IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1176

Filed: 3 September 2019

Mecklenburg County, No. 17 CVS 15562

J. FREEMAN PROPERTIES, LLP, Plaintiff,

v.

CROSS DEVELOPMENT CC CHARLOTTE SOUTH, LLC, Defendant.

Appeal by defendant from order entered 31 July 2018 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 April 2019.

Thomas, Godley & Grimes, PLLC, by L. Charles Grimes, Ted Lewis Johnson, and Tiffany A. Webber, for plaintiff-appellee.

Johnston, Allison & Hord, P.A., by Robert L. Burchette and David V. Brennan, for defendant-appellant.

BERGER, Judge.

Cross Development CC Charlotte South, LLC ("Defendant") appeals from an order that denied not only its motion for summary judgment and motion to dismiss, but also the summary judgment motion made by J. Freeman Properties, LLP ("Plaintiff"). Defendant concedes that this appeal is interlocutory but argues the

denial of its motions, because they were based on the defense of *res judicata*, affects a substantial right making the order immediately appealable.

In arguing for interlocutory review, Defendant asserts the preclusive effect of *res judicata* from Plaintiff's voluntary dismissal without prejudice of the entire cause of action on July 3, 2017 and a voluntary dismissal with prejudice of a former co-defendant in the current cause of action on July 5, 2018, both procedural dismissals pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. However, these are not dismissals that give rise to *res judicata* protections for Defendant in this matter. Because the defense of *res judicata* does not apply, no substantial right of Defendant is affected by the trial court's order. Therefore, we dismiss this interlocutory appeal for lack of appellate jurisdiction.

Factual and Procedural Background

This dispute began when Defendant built a fence that blocked access to a shared easement that had been used to access both Defendant's property and the adjoining property owned by Plaintiff in Charlotte, North Carolina. The parcel owned by Defendant was leased to Caliber Bodyworks, an auto-body collision repair shop, starting in December 2015. Plaintiff's parcel is mostly leased to Genuine Parts Company, with the remainder retained by Plaintiff. Plaintiff had purchased its parcel in January 1995.

The deed granted Plaintiff when it purchased the parcel contained an appurtenant easement that allows access to Plaintiff's full parcel through Defendant's parcel. This easement was necessary because the building that was being leased by Genuine Parts Company was immediately adjacent to the property line, and so access to the building's loading docks required delivery vehicles to cross Defendant's property via the paved easement. Both Defendant and its lessee accessed their own buildings by driving across the same paved area Plaintiff had been using. In February 2016, Defendant began erecting a gated fence that closed off access to the easement both parties had been using. Plaintiff repeatedly asked Defendant to remove the barrier, but Defendant refused and completed construction of the fence.

Plaintiff subsequently filed suit against both Defendant and Caliber Bodyworks on September 9, 2016. Plaintiff voluntarily dismissed this suit without prejudice on July 3, 2017, but then refiled its complaint against both Defendant and Caliber Bodyworks on August 28, 2017. This second complaint was identical to the first, except Plaintiff's name had been changed. Each party filed a motion for summary judgment: Caliber Bodyworks on May 25, 2018; Defendant on June 6; and Plaintiff on June 7.

On July 5, 2018, Plaintiff filed notice of its voluntary dismissal of all claims against Caliber Bodyworks with prejudice. Caliber Bodyworks reciprocally dismissed all of its claims against Plaintiff, also on July 5. After these dismissals, Defendant

was granted leave to amend its answer and filed its amended answer on July 6, 2018, in which it asserted additional defenses and moved for summary judgment and dismissal. The trial court denied all motions per order filed July 31, 2018. It is from this order that Defendant appeals.

Analysis

Generally, "there is no right to appeal from an interlocutory order." *Darroch v. Lea*, 150 N.C. App. 156, 158, 563 S.E.2d 219, 221 (2002) (citation omitted). "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." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 76, 711 S.E.2d 185, 188 (2011) (citation and quotation marks omitted).

