

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-889

Filed: 2 June 2015

Moore County, No. 11-CVS-927

BRANCH BANKING AND TRUST COMPANY, Plaintiff,

v.

PEACOCK FARM, INC., RODOLPHE T. LYNCH AND WILLARD A. RHODES,
Defendants.

Appeal by defendant Rodolphe T. Lynch from order entered 5 June 2012 by Judge Anderson D. Cromer in Moore County Superior Court. Heard in the Court of Appeals 21 January 2015.

Howard, Stallings, From & Hutson, P.A., by Matthew M. Lawless and John N. Hutson, Jr., for plaintiff-appellee.

Van Camp, Meacham & Newman, PLLC, by William M. Van O'Linda, Jr. and Michael J. Newman, for defendant-appellant Rodolphe T. Lynch.

DAVIS, Judge.

Defendant Rodolphe T. Lynch ("Lynch") appeals from the trial court's order granting summary judgment in favor of plaintiff Branch Banking & Trust Company ("BB&T") in this action seeking to enforce a guaranty agreement. After careful review, we dismiss the appeal for lack of appellate jurisdiction.

Factual Background

Willard A. Rhodes ("Rhodes") is a developer and the sole owner of Peacock

Opinion of the Court

Farm, Inc. (“Peacock Farm”). Lynch operates a business that specializes in farm management and field preparation of horse farms. In spring 2007, Lynch and Rhodes began discussing development of a residential horse farm in Southern Pines, North Carolina to be called Pelham Farms. The two men entered into a Memorandum of Understanding, which provided that Lynch would do the site work for the development at cost and receive 50% of the net profits from the development.

According to Lynch, he understood that Peacock Farm would initially own the Pelham Farms property, but that it would ultimately transfer the property to a separate partnership between Lynch and Rhodes. The Memorandum of Understanding, however, provided that Peacock Farm would hold title to the land and that Lynch’s interest would be limited to receiving 50% of the net profits from the sale of the property.

On 15 May 2007, Peacock Farm and Lynch executed a loan agreement with BB&T, which provided that BB&T would loan Peacock Farm \$2,250,000.00 and that Lynch and Rhodes would each personally guarantee Peacock Farm’s promissory note. On the same day, Lynch signed an agreement guaranteeing the loan. The guaranty agreement provided, in part, that Lynch guaranteed the debts of Peacock Farm absolutely and unconditionally “at any time, now or hereafter” acquired and that his obligation would be a primary rather than a secondary obligation.

On 9 August 2007, when BB&T made three additional loans to Peacock Farm, Lynch signed three corresponding personal guaranty agreements with virtually

Opinion of the Court

identical language. The loans were also secured by a deed of trust encumbering Pelham Farms.

Sometime in early 2008, Lynch realized that he did not own half of the property that made up Pelham Farms and had no control over the development. He contacted a loan officer with BB&T to inform him that it had been Lynch's understanding that he would ultimately have an ownership interest in Pelham Farms. On 24 April 2009, Lynch, through counsel, wrote BB&T a letter conveying this same information. Lynch indicated to BB&T that he would not participate in the renewal of the loan or execute any other notes.

On 12 June 2009, an employee of BB&T inadvertently emailed Lynch a document prepared by BB&T's in house counsel entitled "Problem Loan Review for Peacock Farm, Inc." This document reviewed the file materials concerning the loans and addressed possible concerns with the documentation, including concerns regarding what benefit Lynch was receiving as consideration for him serving as a guarantor, and ultimately recommended that BB&T confirm that proper consideration actually existed.

Peacock Farm defaulted on the BB&T notes, and BB&T filed suit against Peacock Farm, Rhodes, and Lynch, seeking to hold them jointly and severally liable. Lynch filed a motion to dismiss, an answer, various counterclaims, and cross-claims against Rhodes and Peacock Farm seeking indemnity and contribution. Peacock Farm and Rhodes also asserted cross-claims against Lynch for contribution.

