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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-78

Filed 5 November 2024

Wake County, No. 19 CVD 15091

BRIAN J. LINEMAN, Plaintiff,

v.

MEGAN McELHANEY (fka: LINEMAN), Defendant.

Appeal by plaintiff from orders entered on 9 May 2022 and 29 March 2023 by Judge J. Brian Ratledge in Wake County District Court. Heard in the Court of Appeals 28 August 2024.

Bosquez Porter Family Law, by Andrea Bosquez-Porter and Emily C. Jeske, for plaintiff-appellant.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, for defendant-appellee.

THOMPSON, Judge.

Brian Lineman (plaintiff) seeks review of the following: an order finding him in civil contempt, an order denying his motion to modify his alimony obligations, and an order denying his Rule 59 motion for a new trial or to amend the district court's findings of fact. After careful review, plaintiff's appeal is dismissed for failure to

comply with Rule 3 of the North Carolina Rules of Appellate Procedure.

I. Factual Background and Procedural History

Plaintiff and Megan McElhaney (defendant) married in April 1995 and separated in October 2018. A year later, plaintiff filed a complaint seeking absolute divorce, and defendant counterclaimed seeking child support, equitable distribution, and alimony. Plaintiff and defendant entered into a Separation and Property Agreement on 5 December 2019, and it was incorporated and made a part of the district court's 27 January 2020 consent order (2020 Order) on custody, child support, alimony, and equitable distribution.

While the 2020 Order covered numerous areas, the relevant facts in this case deal in large part with plaintiff's alimony obligations to defendant. According to the 2020 Order, plaintiff was the financially supporting spouse while defendant was the financially dependent spouse. Per the 2020 Order, plaintiff was to pay alimony to defendant in the amount of \$7,000.00 per month, said alimony payments to be split into two equal payments of \$3,233.26 every other week when plaintiff was paid. Plaintiff's alimony payments to defendant were to continue until further agreement between the parties or order of the court, and alimony would terminate upon the death of plaintiff or defendant, if defendant remarried, or if defendant began cohabitating with a third party. Moreover, if plaintiff was terminated from his employment with NetApp for any reason, the parties agreed to try in good faith to renegotiate the alimony provisions of the 2020 Order. In addition to alimony

payments, plaintiff was to pay defendant fifty percent (50%) of the Incentive Compensation Bonuses (ICBs) that he earned from NetApp within twenty days of receiving the bonuses; and fifty percent (50%) of the value of the Restricted Stock Units (RSUs) that he received as of 31 October 2018 (date of the parties' separation), from NetApp, once plaintiff vested in the stock. Additionally, the 2020 Order indicated that plaintiff was to name defendant as beneficiary to one-half of the proceeds of his life insurance policy through his current and any future employment and name their three children as equal beneficiaries on the other half of the proceeds.

On 28 August 2020, defendant filed a motion to show cause for contempt regarding alimony and other issues. In this motion, defendant alleged that plaintiff failed to (as agreed in the 2020 Order): (1) pay the second installment of the full amount of alimony due in February 2020, (2) pay defendant any portion of plaintiff's ICBs for 2020 even though plaintiff had received them, (3) pay defendant any portion of the sales proceeds of the RSUs for 2020, (4) provide information regarding the amount and vesting schedule of his ICBs or RSUs for 2020, (5) pay defendant \$5,000.00 or any sum of money as reimbursement for attorney's fees, and (6) provide information showing that plaintiff had named defendant and their children as co-beneficiaries on his life insurance.

Before the hearing to show cause regarding defendant's 28 August 2020 motion, plaintiff filed a motion to modify alimony alleging that substantial and material changes in circumstances had occurred that warranted a modification of

plaintiff's obligation to pay defendant alimony. Plaintiff alleged that the substantial changes in circumstances were (1) at the time the 2020 Order was entered, plaintiff had been an employee of NetApp for fifteen years and was the vice president of engineering for the last three years; (2) plaintiff was notified on 4 June 2020 that he would be terminated from employment at NetApp, effective 3 August 2020; (3) plaintiff was terminated; and (4) at the time defendant filed her 28 August motion, plaintiff had not found suitable employment with equivalent compensation despite his best efforts.

On 30 July 2021, defendant filed a second motion for order to show cause and a motion for contempt. Defendant alleged that plaintiff (1) failed to pay alimony totaling \$14,000.00 for the months of November and December 2020; (2) failed to pay alimony totaling \$14,000.00 for the months of January and February 2021; (3) only made partial alimony payments for the months of March 2021, April 2021, May 2021, June 2021, and July 2021; (4) failed to make the requisite arrangements to have the alimony payments be paid to defendant directly from his employer; and (5) failed to provide information regarding the IBCs and RSUs that he received in 2019 and 2020, despite having received those from his then-employer, NetApp. After reviewing defendant's motion, the district court entered an order for plaintiff to appear before the court and show cause for contempt with regard to the 2020 Order.

