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NO. COA11-180
NORTH CAROLINA COURT OF APPEALS

Filed: 16 August 2011

EAST BAY COMPANY, LTD.,
Plaintiff,

v. Wake County
No. 08 CVS 14349

BAXLEY COMMERCIAL PROPERTIES, LLC, BAXLEY DEVELOPMENT, INC. and BRANDON BAXLEY, Individually,
Defendants.

Appeal by defendant from judgment entered 30 July 2010 by Judge Paul Gessner in Wake County Superior Court. Heard in the Court of Appeals 8 June 2011.

McGuire Woods LLP, by Christian M. Kennedy and Monica E. Webb, for plaintiff-appellee.

Unti & Lumsden LLP, by Michael L. Unti, for defendant-appellant Brandon Baxley.

HUNTER, Robert C., Judge.

Defendant Brandon Baxley appeals from the trial court's judgment as well as several intermediate orders entered in this action by plaintiff East Bay Company, Ltd. to collect on two

promissory notes guaranteed by Mr. Baxley. After careful review, we dismiss in part and affirm in part.

Facts

Mr. Baxley is the sole member and manager of Baxley Commercial Properties, LLC ("BCP"), a North Carolina corporation that was the developer of Salterbeck Village, a condominium development in Charleston, South Carolina. In connection with the development, BCP executed and delivered a promissory note on 19 March 2007 for $1,127,750.00 ("March note") to Regions Bank, an Alabama banking corporation. On 30 May 2007, BCP executed and delivered a second promissory note to Regions Bank in the amount of $296,500.00 ("May note"). Mr. Baxley signed the guaranty agreements, personally guaranteeing BCP's obligations under the March and May notes. As additional security for the loans, Baxley Development, Inc. ("BDI"), a North Carolina corporation of which Mr. Baxley is the founder, president, and sole shareholder, executed a commercial guaranty agreement that also guaranteed BCP's obligations.

Disputes arose between BCP and Regions Bank about the progress of the Salterbeck Village development. Regions Bank asserted that BCP had defaulted under the terms of the March and May notes by failing to make timely payments. Regions Bank initiated an action against BCP in South Carolina state court on

8 July 2008 to foreclose on the real property securing the promissory notes ("South Carolina action"). On 15 August 2008, Regions Bank filed a complaint against BCP, BDI, and Mr. Baxley in Wake County Superior Court, seeking to recover for BCP's breach of the March and May promissory notes and BDI's and Mr. Baxley's breach of the guaranty agreements ("North Carolina action") (08 CVS 14349). BCP and Mr. Baxley filed an answer in the North Carolina action, generally denying the allegations in the complaint. BDI did not file an answer in the North Carolina action.[1]

Sometime around 10 February 2009, East Bay, a South Carolina corporation and real estate developer, purchased Region Bank's interests in the March and May notes. On 8 May 2009, an entry of final judgment and decree of foreclosure was entered in the South Carolina action against BCP. After the foreclosure sale was completed, a deficiency judgment was entered against BCP for $359,998.43 plus interest ("South Carolina judgment").

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[1] On 29 September 2008, Regions Bank filed motions for entry of default and default judgment against BDI. *See Regions Bank v. Baxley Commercial Props.*, __ N.C. App. __, __, 697 S.E.2d 417, 419 (2010). The clerk of superior court granted the motions on 1 October 2008. *Id.* This Court issued an opinion on 3 August 2010 affirming the denial of BDI's motion to set aside the entry of default and default judgment. *Id.* at __, 697 S.E.2d at 420-22. BDI also filed a petition for writ of prohibition with this Court, which was denied.

On 31 July 2009, East Bay filed a motion to compel discovery against BCP and Mr. Baxley for failure to respond to East Bay's discovery requests. The trial court, after conducting a hearing on the motion to compel, entered an order on 6 October 2009, directing BCP and Mr. Baxley to respond to the discovery requests, prohibiting them from introducing any evidence in their defense not produced within 14 days of the order, and imposing $7,421.80 in costs and expenses and attorneys' fees.

