NO. COA07-913

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2008

Nelson W. Taylor, III,
Plaintiff,

v. Carteret County
No. 06 CVS 25

Marilyn Miller,
Defendant.

Appeal by defendant from judgment entered 4 December 2006 by Judge W. Allen Cobb, Jr. in Carteret County Superior Court. Heard in the Court of Appeals 17 January 2008.

Mason & Mason, P.A., by L. Patten Mason, for plaintiff-appellee.

McAfee Law, P.A., by Robert J. McAfee, for defendant-appellant.

GEER, Judge.

Defendant Marilyn Miller appeals from a judgment (1) ordering reformation of a deed executed by defendant and plaintiff Nelson W. Taylor, III to include a lot omitted from the original deed based on the doctrine of mutual mistake and (2) transferring defendant's interest in the lot to plaintiff. We hold that the trial court's findings of fact in support of this judgment are supported by competent evidence. As for the statute of limitations defense, however, the trial court failed to make sufficient findings of fact to resolve the question whether plaintiff's claim for reformation

was timely filed. We, therefore, remand for further findings of fact on that issue.

Facts

Plaintiff and defendant were divorced on 31 May 1994. While married, plaintiff and defendant had owned together various pieces of real estate, including property in Morehead City previously owned by plaintiff and a former law partner comprised of a building at 610 Arendell Street ("Lot 6"), with a parking area behind the building that extended onto the eastern half of a wedge-shaped lot ("Lot 8"), and a third lot that faced Bridges Street ("Lot 10"). As the trial court described the property, it "was one continuous 50-foot-wide tract from Arendell Street to Bridges Street . . . ." All three lots were located in Block Eight on the official plat of Morehead City.

Prior to their divorce, plaintiff and defendant entered into a separation agreement, but neither party had a copy of the agreement at trial. Plaintiff testified that the separation agreement provided plaintiff would pay defendant $95,000.00 in cash and would pay the cost of defendant's obtaining her undergraduate degree at East Carolina University. Plaintiff would have ownership of his ancestral home and the property from Arendell Street to Bridges Street, while the agreement gave defendant property on Fisher Street where she had once lived.

On 14 April 1993, the parties signed an addendum to the original separation agreement. The addendum specifically referenced the earlier, now missing, separation agreement that had

divided up the parties' real property. In addition to other provisions, the addendum stated: "Wife releases and waives any and all other right to marital or other property, agrees this is a fair settlement and waives all right or claim to support." Pursuant to the addendum, the parties, on 3 June 1993, executed a deed conveying to plaintiff several parcels of land, including Lot 10. The deed was delivered to plaintiff, but the parties agreed that plaintiff would hold the original deed until he had paid all sums due to defendant.

On 17 June 1994, after plaintiff had paid defendant the agreed-upon money, the parties signed a new deed that conveyed to plaintiff all of the property described in the 3 June 1993 deed except for Lot 10. The deed also added a buy-back provision in favor of defendant as to one tract described in the deed. When, at the time, plaintiff handwrote the tax parcel numbers on this deed, he included the number for Lot 10.

Ultimately, plaintiff paid defendant more than $240,000.00 in accordance with the separation agreement and the addendum. There had been no reduction in the amount of money due from plaintiff to defendant even though the 1994 deed omitted Lot 10. In addition, plaintiff maintained continuous possession of Lot 10 from 1993, and, as the trial court found and defendant does not dispute, "Defendant has acquiesced in the occupation, possession and use of Lot 10, Block 8, Morehead City by the Plaintiff."

The trial court found, although defendant disputes, that Lot 10 "was omitted in the Deed from the Defendant by the mutual

mistake of the Plaintiff and Defendant as well as by a scribner's [sic] error." The trial court further found that plaintiff was unaware of the omission until May 2003.

Plaintiff filed a complaint in the parties' divorce proceedings, attaching a copy of the addendum and incorporating it into the allegations of the complaint. The divorce complaint asked the court to find that the separation agreement and the addendum equitably resolved the issue of equitable distribution. A decree of divorce was granted on 31 May 1994, and, on 30 June 1994, the parties filed a "Stipulation of Dismissal of Issues Other Than the Issue of Absolute Divorce," providing that "all issues arising out of the former marriage between the parties have been compromised and settled" and that the parties agreed to dismiss with prejudice all issues except absolute divorce.

