IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-535

Filed 6 February 2024

Wake County, No. 20 CVS 8349

MICHAEL TROUTT, Individually, Plaintiff,

v.

JOSH WATSON; RANDALL BRIAN WILDER; JOHN BELL; DID, LLC; and DID JR., LLC, Defendants.

Appeal by Plaintiff and cross-appeal by Defendants from an order entered 15 December 2022 by Judge Thomas Wilson in Wake County Superior Court. Heard in the Court of Appeals 14 November 2023.

Meynardie & Nanney, PLLC, by Joseph H. Nanney, Jr., for plaintiff-appellant.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, for defendants-appellees / cross-appellants.

WOOD, Judge.

Michael Troutt ("Plaintiff") appeals the trial court's grant of summary judgment in favor of Defendants, disposing of his claims of breach of fiduciary duty, interference with reasonable expectations, and civil conspiracy against John Watson ("Watson"), Randall Brian Wilder ("Wilder"), John Bell ("Bell"), DID, LLC ("DID"),

and DID JR, LLC ("DID JR") (collectively, "Defendants"). Defendants conditionally cross-appeal the trial court's denial of their motion for summary judgment as to Plaintiff's breach of contract claim. We dismiss this appeal as interlocutory because claims are still pending in the trial court and Plaintiff will not be deprived of a substantial right by not receiving immediate appellate review.

I. Factual and Procedural History

Plaintiff has been a franchise owner of Window World for fifteen years. Originally, Plaintiff was the owner of the Window World franchises in Paducah, Kentucky and Fort Wayne, Indiana. In 2018 and 2019, Plaintiff and Watson went into business together to purchase the Window World franchises located in Raleigh and Fayetteville, North Carolina, both of which sell and install windows, doors, and siding. To effectuate the purchase, Plaintiff and Watson created two limited liability companies ("LLC"). They created DID for the Raleigh franchise and DID JR for the Fayetteville franchise. DID is an LLC registered in Tennessee.

Plaintiff and Watson decided to add business partners as partial owners of both LLCs. Bell, Wilder, and Brigette Mathis were brought in as business partners and each own a ten percent (10%) stake in the LLCs. Plaintiff owns thirty percent (30%) and Watson owns forty percent (40%) of the LLCs. In order for Watson to secure a loan, his bank required that he own the largest share in the LLCs. Plaintiff and Watson, therefore, reached an informal agreement by which, once the bank loan was

paid off, Watson would transfer five percent (5%) of his ownership interest to Plaintiff to make their ownership interests equal.

On 25 March 2020, Watson, Wilder, and Bell provided a letter to Plaintiff expressing concern that Plaintiff was "seriously in debt to several vendors" and was therefore no longer wanted as a business partner in the LLCs. Specifically, they cited a provision from both LLC operating agreements: "No member shall make any other investment nor take any actions deemed by the majority vote of members to be illegal, unmoral, or a risk the operation and reputation of Window World." Watson, Wilder, and Bell offered to purchase Plaintiff's interests in DID for $300,000.00 and in DID JR for $250,000.00. Plaintiff had purchased his interests in the LLCs for $150,000.00 each. Watson, Wilder, and Bell stated if Plaintiff refused, they would put his ouster to a vote and buy out his interests in the LLCs for $150,000.00 each. Watson, Wilder, and Bell signed their names to the letter which included a line for Plaintiff's signature.

On 27 March 2020, Plaintiff, through counsel, sent a letter to Watson and Wilder stating that neither of the operating agreements allowed them to "squeeze out" Plaintiff from the LLCs. Plaintiff requested a "specific description of the purported breach" to allow him to exercise his contractual right to cure. Thereafter, Plaintiff and Defendants, through counsel, exchanged additional correspondence in an attempt to negotiate a buyout of Plaintiff's interests in the LLCs. They did not reach an agreement.

