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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-642

No. COA22-1

Filed 20 September 2022

Mecklenburg County, No. 09-CVD-15867

MELISSA KASER, Plaintiff,

v.

MICHAEL ZWICK, Defendant.

Appeal by Defendant from Order entered 22 September 2021 by Judge Tyyawdi M. Hands in Mecklenburg County District Court. Heard in the Court of Appeals 11 May 2022.

No brief filed on behalf of Plaintiff-Appellee.

Law Offices of Anton Lebedev, by Anton M. Lebedev, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Michael Todd Zwick (Defendant) appeals from an Order entered 22 September 2021 denying his Motion filed pursuant to Rule 60(b)(4) of the North Carolina Rules of Civil Procedure which sought relief from a Domestic Violence Protective Order previously entered by consent of the parties over a decade earlier on 17 July 2009 (the Consent DVPO). The Record before us reflects the following:

¶ 2 On 9 July 2009, Melissa Jeanne Kaser (Plaintiff) filed a Complaint and Motion for Domestic Violence Protective Order asserting two separate allegations of domestic violence committed by Defendant occurring on 4 July and 8 July 2009:

> 7/4/09 acted very manic [at] dinner, threatened to punch me in the face. Would not let me walk home from dinner, [at] movie theatre told me would kill me if I ever broke up with him. At home asked me how I wanted to die, told me I should be scared of him, said he's a lunatic [and] will kill me
>
> 7/8/09 voicemail - threatened to kill me

¶ 3 The same day, the trial court entered a temporary Ex Parte Domestic Violence Order of Protection (Ex Parte DVPO) expiring 17 July 2009. In the Ex Parte DVPO, the trial court found that on 4 July 2009 Defendant placed Plaintiff in fear of imminent serious bodily injury when he "threatened to kill Plaintiff if she ever broke up with him and then asked her how she wanted to die." The trial court further found, for purposes of the Ex Parte DVPO, Defendant "made threats to seriously injure or kill" Plaintiff. Based on these findings, the trial court concluded Defendant "committed acts of domestic violence" against Plaintiff and that "it clearly appears there is a danger of acts of domestic violence against" Plaintiff. Defendant was ordered to not commit or threaten any further acts of domestic violence and to have no contact with Plaintiff. Defendant was served with the Ex Parte DVPO and given notice that the return hearing on the matter would occur on 17 July 2009.

¶ 4 On 17 July 2009, with both parties appearing *pro se*, the trial court entered the Consent DVPO. The Consent DVPO provided:

> THE COURT HEREBY FINDS THAT:
> The matter was heard by the undersigned district court judge, the court has jurisdiction over the parties and subject matter, and the Respondent/Defendant has been provided with reasonable notice and opportunity to be heard.
>
> . . . .
>
> THE COURT HEREBY ORDERS THAT:
> [Defendant] shall not commit any further acts of abuse or make any threats of abuse.
>
> [Defendant] shall have no contact with [Plaintiff].
>
> . . . .
>
> The terms of this order shall be effective until [17 July 2010]

¶ 5 The Consent DVPO further stated: "The parties consent to entry of this order, without further findings or conclusions." This provision was expressly signed off on by both parties. The Consent DVPO, nevertheless, also included the specific conclusion of law: "The defendant has committed acts of domestic violence against the plaintiff." The parties both executed the Consent DVPO acknowledging: "Each of us enters into this Consent Order knowingly, freely, and voluntarily. The defendant

understands that in consenting to this Order all of the consequences set out in the Notice to Parties and Warnings to Respondent/Defendant in this Order apply."

