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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-275

No. COA21-102

Filed 19 April 2022

Iredell County, No. 19 CVS 2577

WARREN PAUL KEAN, Plaintiff,

v.

AMY DELENE KEAN, Defendant.

Appeal by Defendant from order entered 10 September 2020 by Judge Steven Warren in Iredell County Superior Court. Heard in the Court of Appeals 17 November 2021.

Fox Rothschild LLP, by Kip David Nelson, Marilyn Feuchs-Marker, and Jessie Conley, for Plaintiff-Appellee.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, John R. Buric, and John R. Brickley, for Defendant-Appellant.

INMAN, Judge.

¶ 1 After careful review of the record and applicable legal authority, we hold that the trial court did not abuse its discretion in finding and concluding that a litigant who failed to serve timely responses to discovery requests had waived all objections to the requests, including objections based on attorney-client privilege and attorney work-product doctrine.

I. FACTUAL & PROCEDURAL HISTORY

¶ 2 Defendant-Appellant Amy Delene, formerly Kean ("Ms. Delene"), and Plaintiff-Appellee Warren Kean married in 2006, after executing a premarital agreement. The two separated in 2018.

¶ 3 Ms. Delene filed suit for post-separation support, permanent alimony, equitable distribution, and injunctive relief on 7 September 2018 during their separation. On 7 December 2018, she brought a second suit for alienation of affection and criminal conversation against a third party. She later voluntarily dismissed both actions.

¶ 4 Mr. Kean then commenced a lawsuit against Ms. Delene on 6 September 2019, claiming, in part, defamation, invasion of privacy, violations of the North Carolina Electronic Surveillance Act and the Omnibus Crime Control and Safe Streets Act of 1968, infliction of emotional distress, and malicious prosecution. His action alleged that, among other things, Ms. Delene had made video recordings of Mr. Kean in their marital home without his consent, breached the parties' prenuptial agreement, and wrongfully prosecuted Mr. Kean.

¶ 5 Shortly after the parties divorced on 24 September 2019, Mr. Kean filed an amended complaint. Ms. Delene filed an answer that denied liability to all claims and denied making any recordings. She also counterclaimed for intentional infliction of emotional distress.

¶ 6 On 6 March 2020, Mr. Kean's counsel served Ms. Delene's counsel with 28 interrogatories and 41 document requests (collectively "discovery requests") relevant to his claims and Ms. Delene's counterclaim, including, for example, information about the alleged recording devices and copies of the alleged recordings. Ms. Delene's responses were required 30 days later, by 6 April 2020. *See* N.C. Gen. Stat. § 1A-1, Rule 33(a), Rule 34(b) (2021).

¶ 7 However, on 19 March 2020, and again on 13 April 2020, in response to the COVID-19 pandemic, the Chief Justice of the Supreme Court of North Carolina issued emergency directives extending court system filing deadlines.[1] The extensions allowed filings otherwise due between 16 March 2020 and 1 June 2020 to be deemed timely if received by 1 June 2020. Simultaneously, the trial court also granted Ms. Delene's request for an extension to respond to the discovery requests through 5 May 2020. The trial court's extension notwithstanding, pursuant to the Chief Justice's orders, Ms. Delene's responses were due 1 June 2020.

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[1] *Orders of the Chief Justice of the Supreme Court of North Carolina* (March 19, 2020 and April 13, 2020), https://www.nccourts.gov/covid-19; *see also Chief Justice Beasley Orders New Extension of Court System Deadlines Until June 1, 2020*, (April 13, 2020), https://www.nccourts.gov/news/tag/press-release/chief-justice-beasley-orders-new-extension-of-court-system-deadlines-until-june-1-2020.

¶ 8 Despite these extensions, Ms. Delene did not respond to the discovery requests by 1 June 2020. Nor did she file a motion with the trial court seeking a further extension of the deadline.

¶ 9 On 10 June 2020, Mr. Kean moved to compel Ms. Delene's discovery responses and noticed the motion to be heard on 20 July 2020. Ms. Delene hired new counsel, who served to Mr. Kean's counsel responses to the discovery requests on 2 July 2020, 31 days after the extended deadline. Ms. Delene's responses included a general objection based on attorney-client privilege and work-product immunity as well as specific objections on the same grounds to eleven interrogatories and twelve requests for production. Ms. Delene served supplemental responses with similar objections on 19 July 2020.

¶ 10 The motion to compel came on for hearing on 24 August 2020. The trial court determined that Ms. Delene had waived all objections to the discovery requests, including objections based on attorney-client privilege, by her failure to timely respond. The trial court directed Mr. Kean's counsel to draft a proposed order granting the motion to compel, allowing Ms. Delene's counsel time to review and comment, before the trial court entered its final ruling.

¶ 11 In the materials submitted for the trial court's consideration, Ms. Delene's counsel urged the trial court to follow the North Carolina Business Court's order in *Addison Whitney, LLC v. Cashion*, 2018 WL 2084678 (N.C. Super. Ct. Feb. 26, 2018),

and conclude Ms. Delene had not automatically waived her objections to the discovery requests, especially those based on attorney-client privilege and work-product doctrine.

