IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1231

Filed: 20 September 2016

Iredell County, No. 07 CVD 2853

JOANN C. SIMON, Plaintiff

v.

BRIAN R. SIMON, Defendant

Appeal by defendant from orders entered 9 June 2015 and 6 July 2015 by Judge Edward L. Hedrick, IV, in Iredell County District Court. Heard in the Court of Appeals 30 March 2016.

Hamilton Stephens Steele & Martin, PLLC, by Amy S. Fiorenza, for plaintiff-appellee.

Homesley & Wingo Law Group PLLC, by Andrew J. Wingo, for defendant-appellant.

CALABRIA, Judge.

Brian R. Simon ("defendant") appeals from an order filed on 9 June 2015 pursuant to Rule 70 of the North Carolina Rules of Civil Procedure directing attachment of property, and an order filed on 6 July 2015 denying his Rule 60(b) motion to set aside the order on which the Rule 70 order was based. We affirm.

I. Background

Defendant married Joann C. Simon ("plaintiff") on 30 March 1985. Defendant had two children with plaintiff during the course of their marriage. The parties separated 16 September 2006. Plaintiff filed her original complaint against defendant on 1 October 2007, seeking sole custody of the children, child support, post-separation support and alimony, equitable distribution, and attorney's fees. Defendant filed an answer and counterclaim for joint custody on 4 December 2007. On 8 May 2008, defendant and plaintiff were divorced. On 12 January 2012, an order was filed setting equitable distribution, alimony, and permanent child support between the parties. Defendant was required to pay child support in the amount of $4,200 per month and permanent alimony in the amount of $12,200 per month.

Subsequently, plaintiff filed a motion to find defendant in contempt for failure to pay alimony and child support.[1] At the hearing on this motion, defendant was not present and was not represented by counsel. On 2 January 2014, the trial court entered an order on this motion, finding that defendant had "failed and refused to pay in full the monthly alimony and child support" owed; that he had "previously been held in contempt for failing to abide by the Support Order by refusing to pay alimony and child support[;]" that since previously being held in contempt, defendant "has again failed to pay his full support obligations[;]" that defendant "has left the country and is presumably living in Asia[;]" that defendant had the ability to comply with the

[1] The motion itself appears to be absent from the record. The order, however, is present.

support order, and that his refusal to do so was willful and without justification. The trial court granted plaintiff's motion to find defendant in contempt, continued to enforce the support order, and ordered defendant's incarceration for civil contempt until he could purge himself of $65,392.85 in arrears. However, the trial court declined plaintiff's request to order the sale of defendant's home on 146 Rustic Way ("Rustic Way") as a remedy for contempt.

The trial court's order on equitable distribution was appealed to this Court, and subsequently remanded; upon remand, the trial court entered an order on 14 April 2014, modifying its original order on equitable distribution, and awarding a distributive award of $271,743.26 to plaintiff, secured by a lien upon Rustic Way. At the hearing on this order, defendant was not present and was not represented by counsel.

On 7 June 2013, plaintiff filed a separate motion for attachment, and on 25 July 2013, a separate motion for attorney's fees and contempt. The trial court heard plaintiff's motions on 6 October 2014, and entered a joint order on 22 October 2014. At the hearing, defendant was not present and was not represented by counsel. In its order, the trial court found, *inter alia*, that plaintiff had received "no direct contact from defendant for more than one year[;]" that defendant left no forwarding address when he left Rustic Way; that defendant, "[w]ith the intent to defraud Plaintiff," had removed himself from the State; that Rustic Way was being rented to a tenant for

$2,500 per month, none of which was being paid to plaintiff; that defendant made payments pursuant to an order for wage withholding; that defendant's child support arrears were $1,375.41 and his alimony arrears were $189,782.83; that plaintiff's expenses had increased since the entry of the trial court's equitable distribution order, forcing her to consume savings; that plaintiff had incurred $4,302 in attorney's fees prosecuting contempt; that defendant had the ability to pay his obligation, and that his refusal to do so was willful and without justification. The trial court awarded additional recovery of arrears to plaintiff, awarded plaintiff $2,000 in attorney's fees as a lien upon Rustic Way, and ordered defendant to execute a deed of trust securing his future obligations, using Rustic Way as security. The trial court further ordered that if defendant failed to execute such a deed, the trial court would order the property be held in trust as security. Defendant does not appeal this order.

