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NO. COA06-1104

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

F. NORWOOD THOMPSON,
Plaintiff,

v.

Wake County
No. 02 CVS 10677

C. THOMAS HENDRICKSON,
Defendant.

Appeal by plaintiff from order entered 19 April 2006 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 11 April 2007.

Shirley & Adams, P.L.L.C., by A. Graham Shirley; Lewis & Roberts, P.L.L.C., by James A. Roberts, III; and Allen R. Tew, P.A., by Allen R. Tew, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Pressly M. Millen and Sarah L. Buthe, for defendant-appellee.

TYSON, Judge.

F. Norwood Thompson ("plaintiff") appeals from order entered granting C. Thomas Hendrickson's ("defendant") motion *in limine* excluding plaintiff's expert's testimony and report on damages and any evidence concerning the value of property "arising from events entirely in the future." We dismiss plaintiff's interlocutory appeal.

I. Background

In 1992, plaintiff, defendant, and others founded an engineering firm, Triangle Environmental, Inc. ("Triangle"). By May 1999, plaintiff and defendant each owned 50% of Triangle's stock and served as directors of Triangle.

Plaintiff ran Triangle's day-to-day operations from its inception in 1992 until approximately 1997 or 1998, when he, defendant, and other key employees mutually agreed that defendant would manage Triangle's day-to-day operations.

In May 1999, the parties discussed the possibility of one buying out the other's interest in Triangle. The parties agreed defendant would buy out plaintiff's interest in June 1999. The transaction closed in August 1999. Defendant acquired plaintiff's stock in Triangle, as well as his interest in real estate jointly owned by the parties. In exchange, plaintiff received certain considerations from defendant.

On 3 April 2000, Triangle and TRC Environmental, Inc. ("TRC") executed an asset purchase agreement in which TRC acquired the majority of Triangle's assets in exchange for cash and stock. Defendant received certain considerations as a result of this transaction.

On 9 August 2002, plaintiff sued defendant and alleged that during the course of their buy out discussions, defendant failed to disclose he had engaged in discussions with TRC, a potential acquirer. Plaintiff asserted claims for: (1) breach of fiduciary duty and constructive fraud; (2) fraud; (3) unfair and deceptive practices under N.C. Gen. Stat. § 75-1.1; and (4) an accounting.

Plaintiff sought to offer at trial the testimony of Gary M. Johnson ("Johnson"), an expert witness, and his report on plaintiff's damages. Johnson failed to value the amounts plaintiff received and the value of the stock and property he sold as of the date of the alleged fraud or breach of fiduciary duty. Johnson purportedly valued the property as of future dates. Johnson valued: (1) the TRC stock received by defendant as of 3 April 2000; (2) the TRC stock warrant as of December 2001, or alternatively as of an one-year period between 18 May 2003 and 17 May 2004; (3) real property as of July 2002; and (4) Triangle's net receivables and cash as of October 1999.

The matter was calendered for trial on 31 October 2005. On 28 October 2005, defendant moved *in limine* to exclude plaintiff from presenting certain evidence on damages. On 19 April 2006, the trial court granted defendant's motion and excluded Johnson's testimony and report on damages and any evidence concerning the value of property "arising from events entirely in the future." The trial court found its interlocutory order affected a substantial right. Plaintiff appeals.

II. Interlocutory Order

Defendant has not challenged plaintiff's appeal as interlocutory. However, "It is well established in this jurisdiction that if an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves." *Bailey v. Gooding*, 301 N.C. 205, 208, 270

S.E.2d 431, 433 (1980) (internal citations omitted); see *Barrett v. Hyldborg*, 127 N.C. App. 95, 98, 487 S.E.2d 803, 805 (1997) ("Although defendant has not challenged plaintiff's appeal as premature, it is our responsibility to address the issue prior to consideration of the merits of plaintiff's appeal." (internal citation omitted)).