The district court held a hearing on 6 January 2022, in which defendant's 24 August 2020 and 30 July 2021 motions to show cause, as well as plaintiff's 30 October

2020 motion to modify alimony, were heard. Following this hearing, the district court concluded that plaintiff failed to meet the burden required to modify his alimony obligations and that plaintiff was in willful contempt. On 9 May 2022, the district court entered its order which denied plaintiff's motion to modify alimony, adjudged plaintiff to be in civil contempt of the 2020 order, and enumerated purge conditions for plaintiff to meet.

Ten days later, plaintiff filed a Rule 59 motion for a new trial or to amend the district court's findings of fact in its 9 May 2022 order. Plaintiff's Rule 59 motion was heard on 7 March 2023, and the district court entered an order on 29 March 2023 (Rule 59 order) which denied plaintiff's motion.

On 27 April 2023, plaintiff filed notice of appeal from the 9 May 2022 order and the Rule 59 order.

II. Appellate Jurisdiction

As an initial matter, we must determine whether this Court has jurisdiction to consider plaintiff's appeal. Plaintiff's notice of appeal from the 9 May 2022 Order was filed on 27 April 2023, which is far beyond the thirty-day requirement outlined in Rule 3(c)(1). N.C.R. App. P. 3(c)(1). As such, the timeliness of plaintiff's appeal centers upon whether plaintiff's 19 May 2022 Rule 59 motion for new trial operated to toll the thirty-day period as proscribed by Rule 3(c)(3). N.C.R. App. P. 3(c)(3).

"Rule 59, by its plain terms, does not apply to an interlocutory, pretrial order like the [contempt] order in this case." *Tetra Tech Tesoro, Inc. v. JAAAT Technical*

Services, LLC, 250 N.C. App. 791, 796, 799 S.E.2d 535, 538 (2016). Moreover, “[a]ll of the enumerated grounds in Rule 59(a), and the concluding text addressing ‘an action tried without a jury,’ indicate that this rule applies only after a trial on the merits or, at a minimum, a judgment ending a case on the merits.” *Id.* at 797, 794 S.E.2d at 538. This comes as “no surprise, as the express purpose of Rule 59(a) is to seek ‘a new trial.’” *Id.*

Here, plaintiff’s Rule 59 motion for a new trial or to amend the findings of fact was not proper and did not toll the thirty-day period set forth in Rule 3(c)(3). The order that prompted plaintiff to file his Rule 59 motion was the result of a hearing for plaintiff to show cause regarding defendant’s motion for contempt, and for plaintiff to be heard on his motion to modify alimony. Therefore, it was not a trial. As further indication of this, the 9 May 2022 order explicitly states, “[t]his Order shall be stayed in order for [p]laintiff/[c]ontemnor to meet his purge conditions as set forth above. Plaintiff/[c]ontemnor shall report to the Wake County Courthouse Courtroom 2D at 9:00AM on Friday, [10 June] 2022, to provide proof to the [c]ourt that he has met his purge conditions.” Therefore, it was not “a judgment ending a case on the merits.” *Id.*

As such, plaintiff’s Rule 59 motion was not proper, and it did not operate to toll the thirty-day period proscribed by Rule 3(c)(3). Thus, plaintiff’s written notice of appeal on 27 April 2023 from the 9 May 2022 order was not timely and this Court lacks jurisdiction to consider plaintiff’s appeal because, “[t]he provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an

appeal.” *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011) (citation omitted).

III. Petition for Writ of Certiorari

Recognizing that this Court may conclude his Rule 59 motion is improper, plaintiff filed a petition for writ of certiorari (PWC) contemporaneously with his appeal.

A writ of certiorari is a “‘prerogative’ writ[] that the Court of Appeals may issue in aid of its own jurisdiction.” *Cryan v. Nat’l Council of YMCAs of the U.S.*, 384 N.C. 569, 572, 887 S.E.2d 848, 851 (2023). This writ “is intended as an extraordinary remedial writ to correct errors of law.” *Id.* (citation omitted). Further, this writ should be issued “only if the petitioner can show merit or that error was probably committed below” and “only if there are extraordinary circumstances to justify it.” *Id.* at 572–73, 887 S.E.2d at 851 (internal quotation marks and citations omitted). This Court “require[s] extraordinary circumstances because a writ of certiorari is not intended as a substitute for notice of appeal[.]” *id.* (citation omitted), and “[i]f courts issued writs of certiorari solely on the showing of some error below, it would render meaningless the rules governing the time and manner of noticing appeals.” *Id.* at 573, 887 S.E.2d at 851 (internal quotation marks and citation omitted).

In his petition, plaintiff argues that his PWC should be granted because the district court “erroneously found him in contempt of court and denied his motion to modify alimony based on a substantial change in circumstances.” After careful

review, we conclude that plaintiff failed to establish that “error was probably committed below[.]” *id.* at 572, 887 S.E.2d at 851 (citation omitted), and even if plaintiff established that error was committed below, he failed to mention the existence of *any* extraordinary circumstance that would justify the issuance of his PWC.

Accordingly, and in our discretion, plaintiff’s PWC is denied.

IV. Conclusion

Based on the foregoing reasons, plaintiff’s appeal is dismissed as he failed to comply with Rule 3 of the North Carolina Rules of Appellate Procedure.

DISMISSED.

Chief Judge DILLON and Judge FLOOD concur.

Report per Rule 30(e).