NO. COA13-171
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

WILLIAM THOMAS FOX and SCOTT EVERETT SANDERS,
Plaintiffs-Principal Appellees, Cross-Appellants,

v. Guilford County
No. 12 CVS 4940

The CITY OF GREENSBORO; MITCHEL JOHNSON in his individual and official capacities; TIMOTHY R. BELLAMY, in his individual and official capacities; ERNEST L. CUTHBERTSON, individually and in his official capacities; JOHN D. SLONE, individually and in his official capacities; NORMAN O. RANKIN, individually and in his official capacities; MARTHA T. KELLY, individually and in her official capacities,
Defendants-Principal Appellants, Cross-Appellees.

Appeal by Defendants and Plaintiffs from order entered 14 August 2012 by Judge Joseph Turner in Superior Court, Guilford County. Heard in the Court of Appeals 13 August 2013.

Wilson Helms & Cartledge, LLP, by G. Gray Wilson, Stuart H. Russell, and Lorin J. Lapidus, for Plaintiffs-Principal Appellees, Cross-Appellants.

Morrow, Porter, Vermitsky & Fowler, PLLC, by John C. Vermitsky, for Defendants-Principal Appellants, Cross-Appellees.

McGEE, Judge.

William Thomas Fox and Scott Sanders (Plaintiffs) filed an amended complaint in the United States District Court for the Middle District of North Carolina on 1 April 2011. Plaintiffs' complaint alleged multiple federal and North Carolina state claims based upon incidents that occurred when they were police officers with the Greensboro Police Department. The specific facts and allegations of Plaintiffs' complaint are not relevant to the holdings in this appeal. Among the defendants in the 1 April 2011 action are the four defendants involved in the present appeal: Timothy R. Bellamy, Gary W. Hastings, Mitchell Johnson, and Martha T. Kelly (Defendants). Plaintiffs' complaint also included claims against the City of Greensboro, Risk Management Associates, Inc., and two other police officers of the Greensboro Police Department. The District Court for the Middle District of North Carolina entered a memorandum opinion and order on 27 August 2011 in which it (1) dismissed all of Plaintiffs' federal claims with prejudice, (2) declined to exercise jurisdiction over Plaintiffs' state claims, and (3) dismissed Plaintiffs' state claims without prejudice.

Plaintiffs filed the complaint in this action on 23 January 2012, alleging, *inter alia*, claims against Defendants in both their official and individual capacities, for malicious prosecution, abuse of process, and civil conspiracy.

Defendants filed a motion to dismiss Plaintiffs' complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure "because it fails to sufficiently plead a conspiracy, abuse of process, and other matters." N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). The City of Greensboro also moved to dismiss and the trial court granted its motion to dismiss with prejudice. The trial court, by order entered 14 August 2012, granted Defendants' motion to dismiss with respect to Plaintiffs' civil conspiracy and abuse of process claims, but ruled that Defendants' motion to dismiss was "otherwise denied." The 14 August 2012 order therefore left intact Plaintiffs' malicious prosecution claims against Defendants in their individual capacities, which claims are the subject of Defendants' appeal. Plaintiffs appealed the trial court's dismissal of their civil conspiracy and abuse of process claims against Defendants.

Defendants' Appeal

Defendants argue that the trial court erred by failing to dismiss Plaintiffs' malicious prosecution claims pursuant to

Defendants' Rule 12(b)(6) motion to dismiss. We hold that this issue is not properly before us.

The 14 August 2012 order granting in part, and denying in part, Defendants' motion to dismiss is an interlocutory order, as it leaves issues for further action by the trial court:

> "Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy." As a general rule, interlocutory orders are not immediately appealable. However, "immediate appeal of interlocutory orders and judgments is available in at least two instances": when the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal; and when the interlocutory order affects a substantial right under N.C.G.S. §§ 1-277(a) and 7A-27 (d)(1).