Opinion of the Court

On 27 January 2012, BB&T filed a notice of voluntary dismissal with prejudice of its claims against Rhodes and Peacock Farm. On 23 February 2012, BB&T moved for summary judgment with respect to its claims against Lynch and Lynch's counterclaims against BB&T.

Lynch moved to amend his answer on 30 May 2012 to add the defense of release. Lynch alleged in the motion that BB&T had settled its claims with Peacock Farm and Rhodes and released their obligations under the notes and guaranty agreements. Lynch contended that "BB&T's release of Defendants [sic] Peacock Farm, Inc. operates as a discharge of Defendant's [sic] Lynch's obligations under his guaranty"

The trial court entered an order on 5 June 2012 (1) granting Lynch's motion to amend his answer; and (2) granting BB&T's motion for summary judgment. The order entered judgment in favor of BB&T and against Lynch in the amount of \$3,749,255.85. Lynch filed a notice of appeal and moved for a stay pending appeal. On 12 July 2012, the trial court granted Lynch's motion for a stay on the condition that Lynch post an appeal bond in the amount of \$25,000.00. BB&T filed a notice of cross-appeal from the order granting the stay.

On 6 August 2013, this Court issued an opinion dismissing Lynch's appeal on the grounds that (1) it was interlocutory due to the fact that cross-claims between Lynch, Peacock Farm, and Rhodes were still pending; and (2) Lynch had failed to show that the 5 June 2012 order affected a substantial right. *Branch Banking &*

Opinion of the Court

Trust Co. v. Peacock Farm, Inc., __ N.C. App. __, 749 S.E.2d 111 (2013) (unpublished).¹

Over eight months later, Lynch obtained an order from the trial court on 16 April 2014 purporting to certify its 5 June 2012 judgment in favor of BB&T for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.² On 8 May 2014, Lynch filed a new notice of appeal seeking once again to appeal the trial court's 5 June 2012 order.

Analysis

It is undisputed by the parties that the current appeal remains interlocutory given that the cross-claims between Lynch, Peacock Farms, and Rhodes remain unresolved. Generally, there is no right of immediate appeal from an interlocutory order. *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, __ N.C. App. __, __, 745 S.E.2d 69, 72 (2013).

However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

¹ This Court also dismissed BB&T's cross-appeal. *Branch Banking & Trust Co.*, __ N.C. App. __, 749 S.E.2d 111, slip op. at 10-11.

² In its 16 April 2014 order, the trial court also lifted the stay it had previously entered, thereby allowing BB&T to proceed with execution on its judgment within 30 days.

Opinion of the Court

N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995)
(internal citations omitted).

In dismissing Lynch's initial appeal, we held that

the [5 June 2012] summary judgment order contained no Rule 54(b) certification. . . . Lynch was, therefore, required to set forth sufficient facts and argument to show that the order affected a substantial right. However, . . . Lynch's statement of grounds for appellate review asserted in its entirety:

This Court has jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) as the 5 June 2012 Judgment is a final judgment in favor of BB&T and against Defendant Lynch on his affirmative defenses and counterclaims.

Thus, . . . Lynch's brief implicitly acknowledged that the summary judgment order resolved only the claims pending between BB&T and . . . Lynch and not the other claims pending among the co-defendants. Nonetheless, the brief does not argue and makes no showing that this order would affect a substantial right in the absence of an immediate appeal.

Branch Banking & Trust Co., __ N.C. App. __, 749 S.E.2d 111, slip op. at 8 (emphasis omitted).

After our dismissal of the appeal, over eight months passed before Lynch obtained the 16 April 2014 order from the trial court, which stated, in pertinent part, as follows:

[T]his Court finds that a money judgment in the amount of Three Million Seven Hundred Forty-Nine Thousand Two Hundred Fifty-Five Dollars and Eighty-Five Cents

Opinion of the Court

(\$3,749,255.85) affects a substantial right under North Carolina law. Wachovia Realty Inv. Housing, Inc., 292 NC 93, 99 (N.C. 1977). Further, the only remaining claims in this case are cross-claims between the Defendants Lynch and Rhodes for contribution or indemnity. However, these cross-claims cannot be finally resolved until there is a determination of (a) the validity of BB&T's judgment against Mr. Lynch, and (b) the amount BB&T is actually able to recover from Mr. Lynch. Thus, pursuant to Rule 54(b) this Court finds, in its discretion, that there is no just reason for the Defendant Lynch to delay appealing BB&T's judgment herein.

