

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

NO. COA13-134
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

RICHARD L. MORGAN,
Plaintiff,

v.

Onslow County
No. 11 CVD 4056

LORA L. MORGAN (WARE),
Defendant.

Appeal by defendant from an order entered 6 August 2012 by Judge James L. Moore, Jr. in Onslow County District Court. Heard in the Court of Appeals 14 August 2013.

Van Der Have Family Law, by Leslie G. Van Der Have, for plaintiff-appellee.

Mercedes O. Chut for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Lora Morgan appeals the order denying her Rule 60(b) motion and denying her claim for equitable distribution pursuant to N.C. Gen. Stat. § 50-11(f). After careful review, we affirm the trial court's order as to each motion.

Background

Plaintiff Richard Morgan ("Mr. Morgan") and defendant Lora Morgan, now Lora Ware, ("Ms. Ware") married in December 2002 in Virginia and separated on 29 October 2009. Prior to June 2009, Mr. Morgan and Ms. Ware resided in Chesterfield, Virginia.

On 20 October 2011, Mr. Morgan filed a *pro se* complaint and summons seeking an absolute divorce based on a separation for a period of one year pursuant to N.C. Gen. Stat. § 50-6 and asserting a claim for equitable distribution. On 29 November 2011, Mr. Morgan filed an Affidavit of Service by Certified Mail and attached the USPS confirmation of delivery and corresponding green card signed by Ms. Ware. On the summons, Mr. Morgan listed Ms. Ware's address as follows: "22575 Leanne Terr #316, Ashburn, VA 20148." However, on the return receipt green card and Affidavit, Mr. Morgan listed Ms. Ware's zip code as 20149. The USPS confirmation sheet states that the summons and complaint were left at zip code 20148. Ms. Ware never filed an Answer or responsive pleading.

On 7 December 2011, Mr. Morgan filed a voluntary dismissal of his claim for equitable distribution ("dismissal"). He also filed a Certificate of Service on 12 December 2011 alleging that he served Ms. Ware a copy of the dismissal at the same address listed on the return receipt green card (zip code 20149). Mr.

Morgan filed a Notice of Hearing ("hearing notice") on 29 November 2011, purportedly on his "Motion for Summary Judgment (Absolute Divorce)." Attached to his hearing notice was a Certificate of Service stating that he served a copy of it on Ms. Ware at the same address as the dismissal. Although she stipulates that she did receive a copy of the summons and complaint, Ms. Ware contends that she did not receive a copy of either the dismissal of Mr. Morgan's equitable distribution claim or the hearing notice. In contrast, Mr. Morgan claims that he not only sent a copy of these documents to her but alleges he has sales receipts from the post office showing he sent Ms. Ware two documents via first-class mail. Copies of those receipts were attached to his Response to Ms. Ware's Rule 60(b) motion. The dates on those receipts are 7 December 2011.

On 14 December 2011, the district court held a hearing on Mr. Morgan's complaint for absolute divorce. Ms. Ware was not present at this hearing. The district court found that: (1) Ms. Ware had been served with a copy of the summons and complaint; (2) Ms. Ware did not respond to the summons and complaint; and (3) the parties had been separate and apart from each other for at least twelve months. Based on these findings, the district

court granted Mr. Morgan an absolute divorce. A copy of the judgment was served on Ms. Ware.

On 26 March 2012, Ms. Ware filed a Rule 60(b) Motion requesting that the trial court set aside the judgment granting Mr. Morgan an absolute divorce based on excusable neglect. Specifically, Ms. Ware contended that after she received a copy of the summons and complaint, Mr. Morgan assured her that they would divide the marital property and that there was no need to obtain legal counsel. Moreover, Ms. Ware claimed that Mr. Morgan did not serve her a copy of either the hearing notice or the dismissal of his equitable distribution claim. Therefore, her failure to respond or file an Answer to the complaint constituted excusable neglect. In the same document, Ms. Ware also requested that the trial court grant her Motion in the Cause pursuant to N.C. Gen. Stat. § 50-11(f) because the trial court did not have personal jurisdiction over her when it entered the judgment of absolute divorce, and she was entitled to make a claim for equitable distribution.

The matters were heard on 11 July 2012. The trial court found that Ms. Ware stipulated that she was properly served with the summons and complaint and that Mr. Morgan certified that he mailed her a copy of both the hearing notice and dismissal.

Furthermore, the trial court noted that Ms. Ware had the responsibility to protect her own rights and interest in the litigation and had actually consulted with several attorneys after the lawsuit was commenced. However, even after these consultations and admitted concerns regarding Mr. Morgan's veracity, she chose not to file an Answer or respond. Thus, the trial court concluded that no grounds existed under Rule 60(b) to set aside the judgment of absolute divorce.

