

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA09-1357

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2010

THOMAS KITTREDGE,
Plaintiff-Appellant,

v.

Mitchell County
No. 05 CVD 155

YVONNE IRENE HEGNEY,
Defendant-Appellee.

Appeal by Plaintiff from judgment entered 12 May 2009 and from order entered 18 June 2009 by Judge Alexander Lyerly in District Court, Mitchell County. Heard in the Court of Appeals 14 April 2010.

Gum, Hillier & McCroskey, P.A., by Patrick S. McCroskey, for Plaintiff-Appellant.

Taylor & Brown, P.A., by Lee F. Taylor, for Defendant-Appellee.

McGEE, Judge.

Plaintiff and Defendant were married on 23 May 1996. They separated on 26 February 2003, and executed a "separation agreement" (the agreement) on 25 April 2003 which, *inter alia*, provided for the division of Plaintiff's and Defendant's assets, including personal and real property. Plaintiff and Defendant resumed marital relations sometime between May and July of 2003, and resumed cohabitation at that time. This cohabitation lasted until 22 July 2004. Defendant filed an action for divorce on 19

July 2004, and divorce was granted on 17 August 2004.

Plaintiff filed this action on 17 June 2005 alleging breach of the agreement by Defendant and requesting specific performance, damages, and attorney's fees related to Defendant's alleged breach of the agreement. Defendant filed an answer and counterclaim on 9 December 2005, denying Plaintiff's claims and seeking damages, the return of property, and attorney's fees due to Plaintiff's alleged breach of the agreement. Defendant also requested that the trial court enter a restraining order against Plaintiff. In her complaint, Defendant alleged that Plaintiff had harassed her, threatened to kill her, and had illegally entered her property and taken some of her belongings. Plaintiff replied to Defendant's counterclaims on 13 January 2006.

This matter was heard in Mitchell County District Court on 11 March 2009. In a judgment entered 12 May 2009, the trial court denied all of Plaintiff's claims. In that same judgment, the trial court granted many of Defendant's claims, including ordering Plaintiff to pay Defendant money damages and awarding Defendant attorney's fees. The trial court also granted a permanent restraining order against Plaintiff. Plaintiff appeals. Additional relevant facts will be addressed in the body of the opinion.

I.

In Plaintiff's first argument, he contends that the trial court erred in enforcing the agreement "when the parties reconciled and [cohabited] for a period of nearly one year following the

execution of the agreement." We disagree.

When the trial court sits without a jury, as it did in this case, "the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." The trial court's conclusions of law are reviewed *de novo*. In this case, Defendants did not assign error to any of the trial court's findings, and, thus, the findings are presumed to be supported by competent evidence.

Shepard v. Bonita Vista Props., L.P., 191 N.C. App. 614, 616, 664 S.E.2d 388, 390 (2008) (internal citations omitted).

Plaintiff filed a complaint on 17 June 2005 with the stated purpose of obtaining a court order to enforce certain provisions of the agreement. After initiating this action to enforce the agreement and after obtaining an order from the trial court that ordered enforcement of the agreement, Plaintiff argues for the first time on appeal that the agreement is void and unenforceable. Plaintiff, having filed this action for enforcement of the agreement, may not now argue that the agreement was void simply because Plaintiff does not like the outcome of the action he initiated.

Even assuming *arguendo* that the resumption of marital relations and cohabitation could have served to invalidate the agreement, Plaintiff subsequently acted in a manner that ratified the agreement after the resumption of cohabitation. "A party ratifies an agreement by retroactively 'authoriz[ing] or otherwise approv[ing] [it], . . . either expressly or by implication.' Thus, ratification can occur where a party accepts benefits and performs

under an agreement." *Goodwin v. Webb*, 152 N.C. App. 650, 656, 568 S.E.2d 311, 315 (2002) (Greene, J., dissenting) (citations omitted), *reversed for reasons stated in dissenting opinion by* 357 N.C. 40, 577 S.E.2d 621 (2003). By filing this action, Plaintiff has performed under the agreement and sought benefits therefrom. Therefore, even assuming *arguendo* that the resumption of marital relations and cohabitation invalidated the agreement, Plaintiff has since ratified the agreement, and is bound by its terms. *Id.* Furthermore, in an uncontested finding of fact, the trial court found: "That both parties have stipulated through prior pleadings filed in this matter that the 25 April[] 2003 Separation Agreement is a binding contract; that the parties do not dispute the validity of said Agreement at this time." Finally:

