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NO. COA14-112
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

SMOKY MOUNTAIN SANCTUARY PROPERTY
OWNERS ASSOCIATION, INC., a North
Carolina non-profit corporation,

Plaintiff,

v.

Haywood County
No. 10 CVS 1452

CONSTANCE P. SHELTON, Trustee of
the Constance P. Shelton Revocable
Trust dated September 8, 1998, and
LEE F. SHELTON, Trustee of the Lee
E. Shelton Revocable Trust Dated
September 8, 1998,

Defendants/Third Party
Plaintiffs,

v.

O.M.A. LAND, INC. and EMIL
MASSARO, BARRY SMALL and ELISABETH
TASIS-SMALL,

Third Party Defendants.

Appeal by defendants from judgment entered 24 September
2013 and order entered 28 October 2013 by Judge Marvin P. Pope
in Haywood County Superior Court. Heard in the Court of Appeals
19 September 2014.

Jeffrey W. Norris & Associates, PLLC, by Jeffrey W. Norris, for plaintiff-appellee.

Melrose, Seago & Lay, P.A., by Mark R. Melrose and Joshua D. Nielsen, for defendants-appellants.

HUNTER, Robert C., Judge.

Defendants appeal from the judgment entered for plaintiff following a bench trial and the order denying their motion for a new trial and judgment notwithstanding the verdict ("JNOV"). On appeal, the gist of defendants' arguments is that the trial court erred in bifurcating their compulsory counterclaims and affirmative defenses from plaintiff's claims. Plaintiff contends that defendants failed to appeal the trial court's order bifurcating the claims and has filed a motion to dismiss Issues I, II, and III of defendant's appeal pursuant to North Carolina Rule of Appellate Procedure 3(d).

After careful review, we deny plaintiff's motion to partially dismiss the appeal because defendants' failure to designate the interlocutory order bifurcating the trial in its notice of appeal does not prevent this Court from obtaining jurisdiction pursuant to *Tinajero v. Balfour Beatty Infrastructure, Inc.*, __ N.C. App. __, __, 758 S.E.2d 169, 175 (2014). However, we dismiss the appeal as interlocutory.

Background

Plaintiff Smoky Mountain Sanctuary Property Owners Association, Inc. ("SMSPOA") is a non-profit corporation organized to "promote the common interest of the property owners" in a development known as the Smoky Mountain Sanctuary (the "Sanctuary"). Its main responsibility is to collect assessments from lot owners pursuant to the terms of the Declarations of Covenants, Conditions, Restrictions, and Easements for the Sanctuary (the "CCRE"). Defendants Constance P. Shelton and Lee F. Shelton ("defendants") are trustees of the Constance P. Shelton and Lee E. Shelton revocable trusts and own lots 41 and 42 within the Sanctuary. In 2010, defendants owed \$3,600 in annual assessments and fees. It is undisputed that defendants did not pay the 2010 assessments; in their answer and counterclaim, they claim that they were excused from paying based on plaintiff's failure to maintain the roads in the Sanctuary.

On 22 December 2010, plaintiff filed a complaint against defendants for breach of contract and requested interest and attorney's fees in addition to the \$3,600 owed for the assessments. On 4 April 2011, defendants filed an answer and counterclaim, admitting they did not pay the 2010 assessment but

claiming that they were excused from performing because plaintiff failed to repair and maintain Celestial Way, a road in the common area of the Sanctuary, which provided access to defendants' lots. Moreover, defendants asserted two counterclaims: (1) breach of contract based on plaintiff's failure to comply with the CCRE; and (2) breach of duty to a member pursuant to N.C. Gen. Stat. § 55A-8-30. In their amended answer, defendants also filed causes of action for a declaratory judgment and specific performance. Although a copy is not included in the record, defendants filed a third-party complaint against O.M.A. Land, Inc. and Emil Massaro (the "third-party defendants"). In their answer, defendants claimed that the third-party defendants were required to construct an "all-weather" road to serve lots 41 and 42, which they failed to do. Furthermore, according to defendants, the third-party defendants conducted land disturbing activities on adjacent lots which led to "tons of fill dirt" falling on Celestial Way.

