NO. COA13-314
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

SKANSKA USA BUILDING, INC.,
Plaintiff

v.

BLYTHE DEVELOPMENT COMPANY and
SAFECO INSURANCE COMPANY OF
AMERICA,

Defendants/Third-Party Plaintiff — Wake County
No. 11 CVS 13406

v.

JOHNSON LANDSCAPES, INC. d/b/a
VERTICAL EARTH and VERTICAL EARTH
CORPORATION,

Third-Party Defendants.

Appeal by third-party defendant from an order entered 29 August 2012 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 28 August 2013.

Pharr Law, PLLC, by Steve M. Pharr and Leslie D. Sherrill, for defendant/third-party plaintiff/appellee Blythe Development Company.

Williams, Mullen, Clark & Dobbins P.C., by John D. Burns, for third-party defendant/appellant Johnson Landscapes, Inc. d/b/a Vertical Earth.

HUNTER, Robert C., Judge.

Third-party defendant/appellant Johnson Landscapes, Inc., d/b/a Vertical Earth Corporation ("JLI") appeals the order granting third-party plaintiff/appellee Blythe Development Company's ("Blythe") motion to amend process, motion to amend its complaint, and motion to compel arbitration. On appeal, JLI argues that the trial court erred in asserting personal jurisdiction over it because the amendment did not simply correct a misnomer but substituted in a new party as a defendant, contrary to *Treadway v. Diez*, 209 N.C. App. 152, 703 S.E.2d 832 (Jackson, J., dissenting), *rev'd per curiam for reasons stated in the dissent*, 365 N.C. 289, 715 S.E.2d 852 (2011). After careful review, we dismiss the appeal.

Background

This case arises from the construction and subsequent failures of retaining walls on the site of the Northlake Mall at the intersection of Interstate 77 and Reames Road in Charlotte, North Carolina. TRG Charlotte, LLC ("TRG") is the owner of the Northlake Mall property. Plaintiff Skanska USA Building, Inc. ("Skanska") worked for TRG as the general contractor on the Northlake Mall construction project. Skanska entered into a

subcontract with Blythe to complete, among other things, the design and construction of retaining walls on the property.

On 2 July 2004, Blythe entered into another agreement to have the retaining walls completed by JLI as subcontractor. Although the agreement itself stated that the subcontractor to complete the retaining walls was "Vertical Earth, 6025 Matt Highway, Cumming, GA 30040," it is undisputed that "all work performed under the name 'Vertical Earth' in North Carolina was performed by Johnson Landscapes Inc. d/b/a Vertical Earth, including all work performed in connection with the Northlake Mall Project."

Vertical Earth Corporation ("VEC"), on the other hand, is a distinct corporate entity from JLI, even though they share the same owner, officers, and registered agent. VEC was not incorporated until 10 March 2008, almost four years after the subcontract agreement was executed between Blythe and JLI. Since its incorporation in the state of Georgia at that time, VEC has not done any business in North Carolina.

Pursuant to the agreement with Blythe, JLI completed the design and construction of the retaining walls at the Northlake Mall in 2004 to 2005. From 2007 to 2010, portions of one of the retaining walls failed.

On 22 July 2011, TRG filed a complaint against Skanska in the Sixth Judicial Circuit Court of Michigan, alleging certain defects in the design and construction of one of the retaining walls. The case was submitted to binding arbitration. On 30 August 2011, Skanska filed this action in Wake County Superior Court against Blythe for damages arising out of the alleged failure of the retaining walls, including indemnification and contribution claims against Blythe for any damages proven against Skanska in TRG's action against them. On 27 December 2011, Skanska amended its complaint, and on 10 February 2012, Blythe answered and filed its third-party complaint against VEC. Blythe's third-party complaint named "Vertical Earth Corporation" as defendant and asserted claims for breach of contract, breach of warranties, indemnification, obligation to defend, and sought a declaratory judgment compelling arbitration.

On 22 May 2012, VEC filed a motion to dismiss the third-party complaint for lack of personal jurisdiction and insufficient service of process and objected to the motion to compel arbitration. On 25 May 2012, Blythe moved to amend its third-party complaint to substitute JLI as the proper third-party defendant.

On 9 July 2012, all matters came on for hearing before Superior Court Judge Donald W. Stephens. At the hearing, the trial court granted VEC's motion to dismiss, as well as Blythe's motion to amend the third-party complaint and to amend process, adding JLI as third-party defendant as of 9 July 2012, the date of the hearing. JLI's counsel then proceeded to argue that the motion to compel arbitration should be denied. The trial court granted Blythe's motion to compel arbitration. JLI timely appealed the order granting Blythe's motion to amend the summons and complaint and compelling arbitration.

