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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-858

Filed 2 April 2024

Guilford County, No. 18 CVD 1024

STEPHEN LAWING, and DONNA LAWING, Plaintiffs,

v.

CHADWICK P. MILLER, C.P. MILLER, INC., DANNY EDWARD EATON II, and,  
DANNY EATON PLUMBING, LLC., Defendants.

Appeal by Plaintiffs from Order entered 21 June 2023 by Judge Marc R. Tyrey  
in Guilford County District Court. Heard in the Court of Appeals 7 February 2024.

*Stephen E. Lawing for Plaintiff-Appellants.*

*No brief filed for Defendant-Appellees.*

HAMPSON, Judge.

**Factual and Procedural Background**

Stephen and Donna Lawing (Plaintiffs) appeal from an Order Designating Exempt Property. The Record before us reflects the following:

On 23 September 2018, Plaintiffs filed a Complaint in Guilford County District Court. The Complaint alleged faulty construction and installation of plumbing by Defendants in building Plaintiffs' house constituting fraud or willful or wanton

negligence. The Complaint alleged damage to Plaintiffs in excess of \$25,000.

On 16 November 2018, Defendant Miller moved to dismiss the action under North Carolina Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. The Motion to Dismiss alleged the Complaint did not plead fraud “with any specific particularity as required by Rule 9(b) of the North Carolina Rules of Civil Procedure[.]” On 7 December 2018, a Superior Court Judge entered an Order transferring the case to Guilford County Superior Court and granting Defendants’ Motion to Dismiss.<sup>1</sup>

On 16 January 2018, the Superior Court entered an Order denying Plaintiffs’ Rule 59 Motion. Defendants filed a Motion for Attorney’s Fees on 28 January 2019, arguing Plaintiffs knew or should have known their Complaint “failed to include any specific allegations of fraud and was frivolous and malicious as being well beyond the 6-year Statute of Repose for construction and improvements to real property set forth in N.C.G.S. § 1-50.” On 28 January 2020, the Superior Court entered an Order and Judgment awarding attorney fees to Defendants (the 2020 Order). Plaintiffs did not appeal.

On 21 April 2022, Defendants filed a Motion to Claim Exempt Property to exempt some of their property from execution of the 2020 Order in District Court.

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<sup>1</sup> The Order entered by the Superior Court Judge still shows the case in District Court. The Record compiled by Plaintiffs does not disclose exactly how this all transpired. However, it is not an issue in this case.

Plaintiffs filed a Supplement to Claim of Exemptions on 20 May 2023. On 21 June 2023, the District Court entered an Order Designating Exempt Property, which listed Plaintiffs' property deemed exempt, but specified "the Sheriff may levy upon any amounts in any bank accounts belonging jointly or individually to Plaintiffs above Fifty Dollars[.]" On 29 June 2023, Plaintiffs timely filed Notice of Appeal from the Order Designating Exempt Property.

### **Issues**

The issues are whether: (I) Plaintiffs can challenge the validity of the 2020 Order; and (II) whether there are defects in the Order Designating Exempt Property.

### **Analysis**

#### **I. The 2020 Order**

Plaintiffs first contend the trial court's Order and Judgment awarding attorney fees to Defendants was "illegal, void and erroneous[.]" This appeal, however, was brought from an entirely separate order—the trial court's Order Designating Exempt Property. Thus, this argument is merely a collateral attack on the underlying Order. "A collateral attack is one in which a party is not entitled to the relief requested 'unless the judgment in another action is adjudicated invalid.' " *In re Webber*, 201 N.C. App. 212, 219, 689 S.E.2d 468, 474 (2009) (quoting *Clayton v. N.C. State Bar*, 168 N.C. App. 717, 719, 608 S.E.2d 821, 822 (2005) (citation and quotation marks omitted)). "A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by

law for the express purpose of attacking it.’ ” *Id.* (quoting *Reg’l Acceptance Corp. v. Old Republic Sur. Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (2003) (citation and quotation marks omitted)). “Collateral attacks generally are not permitted under North Carolina law.” *Id.* (citation omitted).

