An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-666

No. COA21-703

Filed 4 October 2022

Watauga County, No. 15 CVD 556

BOUNTHANH SISOUKRATH, Plaintiff,

v.

SISAVATH SISOUKRATH, Defendant.

Appeal by plaintiff from order entered 26 May 2021 by Judge Larry B. Leake in District Court, Watauga County. Heard in the Court of Appeals 24 May 2022.

Miller & Johnson, PLLC, by Nathan A. Miller, for plaintiff-appellant.

Morrow, Porter, Vermitsky and Taylor, PLLC, by John C. Vermitsky, for defendant-appellee.

STROUD, Chief Judge.

¶ 1 Plaintiff appeals an order setting aside and voiding a divorce judgment and dismissing her divorce action for lack of service of process. Because the trial court's unchallenged findings of fact support its conclusion that the trial court did not have personal jurisdiction over defendant due to insufficiency of service of process, we affirm.

I. Background

¶ 2 On or about 26 October 2015, plaintiff-wife filed a verified complaint alleging she and defendant-husband were married 8 January 2007 and separated 26 October 2014. Wife made claims for absolute divorce, equitable distribution, post-separation support, alimony, and attorney fees. On or about 2 February 2016, the trial court entered an order granting Wife's claim for absolute divorce, leaving the remaining claims pending for further hearing ("Divorce Judgment"). On or about 16 February 2016, Wife voluntarily dismissed her remaining pending claims.

¶ 3 On 15 June 2020, Husband filed a verified motion based on North Carolina Rule of Civil Procedure Rule 59 and Rule 60 requesting that the Divorce Judgment be set aside because he was never served with the summons and complaint or the Divorce Judgment ("Husband's Rule 59 & 60 Motion"). The trial court held a hearing on 13 July 2020, and on 27 July 2020, the trial court entered an order setting aside and voiding the Divorce Judgment because Husband "has never been served with any of the documents related to Plaintiff's divorce action." ("2020 Set Aside Order"). In August 2020, Wife filed a verified motion for relief under Rules 59 and 60 requesting to set aside the Set Aside Order ("Wife's Rule 59 & 60 Motion"). Other motions were filed. On or about 16 November 2020, Wife filed an amended verified motion for relief under Rules 59 and 60, again requesting to set aside the 2020 Set Aside Order ("Wife's Amended Rule 59 & 60 Motion").

¶ 4 After hearings on 25 February and 18, 19, and 22 March 2021, the trial court

entered an order on 26 May 2021 allowing Wife's Rule 59 & 60 Motion and set aside the 2020 Set Aside Order, meaning the Divorce Judgment was back in effect ("2021 Set Aside Order"). Also, on 26 May 2021, and noting the same hearing dates as the 2021 Set Aside Order, based on Husband's Rule 59 & 60 Motion, the trial court again set aside and voided the Divorce Judgment and dismissed Wife's action "for lack of service of process" ("Set Aside & Dismissal Order").

¶ 5 The trial court found Husband "almost totally resided in Laos." Wife attempted to serve Husband in Laos, and "service was purportedly effected on or about December 11, 2015" at "[t]he Angnamhoum address" in Laos. But, "[t]he Angnamhoum address" did "not match either of the Civil Summonses issued in this case[,]" and Husband "has never lived at the Angnamhoum address[.]" Husband contends "service was not proper as to form and that the alleged signature on the return receipt was a forgery." Indeed, the trial court believed Husband and found "[s]omeone forged [Husband]'s signature[,]" and thus "there has not been valid service of this Action on the Defendant." Therefore, the trial court set aside the Divorce Judgment. Wife appeals the final Set Aside and Dismissal Order.

II. Motion to Dismiss

¶ 6 Wife first contends "the trial court erred by denying the [Wife's] motion to dismiss the [Husband's] Rule 59/60 motion." (Capitalization altered.) Wife made an oral motion to dismiss but from our review of the transcript, the trial court never

ruled on this oral motion. Wife fails to direct us to where the trial court denied her motion. Accordingly, there is nothing for this Court to review. *See generally* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. *It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.*" (emphasis added)); *Blyth v. McCrary*, 184 N.C. App. 654, 660, 646 S.E.2d 813, 817 (2007) ("In order to preserve a question for appellate review, the complaining party must obtain a ruling from the trial court upon the party's request, objection or motion. Plaintiffs concede that the trial court entered no order regarding discovery of defendants' computers or release of information concerning the income and assets of defendants. Absent a ruling from the trial court on these two issues, plaintiffs may not assign error to them. Accordingly, these two assignments of error are dismissed." (citation, quotation marks, ellipses, and brackets omitted)). This argument is dismissed.

III. Waiver of Service

¶ 7 Wife next contends "the trial court erred by finding and concluding that . . . [Husband] had not waived service issues by filing a Rule 59/60 motion and subsequent filings." (Capitalization altered.)

In an appeal from a judgment entered in a non-jury

> trial, our standard of review is whether competent evidence exists to support the trial court's findings of fact, and whether the findings support the conclusions of law. The trial judge acts as both judge and jury and considers and weighs all the competent evidence before him. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary. When competent evidence supports the trial court's findings of fact and the findings of fact support its conclusions of law, the judgment should be affirmed in the absence of an error of law.

