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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-665

No. COA21-132

Filed 7 December 2021

Alamance County, No. 19 CVS 2170

ASSURE RE INTERMEDIARIES, INC (F/K/A ASSURE MANAGEMENT GROUP, INC.), Plaintiff,

v.

C. WAYNE PYRTLE; GUY CARPENTER & COMPANY, LLC; HUDSON SPECIALTY INSURANCE COMPANY; PLATINUM MANAGING GENERAL AGENCY, INC.; and STREAMLINE INSURANCE SERVICES, INC., Defendants.

Appeal by Defendants from order entered 22 September 2020 by Judge Andrew H. Hanford in Alamance County Superior Court. Heard in the Court of Appeals 20 October 2021.

Womble Bond Dickinson (US) LLP, by John E. Pueschel, Philip J. Mohr, and Patricia L. Holliman, for Plaintiff-Appellee.

Jackson Lewis P.C., by Robin Davis and Jonathan L. Crook, for Defendants-Appellants C. Wayne Pyrtle and Guy Carpenter & Company, LLC.

JACKSON, Judge.

¶ 1 Defendants C. Wayne Pyrtle and Guy Carpenter & Company, LLC appeal from an order denying their 12(b)(3) motion to dismiss for improper venue. We allow the interlocutory appeal and affirm the trial court's order.

I. Background

¶ 2 This action arises out of the dissolution of an employment relationship between Defendant C. Wayne Pyrtle and Plaintiff Assure Re Intermediaries, Inc. ("Plaintiff"). Defendant Pyrtle is a former Vice Chair of Plaintiff's Board of Directors and Plaintiff's former President and Chief Operating Officer.

¶ 3 In 2011, Defendant Pyrtle was employed by BMS Intermediaries, Inc. ("BMS"), whose primary place of business is in Texas.[1] At all relevant times, Defendant Pyrtle was a resident of Alamance County, North Carolina. On 17 October 2012, Defendant Pyrtle entered into an employment agreement ("Agreement") with BMS, which was assigned to Plaintiff on 1 January 2013. The Agreement contained a "Choice of Law and Forum" provision, which stated:

> Choice of Law and Forum. The terms and enforcement of this Agreement are governed by the laws of the State of Texas, without regard to conflict of laws rules. Any legal action relating to or arising from this Agreement will be brought in a state court of competent jurisdiction in Dallas, Texas or in the United States District Court for the Northern District of Texas, each venue being where the Employer maintains it[s] principal place of business.

Defendant Pyrtle continued to work for Plaintiff until his resignation on 17 June 2019.

¶ 4 Plaintiff filed suit on 9 October 2019, alleging that Defendant Pyrtle, while still employed by Plaintiff, agreed to work for Plaintiff's competitor, Defendant Guy

[1] BMS is not a party to this lawsuit or appeal.

Carpenter & Company, LLC, and conspired to usurp Plaintiff's corporate opportunities, in breach of his fiduciary duties and the non-competition and non-solicitation provisions of the Agreement, among other claims.

¶ 5 Defendant Pyrtle and his new employer, Guy Carpenter & Company, LLC (hereinafter collectively referred to as "Defendants"), moved to dismiss all claims against them for improper venue under North Carolina Rule of Civil Procedure 12(b)(3), arguing that the forum provision of the Agreement required any litigation to take place in Texas. Before this motion was heard, Plaintiff filed a motion to amend its complaint.

¶ 6 On 17 February 2020, the Honorable Lora Cubbage conducted a hearing on these pending motions. At the hearing, Plaintiff's motion to amend was heard first. Defendants opposed the motion to amend, arguing that amending the complaint would be futile in light of the forum selection clause. Defendants acknowledged that this argument was the same argument supporting their 12(b)(3) motion to dismiss. Judge Cubbage also acknowledged that Defendants' argument in opposition to the motion to amend blended into Defendants' argument on the 12(b)(3) motion to dismiss:

> THE COURT: . . . This is plaintiff's motion to amend which the Court heard first. And in hearing the defendant's argument to that motion to amend, it transitioned into defendant's motion to dismiss the case citing number 16 of the employment contract that there was a forum that was

> chosen in 2012.

Judge Cubbage ultimately rejected Defendants' argument and allowed Plaintiff to file an amended complaint.

