

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-895

Filed: 18 July 2017

Buncombe County, No. 16-CVS-548

RUSSELL VON ZOLP, IV, Plaintiff

v.

WILLIAM H. CORDELL, Individually and as Trustee of the William Henry Cordell and Joyce Ann Cordell Living Trust dated June 4, 2008 and any amendments thereto, Defendant.

Appeal by plaintiff from orders entered 24 May and 19 July 2016 by Judge Gary M. Gavenus and 13 June 2016 by Judge J. Thomas Davis in Buncombe County Superior Court. Heard in the Court of Appeals 7 February 2017.

Ferikes & Bleynt, PLLC, by H. Gregory Johnson, for plaintiff-appellant.

Ward and Smith, P.A., by Alexander C. Dale and Haley R. Wells, for defendant-appellee.

BRYANT, Judge.

Where plaintiff appeals a series of interlocutory orders but fails to either present a Rule 54(b) certification for the orders or establish that a substantial right would be lost if not immediately reviewed, we dismiss the appeal.

ZOLP V. CORDELL

Opinion of the Court

On 4 February 2016, in Buncombe County Superior Court, plaintiff Russell Von Zolp, IV, filed a complaint against defendant William H. Cordell, individually and as Trustee of the William Henry Cordell and Joyce Ann Cordell Living Trust.

Per the complaint allegations, defendant was the owner of two acres of real property and a commercial building. Sometime just before 1 July 2014, plaintiff spoke with defendant about renting the property for the purpose of operating a dog kennel. Plaintiff also inquired about purchasing the property. Defendant informed plaintiff that the property was originally purchased using seller financing and that a balance owed on the note would be due in about six years, by 1 August 2020. Plaintiff was told he could purchase the property if he also agreed to assume the obligation for the balance owed on the note. Thereafter, on 1 July 2014, the parties executed two written agreements: a lease agreement from 1 July 2014 to 31 December 2015, including a right for plaintiff to purchase the property on or before 31 December 2015 for \$750,000.00 (“lease agreement”); and an agreement to sell the property for \$750,000.00 with \$49,500.00 due at closing on 3 January 2016 (“sale agreement”). In January 2016, plaintiff requested that the sale transaction close on or before 31 January 2016, as provided in the sale agreement. Defendant, refusing to honor the agreement, informed plaintiff that because of recent changes in the banking laws, plaintiff could not assume the obligation owed on the outstanding note. Meanwhile,

plaintiff deposited \$49,500.00 into a trust account and demanded that the transaction be completed by 31 January. Defendant did not sell.

Plaintiff's complaint filed 4 February 2016 alleged breach of contract, breach of duty of good faith and fair dealing, unfair and deceptive acts, constructive fraud, and fraud. Plaintiff also sought specific performance, declaratory judgment, injunctive relief, and punitive damages.

Thereafter, the parties entered into an oral agreement to settle the case after which plaintiff would dismiss the lawsuit. The settlement agreement was reduced to writing and several revisions were proffered; defendant noted a requirement that plaintiff continue to pay rent on a month-to-month basis. Defendant signed the settlement agreement and sent the document to plaintiff for signature. Instead of signing, plaintiff requested "gentle revisions." Defendant agreed to alter the agreement to reflect plaintiff's revisions. Then, on 19 April 2016, plaintiff notified defendant that he would not sign the settlement agreement and instead demanded material changes, including a proposal that plaintiff pay no rent after March 2016 until the closing of the sale (per the lease agreement, plaintiff paid \$3,300.00 per month). On 26 April 2016, defendant filed a motion to enforce a settlement agreement that was intended to dispose of the matter between the parties. In the motion, defendant contended there was no dispute as to the original terms of the agreement. Defendant urged the trial court to determine "that the Parties ha[d] settled the

lawsuit in accordance with the settlement agreement” and that plaintiff was required to satisfy his obligations, including payment of rent for February, March, April, and May 2016 and that plaintiff should execute all documents and pay all funds necessary to close on the property. Defendant also requested attorneys’ fees and such other relief the court deemed proper.

