An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-669

No. COA20-413

Filed 7 December 2021

Mecklenburg County, No. 18 CVS 20330

GREENLEAF CONDOMINIUM HOMEOWNERS ASSOCIATION, INC., Plaintiff,

v.

FOREST LEAF, LLC, a North Carolina limited liability company, and SHAHRAM LAVIAN, a/k/a DAVID LAVIAN, ZOHAR INVESTMENT GROUP, a California limited liability company, Trustee, and FARHAD HAKAKKA, Beneficiary, Defendants.

Appeal by defendants from order entered 21 October 2019 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 October 2021.

Miller, Walker & Austin, by J. Jerome Miller and Carol L. Austin, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, for defendants-appellants.

ZACHARY, Judge.

¶ 1 Defendants Forest Leaf, LLC, Shahram Lavian a/k/a David Lavian, Zohar Investment Group, and Farhad Hakakka appeal from the trial court's order granting Plaintiff Greenleaf Condominium Homeowners Association, Inc.'s motion for sanctions and, *inter alia*, entering default judgment against Defendants. After careful

review, we dismiss Defendants' appeal.

I. Background

¶ 2 Plaintiff is a homeowners' association that manages a three-unit condominium ("the Property") in Charlotte. On 17 October 2018, Plaintiff filed a verified complaint against Defendant Forest Leaf and its owner and sole member, Defendant Lavian. Plaintiff then filed an amended complaint on 31 October 2018,[1] adding Defendants Zohar and Hakakka as parties.

¶ 3 Plaintiff alleged the following facts in its amended complaint: After purchasing a unit ("the Unit") in the Property at a foreclosure sale in 2012, Defendant Forest Leaf, by and through Defendant Lavian, made substantial changes to the Unit in violation of Plaintiff's Declaration of Condominium ("the Declaration") and its bylaws. These changes caused substantial damage to all three units and to the interior and exterior common areas of the Property, and the City of Charlotte cited the Unit for numerous code violations and declared the Property to be unsafe. Thereafter, Plaintiff sent Defendants Forest Leaf and Lavian a series of letters demanding repairs and payment of damages, but Defendants Forest Leaf and Lavian did not repair the Property or pay the assessed damages.

¶ 4 When searching the title to the Property, Plaintiff's counsel discovered that

[1] Plaintiff's amended complaint was not verified when filed; Plaintiff filed a verification to its amended complaint the following day.

Defendant Forest Leaf had recorded a deed of trust on the Unit, naming Defendant Zohar as trustee and Defendant Hakakka as beneficiary, and notified Plaintiff. On 28 September 2018, Plaintiff filed a claim of lien on the Unit.

¶ 5 In its amended complaint, Plaintiff sought foreclosure of the claim of lien, and asserted, *inter alia*, claims for fraudulent transfer under the Uniform Voidable Transactions Act (based on the recording of the deed of trust encumbering the Unit) and breach of covenants.

¶ 6 On 2 January 2019, Defendant Forest Leaf filed a motion to dismiss, which was followed by motions to dismiss filed by Defendants Zohar and Hakakka on 4 January 2019 and Defendant Lavian on 18 February 2019.[2] On 25 February 2019, Defendants Forest Leaf's, Zohar's, and Hakakka's motions to dismiss came on for hearing before the Honorable Jesse Caldwell in Mecklenburg County Superior Court. Judge Caldwell entered an order denying the motions on 19 March 2019. Defendant Lavian's motion to dismiss came on for hearing on 6 May 2019, before the Honorable Louis A. Trosch, Jr., in Mecklenburg County Superior Court; Defendant Lavian failed to appear, and Judge Trosch denied the motion by order entered 15 May 2019.

¶ 7 In the interim, on 26 March 2019, counsel for all Defendants filed a motion to withdraw as counsel, citing Defendants' failure to respond or to fulfill their

[2] Although referenced by other documents in the record on appeal, Defendant Lavian's motion to dismiss is not included in the record.

obligations to counsel. On 2 April 2019, Plaintiff moved for entry of default against Defendants Forest Leaf, Zohar, and Hakakka, citing their collective failure to appear. On 12 April 2019, Defendants Lavian and Hakakka filed a *pro se* verified answer that they prepared and purported to sign on behalf of all Defendants. On 15 April 2019, over Defendants' objection, the Honorable Forrest Bridges granted Defendants' counsel's motion to withdraw. On 7 May 2019, Defendants Lavian and Hakakka served Plaintiff's counsel with a *pro se* amended verified answer and counterclaim, along with interrogatories, requests for production of documents, and requests for admissions, not only on their own behalf but also allegedly on behalf of all Defendants. The amended answer was filed on 14 May 2019. From that point on, Defendants Lavian and Hakakka filed a few *pro se* motions for extension of time, again allegedly on behalf of all Defendants, but Defendants otherwise failed to participate in litigation, including discovery and court-ordered alternative dispute resolution.

