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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-853

No. COA22-474

Filed 20 December 2022

Sampson County, No. 21 CVD 1238

ADRIANA LUSINA JUAREZ for J.I.A-M., Plaintiff,

v.

LENNIN ALVAREZ-GOMEZ, Defendant.

Appeal by defendant from order entered 22 February 2022 by Judge Michael Surles in Sampson County District Court. Heard in the Court of Appeals 1 November 2022.

Legal Aid of North Carolina, Inc., by Kaitlyn Parker, Devin Trego, TeAndra H. Miller, James Battle Morgan, Jr., and Celia Pistolis, for plaintiff-appellee.

Jesse Jones Law, P.A., by Jesse Womble Jones, for defendant-appellant.

DIETZ, Judge.

¶ 1 Defendant Lennin Alvarez-Gomez appeals the trial court's order denying his Rule 60(b) motion to set aside a domestic violence protective order entered against him. As explained below, under the narrow standard of review applicable to the denial of a Rule 60(b) motion, the trial court's ruling was well within the court's sound discretion and we therefore affirm the trial court's order.

Facts and Procedural History

¶ 2 In 2021, Defendant's daughter, Jessica[1], was five years old and lived with Defendant under a custody order that provided for monthly visitation with Plaintiff, Jessica's grandmother. During a monthly visit in October 2021, Jessica told Plaintiff that Defendant had sexually abused her. Plaintiff contacted police and child protective services to report Jessica's allegations. Following an investigation, Defendant was charged with felony sex offenses.

¶ 3 On 17 November 2021, Plaintiff filed a complaint and motion for a domestic violence protective order on behalf of Jessica. The same day, the trial court entered an ex parte DVPO against Defendant. The court also appointed Plaintiff as Jessica's guardian ad litem. The matter was initially set for hearing on 22 November 2021, but the trial court continued the hearing because Defendant had not yet been served. The trial court's continuance order extended the ex parte DVPO and granted Plaintiff temporary custody of Jessica.

¶ 4 On 13 December 2021, the trial court again found that Defendant had not been served and set a new hearing date of 24 January 2022. Defendant ultimately received service of the pleadings, the ex parte DVPO, and the notice of hearing on 3 January 2022.

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[1] We use a pseudonym to protect the identity of the child.

¶ 5 On 24 January 2022, the trial court held the hearing on Plaintiff's complaint. Defendant and his trial counsel did not appear at the hearing. Following the hearing, the trial court entered the requested DVPO against Defendant. In the order, the court found that Defendant had "sexually assaulted" Jessica, ordered Defendant to have no contact with her, and granted temporary custody to Plaintiff. At the time of the January 2022 hearing, the criminal sex offense charges against Defendant were still pending.

¶ 6 On 27 January 2022, Defendant's counsel filed a "Motion to Set Aside Domestic Violence Order of Protection." The motion stated that Defendant retained his counsel on 19 January 2022, that Defendant "was believed to have [had] Covid-19" and failed to appear at the hearing for that reason, and that Defendant's counsel had a medical emergency the morning of the hearing and thus could "not appear on the Defendant's behalf to request a continuance." Defendant asked the trial court to set aside the DVPO on that basis "to allow for a contested hearing on the facts." The motion did not assert any defenses to the allegations against Defendant or describe any evidence or arguments Defendant would have presented had he or his counsel been present at the hearing.

¶ 7 The trial court held a hearing on Defendant's motion on 21 February 2022 with both parties' counsel present. Defendant appeared at the hearing but did not testify. Both parties' counsel made arguments but did not present any witnesses or other

evidence. The following day, the trial court entered a written order denying Defendant's motion, finding that grounds "do not exist to rise to the level to set aside the 1-24-22 DVPO under Rule 60(b)." On 28 February 2022, Defendant filed notice of appeal from the underlying DVPO and the subsequent order denying his Rule 60 motion. He later filed notice of dismissal of his appeal from the DVPO.

Analysis

¶ 8 Defendant argues that the trial court abused its discretion in denying his motion for relief from the domestic violence protective order because the trial court should have set aside the order on the ground that defense counsel made a "fatal mistake by failing to inform the court that he was experiencing a medical emergency, that Defendant was sick with COVID-19 symptoms, and that neither could appear in court."

¶ 9 A motion for relief under Rule 60(b) "is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). This Court can find an abuse of discretion only "when the court's decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Brown v. Foremost Affiliated Ins. Servs., Inc.*, 158 N.C. App. 727, 732, 582 S.E.2d 335, 339 (2003).

