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NO. COA11-1498
NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

JENNIFER L. HARMON,
Plaintiff,

v.

Onslow County
No. 11-CVD-3105

DENNIS LEEUWENBURG,
Defendant.

Appeal by defendant from the denial of his motion to dismiss allegedly issued 22 August 2011 by Judge Carol Jones-Wilson in Onslow County District Court. Heard in the Court of Appeals 23 May 2012.

Jason D. Hegg for plaintiff-appellee.

Dennis Leeuwenburg, pro se, for defendant-appellant.

PER CURIAM

Dennis Leeuwenburg ("defendant") appeals the denial of his motion to dismiss for failure to state a claim allegedly issued 22 August 2011 by Judge Carol Jones-Wilson in Onslow County District Court. Defendant argues on appeal that the trial court erred by: (1) denying his motion to dismiss for failure to state a claim; (2) denying defendant his rights of pretrial due

process; (3) denying defendant his opportunity to engage in discovery; and (4) denying his motion to dismiss for insufficient evidence. After careful review, we affirm the trial court's entry of the domestic violence protection order ("DVPO").

Background

Plaintiff Jennifer Harmon ("plaintiff") filed a complaint and motion for a domestic violence protective order ("complaint") on 11 August 2011 alleging that defendant sent her more than 1756 emails and called her over 300 times since March 2010. Plaintiff further contended that "[t]he content of the emails ha[d] increasingly become more threatening," and that she believed there was "danger of serious and immediate injury to [her] or [her] child(ren)." In her complaint, plaintiff requested an ex parte order of protection ("ex parte order"). A district court judge[1] entered an ex parte order based on the "danger of acts of domestic violence."

On 17 August 2011, defendant filed an answer to the complaint and therein requested the court dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted.

[1] We note that the name of the district court judge is illegible.

On 22 August 2011, the district court granted plaintiff a one-year DVPO. In its order, the district court found that defendant "placed [plaintiff] in fear of imminent serious bodily injury" and "placed [plaintiff] in fear of continued harassment that rises to such a level as to inflict substantial emotional distress[.]" Based on these findings, the court concluded defendant had committed acts of domestic violence against plaintiff, there was a danger of serious and immediate injury to plaintiff, and "defendant's conduct requires that [he] surrender all firearms, ammunition and gun permits."

Defendant filed a notice of appeal to this Court on 20 September 2011. On appeal, defendant did not submit the transcript of either the ex parte order hearing or the 22 August 2011 hearing granting plaintiff the DVPO.

Discussion

On appeal, defendant seems to argue that the trial court erred by: (1) denying his motion to dismiss for failure to state a claim; (2) denying his motion to dismiss for insufficient evidence; (3) denying defendant his rights of pretrial due process and time to prepare for the hearing; and (4) denying defendant his opportunity to engage in discovery.

I. Motions to Dismiss

We first note that defendant failed to include any evidence in the record demonstrating that the trial court denied his motion to dismiss. However, the trial court ultimately granted plaintiff the DVPO. Thus, the trial court obviously denied defendant's motion to dismiss, and we will treat the trial court's entry of the DVPO as an implicit denial of defendant's motion when addressing defendant's arguments on appeal.[2]

Although defendant's answer seems to request a dismissal of plaintiff's complaint for failure to state a claim upon which relief may be granted, his argument on appeal focuses on the sufficiency of the evidence. Based on the discrepancy between the type of motion to dismiss defendant requested and his argument, we will review as if defendant properly argued both on appeal.

A. Failure to State a Claim

[2] We presume that the district court properly addressed defendant's motion to dismiss even though defendant failed to include any evidence in the record of the denial. *See generally State v. Williams*, 304 N.C. 394, 415-16, 284 S.E.2d 437, 450-51 (1981) (noting that even though the defendant failed to include orders in the record evidencing the trial court's denial of his motions, our Supreme Court "assume[d] that the trial judge ruled properly on matters before him, correctly applying the applicable law" but deciding to not "dismiss the assignments of error without due consideration."), *cert. denied*, 456 U.S. 932, 72 L. Ed. 450 (1982).

In both his answer and brief, defendant fails to provide any argument in support of his claim that the trial court should have granted his motion to dismiss for failure to state a claim.

"The motion to dismiss [for failure to state a claim] tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

Domestic violence is defined in N.C. Gen. Stat. § 50B-1 (2011), in pertinent part, as

> the commission of one or more of the following acts upon an aggrieved party . . . by a person with whom the aggrieved party has or has had a personal relationship . . .:
>
> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
>
> (2) Placing the aggrieved party . . . in

> fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
>
> (3) Committing any act defined in G.S. 14-27.2 through G.S. 14-27.7.

"[P]ersons of the opposite sex who are in a dating relationship or have been in a dating relationship[]" constitutes a "personal relationship." N.C. Gen. Stat. § 50B-1(b)(6). Pursuant to N.C. Gen. Stat. § 50B-3 (2011), if the trial court "finds an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence."