Plaintiffs could have appealed from the 2020 Order awarding attorney fees, but they failed to do so. In fact, Plaintiffs instead filed a Motion to Claim Exempt Property on 21 April 2022—long after the expiration of the time to appeal the underlying judgment and at least tacitly acknowledging the validity of that judgment. Instead, Plaintiffs appealed from the trial court’s Order Designating Exempt Property, entered over three years later on 21 June 2023. Thus, arguing on appeal the 2020 Order awarding attorney fees was invalid is an impermissible collateral attack. Consequently, we dismiss this argument.

## II. The Order Designating Exempt Property

Plaintiffs also contend the Order Designating Exempt Property was invalid because it was issued pursuant to the 2020 Order, which Plaintiffs claim is also invalid. Again, Plaintiffs cannot challenge the validity of the 2020 Order, thus we reject this argument.

Finally, Plaintiffs contend there were several defects in the Order Designating Exempt Property. We agree. The Order Designating Exempt Property grants a joint total exemption of \$70,000 with respect to their primary residence; exemptions of \$3,500 each with respect to each Plaintiff’s motor vehicle; and exemptions of personal

property. However, the Order specifically states “the Sheriff may levy upon any amounts in any bank accounts belonging jointly or individually to Plaintiffs above Fifty Dollars[.]” Plaintiffs contend “[e]xecution and levy upon Plaintiffs’ bank accounts would take and convert Plaintiff’s exempt property including Social Security and the earnings of the Plaintiff for his personal services at any time within 60 days next preceding the [O]rder, in violation of N.C.G.S. § 1-362; 1C-1603(a)(5)(d); 1C-1603(c1).”

N.C. Gen. Stat. § 1-362 provides:

The court or judge may order any property . . . in the hands of the judgment debtor . . . to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within 60 days next preceding the order, cannot be so applied . . .

N.C. Gen. Stat. § 1-362 (2021). Accordingly, it is clear under our statutes that earnings from personal services within the 60 days preceding the Order Designating Exempt Property should have been deemed exempt. Additionally, Social Security benefits are also exempt from execution. *See generally* 42 U.S.C. § 407(a) (2021) (“The right of any person to any future payment under this title [Federal Old-Age, Survivors, and Disability Insurance Benefits under Social Security] shall not be transferrable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution . . .”); N.C. Gen. Stat. §1C-1603(c1) (2021) (requiring forms provided to judgment debtor “include a statement to the effect that North Carolina law and federal law also exempt certain

other property not included in the form, such as Social Security benefits[.]”). Thus, the Order Designating Exempt Property should be modified to reflect those exemptions.

Plaintiffs also contend the Order Designating Exempt Property is defective in that it fails to value Plaintiffs’ property. Our statutes addressing the procedure for setting aside exempt property expressly require the district court to value a judgment debtor’s property subject to execution: “The district court judge must determine the value of the property.” N.C. Gen. Stat. § 1C-1603(e)(8) (2021). Here, the Order at issue provides no valuation of the Plaintiffs’ property. Thus, Plaintiffs are correct the trial court failed to provide a valuation of the property in contravention of the statutory requirement. Consequently, this defect must be corrected on remand to the trial court.

### **Conclusion**

Accordingly, for the foregoing reasons, we dismiss Plaintiffs’ appeal with respect to the validity of the 2020 Order and remand to the trial court for corrections to the Order Designating Exempt Property to specify that Plaintiffs’ Social Security benefits and earnings from personal services rendered 60 days prior to the Order are exempt, and to complete a valuation of Plaintiffs’ property.

DISMISSED IN PART; REMANDED IN PART.

Judges MURPHY and ARROWOOD concur.

LAWING V. MILLER

*Opinion of the Court*

Report per Rule 30(e).