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NO. COA08-404

NORTH CAROLINA COURT OF APPEALS

Filed: 19 May 2009

SUE ALLISON BROADWELL ROBERTS,

Plaintiff,

v.

Guilford County  
No. 02 CVS 10553

RONALD WAYNE ROBERTS,

Defendant.

# Court of Appeals

Appeal by plaintiff and cross-appeal by defendant from orders entered 23 October 2007 by Judge Stuart Albright in Guilford County Superior Court. Heard by the Court of Appeals 22 October 2008.

## Slip Opinion

*Floyd & Jacobs, L.L.P., by Constance F. Jacobs; and William G. Barbour, for plaintiff-appellee/cross-appellant.*

*Mercedes O. Chut, for defendant-appellant/cross-appellee.*

JACKSON, Judge.

Sue Allison Broadwell Roberts ("plaintiff") appeals the trial court's order awarding Ronald Wayne Roberts ("defendant") a credit against contributions he owed to a joint checking account ("the joint account") required by the parties' premarital agreement. Defendant cross-appeals the trial court's orders granting summary judgment in plaintiff's favor and awarding plaintiff attorney's

fees pursuant to the parties' premarital agreement. For the following reasons, we affirm the trial court's orders.

The facts in the case *sub judice* are largely undisputed and have been well-established in the parties' two prior appeals, *Roberts v. Roberts*, 173 N.C. App. 354, 618 S.E.2d 761 (2005) ("*Roberts I*"), and *Roberts v. Roberts*, 182 N.C. App. 176, 641 S.E.2d 417, 2007 WL 656322 (2007) (unpublished) ("*Roberts II*").

On 1 September 2000, the parties signed a premarital agreement. In relevant part, the agreement required the parties to continue to contribute mutually agreed upon amounts to a joint checking account until the debt owed on the marital residence was satisfied or until one party bought out the other's interest in the property. Furthermore, the agreement provided that attorney's fees would be awarded to the prevailing party, whether the party prevailed by settlement or by favorable adjudication. On 9 September 2000, the parties married.

During the summer of 2002, the marital relationship began to deteriorate, and the parties stopped contributing to the joint account. On 1 October 2002, plaintiff instituted these proceedings against defendant seeking (1) to compel specific performance of defendant's obligations owed pursuant to the agreement, and (2) to recover attorney's fees as provided in the agreement. On 5 November 2002, the parties separated.

On 29 April 2004, the trial court entered an order granting partial summary judgment in favor of defendant as to plaintiff's claim that defendant had a contractual duty to continue

contributing to the joint account. Upon plaintiff's appeal, we reversed the trial court's granting of summary judgment in defendant's favor on the joint checking account issue. *Roberts I*, 173 N.C. App. 354, 618 S.E.2d 761. Upon remand, the trial court granted partial summary judgment in plaintiff's favor and entered an order awarding plaintiff \$79,413.19 in damages, plus interest through October 2005 as a result of defendant's failure to contribute to the joint account. *Roberts II*, 2007 WL 656322, at \*3. The trial court also entered a separate order awarding \$65,475.00 in attorney's fees to plaintiff pursuant to the parties' premarital agreement. *Id.* at \*1. Upon defendant's second appeal, we reversed the trial court's order with respect to the damages owed to plaintiff pursuant to the parties' joint account obligations because the trial court failed to take into account defendant's contributions to the indebtedness on the marital home. *Id.* at \*3. Because defendant had prevailed on the appeal, we remanded the matter to the trial court for recalculation of attorney's fees in light of the parties' agreement and this Court's opinion. *Id.* at \*3-4.

On 17, 18, and 21 September 2007, the remanded matter came on for its third hearing at the trial court. On 23 October 2007, the trial court entered an order granting plaintiff's motion for summary judgment as to defendant's breach of his obligation to continue to contribute to the joint account. The trial court awarded to plaintiff \$42,898.66 in damages, plus interest. From this order, both parties have appealed claiming the trial court

miscalculated the amount of damages owed. The trial court also entered an order awarding plaintiff \$98,202.43 in attorney's fees after recalculation pursuant to our instruction in *Roberts II*. *Id.* From this order, defendant appeals. For the reasons stated below, we affirm both of the trial court's orders.

Summary judgment is appropriate "if 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) (2007). "An issue is 'genuine' if it can be proven by substantial evidence[,] and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citing *Bone International, Inc. v. Brooks*, 304 N.C. 371, 374-75, 283 S.E.2d 518, 520 (1981)).

In deciding a motion for summary judgment, a trial court must consider the evidence in the light most favorable to the non-moving party. See *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004).

The moving party bears the burden of showing that no triable issue of fact exists. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citing *Texaco, Inc.*

*v. Creel*, 310 N.C. 695, 314 S.E.2d 506 (1984)). This burden can be met "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted).

