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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-940

Filed: 7 April 2020

Durham County, No. 19CVS1905

BRENDA S. WIGGINS and
the ESTATE OF GEOFFREY WIGGINS, Plaintiffs,

v.

WELLS FARGO BANK, N.A., MCALLEN
JULES, DAVID J. WYATT, TRINA GOMEZ, and
JACQUELINE JIMENEZ, Defendants.

Appeal by Plaintiffs from order entered 25 June 2019 by Judge Orlando F.
Hudson in Durham County Superior Court. Heard in the Court of Appeals 18 March
2020.

J.C. White Law Group, PLLC, by James C. White, for Plaintiff-Appellants.

*Burr & Forman, LLP, by William Grayson Lambert and Mignon A. Lunsford,
for Defendant-Appellees.*

INMAN, Judge.

Plaintiff-appellants Brenda S. Wiggins (“Brenda”) and the estate of Geoffrey Wiggins (collectively, “Plaintiffs”) appeal from the trial court’s order compelling arbitration of their claims against Wells Fargo Bank, N.A., (“Wells Fargo”) and its

above-named employees (collectively, “Defendants”). Plaintiffs contend a confidentiality provision in the arbitration agreement is unconscionable and voids the agreement, or, at least, the alleged unlawful provision. Plaintiffs also argue the trial court lacked the authority to award attorney’s fees to Defendants. After careful review, we dismiss Plaintiffs’ appeal as interlocutory.

I. Factual and Procedural Background

The record tends to show the following facts:

In 2011, Geoffrey Wiggins (“Geoffrey”) opened a checking account with Wells Fargo. Five years later, in November 2016, his wife Brenda joined that checking account. In each of the documents signed by Geoffrey and Brenda, the terms of the account agreement stipulated, in relevant part, that any “disputes” would be “decided before one or more neutral persons in an arbitration proceeding and not by a jury trial or a trial before a judge.” The agreement defined “disputes” as “any unresolved disagreement between Wells Fargo and you,” including disagreements “about this Arbitration Agreement’s meaning, application, or enforcement.”

About a month later, in December 2016, Geoffrey, who had been undergoing cancer treatment, allowed his nephew to begin caring for him. Plaintiffs allege that over the following six months, Geoffrey’s nephew made 126 unauthorized withdrawals totaling \$40,746 from the couple’s joint checking account through forged checks and ATM withdrawals.

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Brenda first contacted Wells Fargo about possible fraudulent activity in her and Geoffrey's joint checking account in May 2017. From May to November 2017, Brenda, Geoffrey, and David Whitfield Kenney, Sr., ("Kenney"), whom Geoffrey had appointed as durable power of attorney, communicated with Wells Fargo and its employees about these suspicious transactions. Geoffrey died on 29 November 2017. Brenda and Kenney continued to press Wells Fargo to investigate the alleged fraudulent withdrawals.

In March 2018, Wells Fargo closed Brenda's claims, reasoning that Geoffrey was not available to attest to his signature on authorized checks dated before his death. Wells Fargo also reported finding no evidence that the ATM withdrawals were unauthorized. Wells Fargo later reevaluated and again denied Brenda's claims, concluding that she and Geoffrey "did not exercise reasonable care" regarding who had access to their account and did not take timely action in alerting Wells Fargo of the suspected unauthorized transactions.

In February 2019, Plaintiffs filed a civil complaint against Defendants in Durham County Superior Court alleging breach of contract, violation of the Uniform Commercial Code, gross negligence, negligent misrepresentation, unfair and deceptive trade practices, negligent infliction of emotional distress, and unauthorized practice of law. After Plaintiffs denied Defendants' request to proceed with their

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claims through arbitration, Defendants filed in the superior court a motion to compel arbitration and stay the trial court proceedings.

