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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-200

Filed: 2 October 2018

Scotland County, No. 15-CVD-166

DESIREE BLOCK, Plaintiff,

v.

MATTHEW BLOCK, Defendant.

Appeal by Plaintiff from order entered 11 December 2017 by Judge Michael A. Stone in Scotland County District Court. Heard in the Court of Appeals 4 September 2018.

Rice Law, PLLC, by Mark Spencer Williams, Richard Forrest Kern & Christine M. Sprow, for plaintiff-appellant.

Michael Schmidt Attorney at Law, PLLC, by R. Michael Schmidt, III, for defendant-appellee.

HUNTER, JR., Robert N., Judge.

Desiree Block (“Plaintiff”) appeals from an order dismissing her claims for post separation support, alimony, and attorney’s fees. On appeal, Plaintiff argues the court erred in dismissing her claims for lack of subject matter jurisdiction. We affirm.

I. Factual and Procedural Background

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Plaintiff and Matthew Block (“Defendant”) married on 13 June 1998 and separated in June 2013.¹ On 24 October 2013, Defendant filed a complaint in Scotland County District Court, requesting equitable distribution of the parties’ property and a declaratory judgment (13 CVD 772). On 13 December 2013 in Mecklenburg County District Court, Plaintiff filed a complaint for post separation support, alimony, and attorney’s fees (13 CVD 21658).

On 27 December 2013 in Mecklenburg County District Court, Defendant filed a motion to dismiss for improper venue, insufficiency of process, and insufficiency of service of process.² *See* N.C. R. Civ. P. 12(b)(3)-(5) (2017). In support of his motion Defendant stated, “a copy of the Summons and Complaint filed in the Mecklenburg County action as well as a Notice of Hearing and a Request for Production of Documents were delivered to Defendant’s office by Federal Express. The Federal Express package was signed for by Defendant’s receptionist, Maria Dudley.” He argued Plaintiff failed to properly serve him with the summons and complaint for her Mecklenburg County action, as she never personally served Defendant. He also asserted proper venue was in Scotland County, not Mecklenburg County, because both parties resided in Scotland County.

¹ Plaintiff avers the parties separated on 26 June 2013, and Defendant asserts the parties separated on 11 June 2013.

² Defendant also moved to abate or stay the Mecklenburg County action.

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On 3 January 2014 in Mecklenburg County District Court, Plaintiff's attorney, Matthew R. Arnold, filed an affidavit of service. Arnold swore Plaintiff's complaint and a discovery request were served upon Defendant "by depositing with a designated delivery service authorized pursuant to 26 U.S.C. §7502(f)(2) . . . on December 18, 2013."³ In the affidavit, Arnold stated he attached a delivery receipt. However, Arnold did not attach the delivery receipt.

On or about 6 January 2014 in Mecklenburg County District Court, Plaintiff filed a reply to Defendant's motion to dismiss. Plaintiff asserted:

- a. Maria Dudley is Husband's employee and she is authorized, both express and implied, to sign for packages delivered to 1601 Medical Drive, Laurinburg, NC on behalf of Husband, Matthew Block.
- b. Maria Dudley is an agent authorized to accept service of process on Husband's behalf.
- c. Service on Maria Dudley, an agent of Husband Matthew Block, satisfies Rule 4(j)(1)(d)'s requirement of "delivering to the addressee".

...

15. Defendant/Husband, Matthew Block, was properly served with process of said Mecklenburg County action (13-CVD-21658) in accordance with the provisions of N.C. Civ. P. 4(j)(1)d, service being made by designated delivery service, as evidenced by the Affidavit of Service, filed on January 3, 2014.

³ Arnold's affidavit did not say who served the summons and complaint on Defendant.

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On 7 January 2014, Plaintiff served Defendant with a subpoena, commanding him to appear at a 10 January 2014 hearing at Mecklenburg County District Court. On 9 January 2014, Defendant filed an objection to the subpoena, arguing: (1) “Compliance with the Subpoena will cause undue burden and/or expense.”; and (2) “The Subpoena is unreasonable and oppressive.” That same day, he withdrew his motion to dismiss in Mecklenburg County District Court. The Mecklenburg County District Court held a hearing on 10 January 2014, which Defendant attended.⁴

On 5 February 2014, Plaintiff obtained an alias and pluries summons. In an order entered 17 February 2014, the Mecklenburg County District Court made the following findings. Defendant sought dismissal of Plaintiff’s complaint in Mecklenburg County, due to improper venue. Alternatively, Defendant requested the court abate the action or transfer it to Scotland County. The court reserved ruling on Defendant’s motion to dismiss for improper venue. The court stayed the Mecklenburg County proceedings, pending disposition of Plaintiff’s motion to dismiss Defendant’s request for declaratory judgment in Scotland County.⁵ On 4 April 2014, Plaintiff obtained another alias and pluries summons.

