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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1206

Filed: 21 January 2020

Wake County, No. 16 CVD 14072

MARGARET PAEZ, Plaintiff,

v.

MICHAEL PAEZ and MICHAEL ANTHONY PAEZ and MARGARET CASASNOVAS REVOCABLE TRUST, Defendants.

Appeal by Defendants from judgment/order entered 24 May 2018 by Judge Debra S. Sasser in Wake County District Court. Heard in the Court of Appeals 5 June 2019.

Gailor, Hunt, Jenkins, Davis, Taylor and Gibbs, P.L.L.C., by Stephanie J. Gibbs and Jonathan Melton, for plaintiff-appellee.

Fox Rothschild LLP, by Michelle D. Connell, for defendants-appellants.

MURPHY, Judge.

This case requires us to decide three issues: (A-1) whether a divorced Husband breached a separation agreement when, believing alimony payments were contingent on continued employment with his employer at the time of the agreement, he ceased alimony payments after losing his job; (A-2) whether Husband earned a credit toward

missed payments when, pursuant to a consent order dividing marital property, Wife received payments from Husband's pension; and (B) whether the trial court's remedy of specific performance was proper when, solely due to an erroneous interpretation of the separation agreement, Husband ceased alimony payments.

We agree with the trial court that Husband breached the separation agreement where the unambiguous language of the contract did not contain an implied term that Husband's paying of alimony was contingent on maintaining employment with a specific employer. Nor was the purpose of the separation agreement frustrated when Husband lost his job, as both parties could have reasonably foreseen Husband losing employment. Further, we agree with the trial court that Husband was not entitled to a credit toward missed alimony payments where the payments from the pension plan were Wife's separate property and the money was not for and on account of the alimony payments. Finally, we vacate the trial court's decision to order specific performance because no deliberate misconduct was engaged in by the supporting spouse, no fraud or punitive damages were found or awarded, and no competent evidence showed that Husband would not return to making payments.

Accordingly, we affirm both the trial court's award of damages and that Husband should not have received credit toward the owed alimony payments. We, nevertheless, vacate the trial court's order of specific performance.

BACKGROUND

Defendant, Michael Paez, (“Husband”) and Plaintiff, Margaret Paez, (“Wife”) entered into a separation agreement (“the Agreement”) in the year before their divorce. Husband was earning approximately \$144,000.00 per year, before bonuses, by working as an account executive with IBM. Meanwhile, Wife was earning less than \$30,000.00 per year by working as an attendance clerk for a high school.

The Agreement provides: “[E]xcept as expressly provided in th[e] Agreement,” Wife “waives all claims against Husband for alimony, support, and maintenance.” In exchange, Husband agreed to “pay to Wife as alimony for her sole use and benefit the sum of \$4,000 per month” and a percent share (15 percent in the first 5 years and 10 percent thereafter) of his “net bonus each year.” No provision states the specific source of the income or bonuses that was to fund the alimony payments. The Agreement also divided up Husband’s IBM Pension Plan. It provided “that Wife is entitled to one-half (1/2) of any and all benefits in the IBM Pension Plan that Husband acquired during the marriage as a result of his employment with IBM.” Both parties expected Husband to retire from IBM at age sixty-five or later.

Eleven years after the Agreement, Husband was involuntarily terminated from IBM at age 58. Husband subsequently stopped paying the \$4,000.00 monthly alimony payments to Wife. Husband encountered difficulty in finding another job after his termination from IBM due to his age, lack of college degree, and treatment for cancer.

In March of 2017, Husband withdrew money from the IBM Pension Plan and began paying Wife approximately \$2,700.00 per month. Husband has substantial assets and substantial debt. He currently lives with his new spouse in Florida, while Wife resides in North Carolina.

ANALYSIS

A. Damages

1. Breach

Husband argues “the parties had a meeting of the minds” that created an implied term in the Agreement. He contends “Wife’s alimony payments were contingent upon Husband’s continued employment with IBM” We disagree.

“Separation agreements that have not been incorporated into a divorce judgment are governed by general contract principles and are enforceable and modifiable only under such principles.” *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003); see *Lane v. Scarborough*, 284 N.C. 407, 409, 200 S.E.2d 622, 624 (1973).¹ We cannot modify such unincorporated separation agreements. See *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983).

