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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-650

No. COA20-834

Filed 16 November 2021

Caldwell County, No. 19 CVS 285

THE TOWN OF BLOWING ROCK, Plaintiff,

v.

CALDWELL COUNTY and THE GIDEON RIDGE, INC., Defendants.

Appeal by Defendant from order entered 12 August 2020 by Judge Steve Warren in Caldwell County Superior Court. Heard in the Court of Appeals 25 August 2021.

Poyner Spruill LLP, by N. Cosmo Zinkow, for Plaintiff-Appellee.

Wilson, Lackey, Rohr & Hall, P.C., by David S. Lackey, for Defendant-Appellant.

Disanti Watson Capua Wilson & Garrett, PLLC, by Frank C. Wilson, III, for Defendant-Appellee.

GRIFFIN, Judge.

¶ 1 Defendant Caldwell County appeals from an interlocutory order denying in part its motion for summary judgment. The County argues that the trial court erred by failing to dismiss the Town of Blowing Rock's *ultra vires* claim, as well as Gideon Ridge, Inc.'s cross-claim alleging *ultra vires* acts and constitutional violations by the

County. The County contends that the trial court erred by failing to grant in full its motion for summary judgment based on its assertion of governmental immunity from suit. Upon review, we affirm the trial court's order.

¶ 2 The County has also filed a petition for writ of certiorari requesting discretionary review of issues pertinent to the merits of the claims in this case. We deny the petition.

I. Factual and Procedural Background

¶ 3 In June 1987, our General Assembly enacted a law authorizing Caldwell County to "levy a room occupancy tax of three percent (3%) of the gross receipts derived from the rental of any room . . . furnished by a hotel . . . or similar place within" the County. An Act to Authorize Caldwell County to Levy a Room Occupancy and Tourism Development Tax, 1987 N.C. Sess. Laws ch. 472, § 1(a). The County's authority to levy an occupancy tax under the Act did not extend to businesses located in Blowing Rock. *Id.* § 2 ("Any tax enacted pursuant to this act shall not apply to the Caldwell County portion of the Town of Blowing Rock.").

¶ 4 As of the date the Act was passed, Gideon Ridge operated a "Lodge" located in Caldwell County, outside of Blowing Rock corporate limits. In October 1987, the County levied a 3% occupancy tax on businesses located within its borders, which included Gideon Ridge's Lodge.

¶ 5 Effective 30 June 2008, Blowing Rock extended its corporate limits to include

the Lodge. At the time, Blowing Rock was authorized to levy a 6% occupancy tax on hotels and similar businesses within its corporate limits. Once the Lodge was annexed by Blowing Rock, Gideon Ridge continued to pay 3% in occupancy tax to the County and began paying an additional 3% in occupancy tax to Blowing Rock.

¶ 6 On 20 November 2019, Blowing Rock filed an amended Complaint against the County and Gideon Ridge alleging, *inter alia*, that the 1987 Act authorizing the County to levy an occupancy tax precluded the County "from receiving any occupancy tax" from businesses located in Blowing Rock corporate limits. Blowing Rock contended that, once the Lodge was annexed by Blowing Rock in June 2008, the County's continued receipt of 3% in occupancy tax from Gideon Ridge was "unlawful[.]" Among other claims for relief in its Complaint, Blowing Rock argued that it was "entitled to the imposition of a constructive trust in its favor[] returning all unlawfully collected and/or retained occupancy tax revenues to [Blowing Rock]."

¶ 7 On 30 December 2019, Gideon Ridge asserted a crossclaim against the County arguing, to the extent that Gideon Ridge erroneously paid occupancy tax to the County, the County's receipt of the payments was not permitted by the 1987 Act and also "deprived [Gideon Ridge] of property without due process or by the law of the land" under the North Carolina Constitution. Gideon Ridge requested, "in the event th[at the trial court] holds that Gideon Ridge is liable to . . . Blowing Rock for the 3% occupancy tax that it paid to Caldwell County," that the County be held liable "for

the full amount of any judgment obtained against Gideon Ridge by [Blowing Rock]."