In October 2005 and January 2006, plaintiff twice demanded that defendant convey Lot 10 to him in accordance with their separation agreement, but defendant refused to do so. Plaintiff filed suit on 30 January 2006 in Carteret County Superior Court (1) requesting reformation of the 1994 deed to include Lot 10, (2) seeking an order, based on breach of the separation agreement and addendum, requiring defendant to execute a deed to plaintiff conveying all of her rights to Lot 10 or transferring in the judgment the interest of defendant in Lot 10 to plaintiff, and (3) in the alternative, seeking a declaration, based on the separation agreement and addendum, that plaintiff had waived and released all interest in Lot 10.

Based on its findings of the above facts, the trial court, in an order filed 4 December 2006, first concluded that because the parties intended that the 1994 deed convey Lot 10, plaintiff was entitled to have the 1994 deed "recorded in Book 738, Page 193, Carteret County Registry reformed to include in its description of the property convey [sic] Lot 10 Block 8, according to the Official Map and Plan of said Town recorded in Map Book 1, Page 139." Second, the trial court concluded that the parties had entered into a contract by which defendant agreed to convey to plaintiff parcels of land including Lot 10 in exchange, initially, for $190,000.00, but later for over $240,000.00. According to the trial court, because defendant accepted the benefits of the transaction, "[d]efendant may not now take a position inconsistent with the transaction." Third, the trial court concluded that "[b]y the waiver and release in the Addendum to Separation Agreement, Defendant gave up any interest in all real property, marital or not" and the addendum "constituted a waiver and release of any and all claims that the Defendant had in this Lot 10, Block 8, Morehead City." Finally, the trial court rejected defendant's statute of limitations defense. The trial court, therefore, ordered the deed reformed and that title of defendant's interest in Lot 10 be transferred, by the judgment, to plaintiff. Defendant timely appealed to this Court.

I

Defendant contends the trial court erred by denying her motion to dismiss for failure to join a necessary party pursuant to N.C.R.

Civ. P. 12(b)(7), made for the first time at the close of all the evidence. We note that defendant stipulated in the Order on Final Pre-Trial Conference that "all parties have been correctly designated, and there is no question as to misjoinder or non-joinder of parties." Nevertheless, "'[t]he waiver provisions of Rule 12(h) provide in effect that the defenses of failure to state a claim, or failure to join a necessary party may be raised at any time before verdict.'" *Four Seasons Homeowners Ass'n v. Sellers*, 62 N.C. App. 205, 209, 302 S.E.2d 848, 851 (quoting N.C.R. Civ. P. 12 cmt), *cert. denied*, 309 N.C. 461, 307 S.E.2d 364 (1983). Assuming, without deciding, that the issue of non-joinder is properly before us despite the stipulation, we hold that defendant has not established non-joinder of a necessary party.

Defendant argues that her current husband, Dr. Sundwall McKay, should have been joined as a necessary party because, in the event that defendant and Dr. McKay are still married at the time of defendant's death, Dr. McKay would receive title to defendant's one-half interest in Lot 10 pursuant to N.C. Gen. Stat. § 29-14 (2007). Thus, although Dr. McKay held no present interest in the property, he had, according to defendant, a "recognizable interest . . . which ultimately was extinguished by the trial court's reformation of the 1994 deed."

"A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence." *Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc.*, 12

N.C. App. 448, 451-52, 183 S.E.2d 834, 837 (1971). On the other hand, a "proper party," who is not a necessary party, "is one whose interest may be affected by a decree, but whose presence is not essential in order for the court to adjudicate the rights of others." *Id.* at 452, 183 S.E.2d at 837. Necessary parties must be joined in an action, while the decision to join a proper party lies within the discretion of the trial court. *Id.* at 451, 183 S.E.2d at 837.

