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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-152

Filed: 3 October 2017

Robeson County, No. 12 CVD 2697

ETTA MCKINNON, Plaintiff

v.

SANDY MCKINNON, Defendant

Appeal by defendant from order entered 2 August 2016 by Judge J. Stanley Carmical in Robeson County District Court. Heard in the Court of Appeals 23 August 2017.

*Higgins Benjamin, PLLC, by Stephen E. Robertson, for plaintiff-appellee.*

*McCallum Law Firm, PLLC, by Bellonora F. McCallum, for defendant-appellant.*

CALABRIA, Judge.

Where defendant did not exercise due diligence in pursuing his case, the trial court did not err in denying his Rule 60 motion to set aside the trial court's order regarding equitable distribution. We affirm.

I. Factual and Procedural Background

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On 9 April 2012, Etta McKinnon (“plaintiff”) filed a complaint in Guilford County, seeking an absolute divorce from Sandy McKinnon (“defendant”), and a claim for equitable distribution of the marital estate. On 7 June 2012, defendant filed an answer, also seeking equitable distribution. This answer included a motion for change of venue to Robeson County. On 18 September 2012, the Guilford County District Court entered an order transferring venue to Robeson County. On 24 November 2014, the Robeson County District Court entered a judgment of absolute divorce, preserving the ongoing claims of equitable distribution.

On 12 May 2015, defendant’s attorney moved to withdraw as counsel. The trial court granted this motion on 3 June 2015.

On 10 December 2015, the trial court conducted a hearing on the parties’ respective claims for equitable distribution. Plaintiff was present and represented by counsel, and defendant, *pro se*, was absent. On 19 January 2016, the trial court entered its order on equitable distribution (“the order”).

On 24 March 2016, defendant filed a motion to set aside the order pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. According to defendant’s motion, defendant never received notice of the equitable distribution hearing, and therefore the trial court should set aside the equitable distribution order. On 2 August 2016, the trial court entered an order on defendant’s motion. The trial court found that the equitable distribution hearing was “set and a calendar was timely

published by the Court[.]” that between 1 July 2015 and 10 December 2015 defendant had no contact with the court or opposing counsel, and that defendant “did not exercise sufficient diligence in the defense of his case.” The trial court therefore concluded that “[n]o extraordinary conditions exist justifying relief from the Judgment entered on August 4, 2015[.]” and denied defendant’s motion to set aside the order.<sup>1</sup>

Defendant appeals from the denial of his motion to set aside the order.

## II. Motion to Set Aside Order

In his sole argument on appeal, defendant contends that the trial court erred in denying defendant’s motion to set aside the order. We disagree.

### A. Standard of Review

“[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). “A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court’s decision] was so arbitrary that it could not have been the result of a reasoned decision.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

### B. Notice of Appeal

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<sup>1</sup> The order specifically denies “Plaintiff’s Motion for Relief[.]” but we hold that this was merely a clerical error, as the order clearly arises in response to defendant’s motion.

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As a preliminary matter, we note that while defendant appeals from the denial of his motion to set aside the order, he does not appeal from the order itself. “Notice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for our review.” *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990). Proper notice of appeal in civil cases is governed by Rule 3 of the North Carolina Rules of Appellate Procedure, and we have previously held that a violation of Rule 3 is a jurisdictional default, which “precludes the appellate court from acting in any manner other than to dismiss the appeal.” *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008).

That said,

we may liberally construe a notice of appeal in one of two ways to determine whether it provides jurisdiction. . . . First, a mistake in designating the judgment or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake. Second, if a party technically fails to comply with procedural requirements in filing papers with the court, the court may determine that the party complied with the rule if the party accomplishes the functional equivalent of the requirement.

*Dafford v. JP Steakhouse LLC*, 210 N.C. App. 678, 681, 709 S.E.2d 402, 405 (2011)  
(citation omitted).

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Defendant attempts to salvage his appeal by relying on our decision in *Dafford*. Specifically, defendant contends that his notice of appeal from the denial of the motion to set aside “was based on the same grounds [and] assignments of error as the court’s 19 January 2016 order. It can thus be plainly inferred that defendant intended to appeal the 19 January 2016 order.”

Defendant is correct that we may liberally construe a notice of appeal where intent to appeal can be fairly inferred and the appellee is not misled. However, *Dafford* dealt with a different set of facts. In *Dafford*, the plaintiff appealed from multiple orders, but gave varying and confusing descriptions of them. We held that her notice of appeal, “although confusing,” did identify both a judgment and an order. *Id.* at 682, 709 S.E.2d at 405-06. We further held that the appeal of both the judgment and order made clear that the plaintiff was also appealing the jury’s award of damages. *Id.* at 682, 709 S.E.2d at 406.

In the instant case, defendant’s notice of appeal was not a confusing aggregation of multiple orders. It was one clear appeal from one specifically and correctly identified order. There was no misinterpretation.

We further note that *Dafford* stands for a more general principle of law, to which *Von Ramm* provides an exception. Permitting that an appeal from the denial to set aside a judgment allows this Court *per se* to infer intent to appeal the original order renders our decision in *Von Ramm* pure dicta. Our decision in *Von Ramm* was

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quite clear: “Notice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for our review.” *Von Ramm*, 99 N.C. App. at 156, 392 S.E.2d at 424. “Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We hold that our decision in *Von Ramm* is binding upon this Court on this issue.

