IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-300

Filed: 30 December 2016

Davidson County, No. 14 CVS 1540

HARDIN GRAY PASS, JR., Plaintiff,

v.

JERRY RAYMOND BROWN, JR. and wife
ROBBIN LEIGH JONES, Defendants.

Appeal by Defendants from orders entered 21 December 2015 by Judge Theodore S. Royster, Jr., in Davidson County Superior Court. Heard in the Court of Appeals 20 September 2016.

J. Calvin Cunningham III for Plaintiff.

Hendrick Bryant Nerhood Sanders & Otis, LLP, by Matthew H. Bryant, for Defendants.

STEPHENS, Judge.

Defendants Jerry Raymond Brown, Jr., and Robbin Leigh Jones appeal from orders partially granting Plaintiff Hardin Gray Pass, Jr.'s motion for summary judgment and denying Brown's and Jones's motion for summary judgment (the "summary judgment orders"). Brown and Jones argue that the trial court erred by (1) granting summary judgment on Pass's breach of contract claim and (2) denying

summary judgment on Brown's and Jones's unfair and deceptive trade practices, fraud, and punitive damages claims.

Factual and Procedural Background

On 14 December 2006, Pass entered into a contract with Brown and Jones to acquire the residence at 329 West Drive, Winston-Salem, North Carolina (the "Premises"). Brown and Jones agreed under this installment sales contract to finance Pass's purchase of the Premises, because he could not obtain a loan to purchase the Premises outright. The contract was titled a "Lease Agreement with Obligation to Purchase" and stated in pertinent part as follows:

> [Brown and Jones], for and in consideration of the rents, covenants, and agreements set forth, which are to be paid, kept and performed by [Pass], has leased and rented and by these presents does lease and rent to [Pass] and [Pass] hereby agrees to lease and take and does hereby lease and take upon the terms and conditions hereinafter set forth [the Premises].
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> 1. TERM: The term of this Lease shall be for a period commencing as of the 14th day of December, 2006 and continuing up to and including the 13th day of November, 2021 or until the closing of [Pass's] purchase of [the Premises] as required by section 12 herein, whichever occurs first.
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> 2. RENTAL: [Pass] shall pay monthly rent of $1248.17 beginning December 14, 2006 and continuing on the 15th day of each month thereafter until closing of [Pass's] purchase of [the Premises] as required by Section 12 herein.

. . . .

11. OBLIGATION TO PURCHASE: [Pass] shall purchase [the Premises] from [Brown and Jones] on or by November 15, 2022 on the following terms, conditions, and provisions:

(a) The purchase price for [the Premises] is $104,000 minus (-) the total of all $1248.17 rent payments made by [Pass] on or by the due date for each such payment.

(b) Closing shall take place in accordance with the terms and provisions of the offer to purchase and contract between [Brown and Jones] and [Pass], a copy of which is attached hereto as Schedule "A" and incorporated herein by reference.

In turn, the offer to purchase and contract stated:

3. PURCHASE PRICE: The purchase price is $104,000 minus (-) the total of all $1248.17 monthly rent payments made pursuant to the Lease on or by the due date for each such payment and shall be paid as follows:

(a) $25,000 EARNEST MONEY DEPOSIT will be paid by [Pass] to [Brown and Jones] at the time of the signing of the Lease and will be credited to [Pass] if closing occurs but will not be refunded to [Pass] for any reason; and

(b) the BALANCE of the purchase price in cash at closing.

. . . .

5. CONDITIONS:

. . . .

(c) Title must be delivered at Closing by GENERAL WARRANTY DEED unless otherwise stated herein . . . .

> . . . .
>
> 14. CLOSING: Closing shall be defined as the date and time of recording of the deed. All parties agree to execute any and all documents and papers necessary in connection with closing and transfer of title on or by November 14, 2021 or such earlier date as may be specified by [Pass]. The deed is to be made to Hardin Gray Pass.
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> . . . .
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> 20. ENTIRE AGREEMENT: This contract contains the entire agreement of the parties and there are no representations, inducements or other provisions other than those expressed herein. All changes, additions or deletions hereto must be in writing and signed by all parties.

The contract does not reference or incorporate any other agreements. After the contract was signed, Brown and Jones recorded a Memorandum of Lease on the books and records of the Davidson County Register of Deeds.

