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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-139

No. COA21-246

Filed 1 March 2022

Person County, No. 15 CVD 393

DEBRA CARSWELL HICKS, Plaintiff,

v.

CHARLES DOUGLAS HICKS, Defendant.

Appeal by Defendant from Order entered 31 August 2020 by Judge Caroline Slater Burnette in Person County District Court. Heard in the Court of Appeals 15 December 2021.

King Law Group, PLLC, by Ronnie P. King, for Defendant-Appellant.

Hedrick, Gardner, Kincheloe, & Garofalo, LLP, by Patricia P. Shields, for Plaintiff-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Charles Douglas Hicks (Defendant) appeals from an Order entered 31 August 2020 in favor of Debra Carswell Hicks (Plaintiff) modifying a 2018 Consent Order which resolved the parties' claims for Equitable Distribution and Alimony. The Record tends to reflect the following:

¶ 2 On 29 June 2015, Plaintiff filed a Complaint against Defendant alleging causes of action for Divorce from Bed and Board, Post-Separation Support and Alimony, Equitable Distribution, and seeking a Temporary Restraining Order to preserve marital assets. On 10 August 2015, Defendant filed his Answer and concurrent counterclaims mirroring—in general substance—Plaintiff's claims.

¶ 3 On 18 September 2018, the parties took part in a mediated settlement conference. At this conference, the parties reached a settlement of their Equitable Distribution and Alimony claims. The terms of the settlement were memorialized in a Consent Order subsequently entered 25 September 2018. The Consent Order contained twelve numbered paragraphs setting forth the terms and included several handwritten insertions within the paragraphs which were initialed by both parties along with attached handwritten exhibits listing individual pieces of property. Relevant to this appeal, the Consent Order contained the following provisions:

> 1. Marital Residence: The Defendant shall have all right, title, and interest in and to that certain tract of land located at [address] consisting of a house and an approximate one acre lot. This property is subject to a Deed of Trust in favor of Roxboro Savings Bank with an approximate payoff of $38,000.00. Defendant shall, within 90 days of the signing of this Consent Order, re-finance the property so as to remove Plaintiff from any liability for this debt. Plaintiff shall sign a Special Warranty Deed transferring her interest in this property at the time of the re-finance.
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> . . . .

> 3. Business Property: The Defendant shall [have] all right, title, and interest in and to that certain tract of land located at [address] and consisting of a building an approximately .26 acres of land. This property is subject to the same Deed of Trust in favor of SunTrust referenced in paragraph 2 above. Defendant shall, within 90 days of the signing of this Consent Order, refinance the property so as to remove Plaintiff from any liability for this debt. Plaintiff shall sign a Special Warranty Deed Transferring her interest in this property at the time of the refinance.
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> . . . .
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> 10. Plaintiff shall pay a distributive award to Defendant in the amount of $87,500.00 on or before January 1, 2019.

Plaintiff and Defendant signed the Consent Order and Plaintiff's attorney, Julie Ramsey (Ramsey), notarized the parties' signatures.

¶ 4 Following entry of the Consent Order, Defendant made unsuccessful attempts to refinance the loans as required by Paragraphs 1 and 3 of the Consent Order. On 4 November 2019, Defendant's attorney withdrew from representation. Defendant obtained new counsel around April 2020, and Ramsey contacted Defendant's new attorney on 7 April 2020 to discuss Defendant's failure to refinance the loans within ninety days as required by Paragraphs 1 and 3 of the Consent Order. During this discussion, Ramsey noticed the words "Plaintiff" and "Defendant" were interchanged in Paragraph 10 of the Consent Order—such that the Consent Order reflected that Plaintiff was to pay a distributive award to Defendant. Thereafter, on 15 April 2020, Plaintiff filed a "Motion for Relief from Order" (Rule 60 Motion) asserting grounds for

relief under Rule 60(a) and Rule 60(b)(6) of the North Carolina Rules of Civil Procedure. The Rule 60 Motion alleged Paragraph 10 of the Consent Order contained a clerical error and, "[a]t the time of the signing of the Consent Order, both parties, the attorneys for both parties, and the mediator understood and agreed that the distributive award would be paid by Defendant to Plaintiff to equalize the distribution of the marital property." Plaintiff requested the Consent Order be amended to correct the alleged error, or, alternatively, the Consent Order be set-aside entirely and a trial scheduled.

