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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-837

Filed 15 August 2023

Durham County, No. 19 CVS 3400

TAMMY LOWREY, Plaintiff,

v.

CHOICE HOTELS INTERNATIONAL, INC., MANOJKUMAR (AKA “MANOJ”) MOHANLAL GANDHI, MONA GANDHI, MM SHIVAH, LLC, MM VAIBHAVLAXMI, LLC, CI HOTELS, LLC and WS HOTELS, LLC, Defendants.

Appeal by defendants from orders entered 11 February 2022 and 16 February 2022 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 6 June 2023.

The Francis Law Firm, PLLC, by Charles T. Francis, Ruth Sheehan Law, by Ruth Sheehan, and Kennedy Kennedy Kennedy & Kennedy, LLP, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellee.

McAngus Goudelock & Courie, PLLC, by Christopher J. Skinner and Emily P. Tucker, for defendant-appellant Choice Hotels International, Inc.

Brown, Crump, Vanore & Tierney, PLLC, by O. Craig Tierney, Jr., and Daughtry Woodard Lawrence & Starling, LLP, by N. Leo Daughtry and Luther D. Starling, Jr., for defendants-appellants Manojkumar Mohanlal Gandhi, Mona Gandhi, MM Shivah, LLC, MM Vaibhavlaxmi, LLC, CI Hotels, LLC, and WS Hotels, LLC.

ZACHARY, Judge.

This dispute over the proper venue for Plaintiff Tammy Lowrey’s action against Defendants Choice Hotels International, Inc. (“Choice Hotels”), Manojkumar and Mona Gandhi (the “Gandhis”), and the Gandhis’ corporate entities, MM Shivah, LLC, MM Vaibhavlaxmi, LLC, CI Hotels, LLC, and WS Hotels, LLC (together with the Gandhis, the “Gandhi Defendants,” and all Defendants collectively, “Defendants”), returns to this Court after we vacated and remanded the trial court’s prior orders concerning venue in three consolidated appeals. *See Lowrey v. Choice Hotels Int’l, Inc. (“Lowrey I”),* 279 N.C. App. 107, 861 S.E.2d 585, 2021 WL 3626779 (2021) (unpublished).¹

Defendants appeal from the trial court’s orders granting Plaintiff’s motion for leave to amend her amended complaint and denying Defendants’ motions to change venue pursuant to N.C. Gen. Stat. § 1-83(1) (2021). After careful review, we vacate and remand to the trial court to consider Defendants’ motions to change venue.

I. Background

The background of this matter is set forth in *Lowrey I*, which concerned the trial court’s denial of Choice Hotels’ and the Gandhi Defendants’ separate motions to change venue from Durham County as a matter of right pursuant to N.C. Gen. Stat.

¹ The two remaining consolidated appeals were disposed of in *Lowrey v. Choice Hotels Int’l, Inc.*, 280 N.C. App. 129, 863 S.E.2d 817, 2021 WL 4851982 (2021) (unpublished), and *Lowrey v. Choice Hotels Int’l, Inc.*, 279 N.C. App. 107, 861 S.E.2d 585, 2021 WL 3627116 (2021) (unpublished).

§ 1-83(1).² *Lowrey I*, at *1–*3. In *Lowrey I*, this Court determined that the trial court erroneously denied both motions, despite Choice Hotels’ motion not being adequately noticed or heard. *Id.*, at *4. We therefore vacated the trial court’s orders “to the extent that [the trial court] concluded Durham County to be a proper venue as a matter of law[,]” and remanded for the trial court “to receive additional evidence and hear Choice Hotels’ motion to transfer venue on the merits.” *Id.*, at *8.³

On remand, the Gandhi Defendants and Choice Hotels filed separate notices of hearing on their respective motions to change venue, which were set for hearing on 7 February 2022. On 31 January 2022, before those motions came on for hearing, Plaintiff filed a motion for leave to amend her amended complaint. Plaintiff also filed her proposed amendment, which would replace paragraph 15 of the amended complaint with allegations providing additional support for Plaintiff’s argument that Durham County was the proper venue for this matter. Plaintiff noticed her motion for leave to amend to be heard on 7 February, along with the two motions to change venue. On 2 February 2022, Defendants filed a joint objection to hearing Plaintiff’s motion for leave to amend, arguing that “[a]ny Motion to Amend Plaintiff’s First Amended Complaint may only be properly considered **AFTER** Defendants’ venue

² The Gandhi Defendants also moved to change venue for the “convenience of witnesses and the ends of justice[,]” pursuant to N.C. Gen. Stat. § 1-83(2). *Lowrey I*, at *2.

