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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-842

Filed 2 April 2024

Wilson County, No. 22 CVS 001641

EVAN RISUENO, Plaintiff,

v.

PURDUE PHARMA, INC., NC DEPT OF COMMERCE, Defendants.

Appeal by Defendant from order entered 27 March 2023 by Judge L. Lamont Wiggins in Wilson County Superior Court. Heard in the Court of Appeals 6 February 2024.

No brief filed for Plaintiff-Appellee.

David J. Adinolfi, II, and R. Glen Peterson, for Defendant-Appellant NC Department of Commerce.

GRIFFIN, Judge.

Defendant North Carolina Department of Commerce, Division of Employment Security, appeals from the trial court's order denying its motion to dismiss for lack of subject matter jurisdiction. Defendant contends the trial court erred in denying its motion to dismiss as Plaintiff Evan Risueno failed to serve a copy of his petition for judicial review upon the employer, Purdue Pharma, after filing the petition in

superior court. We agree and reverse the trial court.

I. Factual and Procedural Background

On 8 May 2022, Plaintiff filed a claim for unemployment insurance. On 26 May 2022, Defendant made a determination noting Plaintiff was ineligible for benefits as he was still employed by Purdue Pharma. Plaintiff appealed to Defendant's Appeals Section. On or around 14 November 2022, the Appeals Section affirmed the determination ("Appeals Decision"). Plaintiff then appealed to the Board of Review who, on 5 December 2022, issued a Higher Authority Decision affirming the Appeals Decision ("Higher Authority Decision"). On 14 December 2022, Plaintiff filed a Petition for Judicial Review. On 27 January 2023, Defendant filed a motion to dismiss, noting Plaintiff failed to serve a copy of the Petition upon Purdue Pharma as required under N.C. Gen. Stat. § 96-15(h). Defendant attached a signed affidavit by Associate General Counsel for Purdue Pharma, M. Christina Ricarte, attesting to Plaintiff's lack of service.

On 27 March 2023, the matter came on for hearing in Wilson County Superior Court. After hearing arguments from both parties, the trial court denied Defendant's motion to dismiss by written order.

Defendant filed notice of appeal on 1 May 2023.

II. Appellate Jurisdiction

As an initial matter, we must determine whether this Court has jurisdiction over the trial court's interlocutory order denying Defendant's motion to dismiss.

Defendant contends the trial court's order affects a substantial right, or in the alternative requests this Court treat its brief as a petition for writ of certiorari.

Generally, there is no right of immediate appeal from an interlocutory order, except where, among other things, the trial court's order affects a substantial right. *See* N.C. Gen. Stat. § 1-277(a) (2023); N.C. Gen. Stat. § 7A-27(b)(3)(a) (2023). Our Court has previously held “[a]n order denying a motion to dismiss for lack of subject matter jurisdiction does not affect a substantial right and is therefore not appealable prior to final judgment.” *Byers v. N.C. Sav. Insts. Div.*, 123 N.C. App. 689, 692, 474 S.E.2d 404, 407 (1996) (citation omitted). Thus, insofar as Defendant contends the trial court's interlocutory order denying his motion to dismiss for lack of subject matter jurisdiction affects a substantial right, we disagree.

Additionally, we recognize Defendant failed to timely file notice of appeal as the trial court denied Defendant's motion in open court and entered an order stating the same on 27 March 2023. Defendant entered notice of appeal more than 30 days later, on 1 May 2023. Nonetheless, Rule 21(a)(1) of our North Carolina Rules of Appellate Procedure “gives [this Court] the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner.” *In re S.Z.H.*, 247 N.C. App. 254, 257, 785 S.E.2d 341, 344 (2016) (internal marks and citation omitted). Here, we elect to treat Defendant's brief on appeal as a petition for writ of certiorari and, in our discretion, grant Defendant's petition.

III. Analysis

Defendant contends the trial court erred in denying its motion to dismiss as the trial court was divested of jurisdiction where Plaintiff failed to serve a copy of his petition for judicial review upon the employer after filing the Petition in superior court as required under N.C. Gen. Stat. § 96-15(h).

Under North Carolina General Statutes, section 96-15(h), a party to a decision of the Board of Review may seek judicial review of the decision

only after [the] party claiming to be aggrieved by the decision has exhausted the remedies provided . . . and has filed a petition for review in the superior court of the county in which the petitioner resides or the county in which the petitioner’s principal place of business is located.

N.C. Gen. Stat. § 96-15(h) (2023). Notably, “[w]ithin 10 days after the petition is filed with the court, the petitioner must serve copies of the petition . . . , upon the Division and upon all parties of record to the Division proceedings.” *Id.* Our Court has previously held these service requirements, under N.C. Gen. Stat. § 96-15(h), are jurisdictional and noncompliance therewith requires dismissal. *See Isenberg v. N.C. Dep’t of Commerce, Div. of Emp. Sec.*, 241 N.C. App. 68, 73, 772 S.E.2d 97, 100 (2015); *see also In re State ex rel. Emp. Sec. Comm’n*, 234 N.C. 651, 653, 68 S.E.2d 311, 312 (1951) (“The statutory requirements are mandatory and not directory. They are conditions precedent to obtaining a review by the courts and must be observed. Noncompliance therewith requires dismissal.” (internal marks and citation omitted)).

Here, Purdue Pharma was a party to the Division proceedings. Purdue Pharma was listed as a party in the captions of the November 2022 Appeals Decision

and the December 2022 Higher Authority Decision. Nonetheless, Plaintiff, upon filing a Petition for Judicial Review, failed to serve a copy of the Petition upon Purdue Pharma, as required under N.C. Gen. Stat. § 96-15(h). Because the service requirements of N.C. Gen. Stat. § 96-15(h) are jurisdictional, noncompliance therewith requires dismissal. *See Isenberg*, 241 N.C. App. at 73, 772 S.E.2d at 100. Thus, the trial court was required to dismiss Plaintiff's Petition for Judicial Review due to Plaintiff's failure to comply with the mandatory service requirements of N.C. Gen. Stat. § 96-15(h). Consequently, the trial court erred in denying Defendant's motion to dismiss.

IV. Conclusion

We reverse the order of the trial court denying Defendant's motion to dismiss.

REVERSED.

Judges STROUD and THOMPSON concur.

Report per Rule 30(e).