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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1166

Filed: 2 July 2019

New Hanover County, No. 13 CVD 1585

JASMINE B. COOPER, Plaintiff,

v.

FAISAL S. ISMAIL, Defendant.

Appeal by Defendant from order entered 16 April 2018 by Judge J.H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 10 April 2019.

L. Bryan Smith for plaintiff-appellee.

Mark L. Hayes for defendant-appellant.

PER CURIAM.

In an order entered 16 April 2018, the trial court denied Ismail's motion under Rules 60(b)(4) and (6) of the North Carolina Rules of Civil Procedure to vacate a previously entered custody order and assessed Rule 11 sanctions against Ismail. In its order, the trial court concluded: "[Ismail] has previously filed a motion seeking the identical relief sought in the Motion to Vacate (Rule 60(b)), which is presently before

this [c]ourt. The previously filed motion was denied by this [c]ourt [on 17 February 2016].”¹ Ismail appeals the 16 April 2018 order and petitions this Court to issue a writ of certiorari to review the 17 February 2016 order.

In both his appeal and petition for writ of certiorari, Ismail asserts the trial court was without jurisdiction to enter the custody order due to an alleged contractual right to arbitration under a “marriage certificate” that the trial court was required to enforce. As an initial matter, the right to enforce a contractual arbitration agreement is an affirmative defense and not a jurisdictional issue; thus, it is a right that may be waived. *See Servomation Corp. v. Hickory Const. Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986). Therefore, Ismail’s Rule 60(b)(4) argument that the custody order is void fails as a matter of law.

Ismail’s argument under Rule 60(b)(6) that “extraordinary circumstances” exist that justify relief from the custody order also fails. We note at the outset that our Supreme Court has held: “[W]e do agree that binding arbitration is not available in this State *by court order* in a civil action for alimony, custody and child support. We hold that while in the absence of court proceedings, parties may settle their disputes by arbitration, once the issues are brought into court, the court may not delegate its duty to resolve those issues to arbitration.” *Crutchley v. Crutchley*, 306 N.C. 518, 522, 293 S.E.2d 793, 796 (1982).

¹ The previously filed motion was entitled “Notice of Preliminary Injunctive Relief, Emergency Hearing, Notice of Trial De Novo, Lack of Jurisdiction and Standing.”

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Even assuming *arguendo* this principle is not applicable here, in the record on appeal before us, there are no pleadings or motions that indicate that Ismail sought to enforce his alleged contractual right to compelled arbitration or raised the issue before the trial court prior to entry of the custody order. Without such necessary documents, we are unable to discern whether Ismail preserved any argument at all related to arbitration. This absence renders us unable to determine if Ismail's arguments regarding the alleged contractual right to arbitration were raised before the trial court entered judgment or whether these arguments were waived by his failure to raise this alleged contractual right. He has thus waived his statutory right to appellate review of this issue. Accordingly, we dismiss Ismail's remaining appeal from the 16 April 2018 order and deny his Petition for Writ of Certiorari for review of the 17 February 2016 order.

AFFIRMED IN PART; DISMISSED IN PART.

Panel consisting of Judges DILLON, MURPHY, and HAMPSON.

Report per Rule 30(e).