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NO. COA11-259
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

DAVID L. TRIPP,
Plaintiff,

v.

New Hanover County
No. 09 CVS 5575

LOIS K. TRIPP,
Defendant.

Appeal by plaintiff from order entered 17 May 2010 by Judge John E. Nobles in New Hanover County Superior Court. Heard in the Court of Appeals 12 September 2011.

Carolina Legal Counsel, by J. Wesley Casteen, for plaintiff-appellant.

J. Albert Clyburn, for defendant-appellee.

MARTIN, Chief Judge.

Plaintiff and defendant were married on 16 June 1990. On 13 January 1995, the parties acquired property located in Kure Beach from a non-family member of either party. The property was titled to the parties as tenants by the entireties. On 11 December 2000, defendant executed a North Carolina general warranty deed, wherein she conveyed the property to plaintiff.

The parties separated on or about 5 February 2009, and plaintiff filed a complaint in Brunswick County District Court seeking equitable distribution. In that action he sought, *inter alia*, a declaratory judgment designating the Kure Beach property as his separate property, and moved for partial summary judgment on that issue. In her answer, defendant asserted the Kure Beach property was marital property because it was acquired during the marriage, not as a gift. In an order entered 30 December 2009, the district court granted defendant's partial summary judgment motion, determining the property was marital property.

While the Brunswick County action was pending, in November 2009, plaintiff brought the present action in New Hanover County Superior Court for claims including to quiet title, breach of warranty of title, fraud, unjust enrichment, and contribution. Defendant filed an answer asserting motions to dismiss pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6), as well as affirmative defenses of res judicata and abatement.

In an order dated 17 May 2010, the New Hanover County Superior Court entered its order concluding, pursuant to N.C.G.S. § 7A-244, that: the district court division was the proper division for the trial of proceedings for equitable distribution and the enforcement of property settlement agreements; the parties invoked the jurisdiction of the district court in Brunswick County to equitably distribute their marital

property; the superior court, therefore, lacked jurisdiction over the subject matter; the prior Brunswick County action abated the present action; and the present action constituted an impermissible collateral attack on the partial summary judgment order entered in the Brunswick County action and was barred under principles of res judicata. The superior court dismissed the New Hanover County action with prejudice. Plaintiff appeals.

On appeal, plaintiff contends the superior court erred in dismissing his claims relating to the Kure Beach property, arguing that New Hanover County was the proper venue for such claims. However, "[v]enue is not jurisdictional, but is only ground[s] for removal to the proper county, if objection thereto is made in apt time and in the proper manner." *Shaw v. Stiles*, 13 N.C. App. 173, 176, 185 S.E.2d 268, 269-70 (1971). Subject matter jurisdiction, on the other hand, is "[a] threshold requirement for a court to hear and adjudicate a controversy brought before it" *In re M.B.*, 179 N.C. App. 572, 574, 635 S.E.2d 8, 10 (2006). Where there is no subject matter jurisdiction, the proceeding is void and may be treated as a nullity. *High v. Pearce*, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941).

N.C.G.S. § 7A-244 provides:

The district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, *equitable distribution of property*, alimony, child support, child custody and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof.

N.C. Gen. Stat. § 7A-244 (2009) (emphasis added). Once a party invokes the jurisdiction of a court for equitable distribution, the court has exclusive jurisdiction over the property issues between the spouses. See *Garrison v. Garrison*, 90 N.C. App. 670, 672, 369 S.E.2d 628, 629 (1988).

Here, plaintiff invoked the jurisdiction of the Brunswick County District Court when he filed the action for equitable distribution in February 2009. In that action, plaintiff asked for a declaratory judgment designating the Kure Beach property as his separate property. At that point, the district court obtained exclusive jurisdiction over any property disputes between plaintiff and defendant as part of the equitable distribution action. Plaintiff subsequently filed the present action in which he alleged alternate claims for relief including to quiet title, breach of warranty of title, fraud, unjust enrichment, and contribution related to the same property.

A court does not have subject matter jurisdiction over a later-filed case if it is substantially similar to an earlier-filed case pending in another court. See *Burgess v. Burgess*, ___ N.C. App. ___, ___, 698 S.E.2d 666, 669 (2010). In determining if

the two cases are substantially similar, the court looks at whether "(1) the same property was the subject of both the superior and district court actions, and (2) the relief sought and available was similar in each suit." *Id.* at ___, 698 S.E.2d at 669.

Here, both the district and superior court actions involve the same property: the Kure Beach property. Furthermore, the relief sought in plaintiff's prayer for a declaratory judgment in the district court action is the same as that sought in the quiet title action in superior court, i.e., a determination that plaintiff is the sole owner of the Kure Beach property and defendant has no rights or interests in the property adverse to that of plaintiff.

Plaintiff contends, however, that his breach of warranty of title, fraud, unjust enrichment, and contribution claims are sufficiently different from the equitable distribution claim in district court so as to give the superior court subject matter jurisdiction to hear the claims. He further argues dismissal of these claims in superior court would leave him without a remedy for these causes of action. We disagree.

