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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-23

No. COA20-365

Filed 16 February 2021

Cumberland County, No. 18 CVS 4955

MARIA HONTZAS POULOS, Plaintiff,

v.

JOHN E. POULOS, Defendant.

Appeal by defendant from order entered 22 November 2019 by Judge Eric C. Morgan in Cumberland County Superior Court. Heard in the Court of Appeals 26 January 2021.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, and L. Lamar Armstrong, Jr., for plaintiff-appellee.

Player McLean, LLP, by Lonnie M. Player, Jr., for defendant-appellant.

ARROWOOD, Judge.

¶ 1 John E. Poulos (“defendant”) appeals from the trial court’s order denying defendant’s motions to dismiss. Defendant argues the trial court erred in determining that *res judicata* does not apply to plaintiff’s claim of fraud. We dismiss defendant’s appeal.

I. Background

¶ 2

Maria Poulos (“plaintiff”) had previously filed a lawsuit in Cumberland County Superior Court against defendant, Icarian Partners, LLC (“Icarian”), MEEJ, LLC (“MEEJ”), JEP Investments, LLC (“JEP Investments”), and the John E. Poulos Family Trust (“Family Trust”) on 11 February 2015. Plaintiff requested an accounting, that the trial court set aside the Family Trust under the Uniform Trust Code (“UTC”), and asserted claims of common law fraud, constructive fraud, breach of fiduciary duty, and statutory fraud. The action was designated a mandatory complex business case by Order of the Chief Justice of the North Carolina Supreme Court and was assigned to Special Superior Court Judge Gregory P. McGuire.

¶ 3

The Business Court granted summary judgment dismissing plaintiff’s claims for constructive fraud, breach of fiduciary duty and fraud arising from the creation of the Family Trust, and the request to set aside the Family Trust. The Business Court denied summary judgment as to plaintiff’s claims for breach of fiduciary duty and fraud arising from the MEEJ and JEP Investments transfers, as well as plaintiff’s request for an accounting of real property and other assets transferred into Icarian. In denying summary judgment on the claim of fraud, the Business Court held plaintiff had presented evidence that defendant misrepresented or failed to disclose the purpose behind the MEEJ and JEP Investments transfers and that “[w]hether allegedly fraudulent representations or concealments were calculated or intended to

deceive are questions of fact generally left to the jury if the circumstances *could demonstrate* fraudulent intent.” Pursuant to further motions by both parties, the Business Court entered an order on 6 June 2017 clarifying the scope and certain issues related to the summary judgment order. Specifically, the Business Court clarified that the summary judgment order was limited to specific issues related to four transfers; the Court also declined to consider the merits of newly submitted evidence of additional transfers.

¶ 4 On 5 July 2017, defendant filed a motion to bifurcate liability, in addition to seeking compensatory and punitive damages. Plaintiff voluntarily dismissed her remaining claims without prejudice on 13 July 2017.

¶ 5 On 13 July 2018, Plaintiff filed a new complaint in Cumberland County Superior Court asserting a claim of fraud. Defendant filed motions to dismiss the complaint on 12 September 2018, followed by amended motions to dismiss filed 20 September 2018. The amended motions to dismiss requested a dismissal pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing that plaintiff’s complaint was not timely re-filed and that the sole claim was barred by *res judicata*.

¶ 6 On 22 November 2019, the trial court entered an order denying defendant’s motions to dismiss. Defendant appealed the trial court’s order on 19 December 2019.

¶ 7 Defendant filed a petition for *writ of certiorari* to this Court on 19 December 2019. Defendant argued that plaintiff did not timely re-file her

complaint and that review was needed to ensure judicial economy and to avoid “expensive” and “time-consuming” discovery, trial, and appeal. This Court denied defendant’s petition for *writ of certiorari* on 31 January 2020.

II. Analysis

¶ 8 We must first address whether we have jurisdiction to review the trial court’s order denying defendant’s motion to dismiss.

¶ 9 “Denial of a motion to dismiss is interlocutory because it simply allows an action to proceed and will not seriously impair any right of defendants that cannot be corrected upon appeal from final judgment.” *Baker v. Lanier Marine Liquidators, Inc.*, 187 N.C. App. 711, 717, 654 S.E.2d 41, 46 (2007) (citing *Howard v. Ocean Trail Convalescent Ctr*, 68 N.C. App. 494, 495, 315 S.E.2d 97, 99 (1984)). “Generally, there is no right of immediate appeal from interlocutory orders and judgments. However, immediate appeal of an interlocutory order is available where the order deprives the appellant of a substantial right which would be lost without immediate review.” *Whitehurst Inv. Props., LLC v. NewBridge Bank*, 237 N.C. App. 92, 95, 764 S.E.2d 487, 489 (2014) (quotation marks and citations omitted).

¶ 10 Defendant argues that the denial of the motion to dismiss affects a substantial right by raising the possibility of a risk of inconsistent verdicts. This Court has previously held that “[w]hen a trial court enters an order rejecting the affirmative defense[] of res judicata . . . the order *can* affect a substantial right and *may* be

immediately appealed.” *Strates Shows, Inc. v. Amusements of Am., Inc.*, 184 N.C. App. 455, 459, 646 S.E.2d 418, 422 (2007) (internal quotation marks and citation omitted) (emphasis added). The invocation of *res judicata* does not, however, “automatically entitle a party to an interlocutory appeal of an order rejecting” that defense. *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). For example, the “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.” *Country Club of Johnston County, Inc. v. U.S. Fidelity and Guar. Co.*, 135 N.C. App. 159, 167, 519 S.E.2d 540, 546 (1999) (quotation marks and citation omitted), *disc. review denied*, 351 N.C. 352, 542 S.E.2d 207 (2000). Additionally, this Court has held that “orders which do not determine even one claim, but simply require subsequent trial of the fact issues underlying that claim, are generally not appealable since ‘the avoidance of one trial is not ordinarily a substantial right.’” *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 26, 376 S.E.2d 488, 492 (1989) (quoting *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982)).

¶ 11 In the present case, defendant appeals from the denial of motions to dismiss rather than a motion for summary judgment. Consistent with this Court’s holding in *Davidson*, we recognize the trial court’s order is one that simply requires further trial

of the fact issues underlying plaintiff's claims. The Business Court specifically declined to grant summary judgment on plaintiff's claim of fraud because "genuine issues of material fact exist[ed] as to [defendant's] intent in making the MEEJ and JEP [Investments] Transfers that foreclose[d] finding as a matter of law that [defendant] did not have a fraudulent intent." There has been no final judgment in either the Business Court case or the present case with respect to plaintiff's claim of fraud. With no prior final judgment that poses any risk of inconsistent verdicts on the sole remaining claim, defendant has failed to demonstrate an entitlement to interlocutory appeal by asserting the defense of *res judicata*. We further note that this Court recently denied defendant's petition for *writ of certiorari* with respect to the same trial court order at issue in this case. Accordingly, we hold that we lack jurisdiction over this appeal. Because we dismiss defendant's appeal, we need not consider the merits of defendant's appeal.

III. Conclusion

¶ 12

For the foregoing reasons, we dismiss defendant's appeal.

DISMISSED.

Judges DIETZ and WOOD concur.

Report per Rule 30(e).