IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-729

Filed: 2 February 2016

Davie County, No. 14CVS115

JOSEPH A. MALDJIAN and MARIANA MALDJIAN, Plaintiffs,

v.

CHARLES R. BLOOMQUIST, CAROLINE BLOOMQUIST, SIDNEY HAWES, and KATE HAWES, Defendants.

Appeal by plaintiffs from Order entered 6 February 2015 by Judge Mark E. Klass in Davie County Superior Court. Heard in the Court of Appeals 2 December 2015.

FITZGERALD LITIGATION, by Andrew L. Fitzgerald, for plaintiffs.

WILSON HELMS & CARTLEDGE, LLP, by Stuart H. Russell and Lorin J. Lapidus, for defendants.

ELMORE, Judge.

Joseph A. Maldjian and Mariana Maldjian (plaintiffs) appeal from the trial court's order granting Charles R. Bloomquist, Caroline Bloomquist, Sidney Hawes, and Kate Hawes' (defendants) motion to compel Mariana Maldjian's deposition answers. Defendants filed a motion to dismiss plaintiffs' appeal and a motion for

sanctions. Consistent with defendants' motion, we dismiss plaintiffs' appeal but we deny defendants' motion for sanctions.

I. Background

The background and facts of the case are recited in a related case, *Maldjian v. Bloomquist*, ___ N.C. App. ___, ___ S.E.2d ___ (No. COA15-697). This appeal also pertains to the discovery stage of the lawsuit but deals with a different privilege issue.

The Bloomquists hired Patti Dobbins, an attorney, to represent their interests as buyers in the real estate closing for the Cana Road property. In May 2013, Ms. Maldjian e-mailed LeAnne Miller at Missions Realty, Inc., asking, "[W]ill we need our own lawyer for closing? If we do, I think we want to use: Tornow, W Mc Nair-Tornow & Kangur LLP . . . , but even better if we don't!" Miller responded, "The closing attorney the buyer uses usually prepares the deed and lien waiver for the seller. But if you'd prefer your attorney prepare it that's fine. Just let me know so I can let the closing attorney know your attorney will be doing it." Ms. Maldjian replied, "Their lawyer is fine." Dobbins prepared the deed, and the Maldjians paid Dobbins seventy-five dollars.

After plaintiffs initiated the instant lawsuit, defendants deposed Ms. Maldjian on 29 October 2014. Throughout the deposition, plaintiffs' counsel objected to questions concerning Dobbins, asserting attorney-client privilege on Ms. Maldjian's behalf. When asked if she had any communications with Dobbins prior to the closing

date, Ms. Maldjian answered, "We spoke with paralegals in her office. I don't recall speaking with her directly." Ms. Maldjian also stated that she, Kathy Smith from Allen Tate, and Miller were present for the closing, which took place in the foyer of Dobbins's office. Ms. Maldjian stated that Dobbins was not present, "just a paralegal or maybe some office staff."

After failing to obtain answers to additional questions concerning Dobbins, defendants filed a motion to compel on 4 December 2014 pursuant to Rules 26(b)(1) and 37(a) of the North Carolina Rules of Civil Procedure, arguing that the questions were relevant, the subject of the lawsuit, and non-privileged. In the motion, defendants requested that Ms. Maldjian be compelled to respond to the following deposition questions:

> Q. Did you ever have any discussions where Ms. Dobbins explained that she was going to be representing the Bloomquists and you and your husband at the closing?
>
> Q. Did you request to see the first page of the document you were signing?
>
> Q. Did it concern you were signing a document that you—who's [sic] complete contents you had not seen?

On 15 December 2014, the trial court heard arguments from both sides regarding whether answers to the above questions were protected by attorney-client privilege. Defendants argued that plaintiffs failed to demonstrate that the communications at issue satisfied each element of the five-part test in *In re Miller*,

which is used to determine whether attorney-client privilege applies to a particular communication. Plaintiffs responded, stating that "there's actually law governing residential real estate closings, whether the attorney represents the seller or not." Plaintiffs argued that under 2004 Formal Ethics Opinion 10, which "governs this situation, the attorney-client relationship was . . . formed." In essence, plaintiffs' position at the hearing and now is that because Dobbins did not provide disclosures, explaining to plaintiffs that she was not their attorney and that her clients were the Bloomquists, Dobbins formed an attorney-client relationship with plaintiffs and their communications are privileged. Regarding the *Miller* test, plaintiffs stated that the State Bar, "in their wisdom knew the *Miller* test when they wrote 2004 FE 10."

The trial court granted defendants' motion to compel on 6 February 2015. Plaintiffs appeal. Plaintiffs did not present the trial court or this Court with Ms. Maldjian's deposition answers for *in camera* review.

II. Analysis

In plaintiffs' statement of the grounds for appellate review, they state that an interlocutory order may be appealed from when the matter affects a substantial right. Plaintiffs further state, "It is well-settled that a party's assertion of the attorney-client privilege affects a substantial right from which an immediate appeal is available." (citing *Brown v. Am. Partners Fed. Credit Union*, 183 N.C. App. 529, 645 S.E.2d 117, 121 (2007); *In re Investigation of Death of Miller*, 357 N.C. 316, 343, 584

S.E.2d 772, 791 (2003)).