In *Hudson International, Inc. v. Hudson*, 145 N.C. App. 631, 632, 550 S.E.2d 571, 572 (2001), then-wife filed an action for equitable distribution in the district court. During the marriage, the husband used proceeds from the parties' marital

residence to build a residence in Maine, which he titled in the name of his business, Hudson International. *Id.* While the equitable distribution action was pending in district court, Hudson International filed suit in superior court seeking declaratory relief as to whether husband or wife had any ownership interest in the Maine property. *Id.* at 633, 550 S.E.2d at 572. The superior court granted wife's motion to dismiss, finding it lacked authority to hear the case. *Id.* at 633, 550 S.E.2d at 572-73. This Court affirmed, holding that the superior court action concerned property which was arguably a marital asset subject to equitable distribution, and thus, the superior court had no subject matter jurisdiction to determine the nature of or divide the property. *Id.* at 636-37, 550 S.E.2d at 574.

Similarly, in *Garrison v. Garrison*, 90 N.C. App. 670, 672, 369 S.E.2d 628, 629 (1988), husband and wife invoked the jurisdiction of the district court to equitably distribute their marital property in an action for absolute divorce and equitable distribution. A judgment of absolute divorce was entered, but the equitable distribution claim remained before the court for decision. *Id.* While the equitable distribution action was still pending, the husband commenced an action in superior court to partition the marital residence, and the superior court ordered that commissioners be appointed and that the partition

proceeding go forward *Id.* at 671, 369 S.E.2d at 629. The wife appealed, and this Court vacated the order of the superior court, holding that the superior court had no authority to partition marital property where the jurisdiction of the district court has already been invoked for equitable distribution. *Id.* at 671-72, 369 S.E.2d at 629. We noted that the superior court could have partitioned the property had the parties not first filed the equitable distribution action in district court. *Id.* at 672, 369 S.E.2d at 629.

Equitable distribution of marital property consists of a three-step process which includes identification and classification, valuation, and distribution of the parties' assets. *See Willis v. Willis*, 86 N.C. App. 546, 550, 358 S.E.2d 571, 573 (1987). While the North Carolina equitable distribution statute presumes an equal division of the marital property is appropriate, if the court finds that an equal distribution would not be equitable, the court "[s]hall divide the marital property and divisible property equitably." N.C. Gen. Stat. § 50-20(c) (2009). In doing so, the court can look at the relevant factors enumerated in N.C.G.S. § 50-20(c), as well as "any other factor which the court finds to be just and proper." N.C. Gen. Stat. § 50-20(c)(12). Such factors are limited, however, to economic concerns similar to the enumerated

factors in N.C.G.S. § 50-20(c). Suzanne Reynolds, *Lee's North Carolina Family Law* § 12.95(a) (5th ed. 2002).

The claims plaintiff asserts in the present superior court action fall within the factors which can be addressed in the district court equitable distribution action. In the present action, plaintiff seeks title to the property or, alternatively, economic damages to compensate him for the alleged fraud surrounding the conveyance of the property during marriage and the expenses of maintaining and improving the property, all of which may be properly addressed in the distribution of the marital estate under the "catch-all" provisions of N.C.G.S. § 50-20(c)(12). See *Sparks v. Peacock*, 129 N.C. App. 640, 641, 500 S.E.2d 116, 117 (1998) (noting that had the equitable distribution action been pending, district court would have had exclusive jurisdiction over spouse's claim for contribution for payments made on marital debt); cf. *Jessee v. Jessee*, ___ N.C. App. ___, ___, 713 S.E.2d 28, 35 (2011) (holding that equitable distribution claim in district court did not require dismissal of subsequent action alleging claims of wrongdoing committed after parties had separated). Thus, we conclude, as did the trial court, that the issues in the equitable distribution case pending in the district court are substantially similar to the claims asserted by plaintiff in the present case so that the

trial court had no subject matter jurisdiction in the present case.

Because jurisdiction is a threshold issue, the absence of jurisdiction is dispositive in this case, and the trial court had no jurisdiction to determine the affirmative defenses of collateral estoppel and res judicata on their merits. For that reason, we do not consider the parties' arguments with respect to those affirmative defenses. Plaintiff further contends, however, that the trial court erred in ordering that the dismissal was with prejudice. We must agree.

Rule 41(b) of the North Carolina Rules of Civil Procedure states that unless the court in its order for dismissal states otherwise, a dismissal other than a dismissal for *lack of jurisdiction*, improper venue or failure to join a necessary party operates as an adjudication on the merits. N.C. Gen. Stat. § 1A-1, Rule 41(b) (2009) (emphasis added). A dismissal for lack of jurisdiction under Rule 12(b)(1) is not a judgment on the merits, and thus the dismissal cannot be with prejudice. *See Hudson Int'l, Inc.*, 145 N.C. App. at 638, 550 S.E.2d at 575; *Cline v. Teich*, 92 N.C. App. 257, 264, 374 S.E.2d 462, 466 (1988). Therefore, we must remand for entry of an order dismissing this action without prejudice to plaintiff's right to have the issues decided in the pending equitable distribution action.

Affirmed; remanded with instructions.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).