

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1002

Filed: 5 July 2016

Halifax County, No. 10 CVS 560

SHAREE M. COVINGTON, Plaintiff,

v.

ALAN VESTER MOTOR COMPANY, INC., Defendant.

Appeal by defendant from writ of execution issued 12 June 2015 by Assistant Clerk of Superior Court Linda P. Bozard and all prior orders entered in this action by Judges Alma L. Hinton and Marvin K. Blount III in Halifax County Superior Court. Heard in the Court of Appeals 27 April 2016.

Teague Rotenstreich Stanaland Fox & Holt, PLLC, by Lyn K. Broom, for defendant-appellant.

Norris Law Firm, PLLC, by J. Matthew Norris, for plaintiff-appellee.

ELMORE, Judge.

Defendant appeals from the writs of execution and interlocutory orders entered throughout the pendency of this action. We dismiss defendant's appeal.

I. Background

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On 3 May 2010, Sharee M. Covington (plaintiff) filed an action against Alan Vester Motor Company, Inc. (defendant) alleging eight claims for relief arising from the purchase of a 2007 Honda Accord. In her complaint, plaintiff alleged deprivation of rights under 42 U.S.C. § 1983, malicious prosecution, abuse of process, breach of contract, unfair and deceptive trade practices, conversion, Article 9 violations, and punitive damages. Defendant filed an answer and counterclaims, alleging breach of contract, conversion, fraud, and unfair and deceptive trade practices.

On 30 August 2013, plaintiff moved for summary judgment on defendant's counterclaims. A hearing was scheduled for 14 April 2014, during which defendant's counsel requested a continuance due to a sudden illness. The hearing was rescheduled for 23 April 2014. At the rescheduled hearing, the court waited forty-five minutes for defendant's counsel before proceeding in her absence. By orders entered 30 April 2014, the court granted plaintiff's motion for summary judgment as to defendant's counterclaims and denied defendant's motion to dismiss/motion to show cause. Defendant subsequently filed a Rule 60(b) motion for relief based, in part, on excusable neglect. The court denied the motion and granted plaintiff's request for attorney's fees in the amount of \$36,168.09.

After three months of defendant's inaction, plaintiff obtained a writ of execution on 8 January 2015 to collect the attorney's fees. In response, on 29 January 2015, defendant filed a motion to stay and for preliminary injunction barring

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execution. On 13 April 2015, the same day as the hearing on the motion to stay, defendant filed a Rule 54(b) motion requesting the court to certify the following for immediate appeal: (1) the 30 April 2014 order granting plaintiff's motion for summary judgment as to defendant's counterclaims; (2) the 2 September 2014 order denying defendant's Rule 60(b) motion; and (3) the 25 September 2014 order granting plaintiff's attorney's fees. Defendant's motion to stay and motion for Rule 54(b) certification were denied by orders entered 27 April 2015 and 26 May 2015, respectively.

On 12 June 2015, just weeks before the original 29 June 2015 trial date, plaintiff obtained a second writ of execution. Defendant filed a notice of appeal on 22 June 2015, attempting to appeal from the second writ of execution and from all prior "decisions, opinions, orders and rulings" in this action, "including, but not limited to the following":

1. The Court's June 12, 2015, Writ of Execution issued by Linda P. Bozard, Assistant Clerk of Superior Court and received from the court by mail on June 17, 2015, followed by receipt of a True Certified Copy of the Writ of Execution by mail on June 19, 2015;
2. The Court's January 8, 2015, Writ of Execution issued by Linda P. Bozard, Assistant Clerk of Superior Court of Halifax County and received from the Court by mail on January 15, 2015;
3. The Court's May 26, 2015, Order entered by the Honorable Alma Hinton denying Defendant's Motion Pursuant to Rule 54(b) of the North Carolina Rules of Civil

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Procedure and received from the Court on June 15, 2015;

4. The Court's April 27, 2015, Order entered by the Honorable Marvin Blount denying Defendant's Motion to Stay the Writ of Execution and for Preliminary Injunction pursuant to Rules 62, 64 and 65 and received from the Court by mail on June 18, 2015;

5. The Court's September 25, 2014, Order entered by the Honorable Alma Hinton granting Plaintiff's Motion for Attorneys' Fees claimed for defending Defendant's Counterclaims pursuant to N.C.G.S. §§ 6-21.5 and § 75-61;

6. The Court's September 2, 2014, Order entered by the Honorable Alma Hinton denying Defendant's Rule 60(b) Motion for Relief and served by mail by plaintiff's counsel on September 11, 2014;

