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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-202

Filed 5 November 2024

Wake County, No. 23-CVS-019622-910

KELLY JOHNSON LEE, Plaintiff,

v.

RICHARD MELVIN LEE, JR., and the law firm of SMITH DEBNAM NARRON  
DRAKE SAINTSING & MYERS, Defendants.

Appeal by Plaintiff from judgment entered 19 December 2023 by Judge John  
W. Smith in Wake County Superior Court. Heard in the Court of Appeals 10  
September 2024.

*The Farrell Law Group, P.C., by Richard W. Farrell, for Plaintiff-Appellant.*

*Wyrick Robbins Yates & Ponton LLP, by Charles George and Jaclyn C. Sitjar,  
for Defendant-Appellee.*

GRIFFIN, Judge.

Plaintiff Kelly Johnson Lee appeals from the trial court's order granting  
Defendant Richard Melvin Lee, Jr.'s motion to dismiss her First Amended Complaint  
under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure.  
Plaintiff contends the trial court erred by ruling that: (1) it did not have subject

matter jurisdiction over Plaintiff's claims; (2) Plaintiff failed to properly state a claim; and (3) Plaintiff's claims were dismissed with prejudice. We vacate and remand for entry of dismissal without prejudice.

### **I. Factual and Procedural Background**

Defendant and Plaintiff are former spouses that share one minor child. On 17 October 2022, Defendant filed a Complaint for Child Custody, a Motion for *Ex Parte* Temporary Emergency Custody, and a Motion for Temporary Restraining Order and Preliminary Injunction to Preserve Status Quo. Defendant premised his filings upon allegations related to Plaintiff's alcoholism and her physical and mental health. On 18 November 2022, the parties entered a Consent Order for Temporary Custody, which Judge Julie Bell in Wake County District Court approved. The Consent Order required Plaintiff to submit to sobriety monitoring and a comprehensive physical and mental exam, the results of which would be shared with Defendant's attorneys.

In addition to the Consent Order for Temporary Custody, Judge Bell entered a Consent Protective Order for Confidential Records on 1 December 2022. The Protective Order required Plaintiff to send all of her medical records since 2015 to Defendant's attorneys. Next to these provisions, Judge Bell wrote in and initialed the words "but shall not provide a copy to [Defendant]."

On 14 April 2023, Plaintiff sent the results of her evaluation to Defendant's attorneys, including her medical records for the previous eight years. After receiving Plaintiff's medical records, Defendant's attorneys sent a copy of those records to

Defendant in violation of the Protective Order. Defendant created copies of the records he received from his attorneys and subsequently emailed the copies to five other people, including Plaintiff's parents and Defendant's sisters, in violation of the Protective Order. Defendant, pursuant to his attorneys' direction, deleted the emails from his attorneys and the emails he sent to the other five individuals. Plaintiff did not move for contempt in Wake County District Court. On 14 July 2023, Judge Bell issued a second consent order in which she stated that she was aware of Defendant's actions regarding Plaintiff's medical records and concluded that he was in violation of the Protective Order. Despite this finding, Judge Bell did not sanction Defendant or his counsel.

On 19 July 2023, Plaintiff filed a complaint initiating the current action in Wake County Superior Court. Plaintiff alleged Defendant's actions amounted to intentional infliction of emotional distress, negligent infliction of emotional distress, and invasion of privacy. Plaintiff filed an amended complaint on 13 September 2023. Defendant answered the Amended Complaint on 13 October 2023. Defendant also filed a Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing the Wake County District Court had exclusive jurisdiction over Plaintiff's claims because all Plaintiff's claims arose out of Defendant's violation of the order issued in 22 CVD 12976—the parties' domestic proceeding. Furthermore, Defendant contended that Plaintiff's appropriate remedy was to make a motion for contempt in the Wake County District Court. Plaintiff

responded by arguing that subject matter jurisdiction was proper. Both parties submitted proposed orders. Plaintiff's proposed order stated the trial court had subject matter jurisdiction, or, in the alternative, she should be allowed to amend her complaint to fix defects in subject matter jurisdiction.

On 18 December 2023, the trial court entered an order granting Defendant's Motion to Dismiss, finding that Plaintiff's claims were subject to the exclusive jurisdiction of the Wake County District Court. The trial court also denied Plaintiff's request to amend her pleadings. Plaintiff timely appeals.

## **II. Analysis**

Plaintiff contends the Protective Order was just a "rubber stamp" on the parties' contractual agreement, so Defendant's actions amount to a breach of contract and are not punishable by contempt. Specifically, she argues the Wake County Superior Court, not the Wake County District Court, has subject matter jurisdiction to adjudicate her claims arising from the Protective Order. We disagree.

