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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-824

Filed: 15 May 2018

Pitt County, No. 13-CvS-2887

DAVID C. SUTTON & ERIKA SUTTON, Plaintiff,

v.

ESTATE of NORMAN H. SHACKLEY, JR., Defendant.

Appeal by Plaintiff Erika Sutton from judgment entered 10 February 2017 by Judge Walter Godwin, orders and judgments entered 15 February 2016 and 16 February 2016 by Judge W. Russell Duke, Jr., order entered 3 June 2015 by Judge Quentin T. Sumner, and order entered 4 September 2014 by Judge George B. Collins, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 8 February 2018.

James K. Antinore for the Plaintiff-Appellant.

Jeffrey L. Miller for the Defendant-Appellee.

DILLON, Judge.

Erika Sutton appeals from the trial court's orders and judgments adding her as a party plaintiff, finding her in default, and ultimately granting the Estate of

Norman H. Shackley, Jr.'s, motion for summary judgment. We affirm the trial court's orders and judgments.

I. Background

In December 2013, David Sutton, a licensed attorney, filed a complaint against Norman Shackley, Jr., alleging that Mr. Shackley damaged three vehicles owned by Mr. Sutton. Mr. Sutton's wife, appellant Ms. Sutton, was not a party to the complaint.

In his responsive pleading, Mr. Shackley asserted multiple counterclaims, seeking relief against both Mr. Sutton and Ms. Sutton, and sought to add Ms. Sutton as a party.

In February 2014, Mr. Shackley died and the trial court substituted his estate as the defendant in this action. (The estate is hereinafter referred to as "Defendant.")

In September 2014, the trial court filed an order (the "September 2014 Order") adding Ms. Sutton as a party and giving her "thirty days following the entry of [the] Order within which to file a Reply or responsive pleading to the defendant's applicable counterclaims against her." This September 2014 Order was served on Mr. Sutton, as Ms. Sutton's attorney, by mail at his business address.

Ms. Sutton never answered Defendant's counterclaims, so in January 2015, in response to a motion filed by the Estate, the clerk of court entered default against Ms. Sutton.

In June 2015, the trial court entered orders denying Ms. Sutton's motion to set aside the entry of default and granted Defendant's motion for sanctions against Ms. Sutton for failure to respond to certain discovery (hereinafter the "June 2015 Orders").[1]

In February 2016, the trial court entered two more orders relevant to this appeal. On 15 February 2016 the trial court entered an order (the "February 2016 Order") finding Ms. Sutton to be in civil contempt until such time as she complied with the terms of the June 2015 Orders. The following day, on 16 February 2016, the trial court entered an order sanctioning Ms. Sutton and granting default judgment against her on the issue of liability as to Defendant's counterclaims (the "Default Judgment").

In February 2017, on Defendant's motion, the trial court entered summary judgment against Ms. Sutton as to Defendant's counterclaims against her (the "February 2017 Judgment").

II. Analysis

Ms. Sutton now seeks to appeal from the September 2014 Order adding her as a party in the underlying action, the June 2015 Orders denying Ms. Sutton's motions to set aside default and imposing sanctions, the February 2016 Order holding her in

[1] Ms. Sutton attempted twice to appeal the September 2014 Order and the June 2015 Orders, once with an unperfected appeal and once by petition for a writ of *certiorari*, but this Court dismissed or denied each appeal. Ms. Sutton did not seek further appellate review.

civil contempt, the Default Judgment, and the February 2017 Judgment in favor of Defendant's counterclaims. We address each of these appeals and their respective issues in turn below.

A. Personal Jurisdiction

Much of Ms. Sutton's argument is based on her contention that all of the orders and judgments against her are void because the trial court never obtained personal jurisdiction.[2]

On 24 April 2014, with Ms. Sutton in the courtroom, the trial court considered Defendant's motion to add Ms. Sutton as a party. After the hearing, on 4 September 2014, the trial court entered an order which added her as a party and which ordered her to reply to Defendant's counterclaim within thirty (30) days. Ms. Sutton, therefore, was not a party to this action until the trial court entered its order. The trial court was certainly within its authority to add Ms. Sutton as a party, but it had no authority to compel her to do anything in that order *until it obtained personal jurisdiction over her*. *See Ottway Burton, P.A. v. Blanton*, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382 (1992) ("A judgment is void only when the issuing court has no jurisdiction over the parties . . . in question or has no authority to render the judgment entered.").

[2] Some of Ms. Sutton's arguments in her brief refer to the trial court's lack of "subject-matter" jurisdiction; however, she does not present any arguments regarding the trial court's "subject-matter" jurisdiction over the substance of her case. Rather, all of her jurisdictional arguments concern her contention that the trial court never obtained "personal" jurisdiction.

However, on 15 September 2014, after Ms. Sutton had been made a party to the action, her husband (a licensed attorney) filed a motion, both for himself and on behalf of Ms. Sutton, for the trial court to reconsider its Order adding Ms. Sutton as a party. Mr. Sutton did *not* challenge personal jurisdiction in the motion. We conclude, for the reasons stated below, that the trial court obtained personal jurisdiction over Ms. Sutton at this time.

