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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-549

Filed: 21 January 2020

Wake County, No. 17-CVS-15355

WILLIAM D. ANTON, Plaintiff,

v.

THOMAS C. ANTON, JR., individually, in his capacity as current trustee of the Rosemary Anton Revocable Living Trust, and in his capacity as personal representative of the Estate of Rosemary Anton, YVONNE A. NIEMANN, and THE ROSEMARY ANTON REVOCABLE LIVING TRUST, Defendants.

and

IN THE MATTER OF THE WILL OF ROSEMARY ANTON, Deceased.

Appeal by Plaintiff from order entered 4 January 2019 by Judge R. Allen Baddour, Jr., in Wake County Superior Court. Heard in the Court of Appeals 13 November 2019.

Fiduciary Litigation Group, by Thomas R. Sparks, and Hopler, Wilms, & Hanna, PLLC, by Adam J. Hopler, for Plaintiff-Appellant.

Manning Fulton & Skinner, P.A., by Robert S. Shields, Jr., for Defendants-Appellees.

COLLINS, Judge.

Plaintiff William D. Anton appeals from an interlocutory order granting partial summary judgment to Thomas C. Anton, Jr., Yvonne A. Niemann, and The Rosemary Anton Revocable Trust. As Plaintiff has failed to demonstrate that he would be deprived of a substantial right absent immediate review, we lack jurisdiction and dismiss this appeal.

I. Procedural History

Plaintiff commenced this action in September 2017 by filing a will caveat to the purported 4 November 2014 will of Rosemary Anton. The propounders of the will, Thomas C. Anton, Jr. (“Thomas”), and Yvonne A. Niemann (“Yvonne”) (together, “Defendants”), filed an answer to the caveat in October. The Clerk aligned the parties in November.

Plaintiff then filed a petition in Wake County Superior Court in December, seeking declaratory judgment that the 6 November 2014 restatement of The Rosemary Anton Revocable Trust (“the trust”) dated 12 June 1993 was invalid because the decedent, Rosemary Anton (“Rosemary”), lacked the requisite capacity and intent to amend the trust, and the revision was executed under duress and undue influence by Defendants.

Both actions were consolidated in July 2018, and Plaintiff filed an amended petition and complaint, adding claims of constructive fraud and tortious interference with expectation of inheritance, and seeking punitive damages. Defendants’ answer

to the amended complaint included counterclaims against Plaintiff for breach of fiduciary duty owed to Rosemary and constructive fraud, specifically alleging that Plaintiff fraudulently misappropriated or embezzled money from Rosemary. In Plaintiff's answer, he denied the allegations, requested dismissal of the counterclaims, and requested a trial by jury on the remaining claims.

In August 2018, Defendants filed a motion for partial summary judgment with respect to Plaintiff's claims, which Plaintiff opposed by memorandum. The trial court conducted a hearing in December and issued an order in January 2019 granting partial summary judgment to Defendants. The trial court's 4 January 2019 order dismissed Plaintiff's will caveat, amended complaint, and petition for declaratory judgment with prejudice, leaving Defendants' counterclaims for further consideration.

Plaintiff timely filed written notice of appeal.

II. Background

The record on appeal contains evidence of the following: Plaintiff and Defendants are siblings. Their mother, Rosemary, died in March 2017 at 101 years old.

Rosemary had previously executed a will and a revocable living trust on 12 June 1993 after her husband, Thomas Anton, Sr., passed away. The estate planning documents specified that her property should be left to her children in equal

shares, except that \$63,000 should be deducted from Plaintiff's share to forgive debt he owed to Rosemary.

In June 2002, Plaintiff moved to Alton, Illinois, to live with Rosemary on her property and in her house. At that time, Rosemary was 86 years old. In February 2003, Plaintiff purchased the house next door to hers. Plaintiff helped Rosemary by doing yardwork and chores around her house, making necessary repairs to her home, and working in her garden. Rosemary was independent and managed her monthly income and finances with no help from Plaintiff. Defendants helped Rosemary manage her brokerage accounts with Morgan Stanley and Vanguard.

After Rosemary stopped driving in 2009, Plaintiff drove her to medical appointments and social engagements. Rosemary's eyesight was limited due to macular degeneration. Because of Rosemary's aging and decreased mobility, Rosemary and Plaintiff discussed modifying her home to make it more suitable. Rosemary did not want her house to be renovated while she was living in it, so Plaintiff made modifications to his home beginning in 2010, to provide wheelchair accessibility and to make it functional for Rosemary if she were to live there in the future.

In September 2012, Rosemary broke her hip, which required surgery. While she was in the hospital after the surgery, Rosemary executed powers of attorney on 9 October 2012 for Plaintiff to make medical and financial decisions on her behalf.