“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.” *Lane*, 284 N.C. at 409-10, 200 S.E.2d at 624. We commonly “gather the intention of [separated]

¹ Both parties agree the Agreement functions as a contract because it has not been incorporated into a court order.

parties from the four corners of the[ir separation agreement].” *Hamby v. Hamby*, 143 N.C. App. 635, 646, 547 S.E.2d 110, 117 (2001) (quoting *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 462, 490 S.E.2d 593, 597 (1997)). And when “a [separation agreement] is unambiguous, its construction is a matter of law for the court to determine.” *Gilmore v. Garner*, 157 N.C. App. 664, 666-67, 580 S.E.2d 15, 18 (2003). We are then bound by the separation agreement’s clear meaning when its “plain language . . . is unambiguous on its face.” *Hamby*, 143 N.C. App. at 646, 547 S.E.2d at 117.

Terms of a separation agreement, however, will be implied when the parties’ true intentions can be plainly seen within the four corners of the contract and they would be “necessary to carry [the parties’] intention into effect.” *Lane*, 284 N.C. at 410, 200 S.E.2d at 624. But “no meaning, terms, or conditions can be implied which are inconsistent with the expressed provisions.” *Id.* at 409, 200 S.E.2d at 624.

We do not construe the terms of this separation agreement as ambiguously as Husband desires. Paragraph 4 of the Agreement expressly explains when Husband shall cease these alimony payments:

Husband’s alimony payments to Wife shall continue until the first to occur of the following events: . . . (iv) until Husband reaches normal retirement age under the IBM Personal Pension Plan (age 65) and Wife begins receiving her portion of Husband’s social security retirement benefits in accordance with federal law and her share of Husband’s IBM Personal Pension, as provided for in the May 6, 2005 *Consent Order for Equitable Distribution*, but in no event

shall Husband's obligation to pay alimony to Wife extend later than sixty (60) days after Husband's 65th birthday.

The Agreement's plain language indicates that, as long as he and Wife were alive and Wife remained unmarried, Husband could cease alimony payments when he "reaches normal retirement age" of 65 and Wife begins to receive her share of Husband's IBM Pension Plan. Although Wife has received her portion of the pension retroactively since December 2016, Husband is not yet 65. Relying upon our four-corners approach to contract interpretation, Husband breached the Agreement when he stopped paying alimony in November 2016 because one of the conditions—reaching the age of 65—was not met.

Thus, we hold that the separation agreement does not contain an implied term or condition that Husband's alimony payments to Wife were contingent on his continued employment with IBM. Even if we found this implied term, Husband's other argument, that his "involuntary termination was an intervening event [that] frustrated the purpose of the Agreement making it impossible to comply with the Agreement," still fails.

The breach of a separation agreement "must be a material breach . . . that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform." *Long*, 160 N.C. App. at 668, 588 S.E.2d at 4. We review the trial court's decision as to Husband's breach de novo. *Id.* at 668-69, 588 S.E.2d at 4; *State v. Biber*, 365 N.C. 162, 168, 712

S.E.2d 874, 878 (2011). Failure to pay alimony when provided for in a separation agreement is a material breach. That breach, however, may be excused under the doctrine of frustration of purpose.

A separation agreement's purpose is frustrated when a change in implied conditions results in the destruction of the purpose of the separation agreement and a failure of consideration. *See Brenner v. Little Red Sch. House, Ltd.*, 302 N.C. 207, 211-12, 274 S.E.2d 206, 209-10 (1981) (holding that a former wife deciding not to have a child attend a private school was foreseeable). We have distilled this doctrine down to three requirements: "(1) there was an implied condition in the [separation agreement] that a changed condition would excuse performance; (2) the changed condition results in a failure of consideration or the expected value of the performance; and (3) the changed condition was not reasonably foreseeable." *Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 79, 715 S.E.2d 273, 284 (2011).

