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NO. COA11-700
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

WENDY RENEE SWANEY,
Plaintiff

v.

Randolph County
No. 08 CvD 2541

THOMAS ERVIN SWANEY,
Defendant

Appeal by defendant from judgment entered 17 November 2010 and order entered 27 January 2011 by Judge Lee W. Gavin in Randolph County District Court. Heard in the Court of Appeals 7 November 2011.

Robertson, Medlin & Bloss, PLLC, by Stephen E. Robertson and Carl I. Carlson IV, for Plaintiff-Appellee.

Law Office of John W. Kirkman, Jr., by John W. Kirkman, Jr. and Adam W. Arthur, for Defendant-Appellant.

ERVIN, Judge.

Defendant Thomas Ervin Swaney appeals from a 17 November 2010 equitable distribution order and a 27 January 2011 order denying his motion to amend the 17 November 2010 equitable distribution order pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. On appeal, Defendant contends that the trial court erred by utilizing an inappropriate method in calculating the "goodwill"

of Defendant's business and in determining the value of the business' fixed assets. After careful consideration of Defendant's challenges to the trial court's judgment and order in light of the record and the applicable law, we conclude that Defendant's contentions lack merit and that the challenged orders should be affirmed.

I. Factual Background

Plaintiff Wendy Renee Swaney and Defendant were married on 18 April 1992. The couple had one child, a daughter, who was born on 26 September 1995. Plaintiff and Defendant separated on 27 July 2008.

On 23 September 2008, Plaintiff filed a complaint seeking post-separation support, alimony, child custody, child support, equitable distribution, temporary and preliminary injunctive relief, a preliminary injunction, and an interim allocation of marital assets. In his answer, Defendant asserted counterclaims for child custody, child support, and equitable distribution. On 23 November 2009 and 21 December 2009, the parties entered into consent orders addressing the issues of child custody, child support, and alimony. The remaining matters came on for hearing before the trial court on 10 September 2010.

At the equitable distribution hearing, the parties litigated issues relating to the proper valuation of Defendant's

information technology business, Milestone Computer Solutions, LLC. As part of that process, the trial court heard testimony from Defendant's expert witness, George Batten, and Plaintiff's expert witness, Christy Smith. Both Mr. Batten and Ms. Smith discussed the value that should be assigned to MCS's "goodwill" given the absence of a noncompetition agreement between Defendant and MCS and addressed a hypothetical situation in which MCS was sold subject to such an agreement. Mr. Batten testified that, as of the date of separation, MCS was worth - \$2,233.36 given the value of existing assets and liabilities, with the only positive component in his analysis being MCS's "goodwill," the value of which hinged upon the existence of an agreement between Defendant and the new owner under which Defendant would refrain from competing with and work for the new owner. On cross examination, Mr. Batten testified that, based upon a reasonable multiple of net earnings over the ten month period that Defendant had owned MCS prior to the parties' separation, MCS's "goodwill" could be valued "in the neighborhood of thirty thousand dollars." In addition, Mr. Batten testified that MCS's fixed assets consisted of office furniture, fixtures, and office equipment and had a total book of value of \$36,051.78. According to Mr. Batten, this total was derived from the information contained in MCS's books and

records prior to Defendant's ownership and that, "[i]f you went through [Defendant's] office, there's definitely not [\$36,000] worth of desks and chairs and bookcases and so forth like that." Mr. Batten did not obtain a fixed asset listing for MCS and had not inventoried the fixed assets that were actually on hand at the time of his valuation. Ms. Smith, who was a former employee of MCS and ran a competing business, testified that, without a noncompetition agreement or some obligation on the part of Defendant to remain in the employ of MCS, there "would not be a lot of value in [MCS]" and that she would not purchase the business in the absence of such an arrangement.

On 17 November 2010, the trial court entered an equitable distribution order in which it valued MCS at \$64,000.00, with this figure derived by taking into account the business' "fixed assets, cash on hand, . . . accounts receivable, [and] . . . business liability," which the trial court valued at \$36,051.68, and by valuing its "goodwill" at \$30,000.00. In its factual findings, the trial court adopted Mr. Batten's "willing buyer, willing seller" approach and specifically pointed to Mr. Batten's testimony that a willing buyer of a service business such as that operated by Defendant would require a noncompetition agreement and an agreement that Defendant remain

an employee of the business for a period of time as a condition of any purchase.

On 30 November 2010, Defendant filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, seeking the entry of an order reopening the proceeding, the taking of additional testimony concerning MCS's fixed assets, and an amendment to the findings of fact and conclusions of law relating to MCS's value on the grounds that the trial court had incorrectly calculated the value of MCS's fixed assets. On 27 January 2011, the trial court entered an order denying Defendant's motion. Defendant noted an appeal to this Court from the 17 November 2010 equitable distribution order and the 27 January 2011 order denying his motion to amend pursuant to N.C. Gen. Stat. § 1A-1, Rule 59.

II. Legal Analysis

A. Standard of Review

According to N.C. Gen. Stat. § 50-20, trial courts have considerable discretion in determining the appropriate distribution of marital and divisible property, with the exercise of such "discretion [to remain un]disturbed in the absence of clear abuse.'" *Mrozek v. Mrozek*, 129 N.C. App. 43, 48, 496 S.E.2d 836, 840 (1998) (quoting *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986)). As a result,

our review of a trial court's distribution decision is limited to determining whether there was a clear abuse of discretion, with the trial court's order to be upheld unless it is "so arbitrary that [it] could not have been the result of a reasoned decision.'" *Id.* (quoting *Lawing*, 81 N.C. App. at 162, 344 S.E.2d 104). "The trial court's findings of fact, on which its exercise of discretion rests, are conclusive if supported by any competent evidence. The mere existence of conflicting evidence or discrepancies in evidence will not justify reversal." *Id.* (quoting *Lawing*, 81 N.C. App. at 162, 344 S.E.2d at 104).

