

NO. COA14-1025

NORTH CAROLINA COURT OF APPEALS

Filed: 17 March 2015

JORDAN HEBENSTREIT
Plaintiff,

v.

Onslow County
No. 13 CVD 2449

RACHEL HEBENSTREIT
Defendant.

Appeal by plaintiff from order entered 20 May 2014 by Judge Louis F. Foy, Jr. in Onslow County District Court. Heard in the Court of Appeals 3 February 2015.

Ferrier Law, P.L.L.C., by Kimberly M. Ferrier, for plaintiff.

Lana S. Warlick, for defendant.

TYSON, Judge.

Plaintiff appeals from the trial court's order, which ruled his motion for contempt had previously been adjudicated, was not properly before the court, and which dismissed his motion. We reverse and remand.

I. Background

The parties were married in 2010 and separated in July of 2012. One child was born of the marriage. On 14 August 2013, the district court granted plaintiff an absolute divorce from

defendant. With consent of the parties, the court also awarded the parties joint legal custody of the minor child. Defendant-mother was awarded primary physical custody. Plaintiff-father was awarded secondary physical custody and liberal visitation privileges.

The custody order sets forth plaintiff's visitation schedule with the child. The court awarded plaintiff visitation every other weekend, and recited a schedule for visitation on holidays. On 9 September 2013, less than a month after entry of the custody order, plaintiff filed a motion for contempt. Plaintiff alleged defendant absconded with the child to Texas without plaintiff's permission, remained there for six weeks, and refused to return the child to North Carolina. Plaintiff also sought modification of the 14 August 2013 custody order to award primary custody of the child to him.

Plaintiff's attorney calendared the motion for contempt. The case appeared on the district court calendar on 30 September 2013, before the Honorable Anne B. Salisbury. When the matter was called for hearing, neither plaintiff nor plaintiff's attorney were present. Defendant's attorney, Lana S. Warlick, Esq., appeared on behalf of defendant. The record shows Ms.

Warlick filed a notice of appearance on 1 July 2013 and represented defendant at the custody hearing.

Plaintiff's counsel represented to the court that she contacted Ms. Warlick's office when she filed the motion for contempt and was informed that Ms. Warlick no longer represented defendant. Ms. Warlick was retained for purposes of the contempt hearing subsequent to plaintiff's filing of the contempt motion. Plaintiff's attorney stated she was unaware that defendant was represented by counsel on the day of the hearing.

Defendant's attorney did not move for dismissal and requested the court to continue the matter. The court dismissed, *sua sponte*, plaintiff's motion for contempt for failure to prosecute. The court also ordered the parties to attend custody mediation with regard to plaintiff's motion to modify the custody order.

Plaintiff filed a second motion for contempt on 7 October 2013. The motion alleges defendant had remained in Texas with the child, refused to return the child to North Carolina, and was collecting unemployment in Texas. Plaintiff's motion further alleged he had traveled to Texas to visit the child. Defendant continued to deny plaintiff access to the child,

refused to return the child to North Carolina, and repeatedly stated she intended to remain in Texas.

Plaintiff's second motion for contempt was heard before the court on 28 October 2013, before the Honorable Louis F. Foy, Jr. Plaintiff's attorney explained to the court that the child was currently back in North Carolina, and that plaintiff sought an order to prevent defendant from taking and keeping the child out of state.

Plaintiff's attorney informed the court she was present in court in another county on the date Judge Salisbury dismissed plaintiff's first contempt motion. Plaintiff's counsel further explained she had recently established a law practice in Onslow County and understood she would receive notice of hearing of when the case was calendared. The court did not rule on the matter and held it open for further consideration.

The matter was held open until 20 May 2014. The court determined the 30 September 2013 dismissal of plaintiff's first motion for contempt was an adjudication of the merits of plaintiff's second motion for contempt. The court ruled that plaintiff's second motion for contempt, which it determined requested the same relief the trial court had ruled upon in the first motion for contempt, was not properly before the court.

The court further ordered that plaintiff may file a motion for reconsideration of the ruling on the prior motion to be addressed by Judge Salisbury. Plaintiff appeals.