The guiding principle underlying the frustration of purpose doctrine is to give "relief in a situation where the parties could not reasonably have protected themselves by the terms of the contract against contingencies [that] later arose." *The Currituck Associates v. Hollowell*, 166 N.C. App. 17, 29, 601 S.E.2d 256, 264 (2004), *aff'd sub nom. Currituck Associates-Residential P'ship v. Hollowell*, 360 N.C. 160, 622 S.E.2d 493 (2005) (internal alterations omitted) (quoting *Faulconer v. Wysong &*

Miles Co., 155 N.C. App. 598, 601, 574 S.E.2d 688, 691 (2002)). For example, our Supreme Court found “the doctrine of frustration of purpose inapplicable” when, “[a]lthough the parties could not have been expected to foresee the exact actions of [the] plaintiff’s former wife in refusing to send the child to [a private] school, the possibility that the child might not attend was foreseeable” See *Brenner*, 302 N.C. at 212, 274 S.E.2d at 210.

Husband’s arguments fail for each requirement. First, as discussed above, there is no implied condition that Husband’s alimony payments would cease should he be terminated from IBM. Second, his loss of employment did not lead to the total destruction of the expected value of performance. Husband agreed to pay alimony in the amount of “\$4,000.00 per month,” not “\$4,000.00 per month of Husband’s income from IBM.” He had or could find other means of making the full alimony payments. Third, losing one’s employment and the associated income is a reasonably foreseeable event. As in *Brenner*, although Husband and Wife could not have been expected to foresee the exact actions or time of IBM in terminating Husband, the possibility that Husband might lose his job, change his job, or lose some of his pay was foreseeable. Indeed, these events are foreseeable enough for the parties to have contracted against these contingencies.

We are not unsympathetic to Husband’s unexpected termination. We must, nevertheless, uphold the premise behind the doctrine of frustration of purpose: to

provide relief to parties who “could not reasonably have protected themselves by the terms of the contract against contingencies which later arose.” *Hollowell*, 166 N.C. App. at 29, 601 S.E.2d at 264. We must ensure this escape-valve, when used by the divorced or soon-to-be divorced, is available only when the parties could not have reasonably foreseen a changed condition and accordingly allocated its risk in the separation agreement. *See Brenner*, 302 N.C. at 211, 274 S.E.2d at 209. Inadequate drafting is also insufficient for this escape-valve. We think parties in the shoes of both Husband and Wife could have reasonably foreseen the possibility of Husband’s reduction in income—whether by lost employment, lost income, or transitioning to a lower paying job with a better work-life balance. Indeed, they had sufficient foresight to secure the alimony payments with Husband’s \$470,000.00 life insurance policy and that alimony payments would cease in the event of “the death of Husband.” An obligor’s premature death and reduced income are comparably foreseeable. It would have been a small burden, compared to the probability of losing his job or changing it, to add the term “of Husband’s income from IBM” to his \$4,000.00 per month obligation.

Thus, the trial court’s findings and conclusions on this issue are affirmed.

2. Credit

In the alternative that we uphold the trial court’s decision on breach, Husband challenges its calculation of the amount of unpaid alimony. The trial court did not

credit Husband for the benefits Wife received from the IBM Pension Plan. It instead ordered Husband to pay a \$64,000.00 arrearage from 16 months of missed alimony payments. On appeal, Husband argues that the trial court erred by failing to credit his alimony arrearage by the amount of pension benefits prematurely received by Wife. Husband contends he should have to pay only \$20,087.04 in unpaid alimony, the total after crediting \$43,912.96 towards the \$64,000.00 arrearage. Wife argues that pension benefits should not be credited because that money is her marital and divisible property as divided under the Consent Order. She contends her portion of the IBM pension is her sole and separate property pursuant to the parties' full and final distribution of their marital estate.

"[T]he proper standard *for measuring damages* is a question of law fully reviewable by this Court." *Smith v. Childs*, 112 N.C. App. 672, 685, 437 S.E.2d 500, 509 (1993). For damages in civil actions, any amount paid toward any injury or damage generally should be counted as credit toward the total recovery for the action. *Baity v. Brewer*, 122 N.C. App. 645, 647, 470 S.E.2d 836, 838 (1996). Our Supreme Court has stated that "any amount paid by anybody, whether they be joint tort-feasors or otherwise, *for and on account of* any injury or damage should be held for a credit on the total recovery in any action for the same injury or damage." *Holland v. Southern Public Utilities Co.*, 208 N.C. 289, 292 180 S.E. 592, 593-594 (1935) (emphasis added). In an action for a breached separation agreement over

