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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-711

Filed: 2 May 2017

Mecklenburg County, No. 09 CVD 26047

BLAKE J. GEOGHAGAN, Plaintiff,

v.

BERNADETTE M. GEOGHAGAN, Defendant.

Appeal by Plaintiff from order entered 20 January 2016 by Judge Alicia D. Brooks in District Court, Mecklenburg County. Heard in the Court of Appeals 30 November 2016.

Marshall & Taylor, PLLC, by Travis R. Taylor, for Plaintiff-Appellant.

Horack Talley Pharr & Lowndes, P.A., by Christopher T. Hood and Tate K. Sterrett, for Horack Talley Pharr & Lowndes, P.A., Appellee.

McGEE, Chief Judge.

Blake J. Geoghagan (“Plaintiff”) appeals from an order denying his motion to dismiss a motion for contempt filed by Horack Talley Pharr & Lowndes, P.A. (“Horack Talley”), and denying Plaintiff’s motion for N.C. Gen. Stat. § 1A-1, Rule 11 sanctions. We dismiss Plaintiff’s appeal as interlocutory.

I. Background

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The dispute which forms the basis of this appeal arose in the context of divorce proceedings between Plaintiff and his wife, Bernadette M. Geoghagan (“Defendant”). Plaintiff filed a complaint on 15 October 2009 in Mecklenburg County District Court against Defendant seeking, *inter alia*, custody of their children, child support, and equitable distribution of the marital estate and other divisible property. Defendant employed the Horack Talley law firm to represent her in the proceedings against Plaintiff. Defendant, through Horack Talley attorneys, filed an answer to Plaintiff’s complaint on 11 January 2010. As a part of Defendant’s answer, she asserted she was a dependent spouse and requested that the court order Plaintiff to pay “a reasonable sum” towards her attorney’s fees “to the extent provided by law.” A hearing was held on Defendant’s claim for attorney’s fees on 6 February 2012. Following the hearing, the trial court entered an order directing Plaintiff to pay “the sum of \$135,453.12 directly to Horack Talley” “[o]n or before 2 March 2011,” and to pay “[t]he remaining balance of \$114,546.88” to Horack Talley in two installments: a payment of \$57,500.00 on or before 30 August 2012, and a payment of \$57,046.88 on or before 26 December 2012 (“the attorney’s fees order”).

Defendant continued to be represented by Horack Talley in the underlying lawsuit against Plaintiff in the ensuing years. Through Horack Talley attorneys, Defendant filed a motion against Plaintiff for contempt on 28 January 2013 for his failure to comply with the attorney’s fees order (“Defendant’s motion for contempt”).

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In the motion, Defendant alleged Plaintiff had failed to make the final payment of \$57,046.88, which was due to Horack Talley on 26 December 2012, and asked the court to issue, *inter alia*, an order finding Plaintiff in contempt of the attorney's fees order and an order directing Plaintiff to immediately pay the past-due amount. Before the trial court acted on that motion, Horack Talley filed a motion on 17 April 2015 to withdraw as Defendant's counsel, citing Defendant's failure to "fulfill[] her financial obligations" to the firm. The trial court allowed Horack Talley's motion on 4 May 2015, and ordered that Horack Talley and its attorneys "shall have no further responsibility to [Defendant] in this case."

A notice of hearing on Defendant's motion for contempt, to be held on 6 October 2015, was sent to Plaintiff's counsel and to Defendant on 8 September 2015. Because Horack Talley had been allowed to withdraw as counsel, it did not receive notice of the hearing. Although Defendant was provided with notice of the hearing, she did not appear at the 6 October 2015 hearing. At the hearing, Plaintiff's counsel moved to dismiss, with prejudice, Defendant's motion for contempt for failure to prosecute. After a brief inquiry of Plaintiff's counsel, the trial court granted Plaintiff's motion.