On 3 November 2014, defendant filed a motion pursuant to Rule 60 of the North Carolina Rules of Civil Procedure to set aside the trial court's 22 October 2014 order, and a motion to release passport restrictions. Defendant contended that he was out of the country on business prior to the hearing, and that his passport had been revoked, and remained revoked as of the filing of his motion. As a result, defendant argued that his inability to attend the hearing represented a reason justifying relief from judgment pursuant to Rule 60(b). Defendant also entered a notice of limited appearance.

On 12 November 2014, the Iredell County Child Support Enforcement Agency ("DSS"), on behalf of plaintiff, filed a motion to dismiss defendant's motion to set aside judgment and release his passport. In its motion, DSS noted that on 17 March 2014, prior to the hearing and order at issue, defendant had sent a letter to the trial court from Japan, which included the following language:

> "My position is a hearing on this matter has already been held and Judge Hedrick made his ruling. There is no new information that would alter his ruling in ex-wife's favor . . . There's no more blood in the turnip and I won't give any more time or energy to anyone or anything involved with this case and past life."

DSS' motion further contended that defendant had actual knowledge and notice of each hearing in the case; that the hearing at issue was continued several times, which would have given defendant ample opportunity to make arrangements; and that during the hearing, when asked about defendant's position on the hearing, defendant's agent, John Deter ("Deter") testified that defendant had stated, "Give them what they want." DSS further alleged that defendant had originally stated that he needed his passport, not to attend the hearing, but to "travel to a business conference[,]" and that, "as evidenced by the testimony of John Deter" and defendant's letter, defendant had no intention of attending the hearing. DSS argued that there was "no mistake, inadvertence, surprise, or excusable neglect[,]" that the lack of a passport had "absolutely no bearing" on defendant's ability to participate in

the proceedings, that there was no reason justifying relief from the 22 October 2014 order, and that DSS lacked the authority to revoke or return a passport.

On 16 December 2014, pursuant to the trial court's 22 October 2014 order, the trial court filed an order of attachment on Rustic Way.

On 9 June 2015, the trial court entered an order pursuant to Rule 70 of the North Carolina Rules of Civil Procedure, conveying Rustic Way to plaintiff based upon defendant's failure to execute an instrument as required in the trial court's 22 October 2014 order.

On 6 July 2015, the trial court entered an order on defendant's motion to set aside. In its order, the trial court found that defendant's passport was restricted due to his failure to pay child support arrears; that the process of restricting passports is "somewhat automated" and "not in the direct control of [DSS;]" that there was insufficient evidence that DSS could have made a mistake in restricting defendant's passport; that irrespective of defendant's passport status, he was not denied the ability to return to the United States, and therefore could have returned to North Carolina to participate in the proceedings; that defendant never filed "affidavits of income or tax returns or any other information necessary to participate in a hearing on his motions or any other[;]" and that defendant "failed to prove by a preponderance of the evidence that he would have appeared at the October 6th, 2014, hearing but for

the restriction placed on his passport." The trial court therefore denied defendant's motion to set aside the 22 October 2014 order.

From the trial court's 9 June 2015 order pursuant to Rule 70, and its 6 July 2015 order denying his motion to set aside, defendant appeals.

II. Standard of Review

"[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

III. Analysis

Defendant contends, in several arguments, that the trial court abused its discretion in denying his Rule 60 motion to set aside the 22 October 2014 order, and that the trial court erred in entering its Rule 70 order. We disagree.

A. The 22 October 2014 Order

As a preliminary matter, we note that defendant does not appeal from the 22 October 2014 order itself, only from subsequent orders. We hold therefore that the findings of fact and conclusions of law in that order, unchallenged as they are, are binding upon this Court. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

B. Motion to Set Aside Order

Pursuant to Rule 60 of the North Carolina Rules of Civil Procedure:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; . . . (6) Any other reason justifying relief from the operation of the judgment.

N.C.R. Civ. P. 60(b). It is the movant's duty to overcome the burden of proof for a Rule 60(b) motion. *See Sharyn's Jewelers, LLC v. Ipayment, Inc.*, 196 N.C. App. 281, 285, 674 S.E.2d 732, 735 (2009). The trial court's decision under Rule 60(b) must focus on "what may be reasonably expected of a party in paying proper attention to his case under all the surrounding circumstances." *N.C. State Bar v. Hunter*, 217 N.C. App. 216, 228, 719 S.E.2d 182, 191 (2011) (citations and quotations omitted). Proper attention has been defined as "[the] attention . . . a [person] of ordinary prudence usually gives [their] important business . . . ." *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 131, 180 S.E.2d 407, 410 (1971) (citations omitted).

