

Vance Const. Co., Inc. v. Duane White Land Corp., 127 N.C.App. 493 (1997)
490 S.E.2d 588

127 N.C.App. 493
Court of Appeals of North Carolina.

VANCE CONSTRUCTION COMPANY, INC., Plaintiff,
v.
DUANE WHITE LAND CORPORATION, Defendant,
and
Eaton Ferry Marina, Inc., Intervenor.

No. COA96–1504.

|
Oct. 7, 1997.

Synopsis

Following affirmance, 120 N.C.App. 401, 462 S.E.2d 814, of judgment for contractor against project owner for balance due and for owner against contractor for construction defects, contractor filed motion for relief from judgment, alleging it was entitled to credit against amount awarded to owner on its counterclaim as result of subcontractor's payment for defective building materials. The Edgecombe County Superior Court, Frank R. Brown, J., granted motion, and owner appealed. The Court of Appeals, Smith, J., held that trial court lacked jurisdiction to hear contractor's motion.

Vacated and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (6)

- [1] **Courts** 🔑 Time of making objection
Objection to subject matter jurisdiction may be made at any time during course of action. Rules Civ.Proc., Rule 12(h) (3), G.S. § 1A–1.

3 Cases that cite this headnote
- [2] **Evidence** 🔑 Existence, organization, and terms of courts
Court of Appeals would take judicial notice of fact that Chief Justice of Supreme Court by order assigned resident or regular judges of superior courts to various counties or judicial districts as they appeared on master calendar or by separate commission. Const. Art. 4, § 11; G.S. § 7A–47.
- [3] **Judges** 🔑 Exercise of powers beyond territorial limits of jurisdiction
Jurisdiction of superior court judge is ordinarily limited to district to which he is assigned or resides. G.S. § 7A–47.1.
- [4] **Evidence** 🔑 Existence, organization, and terms of courts

Vance Const. Co., Inc. v. Duane White Land Corp., 127 N.C.App. 493 (1997)

490 S.E.2d 588

Court of Appeals would take judicial notice of assignment of trial judge to hold court, and of county that made up district to which he was assigned

[5] **Courts** 🔑 Consent of Parties as to Jurisdiction

Judges 🔑 Exercise of powers beyond territorial limits of jurisdiction

Because superior court judge had no commission from Chief Justice or other authorization to hold session of superior court in district other than that to which he was assigned, judge lacked jurisdiction to hear contractor's motion for relief from judgment, notwithstanding that parties consented to motion being heard in that county. Const. Art. 4, § 11; G.S. § 7A-47; **Superior and District Courts Rule 2.1**.

[6] **Courts** 🔑 Of cause of action or subject-matter

Courts 🔑 Waiver of Objections

Subject matter jurisdiction cannot be conferred upon court by consent, waiver, or estoppel.

3 Cases that cite this headnote

****588 *493** Appeal by defendant and intervenor from order entered 25 October 1996 by Judge Frank R. Brown in Edgecombe County Superior Court. Heard in the Court of Appeals 27 August 1997.

Attorneys and Law Firms

Banzet, Banzet & Thompson by Lewis A. Thompson, III, Warrenton, for defendant/intervenor appellant.

Zollicoffer & Long by Nicholas Long, Jr., Henderson, for plaintiff appellee.

Opinion

SMITH, Judge.

In February of 1990, Vance Construction Company, Inc. ("plaintiff"), agreed to build a boat storage facility for Duane White Land Corporation, predecessor to Eaton Ferry Marina, Inc. (collectively "defendant"). Plaintiff subsequently filed this action in Warren County Superior Court seeking to recover the balance due from defendant for the construction of the boat storage facility. Defendant counterclaimed for damages as a result of defects in the facility's construction. On 3 June 1994, the trial court, with Judge Frank R. Brown presiding, entered judgment awarding plaintiff \$41,863.67 with interest for the construction of the facility and \$15,839.05 ****589** with interest for repairs to the sales and service center building, and ***494** also awarding defendant \$12,238.00 with interest for defects in the facility's construction.

Prior to the entry of judgment, defendant contacted Varco-Pruden Buildings, Inc. ("Varco-Pruden"). Varco-Pruden, a division of United Dominion Industries, Inc. ("United Dominion"), was a subcontractor for plaintiff and had supplied the metal building components plaintiff used in the construction of the facility for defendant. On 19 April 1994, defendant and Varco-Pruden entered into a settlement agreement providing that Varco-Pruden would pay defendant \$13,900.00 for "problems [that] arose with the materials that were used in the construction of the storage facility...." On or about 19 May 1995, United Dominion paid

Vance Const. Co., Inc. v. Duane White Land Corp., 127 N.C.App. 493 (1997)

490 S.E.2d 588

defendant \$13,400.00 as payment in full for all claims by defendant against United Dominion and Varco-Pruden arising out of the defects in the materials used in the facility's construction.