It is undisputed that, at the time of trial, Dr. McKay had no present interest in Lot 10. The only interest identified by defendant is N.C. Gen. Stat. § 29-14's provision of a share to the surviving spouse of any real property owned by a deceased dying intestate. This Court has previously held that N.C. Gen. Stat. § 29-14 does not establish any rights that would preclude the spouse owning the property from conveying it to someone else during the marriage:

> For purposes of G.S. 29-14 her husband's estate would not include, however, property which he had conveyed away prior to his death, even though she had not joined in the conveyance. The real and personal property of any married person in this State, acquired before or after marriage, remains the sole and separate property of such married person, and "may be devised, bequeathed and conveyed by such married person subject to such regulations and limitations as the General Assembly may prescribe." G.S. 52-1. Subject to such regulations and limitations, "every married person is authorized to contract and deal so as to affect his or her real and personal property in the same manner and with the same effect as if he or she were unmarried." G.S. 52-2. Insofar as concerns any rights which the spouse of a married person might acquire by virtue of the

> provisions of G.S. 29-14, the General Assembly has prescribed no regulation or limitations relating to the conveyance during lifetime by such married person of his or her separate real or personal property. Therefore, the deed described in the complaint by which plaintiff's husband conveyed his separate real property to his two children was effective to convey title to them, free from any claim of plaintiff under G.S. 29-14, and her complaint alleges no cause of action based on any rights provided her under that statute.

Heller v. Heller, 7 N.C. App. 120, 123, 171 S.E.2d 335, 337 (1969).

As a result, Dr. McKay's "interest" in Lot 10 was contingent on defendant's pre-deceasing him, defendant's dying intestate, the two remaining married at the time of defendant's death, and defendant's having not conveyed Lot 10 prior to her death. While Dr. McKay's "interest" was certainly affected by the judgment, he is not a person "who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence." *Crosrol Carding Devs.*, 12 N.C. App. at 451-52, 183 S.E.2d at 837. If his interest under N.C. Gen. Stat. § 29-14 is not sufficient to preclude defendant from unilaterally transferring Lot 10, we cannot see how that interest could preclude the trial court from determining whether the original deed — recorded before defendant and Dr. McKay married — was intended to include Lot 10.

While Dr. McKay may have been a proper party, he was not a necessary party. The trial court, therefore, did not err in denying defendant's motion to dismiss. *See Pittman v. Barker*, 117 N.C. App. 580, 586, 452 S.E.2d 326, 330 (holding that while remaindermen "have undeniable interests which might have been

affected by the outcome of this action, they were not essential parties" and, therefore, were proper, but not necessary, parties), *disc. review denied*, 340 N.C. 261, 456 S.E.2d 833 (1995); *Thomas v. Thomas*, 43 N.C. App. 638, 644, 260 S.E.2d 163, 168 (1979) (holding that heirs of deceased husband were not necessary parties to action by wife to set aside divorce decree "even where the rights of a decedent's heirs to real property held by the decedent and an estranged spouse by the entirety during the marriage would be affected were the divorce decree to be overturned").

II

Defendant next contends that the trial court erred by allowing plaintiff to testify regarding the contents of the original separation agreement. Defendant argues on appeal that the statements were inadmissible hearsay. At trial, however, defendant did not object on the grounds of hearsay.

Defendant acknowledges that "[t]he issue whether statements constituted hearsay . . . was not addressed by the court[,]" but attempts to justify her failure to raise the issue of hearsay by stating that "[d]efendant was only asked to respond to the authentication argument." At trial, defendant made a general objection — not specifying any basis — when plaintiff's counsel asked plaintiff "what that first agreement provided?" In response to that objection, plaintiff's counsel argued that the testimony was permitted by Rules 1002, 1004, and 1008 of the North Carolina Rules of Evidence. Although defendant's counsel presented contrary

argument as to those rules, he never raised hearsay as a possible basis for exclusion.

In contending that she was only required to respond to the arguments made by plaintiff's counsel, defendant mistakes the requirements for preserving a question for appellate review. "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1). The purpose of Rule 10(b)(1) "'is to require a party to call the [trial] court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal.'" *Reep v. Beck*, 360 N.C. 34, 37, 619 S.E.2d 497, 499 (2005) (quoting *State v. Canady*, 330 N.C. 398, 401, 410 S.E.2d 875, 878 (1991)).

