IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-311

Filed: 1 December 2015

Wilkes County, No. 14 CVS 675

ANTIQUITY, LLC, Plaintiff,

v.

ELECTRICITIES OF NORTH CAROLINA, INC., and PIKE ELECTRIC, LLC, Defendants.

Appeal by Plaintiff from order entered 1 October 2014 by Judge Julia Lynn Gullett in Wilkes County Superior Court. Heard in the Court of Appeals 9 September 2015.

McElwee Firm, PLLC, by John M. Logsdon, for Plaintiff.

Gallivan, White & Boyd, P.A., by Sarah M. Bowman and Christopher M. Kelly, for Defendants.

STEPHENS, Judge.

Plaintiff Antiquity, LLC, filed an action against Defendants ElectriCities of North Carolina, Inc., and Pike Electric, LLC, in Wilkes County Superior Court alleging claims for breach of contract and negligence arising from damages to a construction project in Mecklenburg County caused by a sinkhole. Antiquity appeals from the trial court's decision to grant the Defendants' motion to transfer venue to Mecklenburg County pursuant to section 1-76(1) of our General Statutes. After

careful consideration, we hold that the trial court did not err and we consequently affirm its order.

Factual Background and Procedural History

Plaintiff Antiquity, LLC, is a North Carolina limited liability company with its principal place of business in Wilkes County. Antiquity is the owner and developer of a mixed residential and commercial development ("the Project") in Mecklenburg County. As part of the development of the Project, Antiquity entered into certain agreements with Defendant ElectriCities of North Carolina, Inc., for the provision of electricity for the residences and businesses to be located within the Project. ElectriCities subsequently contracted with Defendant Pike Electric, LLC, for the installation of underground electric transmission lines and associated facilities.

While completing its electrical installation work on the Project in July 2012, Pike Electric dug a trench along the northern side of a road called Old Canal Street, and also dug a hole adjacent to a storm water catch basin in the curb of Old Canal Street. In April 2013, a large sinkhole formed along Old Canal Street, causing substantial damage to the roadway, underground utility lines for water and gas, and a retaining wall. In June 2013, a water line ruptured during construction of a nearby residence within the Project, resulting in further damage and inundating a nearby creek with sediment.

On 2 June 2014, Antiquity filed a complaint in Wilkes County Superior Court alleging claims for breach of contract and negligence against both ElectriCities and Pike Electric (collectively, "the Defendants"). In its complaint, Antiquity alleged that ElectriCities breached its contractual duty to install the electrical infrastructure in a workmanlike manner and also failed to use due care in selecting, securing, and supervising Pike Electric's work. The complaint further alleged that by failing to properly backfill the trench and hole that it dug on the Property with sufficiently compacted soil, Pike Electric proximately caused the sinkhole and resulting damage to the Project and also breached its contractual duty—owed to Antiquity as a third party beneficiary of the Defendants' subcontracting arrangement—to install the electrical infrastructure in a workmanlike manner.

On 3 July 2014, the Defendants filed an answer to the complaint in which they asserted various defenses and moved to transfer venue to Mecklenburg County pursuant to N.C. Gen. Stat. § 1-76(1). After a hearing held on this motion in Wilkes County Superior Court on 25 August 2014, the trial court entered an order on 1 October 2014 granting the Defendants' motion to transfer venue to Mecklenburg County based on its conclusions of law that section 1-76(1) provides that actions "for injuries to real property[] must be tried in the county in which the subject of the action, or some part thereof, is situated" and that in the present case, "[t]he damages for which [Antiquity] seeks recovery are for injuries to real property owned by

[Antiquity] located in Mecklenburg County." Antiquity gave notice of appeal to this Court on 28 October 2014.

Jurisdiction

As an initial matter, we note that although parties generally have no right of immediate appeal from interlocutory orders and judgments, this Court has jurisdiction to hear an immediate appeal when such an order or judgment "[a]ffects a substantial right." N.C. Gen. Stat. § 7A-27(b)(3)(a) (2013), *amended by* 2015 N.C. Sess. Law 264. Moreover, our Supreme Court has held that "there can be no doubt that a right to venue established by statute is a substantial right," and therefore an order granting or denying such a motion "is immediately appealable." *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) (citations omitted). This appeal is thus properly before us.

Standard of Review

Antiquity's appeal challenges the trial court's decision to grant the Defendants' motion to transfer venue pursuant to section 1-76(1) of our General Statutes. "Issues of statutory construction are questions of law, reviewed *de novo* on appeal." *Kirkland's Stores, Inc. v. Cleveland Gastonia, LLC*, 223 N.C. App. 119, 122, 733 S.E.2d 885, 887 (2012) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citation and internal quotation marks omitted).