B. Substantive Legal Issues

1. Net Value of MCS

In his first challenge to the trial court's judgment, Defendant contends that the trial court erred by using the "willing seller and willing buyer" method to value MCS's goodwill. More specifically, Defendant contends that the trial court should have declined to utilize this method of valuation given the absence of any evidence tending to show the existence or availability of a noncompetition agreement and an employment agreement. Defendant's argument lacks merit.

A trial court, "[f]or purposes of equitable distribution," shall determine the net value of marital property "as of the date of the separation of the parties." N.C. Gen. Stat. § 50-

21(b). As a result of the fact that "there is no single best approach" to valuing a business, "the task of a reviewing court on appeal is to determine whether the approach used by the trial court reasonably approximated the net value" of the business. *Poore v. Poore*, 75 N.C. App. 414, 419, 331 S.E.2d 266, 270 (citing *Weaver v. Weaver*, 72 N.C. App. 409, 412, 324 S.E.2d 915, 917-18 (1985), *disapproved on other grounds in Armstrong v. Armstrong*, 322 N.C. 396, 403-04, 368 S.E.2d 595, 599 (1988)), *disc. review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985). "In valuing a professional practice, a court should consider the following components of the practice: (a) its fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities." *Id.* (citing *In re Marriage of Lopez*, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974) and *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975)). The approach outlined in *Poore*, which was developed in connection with the valuation of a professional partnership, "is also applicable to the valuation of closely held corporations" such as MCS. *Locklear v. Locklear*, 92 N.C. App. 299, 301, 374 S.E.2d 406, 407 (1988) (citation omitted), *disc. review allowed*, 324 N.C. 336, 378 S.E.2d 794 (1989). "On appeal, if it appears that the trial court reasonably

approximated the net value of [a business] and its goodwill, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed." *Poore*, 75 N.C. App. at 422, 332 S.E.2d at 272.

As we have already indicated, the net value of a business includes goodwill, which "*must* be valued and considered in determining the value of a [business] for purposes of equitable distribution." *Poore*, 75 N.C. App. at 420-21, 331 S.E.2d at 271 (emphasis added). "Any legitimate method of valuation that measures the present value of goodwill by taking into account past results, and not the postmarital efforts of the professional spouse, is a proper method of valuing goodwill." *Id.* at 421, 331 S.E.2d at 271. A widely accepted method for determining the value of a business' goodwill is "the price that a willing buyer would pay to a willing seller for" that business. *Id.*

In this case, Mr. Batten valued MCS's "goodwill" using the "willing buyer, willing seller" method as "in the neighborhood of thirty thousand dollars" based upon a reasonable multiple of earnings accumulated during the time period that Defendant had owned MCS. In addition, Ms. Smith testified that, given the execution of a noncompetition and employment agreement, she would be willing to buy MCS. The trial court based its

valuation decision upon this testimony and valued MCS's goodwill at \$30,000.00. Although Defendant contends that, given the absence of any evidence tending to show that a noncompetition agreement and an employment agreement actually existed or would be made available, it was inappropriate for the trial court to rely on this approach in valuing MCS's goodwill, we do not find this argument persuasive. On the contrary, the inclusion of such assumptions was necessary in order to fully reflect the value of the goodwill that Defendant had accumulated as a result of his operation of the business, particularly given the absence of any indication that Defendant intended to close or abandon MCS at less than its actual value. As a result, given that the trial court based its valuation of MCS's goodwill "on competent evidence and on a sound valuation method" previously accepted by this Court, its goodwill "'valuation [method] will not be disturbed'" on appeal. *Offerman v. Offerman*, 137 N.C. App. 289, 293, 527 S.E.2d 684, 686 (2000) (quoting *Poore*, 75 N.C. App. at 422, 331 S.E.2d at 272).

2. Valuation of "Fixed Assets"

In addition, Defendant contends that the trial court's method of calculating the value of MCS's fixed assets was in error given the testimony of Mr. Batten. More specifically, Defendant claims that the \$36,051.68 figure adopted by the trial

court was based upon an accounting entry and did not represent MCS's actual fixed assets given Mr. Batten's testimony that he had not observed fixed assets of that total value at MCS's premises. Once again, we conclude that Defendant's argument lacks merit.

At trial, Mr. Batten testified that, based upon the information contained in MCS's books and records, the corporation's fixed assets, consisting of office furniture, fixtures, and office equipment, had a total book value of \$36,051.78. The trial court's finding with respect to the valuation of MCS's fixed assets was based upon this evidence. Although Mr. Batten expressed the opinion that the actual value of MCS's fixed assets might be lower than the value shown on MCS's records given that this book value figure was calculated at a time when Defendant did not own MCS and given that Mr. Batten had not observed sufficient fixed assets at MCS to support such a valuation, he had not obtained a listing of MCS's fixed assets or performed an accounting of the fixed assets that were actually on hand and could not, for that reason, provide a more specific value for MCS's fixed assets. Although this evidence raises questions about the validity of the net book value figure upon which the trial court relied, this conflict in the evidence involves a factual determination of the type for

which the trial court, and not this Court on appeal, is ultimately responsible. As a result, given that the record contains sufficient evidence, if believed, to support the trial court's valuation of MCS's fixed assets, we have no basis for overturning the trial court's resolution of this issue on appeal even though the record also contains evidence from which the trial court could have reached a different conclusion.

III. Conclusion

Thus, for the reasons set forth above, we conclude that neither of Defendant's challenges to the trial court's judgment and order have merit. As a result, the trial court's equitable distribution order and order denying Defendant's motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, should remain undisturbed.

AFFIRMED.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).