NO. COA09-1168

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

RONNIE DALE ADAMS and wife,
PAMELA H. ADAMS,
Plaintiffs,

v.

Duplin County
No. 06 CVS 695

CLAIRE R. KALMAR, ROGER WHEELER and BILLY YOUNG,
Defendants.

Appeal by defendants from orders entered 16 March 2009 and 28 May 2009 by Judge W. Allen Cobb, Jr., in Duplin County Superior Court. Heard in the Court of Appeals 10 February 2010.

Thompson and Thompson, P.C., by E.C. Thompson, III, and Turner Law Office, by W. Carroll Turner, for plaintiff-appellees.

Ingram and Ingram, by Charles Marshall Ingram, for defendant-appellants.

BRYANT, Judge.

Defendants Claire Kalmar, Roger Wheeler, and Billy Young appeal from trial court orders entered 16 March 2009, which granted plaintiffs' motion for summary judgment on defendants' counterclaim for fraud, and 28 May 2009, which dismissed defendants' counterclaims for negligent misrepresentation and lack of meeting of the minds and denied defendants' motion to reconsider the 16 March 2009 order. For the reasons stated below, we dismiss this appeal.

Facts

In 1994, Kalmar and plaintiffs Ronnie and Pamela Adams entered into a land agreement. Plaintiffs sought to use Kalmar's land as a hog nursery and waste disposal site. In March 2009, Kalmar sold plaintiffs certain real property for the construction of a hog farm. The sale carried with it a spray easement for 21.803 acres of Kalmar's land to dispose of hog waste. The easement also gave the plaintiffs the right to do any other act which was deemed necessary and prudent upon said tract of land to dispose of such waste as required by any state or federal regulatory agency. Plaintiffs were required to develop and file with the North Carolina Division of Water Quality (DWQ) a waste management plan, which called for the spray easement area to be maintained in Bermuda grass to minimize problems and absorb nitrogen. However, Kalmar wished to grow soybeans on the land on which plaintiffs' easement was granted. In April 2007, Kalmar hired defendants Roger Wheeler and Billy Young to spray plaintiffs' Bermuda grass with grass killer and plant soybeans.

Plaintiffs brought a civil action for injunctive relief and damages. Defendants brought a counterclaim for a declaratory judgment to void the spray easement and additional counterclaims for fraud, negligent misrepresentation, lack of meeting of the minds, and breach of contract. On 22 December 2006, plaintiffs filed a motion to dismiss and defenses to defendants' counterclaims.

On 16 March 2009, the trial court entered an order which granted plaintiffs' motion for partial summary judgment on the issue of fraud. On 28 May 2009, the trial court entered an order which granted plaintiffs' motion to dismiss defendants' counterclaims for negligent misrepresentation and lack of meeting of the minds; denied plaintiffs' motion for partial summary judgment on defendants' counterclaim for breach of contract; and denied defendants' motion to reconsider the 16 March 2008 order dismissing defendants' fraud claim. Defendants appeal.

On appeal, defendants raise the following issues: did the trial court err by (I) granting plaintiffs' motion for partial summary judgment and (II and III) plaintiffs' motions to dismiss defendants' counterclaims for negligent misrepresentation and lack of meeting of the minds; and (IV) denying defendants' motion to reconsider and strike the 16 March 2009 order.

In their complaint, plaintiffs raised four claims for relief. All of plaintiffs' claims remain pending before the trial court. Defendants raised five counterclaims. The trial court dismissed three counterclaims and defendants now appeal from the order granting the dismissal. Defendants' counterclaim for breach of contract remains pending before the trial court.

We first address defendants' appeal from the order entered 28 May 2009, which dismissed defendants' counterclaims for negligent misrepresentation and lack of meeting of the minds and denied

plaintiffs' motion for partial summary judgment on defendants' counterclaim for breach of contract.

"Where an order of summary judgment disposes of fewer than all claims between all parties the order is interlocutory." *Dalton Moran Shook Inc. v. Pitt Dev.* Co., 113 N.C. App. 707, 710, 440 S.E.2d 585, 588 (1994); *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."). As a general rule, "[this Court does] not review interlocutory orders as a matter of course." *Alexander Hamilton Life Ins. Co. of Am. v. J. & H. Marsh & McClennan, Inc.*, 142 N.C. App. 699, 700, 543 S.E.2d 898, 900 (2001). However, there are two instances in which an interlocutory appeal may be granted. "First, 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." *Pitt Dev. Co.*, 113 N.C. App. at 710, 440 S.E.2d at 588; *see also* N.C. R. Civ. P. 54(b) (2009).

Second, an interlocutory order is appealable if it affects a substantial right. *Pitt. Dev. Co.*, 113 N.C. App. at 710, 440 S.E.2d at 588. "A substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which [one] is

entitled to have preserved and protected by law: a material right." *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009); *see also, Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 38, 626 S.E.2d 315, 320 (2006) (A substantial right is "affected if there are overlapping factual issues between the claim determined and any claims which have not yet been determined because such overlap creates the potential for inconsistent verdicts resulting from two trials on the same factual issues."). "The burden is on the appealing party to establish that a substantial right will be affected." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (citation omitted).

Here, the trial court did not provide a 54(b) certification stating that there was no just reason to delay the appeal. Therefore, we consider whether denial of this appeal affects a substantial right. We hold that defendants have failed to meet their burden to establish that denial of this appeal would affect a substantial right.

Defendants assert that the trial court's order dismissing their counterclaims affected a substantial right by denial of a jury trial on those counterclaims. However, because defendants may appeal those issues at the conclusion of the case, there is no substantial right lost to defendants at this stage of the proceedings. Defendants also assert that there exists a possibility of two different trials and inconsistent verdicts absent our review on appeal. However, defendants fail to explain,

and we decline to speculate, on how our dismissal of this appeal could result in two different trials on the same issues and thereby create the possibility of inconsistent verdicts. We conclude that defendants have failed to meet their burden to establish that a substantial right exists to allow appeal of this interlocutory order.

We also note that plaintiffs filed a motion to dismiss defendant's appeal from the trial court's order entered 16 March 2009 based on failure to timely file the notice of appeal pursuant to North Carolina Rules of Appellate Procedure, Rule 3(c). We dismiss defendant's appeal, not for the reasons stated in plaintiffs' motion, but, because the appeal from the 16 March 2009 order is interlocutory. "[T]he reason for these rules is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division." *Jones v. Durham Anesthesia Assocs., P.A.*, 185 N.C. App. 504, 506, 648 S.E.2d 531, 534 (2007) (citation omitted). Accordingly, this appeal is dismissed.

Dismissed.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).