

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA14-304
NORTH CAROLINA COURT OF APPEALS

Filed: 18 Nov. 2014

KAREN LEIGH VESTER DILLARD,
Plaintiff,

v.

Mecklenburg County
No. 13 CVD 11054

THOMAS THURMAN DILLARD, JR.,
Defendant.

Appeal by defendant from order entered 11 December 2013 by Judge Ronald L. Chapman in Mecklenburg County District Court. Heard in the Court of Appeals 11 September 2014.

No brief filed for plaintiff-appellee.

Thomas T. Dillard, Jr., pro se, for defendant-appellant.

DIETZ, Judge.

Defendant Thomas T. Dillard, Jr. appeals from the trial court's order granting his ex-wife's motion for summary judgment on her claim for absolute divorce. Defendant, who is currently incarcerated, filed a handwritten *pro se* appellate brief challenging the trial court's jurisdiction, the venue for the proceeding, and various procedural aspects of the action below. Because the trial court had jurisdiction to hear the claim,

because Defendant waived any challenge to venue, and because the court correctly determined that there are no disputed issues of material fact, we affirm the trial court's entry of summary judgment.

Factual Background

Plaintiff and Defendant were married on 30 December 2002 and permanently separated by the summer of 2011.¹ On 19 June 2013, Plaintiff petitioned to sue as an indigent and filed a verified complaint with the Clerk of Court in Mecklenburg County seeking absolute divorce. In her complaint, Plaintiff alleged that the parties "have lived continuously separate and apart with the intent to cease the marital relationship for no less than one year and a day next preceding the date this document was notarized as indicated by the date below and at no time since have resumed the marital relationship." Plaintiff attested to being a resident of North Carolina for the six months preceding the filing of the complaint and requested that her verified complaint be "accept[ed] . . . as an affidavit for the purpose of granting Summary Judgment."

¹ Plaintiff contends that the date of separation was 28 July 2011, while Defendant contends that the two separated on 27 June 2010.

Defendant filed an answer on 9 July 2013, offering a general denial of the allegations in Plaintiff's complaint and moving to dismiss based on a number of alleged procedural and technical violations. Defendant was in prison when he filed his responsive pleading. Later that month, Defendant filed a "Request and Notice" with the trial court asking that any hearing be held no sooner than four months from the date of the initial filing of the action and that he be allowed to participate.

On 12 September 2013, Defendant submitted an application and writ of habeas corpus *ad testificandum*, seeking permission to be brought from prison to testify at the divorce hearing, as well as a petition to sue as an indigent. That same day, Defendant filed a verified "Counterclaim Complaint for Divorce from Bed and Board" in which he alleged fault on the part of Plaintiff, raised issues relating to equitable division of the parties' marital property, asked the court to award spousal support, and requested a jury trial. Defendant also renewed his jurisdictional and procedural defenses, requesting a change of venue to Nash County.

In his counterclaim, Defendant stated (under oath) that both parties are residents of Nash County, North Carolina, and

had been for more than six months preceding the filing of the action. Defendant further stated that the parties were married on 30 December 2002 and permanently separated on 27 June 2010 "by such conditions of marital discord that [Defendant] was forced to flee from his place of shared residence with [Plaintiff] as a direct result of [Plaintiff's] continued, unprovoked assaults upon his physical, mental, and legal stability."

Plaintiff moved for summary judgment on her claim for absolute divorce on 27 November 2013. In response, Defendant asked that the motion be denied, arguing that the court was without jurisdiction to hear the claim and that there existed material questions of fact requiring an evidentiary hearing.

The trial court granted Plaintiff's motion on 11 December 2013, ordering absolute divorce while specifically preserving "any valid counter-claim" that existed prior to the judgment.

Defendant filed a timely notice of appeal on 19 December 2013. This Court denied his petitions for a stay of judgment and writ of supersedeas on 19 March 2014, and denied his petition for a writ of mandamus on 8 May 2014.

Analysis

I. Subject Matter Jurisdiction

Defendant first argues that the trial court lacked subject matter jurisdiction over Plaintiff's claim for absolute divorce. Subject matter jurisdiction refers to a court's "power to hear and to determine a legal controversy; to inquire into the facts, apply the law, and to render and enforce a judgment." *High v. Pearce*, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941) (citation and internal quotation marks omitted). This Court has stated that "[j]urisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987).

