IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-20

No. COA20-207

Filed 16 February 2021

Henderson County, No. 16 CVS 2354

PATRICK JOHN BRESNAHAN and AMY IRELAND BRESNAHAN, Plaintiffs,

v.

THOMAS F. KIRK and LAURA KIRK, Defendants.

Appeal by plaintiffs from order entered 17 October 2019 by Judge Gary M. Gavenus in Henderson County Superior Court. Heard in the Court of Appeals 26 January 2021.

Donald H. Barton, P.C., by Donald H. Barton, for Plaintiffs-Appellants.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Matt W. Kitchens and Jackson C. Bebber, for Defendants-Appellees.

ARROWOOD, Judge.

¶ 1 Patrick John Bresnahan and Amy Ireland Bresnahan ("plaintiffs") appeal from an order entered 17 October 2019 granting Thomas F. Kirk ("Mr. Kirk") and Laura Kirk's (collectively "defendants") motion to amend their pleadings and granting, in part, defendants' motion for sanctions under Rules 11 and 37 of the North Carolina Rules of Civil Procedure. For the reasons set forth below, we have determined that

the appeal is interlocutory and therefore not properly before this Court. As such, the instant appeal is dismissed.

I. Background

¶ 2 This dispute dates back to 25 August 2015 when plaintiffs filed a complaint in Henderson County Superior Court (No. 15 CVS 1446) alleging that defendants (plaintiffs' neighbors) were interfering with easements benefiting plaintiffs' property. The complaint alleged that defendant Mr. Kirk "had obstructed their right-of-way and that he was otherwise interfering with [plaintiffs'] rights to their property." This case was resolved via mediation on 30 August 2016.

¶ 3 On 14 June 2016, prior to the first dispute's resolution, plaintiffs filed a complaint with the North Carolina Department of Agriculture and Consumer Services (the "NCDA"). Plaintiffs' petition stemmed from their concern that "trees [were] dying on [their] property." Plaintiffs alleged that "approximately 40 trees and several ornamental shrubs on [their] property ha[d] been damaged during this dispute." Plaintiffs also informed the NCDA that they and their other neighbors (the "Killians")[1] had "obtained a lawyer to help and hope that proof of herbicide vandalism would help their case."

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[1] The Killians, represented by the same counsel as plaintiffs here, filed a separate suit against defendants in Henderson County Superior Court (No. 19 CVS 1617). The allegations were essentially carbon copies of the claims in this case. The Killians voluntarily dismissed the

¶ 4 The NCDA subsequently conducted an investigation which entailed, among other things, interviewing plaintiffs and their neighbors, inspecting and photographing the property, and collecting soil samples from damaged trees and vegetation. On 20 September 2016, the NCDA provided plaintiffs with a written report detailing its findings and conclusions (the "NCDA Report"). Laboratory analyses of samples collected from plaintiffs' property "did not detect any herbicides from [their] trees or property." Thus, the NCDA determined that "there ha[d] been no violation of the North Carolina Pesticide Law of 1971 and/or Regulations[,]" and closed the case.

¶ 5 On 19 December 2016—after plaintiffs were in receipt of the NCDA Report—plaintiffs filed the instant action against defendants asserting claims for intentional infliction of emotional distress, trespass to real property and wrongful damage to timber, malicious prosecution, assault, abuse of process, and diversion of water. Plaintiffs also sought punitive damages and an injunction. More relevant to this appeal, plaintiffs averred the following:

> 8. That the conduct of the Defendants that caused the Plaintiffs to suffer from, and continue to suffer emotional stress, and was conduct that no reasonable person should be expected to endure, is described as follows:

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action in mid-September 2019, shortly after defendants obtained the NCDA Report through the public records request.

> a. Defendants, by the use of poisonous, noxious chemicals, the exact nature of which is currently unknown to Plaintiffs, damaged and destroyed real property of the Plaintiffs' consisting of plants, vegetation, trees, ground cover and mature pine trees.
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> b. That on or about the 4th day of March, 2016, Plaintiffs observed [Mr.] Kirk walking on the edge of Plaintiffs' property where he threw a five gallon bucket full of a white poisonous liquid herbicide on to Plaintiffs' azaleas and a miniature fir tree, killing those plants.
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> c. That sometime after the 25th day of August, 2015, [Mr.] Kirk drilled holes at the base of some of the Plaintiffs' mature trees on his property and injected each tree with a deadly herbicide killing all these mature trees.
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> d. That at the present time, [Mr.] Kirk has killed 70 trees on Plaintiffs' property by the use of deadly herbicides and chemicals.

