IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-149

Filed: 17 July 2018

Wake County, No. 17 CVS 13394

VR SYSTEMS, INC., Respondent,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT, Petitioner.

Appeal by petitioner from order entered 6 November 2017 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 6 June 2018.

Capital Law Group, by Michael L. Weisel, and Bailey & Dixon, LLP, by Sabra J. Faires, for respondent-appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James Bernier, Jr., for petitioner-appellant.

DAVIS, Judge.

The North Carolina State Board of Elections & Ethics Enforcement (the "Board") appeals to this Court from a superior court's dismissal of its appeal from a preliminary injunction order issued by an administrative law judge in the North

Carolina Office of Administrative Hearings ("OAH"). After a thorough review of the record and applicable law, we dismiss the Board's appeal.

Factual and Procedural Background

The subject matter of this action concerns electronic pollbooks ("e-pollbooks"), which enable poll workers to efficiently check voters into polling stations during elections and prevent voter fraud. Individual counties across the state are permitted to use a third-party e-pollbook to conduct elections in their precincts as long as the e-pollbook has been certified by the Board pursuant to N.C. Gen. Stat. § 163A-1115(c).[1]

VR Systems, Inc. ("VR Systems") developed an electronic voter identification and polling place automation system — the EViD e-pollbook ("EViD") — that has been used in certain counties in North Carolina since 2009. During the 2016 election cycle, the Board permitted VR Systems to utilize EViD in a number of counties.

In June 2017 the Board began an investigation into malfunctions with the EViD software. The Board subsequently notified county boards of elections on 20 June 2017 that the EViD software should no longer be considered as having been certified by the Board. The Board advised the county boards that they should prepare for an alternative pollbook solution.

[1] Prior to 1 May 2017, this statutory requirement was codified at N.C. Gen. Stat. § 163-165.7(a2). In April 2017, the General Assembly enacted a session law that merged the State Ethics Commission and State Board of Elections into the Bipartisan State Board of Elections and Ethics Enforcement and recodified Chapter 163 as Chapter 163A of the North Carolina General Statutes. *See* 2017-2 N.C. Adv. Legis. Serv. 6 (LexisNexis).

On 23 October 2017, VR Systems filed a petition for a contested case hearing in OAH pursuant to N.C. Gen. Stat. § 150B-23 along with a motion for a temporary restraining order, preliminary injunction, and permanent injunction, alleging that the Board had impermissibly revoked its license authorizing the use of its e-pollbook software in North Carolina. A hearing was held before Administrative Law Judge Donald W. Overby (the "ALJ"), and on 3 November 2017, the ALJ issued a preliminary injunction that enjoined the Board from prohibiting the use of EViD by county boards of elections during the pendency of the litigation.

On 6 November 2017, the Board filed in Wake County Superior Court a notice of appeal, emergency petition for judicial review, emergency motion for temporary stay pending judicial review, petition for writ of supersedeas, petition for mandamus, and motion for expedited response in which it sought the reversal of the ALJ's order. The Board argued that the ALJ's order was void because OAH lacked jurisdiction over the subject matter of the parties' dispute. The Board further argued that absent immediate review of the preliminary injunction it would suffer irreparable harm because (1) the use of EViD during the 2018 elections could result in serious malfunctions; and (2) the ALJ's preliminary injunction estopped the Board from exercising its authority under state law. On that same day, VR Systems moved to dismiss the Board's appeal to superior court for lack of subject matter jurisdiction.

On 6 November 2017, a hearing was held before the Honorable Paul C. Ridgeway in Wake County Superior Court. Following the hearing, the court entered an order (the "Superior Court Order") dismissing the Board's appeal for lack of subject matter jurisdiction. The Board filed a timely notice of appeal to this Court.

Analysis

In this appeal, the Board contends that the superior court erred in determining that it lacked jurisdiction to review the preliminary injunction order issued by the ALJ. Thus, it argues, the superior court's dismissal of its appeal was improper. VR Systems has moved to dismiss the Board's present appeal on the ground that this Court — like the superior court — lacks subject matter jurisdiction over the Board's appeal because it is, in essence, an impermissible interlocutory appeal from a ruling in OAH that was not a final decision.