The 16 April 2014 order was not an amended judgment regarding BB&T's claim against Lynch. It did not set out the substantive basis for ruling that the granting of BB&T's motion was proper under Rule 56. Instead, it served as a "stand-alone" order, simply making reference to its prior judgment in favor of BB&T and stating its belief that "in its discretion" an immediate appeal as to that judgment was appropriate.

Rule 54(b) of the North Carolina Rules of Civil Procedure provides, in pertinent part, that "[w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim . . . the court may enter a final judgment as to one or more but fewer than all of the claims . . . only if there is no just reason for delay *and it is so determined in the judgment*. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes." N.C.R. Civ. P. 54(b) (emphasis added). However, "the trial court's determination that there is no just reason to delay the appeal, while accorded great

Opinion of the Court

deference, cannot bind the appellate courts because ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court.” *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) (internal citations and quotation marks omitted); *see Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979) (affirming dismissal of interlocutory appeal where trial court’s use of certification language under Rule 54(b) was insufficient to establish appellate jurisdiction; “That the trial court declared it to be a final . . . judgment does not make it so.”).

We conclude here that the trial court’s 16 April 2014 order fails to confer jurisdiction upon this Court to review the trial court’s 5 June 2012 order. Had Lynch desired to take a proper appeal of the trial court’s 5 June 2012 interlocutory order, he had two options. First, he could have noticed an appeal and then demonstrated in his appellate brief how the trial court’s order deprived him of a substantial right. Instead, while he did notice an appeal within 30 days of the 5 June 2012 order, he failed to even argue — much less make a valid showing — in his brief that he would be deprived of a substantial right absent an immediate appeal. As a result, his appeal was dismissed by this Court.³ Lynch has failed to cite any caselaw suggesting that litigants are entitled to multiple “bites at the apple” to establish the existence of

³ In the event Lynch believed that this Court erred in dismissing his initial appeal, he could have filed a petition for discretionary review with our Supreme Court. However, he failed to do so.

Opinion of the Court

appellate jurisdiction over an interlocutory appeal based on the “substantial right” doctrine.

Alternatively, he could have obtained from the trial court the inclusion of appropriate language *in the 5 June 2012 order itself* certifying the case for immediate review pursuant to Rule 54(b) on the ground that there was no just reason to delay the appeal. *See Brown v. Brown*, 77 N.C. App. 206, 208, 334 S.E.2d 506, 508 (1985) (“Rule 54(b) expressly requires that this determination be stated *in the judgment itself*.” (emphasis added)), *disc. review denied*, 315 N.C. 389, 338 S.E.2d 878 (1986); *see also Tridyn Indus.*, 296 N.C. at 490, 251 S.E.2d at 447 (holding that “Rule 54(b) permits the trial judge *by determining in such a judgment* that ‘there is no just reason for delay’ to release it for immediate appeal before the litigation is complete as to all claims or all parties.” (emphasis added)). However, Lynch either did not seek the inclusion of such certification language in the order or was unsuccessful in persuading the trial court to add such language. In any event, the 5 June 2012 order did not contain a Rule 54(b) certification.

While, as explained above, Lynch ultimately obtained a *separate* order from the trial court on 16 April 2014 purporting to certify for immediate appeal the 5 June 2012 order it had issued almost two full years earlier, the 16 April 2014 order is not the order from which Lynch seeks to appeal. Neither Rule 54(b) itself nor the cases interpreting it authorize such a retroactive attempt to certify a *prior* order for immediate appeal in this fashion. Therefore, because Rule 54(b) cannot be used to

Opinion of the Court

create appellate jurisdiction based on certification language that is not contained in the body of the judgment itself from which appeal is being sought, dismissal of Lynch’s appeal is, once again, appropriate.