A court obtains subject matter jurisdiction over a claim through the North Carolina Constitution or by statute. *Id.* "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), *aff'd*, 362 N.C. 170, 655 S.E.2d 712 (2008).

In divorce actions, subject matter jurisdiction is conferred by Section 7A-244 of the General Statutes, which

provides that the district courts are the proper division for the trial of civil actions and proceedings for divorce. N.C. Gen. Stat. § 7A-244 (2013). Additionally, the statutory residency requirements in divorce proceedings are jurisdictional and thus, to confer jurisdiction on the trial court, the plaintiff must allege facts satisfying the statutory residency requirement. See *Martin v. Martin*, 253 N.C. 704, 706, 118 S.E.2d 29, 31 (1961); see also N.C. Gen. Stat. § 50-6, 50-8 (2013).

The trial court in this case properly exercised subject matter jurisdiction over Plaintiff's claim. The complaint raises a standard claim for absolute divorce after separation of one year, and both parties have attested—in verified pleadings—to residing in the State for a period of six months prior to the commencement of the action, as required by statute. Thus, Defendant's jurisdictional argument is without merit.

II. Venue

Defendant also argues that the trial court erred by failing to grant his motion for a change of venue. Defendant asserts that neither party has ever been a resident of Mecklenburg County, where this action was heard, and that Plaintiff and

Defendant have at all relevant times owned property and made their marital home in Nash County.

The proper venue for an action seeking absolute divorce is the county in which either party resides, or the county where the defendant resides if the plaintiff is a nonresident. N.C. Gen. Stat. § 50-3 (2013). This requirement is non-jurisdictional and may be waived. *Smith v. Smith*, 56 N.C. App. 812, 813, 290 S.E.2d 390, 391 (1982). "If an action for divorce be instituted in a county in the State other than the county of proper venue, the action may be tried therein, unless the defendant before the time of answering expires demands in writing that the trial be had in the proper county." *Id.* (citation and internal quotation marks omitted).

A venue objection may be asserted in either a responsive pleading or a motion to dismiss for improper venue under North Carolina Rule of Civil Procedure 12(b)(3). *LendingTree, LLC v. Anderson*, ___ N.C. App. ___, ___, 747 S.E.2d 292, 297 (2013). Even if a defendant properly raises a venue objection, however, he can impliedly waive the defense through subsequent actions or conduct. *Id.* Factors indicating waiver of a venue defense "include: (i) failure to unambiguously raise and pursue a venue objection; (ii) participation in litigation; and (iii)

unnecessary delay.” *Id.* This court reviews arguments relating to a waiver of venue defense *de novo*. See generally *Hawley v. Hobgood*, 174 N.C. App. 606, 622 S.E.2d 117 (2005); *Miller v. Miller*, 38 N.C. App. 95, 247 S.E.2d 278 (1978).

Here, Defendant raised a venue objection in his responsive pleading, but never pursued that claim or noticed it for a hearing. After Defendant filed his “Answer and Defense” in which he presented his objection and requested a change of venue, Defendant later filed with the trial court a “Request and Notice”; a petition for a writ of habeas corpus *ad testificandum*; a petition to sue as an indigent; a “Counterclaim Complaint for Divorce from Bed and Board”; and a response to Plaintiff’s summary judgment motion—all without seeking a hearing on his venue objection or otherwise pursuing that argument. Defendant’s failure to pursue his venue argument and his participation in extensive litigation in the Plaintiff’s chosen forum constitute waiver of this venue issue. See *Shaw v. Stiles*, 13 N.C. App. 173, 175, 185 S.E.2d 268, 269 (1971) (holding that defendants waived venue defense by participating in subsequent litigation without moving to dismiss); *LendingTree*, ___ N.C. App. at ___, 747 S.E.2d at 299 (holding that participation in discovery was a factor in finding waiver).

III. Procedural Rules

Defendant also asserts a series of technical challenges to the complaint that he believes were grounds for the trial court to dismiss Plaintiff's absolute divorce claim. First, Defendant objects to Plaintiff's failure to state any rules or procedural grounds for relief in her complaint, citing Rule 7(b) of the North Carolina Rules of Civil Procedure as well as Rule 6 of the General Rules of Practice for the Superior and District Courts, which supplement the Rules of Civil Procedure as provided by N.C. Gen. Stat. § 7A-34 (2013).

