

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA19-961

Filed: 18 August 2020

Beaufort County, No. 17 CVD 609

ZSUZSANNA HARRINGTON, Plaintiff,

v.

STEPHEN M. HARRINGTON a/k/a STEVEN M. HARRINGTON, EAST CAROLINA MASONRY, INC., HARRINGTON MANAGEMENT CONSULTANTS INC. AND HPR, LLC, Defendants.

Appeal by defendants from order entered 5 March 2019 by Judge Christopher McLendon in Beaufort County District Court. Heard in the Court of Appeals 12 May 2020.

Hiner Law, PLLC, by Frank P. Hiner, IV and Brett A. Lewis, for plaintiff-appellee.

Mills & Alcorn, L.L.P., by Cynthia A. Mills, for defendant-appellant.

BRYANT, Judge.

Defendant Stephen M. Harrington appeals from an order entered 5 March 2019, awarding alimony and attorney's fees to plaintiff Zsuzsanna Harrington and ordering equitable distribution and judicial conveyance of marital estate to plaintiff. For the following reasons, we dismiss this appeal and remand this matter to the trial court.

On 10 August 2017, plaintiff commenced an action against defendant for post-separation support, alimony, attorney’s fees, and equitable distribution—requesting the court to enter a temporary and permanent restraining order. A civil summons was issued that same day, but it was eventually returned unserved. On 5 September 2017, two additional civil summons were issued at different addresses—both were also returned unserved as defendant was unable to be located. On 13 November 2017, plaintiff filed an affidavit for publication, which asserted notice of service of process was published for three consecutive weeks—27 October, 3 November, and 10 November 2017. Subsequently, plaintiff filed an affidavit of service on 16 November 2017. Defendant filed no responsive pleadings. On 12 January 2018, plaintiff moved for entry of default, and the trial court entered the entry of default later that day.

On 9 July 2018, the Honorable Christopher McLendon, presiding Judge in Beaufort County District Court, conducted a hearing on plaintiff’s claim for post-separation support. Following the hearing, the trial court entered an order awarding post-separation support and attorney’s fees to plaintiff. On 10 August 2018, plaintiff filed a motion to join defendants East Carolina Masonry, Inc., Harrington Management Consultants, Inc., and HPR, LLC, as necessary parties to this action. The Secretary of State served each corporate defendant.¹ On 5 March 2019, the trial court entered an order for alimony, equitable distribution, judicial conveyance, and

¹ We note that the legal entities made party to this action as defendants were not involved in this appeal. For these reasons, we refer to Stephen Harrington as “defendant” throughout.

attorney's fees. Defendant made his first appearance in the case by filing notice of appeal on 3 April 2019.

On 17 May 2019, defendant filed motions under Rule 12(b)(2), (4), and (6) and under Rule 60(b)(4) and (6) to set aside the March 5 order. A hearing was held, and the trial court entered an advisory opinion/order on 3 October 2019 denying defendant's motions.

“As a general rule, once a party gives notice of appeal, such appeal divests the trial court of its jurisdiction, and the trial judge becomes *functus officio*.” *RPR & Assocs., Inc. v. Univ. of N. Carolina-Chapel Hill*, 153 N.C. App. 342, 346, 570 S.E.2d 510, 513 (2002). “[W]hen [the trial] court *is functus officio*, it has completed its duties pending the decision of the appellate court.” *Id.* at 347, 570 S.E.2d at 513. In theory, the application of the general rule is based on the belief “that two courts cannot ordinarily have jurisdiction of the same case at the same time.” *Id.* (citing *Wiggins v. Bunch*, 280 N.C. 106, 110, 184 S.E.2d 879, 881 (1971)). Nevertheless, this Court recognizes that the trial court is better suited to address the issues presented in a Rule 60(b) motion. *Hall v. Cohen*, 177 N.C. App. 456, 458, 628 S.E.2d 469, 471 (2006).

Upon notification of a Rule 60(b) motion filed with the trial court, this Court has remanded the matter back to the trial court to hold an evidentiary hearing and issue a ruling. *Id.*

Opinion of the Court

This practice allows the appellate court to delay consideration of the appeal until the trial court has considered the [Rule] 60(b) motion. . . . Arguments pertaining to the grant or denial of the motion along with other assignments of error could then be considered by the appellate court simultaneously.

Id. (alterations in original) (internal citation and quotation marks omitted).

Here, defendant filed made his Rule 60(b) motion to set aside the March 5 order for improper service and for lack of jurisdiction after his notice of appeal had been filed appealing the same order. The trial court, in acknowledgment that defendant had a pending appeal with this Court, issued an advisory opinion “to assist the appellate court on appeal.” Therein, the court addressed defendant’s arguments finding that jurisdiction was proper and that service on defendant was proper under Rule 4 of the North Carolina Rules of Civil Procedure. However, we consider the binding effect of the trial court’s findings of fact and defendant’s ability, as the appellant, to assign error or present “[a]rguments pertaining to the grant or denial of the [Rule 60] motion” on appeal. *Id.* Consistent with our general principles for appellate review, we believe that while this Court may review the rulings on these motions, such procedures should be disfavored and reserved for a proper trial court ruling. Therefore, we dismiss the instant appeal and remand this matter to the trial court for entry of a final order on defendant’s Rule 60(b) motion.

DISMISSED AND REMANDED.

Judges BERGER and MURPHY concur.

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Report per Rule 30(e).