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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-885

Filed: 5 September 2017

Lee County, No. 15 CVD 276

MICHAEL B. DALY, Plaintiff,

v.

CHRISTY B. DALY, Defendant.

Appeal by Plaintiff from an equitable distribution judgment entered 10 March 2016 by Judge Mary H. Wells in Lee County District Court. Heard in the Court of Appeals 21 February 2017.

*Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for Plaintiff-Appellant.*

*Doster, Post, Foushee, Post & Patton, P.A., by Kristy G. Patton, for Defendant-Appellee.*

INMAN, Judge.

Plaintiff Michael B. Daly (“Mr. Daly”) appeals from an equitable distribution judgment distributing marital and divisible property between himself and his ex-wife Christy B. Kelly (formerly Christy B. Daly, hereinafter “Mrs. Kelly”) following their divorce. Mr. Daly argues that the trial court erred in: (1) failing to properly consider

the lack of market activity in valuing the former marital residence; (2) valuing the divisible property in the former marital residence at the time of its interim distribution rather than at the time of the final equitable distribution order; and (3) treating Mr. Daly's post-separation payments on the former marital residence as a distributional factor rather than as a credit and failing to explain such a decision. After careful review, we affirm.

### **Factual and Procedural History**

Mr. Daly and Mrs. Kelly were married in 2001. In the course of their marriage, they purchased a residence located at 2608 Bristol Way, Sanford, North Carolina (the "Property"). The parties separated on 12 December 2013, and Mrs. Kelly vacated the Property. The following day, the Property was appraised with a fair market value of \$282,000 (the "First Appraisal").

Mr. Daly enjoyed the exclusive use of the Property from the date of separation; he also paid all associated mortgage, insurance, and tax liabilities on the Property thereafter. He claimed the *ad valorem* tax and interest payments as deductions on his federal and state income taxes, and lived in the residence until he elected to move to Raleigh in March 2015. He also housed his girlfriend rent-free at the Property beginning in January 2015, although the Property held a fair market rental value of \$1,500 a month.

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By mid-May 2015, both parties had filed equitable distribution actions and motions for the interim distribution of the Property. On 13 May 2015, the trial court entered an order on the parties' interim distribution motions (the "Interim Order"), as well as an order for absolute divorce. The trial court left open the final adjudication of the parties' equitable distribution claims.

In its Interim Order, the trial court denied Mr. Daly's motion for interim allocation, which sought the forced sale of the Property, and instead granted Mrs. Kelly's motion distributing the Property and all debts relating thereto to Mr. Daly. The Interim Order: (1) expressly provided that Mr. Daly "shall hereafter have the sole ownership and possession of this property[;]" (2) ordered Mrs. Kelly to execute a special warranty deed conveying all right, title, and interest in the Property to Mr. Daly; (3) allowed Mrs. Kelly to have the Property appraised on or before 31 May 2015; and (4) stated that "proper credit shall be given for this interim distribution in any final equitable distribution judgment." Mrs. Kelly, employing the same appraisers used in the First Appraisal, had the Property appraised a second time on 29 May 2015 at a fair market value of \$315,000 (the "Second Appraisal").

Mr. Daly listed the Property in mid-2015 for \$311,000. From June 2015 until December 2015, Mr. Daly reduced the asking price at least four times, ultimately arriving at an asking price of \$249,900 at the time of the final equitable distribution hearing. Mr. Daly received no offers, at any price, on the Property during this time.

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The trial court held hearings on the equitable distribution claims on 1 December and 30 December 2015, with the distribution of marital and divisible property in the Property of concern to both parties. The First and Second Appraisals were introduced into evidence by Mrs. Kelly without objection. The Parties stipulated that the Property's fair market value at the time of separation was \$282,000.00, consistent with the First Appraisal, and that the net fair market value of the Property at separation was \$77,932.00; the parties did not agree on a fair market value of the Property at the time of distribution to Mr. Daly under the Interim Order, with any such increase constituting divisible property. Mrs. Kelly contended that there was a passive increase of \$33,000 (the difference of the First and Second Appraisals) from separation to the date of the Interim Order; Mr. Daly contended that the change in value was \$0.00. The only evidence Mr. Daly offered concerning the value of the Property at the entry of the Interim Order was testimonial, concerned the lack of any offers despite the reductions in asking price, and is summarized in his contentions that "[Appraisals are] meaningless. . . . [R]eal estate's only worth what someone's willing to offer you. . . . [T]here is no evidence [of value] because there's no offer."