Our Supreme Court has held that where a party has not been served with a summons and complaint, the trial court still obtains personal jurisdiction over that party "if [s]he or [her] attorney has consented to the jurisdiction of the court by voluntarily appearing in the case." *Grimsley v. Nelson*, 342 N.C. 542, 546, 467 S.E.2d 92, 94 (1996). And "[w]here counsel signs a pleading on behalf of a party, the law imposes *a presumption* that the attorney held the authority to act for the client he or she professed to represent." *Id.* at 546, 467 S.E.2d at 95 (emphasis added).

Here, the trial court entered an order finding that Mr. Sutton appeared on Ms. Sutton's behalf in filing the motion to reconsider the September 2014 Order. Ms. Sutton appealed that order to this Court, but she failed to perfect her appeal and her appeal was dismissed. We conclude that the trial court did not commit reversible error in determining that Ms. Sutton had failed to overcome the presumption that her husband made a general appearance in this matter on her behalf in late 2014.

Further, on 1 October 2014, after Ms. Sutton made a general appearance through her husband, Defendant served a motion on her husband/attorney seeking an order that the facts alleged in its counterclaims against her be established. But Ms. Sutton failed to reply to the counterclaims within thirty days of the time she made her appearance on 15 September 2014, and within thirty days of when her attorney was served with the motion regarding the counterclaims against her. In fact, Ms. Sutton has never replied to Defendant's counterclaims. Therefore, we conclude that it was appropriate for the clerk to enter default against her on 5 December 2014.

We also conclude that, because it had personal jurisdiction over Ms. Sutton as of 15 September 2014, the trial court had personal jurisdiction to enter default judgment, summary judgment, and all of the other orders–including orders imposing discovery sanctions–that she is challenging on appeal.[3]

We note Ms. Sutton's argument that it is unclear which of the counterclaims pertain to her. However, we have carefully reviewed Defendant's counterclaims and conclude that they put Ms. Sutton on notice that Defendant is seeking relief from her

[3] Though the September 2014 Order was entered prior to the trial court's acquisition of personal jurisdiction, we note that the motion filed by Mr. Sutton and Ms. Sutton to reconsider the September 2014 Order was denied by the trial court when the trial court *did* have personal jurisdiction over Ms. Sutton. We further note that the trial court acted appropriately in denying Ms. Sutton's motion to reconsider as she failed to make any arguments in her motion concerning the trial court's lack of personal jurisdiction to enter the September 2014 Order. Any defense based on personal jurisdiction is waived when one fails to raise it. *See Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 154, 203 S.E.2d 769, 775-76 (1974).

only for the Second Counterclaim for Conversion and the Third Counterclaim for Constructive Fraud/Constructive Trust. The First Counterclaim for Breach of Contract is clearly against Mr. Sutton only.

B. Denial of Motion to Recuse

Ms. Sutton challenges the February 2016 Order entered by Judge Duke denying her motion that Judge Duke recuse himself.

We review a trial judge's denial of a motion to recuse for abuse of discretion. *SPX Corp. v. Liberty Mut. Ins. Co.*, 210 N.C. App. 562, 576, 709 S.E.2d 441, 450 (2011). "On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned[.]" Code of Judicial Conduct, Canon 3(C)(1), 2012 Ann. R. N.C. 542. The party seeking disqualification must allege facts sufficient to suggest that a reasonable person would doubt the judge's ability to render an impartial, unbiased ruling. *Lange v. Lange*, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003). We review *de novo* whether the party requesting recusal has shown "through substantial evidence that the judge has such a personal bias, prejudice or interest that he would be unable to rule impartially." *In re Faircloth*, 153 N.C. App. 565, 570, 571 S.E.2d 65, 69 (2002).

Ms. Sutton's motion for recusal requested that Judge Duke be disqualified because he had some degree of animosity toward Mr. Sutton, and Ms. Sutton made a number of allegations concerning this animosity. However, even assuming the

allegations were such that would show that Judge Duke could not be unbiased, we conclude that Judge Duke did not commit reversible error by refusing Ms. Sutton's motion for recusal. Indeed, Ms. Sutton allowed Judge Duke to render a ruling on her motion to dismiss earlier proceedings in this matter in October 2015, and only filed for his recusal before further proceedings in February 2016. We have previously stated that "[o]ne must raise a motion to recuse at the earliest moment after acquiring knowledge of the facts which give rise to the motion to recuse." *State v. Pakulski*, 106 N.C. App. 444, 450, 417 S.E.2d 515, 519 (1992).

