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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-914

Filed: 20 June 2017

Ashe County, No. 13 CVD 261

RICKEY LEE ELLISON, Plaintiff,

v.

GENA ELLISON, Defendant.

Appeal by plaintiff from judgment entered 22 February 2016 by Judge Jeanie R. Houston in Ashe County District Court. Heard in the Court of Appeals 7 March 2017.

Randolph and Fischer, by J. Clark Fischer, for plaintiff-appellant.

No brief was filed for defendant.

BRYANT, Judge.

Where the trial court failed to list, value, or distribute various items of marital property and thereby failed to value the net marital estate, we vacate and remand to the trial court for entry of a new equitable distribution judgment.

Plaintiff Ricky Lee Ellison and defendant Gena Ellison were married on 17 March 1995 and separated on or about 18 October 2011. No children were born of

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the marriage, but plaintiff adopted defendant's child. At the time of the parties' divorce hearing on 7 April 2014, however, the child was emancipated.

On 27 June 2013, plaintiff Rickey Lee Ellison filed a verified complaint against defendant Gena Ellison seeking an absolute divorce, equitable but unequal distribution, and an injunction to enjoin the parties from disposing of marital assets. Defendant failed to respond, and plaintiff filed a motion for entry of default followed by a motion for a default judgment. On 14 March 2014, the Ashe County clerk of court filed an entry of default against defendant.¹ On 7 April 2014, following a

¹ "Entry of default against a defendant results in all allegations of plaintiff's complaint being deemed admitted against that defendant, and thereafter, defendant is prohibited from defending on the merits of the case." *Estate of Teel by Naddeo v. Darby*, 129 N.C. App. 604, 607, 500 S.E.2d 759, 762 (1998) (citation omitted). "[W]here an entry of default has not been set aside and the complaint is sufficient to state a claim, the defendant in default may not defend its merits by asserting affirmative defenses . . ." *TradeWinds Airlines, Inc. v. C-S Aviation Servs.*, 222 N.C. App. 834, 843, 733 S.E.2d 162, 170 (2012) (alteration in original) (quoting *Hartwell v. Mahan*, 153 N.C. App. 788, 792, 571 S.E.2d 252, 254 (2002)).

But "[t]he entry of default is only an *interlocutory act looking toward subsequent entry of final judgment of default.*" *Darby*, 129 N.C. App. at 607, 500 S.E.2d at 762 (emphasis added) (citation omitted); see also *Looper v. Looper*, 51 N.C. App. 569, 570, 277 S.E.2d 78, 79 (1981) ("The entry of default by the clerk is not a final judgment and it is *not appealable.*" (emphasis added) (citation omitted). Furthermore, "[i]n North Carolina, a plaintiff cannot obtain judgment by default in a divorce proceeding." *Adair v. Adair*, 62 N.C. App. 493, 498–99, 303 S.E.2d 190, 193–94 (1983) (holding that a default judgment entered pursuant to Rule 37(d) as a sanction for failure to appear for a deposition after having been given proper notice "does not dispose of the underlying action for absolute divorce").

In the instant case, entry of default was entered against defendant by the clerk of court and filed on 14 March 2014 "in accordance with Rule 55(a) of the North Carolina Rules of Civil Procedure[.]" on the basis of plaintiff's complaint for absolute divorce, equitable distribution, and injunction. Thereafter, on 26 April 2014, the trial court entered an absolute divorce judgment, which made the following relevant findings of fact and conclusions of law:

FINDINGS OF FACT

....

8. Entry of Default has been entered in this matter, and [plaintiff] has

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filed a motion for Default Judgment in this matter.

....

10. [Defendant] has expressed in open court a desire to pursue claims of her own including but not limited to Post Separation Support, Alimony, and Equitable Distribution.

....

CONCLUSION[S] OF LAW

....

4. Wife has not properly raised issues of Post Separation Support, Alimony, and/or Equitable Distribution, but has expressed in open court a desire to pursue such action(s). [Defendant's] rights to raise such claims shall only be limited by the laws of the State of North Carolina.