Horack Talley filed its own motion for contempt for Plaintiff's failure to comply with the attorney's fees order ("Horack Talley's motion for contempt") on 9 September 2015. Nearly identical in substance to Defendant's motion for contempt, Horack Talley's motion for contempt similarly alleged that Plaintiff failed to pay Horack

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Talley the final payment of \$57,046.88 pursuant to the attorney's fees order, and asked that the court issue, *inter alia*, an order directing Plaintiff to immediately do so. The trial court filed a show cause order on 10 September 2015 directing Plaintiff to appear and to show "why he should not be adjudged in willful contempt . . . as prayed for in Horack Talley's motion."

Plaintiff responded by filing a motion to dismiss Horack Talley's motion for contempt, and moved for N.C.G.S. § 1A-1, Rule 11 sanctions arguing, *inter alia*, that the Horack Talley attorney who represented Defendant "does not have the requisite interest in the subject matter of the litigation and therefore lacks standing to pursue" a claim for attorney's fees. Plaintiff further asserted in the motion that the issues raised in Horack Talley's motion for contempt were barred by the doctrines of *res judicata* and collateral estoppel due to the trial court's earlier dismissal of Defendant's motion for contempt.

Horack Talley's motion for contempt and Plaintiff's responsive motion to dismiss and motion for N.C.G.S. § 1A-1, Rule 11 sanctions were heard by the trial court on 3 November 2015. Following the hearing, the trial court entered an order on 20 January 2016 denying Plaintiff's motion to dismiss and his motion for N.C.G.S. § 1A-1, Rule 11 sanctions.¹ In its order, the trial court reasoned that: (1) Horack Talley "is a person with an interest in enforcing the [attorney's fees order]," and thus

¹ While the trial court denied Plaintiff's motions, it did not rule on Horack Talley's motion for contempt, and a separate order ruling on that motion is not contained in the record on appeal.

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“has standing to bring its [m]otion for [c]ontempt;” (2) “[t]he doctrine of *res judicata* does not bar Horack Talley’s [m]otion for [c]ontempt” because it “was never provided notice of the October 6, 2015 hearing on Defendant’s [m]otion for [c]ontempt;” and (3) Plaintiff “failed to present any argument” on the issue of collateral estoppel in his motion to dismiss, and his “failure to argue the potential application of collateral estoppel constitutes abandonment of such argument.”

The trial court, recognizing that its order was interlocutory, further concluded “[t]here exists no just reason for delaying any potential appeal from [the] [o]rder,” and “certified [the order] for review by appeal to the North Carolina Court of Appeals.” Plaintiff appeals.

II. Analysis

Plaintiff argues on appeal that the trial court erred by: (1) finding Horack Talley had standing to file a motion for contempt pursuant to N.C. Gen. Stat. § 5A-23(a1); (2) holding Horack Talley’s motion for contempt was not barred by the doctrine of *res judicata*; (3) holding Horack Talley’s motion for contempt was not barred by the doctrine of collateral estoppel; and (4) denying Plaintiff’s motion for N.C.G.S. § 1A-1, Rule 11 sanctions against Horack Talley. As explained below, we do not reach the merits of Plaintiff’s arguments.

Interlocutory Nature of Plaintiff’s Appeal

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We first consider whether Plaintiff's appeal is properly before this Court. *See Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (“[W]hether an appeal is interlocutory presents a jurisdictional issue, and this Court has an obligation to address the issue *sua sponte*.” (citation, quotation marks, and brackets omitted)). An interlocutory order is one that does not settle all of the issues in the case but rather “directs some further proceeding preliminary to the final decree.” *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985). The order appealed from in the present case left more to be determined by the trial court: the trial court had not ruled on the motion for contempt filed by Horack Talley against Plaintiff, and had not ruled on the merits of the underlying substance of the dispute between Plaintiff and Defendant. Therefore, the trial court's order is not a final judgment, and Plaintiff's appeal is interlocutory.

Generally, “there is no right of immediate appeal from interlocutory orders and judgments.” *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013) (citation and quotation marks omitted). This prohibition against interlocutory appeals “prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts.” *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted). There

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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.

N.C. Dep't of Transportation v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted). In order for Plaintiff's appeal to be properly before this Court, the order must either contain an effective N.C. Gen. Stat. § 1A-1, Rule 54(b) certification, or otherwise affect a demonstrated substantial right.

