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NO. COA12-1571
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

MARIA LIBERATORE,
Plaintiff,

v.

Cleveland County
No. 11 CVD 2094

ROBERT LIBERATORE,
Defendant.

Appeal by defendant from orders entered 20 April 2012 and 23 August 2012 by Judge Meredith Shuford in Cleveland County District Court. Heard in the Court of Appeals 14 August 2013.

Jon W. Myers for defendant-appellant.

Anna S. Lucas for plaintiff-appellee.

HUNTER, Robert C., Judge.

Defendant Robert Liberatore ("defendant") appeals orders entered 20 April 2012 and 23 August 2012 by Judge Meredith Shuford in Cleveland County District Court. On appeal, defendant argues that the trial court erred by: (1) declining to refer defendant's motion to recuse to another judge and later denying the motion; (2) holding defendant in willful civil contempt at the 2 and 3 August 2012 hearing; (3) failing to

grant a hearing *de novo* when it held defendant in continuing willful civil contempt at the 22 and 26 March 2012 hearings; (4) holding defendant in continuing willful civil contempt at the 22 and 26 March 2012 hearings when defendant was unable to comply with the purge conditions; and (5) granting plaintiff's attorney the sole signature authority on all Carolina Foot & Ankle Specialists, PA ("Carolina Foot and Ankle") bank accounts at the 2 and 3 August 2012 hearing. After careful review, we affirm all of the trial court's orders.

Background

Plaintiff Maria Liberatore ("plaintiff") and defendant were married in 1992 and have two minor children. Plaintiff filed a complaint against defendant on 30 March 2010 seeking a divorce from bed and board, alimony, injunctive relief, and family support. They acquired significant marital property during their marriage including numerous savings and investment accounts valued at more than \$1.5 million.

I. The 23 August 2011 Hearing

A hearing was scheduled on 23 August 2011 after plaintiff filed a motion in the cause and a motion to hold defendant in contempt. The trial court issued two orders in response to the 23 August 2011 hearing. The first order enjoined both parties

from disposing of any part of the marital estate prior to equitable distribution. The second order granted plaintiff interim distributions, compelled defendant to produce certain financial documents, and held defendant in civil contempt for failure to pay family support pursuant to a 21 February 2011 order. During the 23 August 2011 hearing, the trial court granted defendant's attorney's request to withdraw and denied defendant's subsequent motion to continue.

II. The 12 October 2011 Hearing

At the next scheduled hearing on 12 October 2011, the trial court made findings of fact that defendant had withdrawn and secreted away the following marital assets: (1) \$1.5 million in diamonds purchased with money wired to a Cyprus bank; (2) \$195,000 transferred to defendant's mother's bank account; (3) \$60,000 withdrawn from defendant's children's college savings accounts; and (4) \$40,000 transferred to defendant's neighbor. After this hearing, the trial court issued an order awarding plaintiff an interim allocation of \$235,000 and attorney fees to be paid by defendant before 21 October 2011. This order also allowed plaintiff access to the marital home to retrieve personal items. The issue of contempt was held open until a hearing on 1 November 2011.

III. The 1 November 2011 Hearing

During the 1 November 2011 hearing, the trial court concluded defendant had not complied with the mandates of the 12 October 2011 order and failed to give truthful answers during sworn testimony. In response, the trial court issued an order holding defendant in criminal and civil contempt. The trial court suspended the sentence for criminal contempt upon payment of \$500 plus court costs, but sentenced defendant to an indefinite period of confinement for civil contempt.

IV. The 1 December 2011 Hearing

Defendant's attorney filed a motion to strike the civil contempt and release defendant; the matters were heard 1 December 2011. On 13 December 2011 the trial court issued an order suspending defendant's indefinite confinement. The trial court, however, denied defendant's motion to strike the civil contempt. This order further required defendant to comply with all previous orders before 5 March 2012 in order to purge the civil contempt.

