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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-327

Filed 6 February 2024

Iredell County, No. 22 CVS 1856

MARVIN J. CASHION, BETTY CASHION WALLEY, PHILLIP D. CASHION, CAROL CASHION COOKE, GEORGE DANIELS, AS SUCCESSOR-IN-INTEREST TO LYND A CASHION DANIELS, BECKY CASHION HART, PRESSLEY L. CASHION, MARTHA KAY SIMMS MILLER, and GARY SIMMS, each Individually and Derivatively on Behalf of CASHION FARMS, LLC, Plaintiffs,

v.

MICHAEL H. CASHION and DIANN B. CASHION, Defendants,

and

CASHION FARMS, LLC, PATRICIA CASHION KISTLER, and PAMELA CASHION JOHNSON, Nominal Defendants.

Appeal by defendants from order entered 17 November 2022 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 14 November 2023.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, John R. Buric, and John R. Brickley, for plaintiffs-appellees.

Pope McMillan, P.A., by Christian Kiechel and Lisa M. Valdez, for defendants-appellants Michael H. Cashion and Diann B. Cashion, and nominal-defendant-appellant Cashion Farms, LLC.

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No brief filed for nominal-defendants-appellees Patricia Cashion Kistler and Pamela Cashion Johnson.

ZACHARY, Judge.

This case arises from an interlocutory order entered during litigation concerning the management of nominal defendant Cashion Farms, LLC (“the Company”). Defendants Michael H. Cashion, Diann B. Cashion, and the Company appeal from the trial court’s order granting Plaintiffs’ motion for a preliminary injunction. After careful review, we dismiss this appeal as interlocutory.

I. Background

The underlying litigation in this matter concerns the management of the Company as it attempts to sell some or all of its 72.18 acres of real property, which is located in Mooresville (“the Property”). In 2004, Claude W. Cashion formed the Company to facilitate the transfer of the Property to his nieces and nephews. He conveyed the Property to the Company, and following his death in 2010, some of the nieces and nephews discussed selling the Property.

Defendant Michael H. Cashion was named as the sole manager of the Company, and subsequently appointed his wife, Defendant Diann B. Cashion, to serve as a manager as well. Plaintiffs, representing a group of the nieces and

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nephews,¹ negotiated an agreement to sell the entire Property and presented it to Defendant Michael H. Cashion for his consideration as manager in May 2022. Defendant Michael H. Cashion declined to execute Plaintiffs' proffered contract before the deadline expired. Thereafter, Defendant Michael H. Cashion executed an agreement ("the Executed Contract") to sell a portion of the Property to another buyer. Plaintiffs became "concerned that Defendant Michael [H. Cashion] has engaged in self-dealing and that [the Executed Contract] may not be in the [Company]'s best interests[.]" and thus "repeatedly sought information related to that contract[.]" which Defendants would not share. In particular, Plaintiffs were disturbed by the fact that the Executed Contract conveys only 66 of the Property's 72.18 acres; as Defendants Michael H. Cashion and Diann B. Cashion "own and reside on property adjacent to the Property," Plaintiffs allege that "they have an interest in preventing some of the Property from being developed to allow a buffer between their residence and the purchaser's mixed-use development."

The heart of the underlying litigation is whether the Plaintiffs are members of the Company, as they allege, or whether they are merely holders of "economic interest units[.]" as Defendants allege. The resolution of that question should determine the

¹ Nominal Defendants Patricia Cashion Kistler and Pamela Cashion Johnson ("the Individual Nominal Defendants") declined to join this action as plaintiffs, and were joined as defendants pursuant to N.C. Gen. Stat. § 1A-1, Rule 19(a) (2021). Although the Individual Nominal Defendants each filed a *pro se* answer to Plaintiffs' complaint, they did not participate in the proceedings resulting in the order from which appeal is taken, nor did they file any briefing on appeal.

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parties' respective rights with regard to the Executed Contract and the sale of the Property, but that is not the issue presently before us. Rather, this appeal concerns the preliminary injunction granted by the trial court during the course of the parties' litigation.

