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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-976

Filed: 5 April 2016

Mecklenburg County, No. 14 CVS 12773

PROSPERITY-HEATH, LLC, VIRGINIA S. HEATH, and WILLIAM HEATH,  
Plaintiffs,

v.

CAPITAL BANK, N.A., Defendant.

Appeal by Defendant from order entered 20 May 2015 by Judge Forest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 January 2016.

*DeVore, Acton & Stafford, PA, by Derek P. Adler and Fred W. DeVore, III, for Plaintiff-Appellees.*

*Honeycutt Law Firm, PLLC, by John B. Honeycutt, Jr., for Defendant-Appellant.*

HUNTER, JR., Robert N., Judge.

Capital Bank, N.A. (“Defendant”), appeals following an interlocutory order granting Plaintiffs partial summary judgment. Defendant contends the trial court committed error in granting Plaintiffs partial summary judgment. We dismiss this appeal as interlocutory for the following reasons.

**I. Factual and Procedural Background**

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This dispute arises out of Defendant's foreclosure on a commercial property owned by Prosperity-Heath, LLC and Virginia Heath. The property was sold at public auction on 8 March 2013. Defendant was the only bidder and bought the property for \$747,278.00. On 25 June 2014, Defendant sold the property to a third party purchaser. On 8 April 2013, Defendant filed a complaint for a deficiency judgment against Prosperity-Heath, LLC, McAlpine Investments, Inc., The McAlpine Company, and Charles L. McAlpine, in Mecklenburg County Superior Court case number 13 CVS 6573. On 17 January 2014, the deficiency action proceeded to bench trial. The named defendants raised the anti-deficiency statutes and breach of good faith and fair dealing as defenses. The court found Defendant violated its duty of good faith and fair dealing and entered an order denying Defendant's complaint with prejudice on 5 May 2014.

Neither party appealed the order. After the appellate deadlines expired, Plaintiffs filed a verified complaint in the case *sub judice* on 9 July 2014. Plaintiffs alleged causes of action for (1) breach of implied covenant of good faith and fair dealing, and (2) unfair and deceptive trade practices. Defendant filed an answer 18 September 2014 and moved to dismiss Plaintiffs' complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Defendant did not raise the issue of collateral estoppel in its answer.

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On 18 March 2015, Plaintiffs filed a Rule 56 motion for partial summary judgment “as to liability only.” Plaintiffs attached a copy of the trial court’s order in 13 CVS 6573 to their motion. On 1 April 2015, Defendant filed a motion for summary judgment with several affidavits attached to it. Defendant contended it was entitled to summary judgment on all of Plaintiffs’ claims.

The parties were heard on 29 April 2015. In a 20 May 2015 order, the trial court granted partial summary judgment as to Prosperity-Heath, LLC’s claim for breach of good faith and fair dealing, and denied partial summary judgment for Plaintiffs’ other claims. The trial court denied summary judgment for Defendant and incorporated findings of fact and conclusions of law from the 5 May 2014 order entered in the deficiency action. The trial court made findings of its own, and found Plaintiffs were not barred from bringing their claim, and William and Virginia Heath were not parties in the first deficiency action. Additionally, the trial court included the following findings in its order:

11. The defendant contends: (1) that neither res judicata nor the doctrine of collateral estoppel arising from the previous case applies to the current case; and (2) that the current claim was a compulsory counterclaim that should have been raised in the previous action.

12. In addressing the compulsory counterclaim issue first, the court finds that the plaintiffs’ action is not barred on the grounds that the plaintiffs’ claims were compulsory counterclaims in the first action. This is based on two findings: (1) the Court is not persuaded that under the anti-deficiency statute and defenses raised in the first action,

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that the plaintiffs would have been permitted to file a counterclaim for damages; and (2) that the defendant's failure in the present matter to allege the compulsory counterclaim issue as an affirmative defense under Rule 8 constitutes a waiver of that defense.

After settlement of the record, the parties filed their appellate briefs. Pursuant to Appellate Rule 37, Plaintiffs filed a motion to dismiss Defendant's appeal as interlocutory. Defendant filed a response to the motion on 6 October 2015, and the Clerk of Court referred Plaintiffs' motion to this panel on 8 October 2015.

**II. Jurisdiction**

"A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). However, a party may appeal an interlocutory judgment when the trial court certifies the judgment under N.C. R. Civ. Pro. 54(b), or the interlocutory order "deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citations omitted).

The trial court did not certify the appeal under Rule 54. Defendant, as the appellant, bears the burden of proving the interlocutory order affects its substantial right. *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277, 679 S.E.2d 512, 516 (2009) (citation omitted). Appellant must present "more than a bare assertion that

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the order affects a substantial right; [it] must demonstrate *why* the order affects a substantial right.” *Id.* at 277–78, 679 S.E.2d at 516 (emphasis in original) (citation omitted).

Defendant contends its substantial rights are prejudiced because it “should not be collaterally estopped from defending the claim of its alleged breach of good faith and fair dealing with respect to Prosperity-Heath, LLC.” We disagree.

Collateral estoppel precludes parties from “retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination.” *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citation and quotation marks omitted). Under this doctrine, “parties have a substantial right to avoid litigating issues that have already been determined by a final judgment.” *Id.* Our Court has held the “denial of a motion to dismiss premised on . . . collateral estoppel does not *automatically* affect a substantial right . . .” *Whitehurst Inv. Properties, LLC v. NewBridge Bank*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 764 S.E.2d 487, 489 (2014) (emphasis in original).

To satisfy its “burden of showing how a substantial right would be lost” based on collateral estoppel, Defendant must show “(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.” *Id.* at \_\_\_, 764 S.E.2d at 490 (citation omitted). Defendant failed to appeal the order denying the first deficiency action with prejudice, and failed to raise

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collateral estoppel in its answer in the current action. Virginia and William Heath were not parties to the deficiency action and their claim for breach of good faith and fair dealing has not been previously litigated. Therefore, Defendant fails to show the same factual issues are present in both actions, and fails to show the possibility of inconsistent verdicts exists. Accordingly, Defendant has failed to carry its burden in showing its substantial right will be lost.

**III. Conclusion**

For the foregoing reasons, we hold this appeal does not affect a substantial right and dismiss it as interlocutory.

DISMISSED.

Judges Stephens and Inman concur.

Report per Rule 30(e).