

No. COA11-298

14th DISTRICT

NORTH CAROLINA COURT OF APPEALS

WILLIAM DAVID CARDEN,)
)
 Plaintiff,)
)
 v.)
)
 OWLE CONSTRUCTION, LLC)
 REGIONAL NEUROSURGERY, PLLC,)
)
 Defendants.)

From Durham County
No. 06 CvS 06720

DEFENDANT APPELLEE'S BRIEF

CLERK COURT OF APPEALS
 OF NORTH CAROLINA
 2011 JUL 14 PM 12:26

FILED

INDEX

TABLE OF CASES AND AUTHORITIES	ii
STATEMENT OF FACTS	1
ARGUMENT	4
THE TRIAL COURT CORRECTLY CONCLUDED THAT THIS ACTION HAD BEEN DISMISSED IN THE CHEROKEE TRIBAL COURT AND WAS NOT PENDING IN DURHAM COUNTY SUPERIOR COURT	4
A. THE PLAINTIFF'S CASE WAS TRANSFERRED TO THE CHEROKEE COURT BY CONSENT, AND WAS THERE VOLUNTARILY DISMISSED.	5
B. THE CHEROKEE COURT CASE IS NOT A SEPARATE CASE FROM THE DURHAM COUNTY SUPERIOR COURT FILING.	5
C. THE PLAINTIFF'S JURISDICTIONAL ARGUMENTS DO NOT APPLY TO THE CASE AT BAR.	7
CONCLUSION	10
CERTIFICATE OF SERVICE	12

TABLE OF CASES AND AUTHORITIES

Cases

In Re Peoples, 296 N. C. 109, 250 S.E. 2d 890 (1978) . . . 9

Shanaghan v. Cahill, 58 F. 3rd 106 (4th Cir. 1995) 9

Silver Surprize, Inc. v. Sunshine Mining Co., 74 Wash.
2d 519, 523, 455 P. 2d 334, 336-337 (1968) 9

Statutes

28 U.S.C. §1367(a) 8

N.C.G.S. §1-75.12 5

N.C.G.S. §1A-1 Rule 41 10

Cherokee Code §7-2(3). 10

Cherokee Code §7-14 10

NORTH CAROLINA COURT OF APPEALS

WILLIAM DAVID CARDEN,)	
)	
Plaintiff,)	
)	From Durham County
v.)	No. 06 CvS 06720
)	
OWLE CONSTRUCTION, LLC)	
REGIONAL NEUROSURGERY, PLLC,)	
)	
Defendants.)	

DEFENDANT APPELLEE'S BRIEF

STATEMENT OF THE FACTS

The Defendant provides a brief statement of the facts for the sole purpose of emphasizing undisputed facts relevant to this appeal.

On December 12, 2003, the Plaintiff, as a pedestrian on or near Highway 19 in Cherokee, North Carolina, was struck by an automobile. The Plaintiff filed an action in Durham County Superior Court on or about December 8, 2006 against Harrah's NC Casino Company, LLC, Harrah's Operating Company, Inc., and Owle Construction, LLC. The complaint alleged that the defendants were negligent in the construction of a sidewalk adjacent to Highway 19, and that such negligence was the proximate cause of the Plaintiff's injuries and damages. (R pp. 21-28) The

defendants filed answers denying negligence and asserting affirmative defenses, including contributory negligence. (R pp. 29-40)

On March 12, 2008, defendants Harrah's NC Casino Company, LLC and Harrah's Operating Company, Inc. filed motions in Durham County Superior Court to dismiss the case for lack of subject matter jurisdiction, to dismiss the case for failing to name the Tribal Casino Gaming Enterprise as a necessary party, to remove the case to the Cherokee Court, and to dismiss for failure to state a claim for which relief can be granted. (R pp. 43-47) Notably, the motion to remove cites Rule 12(b)(3) of the North Carolina Rules of Civil Procedure -- the rule regarding improper venue -- and states:

. . . in support of the Motion [the Defendants] show unto the Court that the events which are the subject of this action occurred on the Cherokee Indian Reservation, that several material witnesses live in and around Cherokee and the Cherokee Court is a more convenient forum than is Durham County, North Carolina, and that the Cherokee Court will grant full faith and credit to an order entered in the General Court of Justice removing this case to the Cherokee Court. Several injury cases previously brought in the General Court of Justice in the last three years have been removed to the Cherokee Court.

