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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-146

Filed: 6 September 2016

Moore County, No. 13 CVD 613

ROBERTA BREIGHNER, Plaintiff,

v.

RUDY D. BREIGHNER, Defendant.

Appeal by defendant from order entered 17 July 2015 by Judge Lee Gavin in Moore County District Court. Heard in the Court of Appeals 24 August 2016.

Foyles Law Firm, PLLC, by Jody Stuart Foyles, for plaintiff-appellee.

Arthur M. Blue Law Office, P.A., by Arthur M. Blue, for defendant-appellant.

TYSON, Judge.

Rudy D. Breighner (“Defendant”) appeals from the trial court’s order, which allowed Roberta Breighner’s (“Plaintiff”) Rule 60 motion, and set aside a previously entered consent order. We dismiss the appeal as interlocutory.

I. Background

Plaintiff and Defendant were married in 1991 and separated on 18 March 2013. No children were born of the marriage. The parties entered into a consent order, which addressed the division of the parties’ marital assets and debts on 24 May

BREIGHNER V. BREIGHNER

Opinion of the Court

2013. The consent order expressly states each party waives any and all claims for alimony and post-separation support.

On 25 October 2013, Plaintiff filed a motion to set aside the consent order pursuant to Rule 60. When the parties' separation, Defendant was awaiting a decision on the payment of disability benefits from the Department of Veterans' Affairs. Plaintiff alleged Defendant represented, following the separation, that he would not be receiving VA disability benefits. Plaintiff allegedly agreed to waive alimony based upon Defendant's representation.

Plaintiff alleged Defendant received a disability rating of 100% by the VA sixteen days prior to entry of the consent order, and that Defendant had made fraudulent and intentional misrepresentations during the parties' negotiations, which induced her to waive alimony and post-separation support.

Plaintiff's motion was heard before the trial court on 1 December 2014. By order entered 17 July 2015, the trial court determined Defendant misrepresented material fact while the parties were negotiating the terms of the consent order, and Defendant had an affirmative duty to correct the misrepresentations prior to entry of the consent order. The court ordered the consent order set aside pursuant to Rules 60(b)(3) and 60(b)(6). Defendant appeals.

II. Interlocutory Order

A. Standard of Review

BREIGHNER V. BREIGHNER

Opinion of the Court

“It is well established that the appellant bears the burden of showing to this Court that the appeal is proper.” *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff’d*, 360 N.C. 53, 619 S.E.2d 502 (2005). Defendant has appealed from an order which sets aside the previously entered consent order, which had determined the division of the parties’ marital property and debts. Our Court has consistently held that an order allowing a Rule 60(b) motion is interlocutory, and not immediately appealable. *See, e.g., Bailey v. Gooding*, 301 N.C. 205, 270 S.E.2d 431 (1980).

B. Rule 60(b) Order

In *Campbell v. Campbell*, 237 N.C. App. 1, 3-4, 764 S.E.2d 630, 632 (2014), our Court stated:

The trial court’s Rule 60(b) order in this case is a textbook example of a non-final, interlocutory order; it took an otherwise final judgment and re-opened it, requiring “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); *see also Metcalf v. Palmer*, 46 N.C. App. 622, 624, 265 S.E.2d 484, 484 (1980) (holding that orders granting a Rule 60(b) motion are, by their nature, interlocutory). Thus, the trial court’s order in this case is appealable only if it is properly certified under Rule 54(b) or if it affects a substantial right.

Here, the order setting aside the consent order left further action to be taken by the trial court to resolve the issues of alimony and property distribution.

III. Conclusion

BREIGHNER V. BREIGHNER

Opinion of the Court

The trial court did not certify the order as immediately appealable under Rule 54(b), nor has Defendant argued a substantial right will be lost if not immediately reviewed. Defendant has failed to demonstrate jurisdiction in this Court. The appeal is interlocutory and dismissed.

DISMISSED.

Judges CALABRIA and DAVIS concur.

Report per Rule 30(e).