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NO. COA01-1446

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

ANNE IMPEMBA PROVENZANO,
Plaintiff

v.

Wake County
No. 00CVD06336

PATRICK PROVENZANO,
Defendant

Appeal by defendant from an order entered 16 August 2001 *nunc pro tunc* to 4 April 2001 by Judge Alice C. Stubbs in Wake County District Court. Heard in the Court of Appeals 9 September 2002.

Herring McBennett Mills & Finkelstein, PLLC, by Scott Allen, for plaintiff-appellee.

Brett A. Hubbard for defendant-appellant.

HUNTER, Judge.

Patrick Provenzano ("defendant") appeals the trial court's order granting Anne Impemba Provenzano's ("plaintiff") motion for relief from judgment of absolute divorce pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure ("Rule 60(b)"). We affirm, holding the trial court did not abuse its discretion in setting aside the divorce judgment because the judgment was entered as the result of mistake, inadvertence, and excusable neglect.

The relevant procedural history is summarized as follows: Plaintiff filed a complaint for absolute divorce from defendant on

6 June 2000. The complaint referenced a pending action in Wake County District Court for post separation support and permanent alimony, child custody and support, and attorney's fees.

Subsequently, on 4 August 2000, a judgment of absolute divorce was entered in Wake County District Court. The trial court stated in the judgment that plaintiff and defendant had separated from each other on or about 5 June 2000 and had lived continuously separate and apart from each other for a period of more than one year preceding the institution of the action. The judgment ordered the pending claims for post separation support and alimony, child custody and support, and equitable distribution be preserved.

On 5 March 2001, plaintiff filed a motion for relief from judgment pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. Plaintiff requested that the absolute divorce judgment of 4 August 2000 be set aside for reasons of mistake, inadvertence, and excusable neglect. Plaintiff further claimed the judgment was void for lack of personal and subject matter jurisdiction.

In an affidavit dated 2 April 2001, defendant stated that he accepted the jurisdiction of the court in granting the absolute divorce. Defendant additionally stated that he accepted the divorce judgment and wished to continue to accept the court's order of absolute divorce.

On 4 April 2001, a hearing was held on plaintiff's motion for relief from judgment. Subsequently, on 16 August 2001, the trial court granted plaintiff's motion after finding the following facts:

defendant was served a civil summons by Samuel McClintock, a private investigator, after the statute allowing a private process server to serve a summons and complaint had expired; Ms. Crabtree, plaintiff's attorney in the divorce action, believed equitable distribution had been preserved in a pending action in Wake County District Court when it had not been and Ms. Crabtree thus misled the court into signing the judgment of absolute divorce on 4 August 2000; and there was no claim for equitable distribution pending at the time of the 4 August 2000 judgment of divorce.

In its order granting relief from judgment, the trial court concluded as a matter of law that the entry of the 4 August 2000 divorce judgment was the result of mistake, inadvertence, and excusable neglect. The court further concluded that the court lacked personal and subject matter jurisdiction when the judgment was entered on 4 August 2000. Accordingly, the court set aside the 4 August 2000 divorce judgment.

On 23 August 2001, plaintiff made a motion to the court for relief pursuant to Rule 60(a) of the North Carolina Rules of Civil Procedure stating that the order setting aside the divorce judgment should have been entered *nunc pro tunc* to the date of the hearing. Thereafter, the trial court made a notation on the order indicating that it was entered *nunc pro tunc* to 4 April 2001.

The sole issue raised by this appeal is whether the trial court erred in setting aside the 4 August 2000 divorce judgment.

At the outset, appellate review of a trial court's ruling on a Rule 60(b) motion is limited to determining whether the trial

court abused its discretion. *Gibson v. Mena*, 144 N.C. App. 125, 548 S.E.2d 745 (2001). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998). Rule 60(b)(1) allows for relief from a final judgment or order for "[m]istake, inadvertence, surprise, or excusable neglect." N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2001). A motion made pursuant to Rule 60(b)(1) must be filed within one year after the judgment or order was entered. N.C. Gen. Stat. § 1A-1, Rule 60(b). Under Rule 60(b), there is "no bar to granting relief to a successful plaintiff when adequate reason is shown." *Wood v. Wood*, 297 N.C. 1, 7, 252 S.E.2d 799, 803 (1979). A trial court's findings of fact are conclusive on appeal when they are supported by competent evidence; however, the trial court's conclusions drawn from these facts are subject to appellate review. *Chance v. Henderson*, 134 N.C. App. 657, 661, 518 S.E.2d 780, 783 (1999).