In reaching a contrary conclusion, the dissent neither cites any North Carolina caselaw supporting its interpretation of Rule 54(b) nor acknowledges the express language contained in the rule itself that certification language must be included “in the judgment.” Notably, while the dissent cites our decision in *Newcomb v. Cty. of Carteret*, 207 N.C. App 527, 701 S.E.2d 325 (2010), *disc. review denied*, 365 N.C. 212, 710 S.E.2d 26 (2011), this Court held in *Newcomb* that it *lacked* appellate jurisdiction pursuant to Rule 54(b) where — as here — the trial court’s attempt to retroactively certify its prior order failed to comply with the Rules of Civil Procedure.

The trial court did not certify the issue of Carteret County’s right to control permanent structures in Marshallberg Harbor for immediate review in its initial summary judgment order. However, in its amended summary judgment order, the trial court attempted to add a certification relating to this issue in apparent reliance on its authority to correct clerical errors under N.C. Gen. Stat. § 1A-1, Rule 60(a). A careful review of the relevant authorities establishes that the trial court lacked the authority to amend its summary judgment order in this fashion.

Id. at 543, 701 S.E.2d at 337.

This Court concluded that “the trial court lacked the authority to amend the original summary judgment order for the purpose of certifying additional issues for

Opinion of the Court

immediate appeal pursuant to Rule 54(b).” *Id.* at 545, 701 S.E.2d at 338⁴; *see also Pratt v. Staton*, 147 N.C. App. 771, 774-75, 556 S.E.2d 621, 624 (2001) (“[B]y adding the trial court’s Rule 54(b) certification and establishing grounds for immediate appellate review of an otherwise interlocutory order, the trial court’s 10 October 2000 amended order . . . altered the substantive rights of the parties. . . . [T]he amended order in the instant case allowed plaintiffs to circumvent the established procedural rules governing the bringing of an appeal and secure appellate review of an otherwise unappealable order [pursuant to Rule 54(b)].” (internal citation and quotation marks omitted)).

Nor do we agree with the dissent’s alternative suggestion that we treat Lynch’s appeal as a petition for certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, thereby granting a petition that Lynch did not actually file. “[O]ur courts have frequently observed that a writ of certiorari is an extraordinary remedial writ.” *N.C. Cent. Univ. v. Taylor*, 122 N.C. App. 609, 612, 471 S.E.2d 115, 117 (1996), *aff’d per curiam*, 345 N.C. 630, 481 S.E.2d 83 (1997).

In our view, Lynch’s appeal fails to present a compelling basis for such extraordinary relief here. Lynch has now failed on two separate occasions to properly bring an interlocutory appeal that complies with the rules governing the

⁴ While the *Newcomb* court deemed it appropriate to treat the record and briefs as a petition for the issuance of a writ of certiorari and to grant the “petition” *sua sponte*, *see Newcomb*, 207 N.C. App. at 545, 701 S.E.2d at 338-39, we decline to do so here for the reasons set out below.

Opinion of the Court

appealability of such orders. *See generally Tridyn Indus.*, 296 N.C. at 494, 251 S.E.2d at 449 (declining to exercise certiorari powers under Appellate Rule 21 where appeal was properly dismissed as interlocutory despite trial court's inclusion of language purporting to certify it for immediate appeal).

Indeed, it is appropriate to note that this case involves a straightforward commercial dispute that is unremarkable either factually or legally. Neither the dissent nor the trial court's 16 April 2014 order explain precisely *why* the pending cross-claims cannot be resolved in the trial court absent immediate appellate review of the 5 June 2012 order. Lynch has failed to cite any North Carolina case for the proposition that cross-claims between a debtor and a guarantor are unable to be litigated until there has been final appellate review of a judgment in favor of the creditor on the guarantor's liability for the underlying debt. Moreover, the eight-month delay between the dismissal of Lynch's first appeal and the 16 April 2014 order — a delay the dissent ignores — belies the notion that there is an urgent need for immediate appellate review over the trial court's 5 June 2012 order. As such, we do not discern any basis for excusing Lynch from compliance with the same rules which every other appellant in this Court is bound to follow.