¶ 6 In August 2017, defendants served discovery requests on plaintiffs seeking all relevant information related to the accusations in the complaint filed 19 December 2016. Plaintiffs responded to the requests for discovery on 30 November 2017. Plaintiffs' responses were signed by plaintiffs' counsel and verified by plaintiffs themselves. Notably, however, plaintiffs' discovery responses failed to disclose or otherwise mention the NCDA Report or its findings. Nor did plaintiffs' discovery responses indicate that trees or other vegetation on their property had been poisoned.

¶ 7 Given plaintiffs' failure to produce anything in support of their tree poisoning claims, defendants filed a Request to Permit Entry to Land for their experts to inspect and test plaintiffs' trees and vegetation. This request was made in or around June 2019, and the inspection occurred in or around July 2019. The inspection "revealed little to support or refute Plaintiffs' allegations."

¶ 8 On 7 August 2019, defendants served plaintiffs with supplemental discovery requests pursuant to Rule 26(e) of the North Carolina Rules of Civil Procedure. Defendants contemporaneously submitted a public records request to the NCDA, which ultimately resulted in defendants obtaining the complete NCDA Report.

¶ 9 On 13 September 2019, plaintiffs responded to defendants' supplemental discovery requests. Plaintiffs provided photographs of trees and vegetation on their property; an itemization of costs to replace supposedly poisoned trees; and an estimate from a tree service company for dead tree removal and new tree planting. Plaintiffs did not produce the NCDA Report or any information concerning the agency's investigation.

¶ 10 On 20 September 2019, ten days before the set trial date, plaintiffs produced two pages of the NCDA laboratory results. Plaintiffs again failed to produce the full NCDA Report, which confirmed that there were no signs of herbicides or poison

exposed to trees and vegetation on plaintiffs' property and therefore the NCDA had closed its case.[2]

¶ 11 On 23 September 2019, defendants filed a "MOTION FOR SANCTIONS OR, IN THE ALTERNATIVE, FOR RELATED RELIEF, INCLUDING TO COMPEL DISCOVERY." On the same day, defendants filed a "MOTION FOR LEAVE TO AMEND ANSWER." "The basis for both motions was Defendants' discovery that Plaintiffs had withheld information showing their claims regarding alleged tree and vegetation damage lacked merit and were brought in bad faith." Defendants claimed that "[d]espite [their] repeated requests, Plaintiffs have failed and refused to produce any documentation from the NCDA regarding its investigation or conclusions." Defendants further asserted the following: "As to Plaintiffs' allegations that Defendants poisoned their trees, and that the NCDA's investigation confirmed this claim, Plaintiffs did not have a reasonable belief the position was well grounded in fact because . . . Plaintiffs knew the NCDA had concluded their trees had not been poisoned." Defendants contended that "because the plaintiffs sued Defendants for poisoning their trees, and/or continued to prosecute this litigation, after Plaintiffs knew or should have known their trees were not, in fact, poisoned, these claims were clearly brought . . . [for] an improper purpose . . . justifying the imposition of Rule 11

[2] This limited production occurred on the same day that defendants served plaintiffs with their motion for sanctions.

sanctions." Accordingly, defendants moved for certain sanctions under Rules 11 and 37 of the North Carolina Rules of Civil Procedure. Specifically, defendants moved to strike plaintiffs' pleadings, enter summary judgment in favor of defendants on all claims, and enter judgment on behalf of defendants for compensatory and punitive damages and attorney's fees and costs.

