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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-647

Filed: 20 March 2018

Mecklenburg County, No. 16 CVS 21564

GATEWAY TERRACE PARTNERS, LLC, Plaintiff,

v.

MJM GATEWAY TERRACE RE, LLC, and MJM GROUP, LLC, Defendants.

Appeal by defendants from order entered 31 March 2017 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 December 2017.

Johnston, Allison & Hord, P.A., by Parker E. Moore, for plaintiff-appellee.

Whitfield Bryson & Mason LLP, by Scott C. Harris, for defendants-appellants.

DAVIS, Judge.

MJM Gateway Terrace RE, LLC, and MJM Group, LLC ("Defendants") appeal from an order entered by the trial court denying their motion for permanent injunction, specific performance, and sanctions. After a thorough review of the record and applicable law, we conclude that Defendants' interlocutory appeal does not implicate a substantial right and must be dismissed.

Factual and Procedural Background

At all times pertinent to this appeal, Gateway Terrace Partners, LLC ("Plaintiff") owned a tract of land ("Lot 1") located on Watkins Road in Durham, North Carolina. Defendants owned an adjoining tract of land that was subdivided into two separate lots ("Lots 2 and 3"). Plaintiff sought to build a hotel (the "Hotel") upon Lot 1 while Defendants intended to develop Lots 2 and 3 for mixed commercial use.

The parties entered into a Site Work Development Agreement ("SWDA") on 21 August 2014, which they agreed would govern the completion of work on the lots and which specified their respective responsibilities related to the development of the three lots. The SWDA was signed on behalf of Plaintiff by its manager, Douglas Stafford, and on behalf of Defendants by their manager, Anuj Mittal. Pursuant to this agreement, Defendants were responsible for the installation of site lighting on all three of the lots.

Gateway Terrace 3, LLC ("GT3") and Atlas Real Estate, LLC ("Atlas") were two separate corporate entities also managed by Mittal. In November 2014, GT3 and Atlas possessed ownership interests in both Plaintiff and the Hotel. On or about 11 November 2014, Plaintiff and Defendants entered into a Membership Interest Purchase Agreement ("MIPA") in which Plaintiff and several affiliated entities agreed to purchase those ownership interests.

The MIPA contained language that provided as follows:

> Buyer, GTP and GT Manager, for themselves and their respective affiliates, members, managers, officers, directors, principals, agents, heirs, executors, administrators, successors, and assigns, each hereby releases Seller, all of Seller's affiliates, and their respective members, managers, successors, and assigns from any and all claims, demands, actions or causes of action, of any kind or nature, whether known or unknown, in any way related to: (i) Seller's ownership of or membership in GTP or GT Manager; and/or (ii) any transactions or activities of Seller and/or its affiliates with any of the Buyer, GTP, GT Manager and/or any of their respective affiliates, arising or existing as of the date of this agreement (except as related to explicit obligations under this agreement).

The MIPA further provided that "[t]his Agreement constitutes the entire agreement and supersedes any and all other prior agreements and undertakings, both written and oral, among the parties[.]" Additionally, the MIPA specified what remedies were available to the parties in the event of a breach.

> Injunctive Relief. Each party agrees that it would be impossible or inadequate to measure and calculate the damages from any breach of the covenants set forth in this Agreement. Accordingly, each party agrees that if it breaches this Agreement, the other parties will have available, in addition to any other right or remedy available, the right to obtain an injunction from a court of competent jurisdiction restraining such breach or threatened breach, and to specific performance of this letter agreement.

Plaintiff filed the present action on 1 December 2016 in Mecklenburg County Superior Court alleging that Defendants failed to install site lighting on the lots as required under the SWDA and asserting claims for (1) breach of contract; (2)

negligent misrepresentation; (3) fraud; (4) unfair and deceptive trade practices; and (5) disregard of the corporate form. In response, Defendants filed a motion for permanent injunction, specific performance, and sanctions on 28 December 2016. Plaintiff filed an amended complaint on 18 January 2017 in which they asserted an additional claim against Defendants for indemnification and/or subrogation.

