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NO. COA12-1126
NORTH CAROLINA COURT OF APPEALS

FILED: 18 June 2013

STEVEN G. GORDON,
Plaintiff,

v.

Guilford County
No. 09 CVD 10832

DEBORAH J. GORDON (now James),
Defendant

Appeal by plaintiff from orders entered 12 April 2012 and 29 June 2012 by Judge Teresa H. Vincent in Guilford County District Court. Heard in the Court of Appeals 27 February 2013.

Randolph M. James, PC, by Randolph M. James, for plaintiff.

Woodruff Law Firm, P.A., by Carolyn J. Woodruff and Jessica Snowberger Bullock, for defendant.

ERVIN, Judge.

Plaintiff Steven G. Gordon appeals from orders (1) granting a motion filed by Defendant Deborah J. Gordon (now James) seeking the entry of a preliminary injunction barring Plaintiff from spending or otherwise dissipating funds held in certain bank accounts; (2) clarifying that a previously-entered consent order constituted a judgment requiring the payment of money and establishing the amount currently due and owing under that

consent judgment; (3) holding Plaintiff in contempt for violating the consent order; and (4) awarding Defendant \$36,579.75 in attorney's fees. On appeal, Plaintiff argues that the trial court "lacked [the] statutory authority to reduce past-due distributive award payments to a judgment;" that the consent judgment was unenforceably ambiguous; that the trial court erred in calculating the award of attorney's fees to Defendant; and that Plaintiff had not breached his obligation to pay money owed under the consent judgment. After careful consideration of Plaintiff's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the orders in question should remain undisturbed.

I. Factual Background

The parties were married in 1983 and separated in 2007. On 21 August 2009, the parties executed a mediated settlement agreement, pursuant to which Plaintiff was required to pay Defendant a distributive award in the amount of \$1,200,000.00 and to pay \$5,600.00 per month in post-separation support until \$1,000,000.00 of the distributive award had been paid. In return, Defendant agreed to waive the right to receive additional post-separation support or alimony.

On 24 August 2009, Plaintiff filed a complaint for divorce.¹ On 28 October 2009, Defendant filed an answer in which she admitted the material facts alleged in Plaintiff's complaint and asserted counterclaims for, among other things, divorce, distribution of the parties' IRA accounts, breach of contract, specific performance of the mediated settlement agreement, and attorney's fees. In a reply filed on 13 November 2009, Plaintiff admitted that he had not made all the payments required by the mediated settlement agreement and asserted various defenses stemming from his alleged inability to obtain a bank loan or otherwise procure the funds needed to make the required payments. On 16 November 2009, Judge Susan R. Burch entered partial summary judgment with respect to the parties' divorce claims.

On 5 May 2010, the trial court entered a consent order which provided, in pertinent part, that:

1. The parties waive findings of fact and conclusions of law.
2. Plaintiff owes [Defendant] an equitable distribution distributive award as follows:

. . . .

¹As a result of the fact that the two children born during the marriage had reached the age of majority by the time that the parties separated and divorced, the present case never involved child custody or child support issues.

b. [Plaintiff] shall pay to [Defendant] on the first day of each month beginning June 1, 2010 the sum of \$9000, by direct deposit. . . to her . . . checking account . . . until the earlier to occur of the following:

(i) July 31, 2011 or

(ii) The sale of 8640 Adkins Road, Colfax, NC

c. Upon the earlier to occur of (i) July 31, 2011 or (ii) the sale of 8640 Adkins Road, Colfax, NC, [Plaintiff] shall pay to [Defendant] the entire balance due on the \$1,025,000 distributive award. Any part of the \$1,025,000 not paid by July 31, 2011 shall bear interest at 8 percent per annum until paid in full.

3. . . . [Plaintiff] shall pay to [Defendant] \$5000 per month nontaxable alimony beginning May 7, 2010 and on the first day of each month thereafter until the \$1,025,000 distributive award is paid in full. . . . This alimony does not reduce the \$1,025,000 distributive award or the \$82,000 additional payment.

4. [Plaintiff's] current listing contract is over in August, 2010. [Plaintiff] shall list 8640 Adkins Road, Colfax, NC with Nancy Laney at a realistic price reasonably designed to sell said property. Issues regarding the listing and sale and acceptance of offers of 8640 Adkins Road, Colfax, NC can come on for arbitration on 2 business days' notice[.] . . . [Plaintiff] shall inform [Defendant] within 24 hours of all listing agreements and all offers[.] . . . Upon the sale of 8640

Adkins Road, Colfax, all net sales proceeds shall be paid to [Defendant, and, the] proceeds from the sale of 8640 Adkins Road shall reduce the \$1,025,000 distributive award.

. . . .

7. Plaintiff shall pay to Defendant an additional \$82,000 as an additional distributive award over and above the \$1,025,000 at the sale of the home at 8640 Adkins Road, Colfax. . . .

