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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1112

Filed: 7 April 2020

Durham County, No. 17 CVS 3710

DUNHILL HOLDINGS, LLC, Plaintiff/Counterclaim Defendant

v.

TISHA L. LINDBERG, Defendant/Counterclaim Plaintiff,

and

WES MASSEY, CRAIG HERNDON, HARDEE MERRITT, and DEREK BOONE,  
Defendants.

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TISHA L. LINDBERG, Third Party Plaintiff

v.

GREG E. LINDBERG, Third Party Defendant.

Appeal by Dunhill Holdings, LLC and Greg E. Lindberg from an order entered 27 June 2018 by Judge John W. Smith in Superior Court, Durham County. Heard in the Court of Appeals 23 April 2019.

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*Opinion of the Court*

*Fox Rothschild, by Matthew Nis Leerberg and Kip D. Nelson, and Condon Tobin Sladek Thornton PLLC, by Aaron Z. Tobin and Jared T.S. Pace, for plaintiff-appellant and counterclaim defendant-appellant and third-party defendant-appellant.*

*Zaytoun Law Firm, PLLC, by Robert E. Zaytoun, and N. Cole Williams, and Young Moore & Henderson, by John Hutson, for defendant/counterclaim plaintiff-appellee.*

McGEE, Chief Judge.

I. Factual and Procedural History

Dunhill Holdings, LLC (“Dunhill”) filed a complaint against Tisha L. Lindberg, as well as four former employees of Dunhill on 24 July 2017. According to Dunhill, the company is owned by Greg E. Lindberg, who is “the founder and sole manager and member of Dunhill.” Greg E. Lindberg and Tisha L. Lindberg married on 19 September 2003 and separated on 22 May 2017. In its amended complaint filed 24 August 2017, Dunhill described Tisha L. Lindberg as Dunhill’s “Chief Executive Officer”; however, she denied this characterization in her answer, saying that “while [Mr.] Lindberg purported to call [her] the ‘C.E.O.’ of [Dunhill] on occasion, [Dunhill] never employed [Tisha L.] Lindberg in any capacity and [Dunhill] was merely a vehicle through which [Greg E.] Lindberg funded the personal lifestyle of the parties and their family . . . .”

Dunhill described itself as a “real estate holding company” in its amended complaint and the primary asset owned by Dunhill was the family home of Greg E.

Lindberg and Tisha L. Lindberg on Stagecoach Drive in Durham, North Carolina. In its amended complaint, Dunhill claimed Tisha L. Lindberg took funds from Dunhill and it asserted claims against her for breach of fiduciary duty, constructive fraud, civil liability for theft and embezzlement, civil conspiracy, conversion and an action for accounting, in addition to claims for unjust enrichment, disgorgement, and civil conspiracy against the other Defendants.

In her answer, Tisha L. Lindberg moved to dismiss Dunhill's complaint for failure to state a claim for which relief may be granted under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), denying various allegations of Dunhill and asserting affirmative defenses of breach of fiduciary duty by Greg E. Lindberg, fraud, constructive fraud, equitable estoppel, waiver, ratification, actual authority, and laches.

She also filed a third-party complaint against Greg E. Lindberg and counterclaim against Dunhill, seeking "all right, title, and interest in the Key West House" and "all right, title, and interest in the tennis complex" Greg E. Lindberg allegedly promised to give her. Tisha L. Lindberg subsequently filed an amended third-party complaint against Greg E. Lindberg and a counterclaim against Dunhill, asserting breach of fiduciary duty, constructive fraud, indemnity, declaratory relief, abuse of process, malicious prosecution, intentional infliction of emotional distress, spoliation of material evidence, and for a constructive trust over the tennis court.

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In her amended third-party complaint and counterclaim, Tisha L. Lindberg alleged Dunhill was merely an “alter-ego” of Greg E. Lindberg and was therefore liable for his actions. Dunhill and Greg E. Lindberg did not file an answer to Tisha L. Lindberg’s counterclaim and third-party complaint or her amended counterclaim and third-party complaint, instead filing a motion to dismiss each complaint.

