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NO. COA09-1543

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

SUPERIOR CONSTRUCTION  
CORPORATION,  
Plaintiff,

v.

Brunswick County  
No. 07 CVS 2806

INTRACOASTAL LIVING, LLC;  
PRESERVE HOLDINGS, LLC; JAMES  
W. DONOHUE; RODNEY J. HYSON,  
SR.; JAMES M. CHIRICO; BRIDGET  
CHIRICO; CAPE FEAR REALTY, LLC;  
CAPE FEAR TRADING GROUP VI, LLC;  
C&P PARTNERSHIP, LLC; BHUPENDRA  
PATEL; and JOHN DOE PATEL,  
Defendants.

Appeal by plaintiff from order entered 29 July 2009 by Judge John R. Jolly, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 12 May 2010.

*Shumaker, Loop & Kendrick, LLP, by Bonnie Keith Green and Steele B. Windle, III, for plaintiff-appellant.*

*Andresen & Arronte, PLLC, by Julian M. Arronte and Kenneth P. Andresen, for defendant-appellee Preserve Holdings, LLC.*

GEER, Judge.

Plaintiff Superior Construction Corporation ("Superior") appeals from an order dismissing its claim against defendant Preserve Holdings, LLC ("Preserve Holdings") for constructive trust/equitable lien and striking its notice of lis pendens. Because the appeal is interlocutory and Superior has failed to

establish that the order affects a substantial right that would be lost without an immediate appeal, we allow Preserve Holdings' motion to dismiss this appeal as interlocutory.

#### Facts

Intracoastal Living, LLC ("Intracoastal") hired Superior to serve as a general contractor for a multiple-building condominium project ("the Preserve Project") in Brunswick County. When the Preserve Project began, Intracoastal entered into a construction loan agreement with Wachovia Bank, through which Wachovia was to loan money to Intracoastal for use specifically in construction of the Preserve Project. The loan was secured by a deed of trust on the Preserve Project.

As a result of Intracoastal's default on the construction loan, Wachovia initiated foreclosure proceedings. Superior subsequently filed suit against defendants on 21 December 2007, asserting claims for breach of contract, lien enforcement, and unjust enrichment. On 16 January 2008, the Preserve Project was purchased by an entity called Preserve Holdings by way of an upset bid. Preserve Holdings had been formed on 9 October 2007 by defendants James M. Chirico and his wife Bridget Chirico, who, together with others, were members of Intracoastal.

On 20 October 2008, Superior filed an amended complaint, asserting additional claims for relief against Preserve Holdings, including (1) a claim for recovery of the *quantum meruit* value of work performed by Superior on the Preserve Project; and (2) a claim seeking imposition of a constructive trust or equitable lien on the

Preserve Project. In November 2008, Superior filed a notice of lis pendens pursuant to N.C. Gen. Stat. § 1-116 (2009), contending that its amended complaint sought to affect title to the Preserve Project.

On 11 December 2008, the case was designated as a complex business case and assigned to the Business Court. On 16 January 2009, Preserve Holdings filed a motion pursuant to Rule 12(b)(6) of the Rules of Civil Procedure, seeking dismissal of Superior's claim for imposition of a constructive trust or equitable lien and cancellation of the notice of lis pendens. On 29 July 2009, the court granted Preserve Holdings' motion. Superior filed notice of appeal on 31 August 2009. Subsequently, on 12 April 2010, Preserve Holdings filed a motion to dismiss Superior's appeal for lack of appellate jurisdiction.

#### Discussion

Superior's appeal of the trial court's order (1) dismissing the claim for imposition of a constructive trust or equitable lien and (2) striking the notice of lis pendens is interlocutory. "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. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). 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).

This Court has jurisdiction to hear an interlocutory appeal in two instances. First, pursuant to Rule 54(b), "'the trial court may certify 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.'" *Meherrin Indian Tribe v. Lewis*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 677 S.E.2d 203, 206 (2009) (quoting *Dep't of Transp. v. Rowe*, 351 N.C. 172, 174-75, 521 S.E.2d 707, 709 (1999)), *disc. review denied*, 363 N.C. 806, 690 S.E.2d 705 (2010). "'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.'" *Id.* (quoting *Rowe*, 351 N.C. at 175, 521 S.E.2d at 709). Where there is no Rule 54(b) certification, "[t]he burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001).

Superior acknowledges that the order is interlocutory, but contends that *Watson v. Millers Creek Lumber Co.*, 178 N.C. App. 552, 631 S.E.2d 839 (2006), establishes that dismissal of the constructive trust claim affects a substantial right:

In *Watson* . . . , this Court held that a summary judgment ruling resulting in the dismissal of the plaintiffs' constructive trust claim was an "interlocutory order concerning title . . . [which] must be immediately appealed as vital preliminary issues involving substantial rights adversely affected." As in *Watson*, Superior has alleged a constructive trust claim, which concerns title to property. The Order dismissing

Superior's constructive trust claim and striking its Lis Pendens adversely affects substantial rights of Superior.

Superior's reliance upon *Watson* is misplaced.

In *Watson*, *id.* at 553, 631 S.E.2d at 840, the plaintiffs entered into an installment contract to purchase a tract of land from defendant Millers Creek Lumber Co., Inc. The contract was recorded. *Id.* Although the plaintiffs timely paid all the installments, Millers Creek failed to deliver the deed to the plaintiffs. *Id.* Instead, Millers Creek conveyed the land to defendant John Counts, who recorded the deed. *Id.* Subsequently, the plaintiffs filed a complaint alleging, among other things, claims for resulting trust, constructive trust, and breach of contract. *Id.* They also twice filed notices of lis pendens. *Id.* at 553-54, 631 S.E.2d at 840. The trial court granted Counts' motion for summary judgment and dismissed the action against him. *Id.* at 554, 631 S.E.2d at 840.

