NO. COA09-1711

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

GENE A. BARFIELD and wife, JUDY S. BARFIELD; STEVEN DOUGLAS MOSS and wife, LUANN PENNINGER MOSS; JOHNATHAN EDWARD HARDISON and wife, PAMELA B. HARDISON; and WILLIAM R. COCHRAN and wife, VIKKI S. COCHRAN,
Plaintiffs,

v.

Mecklenburg County
No. 07 CVS 20233

ELIEZER MARTY MATOS,
Defendant/Third-Party Plaintiff,

v.

COY L. McMANUS and wife, MARGARET C. McMANUS; THE REVOCABLE TRUST OF COY L. McMANUS, as Amended; THE REVOCABLE TRUST OF MARGARET C. McMANUS, as Amended; SCOTT WHITTLE and wife, ELISABETH R. WHITTLE; and PAUL GAVRILYUK and wife, ALENA I. GAVRILYUK,
Third-Party Defendants.

Appeal by Defendant/Third-Party Plaintiff from order entered 4 August 2009 by Judge Robert C. Ervin in Superior Court, Mecklenburg County. Heard in the Court of Appeals 26 May 2010.

Bernhardt & Strawser, P.A., by Scott I. Perle, and Griffin, Brunson & Wood, L.L.P., by N. Deane Brunson, for Plaintiffs.

Johnston, Allison & Hord, P.A., by Patrick E. Kelly, for Defendant/Third-Party Plaintiff.

No brief filed for Third-Party Defendants.

STEPHENS, Judge.

This matter arises out of Plaintiffs' efforts to enforce certain restrictive covenants against two parcels of property owned by Defendant/Third-Party Plaintiff ("Defendant"). The trial court entered partial summary judgment for Plaintiffs and imposed a permanent injunction against Defendant. Defendant appeals from the order for permanent injunction. For the reasons set forth below, we dismiss.

I. Procedural History & Factual Background

Third-Party Defendants, Coy L. McManus and his wife, Margaret C. McManus (collectively, "McManus"), were the record owners of a 34.5 acre tract located in both Mecklenburg and Cabarrus Counties (the "Property"). By deed recorded in Cabarrus County, but not in Mecklenburg County, on 2 February 2001, McManus conveyed the Property to the Revocable Trust of Coy L. McManus and the Revocable Trust of Margaret E. McManus (collectively, the "Trusts"). On or about 20 April 2005, McManus agreed to sell approximately 12.83 acres of the Property to Defendant Eliezer Marty Matos ("Defendant") as Tracts Eight and Nine as described on an unrecorded survey. Defendant paid McManus $10,000 in earnest money to purchase Tracts Eight and Nine.

On or about 26 May 2005, prior to the closing of the purchase, McManus caused a survey of the Property to be recorded in the respective offices of the Register of Deeds in Mecklenburg County and Cabarrus County. This survey subdivided the Property into seven separate lots (the "First Plat") designated as Tracts One

through Seven. The First Plat combined Tracts Eight and Nine, consisting of 12.83 acres as described on the earlier unrecorded survey, and redesignated them as Tract Seven, consisting of 12.458 acres. On approximately 26 May 2005, McManus and Defendant entered into an "Offer to Purchase and Contract" whereby Defendant agreed to purchase Tract Seven as shown on the First Plat. The deed to Tract Seven states that the conveyance is made subject to all valid and enforceable restrictions of record, but it does not specifically describe any such restrictions.

By deed recorded on 21 June 2005, McManus conveyed Tract Two of the Property to Plaintiffs Steven Douglas Moss and Luann Penninger Moss. The deed conveying the Moss Property provides that the "'conveyance is made and accepted subject to the restrictive covenants attached and shown as Exhibit A.'" Exhibit A provides that "Tracts 1 through 7 shall be held, transferred, sold, conveyed and occupied subject to the covenants and restrictions set forth, all of which shall run with the land" and be binding on subsequent individuals owning any right, title, or interest in the parcels.

On 27 October 2005, McManus recorded a revised survey (the "Second Plat") of the Property in the offices of the Register of Deeds in Mecklenburg and Cabarrus Counties. The Second Plat recorded in Mecklenburg County showed that 1.447 acres was combined with Tract Seven. However, the Second Plat recorded in Cabarrus County showed the 1.447 acre parcel as a separate parcel from Tract Seven, but with a notation to "'recombine with Tract 7.'" On 24 August 2006, McManus conveyed this 1.447 acre parcel to Defendant.

The deed for the 1.447 acres describes the property being sold as "'1.447 acres (Cabarrus and Mecklenburg County), formerly a portion of Tract 7 [sic] Coy L. McManus Property.'" The deed for the 1.447 acres does not expressly subject the property to any restrictions.