The trial court entered its equitable distribution judgment (the "Judgment") on 10 March 2016. The Judgment incorporated the Interim Order by reference and gave credit to Mr. Daly for the distribution of the Property, expressly noting that it "was distributed to . . . Plaintiff by virtue of th[e] interim distribution order." The

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Judgment listed the Property as marital, and distributed its stipulated fair market value at the time of separation to Mr. Daly. The Judgment contains a finding of fact by the trial court concerning Mr. Daly's testimonial evidence as to the value of the Property, which reads:

The Court has carefully considered the reduction in listing price, but does not treat the decisions made by [Mr. Daly] regarding listing price as dispositive of [the] current fair market value [of the Property]. . . . [His] individual need to sell this property as promptly as possible does not equate to it having decreased fair market value. Additionally, [Mr. Daly] has offered no appraisal evidence to the Court to contradict the appraisals received into evidence as offered by [Mrs. Kelly].

The trial court found that there was a passive increase in value of \$33,000 between the date of separation and the entry of the Interim Order, and distributed it to Mr. Daly. It also considered his post-separation payments on the Property's associated debts and liabilities as a distributional factor. In so doing, the court considered the post-separation benefits received by Mr. Daly, including his ability to claim mortgage interest deductions on his state and federal income taxes and the use of the property by him and his girlfriend rent-free despite a fair market rental value of \$1,500 a month. The trial court ordered an equal distribution of the marital and divisible property following its consideration of the relevant equitable distribution factors, and Mr. Daly timely appealed.

### **Analysis**

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When reviewing an equitable distribution judgment, we “will uphold the trial court’s written findings of fact as long as they are supported by competent evidence.” *Mugno v. Mugno*, 205 N.C. App. 273, 276, 695 S.E.2d 495, 498 (2010) (internal quotation marks and citation omitted). We apply *de novo* review to the lower court’s conclusions of law. *Id.* at 276, 695 S.E.2d at 498. The equitable distribution itself “is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion.” *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (internal citations omitted). “A ruling committed to a trial court’s discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Mr. Daly first argues that the trial court erred in “requir[ing Mr. Daly] to ‘contradict’ [Mrs. Kelly’s] self-serving appraisal with his own self-serving appraisal[,]” and that “the trial court did not have the discretion to effectively ignore [Mr. Daly’s] evidence concerning value by holding [Mr. Daly] failed to ‘contradict’ [Mrs. Kelly’s] appraisal with an appraisal of his own.” The Judgment, however, is devoid of any language imposing a standard of proof requiring that Mr. Daly present appraisal evidence. Further, the Judgment discloses on its face that the trial court “carefully considered” Mr. Daly’s evidence.

Mr. Daly does not challenge the trial court’s finding of an equitable distribution amount as unsupported by the evidence, and acknowledges in his brief that the trial court “had the discretion to accord a single uncorroborated appraisal more weight than [Mr. Daly’s] testimony about repeated unfruitful efforts to sell the former marital home.” As reflected in the Judgment’s findings of fact, this is precisely what the trial court did.

While Mr. Daly relies upon a litany of decisions from other jurisdictions for the proposition that the ultimate sale price of property is the best evidence of its market value, the Property in this case, unlike those in the cited cases, *was never sold*, and North Carolina’s appellate courts have long held that asking prices are incompetent evidence of fair market value. *See, e.g., Hill v. Hill*, 229 N.C. App. 511, 527, 748 S.E.2d 352, 363 (2013) (noting that a listing price “is nothing more than the amount for which the parties would like to sell the property [and] has no bearing upon the fair market value of the property”); *N.C. State Highway Comm’n v. Helderman*, 285 N.C. 645, 655, 207 S.E.2d 720, 727 (1974) (“A mere offer to buy or sell property is incompetent to prove its market value.”).

Finally, Mr. Daly’s evidence concerned the fair market value of the Property at the time of the Judgment—not at the time of its distribution to him in the Interim Order. As we explain *infra*, such evidence was therefore irrelevant to the valuation of the marital estate.

