

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-919

Filed: 5 March 2019

Wake County, No. 17 CVS 9169

SHAKEEVIA BROWN, Plaintiff-Appellee,

v.

STEPHEN SHAW THOMPSON, Defendant-Appellant.

Appeal by defendant from order entered 6 June 2018 by Judge Vince M. Rozier, Jr., in Wake County Superior Court. Heard in the Court of Appeals 13 February 2019.

No brief filed for plaintiff-appellee.

Blue LLP, by Dhamian A. Blue, for defendant-appellant.

ARROWOOD, Judge.

Stephen Shaw Thompson (“defendant”) appeals from the trial court’s order denying his motion for summary judgment. For the following reasons, we dismiss the appeal.

I. Background

Shakeevia Brown (“plaintiff”) commenced this action against defendant on 27 July 2017. Plaintiff asserted allegations including defamation, intentional

BROWN V. THOMPSON

Opinion of the Court

infliction of emotional distress, negligent infliction of emotional distress, and sexual harassment. Defendant filed a motion to dismiss and an answer on 11 October 2017.

On 25 April 2018, defendant filed a motion for summary judgment, or in the alternative, a motion to dismiss for failure to prosecute. Defendant sought summary judgment on the basis that principles of *res judicata* precluded plaintiff from any recovery. Defendant attached to the motion a copy of a “Complaint for No-contact Order for Stalking or Nonconsensual Sexual Conduct” filed by plaintiff in Wake County District Court on 5 October 2017. Defendant also attached to the motion a copy of the district court’s 2 November 2017 “No Contact Order for Stalking or Nonconsensual Sexual Conduct” denying plaintiff’s complaint and dismissing the matter upon finding a failure to prosecute.

Defendant’s motion for summary judgment was heard at the 31 May 2018 session of Wake County Superior Court. On 6 June 2018, the trial court entered an order denying defendant’s motion for summary judgment. Defendant filed notice of appeal on 27 June 2018.

II. Discussion

At the outset, we must address the interlocutory nature of defendant’s appeal.

An order denying of a motion for summary judgment is an interlocutory order because it leaves the matter for further action by the trial court. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (“An interlocutory order is

BROWN V. THOMPSON

Opinion of the Court

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.”). “Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, “immediate appeal is available from an interlocutory order or judgment which affects a substantial right.” *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quotation marks omitted).¹

“[W]hen an appeal is interlocutory, the appellant must include in its statement of grounds for appellate review ‘sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.’ ” *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (quoting N.C.R. App. P. 28(b)(4)), *aff’d per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005). “The 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.” *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009) (emphasis in original).

Defendant concedes this appeal is interlocutory, but contends it affects a substantial right because the basis of his motion for summary judgment was that recovery in this action is barred by principles of *res judicata*.

¹ Immediate appeal is also available if the trial court certifies the matter for immediate appeal. See N.C. Gen. Stat. § 1A-1, Rule 54 (b) (2017); *Sharpe*, 351 N.C. at 161-62, 522 S.E.2d at 579. However, the trial court did not certify its order in this case as immediately appealable under Rule 54(b).

As defendant points out, this Court has acknowledged that “our Supreme Court has ruled that the denial of a motion for summary judgment based on the defense of *res judicata* . . . is immediately appealable.” *McCallum v. N.C. Co-op. Ext. Serv. of N.C. State Univ.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (citing *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993)), *appeal dismissed and disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001). When considered in isolation, the above quote seems to be an absolute statement of the law; however, in context, it is clear that this Court was simply noting that, in *Bockweg*, the denial of the defendant’s motion for summary judgment based on the defense of *res judicata* was held to affect a substantial right. In *McCallum*, this Court further stated, “the denial of summary judgment based on the defense of *res judicata* can affect a substantial right and may be immediately appealed.” *Id.* (citing *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161).

In *Bockweg*, the Supreme Court explained why the denial of a motion for summary judgment based on the defense of *res judicata* can affect a substantial right and may be immediately appealable:

As a general rule, a moving party may not appeal the denial of a motion for summary judgment because ordinarily such an order does not affect a substantial right. However, we have noted that while [t]he right to avoid one trial on the disputed issues is not normally a substantial right that would allow an interlocutory appeal, . . . the right to avoid the possibility of two trials on the same issues can be such a substantial right.

333 N.C. at 490-91, 428 S.E.2d at 160 (quotation marks and citations omitted).

Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them. Thus, a motion for summary judgment based on *res judicata* is directed at preventing the possibility that a successful defendant, or one in privity with that defendant, will twice have to defend against the same claim by the same plaintiff, or one in privity with that plaintiff. Denial of the motion could lead to a second trial in frustration of the underlying principles of the doctrine of *res judicata*. Therefore, we hold 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.

