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NO. COA11-177
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

MARC D. PREIS,
Plaintiff,

v.

New Hanover County
No. 09 CVD 3301

LESLIE J. YOAS,
Defendant.

Appeal by plaintiff from orders entered 2 November 2009 and 5 October 2010 by Judge James H. Faison, III, in New Hanover County District Court. Heard in the Court of Appeals 31 August 2011.

Rice Law, PLLC, by Mark Spencer Williams, Richard Forrest Kern, and Stephen G. Domer, for plaintiff-appellant.

Johnson, Lambeth & Brown, by Maynard M. Brown, for defendant-appellee.

HUNTER, Robert C., Judge.

Marc D. Preis ("plaintiff") appeals from the trial court's order dismissing his complaint for declaratory judgment and its order denying his subsequent motions for a new trial, to set

aside the trial court's order, or to amend the order. After careful review, we affirm the trial court's orders.

Background

In March 2006, plaintiff and Leslie J. Yoas ("defendant"), then residents of Pennsylvania, entered into a Marital Separation Agreement (the "Separation Agreement") in which the parties attempted to agree to terms for alimony, child support, and the custody of their minor children, among other issues. The Separation Agreement provided that plaintiff would pay child support until their two children reached the age of majority. While the amount of plaintiff's child support payment, \$500, was specified in the Separation Agreement, for unknown reasons the frequency of the payment was struck from the text. The agreement also provided that its terms were to be construed under the laws of the Commonwealth of Pennsylvania, and that while it could be incorporated into a divorce decree for the purpose of enforcement, it was not to be merged into a divorce decree.

In November 2006, a divorce decree (the "Divorce Decree") was entered in Lebanon County, Pennsylvania. The order stated the parties' Separation Agreement was "adopted as an Order" for the "purposes of enforcement and consideration of disposition of the rights and liabilities of the parties."

Sometime after the Divorce Decree was entered, plaintiff moved from Lebanon County to Lancaster County, Pennsylvania. Defendant filed a petition to register the Divorce Decree in Lancaster County for the enforcement of plaintiff's child support obligation. The matter came on for a hearing before Judge David R. Workman in the Court of Common Pleas of Lancaster County. In a 16 October 2007 order, Judge Workman denied the request to register the Divorce Decree in Lancaster County as defendant had not followed the procedure for registration of the order. Judge Workman also concluded that due to the ambiguity of the frequency of plaintiff's child support payment, any modification of that order could only be made in the Court of Common Pleas of Lebanon County.

On 29 October 2008, a new order was signed in the Court of Common Pleas of Lancaster County (the "Pennsylvania Order"), which states the parties stipulated that as of 16 September 2008 a new order would be entered to supersede the "marital portion of the parties divorce settlement agreement." The Pennsylvania Order further provided that plaintiff was to pay \$810.12 per month for "current support" and \$86.66 per month for arrears, as well as other payments for medical expenses. The order stated, however, that "support issues existing prior to this Order" were not addressed and would be addressed under the parties' divorce agreement.

The record is unclear as to when defendant moved to North Carolina. However, in late 2008, the North Carolina Department of Health and Human Services, Division of Social Services, Child Support Enforcement Section (hereinafter the "Child Support Enforcement Section") instituted an action against plaintiff alleging that he was "delinquent in the payment of his court ordered Pennsylvania child support obligation" and sought to intercept plaintiff's 2008 federal income tax refund.

While the action between plaintiff and the Child Support Enforcement Section continued, plaintiff filed the underlying complaint for declaratory judgment against defendant on 16 July 2009 in New Hanover County District Court. Plaintiff sought the District Court to declare the parties' Separation Agreement invalid and unenforceable as to the amount of child support plaintiff owed defendant and to establish the amount of arrears plaintiff owed.

Defendant filed motions to dismiss plaintiff's complaint for lack of subject matter jurisdiction, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), and for failure to state a claim upon which relief could be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

Defendant's motions came before Judge James H. Faison, III, in New Hanover County District Court on 19 August 2009. At the hearing, plaintiff argued that the motions to dismiss his

complaint were filed by the New Hanover County Child Support Enforcement Agency (the "Agency"), not by defendant, and that the Agency did not have standing to intervene in the case. The motions to dismiss were signed, "Johnson, Lambeth & Brown / By: Carter T. Lambeth / Attorney for New Hanover County Child Support Enforcement Agency." The record also reveals that the motions begin with the text, "Defendant, through counsel, hereby moves the Court." Attached to the motions was a verification signed by defendant, which stated that Leslie J. Yoas deposed that she was the defendant in the action, that she read the pleadings, knew the contents of the pleadings, and believed them to be true.