Resort Realty of Outer Banks, Inc. v. Brandt, 163 N.C. App. 114, 116, 593 S.E.2d 404, 407–08 (2004) (citations and quotation marks omitted). "[U]nchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *In re R.D.B.*, 274 N.C. App. 374, 379–80, 853 S.E.2d 1, 5 (2020) (citation and quotation marks omitted). "We review conclusions of law de *novo*." *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

> > In order for a court to obtain personal jurisdiction over a defendant, a summons must be issued and service of process secured by one of the statutorily specified methods. If a party fails to obtain valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed.
>
> Medlin filed an answer but raised the lack of service as its first affirmative defense, thus preserving the defense.
>
> > *To preserve the defenses of insufficiency of service, service of process, and lack of personal jurisdiction, the defendant must assert them in either a motion filed prior to any responsive pleading or include them in his answer or*

> *other responsive pleading permitted by the Rules of Civil Procedure*. If a defendant makes a general appearance in conjunction with or after a responsive pleading challenging jurisdiction pursuant to Rule 12(b), his right to challenge personal jurisdiction is preserved.

Stunzi v. Medlin Motors, Inc., 214 N.C. App. 332, 335–36, 714 S.E.2d 770, 774 (2011) (emphasis added) (citations and quotation omitted); *see also Kleinfeldt v. Shoney's of Charlotte, Inc.*, 257 N.C. 791, 794, 127 S.E.2d 573, 575 (1962) ("Service of summons, unless waived, is a jurisdictional requirement. A meritorious defense is not essential or relevant on a motion to set aside a default judgment for want of jurisdiction by reason of want of service of summons." (citation omitted)).

¶ 8 Wife does not challenge the trial court finding of fact that Husband was not properly served the divorce complaint and subsequent judgment. Instead, Wife contends that by filing his motion to set aside the Divorce Judgment, he waived any objection to service of the divorce complaint and summons. Wife argues,

> Appellee / Defendant filed a Motion for Relief Pursuant to Rule 59 / 60 *on June 15, 2020*. (R pp 18 – 40). Appellee only requested three causes of relief in his Rule 59 / 60 motion which were that the motion be treated as verified affidavit, that the Appellee / Defendant be granted relief from the February 2, 2016, judgment, and such other and further relief that the court deems just and proper. (R pp 20 – 21). *The Appellee never prayed unto the court or requested that the Court dismiss this action based upon no service.*

(Emphasis added.) This is simply false.

¶ 9 In Husband's 15 June 2020 "MOTION FOR RELIEF PURSUANT TO RULES 59 and 60[,]" he noted he was "never served" with the summons; "counsel for [Mother] never achieved proper service on [him;]" Mother failed "to serve the above pleadings on [him']" and "[he] has never been served with **any** of the documents related to [Mother's] divorce action." (Emphasis in original.) Husband then requests his motion be treated as a verified affidavit and he "be granted relief from the Judgment[.]" Thus, the first time Husband appeared in the case, he challenged service of process.

¶ 10 Husband filed later other motions, but this does not alter the fact that Husband plainly challenged sufficiency of service of process upon his first filing with the Court. Husband did not make a general appearance before filing the Rule 59 and 60 Motion challenging sufficiency of service and thereby personal jurisdiction. *See generally In re Blalock*, 233 N.C. 493, 504, 64 S.E.2d 848, 856 (1951) ("[A] general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person.") Wife does not challenge the trial court's finding of fact that Husband was not served with the summons and complaint and that he did not waive or accept service. This argument is without merit.

IV. Service

¶ 11 Last, Wife contends "the trial court erred by finding that the

appellee/defendant was not properly served with the summons and the lawsuit pursuant to Rule 4 of the North Carolina Rules of Civil Procedure." (Capitalization altered.) While Wife does not challenge any specific finding of fact, Wife contends Husband's and his sister's testimonies "that the signature on the return receipt was not his" are insufficient because their testimonies are "biased[.]" Wife also demands corroboration of the testimony of Husband and his sister but cites no authority for this requirement.

¶ 12 There is no specific requirement for corroboration of testimony regarding signatures or a lack thereof in this situation, and bias does not make evidence incompetent as potential bias is simply a factor for the trial judge to consider in considering credibility of the evidence. *See In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) ("[W]hen a trial judge sits as both judge and juror, as he or she does in a non-jury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." (citation and quotation marks omitted)); *see generally Resort Realty of Outer Banks, Inc.*, 163 N.C. App. at 116, 593 S.E.2d at 408 (2004) ("The trial judge acts as both judge and jury and considers and weighs all the competent evidence before him. The trial court's findings of fact are binding on appeal if competent evidence supports them, despite the existence of evidence to the contrary. When competent evidence supports

the trial court's findings of fact and the findings of fact support its conclusions of law, the judgment should be affirmed in the absence of an error of law.").

¶ 13 Based on the trial court's unchallenged and thus binding finding of facts, *see In re R.D.B.*, 274 N.C. App. at 379–80, 853 S.E.2d at 5, "there has not been valid service of this Action on the Defendant." Accordingly, the trial court properly concluded, "service failures constitute that the judgement is void[.]" *See Stunzi*, 214 N.C. App. at 335–36, 714 S.E.2d at 774. This argument is overruled.

V. Conclusion

¶ 14 Because Husband was not properly served with the summons and complaint; the trial court did not err by voiding the Divorce Judgment.

AFFIRMED.

Judges DILLON and GRIFFIN concur.

Report per Rule 30(e).