Dunhill served Tisha L. Lindberg with its first request for production of documents on 24 October 2017 and she replied with objections and responses on 22 December 2017. On 26 February 2018, Tisha L. Lindberg submitted her first set of interrogatories and request for production of documents to Greg E. Lindberg and Dunhill. Dunhill moved to compel discovery on 9 March 2018. Tisha L. Lindberg filed a motion to compel discovery and request for attorney’s fees on 21 May 2018.

In her first request for production of documents submitted to Greg E. Lindberg and Dunhill, Tisha L. Lindberg sought the production of forensic evidence, stating in each Request for Production of Documents No. 23 as follows:

Produce for forensic inspection all electronic storage devices owned, leased, used or otherwise possessed or controlled by you, including, but not limited to, computers, hard drivers, servers, laptops, IPads, iPhones, smart phones, tablets, e-mail servers, e-mail cloud servers, or any other electronic device that is the repository for electronic messaging and communication. Identify the precise geographic location of each such device. This request seeks forensic inspection of any such electronic device for search of all documents referenced herein in these Requests for Production of Documents to you.

In his responses, Greg E. Lindberg responded as follows to this request:

Third Party Defendant objects to Request No. 23 on the ground that it is harassing, overly broad, unduly burdensome, not proportional to the needs of this case, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information that is not relevant to the subject matter of the pending action.

Third-Party Defendant further objects to Request No. 23 on the ground that, on its face it seeks production of records that are confidential or privileged, including records that are protected by the work product and attorney-client privileges, and violates the privacy rights of third persons who are not parties to this lawsuit.

Dunhill made an identical response to this request. In her motion to compel production of discovery, Tisha L. Lindberg specifically asked the trial court to order a forensic search of computer drives and devices, alleging that “[u]pon information and belief, Mr. Lindberg and Dunhill have intentionally attempted to destroy evidence from computers and electronic devices that is relevant to this matter.” Dunhill and Greg E. Lindberg filed a response to the motion to compel discovery and the trial court held a hearing on the motions to compel on 25 June 2018.

The trial court entered an Order Compelling Discovery by Dunhill and Greg E. Lindberg, an Order for Forensic Examination of Electronic Storage Device, and an Award of Attorney Fees to Tisha L. Lindberg (“the order”) on 27 June 2018. In the order, the trial court found as follows:

As to the request for a forensic examination of certain electronic devices, the Court . . . finds that there are

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circumstances whereby a forensic examination of the server housing the outlook email accounts used by the parties to this action during the time frame reaching back to the [] period when contested contentions of gifts of real estate valued in excess of one million dollars arose, would be beneficial in the ascertainment of truth. Such a forensic examination would disclose or shed light upon the question of whether or not there exists or existed crucial and relevant documentation that one party contends existed but was “scrubbed” and the other party conten[d]s never existed. . . . The Court further finds that considering the resources of the parties, a forensic examination of the server itself would not unduly burden or obstruct Dunhill Holdings LLC in its operations, nor has any credible evidence been presented that it would unduly interrupt or interfere with operations of any of the other LLC entities connected to Dunhill that may have possession of the server used by the parties to this litigation. There is some evidence that the server may be “owned” by a subsidiary, but all of the evidence shows that any other entity having such an interest exists under the control of Mr. Lindberg. . . . The concern about disclosing any confidential or privileged information is unsupported by any credible evidence or argument, and the inquiry in the forensic analysis can be conducted to a[s] to obviate any prejudice to Dunhill or to Mr. Lindberg should any such attorney-client privileged data be present.

The trial court concluded that:

The objection to the request for a forensic examination should be overruled for the reasons set forth in the findings [] above. The Court is authorized to order a forensic examination after weighing and balancing the burdens and rights of the parties and the Court finds that the balancing as to those findings clearly show in this case that such an examination is justified, will serve the best interests of both parties, and not pose an undue burden on any party.

