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NO. COA14-316  
NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2014

LSREF2 ISLAND HOLDINGS, LTD, INC.,

Plaintiff,

v.

Mecklenburg County

No. 13 CVS 16679

CARLOS RAMON PLANELL PORRATA A/K/A  
CARLOS PLANELL, AND MARIA ISABEL  
DANIELSEN VELAZQUEZ A/K/A MARIA  
DANIELSEN,

Defendants.

Appeal by plaintiff and cross-appeal by defendants from order entered 9 December 2013 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 September 2014.

*Nelson Mullins Riley & Scarborough LLP, by Joseph S. Dowdy, D. Martin Warf, and Bryce R. Lowder, for plaintiff-appellant/cross-appellee.*

*Devore, Acton & Stafford, PA, by Derek P. Adler and Fred W. Devore, III, for defendant-appellee/cross-appellant.*

HUNTER, Robert C. Judge.

Plaintiff appeals and defendants cross-appeal an order granting in part defendants' motion to dismiss, staying

plaintiff's remaining claims, and refusing to cancel plaintiff's *lis pendens* notice. On appeal, plaintiff argues that: (1) the trial court erred when it dismissed plaintiff's breach of the guaranty agreement claim against defendant Carlos Planell Porrata; and (2) the trial court erred when it stayed plaintiff's remaining claims. On cross-appeal, defendants argue that: (1) the trial court erred by denying in part their motion to dismiss; and (2) the trial court erred by not cancelling plaintiff's *lis pendens*.

After careful review, we dismiss plaintiff's appeal of the portion of the order granting in part defendants' motion to dismiss because it is interlocutory and does not affect a substantial right. However, because North Carolina has exclusive *in rem* jurisdiction to determine title to the property at issue, we reverse the portion of the order staying plaintiff's remaining claims pursuant to *Green v. Wilson*, 163 N.C. App. 186, 592 S.E.2d 579 (2004), and remand for further proceedings. Finally, we dismiss defendants' cross-appeal because the order denying their motion to dismiss plaintiff's claims and denying defendants' motion to cancel the *lis pendens* is interlocutory and does not affect a substantial right.

#### **Background**

Plaintiff LSREF2 Island Holdings, Ltd., Inc. alleges the following facts in its complaint: plaintiff, a Bermuda exempted limited company, was a successor-in-interest to a loan entered into on 6 July 2007 between FirstBank Puerto Rico ("FirstBank") and Terraverde Development Corporation ("Terraverde"). Also on 6 July 2007, as a part of the loan agreement, defendant Carlos Planell ("Planell"), a citizen of both Puerto Rico and North Carolina, signed a guaranty agreement where he agreed to be jointly and severally liable on the obligations owed by Terraverde to Firstbank. The loan documents provided that Puerto Rico law would govern the parties' rights and obligations. Subsequently, Terraverde defaulted on the loan with FirstBank, leaving an outstanding balance of \$21,255,379.25 owed on the loan as of 27 May 2011. Terraverde and FirstBank entered into a forbearance agreement on 27 May 2011 that restructured the terms of the original loan; however, the new loan agreement kept the provision that Puerto Rico law would govern the parties' rights and obligations and that Planell would remain jointly and severally liable as guarantor on the loan.

Plaintiff later obtained an interest in the right to receive payments on the loan from FirstBank. To recover the

amount owed, plaintiff filed suit in Puerto Rico to foreclose on the loan and to determine Planell's liability as guarantor on the loan (the "Puerto Rico litigation"). The Puerto Rico litigation included allegations that Planell made fraudulent transfers of numerous properties he owned in Puerto Rico in an attempt to avoid repayment as guarantor on the loan. The Puerto Rico courts had yet to issue a ruling determining any of these issues at the time this case was heard in Mecklenburg County Superior Court on 12 November 2013.