The proceedings underlying the present appeal began when Defendant filed a motion on 18 October 2011 seeking to have Plaintiff held in contempt on the grounds that Plaintiff had failed to comply with the consent order. The contempt motion asserted that Plaintiff had willfully failed to (1) pay the distributive award as ordered, (2) pay the monthly alimony award as ordered, (3) set up automatic deposit drafts as ordered, or (4) list the Adkins Road property for sale with Ms. Laney. In addition, Defendant alleged that Plaintiff was "gainfully employed as he owns his own business and is capable of making all payments" required under the consent order. On 8 November 2011, Plaintiff filed a response to Defendant's contempt motion in which he admitted that he had not listed the Adkins Road property for sale with Ms. Laney, argued that listing the home for sale would be an exercise in futility, and alleged that he lacked "the present ability" to comply with the payment provisions of the consent order.

Hearings were held concerning the issues raised by Defendant's contempt motion on four different dates between 26 January 2012 and 12 April 2012. During the course of these hearings, Plaintiff admitted that he had failed to list the Adkins Road property for sale with Ms. Laney in accordance with the provisions of the consent judgment. Plaintiff argued, however, that the language requiring him to list the Adkins Road property for sale at a "realistic price reasonably designed to sell the property" was unenforceably vague and that this deficiency in the consent order obviated the necessity for him to list the property for sale with Ms. Laney at all. Finally, Plaintiff argued that he lacked the ability to make the lump sum payment owed under the consent order and asserted that Defendant had "elected the remedy" of contempt, as opposed to "her contract remedy, suing under [the] contract remedy."²

²During the hearings held for the purpose of considering the contempt motion, Plaintiff repeatedly argued that Defendant had "elected" the "remedy" of pursuing a contempt motion in lieu of "suing on the contract." However, a party to a consent judgment may not bring a breach of contract action to enforce the terms of a consent order. See, e.g., *Fucito v. Francis*, 175 N.C. App. 144, 148-49, 622 S.E.2d 660, 663 (2005) (noting that, "when parties present their separation agreement to the court for approval, the agreement will no longer be considered a contract between the parties, but rather a court-ordered judgment" and stating that "'the parties to a consent judgment . . . do not have an election to enforce such judgment by contempt or to proceed in an independent action in contract'" because the "Supreme Court in *Doub* specifically prohibited 'independent actions in contract'" (citing *Walters v. Walters*, 307 N.C. 381, 386-87, 298 S.E.2d 338, 342 (1983), and quoting *Doub v. Doub*,

On 12 April 2012, the trial court orally determined that Plaintiff was in contempt of the consent judgment by willfully failing to list the Adkins Road property for sale with Ms. Laney; stated that Defendant had chosen, instead, to list the property with an "inexperienced" agent who "doesn't even come close to having the qualities, the skills necessary, the connections necessary to sell this price of a house;" and noted that, in the court's "opinion . . . [, Plaintiff] really [wasn't] trying to satisfy this obligation" because he did not "believe that [he] should have to pay [Defendant any more] money." As a result, the trial court told Plaintiff that he was being held in contempt of court for willfully failing to list the property with Ms. Laney and that, in the event that he failed to execute a listing contract with her within fourteen days, he would be jailed pending compliance with the relevant provision of the consent judgment. However, the trial court announced that Plaintiff would not be held in contempt for failing to make the lump sum payment required under the consent judgment given that the only way that Plaintiff could have made that payment would have been to liquidate his business, a step that the trial court was unwilling to require.

313 N.C. 169, 171, 326 S.E.2d 259, 260-61 (1985) (emphasis in original)).

After the trial court announced its decision with respect to the contempt motion, Defendant's counsel reminded the trial court that the Clerk of Superior Court had previously declined to record the consent order as a judgment requiring the payment of money "without additional language." In response, the trial court noted that Plaintiff had agreed that the consent order could be recorded as a judgment requiring the payment of money, an observation that Plaintiff did not dispute. As a result, the trial court entered an order on 12 April 2012 "clarifying the judgment index in this County;" stating that "a money judgment has been in effect and on record from and since May 5, 2010, against [Plaintiff] in favor of [Defendant] in the amount and sum certain of \$1,025,000.00, as a tax free distributive award"; specifying the amount currently owed as of the date of the trial court's order; and directing the Clerk of Superior Court "to confirm that the money judgment is docketed in favor of Defendant" On the same date, the trial court entered a preliminary injunction barring Plaintiff from spending or otherwise disposing of certain funds and conducted a hearing concerning the merits of Defendant's motion for attorney's fees.

At the attorney's fees hearing, Plaintiff argued that, given that he had not been found in contempt of the provisions contained in the consent order relating to payment of the distributive award, the trial court should refrain from awarding

attorney's fees stemming from any aspect of the contempt hearing that dealt with Plaintiff's income, expenditures, or ability to pay the money that he owed Defendant. The trial court rejected this argument, noting that if Plaintiff had listed the Adkins Road property the entire contempt proceeding might well have been avoided, and indicated the intention of awarding the requested attorney's fees to Defendant.