5. All pending matters between the parties, and matters which are not otherwise barred by the laws of the State of North Carolina shall be reserved for future hearing(s).

....

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, and Decreed:

....

2. All pending matters between the parties, and matters which are not specifically otherwise barred by the laws of the State of North Carolina shall be reserved for future hearing(s) including but not limited to matters such as Post Separation Support, Alimony, and Equitable Distribution.

Nothing in the record indicates that the entry of default was set aside or that default judgment was entered against defendant.

But, thereafter, on 18 June 2014, defendant filed a Motion and Notice of Hearing, alleging as follows:

3. Even though . . . [d]efendant filed no response, pleading or counterclaim, she verily believes that she has preserved these claims on record in open Court;

hearing during which defendant was present and testified, the trial court entered an absolute divorce judgment, which did not resolve the issue of equitable distribution. On 18 June 2014, defendant through counsel filed a motion for leave to file a late answer to plaintiff's complaint, raise affirmative defenses, and assert counterclaims.

On 27 August 2014, the trial court entered a restraining order to enjoin the parties from disposing of marital assets. In its order, the court found that the parties had accumulated marital property, including but not limited to money collected from

4. A Judgment of Absolute Divorce has been entered on April 7, 2014. Defendant did not understand that the entry of Absolute Divorce could act as a bar to her right to raise certain Counterclaims. Whether or not the Court will allow her to raise Counterclaims at this juncture, the facts surrounding her Counterclaim would at the very least be arguable as a set off against any potential distributive award to . . . [p]laintiff[.]

Defendant also filed an Answer and Counterclaim on 23 September 2014, in which she requested that the trial court “set aside the Entry of Default and any Entry of Judgment.” The trial court did not enter any orders in this case until it entered its equitable distribution judgment on 22 February 2016, which did not address the previous entry of default.

Because an entry of default is an “interlocutory act” and is therefore “not a final judgment and it is not appealable[.]” *see Looper*, 51 N.C. App. at 570, 277 S.E.2d at 79 (citations omitted), on that logic, then, even if the trial court failed to set aside the clerk’s entry of default, it nevertheless maintained jurisdiction to enter an absolute divorce judgment (as well as an injunction and equitable distribution judgment) in the same case. As noted herein, the court entered an absolute divorce judgment following a hearing in which defendant “was present and testified.” Indeed, it seems clear to this Court—and no case law we have found suggests otherwise—that the judgment for absolute divorce in this case functions, essentially, to address the clerk’s entry of default, at least with respect to defendant’s right to assert counterclaims and affirmative defenses thereto. An entry of default (from which a party has no right to appeal, *see id.*) in a divorce and equitable distribution proceeding does not and did not divest the trial court of *jurisdiction* to find facts and make conclusions of law regarding the listing, classification, valuation, and distribution of marital and divisible property, especially where the law is clear at least with regard to the fact that a default judgment “does not dispose of the underlying action for absolute divorce.” *See Adair*, 62 N.C. App. at 498, 303 S.E.2d at 193; *see also Hawkins ex rel. Thompson v. Hawkins*, 192 N.C. App. 248, 253, 664 S.E.2d 616, 619 (2008). It cannot follow, then, that entry of default divests the trial court of jurisdiction from disposing of—or hearing—the underlying action for equitable distribution as well.

the lease of real property. After the parties separated, defendant received the \$1,500.00 annual lease payment. Defendant testified that she used the money to meet expenses such as homeowners' insurance and property taxes, but the money was not sufficient to entirely cover those expenses. The trial court ordered that the lease payments be held in a separate account and that an accounting of the incoming funds be made to plaintiff.

On 23 September 2014, defendant filed an answer to plaintiff's complaint, including a counterclaim that the issues of post-separation support, alimony, and equitable distribution were preserved, and advocating for an unequal distribution in defendant's favor. Plaintiff filed a reply on 6 October 2014.

Both parties filed documents with the court setting out their respective employment histories, salaries and other income, separate property, marital property, and liabilities and expenses. Plaintiff listed the fifteen acres of real property located on Weaver Ford Road, Grassy Creek, on which the marital residence was located, as *marital* property. Defendant, who resided on that property, listed the fifteen acres of land as separate property.

