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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-692

No. COA21-250

Filed 18 October 2022

Watauga County, No. 20 CVS 390

GRANDFATHER CENTER SHOPPES, LLC, Plaintiff,

v.

BEECH CREEK RESTAURANT, LLC d/b/a ELEVATIONS TAVERN AND GRILL, EDWARD A. PLANTE, and VICKIE JO PLANTE, Defendants.

Appeal by Defendants from order entered 25 January 2021 by Judge R. Gregory Horne in Watauga County Superior Court. Heard in the Court of Appeals 16 November 2021.

Angle, Rupp & Rupp, by Matthew J. Rupp, for plaintiff-appellee.

Miller & Johnson, PLLC, by Nathan A. Miller, for defendants-appellants.

MURPHY, Judge.

¶ 1 We may only hear interlocutory appeals when an issue has been certified for immediate appeal pursuant to Rule 54 or when the appeal impacts a substantial right that will potentially work injury if not appealed prior to a final judgment. When a substantial right is the basis of an interlocutory appeal, the appellant bears the burden of demonstrating we have jurisdiction over the appeal; thus, where an

appellant fails to show that the impact on a substantial right will potentially work injury if not appealed prior to a final judgment, we must dismiss the appeal. Here, Defendants have not demonstrated that there will be potential injury from the alleged impact on their substantial right to due process, and we dismiss their appeal.

BACKGROUND

¶ 2 Plaintiff Grandfather Center Shoppes, LLC operates a commercial real estate shopping center. On 4 January 2018, Plaintiff entered into a lease with Defendant Beech Creek Restaurant, LLC for two suites in which Defendants Edward A. Plante and Vickie Jo Plante opened the restaurant. The lease term began on 1 January 2018 and was set to end on 30 April 2023. The lease required the premises to be open continuously beginning 30 April 2018 and required rent in equal monthly installments before the first of each month. The lease also stated that failure to pay rent when due would result in default. The Plantes executed a personal guaranty of the lease, which stated:

> IN CONSIDERATION OF, and as an inducement for the granting, execution and delivery of that certain Lease Agreement (the "Lease"), covering certain Premises in the Shopping Center (as such terms are defined in the Lease) and dated January __, 2018 (hereafter called the "Lease"), between **Grandfather Center Shoppes, LLC**, as the Landlord (hereafter called the "Landlord"), and **Elevations Tavern and Grill**, as Tenant (hereafter called the "Tenant"), and in further consideration of the sum of One Dollar ($1.00), and other good and valuable consideration paid by the Landlord to the undersigned, the

undersigned (whether one or more, hereafter called the "Guarantor") hereby jointly and severally guarantees to the Landlord, its successors and assigns, the full and prompt payment of rent, including, but not limited to, the Fixed Minimum Rent, Additional Rent and any and all other sums and charges payable by the Tenant, its successors and assigns under said Lease; and the full performance and observance of all the covenants, terms, conditions and agreements therein provided to be performed and observed by the Tenant, its successors and assigns. The Guarantor hereby covenants and agrees to and with the Landlord, its successors and assigns, that the Guarantor will forthwith pay to the Landlord all damages that may arise in consequence of any Default by the Tenant, its successors and assigns under the Lease, including, without limitation, all court costs and reasonable attorneys' fees incurred by the Landlord and caused by any such Defaults or by the enforcement of this Guaranty. The parties agree that reasonable attorneys' fees shall mean fifteen percent (15%) of all amounts owed by Tenant or Guarantor, as the case may be, or such other percentage as shall be allowed by law from time to time.

THIS GUARANTY IS AN ABSOLUTE AND UNCONDITIONAL GUARANTY OF PAYMENT AND OF PERFORMANCE. It shall be enforceable against the Guarantor, its successors and assigns, without the necessity for any suit or proceedings by Landlord of any kind or nature whatsoever against the Tenant, its successors and assigns, and without the necessity of any notice of non-payment, non-performance or non-observance, or of any notice of acceptance of this Guaranty, or of any other notice or demand to which the Guarantor might otherwise be entitled, all of which the Guarantor hereby expressly waives. Without limiting the generality of the foregoing, the Guarantor expressly waives the benefits of any statute or law requiring Landlord to proceed against Tenant before pursuing Guarantor for any amounts owed under the Lease or this Guaranty, including without

limitation North Carolina General Statutes Section 26-7 et seq. The Guarantor hereby expressly agrees that the validity of this Guaranty and the obligations of the Guarantor hereunder shall not in any way be terminated or diminished, affected or impaired by reason of the assertion or the failure to assert by the Landlord against the Tenant, or the Tenant's successors or assigns, of any of the rights or remedies reserved to the Landlord pursuant to the provisions of the Lease, by reason of the termination of the Lease so long as the Tenant continues to be liable, or by reason of the invalidity of the Lease or its unenforceability against the Tenant for any reason.