On 28 July 2020, Plaintiff sued Defendants, alleging five causes of action: (1) breach of fiduciary duty; (2) breach of contract; (3) interference with reasonable expectations; (4) civil conspiracy; and (5) dissolution of the LLCs. On 14 June 2021, Defendants filed their answer. On 26 September 2022, Defendants filed two motions, a motion for judgment on the pleadings and alternatively summary judgment, and a stand-alone motion for summary judgment. On 15 December 2022, the trial court entered its order on both motions, concluding Defendants are not entitled to judgment on the pleadings. The trial court granted summary judgment in favor of Defendants as to Plaintiff's first, third, and fourth causes of action but denied summary judgment as to the second cause of action. Finally, the trial court concluded dissolution of both DID and DID JR is necessary pursuant to N.C. Gen. Stat. § 57D-6-02, which grants a superior court authority to dissolve an LLC if "liquidation of the LLC is necessary to protect the rights and interests of the member." N.C. Gen. Stat. § 57D-6-02(2) (2022). Rather than ordering dissolution, however, the trial court ordered a forced sale of Plaintiff's interests to Defendants pursuant to N.C. Gen. Stat. § 57D-6-03(d) (2022). To effectuate the dissolution, the trial court ordered an evidentiary hearing be held to establish the fair value of Plaintiff's ownership interests in the LLCs.

On 13 January 2023, Plaintiff filed a notice of appeal of the trial court's summary judgment order. On 17 January 2023, Defendants filed notice of conditional cross-appeal in which they deny that there are grounds for appellate review of Plaintiff's appeal, but in which they made substantive arguments in the event this

Court decides to address the merits of Plaintiff's appeal. Additional relevant facts are provided as necessary in our analysis.

II. Analysis

Defendant argues this Court has jurisdiction to hear his appeal from the trial court's grant of partial summary judgment because the order "affects a substantial right" pursuant to N.C. Gen. Stat. § 1-277 (2022) and because there is a possibility of inconsistent judgments if this Court does not allow immediate appellate review. We disagree.

We must determine whether the parties' appeals are properly before us because "[a]n order granting partial summary judgment is interlocutory, and ordinarily, there is no right of immediate appeal from an interlocutory order." *Country Boys Auction & Realty Co. v. Carolina Warehouse, Inc.*, 180 N.C. App. 141, 144, 636 S.E.2d 309, 312 (2006) (quotation marks and brackets omitted). This Court has enumerated the two circumstances in which a party may appeal an interlocutory order:

> (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C. R. Civ. P. 54(b) or (2) if the trial court's decision deprives the appellant of a substantial right.

Woody v. Vickrey, 276 N.C. App. 427, 433, 857 S.E.2d 734, 739 (2021).

As a preliminary matter, we note that the trial court did not certify the order for immediate appeal. Therefore, N.C. R. Civ. P. 54(b) precludes an immediate right

of appeal. Consequently, our review is appropriate only if a dismissal of Plaintiff's appeal deprives him of a substantial right.

A. Forced Sale of Plaintiff's Interests

Plaintiff argues that if he

> is forced to sell his membership interest[s] against his will (and based upon no legal authority), the deprivation of his substantial property right would plainly work injury to him. Once sold, there is no legal remedy that would return his membership interest intact if it is later determined that the forced sale was improper.

Plaintiff further argues the trial court exceeded its authority in ordering a sale of his interest in DID because it is a Tennessee LLC. As a Tennessee LLC, Plaintiff argues, Tennessee law should apply, and "Tennessee law contains no provision that is comparable to the forced sale provision in [N.C. Gen. Stat.] § 57D-6-03." Finally, Plaintiff argues Defendants must not be allowed to reap the benefits DID generates while forcing him out.

"An appellant's substantial right is deprived if it is lost, prejudiced or will be less than adequately protected without an immediate appeal pursuant to N.C. Gen. Stat. §[ ] 1-277(a)." *Woody*, 276 N.C. App. at 433, 857 S.E.2d at 739 (quotation marks and brackets omitted). "Whether a substantial right is affected is determined on a case-by-case basis and should be strictly construed." *Nello L. Teer Co. v. Jones Bros.*, 182 N.C. App. 300, 303, 641 S.E.2d 832, 835 (2007).

Here, Plaintiff requested judicial dissolution of DID JR pursuant to N.C. Gen. Stat. § 57D-6-02(2), which authorizes a superior court to dissolve an LLC in a proceeding brought by "[a] member, if it is established that . . . (ii) liquidation of the LLC is necessary to protect the rights and interests of the member." N.C. Gen. Stat. § 57D-6-02(2). N.C. Gen. Stat. § 57D-6-03(d), in turn, provides:

> In any proceeding brought by a member under clause (ii) of [N.C. Gen. Stat. §] 57D-6-02(2) in which the court determines that dissolution is necessary, the court will not order dissolution if after the court's decision the LLC or one or more other members elect to purchase the ownership interest of the complaining member at its fair value in accordance with any procedures the court may provide.