On 27 July 2022, Plaintiffs filed a motion for a temporary restraining order and preliminary injunction, and a verified complaint. Plaintiffs moved the trial court to enjoin Defendants from closing on the sale of the Property, and to order Defendants to provide a copy of the Executed Contract (1) to Plaintiffs, (2) to Plaintiffs' counsel for "attorneys' eyes only" review, or (3) to the trial court for *in camera* review. That same morning, Plaintiffs' counsel notified Defendants' counsel that the "motion for a TRO" would come on for hearing in Iredell County Superior Court during the afternoon of 27 July.

Plaintiffs' motion first came on for hearing on 27 July 2022, and at the trial court's suggestion, both parties attempted to settle the case. However, Defendants' counsel explained that the Executed Contract contained a confidentiality agreement, thus necessitating the third-party buyer's consent to release any information about the Executed Contract. Meanwhile, Plaintiffs' counsel informed the court that "[o]nce we get that information, we will be in a position to make the comparisons that we need. If it alleviates our concerns about comparability of the sale, we will dismiss the restraining order matter of this complaint, and perhaps all of it[.]" Therefore, the parties agreed to "hold open the matter for the restraining order" while Defendants'

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counsel tried to obtain the requisite consent.

Ultimately, the parties were unable to reach an agreement, and on 17 August 2022, Plaintiffs' counsel sent a message to the trial court coordinator and Defendants' counsel requesting "a hearing on my motion for injunctive relief." On 22 August 2022, the matter came on for a second hearing, which the trial court initially described as "for [P]laintiffs' motion for an injunction." Defendants' counsel replied that the hearing was for "a Temporary Restraining Order because there are two defendants that were not noticed[,] which Plaintiffs' counsel confirmed. At the conclusion of the hearing, the trial court again urged counsel for both parties to work toward an agreement regarding the sharing of the requested information.

The parties remained unable to come to an agreement, and on 31 August 2022, Plaintiffs' counsel requested another hearing on their motion. Via emails with the trial court coordinator, by 3 October 2022 the matter was set for hearing on 10 October 2022.

On 10 October 2022, the motion came on for hearing for the third time, which the trial court noted was "the first time on the record" for this matter. The trial court initially stated that it was "listed on for an injunction, but I know there has been a lot of other talk for weeks." When Plaintiffs' counsel began the hearing, he reiterated the outline of the agreement that the parties had tried but failed to reach, and explained the three alternative forms of injunctive relief that Plaintiffs sought in their motion. The parties' counsel also discussed the various affidavits and other

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documents submitted to the trial court over the course of these proceedings.

During the hearing, Defendants' counsel expressed confusion over the subject matter of the hearing:

I would also say, candidly, Your Honor, I don't know if we are here on a TRO or if we are here on an injunction. Because there are two other defendants [(the Individual Nominal Defendants)] that have been served and answered in this and they, to my knowledge, have not been given notice. So I assume this is the third hearing in a TRO. And there's been no offer of a bond, no discussion of a bond, in the event that something is granted that hinders this contract that's out there that's of a rather large sum.

So I am not sure -- candidly, I kind of feel like I'm in limbo here as to what this actually is, but I'm assuming it's a TRO hearing. . . .

The trial court responded by asking Defendants' counsel about Defendants' position as regards the forms of injunctive relief sought by Plaintiffs.

At the conclusion of the hearing, the trial court rendered its oral ruling on Plaintiffs' motion, granting the second of the three alternative forms of injunctive relief sought:

Well, here's what we're going to do. It's just kind of like we are all riding along in a car down the interstate and the car breaks down, runs out of gas. And we're all just sitting there saying well what are we going to do now? Nobody is wanting to get out and see if it is out of gas, push, or anything else.

Here's what we will do: [Plaintiffs' counsel], I'm going to ask you [to] prepare an order and get [Defendants' counsel] to look at it. But it's going to be triggered . . . three weeks from now, that by October the 31st, unless an alternate

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agreement has been reached by consent of the parties, that . . . [D]efendants will provide a copy of the contract to . . . [Plaintiffs'] transactional attorneys for review, subject to a confidentiality agreement.

And included in that confidentiality agreement, will mean that that agreement will not be copied or dispersed in any way, including to the clients of the transactional attorneys. In other words, it is to remain only in-house only, for the attorneys[] use. It is not to be e-mailed or in any other way dispersed.