Grounds for Appeal

JLI asserts two grounds for appellate review of the order. First, JLI contends that N.C. Gen. Stat. § 1-277(b) gives it the right of immediate appellate review. Specifically, N.C. Gen. Stat. § 1-277(b) states that "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause." Thus, JLI argues that since the amendment of the summons constitutes an assertion of personal jurisdiction over it, the order constitutes a ruling of jurisdiction which allows for immediate

appeal under N.C. Gen. Stat. § 1-277(b).

While the plain language of the statute seems to support defendant's claim, our caselaw does not. Although this Court used to construe this statute as allowing all adverse rulings on service and process, our Supreme Court rejected that argument in *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982). Instead, the *Love* court held that "we believe that it is the most reasonable interpretation of G.S. 1-277(b) and hold that the right of immediate appeal of an adverse ruling as to jurisdiction over the person, under that statute, is limited to rulings on 'minimum contacts' questions, the subject matter of Rule 12(b)(2)." *Id.*

Here, JLI is not challenging the order amending service on a minimum contacts basis; instead, JLI is challenging the ability of the trial court to amend the summons on the basis that our caselaw prohibits the amendment of a summons that, essentially, adds a new party/defendant. The Supreme Court's language in *Love* is clear: N.C. Gen. Stat. § 1-277(b) only permits an immediate appeal of an interlocutory order when the appeal raises questions relating to a lack of minimum contacts. Here, since JLI is not contending that the trial court lacks authority to hale it into court once the summons was amended,

the statute does not apply. Therefore, pursuant to *Love*, we find that N.C. Gen. Stat. § 1-277(b) does not give JLI an immediate right of appeal.

As for its second ground for appeal, JLI contends that the order affects its substantial rights pursuant to N.C. Gen. Stat. § 1-277(a). Whether a party may immediately appeal an interlocutory order based on the substantial rights exception is a two-part test: (1) the right itself must be substantial, and (2) "the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment." *Wood v. McDonald's Corp.*, 166 N.C. App. 48, 55, 603 S.E.2d 539, 544 (2004) (citation omitted).

First, JLI cites to no authority, and we find none, for the proposition that an order granting a motion to amend a summons affects a substantial right of the defendant. This Court has held in analogous contexts that "a mere desire to avoid trial does not give rise to a substantial right justifying an interlocutory appeal." *See Burton v. Phoenix Fabricators and Erectors, Inc.*, 185 N.C. App. 303, 304, 648 S.E.2d 235, 236 (2007) (declining to review an interlocutory order denying a motion to dismiss for lack of subject matter jurisdiction). Therefore, we find that the order granting plaintiff's motion to

amend the summons did not affect a substantial right of JLI, and appeal on that issue is not properly before us. Second, with regard to the amendment of the complaint, this Court held in *Howard v. Ocean Trail Convalescent Ctr.*, 68 N.C. App. 494, 496, 315 S.E.2d 97, 99 (1984) that an order granting a motion to amend to add parties in a complaint did not affect a substantial right and was not immediately appealable. While the Court has held that an order denying a motion to add two defendants was immediately appealable given that "the possibility of two trials on the same issues exist[ed][,]" *Carter v. Rockingham Cnty. Bd. of Educ.*, 158 N.C. App. 687, 689, 582 S.E.2d 69, 72 (2003), there is no possibility here of multiple trials on the same issue since the order allowed the amendment to add only JLI to the complaint. Finally, this Court held in *The Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 285, 314 S.E.2d 291, 293 (1984) that:

> [N]o substantial right is affected by an interlocutory appeal from an order compelling arbitration because the parties have access to the courts. A party may petition the court after arbitration for an order confirming, vacating, modifying or correcting an arbitration award. Once granted, the trial court enters a judgment or decree in conformity with that order. A party may then appeal the trial court's order or judgment.

Darroch v. Lea, 150 N.C. App. 156, 162, 563 S.E.2d 219, 223 (2002) (internal citations and quotations omitted).

Because we find that the order did not affect any of JLI's substantial rights, JLI may not avail itself of the substantial rights exception which would confer jurisdiction on this Court to consider the merits of its appeal.

Conclusion

Based on the foregoing reasons, we find that the appeal is not properly before this court, and therefore we dismiss.

DISMISSED.

Judges GEER and McCULLOUGH concur.

Report per Rule 30(e).