IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1315

Filed: 5 September 2017

Buncombe County, No. 14 CVD 3600

PAMELA SUE WHITE EAGLE, Plaintiff,

v.

JAMES ARTHUR EAGLE, Defendant.

Appeal by defendant from orders entered 8 August 2016 and 24 October 2016 by Judge Susan Dotson-Smith in Buncombe County District Court. Heard in the Court of Appeals 10 August 2017.

*The Van Winkle Law Firm, by Katherine Fisher, for plaintiff-appellee.*

*Hyler & Lopez, P.A., by Stephen P. Agan, for defendant-appellant.*

ZACHARY, Judge.

This case arises out of plaintiff Pamela Sue White Eagle's (Pamela's) action to enforce a spousal support order previously entered in Kentucky. Pamela's action was filed under Chapter 52C of the North Carolina General Statutes, the Uniform Interstate Family Support Act (UIFSA). Defendant James Arthur Eagle (James) contested the enforcement of the Kentucky support order in North Carolina, and he

now appeals from Buncombe County District Court orders dismissing his defense of equitable estoppel and granting Pamela's motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure to set aside a previous order denying her request for attorney's fees. For the reasons that follow, we dismiss this appeal as interlocutory.

**Background**

Pamela and James lived in Kentucky at the time of their separation in May 2005. One month later, the parties executed a separation agreement, which provided that, *inter alia*, James would pay $1,500.00 per month in spousal support to Pamela "until the death of either party hereto or until [Pamela's] remarriage, whichever first occurs." The separation agreement was then incorporated into the parties' divorce judgment, which was entered in Kentucky on 1 November 2005. In December 2005, the Kentucky court entered a consent order (the Kentucky Order). The Kentucky Order memorialized James' withdrawal of his objections to spousal support "as set forth in the parties' Separation Agreement" and established that James would pay alimony to Pamela pursuant to the agreement's terms. Both parties later moved to North Carolina.

James made regular payments of $1,500.00 per month to Pamela until September 2013, the last payment being tendered on 1 August 2013. Pamela was neither dead nor remarried at that time. On 15 August 2014, Pamela filed a notice

of registration for enforcement of the Kentucky Order in Buncombe County District Court. *See* N.C. Gen. Stat. § 52C-6-601A (2015) ("A support order or income-withholding order issued in another state or a foreign support order may be registered in this State for enforcement."). James contested the registration order, and a hearing was held on 9 January 2015. The Honorable Susan M. Dotson-Smith entered an order confirming registration for enforcement of the Kentucky Order on 13 February 2015.

On 1 June 2015, Pamela filed a document that contained a series of motions related to James' cessation of alimony payments. Specifically, Pamela moved the district court to enforce the registered Kentucky Order, to find James in contempt for noncompliance with the order, to garnish James' wages, to reduce the alimony arrears to judgment "due and payable to the Plaintiff[,]" and to award Pamela attorney's fees incurred in the enforcement action. Pamela also filed and served discovery requests—interrogatories and request for production of documents—on James.

On 1 July 2015, James filed his response to Pamela's motions, along with two motions of his own: (1) a motion to modify or terminate the Kentucky Order based on "changed circumstances," and (2) a motion to terminate the Kentucky Order based on the doctrine of equitable estoppel. James' equitable estoppel defense was based on the following allegations:

> 8. At the time of the separation of the parties in 2005, the Plaintiff and Defendant entered into extensive negotiations.
>
> 9. The Plaintiff indicated to the Defendant that her mother was elderly and ill and required significant attention.
>
> 10. The Plaintiff requested the Defendant to agree to pay her alimony in an amount such that she would not have to work and could stay home to care for her mother.
>
> 11. The Plainitff and Defendant agreed that he would pay her alimony in the amount of $1,500.00 per month until the time of her mother's death, and they agreed it would terminate upon her mother's death.
>
> 12. After the Plaintiff's mother passed away, the Defendant contacted Plaintiff and discussed terminating alimony as previously agreed, and Plaintiff refused.
>
> 13. The Defendant relied on the Plaintiff's representation that she would terminate alimony after her mother's death, and was induced to enter into an agreement to pay that alimony based on her representations. Defendant would never have consented to pay alimony except for her representations.
>
> 14. Defendant's obligation to pay should be terminated back to the date of Plaintiff's mother's death.