When construing a statute, our analysis "begins with an examination of the plain words of the statute" because "[t]he legislative purpose of a statute is first ascertained by examining the statute's plain language." *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citations omitted). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Id.* (citation omitted). Moreover, it is well established that "[a] statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage." *Oxendine v. TWL, Inc.*, 184 N.C. App. 162, 166, 645 S.E.2d 864, 867 (2007) (citation omitted).

Analysis

Antiquity argues that the trial court erred in granting the Defendants' motion to transfer venue to Mecklenburg County. We disagree.

Section 1-76 of our General Statutes provides in pertinent part that:

> Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by law:
>
> (1) Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

N.C. Gen. Stat. § 1-76(1) (2013). The right to transfer an action pursuant to section 1-76(1) depends on whether the action is local or transitory, which is determined by "[t]he form of action alleged in the complaint." *Thompson v. Horrell*, 272 N.C. 503, 504, 158 S.E.2d 633, 634 (1968).

In the present case, Antiquity contends that our State's appellate courts have consistently held that actions affecting title to real property are local, and therefore properly transferable under section 1-76(1), while actions seeking only monetary damages are transitory and outside the scope of section 1-76(1). In support of this argument, Antiquity relies on our Supreme Court's decisions in *Thompson* and in *Rose's Stores, Inc. v. Tarrytown Ctr., Inc.*, 270 N.C. 201, 154 S.E.2d 320 (1967).

In *Rose's Stores, Inc.*, the defendants moved pursuant to section 1-76(1) to transfer venue after the plaintiff filed an action for breach of contract in Vance County alleging that the defendants had breached a lease agreement concerning a shopping center in Nash County. 270 N.C. at 202, 154 S.E.2d at 321. The trial court denied the motion to transfer, and in affirming its decision, our Supreme Court explained that "[i]t is the principal object involved in the action which determines the question [of whether an action is local or transitory], and if title is principally involved or if the judgment or decree operates directly and primarily on the estate or title, and not alone in personam against the parties, the action will be held local." *Id.* at 206, 154 S.E.2d at 323 (citation omitted). However, since the plaintiff's complaint did not

affect the title to the land and "sound[ed] of breach of contract and not for recovery of real property, or of an estate or interest therein, or for the determination of any form of such right or interest, and for injuries to real property," the Court held the action was transitory and was not removable under section 1-76(1). *Id.* at 206, 154 S.E.2d at 324 (citation and internal quotation marks omitted). One year later, the Court followed a similar rationale in *Thompson*, wherein it reversed the trial court's decision to grant the defendant's motion to transfer venue pursuant to section 1-76(1) after the plaintiff had filed suit for breach of contract in Wake County alleging that the defendant, who had agreed to construct a beach house in Carteret County, had performed defective and unsafe work. 272 N.C. at 504, 158 S.E.2d at 634. In so holding, the *Thompson* Court observed:

> [The p]laintiff's action is to recover monetary damages for the breach of a contract to construct a house. Its purpose is not to recover real property, not to determine an estate or interest in land, and not to recover for damages to realty. It is not, therefore, a local action within the meaning of [section 1-76(1)], and [the] defendant is not entitled to have the cause removed to Carteret County as a matter of right. The test is this: If the judgment to which [the] plaintiff would be entitled upon the allegations of the complaint will affect the title to land, the action is local and must be tried in the county where the land lies unless [the] defendant waives the proper venue; otherwise the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action.

Id. at 504-05, 158 S.E.2d at 634-35. In Antiquity's view, based on the holdings in *Rose's Stores, Inc.* and *Thompson*, the fact that the present lawsuit seeks money

damages for breach of contract and does not involve any issue affecting title to the Project means that it is a transitory action, and that the trial court erred in granting the Defendants' motion to transfer venue to Mecklenburg County.

We find Antiquity's reliance on *Rose's Stores, Inc.* and *Thompson* misplaced, as those cases are readily distinguishable from the present facts. Notably, neither of the complaints in *Rose's Stores, Inc.* or *Thompson* alleged any injury to real property. Consequently, the Court's analysis in both cases focused entirely on the plaintiffs' breach of contract claims, which it concluded were transitory and therefore did not trigger removal under section 1-76(1). However, at no point in either *Rose's Stores, Inc.* or *Thompson* did the Court ever suggest that section 1-76(1) applies exclusively to lawsuits where the title to real property is at issue. Indeed, had it done so, it would have rendered the final clause of section 1-76(1)—which expressly lists "injuries to real property" as a type of action subject to removal under the statute—useless and redundant, in contravention of the well-established presumption "that the legislature intended each portion [of the statute] to be given full effect and did not intend any provision to be mere surplusage." *Oxendine*, 184 N.C. App. at 166, 645 S.E.2d at 867.

