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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-531

No. COA21-771

Filed 2 August 2022

Johnston County, No. 20CVS003321

CLEAN N DRY, INC., Plaintiff,

v.

RICHARD T. EDWARDS, Defendant.

Appeal by Defendant from order entered 14 September 2021 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 27 April 2022.

Mast, Johnson, Trimyer, Wright, Booker & Van Patten, P.A., by George B. Mast, for Plaintiff-Appellee.

Daughtry Woodard Lawrence & Starling, by Luther D. Starling and Kyle A.R. Lewis, for Defendant-Appellant.

JACKSON, Judge.

¶ 1 Defendant-Appellant Richard Edwards appeals the trial court's order denying his Motion for Leave to Amend his Answer to a Complaint filed by Plaintiff-Appellee Clean N Dry, Inc. After careful review, we affirm the order of the trial court.

I. Background

¶ 2 On 19 January 2020, Mr. Edwards's home was destroyed by a fire. Mr. Edwards contracted with Clean N Dry, Inc. ("CND") for remediation work in order to salvage his home. State Farm, Mr. Edwards's insurance company, determined that the home was not salvageable. State Farm then issued payments to Mr. Edwards and Benchmark, the bank holding the Deed of Trust on Mr. Edwards's property. The bank applied the payments from State Farm to their Deed of Trust and provided Mr. Edwards with the remainder instead of paying CND.

¶ 3 State Farm paid $140,000 to Mr. Edwards and the bank, $118,000 of which for damages to his home and the remainder for his living expenses. Mr. Edwards endorsed the check from State Farm and gave it to the bank in order to pay off his outstanding balance of $135,000.

¶ 4 CND sued Mr. Edwards for breach of contract due to his failure to pay for remediation services totaling $60,466.34 and sought late fees of 1.5% per month that the balance was not paid, reasonable attorney fees, and punitive damages. Mr. Edwards claimed that he intended for the payment from State Farm to be used to pay CND, but CND was never paid. His separate attempt to sue the bank to remedy the situation was unsuccessful.

¶ 5 CND filed its complaint on 30 October 2020. Mr. Edwards filed his answer 31 December 2020, moving to dismiss for improper venue and failure state a claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) and Rule 12(b)(6). On 14 April 2021,

the trial court denied both motions. On 12 May 2021, the trial court entered a Scheduling Order, setting the following deadlines: 30 September 2021 for the completion of discovery, 15 October 2021 for the completion of mediation, 6 December 2021 for filing of all Motions in Limine, and 13 December 2021 for the jury trial. Mr. Edwards was deposed on 28 June 2021.

¶ 6 On 30 July 2021, Mr. Edwards moved for leave to amend his initial answer. Mr. Edwards's motion proposed introducing a variety of counterclaims, namely: (1) damage to real property, (2) fraud, (3) conversion, and (4) Unfair and Deceptive Trade Practices under N.C. Gen. Stat. § 75-1. Mr. Edwards alleges that his review of the invoice provided by CND revealed inaccuracies, including work that was invoiced by CND but not performed. Shortly after Mr. Edwards filed his motion, CND moved for summary judgment on 9 August 2021. The trial court heard both motions on 30 August 2021 and denied the motions in an order entered 14 September 2021 (the "Order").

¶ 7 Mr. Edwards entered timely written notice of appeal on 16 September 2021.

II. Jurisdiction

¶ 8 In general, interlocutory orders are not immediately appealable "unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (internal quotation and citation omitted); N.C. Gen. Stat.

§ 1-277(a) (2021). To determine whether the denial of appellate review would amount to a loss of a substantial right, we apply a two-part test, "(1) the right itself must be substantial; and (2) the deprivation of that substantial right must potentially work injury to the appealing party if not corrected before appeal from final judgment." *Builders Mut. Ins. Co. v. Meeting St. Builders, LLC*, 222 N.C. App. 646, 649, 736 S.E.2d 197, 199 (2012) (citing *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736) (internal marks omitted). Furthermore, the appellant bears the burden to show a substantial right in each case. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). Our appellate courts have repeatedly held that whether an interlocutory appeal affects a substantial right is determined on a "case-by-case" basis. *See, e.g.*, *Dewey Wright Well & Pump Co. v. Worlock*, 243 N.C. App. 666, 669, 778 S.E.2d 98, 101 (2015); *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978) ("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.").

