An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

2022-NCCOA-241

No. COA 21-195

Filed 5 April 2022

Durham County No. 19 CVD 357

JUDY G. SMITH, Plaintiff,

v.

CHRISTOPHER R. SMITH, Defendant.

Appeal by plaintiff from order entered 15 December 2020 by Judge O. David Hall in Durham County District Court. Heard in the Court of Appeals 5 October 2021.

R. Hayes Hofler, III for plaintiff-appellant.

Payne Family Law & Mediation, by Barri H. Payne, for defendant-appellee.

TYSON, Judge.

¶ 1 Judy Smith ("Plaintiff") appeals from a final order of dismissal entered December 2020. We affirm.

I. Background

¶ 2 Christopher Smith ("Defendant") and Plaintiff married on 21 May 1994. Defendant filed for absolute divorce pursuant to N.C. Gen. Stat. § 50-6 on 6 November 2018. Plaintiff's attorney filed her answer and reservation of rights in November

2018 and filed a subsequent amended answer and reservation of rights on 4 December 2018. Neither document asserted formal claims by Plaintiff for post-separation support, alimony, or equitable distribution. No formal claims for post-separation support, alimony, or equitable distribution were filed until after the judgment of absolute divorce was entered 15 February 2019. No motion to either set aside the divorce judgment or notice of appeal from the judgment was filed.

¶ 3 Plaintiff's attorney filed a new action asserting claims for equitable distribution, post-separation support and alimony and asserting the doctrine of equitable estoppel on 3 April 2019. Defendant's attorney filed an answer including a motion to dismiss, motion for sanctions, motion for attorney's fees and motion to strike on 4 June 2019. Defendant asserted no subject matter jurisdiction exists for the district court to hear Plaintiff's claims after the divorce judgment was entered.

¶ 4 A trial judge heard the motion to dismiss on 16 September 2019, and rendered his ruling from the bench on 30 September 2019, dismissing Plaintiff's complaint asserting claims for equitable distribution, post-separation support, and alimony under the doctrine of equitable estoppel. The trial court found "the filing [was not timely asserted] prior to the entry of divorce, 'cause things were not presented based on negotiations between the two parties. I don't (sic) find that - - that negotiations and even the back-and-forth preserved those issues past to filing - - past the entry of divorce."

¶ 5 The order of dismissal, based upon the doctrine of equitable estoppel, was prepared by Defendant's counsel with blanks left for the motion for attorney's fees issue to be addressed and ruled upon. Plaintiff's counsel never submitted proposed changes to the draft order to the court.

¶ 6 Plaintiff's counsel then filed a motion to recuse the trial judge in March 2020. The trial court denied the motion to recuse and signed the word "Denied," his name, and the date May 29, 2020, on the front of the Motion to Recuse. It was also file-stamped that same date. No appeal was filed by Plaintiff from that order. On 14 December 2020, the trial judge signed the order of dismissal that had been pending since the hearing in September 2019. Plaintiff appealed stating she "gives notice of appeal to [this Court] from the final order of dismissal entered 15 December 2020."

II. Jurisdiction

¶ 7 This Court's review of the trial court's order of dismissal is proper pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2021). Plaintiff has not filed a notice of appeal from the trial court's order denying Plaintiff's motion to recuse. This Court has no jurisdiction to review that order.

III. Issues

¶ 8 Plaintiff argues two issues on appeal: whether the trial court erred (1) in issuing an order denying her motion to recuse; and, (2) in granting Defendant's motion to dismiss.

IV. Analysis

A. Plaintiff's Motion to Recuse

The Code of Judicial Conduct provides in pertinent part:

> (1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:
>
> > (a) The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;

Code of Judicial Conduct, Canon 3(C)(1)(a) (2021).

¶ 9 Judge Hall scheduled a date for a hearing on the motion to recuse, but the hearing was continued as a result of the Covid 19 pandemic. Plaintiff's attorney agreed a hearing was unnecessary.

¶ 10 Judge Hall ruled and wrote "Denied" on the first page of Plaintiff's motion to recuse, and signed, dated, and filed the document on 29 May 2020. This is a valid order. *See* N.C. Gen. Stat. § 1A-1, Rule 58 (2021) (providing "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court pursuant to Rule 5."). A copy of the denial order was placed in both attorneys' mailboxes in the family court office. Plaintiff's attorney asserts he learned of the order being entered on or about 7 July 2020.

¶ 11 The North Carolina Rules of Appellate Procedure require notice of appeal be given within 30 days of entry of the order from which the appeal is taken. N.C. R. App. P. 3. Plaintiff could have filed a notice of appeal, if error was asserted in the order. No notice of appeal was filed within 30 days of either 28 May or 7 July 2020, and no appeal or petition for writ of *certiorari* has been filed to date. Because no notice of appeal or petition has been filed, the order denying Plaintiff's motion to recuse is not before this Court. Plaintiff's argument is dismissed.

B. Defendant's Motion to Dismiss

¶ 12 The standard of review is *de novo* for an order allowing a motion to dismiss for lack of subject matter jurisdiction under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1). *Brown v. N.C. Dep't of Pub. Safety*, 256 N.C. App. 425, 427, 808 S.E.2d 322, 324 (2017) (citations omitted). "The failure to specifically apply for equitable distribution prior to a judgment of absolute divorce will destroy the statutory right to equitable distribution." *Lockamy v. Lockamy*, 111 N.C. App. 260, 261, 432 S.E.2d 176, 177 (1993).

> A divorce obtained pursuant to G.S. 50-5.1 or G.S. 50-6 shall not affect the rights of either spouse with respect to any action for alimony or postseparation *support pending at the time the judgment* for divorce is granted. Furthermore, a judgment of absolute divorce shall not impair or destroy the right of a spouse to receive alimony or postseparation support or affect any other rights provided for such spouse under any judgment or decree of a court rendered *before or at the time of the judgment of*

> *absolute divorce.*

N.C. Gen. Stat. § 50-11(c) (2021) (emphasis supplied).

¶ 13 Plaintiff only appealed the trial court's order under Rule 12(b)(1). Defendant's counsel asked Plaintiff's counsel if he planned to file formal claims for post-separation support, alimony, and equitable distribution in January 2019. The proposed divorce judgment was emailed to both attorneys on 13 February 2019. Neither party contested the decree, and the judgment of absolute divorce was entered 15 February 2019.

¶ 14 Plaintiff filed purported claims for post-separation support, alimony, and equitable distribution on 3 April 2019. The trial court found no grounds for equitable estoppel to exist based upon these facts.

¶ 15 The district court was divested of jurisdiction to hear or enter an order for alimony or equitable distribution after entry of the judgment of divorce. *See Lockamy*, 111 N.C. App. at 261, 432 S.E.2d at 177. The trial court did not err in granting Defendant's motion to dismiss Plaintiff's claims.

V. Conclusion

¶ 16 Plaintiff failed to file a timely notice of appeal regarding the trail court's denial of her motion to recuse or anything tending to show Judge Hall's "impartiality may reasonably be questioned" or any "personal bias or prejudice concerning [her]." Code of Judicial Conduct, Canon 3(C)(1)(a). No appeal of that issue is properly before this

Court.

¶ 17 Plaintiff failed to file her claims for post-separation support, alimony, and equitable distribution prior to entry of the divorce judgment and did not move to set it aside. We affirm the trial court's findings and conclusions it lacked subject matter jurisdiction over that claim post-judgment. *It is so ordered.*

AFFIRMED.

Chief Judge STROUD and Judge INMAN concur.

Report per Rule 30(e).