IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-133

No. COA20-506

Filed 6 April 2021

Caldwell County, No. 18 CVS 1253

U.S. BANK TRUST, AS TRUSTEE FOR LSF10 MASTER PARTICIPATION TRUST, Plaintiff,

v.

RALEIGH G. ROGERS, DREAMA LOUISE ROGERS & JONATHAN J. ROGERS, Defendants.

Appeal by defendant Raleigh Rogers from order entered 12 May 2020 by Judge Robert C. Erwin in Caldwell County Superior Court. Heard in the Court of Appeals 9 March 2021.

No brief for plaintiff.

Raleigh Rogers pro se.

TYSON, Judge.

¶ 1 Raleigh Rogers ("Defendant") appeals from an order denying his motion for leave to file a third-party complaint. This appeal is interlocutory. Defendant has not shown a substantial right is affected warranting immediate review. We dismiss.

I. Background

¶ 2 This case arises out of a dispute between U.S. Bank Trust ("US Bank") and

Defendant to address and correct a purported error in a deed of trust ("DOT") created in February 2008. On 18 February 2008, Granite Mortgage, Inc. loaned Defendant $373,000 as evidenced by a promissory note, secured by the DOT and recorded 22 February 2008. The DOT provided the collateral for the loan would be the property "located at 520 Tremont Park Drive SE, Lenoir, NC 28645." Plaintiff alleges the DOT did not include "Intended Collateral," which includes the residence, pool and deck now located on the property at 520 Tremont Park Drive SE, which were under construction at the time of loan closing. US Bank asserted the absence of the Intended Collateral was: "The Mutual Mistake."

¶ 3 The note and mortgage were assigned to Wells Fargo, then transferred to Specialized Loan Servicing ("SLS"), and then transferred to US Bank. Defendant claims to be a victim of an unauthorized Wells Fargo fraudulent account creation, when an account was opened in his name on 17 December 2013.

¶ 4 Jonathan Rogers became the record owner of the Intended Collateral reflected in the deed on 6 January 2017. The purported mutual mistake regarding the missing collateral on 520 Tremont Park Drive SE was discovered in 2017 while the loan was in default and when the description was reviewed by foreclosure counsel.

¶ 5 Ken Fromknecht, II, Esq. served a civil summons against Defendant with Wells Fargo named as plaintiff on 9 October 2018. A later civil summons with SLS named as plaintiff and naming Defendant was served on 12 October 2018.

¶ 6 Attorney Fromknecht, representing US Bank as plaintiff, filed a complaint against Defendant on 8 November 2019. US Bank brought the original action in this case to reform the DOT to include the "Intended Collateral."

¶ 7 Defendant sought to add Wells Fargo as a third-party to the reformation action. Defendant alleged Wells Fargo had wrongfully and illegally acquired the note and DOT and then sold it to SLS, and ultimately assigned it to US Bank. Defendant alleges that but for Wells Fargo's actions creating the false account, Defendant would not be in default with US Bank.

¶ 8 The trial court denied Defendant's motion for leave to file a third-party complaint on 7 May 2020. The trial court held, "[h]aving considered the arguments of the parties and being fully advised, the [c]ourt has determined that allowing . . . the Third-Party Complaint would unnecessarily complicate the issues already in the case." The order was expressly issued without prejudice to permit Defendant to pursue an action against Wells Fargo for injuries purportedly incurred as a result of the creation of the false account.

II. Interlocutory Jurisdiction

> Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment . . . Essentially a two-part test has developed - the right itself must be substantial and the deprivation of that substantial right must potentially work injury to

plaintiff if not corrected before appeal from final judgment.

Goldston v. American Motors Corp., 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citations and internal quotation marks omitted).

¶ 9 The "substantial right" test for interlocutory orders' appealability is not a bright-line test. "It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

¶ 10 "[T]he 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." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citations omitted).

III. Issue

¶ 11 Defendant asserts the trial court erred by denying his motion for leave to file a third-party complaint. Defendant acknowledges his appeal is interlocutory, but asserts the challenged order affects a substantial right to warrant immediate review.