On 13 April 2012, plaintiff filed motions for summary judgment on both its affirmative claims and on defendants' counterclaims, both of which were denied by the trial court. On 13 June 2013, plaintiff filed a motion to bifurcate the trial. Specifically, pursuant to Rule 42, plaintiff moved to bifurcate

its affirmative claims from defendants' counterclaims and third-party claims because, in sum, the matter had been "drag[ging] on" and bifurcation would not prejudice defendants or the third-party defendants. On 22 July 2013, the trial court issued an order granting plaintiff's motion and bifurcating plaintiff's affirmative claims from "the remaining issues as set forth in [d]efendants' counterclaims and third party complaints." Defendants filed a motion for the trial court to reconsider this order on 25 July 2013, which was denied by the trial court.

The matter came on for a bench trial on 12 August 2013. After considering the evidence, the trial court found that, pursuant to the CCRE, plaintiff complied with the procedural requirements regarding the assessments and that defendants breached the CCRE by failing to pay the 2010, 2011, 2012, and 2013 assessments on lots 41 and 42. Furthermore, the trial court held that plaintiff was entitled to reasonable attorney's fees and costs. In total, the trial court entered a judgment against defendants for \$78,934.85.

On 15 October 2013, defendants moved for a new trial and JNOV, claiming that they were prevented from having a fair trial because the trial court prohibited them from presenting evidence showing that plaintiff's material breach of the CCRE excused

defendants from having to pay the annual assessments on lots 41 and 42. The trial court denied defendants' motion on 28 October 2013. On 12 November 2013, defendants filed a notice of appeal from the trial court's judgment and its order denying defendants' motion for a new trial and JNOV. At the time the notice was filed, the trial on defendants' counterclaims and claims against the third-party defendants had not been held.

Plaintiff's Motion to Partially Dismiss the Appeal

On 10 April 2014, plaintiff filed a motion to partially dismiss defendants' appeal. Specifically, plaintiff alleges that, because the notice of appeal does not designate that defendant is appealing the order bifurcating the defendant's counterclaims and third-party claims from plaintiff's affirmative claims, this Court does not have jurisdiction to address Issues I, II, and III of defendant's appeal pursuant to Rule 3(d). For the following reasons, we disagree.

This Court recently clarified the appealability of interlocutory orders that are not specifically designated in a notice of appeal under Rule 3:

We note that while Rule 3(d) of the Rules of Appellate Procedure provides that the notice of appeal "shall designate the judgment or order from which appeal is taken," N.C. Gen. Stat. § 1-278 (2013) provides: "Upon an appeal from a judgment, the court may review

any intermediate order involving the merits and necessarily affecting the judgment." This Court has held that even when a notice of appeal fails to reference an interlocutory order, in violation of Rule 3(d), appellate review of that order pursuant to N.C. Gen. Stat. § 1-278 is proper under the following circumstances: (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. All three conditions must be met.

Tinajero, __ N.C. App. at __, 758 S.E.2d at 175; see also *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 641, 535 S.E.2d 55, 59 (2000) (noting that N.C. Gen. Stat. § 1-278 may provide "another avenue by which an appellate court may obtain jurisdiction to review an interlocutory order absent compliance with Rule 3(d)").

Here, all three conditions are met. First, defendants timely objected to the order and even filed a motion for reconsideration of the bifurcation order on 25 July 2013, three days after the order was filed. In addition, defendants appealed the denial of their motion for a new trial and JNOV which were predicated, in part, upon the trial court's decision to bifurcate the trial. Thus, plaintiff would have been on notice that defendants intended to appeal the bifurcation order,

