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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1097

Filed: 5 May 2015

Wake County, No. 11 CVS 6878

NARENDRA and PADMAVATHI MAVILLA, Plaintiffs

v.

ABSOLUTE COLLECTION SERVICE, INC., Defendant

Appeal by defendant from order entered 10 January 2014 by Judge Robert F. Johnson in Wake County Superior Court. Heard in the Court of Appeals 19 February 2015.

Christopher W. Livingston for plaintiffs-appellees.

Yates, McLamb & Weyher, LLP, by Sean T. Partrick and Jennifer D. Maldonado, for defendant-appellant.

DAVIS, Judge.

Defendant Absolute Collection Service, Inc. ("ACS") appeals from the trial court's order granting in part and denying in part its motion for summary judgment. On appeal, ACS contends that the trial court erred by failing to enter summary judgment in its favor as to all claims asserted by Narendra and Padmavathi Mavilla (collectively "Plaintiffs"). After careful review, we dismiss ACS's appeal for lack of appellate jurisdiction.

Factual Background

In early 2009, WakeMed Faculty Practice Plan ("WakeMed"), a North Carolina corporation doing business as WakeMed Faculty Physicians, retained ACS, a debt collection agency, to collect a debt in the amount of $492.00 allegedly owed to WakeMed by Plaintiffs for medical services provided in June and July of 2005. Shortly after being retained by WakeMed, ACS began engaging in collection efforts on its behalf by calling and sending letters to Plaintiffs concerning payment of the alleged debt.

In response, Plaintiffs sent a letter to WakeMed on 21 July 2009 disputing the debt. Plaintiffs sent a similar letter to ACS on 24 August 2009. Plaintiffs also sent ACS a letter on 24 August 2009 demanding that ACS cease all further communications with them.

In November 2009, ACS reported Plaintiffs' failure to pay the debt to three credit bureaus — Equifax, TransUnion, and Experian. Plaintiffs contacted the credit bureaus to dispute the debt.[1] While ACS ultimately requested that the credit bureaus remove the debt from Plaintiffs' credit reports, it is unclear from the record exactly when ACS actually took this action.

On 4 October 2010, Plaintiffs filed a complaint ("the Federal Action") against ACS and WakeMed in the United States District Court for the Eastern District of

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[1] The record does not reflect the precise date on which Plaintiffs disputed the debt to the credit bureaus. However, on 27 September 2010, ACS received notice of Plaintiffs' dispute from Equifax.

North Carolina, asserting claims based on (1) the Fair Credit Reporting Act (the "FCRA"); (2) the North Carolina Debt Collection Act (the "NCDCA"); (3) the North Carolina Collection Agency Act (the "NCCAA"); and (4) the Fair Debt Collection Practices Act (the "FDCPA"). Plaintiffs further requested a declaration that they "owe[d] [WakeMed] nothing." Plaintiffs subsequently dismissed their claims against WakeMed in the Federal Action without prejudice on 14 January 2011.

On 3 May 2011, while the Federal Action was still pending, Plaintiffs initiated an action in Wake County Superior Court — the lawsuit that forms the basis for the present appeal — asserting claims against ACS for (1) violation of the NCCAA; (2) defamation; and (3) declaratory judgment. ACS filed an answer and moved for a stay of the action due to the pendency of the Federal Action, and the trial court granted its motion.

On 17 January 2012, Plaintiffs then filed a separate state court action (the "WakeMed Action") against WakeMed in Wake County Superior Court. In their complaint, Plaintiffs asserted claims for (1) violation of the NCDCA; (2) defamation; (3) duress; and (4) declaratory judgment. WakeMed subsequently filed an answer and motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 6 August 2012, Judge Paul G. Gessner entered an order ("Judge Gessner's Order") dismissing Plaintiffs' claims against WakeMed for violation of the NCDCA, defamation, and duress. However, Judge Gessner's Order stated that "[t]he

Court makes no ruling with respect to Count IV of Plaintiffs' Amended Complaint, which seeks a declaratory judgment."

While the WakeMed Action was still pending, ACS moved for summary judgment in the Federal Action. On 10 January 2013, the Honorable James C. Fox entered an order granting summary judgment in favor of ACS as to Plaintiffs' (1) FDCPA claim; (2) FCRA claim; and (3) NCDCA claim. Judge Fox declined, however, to exercise supplemental jurisdiction over Plaintiffs' NCCAA claim or their claim seeking a declaratory judgment. Plaintiffs appealed Judge Fox's order to the United States Court of Appeals for the Fourth Circuit, and on 10 September 2013, the Fourth Circuit affirmed Judge Fox's order. *Mavilla v. Absolute Collection Serv., Inc.*, 539 F. App'x 202 (4th Cir. 2013).

Based upon the resolution of the Federal Action, on 12 September 2013, ACS moved the trial court in the present action to lift the stay that had previously been imposed. ACS simultaneously filed a motion to dismiss and a motion for summary judgment.