³ While *Lowrey I* and its companion cases were pending before this Court, Defendants also appealed from the trial court’s order denying Defendants’ motion for reconsideration of a previous order restricting discovery under Rule 412 of the North Carolina Rules of Evidence. *Lowrey v. Choice Hotels Int’l, Inc.*, 282 N.C. App. 208, 868 S.E.2d 376, 2022 WL 599235, at *2 (2022) (unpublished). This Court dismissed that appeal as interlocutory. *Id.*

motions have been heard and decided.”

On 7 February 2022, the matter came on for hearing in Durham County Superior Court. The trial court denied Defendants’ joint objection to hearing Plaintiff’s motion for leave to amend and granted Plaintiff’s motion, as reflected in an order entered on 11 February 2022. The trial court then denied Defendants’ motions to change venue and concluded that “venue is proper in Durham County”; the court memorialized its rulings in an order entered on 16 February 2022. Defendants timely filed notices of appeal from both orders.

II. Appellate Jurisdiction

Defendants acknowledge the interlocutory nature of the orders from which they appeal. Generally, this Court only hears appeals from final judgments. *See* N.C. Gen. Stat. § 7A-27(b)(1)–(2). “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.” *Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381, *reh’g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). “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.” *Id.* at 362, 57 S.E.2d at 381. Because an interlocutory order is not yet final, with few exceptions, “no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge[.]” *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974).

However, an interlocutory order may be immediately appealed if “the order affects some substantial right and will work injury to [the] appellant if not corrected before appeal from final judgment.” *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citation omitted); accord N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)(a). Our Supreme Court has defined a “ ‘substantial right’ as ‘a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right.’ ” *Oestreicher v. Am. Nat’l Stores Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (citation omitted). “The burden is on the appellant to affirmatively establish this Court’s jurisdiction to accept an interlocutory appeal.” *Lakins v. W. N. Carolina Conf. of United Methodist Church*, 283 N.C. App. 385, 389, 873 S.E.2d 667, 672 (2022).

As Defendants assert, a trial court’s denial of a motion for change of venue as a matter of right affects a substantial right and, “although interlocutory, is directly appealable.” *Osborne v. Redwood Mountain, LLC*, 275 N.C. App. 144, 147, 852 S.E.2d 699, 701 (2020) (citation omitted).

III. Discussion

On appeal, Defendants raise several arguments regarding both the procedure and the merits of the trial court’s orders. Of these, the dispositive issue is whether the trial court erred by denying Defendants’ joint objection to hearing Plaintiff’s motion for leave to amend her amended complaint prior to ruling on Defendants’

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motions to change venue. As explained herein, the trial court erred by denying Defendants' joint objection, then hearing and granting Plaintiff's motion, all before hearing and ruling on Defendants' motions to change venue. Because we vacate and remand on this procedural argument, we need not reach the parties' arguments concerning the merits of the trial court's ruling on the proper venue in this opinion.

"If the county where the suit is filed is improper, the trial court does not have discretion, but *must* upon a timely motion and upon appropriate findings transfer the case to the proper venue." *Id.* at 148, 852 S.E.2d at 703 (citation and internal quotation marks omitted). When a motion to change venue "is made in writing and in apt time, the question of removal then becomes a matter of substantial right, and the court of original venue is without power to proceed further in essential matters until the right of removal is considered and passed upon." *Casstevens v. Wilkes Tel. Membership Corp.*, 254 N.C. 746, 750, 120 S.E.2d 94, 97 (1961).

In *Casstevens*, the plaintiff filed a complaint in Guilford County seeking monetary damages from the defendant. 254 N.C. at 747, 120 S.E.2d at 95. The plaintiff subsequently amended his complaint to additionally seek enforcement of his materialmen's and laborers' liens on the defendant's Wilkes County property via sale of that property. *Id.* The defendant timely filed a motion to change venue to Wilkes County as a matter of right after the plaintiff amended his complaint; in an effort to defeat the defendant's motion, the plaintiff moved to amend his complaint again—this time, to remove the portions that he had previously amended the complaint in

order to add. *Id.* at 748, 120 S.E.2d at 95.