and the failure to specifically designate it in the notice of appeal would not prejudice plaintiff. Second, the order bifurcating the trial was interlocutory because it did not dispose entirely of the case. See *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("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."). Furthermore, a bifurcation order is not one which entitles a party to an immediate appeal nor does it automatically affect a substantial right. Specifically, this Court has held that orders bifurcating trials do not necessarily implicate a substantial right even though "there will . . . be some repetition of evidence[.]" *Land v. Land*, 201 N.C. App. 672, 678, 687 S.E.2d 511, 516 (2010). Finally, because the order prevented defendants from presenting any evidence that plaintiff's breach of the contract excused their performance of paying assessments, it involved the merits and "necessarily affected the judgment." *Tinajero*, __ N.C. App. at __, 758 S.E.2d at 175. In other words, those counterclaims and affirmative defenses could have had substantial consequences on plaintiff's ability to succeed in its breach of contract claim

against defendants and on the amount of recovery plaintiff would be entitled to. Therefore, although defendants' notice of appeal does not specifically designate the order bifurcating the trial, this Court has jurisdiction to consider Issues I, II, and III of defendants' appeal. Accordingly, we deny plaintiff's motion to partially dismiss the appeal.

Interlocutory Nature of Appeal

Despite the fact that this Court has jurisdiction to consider all issues raised in defendants' appeal even though defendants did not fully comply with Rule 3(d), we must dismiss this appeal as interlocutory. Defendants' counterclaims against plaintiff and its claims against the third-party defendants are still pending; thus, the "entire controversy" has not been "determine[d]," *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381, and the judgment for plaintiff is clearly interlocutory. See also *Fed. Land Bank of Columbia v. Lieben*, 86 N.C. App. 342, 344, 357 S.E.2d 700, 702 (1987) (noting that an order granting summary judgment for one defendant was interlocutory because "[s]till to be determined" were the plaintiff's claim against the other defendant, the defendant's counterclaims against the plaintiff, the defendant's cross-claims against the cross-claim defendants,

and the defendant's and third-party plaintiff's complaint against the third-party defendant).

"[I]mmediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (quotation marks omitted).

In its "Statement of Grounds for Appellate Review," defendants assert that "this appeal lies as a matter of right to the Court of Appeals from a final judgment of the Superior Court[.]" It is unclear whether defendants are contending that the judgment is appealable as a final judgment because plaintiff's claims against defendant have been resolved or under Rule 54(b) because the trial court's judgment characterizes itself as "final." However, as discussed, even though the trial court called the judgment "final," it is clearly interlocutory as defendants' counterclaims and third-party claims have yet to be resolved. Therefore, the only way the judgment would be

immediately appealable was if the trial court certified it as immediately appealable pursuant to Rule 54(b) or if it affects a substantial right.

With regard to Rule 54(b) certification, although the trial court classified its judgment as "final," it did not certify it as immediately appealable or expressly declare that there was no just reason for delay of appeal. Our Supreme Court has held that a trial court's designation of a judgment as "final" does not make it immediately appealable under Rule 54(b). *Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979). Therefore, defendants are not entitled to immediate appeal of the judgment based on a Rule 54(b) certification.

With regard to whether an interlocutory judgment or order affects a substantial right, Rule 28(b)(4) requires that an appellant provide "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." Here, defendants have failed to include any such argument that the judgment for plaintiff affects a substantial right; instead, they mistakenly claim that "this appeal lies as a matter of right to the Court of Appeals from a final judgment[.]" "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). Furthermore, as noted, defendants' arguments on appeal also challenge the bifurcation order. However, since bifurcation orders do not automatically affect a substantial right, *Land*, 201 N.C. App. at 678, 687 S.E.2d at 516, the burden was on defendants to provide support for the contention that it affects a substantial right, which they failed to do. In sum, since defendants have failed to provide any substantial right analysis as to either the interlocutory judgment or interlocutory bifurcation order, we dismiss this appeal as interlocutory.

Conclusion

Based on the foregoing reasons, we deny plaintiff's motion to partially dismiss the appeal. However, we dismiss the appeal as interlocutory.

DISMISSED.

Chief Judge McGEE and Judge STEPHENS concur.

Report per Rule 30(e).