The trial court's order states that granting defendant's motion *in limine* affected plaintiff's substantial rights. The trial court stated:

This Order affects a substantial right of the Plaintiff and this Court is of the opinion that absent immediate appellate review such substantial right will be lost, prejudiced, or inadequately protected if Plaintiff is required to proceed to trial without an expert witness on the subject of damages. Therefore, this Court respectfully requests that the Court of Appeals review this Order on an interlocutory basis so that the parties can proceed to trial using the appropriate measure of damages and taking into account the proper evidence under that measure of damages.

Interlocutory appeals are those "made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court to settle and determine the entire controversy.'" *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999) (quoting *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999)); accord *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). "[A] trial court's ruling on a motion *in limine* is an interlocutory ruling[.]" *Barrett*, 127 N.C. App. at 98, 487 S.E.2d at 805. Plaintiff's appeal is clearly interlocutory.

Our Supreme Court has stated:

Generally, a party cannot immediately appeal from an interlocutory order unless failure to grant immediate review would affect[] a substantial right pursuant to N.C.G.S. sections 1-277 and 7A-27(d).

A party may appeal an interlocutory order under two circumstances. First, the trial court may certify [pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (2005)] that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. Second, a party may appeal an interlocutory order that affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment.

Davis v. Davis, 360 N.C. 518, 524-25, 631 S.E.2d 114, 119 (2006) (internal citations and quotations omitted). The trial court could not certify the matter for immediate appellate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) because the trial court did not "enter[] a final judgment as to fewer than all of the claims or parties in [the] action." *Id.* at 525, 631 S.E.2d at 119.

The issue before us is whether the trial court's order "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." *Id.* Plaintiff failed to state in his brief the grounds for appellate review of an interlocutory appeal or discuss the substantial rights that will be affected if the trial court's order is not reviewed at this time.

This Court addressed similar circumstances in *Johnson v. Lucas*, 168 N.C. App. 515, 608 S.E.2d 336, *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005). In *Johnson*, this Court dismissed the

appellant's appeal, even though neither party had raised the interlocutory nature of the appeal in its briefs. 168 N.C. App. at 518-19, 608 S.E.2d at 338. The appellant failed to comply with N.C.R. App. P. 28(b)(4) by not "address[ing] what substantial right might be lost if this appeal does not lie" and to meet its burden to show "why the appeal affects a substantial right." *Id.* at 518, 608 S.E.2d at 338.

Here, plaintiff failed to state in his brief any grounds for appellate review.

It is well established that the appellant bears the burden of showing to this Court that the appeal is proper. First, when an appeal is interlocutory, *the appellant must include in its statement of grounds for appellate review "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right."*

Id. (emphasis supplied) (quoting N.C.R. App. P. 28(b)(4)).

Plaintiff failed to include any statement of grounds for appellate review and to include "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C.R. App. P. 28(b)(4) (2007). As in *Johnson*, "we could dismiss the appeal based solely on [plaintiff's] failure to comply with this requirement of the Rules." *Johnson*, 168 N.C. App. at 518, 608 S.E.2d at 338.

Plaintiff failed to meet his burden to show what substantial rights would be affected if his appeal is not reviewed at this time. Plaintiff's brief, like the appellant's brief in *Johnson*, contains "no discussion of any substantial right that will be

affected if we do not review this order at this time." 168 N.C. App. at 519, 608 S.E.2d at 338. As this Court stated in *Johnson*:

[The appellant] has failed to carry the burden of showing why the appeal affects a substantial right. It is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal, . . . and not the duty of this Court to construct arguments for or find support for appellant's right to appeal[.] Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed.

168 N.C. App. at 518, 608 S.E.2d at 338 (internal quotation and citations omitted).

III. Conclusion

Plaintiff's brief contains no statement of the grounds for appellate review of an interlocutory order. Plaintiff failed to comply with N.C.R. App. P. 28(b)(4). *Id.* at 519, 608 S.E.2d at 338. Plaintiff's brief contains "no discussion of any substantial right that will be affected if we do not review this order at this time." *Id.* Plaintiff "has failed to carry the burden of showing why the appeal affects a substantial right." *Id.* at 518, 608 S.E.2d at 338. Plaintiff's interlocutory appeal is dismissed.

Dismissed.

Judges HUNTER and JACKSON concur.

Report per Rule 30(e).