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NO. COA14-507  
NORTH CAROLINA COURT OF APPEALS

Filed: 17 March 2015

JOY MANN JONES,  
Plaintiff,

v.

Lee County  
No. 13 CVD 817

BRUCE RAY JONES,  
Defendant.

Appeal by defendant from order entered 18 March 2014 by Judge Caron H. Stewart in Lee County District Court. Heard in the Court of Appeals 25 September 2014.

*Harrington, Gilleland, Winstead, Feindel & Lucas, LLP, by Eddie S. Winstead, III and Susan M. Feindel, for plaintiff-appellee.*

*Doster, Post, Silverman, Foushee, Post & Patton, P.A., by Jonathan Silverman, for defendant-appellant.*

GEER, Judge.

Plaintiff Joy Mann Jones brought an action against defendant Bruce Ray Jones for breach of the parties' separation agreement. Defendant moved to dismiss the complaint for lack of subject matter jurisdiction on the grounds that, pursuant to Rule 13(a) of the Rules of Civil Procedure, plaintiff's claims should have been

asserted as compulsory counterclaims in defendant's previous pending action, 12 CVD 442, in which defendant sought to rescind the separation agreement. Defendant appeals from the trial court's order denying his motion.

Rule 13(a) applies only to claims that arise out of the same transaction or occurrence as the opposing party's claim and are mature at the time the responsive pleading is filed. Therefore, plaintiff's claims that are based on defendant's breach of the separation agreement occurring after plaintiff filed her initial answer in 12 CVD 442 are not subject to the compulsory counterclaim rule. In any event, plaintiff's action for breach of the separation agreement and defendant's prior pending action to rescind the agreement raise different issues of fact and law, do not require substantially the same evidence, and seek divergent remedies. Accordingly, we conclude that they do not arise from the same transaction or occurrence, and we affirm the trial court's order.

#### Facts

The parties were married on 21 October 1978 and separated on 14 October 2011. On 19 October 2011, they executed a Separation Agreement and Property Settlement.

On 24 April 2012, defendant initiated an action in case file number 12 CVD 442 to vacate and declare void the separation

agreement on the grounds that it was procedurally and substantively unconscionable and that the execution of the agreement was the result of duress, coercion, and undue influence by defendant upon plaintiff. Plaintiff filed an answer and counterclaim for attorneys' fees on 12 July 2012. On 4 June 2013, plaintiff amended her answer to assert the affirmative defense of ratification, and, on 1 August 2013, moved for summary judgment on those grounds.

This matter was initiated on 5 September 2013 when plaintiff filed a separate action against defendant for breach of the separation agreement. In the complaint, plaintiff alleged that defendant breached the separation agreement by (1) failing to maintain the 12.743 acres adjoining the marital residence, resulting in costs to plaintiff of \$7,200.00 from June 2012 until August 2013; (2) failing to pay the monthly alimony of \$3,750.00 in full since 7 December 2012; (3) failing to make minimal monthly payments on an equity line of credit with BB&T since 27 November 2012; and (4) failing to maintain a life insurance policy on his life. Plaintiff sought damages and specific performance of defendant's obligations under the agreement.

On 7 November 2013, defendant moved pursuant to Rule 12(b)(1) of the Rules of Civil Procedure to dismiss plaintiff's complaint for lack of subject matter jurisdiction on the grounds that plaintiff's claims should have been brought as compulsory

counterclaims in 12 CVD 442. After a hearing on 12 February 2014, the trial court entered an order on 18 March 2014 denying defendant's motion to dismiss. Defendant timely appealed to this Court.<sup>1</sup>

#### Grounds for Appellate Review

We first address this Court's jurisdiction over 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). "The denial of a motion to dismiss is an interlocutory order and is generally not appealable." *Hendrix v. Advanced Metal Corp.*, 195 N.C. App. 436, 438, 672 S.E.2d 745, 747 (2009). "However, our Supreme Court has allowed immediate review of the denial of a motion to dismiss on the ground of a prior action pending." *Id.* (citing *Atkins v. Nash*, 61 N.C. App. 488, 489, 300 S.E.2d 880, 881 (1983)). Accordingly, we hold that immediate review of the trial court's order is proper.

#### Discussion

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<sup>1</sup>On 18 December 2013, the trial court entered an order granting plaintiff's motion for summary judgment in 12 CVD 442 on the grounds that defendant had ratified the agreement. Defendant has also appealed that order to this Court. Resolution of that appeal is the subject of a separate opinion.