II. Issues

Plaintiff argues the trial court erred by: (1) finding that his 9 September 2013 motion and 7 October 2013 motion contained the same allegations and sought the same relief; (2) concluding Judge Salisbury's 30 September 2013 order dismissed her motion for contempt with prejudice; (3) failing to consider lesser sanctions; (4) failing to make proper findings of fact and conclusions of law; and, (5) requiring plaintiff to file a motion for reconsideration.

III. Plaintiff's Arguments on Appeal

Plaintiff argues issues related to the entry of Judge Salisbury's 30 September 2013 order. Plaintiff has not appealed from the 30 September 2013 order, and we do not address any arguments pertaining thereto. N.C.R. App. P. Rule 10(a) (2013). Plaintiff has only appealed from Judge Foy's 20 May 2014 order, in which he concluded the allegations of plaintiff's second motion for contempt were previously adjudicated on 30 September 2013.

We will only consider plaintiff's arguments and issues pertaining to the 20 May 2014 order, and specifically whether the court erred in concluding that it was precluded from ruling upon the merits of the case by Judge Salisbury's prior order.

IV. Adjudication of Plaintiff's Claims

Plaintiff argues the court erred by ruling his second motion for contempt was not properly before the court, because it contained the same allegations as the first motion for contempt, dismissed by Judge Salisbury on 30 September 2013. We agree.

On 9 September 2013, plaintiff filed his first motion for contempt and motion to modify child custody. Plaintiff alleged:

6. The Defendant has willfully and without legal justification or excuse failed and refused to comply with the terms of the Judgment in that Defendant has failed to allow Plaintiff reasonable visitation with the minor child. Specifically, Defendant informed the Plaintiff that her grandmother was dying, but instead of taking the minor child for a few days, took the minor child for six weeks to Texas over the objection of the Plaintiff and without the Plaintiff's permission. Furthermore, Defendant is now refusing to return the minor child to the State of North Carolina upon Plaintiff's request.

This is the only allegation contained in the 9 September 2013 motion pertaining to contempt. Plaintiff alleged that a substantial and material change in circumstances occurred by

defendant's departure from the State with the child, which completely denied plaintiff access to the child. Plaintiff sought an order to adjudicate defendant in willful civil contempt, and sought modification of his visitation with the child.

The court dismissed, *sua sponte*, plaintiff's first contempt motion and motion to modify child custody on 30 September 2013 for plaintiff's failure to prosecute. Neither plaintiff nor his counsel was present when the case was called for hearing. Defendant's counsel did not move for dismissal, but rather for a continuance.

On 7 October 2013, plaintiff filed a second contempt motion and alleged:

7. The Defendant has willfully and without legal justification or excuse failed and refused to comply with the terms of the Judgment in that Defendant has failed to allow Plaintiff reasonable visitation with the minor child. Specifically, Defendant informed the Plaintiff that her grandmother was dying, but instead of taking the minor child for a few days, took the minor child to Texas over the objection of the Plaintiff and without the Plaintiff's permission. Furthermore, Defendant is now refusing to return the child to the State of North Carolina upon Plaintiff's request.

8. The Defendant has repetitively promised to return the minor child to the State of North Carolina and has repetitively failed to return

the minor child to the State of North Carolina.

9. Upon information and belief, the Defendant has not returned the minor child to the State of North Carolina and appears to have no intent on returning the child to the State of North Carolina as the Defendant is collecting unemployment in the State of Texas.

10. The Plaintiff has flown to the State of Texas to visit with the minor child and was not allowed to bring the minor child back to the State of North Carolina and has been refused normal visitation and access to the minor child has continued to be denied.

In the 7 October 2013 motion, plaintiff sought an order holding defendant in willful civil contempt of court. Plaintiff also sought an order granting temporary emergency custody of the child to plaintiff, and to prevent defendant from removing the child from plaintiff's care and the jurisdiction of this State, pending further orders of the court.