On the same day, Plaintiff and Defendants decided in a telephone conversation that Defendants would continue to manage Rosemary's brokerage accounts. Thomas maintained control of these accounts for Rosemary until her death. In April 2013, Rosemary resigned as trustee of the trust and made Thomas the sole trustee.

After being released from post-surgery rehabilitation, Rosemary moved into Plaintiff's modified home next to her house, and Plaintiff stayed in Rosemary's house. Plaintiff brought her meals daily. Rosemary told a friend who visited her during the summer and fall of 2012 that Plaintiff did not allow Rosemary to make decisions and that he locked her in the house at night. Rosemary's friend believed that Plaintiff was psychologically hurting Rosemary. When Rosemary shared similar feelings with her friend again in September 2013, the friend contacted Yvonne to let her know.

On 9 October 2013, Defendants travelled to Illinois to remove Rosemary from Plaintiff's home, planning to take her to Wake Forest, North Carolina, where Thomas lived. They told Plaintiff they were taking Rosemary to visit the grave of her late husband, which they did, but afterward they took Rosemary to a local attorney's office. During her meeting with two attorneys, Rosemary revoked the previously executed powers of attorney and executed new powers of attorney in favor of Thomas. Neither Thomas nor Yvonne participated in this meeting, and both attorneys documented that Rosemary's execution of new powers of attorney was a "free and voluntary act."

Yvonne returned to Illinois at the end of October 2013 to retrieve some of Rosemary's belongings, including financial records that Yvonne thought Rosemary had maintained since 1993, when Yvonne helped her establish a record-keeping system. When Yvonne was unable to find the records she was looking for, she believed that Plaintiff had taken them.

Thomas sent an email message to Plaintiff in October 2013 inquiring about certain items of Rosemary's personal property and asking Plaintiff to provide a "record of accountability from the time [Plaintiff] took over payment of daily bills until the final disbursement was made" by Plaintiff in his capacity as her agent. Plaintiff emailed electronic copies of bank statements to Thomas. In November 2013, Thomas sent Plaintiff a letter demanding records of "current and past files for [Rosemary's] investments that were made or cashed out," records of improvements to Rosemary's property, and receipts for expenditures incurred while Plaintiff managed Rosemary's daily bills starting in December 2012. At the end of the letter, Thomas wrote, "Please understand that any missing items or records that cause Mother further trouble will be valued and may reflect future decisions that Mother makes in her management of her will. She wants a resolution of this matter by December 6, 2013."

In the spring of 2014, Rosemary met with an attorney in North Carolina to discuss revising her will and trust. She explained to the attorney that she did not

wish to include Plaintiff in her revised will and trust and that she did not feel obligated to include Plaintiff because Plaintiff had not been a dutiful son. The attorney described Rosemary as “mentally alert, extremely sharp in her expressions and conversation,” “knowing exactly what she wanted,” and “prepared to discuss these matters in detail.” The attorney prepared a revised will, a revised trust, and a new health care power of attorney, but Rosemary did not execute the documents at that time.

Rosemary moved in June 2014 to Kentucky to live with Yvonne. Rosemary met with an attorney there to discuss executing the revised estate planning documents that had been prepared in North Carolina. In a private meeting with the attorney, Rosemary explained “in great detail that she was not providing for [Plaintiff] in her will . . . because he had not been a dutiful son.” The attorney described Rosemary as “a well-educated person” who was “extremely lucid and articulate.” On 6 November 2014, Rosemary executed the revised will and trust, and the new health care power of attorney.

Plaintiff did not see Rosemary again after she departed Illinois in 2013, and Plaintiff did not attend Rosemary’s memorial service after she passed away in March 2017.

III. Discussion

On appeal, Plaintiff argues that the trial court erred by granting Defendants' motion for partial summary judgment, dismissing with prejudice Plaintiff's will caveat, amended complaint, and petition.

Defendants move to dismiss Plaintiff's appeal, contending that the trial court's order granting partial summary judgment to Defendants is an interlocutory order that is not immediately appealable. Plaintiff acknowledges that the order is interlocutory, but argues that the order is immediately appealable because it affects a substantial right. Specifically, Plaintiff argues that, absent immediate review, he will be deprived of his substantial right to avoid inconsistent verdicts in multiple trials because the same factual issues exist in his dismissed claim of undue influence and Defendants' remaining counterclaims for constructive fraud and breach of fiduciary duty.

Where, as here, the trial court's order does not dispose of all claims and all defendants, it is an interlocutory order. N.C. Gen. Stat. § 1A-1, Rule 54(a) (2018); *see Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (comparing an interlocutory order that "does not dispose of the case" with a final judgment that "leav[es] nothing to be judicially determined between [the parties] in the trial court"). Because there is generally no right to immediate appeal of an interlocutory order, a party wishing to appeal an interlocutory order must wait until a final judgment has

been rendered in the case. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2018). This rule 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.” *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218 (1985) (citation omitted).