During a hearing on the motion to compel arbitration, Plaintiffs' counsel argued that portions of their claims were outside of the scope of the arbitration agreement. Defendants' counsel argued that Plaintiffs not only agreed to arbitrate, but also agreed for an arbitrator, rather than the court, to determine any issues as to a claim's arbitrability. The trial court issued a written order on 25 June 2019 compelling arbitration of all claims and staying court proceedings pending arbitration. The trial court also ordered Plaintiffs to pay \$3,980 in fees and expenses incurred by Defendants in filing their motion.

Plaintiffs appeal.

II. Analysis

A. Appellate Jurisdiction

Plaintiffs appeal from an interlocutory order compelling arbitration of their claims and awarding attorney's fees to Defendants. "An interlocutory order is 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." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 76, 711 S.E.2d 185, 188 (2011) (citation and quotation marks omitted). By contrast, a final judgment generally "disposes of the cause as to all the parties, leaving nothing to be judicially

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determined between them in the trial court.” *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950).

An appellant has no right to appeal from an interlocutory order unless “the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.” *Edwards v. Foley*, 253 N.C. App. 410, 411, 800 S.E.2d 755, 756 (2017) (quotation marks and citation omitted); *see also Cochran v. Cochran*, 93 N.C. App. 574, 577, 378 S.E.2d 580, 582 (1989) (“[A] substantial right [is one] which might be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order.” (citations omitted)). The burden is on Plaintiffs to demonstrate that the order affects a substantial right. *Edwards*, 253 N.C. App. at 411, 800 S.E.2d at 756.

B. Confidentiality Provision

Unlike orders denying motions to compel arbitration, orders compelling parties to arbitrate are interlocutory and thus not immediately appealable, as they do not, on their face, affect a substantial right. *See Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 285, 314 S.E.2d 291, 293 (1984); *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 801, 526 S.E.2d 494, 496-97 (2000) (“An order compelling arbitration is not a final judgment, as by its terms it fails to resolve all issues between all parties, but rather refers such issues to arbitration to be resolved.” (quotation marks and citation omitted)). Plaintiffs argue that the confidentiality provision in the arbitration

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agreement is unconscionable because it restricts their First Amendment rights and therefore “impacts a substantial right under both the United States and North Carolina constitutions.” We do not address this issue because Plaintiffs have not properly preserved it for appellate review.

“This Court has long held that issues and theories of a case not raised below will not be considered on appeal[.]” *Ellis-Don Constr., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 632, 610 S.E.2d 293, 295 (2005) (quotation marks and citations omitted). The only arguments Plaintiffs’ counsel alleged at the hearing concerned whether Plaintiffs’ seven claims against Defendants fell within the scope of the arbitration agreement. At no point did Plaintiffs’ counsel argue that the confidentiality provision or any other provision in the arbitration agreement was invalid or unconscionable. Plaintiffs concede this and request that we use our discretion under Rule 2 of our Rules of Appellate Procedure to review this issue. *See, e.g.*, N.C. R. App. P. 2 (2020). In light of established law on this topic and the circumstances of Plaintiffs’ appeal, we decline to invoke Rule 2 and dismiss this argument. *Bailey v. Handee Hugo’s, Inc.*, 173 N.C. App. 723, 727, 620 S.E.2d 312, 316 (2005).

Plaintiffs do not argue on appeal that some of their claims are beyond the scope of the arbitration agreement. Nor do they assert any other argument that the trial court erred or that a substantial right would be affected absent our review of the trial

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court's decision to compel their claims to arbitration. Accordingly, we dismiss this appeal as interlocutory.

C. Attorney's Fees

Plaintiffs further argue that the trial court lacked the statutory authority to award attorney's fees to Defendants. Rather than trying to show that a substantial right would be infringed without our immediate review, Plaintiffs contend that the order as to attorney's fees is a final judgment, pursuant to N.C. Gen. Stat. § 7A-27(b)(2). We disagree.

