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NO. COA13-741
NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2013

ALEXANDER BRIGMAN, JR.,
Plaintiff

v.

Cumberland County
No. 12 CvD 8486

SHARON MCFETRIDGE,
Defendant

Appeal by defendant from order entered 5 March 2013 and amended order entered 4 April 2013 by Judge Robert J. Stiehl in Cumberland County District Court. Heard in the Court of Appeals 21 November 2013.

Cranfill Sumner & Hartzog LLP, by Michelle D. Connell, for Plaintiff.

Lewis, Deese, Nance, Briggs & Hardin, LLP, by Renny W. Deese, for Defendant.

ERVIN, Judge.

Defendant Sharon McFetridge appeals from an order denying her motion to set aside the premarital agreement which she had entered into with Plaintiff Alexander Brigman, Jr. In her brief, Defendant contends that the trial court erred by refusing to set aside the premarital agreement on the grounds that Plaintiff materially breached that agreement. After careful consideration of Defendant's challenge to the trial court's

judgment in light of the record and the applicable law, we conclude that the trial court's judgment should be affirmed.

I. Factual Background

A. Substantive Facts

On 8 September 2001, Plaintiff and Defendant were married. On or about 29 August 2001, after consulting with legal counsel, the parties entered into a pre-marital agreement which included provisions addressing a number of issues, including language providing that the property owned by the parties prior to the marriage would remain separate; addressing Plaintiff's military retirement, future property acquisitions, and tax issues; waiving the right to seek alimony or spousal support; and disposing of what would become the marital residence. The provisions addressing the disposition of the marital residence underlie the issues which are before us in this case.

According to Paragraph 7(a) of the pre-marital agreement, the parties had recently purchased a house and lot located at 7579 Firethorn Drive in Fayetteville and intended to convert the property to a tenancy by the entireties after they were married. In addition, Paragraph 7(a) of the pre-marital agreement provided that, "[i]n the event of a separation of the parties, they agree that the house will be immediately listed for sale," with the net proceeds of the sale being divided in accordance

with a formula set out in the pre-marital agreement. In addition, the parties stated in Paragraph 7(b) of the pre-marital agreement that:

Husband shall retain the option to keep the house in his name only if he chooses and so long as he compensates Wife within 30 days of separation for her equity in the property. To constitute (sic) Wife for her equity in the property, the parties shall agree upon a real estate appraiser to value the property.

In the event that Plaintiff elected to retain the marital residence, Defendant's equity interest would be valued using a formula set out in Paragraph 7(b) of the pre-marital agreement.

Although Paragraph 7(a) of the pre-marital agreement indicated that the marital residence would eventually be converted to entireties property, the residence remained titled to Plaintiff during the course of the parties' marriage despite Defendant's attempts to persuade Plaintiff to execute a deed which would have effectuated their initial agreement. After the parties separated, Plaintiff proposed that a particular appraiser be utilized to value the marital residence for the purpose of facilitating a determination of the value of Defendant's equity interest in the property. However, Defendant refused to agree to the use of the appraiser proposed by Plaintiff without apparently taking any additional action, such as suggesting the name of an alternative appraiser. As a

result, Plaintiff did not compensate Defendant for her equity interest in the marital residence within 30 days of the date of separation.¹

B. Procedural History

On 28 September 2012, Plaintiff filed a complaint against Defendant asserting claims for divorce from bed and board and equitable distribution of the marital property not addressed in the pre-marital agreement. On 14 December 2012, Defendant filed an answer and counterclaim in which she denied certain material allegations set out in Plaintiff's complaint and asserted claims against Plaintiff for post-separation support, alimony without divorce, equitable distribution, divorce from bed and board, and rescission of the pre-marital agreement. On 29 January 2013, a hearing concerning Defendant's request that the pre-marital agreement be set aside was held before the trial court. On 5 February 2013, Plaintiff filed a reply denying the material allegations asserted in Defendant's counterclaims.