¶ 5 During a 26 April 2020 hearing before the trial court on Plaintiff's Rule 60 Motion, both Plaintiff and Ramsey testified about the intent of the parties regarding the Equitable Distribution settlement. Defendant offered no evidence at the hearing. Ramsey took the stand first and testified Paragraph 10 should have said, "Defendant shall pay to Plaintiff," because "[t]hat was the agreement that we came to in mediation." Ramsey then referenced her notes, over the objection of Defendant, to aid in her testimony regarding the agreement. Based on her notes, Ramsey testified:

> So, essentially, the marital assets were -- there was a business and a house. In the consent order, [Defendant] received the house and the business. And what my notes -- when I went back through these, the -- half of the purchase price of the business -- And we agreed, we did not have the business appraised. We agreed on the purchase price. Half of the purchase price was $63,500. That would have been [Plaintiff's] half. And subtract $17,00 that was still owed to Roxboro Savings, and that left us with $46,500 in equity. The house, half of the purchase price -- or

> half of the equity in the house was $41,000. So, when I added together the 45-5 and the 41,000, it came up to $87,500. Therefore [Defendant] was going to receive the total interest in the business and total interest in the house. And in exchange [Plaintiff] was going to receive $87,500.

After Ramsey testified as to the contents of the notes, the notes were entered into evidence as Plaintiff's Exhibit 1, again over Defendant's objection. Ramsey also testified she did not discover the clerical error in the Consent Order until more than one year after the Consent Order was signed because she initially overlooked the error, and she would have discovered it earlier had Defendant complied with the terms of the Consent Order. She explained the Consent Order required Defendant to refinance the loans within ninety days after signing it, and Plaintiff was not expecting the $87,500.00 payment until after Defendant refinanced the loans. She testified that had Defendant complied with the Consent Order, the entire matter would have been resolved earlier.

¶ 6 On cross-examination, Defendant's counsel asked: "It was very clear from the intent of the parties that neither party would pay the other alimony. Is that correct?" To which Ramsey responded:

> That is correct. That was part of the agreement, yes. It was also very, very clear between the parties that [Defendant] would pay [Plaintiff] $87.500. That was clear with [Defendant's counsel], myself, [Defendant], and [Plaintiff]. That was very clear.

Defendant's counsel then moved to strike that response as being unresponsive, and

the trial court overruled the objection. Plaintiff then testified the parties agreed Defendant would pay her the $87,500.00, and in between mediation and filing the Rule 60 Motion, Defendant attempted to obtain a loan to get the money to pay her sometime in 2018. Plaintiff knew about the loan attempt because the bank called her to sign something associated with the loan, which she declined to do until she spoke with her attorney.

¶ 7 Following the hearing, the trial court granted Plaintiff's Rule 60 Motion in an Order filed 31 August 2020. In its Order the court made the following Findings of Fact and Conclusions of Law:

> 3. During the mediation, it was agreed that in return for the [Plaintiff] conveying her interest in the marital house and the marital business to the [Defendant], the [Defendant] would pay unto [Plaintiff] the sum of Eighty Seven Thousand Five Hundred and 00/100 Dollars ($87,500.00) and would re-finance the debts on both the marital residence and the business.
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> 4. The Consent Order was supposed to state the [Defendant] would pay the [Plaintiff] the sum of Eighty Seven Thousand Five Hundred and 00/100 Dollars ($87,500.00) and the [Plaintiff] would convey unto the [Defendant] the marital house and the marital business upon refinance. The Consent Order stated the opposite and was clearly a clerical error.
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> . . . .
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> 6. The error was first brought to light when [Defendant's] attorney wrote [Ramsey a letter] dated April 3, 2020 tendering a deed on another piece of property related to the marital estate. [Ramsey] called [Defendant's counsel] to inquire about the payment of the $87,500.00 as well as compliance with other

> portions of the Order. This is the first time she realized the error in the Consent Order. [Ramsey] filed the Rule 60 motion on April 15, 2020.
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> . . . .
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> 8. [Plaintiff], by and through her attorney, had attempted to settle provisions of the Consent Order through [Defendant's] previous attorney, George Daniel, who withdrew from the matter in November, 2019.
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> 10. The Plaintiff discovered this scrivener's error in a reasonable amount of time after the entry of the Consent Order.
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> 11. The clear intent of the parties the [Plaintiff] was supposed to receive $87,500.00 as a distributive award from the [Defendant] as opposed to the [Defendant] receiving an $87,500.00 distributive award from the [Plaintiff]. The clear intent of the parties the [Defendant] was to make this distributive award by on or before January 1st, 2019.
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> 12. The mistake in Paragraph 10 was a clear scrivener's error and to allow this scrivener's error to remain the Order of this Court would be fundamentally unfair, would shock the conscience of the Court, and would be manifestly contrary to the clear understanding and intent of the agreement of the parties entered into. It is in the interest of justice and equity that this scriveners' error be fixed in this order.

