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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-307

No. COA21-298

Filed 3 May 2022

Durham County, No. 14CVD1272

CHARLES DOZIER, Plaintiff,

v.

REGINA DOZIER, Defendant.

Appeal by defendant from order entered 17 March 2021 by Judge Amanda L. Maris in Durham County District Court. Heard in the Court of Appeals 14 December 2021.

Jackson Family Law, by Jill S. Jackson, for defendant-appellant.

Patrick Law PLLC, by Kirsten Grieser, for plaintiff-appellee.

GORE, Judge.

I. Factual and Procedural Background

¶ 1

Plaintiff, Charles Dozier, and Defendant, Regina Dozier, were married on 6 July 1985 and separated on 22 October 2014. On or about 30 October 2014, Plaintiff commenced this action by filing a Complaint for equitable distribution, alimony, post-separation support, and attorney fees. Defendant filed her Answer and Counterclaim for equitable distribution 3 December 2014. Following a Mediated Settlement

Agreement, Defendant paid \$80,000.00 to Plaintiff as an interim distribution, and Plaintiff dismissed his claims for post-separation support and alimony with prejudice on 27 March 2015.

¶ 2 On 8 October 2015, the parties resolved the issue of equitable distribution through private mediation and filed a Consent Order for Equitable Distribution with the trial court. Under the Consent Order, the parties classified and distributed, *inter alia*, certain real property subject to equitable distribution pursuant to N.C. Gen. Stat. § 50-20 *et seq.* Paragraph 3(d) of the Consent Order identified one of the properties owned by the parties, a house and lot located at 38489 Jacaranda Drive, Newark, California, (the “Disputed Property”).

¶ 3 On 18 December 2017, Defendant filed a Rule 60 Motion requesting the trial court to “relieve the parties from the Order entered on or about [8 October 2015] and/or modify the terms contained therein as it relates to paragraph 3(d).” Defendant alleged, due to Plaintiff’s misconduct, she was unable to prove prior to the mediation resulting in entry of the Consent Order that the Disputed Property was her separate property within the meaning of § 50-20.

¶ 4 Plaintiff filed a Motion for Contempt on 13 March 2018 seeking to enforce provisions of the Consent Order requiring Defendant to buy out Plaintiff’s interest in the Disputed Property. Defendant filed a Motion for Contempt on 11 April 2018 seeking to enforce provisions of the Consent Order requiring Plaintiff to remove

Defendant from liability on debts secured by certain other real properties that were not the subject of Defendant's Rule 60 Motion.

¶ 5

On 19 December 2018, Plaintiff filed a Reply and Joinder to Defendant's Rule 60 Motion, requesting the trial court to "[f]ind that Plaintiff consents to and joins in Defendant's ultimate Request for Rule 60 relief for the parties from the [8 October 2015] Order, and set aside said Order in its entirety, pursuant to [N.C. R. Civ. P. 60(b)(6)]." Thereafter, Defendant asserted that Plaintiff's Reply and Joinder raised a separate cause of action and served discovery requests on Plaintiff. Plaintiff did not respond to Defendant's discovery requests, on 14 May 2019, Defendant filed a Motion to Compel. Plaintiff asserted that he had consented to the Rule 60 Motion, and there was no justiciable issue pending that would allow discovery to proceed.

¶ 6

On 18 July 2019, the trial court held a hearing on Defendant's Motion to Compel. At this hearing, Defendant asserted that her request was not asking the trial court to set aside the entire Consent Order, but instead to set aside only paragraph 3(d). Plaintiff objected, and the trial court questioned whether it could relieve a party from one particular provision of an equitable distribution order or modify the same. The trial court asked both parties to submit a Memorandum of Law concerning the trial court's ability to grant such relief before a hearing on Defendant's Motion to Compel set for 13 August 2019.

¶ 7

During the 13 August 2019 hearing, Defendant again stated she was seeking

relief from only one paragraph in the Consent Order. Plaintiff made an Oral Motion for a More Particular Statement, which was granted over Defendant's objection. On 3 September 2019, Defendant filed her Response to Oral Motion for a More Particular Statement, in which she sought relief from paragraph 3(d) of the Consent Order pursuant to Rule 60(b)(2) and (6). Plaintiff withdrew his consent and joinder to the Rule 60 Motion.

