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NO. COA11-1546
COA11-1547

NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

ACADIA NORTHSTAR, L.L.C.,
Plaintiff,

v.

Rutherford County
No. 11 CVS 224

KINSTON CHARTER ACADEMY, INC.,
d/b/a KINSTON CHARTER ACADEMY
CHARTER SCHOOL
Defendant.

Appeal by defendant from orders entered 27 July 2011 and 2 September 2011 by Judge Marvin P. Pope, Jr. in Rutherford County Superior Court. Heard in the Court of Appeals 5 June 2012.

Robinson, Bradshaw & Hinson, P.A. by Richard A. Vinroot and Matthew F. Tilley for plaintiff-appellee.

McDonald Law Offices, P.C. by Demyra R. McDonald Hall for defendant-appellant.

STEELMAN, Judge.

Where defendant fails to articulate a substantial right which would be affected if its interlocutory appeals are not heard, they are dismissed.

I. Factual and Procedural History

On 21 February 2011, Acadia NorthStar, L.L.C. (plaintiff) filed a complaint against Kinston Charter Academy, Inc. (defendant), alleging breach of contract. Defendant answered and filed counterclaims for breach of contract, negligence, fraud, unjust enrichment, and deceptive trade practices. Plaintiff moved to dismiss the counterclaims pursuant to N.C.R. Civ. P. 12(b)(6) on 31 May 2011. The trial court granted plaintiff's motion on 27 July 2011.

On 18 June 2011, plaintiff filed a motion for sanctions pursuant to N.C.R. Civ. P. 11 against defendant and defendant's counsel. On 2 September 2011, the trial court granted plaintiff's motion.

Defendant appeals both orders.

II. Interlocutory Order

"A judgment is either interlocutory or the final determination of the rights of the parties." N.C.R. Civ. P. 54(a) (2011). "A final judgment is one that determines the entire controversy between the parties, leaving nothing to be decided in the trial court." *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (2005), *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005). "Interlocutory orders are those made during

the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009).

Generally, "interlocutory orders are not immediately appealable." *Id.* However, immediate appeal of interlocutory orders is available when the interlocutory order affects a substantial right under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) (2011). *Turner*, 363 N.C. at 558, 681 S.E.2d at 773.

We determine whether an interlocutory order affects a substantial right under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1). "The inquiry as to whether a substantial right is affected is two-part—the right itself must be substantial and the deprivation of that substantial right must potentially work injury to [a party] if not corrected before appeal from final judgment[.]" *Jenkins ex rel. Hajeh v. Hearn Vascular Surgery, P.A.*, ___ N.C. App. ___, ___, 719 S.E.2d 151, 156, (2011) (alterations in original) (internal quotation marks omitted).

A substantial right is "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." *Myers v. Mutton*, 155 N.C. App. 213, 216, 574 S.E.2d 73, 76 (2002) (alteration in original).

An appellant is not entitled to appeal from the interlocutory order unless the order deprived appellant of a substantial right which appellant would lose absent review prior to final determination. *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). "[T]he enforcement of the substantial right must be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 6, 362 S.E.2d 812, 815 (1987).

"When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C.R. App. P. 28(b)(4) (2011). "It is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal . . . and not the duty of this Court to construct arguments for or find support for appellant's right to appeal[.]" *Griessel v. Temas Eye Ctr., P.C.*, 199 N.C. App. 314, 316, 681 S.E.2d 446, 447 (2009) (alteration in original).

A. Order Dismissing Defendant's Counterclaims

The trial court entered an order dismissing defendant's counterclaims. The order did not dispose of the case, and issues remain to be decided in the trial court. This order is interlocutory. *See, e.g., McGuire v. Dixon*, ___ N.C. App. ___, ___, 700 S.E.2d 71, 73 (2010); *City of Charlotte v. BMJ of Charlotte, LLC*, 196 N.C. App. 1, 7, 675 S.E.2d 59, 63 (2009), *disc. review denied*, 363 N.C. 800, 690 S.E.2d 533 (2010).

Defendant's entire argument for immediate appellate review is that the "order dismissing all of Defendant's counterclaims affects a substantial right, is a final judgment, and therefore appeal lies to the Court of Appeals pursuant to *N.C. Gen. Stat. § 7A-27*." Defendant fails to articulate what substantial right the interlocutory order affects. The order is clearly not a final judgment. Defendant fails to argue that the interlocutory order affects a substantial right that will be lost, prejudiced, or less than adequately protected on appeal from a final judgment.

It is not sufficient to merely recite that an interlocutory appeal affects a substantial right. It is not the role of this Court to create arguments for the defendant. Unless this appeal affects a substantial right, this Court is without jurisdiction

to hear this appeal.

The appeal of the order granting plaintiff's motion to dismiss defendant's counterclaims is dismissed.

B. Order for Sanctions

The trial court also entered an order for N.C.R. Civ. P. 11 sanctions against defendant, defendant's counsel (Demyra R. McDonald Hall), and defendant's principal and CEO (Ozie Lee Hall, Jr.). The order did not finally dispose of the case, and issues remain to be decided in the trial court. An order imposing monetary sanctions upon counsel is interlocutory because it did not finally dispose of the case. *Myers*, 155 N.C. App. at 215, 574 S.E.2d at 75. The order appealed from is interlocutory.

Defendant's entire statement of the grounds for appellate review is that the sanctions order "affects a substantial right and is a final judgment on this matter and therefore appeal lies to the Court of Appeals pursuant to *N.C. Gen. Stat. § 7A-27*." Defendant fails to articulate what substantial right the interlocutory order affects. The order is clearly not a final judgment. Defendant fails to argue that the interlocutory order affects a substantial right that will be lost, prejudiced, or less than adequately protected on appeal from a final judgment.

In *Myers, supra*, this Court dismissed the appeal of an interlocutory order imposing sanctions on counsel for discovery violations. *Myers*, 155 N.C. App. at 216, 574 S.E.2d at 76. "[N]o substantial right of plaintiff's would be jeopardized by postponing appeal of the discovery order until after trial." *Id.*

The appeal of the N.C.R. Civ. P. 11 sanctions order is dismissed.

APPEAL DISMISSED IN CASES 11-1546 and 11-1547.

Judges McGEE and ERVIN concur.

Report per Rule 30(e).