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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-5

Filed: 1 September 2020

Durham County, No. 17 CVD 4696

LAMONT ROBINSON, Plaintiff

v.

ADRIENNE ROBINSON, Defendant

Appeal by Defendant from Order entered 3 July 2019 by Judge Clayton J. Jones, Jr., in Durham County District Court. Heard in the Court of Appeals 12 May 2020.

No brief for plaintiff-appellee.

Foil Law Offices, by N. Joanne Foil and Britney R. Weaver, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Adrienne Robinson (Defendant) appeals from an “Order Regarding Orders to Show Cause” (Order) finding her former husband Lamont Robinson (Plaintiff) in civil contempt and imposing conditions by which Plaintiff could purge civil contempt. Defendant primarily contends the trial court’s purge conditions impermissibly modify

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the terms of the underlying orders that were the subject of the instant contempt proceedings and of which Plaintiff was alleged to be in willful violation. Relevant to this appeal, the Record before us tends to show the following:

The parties separated on 4 May 2014 and divorced on 27 April 2018. This case arises from a Complaint filed on 29 December 2017 seeking custody of the parties' minor child. Defendant answered Plaintiff's Complaint and asserted her own claim for child custody on 11 April 2018. On 19 November 2018, the trial court entered an order compelling Plaintiff to comply with discovery requests, participate in mediation, and awarding Defendant attorneys' fees to be set under separate order. The same day, the trial court entered its separate order requiring Plaintiff to pay attorneys' fees, related to its order compelling discovery and mediation, in the total amount of \$1,774.64—payable in monthly installments of \$443.66 beginning 30 November 2018, with the remaining payments due the first day of each subsequent month (November 2018 Attorneys' Fee Order). On 20 December 2018, the trial court entered an order for a separate attorneys' fee award to Defendant arising from the parties' child custody claims in the amount of \$12,000.00—payable in monthly installments of \$334.00 (December 2018 Attorneys' Fee Order).

Also on 20 December 2018, the trial court entered a Consent Judgment and Order, which purported to resolve the “pending issue of Equitable Distribution” (ED

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Consent Order).¹ As part of the ED Consent Order, Plaintiff was required to pay Defendant a distributive award of \$3,730.32—payable in four installments of \$932.58 due 15 April 2019, 15 June 2019, 15 September 2019, and 15 January 2020.

On 12 February 2019, Defendant filed a Motion for Contempt alleging Plaintiff had failed to make any payment toward the November 2018 Attorneys’ Fee Order or the December 2018 Attorneys’ Fee Order. The trial court issued an Order to Show Cause 14 February 2019. On 30 April 2019, Defendant filed a second Motion for Contempt alleging Plaintiff had also now failed to make the first payment toward the distributive award under the ED Consent Order, due 15 April 2019. Another Order to Show Cause issued on this second motion the same day.

¹ The savvy reader will note we have not mentioned any pending equitable distribution claim. This observation, coupled with the fact the parties divorced on 27 April 2018, would make the entry of the ED Consent Order problematic at best and, at worst, deprive the trial court of subject-matter jurisdiction to enter any order on equitable distribution. See N.C. Gen. Stat. § 50-11(e) (2019) (“An absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution under [N.C. Gen. Stat. §] 50-20 unless the right is asserted prior to judgment of absolute divorce; except, the defendant may bring an action or file a motion in the cause for equitable distribution within six months from the date of the judgment in such a case if service of process upon the defendant was by publication pursuant to [N.C. Gen. Stat. §] 1A-1, Rule 4 and the defendant failed to appear in the action for divorce.”); see also *Lockamy v. Lockamy*, 111 N.C. App. 260, 261, 432 S.E.2d 176, 177 (1993) (trial court lacked subject-matter jurisdiction to hear any claim for equitable distribution because neither party asserted the right to equitable distribution before the judgment of absolute divorce). Indeed, the Record before us contains no pleading or other filing asserting a claim for equitable distribution in this action prior to 27 April 2018. However, because the Consent Judgment and Order, signed by both parties, their respective counsel, and entered by a District Court Judge, recites the existence of a pending equitable distribution claim—and because no party asserts otherwise—*solely* for purposes of this appeal (and not expressing any opinion as to the validity of such a practice), we accept the parties’ affirmative representations made in the ED Consent Order that there was a pending equitable distribution claim.

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Following a 10 June 2019 hearing, on 3 July 2019, the trial court entered its Order on both of Defendant's Motions for Contempt. The trial court found Plaintiff in civil contempt with respect to the ED Consent Order by failing to make the first \$932.58 payment on 15 April 2019. The trial court also found Plaintiff in civil contempt of the November 2018 Attorneys' Fee Order. The trial court, however, found Plaintiff was not in civil contempt of the December 2018 Order on the basis Plaintiff did not have the ability to comply with that order.