N.C. Gen. Stat. § 57D-6-03(d). Therefore, Plaintiff's complaint specifically invokes a statutory provision that may entail, if a member elects, a forced sale of the complaining member's interest at its fair value. We cannot see how an interlocutory appeal affects a substantial right where, as here, Plaintiff has sought dissolution, the statutory consequence of which may be a forced sale of his interest.

Moreover, Tennessee law does contemplate a forced sale of a member's interest in an LLC. Pursuant to TENN. CODE ANN. § 48-249-503(a)(6)(C) (West 2023), a member's interest in an LLC is terminated when a court, upon application by the LLC or another member, expels the member because it makes a judicial determination that the member "[e]ngaged in conduct relating to the LLC's business that makes it not reasonably practicable to carry on the business with the member." TENN. CODE ANN. § 48-249-503(a)(6)(C) (West 2023). If, after expelling the member,

the existence and business of the LLC continue, then the expelled member "is entitled . . . to receive from the LLC the fair value of the terminated membership interest as of the date of termination of such membership interest." TENN. CODE ANN. § 48-249-505(c) (West 2023). So then, Tennessee courts *are* authorized under specific circumstances to terminate a member's interest in an LLC and subject it to forced sale at the fair market value of the expelled member's interest at the time of termination.

Here, in requesting judicial dissolution of DID, Plaintiff specifically cites TENN. CODE ANN. § 48-249-617 (West 2023), which authorizes the court to decree dissolution "whenever it is not reasonably practicable to carry on the business in conformity with the LLC documents," which is the same finding a Tennessee court must make to terminate a member's interest and force its sale. TENN. CODE ANN. § 48-249-503(a)(6)(C) (West 2023); TENN. CODE ANN. § 48-249-505(c) (West 2023); TENN. CODE ANN. § 48-249-617(a) (West 2023). Therefore, Plaintiff would be subject to a potential forced sale of his membership interest under both North Carolina and Tennessee statutes.

In any event, whether through dissolution and liquidation or by forced sale, Plaintiff will receive the fair market value of his interest from the LLCs. If Plaintiff is unsatisfied with the fair market value determination, he retains the right to appeal its determination at the proper time. We hold Plaintiff has failed to demonstrate he would be deprived of a substantial right absent immediate appellate review.

B. Possibility of Inconsistent Judgments

Plaintiff argues the "factual issues in the remaining claim for breach of contract, and the claims dismissed at summary judgment all arise from Defendants' wrongful acts in ousting [Plaintiff]. If tried separately, there is the very real possibility of inconsistent verdicts, which would certainly affect a substantial right."

"A party's right to avoid separate trials of the same factual issues may constitute a substantial right." *Woody*, 276 N.C. App. at 434, 857 S.E.2d at 740. A two-part test determines whether this right is violated. The appealing party must "show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *Id.* at 434, 857 S.E.2d at 740. The court in *Woody* further explained:

> The test is satisfied when overlapping issues of fact between decided claims and those remaining create the possibility of inconsistent verdicts from separate trials. The mere fact that claims arise from a single event, transaction, or occurrence does not, without more, necessitate a conclusion that inconsistent verdicts may occur unless all of the affected claims are considered in a single proceeding. The risk of inconsistent verdicts means that there is "a risk that different fact-finders would reach irreconcilable results when examining the same factual issues a second time."

Id. at 434–35, 857 S.E.2d at 740 (citations and quotation marks omitted). We will examine each cause of action in turn, presuming that they all involve the same factual issues.

Regarding Plaintiff's claim for breach of fiduciary duty, this Court has stated, "[a] claim for breach of fiduciary duty requires the existence of a fiduciary relationship." *White v. Consol. Plan., Inc.*, 166 N.C. App. 283, 293, 603 S.E.2d 147, 155 (2004). The court in *White* explained that a fiduciary relationship exists "wherever confidence on one side results in superiority and influence on the other side; where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence." *Id.* at 293, 603 S.E.2d at 155 (brackets omitted). "In North Carolina, it is well established that a controlling shareholder owes a fiduciary duty to minority shareholders." *Farndale Co., LLC v. Gibellini*, 176 N.C. App. 60, 67, 628 S.E.2d 15, 19 (2006).