Defendant’s motion was heard on 23 May 2016 in Buncombe County Superior Court, the Honorable Gary M. Gavenus, Senior Resident Superior Court Judge presiding, and thereafter, the trial court entered an order on 24 May 2016 granting defendant’s motion to enforce the settlement agreement. In his order, Judge Gavenus noted that a hearing was initially held on 19 May; however, defendant had filed an affidavit in support of his 26 April 2016 motion to enforce the settlement agreement two days before the 19 May scheduled hearing date. Granting plaintiff’s 19 May oral motion to continue the matter in order to respond to the affidavit, the court instructed plaintiff to draft an order for continuance. Rather than draft the order as directed by the court on 19 May, plaintiff filed a voluntary dismissal on 20 May. At the 23 May hearing on defendant’s motion to enforce the settlement agreement, plaintiff’s counsel gave notice that plaintiff had filed a voluntary dismissal and that all funds in plaintiff counsel’s trust account had been returned to plaintiff. Plaintiff’s counsel was not further authorized to act on behalf of plaintiff in regard to defendant’s motion to enforce the settlement agreement. Plaintiff did not attend the hearing. The trial

court, in striking plaintiff's attempted dismissal, found that plaintiff's notice of voluntary dismissal was an act contrary to the terms of the settlement agreement negotiated by plaintiff's counsel, that plaintiff acted in bad faith by refusing to execute the settlement agreement, that plaintiff acted to delay the matter, that plaintiff owed rent for February, March, April, and May, and that defendant was permitted to present evidence of reasonable attorneys' fees related to bringing the motion to enforce the settlement agreement. Defendant submitted an affidavit for attorneys' fees detailing costs incurred totaling \$13,455.00.

On 1 June 2016, in response to a motion for contempt filed by defendant, J. Thomas Davis, Superior Court Judge presiding, entered an order directing plaintiff to appear and show cause why he should not be held in criminal/civil contempt for failure to pay rents due for February, March, April, and May 2016. Following a hearing, Judge Davis entered a 13 June 2016 order in which plaintiff was held in civil contempt and ordered to deposit into a trust account, pending the outcome of the action, \$16,500.00 for rent due, including the rent for June 2016. That day (13 June 2016), plaintiff gave notice of appeal of the 24 May 2016 order enforcing the settlement agreement; notice of appeal of the 13 June 2016 contempt order was given on 27 June 2016.

On 19 July 2016, Judge Gavenus entered an order awarding defendant attorneys' fees in the amount of \$5,503.75. Plaintiff then entered notice of appeal of the 19 July 2016 attorneys' fees award.

On appeal, plaintiff raises the following issues: whether the trial court erred by (I) striking the notice of voluntary dismissal; (II) granting defendant's motion to enforce the settlement; (III) holding plaintiff in contempt; and (IV) awarding fees.

Interlocutory appeal

Before we reach plaintiff's arguments, we must consider defendant's contention that this appeal is premature and not properly before this Court. Defendant argues that where the trial court ordered "Plaintiff's Notice of Voluntary Dismissal filed on May 20, 2016 is hereby stricken and of no further effect," the claims in plaintiff's complaint survive unresolved. We agree. The trial court properly found that plaintiff's voluntary dismissal was in bad faith. A plaintiff's ability to file a voluntary dismissal under Rule 41(a) is subject to two limitations: "the dismissal [must] not be done in bad faith" and it must be done prior to a plaintiff resting his or her case. *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 597, 528 S.E.2d 568, 573 (2000); *see also Estrada v. Burnham*, 316 N.C. 318, 323, 341 S.E.2d 538, 542 (1986) ("Although it is true that Rule 41(a)(1) does not, on its face, contain an explicit prerequisite of a good-faith filing with the intent to pursue the action, we find such a

requirement implicit in the general spirit of the rules . . .”), *superseded by statute on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 381 S.E.2d 706 (1989). Therefore, plaintiff’s underlying claims remain pending. Thus, the trial court order granting defendant’s motion to enforce the settlement agreement is interlocutory, as are the subsequent orders brought forth on appeal.

“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.” *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). “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.” *Id.* at 361–62, 57 S.E.2d at 381.

