COA 21-439 JUDICIAL DISTRICT 19A

NORTH CAROLINA COURT OF APPEALS

****

JOHANNA M. JONES,

Plaintiff-Appellee,

v.

CEDRIC L. JONES,

Defendant-Appellant.

From Cabarrus County

****

PLAINTIFF-APPELLEE'S BRIEF

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INDEX

TABLE OF CASES AND AUTHORITIES

Cases:

Statutes:

Rules:

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INTRODUCTION

"Lawyers and litigants who decide that they will play by rules of their own invention will find that the game cannot be won." *Nw. Nat. Ins. Co. v. Baltes*, 15 F.3d 660, 663 (7th Cir. 1994).

After the parties separated, Johanna Jones (Wife) filed a complaint for equitable distribution. Cedric Jones (Husband) decided to ignore the Rules of Civil Procedure and never bothered to answer or respond. Wife filed a second complaint, this time for an absolute divorce. Husband never answered that complaint either.

When the divorce judgment was entered, Husband's omissions caught up with him. Once the divorce judgment was entered, Husband lost all right to seek equitable distribution of the marital estate. He could receive an equitable distribution of property only if Wife proceeded with her own equitable distribution claim, which she had timely asserted. Wife, however, chose to dismiss her equitable distribution claim, leaving the former spouses to the traditional tools for dividing marital property after a divorce.

After realizing the consequences of his inaction, but without accepting responsibility for them, Husband asked the trial court to *compel* Wife to litigate her equitable distribution claim against her will. There is no authority for such a request, so the trial court properly denied it.

The trial court not only acted well within its discretion, but did the only thing, by law, that it could have done under the circumstances. The court's judgment should be affirmed.

STATEMENT OF FACTS

After Wife and Husband separated, Wife filed a complaint in district court seeking equitable distribution. (R pp 3-4.) Husband never answered the complaint, and, after his time for answering had passed, counsel for Husband filed a notice of appearance. (R p 9.) Even after Husband's counsel appeared, Husband never filed an answer, counterclaim, or Rule 12(b) motion. (R p 93.)

Meanwhile, in a separate action filed by Wife, a judgment of absolute divorce was entered between the parties on 23 October 2020. (R p 37.) Husband did not answer or otherwise respond to the complaint in the divorce action either. (R p 37 ¶ 1.) The divorce judgment recognized that Wife had asserted an equitable distribution claim in the prior proceeding. (R pp 37-38.) The judgment specifically reserved Wife's right to continue pursuing her equitable distribution claim in the other action. (R p 38.) The judgment did not reserve a right for Husband to pursue any claims in the other action. (R p 38.)

Shortly thereafter, Wife filed a notice of voluntary dismissal without prejudice of all her claims in the equitable distribution proceeding. (R p 45.)

Eleven days later, Husband's counsel filed a paper styled as "motion to set aside dismissal without prejudice" and "motion to allow filing answer and counterclaim." (R p 46.) The motion admitted that the voluntary dismissal had been "fil[ed] with the clerk and deliver[ed] to [Husband] through [his] attorney." (R p 48 ¶ 10.)

The motion requested that the voluntary dismissal be set aside due to fraud or other misconduct under Rule 60(b)(3) of the North Carolina Rules of Civil Procedure. (R pp 48-49 ¶¶ 11-12.) The motion separately requested that Husband be allowed to file an answer and counterclaim over a year late. (R pp 51-52.)

Wife filed a verified objection to Husband's motions. (R pp 60, 68.) Wife's objection stated under oath that the voluntary dismissal had been both filed and served on Husband's counsel. (R pp 61 ¶ 8, 68.) Wife attached a copy of the cover letter to Husband's counsel serving the voluntary dismissal. (R p 70.)

The district court denied Husband's motions. (R p 92.) The court found that Husband's counsel had approved the divorce judgment specifically reserving Wife's equitable distribution claims. (R p 93 ¶ 10.) The court also found that the voluntary dismissal conformed to the requirements of Rule 41 of the Rules of Civil Procedure. (R pp 94-95 ¶ 22.)

In response to Husband's assertion of deceit, the court found as a fact that Wife "did nothing other than file for equitable distribution (and other actions) and then dismiss them which she had the absolute right to do." (R p 95 ¶ 25.) Husband does not challenge that finding on appeal. The court also specifically found that Wife's "negotiations and active prosecution" of her equitable distribution claim was "not a misrepresentation or a breach of fiduciary duty." (R p 95 ¶ 26.)

The district court concluded that the voluntary dismissal was properly filed and that, at the time it was filed, Husband had no claim for equitable distribution, nor could he ever have such a claim due to the divorce judgment. (R p 96.)

Husband appeals from this order. (R p 98.)

