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NO. COA14-252
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

SETTLERS EDGE HOLDING COMPANY,
LLC; MOUNTAIN AIR DEVELOPMENT
CORPORATION; VIRGINIA A. BANKS;
WILLIAM R. BANKS; JEANI H. BANKS;
MICHAEL R. WATSON, SHEREE B.
WATSON; VIRGINIA A. BANKS;
WILLIAM R. BANKS, AND
SHEREE B. WATSON in their capacity
as TRUSTEES OF WILLIAM A. BANKS
REVOCABLE TRUST; MORRIS ATKINS in
his capacity as TRUSTEE OF WILLIAM
BANKS FAMILY IRREVOCABLE
TRUST NUMBER 1; and MORRIS ATKINS
in his capacity as TRUSTEE OF
WILLIAM BANKS FAMILY
IRREVOCABLE TRUST NUMBER 2;

Plaintiffs,

v.

Yancey County
No. 10-CVS-279

RES-NC SETTLERS EDGE, LLC,

Defendant.

Appeal by plaintiffs from order entered 4 November 2013 by
Judge Mark Powell in Yancey County Superior Court. Heard in the
Court of Appeals 27 August 2014.

*Rayburn Cooper & Durham, P.A., by G. Kirkland Hardymon,
Ross R. Fulton, and Benjamin E. Shook, for plaintiffs-
appellants.*

Nelson Mullins Riley & Scarborough LLP, by Christopher J. Blake, Joseph S. Dowdy, and Phillip A. Harris, Jr., for defendant-appellee.

DAVIS, Judge.

Settlers Edge Holding Company, LLC ("Settlers Edge"); Mountain Air Development Corporation; Virginia A. Banks; William R. Banks; Jeani H. Banks; Michael R. Watson; Sheree B. Watson; Virginia A. Banks, William R. Banks, and Sheree B. Watson in their capacities as trustees of William A. Banks Revocable Trust; Morris Atkins in his capacity as trustee of William Banks Family Irrevocable Trust Number 1; and Morris Atkins in his capacity as trustee of William Banks Family Irrevocable Trust Number 2 (collectively "Plaintiffs") appeal from the trial court's 4 November 2013 order granting partial summary judgment in favor of RES-NC Settlers Edge, LLC ("Defendant"). After careful review, we dismiss Plaintiffs' appeal.

Factual Background

Settlers Edge was formed in 2007 to expand the existing Mountain Air Country Club community in Yancey County with a new phase of development. In order to finance the development, Settlers Edge entered into a \$15,500,000.00 construction loan agreement ("the Construction Loan Agreement") with Integrity

Bank. Settlers Edge executed a promissory note in favor of Integrity Bank secured by a deed of trust along with unconditional guaranties of payment and performance executed by the remaining Plaintiffs.

On 27 October 2009, the Federal Deposit Insurance Corporation ("FDIC") - which assumed the rights and obligations under the Construction Loan Agreement when Integrity Bank was placed in receivership - filed a notice of hearing on foreclosure. Following a hearing held on 19 January 2010, the Clerk of Superior Court of Yancey County ("the Clerk") entered an order on 11 February 2010 denying the requested foreclosure and prohibiting the Substitute Trustee from proceeding with foreclosure on the deed of trust.

On 15 October 2010, Plaintiffs filed a complaint against Defendant in Yancey County Superior Court seeking a declaratory judgment that (1) the FDIC committed a material breach of the terms of the Construction Loan Agreement by refusing to fund Settlers Edge's draw requests; (2) the FDIC's breach excused Settlers Edge from further performing its obligations under the Construction Loan Agreement; (3) these issues had previously been litigated and actually decided in the order denying foreclosure entered by the Clerk on 11 February 2010 such that

the doctrine of collateral estoppel precluded Defendant from relitigating them; and (4) Plaintiffs had no further obligation to pay Defendant under the Construction Loan Agreement.

On 31 July 2013, Defendant filed an answer and counterclaim (1) denying that the 11 February 2010 order had any preclusive effect; (2) alleging that the Clerk lacked jurisdiction to enter an order in the foreclosure proceeding excusing Plaintiffs' performance of its remaining obligations under the Construction Loan Agreement; (3) asserting a breach of contract claim and seeking recovery from Plaintiffs for amounts due under the Construction Loan Agreement; and (4) requesting an award of attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.2.

