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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-462

Filed: 6 November 2018

New Hanover County, No. 16 CVD 361

BRENDA B. BOSWELL, Plaintiff,

v.

LARRY WAYNE BOSWELL, Defendant.

Appeal by defendant from order entered 6 December 2017 by Judge Robin W. Robinson in New Hanover County District Court. Heard in the Court of Appeals 17 October 2018.

Rice Law PLLC, by Richard Forrest Kern, Mark Spencer Williams and Christine M. Sprow, for plaintiff-appellee.

Christopher D. Johnson for defendant-appellant.

TYSON, Judge.

Larry Wayne Boswell ("Defendant") appeals from an order of the trial court concerning equitable distribution, alimony, and contempt. We affirm in part and remand.

I. Background

Defendant and Brenda B. Boswell ("Plaintiff") (collectively, "the Parties") were married on 1 August 1987. After 28 years of marriage, Plaintiff and Defendant separated on 27 December 2015. No children were born during their marriage.

On 1 February 2016, Plaintiff filed a verified complaint for equitable distribution, which included motions for post-separation support, alimony, and attorney's fees. Plaintiff's complaint also included motions for interim distribution and a motion for a temporary restraining order and permanent injunction. An affidavit of financial standing was attached to Plaintiff's verified complaint and is referenced within the body of the complaint. In the affidavit, Plaintiff averred to her monthly income and average monthly expenses. Defendant filed an answer, including affirmative defenses, counterclaims, and a motion to dismiss.

The trial court held a hearing and later entered a written order upon Plaintiff's motions for post-separation support, interim distribution, temporary restraining order and injunction ("6 April 2016 Order"). The trial court's order contained 34 findings of fact and concluded, in part,

> 3. The Defendant is acting in bad faith and purposefully suppressing his income.
>
> 4. Plaintiff is a dependent spouse and is substantially in need of maintenance and support from Defendant.
>
> 5. Defendant is a supporting spouse.
>
> 6. Plaintiff is entitled to an award of post-separation support and Defendant has the ability to pay post-

separation support as set forth herein.

On 14 April 2016, Defendant filed a motion for a new trial on the issues of post-separation support, interim distribution, and the temporary restraining order and injunction. Following a hearing, the trial court entered an order denying Defendant's motion, which incorporated the findings of fact from the 6 April 2016 Order.

On 6 September 2017, the trial court entered a pre-trial consent order. The parties stipulated to certain facts and included a combined listing "of all property agreed to be marital, partly marital, and [s]eparate, and showing each party's contentions as to value, proposed distribution, and classification, including where the parties agree and disagree."

A trial was conducted on Plaintiff's claims for equitable distribution, alimony, and contempt, and on Defendant's counterclaims and affirmative defenses. On 6 December 2017, the trial court entered an order resolving equitable distribution, alimony, and contempt. The trial court concluded, in part, that "Plaintiff is the 'dependent spouse[,]'" "Defendant is the 'supporting spouse[,]'" "Plaintiff's resources are not adequate to meet her reasonable needs[,]" "Plaintiff is in need of permanent alimony from the Defendant[,]" and "Defendant is in contempt of this Court's post separation support order."

On 9 December 2017, Defendant filed notice of appeal. On 13 December 2017, Plaintiff filed a motion requesting the trial court correct a clerical error in the 6

December 2017 order. The trial court entered an amended order ("Amended Order") on 7 March 2017 with the clerical error corrected. *See* N.C. Gen. Stat. § 1A-1, Rule 60(a) (2017) ("Clerical mistakes in . . . orders . . . may be corrected by the judge at any time . . . on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division[.]")

II. Jurisdiction

Jurisdiction lies in this Court over an appeal of a final judgment regarding equitable distribution and alimony in a civil district court action pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2) (2017) and 50-19.1 (2017).

III. Standard of Review

> [T]he 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. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.
>
> The trial court's findings need only be supported by substantial evidence to be binding on appeal. We have defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. As to the actual distribution ordered by the trial court, when reviewing an equitable distribution order, the standard of review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by

reason.

Peltzer v. Peltzer, 222 N.C. App. 785, 786-87, 732 S.E.2d 357, 359-60 (citations, quotation marks, and brackets omitted), *disc. rev. denied*, 366 N.C. 417, 735 S.E.2d 186 (2012). In addition, "where a trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *Juhnn v. Juhnn*, 242 N.C. App. 58, 63, 775 S.E.2d 310, 313 (2015) (citation omitted).