N.C. Gen. Stat. § 7A-27(b) provides, in pertinent part, as follows:

> Except as provided in subsection (a) of this section, appeal lies of right directly to the Court of Appeals in any of the following cases:
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> > (1) From any final judgment of a superior court . . . including any final judgment entered upon review of a decision of an administrative agency . . . .
> >
> > . . . .
> >
> > (3) From any interlocutory order or judgment of a superior court . . . in a civil action or proceeding that does any of the following:

> a. Affects a substantial right.
>
> . . . .

N.C. Gen. Stat. § 7A-27 (2017).

As an initial matter, we note that the Board's appeal to the superior court was not from a final decision by OAH but was instead an appeal from the entry of a preliminary injunction. "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them . . . ." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985). Thus, the Board's appeal to superior court was from an interlocutory order. *See Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins.*, 230 N.C. App. 317, 318, 749 S.E.2d 469, 471 (2013) ("It is well-established that a preliminary injunction is an interlocutory order." (citation omitted)), *disc. review denied*, 367 N.C. 532, 762 S.E.2d 461 (2014).

The Superior Court Order is also not a final judgment. Indeed, Judge Ridgeway did not make any substantive rulings at all with regard to the case. Instead, he simply dismissed the Board's appeal on the ground that there was no statutory basis for an appeal to superior court of an order from OAH that was not a

final decision. Therefore, the Board's appeal to this Court is proper only if it can demonstrate a substantial right pursuant to N.C. Gen. Stat. § 7A-27(b)(3)a. that would be lost absent an immediate appeal. For the reasons set out below, we conclude that it has failed to do so.

An appellant in this Court is required to include in its brief "[a] statement of the grounds for appellate review," explaining the jurisdictional basis for review by this Court. N.C. R. App. P. 28(b)(4). In this section of its appellate brief, the Board states the following:

> The State Board appeals the 6 November 2017 *final judgment* of the Superior Court dismissing its Petition for Review and Motion for Stay for lack of subject matter jurisdiction. Appeal to this Court is authorized by N.C. Gen. Stat. § 7A-27(b).

(Emphasis added.)

This statement is inaccurate. As discussed above, the Superior Court Order is *not* a final judgment. In order for this Court to possess jurisdiction over this appeal, the Board was required to explain how a substantial right would be lost absent immediate appellate review. *See Akers v. City of Mt. Airy*, 175 N.C. App. 777, 779, 625 S.E.2d 145, 146 (2006) ("The appellant has the burden of showing that a substantial right would be lost without immediate review."); *Heritage Pointe Builders v. N.C. Licensing Bd. of Gen. Contractors*, 120 N.C. App. 502, 504, 462 S.E.2d 696, 698 (1995) ("[T]his Court has jurisdiction only if the order affects some substantial

right and the loss of that right will work injury to appellant if not corrected before appeal from final judgment." (citation, quotation marks, and brackets omitted)), *disc. review denied*, 342 N.C. 655, 467 S.E.2d 712 (1996).

We have emphasized that "[i]t is not the duty of this Court to construct arguments for or find support for [an] appellant's right to appeal from an interlocutory order." *Akers*, 175 N.C. App. at 779, 625 S.E.2d at 146. Thus, because the Board has not expressly made a "substantial right" argument in its brief, its appeal must be dismissed.[2]

Conclusion

For the reasons stated above, we dismiss the Board's appeal.[3]

DISMISSED.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).

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[2] While subsection f. of N.C. Gen. Stat. § 7A-27(b)(3) authorizes appeals to this Court from orders by a superior court granting temporary injunctive relief against a state agency, that statutory provision does not apply here because the preliminary injunction at issue was entered by the *ALJ* rather than by the *superior court*. Moreover, the Board has not asserted N.C. Gen. Stat. § 7A-27(b)(3)f. in its brief as a basis for this Court's jurisdiction.

[3] VR Systems has moved for sanctions pursuant to Rule 34 of the North Carolina Rules of Appellate Procedure. In the exercise of our discretion, we conclude that sanctions are not warranted in this case. *See Lesh v. Lesh*, __ N.C. App. __, __, 809 S.E.2d 890, 899 n.2 (2018) ("In our discretion, we decline to impose sanctions under Rule 34.").