

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1040

Filed: 5 May 2015

Moore County, No. 13-CVS-1379

KAREN LARSEN, BENEFICIARY, MORGAN STANLEY as IRA CUSTODIAN
f/b/o KAREN LARSEN, MARY JO STOUT, CHIARA IDHAMMAR, and CHRISTER
IDHAMMAR, Plaintiffs,

v.

BLACK DIAMOND FRENCH TRUFFLES, INC. and SUSAN RICE, Defendants.

Appeal by Defendants from an order entered on 16 June 2014 by Judge James
M. Webb in Moore County Superior Court. Heard in the Court of Appeals on 4 March
2015.

*H. Gregory Johnson and Jane Soboleski, Ferikes & Bleynt, PLLC, for
Defendant-Appellants.*

*R. Palmer Sugg and Neil T. Oakley, Robbins May & Rich, LLP, for Plaintiff-
Appellees.*

HUNTER, JR., Robert N., Judge.

Black Diamond French Truffles, Inc. (“BDFT”) and Susan Rice (collectively,
“Defendants”) appeal from an order granting Plaintiffs’ motion for judgment on the
pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. For
the following reasons, we dismiss Defendants’ appeal as interlocutory.

I. Factual & Procedural History

Defendant BDFT is a North Carolina corporation. Since its incorporation in
2007, Defendant Susan Rice has been BDFT’s president. On 19 March 2008, Plaintiff

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Karen Larsen purchased 25,000 shares of BDFT Series B Preferred Stock. On 15 May 2008, Plaintiffs Chiara and Christer Idhammar purchased 25,000 shares of BDFT Series A Preferred Stock. On 24 June 2008, Plaintiff Mary Jo Stout purchased 25,000 shares of BDFT Series A Preferred Stock.

On 25 November 2013, Plaintiffs filed a verified complaint, alleging that they are qualified shareholders of BDFT and are entitled to inspect certain corporate records under N.C. Gen. Stat. § 55-16-02. Plaintiffs' complaint contended that they met the statutory notice and demand requirements of N.C. Gen. Stat. § 55-16-02, but Defendants refused to provide the requested documents. Plaintiffs asked the trial court to order Defendants to permit them to inspect the corporate records, and to order Defendants to pay Plaintiffs' costs incurred to obtain the order, including reasonable attorney's fees.

On 30 January 2014, Defendants answered Plaintiffs' complaint. In their answer, Defendants admitted that Plaintiff Idhammar sent a written demand to Defendant Rice and admitted that Defendant Rice "agreed to provide the requested information 'as soon as [Defendants] have it in proper form[.]'" Defendants denied all other relevant allegations, including Plaintiffs' contention that they desired to inspect the records in good faith and for a proper purpose.

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On 14 May 2014, Plaintiffs filed a Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. The motion was heard on 30 May 2014. On 16 June 2014, the trial court issued an order granting the motion for judgment on the pleadings as to Plaintiffs Larsen, Christer Idhammar, and Stout, but denying the motion as to Plaintiff Chiara Idhammar. The trial court also ordered Defendant BDFT to pay Plaintiffs Larsen, Christer Idhammar, and Stout's attorney's fees in the amount of \$4,520.62. Defendants filed timely written notice of appeal on 23 June 2014.

Defendants filed their principal appellant brief with this Court on 25 November 2014. Defendants argue in their brief that the trial court erred in granting Plaintiffs' motion for judgment on the pleadings and awarding attorney's fees. Defendants contend that the trial court's grant of Plaintiffs' motion for judgment on the pleadings was erroneous because, among other things, the order "did not fully resolve all issues between all of the parties." Despite that admission, Defendants' principal brief to this Court does not address the interlocutory nature of their appeal, or allege that the trial court's order deprives them of a substantial right. Furthermore, Defendants' principal brief contains no statement of the grounds for appellate review.

On 15 January 2015, Plaintiffs filed their appellee brief with this Court. In their brief, Plaintiffs argue that Defendants' appeal should be dismissed as

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interlocutory. Plaintiffs contend that the appeal is interlocutory because it does not finally determine the entire controversy, and neither a substantial right is implicated nor did the trial court certify the case for appellate review pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

Defendants served Plaintiffs with a reply brief on 29 January 2015. In their reply brief, Defendants admit that the appeal is interlocutory, but argue that grounds for appellate review exist because the trial court's judgment on the pleadings creates "a potential for inconsistent trial verdicts" and therefore "affects a substantial right." We need not reach the issue of whether a substantial right is implicated here because Defendants failed to properly establish grounds for appellate review. Defendants' appeal must be dismissed.

II. Analysis

"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." *Veazy v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). As a general rule, there is no right of appeal from an interlocutory order. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). "The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting

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the trial court to bring the case to final judgment before it is presented to the appellate courts.” *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985) (citation omitted). However, there are two circumstances under which a party is permitted to appeal an interlocutory order:

First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys, 115 N.C. App. at 379, 444 S.E.2d at 253 (internal citations and quotation marks omitted). “Under either of these two circumstances, it is the appellant’s burden to present appropriate grounds for this Court’s acceptance of an interlocutory appeal[.]” *Id.* “It is not the duty of this Court to construct arguments for or find support for appellant’s right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right[.]” *Id.* at 380, 337 S.E.2d at 254.