missed alimony payments, a court will credit a supporting spouse's alimony payments when he or she gave money to the dependent spouse before the separation agreement's start date and alimony payments. *See Lowry v. Lowry*, 99 N.C. App. 246, 250-51, 393 S.E.2d 141, 143-44 (1990); *see also Glass v. Glass*, 131 N.C. App. 784, 791-92, 509 S.E.2d 236, 240-41 (1998) (affirming the trial court crediting, toward alimony payments, the money "defendant voluntarily paid[] for the benefit of his wife and child"). The underlying rationale is that the money given by the supporting spouse was "for and on account of" prospective alimony payments. *Holland*, 208 N.C. at 292, 180 S.E. 593-94; *Glass*, 131 N.C. App. at 791-92, 509 S.E.2d at 240-41; *see Lowry*, 99 N.C. App. at 250-51, 393 S.E.2d at 143-144.

That same rationale does not apply here. The Agreement provides Wife is entitled to \$4,000.00 per month in alimony from Husband. It, separately, states "Wife is entitled to one-half (1/2) of any and all benefits in the IBM Pension Plan that Husband *acquired during the marriage as a result of his employment with IBM.*" The Consent Order similarly states Wife "shall be entitled to one-half (1/2) of the IBM Pension Plan that [Husband] *acquired during the marriage as a result of his employment with IBM up to the date of separation.*" Wife's benefits from the IBM Pension Plan, consequently, are a result of Husband's employment with IBM and the benefits he acquired during the marriage and up to the date of separation.

The payments IBM made to Wife were not made by Husband for and on account of prospective alimony payments. These benefits, instead, were for and on account of her property interest stemming from the Consent Order, not prospective alimony payments as in *Glass* or *Lowry*. Crediting the payments toward the overall alimony owed to Wife would mischaracterize the nature of the payment: the Consent Order already guaranteed it to her and the Agreement merely recognized this status quo.

As discussed above, Husband's \$4,000.00 per month alimony obligation—unrelated to Wife's pension benefits—never terminated during the 16 months he did not pay alimony between December 2016 and March 2018, creating a \$64,000.00 arrearage for alimony payments while Wife individually received \$43,912.96 in benefits from the IBM Pension Plan. In March 2017, retroactive to December 2016, IBM began paying Wife \$2,744.56 in benefits per month. This amount represented Wife's marital share of Husband's IBM Pension Plan as provided for in the May 6, 2005 Consent Order for Equitable Distribution ("Consent Order"). This was her property, and Husband cannot claim that this money was "for and on account of" the alimony payments.

Thus, the trial court properly denied the credit toward Husband's owed payments, and we affirm the trial court's award of damages to Wife.

B. Remedies

“[A]n unincorporated separation agreement is generally treated as any other contract.” *Lasecki v. Lasecki*, 257 N.C. App. 24, 29, 809 S.E.2d 296, 302 (2017). A breached separation agreement may be remedied by an order for specific performance, an order that “rests in the sound discretion of the trial court and is conclusive on appeal absent a showing of a palpable abuse of discretion.” *Lasecki v. Lasecki*, 246 N.C. App. 518, 538-39, 786 S.E.2d 286, 301 (2016). “Abuse of discretion results where the court’s [order requiring specific performance of the separation agreement] is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). The trial court, here, abused its discretion.

“The sole function of the equitable remedy of specific performance is to compel” the party who breached the separation agreement “to do that which in good conscience he [or she] ought to do without court compulsion.” See *Munchak Corp. v. Caldwell*, 46 N.C. App. 414, 418, 265 S.E.2d 654, 657 (1980) (citations omitted), *modified on other grounds*, 301 N.C. 689, 273 S.E.2d 281 (1981). “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) (alterations, quotation marks, and citation omitted). A trial court’s decision on each

of these prongs is reviewed for abuse of discretion. *See Crews v. Crews*, 826 S.E.2d 194, 196-97 (N.C. Ct. App. 2019).