This Court has previously held that "'a general objection, if overruled, is ordinarily not effective on appeal.'" *State v. Parker*, 140 N.C. App. 169, 183, 539 S.E.2d 656, 665 (2000) (quoting *State v. Hamilton*, 77 N.C. App. 506, 509, 335 S.E.2d 506, 508 (1985), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986)), *appeal dismissed and disc. review denied*, 353 N.C. 394, 547 S.E.2d 37, *cert. denied*, 532 U.S. 1032, 149 L. Ed. 2d 777, 121 S. Ct. 1987 (2001). In addition, as is often stated, "where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount [on appeal].'" *State v. Sharpe*, 344 N.C. 190, 194,

473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). Since defendant did not object to the testimony by plaintiff on the basis of hearsay, she did not properly preserve that issue for appeal.[1]

III

With respect to plaintiff's reformation claim for relief, defendant assigns error to one portion of the trial court's findings of fact underlying its conclusion that the 1994 deed should be reformed to add Lot 10 based on a mutual mistake of fact. Defendant also contends that clear, cogent, and convincing evidence does not exist to support the trial court's determination that the 1994 deed was the result of a mutual mistake of fact.

"When the trial court conducts a trial without a jury, 'the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding.'" *Stephenson v. Bartlett*, 357 N.C. 301, 309, 582 S.E.2d 247, 252 (2003) (quoting *Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998)). If the findings of fact are supported by the evidence, "we must then determine whether those findings of fact support the conclusions of law." *Id.*

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[1]Defendant's hearsay argument is also the sole basis for defendant's assignment of error challenging the finding of fact setting out the substance of the original separation agreement. Since that finding is supported by plaintiff's testimony, and defendant waived any argument that the testimony was inadmissible, we also overrule that assignment of error.

Defendant first points to the trial court's finding that Lots 6, the eastern half of Lot 8, and Lot 10 were "always used as a single parcel." Plaintiff testified, however, that those three parcels were originally purchased at the same time, and "[i]t was always considered one tract of land." Plaintiff also explained that the separation agreement gave him the "whole tract that had been used as part of the office property for all these years." Although defendant points to the fact that the parties, at one time, obtained financing on Lot 6 and a portion of Lot 8 without including Lot 10, plaintiff, when asked about the financing on cross-examination, responded: "That doesn't change the fact that the whole property was being used as one tract." Plaintiff also submitted the testimony of his former law partner and plaintiff's son regarding the use of Lot 10 in conjunction with the other two parcels. This testimony was sufficient to support the trial court's finding of fact regarding the use of the parcels. Defendant's argument with respect to the financing goes to the credibility and weight of the evidence, an issue for the trial court.

With respect to the sufficiency of the evidence of a mutual mistake of fact, defendant argues that because she testified that there was no mutual mistake of fact, there necessarily cannot be clear, cogent, and convincing evidence of a mutual mistake of fact. In other words, according to defendant, a dispute in the evidence precludes a finding of mutual mistake. Defendant cites no authority to support this novel proposition.

Trials occur to resolve disputes in the evidence. In a bench trial, "[a]ny inconsistency in the testimony between plaintiffs' witnesses, defendant's witness, and [the exhibits] was a matter to be resolved by the trial court in its findings of fact." *Cogdill v. N.C. State Highway Comm'n*, 279 N.C. 313, 319, 182 S.E.2d 373, 377 (1971). When "the evidence presented by the parties [is] contradictory, '[t]he credibility of the witnesses and the weight of the evidence were for determination by the court below in discharging its duty to find the facts.'" *Strauss v. Hunt*, 140 N.C. App. 345, 351, 536 S.E.2d 636, 640 (2000) (quoting *Harrington v. Rice*, 245 N.C. 640, 643, 97 S.E.2d 239, 241 (1957)).