In this case, the trial court’s order is interlocutory because it does not dispose of the case as to Plaintiff Chiara Idhammar. Furthermore, the trial court did not certify in the judgment that there is no just reason for delay of the appeal under Rule

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54(b) of the North Carolina Rules of Civil Procedure. Therefore, in order for this Court to accept Defendants' interlocutory appeal, Defendants must show that the trial court's order deprives Defendants of a substantial right.

Here, Defendants' only allegation of a substantial right deprivation is in their reply brief, as a reaction to Plaintiffs' argument that the appeal should be dismissed as interlocutory. Therefore, for this Court to find that proper grounds exist for appellate review, we must either: (1) find that Defendants' principal brief sufficiently states grounds for appellate review; or (2) allow Defendants to establish grounds for appellate review via reply brief. We refuse to do so for the following reasons.

Defendants' principal brief is wholly insufficient to establish grounds for appellate review. Not only did the principal brief not mention the interlocutory nature of the appeal or the issue of a substantial right deprivation, but also it did not include *any* statement of grounds for appellate review, in violation of Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure. Rule 28(b) provides:

An appellant's brief *shall* contain . . .

(4) *A statement of the grounds for appellate review.* Such statement *shall* include citation of the statute or statutes permitting appellate review. . . . 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.

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N.C. R. App. P. 28(b)(4) (2014) (emphasis added). Our Supreme Court has held that noncompliance with “nonjurisdictional” rules such as Rule 28(b) “normally should not lead to dismissal of the appeal.” *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). However, when an appeal is interlocutory, Rule 28(b)(4) is not a “nonjurisdictional” rule. Rather, the *only way* an appellant may establish appellate jurisdiction in an interlocutory case (absent Rule 54(b) certification) is by showing grounds for appellate review based on the order affecting a substantial right. In this case, because Defendants failed to state *any* grounds for appellate review in their principal brief, their appeal can only survive if we allow Defendants to establish grounds for appellate review via reply brief.

We will not allow Defendants to use their reply brief to independently establish grounds for appellate review. Rule 28(h) of the North Carolina Rules of Appellate Procedure governs reply briefs. Rule 28(h) was amended in 2013 to provide greater opportunity for an appellant to submit a reply brief. The amended Rule provides:

Within fourteen days after an appellee’s brief has been served on an appellant, the appellant may file and serve a reply brief, subject to the length limitations set forth in Rule 28(j). 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 and shall not reiterate arguments set forth in the appellant’s principal brief.

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N.C. R. App. P. 28(h) (2014). Although this Rule is permissive, allowing appellants to freely file reply briefs so long as they follow the Rule’s requirements, this Court has noted that “[a] reply brief does not serve as a way to correct deficiencies in the principal brief.” *State v. Greene*, 753 S.E.2d 397, 2013 WL 5947337, at *5 (N.C. Ct. App. 2013) (unpublished); *see also Red Arrow v. Pine Lake Preparatory, Inc. Bd. of Dirs.*, 741 S.E.2d 511, 2013 WL 1314053, at *2 (N.C. Ct. App. 2013) (unpublished).¹

For example, we have held that where a criminal defendant did not ask this Court to review an unpreserved issue under the plain error standard in his principal brief, he may not cure this deficiency by mentioning plain error in his reply brief. *See State v. Dinan*, ___ N.C. App. ___, ___, 757 S.E.2d 481, 485 (2014) (“[A] reply brief is not an avenue to correct the deficiencies contained in the original brief.”); *see also Greene*, at *5.

Furthermore, we have held that under Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, where a party fails to assert a claim in its principal brief, it abandons that issue and cannot revive the issue via reply brief. *See Beckles-*

¹ Under the old version of Rule 28(h), an appellant was not permitted to submit a reply brief except under certain circumstances, one of which was “if the appellee has presented in its brief new or additional issues[.]” N.C. R. App. P. 28(h) (2012). In *Red Arrow*, this Court held that where an appellant did not mention the interlocutory nature of the appeal in her principal brief, and the appellees subsequently raised the issue in their brief, the appellees’ raising of the issue was not “new or additional[.]” rather, it was a different argument on the grounds for appeal. *Red Arrow*, 2013 WL 1314053, at *2. Therefore, we refused to consider the appellant’s reply brief. *Id.* at *2. Our opinion here, under the new Rule 28(h), is consistent with our holding in *Red Arrow*.

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Palomares v. Logan, 202 N.C. App. 235, 246, 688 S.E.2d 758, 765 (2010) (holding that appellant abandoned its statute of limitations argument “by its failure to advance the issue in its principal brief”); *see also* N.C. R. App. P. 28(b)(6) (2014) (“An appellant’s brief shall contain . . . the contentions of the appellant with respect to each issue presented. Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”).

Therefore, in this case, we will not allow Defendants to correct the deficiencies of their principal brief in their reply brief. Because “it is the appellant’s burden to present appropriate grounds for this Court’s acceptance of an interlocutory appeal[,]” *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253, and Defendants have not met their burden, Defendants’ appeal must be dismissed.

III. Conclusion

For the foregoing reasons, Defendants’ appeal is dismissed as interlocutory.

DISMISSED.

Judges STEPHENS and TYSON concur.