On 22 December 2009, East Bay filed a Notice of Filing of Foreign Judgment in the North Carolina action to domesticate the South Carolina Judgment (09 CVS 25392). BCP filed a Motion for Relief from Foreign Judgment on 25 January 2010. On 4 March 2010, East Bay filed in the North Carolina action: (1) a motion to enforce the South Carolina judgment; (2) a motion for consolidation of the action to enforce the South Carolina judgment (09 CVS 25392) with the North Carolina action (08 CVS 14349); and (3) a motion to strike BCP's and Mr. Baxley's answer and for further sanctions under Rule 37 of the Rules of Civil Procedure. The trial court held a hearing on the parties' respective motions on 16 March 2010 and subsequently entered an order on 22 March 2010 in which the court: (1) granted East Bay's motion for enforcement of the South Carolina judgment and

denied BCP's motion for relief from the judgment; (2) denied East Bay's motion for consolidation; (3) substituted East Bay for Regions Bank as the party plaintiff in the North Carolina action (08 CVS 14349); and (4) denied East Bay's motion to strike and for further sanctions.

On 23 April 2010, East Bay moved for summary judgment against Mr. Baxley on the breach of guaranty claim. Mr. Baxley filed in writing his opposition to the summary judgment motion. After conducting a hearing on 25 May 2010, the trial court entered an order on 27 May 2010 granting East Bay's motion for summary judgment. On 3 June 2010, East Bay filed a motion for entry of judgment against Mr. Baxley, seeking to collect $359,998.43, "representing the indebtedness of BCP that Brandon Baxley unconditionally guaranteed," plus post-judgment interest, costs and expenses, and attorneys' fees. The trial court entered judgment against Mr. Baxley on 30 July 2010, awarding East Bay "the principal amount of $359,998.43, plus $24,097.70 in interest accrued from August 27, 2009 at the South Carolina legal rate of 7.25% per annum . . . , plus $123,197.96, representing East Bay's reasonable attorneys' fees, costs and expenses, for a total judgment of $507,294.09, plus interest at the North Carolina legal rate from the date of entry of th[e] Final Judgment until the Final Judgment is satisfied . . . ."

Mr. Baxley noticed appeal from the trial court's 30 July 2010 judgment.

I

On appeal, Mr. Baxley argues for reversal of the trial court's (1) 6 October 2009 order compelling discovery; (2) 22 March 2010 order substituting East Bay as party plaintiff; (3) 27 May 2010 order granting East Bay's motion for summary judgment; and (4) 30 July 2010 judgment awarding damages, interest, attorneys' fees, and costs. Mr. Baxley's notice of appeal, however, only designates the 30 July 2010 judgment as the trial court's ruling from which appeal was taken: "PLEASE TAKE NOTICE that, pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, Defendant Brandon Baxley appeals to the North Carolina Court of Appeals from the Final Judgment entered against him individually on July 30, 2010." Mr. Baxley's notice of appeal thus does not specifically designate the trial court's intermediate orders.

Rule 3(d) of the Rules of Appellate Procedure requires that an appellant's notice of appeal "designate the judgment or order from which appeal is taken and the court to which appeal is taken . . . ." N.C. R. App. P. 3(d); *Boger v. Gatton*, 123 N.C. App. 635, 637, 473 S.E.2d 672, 675 (1996). "Proper notice of appeal is a jurisdictional requirement that may not be

waived[,]" *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994), and thus "[a]n appellant's failure to designate a particular judgment or order in the notice of appeal generally divests this Court of jurisdiction to consider that order[,]" *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 347, 666 S.E.2d 127, 133 (2008), *disc. review denied*, 363 N.C. 260, 677 S.E.2d 461 (2009).

An appellate court may nonetheless obtain jurisdiction to review an order not included in a notice of appeal pursuant to N.C. Gen. Stat. § 1-278 (2009), which provides that "[u]pon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." *See Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 641, 535 S.E.2d 55, 59 (2000) (explaining that N.C. Gen. Stat. § 1-278 "provides another avenue by which an appellate court may obtain jurisdiction to review an interlocutory order absent compliance with Rule 3(d)." (internal citation and quotation marks omitted)). Review under N.C. Gen. Stat. § 1-278 is permissible if three requirements are satisfied: "(1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected

the judgment." *Gaunt v. Pittaway*, 135 N.C. App. 442, 445, 520 S.E.2d 603, 606 (1999).

