

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-378

Filed: 3 October 2017

Surry County, No. 16 CVS 199

TILLIE STEWART, Plaintiff,

v.

JAMES R. SHIPLEY, DPM, INSTRIDE MT. AIRY FOOT AND ANKLE SPECIALISTS, PLLC d/b/a MT. AIRY FOOT & ANKLE CENTER, and NORTHERN HOSPITAL DISTRICT OF SURRY COUNTY, Defendants.

Appeal by Plaintiff from order entered 19 December 2016 by Judge Eric C. Morgan in Surry County Superior Court. Heard in the Court of Appeals 21 September 2017.

Pangia Law Group, by Amanda C. Dure, and Joseph L. Anderson, for Plaintiff-Appellant

Wilson & Helms LLP, by G. Gray Wilson, and Lorin J. Lapidus, for Defendants-Appellees

HUNTER, JR., Robert N., Judge.

Plaintiff Tillie Stewart (“Plaintiff”) appeals the 19 December 2016 interlocutory order granting Defendants Dr. James R. Shipley’s and Instride Mt. Airy Foot and Ankle Specialists, PLLC’s (“the Shipley Defendants”) motion to dismiss for lack of personal jurisdiction and insufficient service of process. On appeal, Plaintiff

contends the trial court erred in granting the Shipley Defendants' motion to dismiss for insufficient service of process because the Shipley Defendants had actual notice of Plaintiff's lawsuit and are estopped from asserting the defense of lack of personal jurisdiction as well as the defense of Plaintiff's noncompliance with the Rules of Civil Procedure for issuance and service of process. Additionally, the Shipley Defendants move this Court to dismiss Plaintiff's appeal, arguing it is interlocutory. We conclude the appeal is interlocutory and does not affect a substantial right. We therefore dismiss this appeal.

I. Background

Plaintiff's evidence tends to show on 19 November 2012, Plaintiff began treatment with the Shipley Defendants for left heel pain, plantar fasciitis on her left foot, and a left foot skin lesion. After approximately three months of treatment, Dr. Shipley recommended Plaintiff undergo an endoscopic plantar fasciotomy surgery on her left foot to relieve her pain. Plaintiff underwent this surgery on 19 February 2013 at Defendant Northern Hospital District of Surry County ("Northern Hospital")¹. Dr. Shipley operated on Plaintiff's right foot, instead of her left foot.

On 18 February 2016, Plaintiff filed a complaint against all Defendants alleging medical malpractice. Plaintiff's complaint also alleges a battery claim against Defendant Dr. Shipley. On the same day, Plaintiff issued a summons for all

¹ Defendant Northern Hospital is not a party to this appeal.

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Defendants. On 29 February 2016, Plaintiff's counsel emailed the summons and complaint to Dr. Shipley's insurance company requesting a waiver of service. The insurance company refused the request. On 9 March 2016, the Shipley Defendants filed a motion for extension of time to answer Plaintiff's complaint. In that motion, the Shipley Defendants stated the complaint "was allegedly served on or about February 19, 2016."

On 10 March 2016, a private process server delivered a civil summons and complaint to the registered agent of Defendant Mt. Airy Foot and Ankle. A private process server personally delivered a summons and complaint to Defendant Dr. Shipley on 7 April 2016. On 10 May 2016, Defendant Dr. Shipley filed an affidavit swearing a process server served him with a copy of Plaintiff's complaint without a summons. This affidavit was dated 19 April 2016. Also on 10 May 2016, the Shipley Defendants filed their answer to Plaintiff's complaint. In their answer, the Shipley Defendants asserted, *inter alia*, "Plaintiff's case should be dismissed for lack of personal jurisdiction over defendants, insufficiency of process, and insufficient service of process pursuant to Rule 12(b)(2), 12(b)(4), and 12(b)(5) of the North Carolina Rules of Civil Procedure."

On 25 August 2016, the Shipley Defendants filed a motion to dismiss Plaintiff's complaint pursuant to Rules 12(b)(2), 12(b)(4) and 12(b)(5) of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. § 7A-221. Additionally, "[t]hese

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defendants move the Court to dismiss this action as to these defendants for failure to state a claim upon which relief may be granted and for lack of personal jurisdiction and insufficient service of process.”