"The denial of summary judgment is not a final judgment, but rather is interlocutory in nature." *McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 50, 542 S.E.2d 227, 230 (2001) (citation omitted). Similarly, "[d]enial of a motion to dismiss is interlocutory because it simply allows an action to proceed and will not seriously impair any right of defendants that cannot be corrected upon appeal from final judgment." *Baker v. Lanier Marine Liquidators, Inc.*, 187 N.C. App. 711, 717, 654 S.E.2d 41, 46 (2007). However, as stated in its order, the trial court considered not only the pleadings filed in this matter, but also considered the motions, affidavits, deposition excerpts, and supplemental materials submitted by the parties, their

briefs, and the arguments of counsel. Where matters such as these "are received and considered by the court in ruling on a motion to dismiss . . ., the motion should be treated as a motion for summary judgment and disposed of in the manner and on the conditions [that govern summary judgment]." *N. Carolina R. Co. v. Ferguson Builders Supply, Inc.*, 103 N.C. App. 768, 771, 407 S.E.2d 296, 298 (1991).

> While an interlocutory appeal may be allowed in "exceptional cases," this Court must dismiss an interlocutory appeal for lack of subject-matter jurisdiction, unless the appellant is able to carry its "burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature."

C. Terry Hunt Indus., Inc. v. Klausner Lumber Two, LLC, ___ N.C. App. ___, ___, 803 S.E.2d 679, 682 (2017) (quoting *Hamilton*, 212 N.C. at 77, 711 S.E.2d at 188-89).

> Ordinarily, this Court hears appeals only after entry of a final judgment that leaves nothing further to be done in the trial court. The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts.
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> There is a statutory exception to this general rule when the challenged order affects a substantial right. N.C. Gen. Stat. § 7A-27(b)(3)(a). To confer appellate jurisdiction in this circumstance, the appellant must include in its opening brief, in the statement of the grounds for appellate review, sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

Denney v. Wardson Constr., Inc., ___ N.C. App. ___, ___, 824 S.E.2d 436, 438-40 (2019) (*purgandum*).

"A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *C. Terry Hunt Indus., Inc.*, ___ N.C. App. at ___, 803 S.E.2d at 682. "As our Supreme Court candidly admitted, the 'substantial right' test is 'more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context....' " *LaFalce v. Wolcott*, 76 N.C. App. 565, 568, 334 S.E.2d 236, 238 (1985) (quoting *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978)).

> Although interlocutory, the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable. Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them. Denial of a summary judgment motion based on *res judicata* raises the possibility that a successful defendant will twice have to defend against the same claim by the same plaintiff, in frustration of the underlying principles of claim preclusion. Thus, the denial of summary judgment based on the defense of *res judicata* can affect a substantial right and may be immediately appealed.

Williams v. City of Jacksonville Police Dep't, 165 N.C. App. 587, 589–90, 599 S.E.2d 422, 426 (2004) (*purgandum*).

However, this Court has also

> held that denial of a motion to dismiss premised on *res judicata* and collateral estoppel does not *automatically* affect a substantial right; the burden is on the party

> seeking review of an interlocutory order to show how it will affect a substantial right absent immediate review. *See Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) ("[W]e hold that the denial of a motion for summary judgment based on the defense of *res judicata may* affect a substantial right, making the order immediately appealable." (emphasis added)). As this Court has previously noted: We acknowledge the existence of an apparent conflict in this Court as to whether the denial of a motion for summary judgment based on res judicata affects a substantial right and is immediately appealable. However, our Supreme Court has addressed this issue in *Bockweg v. Anderson*, and, like the panel in *Country Club of Johnston Cnty., Inc. v. U.S. Fid. & Guar. Co.*, 135 N.C. App. 159, 166, 519 S.E.2d 540, 545 (1999), "we do not read *Bockweg* as mandating in every instance immediate appeal of the denial of a summary judgment motion based upon the defense of *res judicata*. The opinion pointedly states reliance upon *res judicata* '*may* affect a substantial right.' "

Whitehurst Inv. Properties, LLC v. NewBridge Bank, 237 N.C. App. 92, 95-96, 764 S.E.2d 487, 489-90 (2014) (*purgandum*).

