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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-730

Filed: 7 July 2020

Guilford County, No. 18-CVD-5508

RACHEL E. WILLIAMS, Plaintiff,

v.

ENTERPRISE HOLDINGS, INC., EAN SERVICES, LLC, EAN HOLDINGS, LLC,
ENTERPRISE LEASING COMPANY SOUTHEAST, LLC, Defendants.

Appeal by plaintiff from order entered 28 March 2019 by Judge Frederick B. Wilkins, Jr. in Guilford County District Court. Heard in the Court of Appeals 13 May 2020.

Rachel E. Williams, pro se, for plaintiff-appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Kevin S. Joyner and Brodie D. Erwin, for defendants-appellees.

DIETZ, Judge.

Plaintiff Rachel Williams appeals the trial court's order dismissing her claims under Rules 12(b)(6) and 12(c). Williams argues that the emergency judge who presided over the case lacked the statutory authority to do so, and that the judge failed to follow the district court's local rules.

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We reject these arguments. Williams did not preserve her challenge to the trial judge's authority to preside over her case and therefore waived this argument. In any event, the applicable statutes authorized the Chief Justice to assign the judge to preside over her case and her argument is therefore meritless.

Likewise, even assuming the trial court did not follow the court's local rules, Williams failed to show that the court's decision to do so was an abuse of discretion, and failed to show that the court's actions prejudiced her in any way. Accordingly, we reject Williams's arguments and affirm the challenged order.

Facts and Procedural History

In 2017, Rachel Williams entered into settlement agreements with Defendants resolving various employment-related claims she had brought against them. In 2018, Williams filed a complaint in Guilford County District Court alleging that Defendants breached the settlement agreements.

Defendants moved to dismiss under Rule 12(b)(6) and moved for judgment on the pleadings under Rule 12(c), arguing that Williams's complaint failed to state a claim upon which relief can be granted. Among other arguments, Defendants asserted that Williams's complaint failed to allege a material breach of the agreements.

The trial court heard Defendants' motions. Judge Frederick Wilkins, an emergency district court judge who served in District 17A in Rockingham County,

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presided over the hearing. The trial judge initially scheduled to preside over that session of district court in District 18 had been suspended by the Supreme Court. As a result, the Chief Justice issued an order that “The Honorable Frederick B. Wilkins, Jr., one of the Emergency Judges of the District Court, is hereby commissioned and assigned to preside over a session or sessions of District Court in the District Court Judicial District Eighteen to begin March 25, 2019, and continue Five Days or until business is completed.” It was during this session, while Judge Wilkins was commissioned by the Chief Justice, that he presided over the hearing on Defendants’ motions.

Following the hearing, the trial court entered a written order granting Defendants’ motions and dismissing Williams’s complaint with prejudice. The trial court ruled that “Plaintiff’s Complaint fails to state a claim upon which relief can be granted in that Plaintiff’s Complaint fails to allege a material breach of contract by Defendants.” Williams filed a written notice of appeal from the trial court’s order.

Analysis

I. Timeliness of notice of appeal

We first address our jurisdiction to hear this appeal. “A timely notice of appeal is required to confer jurisdiction upon this Court.” *Raymond v. Raymond*, 257 N.C. App. 700, 703, 811 S.E.2d 168, 170 (2018). Rule 3 of the Rules Appellate Procedure provides that notice of appeal must be filed “within thirty days after entry of

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judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58” or “within thirty days after service upon the party of a copy of the judgment if service was not made within that three-day period.” N.C. R. App. P. 3(c)(1), (2).

Williams filed her notice of appeal on 2 May 2019, more than 30 days after entry of the dismissal order on 28 March 2019. But there is no certificate of service attached to the dismissal order in the record, and thus, the record does not indicate when the 30-day time period for appeal began to run.

“[W]here evidence in the record shows that the appellant received actual notice of the judgment more than thirty days before noticing the appeal, the appeal is not timely.” *Brown v. Swarn*, 257 N.C. App. 417, 421, 810 S.E.2d 237, 239 (2018). But where “there is no certificate of service in the record showing *when* appellant was served with the trial court judgment,” the “burden is *on the appellee*” to “show that appellant received actual notice of the judgment more than thirty days before filing notice of appeal in order to warrant dismissal of the appeal.” *Id.* at 422, 810 S.E.2d at 240.

Williams asserts that she was never served with a copy of the order and first received actual notice of the entry of the order during a trip to the courthouse on 26 April 2019. Defendants do not contest this assertion. Because Defendants have not shown that Williams received actual notice of the order more than 30 days before she

filed her notice of appeal, we conclude that Williams's notice was timely and that we have jurisdiction to reach the merits of her appeal. *Id.*

II. Authority of retired emergency district court judge to hear case

Williams first argues that the trial court lacked statutory authority to decide her case because the presiding judge was not properly assigned to hear cases in District 18 of the district court division. We reject this argument, as it is both unpreserved and meritless.

