STATE OF NORTH CAROLINA GUILFORD COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21CVS010032-400
BLUSKY RESTORATION CONTRACTORS, LLC, Plaintiff/Counterclaim Defendant, v. STEVEN W. BROWN, Defendant/Counterclaim Plaintiff/Third-Party Plaintiff, and BLUSKY HOLDCO, LLC, Third-Party Defendant.	**ORDER ON MOTION OF DEFENDANT STEVEN W. BROWN TO STAY PENDING APPEAL**

1. **THIS MATTER** is before the Court following the 29 March 2024 filing of the *Motion of Defendant Steven W. Brown to Stay Pending Appeal* (the "Motion"). (ECF No. 232 ["Mot."].) Pursuant to N.C.G.S. § 1-294 and Rule 8 of the North Carolina Rules of Appellate Procedure, Steven W. Brown ("Brown") requests that the Court stay all proceedings in this matter pending the resolution of his appeal to the North Carolina Supreme Court. (*See* Mot.; Notice of Appeal, ECF No. 231 ["Not. Appeal"].)

2. On 26 March 2024, Brown filed his Notice of Appeal pursuant to Business Court Rule ("BCR(s)") 14.1, thereby giving the Court notice of Brown's appeal from the Court's 19 March 2024 Order on Motion to Strike (the "Appeal"). (Order on Mot. Strike, ECF No. 230; Not. Appeal.)

3. Following full briefing on the Motion, (*see* ECF Nos. 233, 236, 240), the Court held a hearing on the Motion on 10 May 2024 at which all parties were present and represented through counsel. (*See* ECF No. 239.) The Motion is now ripe for resolution.

4. Pursuant to N.C.G.S. § 1-294, an appeal "stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein[.]" "[T]his rule is not without exceptions. When a party appeals from a non-appealable interlocutory order, the appeal 'does not deprive the trial court of jurisdiction and thus the court may properly proceed with the case.'" *Howard v. IOMAXIS, LLC*, 2024 NCBC LEXIS 46, at *5–6 (N.C. Super. Ct. Mar. 12, 2024) (quoting *SED Holdings, LLC v. 3 Star Props., LLC*, 250 N.C. App. 215, 220 (2016) (citations omitted)).

5. For example, "[i]nterlocutory orders are generally not appealable[,]"[1] *Id.* at *6 (citing *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725 (1990)), but an appeal from an interlocutory order may proceed when it "affects a substantial right that will clearly be lost or irremediably adversely affected if the order is not reviewed before final judgment[,]" *SED Holdings, LLC*, 250 N.C. App. at 221 (cleaned up); *see* N.C.G.S. § 7A-27(a)(3) ("Appeal lies of right directly to the Supreme Court . . . [f]rom

[1] "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 (1950). Here, the parties' Cross Motions for Summary Judgment remain pending. (*See* Mots. Summ. J., ECF Nos. 140, 143.) The filing of an Order and Opinion on those motions would result in the next stage of this litigation being a jury trial on any remaining claims.

an interlocutory order of a Business Court Judge that . . . [a]ffects a substantial right.").

6. Our Courts apply a two-part test to determine whether an interlocutory order affects a substantial right: (1) "the right itself must be substantial and [(2)] 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; *see also Plasman v. Decca Furniture (USA), Inc.*, 2015 NCBC LEXIS 90, at **10 (N.C. Super. Ct. Oct. 2, 2015).

7. "Recognizing that 'the "substantial right" test for appealability of interlocutory orders is more easily stated than applied,' [our Supreme Court has] determined that it is 'usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context' " of the order appealed from. *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 219 (2016) (quoting *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208 (1978)).

8. Brown contends that the Court's Order on Motion to Strike (the "Appealed Order") is immediately appealable because it affects a substantial right—namely, that the Appealed Order struck Brown's "good faith defense" and penalized Brown for asserting the attorney-client privilege. (Br. Supp. Mot. 2–3, ECF No. 233 ["Br. Supp."].) Brown contends that his "right to raise and protect the attorney-client privilege is implicated and will be prejudiced absent an immediate appeal" from the Appealed Order. (Reply Br. 9, ECF No. 240 ["Reply"].)

9. Brown cites and principally relies upon *Kelley v. Kelley*, 252 N.C. App. 467 (2017), to support his contention that an order striking an entire defense is immediately appealable. A separation agreement was at issue in *Kelley*, and there, plaintiff filed suit against defendant for breach of that contract. *Id.* at 468. At the summary judgment stage, the trial court struck an entire defense in its order denying defendant's motion for summary judgment by finding "that [defendant's contentions that] the modification to the separation agreement is void *ab initio* fail and that the Contract is not void as a matter of law." *Id.* at 470. Defendant appealed. *Id.* at 469.

