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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-61

Filed 16 May 2023

Wake County, No. 21 CVS 2310

RICHARD H. ANDERSON, Plaintiff,

v.

THE NORTH CAROLINA 4504 GRAHAM NEWTON ROAD TRUST, BY AND THROUGH ITS TRUSTEE, Defendant.

Appeal by defendant from order entered 10 October 2021 by Judge Andrew Hanford in Superior Court, Wake County. Heard in the Court of Appeals 9 August 2022.

Oak City Law LLP, by Samuel Pinero II, for defendant-appellant.

Howard, Stallings, From, Atkins, Angell & Davis, P.A., by Kenneth C. Haywood and Marianna M. Baggett, for plaintiff-appellee.

STROUD, Chief Judge.

Defendant appeals from the trial court's order granting Plaintiff a preliminary injunction. Because the failure to hear Defendant's appeal does not impact Defendant's substantial rights; this appeal is dismissed for lack of jurisdiction.

I. Background

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Plaintiff is the owner of a parcel of real property located on Graham Newton Road in Raleigh, North Carolina. Defendant is the owner of an adjacent parcel. Both parcels of property were owned by a common owner until Plaintiff purchased his lot in 1996, and sometime prior to Plaintiff's purchase, the common owner had constructed a semi-circular driveway in front of what is now Plaintiff's home. After the two parcels were severed, a portion of the driveway in front of Plaintiff's home now extends from Graham Newton Road across Defendant's property to the property line between Plaintiff's and Defendant's properties. In February of 2021, Defendant's trustee installed "a three-rail fence" along the property line. This fence prevents Plaintiff from driving a vehicle across the portion of the driveway on Defendant's property, although Plaintiff's property still has access from other portions of the driveway to Graham Newton Road and his own property.

Plaintiff filed a complaint on 19 February 2021 alleging he had used the "thirty-foot wide strip of land" on Defendant's property on which the driveway is located "as a point of access to the backyard portion" of his property since he acquired the property in 1996. On 12 July 2021, Plaintiff filed a motion for a preliminary injunction pursuant to North Carolina Rule of Civil Procedure 65, supported by an attached affidavit, alleging he will "continue to suffer immediate and irreparable harm" unless Defendant is enjoined from excluding Plaintiff from the blocked portion of the driveway, and Defendant is ordered to remove the fence blocking Plaintiff's access to the driveway.

After a hearing on Plaintiff's motion for a preliminary injunction on 22 September 2021, the trial court granted plaintiff's motion for a preliminary injunction. The order made preliminary findings of fact, found Plaintiff had met the requirements for issuance of a preliminary injunction, and ordered Defendant to "remove the fencing running along the southern property line of Lot 1 from Graham Newton Road to the Set Rebar on the south-west corner of Lot 1 as shown on the Recombination Map for Tony H. Casey in Book 17109, Page 1227 of the Wake County Register of Deeds." The "Recombination Map" showing the extent to which Defendant must remove its fence is not included in the record. The order also limited the weight of vehicles Plaintiff could drive on the driveway and required Plaintiff to post a bond of \$2,500 "to protect the Defendant against costs and damages it may suffer in the event the injunction is dissolved or otherwise found to have been wrongful[.]" Defendant appeals.¹

II. Jurisdiction

Defendant appeals from the order granting Plaintiff's motion for a preliminary injunction. "It is well-established that a preliminary injunction is an interlocutory order." *Rockford-Cohen Group, LLC v. North Carolina Dept. of Ins.*, 230 N.C. App. 317, 318, 749 S.E.2d 469, 471 (2013). "An interlocutory order is one made during the

¹ Defendant later filed a "Motion to Suspend or Modify Preliminary Injunction," (capitalization altered), pending our review of the trial court's order. The record does not indicate this motion was heard or ruled upon by the trial court.

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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. City of Durham, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950).

Generally, there is no right of immediate appeal from an interlocutory order. However, an interlocutory order is immediately appealable if (1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C.G.S. § 1A–1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed.

Currin & Currin Const., Inc. v. Lingerfelt, 158 N.C. App. 711, 713, 582 S.E.2d 321, 323 (2003) (citations omitted). Here, there is no Rule 54(b) certification, but Defendant asserts the trial court’s order affects a substantial right which would be impaired without immediate review. “If a party attempts to appeal from an interlocutory order without showing that the order in question is immediately appealable, we are required to dismiss that party’s appeal on jurisdictional grounds.” *Hamilton v. Mortgage Information Services, Inc.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 189 (2011) (citation omitted).

Defendant cites a line of cases from this Court to argue “[m]andatory injunctions that require defendants to alter the condition of their property affect such

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defendants’ substantial rights.”² However, the cases Defendant seeks to rely upon are appeals from permanent injunctions, not preliminary injunctions. We further note, despite Defendant’s contentions in its brief, there is no evidence in the record to indicate the fence is permanently affixed to Defendant’s property nor to indicate precisely how much of Defendant’s fence must be removed to comply with the trial court’s order. The trial court’s order also included a provision to protect Defendant’s interest if Plaintiff’s claim for removal of the fence ultimately fails. Specifically, the trial court limited the weight of vehicles Plaintiff could drive on the driveway and required Plaintiff to post a bond of \$2,500 “to protect the Defendant against costs and damages it may suffer in the event the injunction is dissolved or otherwise found to have been wrongful[.]”

We conclude Defendant has not demonstrated “the order deprives the appellant of a substantial right that would be lost unless immediately reviewed.” *Currin & Currin Const., Inc.*, 158 N.C. App. at 713, 582 S.E.2d at 323. To the extent Defendant’s interest in keeping the fence is impaired, the preliminary injunction order has already protected that interest by the limitation on the use of the driveway

² Defendant cites to *Steel Creek Development Corp. v. Smith*, 300 N.C. 631, 634-35, 268 S.E.2d 205, 208 (1980) (dealing with a permanent injunction); *C.F. Little Development Corp. v. North Carolina Natural Gas Corp.*, No. COA03-1383, slip op. at 3, 167 N.C. App. 653 (2004) (unpublished) (dealing with a permanent injunction); *Keener v. Arnold*, 161 N.C. App. 634, 634-35, 589 S.E.2d 731, 732 (2003) (dealing with no injunction); *English v. Holden Beach Realty Corp.*, 41 N.C. App. 1, 2-3, 254 S.E.2d 223, 227-28 (1979) (dealing with a permanent injunction), *overruled in part by Crow v. Citicorp Acceptance Co., Inc.*, 319 N.C. 274, 279-80, 354 S.E.2d 459, 464 (1987) (overruling on grounds unrelated to injunction).

and the bond for potential damages from removal of the fence.

III. Conclusion

Because Defendant failed to demonstrate a substantial right would be impacted without immediate review, we dismiss Defendant's appeal.

DISMISSED.

Judges ARROWOOD and COLLINS concur.

Report per 30(e).