An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 17-192

Filed: February 6, 2018

Wake County, No. 16 CVD 2437

HOWARD A. JACOBSON, Plaintiff,

v.

DIANA ANGELA PADGETT, Defendant.

Appeal by Plaintiff from order entered 7 October 2016 by Judge Michael Denning in Wake County District Court. Heard in the Court of Appeals 23 August 2017.

Howard A. Jacobson, pro se.

No brief filed for Defendant-Appellee.

MURPHY, Judge.

To obtain appellate review, an interlocutory appeal must be certified for appeal pursuant to N.C. R. Civ. P. 54(b), deprive the appellant of a substantial right, or arise from certain domestic situations under N.C.G.S. § 50-19.1 (2017). Thus, when an appellant files an interlocutory appeal without showing a substantial right will be

affected, and the appeal meets neither of the other requirements outlined above, then there is no right to appeal.

Howard A. Jacobson ("Plaintiff") appeals from the trial court's interim distribution order requiring Plaintiff to transfer his ownership interest in a house to Diana Angela Padgett ("Defendant"), and also grant Defendant limited access and use of a boat. After careful review, we dismiss Plaintiff's interlocutory appeal.

Background

Plaintiff and Defendant were legally married until their separation on 18 December 2015. On 24 February 2016, Plaintiff filed a Complaint for Child Custody and Equitable Distribution against Defendant. Before the equitable distribution phase of the trial, Defendant filed an Emergency Motion to Prevent Waste to avert the foreclosure of a house owned by both Defendant and Plaintiff in Raleigh ("Raleigh House"). Defendant asserted she could bring one of the two mortgages on the Raleigh House out of default, and thereby prevent its foreclosure, if Plaintiff transferred his ownership interest in the property to her.[1]

At the hearing, Defendant explained she had secured an "angel investor" who would provide financial aid for a mortgage on the Raleigh House, but only if Defendant held sole title to the property. Plaintiff eventually consented to Defendant's motion after the trial court explained that transferring title to Defendant

[1]In response, Plaintiff apparently filed a cross-motion to prevent marital waste regarding a boat, but did not include this motion in the record.

would not change the Raleigh House's status as a marital asset available for equitable distribution. At the hearing, Plaintiff also discussed preventing the repossession of a boat titled solely in the name of and possessed by Defendant. Neither of the parties were making the required loan payments on the boat, and both sought relief from the court to preserve the asset for equitable distribution.

The trial court ultimately issued an order requiring, *inter alia*: (1) Plaintiff to "transfer title of the [Raleigh House] into the [D]efendant's sole name so that the [D]efendant may complete the paperwork and make payments necessary to bring current the first mortgage . . . associated with the [Raleigh House]"; (2) Defendant to continue to make payments on both mortgages associated with the Raleigh House "until further Order [by the trial court] or written agreement of the parties"; (3) Plaintiff to bring the boat loan current and to continue to make the payments until ordered otherwise by the court or written agreement of the parties; and (4) "equal access" to the boat for each party, with Defendant having use and possession for two weeks each month, and Plaintiff having use and possession for the remaining time each month. Thereafter, Plaintiff filed this appeal challenging the trial court's interlocutory order.

Analysis

I. Interlocutory Appeal

As an initial matter, we note the present appeal is interlocutory because the equitable distribution phase of the trial has not yet occurred. *Veazey v. City of*

Durham, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted) (explaining an interlocutory appeal "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").

"Generally, there is no right of immediate appeal from an interlocutory order." *Hanna v. Wright*, ___ N.C. App. ___, ___, 800 S.E.2d 475, 476 (2017) (citation omitted). To obtain appellate review, "the trial court's order must: (1) certify the case for appeal pursuant to N.C. R. Civ. P. 54(b); or (2) have deprived the appellant of a substantial right that will be lost absent review before final disposition of the case." *Bessemer City Express, Inc. v. City of Kings Mountain*, 155 N.C. App. 637, 639, 573 S.E.2d 712, 714 (2002). Moreover, a right of appeal from non-final judgments is present in certain domestic situations under N.C.G.S. § 50-19.1. A right of appeal exists from an order or judgment adjudicating "a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment . . . but for the other pending claims in the same action." N.C.G.S. § 50-19.1.

In the instant case, the trial court did not certify its order for immediate appeal, and N.C.G.S. § 50-19.1 is inapplicable because the appeal challenges an interim distribution order. Therefore, Plaintiff must show the trial court's order will affect a substantial right. Plaintiff argues that (1) the transfer of his ownership interest in the Raleigh House to Defendant; and (2) the limited use of his boat with

requirements to bring the loan current and make future loan payments each affect substantial rights. For the following reasons, we find Plaintiff's arguments unpersuasive.

Initially, Plaintiff argues that one of our previous decisions stands for the proposition that "the deprivation of a significant property interest [is a] substantial right[.]" *Bessemer City Express,* 155 N.C. App. at 640, 573 S.E.2d at 714. However, Plaintiff has failed to show that the mere transfer of ownership in the Raleigh House to Defendant will affect a substantial right because the property will still be subject to equitable distribution. *See Stanley v. Stanley*, 118 N.C. App. 311, 314-15, 454 S.E.2d 701, 703-04 (1995) (stating one spouse's post-separation transfer of marital property to the other spouse does not affect equitable distribution of the property). Indeed, as noted by the trial court, both parties will in fact benefit from avoiding foreclosure of the Raleigh House, as it will enlarge the pool of assets to be equitably distributed and also reduce a large amount of debt jointly owed. Moreover, at the hearing before the trial court, Plaintiff agreed to the transfer of ownership in the Raleigh House pending equitable distribution.

