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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-370

Filed 5 February 2025

Durham County, No. 19 CVS 1958

PETER MILLAR, LLC, Plaintiff,

v.

SHAW'S MENSWEAR, INC. d/b/a THE SHAW GROUP RETAIL CONSULTANTS,
Defendant.

SHAW'S MENSWEAR, INC., Third Party Plaintiff,

v.

JC NAPLES, INC., G.C. OF WINTER PARK, INC., JCWP, LLC, and HOWARD
CRAIG DELONGY, Third Party Defendants.

Appeal by substituted plaintiff JC Naples, Inc., from order entered 22 August 2023 by Judge Michael J. O'Foghludha in Durham County Superior Court and appeal by third-party defendants from order dated 6 August 2019 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 5 November 2024.

Morningstar Law Group, by Christopher T. Graebe, for substituted plaintiff-appellant JC Naples, Inc., and third-party defendants-appellants.

Manning, Fulton & Skinner, P.A., by William S. Cherry III and Jessica B. Vickers, and Huestis Law, LLC, by Robert S. Huestis, pro hac vice, for defendant-appellee/third-party plaintiff-appellee.

ZACHARY, Judge.

This case returns to this Court upon the trial court’s entry of summary judgment and dismissal of the claims of Plaintiff JC Naples, Inc., (“JC Naples”) following our remand in *Peter Millar, LLC v. Shaw’s Menswear, Inc. (Millar I)*, 274 N.C. App. 383, 853 S.E.2d 16 (2020).

JC Naples is a Florida corporation that owns and operates men’s retail clothing stores in Florida. Defendant/Third-Party Plaintiff Shaw’s Menswear, Inc., also known as The Shaw Group Retail Consultants (“Shaw”), is a men’s clothing wholesaler based in Georgia.¹ Third-Party Defendants JC Naples; G.C. of Winter Park, Inc.;² JCWP, LLC;³ and Howard Craig Delongy⁴ (collectively, “Delongy Stores”) are or were related entities operating in the men’s clothing business in Florida.

The present appeal arises from a debt (the “Shaw debt”) for consigned menswear allegedly owed by Shaw to Peter Millar, LLC (“Millar”). Millar assigned the Shaw debt to JC Naples, bringing into play various consignment agreements (the

¹ Shaw is a Georgia-based corporation that was administratively dissolved on or around 7 September 2018 and subsequently reinstated.

² G.C. of Winter Park, Inc. was a Florida-based corporation that was administratively dissolved on 23 September 2011.

³ JCWP, LLC is a Florida-based corporation.

⁴ Howard Craig Delongy is the president of JC Naples.

“Consignment Agreements”) to which JC Naples and Shaw are parties. The Consignment Agreements each contain a forum-selection clause, the effect of which on this action is in dispute.

JC Naples appeals from the trial court’s 22 August 2023 order denying its motion for summary judgment, granting summary judgment in favor of Shaw, and dismissing JC Naples’s claims but leaving pending Shaw’s counterclaims. Delongy Stores appeals from the trial court’s order dated 6 August 2019 denying its claim for attorneys’ fees pursuant to the Consignment Agreements.

After careful review, we reverse the trial court’s 22 August 2023 order and remand this matter to the trial court for consideration of the parties’ competing motions for summary judgment on the merits. We dismiss Delongy Stores’ interlocutory appeal on the issue of attorneys’ fees.

I. FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to the Consignment Agreements, Shaw provided certain services for Delongy Stores, including “purchas[ing] inventory from manufacturing suppliers[.]” *Millar I*, 274 N.C. App. at 386, 853 S.E.2d at 19. As Delongy Stores sold the consigned inventory, “the sale proceeds [we]re deposited in an account owned by Shaw.” *Id.* Shaw would then use “the proceeds to reimburse the manufacturing suppliers, take a commission, and pay the balance to Delongy Stores.” *Id.*

Millar is a limited liability company organized in Delaware with its principal place of business in North Carolina. Millar “provide[d] inventory to Shaw, some of

which was consigned in Delongy Stores.” *Id.* On 6 February 2019, Millar filed a complaint against Shaw in Durham County Superior Court (the “North Carolina action”), alleging that “Shaw owed Millar \$448,050.66 for inventory shipped to Delongy Stores.” *Id.*

On 8 February 2019, “Shaw filed suit against Delongy Stores in Georgia Superior Court [(the “Georgia action”)] for default and breach of the Consignment Agreements” but did not name Millar as a party. *Id.*

On 9 April 2019, Shaw filed its answer and third-party complaint in the pending North Carolina action and joined Delongy Stores as third-party defendants on the grounds that they were “obligated to indemnify and hold Shaw harmless from any and all monetary damages[.]” In its third-party complaint, Shaw alleged that “[v]enue is proper [in Durham County Superior Court] pursuant to N.C. Gen. Stat. § 1-82.”