The trial court explained that “the big thing I’m putting in there” was the three-week delay for the parties to “figure out something better between now and then. But if you can’t, we’ve got to do something to get this moving[.]”

On 17 November 2022, the trial court entered its order granting Plaintiffs’ motion for a preliminary injunction, finding as fact:

2. Plaintiffs’ Motion for Preliminary Injunction is properly before the Court.
3. Defendants and Cashion Farms received proper notice of the hearing on Plaintiffs’ Motion.
4. Plaintiffs have demonstrated a likelihood of success on the merits of at least their breach of contract claim as set forth in the Verified Complaint, at least as it relates to Plaintiffs’ assertion that Defendants have failed to provide Plaintiffs all information to which they are entitled under Cashion Farms’ Operating Agreement and North Carolina law.
5. Absent this Preliminary Injunction, Plaintiffs are likely to sustain irreparable loss, and issuance of this Preliminary Injunction is also necessary to protect Plaintiffs’ rights during the pendency of this litigation.

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6. The balance of the equities weighs in favor of granting injunctive relief.
7. Based upon the allegations in the Verified Complaint, Plaintiffs are entitled to a Preliminary Injunction, and their Motion for Preliminary Injunction should be allowed.

Accordingly, the trial court ordered:

1. Plaintiffs' Motion for Preliminary Injunction is GRANTED.
2. Defendants are hereby ordered to provide a copy of [the Executed Contract] to [Plaintiffs' transactional] attorneys This delivery is limited. [Plaintiffs' transactional attorneys] shall review the [Executed] Contract to meaningfully determine (on Plaintiffs' behalf) whether the terms of the [Executed Contract] are indeed similar to the terms of [Plaintiffs' contract].
3. [Plaintiffs' transactional attorneys] shall not make any copy of the [Executed C]ontract and shall not duplicate the [Executed] Contract in any form.
4. Until further Order of the Court, the [Executed] Contract shall be under an "Attorneys' Eyes Only" designation such that [Plaintiffs' transactional attorneys] may not provide a copy of the [Executed] Contract to anyone outside their law firm.

. . . .

7. Prior to October 31, 2022, the parties may, by mutual agreement, agree to an alternative performance. If the parties reach such agreement, such agreement will supersede this Order.

Defendants timely filed notice of appeal. On 18 November 2022, Defendants filed with this Court a motion for a temporary stay and a petition for a writ of

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supersedeas. On 22 November 2022, this Court allowed the motion for a temporary stay pending a ruling on the supersedeas petition, and on 4 January 2023, this Court issued its writ of supersedeas. Consequently, the trial court's order has been stayed pending the disposition of this appeal.

II. Discussion

In the instant case, the parties agree that the trial court's order is interlocutory, but Defendants contend that the order "affects a substantial right" and is, therefore, immediately appealable. Plaintiffs disagree, and argue that Defendants' "cursory arguments" for appellate jurisdiction "are wholly unavailing." For the reasons that follow, we agree with Plaintiffs.

Generally, this Court only hears appeals from final judgments. *See* N.C. Gen. Stat. § 7A-27(b)(1)–(2) (2021). An interlocutory order is not a final judgment; rather, it is "one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016) (citation omitted). "However, an interlocutory order is subject to immediate review when it affects a substantial right that will clearly be lost or irretrievably adversely affected if the order is not reviewed before final judgment." *Plasman v. Decca Furniture (USA), Inc.*, 253 N.C. App. 484, 493, 800 S.E.2d 761, 767–68 (2017) (cleaned up), *disc. review and cert. denied*, 371 N.C. 116, 812 S.E.2d 849 (2018); *accord* N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3).

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Our Supreme Court defines a “substantial right” as “a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [party] is entitled to have preserved and protected by law: a material right.” *Oestreicher v. Am. Nat’l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (citation omitted). “Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury to [the appellant] if not corrected before appeal from final judgment.” *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). Nonetheless, “the ‘substantial right’ test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.” *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

“To confer appellate jurisdiction based on a substantial right, the appellant must include in its opening brief, in the statement of the grounds for appellate review, sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.” *Doe v. City of Charlotte*, 273 N.C. App. 10, 21, 848 S.E.2d 1, 9 (2020) (cleaned up); *see also* N.C.R. App. P. 28(b)(4) (“When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.”). “[I]f the appellant’s opening brief fails to explain why the challenged order

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affects a substantial right, we must dismiss the appeal for lack of appellate jurisdiction.” *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438, *disc. review denied*, 372 N.C. 701, 831 S.E.2d 73 (2019).