After the conclusion of the contempt hearing, Defendant served a Notice of Right to have Exemptions Designated on Plaintiff. In response, Plaintiff filed a Motion to Claim Exempt Property. Subsequently, Defendant objected to certain of Plaintiff's claimed exemptions. On 11 May 2012, Plaintiff noted an appeal from the trial court's oral announcement holding him in contempt of the consent order and awarding Defendant attorney's fees, from the 12 April 2012 order clarifying that the consent judgment was a judgment for the payment of money, from the preliminary injunction precluding him from disposing of certain items of property, and from the trial court's decision to quash a subpoena that Plaintiff had issued for the purpose of seeking discovery of Defendant's tax returns.³

³As a result of the fact that Plaintiff has not advanced any argument challenging the trial court's decision to enjoin him from disposing of certain items of property or to quash the subpoena directed toward Defendant's tax returns, we need not address any issues arising from these decisions in this opinion.

On 24 May 2012, Plaintiff filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(1), (4), and (6) in which he sought relief from the 12 April 2012 order. In support of this motion, Plaintiff asserted that the consent judgment did not amount to "an equitable distribution award pursuant to N.C. Gen. Stat. § 50-20" and that, even though he had "had argued throughout the contempt hearings" that his liabilities pursuant to the consent judgment could "be reduced to a money judgment if defendant decided to pursue a breach of contract claim in the future," Defendant had "elected to pursue only the remedy of contempt," so that the 12 April 2012 order "was mistakenly entered under the erroneous belief that [P]laintiff had consented to [its] entry[.]" In addition, Plaintiff argued that the 12 April 2012 order was an "irregular judgment" on the grounds that it "provided [D]efendant with the opportunity to execute on plaintiff's" business."

On 26 June 2012, the trial court conducted a hearing for the purpose of addressing the validity of Plaintiff's exemption claims and the language that should be included in the written order finding Plaintiff in contempt and awarding attorney's fees in favor of Defendant. Plaintiff's motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 was not addressed at this hearing.⁴ On 29

⁴"As a general rule, an appellate court's jurisdiction trumps that of the trial court when one party files a notice of

June 2012, the trial court entered an order finding Plaintiff in civil contempt for failing to list the Adkins Road property for sale with Ms. Laney. More specifically, the trial court found that Plaintiff had hired an "inexperienced realtor" to sell the home and that there was "no evidence of any attempts by [Plaintiff] to get the listing agreement executed with Nancy Laney[.]" For that reason, the trial court concluded that Plaintiff had "willfully and without legal justification disobeyed, resisted, and interfered with the Court's lawful Order of May 5, 2010 by failing to list the property . . . with realtor Nancy Laney." In addition, the trial court noted that "Plaintiff has been wasting money in many instances" and that he

appeal[.] . . . [However, the] trial court retains limited jurisdiction to indicate how it is inclined to rule on a Rule 60(b) motion." *Hall v. Cohen*, 177 N.C. App. 456, 458, 628 S.E.2d 469, 471 (2006) (citing *Bell v. Martin*, 43 N.C. App. 134, 140-42, 258 S.E.2d 403, 407-09 (1979) (citations omitted), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980)). As a result, "[u]pon the appellate court's notification of a . . . motion filed with the trial court" pursuant to N.C. Gen. Stat. § 1A-1, Rule 60, this Court often "will remand the matter to the trial court so the trial court may hold an evidentiary hearing and indicate 'how it [is] inclined to rule on the motion were the appeal not pending.'" *Id.* (quoting *Bell*, 43 N.C. App. at 142, 258 S.E.2d at 409). In this case, however, Plaintiff's motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 raises legal questions that are essentially identical to those presented on appeal. As a result, we conclude that there is no need to remand this case to the trial court for an "evidentiary hearing" concerning the merits of Plaintiff's motion for relief from judgment given that Plaintiff's motion does not raise any issues of disputed fact and given that our decision with respect to the issues raised by Plaintiff's appeal will obviate the necessity for a ruling on Plaintiff's motion by the trial court.

"ha[d] not been serious and diligent about the success of his business" because he believed that "he should not have to pay [Defendant] the distributive award." However, the trial court refused to find Plaintiff in contempt for failing to make the distributive award payments required in the consent judgment since "the only way that [Plaintiff] may have the present ability to comply with the [consent order] would be to liquidate his business, . . . which the Court will not order[.]" As a result, the trial court ordered that Plaintiff list the home "with realtor Nancy Laney at a realistic price, reasonably designed to sell said property OR report to the Guilford County Sheriff's Department for indefinite incarceration until Plaintiff cures himself of his contempt." In addition, the trial court ordered that, "as a condition of purging himself of contempt, [P]laintiff shall by July 30, 2012 pay . . . the sum of \$36,579.75 for Defendant's attorney's fees." Plaintiff noted an appeal to this Court from the 12 April 2012 and 29 June 2012 orders.

