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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-602

No. COA21-61

Filed 2 November 2021

Onslow County, No. 20 CVS 1030

IZMACO INVESTMENTS, LLC, Plaintiff,

v.

ROYAL ROOFING & RESTORATION, LLC and ROYAL FEATHERS, Defendants.

Appeal by Plaintiff from order entered 23 July 2020 by Judge Paul Quinn in Onslow County Superior Court. Heard in the Court of Appeals 11 August 2021.

Starling Law Firm, PLLC, by Casey S. Starling (withdrew after filing briefs), for Plaintiff-Appellant.

Mewborn & Deselms, by Sarah N. Sherrington, Brett J. DeSelms, and J. Timothy Wilson, for Defendants-Appellees.

INMAN, Judge.

¶ 1

Plaintiff-Appellant IzMaCo Investments, LLC, (“Plaintiff”) appeals from an interlocutory order dismissing seven of the eight causes of action alleged in its amended complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we hold Plaintiff has failed to demonstrate that the interlocutory order affects a substantial right and the appeal must be dismissed for

want of jurisdiction.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 Plaintiff instituted this action on 27 March 2020 by filing a complaint against Royal Roofing & Restoration, LLC (“Royal Roofing”) and its principal, Royal Feathers (“Mr. Feathers”), for: (1) breach of contract; (2) actual fraud; (3) constructive fraud; (4) breach of fiduciary duty; (5) unfair and deceptive trade practices; (6) civil conspiracy; (7) piercing the corporate veil; and (8) punitive damages.

¶ 3 Plaintiff filed an amended complaint as a matter of right on 21 April 2020, replacing Royal Roofing as a defendant with a different corporate entity, Royal Steamers Coastal Carolina Inc. (“Royal Steamers”). The amended complaint stated the same causes of action as the original complaint, alleging breach of contract against Royal Steamers and the remaining seven claims against both Royal Steamers and Mr. Feathers. Plaintiff served Defendants by sheriff on 31 May 2020, but Defendants did not notify their counsel of the new pleading.

¶ 4 On 29 May 2020, counsel for Defendants filed a motion to dismiss the action under Rule 12(b)(6).¹ During a hearing on the motion on 22 June 2020, Defendants’ counsel argued that all claims except for Plaintiff’s breach of contract claim failed to

¹ The motion lists Royal Roofing and Mr. Feathers as the movants, as Defendants’ counsel had not been made aware of the amended complaint substituting Royal Steamers for Royal Roofing at the time the motion to dismiss was filed.

state a valid cause of action, for reasons including that the parties did not have a fiduciary relationship. When informed by the trial court and counsel for Plaintiff of the amended complaint, counsel for Defendants maintained the same arguments.

¶ 5 The trial court on 20 July 2020 entered an order granting Defendants’ motion. The order’s conclusions and decree make clear that the trial court dismissed “all causes of action contained within the Amended Complaint except for the First Cause of Action (Breach of Contract).” The decretal portion of the order misidentifies the defendant named in the surviving claim as Royal Roofing—omitted from the amended complaint—instead of the proper corporate defendant, Royal Steamers.

¶ 6 Plaintiff filed written notice of appeal on 21 August 2020.

II. ANALYSIS

¶ 7 Plaintiff argues that the trial court erred in dismissing its claims for actual fraud, piercing the corporate veil, civil conspiracy, and punitive damages. The order is not a final judgment and was not certified for immediate review pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. So we must address the jurisdictional question of whether the trial court’s order affects a substantial right. *See, e.g., Turner v. Norfolk Southern Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) (noting that interlocutory orders may only be appealed when properly certified pursuant to Rule 54(b) or “if the trial court’s decision deprives the appellant of a substantial right which would be lost absent immediate review” (citations and

quotation marks omitted)). We hold Plaintiff has not met its burden of showing the trial court's order deprives Plaintiff of a substantial right and dismiss the appeal.

1. The “Substantial Right” Test

¶ 8

Our substantial right analysis is guided by a two-part test: “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). This 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 in which the order from which appeal is sought was entered.” *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). It is the appellants burden to satisfy both prongs of the test. *Embler v. Embler*, 143 N.C. App. 162, 165, 545 S.E.2d 259, 262 (2001).