On or about 2 July 2013, Planell recorded a conveyance of an unencumbered tract of land located in Mecklenburg County ("the Subject Real Property") jointly to himself and his wife, Maria Danielsen ("Danielsen") (collectively, Planell and Danielsen are referred to as "defendants"), as tenants by the entirety without the exchange of consideration. The Subject Real Property was originally purchased on 23 July 2012 solely in Planell's name for \$925,000. Plaintiff's complaint alleges that this transfer of property was done in an attempt to defraud plaintiff as a potential creditor.

On 16 September 2013, plaintiff filed suit against both defendants in Mecklenburg County Superior Court alleging the following causes of action: (1) breach of the guaranty agreement

and other loan documents by Planell; (2) a violation of the North Carolina Uniform Fraudulent Transfers Act ("NCUFTA") based on defendants' fraudulent transfer of the Subject Real Property; (3) a request that the Subject Real property be held in a constructive trust; (4) a request for a declaratory judgment; and (5) a request for a temporary restraining order and injunctive relief. Defendants filed a motion to dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(1)-(6). At a hearing concerning defendants' motion to dismiss before Judge James W. Morgan on 12 November 2013, the court dismissed Count I of plaintiff's complaint, the breach of guaranty claim. The trial court also ordered that all of plaintiff's remaining claims be stayed until resolution of the matters pending in Puerto Rico.

Plaintiff appealed and defendants cross-appealed this order.

## **Arguments**

### **I. Plaintiff's Appeal**

#### **A. The Order of Dismissal**

Initially, it should be noted that plaintiff is appealing an interlocutory order since it does not dispose of all of plaintiff's claims, only Count I; there are still five remaining

active claims against defendants. 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.") "The burden is on the appealing party to establish that a substantial right will be affected." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000).

In its written order, the trial court dismissed plaintiff's claim concerning the guaranty agreement with prejudice because the claim "is already in litigation in Puerto Rico" and based on the choice of law provision in the documents that "stipulate that the law of Puerto Rico applies." In its "Statement of the Grounds for Appellate Review," plaintiff contends that the trial court dismissed the breach of the guaranty agreement claim based on lack of personal jurisdiction and choice of venue, both of which affect a substantial right. However, we disagree. There is nothing in the trial court's order indicating that it concluded that Mecklenburg County was the improper place to hold the trial or that it lacked jurisdictional authority over defendants. Although the order noted that Puerto Rico law would

govern the documents at issue, this refers to a choice of law provision which, unlike mandatory forum clauses or consent to jurisdiction clauses, does not implicate venue or personal jurisdiction. Compare *LendingTree, LLC v. Anderson*, \_\_\_ N.C. App. \_\_, \_\_, 747 S.E.2d 292, 297 (2013) (holding that mandatory forum selection clauses involve venue), and *Gary L. Davis, CPA, P.A., v. Hall*, \_\_\_ N.C. App. \_\_, \_\_, 733 S.E.2d 878, 880 (2012) (noting that consent to jurisdiction clauses implicate both venue and personal jurisdiction), with *Corbin Russwin, Inc. v. Alexander's Hardware, Inc.*, 147 N.C. App. 722, 726-27, 556 S.E.2d 592, 596 (2001) (comparing "choice of law clause[s] [that] designate[] the law to be applied" with forum selection clauses and consent to jurisdiction clauses that concern venue and personal jurisdiction), and *Lab. Corp. of Am. Holdings v. Caccuro*, 212 N.C. App. 564, 574, 712 S.E.2d 696, 703 (2011) (noting that "choice of law clauses are not determinative of personal jurisdiction"). Furthermore, the trial court's other basis for granting in part defendants' motion to dismiss, the ongoing Puerto Rico litigation, does not relate to personal jurisdiction or venue.

Notwithstanding the fact that neither personal jurisdiction nor venue served as the basis for the trial court's dismissal of

plaintiff's breach of the guaranty agreement claim, our review of the record leads us to the conclusion that plaintiff will not be deprived of a substantial right that would be jeopardized by postponing appeal of the order until after trial. In fact, the Puerto Rico litigation involves a determination of Plannell's liability on the loan as a personal guarantor, which is the same issue involved in Count I of plaintiff's complaint. Furthermore, we find that denying immediate review would not irreparably injure plaintiff pending determination of its remaining claims and resolution of the Puerto Rico litigation. Accordingly, plaintiff has failed to show that the trial court's interlocutory order dismissing Count I of plaintiff's complaint affects a substantial right, and we dismiss plaintiff's appeal of this portion of the order.