Next, Plaintiff has not shown that bringing the boat loan current and making payments on the loan, in exchange for also having limited use of the boat, creates an irreparable injury to a substantial right. Plaintiff has not presented or demonstrated "more than a bare assertion that [this portion of] the order affects a substantial right."

Filipowski v. Oliver, 219 N.C. App. 398, 399, 723 S.E.2d 789, 790 (2012) (citation omitted). Moreover, both parties benefit from avoiding repossession of the boat, as it remains available for equitable distribution. Plaintiff's situation of bearing full responsibility for the loan with only limited access to the boat is an issue to be addressed at the equitable distribution phase of the trial, but is not the deprivation of a substantial right entitling him to immediate review.

None of the remaining issues raised by Plaintiff "deprive[ ] [him] of a substantial right that will be lost absent review before final disposition of the case."[2] *Bessemer City Express*, 155 N.C. App. at 639, 573 S.E.2d at 714. We do not have jurisdiction to hear this appeal and we do not reach these additional issues. Accordingly, Plaintiff may raise these issues on appeal after the final disposition of his case. *See Hunter v. Hunter,* 126 N.C. App. 705, 708, 486 S.E.2d 244, 246 (1997)

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[2] These issues include the following:

> Whether [Defendant-]Appellee failed to present competent evidence to support her Motion for Temporary Restraining Order and Preliminary Injunction to Preserve Marital Property and Prevent Marital Waste and Emergency Motion to Prevent Waste Pursuant to N.C.G.S. § 50-20(i) (2017), and 1A-1, Rule 65?
>
> Whether the District Court erred in relying on the admitted, false representation of [Defendant-]Appellee and her counsel?
>
> Whether the District Court erred in denying [Plaintiff-]Appellant the opportunity to present his own evidence and to cross-examine [Defendant-]Appellee?
>
> Whether the District Court erred in failing to make findings of fact?

(ruling an interim order does not affect a substantial right, and the appealing party's "rights will be adequately protected by an appeal timely taken from the final equitable distribution judgment"). Consequently, the entirety of Plaintiff's appeal is subject to dismissal as interlocutory.

II. North Carolina Rules of Appellate Procedure Violations

Notwithstanding the merits of the appeal, Plaintiff committed numerous violations of the North Carolina Rules of Appellate Procedure ("Rules").

"[W]hen a party fails to comply with one or more nonjurisdictional appellate rules, the court should first determine whether the noncompliance is substantial or gross under Rules 25 and 34." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 201, 657 S.E.2d 361, 367 (2008). If the court finds such a violation then it may dismiss the appeal under Rule 25(b) as a sanction for a substantial failure to follow the Rules. *See id.* at 201, 657 S.E.2d at 367.

To determine whether an appellant's violations of the Rules are substantial, "the court may consider, among other factors, whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process," as well as the number of Rules violated by an appellant. *Id.* at 200, 657 S.E.2d at 366-67 (citation omitted).

We have "repeatedly held that the failure to serve a proposed record on appeal in accordance with Rule 11 is a substantial violation of the rules requiring dismissal

of the appeal." *Day v. Day*, 180 N.C. App. 685, 688, 637 S.E.2d 906, 908 (2006); *compare Woods v. Shelton*, 93 N.C. App. 649, 652-53, 379 S.E.2d 45, 46-47 (1989) (failing to serve a proposed record to other parties until 139 days after filing a notice of appeal warranted dismissal); *with Harvey v. Stokes*, 137 N.C. App. 119, 123-124, 527 S.E.2d 336, 339-340 (2000) (noting a court reporter's failure to deliver a transcript did not warrant dismissal).

The Rules set forth requirements for an appellant to serve the proposed record to an appellee. "If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal . . . ." N.C. R. App. P. 11(b) (2017). The time frame for such service must be "[w]ithin thirty-five days after the court reporter or transcriptionist certifies delivery of the transcript, if such was ordered . . . or thirty-five days after appellant files notice of appeal, whichever is later." N.C. R. App. P. 11(a) (2017).

Here, Plaintiff failed to settle the record within the time frame established by Rule 11(b). The record does not reflect a date on which the transcript was certified for delivery. Therefore we can examine only the notice of appeal date to determine whether Plaintiff violated Rule 11(b). Plaintiff filed the notice of appeal on 10 October 2016, and the proposed record on appeal on 17 January 2017. Plaintiff waited one

hundred days to serve the proposed record on appeal in violation of Rule 11(b), which requires service within thirty-five days.

Furthermore, Plaintiff did not include his cross-motion for interim distribution to prevent waste in the record, which is a failure to include documents filed in the lower court. N.C. R. App. P. 9(a)(1)(j) (2017). Plaintiff did not include a complete index of the contents of the record, which is required by Rule 9. N.C. R. App. P. 9(a)(1)(a).

"[F]ailure of the parties to comply with the [Rules of Appellate Procedure], and failure of the appellate courts to demand compliance therewith, may impede the administration of justice." *Dogwood*, 362 N.C. at 193, 657 S.E.2d at 362. All appellants, whether pro se or represented, must comply with the Rules or face the prospect of dismissal with prejudice. In the exercise of our discretion and in light of his appeal being otherwise subject to dismissal without prejudice, in lieu of a dismissal of his appeal with prejudice we caution Plaintiff that his disregard of the Rules and our leniency will be considered in the event of any Rules violations in any subsequent appeal(s) in this matter.

Conclusion

For the reasons stated above, Plaintiff has not shown the transfer of his ownership interest in the Raleigh House to Defendant or the limited use of his boat with additional loan responsibilities would deprive him "of a substantial right that

will be lost absent review before final disposition of the case." *Bessemer City Express,* 155 N.C. App. at 639, 573 S.E. 2d at 714. Therefore we dismiss the interlocutory appeal.

DISMISSED.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).