Following a hearing, the trial court entered a 22 February 2016 judgment of equitable distribution. The court found that plaintiff was in average health and was able to work but

[did] not consistently work and has been either unwilling or unable to maintain employment during the parties'

marriage. Since 2010 he has done “odd jobs”. He did not finish high school. He was fired by [one employer] and quit a partnership with . . . Defendant’s brother leaving the brother in a bind.

Plaintiff also spent money on illegal drugs and alcohol instead of contributing to the marriage, thereby “depleting the marital estate.”

The trial court found that defendant, on the other hand,

[was] 46 years old and [was] in average to below average health. She has been on disability since 2012 for mental disorders and is unable to work. During the marriage of the parties, . . . Defendant worked primarily as a caregiver although she also engaged in the sale of antiques and jewelry. She was the primary bread winner and the only party between the two that consistently earned income. She has a high school education.

In 2008, the parties sold a house and real property. At that time, plaintiff requested that half of the net proceeds, approximately \$32,000.00, be issued to him by separate check “because he was planning on leaving . . . Defendant.” Defendant used the remaining \$32,000.00 issued to her to pay off the \$35,000.00 mortgage balance on the Weaver Ford Road property. Plaintiff could not account for what he did with his \$32,000.00.

Also during the marriage, plaintiff sold his son’s vehicle, having a value of \$2,000.00, without the son’s permission. Again, plaintiff could not account for what he did with the proceeds. During the marriage, plaintiff also removed all tools and equipment from a storage building on the Weaver Ford Road property; at the time of

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the hearing, plaintiff could not account for the whereabouts of the tools and equipment. Plaintiff sold seventeen rifles and a handgun for \$300.00 without defendant's permission; to date there is no accounting for the proceeds from the sale. And, prior to the date of separation, plaintiff sold jointly held real property for \$5,500.00 without defendant's permission; at the time of the hearing the proceeds from that sale were also unaccounted for.

The court found that the real property located on Weaver Ford Road "was deeded to . . . Defendant as compensation for [caregiver services to a family] from January 1996 to 2001. The parties lived at this address in a mobile home together from May 2000 to 2006" The court further noted that plaintiff moved in and out of the residence a number of times between 2006 and 17 October 2011. Per plaintiff's appraiser, the fifteen acres of real property located on Weaver Ford Road, along with the mobile home, were valued at \$129,000.00. Plaintiff testified that he was not concerned with the mobile home furnishings, only the fifteen acres and the mobile home itself. Following the separation, plaintiff contributed no money toward the upkeep of the property. According to defendant, the income from the annual lease payment of \$1,500.00 was "always used for upkeep, taxes and insurance on the property."

The court concluded that "[a]n unequal division of the net marital and divisible property [wa]s equitable." The court awarded defendant the fifteen acres of land on

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Weaver Ford Road and awarded plaintiff 35% of the market value of the mobile home, \$24,150.00, ordering defendant to pay plaintiff that sum. “Defendant’s interest in the 15 Acres and the mobile home shall be free and clear from any claims of . . . Plaintiff; and the Order shall operate as a Bench Deed to . . . Defendant in fee simple absolute.” Plaintiff appeals.

On appeal, plaintiff contends (I) the trial court’s judgment of equitable distribution failed to properly value the net marital estate; (II) the trial court’s judgment failed to make adequate findings of fact to support an unequal distribution; (III) the findings upon which the trial court based its unequal distribution were not supported by competent evidence; and (IV) the trial court erred by concluding that the 15 acre tract of land where the marital residence was located was defendant’s separate property. Because we determine that the trial court’s judgment (I) failed to properly value the net marital estate in that it failed to list, value, or award various items of marital property, we do not address plaintiff’s remaining arguments on appeal.

