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NO. COA10-1014
NORTH CAROLINA COURT OF APPEALS

Filed: 19 July 2011

BOST CONSTRUCTION COMPANY,
Plaintiff,

v.

Chatham County
No. 09 CVS 79

MARY LYNN BAUMUNK BLONDY,
Defendant.

WILLIS COATING & FINISHES, INC.,
Plaintiff,

v.

BOST CONSTRUCTION COMPANY d/b/a
BOST CUSTOM HOMES f/k/a/ BOST
BUILDERS, INC [sic] f/k/a/ BOST,
INC.; MARY LYNN BAUMUNK BLONDY and
STEVEN M. BLONDY,
Defendants.

BOST CONSTRUCTION COMPANY,
Third-Party Plaintiff,

v.

SUMMERHOUR AND ASSOCIATES
ARCHITECTS, INC.; ARCHITECTURAL
DETAILS & MILLWORK, INC.; LOEWEN
WINDOW CENTER OF ATLANTA, INC.;
TIMOTHY D. MILLS d/b/a T.D. MILLS
STONESETTING; ALLPRO INSULATION,
CO.; FLUE SENTINEL, LLC; FLUE
SENTINEL, INC.; MYATT LANDSCAPING
CONCEPTS, INC.; MAVERIC WINDOW &
DOOR, INC.; ERIC DAVIS d/b/a
CLASSIC EXTERIORS; THE CENTURY

SLATE COMPANY; DURANGO ASSOCIATES, INC.; TRI-CITY CONTRACTORS, INC.; AIRMAKERS HEATING & AIR CONDITIONING, INC.; EIKLOR FLAMES, INC.; M.A. WILLIS, LLC and B&B MAINTENANCE ENTERPRISES, LLC; HARMONY EXCHANGE, INC. and NEIL DONOVAN d/b/a DONOVAN'S PAINTING CO.,

Third-Party Defendants.

Appeal by Third-Party Plaintiff from orders entered 15 April 2010 and 14 May 2010 by Judge R. Allen Baddour, Jr. in Superior Court, Chatham County. Heard in the Court of Appeals 8 February 2011.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence and Michael R. Porter, for Third-Party Plaintiff-Appellant.

Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, for Third-Party Defendants-Appellees Flue Sentinel, LLC and Flue Sentinel, Inc.

McGEE, Judge.

Bost Construction Company (Bost) filed a complaint against Mary Lynn Baumunk Blondy (the homeowner) concerning her alleged failure to pay Bost for construction of a house (the house). In its complaint, Bost asserted claims for, *inter alia*, breach of contract and *quantum meruit*, and sought a declaratory judgment. The homeowner filed a counterclaim, alleging breach of contract

and warranties, negligence, negligent misrepresentation, and unfair and deceptive trade practices by Bost, concerning Bost's alleged failure to satisfactorily construct the house.

Bost was the general contractor for the house and subsequently filed a third-party complaint against several subcontractors who provided labor and materials for the house. These subcontractors included Flue Sentinel, LLC and Flue Sentinel, Inc. (collectively, Flue Sentinel). Bost's third-party complaint against Flue Sentinel alleged breach of contract and warranties, indemnification based on "the theory of active/passive tort liability[,] and contribution. The record does not include a copy of the alleged agreement between the homeowner and Bost or the alleged agreement between Bost and Flue Sentinel.

Flue Sentinel was the manufacturer of a "gas fireplace product" (the fireplace product) that was integrated into a fireplace in the house. Although the fireplace product was installed by another subcontractor, Bost contacted Flue Sentinel when it malfunctioned. Flue Sentinel sent its representatives to repair the fireplace product.

