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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-724

Filed: 19 June 2018

Durham County, No. 15 CVS 5263

CLAIRE AMELIO and ANTONIO AMELIO, Plaintiffs,

v.

REAL ESTATE BY DESIGN, LLC, HOME BY DESIGN, LLC, LISA LYNN ELLIS, COLLEEN BENNETT ELLIS, STEPHEN GREGORY ELLIS, Defendants.

Appeal by plaintiffs from orders entered 22 March and 10 April 2017 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 21 February 2018.

Stark Law Group, PLLC, by Thomas H. Stark and Brycen G. Williams, for plaintiff-appellants.

Cranfill Sumner & Hartzog LLP, by Ryan D. Bolick, for defendant-appellees.

ELMORE, Judge.

Plaintiffs Claire and Antonio Amelio appeal an interlocutory partial summary judgment order dismissing with prejudice their six claims against three defendants but not resolving their ten claims against two other defendants. Plaintiffs also appeal the trial court's subsequent order denying their motions to reconsider and revise its partial summary judgment order, to Rule 54(b)-certify the partial summary judgment

order as immediately appealable, and to continue their trial against the two remaining defendants; however, as plaintiffs failed to raise any challenge to the propriety of that order in their principal or reply briefs, they have waived their right to appellate review of that order.

The only remaining issue is whether plaintiffs have sufficiently demonstrated how their claimed substantial right to avoid potentially inconsistent jury verdicts in separate trials against these two groups of defendants would be irreparably affected if their appeal was delayed until entry of a final judgment. We conclude plaintiffs failed to satisfy this burden and are thus not entitled to appellate review of that order. Accordingly, we dismiss plaintiffs' two appeals.

I. Background

Arising from their purchase of a new home contingent upon kitchen renovations that were allegedly negligently performed, on 9 May 2016 plaintiffs filed an amended complaint asserting fifteen claims against seven defendants: Real Estate by Design, LLC, Lisa Ellis, and Colleen Ellis (collectively, "the Realtors"); Home by Design, LLC and Gregory Ellis (collectively, "the Contractor"); and Steve Smallman Property Inspections, L.L.C. and Gary Sutton (collectively, "the Inspector"). Against the Realtors separately, plaintiffs alleged (1) breach of fiduciary duty, (2) constructive fraud, (3) fraud in the inducement, and (4) unfair and deceptive trade practices ("UDP"). Against the Contractor separately, plaintiffs alleged (5)

breach of contract, (6) breach of implied warranty of workmanship, (7) negligent construction, (8) breach of implied warranty of habitability, (9) negligent misrepresentation, (10) fraud, (11) fraud in the inducement, and (12) UDP. Against the Realtors and the Contractor together, plaintiffs alleged (13) punitive damages and (14) conspiracy. Against the Inspector separately, plaintiffs alleged (15) negligence.[1]

On 11 January 2017, the Realtors moved for summary judgment as to all claims plaintiffs asserted against them. After a hearing, the trial court entered a 22 March 2017 partial summary judgment order dismissing with prejudice plaintiffs' claims against the Realtors ("Partial SJ Order"). On 3 April, plaintiffs filed a "motion to reconsider and revise summary judgment order" (original in all caps), purportedly under the authority of Rule 54(b) of our Civil Procedure Rules, requesting the trial court to enter an order denying the Realtors' summary judgment motion. After a hearing, the trial court entered a 12 April 2017 order denying plaintiffs' written motion to reconsider and revise the Partial SJ Order, as well as plaintiffs' oral motions to certify the Partial SJ Order as immediately appealable under Rule 54(b)

[1] Plaintiffs later voluntarily dismissed with prejudice their sole claim against the Inspector, thereby removing those defendants from the action.

and to continue their trial against the Contractor ("Reconsideration Order"). Plaintiffs appeal both the Partial SJ Order and the Reconsideration Order.[2]

II. Analysis

On appeal, plaintiffs raise multiple merits-related arguments challenging the propriety of the Partial SJ Order. A threshold issue, however, is whether plaintiffs are entitled to immediate appellate review of that interlocutory order.

A. Appellate Jurisdiction

Plaintiffs acknowledge the Partial SJ Order is interlocutory since it dismissed their six claims against the Realtors but failed to resolve their ten claims against the Contractor. They assert entitlement to immediate appellate review of that order on substantial-right grounds under an inconsistent-verdict theory. *See* N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)(a) (2017).