On 19 September 2013, Defendant filed a motion for partial summary judgment on "the issue of whether there was a material breach that excused Plaintiffs from further performance under the loan documents [that] was previously litigated and actually adjudicated in the Foreclosure Proceeding, and [whether] the doctrine of collateral estoppel precludes [Defendant] from relitigating those issues." The trial court held a hearing on Defendant's motion on 7 October 2013 and entered an order granting partial summary judgment in Defendant's favor on 4 November 2013.

In its order, the trial court determined that the 11 February 2010 order denying foreclosure “does not have any preclusive effect with respect to the issues of: (a) whether the FDIC breached the loan documents; (b) whether the FDIC’s breach was material; and (c) whether Plaintiffs’ obligations to Defendant under the loan documents are excused.” Plaintiffs gave timely notice of appeal to this Court.

Analysis

As an initial matter, we must determine whether we have jurisdiction to hear Plaintiffs’ appeal. Because the trial court’s 4 November 2013 order granted summary judgment in favor of Defendant on some – but not all – of the issues before it, it is interlocutory. See *Mecklenburg Cty. v. Simply Fashion Stores, Ltd.*, 208 N.C. App. 664, 667, 704 S.E.2d 48, 51 (2010) (“An order is interlocutory when it does not dispose of the entire case but instead, leaves outstanding issues for further action at the trial level.”), *appeal dismissed and disc. review denied*, 365 N.C. 187, 707 S.E.2d 231 (2011).

Generally, there is no right of immediate appeal from an interlocutory order. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). “An interlocutory order may be appealed, however, if the order implicates a substantial

right of the appellant that would be lost if the order was not reviewed prior to the issuance of a final judgment." *Keese v. Hamilton*, ___ N.C. App. ___, ___, 762 S.E.2d 246, 249 (2014). It is the appealing party's burden to establish that a substantial right would be jeopardized unless an immediate appeal is allowed. *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001).

Both this Court and our Supreme Court have previously held that a substantial right *may* be implicated when a trial court enters an order rejecting the applicability of the doctrines of collateral estoppel or *res judicata*. See *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) ("[W]e hold that the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable."); *McCallum v. N.C. Coop. Extension Serv. of N.C. State Univ.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 ("[T]he denial of a motion for summary judgment based on the defense of collateral estoppel may affect a substantial right . . ."), *appeal dismissed and disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001).

However, this Court has explained that a party is not *automatically* entitled to an immediate appeal from a trial

court's determination that collateral estoppel does not apply but rather must demonstrate that there is a possibility of inconsistent verdicts if the case proceeds to trial without a ruling on the issue raised in the interlocutory appeal. *Whitehurst Inv. Props., LLC v. NewBridge Bank*, No. COA14-257, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (filed Oct. 21, 2014); see also *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, ___ N.C. App. ___, ___, 727 S.E.2d 311, 314 (2012) (holding that substantial right is affected "only where a possibility of inconsistent verdicts exists if the case proceeds to trial" (citation and quotation marks omitted)).

To demonstrate that a second trial will affect a substantial right, [the appealing party] must show not only that one claim has been finally determined and others remain which have not yet been determined, but that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.

Heritage Operating, ___ N.C. App. at ___, 727 S.E.2d at 314-15 (citation and quotation marks omitted).

In the present case, Plaintiffs contend that the trial court's order rejecting their "asserted affirmative defenses based on the preclusive effect of the Foreclosure Action . . . now forces Plaintiffs to re-litigate issues that were actually

litigated and necessarily determined in the Foreclosure Action.” Plaintiffs argue that the Clerk – in determining that the FDIC could not proceed with foreclosure in 2010 – necessarily determined that the FDIC committed a material breach of the Construction Loan Agreement.

The Clerk’s order denying foreclosure contained the following findings:

1. Mortgagor and Integrity Bank entered into a Construction Loan Agreement on or around June 20, 2007. Contemporaneously and in connection therewith, Mortgagor executed the above captioned Deed of Trust as well as a Promissory Note in Integrity Bank’s favor.
2. The Construction Loan Agreement, Deed of Trust and Promissory Note constitute a single integrated agreement between the parties thereto (the “Loan Documents”). Copies or originals of each of the Loan Documents have been exhibited for inspection at, or within the time allotted subsequent to, the hearing.
3. Mortgagee succeeded to Integrity Bank’s interests and assumed its obligations under the Loan Documents on or around August 29, 2008.
4. Mortgagee sought to foreclose pursuant to the Deed of Trust.
5. The Loan Documents and matters at issue in this case are not, and do not pertain to, a subprime loan, as defined in N.C. Gen. Stat. § 45-101(4).