(R p. 45)

On April 19, 2008, a Consent Order filed in Durham County Superior Court directed that the matter be removed to Cherokee Tribal Court, and that the Durham County Clerk of Superior Court

forward the file to the Cherokee Clerk of Court. The Consent Order further provided that after the Durham Clerk transferred the file to the Cherokee Court, the Plaintiff was to file an amended complaint naming the Tribal Casino Gaming Enterprise as a party defendant. (R pp. 48-50)

The Cherokee Court accepted the case. The Tribal Casino Gaming Enterprise was added as a party defendant. The Cherokee Court conducted a jury trial from November 3, 2009 to November 18, 2009. The jury deadlocked, and the Cherokee Court entered an order granting a mistrial on December 15, 2009. (R 54-58)

Following the mistrial, the Cherokee Court ordered a mediation of the case. (R p. 59) At mediation, the Plaintiff settled with the Harrahs defendants and the Tribal Casino Gaming Enterprise (the "tribal defendants"). The Plaintiff filed a Notice of Dismissal with Prejudice as to the tribal defendants in the Cherokee Court on May 19, 2010. (R p. 63)

The Plaintiff then sought an order in Cherokee Court to stay or dismiss the action to "effectively transfer the case to Superior Court of Durham County." (R p. 68) The Plaintiff argued that the dismissal of the tribal defendants from the case destroyed the Cherokee Court's jurisdiction over the case, and thus mandated a transfer of the case back to Durham County Superior Court. By order entered September 2, 2010, the Cherokee Court denied the motion to transfer, finding that the

Cherokee Court had jurisdiction over the parties and the subject matter of the action. (R pp. 68-72) On October 27, 2010, the Plaintiff filed a Voluntary Dismissal without Prejudice in the Cherokee Court as to the remaining defendant, Owle Construction, LLC. (R p. 73)

On October 21, 2010, the Plaintiff filed a Motion to Lift Stay in Durham County Superior Court. (R p. 51) The Honorable Shannon Joseph, Superior Court Judge Presiding, heard arguments on the motion on December 15, 2010, and entered an Order denying the motion on December 16, 2010. Judge Joseph's Order found that the Plaintiff's action had been dismissed without prejudice, and that the Plaintiff could refile an action against the defendant Owle Construction "if proper under applicable law." The Court expressly did not reach any jurisdictional issues, and made no findings or rulings concerning the proper jurisdiction, venue or forum for any refiling of any action. (R pp. 75-78)

ARGUMENT

THE TRIAL COURT CORRECTLY CONCLUDED THAT THIS ACTION HAD BEEN DISMISSED IN THE CHEROKEE TRIBAL COURT AND WAS NOT PENDING IN DURHAM COUNTY SUPERIOR COURT.

The Plaintiff argues that Judge Joseph's denial of the Motion to Lift Stay is erroneous because: (1) no mechanism exists to transfer a case from North Carolina Superior Court to the Cherokee Court; and (2) the Cherokee Court had no

jurisdiction of the case after the dismissal of the tribal defendants. These arguments misconstrue the facts and the law.

A. THE PLAINTIFF'S CASE WAS TRANSFERRED TO THE CHEROKEE COURT BY CONSENT, AND WAS THERE VOLUNTARILY DISMISSED.

The Plaintiff contends that no statutory mechanism exists to remove or transfer a case from North Carolina state court to Cherokee Court, and that, therefore, the Plaintiff's case remained open in Durham County after the Plaintiff dismissed the case in Cherokee Court. While it is true that no statute directly governs transfers to the Cherokee Court, Plaintiff's argument completely ignores the fact that he consented to have his case adjudicated by the Cherokee Court. Although he voluntarily submitted to both the subject matter and *in personam* jurisdiction of the Cherokee Court, and voluntarily participated in a multi-week jury trial in that forum, he now argues that his dismissal of his case in Cherokee Court has no effect. Such a result would be illogical, and would inappropriately call into question the legitimacy of the Cherokee Court.