The trial court's June 1994 judgment was later affirmed by this Court in *Vance Construction Co. v. Duane White Land Corp.*, 120 N.C.App. 401, 462 S.E.2d 814 (1995). On 8 November 1995, plaintiff and defendant entered into a consent order allowing payment which authorized the release to plaintiff of \$62,574.40 plus \$100.48 in court costs, such funds being held by the Warren County Clerk of Court as a cash bond paid by defendant. Plaintiff subsequently filed a motion for relief from judgment pursuant to N.C. Gen.Stat. § 1A-1, Rule 60(b)(5) (1990), alleging it was entitled to a credit against the amount awarded to defendant on its counterclaim as a result of United Dominion's payment of \$13,400.00 to defendant for the defective building materials. Plaintiff's motion was heard after notice and by consent at the 23 September 1996 term of Edgecombe County Superior Court, Judge Frank R. Brown presiding. Judge Brown granted plaintiff's motion for relief on 25 October 1996.

On appeal, defendant contends the trial court erred by granting plaintiff's motion for relief. However, we do not reach this issue, since Judge Brown did not have jurisdiction to hear or grant plaintiff's motion, and his 25 October 1996 order is therefore vacated.

[1] “Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” N.C. Gen.Stat. § 1A-1, Rule 12(h)(3) (1990). An objection to subject matter jurisdiction may be made at any time during the course of the action. *Turner v. Hatchett*, 104 N.C.App. 487, 488, 409 S.E.2d 747, 748 (1991) (citations omitted).

[2] [3] *495 N.C. Const. Art. IV, § 11 provides that “[t]he Chief Justice of the Supreme Court, acting in accordance with rules of the Supreme Court, shall make assignments of Judges of the Superior Court and may transfer District Judges from one district to another for temporary or specialized duty.” We take judicial notice of the fact that the Chief Justice of the North Carolina Supreme Court by order assigns resident or regular judges of the superior courts to various counties or judicial districts as they appear on the master calendar or by a separate commission. According to N.C. Gen Stat. § 7A-47 (1995),

[a] regular superior court judge, duly assigned to hold the courts of a county, or holding such courts by exchange, shall have the same powers in the district or set of districts as defined in G.S. 7A-41.1(a) in which that county is located, in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district or set of districts as defined in G.S. 7A-41.1(a) has....

In addition, “[i]n any case in which the superior court in vacation has jurisdiction, and all the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or during a session of court, at their election.” N.C. Gen.Stat. § 7A-47.1 (1995). However, the jurisdiction of a superior court judge is ordinarily limited to the district to which he is assigned or resides. *Baker v. Varser*, 239 N.C. 180, 188, 79 S.E.2d 757, 763 (1954).

[4] [5] [6] “[W]e note *ex mero motu* that we may take judicial notice of the assignments of trial judges to hold court, of the counties that **590 make up a certain district and of the resident district of a superior court judge.” *Turner*, 104 N.C.App. at 489, 409 S.E.2d at 748 (quoting *State v. Sauls*, 299 N.C. 319, 324, 261 S.E.2d 839, 842 (1980)). We therefore take judicial notice of the following: During September of 1996, Judge Brown was assigned to District 7BC, which included Edgecombe County. At that time he was not assigned to hold any session of superior court in Warren County, located in District 9. The instant case had not been designated as exceptional with Judge Brown assigned to hear the same pursuant to **Rule 2.1 of the General Rules of Practice for the Superior and District Courts**. Because Judge Brown had no commission from the Chief Justice or other authorization to hold a session of superior court in Warren County or District 9 during the week plaintiff's motion was

Vance Const. Co., Inc. v. Duane White Land Corp., 127 N.C.App. 493 (1997)

490 S.E.2d 588

heard, the order entered is void. *See Baker*, 239 N.C. at 185, 79 S.E.2d at 761. It is irrelevant that the parties consented to the motion being heard in Edgecombe County, as *496 subject matter jurisdiction “ ‘cannot be conferred upon a court by consent, waiver, or estoppel.’ ” *Deep River Citizens Coalition v. North Carolina Dept. of E.H.N.R.*, 119 N.C.App. 232, 235, 457 S.E.2d 772, 774 (1995) (quoting *State v. Earley*, 24 N.C.App. 387, 389, 210 S.E.2d 541, 543 (1975)).

For the above reasons, the order granting plaintiff's motion for relief pursuant to N.C. Gen.Stat. § 1A–1, Rule 60(b)(5) is vacated and the case is remanded to the Warren County Superior Court. In the event of a rehearing, we recommend the trial court make additional findings regarding plaintiff's knowledge, if any, of United Dominion's payment to defendant at the time it entered the consent order with defendant.

Vacated and remanded.

LEWIS and JOHN, JJ., concur.

All Citations

127 N.C.App. 493, 490 S.E.2d 588

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.