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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-576

Filed: 4 February 2020

Union County, No. 16-CVS-2654

LENNAR CAROLINAS, LLC, Plaintiff,

v.

COUNTY OF UNION, Defendant.

Appeal and petition for writ of certiorari by Defendant from an order entered 14 March 2019 by Judge Richard S. Gottlieb in Union County Superior Court. Heard in the Court of Appeals 8 January 2020.

Ferguson, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay, and Scarbrough & Scarbrough, PLLC, by James E. Scarbrough, John F. Scarbrough, and Madeline J. Trilling, for Plaintiff-Appellee.

Erwin, Bishop, Capitano & Moss, PA, by J. Daniel Bishop, Joseph W. Moss, Jr., and Matthew M. Holtgrewe, for Defendant-Appellant.

INMAN, Judge.

Defendant Union County (the “County”) appeals from and requests certiorari review of an order denying summary judgment in its favor. After careful review, we dismiss the County’s appeal for lack of jurisdiction because: (1) an order denying summary judgment is not a judgment subject to certification for immediate appeal

pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure; and (2) the County has not demonstrated the interlocutory order affects a substantial right within the meaning of N.C. Gen. Stat. § 7A-27(b)(3). We also deny the County's petition for writ of certiorari in our discretion.

I. FACTUAL AND PROCEDURAL HISTORY

In 1997, the County's Board of Commissioners adopted a Water and Sewer Extension Policy governing residential real estate developments and their integration into the County-operated sewer and water system. The policy imposed capacity fees for both sewer and water services. The County Commissioners had not yet established a county water and sewer district. *See* N.C. Gen. Stat. §§ 162A-86 *et seq.* (2019) (allowing counties to establish water and sewer districts by action of county commissioners and describing the powers of said districts).

Sections of Chapter 153A of the North Carolina General Statutes, generally referred to as Public Enterprise Statutes, authorize all counties to assess certain water and sewer capacity fees in the absence of a water and sewer district. N.C. Gen. Stat. §§ 153A-274 *et seq.* (2019). When the County first imposed the capacity fees at issue in this appeal, the pertinent Public Enterprise Statutes provided that “[a] county may establish and revise . . . rents, rates, fees, charges, and penalties for the use of or the services furnished by a public enterprise.” N.C. Gen. Stat. § 153A-277(a) (1995). A “public enterprise” for purposes of those statutes included “[w]ater supply

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and distribution systems” and “[w]astewater collection, treatment, and disposal systems of all types.” N.C. Gen. Stat. §§ 153A-274(1)-(2) (1995).

In 2012, fifteen years after adopting the Water and Sewer Extension Policy, the County Commissioners enacted a Water and Sewer Extension Ordinance (the “Ordinance”), requiring developers to pay water and sewer capacity fees as a precondition to construction of any water and sewer lines connecting a development to the County’s system.

In 2016, our Supreme Court decided *Quality Built Homes Inc. v. Town of Carthage*, 369 N.C. 15, 789 S.E.2d 454 (2016) (“*Carthage I*”), holding that the Public Enterprise Statutes enabling cities to levy water and sewer fees only authorized cities “to charge for the contemporaneous use of water and sewer services” because the statutes at issue in that case lacked necessary language authorizing fees “for services ‘to be furnished.’ ” 369 N.C. at 20, 789 S.E.2d at 458 (citations omitted).¹ In other words, cities only had the power to levy fees for water and sewer services actually furnished—not prospective capacity fees for future service. *Id.* The Supreme Court reached its holding by drawing a contrast to statutes governing county water and

¹ The Public Enterprise Statutes governing municipal sewer and water systems at issue in *Carthage I* contained fee-authorization language that was identical to that used in the county Public Enterprise Statutes at the time the County began assessing its sewer and water capacity fees. Compare N.C. Gen. Stat. § 160A-314(a) (2015) (“A city may establish and revise . . . rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise.”) with N.C. Gen. Stat. § 153A-277(a) (“A county may establish and revise . . . rents, rates, fees, charges, and penalties for the use of or the services furnished by a public enterprise.”).