THE GAURANTY SHALL BE a continuing Guaranty, and the liability of the Guarantor hereunder shall in no way be affected, modified or diminished by reason of any assignment, renewal, modification or extension of the Lease, by reason of any modification or waiver of or change in any of the terms, covenants, conditions or provisions of the Lease, by reason of any extension of time that may be granted by the Landlord to the Tenant, its successors or assigns, or by reason of any dealings, transactions, matters or things occurring between the Landlord and Tenant, its successors or assigns, whether or not notice thereof is given to the Guarantor.

In the event the Tenant shall become insolvent, shall be adjudicated a bankrupt, or shall file a petition for reorganization, arrangement or similar relief under any present or future provision of the United States Bankruptcy Code, or if such a petition filed by creditors of the Tenant shall be approved by a court, or if the Tenant shall seek a Judicial readjustment of the rights of its creditors under any present or future federal or state law, or if a receiver of all or part of its property and assets is appointed by any state or federal court, and in any such proceeding the Lease shall be terminated or rejected or the obligations of the Tenant thereunder shall be modified, the Guarantor shall immediately pay to the Landlord: (a) an

> amount equal to all fixed, contingent and additional rent accrued to the date of such termination, rejection or modification, plus (b) an amount equal to the then cash value of the rent and Additional Rent which would have been payable under the Lease for the unexpired portion of the term less the then cash rental value of the Premises for such unexpired portion of the term, together with interest on the amounts designated in clauses (a) and (b) above at the rate of ten percent (10%) per annum from the date of such termination, rejection or modification to the date of payment. The Guarantor's obligation to make payment shall not be modified, changed, released, or limited in any manner whatsoever by any impairment, modification, change, release or limitation of the liability of the Tenant or its estate in bankruptcy resulting from the opertation of any present or future provision of the United States Bankruptcy Code or other statute, or from the decision of any court.
>
> ALL OF THE LANDLORD'S rights and remedies under this Guaranty are intended to be distinct, separate and cumulative, and no such right and remedy therein or herein mentioned is intended to be in exclusion of or a waiver of any of the others.

On 21 August 2020, Plaintiff filed a complaint against Defendants alleging that they breached the contract by failing to pay the rent they owed to Plaintiff from 1 March 2020 to 1 August 2020, resulting in an outstanding balance of $30,452.86,[1] and by failing to continuously operate the restaurant without interruption for the lease term. On 15 December 2020, Plaintiff filed an *Affidavit in Attachment Proceeding* that sought $30,452.86 from Defendants based on the contention that Defendants, with

[1] This amount included late fees.

the intent to defraud their creditors, had assigned, disposed of, secreted, or were about to assign, dispose of, or secrete, property. Plaintiff placed the same amount with the Clerk of Court in an attachment bond. The *Affidavit of Mitchell B. Malvan* was attached as supporting material, which stated, in relevant part:

> 5. I believe the following facts and circumstances demonstrate that Defendants Plante are attempting to defraud Grandfather Center as a creditor:
>
> a. Defendants Plante contacted me in the early fall of 2019 to request a temporary delay to remit payment of their monthly rent, citing an inability to afford to pay their rent on time. They also informed me of their desire to sell the restaurant business and assured me that they would use the sale proceeds to pay any outstanding rent. I acceded to their request and did not charge late fees or interest for several months despite their rent being late.
>
> b. In October 2019, Defendants Plante entered a contract to sell the restaurant. I later learned that the contract included certain furniture and equipment in the sale. Many of these items were either the property of Grandfather Center or were items with a security interest to ensure complete performance of the terms and conditions of their lease. However, that contract was terminated before Defendants Plante could defraud Grandfather Center by selling its property.
>
> c. In March 2020, the Defendants curbed its communication and cooperation with Grandfather Center. The Defendants stopped paying monthly rent. As of [17 August 2020], the Defendants owed $30,452.86 in back rent. The Defendants owe additional amounts for future rent payable for the reaminder of the elase term, as well as attorney's fees, costs, and other damages sustained by Grandfather Center. These amounts are over and above all counterclaims known to me at this time. Such amounts

are further described in the Complaint filed in the above-captioned case. The large amount of monies owed provides Defendants Plante a greater incentive to dispose of their assets, such as their residence.

d. The premises leased by Defendants Plante came with a substantial amount of furniture, fixtures, equipment, and leasehold improvements. These items were the property of Grandfather Center. However, on four separate occasions during the term of their lease, Defendants Plante assigned an interest in all of the personal property at the restaurant to various creditors as collateral, including property that belonged to Grandfather Center. Defendants Plante had no authority to encumber property that did not belong to them.