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Husband's appeal should be dismissed for lack of appellate jurisdiction.

Husband contends that the order denying his Rule 60(b) motion is a final judgment under N.C. Gen. Stat. § 7A-27(b)(2). But the order is not a final judgment. Indeed, nothing about this case has become final because Wife voluntarily dismissed her claims *without* prejudice, so she continues to have time to refile her claims. *See* N.C. R. Civ. P. 41(a)(1). As this Court has held, there is no right to appeal from the denial of a Rule 60(b) order that refuses to set aside a voluntary dismissal without prejudice. *Troy v. Tucker*, 126 N.C. App. 213, 215, 484 S.E.2d 98, 99 (1997).

Wife is filing a motion to dismiss contemporaneously with this merits brief.

STANDARD OF REVIEW

Husband errs in his statement of the standard of review.

Husband's motion was filed under Rule 60(b) of the Rules of Civil Procedure. (R pp 48-49 ¶¶ 11-12.) A Rule 60(b) motion "is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975); *accord Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) ("[T]he standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion."). This Court may find an abuse of

discretion only "when the court's decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Brown v. Foremost Affiliated Ins. Servs., Inc.*, 158 N.C. App. 727, 732, 582 S.E.2d 335, 339 (2003).

Husband never contends that the district court's denial of his motion was so arbitrary that it could not have been the result of a reasoned decision.

Separately, the district court's order included numerous findings of fact, four of which Husband challenges on appeal. (R pp 92-96.) Factual findings made in a Rule 60(b) order "are binding on appeal if supported by any competent evidence." *Pope v. Pope*, 247 N.C. App. 587, 590, 786 S.E.2d 373, 377 (2016).

Husband's other motion was a motion for leave to file an answer and counterclaim out of time. (R p 50.) Because Husband admits that he failed to answer or otherwise respond to Wife's complaint within the time permitted by N.C.R. Civ. Proc., Rule 12, he was required to file a motion under N.C.R. Civ. Proc., Rule 6(b) seeking leave of court to file out of time and explaining the "excusable neglect" for the tardy filing. *Johnson v. Hooks*, 21 N.C. App. 585, 588, 205 S.E.2d 796, 799 (1974). A district court's decision to extend time is reviewed for abuse of discretion. *See id.*

Again, Husband failed to argue that the district court abused its discretion in denying this motion.

ARGUMENT

This appeal involves two discretionary orders entered by the district court. Orders for Rule 60(b) relief and orders for filing late pleadings are both reviewed for an abuse of discretion. The district court, however, acted reasonably in denying both of Husband's motions. In fact, it was legally impossible for the district court to grant either motion. What Husband sought was simply prohibited by law.

I. The District Court Correctly Denied Husband's Rule 60(b) Motion.

The district court did not abuse its discretion by denying Husband's Rule 60(b) motion to set aside the notice of dismissal. The district court's order should be affirmed for three reasons. First, Husband's motion was an improper procedural vehicle to set aside the dismissal. Second, Wife had not engaged in any misconduct to warrant setting aside the dismissal. And, third, Husband's consent to the dismissal was not needed because Husband had not asserted his own equitable distribution claim.

A. A Rule 60(b) motion cannot be used to set aside a notice of voluntary dismissal without prejudice.

Wife voluntarily dismissed her equitable distribution claim *without* prejudice. That means that her claims have not reached finality. Because there is no final adjudication of Wife's equitable distribution claim, Husband could not use Rule 60(b) to set it aside.

Under Rule 41(a), a plaintiff can dismiss his claim without prejudice and "without order of the court (i) by filing a notice of dismissal at any time before the plaintiff rests his case." N.C. R. Civ. P. 41(a). A plaintiff's "right to a voluntary, nonprejudicial dismissal" is "unfettered" and "endures up to the moment he rests his case." *Id.* cmt. to 1969 amendment.

The only way to "undo" a nonprejudicial dismissal is for the plaintiff to refile her claims within the one-year saving provision. N.C. R. Civ. P. 41(a). Thus, a party cannot use a different rule, i.e., Rule 60, to set aside a nonprejudicial voluntary dismissal.

In fact, this Court has already rejected exactly this argument. In *Robinson v. General Mill Restaurants*, this Court addressed an issue of first impression: "whether a voluntary dismissal without prejudice is a final adjudication to which a Rule 60(b) motion might be directed." 110 N.C. App. 633, 636, 430 S.E.2d 696, 698 (1993). A voluntary dismissal without prejudice can constitute a "final adjudication" to which Rule 60(b) applies, but only if (1) it is the plaintiff's second voluntary dismissal, or (2) the one-year savings provision has ended ***and*** the statute of limitations has also run on the dismissed claims. *Id.* at 637, 430 S.E.2d at 698.

