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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-142

No. COA21-283

Filed 1 March 2022

Chatham County, No. 18 CVS 345

GREGORY E. LINDBERG, Petitioner,

v.

TISHA L. LINDBERG, Respondent.

Appeal by petitioner from order entered 4 February 2021 by Judge R. Allen Baddour in Chatham County Superior Court. Heard in the Court of Appeals 26 January 2022.

Fox Rothschild LLP, by Matthew Nis Leerberg, Kip D. Nelson, and Jonathan S. Melton, for petitioner-appellant.

Zaytoun Ballew & Taylor PLLC, by Matthew D. Ballew, Robert E. Zaytoun, and N. Cole Williams, for respondent-appellee.

ARROWOOD, Judge.

¶ 1 Gregory E. Lindberg ("petitioner") appeals from an order compelling arbitration and denying, with prejudice, his Motion for Relief from Order; Motion for a Permanent Stay of Entire Arbitration Proceeding; Alternative Motion for Partial Permanent Stay; Motion for a Temporary Stay to Avoid Inconsistent Verdicts; Motion

for Declaratory Judgment; Motion for Entry of Temporary Stay Order Pending a Hearing on the Merits; and Alternative Motion to Appoint Substitute Arbitrator. For the following reasons, we dismiss petitioner's appeal.

I. Background

¶ 2 On 8 September 2003, petitioner and Tisha L. Lindberg ("respondent") executed a Premarital Agreement ("PMA"), which provided, in pertinent part:

> The parties agree that any dispute concerning the enforcement, interpretation or implementation of this Agreement shall be submitted to binding arbitration. . . . The parties further agree that any dispute concerning the parties' rights and/or obligations as set forth in this Agreement, including but not limited to the parties' rights and obligations for division of and/or distribution of Joint Property and/or the determination of either party's entitlement to alimony or postseparation support, support [sic] shall also be submitted to binding arbitration.

Petitioner and respondent married on 19 September 2003 and separated on 22 May 2017.

¶ 3 On 25 May 2018, petitioner submitted a Petition for Appointment of Arbitrator in Chatham County Superior Court, claiming the parties could not agree on whom to appoint as arbitrator for the purpose of moving along their PMA-required arbitration proceedings. On 24 September 2018, respondent filed an Answer, Counterclaim, and

separate Motion to Appoint Arbitrator.[1] Therein, respondent requested that the trial court appoint Judge A. Leon Stanback, Jr. (Ret.) ("Judge Stanback"), to preside over the arbitration. On 2 October 2018, the trial court filed an Order to Arbitrate and Appointing Arbitrator (the "2018 Order"), ordering that the matter be arbitrated in accordance with the PMA and appointing Judge Stanback as arbitrator.

¶ 4 On 31 October 2018, petitioner filed a Notice of Appeal from the 2018 Order. Petitioner argued on appeal that "the trial court abused its discretion in appointing an arbitrator without following the procedural requirements of [N.C. Gen. Stat. §] 50-45(c)(1)-(4)." *Lindberg v. Lindberg*, 267 N.C. App. 511, 832 S.E.2d 568 (2019) (slip op. at *3) (unpublished). On 17 September 2019, this Court, finding that the trial court had complied with Section 50-45 and that petitioner had not shown that the trial court had abused its discretion by appointing Judge Stanback as arbitrator, affirmed the 2018 Order. *Id.* (slip op. at *6). Thereafter, on 23 October 2019, petitioner submitted a petition for discretionary review to the Supreme Court, which was denied. *Lindberg v. Lindberg*, 373 N.C. 258, 835 S.E.2d 455 (2019).

¶ 5 On 31 January 2020, petitioner filed the following seven motions: Motion for Relief from Order; Motion for a Permanent Stay of Entire Arbitration Proceeding; Motion for Partial Permanent Stay regarding claims for alimony, postseparation

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[1] Respondent had previously submitted a motion to dismiss petitioner's petition on 4 June 2018, which she later withdrew on 24 September 2018.

support, equitable distribution, and attorney's fees; Motion for Temporary Stay to Avoid Inconsistent Verdicts; Motion for Declaratory Judgment (or in the alternative "for Leave to Supplement/Amend"); Motion for Entry of Temporary Stay Order Pending a Hearing on the Merits; and a Motion (in the Alternative) to Appoint a Substitute Arbitrator. Particularly, petitioner argued respondent had waived her contractual right to arbitration because she had, "since the parties' 2017 separation, . . . filed several separate civil complaints against [petitioner] in which she asserted claims" petitioner contended were governed solely by the PMA.[2] Petitioner also argued that the dismissal of respondent's prior divorce action against petitioner constituted *res judicata*, thus barring her from arbitration.[3]

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[2] Respondent had, over the years, filed against petitioner a child custody action in Durham County District Court (17 CVD 593), a child support action in Durham County District Court (17 CVD 1364), and a civil action in Key West, Florida "seeking specific performance of [petitioner's] prior gift of [a] Key West beach house to Respondent[,]" in addition to engaging in defense efforts, including a Third Party Complaint, in a separate civil action petitioner had filed against her (17 CVS 3710).

[3] On 22 June 2018, respondent filed a divorce action, as well as a Motion to Stay in Durham County (18 CVD 596), which she voluntarily dismissed without prejudice on 21 September 2018. Respondent then re-filed her divorce action and Motion for Stay in Durham County (18 CVD 1108) on 13 November 2018 and again voluntarily dismissed both without prejudice on 16 November 2018. On 24 April 2019, respondent filed a divorce action and Motion to Stay in Chatham County (19 CVD 298), seeking equitable distribution, alimony, and postseparation support, in response to which petitioner filed, among other things, a Motion for Summary Judgment. On 7 August 2019, the Chatham County District Court entered a judgment for absolute divorce, "holding alternative claims for later determination." Then, on 17 December 2019, the Chatham County District Court granted petitioner's Motion for Summary Judgment, barring respondent's "alternative claims" under North Carolina Rules of Civil Procedure "Rule 41(a)(1)'s two-dismissal rule[.]"

¶ 6 On 2 March 2020, respondent filed a Motion to Appoint Arbitrator and a Motion for Expedited Consideration. Because Judge Stanback had fallen ill and could no longer serve as arbitrator, respondent sought the appointment of Judge Robert N. Hunter, Jr. (Ret.) ("Judge Hunter"), as substitute arbitrator. Further, respondent sought an expedited consideration because, among other reasons, petitioner had recently been indicted on several federal criminal charges. On 21 September 2020, petitioner filed "Amended/Supplemental" versions of the motions originally filed on 31 January 2020.

¶ 7 The parties' motions came on for hearing on 28 September 2020 in Chatham County Superior Court, Judge Baddour presiding. On 16 November 2020, the trial court filed an Order Appointing Substitute Arbitrator, in which it granted respondent's motion to appoint Judge Hunter as substitute arbitrator, granted in part and denied in part petitioner's motion to appoint a substitute arbitrator,[4] and ordered for "this matter . . . to be arbitrated in accordance with" the PMA. Within the written order, the trial court also announced it would enter a separate order at a later date denying petitioner's remaining six motions. Petitioner did not appeal from this order.

[4] Petitioner's motion for substitute arbitrator was granted in part to the extent that the trial court did indeed appoint a substitute arbitrator, and denied to the extent that the substitute arbitrator was not someone other than Judge Hunter.

¶ 8 After an initial administrative conference held on 8 December 2020, Judge Hunter, in his capacity as arbitrator, filed an "Administrative Hearing and Scheduling Order #1" on 28 December 2020 for the purpose of moving along the parties' arbitration proceedings.

¶ 9 On 4 February 2021, the trial court entered an "Order Denying Petitioner's Amended/Supplemental Motions" (the "2021 Order"). Therein, the trial court found petitioner "ha[d] not met his burden of showing that [respondent] waived her right to arbitrate any claims available under the parties' PMA, or that [petitioner] has suffered prejudice sufficient to warrant a finding of waiver." The trial court further found that petitioner "ha[d] not shown the doctrine of res judicata applies to bar arbitration of any claims available to [respondent] under the PMA[,]" stating that "[n]either [respondent]'s voluntary dismissal of her Durham County Divorce Actions, nor the Chatham County District Court's summary judgment order based on the 'two dismissal' rule, operate as res judicata of any of [respondent]'s claims available under the PMA." Accordingly, the trial court dismissed all of petitioner's remaining motions with prejudice, affirming respondent's right to arbitrate. On 5 February 2021, petitioner filed written notice of appeal from the 2021 Order.

¶ 10 On 12 February 2021, petitioner filed with this Court a Petition for *Writ of Supersedeas* and Motion for Temporary Stay of the arbitration proceedings. Again, petitioner argued the arbitration proceedings should be barred by waiver and *res*

judicata, and also argued, in the alternative, that the arbitration should be stayed to avoid the risk of inconsistent verdicts. This Court denied both petitioner's petition and his motion on 10 March 2021.

¶ 11 The record on appeal was filed on 21 May 2021. After being granted an extension, petitioner filed his appellate brief and a Petition for *Writ of Certiorari* on 7 July 2021 to this Court. Respondent, after being granted an extension, filed her appellate brief on 19 October 2021, and then filed a Motion to Dismiss Appeal and for Sanctions, as well as a Response in Opposition to Conditional Petition for *Writ of Certiorari* on 20 October 2021.

II. Discussion

¶ 12 On appeal, petitioner's issues echo those same issues he raised previously in his multiple motions before the trial court and, pertinently, in his Petition for *Writ of Supersedeas* and Motion to Stay before this Court, which we denied: that the trial court erred in permitting arbitration proceedings to move forward because respondent had waived her right to arbitrate, and that the trial court erred in concluding respondent's claims were not barred by the two-dismissal rule, *res judicata*, and collateral estoppel. We first address the interlocutory nature of this appeal.

A. Interlocutory Appeal

¶ 13 "[A]ppeal lies of right directly to the Court of Appeals . . . [f]rom any final judgment of a superior court[.]" N.C. Gen. Stat. § 7A-27(b)(1) (2021). "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) (citation omitted). Conversely, "[a]n 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.* at 362, 57 S.E.2d at 381 (citation omitted).

¶ 14 Petitioner argues, in favor of our immediate review, that his appeal is from a final order because "the only requests of the trial court in this matter were to appoint an arbitrator and decide whether the parties were required to pursue arbitration[,]" and, with "[t]hose decisions hav[ing] been made," there is "nothing left for the trial court to do."

¶ 15 Petitioner appeals from the trial court's 2021 Order, which dismissed his many motions and affirmed respondent's right to arbitrate, thus compelling arbitration. This Court has already determined that an order compelling arbitration is not a final order. *See Spencer v. Portfolio Recovery Assocs., LLC*, 263 N.C. App. 219, 220-21, 822 S.E.2d 739, 740-41 (2018) (dismissing an appeal from an order compelling arbitration as interlocutory). Accordingly, the 2021 Order was not a final order, and petitioner's appeal is interlocutory. *See id.*

B. Substantial Right

¶ 16 Alternatively, petitioner argues that the 2021 Order affects a substantial right, thus warranting his immediate appeal, because "[u]nder the circumstances of this case, the right to avoid arbitration that has been waived and the right to avoid litigation barred by the two-dismissal rule and *res judicata* are substantial rights that will be lost absent immediate appellate review." Specifically, petitioner argues that, absent immediate appeal, he "would lose a substantial right because trial of the instant case could result in inconsistent judgments between the same parties[,]" as he contends it is "the fundamental purpose of the doctrines like waiver and *res judicata* . . . to prevent parties from needlessly litigating the claims to their final conclusion."[5]

¶ 17 "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "[r]eview of an interlocutory ruling is proper if the trial court certifies the case for appeal pursuant to North Carolina Rules of Civil Procedure Rule 54(b), or if the ruling deprives the appellant of a substantial right that will be lost absent immediate review." *Greenbrier Place, LLC v. Baldwin Design Consultants,*

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[5] Petitioner also argues that the 2021 Order "in effect determined the action or discontinued the action—namely, the underlying trial court proceedings as to whether the arbitration could proceed." This appears to be an attempt to reiterate his contention that the 2021 Order is not interlocutory.

P.A., 2021-NCCOA-584, ¶ 10 (citations omitted). "The appellant[ ] must present more than a bare assertion that the order affects a substantial right; [he] must demonstrate *why* the order affects a substantial right." *Id.* (citation and quotation marks omitted).

¶ 18 "The inconsistent verdicts doctrine is a subset of the substantial rights doctrine and is often misunderstood." *Id.* ¶ 12 (citation and quotation marks omitted). "An appellant is required to show that the same factual issues are present in both trials and that [appellant] will be prejudiced by the possibility that inconsistent verdicts may result." *Id.* (citation and quotation marks omitted).