> As this Court recently reaffirmed, "when a trial court enters an order rejecting the affirmative defense of res judicata, the order *can* affect a substantial right and *may* be immediately appealed." *Smith v. Polsky*, ___ N.C. App. ____, ___, 796 S.E.2d 354, 359 (2017). "Even so, it is clear that invocation of res judicata does not automatically entitle a party to an interlocutory appeal of an order rejecting that defense." *Id.* Instead, the challenged order affects a substantial right only if there is a risk of "inconsistent verdicts," meaning a risk that different fact-finders would reach irreconcilable results when examining the same factual issues a second time. *Id.*

Denney, ___ N.C. App. at ___, 824 S.E.2d at 439.

Here, we must address whether or not Plaintiff's second dismissal of Caliber Bodyworks constituted an adjudication on the merits pursuant to Rule 41 of the North Carolina Rules of Civil Procedure, which would bar Plaintiff from continuing this action. Rule 41(a)(1) states, in pertinent part:

> (a) Voluntary dismissal; effect thereof. --
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> (1) By Plaintiff; by Stipulation. -- Subject to the provisions of Rule 23(c) and of any statute of this State, an *action* or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an *action* based on or including the same claim.

N.C. Gen. Stat. § 1A-1, Rule 41 (2017) (emphasis added). "The provision in Rule 41(a)(1) equating a second voluntary dismissal with an adjudication on the merits is known as the 'two-dismissal rule.' " *Hopkins v. Ciba-Geigy Corp.*, 111 N.C. App. 179, 182, 432 S.E.2d 142, 144 (1993). However, "[a] judgment based on matters of practice or procedure is not [necessarily] a judgment on the merits." *Beam v. Almond*, 271 N.C. 509, 515, 157 S.E.2d 215, 221 (1967) (citation omitted).

Here, Plaintiffs filed their initial action against Caliber Bodyworks and Defendant, and Plaintiff subsequently filed a notice of voluntary dismissal pursuant to Rule 41. At that point, Plaintiff had dismissed the entire first action. Then,

Plaintiff filed a complaint that had the same parties and claims as the first action; this was the second action. Then, Plaintiff dismissed their claims against Caliber Bodyworks from the second action, but did not dismiss the second action entirely. "Accordingly, the two-dismissal rule does not apply in this case. Consequently, [P]laintiffs' voluntary dismissal of their claim against defendant [Caliber Bodyworks] did not constitute an adjudication on the merits pursuant to Rule 41(a)(1) and [P]laintiffs were not barred from bringing this action." *Id.* *See Allen v. Stone*, 161 N.C. App. 519, 522, 588 S.E.2d 495, 497 (2003) ("In his brief, defendant argues the Rule 41(a)(1) two-dismissal rule creates a 'right to be free from the burdens of litigation' giving rise to a 'conditional immunity from suit,' such that denial of a motion to dismiss grounded on Rule 41(a)(1) likewise affects a substantial right and is immediately appealable. We decline to adopt defendant's interpretation of Rule 41(a)(1) as creating a 'conditional immunity from suit.' ").

> Applying this controlling line of precedent, we again reaffirm that an appellant seeking to appeal an interlocutory order involving res judicata must include in the statement of the grounds for appellate review an explanation of how the challenged order would create a risk of inconsistent verdicts or otherwise affect a substantial right based on the particular facts of that case.

Denney, ___ N.C. App. at ___, 824 S.E.2d at 439 (citation omitted). Defendant did not do so here, and it has therefore failed to give us grounds for review.

"Accordingly, mindful of our duty to avoid 'fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment

before it is presented to the appellate courts,' we dismiss this interlocutory appeal for lack of appellate jurisdiction." *Id.* at ___, 824 S.E.2d at 439-40 (quoting *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 76, 772 S.E.2d 93, 95 (2015)).

Conclusion

Defendant has not given sufficient facts and arguments that the challenged order affects a substantial right to support immediate appellate review on that ground. We are without appellate jurisdiction and dismiss the appeal as interlocutory.

DISMISSED.

Chief Judge MCGEE and Judge TYSON concur.

Report per Rule 30(e).