In their statement of the grounds for appellate review, Defendants offer assorted substantial-right arguments to support our exercise of interlocutory jurisdiction. However, each of these arguments fails to persuade, because Defendants fail to sufficiently show either that the trial court’s order affects a substantial right, or that the deprivation of such substantial right will “potentially work injury to [Defendants] if not corrected before appeal from final judgment.” *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736.

Primarily, Defendants cite *Perry v. Baxley Development, Inc.*, for the proposition that “a preliminary injunction entered without notice affects a substantial right and is immediately appealable[.]” 188 N.C. App. 158, 161, 655 S.E.2d 460, 463 (2008) (cleaned up). In *Perry*, this Court explained that “the notice requirement [of N.C. Gen. Stat. § 1A-1, Rule 65(a)] is mandatory before a preliminary injunction can be issued” and also “that a preliminary injunction can only be issued after notice and a hearing, which affords the adverse party an opportunity to present evidence in his behalf.” *Id.* (cleaned up). “To hold otherwise would eviscerate the legislative mandate that parties receive notice of a preliminary injunction as the notice requirement affords the parties a full and fair investigation and determination according to strict legal proofs and the principles of equity.” *Id.* (cleaned up).

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Defendants' reliance upon *Perry* is misguided. In *Perry*, this Court reviewed the trial court's denial of a Rule 59 motion to set aside the preliminary injunction. *Id.* It was undisputed that the defendant was not personally served with notice of the hearing on the motion for preliminary injunction. *Id.* at 162, 655 S.E.2d at 463. Instead, the plaintiffs served an attorney that they alleged was the "attorney of record" for the defendant. *Id.* However, this Court concluded that the attorney "was not the attorney of record in this action. . . . Accordingly, [the] defendant never received notice as required under Rule 65 and the failure to set aside the preliminary injunction granted under that rule constitute[d] an abuse of discretion." *Id.* at 162, 655 S.E.2d at 464.

Unlike *Perry*, in which no notice of any kind was served upon the defendant or his counsel, in the case at bar Defendants' complaint of Plaintiffs' "imprecise use of language" in their emails with the trial court coordinator implies that Defendants had at least *some* notice of each hearing. Notwithstanding the alleged imprecision, Plaintiffs contend that the emails were nevertheless sufficient to give Defendants *actual* notice. See *Brown v. Ellis*, 206 N.C. App. 93, 105, 696 S.E.2d 813, 822 (2010) ("Notice is adequate if it is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (citation omitted)), *appeal dismissed and disc. review denied*, 365 N.C. 209, 709 S.E.2d 928 (2011). Yet we need not address that issue because Defendants do not show any prejudice from the alleged violation

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of their substantial right to notice and an opportunity to be heard.²

In this case, and also unlike *Perry*, Defendants were represented by counsel at each of the three hearings leading up to the trial court's order. Further, Defendants' assertion that the 10 October hearing "saw not a single witness called, [nor] a single exhibit marked or admitted" implies an argument that Defendants were deprived of the opportunity to conduct a "full and fair investigation and determination according to strict legal proofs and the principles of equity." *Perry*, 188 N.C. App. at 161, 655 S.E.2d at 463 (citation omitted). But Defendants do not argue that they were unable to call "a single witness" or mark or admit "a single exhibit[,]" nor do they connect any alleged deficiency in their ability to conduct a "full and fair investigation and determination" to the alleged violation of their substantial right to notice and an opportunity to be heard. *Id.* (citation omitted). Accordingly, Defendants have not shown that "the deprivation of that substantial right [to notice and an opportunity to be heard will] potentially work injury to [Defendants] if not corrected before appeal from final judgment." *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736.