e. During the week of [6 July 2020], I was informed that Defendants Plante were moving furniture and other personal property out of the restaurant without any notice to me or my agents. After Defendant Plantes abandoned the premises on [13 July 2020], many items of Grandfather Center's furniture and personal property were gone.

f. On [29 July 2020], the property management company for Grandfather Center sent a letter via certified mail to Defendants Plante's last known address notifying them they were in default under the terms of the lease. The letter demanded the outstanding rent be paid by [10 August 2020]. The letter was also emailed. Defendants Plante did not respond to me or my agents, nor did they pay the rent. I have had no contact with Defendants Plante since this letter was sent.

g. The Lease provides Grandfather Center a lien on all restaurant fixtures, equipment, goods, and other personal property placed in the premises to secure the payment of rent. Defendants Plante removed these items before they abandoned the premises without notice. This action deprived Grandfather Center of the ability to assert a lien on such property, further defrauding Grandfather Center.

> h. The North Carolina Secretary of State has administratively dissolved Beech Creek Restaurant LLC for failing to file an annual report. Based on my decades-long career as a certified public accountant, it is unlikely that any collectible assets remain in the name of this dissolved corporate entity. This leaves Grandfather Center with the sole recourse of pursuing Defendants Plante under the personal guaranty they each signed.
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> i. I last saw Defendants Plante in late June 2020. I noticed they were driving a pick-up truck with an out-of-state license plate instead of the Jaguar or Hummer they had driven in the past. I am concerned that Defendants Plante are disposing of their assets and have moved or are planning to move from the State of North Carolina.
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> j. Defendants Plante own a residence in Watauga County, North Carolina, that has a Watauga County tax assessment value of $432,700.00. The street address is 330 North Pinnacle Ridge Road; Beech Mountain, North Carolina. The residence is further described in the deed attached as Exhibit A-2. The Plantes listed their residence for sale for $469,900.00 and presumably have equity in such a valuable residence that can be used toward their debt to Grandfather Center. According to the Multiple Listing Service, this property is under contract (Exhibit A-3). Should the Plantes sell this real estate without attachment, I am gravely concerned that I will be unable to satisfy any judgment for money that may be rendered against Defendants Plante in the principal action.

Following the filing of the *Affidavit in Attachment Proceeding*, the Clerk of Court found that Plaintiff executed a satisfactory attachment bond and that the allegations in the affidavit were true, ordering attachment in the amount of $30,452.86.[2]

[2] The attached funds ultimately came from the Plantes' sale of their home.

¶ 3 On 23 December 2020, Defendants appealed to the Watauga County Superior Court from the Clerk of Court's order allowing the attachment. Defendants also moved to dismiss or dissolve the attachment or, in the alternative, to increase the bond. On 25 January 2021, the trial court filed an order denying Defendants' motions in their entirety and upholding the Clerk of Court's order. Defendants appeal from this order.

ANALYSIS

¶ 4 On appeal, Defendants argue "the trial court erred and violated [Defendants'] due process rights by upholding an attachment issued against the [Defendants'] personal property without any notice to [Defendants]" and "the trial court erred by concluding that the [Plaintiff's] affidavit was sufficient to support the order of attachment." Defendants also acknowledge that this appeal is interlocutory. We must resolve this jurisdictional issue before turning to the merits. *See, e.g.*, *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 364 (2008) (explaining that an appellate court must have jurisdiction to hear an appeal).

¶ 5 Defendants contend that this interlocutory order is properly before us as the violation of their due process rights implicates a substantial right.

¶ 6 "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). "An 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." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g. denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). It is undisputed that the order appealed from here is interlocutory, as the order simply upheld the Clerk of Court's attachment order and the underlying merits of the contract dispute have yet to be resolved.

¶ 7 One basis for our jurisdiction to hear interlocutory appeals is N.C.G.S. § 1-277, which states, in relevant part:

> An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding . . . .

N.C.G.S. § 1-277(a) (2019); *see also* N.C.G.S. § 7A-27(b)(3)(a) (2019) ("Except as provided in subsection (a) of this section, appeal lies of right directly to the Court of Appeals in any of the following cases: . . . From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding that . . . [a]ffects a substantial right."). A substantial right is "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right." *Oestreicher v. Am. Nat. Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (marks and citation omitted).