Here, in its order granting defendant’s motion to enforce the settlement agreement, the trial court ordered that “Defendant’s Motion to Enforce Settlement Agreement is hereby granted and the Settlement Agreement is a valid, binding, enforceable contract between Plaintiff and Defendant[.]” Furthermore, the court ordered plaintiff

to take all steps, execute all documents, and pay all funds necessary to close the sale of the property within thirty (30) days of the filing of this Order Enforcing Settlement Agreement as set forth in the Settlement Agreement[.]

. . . .

That upon conclusion of all proceedings related to

enforcement of the Settlement Agreement, Defendant shall present the [c]ourt with and *the [c]ourt shall enter an Order dismissing this action with prejudice.*

(emphasis added).

Although it is not entirely clear, it appears the “action” the trial court was referring to is the underlying complaint for relief filed (and attempted to be dismissed) by plaintiff. As the underlying complaint still exists, these intervening motions and orders are a part of the same case—16 CVS 548. Where the record does not reflect an order dismissing the action with prejudice, this is not an appeal from a final judgment. Therefore, in the absence of evidence to the contrary, we consider plaintiff’s appeal interlocutory.

Two avenues are available to a party to obtain review of an interlocutory order. One is certification under Rule 54(b). The other is pursuant to N.C.G.S. § 1–277 if the interlocutory order affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment.

Stanford v. Paris, 364 N.C. 306, 311, 698 S.E.2d 37, 40 (2010) (citation omitted).

The record before us does not include a Rule 54(b) certification as to any order. “Therefore, the burden is on plaintiff to establish that a substantial right will be lost unless its appeal is immediately reviewed by this Court.” *FMB, Inc. v. Creech*, 198 N.C. App. 177, 179, 679 S.E.2d 410, 412 (2009) (citation omitted).

Admittedly the “substantial right” test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by

considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.

Waters v. Pers., Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

The right must be one which will clearly be lost or irretrievably adversely affected if the order is not reviewable before final judgment. In other words, the right to immediate appeal is reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed.

Blackwelder v. Dep't of Human Res., 60 N.C. App. 331, 335, 299 S.E.2d 777, 780–81 (1983).

Plaintiff contends that the trial court orders affect a substantial right.

[Plaintiff] will suffer severe prejudice if this appeal is not heard as he would face the possibility of summary ejectment, which defendant is seeking in another pending case, the loss of \$16,500.00 in funds currently held in trust by counsel for defendant, who is currently seeking the trial court to distribute same to defendant, and the continuation of payment of rent pending the closing as ordered by the trial court.

Other than the statement that plaintiff will have to continue paying rent as ordered by the trial court, plaintiff's other statements asserting prejudice are not supported by the record. Based on the facts as set forth in this record, it appears plaintiff continues to occupy the property on which rent is being paid. A court order requiring payment under such circumstances does not affect a substantial right. As for the remaining statements, not only are they unsupported by the record, but even

assuming they are supported, plaintiff presents no argument or citation to any authority to establish that such assertions would affect a substantial right. Therefore, plaintiff's mere assertions of prejudice, without more, are insufficient to show a substantial right is adversely affected.

Here, plaintiff appeals the trial court order granting defendant's motion to enforce the settlement agreement (directing plaintiff to execute all documents and pay all funds necessary to close the sale of the property), the order of contempt (directing plaintiff to submit to a trust account \$16,500.00 for rent past due), and the order awarding attorneys' fees (in the amount of \$5,503.75). Upon review, we hold that plaintiff has failed to establish that "the normal course of procedure is inadequate to protect the substantial right affected by the order[s] sought to be appealed." *Id.* Thus, these orders do not detrimentally affect a substantial right that would work an injury to plaintiff if not corrected before an appeal from the final judgment. *See Stanford*, 364 N.C. at 311, 698 S.E.2d at 40. Therefore, plaintiff has failed to establish that his interlocutory appeal is properly before this Court. Accordingly, this appeal is

DISMISSED.

Judges HUNTER, Jr., and DIETZ concur.

Report per Rule 30(e).