¶ 8 On 28 July 2020, the County filed a motion for partial summary judgment arguing that all claims asserted against it by Blowing Rock and Gideon Ridge were "barred by governmental immunity[.]" The trial court granted the County's motion in part, but denied the motion as to Blowing Rock's constructive trust claim and Gideon Ridge's crossclaim. The County filed written notice of appeal from the trial court's order.

II. Analysis

¶ 9 "Ordinarily, appellate courts do not review the denial of a motion for summary judgment because of its interlocutory nature." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). "However, immediate appeal of interlocutory orders and judgments is available in at least two instances:" (1) "when the trial court certifies . . . that there is no just reason for delay of the appeal; and" (2) "when the interlocutory order affects a substantial right." *Turner v. Hammock's Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (internal quotation marks and citation omitted).

¶ 10 The trial court did not certify its order as immediately appealable. However, interlocutory orders "denying dispositive motions based on the defenses of governmental and public official[] immunity affect a substantial right and are immediately appealable." *Fullwood v. Barnes*, 250 N.C. App. 31, 36, 792 S.E.2d 545, 549 (2016). The County's appeal is based on the defense of governmental immunity and is properly before this Court.

¶ 11 The County argues that the trial court erred by failing to dismiss (1) Blowing Rock's claim alleging that the County's continued receipt of occupancy tax payments from Gideon Ridge after the Lodge was annexed by Blowing Rock was not authorized by the 1987 Act; and (2) Gideon Ridge's crossclaim alleging the same, in addition to constitutional violations under the North Carolina Constitution. First, "[i]t is well established that sovereign immunity does not protect the state or its counties against claims brought against them directly under the North Carolina Constitution." *Peverall v. Cnty. of Alamance*, 154 N.C. App. 426, 430, 573 S.E.2d 517, 519 (2002) (citing *Corum v. Univ. of N.C.*, 330 N.C. 761, 785-86, 413 S.E.2d 276, 291 (1992)). The County concedes in its brief that "[g]overnmental immunity does not bar claims against a local government for violation of constitutional or statutory rights." The remainder of this analysis is thus limited to whether governmental immunity bars Blowing Rock's claim and Gideon Ridge's crossclaim alleging that the County collected occupancy tax payments which it was not authorized to collect under the

1987 Act once the Lodge was annexed by Blowing Rock. We hold that governmental immunity does not preclude these claims and affirm the trial court's order.

¶ 12 "[T]he doctrine of governmental, or sovereign, immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity." *Sumney v. Barker*, 142 N.C. App. 688, 690, 544 S.E.2d 262, 265 (2001) (citation omitted). "The general rule of immunity is subject to exceptions, however, in cases where the state is deemed to have 'consented to be sued.'" *Peverall*, 154 N.C. App. at 429, 573 S.E.2d at 519 (citation omitted).

¶ 13 For example, this Court has previously held that governmental immunity did not bar claims against Durham County which alleged that the county imposed a "school impact fee" without any enabling legislation permitting the county to levy the fee. *Durham Land Owners Ass'n v. Cnty. of Durham*, 177 N.C. App. 629, 639-40, 630 S.E.2d 200, 207 (2006). In its reasoning, the Court cited *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E.2d 874 (1999), in which "the North Carolina Supreme Court awarded the plaintiffs a refund of fees paid pursuant to a city ordinance enacted without proper enabling legislation." *Durham Land Owners Ass'n*, 177 N.C. App. at 639, 630 S.E.2d at 207. This Court has also "rejected the defense of sovereign immunity to a declaratory judgment action alleging that the Industrial Commission created a regulation beyond its statutory authority." *Id.* (citing *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm.*, 336 N.C. 200, 443

S.E.2d 716 (1994)).

¶ 14 In this case, the County's authority to levy an occupancy tax under the 1987 Act did not extend "to the Caldwell County portion of the Town of Blowing Rock." An Act to Authorize Caldwell County to Levy a Room Occupancy and Tourism Development Tax, 1987 N.C. Sess. Laws ch. 472, § 2. Once the Lodge was annexed by Blowing Rock in June 2008, the County's continued receipt of occupancy tax payments from Gideon Ridge was *ultra vires* and thus unlawful. As in *Durham Land Owners Association*, we hold that governmental immunity does not bar Blowing Rock's claim or Gideon Ridge's crossclaim insofar as they allege that the County unlawfully collected occupancy tax payments from Gideon Ridge once the Lodge was annexed by Blowing Rock.

