IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-430

Filed: 19 December 2017

Mecklenburg County, No. 10 CVD 8391

HAROLD FULLER, Plaintiff,

v.

DEBORAH FULLER, Defendant.

Appeal by plaintiff from judgment entered 15 August 2016 by Judge Donnie Hoover in Mecklenburg County District Court. Heard in the Court of Appeals 2 November 2017.

Hunt Law, PLLC, by Gregory Hunt, for plaintiff-appellant.

Plumides, Romano, Johnson and Cacheris, PC, by Richard B. Johnson, for defendant-appellee.

ZACHARY, Judge.

Harold Fuller (plaintiff) appeals from an equitable distribution order distributing the marital and divisible property of the estate of plaintiff and his ex-wife, Deborah Fuller (defendant). On appeal, plaintiff argues that the trial court's delay in entering the equitable distribution order violated his right to due process under the North Carolina and United States Constitutions, and that he is entitled to

a new equitable distribution hearing. Although we cannot condone the trial court's delay in entering the equitable distribution order, we conclude that plaintiff has failed to establish a right to relief.

Record on Appeal

The record on appeal is the history of the proceedings, and contains the official documentation thereof furnished to the Court, together with any additions or amendments permitted by this Court. Regarding the record of the evidence and testimony introduced at the equitable distribution hearing, as well as the statements of the trial court and of the parties, N.C. R. App. P. 9(a)(1)e. (2016) directs an appellant to include in the record "so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2)[.]" Rule 9(c)(1) provides that

> . . . [T]estimonial evidence, *voir dire*, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings required by Rule 9(a) to be included in the record on appeal shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received[.] . . . Parties may object to particular narration on the basis that it does not accurately reflect the true sense of testimony received, statements made, or events that occurred; or to particular questions and answers on the basis that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, the judge or referee

> shall settle the form in the course of settling the record on appeal.

N.C. R. App. P. 9(c)(1) thus provides a mechanism by which an appellant may present the substance of the events that transpired during a case and of the testimony that was adduced at trial, allows the opposing party to object to the appellant's narration of the evidence, and provides for assistance by a judge or referee in settling the record.

In the present case, plaintiff contends that the transcript of the equitable distribution hearing is not available. However, he did not offer a narration of the evidence as provided in Rule 9 of the Appellate Rules. Instead, plaintiff weaves into his appellate brief statements that reflect plaintiff's recollection of the proceedings, but that are not supported by citation to the record. For example, plaintiff states that during the equitable distribution hearing he "testified that the mortgage increased post-separation because he had to modify the underlying mortgage to prevent foreclosure[,]" and that "[u]pon information and belief,[1] both parties testified that they purchased the Cadillac XLR with the proceeds from the second mortgage[.]" Plaintiff also posits that the loss of the transcript is causally related to the delay in

[1] ". . . [I]n his appellate brief, [plaintiff's] counsel repeatedly used the phrase 'upon information and belief' before making various factual assertions and made other statements of fact that were apparently from personal recollection or at the very least are not based upon the record. Such arguments are wholly inappropriate. . . . Appellate counsel should make arguments based on the facts in the record, not 'upon information and belief.' " *Hennessey v. Duckworth*, 231 N.C. App. 17, 25 n.5, 752 S.E.2d 194, 200-01 n.5 (2013).

entry of the equitable distribution order. However, plaintiff has not supported this assertion with, for example, an affidavit stating that transcripts of proceedings are destroyed after a given length of time, or other explanation of the reason for the unavailability of the transcript.

It is well established that "[i]t is the duty of the appellant to provide the Court with the materials necessary to decide the issue on appeal. The appellate courts can judicially know only what appears of record. Even though we have no reason to doubt the accuracy of counsel's statement, it cannot serve as a substitute for record proof." *Jackson v. Housing Authority of High Point*, 321 N.C. 584, 586, 364 S.E.2d 416, 417 (1988) (citations omitted). Accordingly, in our determination of the issues raised on appeal, we are unable to consider statements by plaintiff as to what transpired at the trial level unless such statements are supported by citation to a document in the record.

Factual and Procedural History

Plaintiff and defendant were married in 2003, separated in 2010, and were subsequently divorced. No children were born of the marriage. On 13 April 2010, plaintiff signed[2] a complaint against defendant seeking equitable distribution,

[2] Because the file stamp on plaintiff's complaint is illegible, we cannot determine the date that the complaint was filed. *See* N.C. R. App. P. 9(b)(3) ("Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed[.] . . . Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.").

postseparation support, alimony, attorney's fees, and an interim distribution of assets. On 29 June 2010, defendant filed an answer and counterclaims for equitable distribution, postseparation support, alimony, attorney's fees, and an interim distribution. On 28 September 2010, the trial court entered an order awarding plaintiff possession of the marital home on an interim basis, pending final resolution of the parties' claims for equitable distribution. An initial equitable distribution pretrial scheduling and discovery order was entered on 10 December 2010, which directed an agreed-upon expert to determine the date of separation value of the marital residence. On the same day, the trial court also entered an order ruling that neither party was entitled to postseparation support or to attorney's fees for the cost of seeking postseparation support. On 13 July 2011, the court entered a final equitable distribution pretrial order ruling that an equal division of the marital estate would be equitable.

