IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-516

Filed 16 January 2024

Mecklenburg County, No. 22 CVD 6955

RODRIGUE ALAIN NDJE NLEND, Plaintiff/Husband,

v.

VALERIE NDJE NLEND, Defendant/Wife.

Appeal by plaintiff from order entered 14 April 2023 by Judge Alyssa Levine in Mecklenburg County District Court. Heard in the Court of Appeals 17 October 2023.

Plaintiff-appellant Rodrigue Alain Ndje Nlend, pro se.

Sodoma Law, PC, by Kelsey Queen and Kaylan M. Gaudio, for defendant-appellee.

ZACHARY, Judge.

Plaintiff Rodrigue Alain Ndje Nlend appeals from the trial court's order granting Defendant Valerie Ndje Nlend's motion to stay absolute divorce proceedings in North Carolina, denying Defendant's motion for sanctions and attorney's fees, and denying Plaintiff's motions for summary judgment. After careful review, we dismiss in part and affirm in part.

I. Background

Plaintiff and Defendant married in 2006 and separated in 2010. Two children were born of the marriage. On 23 November 2020, an order for protection was entered in King County Superior Court, in the State of Washington, where the parties resided. On 10 May 2021, Defendant filed a petition in King County Superior Court, which included claims for divorce, child custody, child support, property division, and spousal support, and sought the entry of a restraining order. At the time Defendant filed this petition, the parties had been living in Washington for three years. On 10 August 2021, Defendant moved to North Carolina with the minor children. The divorce proceedings continued in Washington, with the trial court there entering orders related to child support, spousal support, visitation, the appointment of a guardian ad litem, and the renewal of the protection order.

On 20 April 2022, Plaintiff filed a complaint for absolute divorce in Mecklenburg County District Court. On 16 May 2022, Defendant filed an answer, in which she alleged that Plaintiff "appears to be forum shopping" and requested that the action be dismissed. On 24 May 2022, Plaintiff filed a motion for summary judgment and notice of hearing, and that same day also filed a reply to Defendant's answer. On 3 June 2022, Defendant filed a second answer.

On 16 June 2022, the trial court entered an order continuing Plaintiff's motion for summary judgment, as the filing could not be found in the court file. Then on 1 July 2022, the trial court entered a judgment for absolute divorce.

On 27 July 2022, Defendant filed a motion for relief from judgment pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. Defendant stated, *inter alia*, that she inadvertently failed to attach her Washington divorce petition to her filings. She also alleged that "Plaintiff purposefully omitted to notify" the trial court of the Washington proceedings, and that Plaintiff purposefully did not notify her of the rescheduled hearing date for his summary judgment motion. Additionally, Defendant moved for sanctions, attorney's fees, and a stay of the proceedings in North Carolina until the resolution of the Washington divorce. Plaintiff filed his response to Defendant's Rule 60 motion on 2 August 2022.

On 3 October 2022, Defendant's Rule 60 motion came on for hearing. On 7 November 2022, the trial court entered an order ("the Rule 60 Order") granting Defendant's Rule 60 motion for relief from judgment. The trial court noted that Defendant testified that she did not receive the order continuing the hearing on the motion for summary judgment and that no certificate of its service appeared in the record. The trial court also found that there was no notice of hearing in the file showing that Plaintiff rescheduled the matter, and "no evidence showing how the Motion for Summary Judgment and Notice of Hearing eventually made it to the Court's file." Because Defendant did not receive adequate notice of the rescheduled summary judgment hearing, the trial court concluded that "[j]ustice demands setting aside the July 1, 2022 Judgment of Divorce." The trial court held open for later consideration Defendant's claims for sanctions, attorney's fees, and a stay of the

proceedings.

On 16 November 2022, Plaintiff filed a Rule 52(b) motion to amend, asking the trial court "to reverse" the Rule 60 Order "and to deny Defendant's Rule 60 Motion[,]" as well as Rule 59 motions to set aside the Rule 60 Order and for a new trial on Defendant's Rule 60 motion. On 17 November 2022, Plaintiff additionally filed a motion to stay the Rule 60 Order. On 12 December 2022, the trial court entered an order dismissing Plaintiff's motions without prejudice for failure to appear and prosecute.

After extensive motions practice by the parties—including multiple motions for a continuance filed by Plaintiff, which were denied on 9 and 22 February 2023, respectively—Defendant's motion for sanctions, attorney's fees, and a stay of the proceedings and Plaintiff's motions for summary judgment came on for hearing on 27 February 2023.[1] By order entered on 14 April 2023, the trial court granted Defendant's motion to stay, denied Defendant's motion for sanctions and attorney's fees, and denied Plaintiff's motions for summary judgment.

