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NO. COA01-893

NORTH CAROLINA COURT OF APPEALS

Filed: 18 June 2002

GEORGE M. JOHNSON,
PRUDENTIAL SECURITIES, INC.,
and J.J.B. HILLIARD, W.L.
LYONS, INC.

Plaintiffs,

v.

Mecklenburg County
No. 00-CVS-19811

H. BROOKS JOHNSON,

Defendant.

Appeal by plaintiff George M. Johnson ("plaintiff Johnson") from order entered 7 February 2001 by Judge L. Oliver Noble, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 May 2002.

James, McElroy & Diehl, P.A., by G. Russell Kornegay, III and Katherine Line Thompson Kelly, for plaintiff-appellant George M. Johnson.

No brief filed for defendant-appellee.

TYSON, Judge.

I. Facts

Plaintiff Johnson and H. Brooks Johnson ("defendant") were married. Defendant filed a domestic complaint (99-CVD-9191) on 17 June 1999 seeking custody of the minor children, support of the minor children, post-separation support, alimony, and equitable

distribution pursuant to Chapter 50 of the North Carolina General Statutes. Additionally, defendant requested: (1) a resulting trust on the marital residence, alleging that she had paid the purchase price and that plaintiff Johnson had wrongfully taken title of the marital residence, and (2) a constructive trust on the separate assets of plaintiff Johnson, alleging that plaintiff Johnson has fraudulently converted the assets of defendant's brokerage account and incurred a substantial indebtedness in her name.

While the domestic complaint was pending, defendant filed a civil action (99-CVS-10351) against plaintiff Johnson and his employer, Prudential Securities, Inc. ("Prudential"), on 29 July 1999. Defendant sought actual and punitive damages alleging constructive fraud, breach of fiduciary duty, conversion, common law fraud, negligence as to Prudential, negligent misrepresentation, unfair and deceptive trade practices, breach of contract as to Prudential, and violation of the North Carolina Securities Laws. Defendant alleges that plaintiff Johnson forged her name on checks and made unauthorized withdrawals from her brokerage account with Prudential which was managed by plaintiff Johnson.

On 3 December 1999, defendant filed a voluntary dismissal, without prejudice, of her civil complaint (99-CVS-10351), pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure. Defendant filed a statement of claim for arbitration (99-05598) against plaintiff Johnson and Prudential with the National

Association of Securities Dealers, Inc. ("NASD") on 14 December 1999. Defendant filed an amendment to the statement of claim to add J.J.B. Hilliard, W.L. Lyons, Inc. ("Hilliard"), plaintiff Johnson's subsequent employer, as a respondent to the arbitration action. Defendant's statement of claim brings forth the same claims and essentially the same facts as those raised in her civil complaint.

In response to plaintiff Johnson's motion to dismiss or elect forum, on 20 September 2000, defendant filed a voluntary dismissal, pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure, of any and all claims of resulting trust, constructive trust, and unequal distribution of the marital property based upon plaintiff Johnson's actions with respect to her brokerage account in her domestic complaint (99-CVD-9191).

Plaintiff Johnson, thereafter, filed a motion to dismiss the arbitration with the NASD raising the affirmative defense of *res judicata* based on the "two dismissal" rule found in Rule 41. A hearing was scheduled before the NASD for 8 December 2000. On 7 December 2000, plaintiff Johnson withdrew his motion to dismiss stating that the issue was more appropriate for a court with appropriate jurisdiction.

On 20 December 2000, plaintiff Johnson, Prudential, and Hilliard filed a complaint for declaratory judgment (00-CVS-19811) in superior court. Plaintiffs sought a declaratory judgment of no liability by operation of Rule 41, a preliminary injunction enjoining the arbitration action before the NASD, and a permanent

injunction enjoining defendant from prosecuting her claims before the NASD or any forum based on the doctrine of *res judicata* pursuant to Rule 41.

Plaintiffs filed a motion for summary judgment and defendant filed a motion to dismiss pursuant to Rules 12(b)(1), 12(b)(3), 12(b)(6), and 12(c) of the North Carolina Rules of Civil Procedure. The superior court entered an order on 7 February 2001, which: (1) denied defendant's motion to dismiss pursuant to Rule 12(b)(1), lack of subject matter jurisdiction; (2) granted plaintiffs' motion for summary judgment with respect to defendant's claims for resulting trust or constructive trust based upon plaintiff Johnson's "fraudulent and deceitful acts" with respect to defendant's brokerage accounts with both Prudential and Hilliard; (3) except as specifically allowed, denied plaintiffs' motion for summary judgment; (4) ordered a permanent injunction enjoining defendant from prosecuting claims for resulting trust or constructive trust based upon the "fraudulent and deceitful acts" of plaintiff Johnson; and (5) except as specifically allowed denied the request for an injunction. Plaintiff Johnson appeals. We find that the trial court's order is interlocutory and dismiss plaintiff Johnson's appeal.

An order which does not entirely dispose of the case as to all parties and issues is interlocutory. *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950). Our courts will not hear appeals from interlocutory orders unless the orders affect a substantial right, *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338

(1978), which may be lost or prejudiced by exception to the order's entry. See *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982). This rule promotes judicial economy by eliminating fragmentary appeals and preserves the entire case for determination in a single appeal. *Harrell v. Harrell*, 253 N.C. 758, 761, 117 S.E.2d 728, 730 (1961).

Typically, "the denial of a motion for summary judgment is a nonappealable interlocutory order." *Northwestern Financial Group, Inc. v. County of Gaston*, 110 N.C. App. 531, 535, 430 S.E.2d 689, 692 (1993). Our Supreme Court has stated that "the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right" *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) (emphasis supplied); cf. *Community Bank v. Whitley*, 116 N.C. App. 731, 449 S.E.2d 226 (1994) (dismissing appeal as interlocutory because facts of case would not lead to "possibility of inconsistent verdicts").

A substantial right is likely to be affected where a possibility of inconsistent verdicts exists if the case proceeds to trial. *Green*, 305 N.C. at 608, 290 S.E.2d at 596. The facts of this case would not lead to such an outcome, and do not present a compelling case for premature appellate review. Accordingly, plaintiff Johnson's appeal is dismissed as interlocutory.

Dismissed.

Chief Judge EAGLES and Judge McGEE concur.

Report per Rule 30(e).