Pass made monthly payments under the contract until 21 October 2013. At that time, Pass consulted with a lawyer, and was advised that he had "overpaid" under the contract. On 16 December 2014, Pass's lawyer wrote a letter to Brown and Jones demanding closing, delivery of title to the Premises, and reimbursement of the excess payments. Brown and Jones did not deliver title to Pass.

On 28 May 2014, Pass filed this action asserting causes of action for breach of contract, fraud, and unfair and deceptive trade practices. Pass filed a motion for partial summary judgment on the issue of breach of contract, seeking delivery of title

and reimbursement for excess payments on 10 November 2015. Brown and Jones filed a cross-motion for summary judgment seeking dismissal of all claims on 1 December 2015. On 21 December 2015, the trial court entered an order granting partial summary judgment to Pass, and ordering Brown and Jones to convey title to the Premises to Pass and to reimburse him in the amount of $26,286.99. The trial court entered a separate order on the same date denying Brown's and Jones's motion in its entirety. Brown and Jones filed their notice of appeal of both orders on 30 December 2015.

Discussion

On appeal, Brown and Jones argue that the trial court erred. We disagree.

1. Interlocutory nature of the appeal

Brown and Jones argue that this Court should hear and determine all of the issues decided by the trial court's interlocutory orders granting partial summary judgment to Pass on the issues of transfer of title and reimbursement of contract payments and denying summary judgment to Brown and Jones on Pass's unfair and deceptive trade practices claim. We hold that only the issue of transfer of title to the Premises is properly before this Court, and we lack appellate jurisdiction to determine the remaining issues.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736

(1990). "If a party attempts to appeal from an interlocutory order without showing that the order in question is immediately appealable, we are required to dismiss that party's appeal on jurisdictional grounds." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 189 (2011). "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 (citations omitted), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "[I]mmediate appeal is available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citation and internal quotation marks omitted). However, where an interlocutory order addresses multiple claims or issues, and only one of those claims or issues affects a substantial right, only the issue which affects a substantial right is properly before this Court. *See, e.g., Hammond v. Saini*, 229 N.C. App. 359, 362-63, 748 S.E.2d 585, 588 (2013) (holding that the Court of Appeals only had jurisdiction over the arguments in the defendants' appeal of a motion to dismiss which related to defense of privilege or immunity which affected a substantial right), *modified on other grounds, aff'd, and remanded*, 367 N.C. 607, 766 S.E.2d 590 (2014); *Richmond Cty. Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 586, 739 S.E.2d 566, 568-69 (2013) (holding that the defendants' appeal of the trial court's denial of their motion to dismiss on

several grounds was only properly before the court on the issue of the defense of sovereign immunity, because it was the only issue which affected a substantial right).

"The appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516, *disc. review denied*, 363 N.C. 653, 686 S.E.2d 515 (2009). "Essentially a two-part test has developed – the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736.

In *Watson v. Millers Creek Lumber Co.*, 178 N.C. App. 552, 631 S.E.2d 839 (2006), this Court held that a substantial right was affected by a summary judgment order when title to land which was purchased pursuant to an installment land contract was in dispute. In *Watson*, the plaintiffs had entered into an installment land contract to purchase property from the defendant Millers Creek Lumber Co., Inc. Under the contract, the plaintiffs would pay the purchase price for the property in monthly installments with an agreed-upon interest rate over a period of three years. *Id.* at 553, 631 S.E.2d at 840. Upon payment in full of the purchase price, Millers Creek would deliver title to the property to the plaintiffs. *Id.* The plaintiffs paid all of the installment payments on time; however, Millers Creek conveyed the property to Defendant Counts instead of to the plaintiffs. *Id.* The plaintiffs sued

Millers Creek and Counts alleging breach of contract, constructive trust, and resulting trust. *Id.* The trial court granted summary judgment to Defendant Counts and dismissed the claims against him. *Id.* at 554, 631 S.E.2d at 840. Defendant Millers Creek was not a party to the appeal, rendering it interlocutory. *Id.* On appeal, this Court held that a substantial right was affected by the summary judgment order because it concerned title to property, and Millers Creek, who was not a party to the appeal, had stipulated that (1) title rested with either the plaintiffs or Counts and (2) Millers Creek's liability could not be determined until the court determined who had superior title. *Id.* at 554-55, 631 S.E.2d at 841.