Here, Wife's voluntary dismissal was not a final adjudication to which Rule 60(b) could apply. Wife filed the nonprejudicial dismissal on 12 November 2020. (R p 45.) Husband filed his Rule 60(b) motion not one year later, but

eleven days later. (R p 46.) That premature motion flunks the *Robinson* test. When Husband filed his motion, Wife's voluntary dismissal had not yet become a final adjudication on her equitable distribution claim.

Alternatively, Rule 60(b) cannot be used to aside notice of voluntary dismissal because such a filing falls outside the express scope of Rule 60(b). By its own terms, Rule 60(b) only applies to "final judgments, orders, and proceedings." N.C. R. Civ. P. 60(b). A "notice" of dismissal is none of those things, as this Court has explained: "[R]elief from a voluntary dismissal is not available pursuant to Rule 60(b), because no relief is sought from an order, judgment, or proceeding as contemplated by the Rule." *Troy*, 126 N.C. App. at 215, 484 S.E.2d at 99.

For either of these reasons, the district court could not have granted Husband's Rule 60(b) motion even if it had been inclined to do so.

B. The district court correctly denied Husband's Rule 60(b) motion on the merits.

Husband filed his Rule 60(b) motion under subsection (3). He claimed that Wife, through counsel, had engaged in fraud, misrepresentation, or other misconduct that led Husband to assume that she would have her equitable distribution claim fully adjudicated. (R p 49.) The district court correctly rejected this ground for relief.

As an initial matter, this argument should be deemed abandoned. Husband's brief does not even mention Rule 60(b), much less present any argument or authority to show "[f]raud . . ., misrepresentation, or other misconduct of an adverse party." N.C. R. Civ. P. 60(b)(3). That failure constitutes abandonment under the Appellate Rules. *See* N.C. R. App. P. 28(b)(6); *see, e.g.*, *Anton v. Anton*, 2021-NCCOA-294, ¶ 29.

Next, the district court found as a fact that Wife did not deceive Husband. (R p 95 ¶¶ 26.) In an unchallenged, binding finding, the court found that Wife "did nothing other than file for equitable distribution (and other actions) and then dismiss them which she had the absolute right to do." (R p 95 ¶ 25.) The court then found that the parties' negotiations and Wife's "active prosecution of her own case is not a misrepresentation or breach of fiduciary duty." (R p 95 ¶ 26.) Although Husband claims to be challenging this finding, (See Opening Br. at 8 (heading)), he presents no actual argument to show that the finding lacks competent evidence in support. Again, that failure should be deemed an abandonment.

Rather than present argument in support of the grounds for relief made in the district court, Husband uses his opening brief to complain about the unfairness in allowing a plaintiff to dismiss her complaint after the parties had engaged in "limited discovery," (R p 93 ¶ 11), and mediation. Husband's real dispute, however, isn't with Wife but with Rule 41. That rule allows a plaintiff

to unilaterally dismiss her complaint, without prejudice, up until *halfway through trial*. N.C. R. Civ. P. 41(a)(1) (allowing a plaintiff to unilaterally take a nonprejudicial dismissal until she "rests [her] case"). Defendants often feel some frustration from this rule. But the remedy isn't a Rule 60(b) motion; it's a request to the General Assembly to change the rule.[1]

Finally, Husband appears to claim that the voluntary dismissal should have been set aside because it was not properly served. (See Opening Br. at 16-17.) This argument fails for several reasons.

Preservation. Husband's Rule 60(b) motion did not claim lack of service as a basis for setting aside the dismissal. To present service as an argument to this Court, Husband was required to show that he first presented it to the trial court: "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). The district court's order also never ruled on the service issue, which confirms that the district court was not presented with the issue and otherwise confirming that the issue is unfit for appellate review. *See id.* ("It is also necessary for

[1] Before the current version of Rule 41, a plaintiff was actually entitled to take a nonprejudicial dismissal "for any or no reason at all at any time before verdict." N.C. R. Civ. P. 41, cmt. to rule as originally enacted.

the complaining party to obtain a ruling upon the party's request, objection, or motion.").

Actual service. Husband's arguments are also wrong. Husband's own Rule 60(b) motion confirms that the dismissal was "deliver[ed] to defendant through her attorney." (R p 48.) Husband's brief likewise says that he was hand-served with the dismissal: "The document apparently was handed to a member of [Husband's] attorneys' staff." (Opening Br. at 16.) Hand service, of course, is a valid form of service for notices, motions, and similar documents. *See* N.C. R. Civ. P. 5(b)(1)(a).

The record itself confirms that Wife's counsel also *mail*-served Husband's counsel with the dismissal. The record includes a copy of the cover letter serving the dismissal.[2] (R p 70.)