On 19 February 2015, the parties consented to an order transferring the Mecklenburg County action (13 CVD 21658) to Scotland County (now 15 CVD 166).

⁴ The record on appeal does not include the transcript from the 10 January 2014 hearing.

⁵ Plaintiff’s motion to dismiss is not included in the record on appeal.

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The parties filed the consent order in Mecklenburg County District Court on 20 February 2015. On 26 September 2017, Defendant filed a motion to dismiss in Scotland County District Court, pursuant to: (1) Rule 12(b)(2), lack of personal jurisdiction; (2) Rule 12(b)(4), insufficiency of process; and (3) Rule 12(b)(5), insufficiency of service of process. *See* N.C. R. Civ. P. 12(b)(2), (4)-(5).

On 2 October 2017, the Scotland County District Court held a hearing on Defendant's motion to dismiss and Plaintiff's motion for post separation support. Defendant's counsel argued: (1) Plaintiff never properly served Defendant with her complaint for post separation support, alimony, and attorney's fees; (2) parties cannot consent to subject matter or personal jurisdiction; (3) the action was discontinued after Plaintiff failed to serve him with summons; and (4) Defendant did not voluntarily appear at the 10 January 2014 hearing, as he attended under command of subpoena. Plaintiff's counsel argued Defendant consented to the change in venue, which is a personal appearance.

During a brief recess, the Scotland County District Court contacted the Clerk of Mecklenburg County Superior Court. The Clerk reviewed the Mecklenburg County file (13 CVD 21658) and confirmed attorney Arnold omitted the delivery receipt when he filed his affidavit of service. The court recessed until the next morning.

Before court began on 3 October 2017, both parties submitted filings. Defendant filed a motion to dismiss for lack of subject matter jurisdiction. Plaintiff's

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attorney, Mark Spencer Williams, filed an amended affidavit of service, in which he swore:

2. That the Civil Summons, Complaint, Notice of Hearing . . . [was] in fact received by Defendant Matthew Block on December 19, 2013 as evidenced by a copy of the delivery receipt attached as Exhibit “1” and fully incorporated herein.
3. That Defendant Matthew Block filed an Affidavit on 27 December 2013 wherein he acknowledged that these documents were received by his receptionist on December 19, 2013.
4. That Defendant Matthew Block has been duly served with process in this action in accordance with the provisions of N.C. GEN. STAT. § 1A-1, Rule 4(j)(1)(d), service being made by a designated delivery service.

Williams attached a UPS “Proof of Delivery” to his affidavit.

On 9 October 2017, Williams filed another amended affidavit of service. In this affidavit, Williams acknowledged the Scotland County District Court rejected his 3 October 2017 affidavit, for lack of personal knowledge. Williams argued Rule 4 of the North Carolina Rules of Civil Procedure does not require affidavits of service be based on personal knowledge. In support of his affidavit, Williams attached, *inter alia*, an affidavit from Kay Fields, Defendant’s former office manager. Fields swore “Ms. Dudley’s responsibilities included processing the mail. She was authorized to receive and sign for any packages or mail from Fed-Ex, UPS, or other like services.” On 6

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November 2017, Plaintiff filed a motion to set aside the consent order changing venue from Mecklenburg County to Scotland County.

On 11 December 2017, the Scotland County District Court entered an order, dismissing Plaintiff's action for lack of subject matter jurisdiction. The court found, *inter alia*, the following: (1) Plaintiff failed to properly attach the delivery receipt to the 3 January 2014 affidavit, making the affidavit of service invalid; (2) Defendant did not make a general appearance or appear voluntarily or by consent in the Mecklenburg County action; (3) Plaintiff failed to serve the 5 February 2014 or 4 April 2014 alias and pluries summonses on Defendant; and (4) the "action was discontinued" on or about 7 July 2014, ninety days after the 4 April 2014 summons. The trial court found and concluded due to discontinuance of the action on or about 7 July 2014, the Mecklenburg County District Court lacked subject matter jurisdiction. Consequently, the Mecklenburg County District Court could not properly transfer the case to the Scotland County District Court. The court dismissed Plaintiff's claims for post separation support, alimony, and attorney's fees (15 CVD 166) for lack of jurisdiction. On 8 and 9 January 2018, Plaintiff filed notices of appeal.