V. The 3 February 2012 Hearing

At a hearing held on 3 February 2012, defendant moved to recuse Judge Shuford and plaintiff moved to hold defendant in contempt for failure to pay attorney fees. First, Judge Shuford

found no evidence that she was motivated by personal bias during the previous hearings and issued an order denying defendant's motion to recuse ("recusal order"). Next, Judge Shuford issued a second order finding defendant in willful civil contempt for violating the previous order's mandate to pay attorney fees. This order then reflected that the willful civil contempt was purged on 2 February 2012 through defendant's payment in full of the attorney fees.

VI. The 22 and 26 March 2012 Hearings

More hearings were scheduled on 22 and 26 March 2012 to review defendant's compliance with the 13 December 2012 order's civil contempt purge requirements. The orders issued by the trial court during the hearings on 3 February 2012, 22 March 2012, and 26 March 2012 were filed on 20 April 2012. The trial court found defendant was not in compliance and issued an order holding defendant in continuing civil contempt ("20 April 2012 contempt order"). Defendant was sentenced to 60 days confinement for failure to comply with the prior trial court order. Defendant gave written notice of appeal on 2 May 2012 for the recusal order and the 20 April 2012 contempt order. On 20 June 2012, this Court granted defendant's motion for temporary stay of the 20 April 2012 contempt order pending the

outcome on appeal; this Court, however, denied defendant's motion for temporary stay concerning defendant's recusal motion.

VII. The 2 and 3 August 2012 Hearings

Plaintiff filed another motion to hold defendant in contempt on 18 July 2012, which was continued by defendant until a hearing on 2 and 3 August 2012. During this hearing, the trial court found defendant had not complied with previous orders to produce financial records, pay attorney fees, pay the balance of interim distributions, or aid in the selling of the marital residence. Furthermore, the trial court found defendant withdrew \$25,403.00 from Carolina Foot and Ankle, which was marital property. In response, the trial court issued an order that found defendant in willful civil contempt and appointed an agent to oversee the accounts of Carolina Foot and Ankle ("23 August 2012 contempt order"). Additionally, the 23 August 2012 contempt order sentenced defendant to an indefinite period of incarceration for willful civil contempt. Defendant appealed this order on 26 September 2012.

Grounds for Appeal

Defendant appeals from interlocutory orders. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for

further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citations omitted). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, pursuant to N.C. Gen. Stat. § 7A-27(d)(1), an appeal of right lies "[f]rom any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which affects a substantial right[.]" N.C. Gen. Stat. § 7A-27(d)(1) (2011).

Here, defendant's appeal is interlocutory because the orders being appealed do not dispose of all the matters in controversy. However, this Court has held that interlocutory orders that find a party in civil contempt affect a substantial right and are immediately appealable. *Ross v. Ross*, ___ N.C. App. ___, ___, 715 S.E.2d 859, 861 (2011). Thus, the trial court's orders finding defendant in civil contempt are immediately appealable and properly before this Court.

However, defendant also appeals the trial court's interlocutory order denying his motion to recuse Judge Shuford. "A ruling on a motion to recuse a trial judge is an

interlocutory order and is not immediately appealable." *Lowder v. All Star Mills, Inc.*, 60 N.C. App. 699, 702, 300 S.E.2d 241, 243, *disc. review denied*, 308 N.C. 387, 302 S.E.2d 250 (1983). The *Lowder* Court, however, determined "since an accusation about a judge's partiality goes to the fundamental issue of maintaining confidence in our court system, we have elected to treat the case as though a petition for certiorari had been allowed and to proceed to the merits[.]" *Id.* Here, although defendant did not file a petition for writ of *certiorari*, we will treat the case as though a petition for writ of *certiorari* had been filed, which we allow and proceed to the merits.

Discussion

I. Defendant's Recusal Motion

Defendant argues the trial court erred when it failed to grant his motion to recuse or refer the matter for a hearing before another judge. We disagree.