Defendants filed a motion to dismiss, arguing that plaintiffs have failed to show that the interlocutory order affects a substantial right because plaintiffs' assertion of the attorney-client privilege is frivolous and insubstantial. Defendants state that plaintiffs failed to create a sufficient record to make appellate review possible, and we should dismiss plaintiffs' appeal based on this Court's decision in *Stevenson v. Joyner*, 148 N.C. App. 261, 558 S.E.2d 215 (2002).

"When an appeal is interlocutory, the statement [of the 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." N.C.R. App. P. 28(b)(4) (2009).

In plaintiffs' brief, they state, "Plaintiffs fully acknowledge that *In re Miller* is a seminal case that helps define North Carolina's view of the attorney-client privilege. In this very specific situation . . . plaintiffs strongly believe that the correct analysis is fully contained in 2004 FEO 10." "Therefore, plaintiffs' analysis will not directly address the five part test set forth in *In re Miller*, as such an analysis is unnecessary in light of the specific guidance from 2004 FEO 10." In plaintiffs' response to defendants' motion to dismiss, plaintiffs state the following regarding their failure to submit the deposition answers for *in camera* review: "Although Ms. Maldjian did not place sealed answers in the record, the answers necessarily have to

disgorge her confidential communications with her attorney about the real estate closing, and thus the objections were proper and the matter is ripe for adjudication." We fail to understand this position.

In *Stevenson*, one of the defendants was instructed not to answer certain questions during a deposition based on attorney-client privilege. *Stevenson*, 148 N.C. App. at 262, 558 S.E.2d at 216. The court ordered the defendant to answer the questions, and the defendant appealed from the interlocutory order. *Id.* at 262, 558 S.E.2d at 217. The plaintiff filed a motion to dismiss, arguing that the order did not affect a substantial right. *Id.* In response, the defendants urged this Court to apply the analysis in *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 541 S.E.2d 782, *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001), and hear their appeal. *Stevenson*, 148 N.C. App. at 264, 558 S.E.2d at 218. We found *Evans* distinguishable and stated the following:

> We reach this conclusion based on important differences between *Evans* and the case at issue. In *Evans*, defendant was asked to turn over an enormous amount of information about the internal processes and practices of defendant-company. This material included documents alleged to be protected under both the attorney-client privilege and work-product doctrine. Here, the discovery at issue consists of only a few questions posed during a deposition, which defendants' counsel instructed Mr. Joyner not to answer. From the record before us, it appears that defendants never presented their deposition answers to the judge *in camera* or under seal for a determination of the application of the privilege to the information. Defendants bear the burden of showing that this information sought

> was protected by attorney-client privilege, but our record is insufficient to determine whether that burden has been carried by defendants. *See id.* at 32, 541 S.E.2d at 791 (noting that "[t]he burden of establishing the attorney-client privilege rests upon the claimant of the privilege"). We do not read *Evans* as opening the door to appellate review of every contested discovery order in which attorney-client privilege is simply asserted, without more. A substantial right has not been shown to be at issue here, and we dismiss defendant's appeal as interlocutory.

Id.

Here, as defendants point out, the existence of an attorney-client relationship between an attorney and a client does not *ipso facto* mandate that all future communications between those parties are entitled to privilege. Plaintiffs did not submit Ms. Maldjian's deposition answers for *in camera* review and did not meet their burden of establishing privilege, entitling them to immediate appellate review of the interlocutory discovery order. *See Miller*, 357 N.C. at 343, 584 S.E.2d at 791 ("Upon *in camera* review, in the event the trial court concludes that any portion of the communications made between the client and the attorney is either not subject to the attorney-client privilege, or though privileged no longer serves the purpose of the privilege and may be disclosed," the trial court's determination affects a substantial right and is immediately appealable.); *Wachovia Bank v. Clean River Corp.*, 178 N.C. App. 528, 532, 631 S.E.2d 879, 882 (2006) ("[A]ppellants bear the burden to illustrate the privilege alleged[ ]" and "could have, but chose not to, produce the . . . documents for an in camera inspection[.]").

Plaintiffs' sole reliance on 2004 Formal Ethics Opinion 10 is misplaced for a number of reasons: namely, it is not binding on this Court, and although it discusses generally whether the buyer's attorney may prepare the deed without creating an attorney-client relationship with the seller, it fails to even mention privilege. *See North Carolina State Bar v. Merrell*, ___ N.C. App. ___, ___, 777 S.E.2d 103, 115 (Oct. 6, 2015) (No. COA14-1334) (noting that formal ethics opinions are not precedential authority for this Court). As in *Stevenson*, we must dismiss the appeal as plaintiffs have failed to carry their burden of establishing that a substantial right is affected.

B. Defendants' Motion for Sanctions

Pursuant to Rules 34 and 37 of the Rules of Appellate Procedure, defendants move for "an order imposing monetary sanctions in the form of expenses, including reasonable attorney fees, incurred by defendants in having to defend against plaintiffs' frivolous interlocutory appeal." Although we note that plaintiffs' appeal is deficient, we decline to impose sanctions.

III. Conclusion

In sum, we grant defendants' motion to dismiss plaintiffs' appeal as the appeal is from an interlocutory order not affecting a substantial right. We deny defendants' motion for sanctions.

DISMISSED.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).