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NO. COA14-484  
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

NORMA C. GORDON,  
Plaintiff

v.

Wake County  
No. 11 CVD 17745

SCOTT GORDON,  
Defendant

Appeal by plaintiff from order entered 12 November 2013 by Judge Lori G. Christian in Wake County Superior Court. Heard in the Court of Appeals 8 October 2014.

*Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Alicia Journey and Rose H. Stout, for Plaintiff.*

*Wake Family Law Group, by Katherine Hardersen King, for Defendant.*

ERVIN, Judge.

Plaintiff Norma C. Gordon appeals from an order rejecting Plaintiff's claims for breach of contract, specific performance, breach of the duty of good faith and fair dealing, and attorney's fees. On appeal, Plaintiff contends that the trial court erred by rejecting Plaintiff's breach of contract claim on the grounds that Defendant Scott Gordon violated the provisions

of the parties' separation agreement relating to the payment of spousal support, that the trial court erred by rejecting Plaintiff's claim for breach of the duty of good faith and fair dealing on the grounds that Defendant's conduct in failing to make the alimony payments contemplated under the parties' separation agreement violated both the spirit and the letter of the parties' separation agreement, and that the trial court erred by denying Plaintiff's request for an award of attorney's fees stemming from Defendant's breach of the parties' separation agreement. After careful consideration of Plaintiff's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

## I. Factual Background

### A. Substantive Facts

Plaintiff and Defendant were married on 26 December 1992, separated on 4 February 2007, and subsequently divorced. The parties are the parents of two children, one of whom is a minor. On 29 August 2008, the parties entered into a separation and property settlement agreement that included, among other things, provisions governing the payment of spousal support from Defendant to Plaintiff. More specifically, the separation agreement provided that "[Defendant] shall pay \$2,500.00 per

month in alimony as set out in the parties' Consent Order that was entered simultaneously with the execution of this Agreement," that "said award of alimony shall not be modified by either party either upward or downward," and that, if either party attempted "to modify said alimony award, and the alimony is modified, then the party obtaining a modification of the award shall owe the other party dollar for dollar of what they receive over and above the agreed upon amount." According to the separation agreement, Defendant's obligation to make alimony payments to Plaintiff would terminate upon the earliest of the date upon which payment of all alimony payments required under the parties' agreement had been made; Defendant died; Plaintiff died; or Plaintiff remarried. The separation agreement did not provide that Defendant's obligation to pay alimony to Plaintiff would be terminated in the event that Plaintiff began cohabiting with a third party.<sup>1</sup> Finally, the parties waived all right to

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<sup>1</sup>The parties disagree about the reason that the separation agreement did not provide that the alimony payments that Defendant was required to make to Plaintiff under the separation agreement would terminate in the event that Plaintiff began cohabiting with someone else. Plaintiff contends that, during the course of her negotiations with Defendant, she agreed to reduce the amount of the required monthly alimony payment from \$4,000 to \$2,500 per month in return for Defendant's agreement that the alimony payments would not cease in the event that she began cohabiting with another person. Defendant, on the other hand, contends that the parties never discussed the deletion of a provision providing that cohabitation would result in the termination of Defendant's obligation to make alimony payments

receive alimony or spousal support except to the extent that such claims were required by the separation agreement.

On 2 October 2008, Plaintiff filed a complaint seeking an award of child custody, child support, alimony, and absolute divorce and the entry of a qualified domestic relations order. In her complaint, Plaintiff requested that "the Court enter the parties' Consent Order for Child Custody, Child Support and Alimony" without making any reference to the alimony-related provisions of the parties' separation agreement. On 24 October 2008, a consent order addressing issues relating to child custody, child support and alimony was entered. According to the consent order, Defendant was required to pay \$2,500 in alimony to Plaintiff each month, with the required alimony payments to be terminated on the same grounds as those specified in the separation agreement. As was the case with the separation agreement, the consent order did not list cohabitation as a ground for terminating Defendant's obligation to make alimony payments to Plaintiff or make any reference to the parties' separation agreement.

On 28 January 2011, Defendant filed a motion seeking the entry of an order modifying his obligation to pay child support to Plaintiff and that the amount of alimony that Defendant was required to pay to Plaintiff had been reduced from \$4,000 to \$2,500 to reflect Defendant's actual ability to make alimony payments.

and terminating his obligation to make alimony payments to Plaintiff based on the fact that Plaintiff had begun cohabiting with another person. On 31 October 2011, the trial court entered an order terminating Defendant's obligation to make alimony payments to Plaintiff pursuant to the consent order based on the fact that Plaintiff had begun cohabiting with someone else. Plaintiff did not appeal this order of the trial court. As a result, Defendant made his last alimony payment to Plaintiff in September 2011.

