SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1393-15T3

CHARLES WALKER,

Plaintiff-Respondent,

v.

CHRISTINA GASKINS,

Defendant-Appellant.

Argued January 11, 2018 – Decided April 2, 2018

Before Judges Rothstadt and Gooden Brown.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Cumberland County, Docket No. FM-06-0115-14.

Troy J. Lambert argued the cause for appellant (Alter & Barbaro, attorneys; Bernard M. Alter, on the briefs).

Robert J. O'Donnell argued the cause for respondent.

PER CURIAM

Defendant Christina Gaskins appeals from a Family Part order, entered on October 23, 2015, denying her motion to vacate prior orders entered on December 20, 2013, January 24, 2014, and December

19, 2014. She argues that in the December 20, 2013 order, the trial judge erroneously assumed jurisdiction to modify the existing custody order, and, in the January 24, 2014 order, erroneously concluded she had violated the December 2013 order. Defendant also argues that during the prior proceedings, "the tone of the [j]udge's admonishments[] and his summary decisions [gave] rise to a distinct appearance of impropriety and partiality," thereby justifying a change of venue. Additionally, defendant argues that the judge violated her rights under the Service Members Civil Relief Act (SCRA), 50 U.S.C. §§ 3901 to 4043, by denying her application for a stay of the proceedings. For the reasons that follow, we dismiss defendant's appeal as untimely.

We glean the following pertinent facts from the record. Defendant and plaintiff Charles Walker divorced in December 2009, when a Florida court entered a Final Judgment of Dissolution of Marriage. Pursuant to the divorce judgment, defendant had sole custody of the couple's four children, with plaintiff having parenting time in the summer, and plaintiff was ordered to pay defendant child support, collected via wage garnishment.

In March 2010, defendant and the children moved to Texas, and, at some point, plaintiff moved to New Jersey. Plaintiff continued to exercise parenting time, and in July 2013, the children were residing with him in Millville, New Jersey, for

their summer visitation. In September 2013, plaintiff filed a motion to domesticate the Florida custody and child support order in New Jersey. In his accompanying certification, plaintiff averred that "[d]uring summer visitation, [defendant] . . . stated she wanted the children to remain in New Jersey with [him]" because "she needed to get herself together." As a result, according to plaintiff, "[defendant] came to New Jersey and registered [the] children at Millville Public Schools." Plaintiff provided a letter to the court, purportedly written by defendant on July 23, 2013, in which she confirmed that the children would be living with plaintiff "for school purposes."

Plaintiff further certified that while the children were residing with him, defendant had refused to return the child support she was still receiving from him under the Florida child support order. Plaintiff asked the court to stop child support payments to defendant and order defendant to pay him child support. In response, on October 10, 2013, defendant sent a letter to the court claiming she had received late notice of the hearing on plaintiff's motion scheduled for October 25, 2013, and requesting a postponement "to seek counsel." Defendant objected to "mov[ing] jurisdiction," because Texas "ha[d] been [the children's] home for almost [four] years." Defendant said she had only intended for the children to stay with plaintiff during that school year, and

they would return to live with her "in Houston, Texas after [she] finish[ed] . . . officer training with the Army Officer Commissioning School th[at] summer."

After two postponements, the court rescheduled the hearing for December 20, 2013. Defendant, appearing telephonically, indicated that she would be represented by an attorney in Texas and requested the court's permission for the attorney to participate in the hearing telephonically as well. However, after confirming that the attorney was not licensed to practice law in New Jersey, defendant withdrew her request and proceeded to represent herself.

During the hearing, plaintiff's counsel reported to the court that two days earlier, defendant, who "[was] now back in Texas," had come to New Jersey unannounced, "removed all the children out of school," and "absconded with them" to Texas. Plaintiff's counsel reported further that after defendant sent the letter to the court requesting a postponement of the hearing, "she then filed certain actions in . . . Florida regarding custody [without] informing them of the ongoing proceedings here."

In response to the court's questions, defendant testified under oath that she did in fact voluntarily leave the children in New Jersey with plaintiff for almost five months. However, she claimed that, despite her October 10, 2013 letter saying "they

were going to be there the whole school year," she only intended for the children to "be there until [she] finished [her] Officer Training . . . school." Defendant also testified that she had filed "paperwork . . . in the State of Florida" seeking to transfer the case to Texas, "prior to what [plaintiff] filed in the State of New Jersey."

After the hearing, the court entered an order assuming jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), N.J.S.A. 2A:34-53 to -95, and granting plaintiff joint legal custody of the children, with plaintiff designated "the parent of primary residence" and defendant designated "the parent of alternative residence." Noting that defendant stated, "I don't think so," and "hung up" the phone when the court pronounced its ruling awarding plaintiff joint custody, the court emphasized that "as called for by the State Court Rules[,]" it had "reached out and attempted to contact [the] Florida [j]udge . . . at least three times . . . and . . . ha[d] not received a return call . . . ." The court also acknowledged that "no one ha[d] told [the court] of any legal action at th[at] time filed in Texas in regard to these children . . . ."

