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NO. COA11-911  
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STEPHANIE CALLANAN,  
Plaintiff,

v.

Transylvania County  
No. 01 CVD 129

BRIAN A. WALSH,  
Defendant.

Appeal by plaintiff from judgment entered 2 March 2011 by Judge Mack Brittain in Transylvania County District Court. Heard in the Court of Appeals 13 December 2011.

*Donald H. Barton for plaintiff appellant.*

*Adams Hendon Carson Crow & Saenger, P.A., by Joy McIver, for defendant appellee.*

McCULLOUGH, Judge.

Stephanie Callanan ("plaintiff") appeals from a Contempt Judgment finding her in continuing civil contempt of an equitable distribution order. We affirm.

I. Background

This case concerns the equitable distribution of assets between plaintiff and defendant Brian A. Walsh ("defendant").

On 4 February 2004, the Transylvania County District Court entered an equitable distribution judgment (the "2004 Judgment") in the present case. Findings of Fact 28-32 and 57 in the 2004 Judgment address an agreement between plaintiff and defendant concerning a certain \$450,000, finding this sum to be a marital debt. Thereafter, the trial court made the following finding of fact: "Based upon the marital agreement entered into between the parties, the court finds that Plaintiff is entitled to \$450,000 before division of the parties' assets." In distributing the parties' assets, the 2004 Judgment orders in part that plaintiff receive fee simple title to two lots, Lots 19 and 20, and a residence in Lake Toxaway Estates and that plaintiff pay to defendant a distributive award of \$225,000. Specifically, the 2004 Judgment states, "With the house and lots 19 and 20 having a combined date of separation value of \$897,540, the court finds that it is equitable for the Plaintiff to pay to the Defendant a distributive award in the amount of \$225,000." The 2004 Judgment then contains the following decretal:

3. The Plaintiff, G. Stephanie Callanan, shall pay to the Defendant, Brian A. Walsh, a distributive award in the amount of Two Hundred and Twenty Five Thousand Dollars (\$225,000). Said distributive award shall be paid and secured by Plaintiff executing a note and deed of trust designating Defendant as beneficiary under the terms of which

Plaintiff shall pay to the Defendant the sum of \$225,000 with interest at the rate of eight percent (8%) per annum, payable in consecutive monthly installments in the amount of One Thousand Five Hundred Dollars (\$1,500) each with said monthly payments to commence 120 days from date of entry of this judgment and continue on the same day of each month thereafter until the twenty-fourth (24th) payment when the balance of the distributive award plus accrued interest shall be due and payable in full.

Plaintiff appealed from the 2004 Judgment to this Court, and on 16 August 2005, this Court rendered a decision remanding the matter in part to the trial court for additional findings of fact regarding the \$450,000 agreement, which we determined could not have been a marital debt. *Callanan v. Walsh*, 172 N.C. App. 591, 616 S.E.2d 693, 2005 WL 1949881, at \*5 (2005) (unpublished) (hereinafter "*Callanan I*").

In response to this Court's remand, on 6 March 2008, the trial court entered an order (the "March 2008 Order") concluding that the \$450,000 matter was a valid premarital contract and adjusting the earlier division by striking "the requirement that Plaintiff pay to Defendant the sum of \$225,000."

On 23 July 2008, defendant filed a motion pursuant to N.C.R. Civ. P. 60, requesting relief from the March 2008 Order because "the initial [2004 Judgment] had already awarded Plaintiff assets valued in excess of \$450,000 more than the

Defendant, and the [March 2008 Order] awards [plaintiff] the benefit of another \$450,000." On 5 November 2008, the trial court entered an order (the "November 2008 Order") withdrawing the March 2008 Order, declaring such order to be "null and void," and declaring "a mistrial of the action," ordering that the matter be placed back on the trial court's docket for trial.