¶ 9

To satisfy the first prong, the appellant must assert “a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right.” *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quotation marks and citation omitted) (alteration in original). We have recognized that avoiding inconsistent verdicts is a substantial right warranting interlocutory appellate review “when common fact issues overlap the claim appealed

and any remaining claims, [and] delaying the appeal until all claims have been adjudicated creates the possibility the appellant will undergo a second trial of the same fact issues if the appeal is eventually successful.” *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491 (1989).

2. Plaintiff Has Failed to Meet Its Burden

¶ 10 Plaintiff’s principal brief asserts that the trial court’s order raises the risk of inconsistent verdicts. Specifically, Plaintiff argues that, under the trial court’s order: (1) all eight claims in the amended complaint remain pending against Royal Steamers; (2) no claims remain against Mr. Feathers; and (3) a breach of contract claim against Royal Roofing remains pending, despite the fact that Royal Roofing is no longer a party to the suit. Plaintiff asserts that once it goes to trial against Royal Steamers on all the claims in the amended complaint, it faces a risk of inconsistent verdicts if the overlapping seven claims against Mr. Feathers are reinstated following a successful appeal after final judgment. *See Cencomp, Inc. v. Webcon, Inc.*, 157 N.C. App. 501, 503, 579 S.E.2d 482, 484 (2003) (holding an interlocutory order dismissing all claims against one defendant implicated a substantial right to avoid inconsistent verdicts when dismissed claims overlapped with surviving claims against co-defendant). Plaintiff misconstrues the trial court’s order and fails to demonstrate a risk of inconsistent verdicts.

¶ 11 Plaintiff’s amended complaint superseded its original complaint and, by

replacing Royal Roofing with Royal Steamers in the amended complaint, effectively dismissed all claims against Royal Roofing from suit. *See, e.g., Hyder v. Dergance*, 76 N.C. App. 317, 319–20, 332 S.E.2d 713, 714 (1985) (“[A]n amended complaint has the effect of superseding the original complaint.” (citation omitted)); *Hughes v. Anchor Enters., Inc.*, 245 N.C. 131, 135, 95 S.E.2d 577, 581 (1956) (recognizing that an amended complaint supersedes the original complaint and “the case [is] tried on [the] plaintiff’s amended complaint”). Plaintiff acknowledges on appeal that this change in corporate defendants was a purposeful and intentional substitution and was not a typographical error or inadvertent misnomer.

¶ 12 As a result of Plaintiff’s amended complaint, no claims were pending against Royal Roofing when the motion to dismiss was filed or heard by the trial court. Royal Roofing was named in the motion to dismiss because Defendants’ counsel had no notice of the amended complaint. The trial court’s order following the hearing could only dismiss claims against the defendants named in the amended complaint, *i.e.*, Royal Steamers and Mr. Feathers. The plain language of the trial court’s order shows that it did exactly that by dismissing all claims in “Plaintiff’s Amended Complaint . . . except for the First Cause of Action (Breach of Contract).” Although the trial court’s order erroneously recites that the breach of contract claim in the amended complaint remained pending against “Royal Roofing & Restoration, LLC,” the remainder of the order makes clear that the only claim surviving the motion to

dismiss was the “First Cause of Action (Breach of Contract) contained within the Amended Complaint.” Such a clerical error² does not serve to vitiate the trial court’s decree that “Plaintiff’s Amended Complaint is hereby dismissed except for the First Cause of Action (Breach of Contract).” Plaintiff’s contention that all the other claims in the complaint nonetheless remain pending against Royal Steamers is without merit given Plaintiff’s intentional amendment of the complaint. *See Patterson v. Walton*, 119 N.C. 500, 501, 26 S.E. 43 (1896) (holding that “[n]ames are to designate persons, and where the identity is certain a variance in the name is immaterial.”).

¶ 13 A proper understanding of the trial court’s order reveals Plaintiff’s substantial right argument to be without merit. Following the order, the only surviving claim is a breach of contract action against Royal Steamers—a claim that was *not* alleged against the other defendant, Mr. Feathers. Because the dismissed tort claims against Mr. Feathers do not overlap with the breach of contract claim and Plaintiff does not identify any factual issues that overlap between those claims in its principal brief, we hold Plaintiff has failed to meet its burden of demonstrating the trial court’s interlocutory order affects a substantial right. *Embler*, 143 N.C. App. at 166, 545 S.E.2d at 262.