On 13 October 2009, plaintiff entered into a consent order with the Child Support Enforcement Section to settle the issue of how much of his 2008 federal income tax refund could be disbursed to defendant for payment of child support arrears—without prejudice to a later determination of the amount of arrears owed by plaintiff.

On 2 November 2009, Judge Faison entered an order dismissing plaintiff's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. On 12 November 2009, plaintiff filed a motion for a new trial arguing that because neither party presented evidence at the 19 August 2009 hearing there was insufficient

evidence to justify the verdict, and that the verdict was contrary to law.

Plaintiff also filed a motion to set aside the 2 November 2009 order as a result of newly discovered evidence (which included plaintiff's consent order with the Child Support Enforcement Section), pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(4). Lastly, plaintiff filed a motion to amend the 2 November 2009 order, pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(b), arguing that the record was devoid of any evidence to support the trial court's findings and conclusions.

After a hearing on the matter, the trial court entered an order denying plaintiff's Rule 59 and Rule 52 motions on 5 October 2010. In this order the trial court made a finding that, "[c]ounsel for the New Hanover County Child Support Enforcement Agency filed a motion [sic] to dismiss Plaintiff's Complaint on July 29, 2009 in [sic] behalf of Leslie J. Yoas." The trial court also found that the "New Hanover County Child Support Enforcement Agency is only enforcing the Pennsylvania Child Support Orders [sic] for Leslie Yoas." The trial court concluded that defendant's Rule 12(b)(1) and Rule 12(b)(6) motions to dismiss plaintiff's complaint were properly granted and denied plaintiff's motions. Plaintiff appeals from the 2 November 2009 order dismissing his complaint and from the 5

October 2010 order denying his motions seeking a new trial, to set aside the order, and to amend the trial court's order.

Discussion

A. Standing

Plaintiff first argues the trial court erred by allowing the New Hanover County Child Support Agency to participate in the case over plaintiff's objection that the Agency did not have standing. Specifically, plaintiff alleges that the opposing counsel was representing the Agency in the underlying action, and yet the Agency was not a real party in interest, nor did it properly intervene in the action in accordance with N.C. Gen. Stat. § 1A-1, Rule 24.

While we acknowledge the record reveals several references that imply plaintiff's opposing counsel, Carter Lambeth, was representing the Agency, we conclude they are insufficient to establish that Mr. Lambeth was representing the Agency rather than defendant. For example, the signature block on the motions to dismiss was signed by Mr. Lambeth as "[a]ttorney for" the Agency. Significantly, however, the motions to dismiss begin with the language: "*Defendant, through counsel*, hereby moves the Court" (Emphasis added.) The motions end with defendant's verification, wherein defendant deposes that she is the defendant in the action and that she knows the matters in the motions are true or believes them to be true upon

information and belief. It is undisputed that defendant has standing to participate in the underlying action. Thus, subsequent references to the Agency in the trial court's orders and in the transcript do not persuade us that Mr. Lambeth was representing the Agency, rather than appearing as counsel for defendant. Plaintiff's argument is overruled.

B. Rule 12(b)(6) Motion to Dismiss

Next, plaintiff argues the trial court erred in dismissing his complaint for failure to state a claim upon which relief could be granted. We disagree.

Pursuant to the North Carolina Uniform Declaratory Judgment Act (the "Act"), our trial courts have the power to declare the "rights, status, and other legal relations" of parties arising under a contract, including questions regarding the construction, or validity, of the instrument. N.C. Gen. Stat. §§ 1-253 to -254 (2009). Before a court may do so, however, there must be an actual controversy between the parties at the time the action seeking declaratory judgment is filed and at the time of any hearing on the matter. *State ex rel. Utilities Comm'n v. Carolina Water Serv., Inc. of N.C.*, 149 N.C. App. 656, 658, 562 S.E.2d 60, 62 (2002). We have previously explained that an actual controversy between the parties is a "jurisdictional prerequisite" to proceed under the Act. *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316

S.E.2d 59, 61 (1984) (citation omitted). This requirement prevents our courts from giving merely advisory opinions, which the parties might use "if and when occasion might arise." *Id.* at 234, 316 S.E.2d at 62 (citation omitted). Thus, when "the complaint does not allege an actual, genuine existing controversy, a motion for dismissal under . . . Rule 12(b)(6) will be granted." *Id.* at 234-35, 316 S.E.2d at 62.