Because the claims against Millers Creek remained pending, the appeal was interlocutory. *Id.* In concluding that the appeal was nonetheless proper, this Court pointed out that the order concerned title to the property, and such interlocutory orders "'must be immediately appealed as vital preliminary issues involving substantial rights adversely affected.'" *Id.*, 631 S.E.2d at 840-41 (quoting *N.C. Dep't of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005)). The Court further pointed out that "defendant Millers Creek stipulated that title to the disputed property rests in either plaintiffs or defendant Counts and their

liability, if any, 'cannot be determined until a final decision is entered on appeal.' Consequently, this appeal is properly before us." *Id.* at 554-55, 631 S.E.2d at 841.

Our Supreme Court has recently limited *Watson* and clarified the holding in *Stagecoach Village*, the sole authority relied upon in *Watson*:

Defendants, relying on *Watson v. Millers Creek Lumber Co.*, 178 N.C. App. 552, 631 S.E.2d 839 (2006), which quoted *North Carolina Department of Transportation v. Stagecoach Village*, 360 N.C. 46, 619 S.E.2d 495 (2005), argue that an interlocutory order such as the 16 February 2007 order in this case affecting title to land must be immediately appealed even though it is not a final order. This reliance is misplaced. First, the procedural posture of *Watson* is distinguishable from the present case. In *Watson* the Court of Appeals allowed the interlocutory appeal, determining that since the order affected title to land, a substantial right was adversely affected. 178 N.C. App. at 554-55, 631 S.E.2d at 840-41. By contrast, in this case plaintiffs' appeal has been dismissed. Second, *Stagecoach Village* was a condemnation case. This Court has said that in condemnation cases, after a hearing pursuant to N.C.G.S. § 136-108, appeal of an issue affecting title to land or area taken by the State is mandatory and the interlocutory appeal must be taken immediately. See *Stagecoach Vill.*, 360 N.C. at 48, 619 S.E.2d at 496; *Rowe*, 351 N.C. at 176, 521 S.E.2d at 710; *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967), modified, *Rowe*, 351 N.C. at 176-77, 521 S.E.2d at 710. The holding that appeal of an interlocutory order affecting title to land and area taken is mandatory is in the context of condemnation cases. Disregarding the words "in condemnation cases" misconstrues the holdings in *Stagecoach Village*, *Rowe*, and *Nuckles* that such interlocutory appeals are mandatory.

*Stanford v. Paris*, \_\_\_\_ N.C. \_\_\_\_, \_\_\_\_, 698 S.E.2d 37, 41 (2010).

Thus, under *Stanford*, outside of the condemnation context, the fact that an interlocutory appeal may affect title to land does not automatically render an interlocutory appeal permissible. The appellant must still demonstrate that the particular order, if not addressed prior to a final judgment, would adversely affect a substantial right of the appellant. In *Watson*, to the extent that it remains good law after *Stanford*, this Court allowed the interlocutory appeal because the defendant who was not a party to the appeal, Millers Creek, had stipulated that the claims against it could not be finally decided until after the Court resolved the question of who held title in the property.

In this case, plaintiffs rely on the fact that they are entitled to appeal because, like the plaintiffs in *Watson*, they asserted a claim for a constructive trust affecting title to the property. Under *Stanford*, this argument is insufficient. Moreover, in contrast to *Watson*, here, there is no dispute as to who has legal title of the Preserve Project. Preserve Holdings acquired the Preserve Project through the foreclosure proceedings. Thus, there is no need to resolve the issue of legal title as a prerequisite to deciding the other issues in the case.

This Court recently distinguished *Watson* precisely on this basis. In *FMB, Inc. v. Creech*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 679 S.E.2d 410, 412 (2009), the Court dismissed an interlocutory appeal in which the plaintiff argued that the summary judgment order at issue resolved the plaintiff's claim for specific performance of an option and contract to purchase real estate, and, therefore,

concerned title to the property and affected a substantial right. In distinguishing *Watson* and dismissing the appeal, this Court held: "First, there is no stipulation in this case, which was a key factor in the determination in *Watson* that the order was immediately appealable. Second, there is no dispute in this case as to who had legal title to the property." *FMB*, \_\_\_ N.C. App. at \_\_\_, 679 S.E.2d at 413.

Aside from *Watson* (and outside the context of condemnation proceedings), *Phoenix Ltd. P'ship of Raleigh v. Simpson*, \_\_\_ N.C. App. \_\_\_, 688 S.E.2d 717 (2009), is the only published case we have identified in which the Court held a substantial right was affected where title to property was alleged to be at issue. *Phoenix* is just like *Watson*. In *Phoenix*, the defendants appealed an order granting specific performance to the plaintiff and requiring the defendants to convey the property to the plaintiff. *Id.* at \_\_\_, 688 S.E.2d at 721. Resolution of the remaining claims could not move forward until the question of who held title to the property was finally decided and, therefore, a substantial right was at stake.

We hold that Superior has failed to demonstrate that a substantial right would be affected in the absence of an interlocutory appeal. Superior has acknowledged that this Court reached the same conclusion in a "related case," also arising out of the Preserve Project, although the opinion was unpublished. *Miller & Long, Inc. v. Intracoastal Living, LLC*, \_\_\_ N.C. App. \_\_\_, 692 S.E.2d 487, 2010 WL 1316211, 2010 N.C. App. LEXIS 582 (Apr. 6,



2010) (unpublished). We see no reason for reaching a different conclusion in this case and dismiss this appeal.

Dismissed.

Judges ROBERT C. HUNTER and STEPHENS concur.

Report per Rule 30(e).