Rather than deciding on an *ad hoc* basis whether or not an appellant should be held to strict compliance with the laws governing appellate jurisdiction over interlocutory appeals, we believe instead that consistent enforcement of the existing jurisdictional rules is more in keeping with the goal of North Carolina's appellate

Opinion of the Court

courts to ensure the uniform application of the laws to all similarly situated litigants. As our Supreme Court has long held, “[w]hen litigants resort to the judiciary for the settlement of their disputes, they . . . should not forget that rules of procedure are necessary, and must be observed” *Pruitt v. Wood*, 199 N.C. 788, 790, 156 S.E. 126, 127 (1930).

Conclusion

For the reasons stated above, Lynch’s appeal is dismissed.

DISMISSED.

Judge ELMORE concurs.

Judge TYSON dissents in a separate opinion.

No. COA14-889 – Branch Banking and Trust Company v. Peacock Farms, Inc.

TYSON, Judge, dissenting.

As the majority’s opinion notes, this is the second time this case has been brought before this Court. In the previous appeal, this Court did not address the merits due to the following grounds: (1) the 5 June 2012 order from which he appealed was interlocutory and did not contain the trial court’s Rule 54(b) certification; and, (2) Lynch failed to argue or show the 5 June 2012 order affected a substantial right. *Branch Banking & Trust Co. v. Peacock Farms, Inc.*, __ N.C. App. __, 749 S.E.2d 111 (2013) (unpublished).

I respectfully dissent from the majority’s holding to dismiss Lynch’s appeal for lack of appellate jurisdiction. I vote to address the merits pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. In the alternative, I vote to treat this notice of appeal and briefs as a petition for the issuance of a writ of *certiorari* pursuant to N.C.R. App. P. 21(a)(1) (2013) and to grant that petition for judicial economy.

The trial court’s 16 April 2014 order stated the “cross-claims between the Defendants Lynch and Rhodes for contribution or indemnity . . . cannot be finally resolved until there is a determination of . . . the validity of BB&T’s judgment against Mr. Lynch.” Upon review of the merits of Lynch’s appeal, the trial court’s order granting summary judgment in favor of BB&T should be affirmed.

I. Interlocutory Appeal

A. Standard of Review

Our Supreme Court has stated:

TYSON, J., Dissenting

Generally, a party cannot appeal from an interlocutory order unless failure to grant immediate review would affect a substantial right pursuant to N.C.G.S. sections 1-277 and 7A-27(d).

A party may appeal an interlocutory order under two circumstances. First, the trial court may certify that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. Second, a party may appeal an interlocutory order that affects some substantial right claimed by the appellant and will work injury to him if not correct before an appeal from the final judgment.

Davis v. Davis, 360 N.C. 518, 524-25, 631 S.E.2d 114, 119 (2006) (citations and internal quotation marks omitted).

B. Analysis

The majority's opinion holds "[n]either Rule 54(b) itself nor the cases interpreting it authorize such a retroactive attempt to certify a *prior* order for immediate appeal." I disagree.

Rule 54(b) of the North Carolina Rules of Civil Procedure enables review of interlocutory orders and judgments "when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999) (citation omitted). The final sentence of Rule 54(b) further provides "in the absence of entry of such a final judgment, any order or other form of decision is subject to revision *at any time before the entry of judgment adjudicating all the claims* and the

rights and liabilities of all the parties.” N.C. Gen. Stat. § 1A-1, Rule 54(b) (2013) (emphasis supplied). Our Supreme Court held “[c]ertification under Rule 54(b) permits an interlocutory appeal from orders that are final as to specific portion of the case, but which do not dispose of all claims as to all parties.” *Duncan v. Duncan*, 366 N.C. 544, 545, 742 S.E.2d 799, 801 (2013).