Pamela filed a motion pursuant to Rule 37(a) of the North Carolina Rules of Civil Procedure for an order compelling discovery responses from James, and for attorney's fees incurred in obtaining the order. On 21 September 2015, Judge Dotson-Smith entered a handwritten order (the 21 September 2015 Order) which contained the following rulings: "Mot[.] to compel[] allowed – No Atty fees + 21 day extension

given after Moorfield + Hyler reached agreement." Attached to the 21 September 2015 Order was a stand-alone, typewritten "Order To Compel[,]" in which a provision ordering that James pay attorney's fees to Pamela's counsel was crossed out. James responded to Pamela's discovery requests on 28 September 2015.

Two months later, Pamela filed a motion to dismiss James' counter-motions pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 15 December 2015, pursuant to Rule 60(b), Pamela filed an amended motion for relief from the 21 September Order, alleging that "the presiding Judge did not indicate that the request for attorney's fees has been adjudicated and was denied[,]" and that there was "no indication that an opportunity for hearing on the matter of attorney's fees was afforded to the parties[.]" Judge Dotson-Smith entered another handwritten order on 8 August 2016 (the 8 August Order) that, *inter alia*, granted Pamela's Rule 12(b)(6) motion to dismiss James' counter-motions, granted Pamela's Rule 60(b) motion, and directed "Atty fees to be submitted." James filed a timely notice of appeal from the 8 August Order.

On 24 October 2016, Judge Dotson-Smith entered another, more extensive order (the 24 October Order) that covered the same subject matter as her 8 August Order, in addition to ruling on the specific amount of Rule 37(a) attorneys' fees to be awarded, and denying James' pending motion to compel discovery responses from Pamela. The 24 October Order again dismissed James' counter-motions (including

his equitable estoppel defense) and granted Pamela's Rule 60(b) motion. James filed a timely notice of appeal from the 24 October Order. In accordance with Rule 40 of the North Carolina Rules of Appellate Procedure, the parties consented to the consolidation of James' two appeals.

**Discussion**

We begin by addressing the extent to which this Court has jurisdiction over James' challenges to the 8 August 2016 and 24 October 2016 orders.

I. Appellate Jurisdiction

"Ordinarily, this Court hears appeals only after entry of a final judgment that leaves nothing further to be done in the trial court." *Campbell v. Campbell*, 237 N.C. App. 1, 3, 764 S.E.2d 630, 632 (2014). "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. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). In most cases, a party has "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). This general rule prevents "fragmentary and premature appeals that unnecessarily delay the administration of justice[,]" *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980), "by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Fraser v. Di Santi*, 75

N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985) (citation omitted). However, exceptions to the general rule do exist.

Absent a statute that specifically allows for immediate review, there are "at least two instances" in which a party is permitted to appeal from an interlocutory order or judgment. *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 579 (1999). The first instance arises when the trial court certifies its order for immediate review under Rule 54(b) of the North Carolina Rules of Civil Procedure. *McConnell v. McConnell*, 151 N.C. App. 622, 624, 566 S.E.2d 801, 803 (2002). Second, "a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citations and quotation marks omitted). In both instances "it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal[.]" *Id.*

A. *Automatic Stay and Interlocutory Nature of 8 August Order*

Initially, we note that an appeal from a trial court order ordinarily "stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein[.]" N.C. Gen. Stat. § 1-294 (2015). Pending the appeal, the trial judge is generally *functus officio*, *France v. France*, 209 N.C. App. 406, 410, 705 S.E.2d 399, 404 (2011), and "is thereafter without power to proceed further until the

cause is returned by mandate of the appellate court." *In re J.F.*, 237 N.C. App. 218, 227, 766 S.E.2d 341, 348 (2014) (citation and quotation marks omitted). "Where a party appeals from a *non* appealable interlocutory order, however, such appeal does not deprive the trial court of jurisdiction, and thus the court may properly proceed with the case." *RPR & Assocs., Inc. v. Univ. of N. Carolina-Chapel Hill*, 153 N.C. App. 342, 347, 570 S.E.2d 510, 514 (2002) (citation omitted).

In the present case, even though James appealed from the 8 August Order, the district court proceeded with the case and entered its 24 October Order. Yet we need not decide whether the appeal from the 8 August Order divested the trial court of jurisdiction over the issues of James' equitable estoppel defense and Pamela's request for Rule 37 attorney's fees. In his statement of grounds for appellate review, James references only the 8 August Order. As a result, our analysis is confined to that order.