A higher standard of proof, such as "clear, cogent, and convincing evidence" or "beyond a reasonable doubt," does not alter these fundamental principles regarding the resolution of conflicting evidence. Even in such cases, the testimony of a single witness — despite conflicting evidence — can constitute clear, cogent, and convincing evidence. *See In re K.W.*, __ N.C. App. __, __, 666 S.E.2d 490, 495 (2008) (holding that finding of fact was supported by clear and convincing evidence even though based solely on minor witness' testimony). While defendant presented evidence suggesting either that there was no mistake of fact or that, at most, there was a unilateral mistake of fact, the trial court was entitled to find her evidence unpersuasive in light of plaintiff's evidence to the contrary.

After hearing the evidence, the trial court found that Lot 10 had always been used as part of a single parcel composed of Lot 6,

the eastern half of Lot 8, and Lot 10. When the parties separated, their separation agreement divided up the property between the two of them and included Lot 10 in the real property to be conveyed to plaintiff. According to the trial court, the addendum to the settlement agreement did not alter the settlement agreement's division of property and provided that defendant released and waived any other right to marital or other property. The 1993 deed, in accordance with the settlement agreement, included Lot 10. The trial court found that although the 1994 deed omitted Lot 10, there was no reduction in the money paid by plaintiff to defendant, and the tax parcel numbers written on the 1994 deed included Lot 10's number. Further, plaintiff was in continuous possession of Lot 10 since 1993, and defendant did not object to plaintiff's possession and use of Lot 10. Ultimately, the trial court found — without specific assignment of error by defendant — that the 1993 deed "described the property to be conveyed as the parties had agreed."

These findings, either unchallenged on appeal or supported by evidence, establish that the parties agreed that plaintiff should receive Lot 10, that Lot 10 was to be included in the 1994 deed resulting from their agreement, and that it was omitted either by mistake of both parties or by mistake of the drafter. Reformation of a deed or written instrument will be allowed when the deed fails to "'express the true intent of both parties'" as a result of a mistake. *Van Keuren v. Little*, 165 N.C. App. 244, 248, 598 S.E.2d 168, 171 (quoting *Matthews v. Shamrock Van Lines, Inc.*, 264 N.C.

722, 725, 142 S.E.2d 665, 668 (1965)), *disc. review denied*, 359 N.C. 197, 608 S.E.2d 328 (2004).

> "The party asking for relief by reformation of a deed or written instrument, must allege and prove, first, that a material stipulation, as alleged, was agreed upon by the parties, to be incorporated in the deed or instrument as written, and second, that such stipulation was omitted from the deed or instrument as written, by mistake, either of both parties, or of one party, induced by the fraud of the other, or by the mistake of the draughtsman."

Id. (quoting *Matthews*, 264 N.C. at 725, 142 S.E.2d at 668). The trial court's findings are, therefore, sufficient to support the trial court's determination that the 1994 deed should be reformed. *Id.*

IV

With respect to plaintiff's breach of contract claim, defendant contends on appeal that the trial court's pertinent conclusion of law was "apparently based upon its findings regarding the parties' non-extant separation agreement, to which defendant objected at trial and within this appeal." Defendant then argues that the terms of the separation agreement were not, therefore, "proven by clear, cogent and convincing evidence — in fact, it was directly contradicted by defendant's testimony — and as such, could not lead to the remedy of reformation based upon mutual mistake occurring in connection with that agreement."

We first note that defendant has not recognized that plaintiff asserted a claim for breach of contract as an independent claim for relief separate from his claim for reformation. Plaintiff alleged that defendant breached the separation agreement by refusing to

execute a quitclaim deed conveying to plaintiff her interest in Lot 10. With respect to this claim, plaintiff asked "that the Court enter its Judgment ordering the Defendant to execute a Deed to the Plaintiff conveying to the Plaintiff all of her right, title and interest in the aforesaid Lot 10 or by its Judgment transferring the interest of the Defendant to the Plaintiff." Following the bench trial, the trial court granted the relief sought by ordering that "the title of the Defendant's interest in this Lot 10, Block 8, Morehead City, shall by this Judgment be transferred to the Plaintiff and that a copy of this Judgment shall be recorded in the Office of the Register [of] Deeds of Carteret County, North Carolina."