¶ 9 We have previously held that the denial of a motion to amend an answer to add a compulsory counterclaim is immediately appealable because failure to assert a compulsory counterclaim typically bars future action on the claim, which would affect a substantial right of the movant. *House Healers Restorations, Inc. v. Ball*, 112 N.C. App. 783, 785, 437 S.E.2d 383, 385 (1993). A counterclaim is compulsory if it "arises

out of the transaction or occurrence that is the subject matter of the opposing party's claim[.]" N.C. Gen. Stat. § 1A-1, Rule 13(a) (2021). Here, Mr. Edwards asserts that the denial of his Motion to Amend affects a substantial right because the proposed counterclaims in his amended complaint were compulsory and would likely be barred from future action. Likewise, CND does not dispute that the counterclaims in Mr. Edwards's amended answer are compulsory or challenge the appealability of the Order. Because we agree with Mr. Edwards that the trial court's denial of his Motion to Amend affects a substantial right, we review the merits of his appeal.

III. Analysis

¶ 10 Amendments to pleadings should be freely allowed unless allowing them would materially prejudice the opposing party. *Vaughan v. Mashburn*, 371 N.C. 428, 433, 817 S.E.2d 370, 374 (2018) (citations omitted). Nevertheless, we review the trial court's denial of a motion to amend using the abuse of discretion standard of review. *Dan King Plumbing Heating & Air Conditioning, LLC v. Harrison*, 2022-NCCOA-27. Such a denial rises to the level of an abuse of discretion when it is "so arbitrary that it could not have been the result of a reasoned decision." *Id.* (cleaned up).

¶ 11 The trial court

> abuses its discretion when it refuses to allow an amendment without providing any justifying reason for denying the motion to amend. In contrast, a trial court acts properly in denying a motion to amend for reasons of (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility

> of amendment, and (e) repeated failure to cure defects by previous amendments.

Id. at ¶ 64 (internal quotations and citations omitted). If the trial court does not state a reason for its denial, this Court may examine the record before it for any apparent reasons for the denial. *Williams v. Craft Dev., LLC*, 199 N.C. App. 500, 510, 682 S.E.2d 719, 725 (2009); *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 431, 391 S.E.2d 211, 216 (1990); *Kinnard v. Mecklenburg Fair, Ltd.*, 46 N.C. App. 725, 727, 266 S.E.2d 14, 16 (1980).

¶ 12 "When a trial court denies a party's motion to amend based on undue delay, the trial court may consider the relative timing of the proposed amendment in relation to the progress of the lawsuit." *Dan King*, 2022-NCCOA-27 at ¶ 65 (internal quotation and citation omitted). Further, a trial court may deny a motion to amend for undue delay "where a party seeks to amend its pleading after a significant period of time has passed since filing the pleading and where the record or party offers no explanation for the delay." *Rabon v. Hopkins*, 208 N.C. App. 351, 354, 703 S.E.2d 181, 184 (2010) (citation omitted).

¶ 13 We have frequently held that a wide range of time constitutes an undue delay when considering whether a denial of a motion to amend was within the trial court's reasonable discretion. *See, e.g., Dan King*, 2022-NCCOA-27 at ¶ 67 ("[W]e conclude that the trial court did not abuse its discretion by denying Defendant's motion for

leave to amend his complaint in the middle of trial."); *Strickland v. Lawrence*, 176 N.C. App. 656, 666-67, 627 S.E.2d 301, 308 (2006) ("Plaintiffs' motion was filed seven months after the institution of their action and nine depositions had been taken, including those of the named individual defendants."); *Micro Cap. Invs., Inc. v. Broyhill Furniture Indus., Inc.*, 221 N.C. App. 94, 102-03, 728 S.E.2d 376, 382-83 (2012), *aff'd*, 366 N.C. 371, 736 S.E.2d 172 (2013) ("Here, plaintiff moved to amend more than eleven months after filing its complaint and three months after amending its complaint a first time to increase the damages sought."); *Rabon*, 208 N.C. App. at 354, 703 S.E.2d at 184-85 (motion came nine months after answer) (citing *Media Network, Inc. v. Long Haymes Carr, Inc.*, 197 N.C. App. 433, 447-48, 678 S.E.2d 671, 681 (2009) (motion came three months after answer)); *Walker v. Sloan*, 137 N.C. App. 387, 402, 529 S.E.2d 236, 247 (2000) (motion came three months after answer); *Caldwell's Well Drilling, Inc. v. Moore*, 79 N.C. App. 730, 731, 340 S.E.2d 518, 519 (1986) (motion came three months after answer); *Patrick v. Ronald Williams, Pro. Ass'n*, 102 N.C. App. 355, 360-61, 402 S.E.2d 452, 455 (1991) ("In the case below defendants moved to amend their answer almost a full year after filing it and after both parties had conducted extensive discovery."); *Delta Env't Consultants v. Wysong & Miles Co.*, 132 N.C. App. 160, 172, 510 S.E.2d 690, 698 (1999) (motion to amend counterclaim came "'rather late' in the case"—one year after the initial claim).