IV. Analysis

A. US Bank's Motion to Dismiss

¶ 12 US Bank filed a motion to dismiss Defendant's interlocutory appeal to this Court and asserts the trial court did not certify the subject order for immediate appeal

under Rule 54(b). US Bank's motion to dismiss also asserts the order does not deprive Defendant of a substantial right because it was issued without prejudice. US Bank points out Defendant has a pending lawsuit against Wells Fargo for the same claims he seeks to assert in this action. As US Bank acknowledged before the trial court, "this whole case is only about the collateral for the loan. It's factually centered on and begins and ends, really, with the closing and an error that was made in the legal description of the deed of trust[]" five years before Wells Fargo became involved.

¶ 13 Defendant asserts the trial court's order deprived him of substantial rights by denying him Due Process and joinder of his claims.

B. Joinder

¶ 14 In relevant part, North Carolina's Rule of Civil Procedure on joinder of parties provides:

> (a) Necessary joinder.--Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants . . .
>
> (b) Joinder of parties not united in interest.--The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

N.C. Gen. Stat. § 1A-1, Rule 19 (2019).

¶ 15 Defendant alleges Wells Fargo created a false account and threatened to turn

his fraudulent account debt of $225 over to a collection agency, which damaged his credit. Defendant asserts he called Wells Fargo for an explanation of the existence of the fraudulent account to no avail.

¶ 16 Defendant further alleges, "Wells Fargo attempted to foreclose on the house, and then when they couldn't do it they packaged up the loan and sold it to [SLS], which then attempted to foreclose on the house. When they couldn't do it, they packaged it up and sold it to US Bank. It all goes back to Wells Fargo. They could have easily solved this by taking the loan to 2 percent . . . but they wouldn't do it."

¶ 17 US Bank asserts Defendant's third-party claims arise out of actions Wells Fargo Bank allegedly took five years subsequent to the loan closing with Granite Mortgage. US Bank further argues the third-party claims do not relate in any way to the facts leading up to or during the loan closing, which form the basis for US Bank's claims.

¶ 18 US Bank also argues it merely seeks to reform a deed of trust, impose a constructive trust, resulting trust and/or an equitable lien on real property. US Bank argued before the trial court, "we are not talking about default. We are not trying to foreclose anything . . . It was a discovered error in the loan document, and it's just being addressed. There is no attempt to get a judicial foreclosure or anything like that in the case."

¶ 19 "[A] motion to amend is left to the discretion of the trial court, and its decision

will not be disturbed on appeal absent a clear showing of abuse of discretion." *News & Observer Pub. Co. v. Poole*, 330 N.C. 465, 485, 412 S.E.2d 7, 19, (1992) (citations omitted).

¶ 20 The trial court denied Defendant's oral motion for leave to file the third-party complaint stating, "Having considered the arguments of the parties and being fully advised, the [c]ourt has determined that allowing the oral motion for leave to file the Third-Party Complaint would unnecessarily complicate the issues already in the case and in the exercise of the [c]ourt's discretion." The trial court's order states it "is expressly made without prejudice to the Defendant."

¶ 21 Wells Fargo was not a party to the creation of the promissory note, the DOT, or the origination of the purported mutual mistake at issue here. Presuming Wells Fargo is a permissive party, the decision to allow or deny Defendant's motion rests within the trial court's discretion. *Id.*; see N.C. Gen. Stat. § 1A-1, Rule 19 (b).

¶ 22 Defendant does not show his substantial rights are affected nor shows any abuse of discretion by the trial court. Defendant's arguments are overruled.

V. Conclusion

¶ 23 Presuming arguendo Defendant's allegations regarding Wells Fargo are true, Wells Fargo was not a party to the creation of the promissory note and DOT at the center of US Bank's alleged mutual mistake and reformation claims in this case.

¶ 24 Joining Wells Fargo to the present litigation offers no resolution to the alleged

dispute between the original drafters and Defendant. The trial court's order is expressly without prejudice to any of Defendant's claims against Wells Fargo. Further, at the time of the appealed order, Defendant allegedly has separate actions pending against Wells Fargo in federal court.

¶ 25 Without a substantial right to warrant an immediate appeal, and in the absence of any showing of abuse of the trial court's discretion, this appeal is interlocutory and is dismissed. *It is so ordered.*

DISMISSED.

Judges MURPHY and GORE concur.

Report per Rule 30(e).