No prejudice. Husband's ultimate point about service is a mystery. He does not dispute that the dismissal was "fil[ed]," as required by Rule 41(a)(1). Nor does he dispute having timely received it. Husband has not shown any defect in service. But even if he had, he's clearly suffered no prejudice that would entitle him to relief under Rule 60(b). Husband responded to the dismissal with his Rule 60(b) motion, filing his motion just *eleven* days after the

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[2] It's not even clear that service is required for a Rule 41 dismissal to take effect. This Court has stated that voluntary dismissals are effective when "received and filed by the clerk of court." *Johnson v. Hutchens*, 103 N.C. App. 384, 385-86, 405 S.E.2d 597, 598 (1991).

dismissal was filed. (*Compare* R p 45 (dismissal filed 11-11-20), *with* R p 46 (motion filed 11-23-20).)

Ultimately, Husband's argument is not that he wasn't served—he admits he was. The argument is just that a certificate of service is lacking. But Husband offers no reason why a dismissal that was actually served, yet lacks a certificate of service, is ineffective and *must* be set aside by a trial court. There is no basis to say that the district court abused its discretion by denying Husband's motion.

C. Husband's consent was not needed for the dismissal.

Husband contends that the dismissal was invalid because he had asserted an equitable distribution claim before the dismissal was filed. Despite his contention, Husband had never asserted an equitable distribution claim and his immoveable deadline to file the claim had passed.

It's true that, if Husband had asserted his own equitable distribution counterclaim, Wife could not have unilaterally dismissed the action without Husband's consent. *See Gillikin v. Pierce*, 98 N.C. App. 484, 487, 391 S.E.2d 198, 199 (1990). But Husband never asserted an equitable distribution claim.

Husband ignored the Rules of Civil Procedure in both this action and in the parallel divorce action. In neither case did Husband file an answer, counterclaim, or Rule 12(b) motion. (R pp 92-94, ¶¶ 3-4, 7, 15-16, 18.)

That failure was fatal for Husband. The time for filing equitable distribution claims are limited by a special rule set by the legislature: "An absolute divorce obtained within this State shall ***destroy*** the right of a spouse to equitable distribution under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce . . . ." N.C. Gen. Stat. § 50-11(e) (emphasis added). As our Supreme Court has explained, "equitable distribution is not automatic. The statute provides that a party seeking equitable distribution must specifically apply for it." *Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987).

Of course, as Husband notes, "no magic language" is needed to prevent an equitable distribution claim from being destroyed by N.C. Gen. Stat. § 50-11(e). (*See* Opening Br. at 14 (quoting *Eubanks v. Eubanks*, No. COA15-859, 2016 WL 1566173, at *5 (N.C. Ct. App. Apr. 19, 2016) [Add. 3]).) But even under *Eubanks*, an unpublished decision, the claim for equitable distribution must be made in a "pleading." *Eubanks*, 2016 WL 1566173, at *5. Elsewhere, this Court has cataloged the various ways that plaintiffs have been allowed to assert equitable distribution claims, whether in answers or counterclaims, but the claim is still always asserted in a "pleading." *See Coleman v. Coleman*, 182 N.C. App. 25, 28, 641 S.E.2d 332, 336 (2007). Without dispute, Husband has not asserted an equitable distribution claim in a pleading. In fact, he has never filed a pleading. *See* N.C. R. Civ. P. 7(a) (listing types of pleadings).

This Court has already addressed Husband's predicament and resolved it against him. In *Lutz v. Lutz*, a husband filed a complaint seeking absolute divorce and equitable distribution. 101 N.C. App. 298, 300, 399 S.E.2d 385, 386 (1991). The wife did not file an answer. *Id.* The trial court then entered the divorce judgment, noting "that other issues including equitable distribution are continued for disposition at the proper time." *Id.*

The wife then filed an answer out of time, and the parties negotiated and engaged in discovery over the equitable distribution claim. *Id.* at 300, 399 S.E.2d at 386-87. Wife then filed a "motion" for equitable distribution. *Id.* at 300, 399 S.E.2d at 387. In response, husband filed a notice of voluntary dismissal without prejudice and the court denied the wife's "motion" for equitable distribution. *Id.*

This Court affirmed, applying the straightforward terms of section 50-11(e). Under that statute, "because the [wife] did not file a cross-action or a separate action asserting her right to equitable distribution prior to the divorce judgment, [the wife] lost her right to equitable distribution." *Id.* at 301, 399 S.E.2d at 387. This Court rejected the wife's efforts to escape N.C. Gen. Stat. § 50-11(e).