Under the heading "Request for Return to the State of North Carolina and Temporary Custody of the Minor Child and Emergency Modification of the Prior Order," plaintiff alleges defendant has refused to return the child to the State of North Carolina, plaintiff has a loving bond with the child, defendant has denied plaintiff all access to the child, and plaintiff is fully capable of providing full-time care for the child.

V. Dismissal of First Motion

In the 30 September 2013 order, Judge Salisbury found that plaintiff had failed to prosecute the motion for contempt and *sua sponte* dismissed the motion. Unless the court specifies otherwise, an involuntary dismissal for failure to prosecute operates as an adjudication upon the merits. N.C. Gen. Stat. §1A-1, Rule 41(b) (2013). The court, in its discretion, may specify in the order that the dismissal is without prejudice and may also specify that a new action based on the same claim may be commenced within one year or less after the dismissal. *Id.*

Here, Judge Salisbury did not specify that the dismissal was without prejudice or that plaintiff may commence a new action within one year. Pursuant to N.C. Gen. Stat. §1A-1, Rule 41(b), Judge Salisbury's order dismissed plaintiff's first motion for contempt with prejudice.

"[O]ne judge may not reconsider the legal conclusions of another judge." *Adkins v. Stanly Cnty. Bd. of Educ.*, 203 N.C. App. 642, 692 S.E.2d 470 (2010). When Judge Salisbury involuntarily dismissed plaintiff's first contempt motion with prejudice, the court adjudicated the merits of that motion. N.C. Gen. Stat. §1A-1, Rule 41(b). Plaintiff is precluded from filing another motion with identical allegations.

Plaintiff's second motion contains additional allegations, which were not included in the first motion. The first motion only alleges defendant took the child to Texas for six weeks and refused to return the child to North Carolina upon plaintiff's request. The second motion alleges additional acts of contempt. It alleges plaintiff spent \$3,000.00 to travel to Texas to visit with the child. While plaintiff was in Texas, defendant denied him access to the child, and refused to allow plaintiff to return to North Carolina with his child. It also alleges that defendant repeatedly promised to return the child to North Carolina and had refused to do so. The allegation that defendant is collecting unemployment in the State of Texas is also not contained in the first motion. If true, this evidences defendant's intent to remain in Texas with the child in spite of the North Carolina order awarding joint custody and liberal visitation rights.

Plaintiff also requested additional relief in the second motion, which was not requested in the first motion. Specifically, in the 7 October 2013 motion, plaintiff requested the court award him emergency temporary custody of the child, because of plaintiff's failure to return the child to North Carolina from Texas. See N.C. Gen. Stat. § 50-13.5(d)(3) (2013)

(A temporary custody order may be entered *ex parte* and prior to service of process or notice, if "there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts.").

When the parties appeared before the trial court on 28 October 2013, plaintiff's attorney represented to the court that the child was presently in North Carolina. She stated that she was seeking an order to ensure the child remained in North Carolina, and that plaintiff is able to visit with the child pursuant to the custody order. The court held the matter open until 20 May 2014.

The issue of emergency custody was not raised in the motion before Judge Salisbury on 30 September 2013 and was not adjudicated by operation of Rule 41. N.C. Gen. Stat. §1A-1, Rule 41(b). Where plaintiff raised issues in the 7 October 2013 motion, which were not raised in the 9 September 2013 motion, the trial court erred in concluding all matters had previously been adjudicated by entry of the involuntary dismissal. The 20 May 2014 order is reversed.

VI. Conclusion

Plaintiff raised allegations and sought relief in his 7 October 2013 motion for contempt and custody, which were not raised in his 9 September 2013 motion for contempt. The court was not precluded from hearing the issues and considering the relief sought in the 7 October 2013 motion, which were not addressed in the 9 September 2013 motion. The court erred in concluding all of plaintiff's allegations and requests for relief included in the 7 October 2013 motion for contempt were adjudicated by the court's previous entry of an involuntary dismissal.

The 20 May 2014 order is reversed and the case is remanded to the district court for further proceedings consistent with this opinion. In light of our decision, it is unnecessary for us to consider defendant's remaining arguments, which are properly before us.

Reversed and remanded.

Judges ELMORE and DAVIS concur.