¶ 15 The County argues that Blowing Rock's claim should be barred by governmental immunity because the claim "is actually seeking the remedy of a constructive trust to prevent what is alleged to be . . . unjust enrichment." The County contends that claims of unjust enrichment are barred by governmental immunity. While Blowing Rock's claim in its Complaint is labeled "constructive trust," "[t]he labels as to legal theories" in a "complaint are not controlling[.]" *Haynie v. Cobb*, 207 N.C. App. 143, 149, 698 S.E.2d 194, 198 (2010). Instead, "when the allegations in the complaint give sufficient notice of the wrong complained of[,] an incorrect choice of legal theory should not result in dismissal of the claim if the

allegations are sufficient to state a claim under some legal theory." *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979); *see also Whitehurst v. Hurst Built, Inc.*, 156 N.C. App. 650, 653, 577 S.E.2d 168, 170 (2003) ("[T]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." (citations omitted)).

¶ 16 Blowing Rock's claim, while titled "constructive trust[,]" states the following:

> Plaintiff is entitled to the imposition of a constructive trust in its favor, returning all unlawfully collected and/or retained occupancy tax revenues to Plaintiff. . . . Upon learning that it was collecting and/or retaining occupancy tax payments properly belonging to Plaintiff, [the County] had a duty to return said funds to. . . . Gideon Ridge, so that the funds may be properly delivered to Plaintiff.

¶ 17 It is well-established that "[a]ll acts beyond the scope of the powers granted to a municipality are void." *Bagwell v. Town of Brevard*, 267 N.C. 604, 608, 148 S.E.2d 635, 638 (1966) (citation omitted). "Municipalities may only exercise that power given to them by the Legislature. Acts or agreements which are beyond the powers of a municipality are invalid and unenforceable" as *ultra vires*. *Myers v. Town of Plymouth*, 135 N.C. App. 707, 711, 522 S.E.2d 122, 124 (1999) (citing *Bowers v. City of High Point*, 339 N.C. 413, 451 S.E.2d 284 (1994)). We hold that the claim adequately alleges that the County's continued receipt of occupancy tax payments was *ultra vires* and thus unlawful once the Lodge was annexed by Blowing Rock in

June 2008.

¶ 18 Lastly, the County has filed a petition for writ of certiorari requesting that we review certain legal questions relevant to the merits of this case and for which the County has not established grounds for immediate review. Specifically, the County contends that the 1987 Act's provision precluding the County from levying an occupancy tax on businesses located in Blowing Rock may be in conflict with, or superseded by, another statute: N.C. Gen. Stat. § 153A-155 (2019).

¶ 19 "Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted). "[I]n most immunity-related interlocutory appeals, we have declined requests that we consider additional non-immunity-related issues on the merits." *Bynum v. Wilson Cnty.*, 228 N.C. App. 1, 7, 746 S.E.2d 296, 300 (2013), *rev'd in part on other grounds*, 376 N.C. 355, 758 S.E.2d 643 (2014). The County contends that addressing its non-immunity argument would "promote judicial economy by simplifying the remaining issues and claims as this case proceeds further in the trial court." However, the County provides no other basis for why we should exercise discretionary review and address its arguments on the merits. *See N.C. Cent. Univ. v. Taylor*, 122 N.C. App. 609, 612, 471 S.E.2d 115, 117 (1996) (stating that "our courts have frequently observed that a writ of certiorari is an extraordinary remedial writ" (citing *Pue v. Hood*, 222 N.C. 310, 22 S.E.2d 896 (1942))). We decline to review the

County's arguments unrelated to governmental immunity.

III. Conclusion

¶ 20 For the foregoing reasons, we affirm the trial court's order denying the County's motion for summary judgment. The petition for writ of certiorari filed in this cause is denied.

AFFIRMED.

Judges TYSON and CARPENTER concur.

Report per Rule 30(e).