¹On the one hand, Plaintiff contended that the parties separated on 5 July 2011, while Defendant claimed that the parties separated on 22 September 2012. As of 29 January 2013, the date upon which the trial court conducted a hearing for the purpose of considering the issues raised by Defendant's request that the pre-marital agreement be set aside, Plaintiff had failed to compensate Defendant for her equity in the property. As a result, Plaintiff had not paid Defendant for her interest in the marital property within 30 days of either of the separation dates contended for by the parties.

On 5 March 2013, the trial court entered an order denying Defendant's request that the pre-marital agreement be set aside. After reciting the procedural history of this case and describing the provisions of the pre-marital agreement, the trial court found as a fact that:

XI

That the parties['] date of separation has not been determined; that the difference in the date of separation is fourteen and one-half months[,] with the last one most recent date of separation being outside of the thirty days; that the parties have been unable to agree on an appraiser; that the Plaintiff initiated an appraiser and the Defendant rejected and said she would not agree to use that appraiser; that the language of 7B indicates the parties were to agree on a real estate appraiser to determine the value.

XII

That on October 11, 2011[,] a letter was sent to the Plaintiff from Attorney Steve Bunce, who practices [r]eal [e]state, requesting Plaintiff to execute a deed; that attempts were made on behalf of the Defendant to submit the deed to the Plaintiff to have him execute a deed; that in January 2012 that requests were made by hand delivery; that again the Plaintiff elected his ability to maintain the house in his sole name; that the Plaintiff presumes parties mutually agree and time limits thereon are contradictions upon the agreement and the Plaintiff has not executed and transferred property which is allowed in Paragraph 7B.

XIII

That clearly in express language utilized by the parties gave the option for the Plaintiff to keep in his name only; that the pre[-]marital agreement gives him that option to transfer . . . title by deed if he chooses.

XIV

That the Court will decline to find that [Plaintiff] has breached the pre[-]marital agreement based on numerous triggers that are required; to include the parties['] agreement or establishing a date of separation to determine a payoff and date house to be valued or the parties agree to an appraiser to determine value of the residence.

Based on these findings of fact, some of which are, in actuality, conclusions of law, the trial court concluded that "Defendant's motion to set aside the pre[-]marital agreement should be denied."

On 21 March 2013, Defendant filed a motion asking that the 5 March 2013 order be amended to include a certification made pursuant to N.C. Gen. Stat. § 1A-1, Rule 54. On 4 April 2013, the trial court entered an amended order that restated its findings and conclusions concerning the validity of Defendant's request that the pre-marital agreement be set aside; found that the order was "tantamount to a denial of Defendant's counterclaims for post[-]separation support and alimony"; concluded that the decisions reflected in the order, while

"adjudicat[ing] less than all of the claims presented in this cause," did "finally adjudicate the post[-]separation support and alimony claims"; and determined "that there's no just reason to delay the entry of this final order regarding said claims." As a result, the trial court certified the revised order for immediate appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). On the same date, Plaintiff noted an appeal to this Court from the trial court's orders.

II. Legal Analysis

In her brief, Defendant argues that the trial court erred by rejecting her request that the pre-marital agreement be set aside. More specifically, Defendant contends that Plaintiff materially breached the pre-marital agreement when he failed to compensate Defendant for her equity interest in the marital residence within 30 days of the date of separation and that Plaintiff was entitled to the entry of an order granting her request for rescission of the pre-marital agreement in light of Plaintiff's material breach. We do not find Defendant's arguments persuasive.

A. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the

findings support the conclusions of law and ensuing judgment.'" *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163, *disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001)), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). In the event that a party "fails to argue that the trial court's findings of fact are not supported by sufficient evidence, any such argument is deemed abandoned, and the trial court's findings of fact are binding on appeal." *O'Connor v. Zelinske*, 193 N.C. App. 683, 687, 668 S.E.2d 615, 617 (2008) (citing *Estroff v. Chatterjee*, 190 N.C. App. 61, 71, 660 S.E.2d 73, 79 (2008)). As a result of the fact that Defendant has failed to challenge any of the trial court's findings of fact, each of them is deemed binding for purposes of appellate review.