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For all of the foregoing reasons, we hold that the trial court did not abuse its discretion or commit any error in determining the equitable distribution.

The second argument advanced by Mr. Daly is on equally unsound footing. He contends that the trial court erred in valuing the divisible interest in the Property at the time of its distribution to him by entry of the Interim Order as opposed to at the time of the Judgment. Pursuant to N.C. Gen. Stat. § 50-20 (2015), marital and divisible property are subject to equitable distribution. Marital property includes “all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties,” N.C. Gen. Stat. § 50-20(b)(1), while divisible property includes “[a]ll appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and *prior to the date of distribution . . .*” N.C. Gen. Stat. § 50-20(b)(4)(a) (emphasis added). “[P]assive increases in the value of the marital home must be distributed by the trial court as divisible property.” *Lund v. Lund*, \_\_\_, N.C. App. \_\_\_, \_\_\_, 779 S.E.2d 175, 181-82 (2015). Under N.C. Gen. Stat. § 50-20(i1):

the court may, at any time after an action for equitable distribution has been filed and prior to the final judgment of equitable distribution, enter orders . . . provid[ing] for a distribution of marital property, marital debt, divisible property, or divisible debt. Any such orders entered shall be taken into consideration at trial and proper credit given.

Thus, passive increases in value of the marital residence are to be considered divisible property subject to equitable distribution until the residence’s distribution by interim

order or final judgment; once property is distributed, any passive increases (or decreases) in value occur outside the marital estate. N.C. Gen. Stat. § 50-20(i1).

Mr. Daly cites no law to support his contention that calculation of the divisible interest accrued in the Property as of the Interim Order was improper, and for good reason: we have plainly held that a marital residence distributed in an interim distribution order becomes the sole property of the party receiving it, and any payments thereon are for the benefit of that individual, not the marital estate. *Johnson v. Johnson*, 230 N.C. App. 280, 291, 750 S.E.2d 25, 33 (2013).

In *Johnson*, the plaintiff received the parties' former marital residence at an interim distribution, with the final value of the residence to be determined at the equitable distribution hearing. *Id.* at 290, 750 S.E.2d at 32. Between the time of the interim distribution and the equitable distribution, plaintiff made payments on the residence. *Id.* at 290, 750 S.E.2d at 32. In its equitable distribution order, the trial court held that the post-interim distribution payments were not valued because the payments were not for the benefit of the marital estate. *Id.* at 290-91, 750 S.E.2d at 32-33. On appeal, we affirmed the trial court's order, writing that "[o]nce the residence was distributed to plaintiff in the interim distribution order, any payments she made on the home were to her benefit, and therefore she need not be credited with them. Those payments were not made for the marital estate, but rather for her own personal residence." *Id.* at 291, 750 S.E.2d at 33.

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This case is directly analogous to *Johnson*. The Interim Order distributed the Property to Mr. Daly, though it left open the final determination of the Property's value. Per the terms of the Interim Order, Mr. Daly enjoyed "the sole ownership and possession of this [P]roperty" from the date of its entry. While Mr. Daly seeks to distinguish *Johnson* by arguing that he, unlike the plaintiff there, was not using the Property as his "personal residence," the actual use of the Property is immaterial to the legal reality that he alone owned and enjoyed the exclusive use and benefit of the Property as of the entry of the Interim Order. Nor did the trial court's decision to leave open its factual findings and legal conclusions concerning the value of the Property render the decretal portion of the order without legal effect; indeed, the trial court in *Johnson* took the same tack without error. The Interim Order transferred the Property to Mr. Daly, and all payments made by him related to the Property benefitted his ownership, not the marital estate. The trial court did not err in valuing the Property for purposes of the marital estate at the time of its distribution to Mr. Daly under the Interim Order.

In his final issue on appeal, Mr. Daly contends that the trial court: (1) erred as a matter of law in failing to credit him with post-separation principal reductions (treating them instead as a distributional factor); and (2) abused its discretion in omitting its reasoning behind this particular decision. Specifically, Mr. Daly contends, without citing any law, that the trial court's decision not to provide him

with credits “violates this Court’s precedents,” and that “[t]he trial judge should at least be required to enunciate why using the distributional factor over other methods of providing credits addresses the facts and equities of this case.” These arguments are wholly unpersuasive.