Here, Plaintiff's complaint states Watson, as the holder of the largest membership interest in the LLCs, owed duties of loyalty and impartiality to him and that he breached such duties when he convinced the other individual Defendants to force Plaintiff out of the business. Plaintiff further argues Watson spent money in sums exceeding his authority and unilaterally reduced Plaintiff's withdrawals. When compared to the remaining breach of contract claim, there is no risk of inconsistent verdicts because a breach of fiduciary duty claim does not necessarily require that a defendant breach a contract. Therefore, although the two claims involve some of the same facts regarding Watson's role in forcing Plaintiff out of the business, there is not a possibility of inconsistent verdicts.

Regarding Plaintiff's claim for interference with reasonable expectations, our Supreme Court has discussed the concept in the context of the then-effective statutes authorizing courts to dissolve a corporation or form "another more appropriate remedy when 'reasonably necessary' for the protection of the 'rights or interests' of the complaining shareholder." *Meiselman v. Meiselman*, 309 N.C. 279, 281, 307 S.E.2d 551, 553 (1983). The court in *Meiselman* "articulate[d] for the first time the analysis a trial court is to apply in resolving suits brought under these two statutes." *Id.* at 281, 307 S.E.2d at 553. The court held:

> For plaintiff to obtain relief under the expectations analysis, he must prove that (1) he had one or more substantial reasonable expectations known or assumed by the other participants; (2) the expectation has been frustrated; (3) the frustration was without fault of plaintiff and was in large part beyond his control; and (4) under all of the circumstances of the case plaintiff is entitled to some form of equitable relief.

Id. at 301, 307 S.E.2d at 564.

Here, Plaintiff's complaint states that Watson, Wilder, and Bell, by forcing Plaintiff out of the LLCs, "materially disrupted and interfered" with his expectation "to operate the franchises for the rest of his working life until he retires." It is true that Plaintiff's claims of interference of reasonable expectations and breach of contract share issues of fact regarding his being forced out of the LLCs. However, under *Meiselman*, a court's determination regarding judicial dissolution, which is controlled by its determination of whether a plaintiff's reasonable expectations have

been frustrated, does not require any finding of a breach of contract. Therefore, there is not a possibility of inconsistent verdicts between the decided claim of interference with reasonable expectations and the surviving breach of contract claim. Moreover, because a claim for interference with reasonable expectations is part of the judicial dissolution analysis under *Meiselman*, we also hold there is no possibility of inconsistent verdicts between Plaintiff's application for judicial dissolution and his breach of contract claim.

Next, this Court has stated that a civil conspiracy claim entails "wrongful acts by persons pursuant to a conspiracy. A claim for civil conspiracy consists of: (1) an agreement between two or more persons; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) which agreement results in injury to the plaintiff." *Di Frega v. Pugliese*, 164 N.C. App. 499, 505–06, 596 S.E.2d 456, 461 (2004) (citation omitted). There is no "separate civil action for civil conspiracy in North Carolina. The charge of conspiracy itself does nothing more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts and conduct of one might be admissible against all." *Esposito v. Talbert & Bright, Inc.*, 181 N.C. App. 742, 747, 641 S.E.2d 695, 698 (2007) (citation and quotation marks omitted). "In civil conspiracy, recovery must be on the basis of sufficiently alleged wrongful overt acts." *Dove v. Harvey*, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005).

Here, although breach of contract might be connected to civil conspiracy if Defendants conspired to breach the contract, there is not a possibility of inconsistent verdicts. As is true for Plaintiff's other claims, civil conspiracy does not require an actual breach of contract. At the most, a showing of civil conspiracy in this case might require a sufficiently alleged wrongful overt act in furtherance of a conspiracy to breach a contract but not a breach itself. Therefore, there is no possibility of inconsistent verdicts between the breach of contract claim and the civil conspiracy claim.

III. Conclusion

For the foregoing reasons, we hold Plaintiff has failed to demonstrate he would be deprived of a substantial right absent immediate appellate review and has failed to show the possibility of inconsistent verdicts exists as to the various causes of action. Therefore, Plaintiff's appeal is dismissed as interlocutory.

DISMISSED.

Judges ARROWOOD and THOMPSON concur.

Report per Rule 30(e).