10. The Court of Appeals in *Kelley* noted that the trial court made findings of fact and conclusions of law at this stage, resulting in a ruling "on the primary legal issue in th[e] case[: whether a contract was amended or modified]." *Id.* at 471. Thus, by eliminating "[d]efendant's defense to [p]laintiff's claim[,]" which the Court of Appeals concluded effectively resulted in striking defendant's seemingly lone defense to plaintiff's breach of contract claim, the trial court issued an order affecting a substantial right and it was therefore immediately appealable. *Id.* at 472.

11. The facts presented by *Kelley* are easily distinguished from the facts of this case. Here, while the Court struck Brown's advice of counsel defense in the Appealed Order, that ruling was not on the primary issue of this case.

12. First, unlike in *Kelley*, the Court has not issued an Order and Opinion on the pending cross-motions for summary judgment. (*See* Mots. Summ. J., ECF Nos. 140, 143.)

13. Further, the primary issue in this case, at least as to BluSky Restoration Contractors, LLC's ("BluSky") breach of contract claims, is *not* whether Brown properly relied on the advice of his personal attorney when leaving BluSky to work for a competing company. (*See* Second Am. Compl. ¶¶ 117–42, ECF No. 66 (BluSky alleging breach of contract for the LLC Agreement and LP Agreement).) Rather, the primary issue—as demonstrated by the briefing at summary judgment—is whether the restrictive covenants in the LLC Agreement and LP Agreement even remain enforceable as to Brown. (*See* Br. Supp. Mot. Summ. J. 13–14, ECF No. 179 ["Br. Supp. MSJ"].) In fact, Brown spent roughly ten pages in the brief in support of his motion for partial summary judgment discussing the enforceability issue, compared to the two paragraphs discussing advice of counsel—the evidence and argument that the Court struck in the Appealed Order. Brown's argument regarding the advice of his attorney was only one of many arguments presented by him at summary judgment, and a relatively minor one at that.

14. This determination is further bolstered by taking a closer look at Brown's brief. In the Amended Memorandum in Support of Steven W. Brown's Motion for Partial Summary Judgment, Brown argues: (1) that he is not bound by the LLC Agreement for at least two reasons, (Br. Supp. MSJ 13–14); (2) that the LP Agreement's restrictive covenants are overbroad and unenforceable as a matter of law, (Br. Supp. MSJ 15–19); and (3) that the LP Agreement is not enforceable against him for at least three other reasons, excluding the advice of counsel argument, (Br. Supp. MSJ 10–12).

15. The facts of this case are more similar to those presented in *DOT v. Stout*, 2003 N.C. App. LEXIS 1553 (Aug. 5, 2003) (unpublished), and *Grande Villas at the Pres. Condo. Homeowners Ass'n v. Indian Beach Acquisition LLC*, 2018 N.C. App. LEXIS 1074 (Nov. 6, 2018) (unpublished). In those cases, the Court of Appeals concluded that an order striking one of many affirmative defenses, rather than the lone defense or all defenses, does not "in effect determine the action and prevent a judgment from which appeal might otherwise be taken." *Stout*, 2003 N.C. App. LEXIS 1553, at *10. The Court of Appeals therefore determined that, since striking one affirmative defense did not, in effect, determine the action, it was not an appeal within an exception that permits immediate appellate review. *Id.*; *see also Grande Villas*, 2018 N.C. App. LEXIS 1074, at *4 (where defendants had "other defenses remaining" in the case, the trial court had not "effectively resolved the entire case on the merits").

16. The *Stout* case is on point here. The Court has not effectively ruled on whether the restrictive covenants in the LP Agreement apply to Brown, resulting in a breach of that contract by him. Brown has a number of defenses and legal arguments remaining in this action which may effectively—and perhaps persuasively—combat BluSky's breach of contract claims. Therefore, no substantial right was affected by the Appealed Order that would permit an immediate appeal.

17. Even assuming, *arguendo*, that a substantial right was at issue, Brown has not demonstrated that deprivation of the substantial right may work injury if not corrected before appeal from a final judgment. *See Goldston*, 326 N.C. at 726. As

stated previously, Brown presented a number of other arguments in support of his motion for partial summary judgment, some of which may prove successful. In which case, the breach of contract claims would not reach trial.

18. Furthermore, even if BluSky's breach of contract claims progress to trial, Brown is not left defenseless. And Brown's argument that there is a risk of inconsistent verdicts absent an appeal, rests on a number of speculative assumptions. Brown has not demonstrated that the Appealed Order has deprived him of any substantial right(s) that would be lost or irremediably and adversely affected if the Appealed Order is not reviewed before final judgment. *See Plasman*, 2015 NCBC LEXIS 90, at **11.

19. To the extent that Defendants' appeal does not divest this Court of jurisdiction, and separate and apart from the automatic stay under N.C.G.S § 1-294, the Court concludes it is inappropriate under the circumstances to exercise its inherit authority to stay all proceedings pending a resolution of the Appeal.

20. **THEREFORE**, the Court hereby **DENIES** the Motion.

SO ORDERED, this the 13th day of May, 2024.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases