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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-224

No. COA21-407

Filed 5 April 2022

Forsyth County, No. 20 CVS 5827

STEPHEN GREENE, in his capacity as Executor of the ESTATE OF FRANCES GREENE, STEPHEN GREENE, in his capacity as the Executor of the ESTATE OF EDWARD GREENE, and STEPHEN GREENE, Individually, Plaintiffs,

v.

CHRISTOPHER D. LANE, and ALYDAR FINANCIAL, INC., Defendants.

Appeal by Defendants from order entered 29 March 2021 by Judge Richard S. Gottlieb in Forsyth County District Court. Heard in the Court of Appeals 11 January 2022.

Hendrick Bryant Nerhood Sanders & Otis, LLP, by Joshua P. Dearman, for Plaintiffs-Appellees.

Christopher D. Lane, for Defendants-Appellants.

CARPENTER, Judge.

I. Factual and Procedural Background

¶ 1 Plaintiff-Appellee Stephen Greene ("Greene") commenced the current action in his capacity as executor of the Estate of Frances Greene, executor of the Estate of Edward Greene, and in his own individual capacity. Christopher Lane ("Lane") is a

North Carolina attorney and is a party to this case; he is also representing Alydar Financial, Inc. ("Alydar"), an entity which is also a party to this case. Alydar was incorporated in 2001. Lane and decedent Edward Greene each owned a 50% interest in Alydar. Greene inherited Edward Greene's shares of Alydar upon Edward Greene's and Frances Greene's deaths. Lane was the president of Alydar until 27 January 2021.

¶ 2 Greene filed a complaint, motion for appointment of receiver, and motion for preliminary injunction in Forsyth County on 23 December 2020 against Alydar and Lane. Greene asserted six claims: for money owed, breach of contract, conversion, exploitation, actual fraud, constructive fraud, and breach of fiduciary duty. Greene also asserted three other requests for relief: piercing the corporate veil, appointment of receiver, and a preliminary injunction. Lane moved to dismiss all claims.

¶ 3 By orders dated 23 February 2021, the trial court dismissed Greene's claims for conversion, exploitation, actual fraud, and breach of fiduciary duty, and the trial court denied without prejudice Plaintiff's motion for appointment of a receiver and preliminary injunction. The issues still within the providence of the trial court are the claims for money owed and breach of contract, both of which relate to a promissory note allegedly owed to Edward Greene by Alydar. These issues are not before this Court and will not be resolved in this appeal.

¶ 4 Following hearings on several motions of the parties, Lane, on behalf of himself

and as counsel to Alydar, filed on 24 February 2021 an answer, motion to strike, and counterclaims. Lane asserted claims for employment compensation allegedly owed to Lane by Alydar. After Lane filed the answer, motion to strike, and counterclaims, Greene moved to disqualify Lane as counsel for Alydar. The trial court made written findings of fact to support its decision regarding the motion to disqualify Lane as counsel. The relevant findings of fact from the order that relate to this appeal are as follows:

> 3. Defendants' Counterclaim seeks compensation for wages that Christopher D. Lane performed on behalf of Defendant Alydar.
> …
> 5. Christopher D. Lane has a conflict of interest in violation of North Carolina State Bar Rules of Professional Responsibility Rule 1.7(a)(2) because his representation of himself will materially limit his responsibilities to Alydar Financial, Inc. and his personal interests will outweigh and limit his representation of Alydar Financial, Inc.
> 6. Christopher D. Lane is likely a material and necessary witness in this litigation and is therefore prohibited from representing Alydar pursuant to North Carolina State Bar Rules of Professional Responsibility Rule 3.7(a).

¶ 5 Based on the parties' pleadings and evidence presented, the trial court found Lane to be in violation of Rules 1.7(a)(2) and 3.7.(a) of the North Carolina State Bar Rules of Professional Responsibility. On 29 March 2021, the trial court entered an order disqualifying Lane as counsel for Alydar (the "Order"). Lane subsequently filed an interlocutory appeal on 30 March 2021.

II. Jurisdiction

¶ 6 An interlocutory order from a superior court is immediately appealable if such order affects a substantial right of the parties involved. N.C. Gen. Stat. § 7A-27(b)(3) (2021). This court has held:

> While an interlocutory appeal may be allowed in "exceptional cases," the Court must dismiss an interlocutory appeal for lack of subject matter jurisdiction, unless the defendant is able to carry its "burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature."

C. Terry Hunt Indus., Inc. v. Klausner Lumber Two, LLC, 255 N.C. App. 8, 11, 803 S.E.2d 679, 682 (2017) (quoting *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 76, 711 S.E.2d 185, 188-89 (2011)). A party may appeal from an interlocutory order in two instances. "First, if the order is final as to some but not all claims or parties, and the trial court certifies there is no just reason to delay appeal pursuant to North Carolina Rule of Civil Procedure 54(b), an immediate appeal may lie." *Bishop v. Lattimore*, 137 N.C. App. 339, 343, 530 S.E.2d 554, 558 (2000). Second, an appeal is permissible if the trial court's decision deprives a party of a substantial right that will be lost absent immediate review. *Id.* at 343, 530 S.E.2d at 558. This Court has held "an order disqualifying counsel is immediately appealable because it affects a substantial right." *Harris & Hilton, P.A. v. Rassette*, 252 N.C. App. 280, 282–83,

798 S.E.2d 154, 157 (2017) (quoting *Robinson & Lawing, L.L.P. v. Sams*, 161 N.C. App. 338, 339 n.3, 587 S.E.2d 923, 925 n.3 (2003)).

III. Issues

¶ 7 The issues before this Court are whether the trial court erred: (1) in entering its findings of fact numbers three, five, or six; or (2) in removing Lane as counsel to corporate defendant Alydar.

IV. Standard of Review

¶ 8 "Decisions regarding whether to disqualify counsel are within the discretion of the trial judge and, absent an abuse of discretion, a trial judge's ruling on a motion to disqualify will not be disturbed on appeal." *Braun v. Tr. Dev. Grp., LLC*, 213 N.C. App. 606, 609, 713 S.E.2d 528, 530 (2011) (quoting *Travco Hotels, Inc. v. Piedmont Nat. Gas Co.*, 332 N.C. 288, 295, 420 S.E.2d 426, 430 (1992)). "It is well settled that the trial court must be given substantial latitude in granting or denying a motion for attorney disqualification." *State v. Taylor*, 155 N.C. App. 251, 255, 574 S.E.2d 58, 62 (2002) (quoting *State v. Shores*, 102 N.C. App. 473, 475, 402 S.E.2d 162, 163 (1991)). "[A] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Smith v. Beaufort Cnty. Hosp. Ass'n*, 141 N.C. App. 203, 210, 540 S.E.2d 775, 781 (2020) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

¶ 9 "On a motion for disqualification, the findings of the trial court are binding on appeal if supported by any competent evidence, and the court's ruling may be disturbed only where there is a manifest abuse of discretion, or if the ruling is based on an error of law." *State v. Smith*, 258 N.C. App. 682, 686–87, 813 S.E.2d 867, 870 (2018) (quoting *State v. Rogers*, 219 N.C. App. 296, 299, 725 S.E.2d 342, 345 (2012)).

V. Analysis

A. Findings of Fact

1. Finding of Fact Number Three

¶ 10 Lane challenges the trial court's finding of fact number three, which reads: "Defendants' Counterclaim seeks compensation for wages that Christopher D. Lane performed on behalf of Defendant Alydar." In his counterclaims, Lane asserted "he had conferred a benefit to Alydar," and if he knew Plaintiffs were going to renege on the agreement, Lane "would have required compensation." Lane iterated in the counterclaims he was "entitled to be compensated in quantum meruit for said benefit." A plain reading of Lane's counterclaims reveals the validity of finding of fact number three. If Alydar must compensate Lane, Greene is affected as a co-owner of Alydar. As such, the counterclaims plainly indicate a conflict of interest. Based on the evidence in Lane's own counterclaim, the trial court had competent evidence to support the entry of finding of fact number three.

2. Finding of Fact Number Five

¶ 11 Lane challenges the trial court's finding of fact number five, which reads: "Christopher D. Lane has a conflict of interest in violation of North Carolina State Bar Rules of Professional Conduct Rule 1.7(a)(2) because his representation of himself will materially limit his responsibilities to Alydar Financial, Inc., and his personal interests will outweigh and limit his representation of Alydar Financial, Inc." **{R p 172}.** Rule 1.7(a)(2) of the North Carolina Rules of Professional Conduct states:

> [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

N.C. R. Prof. C. 1.7(a)(2). The trial court had competent evidence to support a finding Lane had a conflict of interest, and his representation of himself would materially limit his representation of Alydar. *See* N.C. R. Prof. C. 1.7(a)(2). The promissory note which forms the basis for this action obligates Lane and Alydar, jointly and severally, to Greene. Lane has a direct personal interest to avoid personal liability and ensure the company, including Greene as a shareholder, bears the cost of such debt. The trial court found Lane sought compensation for services provided to Alydar. The compensation Lane sought through the counterclaim creates a conflict of interest: the compensation would be paid through Alydar, and Greene is a 50% shareholder in

Alydar. This situation represents a direct conflict with a concurrent client that cannot be waived. *See* N.C. R. Prof. C. 1.7(a)(2). Therefore, the trial court had competent evidence to support the finding that Lane had a conflict of interest, and he failed to obtain the informed consent in writing necessary to waive such a conflict.

