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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-659

No. COA22-226

Filed 4 October 2022

Wake County, No. 19CVS500511

CHEREE BROWN, Plaintiff,

v.

CARUSO HOMES, INC., Defendant.

Appeal by defendant from judgment entered 3 November 2021 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 23 August 2022.

The Law Offices of Gilda A. Hernandez, PLLC, by Gilda Hernandez and Charlotte C. Smith, for plaintiff-appellee.

Hilton Silvers & McClanahan, PLLC, by Nelson G. Harris, for defendant-appellant.

GORE, Judge.

¶ 1

Defendant seeks interlocutory appeal claiming the trial court erred by entering an order denying defendant's motion for a non-jury trial and affirming plaintiff's right to trial by jury ("Jury Order"). Plaintiff filed a Motion to Dismiss defendant's interlocutory appeal asserting the appeal does not injuriously affect a substantial right of defendant. Defendant's interlocutory appeal meets the substantial right

exception. Therefore, plaintiff's motion to dismiss this case as interlocutory is denied. On the merits, we affirm the trial court's interlocutory order.

I.

¶ 2 On 26 November 2019, plaintiff filed a complaint against defendant for claims of violations of the North Carolina Wage and Hour Act, Section 95-25.1 *et seq.* N.C. Gen. Stat. § 95-25.1 *et seq.* (2021). Within the complaint, plaintiff stated, "Pursuant to Rule 38(b) of the North Carolina Rules of Civil Procedure, Plaintiff hereby demands a trial by jury as to all issues so triable." Defendant answered the complaint and asserted affirmative defenses, including waiver of the right to jury trial within plaintiff's employment contract.

¶ 3 The parties worked jointly to prepare and file a Case Management Order ("CMO") with the court on 21 October 2020. The parties agreed to a non-jury trial within the CMO, which plaintiff alleges was a compromise during the height of the COVID-19 Pandemic. Defendant believed plaintiff was stipulating to waiver of a jury trial, although plaintiff was unwilling to sign a stipulation to the same. The trial was originally set for 19 April 2021, but the trial was continued twice to 26 July 2021 and then 1 November 2021 because of the ongoing pandemic.

¶ 4 On 11 October 2021, the trial court coordinator reached out to the parties regarding the 1 November 2021 trial and stated it was set as a jury trial within the court calendar. After back-and-forth e-mail communication, the trial court

coordinator communicated with the presiding judge for the week of the trial and set the calendar as a “Jury/Non-jury trial” for the trial judge to rule on the matter. Additionally, she told the parties to be prepared to move forward independent of whether it was a jury trial or non-jury trial.

¶ 5 On 13 October 2021, defendant filed a Motion for Non-Jury Trial and on 28 October 2021, plaintiff filed a response in opposition to defendant’s motion. On 1 November 2021, the parties argued the matter of a jury trial before the presiding judge. After consideration of the same, the trial court entered an order on 3 November 2021, denying defendant’s motion for non-jury trial and affirming plaintiff’s right to a trial by jury. Defendant timely appealed this interlocutory order.

II.

¶ 6 Generally, appeal is not ripe from an interlocutory order. *Liggett Group, Inc. v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). However, in two situations, this Court will permit an interlocutory appeal: (1) “where the order represents a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal,” or (2) “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) (quoting N.C. R. Civ. P. 54(b)) (internal quotations omitted). Our Supreme Court previously held an order granting a party’s

right to trial by jury is immediately appealable as a substantive right. *Faircloth v. Beard*, 320 N.C. 505, 507, 358 S.E.2d 512, 514 (1987), *overruled on other grounds by Kiser v. Kiser*, 325 N.C. 502, 385 S.E.2d 487 (1989); *see Jacobs v. City of Asheville*, 137 N.C. App. 441, 442–43, 528 S.E.2d 905, 906 (2000). Accordingly, defendant’s interlocutory appeal is properly before this Court.

A.

¶ 7 Defendant claims the trial court erred, (1) by ordering the matter be tried by jury, (2) by claiming it had discretion under Rule 39(b) to order a trial by jury, and (3) by enforcing its discretion under Rule 39(b) when the parties had waived trial by jury under Rule 39(a)(1). We disagree.

¶ 8 On appeal, this Court reviews the trial court’s findings of fact to determine, “whether the trial [court’s] underlying findings of fact are supported by competent evidence, . . . and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008). Whereas the trial court’s “[c]onclusions of law . . . are reviewable *de novo* on appeal.” *Id.* (citation omitted).

