IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1006

Filed: 20 August 2019

Rutherford County, No. 13 CVD 1247

RICHARD LEE BENDER, Plaintiff,

v.

ALISHA HORNBACK, Defendant.

Appeal by Plaintiff from order entered 12 July 2018 by Judge Robert K. Martelle in Rutherford County District Court. Heard in the Court of Appeals 28 March 2019.

Richard Lee Bender, pro se, for plaintiff-appellant.

W. Martin Jarrard for defendant-appellee.

MURPHY, Judge.

Appellant Richard Lee Bender's ("Bender") notice of appeal is untimely and deficient in part, and, as to the majority of his arguments on appeal, does not confer jurisdiction upon this Court. To the extent Bender does make timely notice of appeal, his arguments are without merit. We dismiss in part and affirm in part.

BACKGROUND

In June 2018, Bender filed a "Motion for Emergency Custody, Motion to Allow Telephonic Testimony, Motion for Change of Venue, and Motion for a Guardian Ad-Litem" ("2018 Motion") in Rutherford County District Court. Bender sought to modify the parties' original custody agreement regarding their minor child, established through a *Consent Order* entered by the Rutherford County District Court in 2014. The 2014 *Consent Order* granted Bender full legal custody and primary physical custody of the child, and Appellee, Alisha Hornback ("Hornback"), physical custody during summer vacation and visitation rights during Christmas, Mother's Day, and the child's birthday. The 2018 Motion sought "emergency child custody of the Minor Child because there is a danger of serious and immediate injury to the Minor Child in this action."

After a hearing on 12 July 2018, the District Court entered a *Memorandum of Consent Order* ("the memorandum order") in which Bender dismissed his 2018 Motion without prejudice and acknowledged that there was no basis for the claims therein that the Minor Child was in danger of serious and immediate injury. The terms of the memorandum order were written by hand on several pages of the form entitled "Memorandum of Judgment/Order," AOC-CV-220, New 4/97, which specifically provided that "a formal judgment/order reflecting the above terms" would be prepared and submitted to the trial court. Both parties also agreed that "the formal judgment or order may be signed by the presiding judge out of term, session,

county and district." In addition, the parties stipulated that "[w]ith the signing of this Memorandum by the presiding judge, the Memorandum shall become a judgment/order of the court and shall be deemed entered pursuant to Rule 58 of the North Carolina Rules of Civil Procedure on the date filed with the Clerk."

On 10 August 2018, Bender filed Notice of Appeal from the memorandum order. On 16 August 2018, the District Court entered two orders: (1) a formal version of its 12 July 2018 consent order ("the formal order"), with findings and conclusions identical to those included in the memorandum order; and (2) an *Order Concerning Child Custody Jurisdiction* ("the jurisdictional order"). Hornback argues this appeal was untimely and should be dismissed. We agree and dismiss this appeal in part. With regard to the parts of this appeal that were timely noticed, we affirm the trial court's memorandum order.

ANALYSIS

Bender's *Notice of Appeal* references only the handwritten order. However, Bender's arguments on appeal are almost entirely related to the jurisdictional order, which was entered six days after Bender's *Notice of Appeal*.

"The provisions of Rule 3 [of North Carolina Appellate Procedure] are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737 (1997), *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997). "This Court is without

authority to entertain appeal of a case which lacks entry of judgment." *Id.* at 803, 486 S.E.2d at 737. Here, Bender's notice of appeal was filed before the trial court entered the jurisdictional order, and he filed no notice of appeal regarding the jurisdictional order. To the extent Bender challenges the jurisdictional order, his appeal is dismissed.

Carefully reading the remainder of Bender's brief in the light most favorable to him—although we are not required to do so—we find Bender's only arguments regarding the memorandum order (or the resulting formal order) are that "the trial court erred in [1] entering orders after the notice of appeal was filed, and [2] manipulating the title of one of the orders[.]" Bender's first argument, that the trial court lacked jurisdiction to enter the formal order on 16 August 2018, is incorrect. The parties agreed in the memorandum order that the trial court would enter a formal order, and the typed version of the memorandum order, entered 16 August 2018, was the formal version of the same order. Bender's second argument, that the trial court "manipulated the title" of the formal order, likewise does not entitle him to relief. The order was entitled "Consent Order" and was a consent order based on the 12 July 2018 memorandum order.

First, Rule 58 states, "Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court pursuant to Rule 5." N.C.G.S. § 1A-1, Rule 58 (2017). The memorandum order

was signed by the presiding judge and filed with the clerk on 12 July 2018, and was therefore entered on that date. We have held that, "pursuant to [Rule 58], after 'entry' of judgment in open court, a trial court retains the authority to approve the judgment and direct its prompt preparation and filing." *Hightower v. Hightower*, 85 N.C. App. 333, 337, 354 S.E.2d 743, 745 (1987). Here, the formal order was prepared and filed by the trial court shortly after it entered judgment on the matter through the memorandum order. Such action was taken in accordance with the trial court's authority under Rule 58—and in conformity with the parties' agreement as stated in the memorandum order—and was not in error.

Second, Bender's argument that the trial court "manipulat[ed] the title" of the consent order seems to be an allegation that the consent order was invalid for lack of consent. "To set a consent judgment aside for lack of consent, there must be proper allegation and proof by the party attacking the judgment that consent was not given." *Chance v. Henderson*, 134 N.C. App. 657, 661, 518 S.E.2d 780, 783 (1999) (*citing Nickels v. Nickels*, 51 N.C. App. 690, 693, 277 S.E.2d 577, 579, disc. review denied, 303 N.C. 545, 281 S.E.2d 392 (1981)).

Bender argues on appeal that "[the formal order] <u>was not</u> a 'consent' Order, regardless of what it was titled." Bender's conclusory assertion that the 12 July 2018 consent order is invalid for lack of consent is insufficient and not an adequate ground to find the trial court erred. The record shows that Bender signed the memorandum

order and consented to entry of both the memorandum order and a formal order incorporating its terms. In addition, the transcript shows that the trial court placed Bender under oath and inquired as to his understanding of, and agreement to, the entry of the memorandum order; Bender stated he understood, and agreed that he wanted the trial court to sign the memorandum order and make it an order of the court. Bender's consent to the entry of the memorandum order gave the trial court authority to enter the formal order incorporating the terms thereof. *See Miller v. Miller*, 153 N.C. App. 40, 45, 568 S.E.2d 914, 917-18 (2002) (citing *Overton v. Overton*, 259 N.C. 31, 37, 129 S.E.2d 593, 598 (1963)). This argument is without merit.

CONCLUSION

In regards to the jurisdictional order, Bender's notice of appeal was untimely and deficient under our Rules of Appellate Procedure to bestow us with jurisdiction. In regard to the handwritten and formal orders, Bender's arguments are without merit.

DISMISSED IN PART; AFFIRMED IN PART.

Judge STROUD and BERGER.

Report per Rule 30(e).