II. Legal Analysis

A. 12 April 2012 Order

As we have already noted, the consent order required Plaintiff to make certain payments to Defendant and specified both a timetable for the making of the required payments and the consequences that would result from any failure on Plaintiff's

part to pay the entire amount owed by 31 July 2011. Subsequently, the Clerk of Superior Court declined to index and record the consent order as presently worded in the judgment docket. As a result, the trial court entered the 12 April 2012 order, which provided, in pertinent part, that, "[f]or the purposes of clarifying the judgment index in this County, a money judgment has been in effect and on record from and since May 5, 2010, against [Plaintiff] in favor of [Defendant] in the amount and sum certain of \$1,025,000.00, as a tax free distributive award." In his brief, Plaintiff argues that the trial court "lacked statutory authority and subject matter jurisdiction to enter" an order that "reduced past-due distributive award payments to a judgment[.]" We conclude, however, that Plaintiff's challenges to the 12 April 2012 order do not implicate subject matter jurisdiction considerations and that Plaintiff failed to properly preserve his challenges to the 12 April 2012 order for appellate review.

As a preliminary matter, we cannot agree with Plaintiff's assertion that the 12 April 2012 order served to "reduce" a distributive award "to judgment." In *Walters*, 307 N.C. at 386, 298 S.E.2d at 342, the Supreme Court

establish[ed] a rule that whenever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation

agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments. . . . The parties can avoid the burdens of a court judgment by not submitting their agreement to the court. By not coming to court, the parties preserve their agreement as a contract, to be enforced and modified under traditional contract principles. Under our new rule every court approved separation agreement is considered to be part of a court ordered consent judgment.

The undisputed information contained in the record establishes that the parties executed a settlement agreement on 21 August 2009 and that a consent judgment incorporating some of the terms contained in the settlement agreement was entered on 5 May 2010. As a result, to the extent that the distributive award specified in the settlement agreement was "reduced to judgment," that step took place when the consent judgment was entered on 5 May 2010. Instead, the 12 April 2012 order was entered "[f]or the purpose[] of clarifying the judgment index in this County" and provided that "a money judgment has been in effect and on record from and since May 5, 2010[.]" Thus, contrary to the premise underlying Plaintiff's argument, we conclude that the 12 April 2012 order did not "reduce a distributive award to judgment."

Regardless of the manner in which the 12 April 2012 order should be characterized, we conclude that Plaintiff has failed to properly preserve his challenge to the entry of that order for appellate review. Although "a court's lack of subject

matter jurisdiction is not waivable and can be raised at any time," *In re K.J.L.*, 363 N.C. 343, 346, 677 S.E.2d 835, 837 (2009), an argument that does not implicate subject matter jurisdiction considerations is waived in the absence of a timely objection. See *In re Hutchinson*, __ N.C. __, __, 723 S.E.2d 131, 133 (stating that, where the party's "argument . . . does not raise a question of subject matter jurisdiction," it "was waived when the [party] failed to advance that argument before the trial court"), *disc. review denied*, __ N.C. __, 724 S.E.2d 910 (2012), and N.C. R. App. P. 10(a)(1) (stating that, "to preserve an issue for appellate review," a party "must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling" and must have "obtain[ed] a ruling upon the party's request, objection, or motion"). Although Plaintiff claims that his challenge to the 12 April 2012 order implicates subject matter jurisdiction considerations, "this logic is flawed, since not every deviation from required statutory procedures is jurisdictional in nature." *State v. Petty*, __ N.C. App __, __, 711 S.E.2d 509, 513 (2011). On the contrary, "'a court's authority to act pursuant to a statute, although related, is different from its subject matter jurisdiction.'" Simply put, "'[s]ubject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it;" the "'power of

a court to hear and determine (subject matter jurisdiction) is not to be confused with the way in which that power may be exercised in order to comply with the terms of a statute (authority to act).'" *Petty*, __ N.C. App at __, 711 S.E.2d at 513 (quoting *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130, *disc. rev. denied*, 354 N.C. 217, 554 S.E.2d 338 (2001) (internal citations omitted)). A careful examination of Plaintiff's brief establishes that, rather than challenging the trial court's authority to adjudicate the issues that have been raised by the parties in this case, Plaintiff is simply arguing that the trial court resolved those issues in an erroneous manner. As a result, Plaintiff's challenge to the 12 April 2012 order does not implicate subject matter jurisdiction considerations, so that Plaintiff was required to assert his challenge to the trial court's authority to enter that order in the court below as a precondition for advancing his challenge to the entry of that order on appeal.