What qualifies as an actual controversy to justify a declaratory judgment must be determined on a case-by-case basis. While the Act provides that a contract may be construed in a declaratory judgment before breach has occurred, N.C. Gen. Stat. § 1-254, our courts have required the existence of more than a disagreement between the parties as to their rights and liabilities arising under the instrument. *Harrison*, 311 N.C. at 234, 316 S.E.2d at 61. Rather, "it must be shown *in the complaint* that litigation appears unavoidable. Mere apprehension or the mere threat of an action or suit is not enough." *State ex rel. Utilities Comm'n*, 149 N.C. App. at 658, 562 S.E.2d at 62 (citation and quotation marks omitted) (emphasis added); *Lide v. Mears*, 231 N.C. 111, 118, 56 S.E.2d 404, 409 (1949) (noting that a litigant seeking declaratory judgment "must set forth in his pleading all facts necessary to disclose the existence of an actual controversy between the parties to the action with regard to their respective rights and

duties"); see *Hammock v. Bencini*, 98 N.C. App. 510, 512, 391 S.E.2d 210, 211 (1990) (rejecting appellant's argument that an actual controversy existed because he remained subject to criminal contempt "should he again fail to pay child support as required by an outstanding court order" and affirming the trial court's dismissal of the action for declaratory judgment).

In the present case, we conclude that plaintiff has failed to allege that an actual controversy arising under the parties' original Separation Agreement existed at the time he filed his complaint or at the time of the hearing on the matter. Plaintiff's complaint alleges that in 2007 defendant filed an action in Lebanon County, Pennsylvania to enforce plaintiff's child support obligation pursuant to the Separation Agreement, but that the trial court held the agreement was too vague to be enforceable. Thus, according to plaintiff, the trial court in Lebanon County has already provided the remedy which he sought from the New Hanover County District Court. Plaintiff's complaint also alleges that the trial court in Lancaster County, Pennsylvania entered an order in October 2008 requiring him to pay \$810.12 per month for "current support" and \$88.66 per month in arrears. However, the record reveals that order (the Pennsylvania Order) did not establish the child support arrears stemming from the Separation Agreement. The remainder of

plaintiff's complaint consists of conclusory statements of the amount of arrears plaintiff contended he owed in child support.

While plaintiff's subsequent motion for a new trial alleged that North Carolina had attempted enforcement of the Separation Agreement, the trial court concluded otherwise finding that North Carolina was "only enforcing the Pennsylvania Child Support Orders [sic]."¹ This conclusion is supported by the record, which reveals that the interception was based upon the Pennsylvania Order that explicitly stated the arrears established did not include arrears from the Separation Agreement.

Thus, plaintiff did not allege that defendant has taken any action in regards to his child support obligation arising under the Separation Agreement, subsequent to the Pennsylvania court's dismissal of defendant's action in that state. Accordingly, we conclude plaintiff failed to allege facts necessary to establish that an actual controversy existed under the Separation Agreement, rather than the mere threat of litigation. Absent this "jurisdictional prerequisite," the trial court did not err in dismissing plaintiff's complaint. Plaintiff's argument to the contrary is overruled.

¹ As explained above in our discussion of standing, we conclude the trial court's references to the State or the Child Support Enforcement Agency do not establish that the Agency was participating as an interested party.

Because we conclude the trial court properly dismissed plaintiff's complaint for failure to state a claim upon which relief could be granted, we do not reach plaintiff's argument that the trial court erred in concluding it did not have subject matter jurisdiction.

C. Trial Court's Findings of Fact

Plaintiff also argues the trial court's findings of fact were unnecessary and not supported by the evidence. Although plaintiff has listed assignments of error in the heading of his argument, he fails to discuss any specific findings of fact in his brief. As such, plaintiff has abandoned his argument on appeal. *Peters v. Pennington*, __ N.C. App. __, __, 707 S.E.2d 724, 735 (2011).

Conclusion

For the reasons stated above, we conclude the trial court did not err in dismissing plaintiff's complaint for failure to state a claim for which relief could be granted or in denying his subsequent motions for new trial, to set aside the order, or to amend the order. The trial court's order is affirmed.

Affirmed.

Judges STEELMAN and McCULLOUGH concur.

Report per Rule 30(e).