

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-328

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

LYNN A. ROLLS,  
Plaintiff,

v.

Guilford County  
No. 08 CVD 12537

FREDERICK ALVIN ROLLS,  
Defendant.

Appeal by defendant from order entered 10 July 2009 by Judge Joseph E. Turner in Guilford County District Court. Heard in the Court of Appeals 29 September 2010.

*Katherine Freeman, PLLC, by Katherine Freeman, for plaintiff-appellee.*

*Fredrick Alvin Rolls, pro se, for defendant-appellant.*

STEELMAN, Judge.

Where defendant failed to assign error to the denial of his motion for a continuance, this argument is dismissed. Where subsequent to asserting a claim for equitable distribution in contravention of the parties' Separation Agreement, defendant accepted the benefits of the Separation Agreement in a domestic relations order, the trial court properly concluded that defendant ratified the Separation Agreement and granted summary judgment in favor of plaintiff.

I. Factual and Procedural Background

Lynn Rolls (plaintiff) and Frederick Rolls (defendant) were married on 1 August 1980 and separated on 23 October 2007. One child was born of the marriage, who has reached the age of majority. Plaintiff and defendant entered into a Separation Agreement on 23 October 2007. In the agreement, plaintiff and defendant acknowledged that a full disclosure of all assets and debts had been made by each of the parties and that they waived equitable distribution pursuant to N.C. Gen. Stat. § 50-20, *et seq.* On 24 October 2008, plaintiff filed a complaint seeking an absolute divorce from defendant. On 22 December 2008, defendant filed an answer and counterclaim alleging that plaintiff had failed to make a full disclosure of all her assets as required by the Separation Agreement; that defendant was entitled to specific performance of that provision of the agreement; and that he was entitled to an equitable distribution of marital property pursuant to N.C. Gen. Stat. § 50-20. Defendant's allegations were made "upon information and belief" and did not specifically assert fraud, duress, undue influence, or coercion on the part of plaintiff. Defendant further requested an unequal division of marital property. Plaintiff replied to defendant's counterclaim and pled the Separation Agreement in bar of defendant's claim for equitable distribution. On 14 January 2009, the trial court entered a judgment of divorce, reserving the other claims for further determination by the court.

On 17 April 2009, with the consent of all parties, the trial court entered a domestic relations order, directing the transfer of one-half of plaintiff's Individual Retirement Account with The

Hartford to defendant, in accordance with the provisions of the Separation Agreement. On 3 June 2009, plaintiff filed a motion for summary judgment seeking dismissal of defendant's counterclaim. When the motion was called for hearing, defendant's counsel moved for a continuance, asserting that she did not have adequate time to obtain copies of plaintiff's discovery responses and that she had not received plaintiff's memorandum of law in support of summary judgment until the afternoon before the hearing. The trial court denied defendant's motion. Plaintiff's motion for summary judgment was granted, and defendant's counterclaim was dismissed with prejudice.

Defendant appeals. Defendant's counsel was allowed to withdraw following entry of summary judgment.

## II. Motion for Continuance

In his first argument, defendant contends that the trial court erred by denying his motion for a continuance. We dismiss this argument.

Prior to the amendments to the North Carolina Rules of Appellate Procedure, effective 1 October 2009, these rules required appellants to set forth assignments of error upon which the appeal was predicated. N.C.R. App. P. 10(c)(1) (2009). The scope of review on appeal was confined to those assignments of error set forth in the record. N.C.R. App. P. 10(a) (2009). Our Supreme Court amended these Rules, and abolished the requirement of assignments of error in favor of proposed issues on appeal. N.C.R. App. P. 10(b) (2009) (amended October 1, 2009). Proposed issues on

appeal do not limit our scope of review. In the instant case, defendant filed his notice of appeal on 10 August 2009. Because the notice of appeal was filed prior to 1 October 2009, the amendments to the Rules of Appellate Procedure are not applicable. See *Latta v. Rainey*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 689 S.E.2d 898, 905 n.4 (2010). Our scope of review is thus limited to the assignments of error set forth in the record. Defendant's only assignment of error states, "Defendant challenges the Summary Judgment ruling entered 10<sup>th</sup> July 2009 from Guilford County District Court[.]" Defendant failed to assign error to the trial court's denial of his motion to continue and has waived appellate review of this issue. *Id.* at \_\_\_, 689 S.E.2d at 905. This argument is dismissed.

### III. Ratification of Separation Agreement

In his second argument, defendant contends that the trial court erred by granting plaintiff's motion for summary judgment because there existed genuine issues of material fact as to whether defendant had ratified the Separation Agreement. We disagree.

