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NO. COA01-280

NORTH CAROLINA COURT OF APPEALS

Filed: 05 February 2002

VALERIE JEAN SCHLITT

v.

Wake County
No. 00 CVD 2120

MICHAEL GEORGE SCHLITT

Appeal by plaintiff from judgment entered 15 December 2000 by Judge Fred Morelock in Wake County District Court. Heard in the Court of Appeals 9 January 2002.

William J. Cotter for plaintiff-appellant.

Nicholls & Crampton, P.A., by Nicholas J. Dombalis, II for defendant-appellee.

THOMAS, Judge.

Plaintiff, Valerie Jean Schlitt, appeals a grant of summary judgment dismissing her claims for alimony, spousal support, equitable distribution, and attorney fees. Defendant, Michael George Schlitt, had pled a ratified separation agreement as a bar to her claims. For the reasons discussed herein, we affirm the trial court.

The facts are as follows: Plaintiff and defendant were married 9 October 1993. They separated on or about 14 December 1999, with

no children being born of the marriage, and did not resume their marital relationship. That same month, defendant and plaintiff signed a separation agreement by which: (1) defendant would continue to cover plaintiff's dental insurance for one year; (2) income taxes would be filed jointly for 1999 and split equally between defendant and plaintiff; (3) debts would be the responsibility of whoever acquires the debt; (4) defendant would pay plaintiff a one-time sum of \$3,000; and (5) plaintiff would receive certain items of personal property listed in the agreement.

On 28 February 2000, plaintiff filed a complaint for post-separation support, alimony, equitable distribution and attorney fees. Defendant answered, pleading the separation agreement as an affirmative defense to all of plaintiff's requests. However, as an alternative pleading, he also made a request for equitable distribution.

In a hearing on post-separation support only, the trial court found that the separation agreement did not prevent plaintiff from pursuing the post-separation support claim in that the agreement was not notarized. The trial court directed defendant to pay plaintiff \$529 per month.

Defendant then moved for summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure as to alimony, equitable distribution and attorney fees. He also motioned for modification or termination of post-separation support, alleging a substantial

change of circumstances. Prior to hearing, defendant amended the post-separation support motion by claiming the separation agreement had been notarized after the initial hearing and should apply retroactively to bar the claim for support.

On 20 November 2000, the trial court granted defendant's motion for summary judgment, finding "no genuine issue of material fact and Defendant is entitled to a judgment as a matter of law on the issues of equitable distribution and spousal support Plaintiff's claims for spousal support, including post-separation support and alimony are dismissed with prejudice." Plaintiff appeals.

By her first and second assignments of error, plaintiff argues the trial court committed reversible error in granting defendant's summary judgment motion and dismissing her claims with prejudice. She claims the separation agreement is the result of duress and coercion and "not final."

We note summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2000). It is also appropriate when it is apparent from the record that there can be no recovery from the plaintiff, even assuming plaintiff's allegations are true. *Lowder v. Lowder*, 68 N.C. App.

505, 315 S.E.2d 520, *cert. den.*, 311 N.C. 759, 321 S.E.2d 138 (1984).

A married couple, upon separation, may determine for themselves how to divide their estate by entering into a valid separation agreement as opposed to subjecting themselves to equitable distribution. *Anderson v. Anderson*, (No. COA00-1008) (Filed: Aug. 7, 2001). A separation agreement is a contract and its meaning and effect are "ordinarily determined by the same rules which govern the interpretation of contracts." *Lane v. Scarborough*, 284 N.C. 407, 409, 200 S.E.2d 622, 624 (1973). In construing a written contract, "[i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean." *Id.* (Citations omitted). Therefore, whether a separation agreement barred a spouse's further claims for support is a question of law open to summary judgment. *Anderson v. Anderson*, (No. COA00-1008) (Filed: Aug. 7, 2001).