Because defendant’s notice of appeal from an order denying defendant’s motion to set aside the order did not also designate the underlying equitable distribution order, we hold that this Court lacks jurisdiction to review the underlying order itself. Therefore, our review is limited solely to the order from which defendant appeals, namely the trial court’s order denying defendant’s motion to set aside the order.

C. Analysis

Defendant contends that the trial court abused its discretion in declining to set aside the order. Defendant contends that he was entitled to such relief, based upon Rule 60(b) of the North Carolina Rules of Civil Procedure, which provides that, “[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . [m]istake, inadvertence, surprise, or excusable neglect; . . . [or a]ny other reason justifying relief

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from the operation of the judgment.” N.C.R. Civ. P. 60(b)(1), (6). Specifically, defendant argues that he did not receive proper notice of the hearing, and thus was unable to attend.

The proceedings below commenced with the filing of plaintiff’s complaint in 2012. Venue was changed that same year. A decree of absolute divorce was entered in 2014, but the matter was held open with respect to equitable distribution of the marital estate. Defendant raises no contentions with respect to his involvement up to that point. It is therefore clear that, at least at the outset, defendant was properly served with process. The question is therefore whether the trial court abused its discretion in determining that the case having been calendared created sufficient notice to render defendant’s absence inexcusable.

There is conflicting evidence in the record as to whether defendant actually received notice. There are no documents indicating that defendant received notice. During the hearing on defendant’s motion to set aside the order, defendant’s counsel argued that defendant “did not have notice of that December 10th hearing, was not noticed of that hearing, and didn’t have a[n] opportunity to present his side of his evidence.” On the other hand, plaintiff’s counsel observed that, on the day of the equitable distribution hearing, “[w]e had a colloquy before we began the trial that day concerning whether or not Mr. McKinnon had notice[.]” Plaintiff’s counsel referred to a prior hearing, which had occurred on 6 October 2015, at which the 10 December

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2015 trial date was determined. Plaintiff's counsel noted "[t]hat a calendar was subsequently issued, which arrived in my office." Counsel conceded that he believed the calendar was served on defendant's attorney who had previously withdrawn, but did not know whether defendant had ever been served. The trial court then went into recess, while the court reviewed the "minutes" from the 6 October 2015 hearing. We note that the minutes reviewed by the trial court are absent from the record.

After reviewing the minutes, the court noted the chronology of the case, particularly the fact that defendant appeared on 1 July 2015, after his attorney had withdrawn, to notify the court that he was seeking the means to hire new counsel. Subsequent to that, the court noted a total absence of contact between defendant and the court. Based upon this fact and other factors, the trial court made the following written findings of fact:

11. Between July 1, 2015 and December 10, 2015 the Defendant did not communicate with the Court or with opposing counsel.

12. The Defendant did not exercise sufficient diligence in the defense of his case.

The trial court then concluded that defendant had not "exercised the due diligence to attend to his legal affairs that the law requires," and denied his motion to set aside the order.

This Court has previously held that "[a] party to a legal action, having been duly served with process, is bound to keep himself advised as to the time and date his



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cause is calendared for trial [or] hearing; and when a case is listed on the court calendar, he has notice of the time and date of the hearing.” *Thompson v. Thompson*, 21 N.C. App. 215, 217, 203 S.E.2d 663, 665, *cert. denied*, 285 N.C. 596, 205 S.E.2d 727 (1974). In *Thompson*, as in the instant case, the defendant was absent at the hearing below and not represented by counsel. We held:

The record shows that defendant was served with process at the inception of the action. The record shows as well that the case was properly calendared for hearing. We note that it is now, and has long been, the practice in Wake County that when a party to an action does not have counsel, a copy of each calendar on which his action appears calendared for trial is mailed to him at the last address available to the Clerk. We have no reason to believe that this customary and quite appropriate practice was not followed in this case. Indeed, it appears from plaintiff’s affidavits that defendant was aware of orders entered and stated his intention not to comply with them. Defendant will not be permitted to frustrate the trial of the case or avoid the duties imposed by orders entered by merely declining or refusing to attend trial. He has been afforded proper legal notice of the orders of the District Court which he now seeks to have declared null and void.

*Id.* Although there is no evidence in the instant case that defendant “stated his intention not to comply” with the trial court’s orders, the remainder of our holding in *Thompson* is applicable to this case. Subsequent to his attorney’s withdrawal from the case, defendant had contact with the trial court, which would therefore have had the means to contact him. Aside from defendant’s self-serving argument that he did not receive notice, there is no evidence that defendant had not been served with the

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court calendar. There is, however, evidence that the proceedings below had gone on for several years, and that, as of July of 2015, defendant remained aware of them. The trial court's order includes the reasons that defendant had proper legal notice. We hold that the trial court's order was not "manifestly unsupported by reason[.]" The trial court did not abuse its discretion in denying defendant's motion to set aside the order.

Defendant raises an additional argument that the trial court should have made findings as to the merits of defendant's defense. However, this argument refers to a defendant's burden on such a motion; when moving to set aside the judgment, the defendant has the burden of showing a meritorious defense. *See Oxford Plastics v. Goodson*, 74 N.C. App. 256, 258-59, 328 S.E.2d 7, 9 (1985). Because we have held that the trial court did not err in denying defendant's motion, we need not address whether defendant met this additional burden.

AFFIRMED.

Judges ZACHARY and MURPHY concur.

Report per Rule 30(e).