In the present case, the trial court certified the order that denied Plaintiff's motion to dismiss and motion for N.C.G.S. § 1A-1, Rule 11 sanctions for immediate review pursuant to N.C.G.S. § 1A-1, Rule 54(b), by including in its order that "[t]here exist[ed] no just reason for delaying any potential appeal from [the] [o]rder," and that the order was therefore "certified for review by appeal to" this Court. We find the trial court's N.C.G.S. § 1A-1, Rule 54(b) certification ineffective because the order was not a "final judgment" as to Horack Talley's claim against Plaintiff – a requirement under N.C.G.S. § 1A-1, Rule 54(b).

N.C.G.S. § 1A-1, Rule 54(b) states, in relevant part:

Judgment upon multiple claims or involving multiple parties. – When more than one claim for relief is presented

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in an action . . . or when multiple parties are involved, the court may enter a *final judgment* as to one or more but fewer than all of the claims or parties 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.

(emphasis added). “A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.” *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *rehearing denied*, 232 N.C. 744, 59 S.E.2d 429 (1950) (citations omitted). The two parties involved in this appeal are Plaintiff and Horack Talley. After the trial court’s entry of its order denying Plaintiff’s motion to dismiss and motion for N.C.G.S. § 1A-1, Rule 11 sanctions, there was still a matter to be judicially determined between Plaintiff and Horack Talley: the trial court’s ruling on Horack Talley’s motion for contempt.

Although the court noted in its order that Horack Talley’s motion for contempt was before it, and concluded as a matter of law both that “Horack Talley ha[d] standing to bring its [m]otion for [c]ontempt” and that the motion was “well-grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law,” the trial court made no ruling on Horack Talley’s motion for contempt in the order from which Plaintiff now appeals. Horack Talley’s motion for contempt formed the basis of the dispute between Plaintiff and Horack Talley. Therefore, the trial court’s order was not a “final judgment” between Plaintiff and Horack Talley.

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A “trial court may not, by Rule 54(b) certification, render its decree immediately appealable if it is not a final judgment.” *Foster v. Crandell*, 181 N.C. App. 152, 161, 638 S.E.2d 526, 533 (2007) (internal quotation marks and brackets omitted). Since the trial court’s order denying Plaintiff’s motion to dismiss and motion for N.C.G.S. § 1A-1, Rule 11 sanctions was not a “final judgment,” in that it left something to be “judicially determined” between Plaintiff and Horack Talley, “the trial court’s Rule 54(b) certification is ineffective.” *CBP Resources, Inc. v. Mountaire Farms of N.C., Inc.*, 134 N.C. App. 169, 171-72, 517 S.E.2d 151, 154 (1999).

Although the trial court’s N.C.G.S. § 1A-1, Rule 54(b) certification is ineffective, Plaintiff’s appeal may nonetheless be properly before this Court “if the trial court’s decision deprives the appellant of a substantial right which would be lost absent immediate review.” *Page*, 119 N.C. App. at 734, 460 S.E.2d at 334 (citation omitted). A substantial right “is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.” *Peters v. Peters*, 232 N.C. App. 444, 448, 754 S.E.2d 437, 440 (2014) (citation omitted).

The test for whether a substantial right has been affected consists of two parts: (1) the right itself must be substantial; and (2) the deprivation of that substantial right must potentially work injury to the appealing party if not corrected before appeal from final judgment. Whether a substantial right is affected is determined on a case-by-case basis and should be strictly construed.

Builders Mut. Ins. Co. v. Meeting St. Builders, LLC, 222 N.C. App. 646, 649, 736 S.E.2d 197, 199 (2012) (citations, internal quotation marks, and brackets omitted).