The court noted

> [the] children . . . ha[d] been in New Jersey for five months, there [was] an order in Florida in regard to them and as to child

> support, they had lived in Texas for a substantial amount of time[,] and then [defendant] allowed the children to come to New Jersey, be registered in New Jersey schools and to be in the State of New Jersey from approximately June of the year 2013 to the current time, until . . . she signed the children out of school, it appears, by her own admission and it appears she [was] taking the children back to Texas . . . .

As to the family's current contacts with Florida, the court found that "the children ha[d] not been in Florida for years," and "[plaintiff] and [defendant] had no contacts with Florida other than the fact they were [once] there." On the other hand, as to their New Jersey contacts, the court determined that "even though the children ha[d] only been in New Jersey for a time period of five months[,]" currently, "they [were] here, they [were] going to school here, their father [was] here and their [m]other gave permission for the children to be in school in New Jersey . . . ."

Accordingly, the court concluded that, "with no action pending in Texas[,]" under the UCCJEA, "New Jersey may and d[id] properly assume jurisdiction in regard to these children" under the circumstances. The court also ordered defendant to return the children to plaintiff in New Jersey no later than December 31, 2013, and "stop[ped] [plaintiff's] obligation to pay child support" because "the four children [were] living with him." As

to plaintiff's request that the court "establish child support to his benefit against [defendant]," the court denied the application without prejudice and directed plaintiff "to file the appropriate paperwork to start the interstate child support process."

When defendant failed to return the children, the court entered another order on January 24, 2014, reaffirming jurisdiction over the case because Florida was no longer the home state of the children or either parent, and issuing a warrant for defendant's "arrest due to her willful violation of the December 20, 2013 order and refusal to return the children to [plaintiff] . . . and New Jersey." Plaintiff eventually regained physical custody of the children in October 2014.

On September 16, 2014, defendant filed a Notice of Appeal with this court under Docket Number A-0269-14 and, thereafter, a motion to file the Notice of Appeal as within time. In October 2014, while her appeal was still pending, defendant moved for reconsideration of the December 2013 order in the trial court, arguing the court lacked jurisdiction because the children had not been in New Jersey for at least six months when it entered the December 2013 order, as required under the UCCJEA. Further, defendant claimed Florida did not relinquish jurisdiction until February 3, 2014, though she never provided corroborating documentation. She also moved for a change of venue, citing local

prejudice and alleging she had not received a fair trial as evidenced by the court's demeanor towards her throughout the hearing. Plaintiff opposed the motion and cross-moved for other relief.[1]

On December 19, 2014, both parties appeared before the trial court on the cross-motions represented by counsel. After oral argument, the court partially granted plaintiff's cross-motion[2] but dismissed defendant's motion, determining that it could not "consider her motion pending disposition on the appeal." The court noted further that while it was "hesitant to make a determination regarding a change in venue as the Appellate Division may very well decide a different venue would be appropriate,"

> The court [did] not see how a transfer of venue to Mercer County would be appropriate in this

[1] Plaintiff sought an order establishing child support against defendant, modifying custody, prohibiting defendant from picking up the children at school or removing them from New Jersey, and requiring the disclosure of Texas' child protective services records pertaining to the children.

[2] The court ordered defendant to pay child support "as agreed upon between the parties," allowed defendant parenting time on December 19 and December 20, 2014, and ordered that plaintiff had "sole legal custody of the children," given the history between the parties, thereby prohibiting defendant from picking the children up from school or removing them from New Jersey without plaintiff's permission. The court held plaintiff's request for Texas' child protective services records in abeyance because plaintiff "[had] not offered any support for [his] request[,]" notwithstanding the fact that plaintiff had apparently regained physical custody of the children in October 2014 through that agency's intervention.

> matter. Both [plaintiff] . . . and the children reside[d] in Cumberland County, and [plaintiff] . . . ha[d] sole custody over the children. The children attend[ed] school in Cumberland County. The court [was] not aware of any ties with Mercer County. Therefore, this matter [was] properly venued in Cumberland County. The court ha[d] and [would] maintain impartiality in this matter, noting that a determination in favor of one side over the other is an inherent aspect of the judiciary - such does not indicate any bias. A party's dissatisfaction with the outcome of a matter also does not indicate that a fair or impartial trial was not had. Therefore, [the] request [was] [denied].

On January 28, 2015, we denied defendant's motion to file a notice of appeal as within time and dismissed her first appeal. On July 13, 2015, defendant again moved for reconsideration before the trial court, renewing her arguments regarding jurisdiction and venue, and seeking an order vacating the December 19, 2014 order. In an October 23, 2015 order, the court again rejected defendant's arguments. Specifically, the court incorporated the rationale for the court's assumption of jurisdiction from the December 2013 order, noting "[t]he court continue[d] to find that the order of custody entered under the circumstances . . . was appropriate and that jurisdiction, whether outright or under the emergency provisions of the [UCCJEA] was proper." On plaintiff's cross-motion, the court awarded counsel fees because defendant's

"arguments in her motion ha[d] been heard time and time again." This appeal followed.

