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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-676

No. COA21-50

Filed 7 December 2021

Wake County, No. 19 CVS 002878

MICHAEL MONTI and wife, MARIA MONTI, Plaintiffs

v.

TOVA ADELSTEIN, BRIAN SCHOOLMAN, LISA M. JACKSON, JENNIFER SPENCER PROPERTIES, INC., and ELLIOTT TATUM d/b/a INSIGHT INSPECTION SERVICES, Defendants

Appeal by Plaintiffs from Order entered 2 July 2020 by Judge Craig Croom in Wake County Superior Court. Heard in the Court of Appeals 3 November 2021.

Vesper & Stallings, PLLC, by Pamela M. Vesper and S. Adam Stallings, for plaintiffs-appellants.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Jeffrey A. Doyle, for defendants-appellees Lisa M. Jackson and Jennifer Spencer Properties, Inc.

Penry Riemann, PLLC, by J. Anthony Penry, for defendant-appellee Brian Schoolman.

Tova Adelstein, Pro Se.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Michael Monti and Maria Monti (Plaintiffs) appeal from an Order Granting

Summary Judgment in favor of Defendants, Tova Adelstein, Brian Schoolman, Lisa M. Jackson, and Jennifer Spencer Properties, Inc. We, however, determine the Order Plaintiffs appeal from is an interlocutory order that does not affect a substantial right of Plaintiffs. Therefore, we dismiss this appeal. The Record before us tends to reflect the following:

¶ 2 Brian Schoolman and Tova Adelstein (Sellers) co-owned residential real property in Raleigh, North Carolina (Property). Defendant Adelstein acquired the Property in 1997, and Defendant Schoolman became a co-owner of the Property in 2010 as a tenant-in-common with Defendant Adelstein. In 2003, the unfinished attic space was converted into a finished space. Permits were opened with the city of Raleigh to start the renovation, but the renovations failed inspection.

¶ 3 On 5 June 2013, the Property experienced a water event when the toilet on third floor leaked. Following the leak, the Sellers spent several months negotiating with their homeowner's insurance carrier about the scope of repairs. Shortly before they reached an agreement, in January 2014, during a "polar vortex" weather event, the Property experienced a second water event when a pipe above the ceiling in the living room on the first floor froze and burst. Subsequently, the Sellers contracted with Emergency Reconstruction, a licensed general contractor, to restore the Property.

¶ 4 The Sellers listed the Property for sale in September of 2014, but the Property

experienced yet another water event when a pipe, allegedly installed by Emergency Reconstruction, separated after a freezing event. The Sellers removed the Property from the market and contracted with Action Restoration to repair the Property following the February 2015 water event. The Sellers retained Defendants Lisa Jackson and Jennifer Spencer Properties (Agents) as their real estate agent and real estate firm, respectively, and re-listed the Property for sale in April of 2015. As part of listing the Property, the Sellers signed a residential disclosure statement. In signing the disclosure statement, the Sellers represented they had no actual knowledge about any problems, malfunctions, or defects with the Property's electrical system, plumbing system, heating or air conditioning system, or appliances. In addition, the Sellers represented they had no actual knowledge of any violations of local zoning ordinances, restrictive covenants, or other land-use restrictions, or building codes.

¶ 5 Plaintiffs visited the Property on 12 June 2015 and prepared and executed an Offer to Purchase and Contract on 14 June 2015. The Sellers accepted the Offer and executed the Contract on the same day. On 21 June 2015, Plaintiffs' home inspector, Defendant Elliott Tatum (Tatum), performed an inspection of the Property. The closing for the sale of the Property occurred on 13 July 2015. After Plaintiffs took title to the Property, they began to experience issues with the home and hired several different inspectors. The inspectors found underlying issues of mold and moisture,

faulty plumbing, electrical, structural, and insulation work, and issues surrounding the work in the attic.

¶ 6 On 6 March 2019, Plaintiffs filed a lawsuit alleging fraud (intentional misrepresentation) and, in the alternative, negligent misrepresentation by Sellers and Agents. Additionally, Plaintiffs alleged gross negligence by Defendant Tatum arising from his home inspection on Plaintiffs' behalf prior to their purchase of the home. Thereafter, Sellers and Agents filed Answers. In their Answers, Sellers each admitted the existence of the three prior water leaks and that they were aware of the leaks. Defendant Tatum failed to answer the Complaint, and the trial court granted an Entry of Default against him on 7 May 2019. Defendant Tatum filed a motion to set aside the Entry of Default on 15 May 2019. That motion is still pending.