¶ 12 On 30 September 2019, a hearing was held on defendants' motions. Defendants presented the full NCDA Report and associated documents; defendants' discovery requests and plaintiffs' responses; e-mail communications between counsel reflecting defendants' repeated requests for supplemental discovery; and relevant legal authorities. Defendants argued that plaintiffs' failure to produce information concerning the NCDA investigation was a clear violation of the applicable discovery rules. Defendants further asserted that plaintiffs' act of filing and prosecuting a verified complaint alleging that defendants had poisoned their trees after plaintiffs had knowledge that such allegation was false amounted to a violation of Rule 11 of the North Carolina Rules of Civil Procedure. Defendants asked the trial court to "enforce or impose sanctions, strike the plaintiffs' pleadings . . . and enter judgment on behalf of the defendant[s] on [their] counterclaims . . . ."

¶ 13 In rebuttal, plaintiffs' counsel argued that the tree poisoning claim is a "very small part of th[e] complaint . . . ." Plaintiffs purported that they had produced everything in their possession, custody, or control concerning the investigation.

Plaintiffs disingenuously claimed that they had produced the NCDA Report when they had actually produced only two pages of the NCDA investigation ten days before the hearing and *after* defendants had served plaintiffs with their motion for sanctions.

¶ 14 On 17 October 2019, the trial court entered an order memorializing its findings of fact and conclusions of law from the hearing. The trial court granted defendants' motion to amend their answer and granted, in part, defendants' motion for sanctions. The trial judge concluded plaintiffs had possessed information prior to the filing of the instant action that indicated their tree poisoning claims lacked merit and were brought in bad faith. Furthermore, the trial judge found that plaintiffs had withheld information concerning the same during discovery. As a result, the trial court ruled, in part, as follows: "[A]ny and all claims raised by Plaintiffs which are related in any way to alleged damage to their plants, vegetation, ground cover and/or trees, and any and all prayers for relief associated therewith, are hereby dismissed with prejudice." All other claims brought by plaintiffs remained pending and intact, however, and the court reserved ruling on defendants' request for attorney's fees and costs. Plaintiffs filed a notice of appeal on 15 November 2019.

II. Discussion

¶ 15 Plaintiffs purport to appeal "a final Judgment of a District Court Civil action under N.C. [Gen. Stat. §] 7A-27(b)(2)." However, the order entered 17 October 2019 did not dispose the entire action; rather it dismissed one of many claims asserted by

plaintiffs and granted defendants' motion to amend their answer. As such, the ruling was interlocutory. *Campbell v. Campbell*, 237 N.C. App. 1, 3, 764 S.E.2d 630, 632 (2014) (citation omitted) ("Ordinarily, this Court hears appeals only after entry of a final judgment that leaves nothing further to be done in the trial court."). "An interlocutory order entered before final judgment is immediately appealable 'in only two circumstances: (1) if the trial court has certified the case for appeal under Rule 54(b) of the Rules of Civil Procedure; and (2) when the challenged order affects a substantial right of the appellant that would be lost without immediate review.' " *Id.* at 3, 764 S.E.2d at 632 (quoting *Robinson v. Gardner*, 167 N.C. App. 763, 767, 606 S.E.2d 449, 452 (2005)).

¶ 16 Here, the trial court did not certify this case for appeal under Rule 54(b) of the North Carolina Rules of Civil Procedure. Moreover, plaintiffs do not contend that the 17 October 2019 order affects a substantial right. *See* N.C. Gen. Stat. § 7A-27(b)(3)(a) (2019); N.C.R. App. P. 28(b)(4) ("When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right."). "To confer appellate jurisdiction in this circumstance, the appellant must include in its opening brief, in the statement of the grounds for appellate review, 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019)

(quoting *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 77, 772 S.E.2d 93, 95 (2015)). Indeed, plaintiffs do not proffer *any* facts or argument to support appellate review on the grounds that the 17 October 2019 order affects a substantial right. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citations omitted) ("It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits."). Accordingly, this Court must dismiss the instant appeal as interlocutory and premature. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) (citations omitted) ("A jurisdictional default, therefore, precludes the appellate court from acting in any manner other than to dismiss the appeal.").

III. Conclusion

¶ 17 For the foregoing reason, we dismiss this appeal as interlocutory. This matter is remanded to the trial court for further proceedings.

DISMISSED.

Judges DIETZ and WOOD concur.

Report per Rule 30(e).