Although Plaintiff contends in his brief that, when Defendant's trial counsel reminded the trial court of the need to enter an order directing the Clerk of Superior Court to record and docket the consent order as a judgment, his trial counsel "immediately objected" and argues that the challenged order was entered "[d]espite [his] objection," we do not believe that the record supports this contention. Instead, the record

reflects that, after the trial court orally announced its decision to find Plaintiff in contempt, Defendant's trial counsel addressed the issue of whether the order at issue here should be entered:

[DEFENSE]: And, Your Honor, there are two other issues. We had been talking throughout this, because the clerk's office would not record this as a money judgment without additional language. I have that Order -

THE COURT: And he already agreed that we'll reduce it to a money judgment. That's not a problem.

The record does not reflect that Plaintiff's trial counsel ever disputed the accuracy of the trial court's observation. On the contrary, the record reflects that the parties immediately moved on to the consideration of other issues:

[DEFENSE]: . . . The other issue is . . . I'd ask that [Plaintiff] not do anything with the money that's over at the Hill Gordon Rentals, and that we have - I'm going to ask for a TRO on that money, to freeze it pending us getting money judgment.

Instead of arguing that the trial court lacked the power to enter an order directing that the consent judgment be docketed as a judgment for the payment of money and establishing the unpaid accrued amount due and owing under the consent judgment, Plaintiff's trial counsel argued that there was no need for the issuance of the requested injunction and that, following entry of the judgment, Defendant would, instead, be required to follow

certain procedures associated with the enforcement of a judgment requiring the payment of money:

[PLAINTIFF]: I'd, I'd like to follow the appropriate process. What I heard her say is, and I was standing up in response to: I want a temporary restraining order to do something. And my point was, simply, Mr. Gordon is not going to touch that money.

THE COURT: She just wants [an] order to make sure he doesn't touch it.

. . . .

[PLAINTIFF]: Right. So, I mean, if I can make the representation to the Court he won't touch it, if she wants to execute on it, which is apparently what she's going to do with her money judgment -

[DEFENSE]: Right.

[PLAINTIFF]: - but, but the steps to follow are she's got to send me, one's the exemption notices -

[DEFENSE]: Right.

[PLAINTIFF]: - pursuant to money judgment. You have to fill them out. It's a process. . . .

. . . .

[DEFENSE]: How about the not doing away with inventory except in the ordinary course of business?

[PLAINTIFF]: No. Can't do that. Sorry. Business is not a party.

[DEFENSE]: Well, [Plaintiff] is.

[PLAINTIFF]: I mean, that's - don't mistake my willingness on one issue to

ignore legal requirements on the other area.
. . . I understand we talked about this judgment. She's giving me a copy. If the file she wants to present to you is in a form that she's provided me, I can't consent to it[.]

The underlined statements are the basis for Plaintiff's contention that he "immediately objected" to the entry of an order reducing the distributive award to a judgment for the payment of money. A fair reading of these statements, however, shows that Plaintiff was not questioning the trial court's authority to enter the 12 April 2012 order; instead, Plaintiff was concerned about the impact that an injunction precluding him from disposing of business-related property would have on the operation of his business and contending that the proper way to reach business-related property was to follow the procedures required for the enforcement of a judgment requiring the payment of money.

The interpretation of the comments made by Plaintiff's trial counsel which we believe to be appropriate is strongly supported by the fact that Plaintiff never argued that the trial court lacked authority to enter an order like the one at issue here at any point during the contempt hearings. In fact, at various points during that proceeding, Plaintiff's trial counsel made statements expressly acknowledging Defendant's right to enforce the distributive award through the execution process.

As a result, we read the record to indicate that Plaintiff's objections to Defendant's attempts to obtain the money that Plaintiff owed her were all addressed to issues other than the one that he now seeks to raise on appeal.

For example, at one point, Defendant asked the trial court to enter an order clarifying that the consent order was a money judgment, stating that "we are asking the Court, because we tried to record this as a money judgment, and we need language clarifying that it is a money judgment[.]" In response, instead of asserting that the trial court lacked the authority to enter such an order, Plaintiff argued that Defendant had "elected the remedy" of obtaining the entry of a consent order and was, for that reason, precluded from enforcing the consent judgment through the institution and prosecution of civil contempt proceedings:

[PLAINTIFF]: . . . I respectfully submit, . . . by signing this Consent Order . . . [Defendant] was waiving her contempt powers of this Court. . . . Judge, I respectfully submit that . . . the parties' Consent order . . . provided a remedy. . . . It was an election of remedies at the time she signed this Consent Order.

THE COURT: So you're saying . . . she should not be able to come to court to get assistance of the Court to ask the Court to hold your client in contempt of court[.]

. . . .

[PLAINTIFF]: What I'm saying is . . . every Consent Judgment, Consent Order, is based on one contract. They could sue -

THE COURT: Enforcement of the contract?