Standard of Review

“[T]rial courts are accorded great discretion in determining the equitable distribution of marital property. This discretion will not be upset on appeal absent

clear abuse.” *Urciolo v. Urciolo*, 166 N.C. App. 504, 505, 601 S.E.2d 905, 907 (2004) (citing *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

Where the trial court’s order sets forth findings of fact supporting its conclusion that “an equal division is not equitable,” this Court will not disturb that holding on appeal unless we, “upon consideration of the cold record, can determine that the division ordered by the trial court[] has resulted in an obvious miscarriage of justice.”

Troutman v. Troutman, 193 N.C. App. 395, 400–01, 667 S.E.2d 506, 510 (2008) (alteration in original) (quoting *Alexander v. Alexander*, 68 N.C. App. 548, 552, 315 S.E.2d 772, 776 (1984)).

“To enter a proper equitable distribution judgment the trial court must[, *inter alia*,] . . . determine the net market value of the marital property as of the separation date” *Carr v. Carr*, 92 N.C. App. 378, 379, 374 S.E.2d 426, 427 (1988) (citations omitted). “And in doing all these things the court must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness.” *Id.* (citation omitted). The trial court “must identify and classify *all* property as marital or separate based upon the evidence presented regarding the nature of the asset.” *Smith v. Smith*, 111 N.C. App. 460, 470, 422 S.E.2d 196, 202 (1993) (emphasis added) (citation omitted), *rev’d in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994). “A distribution order failing to list all the marital property is fatally defective[.]” *Cornelius v. Cornelius*, 87 N.C. App. 269, 271, 360 S.E.2d 703, 704 (1987) (citation omitted); see *Little v. Little*, 74 N.C. App. 12, 17, 21, 327 S.E.2d 283, 288, 290

(1985) (vacating and remanding where the trial court “neglected entirely to list, value, or award the second house and lot,” an item of marital property, in its equitable distribution order).

“If the judgment refers only to some of the marital and divisible property, and the record reveals that the party with the burden of proof offered credible evidence of additional marital or divisible property, the appellate court must vacate and remand.” 3 Suzanne Reynolds, *Lee’s North Carolina Family Law* § 12.142, at 378 (5th ed. 2002); see *Washburn v. Washburn*, No. COA12-1364, 2013 WL 3990791, at *5 (N.C. Ct. App. Aug. 6, 2013) (unpublished) (vacating and remanding for the trial court to determine the status and value of two assets where the parties presented evidence at trial regarding the assets, but the trial court did not account for, classify, or distribute them in its judgment).

In the instant case, the trial court made the following finding of fact: “The Court takes judicial notice that the Plaintiff testified that he ‘did not care anything’ about the household furnishings, only about the 15 acres and the mobile home located at . . . Weaver Ford Road, Grassy Creek, North Carolina.” But the record reveals evidence not only of household furnishings (with a listed net value of \$3,250.00), but also the following additional items of *marital* property (with corresponding estimated net values) which were not listed, valued, or awarded in the trial court’s equitable distribution judgment: (1) a bedroom suite, \$1,947.50; (2) five televisions, \$100.00;

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(3) a washer and dryer, \$500.00; (4) deer stands, \$1,000.00; (5) a four wheeler, \$2,500.00; (6) tools for gardening and home maintenance, \$1,500.00; (7) a gas posthole digger, \$150.00; (8) a jig saw, \$40.00; and (9) nail guns, \$350.00.

Notwithstanding the trial court's statement of judicial notice that plaintiff did not care about the distribution of household furnishings, the trial court was nevertheless required to list, value, and distribute the above-mentioned items of marital property where evidence of their existence was before the trial court. *See Little*, 74 N.C. App. at 17, 327 S.E.2d at 288 ("The problem with the trial court's determination of marital property is that the order contains only a partial listing thereof."). Because the trial court failed to do so, this distribution order must be vacated. *See Cornelius*, 87 N.C. App. at 271–72, 360 S.E.2d at 704–05. Accordingly, "we vacate the order of the trial court[] and remand this cause so that the marital property may be equitably distributed according to applicable law" *See Little*, 74 N.C. App. at 21, 327 S.E.2d at 290.

VACATED AND REMANDED.

Judges INMAN and ZACHARY concur.

Report per Rule 30(e).