The trial court ordered Plaintiff to purge contempt by paying Defendant \$1,300.00 on or before 5 July 2019. The trial court ordered \$932.58 of this sum be applied to Plaintiff's 15 June 2019 payment under the ED Consent Order and the remaining \$367.42 be applied to the arrears from the November 2018 Attorneys' Fee Order. The trial court further required Plaintiff pay off the remaining balance of the November 2018 Attorneys' Fee Order in monthly installments of \$200.00. The trial court also required Plaintiff pay arrears under the ED Consent Order "in amount of \$932.58" on or before 15 June 2020. Finally, notwithstanding the fact the trial court found Plaintiff not in contempt of the December 2018 Attorneys' Fee Order, the trial court, nevertheless, ordered Defendant to continue paying \$200.00 per month toward the December 2018 Attorneys' Fee Order once the November 2018 Attorneys' Fee Order was paid off.

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On 1 August 2019, Defendant filed Notice of Appeal from the trial court's 3 July 2019 Order.

Issue

The dispositive issue on appeal is whether the purge provisions imposed by the trial court impermissibly served to modify the underlying orders of which Plaintiff was found in civil contempt.

Standard of Review

“The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.” *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007). “‘Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment.’” *Id.* (quoting *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990)).

Analysis

Plaintiff has not appealed the portions of the trial court's Order holding him in civil contempt. Thus, we do not reach the question of whether Plaintiff was properly held in civil contempt or whether the trial court's Order contains sufficient findings of fact or conclusions of law to support a civil contempt adjudication. Rather, it is

Defendant who appeals the Order contending the trial court's purge conditions impermissibly modify payments owed as agreed to by the parties under the ED Consent Order and as previously ordered by the trial court in the November 2018 Attorneys' Fee Order and December 2018 Attorneys' Fee Order. Thus, Defendant contends the trial court's Order holding Plaintiff in civil contempt and imposing such purge conditions constitutes a final judgment under N.C. Gen. Stat. § 7A-27(b)(2) from which she has a right of appeal. N.C. Gen. Stat. § 7A-27(b)(2) (2019). The only statute providing an express right to appeal a civil contempt judgment on its face applies only to the person found in civil contempt. N.C. Gen. Stat. § 5A-24 (2019) ("A person found in civil contempt may appeal in the manner provided for appeals in civil actions.").

Here, however, if in fact the purge conditions in the trial court's Order resulted in a modification of the prior orders and impacted the substantive obligations of the parties under those prior orders to Defendant's detriment, Defendant would constitute a party aggrieved under N.C. Gen. Stat. § 1-277 and be entitled to appeal such final judgment or order from District Court under Section 7B-27(b)(2). Consequently, we reach the merits of Defendant's appeal in order to resolve both the question of appellate jurisdiction and the underlying issue of whether the trial court's purge conditions constitute an improper modification of prior orders.

A. *Distributive Award Payments*

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Defendant first argues the trial court’s purge conditions, related to its finding Plaintiff in civil contempt for violating the ED Consent Order, improperly modified the terms of the previously agreed-upon distributive award payment schedule.

“The purpose of civil contempt is not to punish but to coerce the [contemnor] to comply with a court order.” *Cox v. Cox*, 133 N.C. App. 221, 226, 515 S.E.2d 61, 65 (1999). “Under N.C. Gen. Stat. § 5A-22(a) (2015), a contempt order ‘must specify how the person may purge [herself] of the contempt.’ The purge conditions cannot be impermissibly vague, but must ‘clearly specify what the [contemnor] can and cannot do . . . in order to purge herself of the civil contempt.’” *Wilson v. Guinyard*, 254 N.C. App. 229, 238, 801 S.E.2d 700, 706 (2017) (quoting *Cox*, 133 N.C. App. at 226, 515 S.E.2d at 65).

Applicable to this case, “[a]s a general rule a consent judgment cannot be modified or set aside except by agreement of the parties.” *White v. White*, 296 N.C. 661, 665, 252 S.E.2d 698, 700 (1979). Additionally, “[a] consent judgment can be set aside unilaterally, though, in case of fraud or mutual mistake[.]” *Id.* These general principles hold in the case of a consent judgment or consent order integrating a marital property settlement. *See id.* at 666-67, 252 S.E.2d at 701.

In this case, the parties’ ED Consent Order required Plaintiff to make four payments of \$932.58 to Defendant as a distributive award. These payments were due 15 April 2019, 15 June 2019, 15 September 2019, and 15 January 2020. This civil

contempt action was based on Plaintiff's failure to make the very first installment payment on 15 April 2019. Having found Plaintiff in civil contempt for the failure to make this payment, the trial court's purge provision required Plaintiff to make a \$1,300.00 payment by 5 July 2019 to Defendant, and directed \$932.58 of that payment be applied to the installment due 15 June 2019. The trial court also required Plaintiff pay "arrears owed by Plaintiff pursuant to the [ED Consent Order] in the amount of \$932.58 [to] be satisfied in full by Plaintiff on or before [15 June 2020]."

The trial court's purge provisions appear to have the effect of modifying the parties' ED Consent Order by either eliminating Plaintiff's liability for the 15 April 2019 payment altogether or by extending the duration of the payments until 15 June 2020. Indeed, the trial court's Order could also be read to mean that once Plaintiff made the first \$1,300.00 payment (with \$932.58 applied to the June 2019 payment), Plaintiff need only make one payment of \$932.58 by 15 June 2020 to satisfy his entire obligation under the parties' ED Consent Order. Any of these interpretations would constitute an improper modification of the parties' ED Consent Order. Moreover, if this was not the intent of the trial court, its purge provisions are impermissibly vague in failing to clearly specify what Plaintiff was required to do to bring himself into compliance with the ED Consent Order and specifically the payment due 15 April 2019.