As for the first requirement, Rule 46(b) of the Rules of Civil Procedure provides, as to interlocutory orders not directed to the admissibility of evidence, that "formal objections and exceptions are unnecessary." N.C. R. Civ. P. 46(b). Instead,

> [i]n order to preserve an exception to any such ruling or order or to the court's failure to make any such ruling or order, it shall be sufficient if a party, at the time the ruling or order is made or sought, makes known to the court the party's objection to the action of the court or makes known the action that the party desires the court to take and the party's grounds for its position.

N.C. R. Civ. P. 46(b). "The opposition must specify 'what action [the non-movant] wanted the trial court to take and the grounds for that action.'" *Dixon v. Hill*, 174 N.C. App. 252, 258, 620 S.E.2d 715, 719 (2005) (quoting *Inman v. Inman*, 136 N.C. App. 707, 712, 525 S.E.2d 820, 823, *cert. denied*, 351 N.C. 641, 543 S.E.2d 870 (2000)), *disc. review denied*, 360 N.C. 289, 627 S.E.2d 619, *cert. denied*, 548 U.S. 906, 165 L. Ed. 2d 954 (2006).

With respect to the 6 October 2009 order, the record on appeal contains no written opposition to East Bay's motion to compel discovery. Nor is there any indication that Mr. Baxley

orally objected to the trial court's ruling as he did not file the transcripts from the hearing on the motion. Mr. Baxley nonetheless contends in his reply brief that, although he failed to object to the order "when entered," there is "ample evidence in the record of objection to that Order . . . at the next hearing in the cause" on 16 March 2010. Without any citation of authority, Mr. Baxley appears to contend that his objection — if, in fact, there was one — to the enforcement of the 6 October 2009 order at a subsequent hearing, is sufficient to preserve review under N.C. Gen. Stat. § 1-278.

Contrary to Mr. Baxley's contention, Rule 46(b) specifies that to be "sufficient," a "party's objection to the action of the court" must be made "*at the time the ruling or order is made or sought* . . . ." N.C. R. Civ. P. 46(b) (emphasis added). Thus, Mr. Baxley's purported objection to the trial court's 6 October 2009 order, coming over five months after the hearing on the motion and the entry of the order, was untimely and fails to satisfy N.C. Gen. Stat. § 1-278's first prong. *Compare Yorke*, 192 N.C. App. at 349, 666 S.E.2d at 134 ("The record in this case reveals that Mr. Yorke vigorously opposed Defendants' motion for a protective order by filing an objection to Defendants' motion, filing a motion to compel discovery of the disputed documents, and presenting his arguments during an 8

November 2004 hearing before the trial court. We therefore conclude that 'at the time the ruling or order [was] made or sought,' [Mr. Yorke] 'ma[de] known to the [trial] court [his] objection to the action of the [trial] court' and 'ma[de] known the action that [he] desire[d] the [trial] court to take and [his] grounds for [his] position.'" (quoting N.C. R. Civ. P. 46(b))). As Mr. Baxley failed to identify the 6 October 2009 order in his notice of appeal and the record does not reflect any objection to the trial court's ruling, this Court lacks jurisdiction to review Mr. Baxley's contentions regarding that order. *See Dixon*, 174 N.C. App. at 258, 620 S.E.2d at 719 ("[B]ecause defendants did not specifically reference the order of substitution in the notice of appeal and because the record contains no indication that defendants objected to the entry of that order, we do not have jurisdiction to review defendants' contentions regarding the order of substitution.").

As for the 22 March 2010 order substituting East Bay for Regions Bank as party plaintiff, Mr. Baxley maintains that the substitution was not "prompted by any motion" by East Bay or Regions Bank, that the trial court made the substitution "*sua sponte*," and thus Mr. Baxley could not have filed a written objection. Even if we assume that the issue of the "real party in interest" was not raised before the trial court prior to the

hearing which resulted in the 22 March 2010 order, the record is nonetheless devoid of any indication that Mr. Baxley orally objected during the hearing as he failed to submit the transcript of the hearing to this Court. Without any indication that he objected to the trial court's substitution of East Bay and without the court's order being specifically referenced in his notice of appeal, we do not have jurisdiction to review the 22 March 2010 order. *See id.*