The summary judgment orders do not dispose of all of the issues in this case. Specifically, the trial court granted partial summary judgment to Pass, ordering specific performance of the installment land contract and reimbursement of certain payments made under the contract. The remaining issues, unfair and deceptive trade practices, fraud, and punitive damages, all remain undetermined. Thus, the summary judgment orders are interlocutory. Brown and Jones must therefore demonstrate that the issues brought up on appeal affect a substantial right and are thereby properly before this Court.

Like the transaction at issue in *Watson*, Pass argues that he is entitled to delivery of title to the Premises from Brown and Jones pursuant to the installment land contract. The partial summary judgment order granting judgment to Pass on

the issue of title thus regards a title concern similar to that in *Watson*, which was held to affect a substantial right. The partial summary judgment order therefore affects a substantial right insofar as it grants summary judgment on the issue of conveyance of title to the Premises and that issue is properly before this Court.

With regard to the reimbursement of contract payments, Brown and Jones make no argument that the order granting summary judgment affects a substantial right. Rather, because both issues stem from interpretation of the contract, Brown and Jones argue that both issues are properly before this Court. However, despite the fact that Pass's entitlement to the Premises and to reimbursement of contract payments both depend on the Court's determination of the contract language, the two issues are separate. Whether Pass is entitled to reimbursement requires the trial court to determine whether Pass was only obligated to pay the purchase price under the contract, whether and by how much he may have overpaid, and whether the contract language or the law mandates reimbursement of any payments which may have been above the purchase price for the Premises. This determination requires the court to examine language in the contract beyond the enumeration of the purchase price. North Carolina case law establishes that this Court only has jurisdiction over those issues which affect a substantial right. Further, the appealing party must show why a substantial right is affected by the order appealed from. Because Brown and

Jones have not made this showing regarding the issue of reimbursement of the contract payments, that issue is not properly before this Court.

Brown and Jones make no argument that the order denying summary judgment affects a substantial right with regard to the unfair and deceptive trade practices claim. As a result, that issue is also not properly before this court.

2. Transfer of title

Brown and Jones argue that the trial court erred in granting summary judgment and ordering that Brown and Jones convey title to the Premises to Pass, because, they contend, the contract is ambiguous, the court should have considered parol evidence, and the court's reasoning reaches a nonsensical interpretation of the contract. Brown and Jones further argue that Pass ratified the contract by continuing to make payments above and beyond the purchase price of the property. We disagree.

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jon*es, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (italics added) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

The parol evidence rule governing when a court may consider evidence outside of the written contract states:

> Any or all parts of a transaction prior to or contemporaneous with a writing intended to record them

> finally are superseded and made legally ineffective by the writing. When a final writing is executed or integrated all prior or contemporaneous negotiations or agreements, whether written or oral, are said to be merged into the writing. The writing then becomes the exclusive source of the parties' rights and obligations with respect to the particular transaction.

Oak Island Southwind Realty, Inc. v. Pruitt, 89 N.C. App. 471, 473, 366 S.E.2d 489, 490 (1988) (citations and internal quotation marks omitted). "The parol evidence rule prohibits the admission of parol evidence to vary, add to, or contradict a written instrument intended to be the final integration of the transaction." *Mayo v. N.C. State Univ.*, 168 N.C. App. 503, 509, 608 S.E.2d 116, 121 (citation omitted), *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005) (per curiam). However, "when a contract is ambiguous, parol evidence is admissible to show and make certain the intention behind the contract." *Id.* "It is well established that where a contract is unambiguous its interpretation is a matter of law for the court, which must interpret the instrument as it is written." *Brown v. Scism*, 50 N.C. App. 619, 623, 274 S.E.2d 897, 899, *disc. review denied*, 302 N.C. 396, 276 S.E.2d 919 (1981).

"Merger clauses create a rebuttable presumption that the writing represents the final agreement between the parties. Generally, in order to effectively rebut the presumption, the claimant must establish the existence of fraud, bad faith, unconscionability, negligent omission or mistake in fact." *Zinn v. Walker*, 87 N.C. App. 325, 333, 361 S.E.2d 314, 318 (1987) (citation omitted), *disc. review denied*, 321

N.C. 747, 366 S.E.2d 871 (1988). Alternatively, a merger clause will be ineffective when it frustrates the clear intention of the parties to include contemporaneously executed agreements regarding the same subject matter, which would ordinarily be considered as part of the same agreement under contract law. *Id.* at 334, 361 S.E.2d at 318-19.