### **A. Standard of Review**

We review a trial court's ruling on a motion to dismiss de novo regardless of whether the motion is brought under Rule 12(b)(1) or 12(b)(6). *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 624, 881 S.E.2d 32, 43 (2022). We "view the allegations as true and the supporting record in the light most favorable to the nonmoving party." *Id.*

### **B. Trial Court Jurisdiction**

A court must have subject matter jurisdiction to rule on the merits of the case; without it, a court has no authority to hear the case and must dismiss. *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (“Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act.”). Issues related to subject matter jurisdiction can be raised at any time by any party or the court and cannot be waived by the parties. *In re L.T.*, 374 N.C. 567, 569, 843 S.E.2d 199, 200 (2020). When a court does not have subject matter jurisdiction over certain claims, it can only dismiss those claims without prejudice since subject matter jurisdiction is a prerequisite to issuing a final judgment on those claims. *United Daughters of the Confederacy*, 383 N.C. at 650, 881 S.E.2d at 60; *Pugh v. Howard*, 288 N.C. App. 576, 588, 887 S.E.2d 734, 74 (2023). Thus, a court cannot dismiss under both Rule 12(b)(1) and Rule 12(b)(6) because a dismissal under Rule 12(b)(6) necessarily requires reaching the merits of the case. *United Daughters of the Confederacy*, 383 N.C. at 650, 881 S.E.2d at 60. When reviewing a motion to dismiss pursuant to Rule 12(b)(1), this Court “may consider information outside the scope of the pleadings in addition to the allegations set out in the complaint.” *Id.* at 624, 881 S.E.2d at 43.

A court generally has the discretion to coerce compliance with its orders and to provide a remedy for an injured party through its contempt power. *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985) (citation omitted). However, this rule has exceptions; a court cannot use its contempt power to enforce a consent

order that is “merely a recital of the parties’ agreement and not an adjudication of rights[.]” *Potter v. Hileman Lab’ys, Inc.*, 150 N.C. App. 326, 334, 564 S.E.2d 259, 265 (2002). In such cases, a violation of a consent order is instead enforceable through a breach of contract action. *Id.*; see also *Kassel v. Rienth*, 289 N.C. App. 173, 181, 888 S.E.2d 682, 691 (2023) (finding that an order that was essentially a “rubber stamp” of the parties’ agreement could be enforced by a breach of contract action).

In *Kassel*, we held “a court must consider whether, on its face, the order goes beyond a mere recital of the parties’ agreement, the facts of each individual case, and the procedural history surrounding the litigation.” *Id.* at 181, 888 S.E.2d at 691 (cleaned up); see also *Crane v. Green*, 114 N.C. App. 105, 106–07, 441 S.E.2d 144, 145 (1994) (analyzing whether a consent order was enforceable by contempt); *PCI Energy Serv., Inc. v. Wachs Tech. Serv., Inc.*, 122 N.C. App. 436, 439–40, 470 S.E.2d 566–67 (1996) (holding contempt to be the appropriate remedy for a violation of a consent order in which the trial court adjudicated the rights of the parties). There, we addressed whether a consent order merely memorialized the parties’ real estate contract or was an independent court order. *Kassel*, 289 N.C. App. at 178, 888 S.E.2d at 689. We concluded that, because the parties drafted the language of the consent order and the trial court only added prefatory language such as “*the parties have reached an agreement* regarding resolution of the issues pleaded in the Complaint and Counterclaim[.]” the consent order acted as a “rubber stamp” upon the parties agreement. *Id.* at 181–82, 888 S.E.2d at 691–92. Integral to our analysis were the

facts that the judge neither determined any of the parties' rights nor made any material changes to the language of the agreement, showing the court merely approved the parties' contract. *Id.* at 182, 888 S.E.2d at 691.

Here, the Protective Order went beyond memorializing the parties' agreement. Accordingly, any violation did not give rise to Plaintiff's breach of contract and tort claims. The plain text of the order is comparable to *Kassel*. *See Id.* at 181, 888 S.E.2d at 691. Like *Kassel*, the Protective Order is a signed copy of a proposed order submitted to the court by the parties. *See Id.* It does not incorporate the agreement by reference; it contains the direct language of the Protective Order. However, Judge Bell did not just sign the proposed order as it was presented to her. She made a substantive written change regarding Plaintiff's medical records. Even though the plain language of the order is comparable to *Kassel*, the fact that Judge Bell added language to the Protective Order that was not part of the original agreement distinguishes this case.