With respect to the trial court's 27 May 2010 order granting summary judgment in favor of East Bay, the record does contain written opposition to the entry of such an order in the form of a memorandum labeled "Opposition to Motion for Summary Judgment." As the order resolved the issue of Mr. Baxley's liability on East Bay's claims for breach of the guaranty agreements, but did not determine the amount of damages, the order was interlocutory and not immediately appealable. *See Love v. Singleton*, 145 N.C. App. 488, 491, 550 S.E.2d 549, 551 (2001) (holding that trial court's summary judgment order that determined liability on plaintiff's negligence claim but "did not address the issue of damages" was "interlocutory" and not immediately appealable). The court's order, moreover, clearly "involv[es] the merits and necessarily affect[s] the judgment," N.C. Gen. Stat. § 1-278, as the court held that Mr. Baxley was

liable as the guarantor on the two promissory notes. Accordingly, this Court has jurisdiction to review the summary judgment order despite its not being identified in Mr. Baxley's notice of appeal.

II

Turning to the merits of Mr. Baxley's appeal, he first contends that the trial court erred in entering the 27 May 2010 order granting East Bay's motion for summary judgment because East Bay lacked standing to prosecute the action to collect on the promissory notes. As this argument relates to the propriety of the trial court's 22 March 2010 order substituting East Bay for Regions Bank as the party plaintiff in this action, and we have held that the order of substitution is not properly before this Court for review, we do not address this contention.

Mr. Baxley next argues that the trial court erred in entering its summary judgment order as he was "deprived of a reasonable opportunity to conduct discovery" in order to develop defenses against East Bay. Mr. Baxley is correct that "[o]rdinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512,

256 S.E.2d 216, 220 (1979). The record on appeal in this case, however, fails to indicate that there were, in fact, any discovery requests pending at the time the trial court granted summary judgment. The trial court substituted East Bay for Regions Bank on 22 March 2010, and East Bay, without moving to amend the complaint initially filed by Regions Bank, moved for summary judgment on 23 April 2010. The trial court heard East Bay's motion on 25 May 2010, without Mr. Baxley having filed any discovery requests against East Bay in the two months since it was made a party to the action. The trial court, therefore, did not err in proceeding to rule on East Bay's motion for summary judgment. *See Shroyer v. County of Mecklenburg*, 154 N.C. App. 163, 169, 571 S.E.2d 849, 852 (2002) (concluding plaintiffs were not prejudiced by entry of summary judgment where "there was no evidence that plaintiffs sought any discovery prior to defendants' motion for summary judgment").

Moreover, while Mr. Baxley filed a memorandum in opposition to East Bay's motion for summary judgment, Mr. Baxley did not file a motion for a continuance, as permitted by N.C. R. Civ. P. 56(f); and, as Mr. Baxley did not file the transcript from the 25 May 2010 hearing, there is no indication that he orally requested such a continuance. *See Shroyer*, 154 N.C. App. at 169, 571 S.E.2d at 852 (finding no prejudice where "plaintiffs

did not move for a continuance of the summary judgment hearing to allow additional time for pre-trial discovery to take place"); *Gebb v. Gebb*, 67 N.C. App. 104, 108, 312 S.E.2d 691, 694 (1984) (holding trial court's entry of summary judgment prior to the close of discovery did not prejudice defendant as "[t]here [wa]s no motion for a continuance in the record"). Accordingly, the trial court's summary judgment order is affirmed.

III

In his final contention on appeal, Mr. Baxley argues that "the attorney's fee award is excessive and unreasonable under the laws of North Carolina." In support of his argument, Mr. Baxley cites to N.C. Gen. Stat. § 6-21.2(2) (2009) and several cases from this Court concerning attorney's fees. As East Bay points out, however, the promissory notes as well as the guaranty agreement specify that they are to be "construed according to the laws of the State of *South Carolina*." (Emphasis added.) Mr. Baxley fails to cite to any South Carolina authority at all, much less any law that might arguably be controlling. Mr. Baxley's insistence that this issue is governed by North Carolina law, when it is evident from the record that it is controlled by South Carolina law, and his failure to cite any relevant South Carolina authority

substantially frustrates our ability to review this argument. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366-67 (2008). While we do not believe that Mr. Baxley intended to mislead this Court, we decline to delve into the law of another state when Mr. Baxley has failed to adequately brief the issue. Accordingly, this contention is dismissed and the trial court's final judgment is affirmed.

Dismissed in part and affirmed in part.

Judges STROUD and Robert N. HUNTER, Jr. concur.

Report per Rule 30(e).