A. The Trial Court Did Not Abuse its Discretion by Denying Mr. Edwards's Motion to Amend

¶ 14 Though the trial court did not expressly state that it denied Mr. Edwards's Motion to Amend because the motion would have caused an undue delay in the trial, its reasoning is apparent from the Order denying the motion. The trial court's Order listed the dates of the Complaint, Answer, and Scheduling Order, including the discovery deadline, mediation deadline, and trial setting. The Order itself, impliedly relying on the scheduled timeline, concludes that Mr. Edwards's motion to amend is denied. Therefore, the trial court's apparent reason for denial was that allowing the Motion to Amend would unduly delay the trial in the matter.

¶ 15 A review of the timeline of this case reveals that the trial court did not abuse its discretion in denying Mr. Edwards's Motion to Amend. The trial court's 12 May 2021 Scheduling Order provided both parties over four months to complete discovery *after* over six months of litigation had already occurred since CND initially filed its Complaint. With the exception of Mr. Edwards's claim that CND caused damage to Mr. Edwards's yard, the primary source of Mr. Edwards's counterclaims is an "Xactimate" invoice listing a variety of charges for services provided by CND that Mr. Edwards either denies were performed or alleges were unnecessary to perform. This central piece of discovery amounts to merely twenty pages of itemized charges made available to Mr. Edwards over eight months before CND filed its Complaint. Mr.

Edwards claims that not much more discovery than the Xactimate and other already-produced items would be necessary to evaluate his counterclaims. Mr. Edwards was deposed and asked to point out various purported inconsistencies with the invoice and the work that was performed on 28 June 2021, nearly eight months after CND's Complaint was initially filed and nearly six months after Mr. Edwards's initial Answer was filed. It subsequently took an additional month for Mr. Edwards to move to amend his answer with the added counterclaims. As mentioned above, we have before affirmed a trial court's denial of a motion to amend when that motion came just three months after the initial answer or complaint because granting that motion would have caused an undue delay. *Media Network*, 197 N.C. App. at 447-48, 678 S.E.2d at 681; *Walker*, 137 N.C. App. at 402, 529 S.E.2d at 247; *Caldwell's Well Drilling.*, 79 N.C. App. at 731, 340 S.E.2d at 519. Here, the Motion came *six* months after the initial Answer, nine months after CND's Complaint, after a lengthy period of discovery, and after more than enough time to examine the invoices that are the source of most of Mr. Edwards's counterclaims. We therefore hold that the trial court did not abuse its discretion in denying Mr. Edwards's Motion to Amend.

¶ 16 Mr. Edwards argues that a "short continuance" of the trial date, while a delay, is not tantamount to *undue* delay, and CND has failed to show that such a delay would cause "material prejudice." *See Vaughan*, 371 N.C. at 433 (citing *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986)); *Mauney*, 316 N.C. at 72, 340

S.E.2d at 400 ("[A]mendments should be freely allowed unless some material prejudice to the other party is demonstrated. The burden is upon the opposing party to establish that that party would be prejudiced by the amendment."). However, we do not find this argument persuasive.

¶ 17 Mr. Edwards's counterclaims would include a claim for Unfair and Deceptive Trade Practices ("UDTP") pursuant to N.C. Gen. Stat. § 75-1. We have previously held that UDTP claims "greatly increase[] the stakes of a lawsuit" because "[UDTP] allegations would not only greatly change the nature of the defense to what was a breach of contract action but also would subject defendant to potential treble damages[.]" *Kinnard v. Mecklenburg Fair, Ltd.*, 46 N.C. App. 725, 727, 266 S.E.2d 14, 16, *aff'd*, 301 N.C. 522, 271 S.E.2d 909 (1980); *N. Carolina Farm Bureau Mut. Ins. Co. v. Wingler*, 110 N.C. App. 397, 405, 429 S.E.2d 759, 764, *rev. denied*, 334 N.C. 434, 433 S.E.2d 177 (1993); *House Healers Restorations*, 112 N.C. App. at 786-87, 437 S.E.2d at 385-86. Likewise, here, allowing a UDTP claim for the first time would expose CND to potential treble damages, require CND to engage in additional discovery and preparation, and greatly increase the stakes of the suit. As such, we hold that allowing Mr. Edwards's Motion to Amend would have materially prejudiced CND, and therefore, the trial court did not abuse its discretion in denying Mr. Edwards's Motion to Amend for undue delay.

IV. Conclusion

¶ 18 For the reasons stated above, we hold that the trial court did not abuse its discretion in denying Mr. Edwards's Motion to Amend and affirm the order of the trial court.

AFFIRMED.

Judges DIETZ and GRIFFIN concur.

Report per Rule 30(e).