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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-494

Filed 7 May 2024

Columbus County, No. 18 CVD 1519

JAMES DIMUZIO, JR., Plaintiff,

v.

VICKI LYNNE DIMUZIO, Defendant,

v.

COASTAL LANDMARK PROPERTIES, LLC, COASTAL CAROLINA ENT, DO,
CCENT PROPERTIES, LLC, Third-Party Defendants.

Appeal by Defendant from order entered 14 March 2022 by Judge C. Ashley Gore in Columbus County District Court. Heard in the Court of Appeals 6 February 2024.

Jonathan McGirt for Plaintiff-Appellee.

The Lea/Schultz Law Firm, P.C., by James W. Lea, III, for Defendant-Appellant.

GRIFFIN, Judge.

Defendant Vicki Lynne DiMuzio appeals from the trial court's order establishing Plaintiff James DiMuzio, Jr.'s alimony obligations and denying

Defendant's claims for attorney's fees. Defendant contends the trial court erred by entering the order because (1) the court incorrectly determined the amount of alimony to be awarded; (2) did not make sufficient findings to support its award; (3) and the award was not equitable. We affirm.

I. Factual and Procedural Background

Plaintiff and Defendant married in March 1991 and separated in January 2018. During the marriage, Plaintiff, through his work as a physician and a real estate investor, was the primary source of income while Defendant raised their three children and managed the home.

On 20 December 2018, Plaintiff filed a complaint for equitable distribution of assets from his and Defendant's marriage. On 15 January 2019, Defendant responded with an answer, counterclaim, and motion to change venue. Defendant requested post-separation support, alimony, and equitable distribution.¹ On 11 March 2019, Plaintiff filed a reply.

On 11 December 2019, following a hearing on the matter, the trial court entered an order establishing post-separation support ("PSS") and interim equitable distribution (the "First PSS Order"). The First PSS Order ordered Plaintiff to pay Defendant \$13,000 per month in PSS, as well as over \$135,000 in PSS arrears.

¹ Defendant also made claims against a number of other corporate defendants, but later dismissed those claims pursuant to a consent order. The corporate defendants are no longer parties to this appeal.

Between December 2019 and March 2022, Plaintiff moved for and received three amendments to his PSS obligations following full trial court hearings. On 12 February 2020, the trial court entered an order directing Plaintiff to pay \$10,000 per month and setting out an interim distribution of marital assets (the “Second PSS Order”).² On 9 October 2020, the court entered an order modifying Plaintiff’s PSS to \$7,500 per month (the “Third PSS Order”). The First, Second, and Third PSS Orders each explicitly stated that they were “temporary in nature and entered without prejudice to either party.”

On 14 March 2022, following a two-day hearing on the matter, the trial court entered an order setting Plaintiff’s alimony obligations to \$5,300 per month and denying Defendant’s request for attorney’s fees (the “Alimony Order”). Defendant appealed to this Court on 17 March 2022.

II. Analysis

Defendant presents three arguments on appeal. Primarily, Defendant contends the trial court erred in its calculation of Defendant’s expenses and made findings of fact related to the calculations without evidentiary support from the record. Defendant further argues the court failed to make sufficient appropriate and required findings for the alimony award, and otherwise abused its discretion by entering an award that was not equitable to both parties.

² On 30 October 2020, Plaintiff and Defendant entered a Consent Order Equitable Distribution. Issues of equitable distribution are not before us in this appeal.

We first address Plaintiff's motion to dismiss Defendant's appeal, then move to each of Defendant's arguments.

A. Motion to Dismiss

Plaintiff filed a motion to dismiss Defendant's appeal because, by serving notice of appeal on Plaintiff by facsimile only, Defendant failed to properly serve opposing counsel as required by Rules 3 and 26 of the North Carolina Rules of Appellate Procedure.

Rule 3 states that an appellant "may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties" within, usually, thirty days from entry of the judgment being appealed, and with service being "made as provided in Rule 26." N.C. R. App. P. 3(a), (c), (e). Rule 26 provides that the proper manner of service of a notice of appeal includes various forms of hand delivery, use of the United States Postal Service, or, in rarer instances, e-mail; Rule 26 does not list facsimile as a proper manner of service. N.C. R. App. P. 26(c). "Proper filing of a notice of appeal is necessary to vest appellate courts with subject matter jurisdiction," but "proper service of a notice of appeal is a non-jurisdictional requirement." *MNC Holdings, LLC v. Town of Matthews*, 223 N.C. App. 442, 446, 735 S.E.2d 364, 366 (2012) (citations omitted). "The violation of non-jurisdictional rules warrants dismissal only when the violation or violations amount to a 'substantial failure or gross violation' of the Appellate Rules that impairs this Court's task of review or frustrates the adversarial process." *Bradley v. Cumberland Cnty.*,

262 N.C. App. 376, 378, 822 S.E.2d 416, 418 (2018) (citing *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198–99, 657 S.E.2d 361, 365–66 (2008)).