After Bost filed its third-party complaint against Flue Sentinel, Flue Sentinel sent the homeowner a request for admissions and interrogatories. The homeowner responded to Flue

Sentinel's request for admissions and interrogatories on 28 December 2009. She admitted, *inter alia*, that she did "not contend that any act, omission or conduct by Flue Sentinel [wa]s attributable to any damage" to the house. Flue Sentinel notified Bost of the homeowner's admissions. Flue Sentinel requested that Bost file a motion to voluntarily dismiss Bost's third-party claims against Flue Sentinel; however, Bost did not do so. Flue Sentinel filed a motion for summary judgment, pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, based on the homeowner's response to its request for admissions. Bost filed a motion for continuance of the hearing on Flue Sentinel's motion for summary judgment. The trial court denied Bost's motion for a continuance but granted Flue Sentinel's motion for summary judgment on 15 April 2010.

Pursuant to N.C. Gen. Stat. § 6-21.5, Flue Sentinel also filed a motion for attorney's fees. Flue Sentinel based its motion on Bost's refusal to file a voluntary dismissal despite the homeowner's response to admissions which, Flue Sentinel argued, rendered Bost's claims against Flue Sentinel non-justiciable. The trial court granted Flue Sentinel's motion for attorney's fees on 14 May 2010. Bost appeals the trial court's 15 April 2010 orders denying Bost's motion for a continuance and

granting summary judgment to Flue Sentinel and the trial court's 14 May 2010 order granting attorney's fees to Flue Sentinel.

Initially, we must determine whether this matter is properly before us. "An order is interlocutory if it does not determine the entire controversy between all of the parties." *Abe v. Westview Capital*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998) (citation omitted). "Generally, there is no right of immediate appeal from an interlocutory order." *Id.* (citation omitted).

There is a three-step analysis: 1) A judgment which is final to all claims and parties is immediately appealable. 2) If a judgment is not final as to all parties and claims, it is appealable if it is final to a party or issue and has been certified for appeal by the trial court under N.C.G.S. Sec. 1A-1, Rule 54(b). 3) If it is neither final to all claims and parties, nor final to a party or issue and certified for appeal, a judgment is immediately appealable if it affects a substantial right of the parties.

New Bern Assoc. v. The Celotex Corp., 87 N.C. App. 65, 67, 359 S.E.2d 481, 483 (1987) (citing *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 168-69, 265 S.E.2d 240, 245 (1980)). Bost admits that, under N.C. Gen. Stat. § 1A-1, Rule 54(b), the appealed orders are interlocutory in that each order "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties[.]" Additionally, the

trial court did not certify the orders for immediate appeal under N.C. Gen. Stat. § 1A-1, Rule 54(b) (2009). Thus, the trial court's orders are immediately appealable only if they affect a substantial right of Bost's.

Bost contends that

 this appeal is ripe for consideration in that the trial court's entry of summary judgment in favor of Third-Party Defendant Flue Sentinel, coupled with the award of substantial attorney's fees under § 6-21.5 affected a "substantial right" of Third Party Plaintiff Bost Construction, supporting immediate appeal under N.C. Gen. Stat. § 1-277 and § 7A-27(d).

Bost further presents a scenario that it contends demonstrates the possibility of inconsistent verdicts in this matter:

 By litigating the Flue Sentinel case separate from the remainder of the *Bost v. Blondy* litigation, the jury in the initial case could find that the counterclaiming [homeowner] is entitled to cost and damages for repairs and modifications to the Flue Sentinel system, (resulting from work performed by Flue Sentinel) which would not be specifically set forth in a judgment, and subsequently, a jury could find that there were no damages as a result of this work having been done by Flue Sentinel, or otherwise that there was much less in actual monetary damages than the first jury awarded.

We disagree.

 "A 'substantial right' is one 'which will clearly be lost or irremediably adversely affected if the order is not

reviewable before final judgment.'" *New Bern*, 87 N.C. App. at 67, 359 S.E.2d at 483 (quoting *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983)). "A judgment which creates the possibility of inconsistent verdicts on the same issue in different trials affects a substantial right." *Id.* (citations omitted).

Admittedly the "substantial right" test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.

Waters v. Personnel, Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

In the case before us, the homeowner alleges the following in her counterclaims against Bost:

8. In addition, Bost warranted that "all work will be performed in a good and workmanlike manner, using new, quality materials, all in accordance with the plans and specifications. . . ."