Here, by contrast, unlike the allegations in *Rose's Stores, Inc.* and *Thompson*, Antiquity's complaint actually does state a claim for injury to real property. To wit, both of Antiquity's causes of action for negligence and breach of contract against both the Defendants are based on the complaint's factual allegations that the Defendants'

collective failure to properly insure that the trench and hole dug for installation of the electrical infrastructure were refilled with adequately compacted soil caused a sinkhole to form on the Project, which in turn resulted in damage not just to Antiquity in an individual capacity but, more significantly for our purposes here, to the very dirt on which the Project is situated. Thus, we conclude that, unlike the transitory actions at issue in *Rose's Stores, Inc.* and *Thompson*, this is an action to recover for injuries to real property.

Our Supreme Court has recognized for over a century that actions to recover damages for injuries to real property "are classified as local in their nature, because, generally speaking, the wrongful act or the damage to the land could only have been done in the county where the land, or some part thereof, is situated." *Perry v. Seaboard Air Line Ry. Co.*, 153 N.C. 117, 118, 68 S.E. 1060, 1061 (1910) (citation omitted). In *Perry*, the Court reversed the trial court's decision denying the defendant's motion to transfer venue under section 419 of the Revisal of 1905, which was a statutory predecessor to section 1-76(1), in an action where the plaintiff filed suit in Wilson County to recover damages for injuries to his land, which was situated in Bladen County, and the timber thereon resulting from a fire allegedly caused by the defendant railroad's negligence. *Id.* Although the plaintiff argued that venue was proper in Wilson County based on a more recently enacted law governing venue in actions against railroads, the Court rejected that argument, reasoning instead that

the Legislature had only intended for the new law to apply to actions outside the scope of the statute, which provided that

> [a]ctions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial in the cases provided by law: (1) For the recovery of real property or of any form of such right or interest, *and for injuries to real property*.

Id. (emphasis in original). Thus, the Court held that the trial court erred in denying the defendant's motion to transfer venue pursuant to the statutory predecessor to section 1-76(1) because the plaintiff's claim was for "an injury to real property within the meaning and intent of that section . . . , and by its provisions an action to recover damages for such an injury should be tried in the county where the injury was committed[.]" *Id.* (citing *Interstate Cooperage Co. v. Eureka Lumber Co.*, 151 N.C. 455, 456, 66 S.E. 434, 435 (1909) (upholding the trial court's order transferring venue of an action filed in Pamlico County and "brought to recover damages for an injury to real estate" to Beaufort County, where the alleged injury occurred, because the predecessor to section 1-76(1) "declares that actions for *injuries* to real property must be tried in the county in which the subject-matter of the action, or some part thereof, is situate[d]") (internal quotation marks omitted; emphasis in orginial)).

Antiquity cites no authority purporting to overrule *Perry*, but instead relies on a line of cases—including *Harris Clay Co. v. Carolina China Clay Co.*, 203 N.C. 12, 164 S.E. 341 (1932); *Cox v. Oakdale Cotton Mills, Inc.*, 211 N.C. 473, 190 S.E. 750

(1937); and *Wheatley v. Phillips*, 228 F.Supp. 439 (1964)—which were decided pursuant to section 463 of the North Carolina Consolidated Statutes of 1919 and 1924, another statutory predecessor to section 1-76(1) with virtually identical language to both the current version of the statute and the version at issue in *Perry*. Antiquity insists this line of cases demonstrates that, as a general matter of law, actions to recover money damages are transitory and only suits seeking title to land are local. While it is true that the actions in *Harris*, *Cox*, and *Wheatley* each involved claims for money damages and were ultimately deemed transitory, we find Antiquity's reliance on these cases unavailing, as its argument ignores crucial distinctions between them and the facts at issue in the present case.