B. THE CHEROKEE COURT CASE IS NOT A SEPARATE CASE FROM THE DURHAM COUNTY SUPERIOR COURT FILING.

The Plaintiff cites N.C.G.S. §1-75.12 (Stay of proceedings to permit trial in a foreign jurisdiction) in support of an argument that his case survived in Durham County Superior Court after he dismissed it in the Cherokee Court. The reliance on

the statute is misplaced. The statute simply provides a mechanism for a party to make a motion for stay of a North Carolina action to allow suit in another jurisdiction. The case at bar involved no "Motion for Stay" filed under the statute; the case was transferred by Consent Order pursuant to a Motion to Remove filed by the tribal defendants.

Moreover, the statute and the cases decided under it all contemplate two or more separate cases filed or to be filed in different jurisdictions. Unlike the cases interpreting the statute, the case at bar does not involve two separate court proceedings filed in separate forums or separate venues. This case involves one court proceeding, originally filed in the North Carolina Superior Court for Durham County and then transferred to the Cherokee Court with the Plaintiff's consent. The Consent Order accomplishing the transfer acknowledges that the case is being "removed" to the Cherokee Court. The Order directs the Durham County Clerk of Superior Court to transfer the case file to the Cherokee Court. The Cherokee Court accepted the case, and the case is now completely dismissed.

While the transfer of this case was not accomplished pursuant to a removal or transfer statute per se, the situation is analogous to two different scenarios: (1) the removal of a case filed in state court to federal court, and (2) the transfer of a North Carolina Superior Court case from one county to

another. Examination of either of the analogous scenarios shows that Judge Joseph's ruling is correct. If a case removed to federal court is voluntarily dismissed in the federal court, the case is not somehow revived in state court. Similarly, if venue in a state Superior Court case is transferred from, for example, Durham County Superior Court to Jackson County Superior Court, a voluntary dismissal in Jackson County does not revive the case in Durham County.

Therefore, the Plaintiff's case is not revived in Durham County Superior Court after its dismissal in Cherokee Court. When the Plaintiff dismissed his case in the Cherokee Court, his cause of action was terminated. Since his cause of action was terminated, no case regarding the Plaintiff's claims against the defendant Owle Construction was open in December, 2010. Thus, Judge Joseph's ruling denying the Plaintiff's Motion to Lift Stay was correct.

C. THE PLAINTIFF'S JURISDICTIONAL ARGUMENTS DO NOT APPLY TO THE CASE AT BAR.

The Plaintiff also argues that after dismissal of the tribal defendants, the Cherokee Court no longer had subject matter jurisdiction over the Plaintiff's case, and thus the Plaintiff should be allowed to proceed in Durham County Superior Court despite his dismissal filed in the Cherokee Court. This argument is erroneous for several reasons.

First, the question of subject matter jurisdiction was not before Judge Joseph when she heard the Motion to Lift Stay in Durham County. Indeed, Judge Joseph's Order specifically states that the Court does not reach any issue of subject matter jurisdiction. The Motion to Lift Stay was not decided upon the basis of subject matter jurisdiction, and therefore, that issue is not before this Court.

Secondly, the Plaintiff in this case voluntarily submitted to the Cherokee Court's jurisdiction. This case does not involve the dismissal of a pending case in a different forum on jurisdictional grounds and then a request for the lifting of a stay in a separate case. Here, the Plaintiff entered into a Consent Order transferring his case to the Cherokee Court for resolution. In so doing, he consented to the jurisdiction of the Cherokee Court. He should not now be allowed to, in effect, unilaterally rescind his consent to that jurisdiction by procedural maneuver.

Thirdly, in any event, concepts of pendent jurisdiction or supplemental jurisdiction apply to this case. Here again, the case is analogous to federal court proceedings. If a case is filed in state court with both federal and state court claims, is then removed to federal court, and the federal claims are dismissed, the federal court may adjudicate the state court claims under its supplemental jurisdiction pursuant to 28 U.S.C.

§1367(a). See *Shanaghan v. Cahill*, 58 F. 3rd 106 (4th Cir. 1995). The elimination of the separate federal subject matter jurisdiction does not eliminate the federal court's ability to adjudicate state court claims.

