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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-983

Filed: 2 May 2017

Cumberland County, No. 15 CVS 5109

JAMES T. GROSSLIGHT, Plaintiff,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION and EUGENE CONTI, in his former official capacity as Secretary of the North Carolina Department of Transportation, NORTH CAROLINA DIVISION OF MOTOR VEHICLES and MICHAEL ROBERTSON, in his former official capacity as Commissioner of the North Carolina Division of Motor Vehicles, RONALD GENE KAYLOR, in his former official capacity as Deputy Commissioner of the North Carolina Division of Motor Vehicles, JACK D. COLTRANE, in his former official capacity as Director of the North Carolina License and Theft Bureau, TIMOTHY I. HICKMAN, in his former official capacity as the District Supervisor of District 2 of the North Carolina License and Theft Bureau, DEAN MACKEY, in his individual capacity and in his official capacity as Assistant District Supervisor of District 2 of the North Carolina License and Theft Bureau, PAUL GRAHAM, in his individual and official capacity, as Inspector of [the] License and Theft Bureau, JEFFREY R. ZIMMERMAN, in his individual capacity and official capacity as Inspector of the License and Theft Bureau, and DEPUTY STACEY SANDERS, in her individual capacity and official capacity as a Deputy Sheriff of the Cumberland County Sheriff[']s Office, Defendants.

Appeal by plaintiff from order entered 27 April 2016 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 3 April 2017.

Broughton Wilkins Sugg & Thompson, PLLC, by Charles P. Wilkins, Christopher J. Skinner, and Blair K. Beddow, for plaintiff-appellant.

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Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil Dalton and Assistant Attorney General John W. Congleton, for defendants-appellees.

ZACHARY, Judge.

James T. Grosslight (plaintiff) appeals from an order dismissing his claims against the North Carolina Department of Transportation; Eugene Conti, in his former official capacity as Secretary of the North Carolina Department of Transportation; the North Carolina Division of Motor Vehicles; Michael Robertson, in his former official capacity as Commissioner of the North Carolina Division of Motor Vehicles; Ronald Gene Kaylor, in his former official capacity as Deputy Commissioner of the North Carolina Division of Motor Vehicles; Jack D. Coltrane, in his former official capacity as Director of the North Carolina License and Theft Bureau; Timothy I. Hickman, in his former official capacity as the District Supervisor of District 2 of the North Carolina License and Theft Bureau; Dean Mackey, in his individual capacity and in his official capacity as Assistant District Supervisor of District 2 of the North Carolina License and Theft Bureau; Paul Graham, in his individual and official capacity, as Inspector for the License and Theft Bureau; Jeffrey R. Zimmerman, in his individual capacity and his official capacity as Inspector of the License and Theft Bureau; and Deputy Stacey Sanders in her official capacity as a Deputy Sheriff of the Cumberland County Sheriff's Office (defendants). Plaintiff has dismissed his claims against Mr. Zimmerman, who is not a party to this appeal.

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Plaintiff also filed suit against Deputy Stacey Sanders in her individual capacity. In its order, the trial court did not dismiss plaintiff's claims against Deputy Sanders in her individual capacity.

On appeal, plaintiff argues that the trial court erred by dismissing his claims against the defendants named above, on the grounds that his claims against the defendants were not barred by the doctrine of sovereign immunity. We conclude that defendant's appeal is interlocutory and should be dismissed.

I. Background

Plaintiff owns and operates a classic car restoration business in Fayetteville, North Carolina. Defendant Stacey Sanders is a law enforcement officer in Fayetteville. Ms. Sanders was identified in plaintiff's lawsuit as a "Deputy Sheriff" with the Cumberland County Sheriff's Department. However, at the hearing on her motion to dismiss plaintiff's complaint, Deputy Sanders' attorney stated that she was a Fayetteville Police Officer and not a Deputy Sheriff. We conclude that, for the purposes of this appeal, it is irrelevant whether Deputy Sanders was employed by the Cumberland County Sheriff's Department or the Fayetteville Police Department. For the sake of consistency, we refer to her as "Deputy Sanders" because this is how she is identified in plaintiff's complaint. The other defendants named in plaintiff's complaint are two state agencies (the Department of Transportation and its Division

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of Motor Vehicles), and several officers or employees of these agencies. We will refer to these defendants as the “State agency defendants.”

On 16 January 2015, plaintiff filed suit against defendants. Plaintiff sought damages from all of the State agency defendants for tortious interference with business relationships, and under the theory of *respondeat superior*. Plaintiff also filed claims alleging malicious prosecution, negligence and gross negligence, and intentional infliction of emotional distress against defendants Timothy Hickman, Dean Mackey, Paul Graham, and Jeffrey Zimmerman.

