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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-937

Filed: 21 May 2019

Guilford County, No. 09 CvD 414

RONALD M. NELSON, Plaintiff,

v.

SUSAN MOLLY NELSON, Defendant.

Appeal by Plaintiff from order entered 5 February 2018 by Judge Jan H. Samet in Guilford County District Court. Heard in the Court of Appeals 10 April 2019.

*Harvey W. Barbee, Jr. for the Plaintiff.*

*Woodruff Family Law Group, by Jessica S. Bullock and Adam D. Furr, for the Defendant.*

DILLON, Judge.

Plaintiff Ronald M. Nelson (“Husband”) appeals from an order modifying and increasing the amount of alimony awarded to Defendant Susan Molly Nelson (“Wife”) and awarding her attorney’s fees.

I. Background

Husband and Wife were divorced in 2010. As part of the divorce, Husband was ordered to pay Wife alimony.

In April 2015, Husband filed a motion to modify alimony, seeking a *decrease* in alimony, alleging a substantial and material change in circumstances. Wife responded to Husband's motion to modify and contended that she was entitled to an *increase* in alimony.

Discovery ensued; and in September 2016, Wife filed a motion to compel, alleging that Husband failed to adequately respond to her discovery requests.

In April 2017, after a hearing on the matter, the trial court entered an order increasing alimony payable to Wife, granting Wife's motion to compel, finding that Husband owed alimony arrears to Wife, and awarding attorney's fees to Wife.

Husband timely appealed.

## II. Analysis

Husband makes two arguments on appeal, which we address in turn.

### A. Modification of Alimony Award

Husband argues that the trial court erred in ordering an increase in his alimony obligation. We conclude that the trial court did not abuse its discretion in this regard.

We review a trial court's decisions regarding alimony for an abuse of discretion. *Kelly v. Kelly*, 228 N.C. App. 600, 601, 747 S.E.2d 268, 272 (2013). "An abuse of discretion has occurred if the [trial court's] decision is 'manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned

decision.’” *Id.* at 601, 747 S.E.2d at 272-73 (quoting *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 646 (1998)).

Section 50-16.9 of our General Statutes allows an alimony order to be modified upon motion and a showing of changed circumstances by either party. N.C. Gen. Stat. § 50-16.9(a) (2015). In determining whether circumstances have changed, the trial court compares “[t]he present overall circumstances of the parties . . . with the circumstances existing at the time of the original award in order to determine if there has been a substantial change.” *Dodson v. Dodson*, 190 N.C. App. 412, 416, 660 S.E.2d 93, 96 (2008). However, “[w]here the change in circumstances is one that the trial court expected and probably made allowances for when entering the original decree, the change is not a ground for a modification of the decree.” *Britt v. Britt*, 49 N.C. App. 463, 472, 271 S.E.2d 921, 927 (1980). Moreover, our Court has held that “it is error to modify alimony based on only one factor, such as a change in a party’s income.” *Dodson*, 190 N.C. App. at 416, 660 S.E.2d at 96 (citing *Britt*, 49 N.C. App. at 474, 271 S.E.2d at 928).

In the present case, Husband initially motioned to decrease the amount of alimony awarded to Wife due to Wife incurring a money judgment in the amount of \$19,167.44 after the parties’ separation, which was satisfied through the couples’ sale of the marital home and precluded Husband from receiving the approximately \$20,000.00 he was due from such sale. Husband did not allege a change in income,

expenses, or living situation – the sole basis for the decrease in alimony was him being denied his share from the sale of the marital home and his desire to be reimbursed.

When Wife responded to Husband’s motion to modify, she alleged “a substantial change of circumstances which would justify the Court’s increasing [Husband’s] alimony obligation.” In support of her contention, Wife put forth the following evidence: Wife no longer receives monthly child support in the amount of \$659.24 from Husband. Wife is disabled and unable to work, receiving \$612.00 per month in social security benefits. Husband has been allegedly promoted at his job and is receiving more monthly income. Wife’s vehicle is non-operational. Wife resides in a condominium owned by her sister, for which she is going to have to start paying rent in the amount of \$750.00 per month. Wife has incurred maintenance fees from her bank due to Husband’s failure to timely pay alimony and child support.