¶ 6 Almost twelve years later, on or about 6 June 2021, Defendant filed a Motion to Set Aside Domestic Violence Protective Order. Defendant's Motion asserted that under the law existing in 2009 when the Consent DVPO was entered, the Consent DVPO was void *ab initio* and should be vacated because it contained no finding that an act of domestic violence had occurred.[1] In particular, Defendant relied on this Court's prior opinions in *Bryant v. Williams*, 161 N.C. App. 444, 588 S.E.2d 506 (2003) and *Kenton v. Kenton*, 218 N.C. App 603, 724 S.E.2d 79 (2012), which Defendant contended stood for the proposition that a trial court was without jurisdiction to enter the Consent DVPO in the absence of an express finding that an act or acts of domestic violence had occurred. Defendant claimed because the trial court allegedly lacked jurisdiction to enter the Consent DVPO it was, thus, void and he was entitled to relief

[1] Defendant's argument was premised on the fact the Consent DVPO was entered prior to October 2013. This is so because effective 1 October 2013, the General Assembly amended the domestic violence statute to expressly provide: "A consent protective order may be entered pursuant to this Chapter without findings of fact and conclusions of law if the parties agree in writing that no findings of fact and conclusions of law will be included in the consent protective order. The consent protective order shall be valid and enforceable and shall have the same force and effect as a protective order entered with findings of fact and conclusions of law." N.C. Gen. Stat. § 50B-3(b1) (2021); *see* An Act to Provide that a Consent Protective Order Entered Under Chapter 50B of the General Statutes may be Entered without Findings of Fact and Conclusions of Law upon the Written Agreement of the Parties, S.L. 2013-237, § 1.

from the Consent DVPO pursuant to Rule 60(b)(4) of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 60 (2021) (providing grounds for relief from judgment where the "judgment is void").

¶ 7 The matter was heard on 24 August 2021. While Defendant apparently made efforts to serve Plaintiff by mail, Plaintiff did not appear at the hearing and it is unclear whether—after years of this matter lying dormant—Plaintiff, in fact, received any notice of these proceedings. On 22 September 2021, the trial court entered its Order denying Defendant's Motion.[2] The trial court made the following relevant Findings of Fact:

> 3. The Defendant argues that under [*Kenton v. Kenton*, 218 N.C. App. 603, 603, 724 S.E.2d 79, 80 (2012)], the consent DVPO was void ab initio [as] it lacked any finding that the defendant committed an act of domestic violence.
>
> 4. The 17 July [2009] order states that the "[p]arties consent to the entry of [the] order, without further findings and conclusions." The same order moreover states that "[b]ased upon these facts, the Court makes the [] conclusion of law" that "[t]he defendant has committed acts of domestic violence against the plaintiff."

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[2] The trial court's Order in several places inadvertently reflects the Consent DVPO was entered 17 July 2019. The Order also reflects the Order was entered in Wake County rather than Mecklenburg County. These are obviously clerical errors. While acknowledging his role in drafting the Order for the trial court, Defendant's counsel nevertheless asserts these clerical errors require us to, at a minimum, remand the matter for correction by the trial court. In the context of this case, this is not a particularly good use of the appellate process. Rather, should Defendant or the trial court deem it necessary to correct these clerical errors, Rule 60(a) of the North Carolina Rules of Civil Procedure provides a far more efficient method to do so.

¶ 8 Based on these Findings, the trial court concluded:

> 2. In [*Kenton*], the Court of Appeals vacated a protective order "because the Consent DVPO [] lacked any finding that defendant committed an act of domestic violence . . . This case is distinguishable from [Kenton] because the protective order in this matter [does] include a consent determination that "[t]he defendant has committed acts of domestic violence against the plaintiff."
>
> 3. It is true that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.". . . However, the 17 July [2009] order was not entered after a contested hearing and the requirements of Rule 52(a)(1) are inapplicable.
>
> Based upon these findings and conclusions, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the Defendant's Rule 60(b)(4) motion in its entirety is DENIED. In doing so, this Court declares that it has the requisite authority and jurisdiction to enter the 17 July [2009] consent DVPO, that and the validity of the 17 July [2009] protective order remains undisturbed."

¶ 9 On 16 October 2021, Defendant filed Notice of Appeal from the trial court's 22 September 2021 Order.

