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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-213

Filed 19 December 2023

New Hanover County, No. 22 CVS 0353

GILBERT LEROY LITTLE, III, Plaintiff,

v.

MICHAEL JOHN CLAY, Defendant.

Appeal by Defendant from order entered 13 December 2022 by Judge J. Stanley Carmical in New Hanover County Superior Court. Heard in the Court of Appeals 3 October 2023.

Rice Law, PLLC, by Richard Forrest Kern, Mark Spencer Williams, and Christine M. Sprow, for Defendant-Appellant.

The Lea Schultz Law Firm, by James W. Lea, III, and Hayley R. Frey, for Plaintiff-Appellee.

GRIFFIN, Judge.

I. Factual and Procedural Background

Defendant Michael John Clay appeals from the trial court's order denying his motion to dismiss. The record before us tends to show the following:

On 17 July 2009, Plaintiff and his wife were married in South Carolina.

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Sometime later, the couple moved to North Carolina and lived in New Hanover County. In December 2020, Plaintiff and his wife moved to Tennessee. On 1 December 2021, Plaintiff and his wife divorced.

On 1 February 2022, Plaintiff filed a complaint against Defendant in New Hanover County Superior Court, seeking relief on claims for alienation of affection, criminal conversation, and intentional infliction of emotional distress.¹ On 1 March 2022, Defendant filed a motion to dismiss for lack of subject matter and personal jurisdiction, pursuant to Rules 12(b)(1) and 12(b)(2) of our Rules of Civil Procedure. Defendant's motion included sworn affidavits from both Defendant and Plaintiff's ex-wife, denying Plaintiff's claims. Defendant also filed a motion for protective order to stay discovery pending Defendant's motion to dismiss.

On 20 April 2022, Plaintiff filed a motion to amend his complaint which was granted. On 24 May 2022, Plaintiff filed an amended complaint. On 16 June 2022, Defendant filed an amended motion to dismiss for lack of subject matter and personal jurisdiction, again incorporating the sworn affidavits from Defendant and Plaintiff's ex-wife.

On 1 August 2022, Defendant's motion to dismiss came on for hearing in New Hanover County Superior Court before Judge Stanley Carmichael. Neither Plaintiff nor Defendant were present. On 5 December 2022, the trial court entered an order

¹ Defendant has never lived in North Carolina and has been a resident of Arizona since 2016.

denying Defendant's motion to dismiss.

On 14 December 2022, Defendant timely filed notice of appeal.

II. Appellate Jurisdiction

An order of the trial court denying a motion to dismiss is an interlocutory order—an order “made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court to settle and determine the entire controversy.” *Bartley v. City of High Point*, 381 N.C. 287, 293, 873 S.E.2d 525, 532 (2022). Generally, there is no right of immediate appeal from an interlocutory order. *See Church v. Carter*, 94 N.C. App. 286, 288, 380 S.E.2d 167, 168 (1989). Our General Statutes allow for several exceptions, including where the order of the trial court affects a substantial right, or where the order is an adverse ruling as to personal jurisdiction. N.C. Gen. Stat. § 1-277 (2023). Absent some exception, there is no right to immediate appeal from an order of the trial court denying a motion to dismiss for lack of subject matter jurisdiction unless the defendant challenges both personal and subject matter jurisdiction. *Church*, 94 N.C. App. at 288, 380 S.E.2d at 168. Where, as here, the defendant appeals from the trial court's denial of a motion to dismiss for both personal and subject matter jurisdiction, our Court must allow immediate review because subject matter jurisdiction is a prerequisite to personal jurisdiction. *Tart v. Prescott's Pharmacies*, 118 N.C. App. 516, 519, 456 S.E.2d 121, 124 (1995). Nevertheless, when a defendant seeks to appeal an interlocutory order, Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure requires the defendant's brief

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contain “[a] statement of the grounds for appellate review” which includes “sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.” N.C. R. App. P. 28(b)(4) (2021).

Here, Defendant filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(2) of our Rules of Civil Procedure for lack of subject matter and personal jurisdiction. The trial court conducted a hearing on Defendant’s motion and entered an order. However, the plain language of the trial court’s order indicates the trial court ruled on a 12(b)(6) motion instead of 12(b)(1) and 12(b)(2) motions, as the trial court concluded: “Insufficient grounds have been shown to dismiss this action pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure at this time.” The court’s reference to Rule 12(b)(6) may have been in error as we recognize our trial courts “address a great volume of cases, sometimes daily, and as a result, their orders occasionally contain clerical errors that complicate our appellate review.” *Gouch v. Rotunno*, 285 N.C. App. 559, 563, 878 S.E.2d 324, 328 (2022). In the event a transcript of the proceedings was maintained, it is not included in the record before this Court. However, the record does include a narration which states, in relevant part, neither party was present but both parties were represented by counsel at the hearing, with Defendant’s counsel making a limited appearance to challenge jurisdiction. Regardless, there is no reference to a Rule 12(b)(6) motion in the record, and without more, we are unable to ascertain whether the trial court was presented with a 12(b)(6) challenge, or whether the order contains a clerical error.

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Defendant did include a statement of the grounds for appellate review pursuant to Appellate Rule 28(b)(4), but the statement only requests this Court review the issues concerning subject matter and personal jurisdiction contemporaneously. The statement fails to reference any issue concerning Rule 12(b)(6) or show how the court's order affects a substantial right.

Because the record here is void of any Rule 12(b)(6) motion to dismiss, we are unable to ascertain whether the trial court was presented with such a motion or whether the trial court's ruling as to Rule 12(b)(6) was a clerical error. While this Court regularly dismisses appeals of interlocutory orders which fail to comply with Rule 28(b)(4), we must, under these circumstances, remand for the court to clarify its ruling.

REMANDED.

Judges COLLINS and THOMPSON concur.

Report per Rule 30(e).