Some of the facts alleged by Wife in her motion to modify alimony are not new or changed information. For instance, Wife has been disabled and unable to work since the original alimony decree. However, there are several facts that indicate a change in circumstances. Specifically, Wife is no longer receiving child support from Husband. Wife now has a housing cost of approximately \$750.00 per month. And Wife has incurred fees from banking institutions due to Husband’s untimely alimony and child support payments. Moreover, the trial court found Husband to presently

have a monthly surplus of \$2,357.80 “after all allowed expenses,” compared with “a monthly surplus of \$2,060.05” at the time of the original alimony order.

Based on these changes, taken as a whole, we cannot say that the trial court abused its discretion in modifying the alimony order. *Kelly*, 228 N.C. App. at 601, 747 S.E.2d at 272. We affirm both the modification of the alimony award and the arrears that Husband has been ordered to pay.

#### B. Attorney’s Fees

Husband also argues that the trial court erred in awarding attorney’s fees to Wife. We disagree.

We review an award of attorney’s fees only for an abuse of discretion or an error of law. *Griffith v. Griffith*, 265 N.C. 521, 523, 144 S.E.2d 589, 590 (1965).

Section 50-13.6 of our General Statutes provides the trial court with the discretion to award “reasonable attorney’s fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit” and any subsequent modification. N.C. Gen. Stat. § 50-13.6 (2017); *see Broughton v. Broughton*, 58 N.C. App. 778, 783, 294 S.E.2d 772, 777 (1982) (stating that “if [the dependent spouse] meets the three requirements of G.S. 50-16.3(a) for alimony pendente lite, she can recover her attorney’s fees even though she sought alimony modification subsequent to absolute divorce.”).

Essentially, Wife must (1) “show that she is a ‘dependent spouse[,]’ ” (2) be “entitled to the relief demanded[,]” and (3) “not have sufficient means to defray expenses of the suit.” *Broughton*, 58 N.C. App. at 783-84, 294 S.E.2d at 777.

In the present case, it is undisputed that Wife is a dependent spouse. Thus, the first element is met. *Id.* Next, as we affirmed above that Wife was entitled to the modification of the alimony award, she has also met the second element. *Id.* Lastly, the trial court found, and we affirm, that Wife did “not have sufficient means to defray expenses of the suit.” *Id.* Thus, we affirm the award of attorney’s fees to Wife.

We note Husband’s separate argument that the trial court erred based on the attorney’s fees attributable to Wife’s Motion to Compel discovery. Specifically, Husband contends that the trial court lacks authority to award attorney’s fees where there is no order which actually results in compelling discovery. N.C. Gen. Stat. § 1A-1, Rule 37(a)(4) (2017). Here, however, the trial court did grant Wife’s Motion to Compel, albeit as part of its Order entered after trial modifying alimony – done without the benefit of the withheld discovery. And Husband makes no argument on appeal that the trial court erred in granting Wife’s Motion to Compel in this fashion. Thus, we conclude that the trial court acted within its authority in awarding attorney’s fees attributable to Wife’s Motion to Compel.

### III. Conclusion

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*Opinion of the Court*

We conclude that there was a change in circumstances to warrant a modification of the alimony award. Moreover, since Wife is a dependent spouse, entitled to an increase in alimony, and unable to defray the costs of litigation, she is entitled to an award of attorney's fees. *Broughton*, 58 N.C. App. at 783-84, 294 S.E.2d at 777. We affirm Judge Samet's order increasing the amount of alimony awarded to Wife and awarding her attorney's fees.

AFFIRMED.

Judges MURPHY and HAMPSON concur.

Report per Rule 30(e).