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NO. COA05-367

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

ETTA C. OAKLEY,

Plaintiff,

v.

Pasquotank County

No. 02 CVS 138

CRAIG C. BARKLEY and  
RIVER ENTERPRISES,

Defendants.

Appeal by plaintiff from judgment entered 16 July 2003 and amended on 27 January 2005 by Judge W. Russell Duke, Jr. in Pasquotank County Superior Court. Heard in the Court of Appeals 22 September 2005.

*Trimpi & Nash, by John G. Trimpi, for plaintiff-appellant.*

*John W. Halstead, Jr. for defendant-appellee.*

ELMORE, Judge.

Etta C. Oakley (plaintiff) appeals from two judgments and an order denying her motion to amend the trial court's findings of fact. Plaintiff joined with defendant Craig C. Barkley and others to form River Enterprises (the partnership), a partnership organized to purchase an old college campus on the Pasquotank river and develop it into an apartment and recreation complex. Plaintiff invested \$60,000.00 in the partnership. This suit arises out of a

disagreement over how much return on her investment plaintiff is entitled to receive under the provisions of the partnership agreement. After a bench trial, the trial court entered a judgment on 16 July 2003 awarding plaintiff the value of her partnership interest, to be offset by \$110,880.00, an amount undisputedly already paid to plaintiff. The trial court also denied plaintiff's motion to amend the findings of fact in the 16 July 2003 judgment.

Plaintiff appealed, and on 16 November 2004 this Court filed an unpublished opinion stating that:

In the present case, plaintiff filed a complaint seeking money damages. Although the trial court ruled in plaintiff's favor, the trial court has not entered a final judgment against River Enterprises for the amount owed to plaintiff. Without such a judgment, there has been no final adjudication of the rights of the parties. As such, the trial court's order does not dispose of the cause as to all the parties, but instead requires further judicial action in order to settle and determine the entire controversy. Moreover, the trial court has not certified that there is no just reason to delay the appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, and our review of the record reveals no substantial right.

*Oakley v. Barkley*, 167 N.C. App. 109, 605 S.E.2d 11 (2004) (unpublished). In response to this Court's opinion, the parties entered into a stipulation that:

plaintiff received nothing by reason of the evaluation of her partnership interest as required by the Judgment dated July 11, 2003 and entered July 16, 2003. This stipulation is entered for the purpose of establishing the Judgment as a final judgment and to support an amended judgment to the effect that there is no just reason for delay.

By amended judgment entered 27 January 2005, the trial court incorporated the stipulation of the parties into its judgment. Plaintiff now appeals from the original judgment, the judgment as amended, and the order denying her motion to amend the findings in the original judgment.

Plaintiff was one of many general partners who, as investors, joined with Barkley to form the partnership. The partnership's main asset was the river-side property, which if developed appropriately and sold would create a profit for all partners. The partnership agreement signed by all partners consisted of seventeen articles directed at the ownership, control, and general maintenance of the partnership. Article nine, entitled "Division of Profits and Losses," in relevant part reads:

Each partner shall be entitled to a pro rata share of the net profits of the business and shall be responsible for a pro rata share of the net losses of the business pursuant to the proportion of his or her capital contribution in the partnership. . . . Distribution of profits shall be made on or before the 31<sup>st</sup> day of December each year. Provided, however, any partner, regardless of capital contribution, shall be entitled to repayment of the amount invested herein together with interest at the rate of twelve per cent (12%) per annum from the date of the investment, six months from the receipt of a written demand for the same, sent by registered mail to Craig C. Barkley. The return of said money shall terminate any partnership interest of the demanding party, who shall then execute a quitclaim deed to the partnership of his or interest at the time his money is returned. This return of capital contribution plus twelve percent (12%), shall be reduced by any monies previously paid by the partnership to the withdrawing partner, or shall serve as an offset as far as applicable to any loss by the partnership.

Any retiring partner may claim the value of his partnership to be in excess of twelve percent (12%) return on his investment as aforementioned. Upon such a request, the partnership's share of the retiring partner shall be evaluated by the remaining partners and a fair market value for the retiring partner's interest shall be paid to him or her. This value shall be determined by closing of the books and a rendition of the appropriate profit and loss, trial balance, and balance sheet statements. All disputes arising therefrom shall be determined as provided in the article on Arbitration hereinafter included.

Plaintiff asserts that the trial court erred in applying the second paragraph of article nine to her request for a return of capital invested.

When reviewing the judgment of a trial court sitting without a jury, the appropriate standard of review is "whether competent evidence exists to support its findings of fact and whether the conclusions reached were proper in light of the findings." *Lewis v. Edwards*, 159 N.C. App. 384, 388, 583 S.E.2d 387, 390 (2003) (internal quotation omitted). "Findings of fact are conclusive if supported by competent evidence, irrespective of evidence to the contrary." *Oliver v. Bynum*, 163 N.C. App. 166, 169, 592 S.E.2d 707, 710 (2004). "Where no exceptions are taken to findings of fact, such findings are binding on appeal." *Creech v. Ranmar Props.*, 146 N.C. App. 97, 100, 551 S.E.2d 224, 227 (2001). However, a trial court's conclusions of law are fully reviewable. *Id.*

Here, plaintiff assigns error to the fourteenth and fifteenth findings of the trial court, essentially that under article nine

she was entitled to have her interest valued by the remaining partners and that she was not entitled to seek additional money from defendant Barkley individually.