This Court has frequently held that an "order granting attorney's fees is interlocutory, as it does not finally determine the action nor affect a substantial right which might be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *Benfield v. Benfield*, 89 N.C. App. 415, 419, 366 S.E.2d 500, 503 (1988) (quotation marks and citations omitted); *see also Cochran*, 93 N.C. App. at 577, 378 S.E.2d at 582 (holding order granting attorney's fees against nonparty deponent for failure to comply with subpoena to be deposed and to produce documents was interlocutory).

In *Andaloro v. Sawyer*, we held that an order granting attorney's fees was interlocutory and not subject to immediate review while an appeal of the arbitration award remained pending. 144 N.C. App. 611, 614, 551 S.E.2d 128, 130-31 (2001). In

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that case, the plaintiff sought damages after a car accident. *Id.* at 611, 551 S.E.2d at 129. Following an arbitration hearing, the arbitrator awarded the plaintiff \$5,500, and the defendant appealed the award to the trial court. *Id.* at 612, 551 S.E.2d at 129. The plaintiff also moved for the trial court to impose sanctions against the defendant for failing to adequately participate in the arbitration proceeding. *Id.* The trial court ordered the defendant to pay \$1,823.75 in attorney's fees. *Id.* The appellate record did not indicate that the trial court took any action on the defendant's appeal. *Id.*

The defendant then appealed the trial court's order of attorney's fees to this Court. *Id.* We dismissed the defendant's appeal from the order imposing attorney's fees because it appeared from the record that her appeal of the arbitration award was still pending before the trial court. *Id.* at 614, 551 S.E.2d at 131. We concluded: "The very purpose of the interlocutory appeals rule is to prevent appeals of this preliminary nature. The issues here are best left until the underlying action has been resolved and the appeals process can address all the issues in the case in one appeal." *Id.*

All of Plaintiffs' claims against Defendants have yet to be determined, as the trial court ordered they be resolved through arbitration. Similar to *Andaloro*, Plaintiffs' substantive claims are still pending a decision by the arbitrator and entry of a final judgment. *See Tands, Inc. v. Coastal Plains Realty, Inc.*, 201 N.C. App. 139,

142, 686 S.E.2d 164, 166 (2009) (“[T]he purpose of [the interlocutory] rule is to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard.” (quotation marks and citations omitted)). The trial court’s order awarding \$3,980 to Defendants is therefore interlocutory and can be appealed following final judgment on Plaintiffs’ substantive claims against Defendants.¹

Though Plaintiffs, in the alternative, argue in their reply brief why we should review this interlocutory order, we have held that appellants cannot “correct the deficiencies of their principal brief in their reply brief” to independently establish grounds for appellate review. *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 79, 772 S.E.2d 93, 96 (2015); see *Denney v. Wardson Constr., Inc.*, __ N.C. App. __, __ 824 S.E.2d 436, 438 (2019) (“[I]f the appellant’s opening brief fails to explain why the challenged order affects a substantial right, we must dismiss the appeal for lack of appellate jurisdiction.” (citation omitted)). Accordingly, because Plaintiffs fail to allege that any substantial right would be affected absent our immediate review, we dismiss their appeal of the court’s interlocutory order awarding attorney’s fees to Defendants.

¹ Plaintiffs cite inapposite caselaw to support their argument that an award of attorney’s fees in a specific amount is “a final order independent of any subsequent judgment.” The cases Plaintiffs rely on—*Sanders v. State Pers. Comm’n*, 236 N.C. App. 94, 99, 762 S.E.2d 850, 854 (2014), and *In re Cranor*, 247 N.C. App. 565, 567-69, 786 S.E.2d 379, 381-82 (2016)—involved appeals of attorney’s fees orders entered *after* the trial court had completely decided the merits of the parties’ substantive claims and had entered a final judgment.

III. Conclusion

For the foregoing reasons, we dismiss Plaintiffs' interlocutory appeal, as they have failed to demonstrate any substantial right affected by the trial court's order imposing attorney's fees.

DISMISSED.

Judges ZACHARY and YOUNG concur.

Report per Rule 30(e).