Turner v. Hammocks Beach Corp., 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citations omitted). There has not been, and could not be, any Rule 54(b) certification in this matter, but Defendants argue denial of their motion to dismiss affected their substantial rights because the order denying their motion necessarily rejected their argument that Plaintiffs' malicious prosecution claims were barred by collateral estoppel. This Court has stated:

> By motion under Rule 12(b)(6), defendants may raise the defense that plaintiff's complaint fails to state a claim upon which

> relief can be granted. Dismissal under Rule 12(b)(6) is proper when one or more of the following three conditions is satisfied: (1) when on its face the complaint reveals no law supports plaintiff's claim; (2) when on its face the complaint reveals the absence of fact sufficient to make a good claim; and (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim. Thus, a complaint is deemed sufficient to withstand a motion to dismiss under Rule 12(b)(6) where no "insurmountable bar" to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature and extent of the claim. More important, plaintiff's complaint should not be dismissed unless it affirmatively appears plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim. . . . . Under Rule 12(b)(6), unless matters outside the pleadings are presented such that the court treats the motion as one for summary judgment under N.C.R. Civ. P. 56, the motion does not present the merits of the action, but only whether the merits may be reached. Thus, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."

Johnson v. Bollinger, 86 N.C. App. 1, 4, 356 S.E.2d 378, 380-81 (1987) (citations omitted).

Collateral estoppel serves to prevent needless relitigation of issues and the possibility of inconsistent verdicts:

> The doctrine of collateral estoppel "'precludes relitigation of an issue decided previously in judicial or administrative proceedings provided the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that

> issue in an earlier proceeding.'" . . . . "The elements of collateral estoppel . . . are as follows: (1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined."

Royster v. McNamara, __ N.C. App. __, __, 723 S.E.2d 122, 126-27 (2012) (citations omitted).

As a general principle, collateral estoppel is an affirmative defense that must be pled. *N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 374, 649 S.E.2d 14, 26 (2007). However, our Supreme Court has held "that the denial of a motion to dismiss a claim for relief affects a substantial right when the motion to dismiss makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel." *Turner*, 363 N.C. at 558, 681 S.E.2d at 773. Thus, collateral estoppel is properly before the trial court if that defense is specifically argued in a motion to dismiss made before a defendant has answered the plaintiff's complaint. In *Turner*, the defendant expressly argued collateral estoppel in its Rule 12(b)(6) motion to dismiss, and alleged facts in support of its argument. The defendant also incorporated the relevant prior judgment in its motion to dismiss. "This Court has . . . held that when ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's

complaint and to which the complaint specifically refers even though they are presented by the defendant." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001) (citation omitted).

> [W]here an affirmative defense is raised for the first time in a motion to dismiss under Rule 12(b)(6), "the motion must ordinarily refer expressly to the affirmative defense relied upon." *Cf. Dickens v. Puryear*, 302 N.C. 437, 443, 276 S.E.2d 325, 329 (1981) (motion for summary judgment must ordinarily refer expressly to the affirmative defense relied upon); N.C.G.S. § 1A-1, Rule 7(b)(1) (1990) (motions must state grounds and relief sought); N.C.G.S. § 1A-1, Rule 8(c) (1990) (affirmative defenses must be pled with sufficient particularity so as to give notice to court and parties). However, where the non-movant "has not been surprised and has full opportunity to argue and present evidence" on the affirmative defense, the failure of the motion to expressly refer to the affirmative defense will not bar consideration of the defense by the trial court. *See Dickens, supra*, 302 N.C. at 443, 276 S.E.2d at 329 (failure to specifically allege defense of statute of limitation in a motion for summary judgment held not fatal to the motion). Once it is determined that the affirmative defense is properly before the trial court, dismissal under Rule 12(b)(6) on the grounds of the affirmative defense is proper *if the complaint on its face* reveals an "insurmountable bar" to recovery.

Johnson v. N.C. Dept. of Transportation, 107 N.C. App. 63, 66-67, 418 S.E.2d 700, 702, (1992) (citation omitted) (emphasis added). In *Johnson*, this Court held that the defendant's Rule

12(b)(6) motion to dismiss was properly granted because "plaintiff's claims are, on the face of the complaint, time-barred." *Id.* at 70, 418 S.E.2d at 704.