Plaintiff then appealed the November 2008 Order to this Court, and on 19 January 2010, this Court rendered a decision vacating "that part of the trial court's order declaring a mistrial" and dismissing the appeal as interlocutory "[b]ecause the 5 November 2008 order requires further proceedings." *Callanan v. Walsh*, 202 N.C. App. 147, 690 S.E.2d 559, 2010 WL 157551, at \*2 (2010) (unpublished) (hereinafter "*Callanan II*"). In *Callanan II*, we stated that following our decision in *Callanan I*, "the only issue that remained in this case was 'the treatment of a certain \$450,000 matter[.]'" *Id.*, 2010 WL 157551, at \*3. We stated that the March 2008 Order was declared null and void by the November 2008 Order, and "[a]s a result of the granting of the Rule 60 motion, Plaintiff faces a new trial to resolve the treatment of the \$450,000 matter." *Id.*

On remand, the trial court entered a judgment on 21 September 2010 (the "2010 Judgment"), concluding that the

\$450,000 matter "was a valid prenuptial agreement between the parties." The 2010 Judgment indicates that the parties "stipulated that the only issue to be decided by [the trial court] was the treatment of the purported prenuptial agreement entered between the parties" and that "no further evidence would be tendered to the Court." Neither party appealed from the 2010 Judgment.

On 7 December 2010, defendant filed the present motion for contempt, stating that plaintiff was in contempt for failure to comply with paragraph 3 of the decretal portion of the 2004 Judgment. On 2 March 2011, the trial court entered a Contempt Judgment finding in part that "[t]he distributive award with interest provided for in Paragraph 3 of the decretal portion of the 2004 Judgment was not altered or amended as a result of Plaintiff's appeals" and that "Paragraph 3 of the decretal portion of the 2004 Judgment remains in full force and effect." The trial court adjudged plaintiff to be "in continuing civil contempt of Court for failure to comply with the provisions of the 2004 Judgment requiring her to execute a note and deed of trust for benefit of Defendant." Plaintiff timely appealed from the Contempt Judgment to this Court.

## II. Standard of Review

"The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007). "'Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment.'" *Id.* (quoting *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990)). "[F]indings of fact [in civil contempt proceedings] to which no error is assigned are presumed to be supported by competent evidence and are binding on appeal. The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*." *Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141, 143 (2009) (internal quotation marks and citations omitted).

### III. Contempt Judgment

We first note that to the extent plaintiff attempts to argue the trial court erred by not revisiting the equitable distribution judgment and taking additional testimony, that issue is not properly before this Court, as neither party appealed the 2010 Judgment to this Court. Our review is limited

only to the Contempt Judgment from which plaintiff presently appeals.

"The purpose of civil contempt is not to punish, but rather to coerce [a party] to comply with an order of the court." *Shippen v. Shippen*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 693 S.E.2d 240, 243 (2010). To hold a party in civil contempt, the trial court must find that (1) the order remains in force and effect, (2) the purpose of the order may still be served by the party's compliance with the order, (3) the party's non-compliance with the order was willful, and (4) the non-complying party is able to comply with the order or is able to take reasonable measures to comply. N.C. Gen. Stat. § 5A-21 (2009); *Shippen*, \_\_\_ N.C. App. at \_\_\_, 693 S.E.2d at 243. In the present case, plaintiff appears to challenge the trial court's findings of fact supporting the first three requirements.

Plaintiff adamantly argues the 2004 Judgment is no longer in force and effect and specifically challenges the trial court's finding of fact that "[t]he distributive award with interest provided for in Paragraph 3 of the decretal portion of the 2004 Judgment was not altered or amended as a result of Plaintiff's appeals." Plaintiff first argues the decretal portion of the 2004 Judgment was expressly set aside by the

March 2008 Order. Plaintiff also argues our opinion in *Callanan II* left in effect that portion of the November 2008 Order placing the matter on the docket for a new trial. Thus, plaintiff argues, the validity and continued effect of the 2004 Judgment was affected by these orders.

However, plaintiff's reliance on the March 2008 Order is entirely misguided, as the November 2008 Order expressly withdraws that order and declares it "null and void." Our opinion in *Callanan II* reiterates this result. *Callanan II*, 2010 WL 157551, at \*3. Further, plaintiff's extensive arguments concerning a retrial of the matter as ordered in the November 2008 Order are likewise misguided. Plaintiff's arguments on this issue completely ignore the progression of this case following our remand of the matter in *Callanan II*. Notably, our decision in *Callanan II* makes clear that "[f]ollowing this Court's decision in *Callanan I*, the only issue that remained in this case was 'the treatment of a certain \$450,000 matter[.]'" *Callanan II*, 2010 WL 157551, at \*3. In *Callanan II*, we pointed out that both the March 2008 Order and the November 2008 Order "applied solely to the \$450,000 matter[.]" *Id.* Upon remand from *Callanan II*, the parties both stipulated the treatment of the \$450,000 matter was in fact the only matter left to be