Rule 2:5-1(f)(3)(A) provides that the notice of appeal "shall designate the judgment, decision, action or rule, or part thereof" from "which the appeal is taken." Therefore, "only the judgments or orders or parts thereof designated in the notice of appeal . . . are subject to the appeal process and review." Pressler & Verniero, Current N.J. Court Rules, cmt. 6.1 on R. 2:5-1 (2018); see also Campagna v. Am. Cyanamid Co., 337 N.J. Super. 530, 550 (App. Div. 2001) (refusing to consider an order not listed in the notice of appeal).

"An appeal from a final judgment must be filed with the Appellate Division within forty-five days of its entry and served upon all other parties." Lombardi v. Masso, 207 N.J. 517, 540 (2011) (citing R. 2:4-1 and R. 2:5-1(a)). Rule 2:4-4(a) permits a maximum thirty-day extension of time, but only if the appellant actually files the notice of appeal "within the time as extended." Lombardi, 207 N.J. at 540-41. Where the appeal is untimely, we lack jurisdiction to decide the merits of the appeal. Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super. 90, 97 n.4 (App. Div. 2014) (quoting In re Hill, 241 N.J. Super. 367, 372 (App. Div. 1990)).

There can be no question that a post-judgment order of the Family Part modifying a custody decree is a final judgment for purposes of appeal. See R. 2:2-3. "[T]he order under appeal, being one that determines the rights of the parties on some definite and separate branch of the controversy, and not merely settling some intervening matter collateral to the issue, would plainly be a final judgment for purposes of appeal." Adams v. Adams, 53 N.J. Super. 424, 429 (App. Div. 1959). On appeal, we view that order "as a new and different judgment, based on a changed set of facts. But even were we to . . . consider the order an amendment, it is an amendment which substantially alters the [prior order], rather than one which merely corrects a clerical or procedural error." Id. at 430. Accordingly, the time for appeal runs from the date of the post-judgment order.

Filing a motion to the trial court for reconsideration or rehearing tolls the time to appeal a final post-judgment order. R. 2:4-3(e). However, once the trial court enters an order disposing of the motion, the time within which to appeal begins to run again, but only the time remaining when the motion was filed is available. Ibid. Thus, "an untimely motion to reconsider does not" toll the time for appeal, Eastampton Ctr., LLC v. Planning Bd., 354 N.J. Super. 171, 187 (App. Div. 2002), and a reconsideration motion "cannot resurrect an appeal that is already

time-barred." Hill, 241 N.J. Super. at 371. Only a timely motion for reconsideration[3] will toll the time for appeal, and a decision on an untimely motion for reconsideration does not restart the forty-five day clock to appeal. See R. 2:4-3(e); see also Potomac Aviation, LLC v. Port Auth. of N.Y. & N.J., 413 N.J. Super. 212, 221-22 (App. Div. 2010). Where the appeal is "not perfected within the period provided by [Rule 2:4-1(a)] and [Rule] 2:4-4(a)," the Appellate Division lacks "jurisdiction to decide the merits of the appeal" and must dismiss the appeal as untimely. Hill, 241 N.J. Super. at 372.

Applying these principles, defendant's appeal is untimely, and we have no jurisdiction to consider arguments the trial court addressed in its December 2013 and December 2014 orders. Defendant's notice of appeal, filed November 30, 2015, identifies only the court's October 23, 2015 order. However, her brief raises arguments primarily challenging the trial court's December 2013 and December 2014 orders, neither of which were perfected within the period provided by Rule 2:4-1(a) and Rule 2:4-4(a). The time to appeal the December 20, 2013 order expired on February 3, 2014. Defendant did not file her first appeal until September 16, 2014,

[3] Under Rule 1:7-4(b) and Rule 4:49-2, a motion for rehearing or reconsideration must be made "not later than [twenty] days after service" of the final judgment or order.

over seven months after the deadline to appeal, and we ultimately dismissed the appeal as untimely.

While that appeal was pending, in October 2014, defendant filed a motion for reconsideration. Because the motion was untimely, it did not toll the time to appeal the judge's decision assuming jurisdiction over the custody dispute, notwithstanding the fact that the trial court lacked jurisdiction to reconsider its ruling while the appeal was pending. See R. 2:9-1. In defendant's October 2014 filing, she also requested a change of venue, alleging local prejudice, which the court denied on December 19, 2014, and the time to appeal that order expired on February 2, 2015. However, defendant did not move for reconsideration until July 13, 2015. Like her previous untimely motion for reconsideration, it too failed to toll the time to appeal. Thus, defendant did not properly appeal the judge's decision denying a change of venue, and we therefore lack jurisdiction to consider that issue on appeal as well.

The only issue properly before us is defendant's argument that the court erred by denying her a stay of proceedings while she served in the United States Military. Specifically, defendant argues, for the first time on appeal, that the court violated her rights under the Service Members Civil Relief Act (SCRA), 50 U.S.C. §§ 3901 to 4043, by denying her the "opportunity to be properly

represented before [it] unilaterally remove[d] [her] custody rights." However, this court "will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). Neither exception applies here. Therefore, we decline to consider the issue, as defendant did not request a stay on these grounds before the trial court.

Dismissed.