"Generally, there is no right of immediate appeal from interlocutory orders." *Radiator Specialty Co. v. Arrowood Indem. Co.*, ___ N.C. App. ___, ___, 800 S.E.2d 452, 458 (2017) (quoting *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990)). Yet a party may be entitled to immediate appellate review of an interlocutory order if (1) "in multi-claim or multi-party litigation, . . . the trial court certifies under Rule 54(b) of the North Carolina Rules of Civil Procedure that its order

[2] However, because plaintiffs have failed to raise any specific challenge to the Reconsideration Order, in their principal or reply briefs, we dismiss their appeal from that order. N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief[ ] . . . will be taken as abandoned.").

represents a final judgment as to some claims or parties and that there is no just reason to delay the appeal"; or (2) "the order qualifies under N.C. Gen. Stat. §§ 1-277 and 7A-27[ ] . . . , typically because it affects 'a substantial right which [the appellant] might lose if the order is not reviewed before final judgment.' " *Id.* (first citing N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015); then quoting *Hanesbrands, Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016)).

Here, the trial court did not Rule 54(b)-certify its Partial SJ Order; indeed, in its Reconsideration Order the trial court explicitly denied plaintiffs' motion to Rule 54(b)-certify the Partial SJ Order as immediately appealable. Because plaintiffs claim a right to immediate appellate review of the Partial SJ Order on substantial-right grounds, they bear the burden of demonstrating that order "(1) affect[s] a substantial right and (2) [will] work injury if not corrected before final judgment." *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 569 (2007) (quoting *Goldston*, 326 N.C. at 728, 392 S.E.2d at 737). "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[.]" *Hanesbrands*, 369 N.C. at 218–19, 794 S.E.2d at 499 (quoting *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005)).

> To satisfy this burden, [plaintiffs] must allege in the statement of the grounds for appellate review section of

> their briefs sufficient facts and argument establishing that [the Partial SJ Order] affects a substantial right, and must present more than a bare assertion that [it] affects a substantial right; they must demonstrate why [that] order affects a substantial right[.]

Radiator Specialty, ___ N.C. App. at ___, 800 S.E.2d at 458–59 (citations, quotation marks, and brackets omitted). "Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed." *Id.* at ___, 800 S.E.2d at 459 (quoting *Johnson*, 168 N.C. App. at 518, 608 S.E.2d at 338).

B. Claimed Substantial Right

Plaintiffs assert delaying their appeal of the Partial SJ Order until entry of a final judgment resolving their pending claims against the Contractor would irreparably affect their substantial right to avoid potentially inconsistent jury verdicts on the same factual issues in two trials should they later prevail in their appeal from the Partial SJ Order and thus be forced to separately litigate their claims against the Realtors and the Contractor.

While "a party's preference for having all related claims determined during the course of a single proceeding does not rise to the level of a substantial right," *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 79, 711 S.E.2d 185, 190 (2011) (citation omitted), "[a] party's right to avoid separate trials of the same factual issues may constitute a substantial right." *Finks v. Middleton*, ___ N.C. App. ___, ___, 795 S.E.2d 789, 794 (2016) (citation and quotation marks omitted). "Issues are the 'same'

if the facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts." *Hamilton*, 212 N.C. App. at 79, 711 S.E.2d at 190 (citation omitted).

"[T]he possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Green v. Duke Power Co.,* 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). Thus, an appellant seeking to appeal an interlocutory order on this basis must show "(1) the same factual issues would be present in both trials *and* (2) the possibility of inconsistent verdicts on those issues exists." *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, 219 N.C. App. 623, 627–28, 727 S.E.2d 311, 314–15 (2012) (citation, quotation marks, and brackets omitted). "The extent to which an interlocutory order affects a substantial right must be determined on a case-by-case basis." *Hamilton*, 212 N.C. App. at 78, 727 S.E.2d at 189 (citations omitted).

C. Substantial Right Showing

Plaintiffs assert their claims against the Realtors and the Contractor "arise out of a common set of facts, raise many similar claims, and turn on many of the same factual issues." They identify the following "overlapping factual issues" if their claims were separately litigated against both groups of defendants:

> [1.] Whether the Realtors conspired with their brother/husband, Greg, to induce the sale of the Amelios'

> home;
>
> [2.] Whether the sale was, in fact, induced by the underbid renovations;
>
> [3.] To what extent the renovation damaged the structure;
>
> [4.] Whether Greg colluded with the Realtors on the bid and the project's costs;
>
> [5.] Whether Greg committed one or more unfair or deceptive acts damaging the Amelios;
>
> [6.] Whether Greg committed fraud;
>
> [7.] Whether Lisa or Colleen had a supervisory function or authority as managers of Home by Design, LLC.