¶ 9 Defendant claims plaintiff waived her demand for a jury trial. In arguing this, defendant relies on the CMO, various e-mail communications between the parties, and the motions to continue as proof of stipulated waiver. Defendant cites to Rule 39(a) of the North Carolina Rules of Civil Procedure, which states:

(a) By jury. When trial by jury has been demanded and has not been withdrawn as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless: (1) The parties who have pleaded or otherwise appeared in the action or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the minutes, consent to trial by the court sitting without a jury, or (2) The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes.

N.C. R. Civ. P. 39(a). Defendant cites to no further case law to support waiver.

¶ 10 Sacred to the North Carolina Constitution, is the highly favored right to a jury trial. Article 1, Section 25 of the North Carolina Constitution states, “In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.” N.C. Const. Art. 1, Sec. 25. Our Supreme Court previously explained when the right to jury trial exists in civil actions. Such right is present “where the prerogative existed by statute or at common law at the time the Constitution of 1868 was adopted.” *Kiser*, 325 N.C. at 507, 385 S.E.2d at 490.

¶ 11 Given the sacred right to a trial by jury in certain civil actions, waivers of such right are not easily enforced. Our Courts have stated multiple times that waivers of the right to a jury trial should be “strictly construed and are not to be lightly inferred or extended by implication, whether with respect to a civil or criminal case. . . . [;] in the absence of an express agreement or consent, a waiver of the right to a jury trial

will not be presumed or inferred.” *In re Gilliland*, 248 N.C. 517, 522, 103 S.E.2d 807, 811 (1958) (citation omitted); *see also Ayscue v. Griffin*, 263 N.C. App. 1, 12, 823 S.E.2d 134, 142 (2018); *Mathias v. Brumsey*, 27 N.C. App. 558, 560, 219 S.E.2d 646, 647 (1975).

¶ 12 Defendant would have this Court infer plaintiff’s stipulation of waiver from a document filed with the trial court with a mere fillable form non-jury trial check box and from two motions to continue which discuss a bench trial. Yet in neither document does plaintiff expressly waive her right to a jury trial. When balancing the highly favored right to a jury trial, such an inference would directly conflict with this Court’s unwillingness to presume or infer waiver. Plaintiff timely demanded a jury trial in her complaint, restated this demand in her response to the motion for a non-jury trial, and orally argued this demand before the trial court on 1 November 2021. Further, these email communications, the CMO, and the motions to continue were during the height of the pandemic when jury trials were on hold for safety reasons.

¶ 13 Accordingly, the trial court’s findings of fact were supported by competent evidence on the Record, which support the trial court’s conclusions of law that plaintiff has a constitutional right to a jury trial and plaintiff did not waive her right to a jury trial under Rule 39(a).

B.

¶ 14 Defendant next raises two issues as to the trial court’s discretion to alternatively, on its own initiative, order a trial by jury pursuant to Rule 39(b). Defendant claims the trial court lacked discretion to take this initiative and even if it had discretion, it was an abuse of discretion in this case. We disagree.

¶ 15 Rule 39(b) gives the trial court discretion to order a jury trial. N.C. R. Civ. P. 39(b). This Court has previously stated the trial court may use its discretion “to grant a jury trial . . . even though jury trial has been waived pursuant to . . . Rule 38(b).” *Bullard v. N.C. Nat. Bank*, 31 N.C. App. 312, 315, 229 S.E.2d 245, 248 (1976). If the trial court has discretion to order a jury trial for waiver under Rule 38(b), it stands to reason the trial court also has discretion in a Rule 39(a) situation, especially considering this Court’s resolve against inferring waiver. Defendant provides little to no support in defense of its position that the trial court lacked discretion.

¶ 16 Finally, defendant claims the trial court lacked reasoning for its decision to order a trial by jury and this was an abuse of its discretion. Yet defendant seems to forget the constitutional rights afforded parties when a right to a jury trial is available. By deferring to this constitutional right, the trial court did not abuse its discretion to order a jury trial under Rule 39(b).

III.

¶ 17 For the foregoing reasons, we hold the trial court did not err in denying

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defendant's motion for a non-jury trial. Further, the trial court did not abuse its discretion in alternatively ordering a jury trial pursuant to Rule 39(b).

AFFIRMED.

Judges DILLON and CARPENTER concur.

Report per Rule 30(e).