We initially decide whether “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), *overruled on other grounds by Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986). For a breached separation agreement, our courts have found that specific performance is usually the appropriate remedy. *See, e.g., id.; Reeder*, 226 N.C. App. at 275, 740 S.E.2d at 918 (stating how the court in “*Moore* established that damages are usually an inadequate remedy”); *Condellone v. Condellone*, 129 N.C. App. 675, 682, 501 S.E.2d 690, 695 (1998). The reason is that suing again and again for missed payments is often financially painful for the spouse depending on these payments.² *See Moore*, 297 N.C. at 18, 252 S.E.2d at 738 (holding that “[r]equiring [the dependent spouse] to bring successive lawsuits to recover in a piecemeal fashion the sums due” leads to an inadequate remedy because it “can hardly be viewed as a duplicate or substantial equivalent of the promised performance”). Since *Moore*, our courts

² We note that, partially for this reason, the parties agreed in the Agreement that specific performance is the proper remedy for breach. Husband and Wife now recognize that the inclusion of such a provision is not dispositive under *Reeder*, 226 N.C. App. 270, 740 S.E.2d 913. Such provisions are not binding because parties may not “contract around” the court’s ability to determine a remedy, but such provisions “may guide a trial court’s equitable determinations.” *Reeder*, 270, 740 S.E.2d at 919. We note that the trial court, in Finding of Fact 43, did acknowledge this provision’s existence, but we must still decide whether specific performance is warranted under the law.

continue to reason that “multiple litigation” concerns go “to the heart of the inadequacy of [a] plaintiff’s remedy at law” for a breached separation agreement. *Id.*

To decide that the remedy at law and collection of a judgment against a defendant would be insufficient, an arrearage from missed payments can be a start, but there must be some other evidence in the record to show the risk of multiple litigation. *See Cavanaugh v. Cavanaugh*, 317 N.C. 652, 657-58, 347 S.E.2d 19, 22-24 (1986). Our Supreme Court has reversed when there was “no competent and substantial evidence in the record to support [the] finding” that “it would require ‘a multiplicity of actions and legal processes . . .’ to effect collection of the judgment through execution.” *Id.* at 658, 347 S.E.2d at 23-24. We subsequently held that when an “order of specific performance involves only arrearages,” then “there must be some evidence in the record to support the conclusion that collection would involve a multiplicity of suits.” *Praver v. Raus*, 220 N.C. App. 88, 98, 725 S.E.2d 379, 386 (2012) (emphasis omitted). In effect, for a trial court to properly exercise its discretion when ordering specific performance of a separation agreement, there must be some competent evidence, aside from a missed payment, that increases the “probability” of “multiple litigation.” *Moore*, 297 N.C. at 18, 252 S.E.2d at 738; *see Cavanaugh*, 317 N.C. at 658, 347 S.E.2d at 23-24; *Stewart v. Stewart*, 61 N.C. App. 112, 117, 300 S.E.2d 263, 266 (1983).

Past cases provide examples of what evidence increases the probability of multiple litigation. The classic example is a defendant's "deliberate pattern of [mis]conduct" by hiding paychecks in a new spouse's checking account. *See Moore*, 297 N.C. at 18, 252 S.E.2d at 738-39 (finding that the defendant put owed payments out of reach of the "plaintiff's remedies at law" when he hid his payday income). Another example is a defendant's "statement of intent not to comply" with a separation agreement. *Stewart*, 61 N.C. App. at 117, 300 S.E.2d at 266 (finding that a trial court did not abuse its discretion when, despite the absence of a "deliberate pattern of conduct designed to defeat [plaintiff's] rights under the agreement," the "defendant had stated that he would not comply with the terms of the agreement" and "fail[ed] to make a payment when due"). An additional example is a defendant "not satisfy[ing a] judgment" when the "[p]laintiff previously obtained a judgment . . . to recover arrearages due" *Condellone*, 129 N.C. App. at 682, 501 S.E.2d at 695. What is common, across these cases, is at least one missed payment combined with a defendant's bad-faith non-compliance or his or her stated intention to not comply in the future.

The evidence here is very different from the above examples. The trial court made no finding that Husband made express statements or gave indications that he will not pay amounts owed, and the trial court made no finding that he has not satisfied any prior judgment for amounts owed. In addition, the trial court made no

finding that Husband hid his income or otherwise engaged in deliberate misconduct. Indeed, the trial court dismissed Wife's claims for fraud and punitive damages, which tends to the conclusion that Husband did not engage in deliberate misconduct or does not intend to make payments in the future.