Marital contracts are "ordinarily determined by the same rules which govern the interpretation of contracts." In determining the meaning and effect of such agreements, the court is "guided by the language of the agreement as it reflects the intentions of the parties" and by the "presum[ption] the parties intended what the language used clearly expresses and . . . mean[s] what on its face it purports to mean." Furthermore, it is particularly necessary to distinguish between "property settlements" and "separation agreements" in determining the intended effects of marital agreements:

"Throughout the development of law defining and enforcing marital contracts, courts and advocates have repeatedly confused the terms 'separation agreement' and 'property settlement' . . . A separation agreement is a contract between spouses providing for marital support rights and is executed while the parties are separated or are planning to separate immediately. A property settlement provides for a division of real and personal property held by the spouses. The parties may

enter a property settlement at any time, regardless of whether they contemplate separation or divorce. . . . Usually the parties will refer to the entire document as a 'separation agreement,' even though its provisions cover both support rights and property rights."

Our Supreme Court has often noted the differing purposes underlying property settlements and separation agreements as defined above. Thus, the Court has stated that, "the heart of a separation agreement is the parties' intention and agreement to live separate and apart forever . . ." However, a property settlement "contains provisions . . . which might with equal propriety have been made had no separation been contemplated . . ." *Jones v. Lewis*, 243 N.C. 259, 261, 90 S.E.2d 547, 549 (1955); see also *Shoaf v. Shoaf*, 282 N.C. 287, 291-92, 192 S.E.2d 299, 303 (1972) (property division was "separable" from alimony provisions since "[t]here is a clear distinction between a property settlement and the discharge of the obligation to support"). It is true that contract provisions covering both support duties and property rights are usually included in a single document which the parties refer to as a "separation agreement." However, noting the label attached to a provision of a marital agreement is no substitute for analyzing the provision's intended effect in light of the agreement's express language and purposes.

Small v. Small, 93 N.C. App. 614, 620-21, 379 S.E.2d 273, 277 (1989) (internal citations omitted). The agreement in this case is titled "Separation Agreement" but the provisions of the agreement are almost exclusively limited to the division of property between Plaintiff and Defendant. Plaintiff and Defendant expressly waived any rights to spousal support by the terms of the agreement. Though the agreement is titled as a separation agreement, for the purposes of this appeal it is, in reality, a property settlement agreement. It is not affected by any resumption of marital

relations if Plaintiff and Defendant intended for the division of property, as contemplated in the agreement, to be effective upon ratification of the agreement. All record evidence suggests this was the intention of Plaintiff and Defendant. As the property was contractually divided upon execution of the agreement, Plaintiff and Defendant had the right to sue for enforcement of the agreement even after they had resumed marital relations. *Id.* at 620-27, 379 S.E.2d at 277-81. Plaintiff's argument is without merit.

II.

In Plaintiff's second and third arguments, he contends the trial court erred in awarding Defendant \$60,000.00 "for the return of personal property when same either deviates from the terms of the agreement or is not set forth in the terms of the agreement." Plaintiff next contends the trial court erred in awarding Defendant \$1,000.00 in damages for trespass. We disagree.

The trial court made the following relevant findings of fact:

[23.] (a) That as to [Defendant's] claim that [Plaintiff] failed to return to her various items of personal property and/or removed the same from [Defendant's] possession and has failed to return the same, the [c]ourt finds [Defendant] is entitled to relief; that [Defendant] has shown by the evidence that various items of personal property awarded to [Defendant] per the [agreement] were either stolen or taken by [Plaintiff] from [Defendant]; were later located in the possession of [Plaintiff]; were never returned; that these items are listed in the discovery provided to [Plaintiff's] attorney and this same list has been admitted into evidence with values for these items; that [Defendant's] family coin collection was taken by [Plaintiff]; the value of the same was \$20,000; that other various tools, equipment and personal property were taken by

[Plaintiff] and not returned, having a value of \$40,000; that when the parties finally stopped living together in July, 2004, [Plaintiff] had 4 days to remove all his personal property from [Defendant's] home; that [Plaintiff] came back to [Defendant's] property several times after that and removed additional items; that [Defendant] contacted the Sheriff's Department seeking relief for these various trespasses; that [Defendant] is entitled to an award for damages for these personal property items taken by [Plaintiff] in the amount of \$60,000; that [Plaintiff] has made no offer to return these items to [Defendant] to reimburse her for value of same[.]¹

[23.] (b) That as to [Defendant's] claim for damages for [Plaintiff's] trespass on her property, the [c]ourt awards [Defendant] the sum of \$1,000.00; that during those occasions when [Plaintiff] trespassed onto [Defendant's] property, he damaged the doors to both [Defendant's] home and studio and the costs to repair the same was \$1,000.00[.]

