IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-936

Filed: 6 March 2018

Mecklenburg County, No. 14 CVD 17086

JOHN A. TIBBS and MARGARET B. TIBBS, Plaintiffs

v.

JENNIFER D. FORD, Defendant

Appeal by defendant from order entered 23 February 2017 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 7 February 2018.

Plaintiff-appellees John A. Tibbs and Margaret B. Tibbs, pro se. No appellee brief filed.

McIlveen Family Law Firm, by Angela W. McIlveen and Tara A. Harrawood, for defendant-appellant.

CALABRIA, Judge.

Jennifer D. Ford ("defendant") appeals from the trial court's order granting plaintiffs' request for an interim distribution of assets prior to equitable distribution. However, the trial court's order is interlocutory, and defendant fails to demonstrate that she is entitled to immediate review. Accordingly, we dismiss defendant's appeal.

I. Background

Defendant and her husband, Joseph Tibbs ("Joseph"), were married on 12 May 1995 and separated on or about 28 July 2014. On 12 September 2014, Joseph filed a complaint against defendant in Mecklenburg County District Court seeking equitable distribution and an interim distribution of property. In support of his second claim, Joseph alleged, *inter alia*:

> 10. During the marriage and prior to their date of separation, Plaintiff and Defendant purchased certain assets and incurred certain debts. Since the parties' date of separation, Plaintiff has become increasingly concerned about Defendant's control and use of these assets and her management of certain debts.
>
> 11. Plaintiff is fearful that Defendant will waste marital assets and neglect marital debts if this Court does not assist in their immediate disposition.
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> . . .
>
> 13. No good cause exists which would prevent this Court from entering an Order distributing the above-listed property to Plaintiff's sole control and possession on an interim basis pending the final trial or resolution of all Equitable Distribution issues between the parties.

Shortly after filing his complaint, on 22 September 2014, Joseph died of cancer. Prior to his death, Joseph executed a will appointing his father, John Tibbs, executor of his Estate, and his mother, Margaret Tibbs, secondary executrix. On 8 October 2014, John and Margaret Tibbs (collectively, "plaintiffs") filed a Motion for Substitution requesting to be substituted as parties in their deceased son's action.

On 20 October 2014, the trial court entered an Order for Substitution granting plaintiffs' motion. Defendant did not appeal the Order for Substitution.

On 16 December 2016, the trial court entered an order granting plaintiffs' request for an interim distribution of assets. Defendant subsequently filed a Rule 60 Motion to Set Aside the Order for Substitution and All Subsequent Orders. On 16 February 2017, the trial court held a hearing on various motions filed in the cause. Defendant argued, *inter alia*, that plaintiffs had been improperly substituted as parties and accordingly, the trial court lacked jurisdiction to enter its prior orders. In addition, defendant notified the trial court that the 16 December 2016 order improperly distributed Joseph's IRA to plaintiffs, when defendant was named as a beneficiary. After considering arguments from both parties, the trial court concluded that it had "jurisdiction galore" and denied defendant's Motion to Set Aside.

On 23 February 2017, the trial court entered an Amended Order for Interim Distribution of Assets and Freezing Account ("the Amended Order"). The trial court ordered that plaintiffs "immediately receive" $178,391.83 from defendant's Wells Fargo IRA and one-half of the monies in two of defendant's Wells Fargo brokerage accounts. The trial court further ordered that "[t]he sum of $85,000.00 in Defendant's Wells Fargo IRA . . . shall not be accessed or utilized by either party prior to a further order of this Court or written agreement of the parties." Defendant appeals.

II. Analysis

On appeal, defendant acknowledges that the Amended Order is not a final judgment, and that "interlocutory appeals challenging the financial repercussions of a separation or divorce do not affect a substantial right." *Johnson v. Johnson*, 208 N.C. App. 118, 126, 701 S.E.2d 722, 728 (2010). Nevertheless, defendant asserts that she is entitled to immediate review because "this is not a matter related to separation and divorce, but rather, is a matter related to the proper parties before and jurisdiction of the trial court." We disagree.