The trial court made three findings that were potentially relevant for needing specific performance, but each is ultimately uninformative. First, the trial court found that "[Husband] lives in Florida, which [would] make execution of a judgment more costly and time-consuming on [Wife]." It also found that "[c]ompelling [Husband] to repeatedly appear for show cause hearings given his residence may prove difficult." One state's judgments, however, are equally enforceable in another, and Husband can send an attorney to attend a show cause hearing.³ Even if the execution of a judgment is more costly or time-consuming, this finding has no bearing on whether additional litigation will arise. If anything, the inconvenience to Husband of having to handle a case across state lines or pay an attorney to go to a show cause hearing serves as an incentive to comply with the remedy at law. Our precedent, moreover, has long looked to risks of multiplicity of litigation or expressions of intent to not pay in the future. The findings here do not increase the odds of multiple litigation.

³ We observe, without ruling, that such a policy related to out-of-state residents may carry its own constitutional concerns.

Second, the trial court stated in Finding of Fact 36 that “[Husband] has an ongoing obligation to pay alimony to [Wife], meaning his failure to pay in the future could result in multiplicity of litigation should he fail to pay in the future,” and “[Wife’s] remedy at law is inadequate for prospective payments.” This finding is similar to one our Supreme Court held insufficient in *Cavanaugh*. Our Supreme Court held that a trial court’s “decree of specific performance” failed because it only “found as a fact that it would require ‘a multiplicity of actions and legal processes’ to effect collection of the judgment through execution [without] competent and substantial evidence . . . to support th[at] finding.” *Cavanaugh*, 317 N.C. at 658, 347 S.E.2d at 23-24. Also, the mere resumption of a person’s ongoing obligation does not raise the odds of that person failing to meet that obligation in the future. Some other factor would have to come into play to show, when payments resume, that Wife will need to sue Husband again for missed payments. Despite Wife’s argument that the “history of [Husband’s] actions comprises strong evidence that [Husband] will persistently fail to pay,” we do not see, nor did the trial court find, any deliberate pattern of conduct by Husband to defeat Wife’s rights under their separation agreement. Although he placed his assets in a Florida trust so they would be “private,” he testified that he did so “to avoid probate” and “to avoid any contention or misunderstandings [with the children and families] as to what was going to happen with our estate after [he and his new wife] pass[] away.” He made no statement that

he intended to hide assets or income from Wife or would do so in the future. The trial court, which was in the best position to determine Husband's credibility, did not make any findings that Husband intended to hide assets or income.

Third, the trial court found that "[Husband] ceased paying any alimony payments to [Wife] based upon his erroneous interpretation of the Agreement that his obligation was connected to employment at IBM." Wife does not argue that this increases the need for specific performance. Even if she had, a legally erroneous interpretation of a separation agreement is much different from deliberate misconduct such as hiding paychecks as in *Moore* or refusing to obey prior judgments as in *Condellone*. Absent a finding that Husband's erroneous interpretation of the Agreement was made in bad faith, we do not find that an erroneous interpretation alone is evidence increasing the odds of multiple litigation. There is no basis to conclude that once Husband's erroneous interpretation is corrected he would fail to resume payments.

Taken together, none of these findings show an increase in "the probability that full compensation cannot be had without multiple litigation." *Moore*, 297 N.C. at 18, 252 S.E.2d at 738; see *Cavanaugh*, 317 N.C. at 658, 347 S.E.2d at 23 (holding that a "decree of specific performance for . . . arrearages must fall" because there was "no competent and substantial evidence in the record to support th[e] finding" that "a multiplicity of actions and legal processes" would be required "to effect collection of

the judgment through execution”). To be sure, specific performance is usually the proper remedy for a breached separation agreement, but the trial court must make sufficient findings to that effect. *Cavanaugh*, 317 N.C. at 658, 347 S.E.2d at 23. Those findings were not found here. Instead, the trial court concluded that there was no fraud or need for punitive damages, and we do not see any evidence tending to show deliberate misconduct or an intention to not make payments in the future. As a result, we do not remand the case “to the trial court for findings of fact and conclusions of law” on the need for specific performance, *Praver*, 220 N.C. App. at 98, 725 S.E.2d at 386, but vacate the order of specific performance.

CONCLUSION

We affirm the trial court’s award of damages and that Husband should not receive credit toward the owed alimony payments. However, we vacate the trial court’s order of specific performance.

AFFIRMED IN PART; VACATED IN PART.

Judges TYSON and YOUNG concur.

Report per Rule 30(e).