NO. COA08-1468

NORTH CAROLINA COURT OF APPEALS

Filed: 4 August 2009

SOUTHERN FURNITURE COMPANY
OF CONOVER, INC.,
Plaintiff,

v.

Catawba County
No. 07 CVS 1160

HARRISON PAUL ANDERSON, II,
Defendant.

Appeal by defendant from order entered 8 May 2008 by Judge Yvonne Mims Evans in Catawba County Superior Court. Heard in the Court of Appeals 23 April 2009.

Patrick, Harper & Dixon L.L.P., by Michael J. Barnett, for plaintiff-appellee.

Law Offices of Matthew K. Rogers, PLLC, by Matthew K. Rogers, for defendant-appellant.

GEER, Judge.

Defendant Harrison Paul Anderson, II appeals from the trial court's order granting summary judgment to plaintiff Southern Furniture Company of Conover, Inc. on Anderson's counterclaims for fraud and unfair and deceptive trade practices ("UDTP"). The trial court's order left pending both Anderson's and Southern Furniture's breach of contract claims, and, therefore, the appeal from this order is interlocutory. Because Anderson has failed to establish

that this Court has jurisdiction over this interlocutory appeal, we must dismiss the appeal.

Facts

Anderson began working for Southern Furniture as an independent sales representative sometime around 13 October 2003. The parties entered into an independent sales representative agreement, as well as a promissory note. After disputes arose concerning, among other things, timely shipping and commissions, Anderson left Southern Furniture on 1 March 2005.

On 3 April 2007, Southern Furniture filed a complaint alleging that Anderson had breached the terms of the independent sales agreement and promissory note. On 25 June 2007, Anderson filed an answer, including counterclaims for breach of contract, fraud, and unfair and deceptive trade practices. Southern Furniture subsequently moved for partial summary judgment on Anderson's fraud and UDTP counterclaims on 17 April 2008.

In an order entered 6 May 2008, the trial court granted partial summary judgment to Southern Furniture on those two counterclaims. On 8 May 2008, the trial court entered a "First Amended Order" that "certifie[d] this order for immediate appeal pursuant to Rule 54(b)." Anderson appealed from the First Amended Order.

Discussion

Generally, "there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*,

326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). In contrast, "[a] final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950).

The trial court's 8 May 2007 order, granting summary judgment to Southern Furniture with respect to Anderson's fraud and UDTP claims, but leaving undetermined both parties' breach of contract claims, is interlocutory and, therefore, ordinarily not appealable. *See Liggett Group, Inc. v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993) ("A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal."). This "prohibition promotes judicial economy by preventing fragmentary appeals." *Id.*

An interlocutory order is, however, "immediately appealable if (1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed." *Myers v. Mutton*, 155 N.C. App. 213, 215,

574 S.E.2d 73, 75 (2002), *appeal dismissed and disc. review denied*, 357 N.C. 63, 579 S.E.2d 390 (2003). In either case, "it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal[.]" *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994).

Here, the trial court's amended order states that it is "hereby certifie[d] . . . for immediate appeal pursuant to Rule 54(b)." The order does not, however, include a determination by the trial court that there is "no just reason for delay" of the appeal. N.C.R. Civ. P. 54(b). This Court has consistently held that "Rule 54(b) expressly requires that this determination be stated in the judgment itself." *Brown v. Brown*, 77 N.C. App. 206, 208, 334 S.E.2d 506, 508 (1985), *disc. review denied*, 315 N.C. 389, 338 S.E.2d 878 (1986). *See Dalton Moran Shook Inc. v. Pitt Dev. Co.*, 113 N.C. App. 707, 710, 440 S.E.2d 585, 588 (1994) ("[A] trial judge may enter a final judgment as to one or more but fewer than all of the claims or parties in a case, which is immediately appealable even though the litigation is not complete as to all claims or all parties, if the trial judge makes an express finding that there is no just reason for delay. In this case, the trial court made no such finding, so no appeal is available under Rule 54(b)." (internal citations omitted)); *Brown*, 77 N.C. App. at 208, 334 S.E.2d at 508 ("Assuming *arguendo* that plaintiff's contention has merit, her appeal is still untimely because the trial court did not certify the action for appeal by finding that there was 'no just reason for delay.' Rule 54(b) expressly requires that this

determination be stated in the judgment itself. In the case *sub judice*, the trial judge made no such declaration in the judgment. Through Rule 54(b), no appeal lies." (internal citation omitted)); *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 171, 265 S.E.2d 240, 247 ("Rule 54(b) expressly provides that th[e] determination [that there is no just cause for delay] must be made *in the judgment*."), *appeal dismissed*, 301 N.C. 92 (1980).

Rule 54(b) does not, therefore, provide jurisdiction for this appeal, and appellate jurisdiction exists, if it exists at all, under the substantial-right exception. When relying upon the substantial-right exception, "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 [judgment or] order affects a substantial right.'" *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (quoting N.C.R. App. P. 28(b)(4)), *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005).

Anderson, in his brief, asserts that the trial court's partial summary judgment order affects a substantial right because it precludes him from pursuing punitive damages on his fraud claim and attorney's fees on his UDTP claim at trial. In support of this contention, he states only, without any citation of authority:

> The case has had a prolonged procedural history, counterclaims are numerous, the same set of operative facts under lie the entire case, especially the facts relating to fraudulent inducement to enter the contract and the unenforceability of Plaintiff's contract arising from the fraud. Further, loss of the right to pursue punitive damages

> and attorney's fees at trial would substantially change Defendant's presentation of evidence at trial and trial strategy.

This statement of grounds for appellate review, without more, is insufficient to establish the existence of a substantial right that will be lost without immediate review.

Anderson provides no explanation why the procedural history and the presence of the counterclaims provide justification for the interlocutory appeal. Moreover, it is now well established that a bare showing that the pending claims involve the same operative facts as those claims upon which judgment was entered is not sufficient to demonstrate that a substantial right is involved unless the appellant also demonstrates the potential for inconsistent verdicts. *See Moose v. Nissan of Statesville, Inc.*, 115 N.C. App. 423, 428, 444 S.E.2d 694, 697-98 (1994) (dismissing appeal from order entering partial summary judgment on punitive damages claim because even though pending negligence claim and punitive damages claim were "based on the same facts," issues were separate, and "there is no possibility of inconsistent verdicts should plaintiff prevail on a later appeal"). In this case, even assuming *arguendo* that the factual issues involved in Anderson's counterclaims were the same as those of the still pending claims, Anderson has failed to explain why the doctrine of collateral estoppel would not protect him from the potential for inconsistent verdicts should he prevail in an appeal from the final judgment.

Finally, trial strategy and presentation is frequently altered to some extent by interlocutory orders. We are unaware of any authority that suggests that this litigation reality supports

interlocutory appeals, and Anderson has cited none. We stress again that "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254. *See also Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam) ("It is not the role of the appellate courts . . . to create an appeal for an appellant."); *Hyatt v. Town of Lake Lure*, ___ N.C. App. ___, ___, 663 S.E.2d 320, 322 (2008) ("It is not the role of this Court to create an avenue of appeal not properly asserted in plaintiff's brief.").

In sum, the trial court failed to properly certify its order below for review under Rule 54(b). Further, Anderson has not demonstrated the existence of any substantial right that would be lost without immediate review. Consequently, we dismiss this appeal.

Dismissed.

Judges BRYANT and STEPHENS concur.

Report per Rule 30(e).