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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-504

Filed 20 February 2024

Durham County, No. 19 CVD 901

ROBERT M. PHILLIPS, JR., Plaintiff,

v.

CATERINA GRECO PHILLIPS, Defendant.

Appeal by defendant from order entered 16 December 2022 by Judge Dorothy Hairston Mitchell in Durham County District Court. Heard in the Court of Appeals 29 November 2023.

Patrick Law, PLLC, by Kirsten A. Grieser and Cheri C. Patrick, for the defendant-appellant.

William J. Cotter for the plaintiff-appellee.

DILLON, Chief Judge.

The issue in this appeal is whether plaintiff-appellee Robert Phillips properly consented to defendant-appellant Caterina Greco Phillips' ("Ms. Greco") voluntary dismissal of her counterclaims and, thus, effectively terminated this action. We answer this question affirmatively and thus conclude that the trial court properly held that it was without subject matter jurisdiction to hear Ms. Greco's subsequent

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motions concerning these counterclaims.

I. Background

Mr. Phillips and Ms. Greco were married in 2001 and separated in 2019.

On 27 August 2019, Mr. Phillips commenced this action for child custody. Later in 2019, the parties entered into a consent order for permanent custody.

In any event, Ms. Greco otherwise responded to the complaint by filing counterclaims for child custody, child support, equitable distribution, post-separation support, alimony, and attorney's fees.

In January 2020, Mr. Phillips filed his answer to Ms. Greco's counterclaims, requesting the court grant him affirmative relief arising from the claims raised in Ms. Greco's counterclaims.

In November 2020, after some litigation, Ms. Greco filed a voluntary dismissal of her counterclaims. The voluntary dismissal stated that "[u]pon information and belief, all of [Mr. Phillips' custody] claims were resolved with the Consent Order entered in this file on November 15, 2019 . . . and there is therefore no unresolved claim now pending in the file."

On 26 August 2021, Ms. Greco filed two motions in the cause, one seeking an order for equitable distribution and interim distribution, and one for post-separation support, alimony, child support, and attorney's fees. Upon being served with Ms. Greco's motions in the cause, Mr. Phillips' attorney communicated to Ms. Greco's attorney that he believed the cause had been dismissed, and that Ms. Greco would

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need to file a new complaint.

On 20 December 2021, Mr. Phillips filed a motion to dismiss Ms. Greco's two motions in the cause with prejudice.

On 16 December 2022, the trial court granted Mr. Phillips' motion to dismiss Ms. Greco's motions with prejudice. Ms. Greco subsequently appealed.

II. Analysis

The sole issue in this appeal is whether Mr. Phillips properly consented to Ms. Greco's voluntary dismissal of her claims, which we review *de novo*. *Azure Dolphin, Ltd. Liab. Co. v. Barton*, 371 N.C. 579, 594, 821 S.E.2d 711, 722 (2018).

Our Supreme Court has held that when a defendant sets up a claim for affirmative relief arising out of the same transaction as the plaintiff's complaint, a plaintiff cannot enter a voluntary dismissal of the action without the consent of the defendant. *McCarley v. McCarley*, 289 N.C. 109, 112, 221 S.E.2d 490, 492 (1976). This also applies to a defendant dismissing a counterclaim if a plaintiff has joined in the request for affirmative relief in the plaintiff's reply. *Lafferty v. Lafferty*, 125 N.C. App. 611, 613, 481 S.E.2d 401, 402 (1997); *Hunt v. Hunt*, 117 N.C. App. 280, 284, 450 S.E.2d 558, 561 (1994).

Generally, consent to dismissal is evidenced "by filing a stipulation of dismissal signed by all parties who have appeared in the action[.]" N.C. Gen. Stat. § 1A-1, Rule 41(a)(1)(ii) (2021). However, our Courts have generally disfavored strict construction of this rule. *Ward v. Taylor*, 68 N.C. App. 74, 79, 314 S.E.2d 814, 819 (1984) (holding

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that “in construing Rule 41 . . . we must give effect to the legislative intent and avoid constructions which operate to defeat or impair that intent.”); *Rhue v. Pace*, 165 N.C. App. 423, 428, 598 S.E.2d 662, 666 (2004). Oral notice in open court is an appropriate substitute for the written requirements of Rule 41. See *Danielson v. Cummings*, 300 N.C. 175, 179, 265 S.E.2d 161, 163 (1980). And, our Court has held that failure to object to a party’s dismissal may also operate as consent. *Rhue*, 165 N.C. App. at 428, 598 S.E.2d at 666.

In *Rhue*, the defendant did not file a stipulation consenting to the dismissal, nor did he give oral notice in open court. However, our Court held that because the defendant failed to object to three voluntary dismissals, the defendant’s inaction amounted to consent. *Rhue*, 165 N.C. App. at 429, 598 S.E.2d at 666 (2004). The Court concluded that “such inaction speaks ‘consent’ as clearly as oral notice or written stipulation.” *Id.*

Here, Mr. Phillips did not file a stipulation of dismissal. Nor did he give oral notice of his consent in open court. However, just like the defendant in *Rhue*, Mr. Phillips did not contest the dismissal, either by filing a Rule 60(b) motion to have the voluntary dismissal overturned or by otherwise objecting. On the contrary, the record reflects (and the trial court found) that the attorneys for both parties were concerned about the upcoming trial and agreed to dismiss the action.

Specifically, during the hearing on Mr. Phillips’ motion to dismiss Ms. Greco’s motions in the cause, Mr. Phillips’ attorney presented an affidavit to the trial court.

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Counsel for Ms. Greco did not object to the affidavit, but instead expressed agreement with the affidavit, saying “I appreciate and agree with everything he’s written in his affidavit, it is true. We did discuss it. We did do this jointly.” In the affidavit, Mr. Phillips’ attorney stated the following:

Both [Ms. Greco’s attorney] and I were having a difficult time dealing with voluminous discovery requests and we were both concerned about an upcoming two-day trial date of December 14, 2020 and December 15, 2020 on the issues of alimony, child support, and equitable distribution.

[Ms. Greco’s attorney] and I talked and we were both concerned that we were not going to be ready for trial and that it would be best for our clients if the case was dismissed and could be reinstated within a year.

We conclude that the facts above are sufficient to show that Mr. Phillips’ consented to Ms. Greco’s voluntary dismissal. Mr. Phillips’ failure to raise an objection to Ms. Greco’s voluntary dismissal, coupled with the trial court’s finding that both parties agreed to dismiss the case, is sufficient to amount to consent. As a result, Ms. Greco’s voluntary dismissal was proper, and the trial court was without subject matter jurisdiction to hear her motions. Accordingly, we affirm the trial court’s grant of Mr. Phillips’ motion to dismiss Ms. Greco’s motions.

AFFIRMED.

Judges MURPHY and GORE concur.

Report per Rule 30(e).