IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 23-208

Filed 20 February 2024

Pender County, No. 21 CVS 503

GABRIEL GLINSKY, Plaintiff,

v.

KUESTER MANAGEMENT GROUP, LLC, TOPSAIL LANDING CONDOMINIUM ASSOCIATION, INC., BLUSKY RESTORATION CONTRACTORS, LLC and S&S SERVICES GROUP, LLC, d/b/a COMMUNITY ASSOCIATION MANAGEMENT SERVICES, Defendants.

Appeal by defendant from order entered 31 October 2022 by Judge R. Kent Harrell in Pender County Superior Court. Heard in the Court of Appeals on 22 August 2023.

*Carruthers & Roth, P.A., by Kevin A. Rust, Rachel Scott Decker, Trisha L. Barfield, for the defendant-appellant.*

*Bradley Arant Boult Cummings LLP, by Michael W. Knapp, Anna-Bryce Hobson, and Brian M. Rowlson, for the plaintiff-appellee.*

STADING, Judge.

Defendant BluSky Restoration Contractors, LLC ("BluSky") appeals the trial court's order granting plaintiff's motion to compel defendant to produce their cellular

telephone data that defendant contends holds privileged material. For the reasons below, we dismiss the appeal for lack of jurisdiction.

## I. Background

This case arises from the damage incurred by a condominium unit during Hurricanes Florence and Michael in 2018. Plaintiff Gabriel Glinsky owns a condominium located in Surf City, North Carolina. The condominium is part of the Topsail Landing complex, maintained by the Topsail Landing Condominium Association, Inc. ("Topsail Landing HOA"). Before the hurricanes, Topsail Landing HOA had contracted Kuester Management Group, LLC ("Kuester") to manage the Topsail Landing properties. In the wake of the 2018 hurricanes, Kuester contacted BluSky for repair work on the complex. BluSky, having entered into a work authorization agreement with Kuester, prepared to mitigate hurricane damage to various units, which included initial inspections and planning for repairs. At first, plaintiff hesitated to allow BluSky access to his unit for inspection and would not provide a key.

On 29 April 2019, Topsail Landing HOA informed its condominium owners that State Farm, its insurer, had approved a scope of work for repairs by BluSky. BluSky commenced and eventually completed the repairs for all units—excluding plaintiff's unit. Subsequently, BluSky issued a deductive change order to Topsail Landing HOA, crediting them for the incomplete work on plaintiff's unit. Plaintiff

then sued BluSky, alleging negligence for failure to inspect and repair his unit and accusing BluSky of unfair and deceptive trade practices in contravention of N.C. Gen. Stat. § 75-1.1. BluSky defended itself by citing the lack of privity, the economic-loss rule, and contributory negligence.

The current appeal does not concern these substantive issues but centers on the trial court's order granting plaintiff's motion to compel. The trial court directed BluSky to submit cellular phone data from certain employees for analysis and extraction by an expert, as stated in plaintiff's First Set of Interrogatories. BluSky contends this order was erroneous as it compels the disclosure of privileged attorney-client communications and protected work product. BluSky further argues that the trial court did not permit a review of the phones for privileged content before issuing the order. In contrast, plaintiff contends that BluSky's objections and subsequent appeal lack merit and are premature, asserting that BluSky failed to raise these objections to the disclosure of privileged information at the trial level. The trial court's order also stipulated that BluSky must provide a privilege log to plaintiff's counsel for any documents it believes to be covered by the attorney-client privilege or work-product doctrine. The order stated that if BluSky withheld any documents based on these claims, it must present them to the court within thirty days for an in-camera review. However, BluSky appealed before complying with the trial court's order and providing the privilege log.

## II. Jurisdiction

"Ordinarily orders denying or granting discovery are interlocutory and not appealable unless they affect a substantial right which would be lost if the ruling was not reviewed prior to final judgment." *N.C. Farm Bureau Mut. Ins. Co. v. Wingler*, 110 N.C. App. 397, 401, 429 S.E.2d 759, 762 (1993) (citing *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 271 S.E.2d 522 (1980)). "An order compelling discovery is not a final judgment. Neither does it affect a substantial right. Consequently, it is not appealable." *B.B. Walker & Hrub Corp. v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 554, 353 S.E.2d 425, 426 (1987) (citing *Alexander v. United States*, 201 U.S. 117, 121 (1906) and *Casey v. Grice*, 60 N.C. App. 273, 298 S.E.2d 744 (1983)). "An exception to this rule applies when 'a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial.'" *Saunders v. Hull Prop. Grp., L.L.C.*, 258 N.C. App. 565, 811 S.E.2d 242 (2018) (quoting *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999)). "Blanket general objections purporting to assert attorney-client privilege or work product immunity to all of the opposing parties' discovery requests are inadequate to effect their intended purpose and do not establish a substantial right to an immediate appeal." *Id.* (quoting *K2 Asia Ventures v. Trota*, 215 N.C. App. 443, 447, 717 S.E.2d 1, 4–5, *disc. review denied*, 365 N.C. 369, 719 S.E.2d 37 (2011)). An interlocutory order affects a substantial right if

the order "deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579 (quoting *Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991)).

