Wachovia Realty Investments v. Housing Inc.

221 S.E.2d 381 (1976) | Cited 1 times | Court of Appeals of North Carolina | January 21, 1976

The judgment of the trial court, though granting summary judgment for plaintiff on its claim, retained the cause "for

determination of what amount, if any, are the defendants entitled to as a setoff" under G.S. 45-21.36, and "as to the rights, if any, of the defendant Housing, Inc. to indemnification by the defendant C. P. Robinson, Jr." Under G.S. 1A-1, Rule 54(b) the trial court "may enter 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." In this case there was no determination in the judgment that there is no reason for delay.

It is obvious that this judgment adjudicated "fewer than all the claims or the rights and liabilities of fewer than all the parties." Therefore, under G.S. 1A-1, Rule 54(b) there was no final judgment, and it "shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes."

In Arnold v. Howard, 24 N.C. App. 255, 210 S.E.2d 492 (1974), the court, in construing G.S. 1A-1, Rule 54(b), ruled that G.S. 1-277 was not a statute expressly providing for review by appeal or otherwise within the meaning of the above-quoted term "except as expressly provided by these rules or other statutes." Briefly, G.S. 1-277(a), and also G.S. 7A-27(d), provide for appeal from an interlocutory order which affects a substantial right, or in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action, or grants or refuses a new trial. Arnold v. Howard, supra, has been followed by this Court in numerous decisions. See Durham v. Creech, 25 N.C. App. 721, 214 S.E.2d 612 (1975); Leasing, Inc. v. Dan-Cleve Corp., 25 N.C. App. 18, 212 S.E.2d 41 (1975); Siders v. Gibbs, 26 N.C. App. 333, 215 S.E.2d 813 (1975); Christopher v. Bruce-Terminix Co., 26 N.C. App. 520, 216 S.E.2d 375 (1975); Mozingo v. Bank, 27 N.C. App. 196, 218 S.E.2d 506 (1975); Ostreicher v. Stores, Inc., 27 N.C. App. 330, 219 S.E.2d 303 (1975); and Builders, Inc. v. Felton, 27 N.C. App. 334, 219 S.E.2d 287 (1975).

So we have interpreted G.S. 1A-1, Rule 54(b) to mean that if the order or judgment adjudicates fewer than all the claims, or the rights and liabilities of fewer than all the parties, and there is no determination in the order or judgment that "there is no just reason for delay," then the order or judgment is not subject to appellate review on the ground that it affects a substantial right, or other grounds enumerated in G.S. 1-277 or G.S. 7A-27(d). Under this Rule the order or judgment is

not final and "is subject to revision at any time before entry of judgment adjudicating all the claims

and the rights and liabilities of all the parties." (Emphasis added.)

One of the obvious purposes of Rule 54 is to minimize fragmentary appeals. It permits appeals only from final judgments, upon the trial court's determination of "no just reason for delay." Appellate review of an "interlocutory order" under Rule 54 may be had under the provision "shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes." (Emphasis added.) This provision, not included in the Federal Rules, may give us, by certiorari or otherwise, limited power to allow appellate review of a Rule 54 interlocutory order, but in view of all of the provisions of the Rule, including the right of the trial court to revise the order or judgment at any time before final adjudication, this provision should be strictly construed; and discretionary authority thereunder, if any, should be exercised sparingly in extraordinary circumstances to avoid a harsh result.

G.S. 1-289 and G.S. 1-269 require the filing of an undertaking or making of a deposit to stay the execution of a money judgment. Any injustice or hardship that may result from execution issued under a "final judgment" which adjudicates "fewer than all the claims or the rights and liabilities of fewer than all the parties" is alleviated by G.S. 1A-1, Rule 62(g), which provides: "When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered." Sub judice, it appears from the record on appeal that execution was issued on the judgment for plaintiff in this case. Defendant Housing filed in this Court a petition for stay of execution, which was denied because of failure to comply with Rule 23, New North Carolina Rules of Appellate Procedure. The defendant, Housing, could have moved for stay of execution in the trial court under Rule 62(g), or, in the alternative, on the ground that execution was improvidently issued because the judgment was interlocutory and not final. And the defendant may now move in the trial court for withdrawal of the execution issued on an interlocutory judgment.

Rule 54 is a simple and workable one. It should be knowledgeably applied in the trial courts and reasonably interpreted in the appellate courts in accord with its purpose.

Appeal dismissed.

Disposition

Appeal dismissed.