6. A valid debt exists between Mortgagor and Mortgagee pursuant to the Loan Documents.
7. All parties entitled by law to notice have been served with adequate notice of the hearing.
8. In the event of default, the Deed of Trust gives to Mortgagee the right to foreclose under a power of sale.
9. Mortgagor is not in default under the Loan Documents.
10. As Mortgagor is not in default under the Loan Documents, the Substitute Trustee does not have the right to institute foreclosure proceedings against the property described in the Deed of Trust.

Based on these findings, the Clerk denied the requested foreclosure.

The doctrine of collateral estoppel prevents issues that were actually litigated and necessary to the outcome of a prior suit from being relitigated in a later action between the original parties or their privies. *Hedgepeth v. Parker's Landing Prop. Owners Ass'n, Inc.*, ___ N.C. App. ___, ___, 762 S.E.2d 865, 871 (2014). The party alleging collateral estoppel must demonstrate

that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both the party asserting collateral estoppel and the party against whom

collateral estoppel is asserted were either parties to the earlier suit or were in privity with parties.

Tucker v. Frinzi, 344 N.C. 411, 414, 474 S.E.2d 127, 128-29 (1996) (citation and brackets omitted). Collateral estoppel only applies to "matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *City of Asheville v. State*, 192 N.C. App. 1, 17, 665 S.E.2d 103, 117 (2008) (citation, quotation marks, and emphasis omitted), *appeal dismissed and disc. review denied*, ___ N.C. ___, 672 S.E.2d 685 (2009).

As Defendant notes in its brief, the order denying foreclosure "made no specific finding or conclusion that the finding of no default was based on a material breach by the FDIC, or the alleged factual basis of that material breach." Plaintiffs nevertheless contend that this Court should infer that the basis of the Clerk's decision was that the FDIC materially breached the Construction Loan Agreement. See *Coker v. Basic Media, Ltd.*, 63 N.C. App. 69, 72, 303 S.E.2d 620, 622 (1983) ("[T]he court may infer that in the prior action a determination appropriate to the judgment rendered was made as to each issue that was so raised and the determination of which was necessary to support the judgment. . . . If the record of

the former trial shows that the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties." (internal citations and quotation marks omitted)).

Plaintiffs argue that the only possible rational basis for the Clerk's finding that no default had occurred was that the FDIC had committed a prior material breach of the Construction Loan Agreement. Consequently, Plaintiffs contend, the issue was actually litigated and necessary to support the Clerk's order denying foreclosure.

While it is true that the order denying foreclosure contained a finding that "Mortgagor is not in default under the Loan Documents," the order also contained a determination that "a valid debt exists between Mortgagor and Mortgagee pursuant to the Loan Documents." The finding of the existence of a valid debt runs counter to Plaintiffs' assertion that the Clerk necessarily based its order denying foreclosure on the FDIC's material breach of the Construction Loan Agreement. See *In re Kitchens*, 113 N.C. App. 175, 177-78, 437 S.E.2d 511, 512 (1993) (finding that no valid debt existed where mortgagee breached its agreement to refrain from instituting criminal charges against

mortgagor); *WRH Mtge., Inc. v. S.A.S. Assocs.*, 214 F.3d 528, 532-33 (4th Cir. 2000) (concluding that breach by repudiation of agreement rendered agreement null and void and discharged debtor's obligation to repay loan). Similarly, in the present case, the finding of the existence of a valid debt between Plaintiffs and the FDIC is inconsistent with Plaintiffs' characterization of the Clerk's order in its complaint as determining that the FDIC's "material breach excused their further performance under the various component agreements which comprise the Development Financing."

In *Coker*, the case upon which Plaintiffs primarily rely, a complaint was filed in state court against the defendants to recover payment due on two promissory notes. *Coker*, 63 N.C. App. at 69-70, 303 S.E.2d at 621. The defendants filed an answer asserting that (1) the plaintiffs' action was time-barred under the three-year statute of limitations; and (2) the issue of whether the promissory notes constituted instruments under seal, thereby extending the statute of limitations for actions relating to the notes, had already been determined in a prior federal court action. *Id.* at 70, 303 S.E.2d at 621.