14. Having made a demand for return of her capital contribution, Plaintiff is entitled to have her partnership interest evaluated by the remaining partners, pursuant to the terms of Article Nine of the partnership agreement, and to be paid the difference between the partnership interest value and the sum of one hundred ten thousand eight hundred and eighty dollars (\$110,880.00), previously paid and received.

15. That Plaintiff and Defendant, Craig C. Barkley, were general partners in River Enterprises but had no agreement between one another whereby Defendant Barkley obligated himself individually to pay compensation to Plaintiff . . . .

Essentially, this dispute involves a matter of interpreting the partnership agreement, a contract. Plaintiff argues that there is no competent evidence to support a determination that she 1) claimed the value of her interest in the partnership to be worth more than twelve percent, or 2) requested that the partners evaluate her interest, consistent with *paragraph two* of article nine. Instead, plaintiff contends that there is competent evidence demonstrating her demand for return of capital contribution, consistent with *paragraph one* of article nine. Defendants do not necessarily disagree with plaintiff's demand for the return of her capital; rather, they argue that the trial court was correct in imposing a "constructive condition" on the language in paragraph one, essentially allowing this "option" only if it were financially feasible. However, "[w]here the provisions of a contract are

plainly set out, the court is not free to disregard them and a party may not contend for a different interpretation on the ground that it does not truly express the intent of the parties." *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 284, 296 S.E.2d 512, 514-15 (1982).

By the agreement's plain language, any partner could request return of his or her capital investment plus twelve percent. There is nothing in the agreement to suggest that this clause, albeit perhaps not in the partnership's best interest, is ambiguous such that other interpretation is necessary. The evidence before the trial court was that plaintiff had requested the return of her investment by letter sent to defendant Craig C. Barkley. This evidence, in conjunction with the partnership agreement, warrants a finding that plaintiff complied with the prerequisites for return of her investment. There is no competent evidence in the record that as a retiring partner plaintiff was asserting her interest in the partnership was worth more than twelve percent. Accordingly, the trial court erred in its fourteenth finding.

Related to the "option" invoked by plaintiff's request, defendants, by cross-assignment of error, assert that the trial court erred in finding that article nine was not modified at a meeting of the general partners to limit the partners ability to demand return of their capital.

11. That on December 10, 1994, the Plaintiff at a meeting of the general partners, made a motion which was seconded and unanimously approved that no liquidation of capital contribution would take place until the transfer of the partnership real estate has

been transferred to new owners. That said condition did not constitute a modification of the partnership agreement on a continuing basis, as it was made solely for the purposes of a pending sale at that time, which was never completed.

This finding, however, is supported by competent evidence, even though contrary evidence exists. The minutes of the general partners meeting on 10 December 1994 reflect plaintiff made a motion that no partnership liquidation occur until the completed sale of the property to new owners. However, there is nothing about the motion's passage that would suggest it was aimed at amending or modifying the partnership agreement. Foremost, not all the partners were attending and voted, none of the twenty or more junior or limited partners were present. See N.C. Gen. Stat. § 59-48(8) (2003) ("[N]o act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners."). Additionally, other testimony was that the motion was made due to a pending sale, which eventually fell through. While evidence exists that other general partners in plaintiff's position operated as if that motion was binding on them, there is competent evidence to support the trial court's finding.

Plaintiff also excepts to the trial court's fifteenth finding that there was no personal agreement between her and defendant Barkley that he pay her a monthly return. Yet, there is competent evidence in the record to support that finding. Defendant Barkley testified that he never agreed to be bound in paying plaintiff a monthly return on her investment. He also testified that no other partner was receiving such payments, nor were those payments

necessarily authorized by the partnership. Accordingly, we affirm the trial court's finding on this point.

Notably then, the trial court erred in determining that plaintiff was entitled to an evaluation of her interest under paragraph two of article nine. We are cognizant of the fact that this agreement is in many respects contrary to ordinary or default provisions of partnership law. See, e.g., N.C. Gen. Stat. § 59-48(4) (2003) ("A partner shall receive interest on the capital contributed by him only from the date when repayment should be made."). However, absent any ambiguity, the agreement between the parties controls; the parties' agreement is what we must enforce, not their perhaps well-meaning but unwritten intentions. We reverse the judgment of the trial court and remand the matter to determine, under paragraph one of the agreement, how much plaintiff is entitled to receive.

Reversed and remanded.

Judges HUDSON and SMITH concur.

Report per Rule 30(e).