[PLAINTIFF]: - One of the remedies they've asked for, they've asked for the remedy of a Judgment. And I'm not - they may be well entitled to a Judgment. I'm not arguing that issue. . . . Is it a Judgment? Yes. I mean, it could be reduced to a written judgment. And has she properly pled that? Certainly the ED statute would permit the recordation of a Judgment. . . . So is she entitled to Judgment? Yes. Is that a remedy? Yes. Is she entitled to civil contempt? Respectfully, no. . . .

(emphasis added) Subsequently, after all of the evidence had been presented and the trial court had indicated that it would not order Plaintiff to dissolve his business until a determination had been made as to whether he could obtain the necessary funds to pay the distributive award by selling the Adkins Road property, Plaintiff did not argue that the trial court lacked authority to enter an order like the one at issue here. Instead, Plaintiff simply asked that certain language be included and expressed concern about the implications for Defendant's ability to attach his business assets:

[DEFENSE]: Your Honor, I have that Judgment and Order to hand up, if you would like to get that entered so we can go ahead and get it docketed.

THE COURT: Okay. And you've had the opportunity to look at it, counsel?

[PLAINTIFF]: . . . I am looking at it now, if Your Honor would give me a moment. . . . Your Honor, in paragraph 8 it says: Any monies collected for (indiscernible word) enforcement would be credited against the distributive award. To the extent that we're talking about the, the Hill and Gordon money, . . . I wonder if we could say that that money could go to attorney's fees first, since . . . I think it will be the first money that will come forward.

[DEFENSE]: I don't think we have an objection to that. . . .

. . . .

THE COURT: Okay. So that's that. Now, for attorney's fees, I'll hear from you.

[DEFENSE]: Can we get those clocked in -

THE COURT: Sure.

[DEFENSE]: - because we were hoping to get those docketed today.

THE COURT: Sure. Madam Clerk, would you clock these in.

[PLAINTIFF]: If I may, if the judgment, I know it would be agreed that it would be a money judgment. But if this is docketed today they could begin the process of executing on all of the properties and the stock and everything immediately[.]

THE COURT: Which I assume they would do. So

[PLAINTIFF]: We're anticipating that.

THE COURT: I anticipate that, that they would do that. And, well, I mean, that's another reason not to really get into dealing with those other properties. Because you're going to have a judgment and you can execute on all of those, if you like. I mean, there are other ways to get what you like. But I don't think that this is the avenue in terms of contempt of court. You have ways to get to it.

[DEFENSE]: Right.

THE COURT: And so - and you know, I don't blame you for using what you can. But I'm not going to do it through this [contempt] process.

Thus, Plaintiff repeatedly conceded that the ordinary execution process was available to Defendant as a means for ensuring payment of the distributive award.

After the contempt hearing had been concluded and the relevant orders entered, Defendant served a Notice of Right to have Exemptions Designated on Plaintiff, who responded by filing a Motion to Claim Exempt Property. Subsequently, after Defendant objected to certain of Plaintiff's exemption claims, a hearing was held on 26 June 2012 for the purpose of addressing the Defendant's objections to Plaintiff's claims. In the course of that hearing, Plaintiff objected to the timing of Defendant's notice of his right to have exemptions designated, requested a stay of the execution process, and questioned whether Defendant could "go after [Plaintiff's] business" and whether Defendant

could execute on the judgment in addition to having Plaintiff held in contempt.

[PLAINTIFF]: . . . If you remember, there was a subtheme throughout the hearing, that Ms. Woodruff elected a remedy, she elected to go to the contempt route, and not to sue us on the Judgment . . . to enforce this order. . . . [T]he day that she handed up the Judgment I objected on the record. . . . I said: I can't consent[.] . . . My concern was exactly what happened here. And what's happened is Your Honor's Order . . . recited that your concern was preserving [Plaintiff's] business[, but] . . . what they're doing . . . with this Judgment is to go after the business through the exemption execution process. And I'm saying: Wait a minute. . . . they served the Judgment and then turned around and served the 1C exemption notice. We say Rule 62 says you've got to wait 30 days, and then you can issue 1C exemption notice. So we say all that procedure is premature. But they're going after the very entity that I thought your Order protected[.]

Defendant strongly disagreed, arguing that

. . . I submit that they consented to that. They did not object at the time it was entered. He even edited it. . . . I am dumbfounded by this. And it is an attempt to delay. . . .

After the parties argued their positions regarding the timing of Defendant's notice of the right to have exemptions designated and the likelihood that Defendant would attempt to execute upon Plaintiff's business assets, Plaintiff again argued that Defendant had "elected a remedy" and was required to focus on their efforts to have him held in contempt:

. . . They chose contempt. They chose that remedy. Your Honor ruled largely in their favor on the contempt issue. . . . So as a result they've now come forward with their Judgment seeking execution on everything that's available, including the corporate stock.

In an apparent attempt to clarify the specific basis for Plaintiff's objections to the 12 April 2012 order, the trial court asked Plaintiff:

THE COURT: I mean, you acknowledge under the ED Order that your client was ordered to pay X amount of money, and that the Clerk's office wouldn't recognize that, and that a Judgment would reflect what was ordered such that the Clerk's office would recognize it. I mean, I think you acknowledge that on the record.