¶ 12 The trial court entered an order compelling Ms. Delene's responses to the discovery requests on 10 September 2020. The trial court found, in relevant part, "Objections to the Interrogatories and Requests for Production which were not timely served have been waived, including any and all claims of privilege." The trial court further concluded, "A failure to object during the time allowed is a waiver of any objection, including any and all privileges." The order decreed that all of Ms. Delene's objections to the discovery requests had been waived, "including any and all privileges."

¶ 13 The order compelled Ms. Delene to further respond to several interrogatories and requests for production, including any documents previously withheld based on any objection, on or before 30 September 2020. The trial court also required Ms. Delene to pay $1,000 to both Mr. Kean and Advanced Technology Investigations, LLC by the same date.

¶ 14 Ms. Delene complied with the motion to compel and served her second supplemental responses on 30 September 2020, in which she objected to producing any discovery that would infringe upon the attorney-client privilege or work-product doctrine. She appealed from the trial court's order on 7 October 2020. Mr. Kean has

filed a motion to dismiss Ms. Delene's appeal as interlocutory and for sanctions.[2]

II. ANALYSIS

A. Appellate Jurisdiction

1. Preservation

¶ 15 As a preliminary matter, Mr. Kean asserts Ms. Delene has not preserved her attorney-client privilege objections to certain discovery requests for our review.

¶ 16 After the trial court indicated it would deem objections waived, Ms. Delene's counsel inquired, "With regard to the objections being waived, are you waiving the attorney-client privilege objections too?" At the trial court's direction, Ms. Delene's counsel redlined opposing counsel's proposed order compelling discovery, citing a non-binding, albeit applicable, decision from the Business Court, to argue that Ms. Delene's attorney-client privilege objections should not be deemed waived, in an email to the trial court.[3] *See, e.g., In re Petition of Utils., Inc.*, 147 N.C. App. 182, 194, 555

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[2] Other than a sweeping request for sanctions against Ms. Delene for pursuing this appeal and a broad allegation that she is attempting to "delay trial court proceedings," Mr. Kean has presented no particular basis to impose sanctions nor has he articulated what type of sanctions we might impose. In addition, Ms. Delene would forfeit the ability to challenge the trial court's order compelling discovery once she produces the purportedly privileged information and documents. *See Crosmun v. Trs. of Fayetteville Tech. Cmty. Coll.*, 266 N.C. App. 424, 432-34, 832 S.E.2d 223, 231-33 (2019) ("We base our determination on whether Defendants have legitimately asserted the loss of a privilege or immunity absent immediate appeal."). We decline to impose sanctions in this case.

[3] For example, Ms. Delene's counsel responded to the proposed order's finding that Ms. Delene had waived all objections, including claims of privilege, urging the trial court to "reconsider [its] prior ruling" because Ms. Delene's conduct was not "so egregious as to

S.E.2d 333, 341-42 (2001) (considering the contents of a proposed order to determine whether a party had preserved a question for appellate review). We hold Ms. Delene has preserved this issue for our review. *See* N.C. R. App. P. 10(a)(1) (2021) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

2. Interlocutory Order Affects a Substantial Right

¶ 17 Mr. Kean moves to dismiss this appeal as interlocutory, arguing Ms. Delene has not demonstrated she is entitled to immediate appellate review of the order compelling discovery. We disagree and deny Mr. Kean's motion to dismiss.

¶ 18 Ms. Delene concedes the trial court's order compelling discovery is interlocutory because it does not resolve any claim of either party. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire

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warrant a waiver of all objections." In doing so, her counsel quoted the Business Court's order in *Whitney*: "The fact that a waiver may result does not mean that it must. A court has broad discretion to decide on a case by case basis whether waiver is appropriate, and the objecting party carries the burden to show good cause to excuse its failure to respond to discovery requests." *Whitney*, 2018 WL 2084678, at *1 (cleaned up).

controversy."); *see also* N.C. Gen. Stat § 1A-1, Rule 54(a) (2021) ("A judgment is either interlocutory or the final determination of the rights of the parties."). An order compelling discovery, in particular, "is interlocutory in nature and is usually not immediately appealable because such orders generally do not affect a substantial right." *Sessions v. Sloane*, 248 N.C. App. 370, 380, 789 S.E.2d 844, 853 (2016) (citation omitted). However, an interlocutory order is immediately appealable when it "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." *Dep't of Transp. v. Rowe*, 351 N.C. 172, 175, 521 S.E.2d 707, 709 (1999); *see* N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)a (2021). An interlocutory order compelling discovery "affects a substantial right when a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial. This rule applies to attorney work-product immunity and common law attorney-client privilege." *Crosmun*, 266 N.C. App. at 432-33, 832 S.E.2d at 231 (cleaned up). *See* also *In re Ernst & Young, LLP*, 191 N.C. App. 668, 673, 663 S.E.2d 921, 925 (2008) ("[E]ven if the appeal was not from a final judgment, appeals of discovery orders asserting a statutory or a common-law privilege affect a substantial right." (citations omitted)).