A trial judge's decision to deny a motion for recusal is reviewed for an abuse of discretion. See *Roper v. Thomas*, 60 N.C. App. 64, 76, 298 S.E.2d 424, 431 (1982), *disc. review denied*, 308 N.C. 191, 302 S.E.2d 244 (1983). "If there is sufficient force to the allegations contained in a recusal motion to proceed to find facts, or if a reasonable man knowing

all of the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner, the trial judge should either recuse himself or refer the recusal motion to another judge." *In re Faircloth*, 153 N.C. App. 565, 570, 571 S.E.2d 65, 69 (2002). "The requesting party has the burden of showing through substantial evidence that the judge has such a personal bias, prejudice or interest that he would be unable to rule impartially." *Id.*

Here, defendant's allegations of Judge Shuford's impartiality were insufficient to warrant a referral to another judge. Furthermore, we note that defendant presented no evidence at the hearing to show Judge Shuford had ever shown bias, partiality, or undue favoritism during this case. In fact, in his motion to recuse, defendant claims only that "Judge Shuford's actions and decisions in these proceedings have been and continue to be in contravention to and have fallen below the standards and expectations set for Judicial Officials[.]" Defendant bases his contentions of personal bias on Judge Shuford's decision to allow his attorney to withdraw at the 23 August 2011 hearing and her subsequent denial of his motion to continue. However, defendant's contentions lack "sufficient force" because he failed to object to his attorney's withdrawal

and Judge Shuford denied defendant's motion to continue based on substantial delays the case had already faced. Therefore, defendant failed to plead sufficient facts that would cause a reasonable man to doubt Judge Shuford's impartiality. Accordingly, we affirm the trial court's order denying defendant's motion to recuse.

II. Civil Contempt Orders

Next, defendant argues the trial court did not have authority to hold him in continuing civil contempt at the 2 and 3 August 2012 hearing because Judge Shuford should have been recused at the 3 February 2012 hearing. In other words, defendant contends her failure to grant defendant's motion to recuse rendered all subsequent orders erroneous. Defendant's argument is without merit. As discussed above, the trial court did not abuse its discretion in denying defendant's motion to recuse. Thus, defendant's argument is overruled.

Moreover, defendant failed to include any additional argument challenging the merits of the 23 August 2012 contempt order. "It is not the role of the appellate courts, however, to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Accordingly, we will not engage in any substantive analysis of

this order.

Next, defendant contends the trial court erred in its 20 April 2012 order finding him in continuing civil contempt at the 22 and 26 March 2012 hearings. Specifically, defendant alleges the trial court erred in not holding a *de novo* hearing when it committed him to a 60 day active sentence. Defendant also argues the trial court erred in concluding he willfully failed to comply with the contempt order since he did not have the ability to comply with it. We disagree.

"The standard of review we follow in a contempt proceeding is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Miller v. Miller*, 153 N.C. App. 40, 50, 568 S.E.2d 914, 920 (2002) (internal quotation marks omitted). Pursuant to N.C. Gen. Stat. § 5A-21(b2),

A person who has not purged himself or herself of the contempt within the period of imprisonment imposed by the court under this subsection may be recommitted for one or more successive periods of imprisonment, each not to exceed 90 days Before the court may recommit a person to any additional period of imprisonment under this subsection, the court shall conduct a hearing *de novo*. The court must enter a finding for or against the alleged contemnor on each of the elements of G.S. 5A-21(a), and must find that all of elements of G.S. 5A-21(a) continue to exist before the person

can be recommitted.

N.C. Gen. Stat. § 5A-21(b2) (2011). Thus, to qualify for a hearing *de novo*, defendant must show he was being recommitted to an additional term of imprisonment. *See id.*

Here, defendant was sentenced to incarceration for an indefinite period of time after being held in civil contempt at the 1 November 2011 hearing. This indefinite incarceration was temporarily suspended by the trial court on 1 December 2011 after defendant had served 30 days of the indefinite sentence in jail. The trial court, however, refused to strike the prior civil contempt charge. Additionally, the trial court conditioned the indefinite sentence's suspension on defendant's compliance with the previous court order by 2 March 2012. Defendant did not comply with the previous court order and the trial court sentenced him to 60 days of confinement. Defendant never completed the original sentence because it was merely temporarily suspended. Thus, defendant was only sentenced to serve time remaining from the first sentence and was not recommitted to a new sentence. Furthermore, subject to the guidelines of N.C. Gen. Stat. § 5A-21(b2), "[a] person who is found in civil contempt may be imprisoned as long as the civil contempt continues[.]" N.C. Gen. Stat. § 5A-21(b) (2011).