Plaintiff does not contest these findings of fact and, therefore, they are binding on appeal. *In re Y.Y.E.T.*, __ N.C. App. __, __, 695 S.E.2d 517, 522 (2010) (citation omitted).

Plaintiff's argument is that the items of personal property the trial court found that Plaintiff had taken from Defendant were not listed in the agreement and thus Defendant had no contractual right to recover damages therefor. Plaintiff acknowledges that "Defendant . . . was to receive certain items of personal property, either specifically listed or in [Defendant's] possession." Plaintiff contends, however, that the items the trial court found

¹The trial court's "findings of fact" contain findings and conclusions, and state the ultimate awards granted Defendant for her claims. "[W]e are not bound by the label used by the trial court." *Pierce v. Reichard*, 163 N.C. App. 294, 299, 593 S.E.2d 787, 790 (2004).

had been removed from Defendant's possession by Plaintiff were not covered by the agreement. The agreement states in relevant part:

Personal Property - [Plaintiff] and [Defendant] have agreed to . . . divide their equipment, inventories, and personal property consistent herewith. . . . [Defendant] is awarded . . . her molds, her tools, band saw, drill press, hand saw, drill, booth, Kill furniture, scrap metal, some of the finials, packing boxes in her possession, halogen light bars, dolly, proceeds from inventory from galleries, quilt, six pillows, and *all other personal property in her possession.*

. . . .

It is understood and agreed by and between the parties that all property now owned or hereafter owned by [Defendant], shall be owned by her individually as if she had never been married to [Plaintiff], and all property now owned by [Plaintiff] shall be owned by him individually, as if he had never been married to [Defendant]. Each party shall execute all documents necessary to transfer title and to effect the [execution] of this Agreement.

(Emphasis added). The trial court's unchallenged relevant finding of fact states that Plaintiff removed Defendant's personal property from Defendant's possession. The agreement states that, unless otherwise specifically devised, personal property in Defendant's possession at the time the agreement was executed constituted Defendant's personal property, to which Plaintiff had no right. Having found Plaintiff breached the agreement by removing Defendant's personal property, the trial court did not err by awarding Defendant damages for Plaintiff's breach of the agreement. The trial court also found that Plaintiff trespassed on Defendant's property, and damaged doors to Defendant's home and studio, which cost \$1,000.00 to repair. This unchallenged finding of fact

supports the trial court's award. Plaintiff's arguments are without merit.

III.

In Plaintiff's fourth argument, he contends the trial court erred in awarding Defendant \$93,000.00 for lost earnings because this "claim for relief either exceeds the terms of the . . . agreement or is not established in the terms of the agreement." We disagree.

Plaintiff again fails to contest the trial court's finding of fact concerning this matter. The trial court found the following:

[23.] (c) That as to [Defendant's] claim to damage to her business from [Plaintiff's] using [Defendant's] work product and/or [Defendant's] inability to participate in shows scheduled as a result of [Plaintiff's] use of the same and/or lost show fees, the [c]ourt awards [Defendant] the sum of \$93,000.00; [Defendant] lost income for the following shows: California (\$12,000); Wisconsin (\$8,000); Asheville (\$10,000); Banner Elk (\$8,000); Halifax (\$9,000); Festival of the Masters (\$12,000); Coconut Festival (\$15,000); Main Street Festival (\$12,000); Lost fees and advanced payments (\$7,000).

Plaintiff argues the agreement does not contemplate any award of damages for Plaintiff's interference with Defendant's business. The agreement states in relevant part that both parties shall be free to "conduct, carry on, and engage in any employment, trade or business . . . free from any control, restrain[t], authority or interference, directly or indirectly, by the other[.]" The uncontested finding of fact states that Plaintiff interfered with Defendant's business by using Defendant's work product. We hold

that this unchallenged finding of fact supports the trial court's conclusion and award for this issue. Plaintiff's argument is without merit.

IV.

In Plaintiff's fifth argument, he contends the trial court erred by ordering Plaintiff to pay Defendant \$2,500.00 related to the cancellation of a Visa credit card. We disagree.

