

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA07-1210

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2008

RICHARD MARKLEY,
Plaintiff-Appellant,

v.

Wake County
No. 06 CVD 16987

LINDA MARKLEY,
Defendant-Appellee.

Court of Appeals

Appeal by Plaintiff from order entered 16 April 2007 by Judge Anne B. Salisbury in District Court, Wake County. Heard in the Court of Appeals 19 March 2008.

The Rosen Law Firm, by Helena M. Nerjodsi, for Plaintiff-Appellant.

Slip Opinion

Tharrington Smith, L.L.P., by Jill Schnabel Jackson and Elisa J. Cyre, for Defendant-Appellee.

McGEE, Judge.

Richard Markley (Plaintiff) filed a complaint against Linda Markley (Defendant) on 17 November 2006, alleging that he and Defendant were married on 29 March 1986, were separated on 28 July 2003, and were later divorced. Plaintiff further alleged that the parties executed a separation and property settlement agreement (the agreement) on 19 September 2005, which Plaintiff attached as an exhibit to his complaint. Pursuant to the agreement, Plaintiff was required to pay alimony to Defendant. His alimony obligation terminated on "the first to occur of the following events": the

death of Plaintiff, the death of Defendant, remarriage of Defendant, or 1 September 2016. The agreement did not provide that Plaintiff's obligation to pay alimony terminated upon Defendant's cohabitation. The agreement was not incorporated into a court order, and provided as follows:

Except as set forth within this Article, in Article VI, or elsewhere in this Agreement, [Plaintiff] and [Defendant] waive all claims for alimony, post-separation support and attorney's fees associated with these claims. The provisions for alimony, support and maintenance of [Defendant] by [Plaintiff] specified in this Article II are nonmodifiable, and shall not be modified or changed except by further agreement between the parties expressed in writing and executed with the same formalities as this Agreement.

Plaintiff further alleged that, at the time the parties executed the agreement, Defendant was cohabiting with another man and concealed that fact from Plaintiff. Plaintiff's claims for relief set forth in his complaint were: (1) "to set aside [the agreement]" based upon fraud and unconscionability; and (2) for "costs, expenses, and attorney fees[.]" Plaintiff also included in his complaint a "motion for temporary order" under North Carolina Rule of Civil Procedure 65. In his motion, Plaintiff requested, pending a final order of the trial court, that either a temporary order be entered relieving Plaintiff of his obligation to pay any further alimony to Defendant or that the payments be held in an interest-bearing trust account.

Defendant filed a motion to dismiss, answer and affirmative defenses on 12 January 2007. The trial court entered an order granting Defendant's motion to dismiss Plaintiff's complaint to set

aside the agreement on 15 February 2007, *nunc pro tunc* 24 January 2007. However, the trial court denied Defendant's motion to dismiss Plaintiff's motion for a temporary order and ordered that Plaintiff's motion be considered by the trial court as a motion to terminate alimony.

The trial court entered an order on 18 April 2007 denying Plaintiff's motion to terminate alimony. Plaintiff appeals from the 18 April 2007 order. No appeal was taken from the order granting Defendant's motion to dismiss Plaintiff's complaint to set aside the agreement entered by the trial court on 15 February 2007, *nunc pro tunc* 24 January 2007.

Plaintiff argues the trial court erred by denying his motion for temporary order, which the trial court converted into a motion to terminate alimony. Specifically, Plaintiff argues that the agreement, which did not contain a provision terminating Plaintiff's obligation to pay alimony upon Defendant's cohabitation, was void as against public policy.

However, because we hold that the trial court did not properly rule on Plaintiff's motion for temporary order after dismissing Plaintiff's claims for rescission, we must dismiss this appeal. It is well settled that "[a] case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996); see also *Leasing Corp. v. Miller*, 45 N.C. App. 400, 408, 263 S.E.2d

313, 318, *disc. review denied*, 300 N.C. 374, 267 S.E.2d 685 (1980) (recognizing that "[w]hen a court decides to dismiss an action pursuant to G.S. 1A-1, Rule 12(b)(6), of the Rules of Civil Procedure, any pending motion for summary judgment against the claimant may be treated as moot, and therefore, need not be decided"). In the case before us, the trial court's dismissal of Plaintiff's claims for rescission was a final order as to those claims. Therefore, Plaintiff's motion seeking a temporary order pending a final order of the trial court became moot, and should have been dismissed. Moreover, a trial court lacks jurisdiction to rule on a motion where all claims have been dismissed. See *State of New York v. Paugh*, 135 N.C. App. 434, 440, 521 S.E.2d 475, 479 (1999) (holding that the trial court lacked jurisdiction to hear a contempt motion after dismissal of the claim for child support). Therefore, once the trial court in the case before us dismissed Plaintiff's claims for rescission, it lacked jurisdiction to rule on Plaintiff's outstanding motion for a temporary order pending the final order of the trial court. Accordingly, we dismiss this appeal.

Dismissed.

Judges TYSON and STEPHENS concur.

Report per Rule 30(e).