The majority’s opinion notes this Court dismissed Lynch’s prior appeal because the trial court’s summary judgment order did not contain a Rule 54(b) certification, nor did Lynch argue this order affected a substantial right which would be lost without immediate review. *Branch Banking & Trust Co. v. Peacock Farms, Inc.*, __ N.C. App. __, 749 S.E.2d 111 (2013) (unpublished).

After dismissal of the prior appeal, the trial court entered an order, which lifted the stay on enforcement of its 5 June 2012 judgment and granted Lynch’s motion to certify BB&T’s judgment as immediately appealable pursuant to Rule 54(b) on 16 April 2014. The trial court’s order states

the only remaining claims in this case are cross-claims between the Defendants Lynch and Rhodes for contribution or indemnity. However, *these cross-claims cannot be finally resolved until there is a determination of (a) the validity of BB&T’s judgment against Mr. Lynch, and (b) the amount BB&T is actually able to recover from Mr. Lynch.* Thus, *pursuant to Rule 54(b)* this Court finds, in its discretion, that *there is no just reason for the Defendant Lynch to delay appealing BB&T’s judgment herein.*

(emphasis supplied).

Based on the last sentence of Rule 54(b), and the absence of any case law to the contrary, the trial court properly certified its 5 June 2012 order as immediately appealable pursuant to Rule 54(b). This Court has jurisdiction to address the merits of Lynch's appeal.

The parties at bar have been entangled in litigation since March 2011. Unless and until this Court reaches the merits of this appeal, the parties cannot move forward or obtain any final resolution on their respective claims.

Under judicial economy, this Court should resolve this issue on the merits. Our decision will not only expedite the ultimate resolution of this case and, as the trial court stated in its order, doing so is *essential* for the parties to reach any finality in the case. *Wilkins v. Safran*, 185 N.C. App. 668, 671, 649 S.E.2d 658, 661 (2007) (electing to review interlocutory appeal "because there is no just reason for delay and our review will avoid both piece-meal litigation and the risk of inconsistent verdicts").

In addition, and in the alternative, I would treat Lynch's notice of appeal and brief as a petition for the issuance of a writ of *certiorari* directed toward the issue of the validity of BB&T's judgment against him pursuant to Rule 21(a)(1) and grant the petition. N.C.R. App. P. 21(a); *see Newcomb v. Cty. of Carteret*, 207 N.C. App. 527, 545, 701 S.E.2d 325, 339 (2010) (electing to treat the record and briefs as a petition for the issuance of a writ of *certiorari* where consideration of the issue on the merits would expedite the ultimate disposition of case).

TYSON, J., Dissenting

II. Summary Judgment in Favor of BB&T

A. Issues

Lynch argues the trial court erred by granting summary judgment in favor of BB&T. He asserts genuine issues of material facts exist concerning whether (1) the parties involved mistakenly believed Lynch was a 50/50 owner and partner in Peacock Farms; and (2) BB&T's release from further liability of defendants Rhodes and Peacock Farms also released Lynch from his absolute guaranty.

B. Standard of Review

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c); *see Draughon v. Harnett Cty. Bd. Of Educ.*, 158 N.C. App. 208, 211, 580 S.E.2d 732, 735 (2003) (citation and internal quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

A party moving for summary judgment may prevail by "(1) proving that an essential element of the [nonmoving party's] case is nonexistent, or (2) showing through discovery that the [nonmoving party] cannot produce evidence to support an essential element of his or her claim, or (3) showing that the [nonmoving party] cannot surmount an affirmative defense." *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995).

TYSON, J., Dissenting

“In a motion for summary judgment, the evidence presented to the trial court must be . . . viewed in a light most favorable to the non-moving party.” *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (citation omitted).

“Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.” *Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735 (citation and quotation marks omitted). This Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

C. Guaranty

A Guaranty of payment is an absolute promise by the guarantor to pay the debt at maturity if it is not paid by the principal debtor. The obligation of the guarantor is separate and independent of the obligation of the principal debtor, and the creditor’s cause of action against the guarantor ripens immediately upon failure of the principal debtor to pay the debt at maturity.