Defendant's reliance on these provisions is misplaced because these rules concern requirements for *motions* in civil actions, while a complaint is governed by the rules for pleadings. See N.C. Gen. Stat. § 1A-1, Rule 7(a) (2013) (distinguishing pleadings from motions and other papers). Accordingly, we reject this argument.

Defendant also argues that the complaint did not provide adequate notice of Plaintiff's claim and that the verified complaint cannot be "construed as to do substantial justice" under Rule 8 of the North Carolina Rules of Civil Procedure. Rule 8 requires that pleadings setting forth a claim for relief contain "[a] short and plain statement of the claim sufficiently

particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2013). Importantly, Rule 8(e)(1) specifies that "[n]o technical forms of pleading or motions are required," and Rule 8(f) requires that "[a]ll pleadings shall be so construed as to do substantial justice." *Id.* Rules 8(e)(1), (f).

"A pleading complies with [Rule 8] if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and . . . to get any additional information he may need to prepare for trial." *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970).

Here, Plaintiff's verified complaint adequately states a cause of action for divorce upon one year of separation, meeting our State's notice pleading requirement. Thus, Defendant's contention that he was not provided adequate notice of the claim and that the verified complaint cannot be "construed as to do substantial justice" is unfounded. See *Taylor v. Taylor*, 225 N.C. 80, 82, 33 S.E.2d 492, 494 (1945) (concluding that a complaint for divorce on grounds of separation need not set out

cause for separation, nor allege that it was without plaintiff's fault or by mutual agreement).

Defendant next argues that the trial court should have dismissed Plaintiff's complaint for alleged technical violations of Rule 10 of the Rules of Civil Procedure involving the caption and formatting of Plaintiff's complaint. Even if the complaint violated the requirements of Rule 10—and we are not persuaded that it does—this would not be a basis for dismissal. This court has repeatedly instructed trial courts to interpret the Rules of Civil Procedure “to disregard technicalities of form and determine the rights of litigants on the merits.” *E.g., Brown v. Am. Messenger Serv., Inc.*, 129 N.C. App. 207, 211, 498 S.E.2d 384, 387 (1998). Under this precedent, incorrect formatting in the caption or body of a civil complaint would not be grounds for dismissal.

Finally, Defendant argues that the trial court erred under Rule 5 of the North Carolina Rules of Civil Procedure. This Court's appellate review is limited to arguments properly raised in the appellant's brief. N.C. R. App. P. 10(a), 28(a) (2013). Here, while Defendant cites Rule 5 as an additional ground for error below, he fails to present any argument or supporting

authority. Thus, we consider this issue abandoned. See *State v. Garcell*, 363 N.C. 10, 70, 678 S.E.2d 618, 655 (2009).

IV. Order on Motion to Sue as an Indigent

Defendant next argues that the trial court committed reversible error when it failed to enter an order authorizing Plaintiff to bring suit as an indigent. The Court need not reach the merits of this claim because Defendant did not raise it in the trial court. An issue not raised and properly preserved in the trial court cannot be raised for the first time on appeal. See N.C. R. App. P. 10(a)(1); *State v. Mills*, 205 N.C. App. 577, 583-84, 696 S.E.2d 742, 746-47 (2010). In any event, even if the trial court had failed to enter an order permitting Plaintiff to sue as an indigent under N.C. Gen. Stat. § 1-110(a) (2013), that would not be a basis for this Court to reverse the trial court's entry of summary judgment on the merits of Plaintiff's divorce claim. Accordingly, we reject this argument.

V. Genuine Issues of Material Fact

Defendant next asserts that the trial court erred in granting Plaintiff's motion for summary judgment because there are genuine issues of material fact requiring an evidentiary hearing. Summary judgment is appropriate where "there is no

genuine issue as to any material fact" and "any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). In considering a motion for summary judgment, "the court may consider the pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials." *Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E.2d 214, 217 (1975). The court must consider all evidence in the light most favorable to the non-moving party. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). On appeal, the Court reviews an order granting summary judgment *de novo*. *Id.*

Defendant appears to assert that his answer generally denying the allegations of Plaintiff's complaint for absolute divorce is sufficient to raise a genuine issue of material fact. A party moving for summary judgment has the burden of establishing the lack of any genuine issue of material fact and that she is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c); *Rankin v. Food Lion*, 210 N.C. App. 213, 215, 706 S.E.2d 310, 312 (2011). If the moving party meets this burden, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth

specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e). "If [the non-movant] does not so respond, summary judgment, if appropriate, shall be entered against him." *Id.*