In support of his claims against the State agency defendants, plaintiff generally alleged the following. In 2011, plaintiff purchased a classic car restoration shop from Mr. Brian Clark, and renamed it American Classic Car Restoration (“ACCR”). When plaintiff bought the shop, he was “aware” that the shop “had been fraught with issues related to fraudulent and deceptive business practices” by Mr. Clark. After taking over the shop, plaintiff discovered numerous irregularities, including “undocumented car parts” and loose Vehicle Identification Numbers (VINs). Plaintiff consulted with defendants and expressed his concerns about “the car identification problems” at ACCR, but did not receive assistance from the State agency defendants.

In December of 2011, defendants obtained a search warrant for ACCR and removed various vehicles, plaintiff’s computer, and his security system equipment.

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Although the State agency defendants were advised by an Assistant District Attorney for Cumberland County that plaintiff had not engaged in criminal activity, they nonetheless obtained warrants for plaintiff's arrest for violation of N.C. Gen. Stat. § 14-72.7 (2015), which criminalizes "chop shop activity." This statute provides in relevant part that:

(a) A person is guilty of a Class G felony if that person engages in any of the following activities . . .

(1) Altering, destroying . . . dismantling, reassembling, or storing any motor vehicle or motor vehicle part the person knows or has reasonable grounds to believe has been illegally obtained by theft, fraud, or other illegal means.

(2) Permitting a place to be used for any activity prohibited by this section[.] . . .

(3) Purchasing, . . . transferring, . . . or possessing a motor vehicle or motor vehicle part either knowing or having reasonable grounds to believe that the vehicle identification number of the motor vehicle . . . has been altered, . . . falsified, forged, obliterated, or removed.

Between January and May, 2012, plaintiff was arrested on more than 75 charges of alleged chop shop violations. In August, 2012, plaintiff was indicted for offenses related to these arrests. In March, 2013, the District Attorney for Cumberland County dismissed the charges against defendant. Based upon these and similar underlying factual allegations, plaintiff generally asserted that defendants had failed to properly investigate chop shop activity at ACCR until after plaintiff bought the shop from Mr. Clark, and had pursued criminal charges against plaintiff

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despite a lack of evidence to support the charges. Plaintiff further alleged that defendants' actions were malicious and wanton.

Plaintiff also sought damages from Deputy Sanders for malicious prosecution and intentional infliction of emotional distress. Plaintiff's claims against the State agency defendants were based upon the actions and omissions of the defendant agencies and their officers and employees, undertaken in the course of their employment. In contrast, plaintiff's claims against Deputy Sanders arose from private business dealings related to a car owned by Deputy Sanders. Plaintiff alleged that Deputy Sanders had brought her car to ACCR and asked plaintiff to "reattach[] the VIN to her vehicle" and that Deputy Sanders had later filed "charges against" plaintiff arising out his assistance to her with this matter. Plaintiff further asserted that after he was charged with criminal offenses, plaintiff repurchased Deputy Sanders' car "[i]n order to preserve evidence in his case" and that Deputy Sanders' resale of the vehicle to plaintiff constituted "knowingly selling Plaintiff a vehicle with [an] invalid title." Plaintiff also makes a conclusory assertion that Deputy Sanders used her position as a law enforcement officer "to persuade the License and Theft Bureau to investigate Plaintiff[.]" However, this conclusory statement is not supported by any factual allegations; for example, plaintiff does not allege that there was any contact between Deputy Sanders and any of defendants. "Although it is true that the allegations of [the] plaintiff's complaint are liberally construed and generally

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treated as true . . . the trial court is not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact[.]” *Laster v. Francis*, 199 N.C. App. 572, 577, 681 S.E.2d 858, 862 (2009) (internal quotation omitted). Accordingly, we disregard this allegation.

On 23 February 2015, the State agency defendants filed motions to transfer venue pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(3), and to dismiss plaintiff’s complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), (2), (4), (5) and (6) of the North Carolina Rules of Civil Procedure. Deputy Sanders also filed a motion to dismiss plaintiff’s complaint. A hearing was conducted in Wake County Superior Court on defendants’ motions on 27 May 2015, before the Honorable James E. Hardin. On 24 June 2015, Judge Hardin entered an order transferring venue from Wake County to Cumberland County. On 29 February 2016, the Honorable Claire V. Hill conducted a hearing in Cumberland County Superior Court on defendants’ motions for dismissal of plaintiff’s claims, and on 4 March 2016, Judge Hill entered an order dismissing plaintiff’s claims against all the State agency defendants, pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(2), (4), and (5). In its order, the court also found that plaintiff had agreed to dismiss his claims against Mr. Zimmerman. In this order, the court did not dismiss plaintiff’s claims against Deputy Sanders. On 25 April 2016, the trial court conducted a hearing on a motion filed by plaintiff pursuant to N.C. Gen. Stat. § 1A-1, Rule 60, asking the trial court to reconsider its order. On 27 April

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2016, the trial court entered an order in which it (1) set aside its earlier order, and (2) entered a new order dismissing plaintiff's claims against "all Defendants except Defendant Sanders in her individual capacity" pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief could be granted. Plaintiff noted an appeal to this Court.