Apart from defendant's argument that plaintiff's testimony regarding the terms of the separation agreement was inadmissible — a contention that defendant did not preserve for appeal — defendant has presented no basis for reversing the trial court's determination that defendant failed to comply with the separation agreement and addendum and that her interest in Lot 10 should be conveyed to plaintiff. We, therefore, overrule defendant's assignment of error directed to plaintiff's breach of contract claim.

V

Defendant also argues that the trial court erred in concluding that she waived her interest in Lot 10 by the release in the addendum. Defendant acknowledges that she "waived her further rights to marital property within that Addendum," but claims that

"[w]here the parties' agreement does not clearly dispose of their property, however, it should not be used as a bar against one of them to encompass a surrender of rights to the marital property." Defendant further argues that "the waiver relied upon by the trial court could not have encompassed later real property conveyances." We disagree with both contentions.

N.C. Gen. Stat. § 52-10 (2007) permits a husband and wife to enter into a separation agreement that "release[s] and quitclaim[s] 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." *See Blount v. Blount*, 72 N.C. App. 193, 195, 323 S.E.2d 738, 740 (1984) ("G.S. 52-10 allows husband and wife to enter a separation agreement which 'release[s] and quitclaim[s]' any property rights acquired by marriage, and that a release will bar any later claim on the released property."), *disc. review denied*, 313 N.C. 506, 329 S.E.2d 389 (1985). This Court has previously held "that the fact that specific property owned by either party was not described in the agreement cannot serve, without more, to avoid the unmistakably clear general provisions of the contract." *Id.* at 196, 323 S.E.2d at 740.

In *Hartman v. Hartman*, 80 N.C. App. 452, 455, 343 S.E.2d 11, 13 (1986), this Court held, contrary to defendant's position in this case, that a separation agreement providing that "each 'waives and relinquishes any and all rights he or she may now have or

hereafter acquire under the present or future laws of any jurisdiction to share in the property or estate of the other as a result of the marital relationship'" supported the trial court's order barring a husband's claim for a share of marital property beyond that specified in the separation agreement. The husband claimed that the parties never intended the agreement to be a final settlement of all property rights, as evidenced by the fact that the agreement made no mention of any real estate or its disposition. *Id.* at 454, 343 S.E.2d at 12. The Court held, in light of the provisions of the settlement agreement, that "[a]n intention to postpone disposition of real property [was] inconsistent with the operation, effect, and stated purpose of the agreement." *Id.* at 456, 343 S.E.2d at 13.

Likewise, defendant's contention that issues regarding the disposition of the real property still remained open is inconsistent with the plain language of the addendum. The addendum specified that "[e]xcept as herein modified, the terms of the original Separation Agreement are ratified and affirmed." The addendum divided up personal property and specified the monetary amount to be paid by plaintiff to defendant. With respect to real property, the addendum provided: "The original separation agreement divides the real property, but it is agreed that it shall not constitute a conveyance or release of title or ownership which shall be accomplished by an exchange of deeds, which shall take place when Husband has paid Wife the full amount of cash stated above or the parties have otherwise agreed on its payment."

Finally, the addendum specified: "Wife releases and waives any and all other right to marital or other property, agrees this is a fair settlement and waives all right or claim to support."

In sum, the separation agreement divided up the real property, the addendum divided up the personal property, the addendum further specified the monetary amounts to be paid, and, finally, the addendum provided that defendant released all other rights to any marital or other property. Under *Blount* and *Hartman*, any failure to specify the individual parcels of real property cannot override the plain language of the agreement in which defendant released her right to marital or other property. Since the trial court was not required to credit defendant's testimony that the addendum was further modified by an agreement not to allocate Lot 10 to either party, the trial court did not err in concluding, consistent with N.C. Gen. Stat. § 52-10, that "[t]he Addendum to the Separation Agreement dated April 14, 1993, constituted a waiver and release of any and all claims that the Defendant had in this Lot 10, Block 8, Morehead City."

