An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-1069

Filed: 5 June 2018

Forsyth County, Nos. 14 CVS 3654 and 16 CVS 2169

SEN LI, Plaintiff,

v.

HENG Q. ZHOU and PING CHUNG, Defendants.

Appeal by defendants from order entered 8 June 2017 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 7 March 2018.

Smith Moore Leatherwood LLP, by Elizabeth Brooks Scherer, Elizabeth Sims Hedrick, and Lisa W. Arthur; and Smith Law Group, PLLC, by Steven D. Smith and Matthew L. Spencer, for plaintiff-appellee.

Bennett & Guthrie, PLLC, by Joshua H. Bennett, for defendant-appellant Zhou.

Carruthers & Roth, PA, by J. Patrick Haywood and Rachel Scott Decker, for defendant-appellant Chung.

ELMORE, Judge.

Heng Q. Zhou and Ping Chung (collectively, "defendants") appeal from an order denying their respective motions for summary judgment. This appeal is interlocutory in nature, and the trial court did not certify the summary judgment order as immediately appealable pursuant to Rule 54(b) of our Rules of Civil Procedure.

Although Sen Li ("plaintiff") did not file a motion to dismiss defendants' appeal, she argues extensively in her brief that it should be dismissed because the summary judgment order does not affect a substantial right. We agree. Accordingly, we dismiss defendants' interlocutory appeal for lack of appellate jurisdiction.

I. Background

Plaintiff and defendant Zhou are former business partners who formed a construction company together in 2003. Plaintiff alleges that at all relevant times, defendants were in a romantic relationship with each other. On 13 June 2014, plaintiff filed a complaint in Forsyth County Superior Court against defendants for civil conspiracy, actual fraud, constructive fraud, and unjust enrichment.

Per her complaint, in August 2003, plaintiff and defendant Zhou purchased real property located at 910 Meadowood Street in Greensboro ("the property"), which was meant to serve as investment property for their newly-formed construction company. Plaintiff and defendant Zhou purchased the property as tenants in common, with each buyer making a $25,000.00 down-payment to the sellers. On 21 August 2003, plaintiff and defendant Zhou executed a promissory note ("the note") agreeing to pay the sellers the remaining sum of $56,000.00, which was secured by a deed of trust on the property.

Initially, plaintiff and defendant Zhou agreed that defendant Zhou would be permitted to reside in a house located on the property. Plaintiff alleges that when

she and defendant Zhou later decided to operate separate construction companies, the two agreed that defendant Zhou could continue to reside at the property so long as he made all payments on the note going forward. According to plaintiff, defendant Zhou intentionally—and unbeknownst to plaintiff—stopped making payments to the sellers sometime in early 2010.

Plaintiff and defendant Zhou ultimately defaulted on the note by failing to pay it in full by its 21 April 2010 maturity date. After the sellers sent several letters to the property demanding payment, defendant Zhou alleges that he approached defendant Chung about potentially purchasing the note and deed of trust. Defendant Chung thereafter contacted the sellers and expressed interest in making the purchase, and on 27 July 2011, the sellers assigned the note and deed of trust to defendant Chung. Plaintiff contends she did not receive notice of the assignment to defendant Chung or of default on the note.

In November 2012, defendant Chung's attorney and substitute trustee, Richard R. Foust, initiated foreclosure proceedings on the property pursuant to the deed of trust. Mr. Foust sent the foreclosure petition and notice of hearing via certified mail to plaintiff's official mailing address, which was listed with the Guilford County Tax Office as 910 Meadowood Street. Mr. Foust later received the signed certified mail return receipt, but it was not dated or sufficiently legible to determine who had signed it. Mr. Foust then sent the petition and notice via first class mail,

postage prepaid, to 910 Meadowood Street; he also physically posted a copy of the documents at the property.

On 15 May 2013, a foreclosure sale was held pursuant to an order issued by an assistant clerk of court in Guilford County. Defendant Chung purchased the property at the sale and thereafter leased the property to defendant Zhou, who paid rent to defendant Chung and continued to reside at the property.

Pursuant to Rule 60(b)(1)–(6) of our Rules of Civil Procedure, plaintiff filed a motion in Guilford County Superior Court to set aside the foreclosure. On 25 April 2014, the court entered an order denying plaintiff's motion. The order included the following, labeled as findings of fact:

> 19. The Court Notes but does not Find as a Fact that [plaintiff and her husband] contend [defendants] colluded resulting in [plaintiff] being deprived of her interest in the Property; and
>
> 20. There is no evidence before the Court that even if such collusion did occur, that Mr. Foust had knowledge of it or it is somehow chargeable to him as the substitute trustee.