Here, plaintiff used a preprinted court form for her complaint and pleaded that she and defendant are members of the opposite sex who have been in a dating relationship. Furthermore, plaintiff alleged that defendant "has attempted to cause or has intentionally . . . placed [her] or a member of [her] family or household in fear of imminent serious bodily injury or in fear of continued harassment that rises to such a level as to inflict substantial emotional distress" based on defendant's emails and phone calls, the content of which plaintiff claimed had become "increasingly . . . more threatening." In support of this claim, plaintiff included four

handwritten pages of excerpts from the alleged voicemails and emails. Finally, plaintiff also indicated her belief that there is a danger of serious and immediate injury to her or her children.

Viewing all of plaintiff's allegations as admitted and true, plaintiff has sufficiently stated a claim for domestic violence based on: (1) her personal relationship with defendant; (2) the numerous threatening emails and voicemails; and (3) her belief that she is in danger of serious and immediate injury. Pursuant to N.C. Gen. Stat. § 50B-3, she is entitled to a protective order. Therefore, because plaintiff has sufficiently stated a claim of domestic violence entitling her to relief, the trial court did not err in denying defendant's motion to dismiss for failure to state a claim. Defendant's argument is without merit and is overruled.

B. Insufficient Evidence

Defendant seems to argue on appeal that the evidence was insufficient because it was not provided to him prior to the hearing, and it was not included in the "record of proceedings."

When reviewing on appeal whether there was sufficient evidence to grant a protective order, the standard of review "is whether there was competent evidence to support the trial

court's findings of fact and whether its conclusions of law were proper in light of such facts." *Burress v. Burress*, 195 N.C. App. 447, 449, 672 S.E.2d 732, 734 (2009) (quotation marks and citation omitted). "The trial judge has the authority to believe all, any, or none of the testimony." *Sharp v. Sharp*, 116 N.C. App. 513, 530, 449 S.E.2d 39, 48, *disc. review denied*, 338 N.C. 669, 453 S.E.2d 181 (1994).

Defendant has failed to include a transcript in the record on appeal of the 22 August 2011 hearing where the district court granted plaintiff the DVPO. Therefore, we will presume the findings of fact were supported by competent evidence. *See Potts v. Potts*, 19 N.C. App. 193, 194, 198 S.E.2d 203, 204 (1973) (holding that "[w]here there is evidence offered before the trial court and appellant assigns as error that the evidence does not support the findings of fact by the trial judge, but does not include the evidence in the record on appeal, we will presume the facts found are supported by competent evidence."). Defendant's argument is overruled.

II. Due Process Claim

Next, defendant argues that because the hearing occurred less than two weeks after plaintiff filed her complaint and defendant only had ten days to file and serve his answer, he was

denied his "rights of pre-trial due process and/or time for preparation of trial/hearing."

Because defendant failed to include a transcript of the 22 August 2011 hearing to establish he raised this due process objection before the district court, and the record does not contain any evidence this objection was raised before the hearing, we have no way of determining whether defendant raised this argument at trial. Therefore, we find that this constitutional argument is deemed waived on appeal. *See generally Muchmore v. Trask*, 192 N.C. App. 635, 643, 666 S.E.2d 667, 672 (2008) (holding that defendant's assignment of error regarding a constitutional issue was waived on appeal because it was not raised at trial).

Even though we have held that defendant's argument is waived on appeal, we have examined the record, and we find no evidence that the district court erred. The hearing was conducted within the time requirements set out by N.C. Gen. Stat. § 50B-2(c) (2011) which governs the time between the issuance of an ex parte order of protection and the date of a DVPO hearing. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *State v. Thompson*, 349 N.C. 483, 498, 508

S.E.2d 277, 286 (1998) (citation omitted). Here, defendant was heard in both a meaningful time and manner because the district court properly followed all statutory requirements. Therefore, defendant's argument is overruled.

III. Pretrial Evidence

Defendant's final argument seems to assign error to plaintiff's failure to include an "expert affidavit" with her complaint and to the fact that defendant was not allowed to engage in discovery before trial. Because there is no requirement that an individual requesting a DVPO include any expert evidence in support of his or her complaint, defendant's assignment of error with regard to that issue is overruled. Furthermore, since we have no transcript of the 22 August 2011 hearing, we are unable to ascertain whether defendant requested time to engage in discovery. We also note that defendant did not allege that he made any request to do so on appeal. Therefore, since we are unable to determine whether defendant requested time to engage in discovery and whether the trial court denied the request, it is waived on appeal, and we will not address it. *See generally Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) (noting that "issues and theories of a case not

raised below will not be considered on appeal. . . ."). Defendant's argument is overruled.

Conclusion

Based on the foregoing reasons, we affirm the trial court's entry of the DVPO.

Affirmed.

Panel consisting of: Judges HUNTER, Robert C., GEER, and BEASLEY.

Report per Rule 30(e).