VI

Finally, defendant contends the trial court erred in denying her motion to dismiss based on the statute of limitations. Plaintiff filed his complaint on 30 January 2006. Defendant argues that the three-year statute of limitations began to run in 1995, when the tax bill became due a year after the deed was recorded, and therefore the complaint was untimely under N.C. Gen. Stat. §

1-52(9) (2007) (providing that an action "[f]or relief on the ground of fraud or mistake" must be brought within three years).

Both parties ignore the fact that plaintiff brought — and prevailed upon — three separate claims for relief. Defendant's arguments on appeal relate to the statute of limitations applicable only to the claim for reformation based on mutual mistake. Plaintiff's arguments, however, relate only to his breach of contract claim. Neither party addresses the proper statute of limitations for plaintiff's claim that the addendum's release provision barred any claim of defendant to Lot 10.

Beginning with plaintiff's mutual mistake claim for relief, N.C. Gen. Stat. § 1-52(9) provides that "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." Our Supreme Court has "previously construed this provision to set accrual at the time of discovery *regardless* of the length of time between the fraudulent act or mistake and plaintiff's discovery of it." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 386 (2007) (internal quotation marks omitted). "For purposes of N.C.G.S. § 1-52(9), 'discovery' means either actual discovery or when the fraud [or mistake] should have been discovered in the exercise of 'reasonable diligence under the circumstances.'" *Id.* (quoting *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 154, 143 S.E.2d 312, 317 (1965) (emphasis omitted)).

Defendant first contends that the trial court erred by finding that plaintiff was unaware that the 1994 deed omitted Lot 10 until

May 2003. Defendant points to evidence of plaintiff's careful office practices in drafting deeds. Defendant further argues that although plaintiff claimed that the tax listing was in his name only between 1993 until 1999 (as opposed to his name and defendant's name, consistent with the 1994 deed), he did not produce tax bills corroborating that testimony. These contentions relate to the credibility and weight of plaintiff's evidence and were for the trial court to resolve. Accordingly, the trial court's finding of fact that plaintiff did not have actual knowledge of the mistake until May 2003 is binding on appeal.

The date of plaintiff's actual knowledge does not, however, fully address the statute of limitations issue with respect to the mutual mistake claim. The trial court was also required to "decide when [the mistake] should have been discovered in the exercise of reasonable diligence under the circumstances." *Id.* A review of the trial court's order reveals no finding of fact addressing this latter issue. We cannot resolve the factual question on appeal. *See Piles v. Allstate Ins. Co.*, __ N.C. App. __, __, 653 S.E.2d 181, 186 (2007) ("The date of [plaintiff's] discovery of the alleged fraud or negligence — or whether she should have discovered it earlier through reasonable diligence — is a question of fact for a jury, not an appellate court."), *disc. review denied*, 362 N.C. 361, 663 S.E.2d 316 (2008).

The trial court concluded, without explanation, that the statute of limitations did not begin to run until October 2005, the date defendant first refused plaintiff's request that she convey

him Lot 10. It appears, based on plaintiff's arguments on appeal, that this date arose from plaintiff's contention that "[i]n the case of executory contracts to convey land, the statute of limitations does not begin to run until there is a demand made for the conveyance of the property provided that the grantee is in possession with the acquiescence of the vendor." This argument, however, relates to plaintiff's breach of contract claim and not his claim for reformation based on mutual mistake. Because the trial court granted reformation, it was required to decide whether that claim for relief was timely under N.C. Gen. Stat. § 1-52(9). We must, therefore, in order to resolve defendant's statute of limitations defense as to the reformation claim for relief, remand for further findings of fact as to when plaintiff knew or should have known of the mistake.

The trial court ordered separate relief as to the breach of contract claim: "[T]he title of the Defendant's interest in this Lot 10, Block 8, Morehead City, shall by this Judgment be transferred to the Plaintiff and . . . a copy of this Judgment shall be recorded in the Office of the Register [of] Deeds of Carteret County, North Carolina." Defendant makes no argument on appeal as to why the breach of contract claim is barred by the statute of limitations and does not address plaintiff's contentions and citation of authority. In the absence of any argument justifying reversal as to this claim for relief, we must affirm.

Affirmed in part; remanded in part for further proceedings.

Judges TYSON and STROUD concur.

Report per Rule 30(e).