Defendant concedes she served the notice of appeal only via facsimile, which is not an approved manner of service under Rule 26. However, Defendant’s notice of appeal was otherwise sufficient and timely. Likewise, all necessary parties have submitted materials to this Court in this matter and the record is sufficient for our review. *See Bradley*, 262 N.C. App. at 381, 822 S.E.2d at 420 (holding non-jurisdictional error did not warrant dismissal because it was “clear that [the opposing party] had actual notice of appeal to this Court by their participation in the appeal”). Plaintiff has not presented a meritorious claim for prejudice due to Defendant’s error. Because Defendant’s error in service is non-jurisdictional and does not amount to a gross violation of the rules, we deny Plaintiff’s motion to dismiss.

B. Alimony Determination

Defendant contends the trial court erred in its calculation of Plaintiff’s monthly alimony obligation, and that the court’s findings of fact reflect this error because they were not based upon competent evidence from the hearing. We hold the trial court’s findings of fact, and ultimate calculation of Plaintiff’s alimony obligation, were based upon competent evidence presented at the hearing for the Alimony Order.

Once the court determines that, as a matter of law, a party is a dependent spouse entitled to receive alimony, “[t]he court shall exercise its discretion in

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determining the amount, duration, and manner of payment of alimony.” N.C. Gen. Stat. § 50-16.3A(b) (2021). “In applying the statute to particular factual situations, our cases have consistently embodied the rule that while the factors which are delineated in the statute must be considered by the judge in determining the amount of alimony to be awarded in a given case, [the judge’s] determination of the proper amount may not be disturbed on appeal absent a clear showing of abuse of discretion.” *Clark v. Clark*, 301 N.C. 123, 128, 271 S.E.2d 58, 63 (1980) (citations omitted). “A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason.” *Id.* at 129, 271 S.E.2d at 63 (citation omitted).

PSS may be ordered in proceedings prior to an alimony determination, but PSS “is only intended to be temporary and ceases when an award of alimony is either allowed or denied by the trial court.” *Rowe v. Rowe*, 131 N.C. App. 409, 411, 507 S.E.2d 317, 319 (1998). With that in mind, we have held that our General Assembly “unmistakably” intended “that factual determinations by the trial court at PSS hearings would not conclusively resolve those issues nor bind the ultimate trier of fact thereon.” *Wells v. Wells*, 132 N.C. App. 401, 413, 512 S.E.2d 468, 475 (1999). “[C]hanges in circumstance occurring between issuance of a PSS order and the permanent alimony hearing may well affect” the determination of the amount and duration of future support awarded. *Id.* at 412, 512 S.E.2d at 475. “[A] trial court’s findings and conclusions in connection with an award of [PSS] are not binding in

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connection with the ultimate outcome of the claim for alimony.” *Langdon v. Langdon*, 183 N.C. App. 471, 474, 644 S.E.2d 600, 603 (2007).

Instead, the trial court must make findings of fact and conclusions of law for its determination of the amount and duration of an alimony award based on the evidence presented at the alimony hearing. N.C. Gen. Stat. § 50-16.3A(b) sets out sixteen factors that the trial court must consider when they would be relevant to determining the amount and duration of its alimony award. The trial court is instructed to “exercise its discretion” by considering “all relevant factors” from the enumerated list. N.C. Gen. Stat. § 50-16.3A(b). “[T]he court shall make a specific finding of fact on each of the factors in [N.C. Gen. Stat. § 50-16.3A(b)] if evidence is offered on that factor.” N.C. Gen. Stat. § 50-16.3A(c) (2021); see *Collins v. Collins*, 243 N.C. App. 696, 707, 778 S.E.2d 854, 861 (2015) (remanding with instruction that the trial court make required findings of fact on relevant factors). “This Court has explained that ‘the findings of fact required to support the amount, duration, and manner of payment of an alimony award are sufficient if findings of fact have been made on the ultimate facts at issue in the case and the findings of fact show the trial court properly applied the law in the case.’” *Wise v. Wise*, 264 N.C. App. 735, 749, 826 S.E.2d 788, 798 (2019) (citation omitted).

To support her argument, Defendant repeatedly references prior calculations of the parties’ financial circumstances in the First, Second, and Third PSS Orders. Defendant contends it is “inexplicable” that the court would find different values for

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her monthly expenses in each of the orders unless the court “completely ignored” some of her expenses. These arguments must fail because the trial court was not bound by any prior factual determinations from its temporary PSS orders when making its alimony determination. *See Langdon*, 183 N.C. App. at 474, 644 S.E.2d at 603; *Wells*, 132 N.C. App. at 413, 512 S.E.2d at 475.

Rather, the evidence presented during the alimony hearing supported the trial court’s alimony award determination in its Alimony Order. The trial court made a total of 133 findings of fact explaining the details of Plaintiff and Defendant’s financial circumstances. The lengthy findings discuss in detail the evidence received during the alimony hearing and break down, among other things: (1) what each party received from equitable distribution; (2) Plaintiff’s sources of income at the time of the hearing; (3) the necessities and amenities Plaintiff paid for during the marriage; (4) Defendant’s roles in providing financial assistance and support during Plaintiff’s schooling, and homecare services during the marriage; (5) Defendant’s chronic medical conditions; (6) Defendant’s recurring medical needs; (7) Defendant’s recent eligibility for full-time work and the respective earning potential; (8) Defendant’s sources of income at the time of the hearing; and (9) Defendant’s overall current and projected financial standing following equitable distribution.