Issue

¶ 10 The dispositive issue on appeal is whether the trial court properly denied Defendant's Motion made pursuant to Rule 60(b)(4) of the Rules of Civil Procedure for relief from the 2009 Consent DVPO where the Consent DVPO included a

determination: "The defendant has committed acts of domestic violence against the plaintiff."[3]

Analysis

¶ 11 Defendant contends the Consent DVPO failed to contain the requisite Findings of Fact and Conclusions of Law to support its entry as was required in 2009 prior to the enactment of N.C. Gen. Stat. 50B-3(b1). Defendant asserts, as such, the trial court lacked jurisdiction to enter the Consent DVPO and the Consent DVPO was void. Thus, ultimately Defendant argues, the trial court erred by denying his Motion under Rule 60(b)(4) to set aside the Consent DVPO on the basis it was void.

¶ 12 As a general principle, this Court reviews a trial court's denial of a Rule 60(b) motion under an abuse of discretion standard of review. *See Davis v. Davis*, 360 N.C. 518, 524, 631 S.E.2d 114, 118 (2006). However, where a motion brought under Rule 60(b)(4) implicates the trial court's subject-matter jurisdiction to enter the underlying order we employ a de novo standard of review. *See Hillard v. Hillard*, 223 N.C. App.

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[3] In reaching this dispositive issue and reviewing the merits of the trial court's Order, we operate under two presumptions. First, we presume, without deciding, that analogous to a direct appeal from entry of a domestic violence protective order, the fact the Consent DVPO has long since expired does not render moot Defendant's efforts to seek relief under Rule 60(b). *Cf. Rudder v. Rudder*, 234 N.C. App. 173, 177, 759 S.E.2d 321, 325 (2014) (expiration of DVPO does not render appeal moot). Second, we presume, again without deciding, that Defendant's Motion was timely and properly invoked Rule 60(b)(4) by alleging the Consent DVPO was void (and not merely voidable or erroneous) and, in fact, implicated the trial court's subject-matter jurisdiction to enter the Consent DVPO. *See Allred v. Tucci*, 85 N.C. App. 138, 141, 354 S.E.2d 291, 294 (1987).

20, 22, 733 S.E.2d 176, 179 (2012); *see also McKoy v. McKoy,* 202 N.C.App. 509, 511, 689 S.E.2d 590, 592 (2010) ("Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal."). In any event, "[a]n error of law is by definition an abuse of discretion." *Sen Li v. Zhou*, 252 N.C. App. 22, 26, 797 S.E.2d 520, 523 (2017).

¶ 13 As this Court has previously summarized:

> Under Rule 60(b)(4), a court may relieve a party from a judgment if the judgment is void. A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered. *See In re Brown*, 23 N.C. App. 109, 208 S.E.2d 282 (1974). Additionally, it is widely accepted "that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction." *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956). Furthermore, when it appears that the court may lack jurisdiction, any person adversely affected may contest subject matter jurisdiction "at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986).

Hillard, 223 N.C. App. at 22, 733 S.E.2d at 178–79. Thus, if the trial court here had no subject-matter jurisdiction to enter the Consent DVPO, the Consent DVPO would be void and may be set aside under Rule 60(b)(4) on motion of Defendant notwithstanding the fact Defendant previously consented to its entry. Consistent with his arguments in the trial court below, Defendant contends this Court's prior decisions in *Bryant v. Williams* and *Kenton v. Kenton* apply in this case and require

a determination that the trial court was without subject-matter jurisdiction to enter the Consent DVPO.

¶ 14 In *Bryant*, this Court vacated a consent order purportedly entered under Chapter 50B of the General Statutes governing domestic violence protective orders. In reaching its conclusion the majority observed: "The court's authority to enter a protective order or approve a consent agreement is dependent upon finding that an act of domestic violence occurred and that the order furthers the purpose of ceasing acts of domestic violence." *Bryant*, 161 N.C. App. 444, 446, 588 S.E.2d 506, 508 (2003). The majority in *Bryant* reasoned the trial court was without authority to enter the consent domestic violence protective order because the consent order provided that both parties would dismiss their dueling domestic violence complaints. As the majority articulated:

> Rather, the issue is whether by dismissing the domestic violence complaints the court loses its authority to enter any domestic violence protective order. We hold it does. Therefore, since the order in the case at bar dismissed the complaints for a domestic violence order, and the court could not enter an order approving a consent agreement for the purpose of ceasing domestic violence pursuant to Chapter 50B, the consent order must be reversed.