¶ 7 In Judge Cubbage's order on 17 March 2020 ("March Order"), Judge Cubbage ruled that the forum selection clause in the Agreement was unenforceable, specifically finding the following:

> The Court finds that, based upon the allegations and all reasonable inferences arising therefrom as contained in the original Complaint and the proposed Amended Complaint, that Assure Re alleged that at all relevant times, including at the time he agreed to the terms of the Agreement, that Defendant Pyrtle was a resident of Burlington, North Carolina.
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> The Court further finds that Assure Re alleged that: the Agreement was entered into in 2012 for an initial term of one year, and provided for a single, one-year renewal term; the Agreement was not expressly renewed by Assure Re or Pyrtle but remains in full force and effect, and the parties continued to operate pursuant to the terms of the Agreement and thereby created an implied in law contract which Defendant Pyrtle entered into while he was in North Carolina.
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> . . .
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> The Court further finds that the decision in *SED Holdings, LLC v. 3 Star Props, LLC*, 246 N.C. App. 632, 784 S.E.2d 627 (2016) controls and that the venue provision in the Agreement is against North Carolina public policy pursuant to N.C.G.S. §22B-3 . . . .

Defendants did not appeal from the March Order.

¶ 8 After the amended complaint was filed, Defendants filed a second 12(b)(3) motion to dismiss. In the second motion, Defendants relied on the same forum selection clause argument previously rejected by Judge Cubbage. Judge Hanford conducted a hearing on the second motion to dismiss on 22 September 2020. At this hearing, Defendants acknowledged that Judge Hanford was likely bound by Judge Cubbage's previous finding that the forum selection clause was unenforceable.

¶ 9 Judge Hanford entered an order on 22 September 2020 ("September Order") denying Defendants' 12(b)(3) motion to dismiss "[b]ased on the law of the case as stated in Judge Cubbage's March 17, 2020 Order[.]"

¶ 10 In the September Order, Judge Hanford specifically found the following:

> The Court finds that the Honorable Lora C. Cubbage entered an Order in this action on or about March 17, 2020, which allowed Plaintiff's Motion to Amend, but did not enter a ruling as to Guy Carpenter Defendants' Motion to Dismiss the original Complaint ("March 17 Order");
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> The Court finds that in the March 17 Order, Judge Cubbage did however conclude that Plaintiff alleged the contract between it and Defendant Pyrtle was not expressly renewed, but there was an implied in law contract which Defendant Pyrtle entered into while he was in North Carolina, and accordingly, that the decision in *SED Holding, LLC v. 3 Star Props, LLC*, 246 N.C. App. 632, 784 S.E.2d 627 (2016), controls and that the forum and venue provision in the contract is "against North Carolina public policy pursuant to N.C.G.S. § 22B-3."

¶ 11 Based on these findings, Judge Hanford concluded that

> The Court . . . is bound by the legal conclusions contained in the March 17 Order as the law of the case; and
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> The Court concludes that the pending Motion to Dismiss the Amended Complaint filed by the Guy Carpenter Defendants must be considered in light of the law of the case as stated in Judge Cubbage's March 17, 2020 Order.

¶ 12 Defendants timely filed notice of appeal from the September Order. Defendants also filed a conditional petition for writ of certiorari, asking this Court to review both the March Order and September Order. Plaintiffs filed a motion to dismiss the interlocutory appeal, which was referred to this panel.

II. Jurisdiction

A. Motion to Dismiss

¶ 13 We must first address Plaintiff's referred motion to dismiss and decide whether we have jurisdiction to hear this appeal. Because Defendants have demonstrated that the September Order affects a substantial right, we allow the appeal and deny Plaintiff's motion to dismiss the interlocutory appeal.

¶ 14 Interlocutory orders are generally not immediately appealable. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). However, an interlocutory order may be appealable when it affects a substantial right of the appellant that would be lost without immediate review. *Id.*; N.C. Gen. Stat. § 1-277(a) (2019). Our Supreme Court created a two-part test for determining whether an interlocutory order can be immediately appealed due to a substantial right: "(1) the

right itself must be substantial; and (2) the deprivation of that substantial right must potentially work injury to the appealing party if not corrected before appeal from final judgment." *Builders Mut. Ins. Co. v. Meeting St. Builders, LLC*, 222 N.C. App. 646, 649, 736 S.E.2d 197, 199 (2012) (citing *Goldston,* 326 N.C. at 726, 392 S.E.2d at 736) (internal marks omitted).

¶ 15 The appellant bears the burden to show a substantial right in each case. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). Our appellate courts have repeatedly held that whether an interlocutory appeal affects a substantial right is determined on a "case-by-case" basis. *See Dewey Wright Well & Pump Co. v. Worlock,* 243 N.C. App. 666, 669, 778 S.E.2d 98, 101 (2015). *See also Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E. 2d 338, 343 (1978) ("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.").