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sewer districts which, unlike the Public Enterprise Statutes, expressly authorized levying prospective fees. *Id.*

Recognizing that the Public Enterprise Statutes governing Union County also lacked the “to be furnished” language necessary for the lawful assessment of prospective water and sewer fees, *see* N.C. Gen. Stat. § 153A-277 (2015), several developers, including Lennar Carolinas, LLC (“Plaintiff”), brought lawsuits in 2016 for refunds of sewer and water capacity fees previously assessed by and paid to the County.² The County Commissioners reacted to these suits by passing a resolution creating the Union County Water and Sewer District (the “District”) on 3 January 2017, as county districts were statutorily authorized to levy prospective fees. County and the District later executed an interlocal agreement approving the imposition of prospective water and sewer fees effective 26 April 2017.³

² In all, twelve such suits were brought against the County between 2016 and 2018. The County filed motions for summary judgment on the retroactive legislation issue in each case, and those motions were all heard together before Judge Gottlieb. Of those twelve cases, nine were appealed to this Court and consolidated for hearing. *See True Homes, LLC v. County of Union*, No. COA19-572, ___ N.C. App. ___ (2020) (unpublished); *Shea Homes, LLC v. County of Union*, No. COA19-573, ___ N.C. App. ___ (2020) (unpublished); *Shops at Chestnut, LLC v. County of Union*, No. COA19-574, ___ N.C. App. ___ (2020) (unpublished); *M/I Homes of Charlotte, LLC v. County of Union*, No. COA19-575, ___ N.C. App. ___ (2020) (unpublished); *Calatlantic Grp., Inc. v. County of Union*, No. COA19-577, ___ N.C. App. ___ (2020) (unpublished); *McInnis Constr. Co. v. County of Union*, No. COA19-578, ___ N.C. App. ___ (2020) (unpublished); *Eastwood Constr. Co. v. County of Union*, No. COA19-579, ___ N.C. App. ___ (2020) (unpublished); *Pace/Dowd Props., Ltd. v. County of Union*, No. COA19-580, ___ N.C. App. ___ (2020) (unpublished).

³ The General Assembly also took action in response to *Carthage I* by enacting legislation authorizing counties to levy prospective fees directly and without the creation of a water and sewer district. 2017 N.C. Sess. Laws ch. 138, § 3.

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On 11 May 2018, in *Quality Built Homes Inc. v. Town of Carthage*, 371 N.C. 60, 813 S.E.2d 218 (2018) (“*Carthage II*”), our Supreme Court clarified the scope of relief available to parties asserting water and sewer fee refund claims, and held that such claims are subject to the three-year statute of limitations found in N.C. Gen. Stat. § 1-52(2). 371 N.C. at 61, 813 S.E.2d at 220. One month after *Carthage II* was decided, the County Commissioners passed a resolution making the formation of the District and the effective date of the interlocal agreement retroactive to 1 July 2013, *i.e.*, more than three years prior to the complaints filed by Plaintiff and other developers. *Carthage II* also led several developers to voluntarily dismiss their refund claims as barred by N.C. Gen. Stat. § 1-52(2).

After passing the resolution to give retroactive effect to the interlocal agreement, the County filed motions for summary judgment, arguing that the developers’ refund claims were now barred because any defect in assessing capacity fees had been cured. Following a hearing, the trial court denied the County’s motion because the County “did not demonstrate a lack of material facts entitling it to judgment as a matter of law.” The trial court certified its order for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. The County appeals.

II. ANALYSIS

A. Appellate Jurisdiction Generally

Interlocutory orders, including orders denying summary judgment, are generally not subject to immediate appeal. *Brown v. Thompson*, ___ N.C. App. ___, ___, 825 S.E.2d 271, 272 (2019). An exception to this rule exists when the interlocutory order affects a substantial right. *Id.* at ___, 825 S.E.2d at 272-73. However, “[a]s a general rule, a moving party may not appeal the denial of a motion for summary judgment because ordinarily such an order does not affect a ‘substantial right.’” *Bockweg v. Anderson*, 333 N.C. 486, 490, 428 S.E.2d 157, 160 (1993) (citation omitted).

“[T]he ‘substantial right’ test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.” *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). This Court “take[s] a ‘restrictive’ view of the substantial right exception and adopt[s] a case-by-case approach.” *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 194, 767 S.E.2d 374, 376 (2014) (quoting *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 78, 711 S.E.2d. 185, 189 (2011)). Even if an appellant demonstrates that a substantial right is affected by an interlocutory order, the order is subject to immediate appeal only if the right

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“might be lost, prejudiced, or inadequately preserved in the absence of an immediate appeal.” *Id.* (citing *Hamilton*, 212 N.C. App. at 78, 711 S.E.2d at 189).

Rule 54(b) of the North Carolina Rules of Civil Procedure provides an additional avenue for prospective appellants to seek review of some orders. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2019). Under the Rule, a party may immediately appeal “a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment.” *Id.*

But Rule 54(b) applies only to those orders disposing of one or more claims or parties. *Id.* An order *denying* summary judgment does not finally determine the viability of any claim and is not subject to certification and immediate appeal under the Rule. “The denial of a motion for summary judgment is not a final judgment and is generally not immediately appealable even if the trial court has attempted to certify it for appeal under Rule 54(b).” *Knighten v. Barnhill Contr. Co.*, 122 N.C. App. 109, 111, 468 S.E.2d 564, 565 (1996). This is true even of summary judgment orders dispensing with a defense. *See Yordy v. N.C. Farm. Bureau Mut. Ins. Co.*, 149 N.C. App. 230, 231, 560 S.E.2d 384, 385 (2002) (“A defense raised by a defendant in answer to a plaintiff’s complaint is not a ‘claim’ for purposes of Rule 54(b).” (citation omitted)).