The court went on to conclude as a matter of law that the note and deed of trust were properly assigned to defendant Chung, and that Mr. Foust had complied with the requirements of N.C. Gen. Stat. § 45-21.16, "including the due diligence and notice requirements." Less than two months later, plaintiff filed her complaint against defendants in Forsyth County Superior Court.

In her complaint, plaintiff alleged defendants conspired to intentionally deprive plaintiff of her interest in the property. She asserted that she never received notice of default on the note and deed of trust assigned to defendant Chung, and that she never received notice of the foreclosure proceedings in Guilford County. Plaintiff further alleged defendants had plaintiff's personal contact information and knew she resided at an address in Winston-Salem—not in Greensboro and certainly not at 910 Meadowood Street, where defendant Zhou resided—but that defendants intentionally failed to send notice to plaintiff's personal address.

Based on the doctrines of *res judicata* and collateral estoppel, defendants Zhou and Chung separately moved for summary judgment on plaintiff's claims on 16 May 2016 and 23 February 2017, respectively. Following a 5 June 2017 hearing on both motions, the court entered an interlocutory order denying summary judgment on 8 June 2017. From that order, defendants appeal.

II. Discussion

Defendants acknowledge that the summary judgment order is interlocutory, but contend that because their motions were based on the doctrines of *res judicata* and collateral estoppel, the interlocutory order affects their substantial right to avoid inconsistent verdicts on the same issues.

Our General Statutes authorize an appeal to be taken from any order of a superior court that affects a substantial right. *See* N.C. Gen. Stat. § 1-277(a) (2017);

see also N.C. Gen. Stat. § 7A-27(b)(3)(a) (2017). 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 a [party] is entitled to have preserved and protected by law: a material right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citation omitted). In ruling on the appealability of an interlocutory order pursuant to the substantial right exception, this Court must first determine if the right itself is "substantial." If it is, we must then determine if "the enforcement of the substantial right [would] be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5–6, 362 S.E.2d 812, 815 (1987).

Our Supreme Court has specifically held that a substantial right may be implicated where an order denies dispositive motions brought pursuant to the doctrines of *res judicata* or collateral estoppel. *See, e.g., Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) (holding that "the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable"); *see also Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) ("The doctrine [of collateral estoppel] is designed to prevent repetitious lawsuits, and parties have a substantial right to avoid litigating issues that have already been determined by a

final judgment."). However, defendants in the instant case have not adequately demonstrated that such a right exists here.

In their motions for summary judgment, defendants asserted that an essential element of each of plaintiff's claims was that she did not have notice of the foreclosure proceedings. Defendants argued they were thus entitled to judgment as a matter of law because the court in Guilford County had previously concluded that plaintiff did, in fact, have notice of those proceedings, when it denied plaintiff's motion to set aside the foreclosure. Defendants now contend that the order denying their motions for summary judgment is immediately appealable because it could otherwise result in inconsistent verdicts—that is, a jury in Forsyth County could conclude that plaintiff did not have notice, which would contradict the 25 April 2014 order entered in Guilford County. We disagree.

In her brief, plaintiff asserts that appellate review of the summary judgment order would be inappropriate here because defendants have not shown a risk of inconsistent verdicts such that a substantial right has been implicated. She argues that defendants' motions for summary judgment were properly denied, and that this interlocutory appeal should be dismissed, because defendants cannot establish an identity of claims or parties between the foreclosure proceedings and the instant case. According to plaintiff:

> At most, the foreclosure proceedings established that [Mr. Foust] obtained *substituted or constructive service* on

> [plaintiff] by posting notice of the foreclosure at the Property as allowed by the foreclosure statute. [Plaintiff's] tort claims, however, are based on a different factual premise: Defendants conspired to deprive [plaintiff] of *actual notice* of the foreclosure proceedings as a way to deprive [plaintiff] of her interest in the Property. Because a finding that [plaintiff] was given legally adequate substitute or constructive service under the foreclosure statute is not inconsistent with a finding that Defendants' intentional and fraudulent conduct deprived [plaintiff] of actual notice, interlocutory review is inappropriate.

(Emphasis in original.)

III. Conclusion

We agree with plaintiff that defendants have not sufficiently demonstrated the existence of a substantial right such that this Court has jurisdiction to review the summary judgment order. Accordingly, we dismiss defendants' interlocutory appeal.

DISMISSED.

Judges INMAN and BERGER concur.

Report per Rule 30(e).