The trial court ordered that Dunhill and Greg E. Lindberg “shall make the server or any electronic device housing, hosting, or storing the outlook email account used by the parties available for a forensic examination,” limited to the following purposes: (1) whether any emails or text messages between Greg E. Lindberg and Tisha L. Lindberg ever existed, and producing copies of them; (2) whether emails or text messages “dealing with real estate holdings subject to dispute in this lawsuit exist or ever existed, and producing copies of the same for the parties;” and (3) whether any of those messages “if there were any, have been intentionally deleted, and, if deleted, the circumstances of any deletion and whether or not they can be recovered.” In its order, the trial court further provided for the protection of arguably privileged communications as follows:

Out of an abundance of caution, if there is a contention that a document or communication is a communication exclusively between Greg E. Lindberg and an attorney actually representing him, and the communication does not include any third person for whom the privilege is unavailable, that objection may be renewed provided the specific communication is specifically identified and the basis for the objection and assertion of the privilege is clearly articulated.

On the same date, the trial court entered an Order Compelling Discovery by Tisha L. Lindberg and an Award of Attorney Fees to Dunhill.

Dunhill and Greg E. Lindberg filed notice of appeal of the order on 17 July 2018. They also filed a motion for stay with the trial court. Tisha L. Lindberg filed

a motion to disregard the notice of appeal and to continue case proceedings with the trial court, along with a response to the motion for stay. The trial court granted Tisha L. Lindberg's motion to disregard notice of appeal and denied Dunhill and Greg E. Lindberg's motion for stay on 24 August 2018. Dunhill and Greg E. Lindberg filed a petition for writ of supersedeas with this Court on 4 September 2018, that was denied in part with certain exceptions on 12 September 2018.

Tisha L. Lindberg filed a motion to dismiss the appeal on 7 November 2018, arguing the appeal was interlocutory and did not affect a substantial right, and therefore should be dismissed. Dunhill filed a response to the motion arguing the order did affect a substantial right to private information stored on the servers.

Tisha L. Lindberg subsequently filed a "New Motion to Dismiss Based on Withdrawal of Underlying Appellate Issue" ("second motion to dismiss") on 7 December 2018. In the second motion to dismiss, Tisha L. Lindberg argued the appeal should be dismissed as moot because she entered a "Notice of Withdrawal of Forensic Search Request" with the trial court. Dunhill and Greg E. Lindberg filed a response to Tisha L. Lindberg's motion to dismiss the appeal with this Court arguing the appeal was not moot because the withdrawal did not unilaterally dissolve the challenged portion of the order, because Tisha L. Lindberg remained free to seek further forensic examinations and, alternatively, because several exceptions to the mootness doctrine applied.



After the trial court granted Tisha L. Lindberg's motion to disregard notice of appeal and to continue case proceedings and response to motion to stay, pre-trial discovery proceeded in the trial court. Dunhill and Greg E. Lindberg filed a "Supplemental Response to New Motion to Dismiss Appeal" on 2 August 2019, arguing Tisha L. Lindberg's counsel had indicated an intent to seek further forensic examinations in the case. However, no new forensic examination order was requested, and pre-trial discovery by the parties proceeded, including the taking of depositions and the submission of a privilege log by Dunhill and Greg E. Lindberg followed by the disclosure of a large number of documents.

After further disputes over depositions and discovery persisted, Tisha L. Lindberg filed a Corrected Motion for Sanctions Regarding Deposition of Plaintiff Dunhill Holdings, LLC on 12 June 2019, and a Supplemental Motion for Sanctions Arising from Deposition of Greg E. Lindberg on 3 July 2019. The trial court held a hearing on Tisha L. Lindberg's motions for sanctions at which "all parties engaged in lengthy and fulsome arguments" on the motions. The trial court entered an order on 1 August 2019 granting sanctions against Dunhill based on repeated violations of the court's discovery orders. The trial court also granted Tisha L. Lindberg's 3 July 2019 Supplemental Motion for Sanctions against both Dunhill and Greg E. Lindberg. Sanctions granted in the order included striking all the pleadings by Dunhill and Greg E. Lindberg, dismissing all their claims with prejudice, and entering default

judgment in favor of Tisha L. Lindberg for all her claims. The only issue not decided by the order was damages, which was reserved for trial; however, we note that, under the sanctions order, Dunhill and Greg E. Lindberg cannot “use any documents or materials included within their recent 129,000+ page document production at any hearing, proceeding, or trial of this matter moving forward[.]”