B. November 2018 Attorneys' Fee Award Payments

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Next, Defendant contends the trial court impermissibly modified the November 2018 Attorneys' Fee Order by modifying the payment schedule in allowing Plaintiff to apply the remaining balance of the required \$1,300.00 payment (\$367.42) to the attorneys' fees owed and requiring Plaintiff to make \$200.00 per month payments until the balance was paid. The trial court's Order in this regard, however, did not modify the payment schedule under the November 2018 Attorneys' Fee Order. This is because the full balance of that attorneys' fee award was already due and payable at the time of the civil contempt hearing. Thus, the trial court had the authority to fashion appropriate purge conditions to compel Plaintiff to pay the full amount due, including through regular monthly payments of limited duration. However, the trial court's purge provision requiring ongoing monthly payments that would ultimately not match up to the amount due² and then requiring Defendant continue paying \$200.00 indefinitely towards the December 2018 Attorneys' Fee Order is exactly the type of purge provision our Courts have determined to be impermissibly vague. *See Lueallen v. Lueallen*, 249 N.C. App. 292, 319, 790 S.E.2d 690, 707-08 (2016); *Spears v. Spears*, 245 N.C. App. 260, 284, 784 S.E.2d 485, 501 (2016).

C. *December 2018 Attorneys' Fee Award Payments*

² After applying the \$367.42 to the balance of \$1,774.60, the remaining balance is \$1,407.18. The trial court's Order requires payment of \$200.00 per month towards this balance without provision for the eventual remainder of \$7.18.

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Finally, Defendant also challenges the portion of the trial court's Order permitting Plaintiff to make future payments towards the \$12,000.00 balance of the December 2018 Attorneys' Fee Order in monthly installments of \$200.00 to begin after satisfaction of the November 2018 Attorneys' Fee Order. The trial court found Plaintiff in arrears but not in willful violation of the December 2018 Attorneys' Fee Order on the basis Plaintiff did not have the ability to make payments towards these fees. Thus, the trial court's Order requiring monthly \$200.00 payments applied to this award to begin at some future date does not constitute a purge condition for purposes of compelling Plaintiff's compliance with the December 2018 Attorneys' Fee Order. Rather, we agree with Defendant that this provision is an improper modification of the December 2018 Attorneys' Fee Order.

"A district court judge may not ordinarily modify, overrule, or change the judgment of another district court judge previously made in the same action." *Hogue v. Hogue*, 251 N.C. App. 425, 428, 795 S.E.2d 607, 609 (2016). "An exception to this rule allows a subsequent trial judge to rehear an issue and enter a ruling if there has been a material change in the circumstances of the parties and the initial ruling was one which was addressed to the discretion of the trial judge." *Morris v. Gray*, 181 N.C. App. 552, 555, 640 S.E.2d 737, 739 (2007) (citation and quotation marks omitted).

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Here, the trial court made no determination there had been a material change in circumstances justifying relief from the December 2018 Attorneys' Fee Order. *Id.* Further, there is no indication in the Record either party moved for relief from that order under N.C.R. Civ. P. 60(b) or that the trial court was acting to grant relief from judgment pursuant to Rule 60(b).³ *Hogue*, 251 N.C. App. at 428, 795 S.E.2d at 609. As such, the trial court had no authority to modify the earlier December 2018 Attorneys' Fee Order; the trial court's Order in this regard must be vacated.

Thus, the trial court's purge conditions are either impermissibly ambiguous or, otherwise, impermissibly modify the prior orders. Therefore, we conclude we have appellate jurisdiction in this case and Defendant has a right to appeal. We further conclude the trial court erred in entering its Order holding Plaintiff in civil contempt. Consequently, we vacate the trial court's Order holding Plaintiff in civil contempt and remand this matter for the trial court to determine whether (A) Plaintiff remains in civil contempt; and (B) if so, to provide for proper purge conditions. *See McKinney v. McKinney*, 253 N.C. App. 473, 476, 799 S.E.2d 280, 283 (2017) ("[A] district court does not have the authority to impose civil contempt after an individual has complied with a court order, even if the compliance occurs after the party is served with a motion to

³ Thus, we do not reach the question of whether Plaintiff's inability to pay the attorneys' fee award justified any relief or modification of Plaintiff's obligations under the December 2018 Attorneys' Fee Order.

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show cause why he should not be held in contempt of court.” (citation and quotation marks omitted)).

Conclusion

Accordingly, for the foregoing reasons, we vacate the trial court’s 3 July 2019 Order and remand the matter for the trial court to impose appropriate conditions under which Plaintiff, if he remains in civil contempt, may purge himself from civil contempt.

VACATED AND REMANDED.

Chief Judge McGEE and Judge ZACHARY concur.

Report per Rule 30(e).