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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-68

Filed: 31 December 2020

Mecklenburg County, No. 18-CVS-5784

ROBERT E. PENNY, III, WADE PURCELL PENNY and REP3 HOLDINGS, LLC,
Plaintiffs,

v.

DILWORTH VENTURES, LLC; FMF MOREHEAD, LLC; and CAMBRIDGE
SWINTERTON BUILDERS, INC., Defendants.

Appeal by plaintiffs from orders entered 23 September 2019 by Judge Robert
C. Ervin in Superior Court, Mecklenburg County. Heard in the Court of Appeals 11
August 2020.

*Hamilton Stephens Steele + Martin, PLLC, by Daniel J. Finegan and Bentford
E. Martin, for plaintiff-appellant.*

*Raynor Law Firm, PLLC, by Kenneth R. Raynor for defendants-appellees
Dilworth Ventures, LLC and FMF Morehead.*

*Cranfill Sumner & Hartzog LLP, by Mica N. Worthy, for defendant-appellee
Cambridge Swinerton.*

STROUD, Judge.

Plaintiffs own two properties in Charlotte, and they allege various damages to
their real property from the construction of a 379 unit apartment building next door.

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Plaintiffs appeal from an interlocutory summary judgment order which dismissed all claims against Defendant Cambridge Swinerton Builders, Inc., and dismissed some claims against Defendants Dilworth Ventures, LLC, and FMF Morehead, LLC, but did not dismiss the claims for breach of contract and damages caused by impairing lateral support at 1332 Harding Place. Plaintiffs argue the “risk of inconsistent verdicts triggers Plaintiffs’ right to immediate appeal of the Summary Judgment Orders.” We conclude Plaintiffs failed to establish a substantial right which may be lost without an immediate appeal and are thus not entitled to appellate review of that order. Accordingly, we dismiss Plaintiffs’ appeal.

I. Background

In 2015, Plaintiffs Robert and Wade Penny were approached by FMF Morehead, LLC, about entering into an easement agreement for 1328 Harding Place, which is owned by Robert and Wade Penny. Plaintiff Robert Penny operates his psychology office at this address. FMF was planning to construct a 379 unit apartment building on adjacent property. FMF’s contractor Cambridge Swinerton Builders, Inc., (“CSBI”) had to lower the elevation of FMF’s property to accommodate a basement and subsurface parking deck for the apartment building; this process would require CBSI to remove a large amount of soil. In October 2015, FMF Morehead and the Pennys entered into an easement agreement detailing the rights

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and responsibilities of the parties arising from this process.¹ In May 2016, FMF Morehead sold the Project to Dilworth Ventures, LLC, and CSBI continued as the general contractor. In August 2016, the Pennys and REP3 Holdings, LLC,² (“Plaintiffs”) entered into a similar easement agreement with Dilworth.

A pre-construction survey of 1328 Harding was performed by FMF Morehead in November 2015, and construction started thereafter. The Pennys had increasing problems with CSBI in 2016 and 2017. One issue dealt with a retaining wall that the Plaintiffs allege has resulted in significant deterioration to the condition of the 1332 Harding parking lot. On 29 March 2018, Plaintiffs filed a complaint against Dilworth, alleging that the construction project adjacent to the Plaintiffs’ two properties resulted in damages arising from claims for negligence, private nuisance, trespass, and breach of contract. In October 2018, Plaintiffs amended their complaint to add FMF and CSBI as Defendants. The amended complaint alleged breach of contract by Dilworth and FMF, negligence by Dilworth and CSBI, private nuisance by Dilworth and CSBI, trespass by CSBI, and requested attorney’s fees.

¹ This easement included provisions for indemnification for any damages that appeared at 1328 Harding after construction that were not present at the time construction began, and indemnification for any attorneys’ fees or engineering costs incurred in the event FMF Morehead failed to comply with the easement agreement.

² REP3 Holdings, LLC, is a limited liability company owned by Robert Penny, and REP3 owns the property located at 1332 Harding Place, Charlotte.

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Defendants filed motions for summary judgment, and the trial court heard these motions on 28 August 2019. On 23 September 2019, the trial court entered orders granting CSBI's summary judgment motion and granting in part and denying in part Dilworth and FMF's motion. Plaintiffs appeal from the interlocutory summary judgment order.

II. Substantial Right

Plaintiffs acknowledge they appeal from an interlocutory order as it is not a final order. This Court noted in *Hamilton v. Mortgage Information Services, Inc.*, the requirements for an interlocutory appeal to be reviewed immediately:

An order is either “interlocutory or the final determination of the rights of the parties.” “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.” . . . As a general proposition, only final judgments, as opposed to interlocutory orders, may be appealed to the appellate courts. Appeals from interlocutory orders are only available in “exceptional cases.” Interlocutory orders are, however, subject to appellate review:

“if (1) the order is final as to some claims or parties, and the trial court certifies pursuant to [N.C. Gen. Stat.] § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed.”