North Carolina is a "no-fault" divorce jurisdiction. *Morris v. Morris*, 45 N.C. App. 69, 70, 262 S.E.2d 359, 360 (1980); see also N.C. Gen. Stat. § 50-6 (establishing separation of one year as grounds for divorce). In order to establish a *prima facie* case for absolute divorce grounded on one year of separation, a plaintiff need only show that the parties have achieved the required periods of residency and separation. *Id.* The statute requires that a plaintiff submit her claim in a verified complaint. N.C. Gen. Stat. § 50-8. A verified pleading may be treated as an affidavit for summary judgment purposes if it: "(1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) (citing N.C. Gen. Stat. § 1A-1, Rule 56(e)).

In this case, Plaintiff's verified complaint satisfies the requisite criteria to be treated as an affidavit, and it

establishes that the parties had lived continuously separate and apart for one year with the intention of Plaintiff to live permanently separate and apart. Defendant's general denial of these allegations is insufficient to raise a genuine issue of material fact. See generally *Daniel v. Daniel*, 132 N.C. App. 217, 510 S.E.2d 689 (1999) (affirming summary judgment on claim for absolute divorce where defendant issued general denial in response to complaint).

Moreover, Defendant concedes these facts in his own allegations in his counterclaim. His allegations of fault—including his claim that his wife abandoned him—do not constitute defenses to an action for absolute divorce based after one year of separation. *Morris*, 45 N.C. App. at 70, 262 S.E.2d at 360. Consequently, because the verified complaint establishes the court's jurisdiction and there are no contested issues of material fact, the trial court did not err in granting summary judgment on Plaintiff's claim for absolute divorce.

Defendant also claims that the court erred in granting Plaintiff's motion for summary judgment without allowing Defendant the opportunity to be present and argue on his behalf at an evidentiary hearing. But nothing in the statute governing divorce proceedings requires an evidentiary hearing and, as

described above, the trial court properly found that there were no issues of material fact that required resolution through a hearing. "Summary judgment simply means that a case can be decided based on undisputed facts without the need for an evidentiary hearing." *In re Estate of Pope*, 192 N.C. App. 321, 328-29, 666 S.E.2d 140, 146 (2008) (italics omitted). Thus, we reject Defendant's claim that the trial court erred on this ground.

VI. Request to Sanction Plaintiff's Counsel

Defendant next claims that the court abused its discretion in failing to sanction Plaintiff's attorney for engaging in alleged violations of professional conduct. We need not address this argument because Defendant failed to properly raise this issue with the trial court below. N.C. R. App. P. 10(a)(1); see also *Mills*, 205 N.C. App. at 583-84, 696 S.E.2d at 746-47. In any event, upon inspection of the record, we find no indication of any misconduct by Plaintiff's counsel warranting imposition of sanctions.

VII. Appointment of Counsel

Defendant next argues that the trial court committed reversible error in failing to appoint counsel to represent him,

while "allowing [Plaintiff] to be represented by counsel provided and/or retained by and/or through the State."

As an initial matter, upon careful inspection of the record, we find no support for Defendant's claim that the trial court appointed counsel for Plaintiff. Indeed, the record indicates that Plaintiff privately retained her counsel.

We also reject Defendant's claim that the court erred in failing to appoint counsel to assist him in this case. Litigants are not entitled to appointed counsel in all cases simply because they cannot afford to pay a private attorney. *King v. King*, 144 N.C. App. 391, 393, 547 S.E.2d 846, 847 (2001). Rather, the constitutional requirement that counsel be provided to indigent defendants is limited to narrow categories of cases where a defendant could be deprived of his physical liberty. *Id.* (citing *Lassiter v. Dept. of Soc. Serv. of Durham Cnty.*, 452 U.S. 18, 25 (1981)). A civil action seeking absolute divorce does not fall within the narrow category of cases triggering a right to counsel at the State's expense. Accordingly, the trial court did not err by declining to appoint counsel for Defendant.

Conclusion

For the reasons discussed above, we affirm the trial court's order granting summary judgment on Plaintiff's claim for absolute divorce. We note that Defendant's counterclaims remain before the trial court and our ruling today has no impact on those pending claims.

AFFIRMED.

Judges STEELMAN and GEER concur.

Report per Rule 30(e).