Under a section labeled "Distribution of Debts" the agreement states in part: Defendant "shall be solely responsible for the MasterCard in her name and the Visa card in both names [Plaintiff's and Defendant's names] and will indemnify [Plaintiff] from any obligation." Plaintiff "delivered his copy of the Visa card to [Defendant] in the office of [Defendant's attorney] on 14 March, 2003." It is clear from the terms of the agreement that Plaintiff and Defendant contemplated that Defendant would retain use of the Visa card. By the express terms of the agreement, Plaintiff agreed to allow Defendant to retain the Visa card for her personal use, and Defendant agreed to indemnify Plaintiff from any obligations related to Defendant's use or control of the Visa card. If Plaintiff believed Defendant was not abiding by the terms of the agreement with respect to Defendant's use and control of the Visa card, Plaintiff should have initiated an action against Defendant for breach of the agreement. Plaintiff has cited no authority indicating that he was justified in resorting to self-help in response to his belief that Defendant was violating the agreement. We can find no such authority. Plaintiff's actions in cancelling

the Visa card were in derogation of the agreement. The trial court found that Defendant was damaged in the amount of \$2,500.00 by the cancellation of the Visa card. We find no error in the trial court's award on this issue. Plaintiff's argument is without merit.

V.

In Plaintiff's sixth through ninth arguments, he contends the trial court erred in awarding Defendant damages related to certain real property. We agree.

The trial court found that Defendant was entitled to the recovery of \$39,500.00 she spent on improvements to real property located in Mitchell County owned solely by Plaintiff, and that Defendant was entitled to the recovery of \$20,000.00 she paid Plaintiff "to pay off a Note and Deed of Trust owing" on a different parcel of real property located in Tennessee. In the 12 May 2009 judgment, the trial court states that Defendant filed claims for relief "for monies paid by [Defendant] to [Plaintiff] for improvements to the separate real property in Mitchell County and to pay off the Promissory Note on Tennessee property[.]" However, Defendant's answer and counterclaim contains no such request for relief. In fact, a 14 October 2008 pre-trial order entered by the trial court sets forth Defendant's counterclaims, and does not include any claims related to either of these properties. Because Defendant's answer and counterclaim does not reference these properties, and Defendant made no claim nor sought any relief related to these properties, it was error for the trial

court to award Defendant damages related to these properties. N.C. Gen. Stat. § 1A-1, Rule 8(a) (2009); *Parkersmith Properties v. Johnson*, 136 N.C. App. 626, 630, 525 S.E.2d 491, 494 (2000). Defendant concedes the trial court erred in granting Defendant these awards. We therefore vacate the trial court's award of \$39,500.00 to Defendant for improvements to the Mitchell County real property, and we vacate the award of \$20,000.00 to Defendant for monies paid to Plaintiff for the purposes of paying off the "Promissory Note and Deed of Trust owing on the Tennessee Property[.]" We remand to the trial court for further action consistent with our holding.

VI.

In Plaintiff's tenth and eleventh arguments, he contends the trial court erred in entering a permanent restraining order against him because there were no findings of any "ongoing act[s] of domestic violence in evidence in the hearing on the merits which may be prevented or terminated by entry of the restraining order."

Because we cannot determine pursuant to what authority the trial court entered its "permanent restraining order" against Plaintiff, we remand for further action. Defendant, in her answer and counterclaim, requested: "That the [c]ourt enter an Order restraining [Plaintiff] from having any contact whatsoever with [Defendant]; from being on or about her property or residence; and communicating with her in any way." The trial court granted the following relief:

That [Defendant] is granted a permanent Restraining Order against [Plaintiff] or any

persons acting on his behalf. That at no time shall [Plaintiff] be within 100 yards of [Defendant]. That at any time [Plaintiff] becomes aware he is within 100 yards of [Defendant] he shall immediately leave the premises, having no contact with [Defendant] under any circumstance.

We cannot find in Defendant's answer and counterclaim, nor in the trial court's judgment, citation to any statutory authority for the grant of this "permanent restraining order." We are therefore unable to conduct any meaningful appellate review of this issue. We therefore vacate this portion of the judgment and remand to the trial court. Upon remand, we direct the trial court to state the statutory authority for any restraining order it may grant, and to include findings and conclusions sufficient to show that any restraining order granted by the trial court complies with the requirements of the statutory authority under which it is authorized.

Affirmed in part, reversed and remanded in part.

Judges STROUD and HUNTER, JR. concur.

Report per Rule 30(e).