Second, Judge Bell reached "a judicial determination of the parties' respective rights," in the Protective Order. *See Kassel*, 289 N.C. App. at 181–82, 888 S.E.2d at 691–92. When Judge Bell added in the provision preventing Defendant's attorneys from sharing Plaintiff's medical records with Defendant, Judge Bell was simultaneously granting Plaintiff an increased right of privacy and Defendant a diminished right of access to Plaintiff's records. *See News and Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 279–80, 322 S.E.2d 133, 136 (1984) (holding that

a civil litigant does not have right to discovery and that discovery may be limited by the court or statute); N.C. Gen. Stat. § 8-53 (2023) (explaining that a litigant’s right to privacy may be curbed by discovery if it is in the interest of justice). Therefore, we hold the Protective Order contains a significant “judicial determination of the parties’ rights” that shows “an adjudication of rights” rather than a “rubber stamp of the parties’ agreement.” *See Kassel*, 289 N.C. App. at 179, 181–82, 888 S.E.2d at 689, 691–92.

Third, Judge Bell “transformed” the agreement by “adopting” her own provisions. *Id.* at 182, 888 S.E.2d at 691-92. Judge Bell wrote in and initialed the provision preventing Defendant’s attorneys from sharing Plaintiff’s medical records with Defendant. This is a significant change from the original agreement, giving Plaintiff’s privacy new substantive protection. Thus, we conclude that Judge Bell sufficiently transformed the Protective Order such that it constituted “an adjudication of rights” rather than a “rubber stamp of the parties’ agreement.” *See Kassel*, 289 N.C. App. 179, 181–82, 888 S.E.2d at 689, 691–92.

We conclude the Protective Order is enforceable through contempt rather than a breach of contract suit. *See Id.*; *see also Potter* 150 N.C. App. at 334, 564 S.E.2d at 265. The power of contempt rests with Judge Bell. Although Judge Bell knew about Defendant’s violation, Plaintiff did not make a motion for contempt. Thus, Judge Bell chose, in her discretion, not to use the contempt power. *See Blue Jeans Corp. v. Amalgamated Clothing Workers of Am.*, 275 N.C. 503, 509, 169 S.E.2d 867, 870 (1969)



(“The Judge determines the facts and adjudges the contempt . . . it is in his discretion to do so or not.”). Thus, Plaintiff’s appropriate path to a remedy was to make a motion for contempt in Wake County District Court; she cannot collaterally attack the District Court’s ruling in Superior Court because she did not make a motion for contempt.

Plaintiff contends she should have been allowed to amend her complaint. However, we conclude the trial court rightly denied this request due to both substantive and procedural defects in her request. In her proposed order, Plaintiff requested permission “to amend her First Amended Complaint to allege amended claims, including those arising out of a breach of contract[.]” Under N.C. Civil Procedure Rule 11(a), every pleading, including a request to make an amended complaint, must be signed. N.C. R. Civ. P. 11(a). Plaintiff’s request to amend her complaint was only made in her proposed order, an unsigned document. Assuming *arguendo* that a litigant may request to amend their complaint in an unsigned order, Plaintiff’s request to amend suffered from a substantive defect; the trial court would still lack subject matter jurisdiction over her breach of contract claim because the Protective Order was “an adjudication of rights” consistent with *Kassel*. See *Kassel*, 289 N.C. App. at 181, 888, S.E.2d at 691. Because the trial court did not err in finding that it was without subject matter jurisdiction to hear Plaintiff’s claims, we conclude the trial court did not err in dismissing Plaintiff’s claims pursuant to Rule 12(b)(1).

### **C. Dismissal With Prejudice**

We next address Plaintiff's contention that the trial court erred by dismissing her claims with prejudice. We agree. In its 18 December 2023 order, the trial court dismissed Plaintiffs' claims pursuant to Rules 12(b)(1) and 12(b)(6). Because the court found that Plaintiff failed to state a claim subject to Rule 12(b)(6), the trial court dismissed with prejudice. Although Plaintiff raised this issue on appeal, she did not brief it. Regardless, this Court may raise defects in subject matter jurisdiction at any time *sua sponte*. *In re L.T.*, 374 N.C. at 569, 843 S.E.2d at 200.

This dismissal was in error because the trial court had no authority to reach the merits of the case and dismiss with prejudice. Defendant argues that because the trial court's dismissal was, in part, pursuant to Rule 12(b)(6), that the dismissal was with prejudice only for the Wake County Superior Court and could still be brought in the District Court. This argument is without merit. The trial court found that it lacked subject matter jurisdiction, which necessarily prevented it from reaching the merits of the case, *United Daughters of the Confederacy*, 383 N.C. at 650, 881 S.E.2d at 60, a pre-requisite for both an application of Rule 12(b)(6) and dismissal with prejudice. Furthermore, by claiming Plaintiff would still be able to bring her claim in Wake County District Court, Defendant concedes that the dismissal cannot be with prejudice.

We vacate the dismissal with prejudice and remand to the trial court for entry of dismissal without prejudice based on lack of subject matter jurisdiction pursuant to N.C. Rule of Civil Procedure 12(b)(1), alone.

**III. Conclusion**

We hold the trial court properly dismissed Plaintiff's claims. However, we vacate and remand for entry of dismissal without prejudice.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).