IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-505

Filed: 18 December 2018

New Hanover County, No. 16 CVS 2284

GILMER MARTIN, II, and his wife JEAN SUTTON MARTIN, Plaintiffs,

v.

THE LANDFALL COUNCIL OF ASSOCIATIONS, INC., MARY R. MCKENNA, FRANK J. MADONNA, ANTHONY G. VAN SCHAICK, CARL O. ROARK, MARK A. SCHWARTZ, DONALD A. BRITT, SR, KATHERINE F. MCKENZIE, GARY L. CAISON, JANET A DEL CHIARO, BETTY E. POTTER, WAYNE ROBERTS, WENDY MILLER MCELHINNEY, HARRY L. DEAS, III, LESLEY C. WOODS, MARTHA P. BLACHER, CAROL A. BLACKBURN, WAYNE W. OAKES, BARBARA A. RUSSO, VAN VLIET HEMPHILL, RICHARD H. BUTLER, MARTHA N. PEPPER, WELTON CURTIS SEWELL, L. WARE PRESTON, III, JOHN DEWEY DICKSON and DAVID JOSEPH WILLIAMSON, Defendants.

Appeal by plaintiffs from order entered 20 January 2017 by Judge Ebern T. Watson, III; order entered 17 October 2017 by Judge R. Kent Harrell; and two orders entered 30 November 2017 by Judge John E. Nobles, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 31 October 2018.

Block, Crouch, Keeter, Behm & Sayed, LLP, by Christopher K. Behm, for plaintiffs-appellants.

Cranfill Sumner & Hartzog LLP, by Rebecca A. Knudson and Patrick M. Mincey, and Ward and Smith, P.A., by Alexander C. Dale and Allen N. Trask, for defendants-appellees.

ZACHARY, Judge.

Plaintiffs appeal from: (1) an order entered 20 January 2017 dismissing numerous individual defendants as party defendants and dismissing Plaintiffs' third claim for relief as to the individual defendants; (2) an order entered 17 October 2017 granting partial summary judgment to Defendant-Association on Plaintiffs' claim for slander of title; (3) an order entered 30 November 2017 denying Plaintiffs' amended motion to amend; and (4) an order entered 30 November 2017 granting summary judgment to Defendant-Association on Plaintiffs' first and fourth claims for relief and dismissing those claims with prejudice, granting summary judgment to Defendant-Association on its first claim for relief, and denying Plaintiffs' Motion for Summary Judgment in its entirety. After careful review, Plaintiffs' appeal is dismissed.

Background

This case comes before us as a dispute between homeowners and their homeowners' association. In 2008, Plaintiffs purchased a single family residence in the Landfall subdivision in New Hanover County. Defendant, The Landfall Council of Associations, Inc. ("Defendant-Association"), is the master governing owners' association for the Landfall Planned Development. Plaintiffs' natural grass repeatedly died, and beginning in 2010, Plaintiffs attempted numerous times to install "replacement natural grass sod," which died as well.

A "Delegation of Powers and Authority" assigned and delegated certain responsibilities to Defendant-Association, including but not limited to "[a]ll authority

with respect to architectural review and control." Under the terms of the Delegation, Defendant-Association formed an Architectural Control Committee to exercise the powers granted to Defendant-Association in the Delegation. The Delegation also established guidelines and procedures for the Architectural Review Committee to follow, including a provision that "[a]ll lawn areas must be sodded, not seeded[,]" and "[r]ubber product cannot be used as mulch."

After numerous failed attempts with the replacement natural grass sod, Plaintiffs requested the permission of Defendant-Association to install artificial turf by submitting a "Modification to Existing Home" application on 11 May 2015 in accordance with Defendant-Association's guidelines. On 9 June 2015, Defendant-Association denied Plaintiffs' request to install artificial turf. Nevertheless, Plaintiffs installed the artificial turf between 24 June 2015 and May 2016.

An agent of Defendant-Association informed Plaintiffs that they were in violation of the guidelines, and Plaintiffs were given an opportunity to remove the turf. When they failed to comply, Defendant-Association notified Plaintiffs of a hearing scheduled before an adjudicatory panel, at which time Plaintiffs could explain why they should not be fined or penalized for the installation of the artificial turf. After the hearing on 4 November 2015, Plaintiffs were informed by letter that the panel was assessing a fine of $100 for the violation, with an additional $100 per day to be assessed "for each day that the violation exists beginning five days after the

date of this notice." On 20 November 2015, Plaintiffs appealed the decision to Defendant-Association's Board of Directors, which affirmed the decision. By 20 May 2016, Plaintiffs' fine balance was $10,900 and Defendant-Association stated its intention to initiate legal proceedings against Plaintiffs.