First, the wife argued that the divorce judgment left open the issue of equitable distribution. *Id.* at 301-02, 399 S.E.2d at 387. But the judgment's unspecified reservation only left the issue open "for the party who has asserted

the right prior to judgment of absolute divorce," which was the husband. *Id.* at 303, 399 S.E.2d at 388. If the wife thought the judgment should have specifically reserved the issue for her, she should have appealed from the adverse judgment. *See id.*

Next, the wife argued that the voluntary dismissal was unfair under the doctrine of equitable estoppel because she was counting on the husband to litigate his claim, and the parties had spent a lot of time and money litigating the claim already. *See id.* But the Court explained that there was nothing unfair about the husband prosecuting his claim while it was "still alive." *Id.* at 304, 399 S.E.2d at 389.

The case before this Court fits the mold of *Lutz*:

- Husband never asserted an equitable distribution claim before the divorce judgment was entered (or even before the dismissal was filed). (R pp 92-94, ¶¶ 3-4, 7, 15-16, 18.)
- The divorce judgment reserved to Wife alone the right to pursue an equitable distribution claim. (R p 38.) Husband has not appealed from the divorce judgment, and the 30 days for doing so has passed, rendering it final.

- It is not unfair for Wife to prosecute and then dismiss her equitable distribution claim, when Husband could have done the same.[3]

For these reasons, Husband never asserted a claim for equitable distribution, nor, when the dismissal was filed, did Husband have a right to assert one. *See* N.C. Gen. Stat. § 50-11(e). Because Husband had not asserted an equitable distribution claim, or any other claim, Wife was free to dismiss the action without Husband's consent. *See* N.C. R. Civ. P. 41(a)(1).

Practically, setting aside Wife's voluntary dismissal would not help Husband. Because Husband never asserted an equitable distribution claim of his own, Wife was always free to dismiss her action. Certainly there is no authority to forever bar a plaintiff from taking a voluntary dismissal, especially given that such dismissal can be filed "at any time before the plaintiff rests [her] case." N.C. R. Civ. P. 41(a)(1). Thus, Husband's failure to appeal the divorce judgment or assert an equitable distribution claim are his own fault and barred the relief he sought from the district court.

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[3] Below, Husband specifically argued that the district court should allow him to file an untimely answer and counterclaim through the doctrine of equitable estoppel. (R pp 51-52.) Husband does not address the doctrine in his opening brief. It is appropriate, therefore, for this Court to treat the argument as abandoned on appeal.

For each or any of the above-stated reasons, the district court's denial of the Rule 60(b) motion should be affirmed.[4]

II. The District Court Correctly Denied Husband's Motion for Leave to File an Equitable Distribution Counterclaim.

Husband combined his Rule 60(b) motion with a motion for leave to file an answer and counterclaim. (R pp 46, 50-52.) Husband's brief, however, makes no argument for why the motion for leave should have been granted, except for arguing that the notice of dismissal was ineffective because it lacked a certificate of service. (*See* Opening Br. at 17.) For the reasons already explained, the notice was properly served. *See supra* pp 11-13.

The proper inquiry is whether Husband showed "excusable neglect" to allow the late filing of his answer and counterclaim. *Johnson*, 21 N.C. App. at 588, 205 S.E.2d at 799. Husband neither raises nor argues excusable neglect; even if he did, he cannot meet that demanding standard.[5] Husband's motion was frivolous because his right to assert an equitable distribution claim had

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[4] In no event should the district court's order be reversed with instructions to grant the Rule 60(b) motion. To do so would "erroneously remove[] all discretion from the trial judge where it properly lies." *Buie v. Johnston*, 313 N.C. 586, 589, 330 S.E.2d 197, 199 (1985).

[5] "Excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case. A litigant's carelessness, negligence, or ignorance of the rules of procedure is not excusable neglect. Inadvertent conduct that does not demonstrate diligence does not constitute excusable neglect. The test for excusable neglect generally does not allow for attorney negligence." *Sellers v. FMC Corp.*, 216 N.C. App. 134, 141, 716 S.E.2d 661, 666 (2011) (cleaned up).

already been "destroyed" by N.C. Gen. Stat. § 50-11(e) and the divorce judgment. *See supra* Argument I.C.

Thus, the district court did not abuse—and could not have abused—its discretion by denying Husband's motion to file out of time.

CONCLUSION

There was an error below, but it wasn't the district court's error. If Husband wanted to use equitable distribution to divide the parties' marital property, he should have asserted his right. Instead, he is attempting to twist his own errors into something deserving of appellate review. His efforts, however, are barred by precedent. This Court has already decided that litigants like Husband must deal with the consequences of their own inaction. Their problems can't be blamed on their ex-spouses.

The judgment below should be affirmed.