7. The August 11, 2014, oral Order(s) by the Honorable Alma Hinton denying Defendant's Rule 60(b) Motion for Relief;

8. The Court's written Order signed by the Honorable Alma Hinton on April 30, 2014, granting Plaintiff's Motion for Summary Judgment as to Defendant's Counterclaims only and served by a Certificate of Service from plaintiff's counsel on September 11, 2014, pursuant to N.C. R. of Civ. Proc. Rule 5(b1);

9. The Court's written Order signed by the Honorable Alma Hinton on April 30, 2014, denying Defendant's Motion to Show Cause/Motion to Dismiss and served by a Certificate of Service from plaintiff's counsel on September 11, 2014, pursuant to N.C. R. of Civ. Proc. Rule 5(b1);

10. The Court's April 23, 2014, oral Order(s) by the Honorable Alma Hinton granting Plaintiff's Summary Judgment Motions as to Defendant's Counterclaims only; and

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11. The Court's April 23, 2014, oral Order(s) by the Honorable Alma Hinton denying Defendant's Motion to Show Cause/Motion to Dismiss.

On 25 June 2015, defendant filed a petition for writ of supersedeas with this Court, staying the trial date. This Court denied defendant's petition on 24 July 2015 and lifted the stay. The case was then tried from 8 to 23 February 2016, resulting in a directed verdict on plaintiff's Article 9 claim and a hung jury and subsequent mistrial on the remaining claims. A new trial has not been scheduled.

II. Discussion

Defendant claims that we have jurisdiction over this appeal from the writs and interlocutory orders because they each affect a substantial right. We need not determine whether a substantial right is affected, however, because defendant's notice of appeal is improper.

"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, 362, 57 S.E.2d 377, 381 (1950) (citation 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). There are two exceptions to this rule: First, pursuant to Rule 54(b), "the trial court may certify that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of

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the claims or parties in an action.” *Dep’t of Transp. v. Rowe*, 351 N.C. 172, 174–75, 521 S.E.2d 707, 709 (1999) (citing N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990)). And “[s]econd, a party may appeal an interlocutory order that ‘affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment.’” *Id.* at 175, 521 S.E.2d at 709 (citations omitted) (quoting *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381).

If a party is entitled to appeal an interlocutory order, the party may pursue an immediate appeal “but is not required to do so.” *Id.* at 176, 521 S.E.2d at 710; *see also* N.C. Gen. Stat. § 1-277(a) (2015) (“An appeal *may* be taken from every judicial order or determination . . . which affects a substantial right” (emphasis added)); *Rowe*, 351 N.C. at 176, 521 S.E.2d at 710 (“The language of N.C.G.S. § 1-277 is permissive not mandatory.”). Where a party forgoes an immediate appeal of an interlocutory order, he or she does not waive the right to appeal that order *after the final judgment*. *Rowe*, 351 N.C. at 176–77, 521 S.E.2d at 710; *see also* N.C. Gen. Stat. § 1-278 (2015) (“Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.”).

If, however, the party elects to appeal from an interlocutory order before the final judgment is entered, notice must be given within the thirty-day window required by Rule 3 of our Rules of Appellate Procedure. *See Johnson v. Rowland Motor Co.*, 168 N.C. App. 237, 238, 606 S.E.2d 711, 712 (2005) (holding that notice of appeal from

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interlocutory order was not timely when filed outside thirty-day window and no motion to toll the time for taking appeal was filed); *Guthrie v. Conroy*, 152 N.C. App. 15, 19, 567 S.E.2d 403, 407 (2002) (holding notice of appeal filed 127 days after interlocutory order was untimely and subject to dismissal).

In this case, defendant gave notice of appeal on 22 June 2015. The only “orders” entered within thirty days prior to the notice of appeal were the 12 June 2015 writ of execution, which is not a “judicial order or determination of a judge of a superior or district court” from which appeal may be taken, N.C. Gen. Stat. § 1-277(a), and the 26 May 2015 order denying defendant’s motion for Rule 54(b) certification, which is not an order subject to appeal, *Van Engen v. Que Scientific, Inc.*, 151 N.C. App. 683, 687, 567 S.E.2d 179, 182 (2002). Although this case has already been to trial, defendant appealed prior to the final judgment and outside the thirty-day window for immediate appeals of interlocutory orders.

III. Conclusion

Defendant failed to give timely notice of appeal and has no right to appeal from a writ of execution or the denial of a motion for Rule 54(b) certification.

DISMISSED.

Judges McCULLOUGH and INMAN concur.

Report per Rule 30(e).