Delongy Stores “filed a motion to dismiss the third-party complaint for improper venue and for lack of personal jurisdiction” on 21 June 2019. *Id.* at 387, 853 S.E.2d at 20. On 3 July 2019, “Shaw filed a motion to stay the North Carolina action.” *Id.* In its memorandum in support of its motion to stay and in opposition to Delongy Stores’ motion to dismiss, Shaw argued that “the enforcement of the forum selection clauses, and the dismissal of Shaw’s Third Party Complaint, would be unfair and unreasonable to Shaw[.]” On 29 July 2019, these motions came on for hearing in

Durham County Superior Court. In an order dated 6 August 2019, the trial court denied Delongy Stores' motion to dismiss and granted Shaw's motion to stay.

Millar and Delongy Stores both appealed from this order. On appeal, Millar argued that "the trial court erred when it granted Shaw's motion to stay." *Id.* Delongy Stores argued that "the trial court erred when it (1) denied the motions to dismiss the third-party complaint for improper venue and for lack of personal jurisdiction, and (2) did not award attorneys' fees pursuant to the Consignment Agreements." *Id.* By opinion filed on 1 December 2020, this Court "dismiss[ed] Delongy Stores' appeal on the issue of attorneys' fees as interlocutory," "affirm[ed] the trial court's order granting the motion to stay, and remand[ed] with instructions to enter an order dismissing Shaw's [third-party] complaint for improper venue and lack of personal jurisdiction." *Id.* at 394, 853 S.E.2d at 24.

Millar assigned its Shaw account receivable and claim against Shaw to JC Naples on 13 October 2021. JC Naples, together with Delongy Stores, then amended the counterclaim in the Georgia action to include recovery of the Shaw debt. On 28 March 2022, the Georgia action came on for jury trial in Putnam County Superior Court, Georgia; at its conclusion on 30 March, the jury returned verdicts awarding damages and attorneys' fees and costs for each claim. On 27 April 2022, the Georgia trial court entered an order dismissing without prejudice the claim for recovery of the Shaw debt, concluding that JC Naples was required to prosecute this claim in the pending North Carolina action.

On 1 August 2022, Millar and JC Naples filed a joint motion in Durham County Superior Court seeking to substitute JC Naples as the plaintiff in the pending North Carolina action. On 16 August 2022, the trial court entered its order granting the motion to substitute. Shaw then filed its amended answer and counterclaims on 16 February 2023, raising three claims against JC Naples. On 13 March 2023, JC Naples filed its reply to the counterclaims.

JC Naples and Shaw filed competing motions for summary judgment in Durham County Superior Court on 31 March 2023. Shaw contended, in part, that it was “entitled to judgment as a matter of law because there is no genuine issue of material fact that (1) the mandatory forum-selection clause in the governing contract requires the case be dismissed[.]”

On 22 August 2023, the trial court entered an order granting summary judgment in favor of Shaw and denying summary judgment for JC Naples after determining “that the forum selection clause in the parties’ consignment agreement[s] is valid and enforceable and covers the instant dispute between the parties.” The court dismissed JC Naples’s claims against Shaw but left pending Shaw’s counterclaims.

On 14 September 2023, JC Naples and Delongy Stores filed a joint notice of appeal. JC Naples specifically appealed from the trial court’s 22 August 2023 order insofar as it “granted [Shaw]’s motion for summary judgment and denied [JC Naples]’s motion for summary judgment.” In the same filing, Delongy Stores again

gave notice of appeal insofar as the trial court's order dated 6 August 2019 "denied [their] motion for attorney fees."

II. DISCUSSION

A. Waiver of Venue

JC Naples first asserts that the trial court erred in granting Shaw's motion for summary judgment because "Shaw waived any objection to venue." We agree.

1. Appellate Jurisdiction

The instant appeal is interlocutory, as it "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" where Shaw's counterclaims remain pending. *Osborne v. Redwood Mountain, LLC*, 275 N.C. App. 144, 146, 852 S.E.2d 699, 701 (2020) (citation omitted). However, "[a]n interlocutory order changing venue as of right affects a substantial right and thus is immediately appealable." *Stokes v. Stokes*, 371 N.C. 770, 773, 821 S.E.2d 161, 164 (2018); *see also 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." (citations omitted)). Accordingly, this appeal is properly before us.

2. Standard of Review

An appellate court's "standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no

genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (cleaned up). We “apply abuse of discretion review to a trial court’s decision concerning clauses on venue selection.” *LendingTree, LLC v. Anderson*, 228 N.C. App. 403, 407, 747 S.E.2d 292, 296 (2013) (cleaned up). Nevertheless, “although we apply abuse of discretion review to general venue decisions, we apply de novo review to waiver arguments.” *Id.* (italics omitted). “Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Badin Shores Resort Owners Ass’n v. Handy Sanitary Dist.*, 257 N.C. App. 542, 550, 811 S.E.2d 198, 204 (2018) (cleaned up).

3. Analysis

JC Naples asserts that “any objection to venue was waived” because “Shaw did not raise improper venue in a responsive pleading or by motion to dismiss under” Rule 12(b)(3) of the North Carolina Rules of Civil Procedure.