Respectfully submitted this the 20th day of October, 2021.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for Plaintiff-Appellee certifies that the foregoing brief contains less than 8,750 words (excluding the cover, caption, index, table of authorities, signature block, certificate of service, and this certificate of compliance) as reported by the word-processing software.

This the 20th day of October, 2021.

/s/ Michelle D. Connell
Michelle D. Connell

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was electronically filed and served this 20th day of October, 2021, by email and by depositing a copy with the United States Postal Service, first-class mail, postage prepaid, and addressed as follows:

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COA 21-439 JUDICIAL DISTRICT 19A

NORTH CAROLINA COURT OF APPEALS

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v.

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From Cabarrus County

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CONTENTS OF ADDENDUM

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Addendum Pages

247 N.C.App. 245
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.
Court of Appeals of North Carolina.

Mary Knight EUBANKS, Plaintiff,

v.

Donald (NMN) EUBANKS, Sr., Defendant.

No. COA15–859.
|
April 19, 2016.

***1** Appeal by Plaintiff from order entered 9 April 2015 by Judge Gary L. Henderson in Mecklenburg County District Court. Heard in the Court of Appeals 14 January 2016.

Attorneys and Law Firms

Kenneth T. Davies, for Plaintiff.

Church Watson Law, PLLC, by Kary C. Watson, for Defendant.

Opinion

STEPHENS, Judge.

Plaintiff Mary Knight Eubanks ("Mary") appeals from the trial court's equitable distribution order requiring her to pay a distributive award in the amount of $42,031.00 to her former husband, Defendant Donald (NMN) Eubanks, Sr. ("Donald"). Mary contends that the trial court's order must be vacated because the court lacked subject matter jurisdiction to hear and determine the matter. We affirm the trial court's order.

Factual Background and Procedural History

The parties were married to each other on 1 January 2004, legally separated on 15 May 2011, and divorced on 29 June 2012. On 23 December 2010, Mary filed a complaint in Mecklenburg County District Court alleging marital misconduct and adultery by Donald and seeking divorce from bed and board, post-separation support, alimony, attorney fees, and injunctive relief. On 29 April 2011, Donald filed an answer in which he asserted several affirmative defenses and a counterclaim for equitable distribution seeking an unequal distribution of the parties' marital estate in his favor.

On 31 May 2011, Mary filed a motion to dismiss Donald's counterclaim for failure to state a claim upon which relief can be granted and lack of subject matter jurisdiction, given that his counterclaim for equitable distribution was untimely filed, approximately two weeks before the parties were legally separated. On 17 June 2011, Mary filed a motion for leave to supplement her complaint pursuant to N.C. Gen.Stat. § 1A–1, Rule 15(d), as well as a draft of her supplemental complaint in which she asserted a claim for equitable distribution of the parties' marital estate with an unequal distribution in her favor. On 12 July 2011, Mary filed a motion for a court-ordered appraisal of the parties' marital residence, as well as a motion for an order requiring the sale of that residence, noting that such a sale would be in the best interests of the parties in order to "ensure an equitable distribution of the marital property, without requiring a large distributive award to either party."

On 15 August 2011, Mary filed notice of withdrawal of her previously filed motion to dismiss. That same day, the district court entered a memorandum of judgment/order noting Mary's withdrawal of her motion to dismiss and the fact that the parties had agreed to list the marital home for sale. The court also granted Mary's motion for leave to supplement her complaint to add her claim for equitable distribution. On 13 September 2011, Donald filed an answer to Mary's supplemental complaint for equitable distribution in which he admitted her allegation that "[d]uring the marriage of the parties they acquired property and debt subject to equitable distribution," requested "relief as set forth in [Donald's original] Answer, Defenses and Counterclaims" for, *inter alia,* equitable distribution, and also asked the court to deny Mary's request for an unequal distribution of marital and divisible property in her favor.

***2** On 7 March 2012, Mary filed notice of voluntary dismissal with prejudice of her claim for divorce from bed and board. The next day, Mary filed notice for an initial pretrial/discovery equitable distribution hearing to be conducted on 4 May 2012. On 17 May 2012, one day after Donald filed his equitable distribution affidavit, Mary filed a complaint

for absolute divorce, as well as notice of voluntary dismissal without prejudice of her claim for equitable distribution. The following day, Donald filed notice for an initial equitable distribution pretrial conference to be conducted on 3 August 2012. On 4 June 2012, Donald filed an answer to Mary's claim for absolute divorce in which he admitted the allegations of Mary's complaint for same, noted that he had already filed a claim for equitable distribution in a separate action, and requested that such claim be preserved upon entry of absolute divorce. Two days later, Mary filed an equitable distribution affidavit. On 29 June 2012, the trial court entered a judgment of absolute divorce in which it also stated that "[Donald's] claim for equitable distribution in another proceeding is hereby preserved." On 2 August 2012, the court entered an order for post-separation support. The next day, the court entered an initial equitable distribution pretrial conference, scheduling, and discovery order.