As a general matter, “[a] spouse is entitled to some consideration, in an equitable distribution proceeding, for any post-separation payments made by that spouse . . . for the benefit of the marital estate” as well as any “post-separation use of marital property by the other spouse.” *Walter v. Walter*, 149 N.C. App. 723, 731, 561 S.E.2d 571, 576-77 (2002) (citations omitted). When it comes to “post-separation payments, the trial court may treat the payments as distributional factors under [N.C. Gen. Stat. §] 50-20(c)(11a), or provide direct credits for the benefit of the spouse making the payments.” *Id.* at 731, 561 S.E.2d at 577 (internal citation omitted). If the party who receives the property at distribution did not have post-separation use or make post-separation payments thereon, then “the use and/or payments *must* be considered as either a credit or distributional factor.” *Id.* at 732, 561 S.E.2d at 577 (emphasis added) (internal citations omitted). In such circumstances, the trial court must make findings of fact concerning those post-separation payments regardless of whether it orders an equal or unequal division. *Warren v. Warren*, 175 N.C. App. 509, 518, 623 S.E.2d 800, 805-06 (2006) (noting that the requirement to make findings of fact concerning N.C. Gen. Stat. § 50-20(c) factors for which evidence is presented

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“exists regardless [of] whether the trial court ultimately decides to divide the property equally or unequally” (citation omitted)).

N.C. Gen. Stat. § 50-20(c) does not require the trial court to make findings concerning post-separation payments if the payor ultimately receives the property. “If, on the other hand, the property is distributed to the spouse who had the post-separation use of it or who made post-separation payments relating to its maintenance, there is, as a general proposition, no entitlement to a credit or distributional factor.” *Walter*, 149 N.C. App. at 732, 561 S.E.2d at 577. Whether and how to consider such payments, depending upon the equities of the case, is in the sound discretion of the trial court. *Id.* at 732, 561 S.E.2d at 577.

Despite Mr. Daly’s contentions to the contrary, there was no requirement imposed upon the trial court to: (1) consider his post-separation payments as a distributional factor; or (2) explain why it did so instead of considering it as a credit. While Mr. Daly argues that we, sitting as the appellate court, are unable to fully review the trial court’s decision due to the lack of any explicit findings concerning its choice to treat the payments as a distributional factor rather than as a credit, the trial court had no obligation to make such findings, and it is clear from the record that the trial court considered the equities as they related to these payments and Mr. Daly’s use of the property. The trial court explicitly found that his post-separation payments were partially offset by deducting them on his taxes, that the Property had

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a fair market rental value of \$1,500 a month of which he could have taken advantage, that he paid no rent to his wife while residing there post-separation, and that his girlfriend lived there rent-free for a period of time.

Although Mr. Daly also contends that the trial court may not have been aware of its ability to treat the payments as a credit, he acknowledges in his brief that he explicitly “requested that his post-date of separation payments be considered as a distributional factor” in the pre-trial order. Assuming *arguendo* that the court committed error here, Mr. Daly’s express request that it consider the payments as a distributional factor and failure to sufficiently apprise the court of available alternatives constitutes invited error not subject to appellate review. *Romulus v. Romulus*, 215 N.C. App. 495, 528, 715 S.E.2d 308, 329 (2011) (noting that invited error is defined as “a legal error that is not a cause for complaint because the error occurred through the fault of the party now complaining. . . . [T]he party who induces an error can’t take advantage of it on appeal, or more colloquially, you can’t complain about a result you caused.” (quotation marks and citations omitted)). In short, the trial court was not required to make findings concerning its treatment of the post-separation payments as a divisible factor instead of as a credit, and its decision to treat them as such was not “so arbitrary that it could not have been the result of a reasoned decision.” *White*, 312 N.C. at 777, 324 S.E.2d at 833.

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Because the trial court properly considered the parties' evidence regarding the value of the Property in its Judgment, properly valued the Property at the time of its distribution to Mr. Daly under the Interim Order, and was under no obligation to: (1) consider Mr. Daly's post-separation payments as a credit or distributional factor; or (2) explain its treatment of Mr. Daly's post-separation payments as the former, we hold that the trial court did not abuse its discretion and committed no error.

AFFIRMED.

Judges BRYANT and ZACHARY concur.

Report per Rule 30(e).