NO. COA11-314
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

CALDWELL COUNTY DEPARTMENT OF SOCIAL SERVICES, ex. rel., CORRENA C. HOWE,
Plaintiff-Appellee,

v. Caldwell County
No. 09-CVD-1085

BRADLEY EARL HOWE,
Defendant-Appellant.

Appeal by Defendant from order entered 12 January 2011 by Judge Robert M. Brady in District Court, Caldwell County. Heard in the Court of Appeals 13 September 2011.

Lucy R. McCarl for Plaintiff-Appellee.

Bradley Earl Howe, Defendant-Appellant, pro se.

McGEE, Judge.

Caldwell County Department of Social Services (Plaintiff) filed a complaint on 16 June 2009 to compel child support from Bradley Earl Howe (Defendant) for the benefit of a minor child (the minor child) whom Defendant fathered with Correna Christine Howe (Ms. Howe). The trial court entered an "order of support for minor child; income withholding and for medical insurance"

(the child support order) on 26 October 2009. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(3), Defendant filed a motion to set aside the child support order, which the trial court denied by order entered 19 February 2010. Defendant filed a second Rule 60(b) motion to set aside the child support order on 31 August 2010 (Defendant's second Rule 60(b) motion). The trial court denied Defendant's second Rule 60(b) motion in an order entered 12 January 2011. Defendant appeals from the trial court's 12 January 2011 order.

I. Factual Background

The relevant undisputed facts are that Defendant and Ms. Howe were married and resided together, along with their minor child, in Cleveland County. In May 2009, Ms. Howe left Cleveland County and moved to Caldwell County, where she petitioned for child support. Plaintiff, on behalf of Ms. Howe, notified Defendant of Plaintiff's involvement in seeking child support and of its intent to pursue the matter. Defendant failed to respond to Plaintiff's notice and Plaintiff thereafter filed a complaint to compel child support. Further facts will be discussed as needed.

II. Standard of Review and Scope of Appeal

This Court has held that "[n]otice of appeal from denial of a motion to set aside a judgment which does not also

specifically appeal the underlying judgment does not properly present the underlying judgment for our review." *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990). In the present case, Defendant's notice of appeal, filed 30 November 2010, is addressed solely to "the ORDER . . . that dismissed or denied . . . Defendant[']s MOTION FOR RELIEF FROM JUDGEMENT [sic] OR ORDER (RULE 60) entered on 5 November 2010." We note that the hearing on Defendant's second Rule 60(b) motion was conducted on 5 November 2010. Though the order from which Defendant appeals was not entered until 12 January 2011, it was announced in open court on 5 November 2010. Therefore, Defendant's notice of appeal is sufficient to present the trial court's 12 January 2011 order for our review. *See e.g.*, *Merrick v. Peterson*, 143 N.C. App. 656, 660, 548 S.E.2d 171, 174 (2001) ("'rendering of an order commences the time when notice of appeal *may* be taken by filing and serving written notice, while entry of an order initiates the thirty-day time limitation within which notice of appeal *must* be filed and served.'") (citation omitted); *see also Harbin Yinhai Tech. Dev. Co. v. Greentree Fin. Grp., Inc.*, 196 N.C. App. 615, 620-21, 677 S.E.2d 854, 858 (2009) (holding notice of appeal proper where decision was announced in open court on 30 April 2008, the plaintiff filed notice of appeal on 6 May 2008, "explaining that the order

being appealed was 'rendered orally by [the court] on April 30, 2008 and to be entered shortly.' [And] [t]he order was subsequently entered on 27 May 2008."). However, in the present case, neither the child support order nor the order denying Defendant's first motion to set aside the judgment is properly before us. *See Von Ramm*, 99 N.C. App. at 156, 392 S.E.2d at 424.

"[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). We therefore review the trial court's 12 January 2011 order denying Defendant's second Rule 60(b) motion for an abuse of discretion. "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it 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). However, "'whether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal *de novo*.'" *Childress v. Fluor Daniel, Inc.*, 172 N.C. App. 166, 167, 615 S.E.2d 868, 869 (2005) (citation omitted).