On 21 April 2023, Plaintiff filed notice of appeal from: (1) the 14 April 2023 order; (2) the 16 June 2022 order continuing Plaintiff's motion for summary judgment; (3) the Rule 60 Order; (4) the 12 December 2022 order dismissing Plaintiff's motions following the Rule 60 Order for failure to prosecute; and (5) the 22 February

[1] As discussed below, no transcript of this hearing appears in the record on appeal.

2023 order denying Plaintiff's motion for continuance.

II. Interlocutory Jurisdiction

In his appellate brief, Plaintiff asserts that the trial court's "order staying divorce proceedings in North Carolina and denying Plaintiff's Motion for Summary Judgement Divorce[ ] is a final judgment, and appeal therefore lies to the Court of Appeals" pursuant to N.C. Gen. Stat. §§ 1-75.12(c), 1-277(a), and 7A-27(b) (2021).

Section 1-75.12(c) provides for a right of immediate appeal for a nonmoving party upon the grant of a motion for a stay in favor of proceedings in a foreign jurisdiction. N.C. Gen. Stat. § 1-75.12(c). Accordingly, we have appellate jurisdiction over that portion of the trial court's 14 April 2023 order granting Defendant's motion for a stay. However, for the reasons that follow, that portion of the trial court's 14 April 2023 order is the only portion of any of the orders from which Plaintiff purports to appeal that is properly before us.

Section 7A-27(b)(2) provides that appeal lies of right to this Court "[f]rom any final judgment of a district court in a civil action." *Id.* § 7A-27(b)(2). However, "[t]he denial of a motion for summary judgment is not a final judgment, but rather is interlocutory in nature." *Stahl v. Bowden*, 274 N.C. App. 26, 28, 850 S.E.2d 588, 590 (2020). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Moreover, despite Plaintiff's citation to § 1-277(a), which provides that an interlocutory appeal "may be taken from every judicial order or determination of a

judge of a superior or district court . . . that affects a substantial right claimed in any action or proceeding[,]" N.C. Gen. Stat. § 1-277(a), Plaintiff makes no claim in the statement of the grounds for appellate review in his appellate brief that any of the interlocutory orders or determinations of the trial court affect such a substantial right.

"To confer appellate jurisdiction based on a substantial right, the appellant must include in its opening brief, in the statement of the grounds for appellate review, sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Doe v. City of Charlotte*, 273 N.C. App. 10, 21, 848 S.E.2d 1, 9 (2020) (cleaned up); *see also* N.C.R. App. P. 28(b)(4) ("When an appeal is interlocutory, the statement [of the grounds for appellate review] must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right."). "[I]f the appellant's opening brief fails to explain why the challenged order affects a substantial right, we must dismiss the appeal for lack of appellate jurisdiction." *Denney v. Wardson Constr., Inc.,* 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019).

Instead, Plaintiff cites our Supreme Court's opinion in *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950), for the proposition that "[i]nterlocutory orders may be appealed after final [judgment] on the case." However, as previously stated, the denial of his motion for summary judgment was not a final judgment, so this citation is inapposite. As

Plaintiff makes no claim of any substantial right in his statement of the grounds for appellate review, he has failed to invoke our appellate jurisdiction over the remaining interlocutory orders and determinations of the trial court from which he noticed his appeal.

III. Petition for Writ of Certiorari

Recognizing the interlocutory nature of at least a portion of his appeal, Plaintiff has filed with this Court a petition for writ of certiorari to review the Rule 60 Order. As an initial matter, we note that Plaintiff's petition solely addresses the Rule 60 Order; accordingly, we do not consider any of the trial court's other interlocutory orders or determinations.

The writ of certiorari "is intended as an extraordinary remedial writ to correct errors of law." *Cryan v. Nat'l Council of Young Men's Christian Assocs. of the U.S.*, 384 N.C. 569, 572, 887 S.E.2d 848, 851 (2023) (citation omitted). The writ "should issue only if the petitioner can show merit or that error was probably committed below" and "only if there are extraordinary circumstances to justify it." *Id.* (cleaned up). "There is no fixed list of extraordinary circumstances that warrant certiorari review, but this factor generally requires a showing of substantial harm, considerable waste of judicial resources, or wide-reaching issues of justice and liberty at stake." *Id.* at 573, 887 S.E.2d at 851 (cleaned up). "Ultimately, the decision to issue a writ of certiorari rests in the sound discretion of the presiding court." *Id.*

In his petition, Plaintiff principally argues that "there is merit to [his]

substantive arguments" because the trial court's 16 June 2022 order continuing his motion for summary judgment was "null and void at [its] inception and . . . the trial court erred and abused its discretion in giving any consideration to that order" when ruling on Plaintiff's Rule 60 motion. Plaintiff contends that a "simple comparison of filing dates provide[s] prima facie evidence that the trial court issued" the continuation order "by mistake," as his motion for summary judgment bears a file stamp with a date earlier than the continuation order. However, as Plaintiff states in his petition, he presented evidence on this issue to the trial court during its consideration of Defendant's Rule 60 motion. Therefore, we may infer that the trial court considered—and rejected—Plaintiff's evidence when it ruled. Yet Plaintiff asks us to re-weigh that evidence on appeal. "Because the trial court is in the best position to weigh the evidence, determine the credibility of witnesses and the weight to be given their testimony, we refuse to re-weigh the evidence on appeal." *Williamson v. Williamson*, 217 N.C. App. 388, 392, 719 S.E.2d 625, 628 (2011) (cleaned up).