On 22 March 2013, the court entered a final equitable distribution pretrial order in which the parties set forth stipulations regarding the classification, valuation, and distribution of various items of marital and divisible property, and also identified issues to be resolved during the equitable distribution trial. The matter came on for hearing on 16–17 September 2014 in Mecklenburg County District Court, the Honorable Gary L. Henderson, Judge presiding. On 9 April 2015, the trial court entered an order in which it allowed the parties' respective claims for equitable distribution, found that an equal division of marital property would be equitable but an in-kind distribution would not be possible, then divided the marital estate and required Mary to pay a distributive award to Donald in the amount of $42,031.00. Mary gave notice of appeal to this Court on 7 May 2015.

Analysis

In her sole argument on appeal, Mary contends that the trial court lacked subject matter jurisdiction to enter its equitable distribution order. We disagree.

"[W]hether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal *de novo*." *Yurek v. Shaffer,* 198 N.C.App. 67, 75, 678 S.E.2d 738, 743 (2009) (citation and internal quotation marks omitted). "Equitable distribution is a statutory right granted to spouses under [section] 50–20 [of our General Statutes] which vests at the time of separation." *Kroh v. Kroh,* 154 N.C.App. 198, 201, 571 S.E.2d 643, 645 (2002) (citation omitted); *see also* N.C. Gen.Stat. § 50–21(a) (2015) ("At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed and adjudicated [.]"). Further, "[a]n absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution under [section] 50–20 unless the right is asserted prior to judgment of absolute divorce." *Coleman v. Coleman,* 182 N.C.App. 25, 28, 641 S.E.2d 332, 335 (2007) (quoting N.C. Gen.Stat. § 50–11(e)). While "there is nothing in the statute regarding the sufficiency of the pleadings to support a claim for equitable distribution, our Supreme Court [has] acknowledged that equitable distribution is not automatic, and that a party seeking such division of marital property must specifically apply for it." *Id.* (citation, internal quotation marks, and certain brackets omitted). An action for equitable distribution may be initiated as a cross-action in an action for absolute divorce or as a separate action, and a trial court's bare reservation of the issue of equitable distribution will preserve such a claim for either party provided they have asserted a right to equitable distribution prior to entry of a judgment for absolute divorce. *See, e.g., Lutz v. Lutz,* 101 N.C.App. 298, 303, 399 S.E.2d 385, 388, *disc. review denied,* 328 N.C. 732, 404 S.E.2d 871 (1991).

***3** Here, the record indicates that the parties were not legally separated until 15 May 2011, approximately two weeks after Donald filed his counterclaim for equitable distribution on 29 April 2011. Mary argues that because Donald failed to comply with the express requirement of section 50–21 that a claim for equitable distribution be filed "[a]t any time after a husband and wife begin to live separate and apart," N.C. Gen.Stat. § 50–21(a), the trial court never acquired subject matter jurisdiction over his counterclaim for equitable distribution. In support of this argument, Mary relies on our Supreme Court's decision in *Atkinson v. Atkinson,* 350 N.C. 590, 516 S.E.2d 381 (1999).

In *Atkinson,* after the plaintiff-wife filed a complaint seeking equitable distribution of marital property, the defendant-husband filed an answer and counterclaim for equitable distribution, to which the plaintiff-wife replied. *See Atkinson v.. Atkinson,* 132 N.C.App. 82, 84, 510 S.E.2d 178, 179, *reversed for the reasons stated in the dissent,* 350 N.C. 590, 516 S.E.2d 381 (1999). However, the trial court declined to rule on both parties' claims based on its finding that they were still living together and had not yet legally separated. *See id.* Two years later, the defendant-husband filed a complaint in a separate action for divorce in which he alleged that "all pending claims arising out of the parties' marriage including