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In the present case, Plaintiff's statement of grounds for appellate review contends that the trial court's order is immediately reviewable because his motion was based on *res judicata*, and therefore affects a substantial right. Our Supreme Court has held that the denial of a motion "based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) (emphasis added) (citations omitted); see also *Strates Shows, Inc. v. Amusements of Am., Inc.*, 184 N.C. App. 455, 459, 646 S.E.2d 418, 422 (2007) ("when a trial court enters an order rejecting the affirmative defense[] of *res judicata* . . . , the order *can* affect a substantial right and *may* be immediately appealed" (emphasis added) (citation and internal quotation marks omitted)). As this Court has recently held, however,

it is clear that invocation of *res judicata* does not automatically entitle a party to an interlocutory appeal of an order rejecting that defense. For example, the denial of a motion for summary judgment based upon the defense of *res judicata* may involve a substantial right so as to permit immediate appeal *only where a possibility of inconsistent verdicts exists if the case proceeds to trial.*

Smith v. Polsky, ___ N.C. App. ___, ___, 796 S.E.2d 354, ___, 2017 N.C. App. LEXIS 24, at *11-12 (2017) (emphasis added) (citations, brackets, ellipses, and internal quotation marks omitted). The Court in *Smith* explained that "[p]revious decisions . . . have specifically restricted interlocutory appeals" based upon the doctrine of *res judicata*: "Interlocutory appeals are limited to the situation when the rejection of defenses based upon *res judicata* . . . give rise to a risk of two actual trials

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resulting in two different verdicts.” *Id.* (citations, internal brackets and ellipses omitted).

In the present case, the ruling that Plaintiff contends has preclusive effect due to the doctrine of *res judicata* was the trial court’s dismissal with prejudice of Defendant’s motion for contempt. While the trial court’s dismissal of Defendant’s motion for contempt was an adjudication on the merits, *see e.g., Caswell Realty Assocs. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998), the dismissal “represents an adjudication on the merits only by operation of law. This appeal does not involve possible inconsistent . . . verdicts, much less an inconsistent *decision* on the merits.” *Smith*, ___ N.C. App. at ___, 796 S.E.2d at ___, 2017 N.C. App. LEXIS at *16-17 (emphasis in original) (citations and internal quotation marks omitted). Therefore, Plaintiff’s argument premised on the doctrine of *res judicata* does not implicate a substantial right and is not immediately appealable.

While Plaintiff asserted in his brief to this Court that the trial court’s ruling on his arguments related to *res judicata* affected a substantial right – and as discussed above, we reject that argument – Plaintiff has made no similar assertion in his brief as to his arguments regarding Horack Talley’s standing, collateral estoppel, or N.C.G.S. § 1A-1, Rule 11 sanctions. When an appeal is interlocutory, “the appellant must include in [the] statement of grounds for appellate review sufficient facts and argument to support appellate review on the ground that the challenged

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order affects a substantial right.” *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *affirmed per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005); *see also* N.C.R. App. P. 28(b)(4) (providing that an appellant challenging an interlocutory order shall include in its brief a statement which “must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right”). “Otherwise, the appeal is subject to dismissal.” *Peters*, 232 N.C. App. at 447, 754 S.E.2d at 440 (citation omitted).

“The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order.” *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001). “Put differently, an appellant must demonstrate that the challenged order deprives the appellant of a substantial right that will clearly be lost or irremediably adversely affected if the order is not review[ed] before final judgment.” *Smith*, ___ N.C. App. at ___, 796 S.E.2d at ___, 2017 N.C. App. LEXIS 24, at *10 (citations and internal quotation marks omitted). This Court has explicitly noted that, in the context of appeals from interlocutory orders, the failure to articulate why an issue affects a substantial right will subject that issue to dismissal, including when the issue relates to subject matter jurisdiction and standing. *See Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 385, 677 S.E.2d 203, 207 (2009) (dismissing an appeal as interlocutory where the

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“defendants failed to argue why the denial of a motion to dismiss based on lack of standing affects a substantial right”).

Plaintiff has made no argument why immediate appeal of the trial court’s interlocutory order is necessary to protect a substantial right as to his arguments related to standing, collateral estoppel, or N.C.G.S. § 1A-1, Rule 11 sanctions. As this Court has repeatedly held, “[i]t 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[.]” *Larsen v. Black Diamond French Truffles, Inc.*, ___ N.C. App. ___, 772 S.E.2d 93, 95 (2015) (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)). Plaintiff has not made that showing, and his appeal is therefore dismissed as interlocutory.

DISMISSED.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).