

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA13-43
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

FRANK J. CORALDI, and
wife, SUSAN CORALDI,
Plaintiffs,

v.

New Hanover County
No. 11 CVS 178

JO ROYCROFT PICKETT and
GEORGE EDWARD PICKETT V,
Defendants.

and

GEORGE EDWARD PICKETT V,
Third Party Plaintiff,

v.

MATTHEW S. CHENEY, Esq., and
LLOYD SCOTT GREEN, Esq.,
Third Party Defendants.

GEORGE EDWARD PICKETT V,
Plaintiff,

v.

New Hanover County
No. 12 CVD 511

MATTHEW S. CHENEY, Esq., and
LLOYD SCOTT GREEN, Esq.,
Defendants.

Appeal by third-party plaintiff/plaintiff from order
entered 3 July 2012 by Judge W. Allen Cobb, Jr. in New Hanover

County Superior Court. Heard in the Court of Appeals 14 August 2013.

George Edward Pickett V, pro se, third-party plaintiff/plaintiff-appellant.

Kelly M. Toms for third-party defendant/defendant-appellee Matthew S. Cheney.

GEER, Judge.

Third-party plaintiff/plaintiff George Edward Pickett V appeals from the trial court's order dismissing his claims against third-party defendants/defendants Matthew S. Cheney and Lloyd Scott Green for breach of contract and legal malpractice. Since Mr. Pickett's appeal is interlocutory and he has made no showing that the appealed order involves a substantial right that would be lost in the absence of an appeal prior to a final resolution of all the claims in this case, we dismiss this appeal.

Facts

On 18 January 2011, Frank J. Coraldi and Susan Coraldi filed a lawsuit against Mr. Pickett and his wife, Jo Roycroft Pickett, asserting various claims arising out of the Picketts' sale of a house to the Coraldis. The Coraldis alleged that due to a scrivener's error on the closing documents, the intended payoff of the Picketts' first mortgage on the house was short by

roughly \$99,000.00, and the Picketts, in turn, had received roughly \$99,000.00 more than they were supposed to receive in the transaction. The complaint further alleged that the Picketts had refused to return the excess funds received as a result of the scrivener's error or otherwise pay off the first mortgage on the house, despite being contacted multiple times about doing so. The complaint also sought a preliminary injunction barring the Picketts from disposing of, conveying, or utilizing the \$99,000.00 at issue in the Coraldis' complaint.

On or about 15 February 2011, Mr. Pickett, acting pro se, filed a third-party complaint against Mr. Cheney and Mr. Green, the closing attorneys for the sale of the house to the Coraldis, alleging claims for legal malpractice, breach of contract, "Professional Incompetence," "Professional Negligence," breach of fiduciary duty, and fraud stemming from the attorneys' role in the closing. Mr. Pickett's third-party complaint also sought a preliminary injunction barring Mr. Cheney and Mr. Green from disposing of, conveying, or utilizing approximately \$10,000.00 that Mr. Pickett alleged the attorneys still held in escrow following the closing and which was, in addition to the funds held by Mr. Pickett, required to fully pay off the first mortgage on the house.

On 23 March 2011, the Coraldis voluntarily dismissed their claims against the Picketts. On or about 25 April 2011, Mr. Cheney and Mr. Green filed an answer, a motion to dismiss Mr. Pickett's third-party complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, and a motion for sanctions pursuant to Rule 11 of the North Carolina Rules of Civil Procedure. Mr. Cheney and Mr. Green's answer included counterclaims against Mr. Pickett for abuse of process and breach of contract. Although no motion is included in the record on appeal, it appears from the transcript that Mr. Pickett filed a motion to dismiss Mr. Cheney and Mr. Green's counterclaims pursuant to Rule 12(b)(6). The transcript further indicates that several hearings on Mr. Pickett's Rule 12(b)(6) motion were continued. The record, however, contains nothing indicating that Mr. Cheney and Mr. Green's counterclaims were ever ruled upon or otherwise resolved.