Defendant contends that the revocation of his passport two days prior to the hearing scheduled for 6 October 2014 was an extraordinary circumstance that

impeded his ability to attend the hearing and present the merits of his defense. Defendant maintains that DSS erred when it revoked his passport, because at the time of the revocation defendant's child support arrears were not in excess of $2,500. Defendant further maintains that, due to this mistake, DSS' forwarding of defendant's arrears was intervention by a third party amounting to an extraordinary circumstance upon which justice requires defendant's Rule 60(b)(6) motion to be approved. In his argument, defendant challenges several of the trial court's findings of fact with respect to the revocation of his passport. Even assuming *arguendo* that the trial court erred in finding that DSS did not err in restricting defendant's passport, the burden is on defendant to demonstrate that DSS' erroneous revocation actually prevented him from paying necessary attention to this case.

Defendant challenges, *inter alia*, the trial court's finding of fact in which it found:

> That specifically under 22 C.F.R. 51.60(a) the Defendant was not denied the ability to return directly to the United States. Therefore, Defendant could have returned to North Carolina to participate in the October 6th, 2014, hearing.

Defendant contends that there is insufficient evidence in the record to support such a finding. We note, however, that "[t]he trial court is expected to take judicial notice of public statutes." *Rutherford Plantation, LLC v. Challenge Golf Grp. of the Carolinas, LLC*, 225 N.C. App. 79, 83, 737 S.E.2d 409, 412 (2013), *aff'd per curiam*, 367 N.C. 197, 753 S.E.2d 152 (2014).

22 C.F.R. § 51.60 concerns the denial and restriction of passports. It provides in relevant part that:

> The Department may not issue a passport, except a passport for direct return to the United States, in any case in which the Department determines or is informed by competent authority that:
>
> . . .
>
> (2) The applicant has been certified by the Secretary of Health and Human Services as notified by a state agency under 42 U.S.C. 652(k) to be in arrears of child support in an amount determined by statute.

22 C.F.R. § 51.60(a)(2) (2016). We note the qualifying language in the first sentence, which states that "[t]he Department may not issue a passport, *except a passport for direct return to the United States*," in a case of child support arrears. *Id.* (emphasis added). Defendant offers no argument against the statute itself, instead merely alleging that it was not in evidence, and that he "reasonably believed he was prevented from returning to the United States."

Defendant further contends that "the only competent evidence in the record as to the Appellant's intention to attend the October 6, 2014 hearing is contained in" an e-mail in which defendant contends, simply, that "I am unable to enter the country due to revocation of my passport and therefor [sic] unable to attend hearings." Defendant ignores the evidence raised by DSS' motion to dismiss defendant's Rule 60 motion, which included multiple statements by defendant indicating that he wanted

nothing to do with the proceedings, and additional evidence that the reason he wanted his passport was for a business trip, not to attend the proceedings.

On review of the record, the evidence presented by DSS, and the arguments asserted on appeal by defendant, we hold that the trial court's ruling was not "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *White*, 312 N.C. at 777, 324 S.E.2d at 833. It is clear that 22 C.F.R. § 51.60 would have permitted defendant to return directly to the United States, and by extension to North Carolina, to be present at the proceedings below. It is also clear that there was ample evidence upon which the trial court could have relied in reaching its ruling. And while defendant challenges additional findings by the trial court, we hold that the facts enumerated above sufficiently demonstrate that his refusal to attend the proceedings below did not result from "mistake, inadvertence, surprise and excusable neglect[,]" or any similarly extenuating circumstance. The findings of fact above support the trial court's conclusions of law, and as such, we hold that the trial court did not abuse its discretion in denying defendant's Rule 60 motion to set aside the 22 October 2014 order.

This argument is without merit.

C. Rule 70 Order

Inasmuch as the trial court did not abuse its discretion in denying defendant's motion to set aside its 22 October 2014 order, and defendant does not appeal from the

22 October 2014 order itself, we affirm the trial court's Rule 70 order, based on the uncontested 22 October 2014 order.

IV. Conclusion

There was ample evidence to demonstrate that the trial court's decision in denying defendant's motion to set aside the 22 October 2014 order was not an abuse of discretion. As the trial court did not err in declining to set aside the 22 October 2014 order, it did not err in entering a Rule 70 order pursuant thereto.

AFFIRMED.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).