NO. COA02-45

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

SEBASTIAN DAVIS,
Plaintiff,

v. Guilford County
No. 00 CVS 9625

CLARENCE E. LLOYD M.D.,
CHESTER S. CLACK, and
THREEFOLD REALTY, INC.,
Defendants.

Appeal by plaintiff from judgments entered 8 November 2001 by Judge Melzer A. Morgan in Guilford County Superior Court. Heard in the Court of Appeals 19 September 2002.

James B. Weeks, for plaintiff-appellant.

Burton & Sue, L.L.P., by Gary K. Sue and Stephanie W. Anderson, for defendant-appellees Clarence E. Lloyd, M.D. and Chester S. Clack.

Stern & Klepfer, L.L.P, by James W. Miles, Jr., for defendant-appellee Threefold Realty, Inc.

HUDSON, Judge.

Appellant Sebastian Davis ("Davis") filed suit against the appellees, alleging that he was injured after the ceiling of a house owned and maintained by the appellees collapsed and fell on him. Appellees Clarence E. Lloyd, M.D. ("Lloyd") and Chester S. Clack ("Clack") moved for summary judgment, which the trial court granted. For the reasons set forth in the following opinion, we dismiss this appeal as interlocutory.

I.

Lloyd and Clack owned a house in Greensboro, North Carolina, and employed appellee Threefold Realty, Inc. ("Threefold") to lease and maintain the residence. On August 20, 1997, Davis entered the home to visit the current tenants when a portion of the ceiling collapsed and fell, injuring him.

Davis filed suit in August 2000 against Lloyd and Clack, the owners of the residence, and against Threefold as Lloyd and Clack's agent. Davis alleged, inter alia, that the appellants knew or should have known that the ceiling needed repair, that the appellants failed to make the necessary repairs, and that the appellants failed to exercise reasonable care and diligence in maintaining the residence. Lloyd and Clack answered the complaint, although Threefold did not, as its president apparently believed that Lloyd and Clack's lawyer also represented it. Davis moved for an entry of default against Threefold, which was granted in December 2000.

Lloyd and Clack filed a motion for summary judgment in September 2001 and filed an amended motion in October 2001. Davis also filed his own summary judgment motion. On 8 November 2001, the trial court granted summary judgment in favor of Lloyd and Clack. Also on that day, the trial court set aside the entry of default against Threefold. Davis now appeals (1) the entry of summary judgment in favor of Lloyd and Clack; (2) the denial of Davis's motion for summary judgment; and (3) the setting aside of the entry of default against Threefold.

II.

We decline to reach the merits of any of these issues. A grant of summary judgment for fewer than all defendants is an interlocutory order from which generally there is no right to appeal. N.C. R. Civ. P. 54(b) (2001); *Liggett Group, Inc. v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). A party is, however, permitted to appeal an interlocutory order in two circumstances: (1) where the order is final as to some claims or parties, and the trial court certifies pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure that there is no just reason to delay the appeal, *Alford v. Catalytica Pharms., Inc.*, 150 N.C.App. 489, 491, 564 S.E.2d 267, 268 (2002); or (2) where the order deprives the appellant of a substantial right that would be lost unless immediately reviewed, *Turner v. Norfolk S. Corp.*, 137 N.C.App. 138, 141, 526 S.E.2d 666, 669 (2000).

In this case, because the trial court made no certification, the first option is unavailable. Regarding the second, Davis argues in his brief that the liability of the principals--Lloyd and Clack--must be resolved before the liability of the agent--Threefold--because agents typically are not deemed liable unless and until their principals are found to be liable. We disagree.

It is true that the Supreme Court has held that a grant of summary judgment as to fewer than all the defendants affects a substantial right when there is the possibility of inconsistent verdicts. *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982). As the Court explained, it is the "plaintiff's right

to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries." *Id.*, 293 S.E.2d at 409. Our court, however, has examined the issue in the more specific context of derivative liability and held that there is no "possibility of inconsistent verdicts [and thus no substantial right affected] when a principal whose liability is derivative is determined to be not liable by the trial court and the claims against the alleged agent remain." *Florek v. Borror Realty Co.*, 129 N.C. App. 832, 834-85, 501 S.E.2d 107, 108 (1998); see also *Long v. Giles*, 123 N.C. App. 150, 153, 472 S.E.2d 374, 375 (1996).

Here, any liability on the part of Lloyd and Clack, the owners of the residence, hinges upon a finding that Threefold, the party that leased and maintained the residence, is liable. *See, e.g.*, *Long*, 123 N.C. App. at 153, 472 S.E.2d at 375-76 (noting that the liability of the principal is only derivative of the wrongful act of the agent). Because one party's liability depends upon the other's, there can be no possibility of inconsistent verdicts. This appeal is, therefore, dismissed in accordance with our procedural rules that are designed to "promote judicial economy by avoiding fragmentary, premature and unnecessary appeals and permit the trial court to fully and finally adjudicate all the claims among the parties before the case is presented to the appellate court." *Florek*, 129 N.C. App. at 836, 501 S.E.2d at 109 (citations and quotation marks omitted).

Dismissed.

Judge TIMMONS-GOODSON and CAMPBELL concur.

Report per Rule 30(e).