On 2 February 2017, a hearing on Defendants' motion was held before the Honorable W. Robert Bell. The trial court entered an order on 31 March 2017 denying the motion. Defendants filed a notice of appeal from the trial court's order on 14 April 2017.

Analysis

Plaintiff has moved to dismiss this appeal on the ground that it is an impermissible interlocutory appeal. Therefore, we must determine whether we possess jurisdiction over this matter.

"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." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation omitted). Conversely, an order or judgment is interlocutory if it 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) (citation omitted).

"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). The 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).

> 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.

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

The trial court's 31 March 2017 order does not contain a certification under Rule 54(b). Therefore, Defendants' appeal is proper only if they can demonstrate a substantial right that would be lost absent an immediate appeal. *See Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) ("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." (citation omitted)).

Our Supreme Court has stated that "the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). As a result, the extent to which an interlocutory order affects a substantial right must be determined on a case-by-case basis. *McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 50, 542 S.E.2d 227, 231 (citation omitted), *appeal dismissed and disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001). "Our courts have generally taken a restrictive view of the substantial right exception." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (citation omitted).

On appeal, Defendants assert that the trial court's 31 March 2017 order adversely affected their substantial right to have the present action enjoined "as agreed to by [Plaintiff] to prevent prolonged and vexatious litigation." We disagree.

It is well established that "a party's desire to avoid a trial and the associated costs of litigation, alone, is insufficient to affect a substantial right." *Builders Mut. Ins. Co. v. Meeting St. Builders, LLC*, 222 N.C. App. 646, 650, 736 S.E.2d 197, 199 (2012) (citation omitted); *see also N.C. Dep't. of Transp.*, 119 N.C. App. at 735, 460 S.E.2d at 335 ("[T]he right to avoid a trial is generally not a substantial right[.]").

It is true that our appellate courts have at times reviewed interlocutory orders both granting and denying *preliminary* injunctions. *QSP, Inc. v. Hair*, 152 N.C. App. 174, 175, 566 S.E.2d 851, 852 (2002). Even in those contexts, however, the

availability of immediate appellate review is still determined on a case-by-case basis and dependent upon whether the appellant has made a sufficient showing that its substantial rights have been adversely affected. *See Little v. Stogner*, 140 N.C. App. 380, 383, 536 S.E.2d 334, 336 (2000) ("For a defendant to have a right of appeal from a mandatory preliminary injunction, substantial rights of the appellant must be adversely affected." (citation and quotation marks omitted)), *disc. review denied*, 353 N.C. 377, 547 S.E.2d 813 (2001).

Moreover, Defendants cite to no case law — nor have we found any — supporting the proposition that the denial of a motion for a *permanent* injunction affects a substantial right that would be lost absent an immediate appeal. Thus, the fact that the trial court's order could expose Defendants to protracted litigation does not implicate a substantial right.

Finally, Defendants contend that the trial court's order adversely affected a substantial right of theirs because it denied them "a contractually agreed upon right, similar to an arbitration agreement." *See Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 644, 562 S.E.2d 64, 65 ("[A]n order denying arbitration is immediately appealable because it involves a substantial right, the right to arbitrate claims, which might be lost if appeal is delayed." (citation and quotation marks omitted)), *disc. review denied*, 356 N.C. 167, 568 S.E.2d 611 (2002). However, the present appeal does not involve an arbitration agreement. Although Defendants

attempt to analogize the MIPA clause to an arbitration clause, they cite no cases that would authorize this Court to equate the two for purposes of a substantial rights analysis.

Therefore, we conclude that Defendants have failed to establish that a substantial right will be affected absent immediate appellate review over the trial court's 31 March 2017 order. Accordingly, we dismiss Defendants' appeal.

Conclusion

For the reasons stated above, Defendants' interlocutory appeal is dismissed.

DISMISSED.

Judges CALABRIA and TYSON concur.

Report per Rule 30(e).