¶ 8 On 2 October 2019, Plaintiff filed a motion for sanctions or, in the alternative, to compel discovery and to strike Defendants' responsive pleadings pursuant to Rule 12(f) of the North Carolina Rules of Civil Procedure. On 8 October 2019, this motion came on for hearing before the Honorable Donnie Hoover in Mecklenburg County Superior Court. Plaintiff was represented by counsel at the hearing, but Defendants failed to appear. On 21 October 2019, the trial court entered an order ("the Final

Order") that, *inter alia*: (1) granted Plaintiff's motion for sanctions; (2) entered default judgment pursuant to Rule 37(b)(2) of the North Carolina Rules of Civil Procedure "on all claims included in Plaintiff's Amended Complaint against all Defendants"; (3) canceled the deed of trust encumbering the Unit; (4) permitted Plaintiff to foreclose on the claim of lien on the Unit; (5) ordered a judicial sale of the Unit to satisfy the lien; (6) prohibited Defendants from bidding on the Unit at the sale; and (7) awarded Plaintiff attorney's fees, to be satisfied from the proceeds of the sale of the Unit.

¶ 9 On 20 November 2019, by and through new counsel, Defendants filed notice of appeal. On 25 June 2020, Defendants moved this Court to "relinquish jurisdiction and remand for the trial court to hear and enter an indicative ruling" on their proposed motion to set aside the default judgment pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. On 13 July 2020, this Court denied Defendants' motion. On 28 July 2020, the trial court granted Defendants' motion to stay pending appeal, but Defendants failed to post the requisite bond, and the Unit was sold at foreclosure.

II. Discussion

¶ 10 On appeal, Defendants argue that the trial court (1) lacked subject-matter jurisdiction over this matter because Plaintiff lacked standing to commence this action; (2) erred by denying their various motions to dismiss; and (3) reversibly erred by entering a sanctions-based default judgment against them. For the reasons that

follow, we conclude that we are precluded from reviewing Defendants' arguments on appeal.

¶ 11 Defendants filed their notice of appeal following the trial court's entry of the Final Order. In that notice of appeal, Defendants identified not only the Final Order as the ruling from which they appealed, but also the orders denying Defendants' motions to dismiss entered by Judges Caldwell and Trosch, as well as "any intermediate order involving the merits and necessarily affecting the Final Order."

¶ 12 Defendants correctly observe that a default judgment "is a final judgment[,]" *Moore v. Sullivan*, 123 N.C. App. 647, 649, 473 S.E.2d 659, 660 (1996), and our General Statutes provide that "[u]pon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." N.C. Gen. Stat. § 1-278 (2019).

¶ 13 "However, Defendants did not move the trial court to set aside the default judgment pursuant to N.C. Gen. Stat. § 1A-1, Rules 55(d) or 60(b). This Court has said that the failure to attack a default judgment at the trial court precludes an attack on the default judgment on appeal." *Akshar Distrib'n Co. v. Smoky's Mart Inc.*, 269 N.C. App. 111, 118, 837 S.E.2d 621, 626–27 (2020). As in the case before us, *Akshar* concerned an attempted appeal of an order entering a sanctions-based default judgment. *Id.* at 113–14, 837 S.E.2d at 624. And here, Defendants similarly failed to attack the Final Order pursuant to either Rule 55(d) or 60(b) at the trial court.

¶ 14 Defendants recognize the difficulty that *Akshar* creates for their appeal. On 25 June 2020, Defendants moved this Court to "relinquish jurisdiction and remand for the trial court to hear and enter an indicative ruling" on their proposed 60(b) motion to set aside the default judgment. However, this Court denied Defendants' motion to remand.

¶ 15 As explained in *Akshar*, the "[d]efendants should have first filed a motion pursuant to N.C.R. Civ. P. 55(d) or 60(b). They would then have been able to appeal to this Court from any denial of that motion. Because [the] defendants failed to follow this procedure, we are precluded from reviewing the issues they raise." *Id.* at 118, 837 S.E.2d at 627 (citation omitted). In the instant case, Defendants did not attack the default judgment at the trial court before bringing this appeal, precluding this Court from reviewing their challenge to the default judgment and the intermediate orders necessarily affecting it. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Accordingly, consistent with precedent, we are constrained to dismiss this appeal.

III. Conclusion

¶ 16 Because Defendants did not attack the default judgment at the trial court before filing this appeal, we are precluded from reviewing the issues they raise.

Accordingly, we dismiss Defendants' appeal.

DISMISSED.

Judges MURPHY and COLLINS concur.

Report per Rule 30(e).