Dunhill and Greg E. Lindberg each subsequently appealed the 1 August 2019 order imposing sanctions and entering default judgment for Tisha L. Lindberg on all issues except damages. On 13 August 2019, Dunhill and Greg E. Lindberg filed a “Notice of Filings of Notices of Appeal” with this Court, attaching as exhibits the underlying Notices of Appeal. We particularly note that in their respective Notices of Appeal, Dunhill and Greg E. Lindberg state they

hereby give[] notice that [they] will also seek appellate review of the discovery orders underlying the 1 August 2019 sanctions order, including, but not limited to, (1) the “Order Compelling Discovery by Dunhill Holdings LLC and Greg E. Lindberg; Order for Forensic Examination of Electronic Storage Device; Award of Attorney Fees” entered 27 June 2018 by the Honorable John W. Smith and (2) the “Order Granting Tisha L. Lindberg’s Motion to Compel Compliance with Court Order” entered 26 March 2019 by the Honorable Lora Cubbage.

The 27 June 2018 Order referenced in Dunhill and Greg E. Lindberg’s Notices of Appeal is the order at issue in the present case.

## II. Analysis

On appeal, Dunhill and Greg E. Lindberg argue the sanctions order is (1) an improper invasion of privacy, (2) it improperly invades the privacy of third parties, and (3) the sanctions order is improper because it is not based in evidence and lacks an appropriate foundation.

Before we can reach the merits of Dunhill and Greg E. Lindberg's arguments in this appeal, however, we note that Tisha L. Lindberg has filed two motions to dismiss the appeal because (1) the appeal is an interlocutory appeal which does not affect a substantial right and (2) the appeal is moot because she has filed a "Notice of Withdrawal of Forensic Search Request" with the trial court, removing the underlying motion to compel discovery. In Tisha L. Lindberg's "Objection and Reply in Opposition to Appellants' 'Supplemental Response to New Motion to Dismiss Appeal,'" she also argues that the trial court's imposition of a final sanctions order on 1 August 2019 moots the present appeal because the discovery order will have no further force or effect.

We further note that Dunhill and Greg E. Lindberg have now also filed notices of appeal dated 9 August 2019, in which each party appeals not only the final judgment of the trial court imposing sanctions, but also again specifically appeals the discovery order at issue in the present appeal. *See In re Pedestrian Walkway Failure*, 173 N.C. App. 254, 262, 618 S.E.2d 796, 802 (2005). As in *In re Pedestrian Walkway Failure*, Dunhill's and Greg E. Lindberg's later appeals "test[] the validity of both the

discovery order and the sanctions imposed.” *Id.* Any decision by this Court in the present case would likely have no “practical effect on the existing controversy” with the subsequent entry of the sanctions order. *Roberts v. Madison Cty. Realtors Ass’n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citation omitted).

This Court will now have an opportunity in the 9 August 2019 appeals to review the issues presented here, with a fully developed record, which includes the underlying discovery order. In the interests of judicial economy and efficiency, and in recognition of the cloud of jurisdictional defects in the present appeal, we refer to the panel of this Court that will decide Dunhill and Greg E. Lindberg’s appeals of the discovery order and the sanctions order together. That panel will have the issues on the merits squarely before it, with a fully developed record, in addition to the related issues in the underlying litigation. We note that dismissal of the present appeal in the interest of judicial efficiency does not prejudice Dunhill and Greg E. Lindberg in their 9 August 2019 appeals, as we are not deciding the merits of their claims on the issues raised here, nor are we holding this Court lacks subject matter jurisdiction to decide an appeal of the discovery order.

Although we dismiss this case without deciding whether the appeal is an interlocutory appeal that does not affect a substantial right, we note the wisdom in our Supreme Court’s statement that “[t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court

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piecemeal through the medium of successive appeals from intermediate orders.”

*Veazey v. City of Durham*, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950).

DISMISSED.

Judges DILLON and TYSON concur.

Report per Rule 30(e).