¶ 8 "To confer appellate jurisdiction based on a substantial right, 'the appellant must include in its opening brief, in the statement of the grounds for appellate review, sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.'" *Doe v. City of Charlotte*, 273 N.C. App. 10, 21, 848 S.E.2d 1, 9 (202 (quoting *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438, *disc. rev. denied*, 372 N.C. 701, 831 S.E.2d 73 (2019)). However, "[n]o hard and fast rules exist for determining which appeals affect a substantial right." *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984). "It is usually necessary to resolve the question of whether there is a substantial right 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." *Barnes v. Kochhar*, 178 N.C. App. 489, 497, 633 S.E.2d 474, 479 (marks omitted), *appeal dismissed, disc. rev. denied*, 360 N.C. 644, 638 S.E.2d 461 (2006).

¶ 9 Consequently, "the appellant cannot rely on citation to precedent to show that an order affects a substantial right. Instead, the appellant must explain, in the statement of the grounds for appellate review, why the facts of that particular case demonstrate that the challenged order affects a substantial right." *Doe*, 273 N.C. App. at 22, 848 S.E.2d at 10 (marks and citation omitted). Moreover,

> [i]t is not the duty of this Court to construct arguments for or find support for [an] appellant's right to appeal from an interlocutory order; instead, the appellant has the burden

> of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). "Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment." *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736.

¶ 10 Here, taking Defendants' due process assertion at face value for purposes of resolving this jurisdictional issue, Defendants have adequately asserted why the attachment order affected their substantial right to due process—that their right to be heard at the time of the order of attachment was deprived, impacting their ability to protect their use and possession of their property. *See K2 Asia Ventures v. Trota*, 209 N.C. App. 716, 708 S.E.2d 106 (2011) (recognizing that the right to due process can be a substantial right).

¶ 11 However, Defendants fail to adequately show how they will be injured by the initial inability to be heard if not corrected before appeal from a final judgment. Defendants argue "[t]he seizing of the [Defendants'] property denied the [Defendants] the use of their money as they see fit which will continue to damage the [Defendants]

if not rectified by this Court."[3] But Defendants do not articulate how they will be damaged before appeal from a final judgment if they cannot use their money as they see fit; nor do they otherwise articulate how they might be injured before appeal from a final judgment due to the alleged loss of their due process rights. *See Jeffreys v. Raleigh Oaks Joint Ventur*e, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) ("[T]he appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.").

¶ 12 Nonetheless, accepting this loss of monetary control as the potential harm, we have previously held that the existence of a sufficient bond adequately protects the potential loss of use and control over money. *See Little v. Stogner*, 140 N.C. App. 380, 383, 536 S.E.2d 334, 336 (2000) (dismissing an appeal as interlocutory where "the trial court adequately protected the defendant's right [to a power of sale foreclosure] by requiring [the] plaintiffs to post a significant security bond in the amount of $15,000.00"), *disc. rev. denied*, 353 N.C. 377, 547 S.E.2d 813 (2001); *see also Stancil*

[3] It is noteworthy that this seems to be a confused approach to the substantial right implicated here. The substantial right Defendants claim to be implicated is due process. They claim this in relation to the lack of notice and hearing prior to the attachment order. However, the alleged harm they focus on is the inability to use and control their money due to the subsequent seizure of their property. The alleged failure to provide due process did not result in the seizure of their property and denial of Defendants' use of their money as they see fit, it resulted in the lack of an opportunity for Defendant to present their arguments regarding the proposed attachment prior to the attachment occurring.

v. Stancil, 94 N.C. App. 760, 764, 381 S.E.2d 720, 723 (1989) (marks omitted) ("The amount of the bond each brother was ordered to post reasonably approximates the value of [the business's] assets allegedly in his possession, and, should the opposing sibling be unsuccessful in obtaining judgment in his favor, the bond will be cancelled. Under these circumstances, no substantial right . . . can possibly be affected to the slightest extent if the validity of the order is not determined until after a final judgment is entered in the case."). Here, although Defendant cannot use and control the attached funds currently, we have no reason to believe that this has or will cause any harm to them. Furthermore, if Defendants prevail at trial on the merits, then the attached funds are protected by Plaintiff's attachment bond of the same amount. As a result, the attachment of Defendants' funds here does not "potentially work injury to [Defendants] if not corrected before appeal from final judgment." *Goldsto*n, 326 N.C. at 725, 392 S.E.2d at 736.

¶ 13 Due to Defendants' failure to adequately show that the violation of their due process rights would potentially work injury if not corrected before an appeal from a final judgment, we dismiss this appeal as interlocutory and not impacting a substantial right.

CONCLUSION

¶ 14 Defendants' appeal is interlocutory, and they have failed to show they are entitled to appellate review. As a result, we dismiss this interlocutory appeal.

DISMISSED.

Judges DILLON and GORE concur.

Report per Rule 30(e).