"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. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "Interim equitable distribution orders are by nature preliminary to entry of a final equitable distribution judgment and thus are interlocutory." *Hunter v. Hunter*, 126 N.C. App. 705, 707, 486 S.E.2d 244, 245 (1997).

An interlocutory appeal "will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to [the] appellant if not corrected before appeal from final judgment." *Hanesbrands, Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016) (citation and quotation marks omitted); *see also* N.C. Gen. Stat. § 1-277(a) (2017). "[W]e take a restrictive view of the substantial right exception to the general rule prohibiting immediate appeals from interlocutory

orders." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 78, 711 S.E.2d 185, 189 (2011) (citation and quotation marks omitted).

"A substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which one is entitled to have preserved and protected by law: a material right." *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (citation, quotation marks, and brackets omitted). However, the substantial right test "is more easily stated than applied[.]" *Hanesbrands*, 369 N.C. at 219, 794 S.E.2d at 500 (citation and quotation marks omitted). Accordingly, "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." *Id.* (citation and quotation marks omitted).

As defendant correctly observes, this Court has previously determined that an order requiring a party "to make immediate payment of a significant amount of money" affected a substantial right. *Estate of Redden v. Redden*, 179 N.C. App. 113, 116-17, 632 S.E.2d 794, 798 (2006), *remanded on other grounds*, 361 N.C. 352, 649 S.E.2d 638 (2007). However, the interlocutory order in *Redden* did not involve an interim distribution of assets, as in the present case. *See id.* at 115, 632 S.E.2d at 797 (stating that the trial court granted the Estate's motion for partial summary judgment against the defendant-widow because "there was no genuine issue of

material fact relating to the ownership of $237,778.71" transferred from the decedent's account). Although defendant frames the issue on appeal as one involving jurisdiction, rather than "a matter related to separation and divorce," we must consider "the particular facts of th[e] case and the procedural context" in which the Amended Order was entered. *Hanesbrands*, 369 N.C. at 219, 794 S.E.2d at 500. Indeed, this Court has explained that "permitting an immediate appeal from an interim equitable distribution order would be contrary to the policy of this state discouraging fragmentary appeals." *Hunter*, 126 N.C. App. at 708, 486 S.E.2d at 245.

Furthermore, in order to demonstrate a right to immediate review, "appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hanesbrands*, 369 N.C. at 219, 794 S.E.2d at 499. Here, defendant asserts that "[t]he issue before this Court is whether the Plaintiff-Appellees are the personal representatives of Joseph E. Tibbs and, whether they are properly substituted as parties"; therefore,"[a] substantial right of Defendant-Appellant will be affected if the order requiring Defendant-Appellant's payment of a substantial sum to Plaintiff-Appellees under no fiduciary duties . . . and who are not subject to a breach of those duties . . . is not immediately reviewed."

Defendant's argument is unavailing. The Amended Order contains only one finding of fact pertaining to plaintiffs' substitution as parties:

> 3. John and Margaret Tibbs (hereinafter the "Plaintiffs") are the parents of Joseph E. Tibbs, the named plaintiff in this action. Plaintiff died on September 22, 2014 and the Tibbs have been substituted in this case for their deceased son via a separate order of this Court.

(emphasis added). Defendant failed to appeal the 20 October 2014 Order for Substitution. The record contains no evidence that the order was withdrawn, nor does defendant argue that it was. Accordingly, even assuming, *arguendo*, that plaintiffs were improperly substituted as parties in this action, defendant fails to establish how immediate review of *the Amended Order* will correct the error. *See id.* at 218, 794 S.E.2d at 499 (explaining that the appellant must demonstrate that the interlocutory "order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment").

"It is the appellant's burden to present appropriate grounds for acceptance of an interlocutory appeal, and not the duty of this Court to construct arguments for or find support for appellant's right to appeal." *Id.* (citation and quotation marks omitted). "Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed." *Id.*

Here, defendant fails to demonstrate that the Amended Order affects a "substantial right and will work injury to [her] if not corrected before appeal from final judgment." *Id.* Therefore, we dismiss defendant's interlocutory appeal.

APPEAL DISMISSED.

Judges ZACHARY and ARROWOOD concur.

Report per Rule 30(e).