**B. Stay Order**

Next, plaintiff argues that the trial court erred by staying the rest of its claims against defendants pending the outcome of the Puerto Rico litigation. Specifically, plaintiff contends that North Carolina has exclusive *in rem* jurisdiction over title disputes to land within its borders and that the trial court's order staying its claims concerning a transfer of



land located within North Carolina was an abuse of discretion. We agree.

Initially, it should be noted that the trial court's interlocutory order staying plaintiff's remaining claims is immediately appealable pursuant to N.C. Gen. Stat. §1-75.12(c) (2012), which provides that "[w]henver a motion for a stay made pursuant to subsection (a) above is granted, any nonmoving party shall have the right of immediate appeal." Thus, the substantive merits regarding the stay order are discussed below.

A trial court's decision to issue a stay order pursuant to N.C. Gen. Stat. § 1-75.12 is reviewed for an abuse of discretion. *Home Indem. Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 113, 117, 493 S.E.2d 806, 809 (1997). "A trial court may be reversed for abuse of discretion only if the trial court made a patently arbitrary decision, manifestly unsupported by reason." *Id.* at 118, 493 S.E.2d at 809 (internal citations and quotations omitted).

A stay may be granted pursuant to N.C. Gen. Stat. § 1-75.12(a) "[i]f, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State." *Muter v. Muter*, 203 N.C. App. 129, 131, 689 S.E.2d 924, 926-27

(2010). However, "[w]hen title to property" is in dispute, "only the court with *in rem* jurisdiction may serve as a proper forum." *Green v. Wilson*, 163 N.C. App. 186, 190-91, 592 S.E.2d 579, 582 (2004).

Here, plaintiff alleges that the transfer of the Subject Real Property's title from Planell to Planell and Danielsen jointly as tenants by the entirety violated NCUFTA. In addition to the NCUFTA claim, plaintiff asserted five additional claims that request relief based on the NCUFTA violation, including a request for a constructive trust and other injunctive relief. Therefore, all of plaintiff's remaining claims stem from and involve a NCUFTA violation.

NCUFTA provides, in pertinent part, that

[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With intent to hinder, delay, or defraud any creditor of the debtor; or

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation[.]

N.C. Gen. Stat. § 39-23.4(a) (2013). Moreover, our Supreme Court has noted that if a conveyance is voluntary and made with

the actual intent to defraud creditors, it is void. *Aman v. Waller*, 165 N.C. 214, 217, 81 S.E. 162, 164 (1914). Thus, plaintiff's NCUFTA claim and related claims involve a dispute as to who owns title to the Subject Real Property—if the conveyance was valid, Planell and Danielsen would own it as tenants by the entirety; however, if the conveyance was done fraudulently in violation of NCUFTA, Planell would solely own it.

In *Green*, this Court resolved a similar situation involving a disputed transfer of title to land located in New Hanover County, North Carolina. *Green*, 163 N.C. App. at 187, 592 S.E.2d at 580. After suit was filed in both Georgia and North Carolina, the trial court in North Carolina issued a stay order pursuant to N.C. Gen. Stat. § 1-75.12 to allow for litigation in Georgia to be resolved. *Id.* The plaintiff in *Green* appealed the stay order, and this Court determined that although “a foreign court with *in personam* jurisdiction could render judgments that indirectly affect ownership of property over which that court would have no *in rem* jurisdiction[,] . . . a court in a jurisdiction foreign to the subject property could not determine title to the property.” *Id.* at 189, 592 S.E.2d at 581. After concluding that North Carolina had “exclusive[]” *in rem* jurisdiction over the subject property because the title

to the property was being disputed, the Green Court held that the trial court erred in staying the proceedings and reversed the stay order, reasoning that “[w]hen title to property is determined, only the court with in rem jurisdiction may serve as a proper forum.” *Id.*