IV. Analysis

A. *Motion to Dismiss*

Defendant argues the trial court erred in denying his motion to dismiss Plaintiff's alimony claim, made following Plaintiff's case-in-chief during the 6 September 2017 bench trial. Defendant cites the standard of review for a motion for directed verdict, which is applicable to jury trials. *See Hawley v. Cash,* 155 N.C. App. 580, 582, 574 S.E.2d 684, 686 (2002) ("Appellate review requires this Court to examine all the evidence in the light most favorable to the nonmoving party . . . and determine if the evidence is sufficient to be *submitted to the jury*." (emphasis supplied) (citations and internal quotation marks omitted).

Defendant's motion to dismiss was made during the bench trial on Plaintiff's claims for equitable distribution, alimony, and contempt. Defendant did not designate at trial or in his appellant brief the rule of civil procedure under which he

purported to bring his motion to dismiss. "[T]he proper motion to dismiss a case during a bench trial is a motion for involuntary dismissal under Rule 41(b)[.]" *Greensboro Masonic Temple v. McMillan*, 142 N.C. App. 379, 381, 542 S.E.2d 676, 678 (2001). We treat Defendant's motion to dismiss, made at the close of Plaintiff's evidence, as a motion for involuntary dismissal under Rule 41(b) of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 41(b) (2017).

Rule 41(b) provides, in relevant part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

Id. This Court has repeatedly recognized that if a defendant presents evidence after making a Rule 41(b) motion to dismiss, the "defendant waive[s][the] right to appeal the denial of [the] motion to dismiss made at the close of [the] plaintiff's evidence." *Karger v. Wood*, 174 N.C. App. 703, 706, 622 S.E.2d 197, 200 (2005); *see Jarrett v. Jarrett,* __ N.C. App. __, __, 790 S.E.2d 883, 892-93 ("we hold that because defendant presented evidence after his motion for involuntary dismissal was denied, he has waived his right to appeal from the denial of the motion."), *disc. review denied*, 369 N.C. 194, 793 S.E.2d 259 (2016).

Defendant presented evidence after his challenge and his Rule 41(b) motion to dismiss was denied. Defendant has waived the right to appeal the trial court's denial of his motion to dismiss made at the close of Plaintiff's evidence. *See Karger,* 174 N.C. App. at 706, 622 S.E.2d at 200. Defendant's arguments relating to the trial court's denial of his Rule 41(b) motion to dismiss are waived and are dismissed.

B. *Bad Faith*

Defendant argues no "substantial or competent" evidence supports the trial court's finding that he had exercised bad faith by reducing his employment. The trial court made several findings of fact regarding Defendant's acting in bad faith to determine Defendant's income for purposes of Plaintiff's alimony and equitable distribution claims. As stated in *Works v. Works,* 217 N.C. App. 345, 719 S.E.2d 218 (2011):

> Alimony is ordinarily determined by a party's actual income, from all sources, at the time of the order. To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed her income in bad faith. In the context of alimony, bad faith means that the spouse is not living up to income potential in order to avoid or frustrate the support obligation. . . . *The trial court might also find bad faith, or the intent to avoid reasonable support obligations, from evidence that a spouse has refused to seek or to accept gainful employment; willfully refused to secure or take a job; deliberately not applied himself or herself to a business or employment; or intentionally depressed income to an artificial low.*

Id. at 347, 719 S.E.2d at 219 (emphasis supplied) (citations, internal quotation marks,

and brackets omitted).

Defendant does not specifically refer to which of the trial court's findings of fact he assigns error concerning his bad faith. The trial court made several findings of fact regarding Defendant's bad faith, including, in part:

> 30. Defendant is an able-bodied man capable of continuing his regular employment.
>
> 31. Defendant testified that he quit his last employment.
>
> 32. Defendant has not tried to continue renting vehicles or equipment as he did in the past.
>
> 33. Defendant has not attempted to work in another state or elsewhere in North Carolina since the date of separation.
>
> 34. Although the North Carolina film industry has declined in the last two years, there have been 14 movie and/or television productions in North Carolina alone to which Defendant could have applied but he is purposefully not seeking employment.
>
> 35. Defendant's brother, Donnie, retired from the film and television industry this year and is at least 3 years older than Defendant.
>
> 36. Defendant has purposefully suppressed his income.
>
> 37. Defendant has acted in bad faith with respect to his current income as follows:
>
> > a. failing to exercise his reasonable capacity to earn;
> >
> > b. deliberately avoiding his family's financial responsibilities;

> c. acting in deliberate disregard for his support obligation to Plaintiff;
>
> d. refusing to seek gainful employment;
>
> e. deliberately not applying himself to his business;
>
> f. intentionally depressing his income to an artificial low; and
>
> g. intentionally leaving his employment.
>
> . . .
>
> 46. Defendant is acting in bad faith by not continuing his employment.

