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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1167

Filed: 18 July 2017

Cabarrus County, No. 15 CVD 3132

LUCI L. NEW, Plaintiff,

v.

FRED NEW, Defendant.

Appeal by defendant from order entered 23 August 2016 by Judge Christy E. Wilhelm in Cabarrus County District Court. Heard in the Court of Appeals 2 May 2017.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, for defendant-appellant.

BRYANT, Judge.

Where the parties entered into a contractual separation agreement to pay the ordinary and necessary expenses for each child to attend a four-year college, including tuition and fees, we hold that the agreement encompassed out-of-state tuition fees. However, as plaintiff failed to present evidence that defendant had the ability to meet

his obligation under the separation agreement, we reverse in part the trial court's grant of summary judgment in favor of plaintiff and remand the matter for further proceedings.

On 2 October 2015, plaintiff Luci L. New filed a complaint in Cabarrus County District Court against defendant Fred New, plaintiff's ex-husband, claiming that defendant breached the contract of the parties' separation agreement. Plaintiff sought specific performance of the contract.

Per the record, the parties married in 1989. Two children were born of the union, a boy, James,¹ in 1997, and a girl in 1999. In 2001, the parties separated. On 12 June 2002, the parties entered into a separation agreement (the "Agreement") which provided that each party would "defray or cover the ordinary and necessary expenses . . . for a four-year college education" for each child. The minor child, James, applied, was accepted, and enrolled at the University of Tennessee. As a North Carolina resident, James was required to pay an out-of-state tuition fee, \$9,095.00 per semester. Defendant paid \$15,244.00 toward James's college expenses—50% of all costs except for the \$9,095.00 tuition fee for out-of-state residents. Defendant argued that because James had been accepted at East Carolina University and that "North Carolina ha[d] some of the best state supported colleges and universities," the

¹ A pseudonym has been used to protect the identity of the juvenile.

\$9,095.00 out-of-state tuition fee was not an “ordinary and necessary” college expense.

Plaintiff moved for summary judgment.

On 23 August 2016, following a hearing, the trial court entered an order granting plaintiff’s motion for summary judgment. Defendant appeals.

On appeal, defendant argues that the trial court erred in granting plaintiff’s motion for summary judgment seeking specific performance of a contract where plaintiff failed to meet her burden of proof, there exist genuine issues of material fact, and there has been no showing that defendant has the ability to comply with the specific performance of the contract.

Summary Judgment

Pursuant to Rule 56 of our Rules of Civil Procedure, “judgment sought shall be rendered forthwith 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) (2015).

“An appeal from an order granting summary judgment solely raises issues of whether on the face of the record there is any genuine issue of material fact, and whether the prevailing party is entitled to judgment as a matter of law.” *Smith v.*

Cty. of Durham, 214 N.C. App. 423, 429, 714 S.E.2d 849, 854 (2011) (citation omitted).

“Summary judgment rulings are reviewed *de novo*.” *Stratton v. Royal Bank of Can.*, 211 N.C. App. 78, 81, 712 S.E.2d 221, 226 (2011) (citation omitted).

Defendant argues that the trial court erred in granting summary judgment in plaintiff’s favor: Plaintiff failed to meet her burden of proof to show defendant breached the Agreement; and there is a genuine issue of material fact as to whether the out-of-state tuition fee is an ordinary and necessary expense. Defendant contends that as averred in his affidavit, he paid \$15,244.00 toward James’s college education. As this represents the “ordinary and necessary” expense to attend college, defendant argues plaintiff failed to show a breach of the Agreement. We disagree.

“Questions relating to the construction and effect of separation agreements between a husband and wife are ordinarily determined by the same rules which govern the interpretation of contracts generally.” *Lane v. Scarborough*, 284 N.C. 407, 409, 200 S.E.2d 622, 624 (1973). “Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution.” *Gilmore v. Garner*, 157 N.C. App. 664, 666, 580 S.E.2d 15, 18 (2003) (citation omitted). “A contract which is plain and unambiguous on its face will be interpreted as a matter of law by the court. If the agreement is ambiguous, however, interpretation of the contract is a matter for the jury. Contracts are interpreted

according to the intent of the parties.” *Metcalfe v. Black Dog Realty, LLC*, 200 N.C. App. 619, 633, 684 S.E.2d 709, 719 (2009) (citations omitted).

“Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly, and it is fundamental that that which is plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed. If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it. The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties, the parties being supposed to have made those stipulations which as honest, fair, and just men they ought to have made.” However, “[n]o meaning, terms, or conditions can be implied which are inconsistent with the expressed provisions.”