To be valid, "a separation agreement must be untainted by fraud, and must be in all respects fair, reasonable, and just." *Lancaster v. Lancaster*, 138 N.C. App. 459, 530 S.E.2d 82 (2000) (quoting *Johnson v. Johnson*, 67 N.C. App. 250, 255, 313 S.E.2d 162, 165 (1984)). It must have been notarized by a certifying officer. N.C. Gen. Stat. §§ 52-10, 52-10.1 (1999). It "must have been entered into without coercion or the exercise of undue influence,

and with full knowledge of all the circumstances, conditions, and rights of the contracting parties." *Id.* "Coercion" is defined as "compelling by force or arms or threat." *Black's Law Dictionary* 258 (6th ed. 1990). Duress is "when one, by the unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will." *Link v. Link*, 278 N.C. 181, 194, 179 S.E.2d 697, 704-05 (1971).

We note that although the separation agreement was not notarized at the time of signing, it was subsequently notarized by a notary public. This action conforms to the N.C. Supreme Court's holding in *Lawson v. Lawson*, 321 N.C. 274, 362 S.E.2d 269 (1987).

Plaintiff does allege that defendant assaulted her in the past and forced her to sign the agreement by saying if she did not accept the terms, he would have her evicted from their home, which was owned by defendant's mother. The evidence also shows however, that when defendant presented plaintiff with a proposed separation agreement, she did not immediately sign it. Instead, she took it with her, consulted an attorney, and even modified the terms before eventually signing it.

Even if evidence regarding duress or coercion were adequate to allow the action to survive summary judgment, plaintiff would still not prevail.

An agreement executed under duress or coercion is invalid and

not a bar to equitable distribution unless the separation agreement was ratified by plaintiff. *Cox v. Cox*, 75 N.C. App. 354, 330 S.E.2d 506 (1985); *Ridings v. Ridings*, 55 N.C. App. 630, 286 S.E.2d 614, rev. denied, 305 N.C. 586, 292 S.E.2d 571 (1982); *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971).

Ratification occurs when one "authorize[s] or otherwise approve[s], retroactively, an agreement or conduct either expressly or by implication." *Black's Law Dictionary* 1262 (6th ed. 1990). A transaction procured by duress may be ratified by a victim so as to preclude subsequent suit to set the transaction aside if, at the time of the signature, the "victim" had full knowledge of facts and was then capable of acting freely. *Fallston Finishing, Inc. v. First Union Nat. Bank*, 76 N.C. App. 347, 333 S.E.2d 321, cert. den., 314 N.C. 664, 336 S.E.2d 621 (1985).

In the instant case, the agreement calls for defendant to pay for a one-year term of dental insurance coverage on plaintiff and for plaintiff to receive twenty-two items of personal property listed in the agreement. Plaintiff accepted the coverage and took the property. Further, the agreement provides that defendant give plaintiff \$3,000 as a "one time sum." He did and she accepted it. Taking plaintiff's allegations as true, she was estopped from claiming further support by ratifying the separation agreement and cashing the \$3,000 check from defendant. A party cannot dispute the validity of a contract after that party has accepted the

benefits of the agreement. *Brooks v. Hackney*, 329 N.C. 166, 404 S.E.2d 854 (1991).

Moreover, when defendant tendered the check for \$3,000, he wrote the words "settlement in full" on it. Our Supreme Court has held that an acceptance of a check tendered as full payment establishes accord and satisfaction, which would bar action on a claim disputing the amount received. *Phillips v. Phillips Construction Co.*, 261 N.C. 767, 136 S.E.2d 48 (1964). See also *North Carolina Farm Bureau Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 483 S.E.2d 452, *rev. denied*, 347 N.C. 138, 492 S.E.2d 25 (1997). Although a payee may express reservations about the check amount, cashing it constitutes evidence of an intent to accept an offer of accord and satisfaction. See *Zanone V. RJR Nabisco, Inc.*, 120 N.C. App. 768, 463 S.E.2d 584 (1995), *rev. denied*, 342 N.C. 666, 467 S.E.2d 738 (1996).

The evidence also shows that defendant presented plaintiff with a proposed separation agreement. She did not immediately sign it, but instead took it with her and consulted an attorney. Plaintiff even made changes before eventually signing it.

In all, plaintiff took possession of the items listed in the agreement, deposited into her account the \$3,000 check from defendant, and accepted the dental insurance coverage. Both parties properly performed in accordance with the agreement. Accordingly, we hold the separation agreement was ratified and

effectively bars plaintiff's claims.

AFFIRMED.

Judges WYNN and HUDSON concur.

Report per Rule 30(e).