“[O]ur courts generally enforce mandatory forum selection clauses.” *LendingTree*, 228 N.C. App. at 408, 747 S.E.2d at 297. “Still, defendants must affirmatively raise a venue objection to enforce a forum selection clause.” *Id.*

In cases where an improper venue is designated, “the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.” N.C. Gen. Stat.

§ 1-83 (2023). A venue objection is made in one of two ways: 1) a responsive pleading; or 2) a timely motion to dismiss under Rule 12(b)(3). *See id.* § 1A-1, Rule 12(h)(1).

“However, since venue is not jurisdictional[,] it may be waived by express or implied consent.” *Miller v. Miller*, 38 N.C. App. 95, 97, 247 S.E.2d 278, 279 (1978). “If a defendant fails to object by timely motion or answer the defense is waived.” *LendingTree*, 228 N.C. App. at 409, 747 S.E.2d at 297 (cleaned up).

Here, Shaw did not object to venue by timely motion, answer, or other responsive pleading. The North Carolina action was filed in 2019, but Shaw did not challenge venue then. JC Naples, the assignee of the Shaw debt to Millar, was permitted to substitute for Millar on 16 August 2022. On 16 February 2023, Shaw filed its amended answer and counterclaims, and again neglected to challenge venue. “The language of the statute is clear that the time for making the [objection] is *before* the time for filing [an] answer expires.” *Cheek v. Higgins*, 76 N.C. App. 151, 153, 331 S.E.2d 712, 714 (1985) (emphasis added); *see also State Auto Ins. Cos. v. McClamroch*, 129 N.C. App. 214, 217, 497 S.E.2d 439, 441 (1998) (“Where a motion in writing is not made within the time prescribed by statute, [the] defendant waives his right to object to venue.”).

Accordingly, Shaw waived any objection to venue by failing to raise such an objection within the parameters prescribed by Rule 12(h)(1). The trial court based its conclusion regarding the parties’ competing summary judgment motions on the application of the forum-selection clause. Therefore, we reverse the trial court’s 22

August 2023 order and remand to the trial court for consideration of the parties' competing motions for summary judgment on the merits.

Furthermore, in light of our conclusion regarding Shaw's waiver of venue, we do not reach JC Naples's other arguments. *See Law Offices of Peter H. Priest, PLLC v. Coch*, 244 N.C. App. 53, 63 n.5, 780 S.E.2d 163, 169 n.5 (2015) (declining to reach additional arguments where one issue was dispositive), *disc. review and cert. denied*, 368 N.C. 689, 781 S.E.2d 479 (2016).⁵

B. Attorneys' Fees

Delongy Stores contends that the trial court erred by denying their request for attorneys' fees in the 21 June 2019 motion to dismiss Shaw's third-party complaint. However, they acknowledge that "if this Court reverses the trial court's order based on the forum selection clause and remands to the trial court . . . the appeal of the earlier denial of attorney fees remains interlocutory and must await final judgment, based on the Court's earlier opinion in this case." Such is the case.

"As a general rule, there is no right of appeal from an interlocutory order." *Edwards v. Foley*, 253 N.C. App. 410, 411, 800 S.E.2d 755, 756, *disc. review denied*, 370 N.C. 74, 807 S.E.2d 571 (2017). It is well established that an "order granting

⁵ JC Naples further argues that "[t]he trial court erred in denying [its] motion for summary judgment" on the Shaw debt. However, the trial court's decision was premised on the preliminary issue of the perceived lack of venue, rather than a consideration of the merits of the parties' motions. Consequently, and in light of our disposition to remand to the trial court for consideration of the merits of the parties' motions for summary judgment, we need not address this argument. *See Greene v. Spivey*, 236 N.C. 435, 442, 73 S.E.2d 488, 493 (1952) ("[U]nless and until it is shown that a trial court ruled on a particular question, it is not given for [an appellate court] to make specific rulings thereon.").

attorney's fees is interlocutory[.]” *Benfield v. Benfield*, 89 N.C. App. 415, 419, 366 S.E.2d 500, 503 (1988).

In that we are reversing the trial court's order, the issue of attorneys' fees remains interlocutory. As we concluded in *Millar I*: “Here, the trial court's decision to not award attorneys' fees is interlocutory and is best left until the underlying action has been resolved.” 274 N.C. App. at 387–88, 853 S.E.2d at 20 (cleaned up) (citing *Andaloro v. Sawyer*, 144 N.C. App. 611, 614, 551 S.E.2d 128, 131 (2001)). Accordingly, we dismiss Delongy Stores' interlocutory appeal of the denial of their motion for attorneys' fees.

III. CONCLUSION

For the foregoing reasons, we reverse the trial court's 22 August 2023 order granting summary judgment in favor of Shaw and denying summary judgment for JC Naples, and remand to the trial court for consideration of the parties' motions for summary judgment on the merits. In addition, we dismiss Delongy Stores' interlocutory appeal on the issue of attorneys' fees.

REVERSED IN PART AND REMANDED; DISMISSED IN PART.

Judges STROUD and CARPENTER concur.

Report per Rule 30(e).