On 9 January 2012, the trial court entered an order dismissing Mr. Pickett's third-party complaint under Rule 12(b)(6) for failure to state a claim for relief. The order provided that the dismissal was without prejudice for 30 days and that Mr. Pickett could "file a new Pleading against the Third Party Defendants complaining of the same transactions so long as such pleading sets forth sufficient allegations to state

legally recognized causes of action upon which relief may be granted." The order further provided that if Mr. Pickett failed to do so, "this action shall be dismissed with prejudice."

On 8 February 2012, Mr. Pickett filed a district court action against Mr. Cheney and Mr. Green based on factual allegations similar to those of his superior court third-party complaint. The district court complaint asserted claims for breach of contract and legal malpractice. On 19 April 2012, Mr. Cheney and Mr. Green responded to the district court action by filing an answer, a Rule 12(b)(6) motion to dismiss, and a Rule 11 motion for sanctions. On 10 May 2012, the trial court entered an order ex mero motu consolidating the superior court action -- in which Mr. Cheney and Mr. Green's counterclaims were still pending -- with the district court action.

Following a hearing on Mr. Cheney and Mr. Green's motion to dismiss Mr. Pickett's second complaint and on the Rule 11 motion, the trial court entered an order on 3 July 2012 dismissing Mr. Pickett's second complaint with prejudice pursuant to Rule 12(b)(6). The trial court's 3 July 2012 order additionally granted Mr. Cheney and Mr. Green's Rule 11 motion and ordered Mr. Pickett to pay attorneys' fees to Mr. Cheney and Mr. Green in the amount of \$11,690.00. Mr. Cheney and Mr.

Green's counterclaims in the original superior court proceeding were not addressed and remain pending.¹

Mr. Pickett appealed the trial court's 3 July 2012 order to this Court. On 25 July 2012, Mr. Green filed for bankruptcy, and on 12 December 2012, Mr. Green filed a notice of bankruptcy stay in this case. Mr. Cheney's brief states that Mr. Cheney "is the sole Appellee" in this appeal.

Discussion

We must first address this Court's jurisdiction to hear this appeal. "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). Here, the trial court's 3 July 2012 order is interlocutory as the order does not resolve the entire case since Mr. Cheney and Mr. Green's counterclaims against Mr. Pickett remain pending.

As our Supreme Court has held, "[i]n general, a party may not seek immediate appeal of an interlocutory order." *Dep't of Transp. v. Rowe*, 351 N.C. 172, 174, 521 S.E.2d 707, 709 (1999). However, "[i]n

¹The record on appeal and the parties' briefs on appeal did not indicate what, if anything, happened to the counterclaims. Upon inquiry, the clerk of superior court for New Hanover County confirmed that the counterclaims remain pending.

under two circumstances. The first is when the trial court certifies [under Rule 54(b)] no just reason exists to delay the appeal after a final judgment as to fewer than all the claims or parties in the action. The second is when the appeal involves a substantial right of the appellant and the appellant will be injured if the error is not corrected before final judgment." *N.C. Dep't of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 47-48, 619 S.E.2d 495, 496 (2005) (internal citation omitted).

In this case, the trial court did not include a Rule 54(b) certification in its order allowing the motion to dismiss. As a result, this Court has jurisdiction over this appeal only if "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, 379, 444 S.E.2d 252, 253 (1994) (quoting *S. Uniform Rentals, Inc. v. Iowa Nat'l Mut. Ins. Co.*, 90 N.C. App. 738, 740, 370 S.E.2d 76, 78 (1988)).

Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure provides that "[w]hen an appeal is interlocutory, the statement [of grounds for appellate review in the appellant's brief] must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." Mr. Pickett makes no argument in his

brief that the trial court's 3 July 2012 order deprives him of a substantial right that would be lost absent an immediate appeal. Instead, Mr. Pickett mistakenly asserts that the 3 July 2012 order "is a final judgment and appeal therefore lies to the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b)."

"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. See also *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (holding that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant"). Because Mr. Pickett has not shown that this Court has jurisdiction to hear his appeal, we must dismiss the appeal. See *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254 (dismissing interlocutory appeal where appellant "presented neither argument nor citation to show this Court that [appellant] had the right to appeal the order dismissing its counterclaims").

Dismissed.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

Report per Rule 30(e).