

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

NO. COA03-1367

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2004

SEABOARD CONTAINER CLEANING, LLC,
Plaintiff,

v.

Guilford County
No. 02 CVS 10097

FOUR SEASONS ENVIRONMENTAL, INC.,
Defendant.

Appeal by defendant from orders entered 10 June 2003 and 3 July 2003 by Judge Catherine C. Eagles in the Superior Court in Guilford County. Heard in the Court of Appeals 25 August 2004.

Forman, Rossabi, Black, P.A., by James H. Slaughter and Jason M. Goins, for plaintiff-appellee.

Nexen, Pruet, Adams, Kleemeier, P.L.L.C. by J. Alexander S. Barrett and Brooks F. Bossong, for defendant-appellant.

HUDSON, Judge.

On 12 September 2002, plaintiff Seaboard Container Cleaning, LLC, filed a complaint against defendant Four Seasons Environmental, Inc. On 12 November 2002, defendant filed a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After discovery, plaintiff obtained an order to compel on 22 April 2003. On 27 May 2003, defendant re-served its motion to dismiss with supporting affidavits. On 27 May 2003, plaintiff filed a motion for an order to show cause. On 10 June 2003, following a hearing, the court denied defendant's motion to dismiss

and granted plaintiff's motion to show cause. Defendant appeals. For the reasons discussed below, we affirm the denial of defendant's motion to dismiss, and dismiss as interlocutory defendant's appeal of the order to show cause.

On 7 August 2001, the parties entered into an agreement entitled, "Acknowledgment of Debt and Repayment Agreement" ("the agreement"). The agreement provided that defendant would forbear from attempting to collect a debt from plaintiff in exchange for plaintiff's agreement to repay that debt. The agreement contained a forum selection clause which states, "In the event that either party initiates any legal action or proceeding that relates to this Agreement in any manner whatsoever . . . it is agreed that venue for such legal action or proceeding shall be in a court of competent jurisdiction located in Hamilton County, Tennessee."

In January 2002, the parties entered into a separate and unrelated contract in which defendant agreed to provide wastewater treatment services to plaintiff in Guilford County, North Carolina. In negotiating the contract, defendant's general manager represented to plaintiff that defendant was capable of performing under the contract, but plaintiff contends that defendant was not so capable. Plaintiff brought this action against defendant for breach of the January 2002 contract.

The order denying defendant's motion is interlocutory. Ordinarily, there is no right of immediate appeal from an interlocutory order. *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 332 N.C. 288, 292, 420 S.E.2d 426, 428 (1992). However, "an

order is immediately appealable if the order affects a substantial right and the loss of that right will injure the party appealing if not corrected prior to final judgment." *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 102 N.C. App. 659, 661, 403 S.E.2d 593, 594 (1991), *affirmed*, 332 N.C. 288, 420 S.E.2d 426 (1992). Where, as here, a party has appealed more than one order, we must consider the interlocutory nature of each order separately. *Id.*

An appeal from the denial of a motion to dismiss is ordinarily not appealable. *Mark Group Int'l, Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 n.1 (2002). However, as defendant points out, our State's "case law establishes firmly that an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right that would be lost." *Id.* In its motion to dismiss here, defendant alleges lack of jurisdiction, contending that the agreement between the parties contained a binding forum selection clause, and thus, this interlocutory appeal is properly before us.

In addition, defendant attempts to bring forward on appeal the denial of its motion to dismiss plaintiff's fraud claim. This part of the order is also interlocutory. *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401 (2000). However, an appeal from such an order is allowed if it effects a substantial right. N.C. Gen. Stat. §§ 1-277, 7A-27(d)(1) (2001); see N.C. R. App. P. 28 (b)(4) (2001) (stating that appellant's brief must include statement of grounds for appellate review, which must

sufficiently show "that the challenged order affects a substantial right"). "It is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal, . . . and not the duty of this Court to construct arguments for or find support for appellant's right to appeal[.]" *Thompson*, 140 N.C. App. at 121, 535 S.E.2d at 401 (internal citations and quotation marks omitted).

In its statement of grounds for appellate review, defendant does not address what substantial right might be lost if this appeal does not lie. Thus, we dismiss defendant's appeal of the 3 July 2003 order to the extent it denied defendant's motion to dismiss plaintiff's fraud claim.

Defendant also appeals the 10 June 2003 order requiring defendant to appear on a specific date and show cause, if any, why it should not be held in contempt. This Court has held that a show cause order is interlocutory and does not affect a substantial right. *Huguelet v. Huguelet*, 113 N.C. App. 533, 537, 439 S.E.2d 208, 210 (1994). Defendant contends in its statement of grounds for appellate review that the trial court lacked jurisdiction because no affidavit was filed pursuant to N.C. Gen. Stat. § 5A-23. This assertion addresses the substance of defendant's assignment of error 4 and in no way addresses whether this issue affects a substantial right as required by Rule 28(b)(4). Further, defendant does not address assignment of error 3 at all in the statement of grounds for appellate review. Defendant's assignments of error 3 and 4 addressing the order to show cause pertain to the substance

of the interlocutory order, and defendant has not explained how they affect a substantial right. Thus, we conclude that they are not properly before this Court and we dismiss them.

Turning to the substantive arguments, we note that in the only assignment of error which is properly before this Court, defendant contends that the court erred in denying its motion to dismiss because of the forum selection clause in the agreement. We disagree.

We review a trial court's decision concerning a venue selection clause for abuse of discretion. *Mark Group Int'l, Inc.*, 151 N.C. App. at 566, 566 S.E.2d at 161. "Under the abuse-of-discretion standard, we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Id.* Here, the trial court declined to dismiss plaintiff's claims or to stay the proceedings on the basis of the forum selection clause in the 2001 agreement. Insofar as this lawsuit involves the 2002 agreement, not the 2001 agreement which contains the disputed forum selection clause, that clause has no application here. Thus, the court did not abuse its discretion in denying defendant's motion to dismiss.

Affirmed in part, dismissed in part.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).