On the other hand, the extent to which the trial court's conclusions of law reflect an accurate understanding of applicable law, *City of Charlotte v. BMJ of Charlotte, LLC*, 196 N.C. App. 1, 9, 675 S.E.2d 59, 64 (2009) (stating that "[t]he propriety of the trial court's conclusions of law is subject to *de novo* review") (citing *Willen v. Hewson*, 174 N.C. App. 714, 718, 622 S.E.2d 187, 190 (2005), *disc. review denied*, 360 N.C. 491, 631 S.E.2d 520 (2006)), *disc. review denied*, 363 N.C. 800, 690 S.E.2d 533 (2010), and have adequate support in the trial

court's findings of fact, *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008) (stating that "[w]hether [the trial court's] findings of fact support the trial court's conclusions of law is reviewable *de novo*") (citing *Sain v. Sain*, 134 N.C. App. 460, 464, 517 S.E.2d 921, 925 (1999)), such conclusions of law are subject to *de novo* review. As a result, the trial court's decision concerning whether a material breach of contract has occurred represents a conclusion of law which is subject to review on appeal utilizing a *de novo* standard of review. *Long v. Long*, 160 N.C. App. 664, 668-69, 588 S.E.2d 1, 4 (2003) (citing *Fletcher v. Fletcher*, 123 N.C. App. 744, 752, 474 S.E.2d 802, 807 (1996), *disc. review denied*, 345 N.C. 640, 483 S.E.2d 706 (1997)). Thus, given that the only portion of the trial court's order which Defendant has questioned on appeal is its decision to refrain from concluding that Plaintiff had "breached the pre[-]marital agreement based on numerous triggers that are required," Defendant's challenge to the trial court's order is subject to *de novo* review. *Heatzig v. MacLean*, 191 N.C. App. 451, 454, 664 S.E.2d 347, 350 (2008) (citing *Huyck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 15, 356 S.E.2d 599, 601 (1987), *aff'd*, 321 N.C. 589, 364 S.E.2d 139 (1988)), *disc. review denied*, 362 N.C. 681, 670 S.E.2d 564 (2008).

B. Validity of Trial Court's Breach of Contract Determination

As a result of the fact that pre-marital agreements are contracts, the principles utilized to construe other contracts apply to such agreements. *Turner v. Turner*, 242 N.C. 533, 539, 89 S.E.2d 245, 249 (1955). As a general proposition, pre-marital agreements should be construed liberally so as to effectuate the intent of the parties. *Stewart v. Stewart*, 222 N.C. 387, 392, 23 S.E.2d 306, 309 (1942). For that reason, the law presumes that the parties intended that the language used in such agreements should be understood in light of ordinary English usage, with the relevant contractual language to be interpreted based upon its facial meaning. *Stewart v. Stewart*, 141 N.C. App. 236, 240, 541 S.E.2d 209, 212 (2000) (citing *Hartford Accident & Indemn. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946)). In the event that the language in which a contract is couched is clear and unambiguous, the proper construction of the relevant contractual language is a matter of law for the court. *Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987). However, "if the terms of the contract are ambiguous then resort to extrinsic evidence is necessary and the question is one for the jury." *Whirlpool Corp. v. Dailey Construction, Inc.*, 110 N.C. App. 468, 471, 429 S.E.2d 748, 751 (1993) (citing *Cleland v. Children's Home, Inc.*, 64 N.C. App. 153, 156, 306 S.E.2d 587, 589 (1983)). "[A]n agreement contains

an ambiguity 'when the writing leaves it uncertain as to what the agreement was.'" *Novacare Orthotics & Prosthetics East, Inc. v. Speelman*, 137 N.C. App. 471, 476, 528 S.E.2d 918, 921 (2000) (quoting *Barrett Kays & Assoc. v. Colonial Building Co.*, 129 N.C. App. 525, 528, 500 S.E.2d 108, 111 (1998)).