This concept is grounded in our common law. The Cherokee Court considered common law in rejecting the Plaintiff's jurisdictional arguments raised in his motion to transfer the case back to Durham County Superior Court. As the Cherokee Court correctly pointed out in its order denying the Plaintiff's motion to transfer, "Once the jurisdiction of a court or administrative agency attaches, the general rule is that it will not be ousted by subsequent events. This is true even when the events are of such a nature that they would have prevented jurisdiction from attaching in the first instance." Cherokee Court Order at R p. 69, citing *In Re Peoples*, 296 N. C. 109, 250 S.E. 2d 890, 911 (1978). As the Court stated, "If the converse of this were true, it would be within the power of [a party] to preserve or destroy jurisdiction of the court at his own whim." Cherokee Court Order at R pp 69-70, citing *Silver Surprise, Inc. v. Sunshine Mining Co.*, 74 Wash. 2d 519, 523, 455 P. 2d 334, 336-337 (1968).

Had the Plaintiff seriously contested the Cherokee Court's rejection of his jurisdictional arguments, he could have

appealed the Court's decision to the Cherokee Supreme Court.¹ Instead of pursuing such an appeal, he chose to dismiss his case. He should not be allowed to now challenge the Cherokee Court's jurisdiction through a Motion to Lift Stay in North Carolina court. He should be bound by his decision to forego an appeal of the Cherokee Court's decision, and he should be bound by his dismissal.

Under the terms of his voluntary dismissal of his case, the Plaintiff is free to refile his case against the Defendant in an appropriate forum. Any argument concerning the proper forum for any refiling of his case is not properly before this Court and is not ripe for consideration.

CONCLUSION

After the Cherokee Court denied the Plaintiff's request to transfer the case back to Durham County Superior Court, he voluntarily dismissed his action pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure.² The dismissal functions as a final resolution of his claim, just as a summary judgment, directed verdict, or judgment in the Cherokee Court would have functioned as a final resolution of his claim. Had

¹The Cherokee Code provides for a Judicial Branch of the Eastern Band of Cherokee Indians. The Judicial Branch consists of a Trial Court, called the Cherokee Court, and a Supreme Court. The Supreme Court hears appeals from the Trial Court. Cherokee Code §7-2(3).

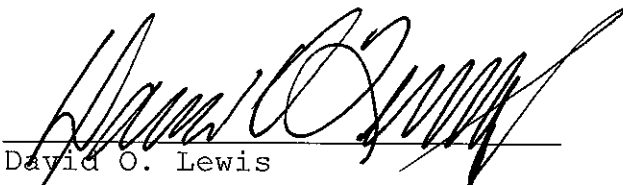
² §7-14 of the Cherokee Code provides that proceedings in the Judicial Branch of the Cherokee Courts shall be governed by the North Carolina Rules of Civil Procedure. The Code states, "The Cherokee Tribal Council adopts these North Carolina rules as a matter of comity to promote respect for the Cherokee Courts and to facilitate the practice of law in the Cherokee Courts."

the Cherokee Court trial resulted in a summary judgment, directed verdict or adverse judgment against the Plaintiff, the Plaintiff would be unable to simply ignore the result against him and proceed in Durham County Superior Court. Therefore, logic dictates that he should not be allowed to simply ignore his voluntary dismissal of his case and then proceed in Durham County Superior Court.

The Defendant respectfully requests that this Court affirm Judge Joseph's Order denying the Plaintiff's Motion to Lift Stay.

This the 14th day of July, 2011.

BRYANT, LEWIS & LINDSLEY, P.A.



David O. Lewis
Attorney for the Defendant-Appellee
P.O. Box 341
Durham, North Carolina 27702
Telephone: (919) 688-6341
Fax: (919) 688-6343
Email: david.lewis@bll-nclaw.com

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the attached **DEFENDANT-APPELLEE'S BRIEF** in the above-referenced action upon all other parties to this cause by:

___ Hand delivering a copy hereof to the attorney for each said party addressed as follows:


X Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

Mr. Michael W. Patrick
LAW OFFICE OF MICHAEL W. PATRICK
P.O. Box 16848
Chapel Hill, North Carolina 27516

___ Depositing a copy hereof with a nationally recognized overnight courier service, for overnight delivery, addressed to the attorney for each said party as follows:

___ Telecopying a copy hereof to the attorney for each said party as follows:

This the 14th day of JULY, 2011.



David O. Lewis
Attorney for Defendant-Appellee