EAC Credit Corp. v. Wilson, 281 N.C. 140, 145, 187 S.E.2d 752, 755 (1972) (citation omitted).

Lynch argues BB&T should be estopped from enforcing the guaranties because they were obtained without consideration. This argument misstates the well-settled law in North Carolina and does not present a genuine issue of material fact.

This Court held “in a guaranty contract, a consideration moving directly to the

guarantor is not necessary. The promise is enforceable if a benefit to the principal debtor is shown or if a detriment or inconvenience to the promisee is disclosed.” *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 196, 188 S.E.2d 342, 345 (1972) (citation omitted).

The evidence Lynch proffered tends to show: (1) BB&T had a long-standing prior relationship with Rhodes and Peacock Farms; (2) BB&T loaned more than 100% of the appraised value of the project; (3) Lynch and Rhodes signed a Memorandum of Understanding, in which the parties allegedly agreed to a 50/50 share of net profits; (4) BB&T settled with and released Peacock Farms and Rhodes for \$100,000.00; (5) Lynch was not a party to the settlement and release; and, (6) the property was conveyed by a quit-claim deed to a third party, purportedly leaving Lynch with no recourse on the original collateral.

The arguments raised by Lynch are issues between Lynch and Rhodes, not Lynch and BB&T. No genuine issue of material fact exists between Lynch and BB&T on his liability under the guarantees. Lynch was unable to proffer any evidence to show BB&T was mistaken about whether Lynch had any ownership interest in Peacock Farms.

The record also shows no proffer of evidence that BB&T extended the payment terms or issued any additional credit to Peacock Farms after Lynch gave notice to BB&T he would not participate in and guarantee further extensions of credit. The

trial court properly granted summary judgment to BB&T.

This record evidence suggests Lynch may have entered into an unfavorable business arrangement with Peacock Farms and Rhodes. The evidence does not, however, raise genuine issues of material facts of whether BB&T had the right to enforce Lynch's guaranties, even when viewed in the light most favorable to Lynch.

N.C. Gen. Stat. § 26-3.1 provides where a guarantor pays the debt of his principal, the guarantor has a right to "either sue his principal for reimbursement or sue his principal on the instrument and may maintain any action or avail himself of any remedy which the creditor himself might have had against the principal debtor." N.C. Gen. Stat. § 26-3.1 (2013).

Lynch's loan agreements and his guaranty agreements with BB&T expressly incorporated the terms of Peacock Farms' promissory notes. Lynch agreed BB&T "shall have the unlimited right to release any person who might be liable hereon, and such release shall not affect or discharge the liability of any other person who is or might be liable hereon."

The remaining issues left for resolution concern Lynch's rights of indemnity and contribution from Peacock Farms and Rhodes. The trial court properly granted summary judgment on BB&T's action to enforce Lynch's guaranties.

Conclusion

This Court has jurisdiction to address the merits of Lynch's interlocutory

TYSON, J., Dissenting

appeal. The trial court certified its 5 June 2012 order for immediate appeal under Rule 54(b). N.C. Gen. Stat. § 1A-1, Rule 54(b) (2013). The trial court also stated the case could not proceed further until Lynch's liability to BB&T was resolved. Alternatively, this Court should treat the notice of appeal and briefs as a petition for writ of *certiorari*, and grant that petition to address the merits. *Newcomb*, 207 N.C. App. at 545, 701 S.E.2d at 339.

Lynch did not proffer any evidence BB&T mistakenly believed he had an ownership interest in Peacock, or that BB&T extended any additional credit to Peacock Farms after Lynch notified BB&T he would not participate in further extensions of credit.

The trial court correctly found no genuine issue of material fact exists and properly granted summary judgment in favor of BB&T. The uncontroverted evidence showed BB&T did not release Lynch when it settled and released defendants Rhodes and Peacock Farms. I vote to affirm the decision of the trial court, which granted summary judgment to BB&T. I respectfully dissent.