addressed by the trial court and that no further evidence would be tendered in the case. Accordingly, the 2010 Judgment reclassifies the \$450,000 as a valid prenuptial agreement, as commanded by our decision in *Callanan I*, effectively amending findings of fact 28-32 and 57 of the 2004 Judgment. Neither party appealed this result. Consequently, the history of this case shows that the 2004 Judgment remained in effect, with the only change being those findings of fact classifying the \$450,000 matter as a marital debt, rather than a prenuptial agreement. If the distributional calculation should have been revisited as a result of this reclassification, as plaintiff presently contends, plaintiff should have presented those arguments to the trial court before entry of the 2010 Judgment, or plaintiff should have appealed from the 2010 Judgment. Because plaintiff did neither, the trial court's finding of fact that the decretal portion of the 2004 Judgment was not altered or amended as a result of plaintiff's appeals is supported by competent evidence in the record.

Plaintiff asserts the same arguments in her challenge to the trial court's finding of fact that "[t]he purpose of the 2004 Judgment may still be served by Plaintiff's compliance with the provisions for payment to the Defendant of the \$225,000.00

distributive award with interest as provided therein." Plaintiff argues only that both the 2010 Judgment and the November 2008 Order had a significant effect on the distribution contained in the 2004 Judgment and that the matter should be reheard. Plaintiff makes no showing of how the purpose of the 2004 Judgment - equitable distribution of the parties' assets - cannot still be served by enforcement of the decretal provisions of the 2004 Judgment. Plaintiff merely points to the possibility of a different distributional calculation if the matter were reheard. However, from the record, it appears that although the trial court originally classified the \$450,000 matter as a marital debt, the trial court arrived at the distributional award by deducting the \$450,000 amount before dividing the parties' marital assets, ultimately achieving the same result as if the amount had been properly classified as a prenuptial agreement. Plaintiff makes no argument how the calculation would, in fact, be different, other than relying on the result achieved by the withdrawn March 2008 Order. Thus, for the reasons stated above, the 2004 Judgment remains in force and effect as amended by the 2010 Judgment, and competent evidence in the record supports the trial court's finding that

the purpose of the 2004 Judgment will still be served by enforcement of the judgment's unamended decretal provisions.

Finally, plaintiff asserts the trial court's finding that plaintiff's failure to comply with the 2004 Judgment was willful is erroneous. "'Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so.'" *Watson*, 187 N.C. App. at 66, 652 S.E.2d at 318 (quoting *Sowers v. Toliver*, 150 N.C. App. 114, 118, 562 S.E.2d 593, 596 (2002)). "The party alleged to be delinquent has the burden of proving either that he lacked the means to pay or that his failure to pay was not willful." *Shumaker v. Shumaker*, 137 N.C. App. 72, 76, 527 S.E.2d 55, 57 (2000).

Here, plaintiff neither testified nor presented evidence at the contempt hearing. On appeal, plaintiff simply asserts that given the March 2008 and November 2008 Orders, plaintiff cannot be found to have willfully violated the 2004 Judgment. Again, plaintiff ignores the fact that the 2010 Judgment is the final judgment in this matter, which left the 2004 Judgment in effect with the amended findings of fact regarding the classification of the \$450,000 matter. No other portions of the 2004 Judgment have been altered by the trial court and plaintiff did not

appeal the 2010 Judgment. Accordingly, at the very latest, the requirement that plaintiff comply with the decretal provision of the 2004 Judgment was conclusive with the final 2010 Judgment. Contrary to plaintiff's assertion, the record contains no evidence showing that plaintiff's failure to comply with the 2004 Judgment was not willful, as the burden falls on her to show such.

For the foregoing reasons, we hold the trial court's findings of fact are supported by competent evidence and support the judgment finding plaintiff to be in continuing civil contempt. The trial court's Contempt Judgment is therefore affirmed. Defendant's motion to dismiss plaintiff's appeal is denied as moot in light of this opinion.

Affirmed.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).