The defendant's motion to change venue and the plaintiff's motion to amend came on for hearing contemporaneously before the clerk of Guilford County Superior Court, who "declined to rule on [the] plaintiff's motion, and ordered the action be removed to the superior court of Wilkes County for trial." *Id.* The plaintiff appealed to the Guilford County Superior Court, which determined "that the two motions were both pending before the clerk of the superior court regardless of the order in which they were filed, and both parties agreed that the two motions should be considered at the same time." *Id.* Accordingly, the trial court allowed the plaintiff's motion to amend, then denied the defendant's motion to change venue. *Id.*

Our Supreme Court recognized, however, that by granting the plaintiff's motion to amend, the trial court "substantially affected the rights of the parties, before [the] defendant's motion for removal as a matter of right was considered and passed upon." *Id.* at 750, 120 S.E.2d at 97. "In allowing such amendment the judge committed error, unless [the] defendant had waived his right to have his motion for removal as a matter of right considered and passed upon first, or had consented to such procedure." *Id.* In *Casstevens*, the trial court found that the defendant had consented to the two motions being heard contemporaneously, and the defendant did not challenge that finding on appeal. *Id.* at 751, 120 S.E.2d at 97. Accordingly, our Supreme Court concluded that the defendant "waived his right to have his motion for removal as a matter of right considered and passed upon first" and affirmed the trial

court’s order. *Id.* at 751, 120 S.E.2d at 98.

Unlike *Casstevens*, in this case, Defendants have strenuously *objected* to the trial court’s hearing Plaintiff’s motion for leave to amend her amended complaint simultaneously with their motions to change venue. Indeed, after Plaintiff filed her motion for leave to amend, Defendants jointly objected to the trial court hearing Plaintiff’s motion “either before or together with the pending venue motions.” Defendants cited *Casstevens* in support of their objection, and asserted that the trial court had “no discretion to hear Plaintiff’s Motion to Amend or consider the proposed second Amendment to Complaint before or together with Defendants’ venue motions.” As Defendants patently had not waived their right to have their venue motions “considered and passed upon first[,]” the trial court “committed error” by granting Plaintiff’s motion for leave to amend her amended complaint prior to hearing Defendants’ motions to change venue. *Id.* at 750, 120 S.E.2d at 97.

Although *Casstevens* was filed prior to the adoption of the North Carolina Rules of Civil Procedure, our analysis remains the same. *Cf. Shaw v. Stiles*, 13 N.C. App. 173, 176, 185 S.E.2d 268, 270 (1971) (“We find nothing in the new rules that negates this principle; on the contrary the principle appears to be fully supported by Rule 12.”). Nothing in Rule 15—which governs the amendment of pleadings, *see* N.C. Gen. Stat. § 1A-1, Rule 15—overcomes the binding mandate of our precedent that a timely filed motion to change venue as a matter of right must be “considered and passed upon” prior to any other essential matter. *Casstevens*, 254 N.C. at 750, 120

S.E.2d at 97. Unless a party has waived the right to have the party’s motion to change venue as a matter of right considered first, as was the case in *Casstevens* but pointedly is not the case here, “when a motion for change of venue as a matter of right has been properly made in apt time, the [trial] court is in error thereafter to enter any order affecting the rights of the parties, save the order of removal.” *Little v. Little*, 12 N.C. App. 353, 355, 183 S.E.2d 278, 279 (1971).

The trial court’s 11 February 2022 order granting Plaintiff’s motion for leave to amend must be vacated and this matter remanded to the trial court in order for Defendants’ motions to change venue as a matter of right to be “considered and passed upon first[.]” *Casstevens*, 254 N.C. at 750, 120 S.E.2d at 97. So too must we vacate the trial court’s 16 February 2022 order denying Defendants’ venue motions, because the trial court’s order relies upon the newly inserted paragraph of the improperly amended complaint. In that the trial court erroneously relied upon Plaintiff’s second amended complaint when considering Defendants’ motions to change venue, and as we remand for reconsideration of Defendants’ motions consistent with this opinion, we need not reach the parties’ arguments concerning the merits of Defendants’ motions before the trial court has had the opportunity to rule on those motions on remand.

IV. Conclusion

For the foregoing reasons, we vacate the trial court’s 11 and 16 February 2022 orders, and remand to the trial court for further proceedings consistent with this

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opinion. Specifically, on remand, the trial court shall “consider[] and pass upon first” Defendants’ pending motions to change venue as a matter of right, pursuant to N.C. Gen. Stat. § 1-83(1). *Id.*

VACATED AND REMANDED.

Judges ARROWOOD and GRIFFIN concur.

Report per Rule 30(e).