On appeal, plaintiff fails to include in the record any documents establishing the number of proceedings before the trial court or the dates on which they may have occurred. In his appellate brief, plaintiff summarizes the testimony offered by the parties, the evidence he presented, his recollection of the court's evidentiary rulings, assertions as to the inferences to be drawn from his evidence, and communications alleged to have occurred between plaintiff and the trial court, and between the parties

and the trial court, all without citation to the record. Because none of these contentions are supported by reference to any record document, they are disregarded.

On 15 August 2016, the trial court entered an equitable distribution order containing findings detailing the court's classification, valuation, and distribution of the marital estate. The court found that the parties were each entitled to 50% of the marital estate, or about $83,822; that plaintiff had been awarded $138,571; and that as a result, plaintiff owed defendant about $52,249 in order to equalize the distribution of assets. The court ordered that:

> Within ninety (90) days of this judgment's entry Plaintiff shall pay Defendant the net distributive award of $52,249.44 in full. In the event Plaintiff is unable to comply with this portion of this judgment, he shall list the house "For Sale" within 120 days of the entry of this order, at its Fair Market Value (as certified to by the listing agent), and the net proceeds of the sale shall be used to satisfy this provision of this judgment first. The balance of the proceeds are to be distributed to Plaintiff.

Plaintiff noted a timely appeal to this Court from the equitable distribution order. On 30 January 2017, defendant filed a motion to dismiss plaintiff's appeal, on the grounds that plaintiff had failed to obtain a transcript of the proceedings or to file the record on appeal in a timely fashion. On 10 April 2017, the trial court denied defendant's motion for dismissal of plaintiff's appeal.

Standard of Review

Plaintiff alleges that the trial court's delay in entering the equitable distribution order violated his right to due process. "We review alleged violations of constitutional rights *de novo*." *Herndon v. Herndon*, 368 N.C. 826, 829, 785 S.E.2d 922, 925 (2016) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks omitted).

Plaintiff also argues that the trial court abused its discretion in its distribution of the marital assets. The standard of review of a court's equitable distribution order is well-established. "[W]hen the trial court sits without a jury, 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." *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004) (citation and quotation marks omitted). 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). "While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*." *Lee,* 167 N.C. App. at 253, 605 S.E.2d at 224 (citation omitted).

"[T]his Court reviews the trial court's actual distribution decision for abuse of discretion." *Mugno v. Mugno*, 205 N.C. App. 273, 276, 695 S.E.2d 495, 498 (2010) (citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Equitable Distribution Order

On appeal, plaintiff asserts that in its equitable distribution order the trial court "clearly abused its discretion." However, plaintiff neither challenges the evidentiary support for any specific findings by the court nor identifies conclusions of law that are not supported by the court's findings. Plaintiff makes a generalized assertion that the "court disregarded all competent evidence, including the parties' testimony" regarding the value of the marital home, and that the "trial judge disregarded competent evidence" concerning the proceeds of a second mortgage on this property. Plaintiff also contends that the trial court "clearly abused its discretion when it overruled [plaintiff's] objection about [defendant's] Exhibit 9." As discussed above, in the absence of a transcript or a narration of the evidence as provided in N.C. R. App. P. 9, we disregard plaintiff's allegations about the parties' trial testimony and the trial court's evidentiary rulings. As a result we are unable to review these arguments.

Additionally, plaintiff argues that "the trial [court] failed to include its denial of [plaintiff's] motion to declare a mistrial because of the 38-month delay of the [equitable distribution] Judgment's entry" and that the "only record of such request is an email between both counsels and the trial judge." Plaintiff has not included this email correspondence in the record, and does not allege that he filed a written motion or obtained a ruling on the motion. Moreover, "[a] motion for mistrial after verdict and judgment comes too late. The proper motion would be a motion to vacate the judgment, set aside the verdict, and order a new trial." *State v. Daye*, 15 N.C. App. 233, 234, 189 S.E.2d 584, 585 (1972).

For the reasons discussed above, we conclude that plaintiff has failed to establish that the trial court abused its discretion in its equitable distribution order. We further conclude that plaintiff's motion for a mistrial was not timely, and that it does not appear in the record. Accordingly, plaintiff is not entitled to relief on the basis of these arguments.