On 29 June 2016, Defendant-Association filed a claim of lien on Plaintiffs' property for $14,900 and continued to impose the $100 per day fine. Plaintiffs filed their verified complaint on 8 July 2016 asserting claims for: (1) declaratory judgment; (2) slander of title and removal of cloud on title; and (3) breaches of fiduciary duties, together with their motions for preliminary and permanent injunctions.[1] Defendant-Association filed its answer and counterclaim on 9 September 2016. Defendant-Association then filed a motion for partial summary judgment on Plaintiffs' claim for slander of title and for removal of cloud of title on 19 September 2017. On 17 October 2017, Judge R. Kent Harrell entered an order: (1) granting the motion in part as to Plaintiffs' claim for slander of title, and (2) denying the motion as to Plaintiffs' claim to remove a cloud on title to their property. The trial court did not certify the order for immediate appellate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (2017).

Defendant-Association filed an additional motion for summary judgment, which was joined for hearing with Plaintiffs' motion for summary judgment. Judge

[1] Plaintiffs included as defendants the individual members of the Board of Directors, Architectural Review Committee, and Covenants and Security Committee of the Defendant-Association. Plaintiffs' third claim for relief was asserted against these individual defendants and was later involuntarily dismissed.

John E. Nobles, Jr. issued an order denying Plaintiffs' motion to amend their complaint on 30 November 2017. That same day, Judge Nobles also entered an order that: (1) granted summary judgment to Defendant-Association on Plaintiffs' first and fourth claims for relief and dismissed those claims with prejudice; (2) granted summary judgment to Defendant-Association on its first claim for relief; and (3) denied Plaintiffs' motion for summary judgment in its entirety. That order contained no language certifying the order for appellate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b).

The trial court filed a second order on motions for summary judgment was on 4 December 2017. This order referenced the first 30 November 2017 order and stated:

> The Court's First Summary Judgment Order affects a substantial right of the parties, and the parties are entitled, pursuant to G.S. § 7A-27(d) or 1-277(a), to the right of an immediate appeal; alternatively, pursuant to Rule 54 of the North Carolina Rules of Civil Procedure, the Court certifies the First Summary Judgment Order is a final judgment for immediate appeal as there is no just reason for delay.

Plaintiffs filed a notice of appeal that same day from, *inter alia*, the summary judgment order filed 30 November 2017, but not from the second order filed 4 December 2017 purporting to certify the 30 November 2017 order for appellate review.

Discussion

The Rules of Appellate Procedure provide that "[i]n civil actions . . . a party must file and serve a notice of appeal[ ] within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure." N.C.R. App. P. 3(c)(1). Failure to give timely notice of appeal is jurisdictional and must result in the dismissal of an appeal. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008).

"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. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Generally, a party has no right to appeal an interlocutory order. *Branch Banking & Trust Co. v. Peacock Farm, Inc.*, 241 N.C. App. 213, 216, 772 S.E.2d 495, 498, *aff'd per curiam*, 368 N.C. 478, 780 S.E.2d 553 (2015). However, there are two commonly employed exceptions to this rule:

> First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

Id.

When attempting to certify a judgment pursuant to Rule 54 of the North Carolina Rules of Civil Procedure, "the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay *and it is so determined in the judgment*." N.C. Gen. Stat. § 1A-1, Rule 54(b) (emphasis added). The certifying language authorizing immediate appeal must be contained in the order from which a party is appealing—Rule 54 does not authorize "a retroactive attempt to certify a *prior* order for immediate appeal." *Peacock Farm*, 241 N.C. App. at 219, 772 S.E.2d at 500.

Alternatively, in the absence of a proper Rule 54(b) certification, a substantial right will exist if it is "one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Blackwelder v. Dep't of Human Res.*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983). "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 v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citation omitted). It is the appellant's burden to show that the order affects a substantial right. *See 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).

In the instant case, Plaintiffs have attempted to appeal from an order entered 20 January 2017, an order entered 17 October 2017, an order entered 30 November

2017, and a second order entered 30 November 2017. All of these appeals are unsuccessful.

First, Plaintiffs appeal from: (1) the order entered 20 January 2017 dismissing numerous individual defendants as party defendants and dismissing Plaintiffs' third claim for relief as to the individual defendants; and (2) the order entered 30 November 2017 denying Plaintiffs' amended motion to amend. Our Appellate Rules provide that "[i]ssues not presented and discussed in a party's brief are deemed abandoned." N.C.R. App. P. 28(a). Plaintiffs did not address these orders in their brief and thus those claims of error are abandoned.

Plaintiffs also appeal the order entered 17 October 2017 granting partial summary judgment to Defendant-Association on Plaintiffs' claim for slander of title. "Rule 3(c) of the North Carolina Rules of Appellate Procedure require[s] [appellants] to file written notice of appeal within thirty days after entry of the [order or] judgment." *Reed v. Abrahamson*, 331 N.C. 249, 251, 415 S.E.2d 549, 550 (1992), *cert. denied*, 333 N.C. 463, 427 S.E.2d 624 (1993). The order was served on Plaintiffs the day it was filed, and thus Plaintiffs had thirty days within which to file their written notice of appeal. The thirty-day deadline to file their notice of appeal was 16 November 2017, but Plaintiffs' notice of appeal was filed 4 December 2017, well past the thirty-day deadline. In addition, the order was interlocutory. Neither did the trial court certify the order for immediate appellate review nor did Plaintiffs argue

that the order affected a substantial right. Accordingly, this Court does not have jurisdiction over the appeal of this order, and Plaintiffs' appeal from the 17 October 2017 order must be dismissed.

