IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-209

Filed: 20 September 2016

Orange County, No. 15 CVD 625

ILA M. MCMILLAN-ERVIN, Plaintiff,

v.

BRUCE M. ERVIN, Defendant.

Appeal by plaintiff from order entered 19 November 2015 by Judge James T. Bryan in Orange County District Court. Heard in the Court of Appeals 7 September 2016.

Emma Jean Levi for plaintiff-appellant.

No brief filed for defendant-appellee.

TYSON, Judge.

Ila M. McMillan-Ervin purports to appeal from the trial court's denial of her petition for a declaratory judgment. We dismiss the appeal.

I. Background

The parties were married in 2009 and separated on 19 May 2014. They lived together as husband and wife in Orange County, North Carolina until they separated. No children were born of the marriage. After separation, Mr. Ervin moved to Burke County, North Carolina, where he continues to reside.

Prior to the marriage, the parties entered into an ante nuptial agreement. The agreement was recorded in both Orange and Burke Counties. The agreement provided that all property acquired by either party during the marriage shall be the separate property of each spouse, and not marital property, unless the property was jointly owned or owned as tenants by the entirety.

On 20 May 2015, Ms. McMillan-Ervin filed a complaint for absolute divorce and equitable distribution in Orange County. Ms. McMillan-Ervin filed an Affidavit of Service of Process, which showed the United Parcel Service ("UPS") delivered the complaint to the address believed to be Mr. Ervin's residence in Burke County on 21 May 2015. That same day, Mr. Ervin filed a complaint for absolute divorce and equitable distribution in Burke County.

In response to Ms. McMillan-Ervin's complaint filed in Orange County, Mr. Ervin filed an "Objection to Jurisdiction, Motion to Dismiss (NCRCP Rule 12(b)(6)), Motion to Change Venue, and Motion to Dismiss for Insufficient Service," on 1 June 2015. Thereafter, on 4 June 2015, Ms. McMillan-Ervin was served with the divorce complaint that Mr. Ervin had filed in Burke County.

On 30 June 2015, Michelle D. Connell, Esq. filed a Notice of Limited Appearance in Orange County. Mrs. Connell's appearance was limited solely to representing Mr. Ervin regarding his motion to dismiss Ms. McMillan-Ervin's complaint filed in Orange County.

The matter came before the Orange County District Court on 30 July 2015. Both parties were represented by counsel. By order entered 11 August 2015, the court concluded Ms. McMillan-Ervin was a resident of Orange County at the commencement of the action, and her complaint states a claim upon which relief may be granted. The court denied Mr. Ervin's objections to the jurisdiction of the Orange County court and motion to dismiss. The court allowed Mr. Ervin twenty days to file a responsive pleading to Ms. McMillan-Ervin's divorce complaint.

On 12 August 2015, the day after the divorce judgment was entered, Ms. McMillan-Ervin's attorney reported orally in court that she had informed Mr. Ervin's attorney in Burke County that she was bringing Ms. McMillan-Ervin's request for divorce before the court. On 12 August 2015, the Orange County District Court entered a Judgment for Absolute Divorce.

Ms. McMillan-Ervin did not file a notice of hearing for the entry of the 12 August 2015 divorce judgment. After the divorce judgment was entered, the Orange County District Court Judge was informed that Ms. McMillan-Ervin's attorney had emailed Mr. Ervin's attorney on 11 August 2015, the day before entry of the divorce judgment, and Mr. Ervin's attorney had objected to her bringing the matter before the court. The court found that "[d]ue to inadvertence, lack of information, and mistake, the [court] entered the Judgment of Divorce on August 12, 2015, when an order had been entered on August 11, 2015, allowing [Mr. Ervin] twenty (20) days to

answer [Ms. McMillan-Ervin's] Complaint for Divorce." On 24 August 2015, the court entered a *sua sponte* order, which set aside the 12 August 2015 divorce judgment.

On 24 August 2015, the same day the Rule 60 set aside order was entered, Ms. McMillan-Ervin filed a petition for declaratory judgment in Orange County, which sought a court order declaring the divorce judgment entered on 12 August 2015 as valid. Ms. McMillan-Ervin's petition was heard before the Orange County District Court on 27 October 2015. The court denied the petition, and Ms. McMillan-Ervin appeals from that order.

II. Appellate Jurisdiction

Ms. McMillan-Ervin has appealed solely from the Orange County District Court's denial of her petition for declaratory judgment. The trial court became aware it had mistakenly entered a divorce judgment after the court had previously entered an order giving Mr. Ervin twenty days to respond to Ms. McMillan-Ervin's complaint. The trial court entered a *sua sponte* Rule 60 order, which set aside the earlier entered divorce judgment. Ms. McMillan-Ervin has not appealed from the Rule 60 order, and that order is not contained within the record.

Ms. McMillan-Ervin filed a petition for a declaratory judgment "for a judgment declaring that [she] has a right to a speedy and final determination of the merit of the divorce complaint filed in Orange County on 22 May 2015," and "[f]or a judgment

declaring that the divorce decree obtained by [Ms. McMillan-Ervin] on 12 August 2015 is valid."

N.C. Gen. Stat. § 1-253 *et. seq*. sets forth the trial court's authority to enter declaratory judgments:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

N.C. Gen. Stat. § 1-253 (2015).

By its Rule 60 order, the court declared the divorce judgment was invalid and set it aside. Ms. McMillan-Ervin failed to appeal from that determination, and it remains undisturbed. *See In re Wheeler*, 87 N.C. App. 189, 194, 360 S.E.2d 458, 461 (1987). Ms. McMillan-Ervin asserts arguments in her brief, which pertain to service of the summons and divorce complaint upon Mr. Ervin. Those arguments pertain to entry of the Rule 60 order, which is not before us.

Ms. McMillan-Ervin also argues the "court erred in not admonishing or sanctioning [Mr. Ervin] and/or opposing counsel" under Rule 11 for filing frivolous motions and using delay tactics. N.C. Gen. Stat. § 1A-1, Rule 11 (2015). Sanctions sought under Rule 11 are not an appropriate issue for a declaratory judgment, and this is a purported appeal from a declaratory judgment action. *See* N.C. Gen. Stat. §

1-253 (courts "shall have power to declare rights, status, and other legal relations"); *Strickland v. Town of Aberdeen*, 124 N.C. App. 430, 432, 477 S.E.2d 218, 219 (1996) ("Generally, only questions of law are appropriate to be determined under the Declaratory Judgment Act . . . . While questions of fact necessary to the adjudication of the legal questions involved may be determined in a declaratory judgment action, the remedy is not available for determination of issues of fact alone." (citation omitted)).

Ms. McMillan-Ervin also purports to raise issues pertaining to alleged *ex parte* communications between the court and opposing counsel. This allegation is also not an appropriate issue to assert in a declaratory judgment proceeding. *See id.*; N.C. Code of Judicial Conduct Canon 3A(4) (2015).

Finally, even if we were to grant Ms. McMillan-Ervin's request to "remand the case with instructions for the trial court to enter judgment pursuant to the law in the interest of justice and fairness," the divorce judgment would remain set aside, pursuant to the trial court's entered Rule 60 order, which was not appealed and is not before us.

As a general matter, a case is moot when "a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cnty. Realtors Ass'n,* 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citing Black's Law Dictionary 1008 (6th ed. 1990)). Our Court

"will not entertain an action merely to determine abstract propositions of law." *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994) (citation omitted).

Plaintiff's arguments and assertions before us are without merit. For any and all of these reasons, the purported appeal is dismissed.

DISMISSED.

Judges CALABRIA and DAVIS concur.

Report per Rule 30(e).