On appeal, defendant argues that the trial court erred in denying his motion to dismiss because plaintiff's claims should have been asserted in 12 CVD 442 as compulsory counterclaims pursuant to Rule 13(a). Rule 13(a) provides, in pertinent part:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

This Court has recognized that "the compulsory counterclaim rule applies only to claims that are mature at the time the responsive pleading is filed." *Jonesboro United Methodist Church v. Mullins-Sherman Architects, L.L.P.*, 359 N.C. 593, 597, 614 S.E.2d 268, 271 (2005). Consequently,

[w]here a cause of action, arising out of the transaction or occurrence that is the subject matter of the opposing party's claim, matures or is acquired by a pleader *after* he has served his pleading, the pleader is not required thereafter to supplement his pleading with a counterclaim. Although G.S. 1A-1, Rule 13(e), permits the court to allow such supplemental pleading to assert a counterclaim, such supplemental pleading is not mandated and failure to do so will not bar the claim.

*Driggers v. Commercial Credit Corp.*, 31 N.C. App. 561, 564-65, 230 S.E.2d 201, 203 (1976) (emphasis added).

Here, plaintiff brought a claim for breach of the separation agreement. A claim for breach of contract "'accrues at the time of notice of the breach.'" *Ludlum v. State*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 742 S.E.2d 580, 582 (2013) (quoting *Henlajon, Inc. v. Branch Highways, Inc.*, 149 N.C. App. 329, 335, 560 S.E.2d 598, 603 (2002)). Plaintiff's claims for breach of the separation agreement are premised on plaintiff's allegations that defendant (1) failed to maintain the 12.743 acres located at 2390 New Elam Church Road, New Hill, North Carolina, causing plaintiff to "purchase chemicals and hire persons to perform the maintenance of the 12.743 acres at a cost to her of \$7,200.00 from June 2012 until August 2013[,] (2) failed to pay alimony in full since 7 December 2012, (3) failed to make payments on the equity line of credit since November 2012, and (4) failed to maintain a life insurance policy.

Plaintiff filed her initial responsive pleading in 12 CVD 442 on 12 July 2012. At the time, plaintiff only had notice of defendant's failure to maintain the property. Accordingly, the only mature claim was one for breach of the settlement agreement based upon defendant's failure to maintain the property. The remaining claims had not yet accrued, and are, therefore, not subject to the compulsory counterclaim rule. Defendant, nevertheless, contends that because plaintiff's claims accrued by the time plaintiff filed her amended answer on 4 June 2013, those

claims are subject to Rule 13(a). This argument, however, is foreclosed by *Driggers* because all but one of the claims accrued after plaintiff filed her responsive pleading.

In any event, plaintiff's claims for breach of the separation agreement do not arise out of the same transaction or occurrence as defendant's action to set aside the separation agreement. In determining whether a counterclaim arises out of the same transaction or occurrence of a prior claim, the court must consider "'(1) whether the issues of fact and law raised by the claim and counterclaim are largely the same; (2) whether substantially the same evidence bears on both claims; and (3) whether any logical relationship exists between the two claims.'" *Holloway v. Holloway*, 221 N.C. App. 156, 159, 726 S.E.2d 198, 201 (2012) (quoting *Jonesboro*, 359 N.C. at 599-600, 614 S.E.2d at 272).

Although both actions relate to the same separation agreement, the issues of fact and law raised by the claims are distinct. Defendants' action to set aside the separation agreement involves questions of contract formation and the presentation of evidence regarding the circumstances surrounding the execution of the separation agreement. In contrast, plaintiff's action for breach of the separation agreement requires plaintiff to present evidence of defendant's failure to perform the terms of the agreement after the agreement had been executed. Additionally,

the remedies sought are divergent. In 12 CVD 442, defendant sought to vacate and set aside the separation agreement, whereas plaintiff seeks to enforce the agreement and recover damages as a result of defendant's alleged breach of the agreement as well as an order requiring specific performance of the agreement's terms.

As this Court explained in *Twin City Apartments, Inc. v. Landrum*, 45 N.C. App. 490, 494, 263 S.E.2d 323, 325 (1980), "Rule 13(a) is a tool designed to further judicial economy. The tool should not be used to combine actions that, despite their origin in a common factual background, have no logical relationship to each other." Given the divergence in the nature of the actions and the remedies sought, we hold that plaintiff's claims do not arise out of the same transaction or occurrence as defendant's prior claim for rescission of the agreement. *See id.* (holding that action for summary ejectment was not a compulsory counterclaim to tenant's previous pending action for breach of lease agreement, despite their origin in a common factual background).

Affirmed.

Chief Judge MCGEE and Judge STROUD concur.

Report per Rule 30(e).