In addition, after applying the minimum contacts standard, the trial court concluded that Ms. Ware did have sufficient minimum contacts with North Carolina to give the trial court personal jurisdiction over her after considering:

the quantity of [Ms. Ware's] contacts with the state of North Carolina; the nature and quality of [Ms. Ware's] contacts with North Carolina; the source and connection of the cause of action with [Ms. Ware's] contacts with North Carolina; the interest of the state of North Carolina; the convenience to the parties as well as what is fair and reasonable [to the parties].

Accordingly, the trial court denied Ms. Ware's motion for equitable distribution pursuant to N.C. Gen. Stat. § 50-11(f). Ms. Ware appealed the order denying both her motions on 30 August 2012.

Arguments

A. Excusable Neglect

Ms. Ware first argues that the trial court erred in denying her Rule 60(b) motion for excusable neglect. Specifically, she contends that the trial court erred in ruling that she was not entitled to service of the notice of dismissal of Mr. Morgan's equitable distribution claim. Because we conclude that Ms. Ware's failure to file a responsive pleading to the summons and complaint does not rise to the level of excusable neglect, we disagree.

"[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). Our Court has noted that:

While there is no clear dividing line as to what falls within the confines of excusable neglect as grounds for the setting aside of a judgment, what constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case. Deliberate or willful conduct cannot constitute excusable neglect, nor does inadvertent conduct that does not demonstrate diligence.

Creasman v. Creasman, 152 N.C. App. 119, 124, 566 S.E.2d 725, 729 (2002) (internal citations and quotation marks omitted).

Here, it is undisputed that Ms. Ware was served with a copy of the summons and complaint. The record includes a signed, return receipt card from Ms. Ware, and she conceded service of these documents was proper in her Rule 60(b) motion.¹ Thus, Ms. Ware was on notice by the complaint and summons that she needed to be prepared to proceed in the divorce action. In fact, she consulted with "three or four" lawyers after receiving the summons and complaint. Moreover, although Ms. Ware denies she was served with these documents, the trial court found that Mr. Morgan certified that he served a copy of both the dismissal of his equitable distribution claim and the hearing notice on Ms. Ware at the same address where she received a copy of the summons and complaint. Finally, Ms. Ware contends that her failure to file any responsive pleading was based on her reliance on Mr. Morgan's assurances and representations regarding his willingness to equitably divide their property. Given that Ms. Ware herself testified that Mr. Morgan has a "history of lying", her reliance does not demonstrate reasonable

¹ While Ms. Ware seems to contend that service was not proper since Mr. Morgan put an incorrect zip code on his affidavits and certificates of service, she has not included any argument on this issue on appeal. "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). Therefore, we will not address this issue.

diligence. Based on all the surrounding circumstances, Ms. Ware's conduct fails to rise to the level of excusable neglect. Accordingly, the trial court did not err in denying her Rule 60(b) motion.

B. Personal Jurisdiction

Next, Ms. Ware argues that the trial court erred in denying her motion in the cause pursuant to N.C. Gen. Stat. § 50-11(f). Specifically, she contends that the trial court did not have personal jurisdiction over her, and she should be allowed to assert a claim for equitable distribution under N.C. Gen. Stat. § 50-20. We disagree.

Pursuant to N.C. Gen. Stat. § 50-11(f) (2011),

[a]n absolute divorce by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property shall not destroy the right of a spouse to equitable distribution under G.S. 50-20 if an action or motion in the cause is filed within six months after the judgment of divorce is entered.

Accordingly, based on this statute, Ms. Ware argues that because the trial court did not have personal jurisdiction over her when it entered the order of absolute divorce, she still has the right to assert a claim of equitable distribution. When reviewing a trial court's finding of personal jurisdiction, our review is *de novo* and limited to "whether the findings of fact

by the trial court are supported by competent evidence in the record" and whether those findings support its conclusions. *Nat'l Util. Review, LLC v. Care Centers, Inc.*, 200 N.C. App. 301, 303, 683 S.E.2d 460, 463 (2009) (internal citations omitted).

When its exercise of personal jurisdiction over a non-resident is challenged, the trial court must undertake a two-pronged inquiry. First, the court must determine whether the controversy falls within the language of the relevant long-arm statute. Second, the exercise of jurisdiction must not violate the due process clause of the Fourteenth Amendment to the United States Constitution.