¶ 10 Defendant contends that the trial court should have granted him relief from

the domestic violence protective order under either Rule 60(b)(1) or 60(b)(6). Rule 60(b)(1) permits the trial court to grant relief from a final judgment or order on the basis of mistake, inadvertence, surprise, or excusable neglect. N.C. R. Civ. P. 60(b). Rule 60(b)(6) allows the trial court to grant relief for any other reason justifying relief from the operation of the judgment. *Id.*

¶ 11 Importantly, in addition to the express requirement of a mistake or other reason justifying relief, case law applying both of these subsections of Rule 60 requires the moving party to show the existence of a meritorious defense to the order or judgment entered against them. "A party moving to set aside a judgment under Rule 60(b)(1) must show not only one of the grounds listed above but also the existence of a meritorious defense." *Baker v. Baker*, 115 N.C. App. 337, 340, 444 S.E.2d 478, 480 (1994). Likewise, under Rule 60(b)(6), the defendant must show that he "has a meritorious defense" in addition to showing "extraordinary circumstances" and that "justice demands the setting aside of the judgment." *Gibby v. Lindsey*, 149 N.C. App. 470, 474, 560 S.E.2d 589, 592 (2002).

¶ 12 This requirement serves the interests of judicial economy by assessing whether there is "a real or substantial defense on the merits" that could change the result because "otherwise the court would engage in the vain work of setting a judgment aside when it would be its duty to enter again the same judgment on motion of the adverse party." *Norton v. Sawyer*, 30 N.C. App. 420, 423, 227 S.E.2d 148, 152 (1976).

This Court has held that a trial court does "not abuse its discretion in denying defendant's motion for relief where there is no indication in the record that defendant made any showing to the trial court of what evidence it would have presented." *Elliott v. Enka-Candler Fire & Rescue Dep't, Inc.*, 213 N.C. App. 160, 171, 713 S.E.2d 132, 140 (2011).

¶ 13 Here, after Defendant's counsel explained what transpired on the day of the scheduled hearing and why he and Defendant were unable to appear, the trial court responded that, whether or not Defendant had retained counsel, he was still required to be present at the hearing; that Defendant was not present; and that he "didn't contact the clerk's office that Monday morning, saying hey, I cannot make a court appearance because I'm under quarantine, or I'm sick, anything of that nature." The trial court acknowledged that Defendant did contact his counsel's office that morning, but stated that "a paralegal from your office could have shown up or reached out to [Plaintiff's counsel], at least showed up for court . . . just to ensure I was made aware early in the day" that defense counsel was unavailable and that Defendant "says he can't show up because he has got COVID."

¶ 14 The court concluded that Defendant had the responsibility to appear or contact the trial court in some way on the morning of the scheduled hearing, and that his failure to do so was "inexcusable neglect." The trial court explained that it would not "give people a second bite of the apple unless there are extenuating circumstances

that fall appropriately under Rule 60" and that the court found Defendant did not satisfy that burden.

¶ 15 "Whether neglect is 'excusable' or 'inexcusable' is a question of law which depends upon what, under all the surrounding circumstances, may be reasonably expected of a party to litigation. The trial judge's conclusion in this regard will not be disturbed on appeal if competent evidence supports the judge's findings, and those findings support the conclusion." *JMM Plumbing & Utilities, Inc. v. Basnight Const. Co.*, 169 N.C. App. 199, 202, 609 S.E.2d 487, 490 (2005). The record readily demonstrates that the trial court made a reasoned decision well within its sound discretion. At the time of the trial court proceedings in this matter, an emergency directive was in effect which provided that a "person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction." Emergency Directive 2, 10 May 2021 Order of the Chief Justice of the Supreme Court of North Carolina. Thus, the trial court's conclusion that Defendant's failure to contact the court was "inexcusable neglect" was supported by its findings. *JMM Plumbing*, 169 N.C. App. at 202, 609 S.E.2d at 490.

¶ 16 Moreover, Defendant failed to present any evidence or make any argument—either in his written motion or his argument at the hearing—concerning a

meritorious defense that he could have put forward had he been present at the hearing. *Baker*, 115 N.C. App. at 340, 444 S.E.2d at 480; *Gibby*, 149 N.C. App. at 474, 560 S.E.2d at 592. Thus, under the narrow standard of review applicable to the denial of a Rule 60(b) motion, we hold that the trial court's ruling was not an abuse of discretion. *Norton*, 30 N.C. App. at 423, 227 S.E.2d at 152; *Elliott*, 213 N.C. App. at 171, 713 S.E.2d at 140.

¶ 17 Finally, Defendant contends that the trial court's denial of relief from the DVPO violated his "constitutional parental rights" to custody of Jessica. Defendant waived this argument by failing to raise it in the trial court below. "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial court. Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court." *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003).

¶ 18 Here, Defendant did not assert to the trial court that the court's denial of the Rule 60(b) motion would create a constitutional concern, either in his written motion or his arguments at the motion hearing. Where "a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996). Accordingly, Defendant waived this constitutional argument by not timely raising it with the trial court.

Conclusion

¶ 19 For the reasons explained above, we affirm the trial court's order.

AFFIRMED.

Judges DILLON and INMAN concur.

Report per Rule 30(e).