

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA15-448

Filed: 19 January 2016

Durham County, No. 13 CVS 5618

CARLA KELLEY, Plaintiff,

v.

MICHAEL D. ANDREWS, in his official capacity as SHERIFF OF DURHAM COUNTY, and JOHN DOE SURETY, Defendants.

Appeal by plaintiff from order entered 24 November 2014 by Judge Orlando Hudson in the Superior Court of Durham County. Heard in the Court of Appeals 8 October 2015.

Gray Newell Thomas, LLP, by Angela Newell Gray, for plaintiff-appellant.

Senior Assistant County Attorney Marie Costello Inserra, for defendant-appellee, Andrews.

DIETZ, Judge.

When a litigant appeals to this Court, that appeal divests the trial court of jurisdiction to proceed on all matters embraced by the challenged order. Here, the Sheriff of Durham County moved to dismiss Plaintiff's complaint on the ground of sovereign immunity. When the trial court denied that motion, the Sheriff appealed. While the appeal was pending, the Sheriff filed a second motion to dismiss, again based on sovereign immunity, but relying on a different legal theory than the first

motion. The trial court granted this second motion while the court's ruling on the first motion was still on appeal. The day after the trial court ruled, the Sheriff sought to withdraw its appeal from the first motion.

As explained below, the trial court lacked jurisdiction to rule on the second motion. Because jurisdiction is a non-waivable, mandatory aspect of a court's authority to adjudicate cases, we must vacate the trial court's dismissal order. Our ruling does not address the merits of that order and does not preclude the trial court from entering the same order again once the mandate issues in this case.

Facts and Procedural History

On 8 April 2011, Durham County Sheriff Worth Hill fired Plaintiff Carla Kelley from her position as a records assistant, citing poor job performance. Kelley sued, asserting various employment discrimination, retaliation, and civil rights claims.

On 10 April 2014, Durham County Sheriff Michael D. Andrews, who succeeded Worth Hill, moved to dismiss Kelley's complaint on several grounds, including that "the Court lacks subject matter and personal jurisdiction over defendant due to Sovereign, Public Official, Qualified and 11th Amendment Immunity." The trial court denied the motion, and the Sheriff appealed the trial court's interlocutory ruling.

KELLEY V. ANDREWS

Opinion of the Court

On 23 October 2014, while the appeal was pending, the Sheriff again moved to dismiss Kelley’s complaint in the trial court. In this second motion, the Sheriff argued—as he did in the first motion—that “the Court lacks subject matter and personal jurisdiction over defendant due to Sovereign, Public Official, Qualified and 11th Amendment immunity.” This time, however, the Sheriff argued a different legal theory—that these immunities applied “by virtue of [Kelley] failing to join the surety to the action within the statutory limitations period.”

On 24 November 2014, the trial court granted this second motion to dismiss, holding that “[t]he court is deprived of personal and subject matter jurisdiction over the Sheriff . . . by virtue of the doctrine of sovereign immunity.”

The day *after* the trial court granted the Sheriff’s second motion to dismiss, the Sheriff filed a “Notice of Withdrawal of Appeal” with this Court, seeking to withdraw his appeal from the denial of the first motion to dismiss.

On 18 December 2014, Kelley timely appealed the trial court’s order granting the second motion to dismiss.

Analysis

On appeal, Kelley argues that the trial court lacked jurisdiction to rule on the Sheriff’s second motion to dismiss. For the reasons explained below, we agree.

KELLEY V. ANDREWS

Opinion of the Court

Ordinarily, an appeal from a trial court order “stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein. . .” N.C. Gen. Stat. § 1-294. As a result, an appeal “removes a cause from the trial court which is thereafter without power to proceed further until the cause is returned by mandate of the appellate court.” *In re J.F.*, ___ N.C. App. ___, 766 S.E.2d 341, 348 (2014).

If Section 1-294 means anything, it means that a trial court lacks authority to rule on a second motion to dismiss asserting sovereign immunity while the trial court’s ruling on an earlier motion to dismiss asserting sovereign immunity is on appeal.

The Sheriff responds by citing *RPR & Assoc., Inc. v. Univ. of North Carolina-Chapel Hill*, 153 N.C. App. 342, 570 S.E.2d 510 (2002). In *RPR & Associates*, this Court affirmed a trial court’s decision to proceed to trial while an appeal from a ruling on sovereign immunity was pending in this Court. *Id.* at 348-49, 570 S.E.2d at 514-15. But a key factor in *RPR & Associates* was that the trial court found that the first appeal was *not* a permissible interlocutory appeal. *Id.* at 349, 570 S.E.2d at 515. The trial court did not make a similar determination in this case. Thus, the exception noted in *RPR & Associates* does not apply.

KELLEY V. ANDREWS

Opinion of the Court

In sum, because both motions sought dismissal of Kelley's lawsuit on the grounds of sovereign immunity, the appeal of the first ruling deprived the trial court of jurisdiction to rule on the second motion. We note in closing that this opinion is not a ruling on the merits of the Sheriff's underlying motion to dismiss. The Sheriff's appeal from the first sovereign immunity ruling is now withdrawn. Thus, after the mandate issues in this appeal, the trial court will have jurisdiction to rule on the second motion to dismiss and may, if it deems it appropriate, rule in the same manner again.

Conclusion

We vacate the trial court's dismissal order and remand for further proceedings.

VACATED AND REMANDED.

Judges MCCULLOUGH and TYSON concur.

Report per Rule 30(e).