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NO. COA01-788

NORTH CAROLINA COURT OF APPEALS

Filed: 18 June 2002

DAVID MASSEY STELL, SR.,
Plaintiff

v.

Wake County
No. 00 CVD 006

LISA MIMS STELL,
Defendant

Appeal by defendant from order entered 12 January 2001 by Judge Anne B. Salisbury in Wake County District Court. Heard in the Court of Appeals 27 March 2002.

Smith Debnam Narron Wyche Story & Myers, L.L.P., by John W. Narron, for plaintiff-appellee.

The Rosen Law Firm, by Lee S. Rosen and Erik L. Mazzone, for defendant-appellant.

CAMPBELL, Judge.

Defendant appeals an order granting partial summary judgment to the effect that all property specifically allocated to plaintiff or defendant in the parties' separation agreement ("agreement") not be subjected to equitable distribution. We affirm.

Plaintiff and defendant were married on 30 August 1986 and subsequently had two children. After a period of marital difficulty between the parties, culminating in defendant having an extra-marital affair, they began discussions regarding separation and divorce. At plaintiff's insistence, the parties prepared an

agreement on 1 January 1999, which included several provisions regarding distribution of property and child custody and support. The agreement was properly notarized on 11 February 1999 without either party having consulted with an attorney before signing, ostensibly because of financial concerns. The agreement was later modified on 13 December 1999 to reflect a change in child custody and support (a modification that is not at issue in this appeal).

On 3 January 2000, plaintiff filed a complaint for an absolute divorce in Wake County District Court. Defendant answered and counterclaimed for equitable distribution. Plaintiff filed a reply and a motion to dismiss defendant's counterclaim on the basis that defendant failed to state a claim upon which relief could be granted. Plaintiff also raised an affirmative defense alleging defendant had waived her right to equitable distribution because the parties had "resolved all property issues and equitable distribution issues outstanding between them . . . pursuant to [the] . . . Agreement."

The court, on defendant's evidence since plaintiff offered no evidence, granted defendant an absolute divorce from plaintiff on 24 March 2000. Thereafter, on 11 July 2000, plaintiff converted his motion to dismiss defendant's equitable distribution counterclaim into a motion for summary judgment. Plaintiff's motion was supported by his sworn affidavit and defendant's deposition testimony that was taken on 3 May 2000. On 12 January 2001, Judge Anne B. Salisbury granted partial summary judgment in

plaintiff's favor with respect to the property items listed in the parties' agreement. Defendant appeals.

"A party moving for summary judgment is entitled to such judgment if he can show, through pleadings and affidavits, that there is no genuine issue of material fact requiring a trial and that he is entitled to judgment as a matter of law." *Hagler v. Hagler*, 319 N.C. 287, 289, 354 S.E.2d 228, 231 (1987) (citation omitted). Thus, the dispositive issue before this Court is whether a genuine issue of material fact exists regarding the intended scope and effect of the parties' agreement. Defendant primarily argues the agreement does not contain specific language by which the court can conclude that she waived her right to equitable distribution. In plaintiff's brief, he concedes the agreement does not constitute a total waiver of defendant's counterclaim to equitable distribution. However, plaintiff does argue the agreement resulted in a waiver of both parties' rights to equitable distribution as to those items of property already allocated in the agreement. We find the trial court correctly granted partial summary judgment under the facts in this case.

Section 52-10(a) of our statutes allows married persons to enter into contracts with one another that "release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released." N.C. Gen. Stat. § 52-10(a) (2001). This statute generally applies to separation

agreements, which are binding in all respects on a husband and wife provided the agreements are in "writing and acknowledged by both parties before a certifying officer[.]" § 52-10.1. "When a prior separation agreement . . . disposes of the spouses' property rights arising out of the marriage, it acts as a bar to equitable distribution." *Blount v. Blount*, 72 N.C. App. 193, 195, 323 S.E.2d 738, 740 (1984). See also § 50-20(d).

Here, defendant does not argue the agreement between her and plaintiff was invalid or not authentic. She makes no claim that the agreement was void as against public policy or that her consent was the product of coercion or overreaching. Rather, defendant maintains that she never intended the agreement to be a final allocation of the property listed therein. However, the clear and unambiguous terms of the agreement, as well as the parties' actions thereafter, prevent us from agreeing with defendant's interpretation.

Our Supreme Court has held that "the very existence of [a separation] agreement evinces an intention by the parties to determine for themselves what their property division should be and what their future relationship is to be, rather than to leave these decisions to a court of law." *Hagler v. Hagler*, 319 N.C. 287, 293, 354 S.E.2d 228, 233 (1987). We find that intention is further strengthened when the terms used in the agreement give no indication that the property allocation was temporary. In the case *sub judice*, plaintiff and defendant composed the agreement, which contained provisions stating that certain items of property, such

as their vehicles, would "be given to" or "remain with" one party or the other. The agreement addressed the signing over of the deeds to the parties' two homes and the ramifications that would result if those homes were sold.¹ The agreement also set forth child custody and support provisions, as well as provisions preventing plaintiff from bringing future lawsuits regarding child custody and alienation of affection. The terms used in the agreement, particularly those terms referencing future events, do not intimate that either party intended anything other than a final allocation of those specific items of property listed in their agreement.

Additionally, the parties' actions following execution of the agreement do not evince an intention that the property allocation was temporary. The parties' vehicles remained with or were given to the party specified in the agreement, each party took possession of the home allocated to him or her, the child custody and support provisions were carried out as per the agreement until those

¹ With respect to the two homes, the parties' agreement stated:

1. The residence, 2028 Davistown Road, Wendell, NC 27591, has been signed over to [plaintiff], and if sold, all proceeds, and the tax burden will be [plaintiff's]. Also, all debt on this home will be the responsibility of [plaintiff].

. . . .

7. Within 15 days after the purchase of the residence on Pine Drive, Raleigh, NC, [plaintiff] agrees to sign over the Deed to [defendant].

provisions were modified and plaintiff did not bring a claim against defendant for alienation of affection. Thus, the parties' adherence to the agreement's terms further supports a finding that they intended the agreement to finalize their property and equitable distribution issues with respect to certain items.

For the reasons stated, we hold the agreement between plaintiff and defendant fully disposed of each party's rights to the property items listed therein and acts as a bar to equitable distribution of those items. Accordingly, there is no genuine issue as to any material fact, and plaintiff was entitled to partial summary judgment in his favor as a matter of law.

Affirmed.

Judges WALKER and McGEE concur.

Report per Rule 30(e).