

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-551
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

VIRGINIA S. PETERS,
Plaintiff

v.

New Hanover County
No. 09 CVS 4356

NORTH STATE PARTNERS, LLC,
SEACOAST REALTY, INC.,
d/b/a COLDWELL BANKER SEA
COAST REALTY, and JON
EDWARD WILSON,
Defendants

Appeal by plaintiff from order entered 17 December 2010 and judgment entered 3 February 2011 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 11 October 2011.

Rice Law, PLLC, by Mark Spencer Williams, Richard Forrest Kern, and Stephen G. Domer, for plaintiff-appellant.

Coble Law Firm, PC, by Stephan E. Coble and Whitney C. Marshall, for defendant-appellee North State Partners, LLC.

CALABRIA, Judge.

Virginia S. Peters ("plaintiff") appeals from (1) the trial court's order granting summary judgment to North State Partners, LLC ("North State") on her second claim for relief; and (2) the

trial court's resulting declaratory judgment. We dismiss the appeal as interlocutory.

On 7 August 2008, plaintiff entered into a contract ("the purchase contract") with North State for (1) the purchase of real property in Wilmington, North Carolina ("the property"); and (2) the construction of a home on the property. The purchase price was \$789,000. Defendants Seacoast Realty, Inc., d/b/a Coldwell Banker Sea Coast Realty ("Seacoast") and Jon Edward Wilson ("Wilson") acted as plaintiff's buying agents.¹ Plaintiff paid North State \$2000 in earnest money at the time the contract was executed. On 19 August 2008, plaintiff paid North State an additional \$39,450 as a nonrefundable construction deposit.

The contract contained, *inter alia*, the following clause ("the appraisal clause"):

The Property must appraise at a value equal to or exceeding the purchase price or, at the option of the Buyer, this contract may be terminated and all earnest monies shall be refunded to Buyer, even if the Loan Condition has been waived as provided in paragraph 5. If this contract is NOT subject to a financing contingency requiring an appraisal, Buyer shall arrange to have the appraisal completed on or before _____.

¹ North State, Seacoast, and Wilson will collectively be referred to as "defendants."

Plaintiff subsequently sent Wilson a letter, dated 19 November 2008, indicating that she would be unable to complete the contract for health and financial reasons. [R p. 171] Plaintiff then obtained three separate appraisals for the property. The first appraisal assumed that a single family home which met plaintiff's proposed specifications had already been constructed on the property. This appraisal estimated that a fair market value of the property would have been \$725,000 as of 7 August 2008, the date plaintiff executed the purchase contract. On 16 February 2009, the property, as a lot without a home, appraised for \$198,000. On 4 March 2009, the lot alone appraised for \$188,000.

On 11 September 2009, plaintiff initiated an action against defendants in New Hanover County Superior Court. Plaintiff's complaint admitted that plaintiff did not intend to close on the purchase contract. However, the complaint included three claims for relief which, if successful, would have justified her refusal to perform: (1) plaintiff sought a declaratory judgment that the purchase contract did not comply with the statute of frauds and was therefore null and void; (2) plaintiff sought a declaratory judgment that the purchase contract was null and void because the appraisal clause had not been satisfied and

thus plaintiff was entitled to a return of her \$41,450; and (3) plaintiff alleged that North State had anticipatorily breached the purchase contract. The complaint's final claim alleged that Seacoast and Wilson breached their fiduciary duties to plaintiff. North State answered plaintiff's complaint and filed a counterclaim for breach of contract.

On 4 October 2010, plaintiff filed a motion for summary judgment solely on the issue of her second claim, which challenged the validity of the purchase contract based upon the appraisal clause. After a hearing, the trial court granted summary judgment on this issue to North State on 17 December 2010. On 3 February 2011, the trial court entered a declaratory judgment solely on plaintiff's second claim, declaring that the appraisal clause did not invalidate the contract and as a result, plaintiff was not entitled to relief on her second claim. Plaintiff appeals.²

As an initial matter, we must address the interlocutory nature of plaintiff's appeal. The trial court's order granting summary judgment and its declaratory judgment were interlocutory in that they only addressed plaintiff's second claim for relief;

² Seacoast and Wilson were not involved in plaintiff's second claim. As a result, they are not a party to this appeal.

they did not address plaintiff's remaining three claims or North State's counterclaim.

An appeal from an interlocutory order is permissible only if [(1)] the trial court certified the order under Rule 54(b) of the Rules of Civil Procedure, or (2) the order affects a substantial right that would be lost without immediate review. The burden rests on the appellant to establish the basis for an interlocutory appeal.

Chidnese v. Chidnese, ___ N.C. App. ___, ___, 708 S.E.2d 725, 730 (2011) (citation omitted). Neither the trial court's summary judgment order nor its declaratory judgment include a Rule 54(b) certification, and thus, the instant case is only properly before us if it affects a substantial right.

In her "Statement of Grounds for Appellate Review," plaintiff contends:

The 17 December 2010 and 3 February 2011 orders of the Trial Court, when taken together, foreclose any possibility of relief on Appellant's claims and as such constitute a final judgment as to her claims. The Trial Court's conclusions that Appellant breached a valid contract and has no relief under the contract available to her constitute rulings which have a significant and lasting effect on the substantial rights of Appellant, Virginia S. Peters[.]

Plaintiff cites two cases in support of her argument. In *Davidson v. Knauff Ins. Agency*, this Court held that "if the

final disposition of multiple claims depends upon the determination of any common fact issues, then the parties ordinarily have a substantial right that those issues be determined by the same jury." 93 N.C. App. 20, 26, 376 S.E.2d 488, 491-92 (1989). In *Whitehurst v. Corey*, this Court held that "[a] party has a 'substantial right' to avoid separate trials of the same legal issues." 88 N.C. App. 746, 747, 364 S.E.2d 728, 729 (1988).

In the instant case, plaintiff does not argue or explain how the trial court's summary judgment order and declaratory judgment on her second claim for relief either overlap with the facts underlying her remaining claims or involve the same legal issues as those claims, and we do not perceive any such overlap. Her assertion of a substantial right is based upon an overly broad reading of the trial court's summary judgment order and declaratory judgment. Plaintiff's motion for summary judgment and the trial court's rulings on that motion clearly state that they only involve plaintiff's second claim for relief.

In her second claim, plaintiff asserted a legal justification for her failure to perform the purchase contract: that the purchase contract was invalid because the contingency clause had not been satisfied. Reading the trial court's

rulings in this context, it is clear that the trial court only addressed the validity of the contract pursuant to the appraisal clause; it did not address any of plaintiff's remaining challenges to the purchase contract. Thus, under the trial court's rulings, the appraisal clause, standing alone, could not operate to excuse plaintiff's failure to perform her obligations which were required by the purchase contract.

None of plaintiff's remaining claims hinge upon the validity of the appraisal clause. To the contrary, the resolution of the issues regarding whether the contract complies with the statute of frauds, whether North State had anticipatorily breached the contract prior to plaintiff's breach, and whether Seacoast and Wilson breached a fiduciary duty to plaintiff, do not require any consideration of the appraisal clause whatsoever. Since plaintiff has failed to meet her burden of establishing a substantial right, her appeal must be dismissed.

Dismissed.

Judges MCGEE and HUNTER, Robert C. concur.

Report per Rule 30(e).