This appeal is interlocutory, and we lack jurisdiction as BluSky failed to meet its burden of establishing that the appeal affects a substantial right under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1). In this case, BluSky never made a privilege log nor provided the trial court with the opportunity for an in-camera review of its allegedly privileged material to make a finding. *See Sessions v. Sloane*, 248 N.C. App. 370, 381, 789 S.E.2d 844, 853 (2016) ("Defendants provided a document privilege log describing the privilege relating to each withheld document. As a result, their assertion of privilege is not frivolous or insubstantial and a substantial right is affected."). The trial court never had the chance to conduct an in-camera review because BluSky appealed before submitting any allegedly privileged material—despite being ordered to do so. *See id.* at 248 N.C. App. at 382, 789 S.E.2d at 854.

Not only did BluSky prevent the trial court from making a finding, but it also only offers bald assertions under the claim of privilege. BluSky, for example, focuses on the trial court compelling it to produce cellular phone data but offers nothing about what privileged information is on the cellular phones. *See Gunter v. Maher*, 264 N.C. App. 344, 349, 826 S.E.2d 557, 561 (2019) ("Plaintiffs are unable to carry their burden

to show that the date in question was a communication to an attorney, made in confidence, that related to the matter about which their attorney was being professionally consulted, and made in the course of giving or seeking legal advice."). Without the disputed data, there is no way to assess whether the privilege claims are bona fide. *See id.*

In addition, the order BluSky appealed from contains no enforcement sanctions—a necessity for appellate jurisdiction. *See Willis v. Duke Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976) (when a civil litigant is adjudged in contempt for failure to comply with a discovery order, the order is immediately appealable); *Adair v. Adair*, 62 N.C. App. 493, 495, 303 S.E.2d 190, 192, *disc. rev. denied*, 309 N.C. 319, 307 S.E.2d 162 (1983) (striking defendant's answer for noncompliance with discovery requests affected a substantial right and was immediately appealable); *B.B. Walker & Hrub Corp.*, 84 N.C. App. at 554–55, 353 S.E.2d at 426 (order compelling discovery not appealable unless it is enforced by sanctions under Rule 37(b), which affect a substantial right).

Since BluSky's appeal is premature and lacking in substance, we are without jurisdiction to hear it. *See Casey v. Grice*, 60 N.C. App. 273, 275, 298 S.E.2d 744, 745 (1983) ("Because all assignments of error are based on [the judge's] order directing defendant to answer interrogatories and submit to oral deposition, we believe defendant's appeal is premature and must, therefore, be dismissed."); *Mack v. Moore*,

91 N.C. App. 478, 480, 372 S.E.2d 314, 316 (1988) ("Here, the order compelling plaintiff to answer the discovery request contained no enforcement sanctions and therefore is not appealable."); *Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 294 S.E.2d 386 (1982); *Alexander*, 201 U.S. at 121 (a right of review arises from a contempt order to enforce an order compelling discovery); *Willis*, 291 N.C. at 19, 229 S.E.2d at 191 (both civil and criminal contempt orders are immediately appealable). The better practice in privilege controversies would be to submit a motion, affidavit, privilege log, request for findings of fact, and request for an in-camera review with a sealed record of the documents that the trial court may review. Here, BluSky never formally requested an in-camera review and appealed prematurely. If we followed BluSky's proffered method, the trial court would not be able to resolve any questions about the alleged privileged documents. While we have discretion to review interlocutory appeals and may treat this appeal as a petition for a writ of *certiorari* and address the merits, we decline to do so. *Industrotech Constructors, Inc. v. Duke Univ.*, 67 N.C. App. 741, 742–43, 314 S.E.2d 272, 274 (1984).

## III. Conclusion

Based on the above reasons, defendant's appeal is dismissed.

DISMISSED.

Judges STROUD and FLOOD concur.

Report per Rule 30(e).