Between 18 November 2005 and 13 June 2007, McManus conveyed the remaining tracts of the Property. In order of conveyance, McManus conveyed Tract One to Plaintiffs Gene A. and Judy S. Barfield, Tract Three to Plaintiffs Johnathan Edward and Pamela B. Hardison, Tract Five to Plaintiffs William R. and Vikki S. Cochran, Tract Four to Third-Party Defendants Scott and Elisabeth R. Whittle, and Tract Six to Third Party Defendants Paul and Alena I. Gavrilyuk. The deeds to Tracts One through Six of the Property specifically state that the property is subject to the following restrictions:

> "No dwelling, outbuilding or any accessory feature to the dwelling or any other structure, including fencing and pools, shall be located and constructed upon any tract until the completed construction plans (the "Plans") are approved by the then owners of tracts 1 and 2 together with Mr. or Mrs. Coy L. McManus or the assignee of Mr. or Mrs. McManus."
>
> . . . "Only one residence shall be permitted on each tract and no residence shall be constructed or permitted to remain on any tract unless it shall have at least 3000 square feet of heated floor space."

After the remaining Tracts of the Property were conveyed, Defendant indicated a desire to subdivide Tract Seven and the 1.447 acre parcel (collectively, "Defendant's Property"), install an access road, and develop high-end residential homes. Defendant did

not submit any plans for construction on Defendant's Property to the owners of Tracts One or Two. In July 2007, Defendant installed barbed wire fencing on his property to contain cows and horses.

On 9 October 2007, Plaintiffs filed an action against Defendant alleging Defendant had breached the restrictive covenants and seeking preliminary and permanent injunctions. On 4 January 2008, Defendant filed an answer and counterclaim seeking a declaratory judgment that Defendant's property was not subject to the restrictions and reformation of the deeds to his property. On 2 March 2008, Defendant filed a motion to amend answer and counterclaim to join McManus and the Trusts as Third-Party Defendants. The trial court entered an order on 5 March 2008 granting Plaintiffs' motion for preliminary injunction, allowing Defendant's motion to join the Third-Party Defendants to this matter, and providing 15 days for Defendant to file his amended answer, counterclaim, and third-party complaint.

On 4 April 2008, Defendant filed a first amended answer, counterclaim, and third-party complaint asserting an additional counterclaim against Plaintiffs for rescission, and asserting a third-party complaint against McManus for negligent misrepresentation and breach of warranty. On approximately 16 June 2008,[1] Plaintiffs filed a motion to dismiss Defendant's claims for reformation and rescission, and asserted crossclaims against the Third-Party Defendants alleging breach of covenant and negligent

[1]The file stamp on Plaintiffs' motion is illegible, but the record shows that this motion was signed on 16 June 2008.

misrepresentation. The record before this Court does not reveal any disposition of Plaintiffs' motion to dismiss.

On 16 October 2008, Plaintiffs filed a motion for partial summary judgment on Defendant's counterclaims for declaratory judgment, reformation, and rescission. On 3 November 2008, McManus filed a motion for summary judgment on Defendant's claims for negligent misrepresentation and breach of warranty, and on Plaintiffs' crossclaims for breach of covenant and negligent misrepresentation. The record before us does not contain any disposition of McManus' motion for summary judgment.

On 24 November 2008, Plaintiffs filed a motion seeking a permanent injunction against Defendant's violation of the restrictive covenants. On 9 December 2008, the trial court entered an order granting Plaintiffs' 16 October 2008 motion for partial summary judgment. The trial court concluded that Plaintiffs were entitled to judgment as a matter of law that the restrictive covenants at issue in this action do apply to and encumber Defendant's Property. The trial court granted Plaintiffs' motion for permanent injunction in an order entered 4 August 2009, thereby enjoining Defendant from taking any action in violation of the terms and conditions of the restrictions and mandating that Defendant remove any and all structures on Defendant's Property which were constructed in violation of the terms and conditions of the restrictive covenants. On 11 August 2009, Defendant filed notice of appeal from the order entering a permanent injunction. That portion of the permanent injunction requiring the removal of

any existing structures on Defendant's property was stayed during the pendency of this appeal.

II. Interlocutory Order

Defendant states the following as the grounds for appellate review in this matter: "The Order for Permanent Injunction is a final judgment and appeal therefore lies to the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b) (2009)." N.C. Gen. Stat. § 7A-27(b) provides that appeal of right to the Court of Appeals lies "[f]rom any final judgment of a superior court[.]" Our Supreme Court has defined a final judgment as "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). We have held that this statute should be strictly construed for the purpose of eliminating the unnecessary delay and expenses of fragmented appeals and of presenting the whole case for determination in a single appeal from a final judgment. *Buchanan v. Rose*, 59 N.C. App. 351, 352, 296 S.E.2d 508, 509 (1982).