9. The Agreement also provides that Bost was to "be solely responsible for all construction under [the] Agreement, including techniques, sequences, procedures and means as well as for coordination of all work under [the] Agreement." Bost was also responsible for the acts of all subcontractors on the project.

Thus, as alleged, Bost's liability to the homeowner is based upon duties owed by Bost to the homeowner in regard to the completion of the house in compliance with certain standards. In order to establish Bost's liability, the homeowner would need to prove the existence of the contract, warranties, or duty, and Bost's breach of the same. See N.C. Gen. Stat. § 25-2-313 (2009) (providing elements for breach of express warranty claim); *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 586, 615 S.E.2d 45, 48 (2005) (providing the elements of negligence claim); *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (providing elements for breach of contract claim). Based on the homeowner's counterclaims, Bost's liability is not dependent upon a showing of errors or mistakes by Flue Sentinel. Rather, Bost's breach may be proven simply by a showing that the construction of the house, including the fireplace product, did not meet the contractual, warranty, or due care standards which were alleged in the homeowner's counterclaims against Bost.

In contrast to the homeowner's counterclaims against Bost, Bost's third-party claims against Flue Sentinel alleging breach of contracts and warranties, indemnification, and contribution are based upon alleged contracts and warranties between Bost and Flue Sentinel, and upon breach of an alleged duty owed by Flue Sentinel to the homeowner. As such, proof of Bost's contractual

and warranty third-party claims against Flue Sentinel does not require proof of the same factual issues raised by the homeowner's counterclaims. See *Terry's Floor Fashions v. Murray*, 61 N.C. App. 569, 572, 300 S.E.2d 888, 890 (1983) (citation omitted) ("[S]ince the original complaint and the third-party complaint relate to different contracts, there is no danger of different juries rendering inconsistent verdicts on the same factual issue.").

Likewise, Bost's indemnification and contribution claims against Flue Sentinel do not require proof of the same issues as the homeowner's counterclaims. The homeowner's negligence claim against Bost is based upon an alleged breach of a duty owed by Bost to the homeowner. Alternately, Bost's indemnification and contribution claims against Flue Sentinel are based upon an alleged breach of a separate duty owed by Flue Sentinel to the homeowner. Therefore, there is not a possibility of inconsistent verdicts. See *Green v. Duke Power Co.*, 305 N.C. 603, 606-08, 290 S.E.2d 593, 595-96 (1982). If the fact finder determined that the damage to the fireplace product was caused by Bost's negligence, then in a second trial, Flue Sentinel would be barred by *res judicata* from raising the defense that Bost was not negligent. See *Hales v. N.C. Insurance Guaranty Assn.*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994) (citation

omitted) ("Under the doctrine of *res judicata* . . . 'a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them.'").

As noted above, Bost also argues that a hypothetical scenario demonstrates the possibility of an inconsistent verdict in a second trial on the amount of damages attributable to Flue Sentinel for any costs and repairs to the fireplace product. We are not persuaded. As alleged by the homeowner, Bost's liability to the homeowner is not dependent upon a finding of any actions or omissions of Flue Sentinel. At the initial trial, a determination could be made that Bost is liable to the homeowner for damages related to the fireplace product, and that determination could fail to specify the exact amount of damages attributable to the fireplace product defects. However, that determination at the initial trial would not be inconsistent with a determination in a second trial that Flue Sentinel is not liable to Bost or that Flue Sentinel is liable to Bost for a lesser amount of damages. Moreover, Bost may request that the trial court instruct the jury, in the initial trial, to return a special verdict which specifies the amount of damages, if any, attributable to defects in the fireplace product. See N.C. Gen. Stat. § 1A-1, Rule 49(a) (2009). Therefore, Bost's argument is

without merit.