Defendant’s brief on appeal meticulously charts out the testimony of her expert witness alongside Plaintiff’s expert witness regarding Plaintiff’s income, noting that the trial court’s order appears to adopt the calculations of Plaintiff’s expert without

deviation. Defendant states that, although the court found her expert to be a credible witness in prior hearings, it appears they ignored her testimony in the alimony hearing. In doing so, however, Defendant admits that the trial court based those calculations in the Alimony Order on competent evidence presented at the alimony hearing. We will not overturn the trial court's ruling under these circumstances. *See Clark*, 301 N.C. at 128, 271 S.E.2d at 63.

Defendant contends the trial court failed to consider evidence she offered regarding a new home and a car in her total expenses; however, Defendant offered only hypothetical information showing possible costs if she were to purchase these items—not actual evidence of real expenses. Ultimately, the trial court relied on Defendant's own competent evidence, her "Financial Standing Affidavit," to determine her monthly expenses. Based on the trial court's recitation of the evidence and resulting findings of fact, we cannot hold the trial court abused its discretion in calculating Defendant's alimony award.

C. Appropriate Findings and Equity

Defendant next asserts that the Alimony Order "should be reversed and remanded because the trial court erred by failing to make sufficient findings as to the amount and duration of the alimony award, as well as a failure to make appropriate findings concerning the evidence presented regarding the enumerated factors in [N.C. Gen. Stat. § 50-16.3A(b)] and for abuse of discretion." Generally, for the reasons

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stated in section II.B above, we hold the trial court made sufficient findings as to the amount and duration of the alimony award.

Specifically, of the sixteen factors set out in section 50-16.3A(b), Defendant asserts that over seventy of the trial court's findings of fact fail to make sufficient, appropriate findings with regard to a single enumerated factor: "The standard of living of the spouses established during the marriage." N.C. Gen. Stat. § 50-16.3A(b)(8) (2021). We disagree. The trial court heard evidence regarding the parties' purchasing habits, expenses, and overall lifestyle during the marriage. The court ultimately found:

117. That while the parties were married, they enjoyed a comfortable lifestyle. Plaintiff and Defendant did not live lavishly; however, they certainly did not worry about affording necessities.

...

149. In determining the amount, durations, and manner of payment of alimony, the Court has considered the factors as set forth in [N.C. Gen. Stat. §] 50-16.3A:

...

f. The standard of living of the spouses established during the marriage;

- i. The parties lived comfortably during the marriage.
- ii. The[] parties were able to meet their reasonable needs.
- iii. The parties drove modest vehicles and purchased a Harley Davidson motorcycle.
- iv. The parties usually vacationed for two (2)

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- weeks each summer at Ocean Isle Beach at the 230 East First Street beach house.
- v. During the marriage, Plaintiff and Defendant also took periodic vacations usually revolving around Plaintiff's continuing education classes, and other vacations, including two trips [to] Hawaii and one trip to Italy. Family members contributed to the costs of the trips not associated with continuing education classes.

Notably, finding 149(f) is not one of the over seventy findings that Defendant challenges. We therefore deem it supported by competent evidence and binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (“Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.”). The trial court made sufficient findings of fact as to N.C. Gen. Stat. § 50-16.3A(b)(8).

Defendant appears to contend that the findings were insufficient because, in reducing the amount of monthly support Defendant would receive, the trial court did not realize it was forcing Defendant to use up funds assigned to her in equitable distribution. Defendant cites to this Court's decision in *Dodson v. Dodson*, 190 N.C. App. 412, 660 S.E.2d 93 (2008), for support, but her reliance is misplaced. In *Dodson*, this Court found an abuse of discretion where the supporting spouse was ordered to pay an alimony award that, when added to their monthly expenses, exceeded their monthly net income. *Id.* at 417, 660 S.E.2d at 97. This Court held that “[a]limony payments cannot reduce the supporting spouse to poverty” and the “[supporting

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spouse] should not be forced to deplete [their] assets, while at the same time [the dependent spouse] is left with a surplus.” *Id.* *Dodson* addressed the appropriateness of an award that depleted the supporting spouse’s assets and did not opine on awards that allegedly did not cover a dependent spouse’s monthly expenses. *Dodson* is inapplicable to the present case. Further, the trial court’s findings show that it took Defendant’s monthly expenses, monthly net income, and other assets all into account when calculating her alimony award.

Finally, Defendant contends the Alimony Order does not create an equitable result for both parties. In support, Defendant repeats each of her grounds discussed above and does not present any new authority. We therefore hold this argument has no merit.

III. Conclusion

We hold the trial court did not abuse its discretion in calculating Defendant’s alimony award and made all required findings of fact to support the award.

AFFIRMED.

Judges STROUD and THOMPSON concur.

Report per Rule 30(e).