II. Interlocutory Nature of Plaintiff's Appeal

"According to N.C. Gen. Stat. § 1A-1, Rule 54(a), a judgment is either interlocutory or the final determination of the rights of the parties.'" *In re Accutane Litig.*, 233 N.C. App. 319, 322, 758 S.E.2d 13, 16 (2014). " '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.'" *Hill v. StubHub, Inc.*, 219 N.C. App. 227, 231-32, 727 S.E.2d 550, 553-54 (2012) (quoting *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)), *disc. review denied*, 366 N.C. 424, 736 S.E.2d 757 (2013). In this case plaintiff concedes that the trial court's order, which did not dismiss plaintiff's claims against Deputy Sanders in her individual capacity, is interlocutory.

Interlocutory orders are not immediately appealable, except "in at least two instances: when the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal; and when the interlocutory order affects a substantial right under N.C.G.S. §§ 1-277(a) and 7A-27(d)(1)." *Turner v. Hammocks*

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Beach Corp., 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (internal quotation and citation omitted). In the present case, the trial court did not certify its order for immediate review. Therefore, plaintiff is entitled to immediate appeal only if delaying appeal would deprive him of a substantial right.

The appealing party bears the burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature. If a party attempts to appeal from an interlocutory order without showing that the order in question is immediately appealable, we are required to dismiss that party's appeal on jurisdictional grounds. . . . [W]e are required to determine, before considering the merits of Plaintiff's challenges to the trial court's order, whether Plaintiff's appeal is properly before this Court at this time.

Hamilton v. Mortg. Info. Servs., Inc., 212 N.C. App. 73, 77, 711 S.E.2d 185, 189 (2011) (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994)) (other citation omitted).

Plaintiff contends that the trial court's order is subject to immediate appeal, on the grounds that "[d]elaying the appeal until a final disposition as to all Defendants may result in multiple trials with possible inconsistent verdicts as to common issues [of] fact and law." We have carefully reviewed plaintiff's argument, but conclude that it lacks merit.

"A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Embler v. Embler*, 143 N.C. App. 162, 165, 545 S.E.2d 259, 262 (2001) (internal quotation omitted).

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“According to clearly-established North Carolina law, a party’s preference for having all related claims determined during the course of a single proceeding does not rise to the level of a substantial right.” *Hamilton*, 212 N.C. App. at 79, 711 S.E.2d at 190 (citation omitted). However, if “the dismissal of an appeal as interlocutory could result in two different trials on the same issues, creating the possibility of inconsistent verdicts, a substantial right is prejudiced and therefore such dismissal is immediately appealable.” *Estate of Harvey v. Kore-Kut, Inc.*, 180 N.C. App. 195, 198, 636 S.E.2d 210, 212 (2006) (citation omitted). “[T]he possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue.” *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). “Issues are the ‘same’ if the facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts.” *Hamilton* at 79, 711 S.E.2d at 190 (citing *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491 (1989)).

In the instant case, the allegations of plaintiff’s complaint that pertain to Deputy Sanders allege actions taken by Deputy Sanders as an individual in the course of her business dealings with plaintiff. Indeed, at the hearing on defendants’ motions to dismiss, plaintiffs’ counsel stated the following:

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PLAINTIFF'S COUNSEL: With regard to Deputy Sanders or Stacey Sanders, she was not part of the DMV, not part of this investigation group. She was an individual who had a car that was being restored by Mr. Grosslight, and the [claims against] her stem[] from this contract that they have.

We have carefully reviewed the allegations of plaintiff's complaint and do not discern any allegations that Deputy Sanders had any contact with the State agency defendants. On appeal, plaintiff asserts generally that his complaint "arises out of the intentional and willful and wanton conduct by all Defendants[,] that the "basis of [plaintiff's] claims against all Defendants, including Defendant Sanders, arises out of the same set of facts[,] and that the dismissal of his appeal "would raise the possibility of inconsistent verdicts in later proceedings." However, plaintiff does not identify any questions of fact that would be at issue both in a trial of his claims against Deputy Sanders and also in a trial against one or more of the State agency defendants. "It is not the duty of this Court to construct arguments for or find support for [an] 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 which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254.

For the reasons discussed above, we conclude that plaintiff has failed to establish that the delay of his appeal might result in inconsistent verdicts on the

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same factual issues. As a result, plaintiff does not have a right to immediate appeal of the interlocutory order entered by the trial court, and his appeal must be

DISMISSED.

Chief Judge McGEE and Judge HUNTER concur.

Report per Rule 30(e).