We first address whether this argument was preserved for appellate review. “[I]ssues and theories of a case not raised below will not be considered on appeal.” *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001). Defendants argue that Williams appeared at the trial court hearing and asserted various legal arguments but did not raise the issue of the presiding judge's statutory authority to hear the case.

There is no transcript of the hearing itself, and no indication from the record that Williams raised this argument in the trial court. It is the appellant's duty to include in the record all information necessary to establish that issues are properly preserved for appellate review. *Hill v. Hill*, 173 N.C. App. 309, 322, 622 S.E.2d 503, 512 (2005). Thus, if this argument is one that *can* be waived by failure to raise it below, it is indeed waived. N.C. R. App. P. 10(a)(1).

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Of course, not all legal issues are subject to waiver for failure to raise them in the trial court. Some legal questions, most notably those involving the trial court's subject matter jurisdiction, "may be raised at any time," including for the first time on appeal. *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986). Williams repeatedly frames her arguments as jurisdictional ones, but they are not. Her challenge is one based on a particular judge's statutory authority to preside over her case. "[A] court's authority to act pursuant to a statute, although related, is different from its subject matter jurisdiction. Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. This power of a court to hear and determine (subject matter jurisdiction) is not to be confused with the way in which that power may be exercised in order to comply with the terms of a statute (authority to act)." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (2001) (citations omitted). Thus, Williams's argument is one that can be, and is, waived because the record does not establish that it was properly preserved in the trial court. *Westminster Homes*, 354 N.C. at 309, 554 S.E.2d at 641.

In any event, even if Williams had preserved this issue for appellate review, we would reject it as meritless because Judge Wilkins, the presiding judge, had statutory authority to hear the case.

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We review questions of statutory interpretation de novo. *Swauger v. Univ. of N. Carolina at Charlotte*, 259 N.C. App. 727, 728, 817 S.E.2d 434, 435 (2018). “The process of construing a statutory provision must begin with an examination of the relevant statutory language. It is well settled that “[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.” *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018) (citations omitted).

Williams first contends that the regular district court judge whom Judge Wilkins replaced had been “temporarily suspended, not removed,” and that this meant none of the statutory criteria permitting assignment of an emergency judge were present. Under the version of N.C. Gen. Stat. § 7A-52(a) applicable at the time Judge Wilkins was assigned,¹ the Chief Justice had authority to assign an emergency district court judge to hold sessions of court under various circumstances:

- (1) Death of a sitting judge.
- (2) Disability of a sitting judge.
- (3) Recall to active military duty of a sitting judge.
- (4) Retirement or removal of a sitting judge.
- (5) Court case-management emergency.

¹ In November 2019, the General Assembly amended the statute to broaden several categories and add two additional categories, including a category to address “court coverage” issues such as the unavailability of active judges due to holdover sessions, administrative responsibilities, conflicts of interest, and judicial educational responsibilities. N.C. Gen. Stat. § 7A-52(a).

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N.C. Gen. Stat. § 7A-52(a) (2017).

The terms used in this enumerated list, such as “disability,” “removal,” and “court case-management emergency” are not defined in the statute itself but other sections of our General Statutes discuss these terms. For example, Section 7A-374.2, governing the Judicial Standards Commission, defines “removal” as “a finding by the Supreme Court, based upon a written recommendation by the [Judicial Standards] Commission, that a judge should be relieved of all duties of the judge’s office.” N.C. Gen. Stat. § 7A-374.2(8). That same statute defines “suspension” as “a finding by the Supreme Court, based upon a written recommendation by the Commission, that a judge should be relieved of the duties of the judge’s office for a period of time.” *Id.* § 7A-374.2(9).

The rules of the Judicial Standards Commission also define “disability” as “any physical, mental, or emotional condition that seriously interferes with the ability of a judge to perform the duties of the judicial office.” Jud. Standards Comm. Rule 1(b)(3) (citing N.C. Gen. Stat. § 7A-374.2). Similarly, although the term “case-management emergency” is undefined in the statute, its ordinary meaning encompasses situations in which, due to high workload or other administrative difficulties, the active judges of a court are unable to effectively carry out their judicial functions.