Following the entry of the Order, Defendant filed written Notice of Appeal on 29 September 2020.

Issues

¶ 8 The dispositive issue on appeal is whether the trial court abused its discretion

by granting Plaintiff's Rule 60 Motion.[1]

Analysis

¶ 9 Defendant contends the trial court abused its discretion by granting Plaintiff's Rule 60 Motion claiming the amendment was: (A) an improper substantive modification to the Consent Order under Rule 60(a) and (B) the Rule 60 Motion was not made within a reasonable time of the entry of the Consent Order. We disagree.

A. Substantive Modification

¶ 10 Defendant first argues the trial court's Order modifying the Consent Order was an improper application of Rule 60(a) in that it went beyond the correction of a clerical error and substantively impacted the rights of the parties vis-a-vis the distributive award payment. Rule 60(a) permits the trial court to correct clerical mistakes in judgments at any time on its own initiative or on the motion of any party. N.C. Gen. Stat. § 1A-1, Rule 60(a) (2021). As Defendant aptly notes: "While Rule 60 allows the trial court to correct clerical mistakes in its order, it does not grant the trial court the authority to make substantive modifications to an entered judgment." *In re C.N.C.B.*,

[1] Defendant also contends the trial court erred by: (1) allowing Plaintiff's attorney to testify; (2) admitting Plaintiff's Exhibit #1 into evidence; and (3) overruling Defendant's Motion to Strike Testimony. However, Defendant fails to offer any substantive argument or analysis—including omitting any applicable standard of review and failing to cite a single case, statute, or rule in support of these contentions in accord with N.C. R. App. P. 28(b)(6) ("the body of the argument . . . shall contain citations of the authorities upon which the appellant relies."). Instead, Defendant merely offers conclusory statements and claims of error. Thus, we deem these arguments abandoned. *See K2Hn Constr. N.C., LLC, v. Five D Contractors, Inc.*, 267 N.C. App. 207, 213, 832 S.E.2d 559, 564 (2019).

197 N.C. App. 553, 556, 678 S.E.2d 240, 242 (2009) (citations omitted).

¶ 11 Presuming arguendo, however, Defendant is correct the trial court's amendment to the Consent Order constituted a substantive and not clerical amendment, Defendant's argument ignores the fact Plaintiff also sought amendment under Rule 60(b)(6). Indeed, the trial court's Order expressly states Plaintiff's "motion for relief pursuant to Rule 60(b)(6) is hereby [granted],"[2] which is consistent with the trial court's oral ruling.

¶ 12 Rule 60(b)(6) permits the court to relieve a party from a final judgment, order, or proceeding for "any other reason justifying relief from the operation of a judgment." N.C.R. Civ. P. 60(b)(6) (2019). Nevertheless, "[i]n order to be entitled to relief under Rule 60(b)(6) the movant must show that (1) extraordinary circumstances exist and that (2) justice demands such relief." *Goodwin v. Cashwell*, 102 N.C. App. 275, 278, 401 S.E.2d 840, 842 (1991).

¶ 13 "A motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). "As such, the trial judge's ruling may be reversed on appeal only upon a showing that the

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[2] The Order also erroneously states: "The Court has the right to modify this order pursuant to N.C.G.S. 1A-A, Rule 60 (a)(6) . . . ." The inclusion of (a) instead of (b) itself appears to be an evident clerical error as there is no such Rule 60(a)(6) and the trial court subsequently states it grants the Rule 60 Motion pursuant to Rule 60(b)(6).

decision results in a substantial miscarriage of justice." *Piedmont Rebar, Inc. v. Sun Constr., Inc.*, 150 N.C. App. 573, 575, 564 S.E.2d 281, 283 (2002).

¶ 14 Thus, we review the trial court's Order for abuse of discretion.