III. Abuse of Discretion and Sufficiency of the Record

While Defendant makes numerous arguments on appeal, he does not argue that the trial court abused its discretion in any of its rulings. Further, we note that the record on appeal is insufficient to address many of Defendant's assertions. The trial court's order denying Defendant's first Rule 60(b) motion contains the following findings of fact:

> 6. . . . . The [c]ourt conducted an extensive evidentiary hearing [on the original judgment], during which . . . Plaintiff was allowed to present testimonial evidence as well as documentary evidence, and . . . Defendant was allowed to present testimonial evidence as well as documentary evidence.
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> 7. Each of the issues that . . . Defendant has raised in his Rule 60 Motion . . . was raised in the evidentiary hearing on [the original judgment]. The [c]ourt made extensive findings of fact in the . . . hearing regarding those issues.

Defendant's affidavits in support of his second Rule 60(b) motion include extensive arguments concerning the trial court's alleged error in determining whether Ms. Howe was a custodial parent, as well as allegations that Ms. Howe "maliciously applied for and received Medicaid to gain services of the Child Support Enforcement Agency[.]" Further, in his answer and counter-complaint, Defendant raised the issue of Ms. Howe's residence. During the hearing on Defendant's second Rule 60(b)

motion, the trial court and Defendant engaged in the following exchange:

> [The court]: . . . . I've also read everything that he's recently filed in support of—all the documents he's filed in support of the, uh, motion, the most recent motion for relief from judgment that was filed August 31st of 2010. And quite frankly Mr. Howe, in the giving you and looking at this in the light most favorable to you as the plaintiff of the moving party, uh, I can clearly tell from the order that was the findings of fact in Judge [Owsley]'s original order back in October of last year and from the findings of fact that were, uh, entered in the, uh, motion for relief in judgment pursuant to Rule 60 that was filed in February in the order, in response there too, that was [Inaudible 00:15:16] by Judge [Owsley], and by what you've just recently filed, that the issues are the same. That many of the issues, if not all of the issues, that you raised in your first motion for relief per Rule 60, were actually resolved. In other words, those issues were raised and heard and resolved by Judge [Owsley] in her original order. Um, so when you filed your motion for relief from that order, back in February of this year, um, she rightly so said, you know, these things have already been heard, they have already been litigated the same issues about, for all of the same issues about date of separation, the same issues about, uh, when Medicare or Medicaid was applied for, the same issues about residency, the same issues about custody, the same issues about, uh, the temporary orders that were entered. All those issues were heard during the first hearing, then they were also re-litigated in the motion for Rule 60. So all those things that you have filed on this Rule 60 have been heard and, and responded to in the first Rule 60 Motion. I don't see that

there's anything for this court to hear that hasn't already been litigated twice.

[Defendant]: Well, Your Honor, there was, uh, specifically the Medicaid fraud was not addressed in the initial order or in this first, uh, Rule 60 order. That has been information that has just come to light. Uh, additionally the jurisdiction was not challenged in the first order or the second Rule 60 order as—

[The court]: But all that information.

[Defendant]: And as well as [Inaudible 00:17:07]

[The court]: But that information was available, or if it wasn't available, it should have been available. And, uh, I'm finding as a matter of fact and as a matter of law that this, uh, matter has already been litigated, that it is res judicata that the prior Rule 60 Motion that was heard addressed these very same issues that you're raising here before the court today that dealt with those and that it's, it's, uh, this issue is moot. Also that an appeal was taken from the order of Judge [Owsley] in October the, uh, 16th. I think it was, it was heard October the 16th, filed maybe around October the 26th, 28, whatever that date specifically was. And there was appeal taken from that, which never was perfected, which would've been the most appropriate way to deal with an order that you felt like was not an appropriate order. But that appeal was then subsequently dismissed. So this is just another effort to try and handle this case through an appeal process, uh, by Rule 60. And so you're trying to get another bite at the apple to appeal. Uh, but I have looked at both at the recent things and what happened before, and every one of those issues has been addressed. Uh, and if they weren't addressed, it would be through the

> fact that, that they were not properly raised at the time, and could have been raised at the time. Because all the facts that you've talked about were in existence at the time the case was tried originally.

However, the record on appeal does not contain the transcripts of either the hearing on Plaintiff's complaint for child support or the hearing on Defendant's first Rule 60(b) motion. Further, there are no copies of any affidavits or memoranda in support of Defendant's first Rule 60(b) motion. Thus, we are unable to determine precisely what occurred at the prior hearings or what arguments Defendant may have made at those hearings. "An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968); *see also McDaniel v. McBrayer*, 164 N.C. App. 379, 383-84, 595 S.E.2d 784, 788 (2004).