#### A. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). "Summary judgment should be looked upon with favor where no genuine issue of material fact is presented." *Lowry v. Lowry*, 99 N.C. App. 246, 249, 393 S.E.2d 141, 143 (1990) (citation omitted).

B. Analysis

It is well-established that parties to a marriage may enter into a written agreement which provides that they are foregoing their statutory right to equitable distribution and agreeing upon a division of their marital estate. N.C. Gen. Stat. § 50-20(d) (2009). "Whether entered into before, during, or after marriage, '[t]hese agreements are favored in this state, as they serve the salutary purpose of enabling marital partners to come to a mutually acceptable settlement of their financial affairs.'" *Hill v. Hill*, 94 N.C. App. 474, 480, 380 S.E.2d 540, 545 (1989) (quotation omitted). An agreement waiving equitable distribution "will be honored by the courts and will be binding upon the parties." *Id.* (quotation omitted).

In order for such an agreement to be valid, it "must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties." *Eubanks v. Eubanks*, 273 N.C. 189, 196, 159 S.E.2d 562, 567 (1968) (quotation omitted). It is well-established that an agreement "procured by either fraud, duress or undue influence may be ratified by the victim so as to preclude a subsequent suit to set the transaction aside." *Link v. Link*, 278 N.C. 181, 197, 179 S.E.2d 697, 706 (1971) (citations omitted).

A party ratifies an agreement by retroactively "authorizing or otherwise approving it, . . . either expressly or by implication." Thus, ratification can occur where a party accepts

benefits and performs under an agreement. The act only constitutes ratification if it is done with full knowledge that the acceptance of benefits or the performance arises pursuant to the agreement and is done so without any duress.

*Goodwin v. Webb*, 152 N.C. App. 650, 656-57, 568 S.E.2d 311, 315 (2002) (Greene, J., dissenting) (internal quotation, citations, and alterations omitted), *per curiam rev'd based on the dissenting opinion*, 357 N.C. 40, 577 S.E.2d 621 (2003).

In *Hill v. Hill*, the plaintiff alleged that her husband wrongfully procured her signature on the parties' property settlement agreement and a subsequent amendment, and argued that she was entitled to a statutory equitable distribution of marital property. 94 N.C. App. at 478, 380 S.E.2d at 544. However, evidence presented to the trial court showed she had accepted a \$1,000.00 per month payment from the defendant pursuant to the agreement after she became aware of his alleged wrongdoing. *Id.* at 479, 380 S.E.2d at 544. This Court held that "[t]he materials before us plainly show that the wife has continued to accept the benefits of both agreements long after she became aware of the alleged wrongdoing. She cannot now avoid the same contracts she acquiesced in for months and the benefits of which she still enjoys." *Id.* (citations omitted).

In the instant case, on 22 December 2008, defendant asserted that plaintiff had failed to disclose all of her marital assets pursuant to the terms of the Separation Agreement. Yet, on 17 April 2009, defendant and his counsel executed a domestic relations order that directed the transfer of one-half of plaintiff's

Individual Retirement Account to defendant in accordance with the terms of the Separation Agreement. This order contained no reservation concerning defendant's counterclaim. Defendant cannot attack the Separation Agreement while simultaneously accepting its benefits. The execution of the domestic relations order, which enforced one of the provisions of the Separation Agreement, constituted a ratification of the Separation Agreement by defendant. *Hill*, 94 N.C. App. at 479, 380 S.E.2d at 544.

Defendant is not permitted to now argue that the provisions in the agreement should be disregarded because he believes he received a bad bargain. See generally *Blaylock Grading Co. v. Smith*, 189 N.C. App. 508, 511, 658 S.E.2d 680, 682 (2008) ("People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain." (quotation omitted)), *disc. review denied*, 362 N.C. 469, 665 S.E.2d 737 (2008).

We note that defendant's arguments attempt to show that a genuine issue of material fact existed as to possible assets that were not disclosed by plaintiff. These arguments are based upon the parties' depositions and discovery responses. However, only portions of defendant's deposition testimony are before this Court on appeal. It is incumbent on an appellant to provide the reviewing court "with the materials necessary to decide the issue on appeal. The appellate courts can judicially know only what appears of record." *Jackson v. Housing Authority of High Point*,

321 N.C. 584, 586, 364 S.E.2d 416, 417 (1988) (internal citations omitted). We do not consider these arguments. *Id.*

DISMISSED IN PART; AFFIRMED IN PART.

Judges BRYANT and ERVIN concur.

Report per Rule 30(e).