3. Finding of Fact Number Six

¶ 12 Lane challenges the trial court's finding of fact number six, which reads: "Christopher D. Lane is likely a material and necessary witness in this litigation and is therefore prohibited from representing Alydar pursuant to North Carolina State Bar Rules of Professional Conduct Rule 3.7(a)."

¶ 13 Rule 3.7(b) of the North Carolina Rules of Professional Conduct states: "A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9." N.C. R. Prof. C. 3.7(b). "Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client." N.C. R. Prof. C. 3.7, cmt. 1. Testimony is necessary within the meaning of Rule 3.7(a) "when it is relevant, material, and unobtainable by other means." *State v. Smith*, 230 N.C. App. 387, 391, 749 S.E.2d 507, 510 (2013) (quoting *Rogers*, 219 N.C. App. at 304, 725 S.E.2d at 348). *See* N.C. R. Prof. C. 3.7(a).

¶ 14 The trial court found Lane had a conflict of interest in violation of Rule 3.7(a)

and was acting as a necessary witness. Evidence existing in the record to support this finding includes the following: Lane is the only witness who could offer testimony about the loan payment history, the balance of the promissory note, journal ledger corrections, and oral agreements with the deceased 50% shareholder; Lane was president of Alydar from 2001 until January 2021; Lane still maintains control of rent collection and accounting for Alydar; and Lane's knowledge makes his testimony material, and being the only other owner of Alydar, the testimony could not otherwise be obtained. *See Smith*, 230 N.C. App. at 391, 749 S.E.2d at 510. Lane repeatedly filed affidavits offering sworn testimony in proceedings in the trial court, in which he simultaneously argued as counsel for himself and Alydar. Lane offered personal testimony throughout the pleadings in this case including in his answer, motion to strike, counterclaims, and responses to Plaintiffs' first discovery. The trial court found Lane had a conflict of interest in violation of Rule 1.7, precluding him from testifying. Furthermore, his testimony is material in the context of Rule 3.7(a), creating another conflict of interest. *See* N.C. R. Prof. C. 3.7(a). The trial court had competent evidence to support a finding that Lane was a necessary witness, which would preclude him from representing himself and Alydar at trial.

B. Disqualification of Counsel

¶ 15 Lane contends the findings of fact made by the trial court regarding the counterclaim were in error. Lane contends he was not seeking damages from Alydar,

but rather from Plaintiffs for negligent misrepresentation. For the following reasons, we find the trial court did not err in disqualifying Lane as counsel for Alydar.

¶ 16 Licensed North Carolina attorneys are subject to the disciplinary jurisdiction of the North Carolina State Bar (the "State Bar") under the North Carolina Rules of Professional Conduct. N.C. Gen. Stat. § 84-28 (2021). The inherent powers of North Carolina Superior Courts to discipline or disqualify attorneys are not abridged or limited by the State Bar's jurisdiction, nor are they abridged or limited by the North Carolina Rules of Professional Conduct. *See* N.C. Gen. Stat. § 84-36 (2021); s*ee also Swenson v. Thibault*, 39 N.C. App. 77, 109, 250 S.E.2d 279, 299 (1978) ("[I]t is clear that the court's inherent power is not limited or bound by the technical precepts contained in the Code of Professional Responsibility as administered by the Bar.").

¶ 17 Lane presented the trial court with testimonial affidavits signed and sworn by Lane himself, a 50% shareholder in Alydar. Lane then argued as counsel for Alydar against the company's other 50% shareholder. This alone was sufficient grounds for the court to order Lane's disqualification as attorney for Alydar and a proper exercise of the trial court's inherent authority over an attorney appearing before it. *See Swenson*, 39 N.C. App. at 109, 250 S.E.2d at 299. Based on the foregoing, the trial court did not abuse its discretion in ruling to disqualify Lane as counsel.

VI. Conclusion

¶ 18 The record contained competent evidence to support the trial court's findings

of fact. The trial court's sound findings in turn provided a proper basis from which to remove Lane as counsel to Alydar. We find the trial court did not abuse its discretion, and the judgment should not be disturbed. Nothing in the holding set forth in this opinion shall prejudice or inhibit the trial court or the North Carolina State Bar in the exercise of their respective duties and authority in regulating the practice of law.

AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

Report per Rule 30(e).