Although neither party acknowledges or addresses the issue, the trial court's order imposing a permanent injunction 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." *Panos v. Timco Engine Ctr., Inc.*, __ N.C. App. __, __, 677 S.E.2d 868, 872 (2009) (internal citations and quotation marks omitted). Here, the trial court

awarded partial summary judgment for Plaintiffs and entered an order for permanent injunction. The trial court's order for partial summary judgment only disposed of Defendant's counterclaims for declaratory judgment, rescission, and reformation. The record before us does not reflect any resolution of Plaintiffs' claims against Defendant for monetary damages, Plaintiffs' crossclaims against the Third-Party Defendants seeking monetary damages for alleged breach of covenant and negligent misrepresentation, or Defendant's crossclaims against the Third-Party Defendants also seeking monetary damages for alleged breach of warranty and negligent misrepresentation. Based on the record before this Court, these actions remain before the trial court for further disposition, and thus, the trial court's order for permanent injunction is interlocutory.

N.C. Gen. Stat. § 7A-27(d) sets forth the circumstances in which an appeal from an interlocutory order or judgment is available.

> From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which
> (1) Affects a substantial right, or
> (2) In effect determines the action and prevents a judgment from which appeal might be taken, or
> (3) Discontinues the action, or
> (4) Grants or refuses a new trial, appeal lies of right directly to the Court of Appeals.

N.C. Gen. Stat. § 7A-27(d) (2009). It is well established that "[t]here is generally no right to appeal an interlocutory order." *N.C. Dept. of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d

332, 334 (1995); however, an interlocutory order is immediately appealable in two instances. "First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie." *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001) (internal citations and quotation marks omitted). "The other situation in which an immediate appeal may be taken from an interlocutory order is when the challenged order affects a substantial right of the appellant that would be lost without immediate review." *Id.* at 165, 545 S.E.2d at 261.

Grounds for appellate review from an order of a superior court judge also exist under N.C. Gen. Stat. § 1-277(a). This section provides that

> [a]n appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

N.C. Gen. Stat. § 1-277(a) (2009).

Defendant does not cite N.C. Gen. Stat. §§ 7A-27(d) or 1-277(a) as the grounds for appellate review. While we acknowledge that the injunction is a final order as to Plaintiffs' claim for injunctive relief, it does not dispose of the entire controversy between all the parties to this case. However, the trial judge did not certify the case for appeal pursuant to Rule 54(b), nor has

Defendant argued that the trial court's order affects a substantial right that would be lost without our immediate review.

> It 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 v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994); *see GLYK & Assoc. v. Winston-Salem Southbound Railway Co.*, 55 N.C. App. 165, 170-71, 285 S.E.2d 277, 280 (1981) (wherein this Court stated that the question of whether it should entertain an appeal from an interlocutory order "depend[ed] upon whether [the appellant] has shown that it was deprived of any substantial right" and dismissed the appeal upon finding that the appellant "failed to show that the [interlocutory order] deprived it of any substantial right"); *see also Godley Auction Co., Inc. v. Myers*, 40 N.C. App. 570, 574, 253 S.E.2d 362, 365 (1979) (dismissing appeal from interlocutory order when appellant "*failed to show*" "that the trial court's interlocutory order '[would] work an injury to him if not corrected before an appeal from the final judgment'") (emphasis added); *see generally Hajmm Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 589, 403 S.E.2d 483, 490 (1991) ("In civil cases, '[t]he burden is on the appellant not only to show error but to enable the court to see that he was prejudiced or the verdict of the jury probably influenced thereby.'"); *Gum v. Gum*, 107 N.C. App. 734, 738, 421 S.E.2d 788, 791 (1992) (appellant has the burden of showing error).

We also note that Defendant has not appealed from the trial court's order of partial summary judgment, in which the trial court ruled that the restrictive covenants do apply to and encumber Defendant's Property.[2] That order, therefore, is not before this Court. *See Whitlock v. Triangle Grading Contr'rs Dev., Inc.*, __ N.C. App. __, __, __ S.E.2d __, __ (2010) ("'Without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2.'") (quoting *Bromhal v. Stott*, 116 N.C. App. 250, 253, 447 S.E.2d 481, 483 (1994), *disc. review denied in part*, 339 N.C. 609, 454 S.E.2d 246, *aff'd in part*, 341 N.C. 702, 462 S.E.2d 219 (1995)). Accordingly, for the foregoing reasons, Defendant's appeal is

DISMISSED.

Judges STEELMAN and HUNTER, JR. concur.

Report per Rule 30(e).

[2]The Notice of Appeal in the Record on Appeal states that Defendant "gives notice of appeal . . . from the Order for Permanent Injunction . . . entered on July 24, 2009 [sic] . . . ."