Here, the trial court denied summary judgment and certified the decision for immediate appeal. Because the trial court’s order is not a judgment subject to

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certification pursuant to Rule 54(b), *Knighten*, 122 N.C. App. at 111, 468 S.E.2d at 565, we have jurisdiction to hear the County's appeal only if the order affects a substantial right. The order does not disclose a substantial right that will be lost absent immediate review, and we can identify no such right from the record.

B. Substantial Rights

In its brief, the County identifies three putative substantial rights allegedly impaired by the trial court's order: (1) the enforcement of legislative authority free from judicial restraint or interference; (2) the financial stability of the County; and (3) the availability of the County's retroactive legislation defense, which the County contends was struck by denial of summary judgment. We address each in turn.

1. Legislative Authority

A court order enjoining a legislative body from performing its lawmaking function may prejudice a substantial right. *See, e.g., Cablevision of Winston-Salem, Inc. v. City of Winston-Salem*, 3 N.C. App. 252, 257, 164 S.E.2d 737, 740 (1968) (holding a preliminary injunction prohibiting Winston-Salem and its board of aldermen from enforcing or voting on certain ordinances affected a substantial right because it "restrained the governing body of the City of Winston-Salem from exercising its legislative function in dealing with a matter of large public interest to the citizens of that City"). However, the order appealed from here did not enjoin,

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restrain, or preclude the County from performing its lawful duties. Nor were the County Commissioners prohibited from voting on any ordinances.

The County’s only “right”—if it can be called such—affected by the order below is the “right” to be free from a trial resolving whether the County’s previous collection of water and sewer capacity fees was lawful. “[A]voidance of a trial, no matter how tedious or unnecessary, is not a substantial right entitling an appellant to immediate review.” *Allen v. Stone*, 161 N.C. App. 519, 522, 588 S.E.2d 495, 497 (2003).⁴ So, this Court has no jurisdiction to review the trial court’s interlocutory order on this basis.

2. Financial Stability

The County next relies on precedent holding that “the protection of the financial stability of the state budget is also a substantial right, which carries the potential injury of a budget crisis.” *Lake v. State Health Plan for Teachers and State Employees*, ___ N.C. App. ___, ___, 825 S.E.2d 645, 649 (2019) (citing *Dunn v. State*, 179 N.C. App. 753, 757, 635 S.E.2d 604, 606 (2006)). But in *Lake*, we reviewed an order *granting* partial summary judgment requiring the State to offer higher-level, premium-free health insurance plans to certain state retirees in perpetuity and at significant cost. *Id.* at ___, 825 S.E.2d at 650. That order also prohibited the State

⁴ This is distinct from the substantial right affected by a denial of summary judgment premised on sovereign immunity because that right is an “entitlement [to] *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial.” *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 425 (1985). No sovereign immunity defense was raised by the County’s summary judgment motion.

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from performing its statutory duty to recoup the cost of that coverage by charging premiums. *Id.* By contrast, the order at issue in this appeal requires nothing of the County other than it proceed to trial—which does not affect a substantial right. *See, e.g., Lee v. Baxter*, 147 N.C. App. 517, 520, 556 S.E.2d 36, 37-38 (2001) (dismissing a defendant’s appeal from an order denying summary judgment because “[t]he only loss [defendant] will suffer will be the time and expense of a trial. . . . [A]voiding the time and expense of trial is not a substantial right justifying immediate appeal.” (citation omitted)).

The County also cites precedent allowing immediate review of an interlocutory order in a tax refund case that presented an “inability to avoid a budget exigency.” *Dunn*, 179 N.C. App. at 757, 635 S.E.2d at 606.

Unlike this case, *Dunn* involved a sovereign immunity defense and a constitutional challenge to a state income tax. *Id.* at 757, 635 S.E.2d at 606. Further, the summary judgment order here does not threaten an existing revenue stream; to the contrary, the General Assembly and the Board of Commissioners have both taken steps to ensure that this revenue stream remains available to the County going forward, refund suits notwithstanding. It is also unclear how the order denying summary judgment in this case risks a budget exigency. *Id.* The County first responded to these suits by creating the District and ratifying the interlocal agreement. It remains able to respond regardless of the denial of summary judgment,

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and proceeding to trial and appealing an adverse decision following final judgment as one would in the ordinary course of litigation does not itself create an unavoidable budget exigency. *Lee*, 147 N.C. App. at 520, 556 S.E.2d at 36.