#### B. Procedural History

On 18 November 2011, Plaintiff filed a complaint in which she sought to have the alimony provisions of the separation agreement specifically enforced, to recover damages for breach of contract and breach of the duty of good faith and fair dealing, and to obtain an award of attorney's fees in accordance with the provisions of the separation agreement. On 19 January 2012, Defendant filed a motion seeking to have Plaintiff's claims dismissed and to have an award of attorney's fees made in his favor. On 14 September 2012, the trial court denied Defendant's motions. Defendant filed an answer in which he denied the material allegations of Plaintiff's complaint and asserted various affirmative defenses, including election of

remedies, rescission, merger, and judicial estoppel, to Plaintiff's claims on 18 October 2012.

The issues raised by the parties' pleadings came on for trial before the trial court in Wake County District Court on 17-18 December 2012. On 12 November 2013, the trial court entered an order rejecting Plaintiff's claims for breach of contract, specific performance, breach of the duty of good faith and fair dealing, and attorney's fees. Plaintiff noted an appeal to this Court from the trial court's order.

## II. Substantive Legal Analysis

### 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). "[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.'" *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010)

(quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008)). In addition, "[u]nchallenged findings of fact are binding on appeal." *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

#### B. Breach of Contract

In her initial challenge to the trial court's order, Plaintiff contends that the trial court erred by rejecting Plaintiff's breach of contract claim on the grounds that Defendant had failed to comply with the provisions of the separation agreement that governed the payment of spousal support. More specifically, Plaintiff contends that the earlier determination that Defendant was excused from the necessity for making further alimony payments under the consent judgment based on Plaintiff's decision to cohabit with another person had no bearing on Defendant's continued responsibility for making the alimony payments required under the separation agreement and that she was, contrary to the trial court's decision, entitled to enforce the alimony-related provisions of the separation agreement regardless of the fact that Defendant had been excused

from making further alimony payments under the consent judgment. Plaintiff's argument lacks merit.

In its order, the trial court made the following findings of fact, which Plaintiff has not challenged as lacking in adequate evidentiary support and which are, for that reason, binding for purposes of appellate review:

3. On August 29, 2008, the parties entered into a Separation Agreement and Property Settlement Agreement ("The Agreement"). The Agreement included, *inter alia*, provisions regarding the payment of spousal support from Defendant to Plaintiff. Specifically, the Agreement provided "Husband shall pay \$2500.00 per month in alimony as set out in the parties' consent order that was entered simultaneously with the execution of this Agreement. The parties agree that said award of alimony shall not be modified by either party either upward or downward. In the event that either party attempts to modify said alimony award, and the alimony is modified, then the party obtaining a modification of the award shall owe the other party dollar for dollar of what they receive above the agreed upon amount."

6. On October 1, 2008, Plaintiff filed a Complaint for alimony under 08 CVD 17234 and requested that the court enter a Consent Order for alimony. The Complaint did not reference the Agreement.

8. On October 24, 2008, a Consent Order was entered which provided, in part, that the Defendant would pay alimony to Plaintiff in the amount of \$2500.00 per month. The consent order did not list "cohabitation" as a terminating event for alimony and states that it cannot be modified. The Consent Order did not reference the Agreement.



10. The Court entered an order on October 31, 2011 terminating alimony under the Consent Order, finding that Plaintiff engaged in cohabitation, and finding that even though cohabitation was not listed in the Consent Order as a terminating event, N.C. [Gen. Stat §] 50-16.9(b) required termination of alimony in a court order as a matter of law.

11. Defendant stopped paying alimony to Plaintiff in September 2011 and did not pay the alimony difference as had been set out in the agreement.

Based upon these findings of fact, the trial court concluded as a matter of law that:

3. The terms of the Separation Agreement Plaintiff seeks to enforce have been rescinded, and no valid contractual obligation exists for which Defendant may be held in breach.

4. Plaintiff's claim for breach of contract is further barred by the doctrines of election of remedies and judicial estoppel.

5. Defendant's alimony obligation to Plaintiff ceased upon her cohabitation.

6. Plaintiff is not entitled to the relief she has requested.

As a result, the trial court ordered that "Plaintiff's claims for breach of contract, specific performance, breach of [the] duty of good faith and fair dealing, and attorney's fees are denied."

In her brief, Plaintiff challenges the following findings of fact:

14. The Court has previously found and ordered that Plaintiff's alimony ceased upon cohabitation under the Consent Order. There is no separate contractual obligation of Defendant to pay alimony to Plaintiff or to pay Plaintiff the difference between court-ordered alimony and the amount set forth in the Agreement in that:

- a. Plaintiff elected the remedy of having alimony payable pursuant to a court order--and not a contract--when she filed a complaint for Alimony and entered into the Consent Order.
- b. Plaintiff rescinded the alimony terms of the Agreement when she filed the Complaint for alimony and subsequently entered into a Consent Order for alimony; and
- c. Plaintiff is judicially stopped from taking the position that the Agreement terms regarding alimony are valid contractual terms and seeking to enforce those terms after taking an inconsistent position with the court earlier in asking for a court order for alimony and not referencing the Agreement.