On 28 October 2013, ACS's motions were heard by Judge Robert F. Johnson in Wake County Superior Court. On 10 January 2014, Judge Johnson entered an order granting in part and denying in part ACS's motion for summary judgment. The order stated, in pertinent part, as follows:

> [W]ith regard to any acts of defendant prior to the filing of a complaint by plaintiffs against defendant in the

> United States District Court on October 4, 2010, the rulings of that Court in that case denominated Narendra Mavilla and Padmavathi Mavilla, plaintiffs v. Absolute Collection Service, Inc., Defendant and WakeMed Faculty Physicians, Defendant, No. 13-1170 are binding upon this Court, and as to any matters arising prior to October 4, 2010, defendant is entitled as a matter of law to summary judgment, and to that extent Defendant's motion for summary judgment should be allowed.
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> However, as to any acts of the Defendant subsequent to October 4, 2010 relative to the issues raised in the complaint, there do exist genuine issues as to material facts, and Defendant is not entitled to summary judgment. Hence as to those matters Defendant's motion for summary judgment should be denied.
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> NOW THEREFORE, Defendant's motion for summary judgment is allowed in part and denied in part.
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> Furthermore, Defendant's motion to dismiss is DENIED . . . .

On 7 February 2014, ACS filed a notice of appeal to this Court.

Analysis

As an initial matter, we must determine whether we have jurisdiction to hear ACS's appeal. Because the trial court's 10 January 2014 order granted summary judgment in favor of ACS on some — but not all — of the issues before it, the order 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, 231-32 (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."[2] *Keesee 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.*

[2] An interlocutory order may also be appealed where the trial court certifies the order for immediate appeal pursuant to Rule 54(b). *See Tands, Inc. v. Coastal Plains Realty, Inc.*, 201 N.C. App. 139, 142, 686 S.E.2d 164, 166 (2009) ("[A]n interlocutory order can be immediately appealed if the order is final as to some but not all of the claims and the trial court certifies there is no just reason to delay the appeal pursuant to North Carolina Rules of Civil Procedure, Rule 54(b)." (citation, internal brackets, and ellipses omitted)). However, in the present case, Judge Johnson's order contains no such certification.

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*, ___ N.C. App. ___, ___, 764 S.E.2d 487, 489 (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 internal 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 internal quotation marks, and brackets omitted).

In the present case, ACS argues that based upon the doctrine of collateral estoppel, "[f]orcing [ACS] to further defend against issues that have been fully litigated and resolved in [ACS's] favor affects a substantial right." We disagree.

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 internal 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, internal quotation marks, and emphasis omitted), *appeal dismissed and disc. review denied*, 363 N.C. 123, 672 S.E.2d 685, 685-86 (2009).

ACS's attempt to establish appellate jurisdiction over this appeal through the doctrine of collateral estoppel is based on (1) the Fourth Circuit's decision in the

Federal Action; and (2) Judge Gessner's Order in the WakeMed Action. We discuss each in turn.

I. Effect of the Federal Action

ACS asserts that "[a]lthough [Plaintiffs'] state court claims under [the NCCAA] are different from those brought in federal court, the state court claims contain issues previously litigated and determined in the federal court. Thus [Plaintiffs'] are barred [under the doctrine of collateral estoppel] from re-litigating these issues."

As noted above, while Judge Fox entered summary judgment in ACS's favor as to Plaintiffs' claims under the FDCPA, FCRA, and NCDCA, he declined to exercise supplemental jurisdiction over Plaintiffs' state law NCCAA claim or their declaratory judgment claim. Judge Fox specifically stated in his order that "[the NCCAA] claim is supplemental to the federal claims that conferred original federal jurisdiction in this court, and all such federal claims have been dismissed. Accordingly, the court declines to exercise supplemental jurisdiction over the [Plaintiffs'] supplemental NCCAA claim."

In affirming the entry of summary judgment on Plaintiffs' FCRA claim, the Fourth Circuit held as follows:

> Here, the undisputed facts demonstrate that ACS received notification of the disputed debt on September 27, 2010. This was the date that ACS's duties as a furnisher under the FCRA were triggered. As the district court

> pointed out, "[b]y law, ACS had *thirty* (30) *days* after receiving notice of the dispute from a CRA within which to investigate and correct any incomplete or inaccurate information ACS had provided to the CRA(s)." Mavilla v. Absolute Collection Serv., Inc., 2013 WL 140046 *8 (E.D.N.C. Jan. 10, 2013) (emphasis in original). It is also uncontested that this action was commenced on October 4, 2010, only five days after ACS's duties arose. Thus, at the time of this suit, ACS had not breached any duty under the FCRA.
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> Appellants concede that the FCRA "allows 30 days for a furnisher of information to conduct a reasonable investigation," but argue that it "does not establish a safe harbor against suit once a furnisher has done all the investigation it intends to do." Appellants' Br. 16. In sum, Appellants argue that ACS completed all of the investigation that it had intended to undertake at the time this action was commenced and "[g]iving it another 25 days would have been futile and is not what the statute requires." Appellants' Br. 49.
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> Contrary to this assertion, the statute precisely requires that the 30 day period for investigation have expired for ACS to have breached any duty which would give rise to the Mavillas's private right of action under this section of the law. It is inapposite whether ACS would or would not have further investigated because Appellants chose to initiate this lawsuit at a time when ACS by the terms of the law could not have yet breached its duty to investigate. Thus, the district court properly granted summary judgment to ACS on the FCRA claim.