Other than making a general challenge to the trial court's finding he had acted in bad faith, the only one of the findings of fact Defendant challenges is Finding of Fact 31, which states: "Defendant testified he quit his last employment." The remainder of the preliminary findings the trial court relied upon to find Defendant acted in bad faith are unchallenged. These findings are deemed to be supported by competent evidence and are binding on appeal. *See Juhnn*, 242 N.C. App. at 63, 775 S.E.2d at 313.

Even if the trial court's Finding of Fact 31 is not supported by competent evidence, the remaining unchallenged findings support the trial court's ultimate finding and conclusion that Defendant had acted in bad faith by deliberately suppressing his income and not continuing his employment. *See Works*, 217 N.C. App. at 347, 719 S.E.2d at 219. Defendant's arguments are overruled.

C. *Defendant's Income*

Defendant argues "the trial court should not have made a finding of $3,581.00 as to Defendant's gross monthly income" in deciding the amount of alimony. Defendant submitted a financial affidavit and testified as to his current income. Defendant contends the evidence that his monthly income is $1,831.00 was not contradicted. Defendant quotes this Court's opinion in *Collins v. Collins* for the general rule that: "Alimony is ordinarily determined by a party's actual income, from all sources, at the time of the order." 243 N.C. App. 696, 703, 778 S.E.2d 854, 858-59 (2015) (citation and emphasis omitted).

The trial court did not find Defendant's actual monthly income was $3,581.00, but imputed income above Defendant's actual income based upon his earning capacity after determining Defendant had acted in bad faith. "To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed [his] income in bad faith." *Works*, 217 N.C. App. at 347, 719 S.E.2d at 219. After finding bad faith, the trial court made several unchallenged findings of fact involving Defendant's imputed income:

> 42. Defendant's gross income in 2013 was $98,973.00, as shown on Plaintiff's Exhibit L.1.
>
> 43. Defendant's gross income in 2014 was $99,450.00, as shown on Plaintiff's Exhibit L.2
>
> 44. Defendant's gross income in 2015 was at least $67,012.00, not including the $10,000.00 401k

> disbursement he received.
>
> 45. Defendant's current [monthly] income is $1,831.00 due to his quitting his last employment and not seeking new employment or income from his ability to rent vehicles as he did in the past.
>
> 46. Defendant is acting in bad faith by not continuing his employment.
>
> 47. In addition to defendant's current social security benefits ($1,831.00 monthly), Defendant's income should be imputed at $30,000.00 gross yearly, which is the average of his yearly gross incomes over the last three years of the marriage ($88,478.33), he discounted to take into account the decline in film opportunities in North Carolina.
>
> 48. Defendant's net income is imputed at $21,000.00 yearly which equals $1,750.00 per month net (plus $1,831.00 in monthly social security income - $3,581.00 monthly net income.)

Defendant does not challenge the trial court's findings of fact or evidence regarding his annual income from prior years, his current social security benefits, or the trial court's calculation of imputed income. These unchallenged findings are binding on appeal. *See Juhnn*, 242 N.C. App. at 63, 775 S.E.2d at 313.

The trial court's conclusion that Defendant had acted in bad faith is supported by competent evidence and the supporting findings of fact. Once the trial court determined Defendant's bad faith in depressing his income, it could properly impute income based upon Defendant's earning capacity. *Works*, 217 N.C. App. at 347, 719 S.E.2d at 219. The trial court's unchallenged findings support its finding Defendant's

actual and imputed gross monthly income is $3,581.00. Defendant's argument is overruled.

D. *Plaintiff's Expenses*

Defendant argues "the trial court erred, due to a lack of substantial evidence, by making a finding as to the Plaintiff's expenses." Defendant does not specifically refer to which of the court's findings of fact he challenges, but the trial court did enter a finding of fact regarding Plaintiff's monthly expenses:

> 50. Plaintiff's reasonable monthly expenses are $3,250.00 which includes the Parties' mortgage payment and marital debt that the parties have agreed should be distributed to the Plaintiff.