15. Because the contractual alimony terms as set forth in the Agreement are not valid and enforceable, Plaintiff cannot show a right to relief from breach of contract or the remedy of specific performance.

16. Additionally, because the contractual alimony terms as set forth in the Agreement are not valid and enforceable, Plaintiff cannot show a right to relief for her claim for breach of the implied covenant of good

faith and fair dealing, which requires Plaintiff to show the existence of a valid contract.

Although the trial court designated these statements as findings of fact, Plaintiff contends, and we agree, that these statements are, in reality, conclusions of law. *In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999) (stating that "any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law") (citations and quotations omitted). As a result, we will review the challenged "findings" using a *de novo* standard of review.

The essence of Plaintiff's challenge to the trial court's "findings" is that, regardless of the fact that Defendant's obligation to pay alimony under the consent judgment had been terminated on the grounds that Plaintiff had cohabited with another person, Defendant remained under a continuing and independent obligation to pay alimony under the separation agreement, which remained valid and enforceable despite the entry of the consent judgment. As a result, according to Plaintiff, the trial court should have held Defendant liable for breaching the terms of the alimony-related provisions of the separation agreement given that he had ceased making the required payments after the entry of the order terminating his

obligation to make alimony payments under the consent judgment. Plaintiff's argument, although ingenious, is not persuasive.

The trial court properly terminated Defendant's obligation to pay alimony pursuant to the consent judgment based on the fact that Plaintiff had begun cohabiting with another person. *Underwood v. Underwood*, 365 N.C. 235, 237, 717 S.E.2d 361, 364 (2011) (stating that "[N.C. Gen. Stat §] 50-16.9(b) . . . requires the termination of alimony payments to a dependent spouse who engages in cohabitation"). Although Plaintiff did not seek appellate review of that decision and has not questioned the validity of that decision in this case in any way, she does seek to sidestep the effect of that decision by claiming a continued right to enforce her perceived right to receive alimony payments under the separation agreement despite the termination of her right to receive alimony under the consent judgment. In our view, Plaintiff's effort to look behind the spousal support provisions of the consent judgment to the alimony provisions of the separation agreement overlooks the fact that her decision to seek and obtain the entry of a judgment requiring the payment of alimony on the same terms and conditions as those set out in the separation agreement had the effect of converting Defendant's obligation to make alimony payments from one based on the existence of a contract between

the parties to one resting on an order of the court. Having elected to proceed in this fashion, Plaintiff forswore her right to obtain alimony payments pursuant to the separation agreement in return for obtaining the right to obtain alimony payments made pursuant to an order of the court and to enforce that obligation using the processes available for the enforcement of court orders. In other words, Plaintiff's right to receive alimony payments under the separation agreement was subsumed within and replaced by her right to receive alimony payments pursuant to a court order. Having made that choice, Plaintiff effectively forfeited the right to seek relief under the separation agreement after her right to receive alimony payments under the consent judgment had been terminated. As a result, the trial court did not err by declining to enter judgment in Plaintiff's favor with respect to her breach of contract claim.

C. Breach of Duty of Good Faith and Fair Dealing

Secondly, Plaintiff contends that the trial court erred by rejecting her claim for breach of the duty of good faith and fair dealing. According to well-established North Carolina law, every contract contains "'an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.'" *Bicycle Transit Authority v. Bell*, 314 N.C. 219,

228, 333 S.E.2d 299, 305 (1985) (citation omitted). In light of our determination that the alimony provisions of the separation agreement were subsumed within and replaced by the spousal support provisions of the consent judgment, there is not, in fact, any remaining contract concerning alimony between the parties on which a claim for breach of the duty of good faith and fair dealing can be based. *Suntrust Bank v. Bryant/Sutphin Properties, LLC*, \_\_ N.C. App. \_\_, \_\_, 732 S.E.2d 594, 603 (stating that, since "the jury determined that plaintiff did not breach any of its contracts with defendants, it would be illogical for this Court to conclude that plaintiff somehow breached implied terms of the same contracts"), *disc. review denied*, 366 N.C. 417, 735 S.E.2d 180 (2012). As a result, the trial court did not err by rejecting Plaintiff's claim for breach of the duty of good faith and fair dealing.<sup>2</sup>

### III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Plaintiff's challenges to the trial court's order have

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<sup>2</sup>In light of our determination that the trial court did not err by determining that Plaintiff was not entitled to receive alimony under the separation agreement on the grounds that a valid contract concerning alimony between the parties did not exist, we also hold that the trial court had no authority to order that that contract be specifically performed or to make an award of contract-based attorney's fees as well.

merit. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).