This Court held that — based on the federal court's order — the plaintiffs were collaterally estopped from relitigating the

issue of whether the promissory notes at issue were instruments under seal despite the fact that the federal court order lacked a specific finding that the notes were not under seal. *Id.* at 71, 303 S.E.2d at 622. We determined that the federal court had “implicitly held” that the notes were not under seal based on its application of the three-year statute of limitations applicable to breach of contract actions rather than the longer limitations period applicable to actions concerning instruments under seal. *Id.* We reasoned that by employing the three-year statute of limitations, the federal court had necessarily determined that the notes were not instruments under seal, and thus, the issue was precluded from being relitigated based on collateral estoppel. As we concluded, “the federal court’s decision could not have been made without a determination that the notes were not under seal.” *Id.* at 72, 303 S.E.2d at 622.

We find *Coker* to be distinguishable from the present case. Here, we cannot say that the Clerk’s order could not have been rendered without it first determining that the FDIC committed a material breach of the Construction Loan Agreement. Indeed, to the contrary, we believe that the Clerk’s express finding regarding the existence of a valid debt between Plaintiffs and the FDIC is inconsistent with the notion that the Clerk

implicitly made a simultaneous determination that the FDIC had materially breached the Construction Loan Agreement.

The application of the preclusive doctrines of collateral estoppel and *res judicata* "must be narrowly construed and cannot be left to uncertain inference." *Girard Trust Bank v. Belk*, 41 N.C. App. 328, 342, 255 S.E.2d 430, 439 (citation and internal quotation marks omitted), *disc. review denied*, 298 N.C. 293, 259 S.E.2d 299 (1979). Here, given that the order denying foreclosure (1) did not include specific findings expressly determining that a material breach had occurred; and (2) did find that a valid debt existed between Plaintiffs and the FDIC, we are unable to conclude that the Clerk actually determined that a material breach had occurred. Such a conclusion would force us to speculate as to the Clerk's thought processes in rendering its findings, which we are not permitted to do. See *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678-79, 657 S.E.2d 55, 62 (explaining that burden of establishing that relitigation of issue is barred is on party relying upon collateral estoppel and "speculation as to what may have or could have happened in the [prior] litigation is not sufficient for us to conclude that the elements of collateral estoppel have been established"), *disc. review denied*, 362 N.C. 679, 669 S.E.2d 741 (2008).

In *Whitehurst Inv. Props., LLC*, this Court was similarly faced with an appeal from an interlocutory order rejecting the applicability of collateral estoppel. *Whitehurst Inv. Props., LLC*, ___ N.C. App. at ____, ___ S.E.2d at ____. In determining whether the order was immediately appealable, we examined whether the parties would be exposed to the risk of inconsistent verdicts if the issue of collateral estoppel was not reviewed prior to the case proceeding to trial. *Id.* at ____, ___ S.E.2d at ____. We determined that collateral estoppel did not apply because the issue that the appellant argued had a preclusive effect on the current controversy "was not necessary to the Court's determination in the First Action." *Id.* at ____, ___ S.E.2d at ____. Accordingly, we dismissed the appeal, concluding that the appellant "failed to carry its burden of demonstrating that the possibility of inconsistent verdicts exists" and, therefore, could not show that a substantial right would be lost absent immediate appellate review. *Id.* at ____, ___ S.E.2d at ____.

We believe the same is true here. Because Plaintiffs in this case have failed to demonstrate that the issue of whether the FDIC materially breached the Construction Loan Agreement was actually litigated and necessary to the Clerk's order, they have

failed to meet their burden of showing that appellate jurisdiction exists over this appeal. We therefore conclude that Plaintiffs' appeal does not affect a substantial right and must be dismissed. See *id.* at ____, ___ S.E.2d at ____ ("Because [the appellant] has failed to demonstrate how a substantial right would be lost without immediate review of the trial court's interlocutory order, we dismiss the appeal.").

Conclusion

For the reasons stated above, Plaintiffs' appeal is dismissed.

DISMISSED.

Judges HUNTER, Robert C., and DILLON concur.

Report per Rule 30(e).