Defendant asserts "Plaintiff offered little to no evidence via testimony or documents that detailed her reasonable needs and expenses." This assertion is incorrect. The record contains Plaintiff's sworn affidavit detailing her monthly expenses and income, which was attached to and referred to in her verified complaint. The trial court's order clearly shows it considered Plaintiff's affidavit in determining her monthly expenses.

Finding of Fact 52 expressly states:

> Plaintiff is a disabled person unemployed earning net monthly income of $1,141.70. After her monthly expenses of $3,250.00 as shown on Exhibit "A" attached and incorporated into the Complaint filed in this matter, she is left with a monthly shortfall of $2,108.30.

The trial court's finding that $3,250.00 are Plaintiff's monthly expenses is supported by competent evidence. *Peltzer*, 222 N.C. App.at 786, 732 S.E.2d at 359 ("findings of fact are binding on appeal as long as competent evidence supports them"). Defendant's argument is overruled.

E. *Plaintiff's Status as Dependent Spouse*

Defendant argues "the trial court erred, due to a lack of substantial evidence, by making a finding as to the Plaintiff qualifying as a dependent spouse." A dependent spouse is defined as one "who is actually substantially dependent upon the other spouse for his or her maintenance and support or *is substantially in need of maintenance and support from the other spouse*." N.C. Gen. Stat. § 50-16.1A(2) (2017) (emphasis supplied). Plaintiff's sworn affidavit provides competent evidence to support Finding of Fact 52 that her net monthly income of $1,141.70 is exceeded by monthly expenses of $3,250.00.

The trial court also made the unchallenged Finding of Fact 57, which states: "The Plaintiff's resources are not adequate to meet her reasonable needs." The trial court's unchallenged Findings of Fact 52 and 57, and the Plaintiff's affidavit attached to her complaint support the trial court's additional finding and conclusion that Plaintiff is a dependent spouse. Defendant's argument is overruled.

F. *Defendant's Ability to Pay Alimony*

Defendant argues "the trial court erred, due to a lack of substantial evidence, by making a finding as to the Defendant's ability to pay alimony." Defendant again does not refer to which specific finding of fact he assigns error.

The trial court found: "The Defendant has the ability to pay Alimony to the Plaintiff in the amount herein ordered." The trial court entered unchallenged findings that Defendant earned $1,750.00 per month of imputed income and an additional $1,831.00 per month of social security income, for a total of $3,581.00 monthly net income.

The trial court also found Defendant's reasonable monthly expenses to be $1,600.00 per month and that "Defendant's sister and daughter have provided him with funds to reduce his living expenses significantly." These unchallenged and binding findings of fact support the trial court's Finding of Fact 60, which states "Defendant has the ability to pay Alimony to the Plaintiff . . . ." Defendant's argument is overruled.

G. *Duration of Alimony*

Defendant argues: "The trial court erred in ordering the alimony award to be permanent without making findings of fact to support its conclusion as required by the statute and our precedents." The trial court ordered Defendant to make permanent alimony payments of $1,500 per month to Plaintiff until the earliest of the

following events: the death of Defendant, the death of Plaintiff, the remarriage of Plaintiff, or, the cohabitation of Plaintiff with another adult.

N.C. Gen. Stat. § 50-16.3A(c) (2017) requires: "The court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment." Defendant is correct that the trial court's order contains no findings or conclusion explaining, as required by the statute, why it ordered the duration of the alimony award to be permanent,

We remand this cause to the trial court to enter findings and conclusions explaining and to support why it awarded permanent alimony for Plaintiff. *Id.*; *see Nicks v. Nicks,* 241 N.C. App. 487, 501, 774 S.E.2d 365, 376 (2015) *(*"We therefore remand the alimony award for further findings of fact regarding the reasons for its permanent duration.").

V. Conclusion

The trial court's conclusions are supported by its unchallenged findings of fact, which are supported by competent evidence on all issues, except permanent alimony. Those portions of the trial court's order are affirmed.

The trial court failed to explain why it ordered the permanent alimony award to Plaintiff. The matter is remanded for further findings of fact and conclusions of law in conformity with the factors required by N.C. Gen. Stat. § 50-16.3A(c) regarding permanent alimony. *It is so ordered.*

AFFIRMED IN PART AND REMANDED.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).