¶ 7 In March, May, and June 2020, Sellers and Agents each filed a Motion for Summary Judgment. Sellers submitted affidavits in support of their Summary Judgment Motions which again conceded the prior leaks and further claimed they were not aware of problems related to the permitting of the attic space until Plaintiffs raised the issue after the sale. Sellers further disclaimed any prior knowledge of defects with any of the systems in the house. Sellers also asserted they had agreed to a price reduction on the home in lieu of making repairs identified by the home inspection. On 2 July 2020, the trial court granted Summary Judgment in favor of the Sellers and Agents, dismissing Plaintiffs' claims for relief against these

Defendants with prejudice. On 31 July 2020, Plaintiffs filed a Notice of Appeal from the Order Granting Summary Judgment.

Jurisdiction

¶ 8 Before we address the merits of this appeal, we must first determine whether it is properly before this Court. Plaintiffs acknowledge the Order appealed from is interlocutory, as the claim against Defendant Tatum remains pending without final disposition, but contend they are entitled to immediate appellate review because a substantial right is affected.[1] Specifically, Plaintiffs contend the Order affects a substantial right because there are overlapping issues of fact and law between the claims which could create the potential for inconsistent verdicts. We disagree.

¶ 9 "[A]ppeal lies of right directly to the Court of Appeals . . . from any final judgment of a superior court." N.C. Gen. Stat. § 7A-27(b)(1) (2019). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). Whereas, "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." *Id.*

¶ 10 Generally, there is no right to appeal from an interlocutory order. *Jeffreys v.*

[1] The trial court also did not certify its Order Granting Summary Judgment for immediate review under N.C.R. Civ. P. 54(b).

Raleigh Oaks Joint Venture, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). However, a party may appeal an interlocutory order "where delaying the appeal will irreparably impair a substantial right of the party." *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999) (internal quotation marks omitted); *see* N.C. Gen. Stat. §§ 1A-1, Rule 54(b), 1-277, 7A-27(d) (2019). "It is the appellant's burden to present appropriate grounds for . . . acceptance of an interlocutory appeal . . ." *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016).

¶ 11 While "a party's preference for having all related claims determined during the course of a single proceeding does not rise to the level of a substantial right," *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 79, 711 S.E.2d 185, 190 (2011) (citation omitted), "[a] party's right to avoid separate trials of the same factual issues may constitute a substantial right." *Finks v. Middleton*, 251 N.C. App. 401, 406, 795 S.E.2d 789, 794 (2016) (citation and quotation marks omitted). "Issues are the 'same' if the facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts." *Hamilton*, 212 N.C. App. at 79, 711 S.E.2d at 190 (citation omitted). "The mere fact that claims arise from a single event, transaction, or occurrence does not, without more, necessitate a conclusion that inconsistent verdicts may occur unless all of the affected claims are considered in a single proceeding." *Moose v. Nissan of Statesville, Inc.,* 115

N.C. App. 423, 428, 444 S.E.2d 694, 698 (1994). "Instead, we must evaluate the specific proof required to litigate each claim in order to determine whether inconsistent verdicts might result in the event that we refrained from considering Plaintiff's appeal on the merits at this time." *Hamilton*, 212 N.C. App. at 81, 711 S.E.2d at 191.

¶ 12 Here, Plaintiffs assert the same factual issues would be present in both trials because "the acts of all of the Defendants are related to a single real estate transaction" and there's a possibility of inconsistent verdicts because "the Defendants herein have asserted collectively and individually that they have no liability for their acts and omissions in the sale of certain real property." However, the claim against Defendant Tatum rests on a different theory of liability—negligent inspection—than the claims against Sellers and Agents, which rest on misrepresentation. Indeed, here, the only potential for an overlapping factual question in the claims would seem to be whether the alleged defects, in fact, existed. It appears, however, the existence of the leaks and failure to obtain final approval and permitting of the attic space, and other alleged defects is uncontroverted—or, at least for purposes of this litigation, uncontested—thereby leaving only the issues of whether Sellers and Agents either fraudulently or negligently failed to disclose those alleged defects to Plaintiffs and, separately, whether Tatum was grossly negligent in his engagement by the Plaintiffs in failing to discover or report the alleged defects. As such, the specific proof required

to litigate the claims is different, and there is no risk of inconsistent verdicts if the claims were separately litigated.[2] Thus, the grant of Summary Judgment to Sellers and Agents in this case does not affect a substantial right of Plaintiffs justifying an immediate interlocutory appeal. Therefore, the trial court's Order Granting Summary Judgment is not appealable at this time, as the claim against Defendant Tatum is still pending. Consequently, we lack appellate jurisdiction over this matter.

Conclusion

¶ 13 Accordingly, for the reasons set forth above, we dismiss this appeal.

APPEAL DISMISSED.

Judges COLLINS and CARPENTER concur.

Report per Rule 30(e).

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[2] Plaintiffs also generally assert review is warranted to avoid having to apportion liability between Tatum and Sellers and Agents at two separate trials. Plaintiffs offer no authority for this giving rise to a right to an immediate appeal. Moreover, Plaintiffs made a specific claim against Tatum and separate claims against Sellers and Agents. Nowhere are the two sets of Defendants alleged to be jointly and severally liable on the basis of these separate claims.