[PLAINTIFF]: No, ma'am[.] . . . [W]hat you just said is not completely accurate. These parties never had an ED Order. What they had was a Mediated Settlement Agreement.

THE COURT: Agreement, whatever.

[PLAINTIFF]: Well, whatever is a big difference. What they had is a Mediated Settlement Agreement that never got reduced to an ED Order. They then had the first Consent Order, the second Consent Order, and then we were before Your Honor. And that's the history procedurally. There was never an ED Order, Judgment from the Court. There were consent orders. . . .

In other words, in response to the trial court's direct question about the order challenged on appeal, Plaintiff did not assert that the trial court lacked the authority to enter the 12 April

2012 order and argued, instead, that there had never been an equitable distribution award in the first place. Thus, although Plaintiff addressed a number of issues relating to the proper interpretation of the Consent Judgment, the sufficiency of the evidence with respect to certain issues, the availability of execution in addition to a judgment of contempt as a means for enforcing the consent judgment, and the existence of certain alleged procedural irregularities (which he conceded was an effort to avoid "an inevitability") during the 26 June 2012 hearing, the record clearly reflects that Plaintiff never argued that the trial court "lacked the authority to reduce the distributive award amount to a money judgment" or to establish the accrued unpaid amount owed under that judgment.

As a result, Plaintiff took a number of different positions during the course of the proceedings held before the trial court in this case. A close examination of the record reveals, however, that Plaintiff never argued during any of those proceedings that the trial court lacked the authority to enter the 12 April 2012 order. On the contrary, the record, when read in its entirety, demonstrates that Plaintiff never objected to the entry of the challenged order before the trial court and, in fact, repeatedly acknowledged that the trial court had the authority to enter an order like the one at issue here. As a result, given that Plaintiff has failed to properly preserve his

challenge to the 12 April 2012 order for purposes of appellate review, his challenges to the validity of that order are not properly before us and will not be addressed on the merits in this opinion.

B. Enforceability of Consent Judgment

Secondly, Plaintiff contends that the trial court erred by holding him in contempt on the grounds that the 5 May 2010 consent judgment "was ambiguous and contained an agreement to agree, rendering these provisions of the consent order unenforceable." More specifically, Plaintiff asserts that the consent order is unenforceably ambiguous because it directs Plaintiff to list the Adkins Road property "at a realistic price reasonably designed to sell said property." Plaintiff's argument lacks merit.

"To establish contempt of a court order, the evidence must show that the person was guilty of knowledge and stubborn resistance in order to support a finding of willful disobedience." *Campan v. Featherstone*, 150 N.C. App. 692, 695, 564 S.E.2d 616, 618, *disc. review denied*, 356 N.C. 297, 570 S.E.2d 504 (2002) (quotations and citations omitted). As a result, if the underlying order "is ambiguous such that a defendant could not understand his respective rights and obligations under that order, he cannot be said to have knowledge of that order for purposes of contempt proceedings."

Blevins v. Welch, 137 N.C. App. 98, 103, 527 S.E.2d 667, 671 (2000) (quotations and citation omitted). "The extent to which a consent judgment is ambiguous is a question of law. An ambiguity exists in the event that the relevant contractual language is fairly and reasonably susceptible to multiple constructions." *DeRossett v. Duke Energy Carolinas, LLC*, 206 N.C. App. 647, 656, 698 S.E.2d 455, 462 (2010) (citing *Duke Energy Corp. v. Malcolm*, 178 N.C. App. 62, 65, 630 S.E.2d 693, 695, *aff'd per curiam*, 361 N.C. 111, 637 S.E.2d 538 (2006)) (internal citations omitted).

The trial court held Plaintiff in contempt for "failing to list the property located at 8640 Adkins Road with realtor Nancy Laney." The consent order clearly specified that "[Plaintiff] shall list 8640 Adkins Road, Colfax, NC with Nancy Laney[.]" The literal language in which the consent order was couched provided Plaintiff with explicit notice to the effect that he was required to list the Adkins Road property for sale with Ms. Laney. In view of the clarity with which the requirement that Plaintiff violated was stated, we conclude that the fact that the consent order "failed to specify a price for which [P]laintiff must list Adkins Road" is immaterial. Simply put, Plaintiff was not held in contempt for listing Adkins Road for an unreasonable price; instead, he was held in contempt for failing to make "any attempt[] . . . to get the listing

agreement executed with Nancy Laney for 8640 Adkins Road." As the trial court stated in rejecting this same argument:

Now, if you had at least attempted to, and you couldn't come up with a price that was realistic that met the other requirements in that provision, . . . that would change my view somewhat of this case. But you didn't do that at all. I have no evidence that there was an attempt by you to set that contract up. . . . [The court] would assume, based upon Ms. Laney's experience in this field of work, that she could suggest what a realistic price is[.]

