

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA09-1404

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

DEREK REPATH,  
Plaintiff,

v.

Catawba County  
No. 08-CVS-2544

PAULA DIANE DUGGER, JASON  
GLADDEN AND JULIE GLADDEN,  
Defendants.

Appeal by plaintiff from order granting summary judgment entered 21 May 2009 by Judge Yvonne Mims Evans in Catawba County Superior Court. Heard in the Court of Appeals 28 April 2010.

*Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by Jason White, for plaintiff-appellant.*

*No brief for defendant-appellees.*

HUNTER, JR., Robert N., Judge.

Plaintiff, Derek Repath ("plaintiff"), appeals from an order allowing the motion for summary judgment for defendants, Jason Gladden and Julie Gladden ("Gladden"). The trial court held that there were no genuine issues of material fact on plaintiff's claims for fraudulent conveyance, the imposition of a constructive trust, or the imposition of a resulting trust on realty against the Gladden defendants. However, the trial court did not dismiss plaintiff's claims against Paula Dugger ("Dugger") for trial. With regard to plaintiff's appeal, we note that plaintiff-appellant's

brief fails to address jurisdiction. This Court has long recognized an appellate court should dismiss an appeal *ex mero motu* if the appealing party has no right of appeal, "even though the question of appealability has not been raised by the parties themselves." *Pentecostal Pilgrims and Strangers Corp. v. Connor*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 688 S.E.2d 81, 81 (2010) (citing *Yordy v. N.C. Farm Bureau Mut. Ins. Co.*, 149 N.C. App. 230, 230-31, 560 S.E.2d 384, 384 (2002)). As this appeal is interlocutory and does not affect a substantial right, we dismiss.

#### **I. FACTUAL BACKGROUND**

In his complaint, plaintiff alleged that he and defendant Dugger began a romantic relationship in the spring of 2006 and were engaged to be married in the late summer of 2006. Plaintiff and Dugger agreed to marry after plaintiff obtained a divorce. Plaintiff alleged that Dugger represented that she was unmarried at all times during their relationship.

Based on Dugger's representation, plaintiff provided Dugger with an apartment, clothing, jewelry, a Corvette, and funded a bank account with a balance of \$10,000. In anticipation of their marriage plaintiff and Dugger searched for, and eventually located, a home and property in Catawba County, North Carolina. This home was intended to serve as their shared marital residence. Plaintiff used \$272,000 of his personal funds to purchase the property.

On 27 September 2006, title to the Catawba County property was transferred to Dugger solely. Plaintiff alleged that he was induced by Dugger to transfer the property solely into her name

based upon her assertions that transfer of the title would not subject the property to his future divorce proceedings. Subsequently, plaintiff learned that Dugger was married and never intended to marry him after the closing on the property.

On 24 January 2007, plaintiff made a demand on Dugger, *inter alia*, for the return of the funds used to purchase the property. Subsequently, on or about 15 October 2007, Dugger transferred the property to the Gladdens. Plaintiff alleges that Dugger and the Gladdens had actual and constructive knowledge of plaintiff's potential civil damages claims against Dugger. He further alleged that Dugger transferred the property with the intent to delay and hinder plaintiff's recovery against Dugger.

On 7 May 2009, defendants Julie and John Gladden filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. On 21 May 2009, the trial court granted the motion for summary judgment and held that the Gladdens were entitled to a judgment as a matter of law. Claims against defendant Dugger were outstanding. On 22 May 2009, plaintiff filed and served written notice of appeal.

## **II. INTERLOCUTORY APPEAL JURISDICTION**

Pursuant to Rule 28(b) of the North Carolina Rules of Appellate Procedure, when appealing an interlocutory order, an appellant's brief must include the following:

*A statement of the grounds for appellate review.* Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a

final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain 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) (2009). The appellant bears the burden of establishing the basis for an interlocutory appeal. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994).

Plaintiff's complaint states causes of action against multiple defendants: Paula Dugger, Jason Gladden, and Julie Gladden. Therefore, the trial court's grant of Jason and Julie Gladden's motion for summary judgment was not a final judgment as to all parties, and as such, the order was interlocutory. *See, e.g., Pratt v. Staton*, 147 N.C. App. 771, 773, 556 S.E.2d 621, 623 (2001) (providing that "[a]n order . . . granting a motion to dismiss certain claims in an action, while leaving other claims in the action to go forward, is plainly an interlocutory order").

Final judgments have been distinguished from interlocutory orders by the North Carolina Supreme Court as follows:

Judgments and orders of the Superior Court are divisible into these two classes: (1) Final judgments; and (2) interlocutory orders. 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. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

*Veazey v. Durham*, 231 N.C. 357, 361, 57 S.E.2d 377, 381 (1950). "Generally there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Moreover, an interlocutory order or judgment is immediately appealable "only if there is no just reason for delay and it is so determined in the judgment." N.C. Gen. Stat. § 1A-1, Rule 54(b) (2009).

An interlocutory order is appealable if it affects a substantial right claimed in any action or proceeding and "'will work injury to the appellant if not corrected before final judgment.'" *Pentecostal*, \_\_\_ N.C. App. at \_\_\_, 688 S.E.2d at 84 (quoting *Goldston*, 326 N.C. at 728, 392 S.E.2d at 737). 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 a man is entitled to have preserved and protected by law: a material right.'" *Oestreicher v. Stores*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (citation omitted). Whether a substantial right has been affected by an order is determined on a case-by-case basis. *Estrada v. Jaques*, 70 N.C. App. 627, 642, 321 S.E.2d 240, 250 (1984).

In the case at bar, the superior court's order granting summary judgment in favor of Jason and Julie Gladden was final only as to the Gladdens, but not to Dugger. Therefore, the order is interlocutory and not immediately appealable. *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 312

(1999). The order did not dispose of plaintiff's claim against Dugger. The judgment entered in favor of the Gladdens failed to adjudicate "'the rights and liabilities of . . . all the parties'" to the civil action. *Christopher v. Bruce-Terminix Co.*, 26 N.C. App. 520, 521, 216 S.E.2d 375, 376 (1975).

Additionally, the order in the case at bar lacks a Rule 54(b) certification from the trial court that "'there was no just reason for delay.'" *Id.*

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties *only if there is no just reason for delay and it is so determined in the judgment.*

N.C.R. Civ. P. 54(b) (emphasis added). Thus, "[plaintiff's] appeal is still untimely because the trial court did not certify the action for appeal by finding there was 'no just reason for delay.' 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). Accordingly, plaintiff may not appeal as a matter of right from the trial court's order.

An immediate appeal from an interlocutory order may be taken from an order that affects a substantial right of appellant. *Hudson-Cole Dev. Corp.*, 132 N.C. App. at 344, 511 S.E.2d at 312. Plaintiff's appeal from the trial court's order granting summary judgment as to the Gladdens is interlocutory as a cause of action remains against defendant Dugger. Thus, the order is not a final judgment. Furthermore, in his appellate brief, plaintiff did not

state that his appeal was interlocutory, and failed to provide this Court with a jurisdictional basis as to whether a substantial right would have been affected absent immediate review. Plaintiff's appeal is thereby

Dismissed.

Judges MCGEE and STROUD concur.

Report per Rule 30(e).