¶ 16 Generally, an order denying a motion to dismiss for improper venue affects a substantial right and is immediately appealable. *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) ("Although the initial question of venue is a procedural one, there can be no doubt that a right to venue established by statute is a substantial right. Its grant or denial is immediately appealable.") (internal citations omitted); *McClure Estimating Co. v. H.G. Reynolds Co.*, 136 N.C. App. 176,

179, 523 S.E.2d 144, 146 (1999) ("[A]n order erroneously denying defendants' Motion to Dismiss for Lack of Venue would [] work an injury which could not be corrected if no appeal was allowed before the final judgment.") (internal marks omitted). Accordingly, an order denying a motion to dismiss for improper venue is usually immediately appealable when the motion is premised on a forum selection clause. *See Schwarz v. St. Jude Med., Inc.*, 254 N.C. App. 747, 751, 802 S.E.2d 783, 787 (2017) ("[O]ur 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.") (internal quotation and citation omitted); *SED Holding, LLC v. 3 Star Props., LLC*, 246 N.C. App. 632, 635, 784 S.E.2d 627, 630 (2016) ("Although a denial of a motion to dismiss is an interlocutory order, where the issue pertains to applying a forum selection clause, our case law establishes that defendant may nevertheless immediately appeal the order because to hold otherwise would deprive him of a substantial right.") (internal quotation and citation omitted).

¶ 17 Here, Defendants acknowledge that the September Order is interlocutory, but assert in their statement of the grounds for appellate review that the September Order is immediately appealable because it affects a substantial right. Specifically, Defendants argue that their right to have this action adjudicated in Texas pursuant to the forum selection clause of the Employment Agreement at issue is a substantial

right that would be lost without immediate review. We agree with Defendants and therefore deny Plaintiff's motion to dismiss the appeal.

B. Conditional Petition for Writ of Certiorari

¶ 18 We must also address Defendants' conditional petition for writ of certiorari, which in part asks this Court to review the March Order that Defendants did not appeal from. Defendants argue that the legal conclusions of the March Order, specifically Judge Cubbage's ruling on venue, are reviewable by this Court because Judge Hanford adopted her conclusions in the September Order. For reasons explained more fully in our discussion, we deny Defendants' request to review the merits of the March Order.

III. Discussion

A. Standard of Review

¶ 19 "Our Court reviews an order denying a motion to dismiss for improper venue in [cases involving a forum selection clause] using the abuse of discretion standard." *SED Holding, LLC v. 3 Star Props., LLC*, 246 N.C. App. 632, 636, 784 S.E.2d 627, 630 (2016). "The test for abuse of discretion requires the reviewing court 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.* (internal quotation and citation omitted).

B. Analysis

¶ 20 Our Supreme Court has firmly established "that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (citation omitted). In other words, "one superior court judge may not modify or overrule the judgment of another superior court judge in the same case on the same issue." *Hieb v. Lowery*, 344 N.C. 403, 407, 474 S.E.2d 323, 325 (1996) (citation omitted).

¶ 21 Here, Defendants acknowledge that Judge Hanford was bound by Judge Cubbage's prior venue determination.[2] However, Defendants contend that Judge Cubbage's conclusions regarding venue were erroneous and are now reviewable by this Court because they "carried over" into Judge Hanford's Order. We disagree and hold that Judge Hanford did not abuse his discretion by adhering to the March Order

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[2] In their brief, Defendants concede that "Judge Hanford had no authority to overrule the March Order," and "[Defendants] candidly advised Judge Hanford they discerned no basis for Judge Hanford to overrule the [March Order's conclusions], given the well-settled principle that one Superior Court judge may not overrule another." Likewise, at the hearing before the September Order, Defendants told Judge Hanford, "we appreciate that the Court may feel bound by the law of the case and the legal conclusions in Judge Cubbage's order. We're not going to pick a fight about that. If the Court wants to say your motion to dismiss is denied because Judge Cubbage had the legal conclusion that the forum selection clause was not enforceable, we're okay with that." Defendants clarify in their conditional petition that the "law of the case" is "simply shorthand for the generally accepted proposition (not challenged by either party) that Judge Hanford could not overrule Judge Cubbage."

and denying Defendants' 12(b)(3) motion.