As a result, Plaintiff is not entitled to relief from the trial court's contempt order on the basis of this argument.

C. Attorney's Fees

Thirdly, Plaintiff argues that the trial court erred by ordering him to pay \$36,579.75 in attorney's fees. More specifically, Plaintiff argues that, given the trial court's decision to hold him in contempt for failing to list the Adkins Road property for sale with Ms. Laney and to refrain from holding him in contempt for failing to pay the distributive award in a timely manner, the trial court had no authority to order him to pay attorney's fees associated with litigating the latter issue and that its decision to do so constituted the imposition of an impermissible penalty. We disagree.

"Generally, attorney's fees and expert witness fees may not be taxed as costs against a party in a contempt action." *Watson v. Watson*, 187 N.C. App. 55, 69, 652 S.E.2d 310, 320 (2007)

(citation omitted), *disc. review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008). On the other hand, a trial court has "the authority to require one to pay attorney fees in order to purge oneself from a previous order of contempt for failing and refusing to comply with an equitable distribution order." *Id.* (quotation and citation omitted). The amount awarded must "relate to the enforcement of the parties' . . . equitable distribution consent order." *Id.* at 70, 652 at 320.

As Plaintiff correctly notes, the attorney's fees that the trial court required him to pay were accumulated during the "five days of hearings" regarding whether Plaintiff's "spending habits amounted to willful failure by [P]laintiff to satisfy the distributive award" and whether plaintiff failed to "list the property with Nancy Laney[.]" The parties litigated these issues as a result of Defendant's attempt to enforce the consent order. As a result, the fact that it only "took three of the 779 transcript pages" associated with that hearing to establish that Plaintiff had violated the provision of the consent judgment requiring him to list the Adkins Road property for sale with Ms. Laney and the fact that the trial court did not hold Plaintiff in contempt for failing to pay the distributive award are irrelevant to the issue of whether the trial court had the authority to assess the entire amount of Defendant's attorney's fees against Plaintiff. Instead, the only pertinent fact is

that Plaintiff was held in contempt for violating the underlying consent order. Since a party may be required to pay another party's attorney's fees as a condition of purging himself or herself from contempt stemming from willful noncompliance with an equitable distribution order and since the attorney's fees in question were incurred in connection with the enforcement of the consent order, we conclude that the trial court did have the authority to require Plaintiff to pay the entire amount of Defendant's attorney's fees.

In addition, we are not persuaded by Plaintiff's argument that the trial court should not have required him to pay attorney's fees associated with Defendant's effort to have him held in contempt for willfully failing to pay the distributive award in a timely manner. Despite the fact that the trial court did not hold Plaintiff in contempt on this basis, the evidence relating to Plaintiff's financial situation and the manner in which he handled his assets, income, and expenses was pertinent to the issue of whether his failure to list the Adkins Road property with Ms. Laney was willful. For example, based upon this evidence, the trial court expressly declined to "condone" the way that Plaintiff had been "wasting money" and concluded that Plaintiff had not been serious or diligent about the success of his business "because [he didn't] want to pay [Defendant any more] money." The trial court admonished

Plaintiff for "showing up to work at 10:30 [or] 11:00" and for "showing up to work under the influence of impairing substances" and pointed out that Plaintiff had even "[come] to court at least on one occasion under the influence of some impairing substance," thereby "show[ing] a blatant disregard for what you agreed to pay [Defendant]." In addition, the trial court specifically stated in open court that Defendant's trial counsel should "[m]ake sure that [the order] includes the finding that, of course, if [Plaintiff] had listed the home it may have sold," and that, when the sale occurred, Plaintiff "could have perhaps recouped his investment, and [D]efendant could have been paid what she's owed, such that this contempt hearing would not have even been necessary."

As a result, the issues that Plaintiff contends are irrelevant to the attorney's fee calculation were, in fact, integral to the trial court's contempt decision. Thus, the trial court did not err by requiring Plaintiff to pay Defendant's attorney's fees.

D. "Alternative Penalty" Provisions of Consent Judgment

Finally, Plaintiff argues that the trial court erred by "reducing the distributive award to judgment" on the grounds that the terms set out in the consent order, instead, of requiring him to pay the agreed-upon distributive award, actually gave him a choice of either paying the award or

allowing the accumulation of interest on the unpaid balance, continuing to pay the premiums associated with Defendant's health insurance coverage, and paying Defendant \$5,000.00 a month in alimony. Plaintiff has not, however, identified any language in the consent order that supports this assertion, and we have not found any such language in the course of our own review of that document. As a result, Plaintiff's final argument is without merit.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Plaintiff is not entitled to relief from the trial court's orders on the basis of any of the arguments asserted in his brief. As a result, the trial court's orders should be, and hereby are, affirmed.

AFFIRMED.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).