantial right; rather it has a statute of limitations defense, which is not immediately appealable. See *Thompson v. Norfolk Southern Railway*, 140 N.C. App. 115, 120-21, 535 S.E. 2d 397, 401 (2000). Accordingly, defendant has failed to demonstrate that trial court's order deprives it of a substantial right; therefore, we must dismiss the appeal as interlocutory.

III. Conclusion

After careful consideration of the record in light of the applicable law, we conclude that defendant's appeal is from an interlocutory order and must, for that reason, be dismissed.

Dismissed.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).