Bost also argues that the trial court's order awarding attorney's fees, considered with the order granting summary judgment, constitutes a final judgment on damages between Bost and Flue Sentinel and thus affects a substantial right of Bost's. We disagree. In support of its argument, Bost cites to *Miller v. Henderson*, 71 N.C. App. 366, 322 S.E.2d 594 (1984). In *Miller*, our Court found that an interlocutory appeal from the trial court's order granting summary judgment to some, but not all, of the co-defendants as to the plaintiff's defamation and malicious interference with contractual rights claims, presented the possibility of inconsistent verdicts in a second trial and, thus, affected a substantial right of the plaintiff. *Id.* at 368, 322 S.E.2d at 596. The *Miller* Court additionally stated:

We further hold the 11 October 1983 order granting defendant appellees' request for attorneys' fees, *when considered with the 18 September 1983 [summary judgment] order*, is immediately appealable. Our courts have held that the entry of a partial summary judgment for a monetary sum against a party affected the substantial right of that party and therefore was immediately appealable. *Investments v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977); *Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E.2d 240, *appeal dismissed*, 301 N.C. 92 (1980). We believe *the two orders appealed from in the present case* are substantially equivalent to a partial judgment against plaintiff for a monetary sum, and as such, affect a substantial right of the plaintiff.

Id. (emphasis added). The *Miller* Court's finding that the trial court's order granting attorney's fees affected a substantial right of the plaintiff was therefore based upon the *Miller* Court's initial finding that the trial court's order granting summary judgment affected a substantial right of the plaintiff. *Id.* In the present case, we have found that the trial court's order granting summary judgment to Flue Sentinel does *not* affect a substantial right of Bost's. *Miller* is distinguishable and does not control our decision.

We find the analysis in *Bowman v. Alan Vester Ford Lincoln Mercury*, 151 N.C. App. 603, 566 S.E.2d 818 (2002), more applicable to the present case. In *Bowman*, our Court granted discretionary review of an appeal from an interlocutory order, despite finding that the appellants had "not met their burden of demonstrating that a substantial right w[ould] be compromised without an immediate appeal of th[e] issue[.]" *Id.* at 611-12, 566 S.E.2d at 824 (citation omitted). Before granting discretionary review, the *Bowman* Court explained why the appealed order granting attorney's fees did not affect a substantial right of the appellants:

The award of attorneys fees here was a sanction against [the appellants]. As such, this part of the interlocutory order does not affect a substantial right and hence, is not immediately appealable. See *Cochran v.*

Cochran, 93 N.C. App. 574, 577, 378 S.E.2d 580, 582 (1989) (stating that an order granting attorney fees is interlocutory and does not affect a substantial right); *Routh v. Weaver*, 67 N.C. App. 426, 428, 313 S.E.2d 793, 795 (1984) (stating that an order imposing sanctions is interlocutory).

Id. at 611, 566 S.E.2d at 824.

Similarly, the trial court's order awarding attorney's fees to Flue Sentinel was a sanction, pursuant to N.C. Gen. Stat. § 6-21.5, against Bost in regard to Bost's persistence "in litigating the case after the point where Bost reasonably should have become aware that the claims it filed against Flue Sentinel no longer contained a justiciable issue." Because the trial court's order granting attorney's fees was a sanction, see *Brooks v. Giese*, 334 N.C. 303, 310, 432 S.E.2d 339, 343 (1993) (citation omitted) ("Sanctions under N.C.G.S. § 6-21.5 may be imposed where there is 'a complete absence of a justiciable issue of either law or fact.'"), the "order does not affect a substantial right and hence, is not immediately appealable[.]" *Bowman*, 151 N.C. App. at 611, 566 S.E.2d at 824 (citations omitted).

In sum, the appealed orders are interlocutory and do not affect a substantial right of Bost. Accordingly, Bost "is not entitled to immediate appellate review as its rights may be adequately protected by timely exception and subsequent

assignment of error thereto upon the entry of final judgment in the trial court." *Yang v. Three Springs, Inc.*, 142 N.C. App. 328, 331, 542 S.E.2d 666, 668 (2001). Bost's appeal is dismissed.

Dismissed.

Judges BRYANT and BEASLEY concur.

Report per Rule 30(e).