¶ 15 In family law cases, "[a] consent judgment is not only a judgment of the court but is also a contract between the parties and 'it cannot be amended without showing fraud or mutual mistake . . . which showing may be by motion in the cause.' " *Buckingham v. Buckingham*, 134 N.C. App. 82, 88, 516 S.E.2d 869, 874 (1999) (citation omitted). "When parties seek to attack a consent judgment on the basis of mutual mistake by way of a motion in the cause, Rule 60(b)(6) controls." *In re Baity*, 65 N.C. App. 364, 367, 309 S.E.2d 515, 517 (1983). A mutual mistake exists "where the mistake is common to both parties and because of it each has done what neither intended." *Stevenson v. Stevenson*, 100 N.C. App. 750, 752, 398 S.E.2d 334, 336 (1990).

¶ 16 Here, the trial court found the parties originally agreed Defendant would pay Plaintiff $87,500.00 as a distributive award in return for Plaintiff conveying her interest in the marital house and marital business to Defendant; the Consent Order was supposed to state Defendant would pay Plaintiff the money; and the clear intent of the parties was for Plaintiff to receive $87,500.00 as a distributive award from Defendant. The uncontroverted evidence presented at the hearing supports these Findings. At the hearing, both Plaintiff and Ramsey testified the parties intended

for Defendant to pay Plaintiff the money to compensate Plaintiff for her share of the marital house and marital business—assets Defendant received in the equitable distribution action. Defendant did not offer any testimony or evidence to refute or contradict this testimony. Furthermore, Plaintiff testified Defendant attempted to take out a loan to get the funds to pay her, indicating Defendant also understood the terms of the agreement to include payment to Plaintiff. Thus, the evidence supports the Conclusion that Paragraph 10 of the Order was the product of mutual mistake and modifying the Consent Order to reflect the intent and agreement of the parties is in the interests of justice and equity. Therefore, the trial court did not abuse its discretion in modifying the Consent Order on the basis of mutual mistake.

B. Reasonable Time

¶ 17 Although mutual mistake may form the basis of a Rule 60(b)(6) motion, in order for the trial court to grant relief the "motion shall be made within a reasonable time." N.C. Gen. Stat. § 1A-1, R. 60(b) (2019). "What constitutes a 'reasonable time' depends upon the circumstances of the individual case." *Nickels v. Nickels*, 51 N.C. App. 690, 692, 277 S.E.2d 577, 578 (1981) (citations omitted). *See e.g.*, *N.C. DOT v. Laxmi Hotels of Spring Lake, Inc.*, 259 N.C. App. 610, 622, 817 S.E.2d 62, 71 (2018) (citation omitted) (motion for relief filed after a year and a half delay not so inherently unreasonable as to constitute an abuse of discretion given the complexities of the case); *Sloan v. Sloan*, 151 N.C. App. 399, 405, 566 S.E.2d 97, 101 (2002) (plaintiff's

motion for relief filed over a year after a consent order awarding equitable distribution timely, when filed within a month of learning that defendant continued to use the equity line on the marital home in violation of the order); *but cf. Brown v. Windhom,* 104 N.C. App. 219, 408 S.E.2d 536 (1991) (motion filed after one year unreasonable when defendant's only reason for delay was uncertainty on the part of defendant as to his legal rights.).

¶ 18 Here, the trial court concluded Plaintiff discovered the error within a reasonable time after the entry of the Consent Order on 25 September 2018, and based upon all the facts and circumstances presented, timely filed the Rule 60 Motion. This Conclusion is supported by the Finding the error was first brought to light when Defendant's new attorney wrote Plaintiff a letter dated 3 April 2020, and Ramsey called to inquire about the payment. Prior to this time, Plaintiff, by and through her attorney, attempted to settle the provisions of the Consent Order through Defendant's previous attorney, who withdrew from the matter in November 2019. Furthermore, prior to April 2020, no one asserted the obligation to pay the award fell on Plaintiff, and Defendant made attempts to pay the money by taking out a loan to cover the amount. After Plaintiff discovered the error on 7 April 2020, she filed the Rule 60 Motion on 15 April 2020, a mere eight days after the discovery of the error. Thus, the trial court's Findings of Fact—supported by the evidence—support its Conclusion the delay in filing the Rule 60 Motion was reasonable under the

circumstances. Therefore, the trial court's Conclusion, in turn, supports its decision to allow amendment of the Consent Order. Consequently, the trial court did not abuse its discretion in granting Plaintiff's Rule 60 Motion under Rule 60(b)(6).

Conclusion

¶ 19 Accordingly, for the foregoing reasons, we conclude the trial court did not err in granting Plaintiff's Rule 60 Motion and affirm the Order modifying the Consent Order.

AFFIRMED.

Judges ARROWOOD and WOOD concur.

Report per Rule 30(e).