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Thus, viewing these enumerated criteria in context, we can discern the intent of the General Assembly: to permit assignment of emergency judges when the unavailability of one or more judges due to these various factors is impacting the orderly administration of justice. With this intent in mind, we hold that the suspension of an active judge—although that suspension is substantively different from permanent removal under the statutes governing judicial discipline—is a form of “removal” as that term is used in N.C. Gen. Stat. § 7A-52(a)(4). Suspension temporarily relieves the impacted judge of the duties of the judge’s office. The statute permits the Chief Justice to assign an emergency judge to that court during the period in which the active judge is temporarily relieved of or unable to perform official duties. Accordingly, we reject Williams’s argument and hold that Judge Wilkins properly was assigned as an emergency district court judge during the period in which an active judge in the district was suspended.

Williams next argues that under the applicable statutory provisions, a retired emergency district court judge may “only be commissioned and hold sessions in the district from which they retired.” Thus, she argues, Judge Wilkins, who retired from District 17A, could not hear cases in District 18.

Section 7A-52 provides that an emergency district court judge may “hold regular or special sessions of *the court from which the judge retired.*” N.C. Gen. Stat. § 7A-52(a) (emphasis added). Section 7A-53 likewise provides that a retired

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judge may become an emergency judge “*of the court from which he retired.*” *Id.* § 7A-53 (emphasis added). Williams contends that this means an emergency judge may only be assigned to hear cases in the particular district from which the judge retired. But reviewing the applicable statutes in context, this is simply wrong. The phrase “the court from which the judge retired” refers to the court division as a whole, not to a particular district.

Under N.C. Gen. Stat. § 7A-4, “[t]he General Court of Justice constitutes a unified judicial system for purposes of jurisdiction, operation and administration, and consists of an appellate division, a superior court division, and a district court division.” Section 7A-53.1 provides that emergency district court judges may be appointed to serve in the district court division:

Emergency district court judges have the same power and authority in all matters whatsoever, in the courts which they are assigned to hold, that regular district court judges holding the same courts would have. An emergency district court judge duly assigned to hold district court in a particular county or district has the same powers in the county or district in open court and in chambers as a resident district court judge or any district court judge regularly assigned to hold district court in that district, but his jurisdiction in chambers extends only until the session is adjourned or the session expires by operation of law, whichever is later.

Id. § 7A-53.1 (emphasis added). This reading is further confirmed by Section 7A-141, which provides that “[t]he Chief Justice may transfer a district judge from one district to another for temporary or specialized duty.” *Id.* § 7A-141.

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In short, emergency district court judges are not confined to the district in which they sat during their active service, but instead are limited only by the terms of their commission and assignment from the Chief Justice to a particular session of district court in a particular district. Here, Judge Wilkins’s commission stated that he was “commissioned and assigned to preside over a session or sessions of District Court in the District Court Judicial District Eighteen to begin March 25, 2019, and continue Five Days or until the business is completed.” Thus, under the applicable statutes and the terms of his commission from the Chief Justice, Judge Wilkins had authority to hear Defendants’ motion to dismiss in District 18 during the period in which his commission applied. *See id.* § 7A-53.1. We therefore reject Williams’s arguments both because they are not preserved for appellate review and because, even if they were preserved, they are meritless.

III. Trial court’s compliance with local rules

Williams next argues that the trial court erred by failing to adhere to the local rules concerning preparation of the proposed order it entered dismissing her case. We reject this argument.

A trial court has “discretion to modify or avoid the application of a jurisdiction’s local rules.” *ABC Servs., LLC v. Wheatly Boys, LLC*, 259 N.C. App. 425, 427–28, 817 S.E.2d 397, 399 (2018) (citations omitted). Moreover, “[t]o obtain relief on appeal, an appellant must not only show error, but that appellant must also show that the error

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was material and prejudicial.” *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 196, 511 S.E.2d 31, 34 (1999) (citations omitted).

Williams argues that the trial court did not permit her to review and approve the proposed order and offer any changes or objections, as required by various local rules. But the order that the trial court entered was a straightforward dismissal order under Rules 12(b)(6) and 12(c), containing only boilerplate recitations and the determination that “Plaintiff’s Complaint fails to state a claim upon which relief can be granted in that Plaintiff’s Complaint fails to allege a material breach of contract by Defendants.” The trial court’s decision not to require compliance with the local rules in this circumstance was supported by reason and thus not so arbitrary that we could find it an abuse of discretion. *ABC Servs.*, 259 N.C. App. at 427–28, 817 S.E.2d at 399. Equally important, Williams acknowledges on appeal that she does not challenge the “legal merit” of the court’s order, only its “procedural integrity.” This is fatal to her argument because, without some showing that compliance with these local rules might have affected the result, Williams cannot show that the failure to follow these procedural rules prejudiced her in any way. *Crutchfield*, 132 N.C. App. at 196, 511 S.E.2d at 34. Thus, Williams has not shown that the trial court erred in its entry of the challenged order.

Conclusion

We affirm the trial court’s order.

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AFFIRMED.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).