1

Accord and Satisfaction


A subcontractor brought a claim for additional compensation against the general contractor. The Court of Appeals held that the contractor was not entitled to summary judgment. The contractor contended that its payment to the subcontractor constituted an accord and satisfaction. The contractor argued that it satisfied the statutory requirements for an accord and satisfaction (N.C. Gen. Stat. § 25-3-311) by submitting to the subcontractor payment in the form of a check with an attached stub which read as follows: “Memo: Full And Final Payment ...” The subcontractor admitted it obtained payment by this instrument, but argued that summary judgment was improper because a genuine issue of material fact remained regarding whether at the time of the payment the claim was unliquidated or subject to a bona fide dispute. The Court of Appeals agreed.

Section 25-3-311 did not apply to cases in which the debt was a liquidated amount or not subject to a bona fide dispute. The requirement that a payment dispute exists is satisfied only if the dispute exists prior to payment of the tendered sum. It was unclear from the record on appeal whether the claim was subject to a bona fide dispute prior to the contractor’s submission of the check as full and final payment. Although the parties later came to disagree over the amount owed, the contractor failed to meet its burden pursuant to § 25-3-311 to prove that the amount was subject to a bona fide dispute at the time of payment.
2

Appeals


   The Court of Appeals dismissed an appeal brought by a surety and a general contractor/bond principal, holding that the appeal was interlocutory.

   The case began with a series of complaints by unpaid material suppliers against a drywall subcontractor, the general contractor and the contractor’s payment bond surety. After the subcontractor filed for Chapter 11 bankruptcy, the trial court *sua sponte* entered Judgments of Discontinuance in all of the suppliers’ actions. The cases were closed with leave to reinstate by motion if the claims were not fully adjudicated.

   Following confirmation of the subcontractor’s Chapter 11 plan, the bankruptcy court terminated the automatic stay. The suppliers moved for reinstatement of their actions against the contractor and surety. The trial court granted the motions, and the contractor and surety appealed.

   The Court of Appeals dismissed the appeal. The orders from which the contractor and surety appealed did not dispose of the entire case. In fact, the orders did not dispose of any issue in the cases; they merely allowed the suppliers to proceed in their actions against the contractor and surety.

   The Court also found wholly unpersuasive the argument that the orders appealed from affected a substantial right. The whole of appellants’ argument on this point was that granting the suppliers’ motions unfairly punished them if they were forced to continue the defense of the actions. Avoidance of a trial is not a substantial right entitling a party to an immediate appeal.

The North Carolina Court of Appeals affirmed its long-standing precedent that a denial of a motion to dismiss for failure to join necessary parties generally does not affect a substantial right and is not immediately appealable.

Builders Mutual Insurance Co. (“Insurer”) brought a declaratory judgment action against Meeting Street Builders, LLC and several other related entities (“Developers”) along with the homeowners’ association (“HOA”) of a townhome community in South Carolina. The Insurer sought a declaration that there was no coverage under a commercial general liability policy issued by the Insurer to the Developers. The Insurer’s action was prompted by a lawsuit filed in South Carolina against the Developers by the HOA (“Underlying Action”). In the Underlying Action, the HOA alleged that there were numerous construction defects in its townhome complex.

The Developers first filed a motion to dismiss the declaratory judgment action for failure to join a necessary party, and the HOA then filed a motion to dismiss for lack of subject matter jurisdiction. The trial court granted the HOA’s motion and denied the Developers’ motion. It also determined that the “HOA is not a necessary party to this action.” The Developers appealed and the Court of Appeals affirmed.

On appeal, the Developers argued that, despite the fact that the trial court’s order was interlocutory, it affected a substantial right and should be immediately appealable. The Developers’ primary concern was that if the HOA was not a party to the lawsuit, it would not be bound by the declaratory judgment. The HOA would then be free to bring its own declaratory judgment action in South Carolina covering the exact same issues. This might result in inconsistent verdicts.

The Court of Appeals agreed that the right to avoid inconsistent verdicts could, under certain circumstances, be a substantial right and should be immediately appealable. The Court cautioned that there must be more than “mere speculation that there might be future litigation between the parties.” In *Meeting Street*, the Court concluded that the danger of inconsistent verdicts was “merely speculative.” For example, the HOA would only have a need to bring another declaratory judgment action in South Carolina if the trial court in the North Carolina action determined that the Insurer had no duty under the policy. Similarly, in their brief, the Developers acknowledged the speculative nature of a second declaratory judgment action by noting that the HOA would “likely” file such an action in South Carolina. With nothing further in the record to demonstrate that there would likely be inconsistent verdicts, the Court dismissed the Developers’ appeal.

The North Carolina Court of Appeals dismissed an appeal of a denial of a summary judgment motion by a subcontractor and subconsultant on the grounds that the appeal did not pertain to a substantial right, despite the fact that the case against the general contractor and designer had been dismissed.

The case arose from alleged defects in the renovation of a restaurant owned by Cameron Hospitality, Inc. (“Owner”). Cameron engaged Cline Design Associates, PA (“Designer”) as the architect for the project and Inland Construction Company (“General Contractor”) as the general contractor. Cline in turn engaged Saber Engineering, P.A. (“Subconsultant”) as a subconsultant, and Inland retained Ross & Witmer, Inc. (“Subcontractor”) as an HVAC subcontractor. After the Owner found defects with the HVAC system, it sued the General Contractor, Designer, Subconsultant and Subcontractor. The Owner ultimately dismissed its claims against the General Contractor and Designer but left intact its claims against the Subcontractor and Subconsultant. The Subcontractor and Subconsultant then moved for summary judgment. Their motion was denied and they appealed. The Owner opposed their appeal on the grounds that the order was interlocutory and did not affect a substantial right. The Court of Appeals agreed and dismissed the appeal.

The Subcontractor and Subconsultant sought to apply the doctrines of *respondeat superior* and *res judicata* to the Owner’s claims against them. They argued that they were merely agents of the General Contractor and Designer, and that a dismissal of claims against a principal is *res judicata* with respect to similar claims against the agent. The Subcontractor and Subconsultant further argued that if the Court did not dismiss the appeal on the basis of *res judicata*, then there was a risk of inconsistent verdicts, and that avoiding inconsistent verdicts was a substantial right. The Court determined that there was no substantial right involved and no issue of *res judicata* since the dismissal of claims against a principal was not *res judicata* with regard to claims against an agent. While dismissal of claims against an agent was *res judicata* with respect to claims against the principal, the opposite was not true: dismissal of claims against a principal does not operate as *res judicata* with regard to claims against an agent as the principal’s liability is only derivative and based on that of the agent. The Court also noted that the appellants’ argument was flawed in that they were subcontractors and thus not agents of the General Contractor and Designer for purposes of *respondeat superior*. 