In the present case, unlike in *Turner* and *Hillsboro*, Defendants did not make any colorable claim of collateral estoppel in their motion to dismiss. In fact, Defendants' motion is devoid of any mention of collateral estoppel. There is *no* pleading in the record asserting collateral estoppel. Further, Defendants' motion does not reference the prior order of the District Court for the Middle District of North Carolina upon which they base their argument for collateral estoppel. Finally, unlike in *Turner*, the complaint in the present case makes no mention of the federal court judgment.

It is true that Defendants argued collateral estoppel at the hearing on their motion to dismiss, and that Plaintiffs, without objection, argued against collateral estoppel at that hearing. It also appears that Defendants submitted a brief in support of their motion to dismiss in which they argued collateral estoppel. However, that brief does not appear in the record. Assuming, *arguendo*, the collateral estoppel argument was properly before the trial court, *Johnson*, 107 N.C. App. 63, 66-67, 418 S.E.2d 700, 702, we do not see how the trial court could have granted Defendants' motion to dismiss based upon that

argument. According to *Johnson*: "Once it is determined that the affirmative defense is properly before the trial court, dismissal under Rule 12(b)(6) on the grounds of the affirmative defense is proper if the complaint on its face reveals an 'insurmountable bar' to recovery." *Id.* at 67, 418 S.E.2d at 702 (citation omitted).

A Rule 12(b)(6) motion to dismiss is based upon an alleged insufficiency of a plaintiff's complaint. *Id.* There is nothing in Plaintiffs' complaint that could support a ruling that any claim was barred by collateral estoppel. *Turner* seems to hold that, as far as the affirmative defense of collateral estoppel is concerned, a Rule 12(b)(6) motion to dismiss on that basis may be granted so long as "the motion to dismiss makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel." *Turner*, 363 N.C. at 558, 681 S.E.2d at 773. However, a colorable claim of collateral estoppel can only exist for Rule 12(b)(6) purposes if the prior order or judgment upon which a defendant bases a defense of collateral estoppel is "the subject of [the] plaintiff's complaint and . . . the complaint specifically refers [to the order or judgment]." *Oberlin*, 147 N.C. App. at 60, 554 S.E.2d at 847. We are not prepared to entertain an interlocutory appeal of the denial of a Rule 12(b)(6) motion to dismiss, based upon the affirmative

defense of collateral estoppel, when there is nothing in the complaint challenged by Defendant indicating the existence of any prior order or judgment relevant to any issue or claim in Plaintiff's complaint.

Because the federal court order upon which Defendants base their defense of collateral estoppel is not the subject of Plaintiffs' complaint, and the complaint does not specifically refer to that order, *Oberlin*, 147 N.C. App. at 60, 554 S.E.2d at 847, Defendants cannot make any colorable claim of collateral estoppel. *Turner*, 363 N.C. at 558, 681 S.E.2d at 773; *see also Johnson*, 107 N.C. App. 63, 66-67, 418 S.E.2d 700, 702. We hold Defendants have failed to meet their burden of showing that some substantial right of theirs will be adversely affected unless we reach the merits of their interlocutory appeal. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). We therefore dismiss Defendants' appeal.

Plaintiffs' Cross-Appeal

Plaintiffs purport to appeal from the trial court's dismissal of their claims for abuse of process and civil conspiracy. The 14 August 2012 order from which they attempt appeal did "'not dispose of the case, but instead leave[s] it for further action by the trial court in order to settle and determine the entire controversy.'" *Turner*, 363 N.C. at 558,

681 S.E.2d at 773 (citation omitted). Plaintiffs attempt to appeal from an interlocutory order.

However, Plaintiffs make no argument that their appeal from the interlocutory order is properly before this Court.

> 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, 115 N.C. App. at 380, 444 S.E.2d at 254 (citations omitted). This failure subjects Plaintiffs' appeal to dismissal. *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 189-90 (2011).

Conclusion

Both Defendants' and Plaintiffs' appeals are dismissed as improper interlocutory appeals. We wish to make it clear that because we are compelled to dismiss on procedural grounds, we make no decision concerning the merits of these appeals.

Dismissed.

Judges STEELMAN and ERVIN concur.

Report per Rule 30(e).