Id., 161 N.C. App. 444, 447, 588 S.E.2d 506, 508 (2003).

¶ 15 *Bryant* is distinguishable from the present case. Plaintiff's domestic violence complaint remained pending and contained allegations of acts to support a finding of

domestic violence and entry of a domestic violence protective order. Thus, the trial court retained authority to enter the Consent DVPO under *Bryant*.

¶ 16 This Court's decision in *Kenton*, however, is more applicable—if ultimately also distinguishable. In *Kenton*, this Court vacated an order renewing an earlier domestic violence protective order originally entered by consent of the parties where the original consent domestic violence protective order contained no finding the defendant committed an act of domestic violence. *Kenton v. Kenton*, 218 N.C. App. 603, 606, 724 S.E.2d 79, 82 (2012). In so doing, the *Kenton* Court found the discussion in *Bryant* controlling. We summarized the analysis of the *Bryant* majority: "Without a finding by the trial court that an act of domestic violence had occurred, the trial court had no authority under Chapter 50B to enter an order for the purpose of ceasing domestic violence between the parties." *Id.* at 605, 724 S.E.2d at 81. As such, bound by *Bryant*, this Court held where the consent order in that case "lacked any finding that defendant committed an act of domestic violence it was void *ab initio*." *Id.* at 606, 724 S.E.2d at 82.

¶ 17 The trial court's Order denying Defendant relief under Rule 60(b) in this case, however, distinguished *Kenton* on the basis that unlike the consent order in Kenton, the Consent DVPO here actually did include an express determination Defendant "has committed acts of domestic violence against the plaintiff." We agree with the trial court's analysis. Here, the Consent DVPO did indeed include the determination

Defendant "has committed acts of domestic violence against the plaintiff" albeit denominated a Conclusion of Law rather than a Finding of Fact. *But see Kennedy v. Morgan*, 221 N.C. App. 219, 223 n.2, 726 S.E.2d 193, 196 n.2 (2012) ("Although N.C. Gen. Stat. § 50B-3(a) states that the trial court must find that an act of domestic violence has occurred, in fact this is a conclusion of law.").

¶ 18 Thus, in this case, unlike the consent orders in either *Bryant* or *Kenton*, the Consent DVPO contains the critical determination that an act of domestic violence has occurred.[4] Therefore, the trial court was authorized to enter the Consent DVPO and it was not void *ab initio*. Consequently, the trial court did not abuse its discretion or err in denying Defendant's Motion to Set Aside Domestic Violence Order pursuant to Rule 60(b)(4) of the North Carolina Rules of Civil Procedure. In so concluding, we hasten to note the limited impact of our decision on future cases. Again, N.C. Gen. Stat. § 50B-3(b1), effective since 1 October 2013, now expressly provides for domestic violence protection orders entered by consent without findings of fact and conclusions of law.

Conclusion

[4] We find nothing in our prior case law requiring a domestic violence protective order entered by consent to contain specific evidentiary findings or to list the acts of domestic violence with any detail. Indeed, in consenting to the entry of a domestic violence protective order, a defendant alleged to have committed domestic violence derives some benefit by not having the acts of domestic violence spelled out in detailed findings or in consenting to such findings which may otherwise have some later collateral impact.

¶ 19 Accordingly, for the foregoing reasons, we affirm the trial court's 22 September 2021 Order denying Defendant's Motion to Set Aside the Domestic Violence Protective Order.

AFFIRMED.

Judges ZACHARY and MURPHY concur.

Report per Rule 30(e).