² Similarly, we need not address any argument implied in Defendants' brief that the Individual Nominal Defendants received inadequate notice, as Defendants do not have standing to raise any such deficiency on the Individual Nominal Defendants' behalf. Only a "party aggrieved" has a right to appeal. N.C. Gen. Stat. § 1-271; *see also* N.C.R. App. P. 3(a) (providing that only a "party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal"). "A 'party aggrieved' is one whose legal rights have been denied or directly and injuriously affected by the action of the trial court." *Selective Ins. Co. v. Mid-Carolina Insulation Co.*, 126 N.C. App. 217, 219, 484 S.E.2d 443, 445 (1997). Defendants do not—and cannot—argue that their legal rights were denied or directly or injuriously affected by the trial court's order because of the alleged absence of sufficient notice to the Individual Nominal Defendants.

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Defendants also assert that “the preliminary injunction affects a substantial right because of the manner in which it hinders Defendants['] ability to use and control [their] assets.” Defendants claim that this Court “has previously recognized that mandatory injunctions affecting real property affect a substantial right.” However, Plaintiffs correctly observe that “none of [the] cases [cited by Defendants] involved an order granting preliminary injunctive relief.” *See, e.g., Steel Creek Dev. Corp. v. James*, 300 N.C. 631, 635, 268 S.E.2d 205, 208 (1980) (appealing the trial court’s order that the “defendants remove forthwith the concrete anchors which they have placed on the submerged land of the plaintiffs, and that they be permanently enjoined from using the land of the plaintiffs in such manner”); *see also Gunn Testamentary Tr. v. Bumgardner*, 276 N.C. App. 277, 278, 857 S.E.2d 533, 534 (2021) (appealing “entry of an order that the parties contend is a permanent injunction”).

Moreover, Defendants overstate the nature of the line of cases upon which they rely; this Court in *Gunn* described the appellants’ reliance on “a long line of cases holding that mandatory injunctions compelling alterations to real property affect a substantial right.” 276 N.C. App. at 279, 857 S.E.2d at 534. There is a wide gulf between a mandatory injunction *affecting* real property and a mandatory injunction *compelling alterations to* real property. Indeed, Defendants cannot credibly describe the trial court’s order as compelling any alteration to the Property; although the injunctive relief awarded affects Defendants’ obligations under their contract, it does not compel alterations to the Property. As Plaintiffs explain, the trial court’s order

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“does not enjoin Defendants[] or any third-party buyer from closing on whatever transaction the Executed Contract might contemplate (whenever that might be).” Consequently, Defendants’ argument that the trial court’s order “hinders [their] ability to use and control [their] assets” fails to persuade.

Relatedly, Defendants contend that the trial court’s order “deprives [them] of a substantial right because it removes the ability of the Manager, of a manager-managed LLC, to keep confidential the terms of an agreement for the sale of land owned by the LLC.” Moreover, Defendants allege that the injunctive relief awarded “would immediately cause a breach of contract between [Nominal] Defendant Cashion Farms and a third-party buyer, a non-party in this lawsuit, who had explicitly declined to waive the confidentiality provision contained within the [Executed C]ontract.” However, Defendants rely upon their bare assertions for this contention, unsupported by any evidence of the asserted confidentiality provision, or citation to authority.

In a related context, this Court has held that “[b]lanket assertions that production [of a document] is not required due to a privilege or immunity are insufficient to demonstrate the existence of a substantial right. But specific objection to a discrete enumerated request for production or a document-by-document identification of alleged privileged information may suffice.” *Crosmun v. Trs. of Fayetteville Tech. Cmty. Coll.*, 266 N.C. App. 424, 433, 832 S.E.2d 223, 231 (2019) (citation omitted). In fact, the record reflects that Defendants did make “specific

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objection[s] to [Plaintiffs'] discrete enumerated request[s] for production” below. *Id.* Yet, in their statement of the grounds for appellate review, Defendants make only “[b]lanket assertions” that the Executed Contract contains a confidentiality provision that would be violated. *Id.* This, too, is insufficient to demonstrate that a substantial right is affected in order to properly invoke our interlocutory jurisdiction.

“Accordingly, mindful of our duty to avoid fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts, we dismiss this interlocutory appeal for lack of appellate jurisdiction.” *Denney*, 264 N.C. App. at 19, 824 S.E.2d at 439–40 (cleaned up).

III. Conclusion

For the foregoing reasons, Defendants’ appeal is dismissed.

DISMISSED.

Chief Judge DILLON and Judge STROUD concur.

Report per Rule 30(e).