both [parties'] claims for an equitable distribution of marital property, are pending in [the prior action].” *Id.* After the plaintiff-wife admitted this allegation in her answer and joined the request for a divorce, the trial court entered a judgment of divorce in which it noted that “all pending claims arising out of the parties' marriage, including both [parties'] claims for an equitable distribution of marital property, are pending in [the earlier action].” *Id.* Thereafter, the defendant-husband filed a voluntary dismissal of his counterclaim for equitable distribution, as well as a motion to dismiss the defendant-wife's original claim for equitable distribution because the parties had not yet separated as of the date when it was filed. *Id.* When the trial court denied his motion to dismiss, the defendant-husband appealed to this Court, which dismissed his appeal as being interlocutory. *Id.* at 85, 510 S.E.2d at 179. The plaintiff-wife then voluntarily dismissed her action for equitable distribution without prejudice. *See id.* When she attempted to refile her complaint several months later, the defendant-husband filed a motion to dismiss, arguing that the parties' divorce had terminated any right of action for equitable distribution. *See id.* Although the plaintiff-wife argued that her claim was preserved by the admission in her answer to the defendant-husband's complaint for divorce that the parties' claims for equitable distribution remained pending, the trial court concluded the plaintiff-wife had failed to preserve her equitable distribution claim and granted the defendant-husband's motion to dismiss. *Id.* at 86, 510 S.E.2d at 180. The plaintiff-wife appealed to this Court, where the majority of a divided panel held that the trial court erred in dismissing her claim. *Id.* at 88, 510 S.E.2d at 181. The majority based its analysis in part on its conclusion that the defendant-husband's complaint for divorce

> ***4** clearly allege[d] a claim for equitable distribution of the marital property when he assert[ed] that such a claim is pending. For what other reason would he include a reference to this matter in his complaint? The plaintiff answered and admitted the parties have a claim for equitable distribution of the marital property. Thus, it is apparent that when [the trial court] considered all of the pleadings in these cases, [it] determined a claim had been made for equitable distribution of the marital property and that [it] was bound to construe the pleadings in accordance with Rule 8 [of our State's Rules of Civil Procedure] so as to do substantial justice.

Id. at 87–88, 510 S.E.2d at 181 (internal quotation marks omitted). However, the dissent concluded that the defendant-husband's motion to dismiss had been properly granted because the plaintiff-wife's original claim for equitable distribution “was not asserted after the date of separation and before the entry of divorce, thus making it invalid.” *Id.* at 90, 510 S.E.2d at 182 (Greene, J., dissenting). The dissent also reasoned that, rather than asserting a claim for equitable distribution in his divorce complaint, the defendant-husband had “simply acknowledged there were, at the time the divorce complaint was filed, pending [equitable distribution] claims filed by both [parties],” and the dissent concluded that “[t]his acknowledgment does not itself constitute an [equitable distribution] claim.” *Id.* at 91 n. 1, 510 S.E.2d at 183 n. 1. When the defendant-husband appealed to our Supreme Court, the Court reversed the majority's decision for the reasons stated in the dissent. *Atkinson,* 350 N.C. at 590, 516 S.E.2d at 381.

Mary insists that the result in the present case should be controlled by *Atkinson* and that, because Donald failed to assert his counterclaim for equitable distribution after the date of separation and before the entry of absolute divorce, the trial court lacked subject matter jurisdiction to enter its equitable distribution order. However, Mary's argument ignores a critical distinction between *Atkinson* and the instant facts. Specifically, in *Atkinson* our Supreme Court ultimately determined that the dissent was correct in its conclusion that there was never any timely or valid claim for equitable distribution filed by either party. Here, by contrast, our review of the record demonstrates that although Donald's original counterclaim for equitable distribution was untimely filed, Mary filed her own supplemental complaint alleging a claim for equitable distribution after the parties separated and before the entry of absolute divorce. In his timely filed answer to Mary's supplemental complaint, Donald admitted Mary's allegation that “[d]uring the marriage of the parties they acquired property and debt subject to equitable distribution” and also prayed “for relief as set forth in his Answer, Defenses and Counterclaims,” in which he first asserted his untimely claim for equitable distribution.

***5** Our decision in *Coleman* illustrates that although “a spouse's pleading asserting an interest in a specific piece of property, or to proceeds generated from an interest in a specific piece of property, is insufficient to state a claim for equitable distribution,” no magic language is required to state a valid claim for equitable distribution so long as the claimant's pleading is sufficiently clear to put the opposite party on notice that the claimant is “requesting the court to enter an order distributing the parties' assets in an equitable manner.” 182 N.C.App. at 28, 641 S.E.2d at 336 (citations omitted). Given the procedural posture of this case, we find it difficult to discern how there could be

any doubt that Mary had ample notice of Donald's intention to assert a claim for equitable distribution of the parties' marital property, and we therefore conclude that, in light of N.C.R. Civ. P. 8 and our State's approach to notice pleading, Donald's answer to Mary's supplemental complaint sufficiently stated a claim for equitable distribution, which —despite Mary's subsequent dismissal of her own claim— the trial court explicitly preserved in its judgment of absolute divorce. We therefore conclude that Mary's argument that the court lacked subject matter jurisdiction to enter an order for equitable distribution is without merit. Accordingly, the trial court's order is

AFFIRMED.

Judges HUNTER, JR., and INMAN concur.
Report per Rule 30(e).

All Citations

Slip Copy, 247 N.C.App. 245, 2016 WL 1566173 (Table)

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