Due Process

Plaintiff also argues that the trial court's delay in the entry of its equitable distribution order violated his right to due process. Plaintiff contends that the last hearing on the parties' equitable distribution claim ended on 17 June 2013. The trial court entered its equitable distribution order on 15 August 2016, a delay of 38 months. Although this was a significant delay, we conclude that on the facts of this

case, plaintiff has failed to establish that he was prejudiced by the delayed entry of the order.

After plaintiff gave notice of appeal, he was unable to obtain the audio transcripts of the equitable distribution hearings. The absence of a transcript undoubtedly made it more difficult for plaintiff to pursue his appeal. However, plaintiff has failed to identify any evidence suggesting that the missing transcripts were related to the delay in entry of the order. Further, although plaintiff speculates that without a transcript he cannot determine whether he "received a fair and square trial," he does not articulate specific prejudice of which he is aware. "[Plaintiff] . . . contends he has been [prejudiced] by the late entry of the order because hearing transcripts and exhibits have been lost during this . . . period. [Plaintiff] presents no specific arguments or examples as to exactly how he has been prejudiced by this loss of trial court materials, nor does he cite any case law in support of his argument." *Juhnn*, 242 N.C. App. at 67, 775 S.E.2d at 316. We conclude that the loss of the transcript does not, standing alone, require reversal of the equitable distribution order, particularly as there is no evidence that its loss was occasioned by the delay.

Plaintiff also asserts that he is entitled to a new equitable distribution hearing on the grounds that there was a significant delay in the entry of the order. In support of this argument, plaintiff cites *Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000), in which this Court held that on the facts of that case the court's nineteen-

month delay in entering the equitable distribution order required remand for a new hearing. Later opinions of this Court have made it clear that *Wall* did not establish a bright-line rule:

> In *Wall*, this Court held that, on the facts of that case, a nineteen-month delay between the date of trial and the date of disposition constituted more than "a *de minimis* delay, and required that the trial court enter a new distribution order on remand." . . . We observe that *Wall* establishes a case-by-case inquiry as opposed to a bright line rule for determining whether the length of a delay is prejudicial. . . . Indeed, since *Wall*, this Court has declined to reverse late-entered equitable distribution orders where the facts have revealed that the complaining party was not prejudiced by the delay.

Britt v. Britt, 168 N.C. App. 198, 201-02, 606 S.E.2d 910, 912 (2005) (quoting *Wall*, 140 N.C. App. at 314, 536 S.E.2d at 654). This Court has summarized the showing required in order for an appellant to obtain a new equitable distribution hearing based on the delay in entry of the order as follows:

> In *Britt*, we noted three factors that guide our analysis: (1) whether the delay was more than *de minimis*; (2) whether there were "potential changes in the value of marital or divisible property between the hearing and entry of the equitable distribution order"; and (3) whether "potential changes in the relative circumstances of the parties warranted additional consideration by the trial court." In the present case, [the appellant] makes no argument that circumstances changed between the end of the trial and entry of the Order/Judgment, nor does he identify any way that the delay resulted in any prejudice to him. Instead, [he] urges this Court to apply exactly the sort of bright line approach that *Wall* rejected. However, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in

> a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."

Nicks v. Nicks, 241 N.C. App. 487, 511, 774 S.E.2d 365, 381-82 (2015) (quoting *Britt*, 168 N.C. App. at 202, 606 S.E.2d at 912-13, and *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)).

In the present case, we agree with plaintiff that there was a significant delay in the entry of the equitable distribution order. Plaintiff has not, however, made a persuasive argument that the delay prejudiced him. Indeed, we observe that pursuant to the terms of the equitable distribution order, plaintiff was required to pay defendant the sum of $52,249.44 within 90 days of the entry of judgment. Accordingly, the trial court's delay in entering the equitable distribution order inured to plaintiff's benefit, by delaying the time that this payment was due and allowing him the use of over $52,000 in the interim.

Conclusion

We are concerned and troubled by the delay of 38 months between the equitable distribution hearing and the entry of the trial court's order. However, we conclude that on the facts of this case, plaintiff has failed to establish that he was prejudiced by the delay or that he is entitled to a new equitable distribution hearing simply on the basis of the delay. We conclude that the court's order should be

AFFIRMED.

Judge DAVIS concurs.

Judge BERGER concurs by separate opinion.

Report per Rule 30(e).

BERGER, Judge, concurring in separate opinion.

I concur with the majority opinion and reasoning therein. I write separately because the 3.167 year delay in entry of the equitable distribution order is more than simply concerning or troubling. It is unacceptable.

Plaintiff deserved to have his case promptly resolved. In that respect, the court system failed him.