Therefore, pursuant to *Green*, since title to land located entirely within North Carolina’s borders is in dispute based on an alleged violation of NCUFTA, North Carolina has exclusive *in rem* jurisdiction over the matter. Therefore, as a matter of law, Puerto Rico, the foreign jurisdiction, has no authority to determine title to the Subject Real Property. *Id.* at 189, 592 S.E.2d at 581. Accordingly, the trial court abused its discretion by issuing the stay order, and we reverse the trial court’s stay order on plaintiff’s remaining claims and remand for further proceedings.

## **II. Defendants’ Cross-Appeal**

Defendants have also cross-appealed the trial court’s order denying in part their motion to dismiss and denying the motion to cancel the *lis pendens*. Because both orders are interlocutory and neither affect a substantial right, we dismiss the cross-appeal.

"Denial of a motion to dismiss is interlocutory because it simply allows an action to proceed and will not seriously impair any right of defendants that cannot be corrected upon appeal from final judgment." *Howard v. Ocean Trail Convalescent Ctr.*, 68 N.C. App. 494, 495, 315 S.E.2d 97, 99 (1984). The purpose of a *lis pendens* notice is "to provide constructive notice of pending litigation." *Hill v. Pinelawn Mem'l Park, Inc.*, 304 N.C. 159, 164, 282 S.E.2d 779, 783 (1981). However, a "trial court's refusal to cancel the notice of [l]is [p]endens" is interlocutory and not immediately appealable unless the appellant shows that a substantial right has been impaired. *Godley Auction Co. v. Myers*, 40 N.C. App. 570, 574, 253 S.E.2d 362, 365 (1979).

"[Immediate] review of [an interlocutory] order nonetheless may be permissible if the appellant demonstrates that, under the circumstances of the particular case, the order affects a substantial right that would be jeopardized in the absence of review prior to a final determination on the merits." *Burton v. Phoenix Fabricators & Erectors, Inc.*, 185 N.C. App. 303, 305, 648 S.E.2d 235, 237 (2007), *review allowed and remanded*, 362 N.C. 352, 661 S.E.2d 242 (2008). "A substantial right is one which will clearly be lost or irremediably adversely affected if

the order is not reviewable before final judgment." *Turner*, 137 N.C. App. at 142, 526 S.E.2d at 670 (internal quotation marks omitted).

In their "Statement of the Grounds for Appellate Review" included in their brief, defendants simply claim that the order "affects a substantial right and/or has the effect of determining the action that prevents a judgment from which an appeal might be taken." Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure requires that, "when an appeal is interlocutory, the statement of grounds for appellate review must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." However, defendants have failed to include any facts or arguments in support of their assertion that the trial court's order denying in part their motion to dismiss or the trial court's refusal to cancel the *lis pendens* affected a substantial right. It is well-established that "[i]t is not the role of the appellate courts, however, to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Consequently, because defendants have failed to provide a basis for this Court

to assert jurisdiction over their interlocutory appeal, we dismiss defendants' cross-appeal.

**Conclusion**

Based on the foregoing, we dismiss plaintiff's appeal of the portion of the trial court's order dismissing the breach of guaranty claim because it is interlocutory and does not affect a substantial right. However, with regard to plaintiff's appeal of the portion of the order staying the proceedings to allow the Puerto Rico litigation to be resolved, we conclude that North Carolina has exclusive *in rem* jurisdiction to determine title to the Subject Real Property pursuant to *Green*. Therefore, the trial court abused its discretion in staying plaintiff's remaining claims as they involve a dispute as to who holds title to the Subject Real Property. Finally, we also dismiss defendants' cross-appeal from the interlocutory order denying their motion to dismiss and refusing to cancel the notice of *lis pendens*.

DISMISSED IN PART; REVERSED IN PART.

Judges DILLON and DAVIS concur.

Report per Rule 30(e).