Beyond the many arguments that Plaintiff raises based on his assertion that the continuation order was null and void, upon careful review, we conclude that none of Plaintiff's other arguments in his petition "show merit or that error was probably committed below." *Cryan*, 384 N.C. at 572, 887 S.E.2d at 851 (cleaned up). Moreover, even if Plaintiff's other arguments were meritorious, he still had to show that "there are extraordinary circumstances to justify" the issuance of the writ. *Id.* (cleaned up).

Yet Plaintiff's only arguments concerning "extraordinary circumstances" relate

to his challenge to the trial court's finding of fact in the Rule 60 Order that the failure to provide Defendant with notice of the rescheduled summary judgment hearing "is an extraordinary circumstance justifying relief from the operation of the Judgment of Divorce." These arguments, however, do not address the extraordinariness of the circumstances arising upon the trial court's entry of the Rule 60 Order. In that he has made no showing that *the entry of the Rule 60 Order gave rise to extraordinary circumstances*, Plaintiff has failed to carry his burden on that factor as well. *See id.*

Accordingly, and in our discretion, we deny Plaintiff's petition for writ of certiorari. We proceed to review the sole portion of the record properly before us: that portion of the trial court's 14 April 2023 order granting Defendant's motion to stay proceedings.

IV. Discussion

In the present case, Defendant moved for a stay of Plaintiff's absolute divorce proceedings in North Carolina pursuant to N.C. Gen. Stat. § 1-75.12, which provides:

> If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State.

N.C. Gen. Stat. § 1-75.12(a).

A. Standard of Review

"When evaluating the propriety of a trial court's stay order the appropriate standard of review is abuse of discretion." *Muter v. Muter*, 203 N.C. App. 129, 132,

689 S.E.2d 924, 927 (2010) (citation omitted). Under the abuse of discretion standard, a reviewing court may reverse an order granting a motion for a stay "only if the trial court made a patently arbitrary decision, manifestly unsupported by reason. Rather, appellate review is limited to [e]nsuring that the decision could, in light of the factual context in which it was made, be the product of reason." *Id.* (cleaned up).

"The essential question for the trial court" when contemplating a motion for a stay under § 1-75.12 "is whether allowing the matter to continue in North Carolina would work a substantial injustice on the moving party." *Id.* at 131–32, 689 S.E.2d at 927 (cleaned up). This Court has enumerated the following factors for a trial court's consideration:

> (1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by [the] plaintiff, and (10) all other practical considerations.

Id. at 132, 689 S.E.2d at 927 (citation omitted). "In considering whether to grant a stay under section 1-75.12, the trial court need not consider every factor and will only be found to have abused its discretion when it abandons any consideration of these factors." *Id.* at 132–33, 689 S.E.2d at 927 (cleaned up). "In addition, this Court has held that it is not necessary that the trial court find that *all* factors positively support a stay." *Id.* at 133, 689 S.E.2d at 927 (cleaned up).

B. Analysis

In its order, the trial court made the following pertinent findings of fact:

> 37. There are currently proceedings in Washington State pending for divorce, spousal support, child support, child custody, and property division, and they are scheduled for final hearings in May of 2023.
>
> 38. In Washington State, these matters cannot be adjudicated in a bifurcated manner. For example, in North Carolina, the absolute divorce can be adjudicated, and other pending claims related to the divorce of parties such as child custody, child support, spousal support and property division can proceed separately, which is not possible in Washington State.
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> 39. The parties can appear and have been appearing in the Washington State matter by virtual means as their hearings continue to take place virtually.
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> 40. Defendant (who is the Petitioner in the King County, Washington State case) chose the forum of King County, Washington State where the parties were residing for the three (3) years preceding the filing of the Petition on May 10, 2021, which should be given great deference.
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> . . . .
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> 43. There are pending contempt proceedings and outstanding discovery matters that are currently scheduled in King County, Washington.
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> 44. The parties have been litigating these matters in King County, Washington for over two (2) years.
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> 45. There are witnesses such as the GAL and the individual supervising the visits between Plaintiff (who is the Respondent in the King County, Washington State case) and the minor children who are located in Washington State.