¶ 8 On 10 September 2019, Plaintiff filed a Motion to Dismiss Defendant's Rule 60 motion pursuant to N.C. R. Civ. P. 12(b)(6), asserting the one-year limitation for seeking relief under Rule 60(b)(2) had expired, and Defendant had not asserted any additional facts to use Rule 60(b)(6) as a catch-all to circumvent the requirements of the time limits imposed.

¶ 9 This matter was set for hearing multiple times but was continued for various reasons including the health of a party or counsel, the impact of COVID-19, court closures, and rescheduling. On 28 January 2021, the parties appeared before the trial court for a hearing on Plaintiff's Motion to Dismiss defendant's Rule 60 Motion.

¶ 10 In an Order entered 17 March 2021, the trial court granted Plaintiff's Motion to Dismiss Defendant's Rule 60 Motion after hearing arguments of counsel and reviewing the written pleadings and other documents of record. On 24 March 2021, Defendant timely filed Notice of Appeal.

II. Discussion

¶ 11 On appeal, Defendant argues the trial court’s *sua sponte* dismissal of her Rule 60(b)(6) Motion without first conducting a properly noticed evidentiary hearing was a fundamental violation of her constitutional right to procedural due process. However, Defendant has not demonstrated this issue is preserved for appellate review. Defendant concedes she did not assert a due process objection before the trial court, but she argues this issue is preserved by operation of timely filing notice of appeal as she “could not have objected prior to entry of the Order because the violation of her procedural due process rights had not occurred until the 17 March 2021 Order was entered.” In Defendant’s estimation, “[i]t is not reasonable, practical, or necessary under [our rules of Civil or Appellate Procedure] to require that the parties make anticipatory objections at hearing in order to preserve their constitutional due process claims for appeal in the event the trial court later enters an erroneous ruling.”

¶ 12 We disagree.

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. It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion.

N.C.R. App. P. 10(a)(1). Nothing in the record indicates Defendant raised an argument or objection on constitutional due process grounds. Defendant did not include transcripts from any of the hearings on this matter. The trial court’s Order

from which Defendant appeals makes no mention of a ruling on any timely due process objection by Defendant.

¶ 13 “It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court’s attention is waived and will not be considered on appeal. As a result, even constitutional challenges are subject to the same strictures of Rule 10(a)(1).” *State v. Bursell*, 372 N.C. 196, 199, 827 S.E.2d 302, 305 (2019) (*purgandum*). “Defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal.” *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (citation omitted). Accordingly, Defendant’s due process argument is dismissed.

¶ 14 Presuming, *arguendo*, Defendant properly preserved this issue on appeal, she fails to demonstrate her claim has merit.

¶ 15 The trial court’s 17 March 2021 Order specifically addressed Plaintiff’s 12(b)(6) Motion to Dismiss Defendant’s Rule 60 Motion. “The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true.” *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428 (2007) (citation omitted).

Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the [non-moving party’s] claim; (2) the

complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the [non-moving party's] claim.

Id. at 512, 640 S.E.2d at 428-29 (*purgandum*). “This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.” *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff’d per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

¶ 16 Here, the trial court did not grant Plaintiff’s Motion to Dismiss because it concluded that “Defendant’s request for relief pursuant to Rule 60(b)(6) can be determined only after a testimonial hearing.” Instead, the trial court made a separate determination, that “Defendant’s ultimate request for relief, regardless of the Rule 60 basis asserted, cannot be granted based on the specific relief requested to set aside one provision of an equitable distribution consent order.”

¶ 17 Defendant makes no argument to show the trial court could grant the relief requested, modification of one portion of the equitable distribution consent order, even if her Rule 60(b) Motion survived Plaintiff’s Motion to Dismiss. Defendant, other than citing general aphorisms regarding due process and justice, has not provided any authority to support the specific grounds of her argument.

III. Conclusion

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Opinion of the Court

¶ 18

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judges TYSON and CARPENTER concur.

Report per Rule 30(e).