Thus, plaintiffs continue, "[m]any elements in the claims against the Contractor are threshold to the claims against the Realtors. If the Contractor's jury found no liability, it would be inconsistent with Realtors' later jury finding them liable." Additionally, plaintiffs assert, two juries could render "inconsistent rulings on [the following] other factual findings:"

> [1.] Whether the Contractor used insider knowledge gained by the Realtors in fashioning his bid which he knew or should have known was inadequate to cover the work necessary on the Amelios' property.
>
> [2.] Whether [the Realtors and the Contractor] acted together in an unfair and deceptive manner in their dealings with Plaintiffs.
>
> [3.] The existence and extent of a conspiracy between the Contractor and the Realtors.

[4.] The scope of the defective work.

While plaintiffs have attempted to identify some purportedly overlapping factual issues, they have failed to adequately demonstrate how separately litigating any particular claim(s) against the Contractor creates a risk of inconsistent verdicts of any particular claim(s) against the Realtors. In light of their eight distinct claims against only the Contractor, and their four distinct claims against only the Realtors, plaintiffs' mere reference to unspecified "elements" or an unparticularized jury finding on the Contractor's "liability" is insufficient to show how the Realtor's jury would be called to decide the same facts as the Contractor's jury in order to resolve any particular issue of any particular claim against the Realtors.

To the extent plaintiffs' argument appears to be grounded in a theory that the Realtors' liability is derivative of a finding of liability against the Contractor, it is foreclosed by *Long v. Giles*, 123 N.C. App. 150, 152, 472 S.E.2d 374, 375 (1996) (holding no substantial right affected when derivative liability claims are litigated separately from related direct liability claims because no possibility of inconsistent verdicts would exist). Further, plaintiffs have neither sufficiently demonstrated how contradictory jury findings on these "same factual issues" could create any particular inconsistent verdict, nor argued how any *prejudicially* inconsistent verdict might result. *See Nguyen v. Taylor*, 200 N.C. App. 387, 391, 684 S.E.2d 470, 473 (2009) ("[B]efore a substantial right is affected on this basis, it must be shown that the same

factual issues are present in both trials *and* that plaintiffs will be prejudiced by the possibility that inconsistent verdicts may result." (citation omitted)).

Nonetheless, in reviewing plaintiffs' complaint, we are satisfied delaying their appeal would not irreparably affect their claimed substantial right. The six claims against only the Contractor were based on different theories of liability than the two claims against only the Realtors, and the two identical claims against both the Realtors and the Contractor separately, i.e., fraud in the inducement and UDP, were based on separate and distinct allegations of misconduct of each group of defendants. As the specific proof required to litigate each of those claims is different, there is no risk of inconsistent verdicts if those claims were separately litigated.

The only claim plaintiffs' alleged "same factual issues" might implicate is their civil conspiracy claim asserted against both the Realtors and the Contractor together. However, one essential element of that claim is "an agreement between two or more individuals . . . ." *Mace v. Pyatt*, 203 N.C. App. 245, 251, 691 S.E.2d 81, 87 (2010) (citation and quotation marks omitted). Because the Partial SJ Order dismissed plaintiffs' claims against the Realtors, no potential co-conspirators would remain to submit any factual issue arising from plaintiffs' conspiracy claim to the Contractor's jury. If plaintiffs later prevail in their Partial SJ Order appeal, only then might that conspiracy claim be presented to a jury. Thus, no risk of inconsistent verdicts exists.

As plaintiffs have failed to allege sufficient facts and argument to support their claimed substantial right to avoid the risk of inconsistent verdicts, they are not entitled to immediate appellate review of that order under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a). We therefore dismiss plaintiffs' appeal from the Partial SJ Order.

III. Conclusion

Because plaintiffs failed to raise any challenge to the Reconsideration Order on appeal, they have waived their right to appellate review of that order. Additionally, plaintiffs have failed to sufficiently demonstrate how delaying their appeal from the non-Rule 54(b)-certified Partial SJ Order would irreparably affect their claimed substantial right to avoid inconsistent jury verdicts in separate trials. Accordingly, we dismiss plaintiffs' appeals.

DISMISSED.

Judges INMAN and BERGER concur.

Report per Rule 30(e).