¶ 22 At the hearing before Judge Cubbage, Defendants argued that the forum provision of the Agreement was valid and enforceable, making the proper venue Texas, and therefore Plaintiff's motion to amend its complaint was futile. Defendants acknowledged that this was the same argument supporting their 12(b)(3) motion to dismiss for improper venue. Although Judge Cubbage did not explicitly deny Defendants' 12(b)(3) motion to dismiss in the March Order, she granted Plaintiff's motion to amend and specifically found that "the venue provision in the Agreement is against North Carolina public policy" and unenforceable, therefore effectively nullifying Defendants' venue argument. Despite Judge Cubbage's adverse ruling on Defendants' venue argument, Defendants did not appeal the March Order. Instead, Defendants filed a second motion to dismiss for improper venue, relying on the same forum provision that Judge Cubbage previously found unenforceable. At the hearing before Judge Hanford on the second motion to dismiss, Defendants acknowledged that Judge Cubbage already ruled on the issue of venue.[3]

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[3] At the hearing, Defendants were transparent with Judge Hanford that the motivation behind their second motion to dismiss was to file an interlocutory appeal: "We just need an order. If the Court decides that our motion should be denied, there is going to be an appeal because that is an appeal as of right. We're not hiding that from anybody. If the Court determines that Judge Cubbage's -- the language in that order is the law of the case and the Court has to deny our motion to dismiss on that basis, then we don't need to go any further."

¶ 23 We therefore hold that Judge Hanford properly adhered to Judge Cubbage's ruling on the forum provision, because "one superior court judge may not modify or overrule the judgment of another superior court judge in the same case on the same issue." *Hieb*, 344 N.C. at 407, 474 S.E.2d at 325. At no point in their briefing do Defendants argue that Judge Hanford erred by following the March Order. Instead, Defendants argue on appeal that the trial court erred by concluding that (1) an implied in law contract was entered into in North Carolina, and (2) the forum provision in the Agreement violated North Carolina public policy, both of which are conclusions from the March Order that Judge Hanford found he was bound by in the September Order. Consequently, Defendants' arguments for why the trial court erred are entirely premised on Judge Cubbage's purported errors of law in the March Order, which Defendants did not appeal from.

¶ 24 In their conditional petition for writ of certiorari, Defendants claim that they strategically chose not to appeal from the March Order, based on precedent from this Court that an order granting a motion to amend a complaint does not affect a substantial right and therefore is not immediately appealable.[4] *LendingTree, LLC v.*

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[4] The determination of whether a substantial right is affected is determined on a case-by-case basis, and the inquiry does not necessarily end at the procedural posture. *See Waters*, 294 N.C. at 208, 240 S.E.2d at 343 ("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.") (emphasis added). For example, despite

Anderson, 228 N.C. App. 403, 407, 747 S.E.2d 292, 296 (2013). No matter the reason, Defendants chose not to appeal the March Order, even though apparently the same substantial right, the right to the appropriate venue, was impacted when Judge Cubbage foreclosed the possibility of Defendants enforcing the forum selection clause. It may be true that Defendants strategically waited to appeal from the order denying their motion to dismiss, but that strategy here backfired, since now we are unable to reach the substance of Defendants' arguments. Because Judge Cubbage's rulings from the March Order are not properly before this Court, and we decline to grant certiorari review for the March Order, we hold that Judge Hanford did not abuse his discretion by denying Defendants' 12(b)(3) motion for improper venue based on the inapplicability of the forum selection clause.

IV. Conclusion

¶ 25 For the foregoing reasons, we conclude that the trial court did not err in

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the general rule that orders granting amendments to pleadings are not immediately appealable, we have before found that an appellant's substantial rights were affected by a trial court granting an amendment to a pleading. *See City of Charlotte v. Univ. Fin. Props., LLC*, 260 N.C. App. 135, 144, 818 S.E.2d 116, 123 (2018) ("[P]laintiff did not have the right to amend the complaint to reduce the deposit, and the trial court's order granting the amendment and refusing to recognize the effect of the voluntary dismissal has the effect of taking away defendant's [statutory] right . . . . Because of these statutory rights in condemnation cases, granting the motion to amend did affect a substantial right of defendant which would be lost otherwise."). We recognize that the March Order presented unique circumstances where precedent regarding interlocutory appeals from amended pleadings and venue determinations overlapped and seemingly conflicted. However, it is not our place to resolve this issue since Defendant chose not to appeal from the March Order.

denying Defendants' motion to dismiss for improper venue.

AFFIRMED.

Judges CARPENTER and GRIFFIN concur.

Report per Rule 30(e).