Immediate appeal of an interlocutory order may be permitted if the trial court certifies the order under Rule 54(b) of the North Carolina Rules of Civil Procedure. See N.C. Gen. Stat. § 1A-1, Rule 54(b). However, the trial court did not certify the order pursuant to Rule 54(b) in this case. Immediate appeal of an interlocutory order may also be permitted if the appellant can show that the order affects a substantial right that will be “lost, prejudiced, or inadequately preserved in the absence of an immediate appeal.” *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 78, 711 S.E.2d 185, 189 (2011). “The avoidance of one trial is not ordinarily a substantial right.” *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (citations omitted). However, “the right to avoid the possibility of two trials on the same issues can be . . . a substantial right.” *Id.* (internal quotation marks, citation, and emphasis omitted).

Where a party is appealing an interlocutory order to avoid two trials, the party must show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists. 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.

Finks v. Middleton, 251 N.C. App. 401, 406, 795 S.E.2d 789, 794 (2016) (internal quotation marks and citations omitted).

In Plaintiff's will caveat, amended complaint, and petition for declaratory judgment, the issue is whether Defendants influenced Rosemary to revise her estate planning documents in a manner that did not reflect her wishes, by disinheriting Plaintiff. In Defendants' claims for constructive fraud and breach of fiduciary duty, the issue is whether Plaintiff fraudulently misappropriated or embezzled money from Rosemary. Plaintiff argues that the facts are "inextricably intertwined" because "[b]oth have to do with the allegedly missing money." Plaintiff explains:

The [Defendants] allege funds, totaling between \$500,000 . . . and up to \$2,000,000 . . . are missing from what they expected would be in their mother's estate, and they blame [Plaintiff] for this alleged shortfall. The [Plaintiff] claims that the [Defendants] unduly influenced the parties' mother to disinherit the [Plaintiff] by planting in her mind that the [Plaintiff] took these funds. This belief so pervaded [Rosemary's] mind that, ultimately, she executed a new will and a new trust disinheriting the [Plaintiff] because, as she states in the documents, she "had already provided for [him]."

Contrary to Plaintiff's assertion, the resolution of the claims does not depend upon similar factual issues or similar proof. To prevail on their constructive fraud and breach of fiduciary duty claims, Defendants must show that Plaintiff misappropriated Rosemary's money. However, Plaintiff's claim for undue influence

is based, in part, on the allegation that Defendants “plant[ed] in [Rosemary’s] mind that the [Plaintiff] took these funds[;]” such allegation is not dependent upon whether Plaintiff actually misappropriated Rosemary’s money.

Plaintiff further argues that

[s]hould the matters be heard separately, it is possible that a first jury may issue a verdict in the [Defendants’] favor on the issues related to the alleged financial misconduct of the [Plaintiff], only to later, following a separate trial on the undue influence claims where the overlapping facts are presented, issue a verdict in the [Plaintiff’s] favor.

However, verdicts in Defendants’ favor on their constructive fraud and breach of fiduciary duty claims are not inherently inconsistent with a verdict in Plaintiff’s favor on his undue influence claim, or vice versa. Here the claims have different elements and require different factual support. Defendants’ constructive fraud claim requires proof of facts and circumstances that created a relationship of trust and confidence between Plaintiff and Rosemary and resulted in the consummation of the transaction in which Plaintiff is alleged to have taken advantage of his position of trust to Rosemary’s detriment. *See Piles v. Allstate Ins. Co.*, 187 N.C. App. 399, 406, 653 S.E.2d 181, 186 (2007). Defendants’ breach of fiduciary duty claim requires proof that a fiduciary relationship existed between Plaintiff and Rosemary and that Plaintiff failed to act in good faith and with due regard to Rosemary’s interests. *See Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 70, 614 S.E.2d 328, 337 (2005). Plaintiff’s undue influence claim requires proof that Rosemary was subject to

influence, that Defendants had the opportunity and disposition to exert influence over her, and that Defendants' influence caused a result indicating undue influence. *See In re Will of Dunn*, 129 N.C. App. 321, 328, 500 S.E.2d 99, 104 (1998).

Thus, even if Plaintiff's misappropriation of funds were relevant to both Plaintiff's and Defendants' claims, which we conclude it was not, Plaintiff advances no argument as to how separate consideration of their claims creates a risk of inconsistent verdicts "given the differences in the nature of the inquiry that must be conducted as part of the evaluation of those claims." *Hamilton*, 212 N.C. App. at 84, 711 S.E.2d at 193.

IV. Conclusion

Because Plaintiff appeals from an interlocutory order and has failed to demonstrate a right to immediate review under the theory that delay until final judgment would deprive him of his substantial right to avoid inconsistent verdicts in multiple trials, we lack jurisdiction and must dismiss.

DISMISSED.

Judges TYSON and YOUNG concur.

Report per Rule 30(e).