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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-880

Filed: 5 May 2020

Pitt County, No. 06 CVD 3540

JENNIFER WALKER (formerly Surles), Plaintiff-Appellant,

v.

TROY SURLES, Defendant-Appellee.

Appeal by plaintiff from order entered 16 April 2019 by Judge Wendy S. Hazelton in Pitt County District Court. Heard in the Court of Appeals 15 April 2020.

White & Allen, PA, by David Fillippeli, Jr., for plaintiff-appellant.

No brief filed by the defendant-appellee.

BERGER, Judge.

Jennifer Walker (“Plaintiff”) appeals the trial court’s denial of her motion for contempt. Plaintiff argues the trial court erred when it (1) declined to hold Troy Surles (“Defendant”) in civil contempt, and (2) determined that Plaintiff failed to present evidence regarding Defendant’s ability to pay personal expenses. We dismiss Plaintiff’s appeal because the trial court lacked jurisdiction.

Factual and Procedural Background

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Plaintiff and Defendant were married on July 17, 2004. The parties had one child born of the marriage. Plaintiff and Defendant separated in December 2006. On December 15, 2006, Plaintiff filed suit against Defendant for child custody, child support, equitable distribution, and attorney's fees. On September 2, 2010, the parties participated in a Mediation Settlement Conference, agreed to provisions regarding child custody and child support, and executed a Memorandum of Compromise and Agreement ("September 2 Memorandum").

On February 20, 2012, Plaintiff filed a motion for modification of the September 2 Memorandum, alleging a substantial and material change affecting the welfare of the minor child. In addition, Plaintiff's motion included allegations that Defendant was in contempt of the September 2 Memorandum for his failure to comply with provisions related to child support. Plaintiff alleged Defendant had failed to reimburse Plaintiff for health insurance premiums, daycare expenses, and medical expenses associated with the minor child. As a result of Plaintiff's motion, the trial court awarded primary legal and physical custody of the minor child to Plaintiff, required Defendant to pay \$646.00 per month in child support, and held Defendant in contempt.¹

¹ For subsequent failures to comply with the September 2 Memorandum, Defendant was held in civil contempt in December 2012 and December 2013. Defendant's child support obligation was later reduced to \$560.00 per month by order filed on February 9, 2013.

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On February 20, 2019, Plaintiff filed a motion requesting that the trial court enter an “Order . . . directing defendant to appear, and show cause . . . as to why he should not be held in contempt” for willfully refusing to abide by the previous child support orders. Plaintiff’s motion was signed by her attorney, but the motion was not verified by Plaintiff, and the motion did not contain an affidavit signed by Plaintiff. On March 1, 2019, the trial court entered an order to show cause. The order to show cause indicated that it accepted Plaintiff’s “verified Motion . . . as an affidavit” and ordered Defendant to appear and show cause. The order to show cause was signed by the trial court but contained no affidavit or otherwise indicated that it was a sworn document. The order to show cause required that Defendant provide financial documents, including federal and state income tax records, checking accounts, pay stubs, medical payments for the minor child, and information concerning monthly expenses.

Defendant failed to appear at a March hearing to be advised of his right to counsel and failed to appear and present evidence at the April 2019 show cause hearing. The trial court made findings of fact and concluded that the trial court had jurisdiction over the parties and the subject matter, and that Plaintiff had not proven Defendant was in contempt.

Plaintiff appeals and argues that the trial court erred when it determined that Defendant was not in contempt for failure to pay child support. However, we do not

reach the merits of Plaintiff's appeal because the trial court did not have personal or subject matter jurisdiction.

Analysis

“It is well settled that the issue of a court’s jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*.” *Carpenter v. Carpenter*, 245 N.C. App. 1, 8, 781 S.E.2d 828, 835 (2016) (*purgandum*). “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 and quotation marks omitted). “Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute.” *Banks v. Hunter*, 251 N.C. App. 528, 531, 796 S.E.2d 361, 365 (2017) (citation and quotation marks omitted). “When a court decides a matter without the court[] having [subject matter] jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened.” *McKoy*, 202 N.C. App. at 511, 689 S.E.2d at 592 (citation and quotation marks omitted).

The procedures for initiating civil contempt are set forth in N.C. Gen. Stat. Section 5A-23.

- (a) Proceedings for civil contempt are by motion pursuant to G.S. 5A-23(a1), by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt, or by the notice of a judicial official that the alleged contemnor will be held in contempt unless he

appears at a specified reasonable time and shows cause why he should not be held in contempt. The order or notice must be given at least five days in advance of the hearing unless good cause is shown. The order or notice *may be issued on the motion and sworn statement or affidavit of one with an interest in enforcing the order, including a judge*, and a finding by the judicial official of probable cause to believe there is civil contempt.

(a1) Proceedings for civil contempt may be initiated by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt. A copy of the motion and notice must be served on the alleged contemnor at least five days in advance of the hearing unless good cause is shown. The *motion must include a sworn statement or affidavit by the aggrieved party* setting forth the reasons why the alleged contemnor should be held in civil contempt. The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party.

N.C. Gen. Stat. § 5A-23 (2019) (emphasis added). Thus, to initiate a proceeding for civil contempt, an aggrieved party must include a sworn statement or affidavit with its motion before the trial court may order a contemnor to show cause. *See Lowder v. Mills, Inc.*, 45 N.C. App. 348, 353, 263 S.E.2d 624, 627 (1980) (“Although the language used in the statute seems to be permissive in nature, . . . a petition, affidavit, or other proper verification charging a willful violation of an order of court was necessary in order for an order to show cause to issue.”), *rev’d in part on other grounds*, 301 N.C. 561, 273 S.E.2d 247 (1981).

On February 20, 2019, Plaintiff, through her attorney, filed a motion requesting that the trial court enter an “Order . . . directing defendant to appear, and

show cause.” The motion was signed by Plaintiff’s attorney but lacked a sworn statement or affidavit from Plaintiff as required by the procedural requirements of Section 5A-23.

The trial court erroneously issued a show cause order directing Defendant to appear and show cause based upon an a “verified motion” that was not verified and where no affidavit was filed. Thus, the trial court did not acquire subject matter jurisdiction pursuant to Section 5A-23(a1) because Plaintiff’s motion did not include a sworn statement or an affidavit. In addition, there was no valid notice or order pursuant to Section 5A-23(a) because there was no sworn statement or affidavit and no finding of probable cause in the order to appear and show cause.

Moreover, the trial court never acquired personal jurisdiction over Defendant. For purposes of establishing personal jurisdiction for civil contempt proceedings, the alleged contemnor must be served with proper notice, make a general appearance, or otherwise waive personal jurisdiction. *Bethea v. McDonald*, 70 N.C. App. 566, 568-69, 320 S.E.2d 690, 692 (1984). As stated above, the trial court did not issue a valid order or notice, Defendant never made a general appearance, and he did not waive personal jurisdiction. Thus, the trial court never acquired personal jurisdiction over Defendant.

Conclusion

For the foregoing reasons, we dismiss for lack of jurisdiction.

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DISMISSED.

Judges TYSON and COLLINS concur.

Report per Rule 30(e).