Although a number of issues were addressed in the 8 August Order, James only challenges the district court's decision to dismiss his defense of equitable estoppel, which James styled as a "counterclaim," and to allow Pamela's Rule 60(b) motion for relief from the portion of the 21 September 2015 Order that declined to grant Rule 37(b) attorney's fees. Unquestionably, the portion of the 8 August Order dismissing James' equitable estoppel defense is interlocutory; it does not finally dispose of the case and requires further action by the trial court concerning Pamela's motions for enforcement of the Kentucky order, contempt, wage garnishment, and

reduction of arrears to judgment as well as her request for attorney's fees incurred in seeking an enforcement order. In addition, this Court has recognized that an order *granting* a Rule 60(b) motion is interlocutory and generally not appealable. *E.g.*, *Campbell v. Campbell*, 237 N.C. App. 1, 3, 764 S.E.2d 630, 632 (2014); *Metcalf v. Palmer*, 46 N.C. App. 622, 624, 265 S.E.2d 484, 484 (1980). Accordingly, because the district court did not certify its 8 August Order pursuant to Rule 54(b), James' appeal is properly before us only if he shows that the order deprives him of a substantial right.

B. Equitable Estoppel Defense

As to the appealability of the dismissal of his equitable estoppel defense, James acknowledges that the 8 August Order is interlocutory. James argues, however, that the dismissal affects a substantial right because facts supporting his equitable estoppel defense may overlap with facts necessary to adjudicate Pamela's motions regarding enforcement of the Kentucky Order, contempt, wage garnishment, arrears, and attorney's fees. We are not persuaded.

Our courts have recognized that a substantial right is "affected if there are overlapping factual issues between the claim determined and any claims which have not yet been determined because such overlap creates the potential for inconsistent verdicts resulting from two trials on the same factual issues." *Liggett Grp., Inc. v.*

*Sunas*, 113 N.C. App. 19, 24, 437 S.E.2d 674, 677 (1993) (citation and quotation marks omitted).

The legal principle upon which James relies for his substantial right contention is certainly a valid one, but we cannot apply it in this instance. James makes a conclusory statement that overlapping factual issues exist between his equitable estoppel defense, which has been dismissed, and Pamela's remaining motions. In doing so, James wholly fails to identify specific factual issues that might be subject to inconsistent rulings in the district court. "It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right[.]" *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254. James has not met his burden. Even if James had made a sufficiently specific argument, we cannot see how factual issues necessary to the determination of Pamela's remaining claims would overlap with the principle allegation underlying James' equitable estoppel defense: that he was induced to agree to the alimony terms contained in the separation agreement and the Kentucky order based on Pamela's purportedly fraudulent representation that the support payments would terminate upon her mother's death. James makes no assertion as to why Pamela would need to rely on these allegations to be successful in her motion for enforcement of the Kentucky Order or her motions for garnishment, the payment

of arrears, contempt, and attorney's fees. James has failed to establish that delaying his appeal until the district court issues a final judgment in this case would expose him to the possibility of inconsistent rulings on certain factual issues, and we decline to speculate on the issue. Consequently, we are without authority to reach the merits of James' challenge to the dismissal of his equitable estoppel defense and must, instead, dismiss that portion of his appeal.

C. Rule 60(b) Motion

James' brief also fails to establish that the district court's ruling on Pamela's Rule 60(b) motion affects a substantial right.

Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure requires that an appellant's brief include:

> A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the *statement must contain sufficient facts and* argument to support appellate review on the ground that the challenged order affects a substantial right.

(Emphasis added). In appeals taken from final orders or judgments, Rule 28 violations generally do not lead to jurisdictional consequences, as "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to

dismissal of the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transport Co., Inc.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). Dismissal of a non-interlocutory appeal is only appropriate "in the most egregious instances of nonjurisdictional default[.]" *Id.* at 200, 657 S.E.2d at 366. Yet this Court has specifically held that a Rule 28(b)(4) violation is jurisdictional in the context of interlocutory appeals because "the *only way* an appellant may establish appellate jurisdiction in an interlocutory case (absent Rule 54(b) certification) is by showing grounds for appellate review based on the order affecting a substantial right." *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 77-78, 772 S.E.2d 93, 96 (2015) (holding that a party's reply brief could not correct the omission of a statement of the grounds for appellate review in the party's principal brief).

In his statement of the grounds for appellate review, James makes a general assertion that the 8 August Order is immediately appealable. However, "appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009). James has failed to state *any* grounds as to why the portion of the 8 August Order granting Pamela's Rule 60(b) motion affects a substantial right that will be lost absent immediate review. This violation of Rule 28(b)(4) has jurisdictional consequences in the present case and, as mentioned above, we may not construct

arguments for James in support of his right to appeal from an interlocutory order. To do so would be unfaithful to our enterprise. Accordingly, because James has not met his "burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal[,]" *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253, his appeal from the district court's Rule 60(b) ruling must be dismissed.

**Conclusion**

For the foregoing reasons, James' appeal is dismissed as interlocutory.

DISMISSED.

Judges DILLON and BERGER, JR. concur.

Report per Rule 30(e).