² Although we dismiss Plaintiff’s appeal as set forth below, we note that the trial court may, on its own initiative or upon a motion by a party, correct the clerical error in the order under Rule 60(a) of the North Carolina Rules of Civil Procedure. N.C. R. Civ. P. 60(a) (2019).

¶ 14

Plaintiff attempts to assert a new substantial right theory in its reply brief, claiming that there is a risk of inconsistent verdicts on its claim for fraud because Royal Steamers has pled the affirmative defense of estoppel. This novel contention, asserted in the reply brief “notwithstanding Defendants’ arguments,” comes too late. An appellant must satisfy its burden of showing a substantial right in the initial brief; while the appellant may respond to the appellee's counterarguments in a reply brief, the appellant may not use the reply brief to raise new arguments. See N.C. R. App. P. 28(h) (2021) (“Any reply brief which an appellant elects to file *shall be limited to a concise rebuttal of arguments set out in the appellee’s brief*” (emphasis added)); *State v. Triplett*, 258 N.C. App. 144, 147, 810 S.E.2d 404, 407–08 (2018) (“[Appellant] may not use his reply brief to make new arguments on appeal. [A] reply brief is not an avenue to correct the deficiencies contained in the original brief.” (cleaned up)); *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 79, 772 S.E.2d 93, 96 (2015) (dismissing an interlocutory appeal where appellants first asserted the existence of a substantial right in their reply brief). Because Plaintiff’s principal brief fails to establish any impact on a substantial right and its reply brief cannot assert new arguments to correct that deficiency, we dismiss Plaintiff’s appeal. *Id.*

3. Request for Writ of Certiorari

¶ 15

Plaintiff further asks this Court to treat its briefs as petitions for writ of certiorari in the event we hold that the interlocutory order is otherwise not

immediately appealable. However, Plaintiff's request does not comply with Rule 21(b) of our appellate rules, which states "[a]pplication for the writ of certiorari *shall be made* by filing a petition therefor with the clerk of the court of the appellate division" N.C. R. App. P. 21(b) (emphasis added); *cf. Doe v. City of Charlotte*, 273 N.C. App. 10, 23, 848 S.E.2d 1, 11 (2020) ("[I]n the interests of justice this Court has—on rare occasions—construed some other appellate filing such as a brief or motion as a petition for a writ of certiorari and then allowed the petition. But this is truly rare and something that this Court chooses to do on its own initiative; it is not something that a litigant should request." (citations omitted)). While the requirements of Rule 21 are subject to suspension "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest," N.C. R. App. P. 2, Plaintiff has not argued for or sought the invocation of Rule 2. Plaintiff's principal brief asserts instead that certiorari review is appropriate in the interest of judicial economy. To the contrary, "the routine allowance of interlocutory appeals would have a tendency to delay, rather than advance, the ultimate resolution of matters in litigation." *Newcomb v. Cty. of Carteret*, 207 N.C. App. 527, 554, 701 S.E.2d 325, 344 (2010). And, upon review of the record and briefs submitted by the parties, we do not discern a "manifest injustice" or issue of public concern marking this ordinary business dispute as a rare case warranting suspension of Rule 21 under an *ex mero motu* invocation of Rule 2. *Doe*, 273 N.C. App. at 23, 848 S.E.2d at 11; *cf. Matter of J.A.E.W.*, 375 N.C. 112, 116,

846 S.E.2d 268, 271 (2020) (electing to treat a parent’s brief in a termination of parental rights proceeding as a petition for writ of certiorari “given the seriousness of the issues that are implicated by the trial court’s termination order” (citation omitted)).

¶ 16 Plaintiff further asserts that a writ of certiorari is appropriate here because the appeal is allegedly meritorious. Asserted merit, standing alone, is insufficient to warrant immediate review of this interlocutory order; the rule against interlocutory appeals is not concerned with whether the appeal has merit, and is instead designed “to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard.” *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980) (citations omitted). For these reasons, we decline, in our discretion, to invoke Rule 2 and to treat Plaintiff’s briefs as petitions for writ of certiorari.

III. CONCLUSION

¶ 17 Plaintiff has failed to meet the burden of showing the interlocutory order affects a substantial right and we therefore dismiss this appeal. We further decline, in our discretion, to treat Plaintiff’s briefs as petitions for writ of certiorari under Rules 2 and 21 of the North Carolina Rules of Appellate Procedure.

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Opinion of the Court

APPEAL DISMISSED.

Judges DILLON and CARPENTER concur.

Report per Rule 30(e).