The relevant contractual language provides that, "[i]n the event of a separation," the parties "agree[d] that the house will be immediately listed for sale" and that, "[u]pon sale of the property," Defendant would receive a certain portion of the net proceeds derived from the sale. However, the pre-marital agreement also provides that Plaintiff "retain[ed] the option to keep the house in his name only" "so long as he compensate[d Plaintiff] within 30 days of separation for her equity in the property," with the parties being under an obligation to "agree upon a real estate appraiser to value the property" in order to permit a determination of the value of Defendant's equity interest in the marital residence in accordance with the formula enunciated in the pre-marital agreement. As a result, the literal language of the pre-marital agreement allowed Plaintiff, in the exercise of his sole discretion, to elect to retain ownership of the marital residence so long as he paid Defendant the value of her equity interest in that property within 30 days after the date of separation, with the amount of the required

payment to be based upon a valuation performed by an appraiser upon whom the parties were to agree.

The undisputed evidence reflects, as the trial court found, that Plaintiff opted, as the pre-marital agreement allowed, to retain ownership of the marital residence rather than listing the property for sale. Under that set of circumstances, Plaintiff was obligated to pay Defendant the value of her equity interest in the residence, as determined using the process set out in Paragraph 7(b) of the pre-marital agreement, within 30 days of the date upon which the parties separated. Although the record clearly reflects, as the trial court found, that Plaintiff did not make any payment to Defendant within 30 days of either of the two dates of separation contended for by the parties, that fact, standing alone, does not, contrary to Defendant's contention, suffice to show that a breach of contract, much less a material breach, occurred.

As a practical matter, Plaintiff could not have made the required payment unless the amount which he was obligated to pay Defendant had been identified. Although the undisputed record evidence reflects, as the trial court found, that Plaintiff suggested the name of an appraiser to Defendant, Defendant declined to agree to allow the appraiser in question to develop the required valuation, has adduced no evidence tending to show

that she had a legitimate basis for refusing to accept the appraiser proposed by Plaintiff, and has never proposed an alternative appraiser for Plaintiff's consideration. As a result, given that the relevant provisions of the pre-marital agreement cannot be construed to require Plaintiff to make a payment when the amount of that payment has not been ascertained using the contractually established process, we conclude that the trial court did not err by concluding that Plaintiff had not breached the provisions of the pre-marital agreement and, in light of that fact, that Defendant's request for the entry of an order setting aside the pre-marital agreement should be denied.

In attempting to persuade us to reach a different conclusion, Defendant contends that "the record does not reflect that Plaintiff suggested any alternative appraiser, made any tender of the equity, or took any other action that would justify his retention of the marital residence in his individual name without paying Defendant her equity." Although Defendant suggests that the trial court, by declining to find that a breach of contract had occurred, created "a perpetual impasse," we do not find this argument persuasive. In essence, Defendant appears to assume that Plaintiff has sole responsibility for identifying an acceptable appraiser and that she is not obligated to do anything to facilitate the selection of an

appropriate appraiser. At least at this point, the record contains no indication that the appraiser that Plaintiff proposed was unqualified or biased in Plaintiff's favor, that Defendant had any other legitimate reason for refusing to agree to utilize the appraiser suggested by Plaintiff, or that Defendant had taken any steps to utilize a different appraiser from the one suggested by Plaintiff. For all that we can tell based upon the information contained in the present record, Defendant, rather than Plaintiff, bears the responsibility for the parties' failure to agree upon an appraiser as required by Paragraph 7(b) of the pre-marital agreement. Although we might reach a contrary conclusion in the event that the record provided some basis for a determination that Plaintiff had acted in such a fashion as to unreasonably or arbitrarily obstruct the effectuation of the appraisal process set out in the pre-marital agreement, no such evidence appears in the present record. As a result, we are not persuaded that the result reached by the trial court will inevitably produce a "perpetual impasse" or that Defendant is without remedy in the event that Plaintiff unreasonably obstructs or interferes with the appraisal process set out in the pre-marital agreement.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court did not err by refusing to find that Plaintiff had committed a material breach of the parties' pre-marital agreement. As a result, the trial court's orders should be, and hereby are, affirmed.

AFFIRMED.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).