46. The King County Superior Court, in Washington State has continuing, exclusive jurisdiction over the child custody matter between these parties.

47. The King County Superior Court, in Washington State has entered a Protective Order against Plaintiff (who is the Respondent in the King County, Washington State case) and renewed the Protective Order and it is still in effect.

48. Plaintiff (who is the Respondent in the King County, Washington State case) has requested a dismissal of the King County, Washington State proceedings more than eight (8) times and each request has been denied.

49. Defendant (who is the Petitioner in the King County, Washington State case) . . . has spent over $80,000.00 in attorney's fees related to representation throughout the Washington State proceedings.

50. The parties are close to a final trial on the domestic matters in King County, Washington.

51. The final trial has been scheduled for spring of 2023, but if it were continued, it would be for a short duration.

52. Based upon [N.C. Gen. Stat. § 1-75.12] and the factors set forth in the case law, there has been a showing that it would work a substantial injustice to Defendant (who is the Petitioner in the King County, Washington State case) if this absolute divorce matter in North Carolina were to proceed.

53. Based upon [N.C. Gen. Stat. § 1-75.12] and the factors set forth in the case law, a stay of an absolute divorce matter in North Carolina is warranted.

54. The alternative forum in King County, Washington State is more convenient, reasonable, and fair.

55. Defendant (who is the Petitioner in the King County, Washington State case) does not dispute that Plaintiff (who is the Respondent in the King County, Washington State

> case)'s Complaint for Absolute Divorce filed on April 20, 2022 was grounded in fact and existing law considering the parties had been separated for over one (1) year and Defendant has been residing in the State of North Carolina for more than six (6) months prior to the filing of the action; however, Defendant alleges that Plaintiff did file the Complaint for Absolute Divorce for an improper purpose to harass Defendant, cause unnecessary delay, and needlessly increase the cost of litigation.
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> 56. This matter has been a financial burden on Defendant in that she has taken out loans against her 401(k) and charged attorney's fees on a credit card in order to pay for her counsel.
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> 57. Defendant has proceeded in good faith in responding to the voluminous litigation filed by Plaintiff in this matter.

Plaintiff challenges several of these findings of fact as unsupported by competent evidence; however, review of his arguments is hindered by his failure to include a transcript or narrative in the record on appeal. *See* N.C.R. App. P. 9(c)(1); *see also In re Duvall*, 268 N.C. App. 14, 20, 834 S.E.2d 177, 182 (2019) ("[T]he Rules of Appellate Procedure permit the parties to create a narrative as a substitute for the verbatim transcript."). "Ordinarily, the burden of creating the appellate record rests with the appellant." *Duvall*, 268 N.C. App. at 21, 834 S.E.2d at 182. In fact, Plaintiff acknowledges that he "did not consider a transcript of any proceeding necessary for the issues presented and opted not to order a transcript." "When the record does not contain a transcript [or a narrative] of the oral testimony[,] the court's findings of fact are presumed to be supported by competent evidence." *Id.* at 18, 834 S.E.2d at 181 (cleaned up).

"Without a transcript or narrative, our review of the trial court's findings of fact is restricted on appeal . . . ." *Id.* In light of this shortcoming, Plaintiff requests that this Court "order [Plaintiff] or [Defendant] to obtain and file such transcript with this Court by a given date" or "provid[e] additional time for any party who so whishes [sic] to obtain and file transcript of any proceeding that party believes to be necessary for meaningful appellate review." We need not consider this request, as the weight of the evidence supporting the trial court's findings of fact is ultimately "not the question we consider on appeal" when reviewing a trial court's order on a § 1-75.12 motion to stay. *Muter*, 203 N.C. App. at 133–34, 689 S.E.2d at 928.

> We do not re-weigh the evidence before the trial court or endeavor to make our own determination of whether a stay should have been granted. Instead, mindful not to substitute our judgment in place of the trial court's, we consider only whether the trial court's [ruling] was a patently arbitrary decision, manifestly unsupported by reason.

Id. at 134, 689 S.E.2d at 928 (cleaned up).

In this case, "the trial court considered each of the relevant factors and made a reasoned finding or conclusion as to each." *Id.* And as the trial court's findings of fact are presumed supported by competent evidence, we are not persuaded by Plaintiff's arguments that the trial court abused its discretion.

V. Conclusion

For the foregoing reasons, Plaintiff's appeal is dismissed as interlocutory, except for that portion appealing the trial court's grant of Defendant's motion for a

stay. We affirm that portion of the trial court's 14 April 2023 order granting Defendant's motion for a stay.

DISMISSED IN PART; AFFIRMED IN PART.

Judges HAMPSON and WOOD concur.

Report per Rule 30(e).