The contract states that Pass "shall pay monthly rent of $1248.17 beginning December 14, 2006 and continuing on the 15th day of each month thereafter until closing of [Pass's] purchase of [the Premises] as required by Section 12"[1] of the contract. In turn, Section 11 of the contract provides that Pass has an obligation to purchase the Premises "on or by November 15, 2022" for a purchase price of "$104,000 minus (-) the total of all $1248.17 rental payments made by [Pass] on or before the due date for each such payment." The total term of the contract is defined as "commencing as of the 14th day of December, 2006 and continuing up to and including the 13th day of November, 2021[2] or until the closing of [Pass's] purchase of [the

[1] Although this section of the contract refers to "Section 12," there is no Section 12 in the Lease Agreement. Section 11 is entitled "Obligation to Purchase," and sets forth Pass's obligation to purchase the Premises, the purchase price, and terms of closing.

[2] The contract refers to 13 November 2021 as the end of the lease term, while stating that Pass has the obligation to purchase the Premises by 15 November 2022. In addition, the offer to purchase and contract states that closing shall take place by 14 November 2021. Despite this apparent discrepancy, neither party argues that the date of termination of the lease or Pass's deadline for purchasing the Premises is ambiguous. Rather, Brown and Jones argue only that the contract is ambiguous in that the purchase price and monthly payment amounts are inconsistent with the contract term. Therefore, we will not address any discrepancy created by these apparently conflicting dates. N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Further, the contract defines the term of the

Premises] . . ., whichever event first occurs." None of these terms on their own are facially ambiguous.

Despite Brown's and Jones's contention to the contrary, the fact that the term of the contract allows the number of rental payments to exceed the purchase price in amount does not create an ambiguity. The fact that the contract defines each monthly payment as rent indicates that the payment of such amount is in consideration for occupation of the Premises. This is supported by the contract language that Brown and Jones "for and in consideration of the rents, covenants, and agreements set forth, which are to be paid, kept and performed by [Pass] has leased and rented and . . . does lease and rent to [Pass]" the Premises. Thus, the clear language of the contract allows for Pass to continue making rental payments in return for the lease of the Premises for the entire period of the contract, despite the fact that the total payments made may exceed the purchase price. This result is not nonsensical, as Brown and Jones argue, because Pass is not solely making installments on a purchase price, but rather rental payments for which he is receiving lease rights in the Premises under the contract.

Because there is no ambiguity in the contract language, parol evidence is inadmissible and interpretation of the contract is a matter of law. This conclusion is

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lease as ending at the *earlier* of 13 November 2021 *or* Pass's purchase of the Premises. Thus, as Pass has paid the purchase price for the Premises and demanded closing, any discrepancy between the maximum lease term, the deadline to purchase, and the closing deadline is immaterial.

also supported by the merger clause contained in the contract which creates a rebuttable presumption that the contract is a complete expression of the intention of the parties. Brown and Jones have not alleged any fraud, mistake, undue influence, or contemporaneously signed agreements which would rebut this presumption. As a matter of law, the interpretation of the contract is properly determined by the court on summary judgment.

Here, as discussed *supra*, the contract unambiguously defines the purchase price for the Premises as "$104,000 minus (-) the total of all $1248.17 rental payments made by [Pass] on or before the due date for each such payment." Further, the contract incorporates the offer to purchase and contract, which states closing shall take place "on or by November 14, 2021 or such earlier date as may be specified by [Pass]" with the balance of any portion of the purchase price due to be paid in cash at closing. In addition, the offer to purchase and contract states that "[t]itle must be delivered at [c]losing by [general warranty deed]." It is undisputed that Pass has made payments to Brown and Jones on or by their due dates in excess of $104,000, has demanded closing, and that Brown and Jones have failed to deliver title to the Premises to Pass. Based on the clear and unambiguous contract terms, the trial court did not err in granting summary judgment to Pass on the issue of breach of contract and ordering Brown and Jones to deliver title to the Premises to Pass. Therefore, on the issue of delivery of title to the Premises, we affirm.

AFFIRMED IN PART; DISMISSED IN PART.

Judges BRYANT and DILLON concur.

Report per Rule 30(e).