NO. COA07-84

NORTH CAROLINA COURT OF APPEALS

Filed: 2 October 2007

PEGGY B. BINGHAM,
Plaintiff,

v. Davie County
No. 06 CVD 647

TOMMI B. STEIDEL, DEBORAH B. PULLEN and DONALD W. BINGHAM,
Defendants.

Appeal by defendants from an order entered 31 August 2006 by Judge Theodore S. Royster in Davie County District Court. Heard in the Court of Appeals 28 August 2007.

Biesecker, Tripp, Sink & Fritts, L.L.P., by Joe E. Biesecker and Christopher A. Raines, attorneys for plaintiff-appellee.

Robinson & Lawing, L.L.P., by C. Ray Grantham, Jr. and Rebecca H. Miller, for defendant-appellants.

BRYANT, Judge.

Tommi Steidel and Deborah Pullen (defendants) appeal from an order entered 31 August 2006 granting Peggy Bingham's (plaintiff's) preliminary injunction and the denial of their motions to dismiss. Defendants also appeal the appointment of a guardian ad litem for their father, Donald Bingham. For the reasons stated, we dismiss the appeal as interlocutory.

Donald and Peggy Bingham were married in 1985 and have lived as husband and wife together in the marital home since that day. Donald's health is failing and he no longer drives. Peggy Bingham provides care for him with daily assistance from other caretakers, including defendants. Defendant Steidel and plaintiff were nominated in a durable power of attorney dated 22 May 2003. A later instrument dated 28 July 2004 expressly left in place the provisions of the 22 May 2003 document and gave (1) original power of attorney to Donald's other daughter, who is not party to this suit, and (2) successor power of attorney to defendants Steidel and Pullen. All three daughters were named trustees of a revocable trust executed on 28 July 2004 which is designed to provide income and care for Donald. Defendants Steidel and Pullen have expressed concern over the care received by their father and have offered to move Donald into the home of either defendant.

On 10 August 2006, Peggy Bingham filed a complaint alleging that her marital rights were under assault due to defendants' desire to move Donald out of the marital home. The relief sought in Peggy Bingham's complaint was: (1) a temporary restraining order and preliminary injunction to keep the daughters from moving Donald; (2) the appointment of a guardian ad litem for Donald; and (3) a declaration of her rights under the power of attorney and the revocable trust. On 10 August 2006 an order was issued which "temporarily restrained [defendants] from removing Defendant Bingham from the martial residence for any overnight visits" and "from removing any furnishings from the marital residence." On 17 August 2006 defendants filed pre-answer motions to dismiss for: (1) lack of subject matter jurisdiction; (2) failure to state a claim; and (3) improper division, motion to transfer in the alternative to dismissal.

On 21 August 2006, a hearing on the motions occurred before the Honorable Theodore S. Royster in Davie County District Court. The trial court entered an order granting plaintiff's preliminary injunction, denying defendants' motions and appointing a guardian ad litem for Donald Bingham. On 22 September 2006, defendants filed an appeal to challenge the preliminary injunction granted on plaintiff's behalf and the denial of defendants' motions to dismiss.

On appeal, defendants contest the preliminary injunction on the grounds that the injunction prevents Donald Bingham from choosing his own living arrangements. Defendants further allege that the suit should be dismissed because: (1) the trial court did not have subject matter jurisdiction to hear the complaint; (2) the complaint did not state a claim for which relief can be granted; and (3) the complaint was filed in the wrong division, and failing dismissal should be transferred to superior court. Defendants also challenge the appointment of a guardian ad litem based on lack of notice to Donald Bingham.

I

We must first address whether the appeal is interlocutory. Ordinarily, "[t]he purpose of a preliminary injunction is [] to preserve the status quo pending trial on the merits." *State v. School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction is an interlocutory order, therefore it can only be appealed if it affects a substantial right. N.C. Gen. Stat. § 1-277 (2005); *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 569 (2007); *Barnes v. St. Rose Church of Christ*, 160 N.C. App. 590, 591, 586 S.E.2d 548, 549 (2003).

On 10 August 2006, the trial court granted plaintiff's request for a preliminary injunction. The order "temporarily restrained [defendants] from removing Defendant Bingham from the marital residence for any overnight visits" and "from removing any furnishings from the marital residence." Here, the trial court's order preserved the status quo for each party until a trial on the merits occurs. Precisely, defendants have not shown that without immediate appellate review the preliminary injunction granted by the trial court will deprive defendants of a substantial right. In fact, the trial court's order allows defendants to continue caring for and visiting their father pending litigation and a final judgment at trial. *See School*, 299 N.C. at 358, 261 S.E.2d at 913 ("[T]he threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment."). This assignment of error is dismissed.

II

Defendants claim their motions to dismiss for lack of subject matter jurisdiction, failure to state a claim upon which relief may be granted and improper division affect a substantial right and must be considered by this Court despite their interlocutory nature. We disagree.

Motions to dismiss are also interlocutory, and do not normally permit an appeal. *Multiple Claimants v. N.C. HHS, Div. of Facility & Detention Servs.*, 176 N.C. App. 278, 282, 626 S.E.2d 666, 669 (2006) (allowing the appeal only because of the special circumstance of a claim under the public duty doctrine).

> An order denying a motion to dismiss for lack of subject matter jurisdiction does not affect a substantial right and is therefore not appealable prior to final judgment. Likewise, an order denying a motion to dismiss for failure to state a claim upon which relief can be granted does not affect a substantial right and is not appealable prior to final judgment.

Byers v. North Carolina Sav. Insts. Div., 123 N.C. App. 689, 692, 474 S.E.2d 404, 407 (1996) (internal citations omitted). Based on this settled law, we decline to review the motions to dismiss based on subject matter jurisdiction and failure to state a claim.

Defendant contends the motion to dismiss for improper division under N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) is immediately appealable. We disagree. While some 12(b)(3) orders may be immediately appealable,

> [o]rders transferring or refusing to transfer . . . are not immediately appealable, even for abuse of discretion. 'Such orders are reviewable only by the appellate division on appeal from a final judgment. . . . If, on review, a new trial or partial new trial is ordered for other reasons, the appellate division may specify the proper division for new trial and order a transfer thereto.'

Bryant v. Kelly, 279 N.C. 123, 131-32, 181 S.E.2d 438, 443 (1971); *see also* N.C. Gen. Stat. § 7A-260 (2005). Because this matter has not yet reached a final judgment and does not affect a substantial right, we decline to consider the motion to dismiss based on improper division or the alternative motion to transfer. These assignments of error are dismissed.

III

Finally, defendants challenge the appointment of a *guardian ad litem* for Donald Bingham. However, pursuant to N.C. Gen. Stat. § 1-271, only an aggrieved party may appeal. *In re J.B.*, 172 N.C. App. 1, 8, 616 S.E.2d 264, 269 (2005); N.C. Gen. Stat. § 1-271 (2005). An aggrieved party is one whose rights have been directly and injuriously affected by the action of the trial court. *See Culton v. Culton*, 327 N.C. 624, 398 S.E.2d 323 (1990) (husband lacked standing to appeal appointment of a guardian ad litem for his wife in a divorce proceeding), *superseded by statute on other grounds as stated in In re J.A.A.*, 175 N.C. App. 66, 623 S.E.2d 45 (2005). Defendants have not demonstrated how the appointment of a guardian ad litem for Donald Bingham has affected their rights. Accordingly, neither defendant is an aggrieved party who may appeal such appointment. Therefore, this assignment of error is dismissed.

Dismissed.

Judges WYNN and HUNTER concur.

Report per Rule 30(e).