II. Jurisdiction

Defendant filed a motion to dismiss Plaintiff's appeal, arguing because the trial court lacked subject matter jurisdiction, our Court also lacks jurisdiction. Our Court may review the trial court's determination it lacks subject matter jurisdiction. *See*

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WLAE, LLC v. Edwards, ___ N.C. App. ___, ___, 809 S.E.2d 176, 181-82 (2017) (reviewing the trial court’s dismissal of appellant’s action due to lack of subject matter jurisdiction); *Booker v. Strege*, ___ N.C. App. ___, ___, 807 S.E.2d 597, 599-600 (2017) (reviewing whether the trial court had subject matter jurisdiction in a custody dispute). Thus, we deny Defendant’s motion to dismiss.

Plaintiff filed a petition for writ of *certiorari* in the event we concluded her notice of appeal to be improper or interlocutory. Plaintiff informs this Court of Defendant’s separate action for equitable distribution pending in Scotland County District Court (13 CVD 772). The trial court’s dismissal of Plaintiff’s complaint in 15 CVD 166 (formerly 13 CVD 21658) is a final judgment disposing of *that* case. Thus, we have jurisdiction under N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(2) (2017). Accordingly, we deny Plaintiff’s petition for writ of *certiorari* as moot.

III. Standard of Review

“Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal.” *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted). “The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record.” *Bradley v. Bradley*, ___ N.C. App. ___, ___, 806 S.E.2d 58, 62 (2017) (quotation marks and citation omitted). Personal jurisdiction is a question of fact. *Id.* at ___, 806 S.E.2d at 62 (citation omitted).

IV. Analysis

Plaintiff argues the trial court erred by concluding: (1) it lacked subject matter jurisdiction over her claims; and (2) Plaintiff failed to properly serve Defendant with summons in the Mecklenburg County action.

While subject matter and personal jurisdiction are two distinct concepts, there are instances, such as the case *sub judice*, in which the lack of service (a requirement for personal jurisdiction) renders an action discontinued, divesting the trial court of its jurisdiction. “In order for a court to obtain personal jurisdiction over a defendant, a summons must be issued and service of process secured by one of the statutorily specified methods.” *Draughon v. Harnett Cty. Bd. of Educ.*, 166 N.C. App. 449, 451, 602 S.E.2d 717, 718 (2004) (citing *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996); N.C. Gen. Stat. § 1A-1, Rule 4 (j)). Thus, “[i]f a party fails to obtain valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed.” *Id.* at 451, 602 S.E.2d at 718 (quotation marks and citation omitted).

A party may extend the original time period for service by suing out an alias and pluries summons within ninety days after the issuance of the last summons, or within ninety days after the last prior endorsement. N.C. R. Civ. P. 4(d)(1)-(2). However, if a party fails to timely serve summons, either in the original time period or within the ninety days period of alias and pluries, the action is discontinued. *See*

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Johnson v. City of Raleigh, 98 N.C. App. 147, 148-49, 389 S.E.2d 849, 851 (1990) (citations omitted). Once an action is discontinued, it is deemed as if the plaintiff never filed the action. *Id.* at 148-49, 389 S.E.2d at 851 (citations omitted). Indeed, a plaintiff must commence a whole new action upon failing to timely file summons. Upon discontinuance, the trial court only has jurisdiction to enter a dismissal order. *Sink v. Easter*, 284 N.C. 555, 561, 202 S.E.2d 138, 143 (1974) (citing *Clark v. Holmes*, 189 N.C. 703, 708, 128 S.E. 20, 23 (1925)). Any appearance after discontinuance does not revive the discontinued action.

Here, Plaintiff failed to properly serve Defendant in her Mecklenburg County action. First, Plaintiff did not attach the required delivery receipt to the first affidavit of service. Although Plaintiff sued out two separate alias and pluries summonses, the record is devoid of any evidence she served Defendant with either. Ninety days after issuance of the last alias and pluries, on or about 7 July 2014, the action was discontinued. *See Johnson*, 98 N.C. App. at 148-49, 389 S.E.2d at 851 (citations omitted). Consequently, the Mecklenburg County District Court did not have jurisdiction over the case, because the court must deem the matter as if Plaintiff never filed the action. *Id.* at 148-49, 389 S.E.2d at 851 (citations omitted). No appearance by Defendant could revive the action. Thus, the Mecklenburg County District Court did not have jurisdiction to enter the consent order to change venue to Scotland County, and the Scotland County District Court also did not have

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jurisdiction over the matter. We conclude the trial court's dismissal due to lack of subject matter jurisdiction was correct and affirm the order.

V. Conclusion

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).