The trial court conducted a hearing on the Shipley Defendants’ motion to dismiss on 14 November 2016. In support of their motion to dismiss, the Shipley Defendants contended there is no dispute Plaintiff chose to serve the Defendants through a private process server in violation of Rule 4 of the North Carolina Rules of Civil Procedure. The Shipley Defendants additionally contended at the time they filed their motion to dismiss and asserted insufficient and improper process, Plaintiff still had approximately two weeks to cure the defective service. In response, Plaintiff contended the Shipley Defendants had notice Plaintiff filed a suit against them since the Shipley Defendants filed a motion for an extension of time to answer Plaintiff’s complaint. Plaintiff also contended “[w]here the defendant appears and challenges service, proof of personal service shall be by affidavit.” Therefore, Plaintiff contended her act of filing an affidavit of service created a “rebuttable presumption of valid service.” The trial court took the matter under advisement in order to “review the cases and authority cited by counsel[.]”

On 19 December 2016, the trial court issued an order dismissing Plaintiff’s action against the Shipley Defendants with prejudice. In its order the trial court found and concluded “that plaintiff did not attempt to have these defendants served

by the sheriff, and that the clerk of court of Surry County has not appointed plaintiff's process servers and, consequently, plaintiff's attempted service by private process servers is invalid under Rule 4[.]” Plaintiff timely appealed.

II. Jurisdiction

An order is interlocutory if it does not fully dispose of a case and “leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veasey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). The reason for this rule is to prevent “premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts.” *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218 (1985). There are two exceptions to this rule. The first exception is when, pursuant to Rule 54 of the North Carolina rules of Civil Procedure, “the trial court enters ‘a final judgment as to one or more but fewer than all of the claims or parties’ and the trial court certifies in the judgment that there is no just reason to delay the appeal.” *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (quoting N.C.R. Civ. P. 54(b)). The second exception occurs if the order deprives the appellant of a substantial right which would be lost if not reviewed prior to final judgment. *Southern Uniform Rentals v. Iowa Nat’l Mutual Ins. Co.*, 90 N.C. App. 738, 740, 370 S.E.2d 76, 78 (1998); N.C. Gen. Stat. § 1-277 (2016).

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We now consider Plaintiff's right to appeal from the trial court's order granting the Shipley Defendants' motion to dismiss on grounds of lack of personal jurisdiction due to insufficient process and insufficient service of process. Here, the trial court did not include a Rule 54(b) certification in its order. Plaintiff is therefore only entitled to pursue this appeal if the trial court's order deprives her of a substantial right that would be lost if this Court dismissed her interlocutory appeal. The appellant bears the burden to establish the existence of a substantial right. *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001).

N.C. Gen. Stat. § 1-277(b) (2016) provides "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause." "This Court has interpreted G.S. § 1-277(b) as allowing an immediate right of appeal only when the jurisdictional challenge is substantive rather than merely procedural." *Hart v. F.N. Thompson Constr. Co.*, 132 N.C. App. 229, 231, 511 S.E.2d 27, 28 (1999). This Court has held:

While G.S. 1-277(b) appears to authorize such right, it is our duty on appeal to examine the underlying nature of defendant's motion: If defendant's motion raises a due process question of whether his contacts within the forum state were sufficient to justify the court's jurisdictional power over him, then the order denying such motion is immediately appealable under G.S. 1-277(b). If, on the other hand, defendant's motion, though couched in terms

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of lack of jurisdiction under Rule 12(b)(2), actually raises a question of sufficiency of service or process, then the order denying such motion is interlocutory and does not fall within the ambit of G.S. 1-277(b).

Id. at 231, 511 S.E.2d at 28 (quoting *Berger v. Berger*, 67 N.C. App. 591, 595, 313 S.E.2d 825, 828-29 (1984)).

The basis of this appeal does not allege insufficient minimum contacts with North Carolina to establish personal jurisdiction as a matter of due process. Rather, this appeal presents procedural issues with respect to Plaintiff's compliance with the Rules of Civil Procedure for issuance and service of process under Rules 12(b)(4) and 12(b)(5). Therefore, Plaintiff's appeal is premature and must be dismissed.

DISMISSED.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).