In *Harris*, the plaintiff entered into a lease with the defendant for mining rights to lands located by a creek in Mitchell County, then subsequently filed suit in Jackson County, its principal place of business, to recover breach of contract and tort damages after the defendant set up its own mining operation two miles upstream from the plaintiff's plant and polluted the creek so severely the plaintiff was forced to shut its plant down. 203 N.C. at 13, 165 S.E.2d at 342. The defendant moved to transfer venue to Mitchell County as a matter of right pursuant to section 463, but the trial court denied its motion. *See id.* In affirming that decision, our Supreme Court made clear that "[t]he action is for the recovery of damages, and appears to be a transitory one. It sounds in neither ejectment nor replevin; *nor is it an action for*

injury to real property, such as contemplated by the statute." *Id.* (emphasis added). In *Cox*, our Supreme Court upheld the trial court's denial of the defendant's motion to transfer venue pursuant to section 463 in an action the plaintiff had filed in Randolph County. 211 N.C. at 473, 190 S.E. at 750. In his complaint, the plaintiff alleged that he suffered injuries that "were caused by the artificial obstruction by the defendant, on its land in Guilford County, of the water in a river which flows through the land of the defendant, and thence to and through the land of the plaintiff [in Randolph County]." *Id.* at 474, 190 S.E. at 750. The Court held that the motion to transfer venue was properly denied because "[t]he action does not involve title to or any interest in land," and, citing *Harris*, concluded that "[f]or purposes of venue, the action is transitory and not local." *Id.*

Unlike the allegations of Antiquity's complaint in the present case, which revolve around an injury to real property insofar as they allege that the sinkhole damaged the real property on which the Project is situated, our review of *Harris* and *Cox* demonstrates that the complaints in those cases alleged injuries to, or arising from, the flow of water and the respective plaintiffs' rights thereunto, rather than injuries to their land. Given that both the classification of and right to transfer an action depends on "[t]he form of action alleged in the complaint," *Thompson*, 272 N.C. at 504, 158 S.E.2d at 634, and in light of the fact that neither *Cox* nor *Harris* featured

a complaint alleging any actions for damages arising from an injury to real property, we find those cases inapposite to the present facts.

Antiquity also relies on *Wheatley*, where the plaintiffs filed an action for damages in the Western District of North Carolina based on allegations that the defendants negligently failed to remove cut timber from a lake in Georgia, which subsequently washed into creeks and damaged the sub-structures of certain bridges. 228 F.Supp. at 440. The defendants were residents of North Carolina, but the damaged property was situated in Georgia, where the plaintiffs resided and where all the relevant acts had transpired. *See id.* at 442 ("The alleged tort occurred in Georgia, and the damage also. If the defendants were negligent they were negligent in Georgia, and, presumably, most of the witnesses to the alleged log jam and water diversion are persons resident in Georgia."). When the defendants moved to transfer venue to the appropriate district in Georgia, the court undertook a review of *Harris* and *Cox* to determine whether the action was local or transitory under North Carolina law. *Id.* at 441. The court also examined the language of section 463, which provided that actions for "[r]ecovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, *and* for injuries to real property" must be tried "in the county in which the subject of the action, or some part thereof, is situated." *Id.* (emphasis in original). At one point, the court suggested that "it is significant that the last two clauses [of the statute] are joined together by the

conjunctive," as that might indicate that "half of the package, injuries to real property, *considered alone*, is transitory." *Id.* (internal quotation marks omitted; emphasis in original). However, the court explicitly stated that it was not attempting to resolve the outcome of the case by construing the statutory language, and it ultimately based its determination on the fact that "[t]he only meaningful question running through all the cases seems to be whether the action is one in rem, i.e., actually affecting title *or the realty itself*." *Id.* at 442 (emphasis added). The court concluded that the plaintiffs' action was transitory because "it is plainly apparent that the allegations of the complaint in this case are directed towards getting a monetary judgment and damages in personam. Whatever judgment may result, *the land itself in Georgia* and legal title *will not be affected*." *Id.* (emphasis added).

Although the *Wheatley* Court's opinion does not control the result here as binding precedent, we conclude that its holding nonetheless does not support Antiquity's argument because, as in *Harris* and *Cox*, the plaintiffs' complaint did not allege any injury to real property. Thus, despite Antiquity's claims to the contrary, we also conclude that like *Thompson* and *Perry*, these cases indicate that it is the allegations of the complaint, rather than the specific form of relief sought, that determine whether an action is local, and thus subject to transfer under section 1-76(1). Therefore, because the allegations in Antiquity's complaint seek damages arising from injuries to the very dirt on which the Project is situated, we hold that

the trial court did not err in granting the Defendants' motion to transfer venue to Mecklenburg County pursuant to section 1-76(1). To hold otherwise, as Antiquity urges, would require us to ignore the statute's plain language and render its final clause useless and redundant, in contravention of the well-established presumption "that the legislature intended each portion [of the statute] to be given full effect and did not intend any provision to be mere surplusage." *Oxendine*, 184 N.C. App. at 166, 645 S.E.2d at 867.

Accordingly, the trial court's order is

AFFIRMED.

Judges MCCULLOUGH and ZACHARY concur.

Report per Rule 30(e).