3. Availability of Retroactive Legislation Defense

The final substantial right alleged by the County is the purported loss of its defense that the retroactive creation of the District and interlocal agreement eliminated any capacity fee refund claims. The County relies on *Kelley v. Kelley*, ___ N.C. App. ___, ___, 798 S.E.2d 771, 774 (2017), which held that a substantial right was affected by an order denying summary judgment. In *Kelley*, a plaintiff filed suit for violation of a settlement agreement and the defendant moved for summary judgment on the theory that the settlement agreement was invalid. *Id.* at ___, 798 S.E.2d at 772. The plaintiff filed a cross-motion for summary judgment seeking enforcement of the contract and, following a hearing, the trial court denied both motions based on the existence of genuine issues of material fact. *Id.* at ___, 798 S.E.2d at 772. In doing so, however, the trial court also resolved the central issue in the case—the validity of the settlement agreement—by specifically concluding as a matter of law in its order that the contract was not void. *Id.* at ___, 798 S.E.2d at 773. We reasoned that the order had the effect of “rul[ing] upon the primary legal issue in this case . . . [which] essentially eliminated [d]efendant’s defense to [p]laintiff’s claim.” *Id.* at ___, 798 S.E.2d at 773. Thus, the order denying summary

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judgment prejudiced a substantial right because it “implicitly determined a material issue later courts would be bound by, even if the trial court claimed it was not determining the law of the case.” *Id.* at ___, 798 S.E.2d at 774.

The order in this case is markedly different from that entered in *Kelley*. Here, the trial court gave no indication, either during the hearing or in its written order, that it was deciding the legal effect of the retroactive legislation defense relied upon by the County. It instead denied summary judgment because the County “did not demonstrate a lack of material facts entitling it to judgment as a matter of law.”⁵ Had the trial court intended to finally and fully resolve the availability of that defense in Plaintiff’s favor, we presume it would have said as much by either reaching that conclusion on the record or affirmatively granting Plaintiff summary judgment on that defense. *See, e.g.*, N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019) (“Summary judgment, when appropriate, may be rendered against the moving party.”); *Beaver v. Fountain*, 208 N.C. App. 174, 177, 701 S.E.2d 384, 385 (2010) (reviewing an order granting summary judgment in favor of a plaintiff on a defendant’s statute of limitations defense). The County has not demonstrated any substantial right affected by the interlocutory order denying summary judgment, and we dismiss the County’s appeal as a result.

⁵ Although the County points out that the developers did not argue the existence of a factual dispute at the summary judgment hearing, counsel for the developers did contend that the summary judgment motion required more than the resolution of a purely legal question.

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C. Petition for Writ of Certiorari

As an alternative to its direct appeal of the interlocutory order, the County requests this Court grant certiorari to hear its appeal. We do not believe this to be the rare case in which granting certiorari to review an interlocutory order denying summary judgment is appropriate. *Cf. Moore v. Moody*, 304 N.C. 719, 720, 285 S.E.2d 811, 812 (1982) (“Except in extraordinary circumstances, this Court will not consider, either by writ of certiorari or discretionary review, any denial of a motion for summary judgment prior to the entry of final judgment in a case wherein summary judgment was denied.”). We deny the County’s petition in our discretion as a result.

The County has not shown how immediate, piecemeal review will aid the County or other local governments in the performance of their duties. To the extent that retroactive curative legislation would be pertinent to other counties and municipalities facing pending or potential capacity fee lawsuits, those defendants remain free to pass their own retroactive legislation and press its curative effect in court, irrespective of whether review is undertaken now or following final judgment.

We also see little benefit to judicial economy in granting certiorari here. Although it is true that the County faces several capacity fee lawsuits from a sizeable group of plaintiffs, these cases—every one of which will be decided by Judge Gottlieb—all seem to involve the same legal and factual issues, differing only as to the dates of fee assessments and amounts of the refunds sought by each plaintiff.

III. CONCLUSION

An interlocutory order denying summary judgment, with limited exception, rarely impacts a substantial right. *Bockweg*, 333 N.C. at 490, 428 S.E.2d at 160. Certiorari review is likewise unavailable outside of “extraordinary circumstances.” *Moore*, 304 N.C. at 720, 285 S.E.2d at 812. The County has not, in this instance, “present[ed] a compelling case for premature review.” *Community Bank v. Whitley*, 116 N.C. App. 731, 733, 449 S.E.2d 226, 227 (1994). Accordingly, we dismiss the County’s appeal as interlocutory and deny certiorari in our discretion.

APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI DENIED.

Judges ARROWOOD and BROOK concur.

Report per Rule 30(e).