In an affidavit submitted to the trial court by plaintiff in support of her Rule 60(b) motion, Ms. Crabtree, plaintiff's attorney at the time the divorce judgment was entered, stated that in her professional opinion, the final divorce decree was entered into without equitable distribution being properly reserved due to excusable neglect on the part of her and plaintiff. Ms. Crabtree assumed representation of plaintiff from Mark Sokol, plaintiff's previously retained attorney. According to Ms. Crabtree, she believed that equitable distribution was included in the action

filed by Mr. Sokol prior to her representation of plaintiff. This belief was based upon plaintiff's statements as well as information received from Mr. Sokol's office that all claims, including equitable distribution, had been made and were pending. Ms. Crabtree's mistake was also based on the fact that plaintiff's file contained several temporary restraining orders limiting defendant's rights to distribute marital property. Further, an interim distribution of property had been entered and defendant executed a quitclaim deed upon marital real property located in North Carolina. Ms. Crabtree claimed in her affidavit that she inadvertently misled the court into entering a final divorce decree without preserving an equitable distribution claim because of her mistaken belief that equitable distribution had been preserved in the prior action.

In its order for relief from judgment, the trial court found the following:

7. As a result of mistake, inadvertence, and excusable neglect detailed in her affidavit[,] Ms. Crabtree believed that equitable distribution had been preserved in the 99 CVD 6750 action when it had not been, and she thereby misled [sic] this Court into signing the divorce decree on August 4, 2000. Filings with the court on behalf of Defendant including the filing of Lis pendens demonstrate that the mistake of fact regarding the pending equitable distribution proceedings was mutual. The court itself labored under this mistake of fact.

The court concluded that the entry of the 4 August 2000 divorce judgment was the result of mistake, inadvertence, and excusable neglect.

"Whether conduct constitutes 'excusable neglect' presents a conclusion of law, fully reviewable on appeal." *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 102, 515 S.E.2d 30, 37 (1999). Excusable neglect within the meaning of Rule 60(b)(1) must have occurred at or before judgment was entered and it must have caused the judgment to be entered. *PYA/Monarch, Inc. v. Ray Lackey Enterprises*, 96 N.C. App. 225, 227, 385 S.E.2d 170, 171 (1989). Further, "[i]gnorance, inexcusable negligence, or carelessness on the part of an attorney will not provide grounds for relief under Rule 60(b)(1)." *Clark v. Penland*, 146 N.C. App. 288, 292, 552 S.E.2d 243, 245 (2001).

In the instant case, the trial court's findings of fact support the conclusion of law that the "divorce judgment was the result of mistake, inadvertence, and excusable neglect." Ms. Crabtree's affidavit reveals that both plaintiff and the office of plaintiff's formerly retained counsel told Ms. Crabtree that a claim for equitable distribution had previously been brought and was pending. Ms. Crabtree's mistake of fact that the equitable distribution claim was pending was also based on the fact that plaintiff's file included several temporary restraining orders limiting defendant's rights to distribute marital property. Additionally, an interim distribution of property had been entered and defendant, at his insistence, had executed a quitclaim deed upon marital property located in North Carolina. Thus, there is evidence supporting the conclusion that Ms. Crabtree's mistake of fact constituted excusable neglect and was inadvertent. In

addition, plaintiff's mistaken belief that an equitable distribution claim was pending was excusable in light of the technical nature of the distinctions between child support, alimony, equitable distribution, and interim distributions. Therefore, we hold that the court did not abuse its discretion in setting aside the 4 August 2000 judgment of absolute divorce.

Although apparently not raised during the hearing on plaintiff's Rule 60(b) motion and not addressed by the trial court in its order setting aside the divorce judgment, we note that the divorce judgment was void on its face for lack of subject matter jurisdiction. One of the necessary requirements before an action for divorce may be instituted in North Carolina is that the husband and wife must have lived separate and apart for one year. N.C. Gen. Stat. § 50-6 (2001); *Bruce v. Bruce*, 79 N.C. App. 579, 339 S.E.2d 855 (1986). Here, the trial court states in its judgment of absolute divorce that plaintiff and defendant separated from each other on or about 5 June 2000 and had lived continuously separate and apart from each other for a period of more than one year preceding the institution of the action. The divorce judgment was filed on 4 August 2000 and it is clear that if plaintiff and defendant separated on 5 June 2000, they could not have been separated for a year prior to the institution of the action. Therefore, it appears that the statutorily required separation period had not been met and thus, the court did not have subject matter jurisdiction. See *Bruce*, 79 N.C. App. 579, 339 S.E.2d 855 (stating the one year separation period is a jurisdictional

requirement). With no subject matter jurisdiction, the divorce judgment would be void on its face.

For the foregoing reasons we hold that the trial court did not abuse its discretion by granting plaintiff's motion for relief from judgment under Rule 60(b)(1). Furthermore, we note that even if there had not been any mistake, inadvertence, or excusable neglect, the divorce judgment would have been void due to lack of subject matter jurisdiction according to the date of separation included on the face of the judgment.

Affirmed.

Chief Judge EAGLES and Judge MARTIN concur.

Report per Rule 30(e).