The appealing party bears the burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature. If a party attempts to appeal from an interlocutory order without showing that

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the order in question is immediately appealable, we are required to dismiss that party's appeal on jurisdictional grounds.

212 N.C. App. 73, 76-77, 711 S.E.2d 185, 188-89 (2011) (second alteration in original) (emphasis added) (citations omitted). Here, the trial court did not certify the order for immediate appeal so Plaintiffs must demonstrate “a substantial right that would be lost unless immediately reviewed.” *Id.* at 77, 711 S.E.2d at 189.

When considering whether an appellant has demonstrated a substantial right

we utilize a two-part test, with the first inquiry being whether a substantial right is affected by the challenged order and the second being whether this substantial right might be lost, prejudiced, or inadequately preserved in the absence of an immediate appeal. As a result, the extent to which [an appellant] is entitled to appeal the trial court's order hinges upon whether she has established that “delay of the appeal will jeopardize a substantial right” and “caus[e] an injury that might be averted if the appeal were allowed.”

The extent to which an interlocutory order affects a substantial right must be determined on a case-by-case basis. In making this determination, *we take a “restrict[ive] view of the ‘substantial right’ exception to the general rule prohibiting immediate appeals from interlocutory orders.* As we previously mentioned, the appellant must demonstrate the applicability of the substantial right exception to the particular case before the appellate court.

Id. at 78-79, 711 S.E.2d at 189-90 (alterations in original) (emphasis added) (citations and footnote omitted).

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Our caselaw makes clear that a substantial right is affected “where a possibility of inconsistent verdicts exists if the case proceeds to trial.”

To demonstrate that a second trial will affect a substantial right, [the appellant] must show not only that one claim has been finally determined and others remain which have not yet been determined, but that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.

Holland v. Harrison, 254 N.C. App. 636, 641, 804 S.E.2d 205, 210-11 (2017) (alteration in original) (quoting *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, 219 N.C. App. 623, 627-28, 727 S.E.2d 311, 314-15 (2012)).

Plaintiffs argue,

In the Amended Complaint, Plaintiff REP3 alleged negligence claims against both CSBI and Dilworth Ventures for damages caused by the sublateral excavation and construction of a retaining wall adjacent to real property located at 1332 Harding Place, Charlotte, North Carolina (“1332 Harding”). The claims against both defendants arise from the same set of facts. The effect of the Summary Judgment Orders is that REP3’s negligence claim for damages against CSBI is dismissed, while its same negligence claim against Dilworth Ventures for the same conduct survived. By dismissing REP3’s negligence claim against CSBI for its role in the sublateral excavation adjacent to 1332 Harding Place, but denying dismissal of the same negligence claim against Dilworth Ventures for the same excavation and damages, the Summary Judgment Orders put REP3 at risk of inconsistent verdicts in separate trials arising from the same set of facts.

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Here, in the absence of an interlocutory appeal, it is possible that REP3 would proceed to jury trial on its

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surviving negligence claim against Dilworth Ventures for the excavation adjacent to 1332 Harding and obtain one result, only to later try the same negligence claim for the same excavation and the same damages against CSBI and obtain an inconsistent result before a second jury. This risk of inconsistent verdicts triggers Plaintiffs' right to immediate appeal of the Summary Judgment Orders.

Where Plaintiffs' amended complaint alleges "Defendants Dilworth and Cambridge owed Plaintiffs a duty of reasonable care to not damage Plaintiffs' property and the improvements thereon during the construction of the Project[,]" this claim deals with separate duties of care for their roles as the developer and general contractor in the construction. *See Shoffner Indus., Inc. v. W. B. Lloyd Const. Co.*, 42 N.C. App. 259, 265, 257 S.E.2d 50, 55 (1979) ("The law imposes upon every person who enters upon an active course of conduct the positive duty to use ordinary care so as to protect others from harm. A violation of that duty is negligence. It is immaterial whether the person acts in his own behalf or under contract with another. An act is negligent if the actor intentionally creates a situation which he knows, or should realize, is likely to cause a third person to act in such a manner as to create an unreasonable risk of harm to another." (citation omitted)). In addition, the individual Plaintiffs and LLC Plaintiff are separate entities, each of which owns one of the properties but not the other. The claims against each of the various Defendants by each Plaintiff—breach of contract, private nuisance, and trespass, and as to each property—are based upon different theories, at least in part. We conclude Plaintiffs

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have not established that “the possibility of inconsistent verdicts on those issues exists.” *See Holland v. Harrison*, 254 N.C. App. at 641, 804 S.E.2d at 210-11.

Accordingly, we dismiss Plaintiffs’ appeal.

DISMISSED.

Judges BRYANT and BROOK concur.

Report per Rule 30(e).