Therefore, we conclude the trial court's 20 April 2012 order did not violate the provisions set forth in N.C. Gen. Stat. § 5A-21.

Contrary to defendant's argument that the trial court erred and abused its discretion when it ruled defendant was able to comply with the 20 April 2012 contempt order, we find that the trial court made sufficient findings establishing that defendant was able to comply with the contempt order.

This Court has noted that "for civil contempt to be applicable, the defendant must have the present ability to comply with the court order." *Scott v. Scott*, 157 N.C. App. 382, 394, 579 S.E.2d 431, 439 (2003). "Moreover, our Courts have required the trial court to make a specific finding as to the defendant's ability to comply during the period in which he was in default." *Id.*

At the 1 December 2011 hearing, in order to purge his continuing civil contempt, the trial court ordered defendant to pay \$115,000 to plaintiff's attorney and produce the nine diamonds he previously purchased from Cyprus before 2 March 2012. Hearings were scheduled for 22 and 26 March 2012 to review defendant's compliance with the December order. During the 22 and 26 March 2012 hearings, the trial court made the following findings of fact:

8. That despite Defendant's decreased work schedule, Defendant continues to earn a salary of at least \$10,000.00 a month from Carolina Foot and Ankle.

. . .

10. The Defendant has continued to receive a monthly disability payment in the approximate amount of \$5,000.00.

. . .

12. The Defendant has elected to pay \$4,800.00 a month to avoid paying interest towards his Bank of America credit card loan.

These findings were supported by competent evidence presented at the hearing - specifically, defendant's testimony during the hearing and defendant's evidence concerning his cash flow. Therefore, the trial court based its findings of fact on competent evidence. Moreover, these findings support the trial court's conclusion that defendant has had the means to comply with the purge conditions, but willfully chose not to comply. Accordingly, we find the trial court did not abuse its discretion when it ruled defendant had the ability to comply, and its decision is affirmed.

Finally, defendant contends the trial court exceeded its authority in its 23 August 2012 contempt order by granting an agent sole signature authority over Carolina Foot and Ankle

business accounts. Defendant argues this appointment amounted to the creation of a corporation receivership which the trial court did not have jurisdiction to create. Defendant's argument is without merit.

A receiver is given authority by the trial court to sell property at the court's direction. See N.C. Gen. Stat. § 1-505 (2011). Here, the court appointed an agent to monitor Carolina Foot and Ankle business accounts, but the agent had no power or authority to sell the business. Since the agent had no power to sell the business, the agent the court appointed was not a receiver. Furthermore, "[d]uring the pendency of the action for equitable distribution . . . the court shall enter temporary orders as appropriate and necessary for the purpose of preventing the disappearance, waste, or destruction of marital or separate property[.]" N.C. Gen. Stat. § 50-21(a) (2011). The court's orders may include "appointment by the court, at the offending party's expense, of an accountant, appraiser, or other expert whose services the court finds are necessary[.]" N.C. Gen. Stat. § 50-21(e) (2011). Here, defendant's past dissipations of the marital estate combined with his withdrawal of \$25,403.00 from Carolina Foot and Ankle accounts made the trial court's appointment of an agent to oversee the business

necessary to prevent further waste. Therefore, we conclude the trial court did not exceed its authority and its order appointing an official to oversee Carolina Foot and Ankle's business accounts is affirmed.

Conclusion

Based on the foregoing reasons, we hold the trial court did not err in its order denying defendant's recusal motion or in its orders holding defendant in civil contempt. Therefore, we affirm all of the trial court's orders.

AFFIRMED.

Judges GEER and McCULLOUGH concur.

Report per Rule 30(e).