In *Pakulski*, the defendant moved for recusal of the presiding judge after an order in May 1989, arguing that the judge had made a statement suggesting bias. *Id.* However, the judge made the statement, and the defendant was aware of the statement, before a hearing in the case in March of 1988. *Id.* This Court held that the defendant was dilatory in seeking recusal, and this delay constituted a waiver of his right to assign error. *Id.* Here, Ms. Sutton has pointed to no change in circumstances after October 2015 to justify her delayed recusal motion. Based on our reasoning in *Pakulski*, we conclude that Ms. Sutton has waived her right to seek recusal, and the presiding judge properly denied Ms. Sutton's motion.

C. Sanctions Orders

Ms. Sutton also challenges the terms of the February 2016 Order and the Default Judgment. The terms at issue stem from Ms. Sutton's repeated failure to

comply with discovery orders in this case, and the judge's decision to grant sanctions under Rule 37 of the North Carolina Rules of Civil Procedure. "The choice of sanctions under Rule 37 lies within the court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion." *Honeycutt Contractors, Inc., v. Otto*, 209 N.C. App. 180, 184, 703 S.E.2d 857, 860 (2011).

Namely, Ms. Sutton argues that the sanctions imposed in the Default Judgment violated her Due Process rights. We disagree. The Default Judgment ordered various sanctions against Ms. Sutton as punishment for her failure to comply with trial procedures and discovery, including entering default judgment "as to each claim and cause of action;" establishing her liability to Defendant in damages; and denying her ability "to introduce any evidence, assert any defense, or otherwise contest any matter at any further hearing or trial in this matter for the establishment of damages against her."

Ms. Sutton is correct in her assertion that a default judgment constitutes only an admission of the allegations in a complaint, and not an absolute admission of the defendant's right to recover, *see Brown v. Cavit Scis., Inc.*, 230 N.C. App. 460, 467, 749 S.E.2d 904, 909 (2013); and that, ordinarily, it is not proper for a court to deny a party the opportunity to present evidence as to punitive damages. *Hunter v. Spaulding*, 97 N.C. App. 372, 380, 388 S.E.2d 630, 635-36 (1990). However, this Court has held that Rule 37 of the North Carolina Rules of Civil Procedure authorizes

a court to sanction a party by prohibiting the party from submitting evidence on damages. *GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 239-40, 752 S.E.2d 634, 652-53 (2013). Specifically, Rule 37 provides, in pertinent part:

> (b)(2) Sanctions by Court in Which Action Is Pending. - If a party . . . fails to obey an order to provide or permit discovery . . . a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
> . . .
> b. *An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence*[.]

N.C. R. Civ. P. 37(b)(2)(b) (emphasis added). When a party repeatedly fails to comply with discovery, even after mandated to do so by court order, a sanction denying the presentation of evidence is proper. *Jennings v. Jessen*, 103 N.C. App. 739, 742, 407 S.E.2d 264, 266 (1991); *Conrad*, 231 N.C. App. at 239-40, 752 S.E.2d at 652-53.

Lastly, Ms. Sutton contends that the trial court committed reversible error by imposing sanctions after it had already entered default. Specifically, she claims that, subsequent to the entry of default, she was no longer a "party" to the lawsuit, and that sanctions may only be imposed upon parties. We find this argument without merit, as an entry of default is an interlocutory act; a party in default remains a party until a final judgment is entered. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950); *Ruiz v. Mecklenburg Utilities, Inc.*, 189 N.C. App. 123, 125, 657 S.E.2d 432, 434 (2008).

Therefore, we affirm each of the June 2015 Orders and Default Judgment.

D. Summary Judgment

When deciding to grant Defendant's motion for summary judgment against Ms. Sutton, the trial court ruled that it was bound by prior orders of the trial court and did not allow Ms. Sutton's counsel to present evidence as to damages, or to be heard at all. She contends that the trial court abused its discretion and therefore committed reversible error under a misapprehension of law. We disagree. Rather, the trial court correctly concluded that it was bound by the sanctions previously entered by Judge Duke forbidding Ms. Sutton from defending on the damages issue:

> The well[-]established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.

Calloway v. Ford Motor Co., 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972).

Ms. Sutton also argues that the trial court erred in granting Defendant's summary judgment because it made a ruling after another necessary party, her husband, had been dismissed. The Summary Judgment against her alone was decided after Defendant voluntarily dismissed Mr. Sutton from the case.

It is true that a default judgment may not be entered against a single, jointly liable party. *Harlow v. Voyager Commc'ns V*, 348 N.C. 568, 570-71, 501 S.E.2d 72, 73-74 (1998). The trial court may enter default, but it must wait until an outcome of

litigation against all jointly liable defendants before entering a final judgment. *Id.* However, where defendants are jointly and severally liable, the trial court may enter final judgment against a defaulting defendant without waiting for an outcome as to all defendants, because one defendant's liability "is not necessarily dependent upon the liability of any other defendant." *Id.* at 572, 501 S.E.2d at 74. Defendant's counterclaims asserted joint and several liability against Mr. Sutton and Ms. Sutton. Therefore, we disagree with Ms. Sutton's contention that judgment against her alone was improper.

AFFIRMED.

Judges STROUD and INMAN concur.

Report per Rule 30(e).