Mavilla, 539 F. App'x at 208.

Thus, the ruling in the Federal Action only addressed whether Plaintiffs had established evidence of an FCRA violation as of 4 October 2010. Even assuming, without deciding, that the elements of the FRCA and the NCCAA are identical, the

Federal Action did not address the question of whether ACS may have violated the statute *after* 4 October 2010.[3]

For this reason, ACS's attempt to portray Judge Johnson's 10 January 2014 order as permitting the relitigation of issues already decided in the Federal Action lacks merit. His order denied summary judgment only as to those claims of Plaintiffs that are based on acts by ACS occurring after 4 October 2010, the date the Federal Action was filed. Indeed, we note that the complaint in the present action — which was not filed until 3 May 2011 — expressly states that "Plaintiffs seek recovery here only for damages incurred after commencement of their federal case on 04 October 2010." Because the ruling in the Federal Action did not purport to address events that may have occurred after 4 October 2010, ACS has failed to demonstrate any risk of inconsistent verdicts by virtue of the Federal Action. *See Heritage Operating*, ___ N.C. App. at ___, 727 S.E.2d at 314 (holding that substantial right is affected "only where a possibility of inconsistent verdicts exists if the case proceeds to trial" (citation and internal quotation marks omitted)).

II. Effect of Judge Gessner's Order

We likewise reject ACS's argument that Plaintiffs are collaterally estopped from proceeding on their NCCAA claim against ACS based on Judge Gessner's Order

[3] For example, the record is silent as to how long ACS waited before requesting that the debt be removed from Plaintiffs' credit report. Indeed, ACS concedes in its brief that "[t]here is no reference [in the record] as to when this occurred-before or after this Action was filed."

in the WakeMed Action. First, Judge Gessner did not rule on Plaintiffs' claim for declaratory judgment. Therefore, based on the record before us, we cannot treat the order as a final judgment on the merits for purposes of collateral estoppel. *See Tucker*, 344 N.C. at 414, 474 S.E.2d at 128 ("A party asserting collateral estoppel is required to show that the earlier suit resulted in a final judgment on the merits[.]" (citation omitted)); *see also Foreman v. Foreman*, 144 N.C. App. 582, 587, 550 S.E.2d 792, 796 ("[T]he threshold question under both theories [*res judicata* and collateral estoppel] is whether there was a final judgment on the merits. If there was a final judgment on the merits, then either theory might apply, depending on the other facts. If there was not a final judgment on the merits, then neither theory should apply regardless of the other facts."), *disc. review denied*, 354 N.C. 68, 553 S.E.2d 38 (2001).

Second, as noted above, a separate element of collateral estoppel is that both the party asserting the doctrine's applicability and the party against whom it is being asserted were either parties to the original proceeding or in privity with those parties. *See Tucker*, 344 N.C. at 414, 474 S.E.2d at 128-29 ("A party asserting collateral estoppel is required to show . . . 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." (citation and internal brackets omitted)). ACS was not a party to the WakeMed Action, and ACS does not assert that privity

existed between it and WakeMed in that action. Therefore, ACS has failed to satisfy this element as well.

Third, the statutory claim at issue in the WakeMed Action was brought under the NCDCA (a statute that does not apply to ACS given that, by its express terms, it is inapplicable to collection agencies) rather than the NCCAA (which does apply to ACS as it exclusively governs claims brought against collection agencies). This Court has previously noted the distinction between these two statutes. *See Simmons v. Kross Lieberman & Stone, Inc.*, ___ N.C. App. ___, ___, 746 S.E.2d 311, 314 (2013) (distinguishing causes of action brought under NCDCA and NCCAA).

For all of these reasons, we conclude that ACS has failed to establish the possibility of inconsistent verdicts absent our consideration of this appeal. Accordingly, we must dismiss ACS's interlocutory appeal. *See Whitehurst Inv. Props.*, ___ N.C. App. at ___, 764 S.E.2d at 491 ("[B]ecause [the appellant] cannot show how a substantial right would be affected without immediate appellate review [given that collateral estoppel and *res judicata* did not apply], we dismiss its appeal from the trial court's interlocutory order.").

Conclusion

For the reasons stated above, ACS's appeal is dismissed for lack of appellate jurisdiction.

DISMISSED.

Judges STROUD and DILLON concur.

Report per Rule 30(e).