Gilmore, 157 N.C. App. at 667, 580 S.E.2d at 18 (quoting *Lane*, 284 N.C. at 410–11, 200 S.E.2d at 624). “It is a well-settled principle of legal construction that it must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.” *Anderson v. Anderson*, 145 N.C. App. 453, 458, 550 S.E.2d 266, 269 (2001) (citation omitted).

Here, the Agreement provided the following provision:

[Defendant] and [plaintiff] consent and agree that each shall contribute directly one-half of all funds required to defray or cover the ordinary and necessary expenses, including but not limited to, [sic] tuition, fees, books, transportation, housing, meals, dues, and other ordinary and necessary expenses for a four-year college education,

or equivalent post-secondary school education for each of the minor children of the parties.

Defendant contends that because he paid fifty-percent of the amounts due to the University of Tennessee, absent the \$9,095.00 out-of-state tuition fee, plaintiff fails to meet her burden to establish that he has not paid the ordinary and necessary expenses for James's college education. Defendant further contends that the out-of-state tuition fee charged by the University of Tennessee is not "ordinary and necessary," within the terms of the contract, as James could earn an equivalent degree at a presumably public university in North Carolina (James was also accepted at East Carolina University), where he would be charged the in-state tuition rate.

The question is whether the parties' agreement to pay for the ordinary and necessary expenses to attend a four-year university encompassed out-of-state tuition fees, at the time they entered into the Agreement. The record provides no evidence other than the terms of the Agreement regarding the parties' mutual intent at the time the contract was executed.

The language of the Agreement states that the parties will "cover or defray the ordinary and necessary expenses, including but not limited to, [sic] tuition, fees, books, transportation, housing, meals, dues, and other ordinary and necessary expenses for a four-year college education." The language of the Agreement clearly expresses the parties' mutual intent to cover or defray fees, "including but not limited to, tuition, . . . books, transportation, housing, meals, dues, and other ordinary and

necessary expenses for a four-year college education.” The agreement placed no qualifications or limitations requiring a child to attend any particular type of school or an in-state school. The \$9,095.00 out-of-state tuition fee charged by the University of Tennessee for non-resident students to attend that university is an “ordinary and necessary” fee charged to all non-resident students. Thus, we construe the terms of the Agreement to mean that, at the time they entered into the Agreement, the parties mutually agreed to cover or defray all “ordinary and necessary” tuition fees for their minor child to receive a four-year college education, without any limitations upon the type of school or its location. *See Anderson*, 145 N.C. App. at 458, 550 S.E.2d at 269. Therefore, defendant’s argument is overruled.

Ability to Comply

Defendant argues that the trial court erred in granting summary judgment in favor of plaintiff where plaintiff failed to present evidence that defendant had the ability to meet the obligation imposed under the Agreement. We agree.

“A marital separation agreement is generally subject to the same rules of law with respect to its enforcement as any other contract. The equitable remedy of specific enforcement of a contract is available only when the plaintiff can establish that an adequate remedy at law does not exist.” *Moore v. Moore*, 297 N.C. 14, 16, 252 S.E.2d 735, 737 (1979) (citations omitted), *abrogated on other grounds by Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986).

Here, in order to obtain a full and complete remedy, a remedy at law would require plaintiff to relitigate the suit for tuition each time tuition is due and defendant fails to perform the terms of the agreement. On these facts, this is an impractical and inefficient remedy. Thus, plaintiff is entitled to pursue the equitable remedy of specific performance. *See id.*; *Edwards v. Edwards*, 102 N.C. App. 706, 708, 403 S.E.2d 530, 531 (1991) (“[A] separation agreement not incorporated into a final divorce decree (as in the present case) may be enforced through the equitable remedy of specific performance.”).

“To receive specific performance, the law requires the moving party to prove that [(i)] the remedy at law is inadequate, [(ii)] the obligor can perform, and [(iii)] the obligee has performed [her] obligations.” *Reeder v. Carter*, 226 N.C. App. 270, 275, 740 S.E.2d 913, 917 (2013) (alteration in original) (citations omitted). Here, the record is almost silent on defendant’s ability to perform the terms of the Agreement. Moreover, in his affidavit, defendant avers that he “could not afford to pay \$20,000.00 a year for [James’s] college and continue to save for [two other minor children].” Therefore, as plaintiff has failed to present evidence that defendant can perform his obligation under the Agreement and defendant has presented his affidavit claiming he lacks the ability to pay, there is a genuine issue of material fact regarding plaintiff’s entitlement to the equitable remedy of specific performance. Accordingly, we reverse in part the trial court’s grant of summary judgment in favor of plaintiff

and remand for further proceedings by the trial court to resolve the factual issue as to defendant's ability to pay, before granting specific performance.

REVERSED AND REMANDED.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).