Lastly, the second order entered 30 November 2017 granted summary judgment to Defendant-Association on Plaintiffs' first and fourth claims for relief and dismissed those claims with prejudice, granted summary judgment to Defendant-Association on its first claim for relief, and denied Plaintiffs' Motion for Summary Judgment in its entirety. In that the order disposed of some claims and left others to be heard at trial, it is an interlocutory order. The trial court did not certify the order for immediate appellate review.

In an attempt to certify the second 30 November 2017 order for appellate review, the trial court entered an order four days later to "amend[ ] its First Summary Judgment Order." However, that order did not amend the initial order; the second order merely referenced the first order and did not copy or explain the reasoning of the first order. Accordingly, the second order was in effect a "stand-alone order." *Peacock Farm*, 241 N.C. App. at 217, 772 S.E.2d at 499. In addition, the second, stand-alone order was not appealed.

It is well established that an interlocutory order from which a party appeals must contain language certifying the order for appellate review. N.C. Gen. Stat. § 1A-1, Rule 54(b). In *Peacock Farm*, a party obtained an order, pursuant to Rule 54(b),

purporting to certify for appeal an order from almost two years earlier. *Id.* at 215-16, 772 S.E.2d at 498. That second order

> was not an amended judgment . . . [and] [i]t did not set out the substantive basis for ruling that the granting of [the summary judgment] motion was proper under Rule 56. Instead, it served as a "stand-alone" order, simply making reference to its prior judgment . . . and stating its belief that "in its discretion" an immediate appeal as to that judgment was appropriate.

Id. at 217, 772 S.E.2d at 499. Thus, this Court determined that the second order failed to confer jurisdiction on this Court and dismissed the appeal. *Id.* at 218, 772 S.E.2d at 499.

Here, Plaintiffs appeal the 30 November 2017 order, which did not include language certifying the order for appellate review, but failed to appeal the 4 December 2017 order attempting to certify the 30 November 2017 order. An appellant's notice of appeal "shall designate the judgment or order from which appeal is taken." N.C.R. App. P. 3(d). Although an appellant is required to reference the judgment being appealed from in their notice of appeal, failure to do so is not always fatal. *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011) ("It is well established that a mistake in designating the judgment . . . should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake." (quotation marks omitted)). While appellants in this case

appealed four separate orders, it is clear to this Court that a central issue in this case is whether the 4 December 2017 order properly certified the 30 November 2017 order for appellate review. In addition, it is apparent that the appellees were not misled by appellant's failure to include the 4 December 2017 order in their notice of appeal, given that all parties fully argued the issue presented by the appeal of the 30 November 2017 order in their briefs to this Court.

Nonetheless, as determined by this Court in *Peacock Farm*, the second order fails to vest this Court with jurisdiction. That is because the second order in this case was not an amended judgment, did not set out the reasoning of the first order, and simply referenced the first order before stating that an immediate appeal was warranted. Thus, as noted in *Peacock Farm*, Plaintiffs should have instead either "obtained from the trial court the inclusion of language *in the [30 November 2017] order itself* certifying the case for immediate review pursuant to Rule 54(b)," *Peacock Farm*, 241 N.C. App. at 218, 772 S.E.2d at 499, or argued in the alternative that the trial court's order deprived Plaintiffs of a substantial right.

Plaintiffs filed a Conditional Petition for Writ of Certiorari in the event that this Court finds "deficiencies in the timing or formal requirements for obtaining a Rule 54(b) certification." However, Plaintiffs failed to argue in their petition and in their brief before this Court that the order at issue affected a substantial right. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254

(1994) ("[T]he appellant has the burden of showing this Court that the order deprives the appellant of a substantial right . . . ."). The summary judgment order was not properly certified for appellate review, and Plaintiffs failed to argue that the summary judgment order affected a substantial right. Thus, the appeal from this order is also dismissed.

Conclusion

In summary, Plaintiffs abandoned their appeal of the 20 January 2017 order and the 30 November 2017 order denying Plaintiff's amended motion to amend. The 17 October 2017 order was not timely noticed for appeal, a jurisdictional error, and is therefore dismissed. Because the trial court did not properly certify for immediate appellate review the other 30 November 2017 order from which Plaintiffs appealed, and Plaintiffs failed to argue the deprivation of a substantial, we deny Plaintiffs' Conditional Petition for Writ of Certiorari and dismiss their remaining arguments on appeal.

DISMISSED.

Judges CALABRIA and TYSON concur.

Report per Rule 30(e).