¶ 19 Because Ms. Delene asserted general and particular attorney-client objections in her delayed responses to Mr. Kean's discovery requests before the trial court on

the motion to compel, and now, before this Court on appeal, we hold the order compelling discovery affects a substantial right. *See Crosmun*, 266 N.C. App. at 432-33, 832 S.E.2d at 231. *Cf. K2 Asia Ventures v. Trota*, 215 N.C. App. 443, 447, 717 S.E.2d 1, 4-5 (2011) ("We hold that blanket general objections purporting to assert attorney-client privilege or work product immunity to all of the opposing parties' discovery requests are inadequate to effect their intended purpose and do not establish a substantial right to an immediate appeal."). We now consider the merits of Ms. Delene's appeal.

B. Waiver of Attorney-Client Privilege Objections

¶ 20 Ms. Delene's sole argument on appeal is that the trial court erred by determining that she waived all objections, including those based on attorney-client privilege and the work-product doctrine, by failing to timely serve her discovery responses. In particular, she contends the trial court misapprehended the law by failing to recognize and exercise its own discretion over the issue of waiver. We hold the trial court did not abuse its discretion.

¶ 21 We review discovery orders for abuse of discretion. *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 370 N.C. 235, 241, 805 S.E.2d 664, 669 (2017). We "may only disturb a trial court's ruling if it was manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Sessions*, 248 N.C. App. at 381, 789 S.E.2d at 854. "When discretionary rulings are made under

a misapprehension of the law, this may constitute an abuse of discretion." *Gailey v. Triangle Billiards & Blues Club, Inc.*, 179 N.C. App. 848, 851, 635 S.E.2d 482, 484 (2006) (citations omitted); *see also Myers v. Myers*, 269 N.C. App. 237, 255-56, 837 S.E.2d 443, 456 (2020) ("The trial court's failure to exercise its discretion was an abuse of discretion.").

¶ 22 Rule 33 of our Rules of Civil Procedure provides: "The party upon whom the interrogatories have been served shall serve a copy of the answers, *and objections if any, within 30 days after the service of the interrogatories*[.]" § 1A-1, Rule 33(a) (emphasis added). Rule 34 provides the same deadline for production of documents. *Id.*, Rule 34(b). These rules do not provide for automatic waiver based on untimely responses. However, "ordinarily, in the absence of an extension of time, failure to object to interrogatories within the time fixed by the rule is a waiver of any objection." *Golding v. Taylor*, 19 N.C. App. 245, 248, 198 S.E.2d 478, 480 (1973); *see also In re K.D.*, 178 N.C. App. 322, 326, 631 S.E.2d 150, 153 (2006) ("[I]t is well-established that a failure to object to requested disclosure of privileged information constitutes a waiver of that privilege."). Even with the months-long statewide filing extensions, Ms. Delene did not timely object to Mr. Kean's discovery requests, and she did not file for a second extension of time. We discern no abuse of discretion, nor any indication that the trial court was unaware of its own discretion, in the trial court's decision that Ms. Delene waived her objections in her failure to timely reply. At the hearing on the

motion to compel, the trial court forecasted, "And I am going to rule this, because that she did not respond, you can put in the order that she's waived any objections, alright[.]". In response to Ms. Delene's counsel's question about whether the waiver ruling applied to attorney-client privilege objections, the trial court further responded, "I mean, if she's got a—she had a privilege objection in there, she should have asserted it. So, I mean, I think any and all objections had to be timely made within that thirty-day period, unless an extension was had. Apparently, it wasn't . . ." In its order, the trial court then found, "Objections to the Interrogatories and Requests for Production of Documents which were not timely served have been waived, including any and all claims of privilege" and concluded "failure to object during the time allowed is a waiver of any objection, including any and all privileges."

¶ 23 Before the trial court and now, on appeal, Ms. Delene suggests we follow the Business Court's order in *Whitney*. In that case the Business Court applied a six-factor test to determine whether failure to timely respond to interrogatories and requests for production of documents amounted to an automatic waiver of all objections to the discovery requests. *Whitney*, 2018 WL 2084678, at *1-2. Based on the factors considered in *Whitney*, Ms. Delene argues the trial court should have found good cause to excuse her late filings and preserve her privilege-based objections. *Whitney* is not binding on this Court nor was it binding on the trial court.

The trial court was not required to consider Ms. Delene's untimely responses in light of the *Whitney* decision and neither are we.

¶ 24 It is not lost on us that Ms. Delene and her original counsel failed to timely serve discovery responses at an unprecedented time for our society, including the legal profession. But we are bound by a standard of review that requires deference to the trial court's discretion regarding the appropriate sanction for a violation of the discovery deadline. *See Golding*, 19 N.C. App. at 248, 198 S.E.2d at 480; *In re K.D.*, 178 N.C. App. at 326, 631 S.E.2d at 153. We will not disturb the trial court's order compelling discovery absent a showing it abused its discretion. *See Sessions*, 248 N.C. App. at 381, 789 S.E.2d at 854.

III. CONCLUSION

¶ 25 For the reasons set forth above, we deny Mr. Kean's motion to dismiss and affirm the trial court's order compelling discovery.

AFFIRMED.

Judges ZACHARY and CARPENTER concur.

Report per Rule 30(e).