¶ 19 There is no risk of inconsistent verdicts in the case before us. The procedural posture which originally gave rise to, and ultimately concluded in, the 2021 Order was petitioner's initial Motion for Appointment of Arbitrator in 2018. This motion served the purpose of appointing an arbitrator, where the parties could not come to an agreement, so that the parties' arbitration proceedings could move forward, as prescribed by their PMA. The 2021 Order, which followed the trial court's appointment of an arbitrator, merely dismissed petitioner's multiplicitous motions and affirmed the parties' ability to commence and engage in arbitration proceedings. Conversely, the arbitration proceedings are, by design, tasked with addressing issues pertinent to the PMA, which the 2021 Order neither did nor had the power to do.

¶ 20 In brief, the arbitration proceedings and the 2021 Order are separate and distinct, and as such do not threaten even the slightest possibility of overlapping

issues or inconsistent verdicts. Furthermore, the arbitration proceedings are currently ongoing; were this Court to allow immediate review of petitioner's interlocutory appeal, that in and of itself would posit a more significant risk of inconsistent verdicts, or at the very least the risk of disrupting ongoing dispute resolution.

¶ 21 Petitioner has raised interesting issues with respect to whether the arbitration is appropriate; however, none of these issues will be waived, nor will petitioner lose the right to have them determined, once the arbitrator has rendered an opinion and award. *See* N.C. Gen. Stat. §§ 50-53 to 50-56 (2021). Indeed, the issues would be ripe to raise with respect to whether any award should be confirmed. *See id.*

¶ 22 The parties agreed to arbitration in their PMA and, as such, petitioner is bound by this arrangement. Being required to engage in an arbitration for which one has contracted and which one has sought to enforce by requesting the initial appointment of an arbitrator does not—much like being required to engage in a trial prior to appealing ancillary matters—deprive one of a substantial right. *Spencer*, 263 N.C. App. at 220, 822 S.E.2d at 740 ("[T]his precise question of the appealability of an order compelling arbitration has previously been decided by a different panel of this Court in *The Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 314 S.E.2d 291 (1984). This Court in *The Bluffs* held that an order compelling arbitration was interlocutory and *did not affect a substantial right*. We find the reasoning in *The Bluffs* persuasive and

its holding dispositive of the case before us. Further, we are bound by it as precedent.") (citation omitted) (emphasis added).

¶ 23 Accordingly, petitioner has not shown that he will suffer the loss of a substantial right absent immediate appeal.

C. Petitioner's Petition for Writ of Certiorari

¶ 24 Recognizing that his appeal is subject to dismissal, petitioner also filed a Petition for *Writ of Certiorari* with this Court.

¶ 25 "*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted). Thus, "[a] petition for the writ must show merit or that error was probably committed below." *Id.* (citation omitted).

¶ 26 In his petition, petitioner argues, among other things, that "certiorari review would . . . be appropriate here because [petitioner] would have no other route to protect the rights at stake" and because "this appeal presents several important issues regarding waiver and res judicata[.]" Petitioner also argues that, were this Court to decline to reach the merits of the appeal, the parties' efforts in drafting the briefs would be wasted. This is the extent of petitioner's argument in favor of our *certiorari* review.

¶ 27 As mentioned above, the issues petitioner raises on appeal echo the issues he already raised before this Court in his Petition for *Writ of Supersedeas* and Motion

for Temporary Stay, both of which we dismissed via order. Furthermore, petitioner's contention that he is left without a "route to protect [his] rights at stake" is unfounded, as our statutes provide avenues for petitioner to bring before the judiciary any sound issue he may have with the arbitration award. *See* N.C. Gen. Stat. §§ 50-53 to 50-56.

¶ 28 This case is replete with evidence that petitioner, having agreed to an arbitration and initially seeking the involvement of the courts, has, once he did not obtain the arbitrator he sought, engaged in a concerted pattern to delay and obstruct the arbitration through a series of appeals and motions. Therefore, in our discretion, we deny the Petition for *Writ of Certiorari*.

III. Conclusion

¶ 29 In sum, we dismiss petitioner's appeal as interlocutory, but decline respondent's request to award sanctions. Petitioner's Petition for *Writ of Certiorari* is denied.

APPEAL DISMISSED.

Judges TYSON and CARPENTER concur.

Report per Rule 30(e).