Id. at 491, 428 S.E.2d at 161 (internal citations omitted).

Subsequent to the Court's decision in *Bockweg*, this Court has noted the permissive language in *Bockweg*, emphasizing that *Bockweg* holds the denial of summary judgment based on a defense of *res judicata* "may" affect a substantial right. *See Country Club of Johnston Cnty., Inc. v. U.S. Fidelity and Gaur. Co.*, 135 N.C. App. 159, 166, 519 S.E.2d 540, 545 (1999) ("[W]e do not read *Bockweg* as mandating in every instance immediate appeal of the denial of a summary judgment motion based upon the defense of *res judicata*. The opinion pointedly states reliance upon *res judicata* 'may affect a substantial right.'") (quoting *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161 (emphasis added)), *disc. review denied*, 351 N.C. 352, 542 S.E.2d 207 (2000). In *Country Club of Johnston Cnty.*, this Court explained that,

in an opinion issued shortly after *Bockweg*, *Community*

BROWN V. THOMPSON

Opinion of the Court

Bank v. Whitley, 116 N.C. App. 731, 449 S.E.2d 226, *disc. review denied*, 338 N.C. 667, 453 S.E.2d 175 (1994), [it] interpreted the permissive language of *Bockweg* as allowing, under the substantial right exception, immediate appeal of the denial of a motion for summary judgment based, *inter alia*, upon defense of *res judicata* “where a possibility of inconsistent verdicts exists if the case proceeds to trial.” *Id.* at 733, 449 S.E.2d at 227 (emphasis added); *see also Little v. Hamel*, 134 N.C. App. 485, 517 S.E.2d 901 (1999) (appeal of denial of summary judgment motion based upon *res judicata* considered to affect substantial right where, although not directly noted by the Court, defendants had been absolved of liability in previous suit between the parties and faced possibility of inconsistent verdicts).

In short, denial of a motion for summary judgment based upon the defense of *res judicata* may involve a substantial right so as to permit immediate appeal only “where a possibility of inconsistent verdicts exists if the case proceeds to trial.” *Community Bank*, 116 N.C. App. at 733, 449 S.E.2d at 227.

135 N.C. App. at 166-67, 519 S.E.2d at 545-46. There was no possibility of inconsistent verdicts in *Country Club of Johnston Cnty.*, *id.* at 167, 519 S.E.2d at 546, and this Court dismissed the appeal, *id.* at 168, 519 S.E.2d at 546; *see also Northwestern Fin. Group, Inc. v. Cnty. Of Gaston*, 110 N.C. App. 531, 536, 430 S.E.2d 689, 692 (holding there was no possibility for inconsistent verdicts because there had yet to be a trial in the matter because the initial action sought only equitable relief), *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993). Citing *Country Club of Johnston Cnty.* and *Northwestern Fin. Group, Inc.*, this Court has more recently stated that it “has previously limited interlocutory appeals to the situation when the

BROWN V. THOMPSON

Opinion of the Court

rejection of [a *res judicata* defense] gave rise to a risk of two actual trials resulting in two different verdicts.” *Foster v. Crandell*, 181 N.C. App. 152, 162, 638 S.E.2d 526, 534, *disc. review denied*, 361 N.C. 567, 650 S.E.2d 602 (2007).

The present case is easily distinguishable from cases holding the denial of a motion for summary judgment on the basis of *res judicata* raises a substantial right to permit immediate appellate review. First, the posture of this case is unique in that the complaint in the present action was filed prior to the complaint in the district court case that defendant now claims precludes recovery. Second, the district court case, which sought only a no contact order under Chapter 50C of the General Statutes based on factual allegations similar to those made in the present case, was dismissed for plaintiff's failure to prosecute. Although a dismissal that does not indicate otherwise operates as an adjudication on the merits, *see* N.C. Gen. Stat. § 1A-1, Rule 41(b) (2017), there was no determination of the underlying issues that would raise the potential for an inconsistent verdict in the present case. Additionally, the issues to be decided in a Chapter 50C action for a no contact order are substantially more narrow than those to be determined in the present action seeking additional relief including money damages, relief not afforded in a Chapter 50C action. As a result, we hold the doctrine of *res judicata* does not raise a substantial right in this case to permit an immediate appeal of the trial court's denial of defendant's motion for summary judgment.

BROWN V. THOMPSON

Opinion of the Court

III. Conclusion

The denial of defendant's motion for summary judgment on the basis of *res judicata* does not affect a substantial right in this instance. Therefore, immediate appeal is not proper and defendant's appeal is dismissed.

DISMISSED.

Judges STROUD and TYSON concur.