Reviewing the record on appeal, including motions, affidavits, and orders that Defendant has filed with the trial court, and in light of the fact that Defendant has failed to file complete transcripts of the underlying hearings, we can find no abuse of discretion in the trial court's determination that all of the issues had previously been raised and ruled on. Because Defendant does not argue that the trial court abused its discretion in denying his motion to set aside the judgment

entered against him, and because the record is insufficient for us to determine such even if Defendant did so argue, we find Defendant's arguments without merit.

IV. Subject Matter Jurisdiction

Defendant also argues subject matter jurisdiction and standing. "Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal." *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007). Further, "'issues pertaining to standing may be raised for the first time on appeal[.]'" *Myers v. Baldwin*, ___ N.C. App. ___, ___, 698 S.E.2d 108, 109 (2010) (citation omitted). Because subject matter jurisdiction may be raised for the first time on appeal, we address Defendant's arguments.

Defendant contends that the trial court "committed reversible error by the hearing of [Plaintiff's] initial complaint filed 16 June 2009 in the absence of subject matter jurisdiction." In Defendant's argument that the trial court lacked subject matter jurisdiction, he asserts that "Plaintiff, by not having custody of [the minor child], nor having initiated an action or proceeding for the custody of [the minor child], the Plaintiff[] and the court[] lacked subject matter jurisdiction to initiate and therefore rule upon an action for

the support" of the minor child. Defendant does not appear to argue that Ms. Howe did not have custody of the minor child, but rather that she did not have *sole* custody of the minor child and, therefore, was not the custodial parent.

"'Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question[, and] . . . is conferred upon the courts by either the North Carolina Constitution or by statute.'" *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003) (citation omitted). Concerning subject matter jurisdiction, Defendant makes a second argument related to standing. Defendant contends that "the [trial] court committed reversible error by the hearing of [Plaintiff's] initial complaint . . . in the absence of standing." Defendant argues that Plaintiff lacked standing to bring this action because of allegedly false statements made by Ms. Howe regarding her income. Defendant also alleges that he had in fact "willfully provid[ed] child support funds" for the minor child. "'Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction.'" *Marriott v. Chatham Cty.*, 187 N.C. App. 491, 494, 654 S.E.2d 13, 16 (2007) (citation omitted). Because both of Defendant's arguments ostensibly concern subject matter jurisdiction, we address them together.

The specific type of action involved in the present case is a child support action. N.C. Gen. Stat. § 7A-244 (2009) provides, in pertinent part, that "[t]he district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for . . . child support[.]" N.C. Gen. Stat. § 50-13.4(a) (2009) provides in pertinent part that: "Any parent, or any person, agency, organization or institution having custody of a minor child, or bringing an action or proceeding for the custody of such child, or a minor child by his guardian may institute an action for the support of such child as hereinafter provided."

In his second Rule 60(b) motion, Defendant argued that Ms. Howe fraudulently indicated that she had custody of the minor child. Defendant further argued that Plaintiff did not have custody of the minor child because "the parties[] had voluntarily entered into a consent order from Cleveland County District Court to equally share custody of their minor child[.]" However, we note that N.C.G.S. § 50-13.4(a) requires only that the person seeking child support be "[a]ny parent . . . having custody[.]" *Id.* Defendant's own argument indicates that Ms. Howe had at least joint custody of the minor child. Therefore, there is no merit to Defendant's contention that Plaintiff lacked standing because Ms. Howe did not "have custody" of the

minor child. Thus, because the district court has subject matter jurisdiction over child support cases, and because Plaintiff brought the present action on behalf of a custodial parent and therefore had standing, there is no merit to Defendant's arguments regarding subject matter jurisdiction.

V. Conclusion

As discussed above, Defendant fails to argue abuse of discretion and, reviewing the record provided by Defendant, we conclude the trial court did not abuse its discretion in denying Defendant's second Rule 60(b) motion. Further, Defendant's arguments concerning subject matter jurisdiction and standing are without merit. We therefore affirm the trial court's order denying Defendant's second Rule 60(b) motion.

Affirmed.

Judges ELMORE and HUNTER, Jr. concur.

Report per Rule 30(e).