Shaner v. Shaner, ___ N.C. App. ___, ___, 717 S.E.2d 66, 68 (2011) (internal citations omitted). Because Ms. Ware does not dispute the applicability of the long-arm statute, we will only address whether the trial court's exercise of personal jurisdiction comports with due process. *See id.*

To comply with due process,

there must exist "certain minimum contacts between the non-resident defendant and the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (internal quotation marks omitted). As our Supreme Court has stated, "[i]n each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum

state, thus invoking the benefits and protections of its laws; the unilateral activity within the forum state of others who claim some relationship with a non-resident defendant will not suffice.

Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc., 169 N.C. App. 690, 695, 611 S.E.2d 179, 184 (2005) (internal quotation marks omitted). To determine whether sufficient minimum contacts exist, our Courts weigh the following factors: "(1) the quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience of the parties." *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 672, 541 S.E.2d 733, 737 (2001) (internal quotation marks omitted).

Here, the trial court made the following, pertinent findings of fact with regard to personal jurisdiction:

5. That at that time the parties had to leave their rental residence in Virginia, and they agreed to ship the majority of their personal property and marital property to the state of North Carolina. That this property included personal items of [Ms. Ware's] such as her family heirlooms, bible and diplomas. That this property stayed in storage until the parties purchased a home in Richlands, North Carolina.

6. That [Mr. Morgan] moved to North Carolina pursuant to his military orders in June of 2009. This work commitment required the

parties to live in two separate states until October of 2009 but during this time the parties went back and forth between Virginia and North Carolina.

7. That [Ms. Ware] visited the state of North Carolina on several occasions in 2009. That during these visits the parties stayed in hotels, ate in restaurants, engaged in sexual relations and held themselves out as husband and wife.

8. That [Ms. Ware] also came to North Carolina to participate in a ceremony for [Mr. Morgan's] career advancement during this time.

9. That the parties in 2009 began looking for a home to purchase in North Carolina. That [Mr. Morgan] and [Ms. Ware] both looked at several different houses and engaged a real estate agent. [Ms. Ware] actively participated in the decision making process involved in purchasing the home.

10. That in October of 2009, [Ms. Ware] executed a power of attorney prepared by a North Carolina attorney to allow [Mr. Morgan] to purchase a home located at 101 Landover Drive in Richlands, North Carolina. [Ms. Ware] was unable to come to the closing for that home due to her work commitments in the state of Virginia.

11. That the parties purchased and continue to own a home located at 101 Landover Drive in Richlands, North Carolina.

12. That after the date of separation, [Ms. Ware] continued to avail herself of certain benefits found in North Carolina. That [Ms. Ware] had her car insured in the state of North Carolina through April of 2011. Further, [Ms. Ware] and [Mr. Morgan] filed

joint taxes for the 2009 tax year using the 101 Landover Drive in Richlands, North Carolina address. The filing of joint taxes prevented [Ms. Ware] from paying a federal tax liability of over \$2,000.00 and allowed both parties to claim a tax credit for the home located at 101 Landover Drive in Richlands, North Carolina.

13. That [Ms. Ware] kept her personal property in the state of North Carolina until September of 2011 when [Mr. Morgan] rented a trailer and brought her the property.

14. That [Ms. Ware] should be considered an absent spouse as contemplated by North Carolina General Statute 50-11(f).

15. That the Court after considering *International Shoe Co. v. Washington*, 326 U.S. 310, and all of the subsequent cases dealing with the minimum contacts standard; looking at the quantity of [Ms. Ware's] contacts with the state of North Carolina; the nature and quality of [Ms. Ware's] contacts with North Carolina; the source and connection of the cause of action with [Ms. Ware's] contacts with North Carolina; the interest of the state of North Carolina; the convenience to the parties as well as what is fair and reasonable to both [Mr. Morgan] and [Ms. Ware] finds that [Ms. Ware] did have minimum contacts with the state of North Carolina.

These findings are supported by competent evidence in the record. Moreover, the record clearly establishes that Ms. Ware purposefully availed herself of the privilege of conducting activities within North Carolina. Specifically, Ms. Ware: (1)

moved and stored her personal property in North Carolina; (2) purchased real estate in North Carolina; (3) executed a power of attorney using a North Carolina attorney; (4) filed taxes in North Carolina; and (5) had her car insured in North Carolina. Taking into consideration all the factors listed in *Filmar*, 141 N.C. App. at 672, 541 S.E.2d at 737, Ms. Ware's contacts are such that the trial court's exercise of personal jurisdiction over her did not violate due process. Accordingly, she no longer has a right to assert a claim for equitable distribution, and the trial court did not err in denying her motion in the cause brought pursuant to N.C. Gen. Stat. § 50-11(f).

Conclusion

Based on the foregoing reasons, we affirm the trial court's order denying Ms. Ware's Rule 60(b) motion and motion in the cause.

AFFIRMED.

Judges GEER and McCULLOUGH concur.

Report per Rule 30(e).