Initially, we note that both parties offer arguments seeking to revisit findings and conclusions of previous orders from the various trial courts as well as analysis and holdings of prior opinions of this Court. However, this panel is bound by our previous opinions insofar as they establish the law of the case. See, e.g., *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983); *Brown v. Brown*, 181 N.C. App. 333, 336, 638 S.E.2d 622, 624 (2007). Therefore, we hold that such arguments are beyond the purview of this Court.

Next, defendant argues that the trial court erred by entering summary judgment in plaintiff's favor because a purported genuine issue of material fact exists as to whether defendant's loan from his Charles Schwab brokerage account ("brokerage account loan") was a joint expense. We disagree.

In *Roberts I*, defendant argued that the same brokerage account loan was an outstanding indebtedness on the parties' marital residence. *Roberts I*, 173 N.C. App. at 358-59, 618 S.E.2d at 765. We disagreed and held that defendant's brokerage account loan was

secured by assets in his separately held brokerage account, not the marital residence. Therefore, the loan is a personal loan which he is responsible to repay. See *id.*

Furthermore, in *Roberts II*, we reviewed the second trial court's entry of partial summary judgment in plaintiff's favor. Upon review, we were satisfied with the trial court's entry of summary judgment for plaintiff, and we reversed the order *only* to the extent that the trial court erroneously calculated the amount of damages owed by defendant to plaintiff. See *Roberts II*, 2007 WL 656322, at \*3. We remanded the matter to the trial court for recalculation of the award after we explained that

[s]ince defendant undertook to pay an obligation that should have been paid from the joint checking account from his own personal funds, he is entitled to a credit for that amount against the funds which he should have contributed to the joint checking account.

*Id.* We further instructed that "[t]he trial court shall determine whether there exist genuine issues of material fact as to the *damages due to plaintiff* under the premarital agreement or whether the issue of damages should be submitted to the jury." *Id.* at \*4 (emphasis added). Therefore, entry of summary judgment for plaintiff as to plaintiff's entitlement to damages already had been approved, and the only issue that remained outstanding was whether the amount of damages properly could be disposed of by the trial court on summary judgment or whether there were issues of fact that necessarily needed to be presented to a jury for resolution. Because we do not discern any genuine issues of material fact, we

affirm the trial court's entry of summary judgment in plaintiff's favor.

Next, both parties assert that the trial court improperly calculated the amount of damages owed to plaintiff. We disagree.

On remand from our opinion in *Roberts II*, the trial court entered an order granting summary judgment in plaintiff's favor and awarded plaintiff \$42,898.66 in damages, plus interest. The trial court found that "[t]he damages in this case are contractual damages for money owed and are calculable by the trial court without need for jury determinations as all mathematical facts and dates [] are uncontested by the parties." The trial court then calculated<sup>1</sup> the award by multiplying \$4,400.00 by thirty-six for a total damage award of \$158,400.00. Pursuant to our instruction in *Roberts II*, the trial court then calculated a credit to defendant for obligations that should have been paid from the joint account, but which he paid with his own funds. The trial court calculated that defendant had paid \$49,242.69 for the monthly mortgage payments of the marital home and \$10,560.00 for the required monthly homeowner's association dues. The trial court then subtracted the amount of plaintiff's obligation to the joint account, \$12,800.00, and divided the resulting number by two. Finally, the trial court entered an order granting plaintiff's motion for summary judgment in plaintiff's favor and requiring

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<sup>1</sup> The court used the stipulated amount of defendant's monthly obligation (\$4,400.00) times the number of months for which it was owed (thirty-six) to reach its breach of contractual obligation award (\$158,400.00).

defendant to pay \$42,898.66, plus interest to plaintiff as damages for defendant's breach of his duty to contribute to the joint account.

Defendant further argues that the trial court erred by failing to credit defendant for his individual living expenses after the parties separated. We disagree.

Like defendant's personal loan on his brokerage account, but unlike the mortgage on the marital home, the parties were not jointly obligated for their mutual living expenses after the date of separation. After the parties separated, their mutual expenses ceased to exist, whereas the parties' joint liability on the mortgage continued. Therefore, the trial court did not err by not providing defendant with a credit for his post-separation, individual living expenses. Accordingly, upon review, we affirm the trial court's entry of summary judgment for plaintiff as well as the final amount of damages defendant owes as a result of his breach of his obligation to continue to contribute to the joint account.

Next, defendant argues that the trial court erred in making certain findings and conclusions numbered 21 through 23. We disagree.

In relevant part, the trial court's order provides the following:

21. The Court finds as a matter of law that Plaintiff took all reasonable action necessary to effectuate the satisfaction of the joint indebtedness upon payment of consideration owed and that Defendant's recent claim that

Plaintiff failed to mitigate her damages is insufficient under the uncontested facts.

22. [Defendant's] Motion to Amend pleadings is filed five years and two appellate opinions since the commencement of the action and the Court finds that said Amendment should not be allowed; it is therefore denied.

23. The Court rules, as a matter of law, that each party is estopped from bringing issues before the Court at this hearing, that have not been presented prior hereto.

On 2 October 2002, plaintiff filed her complaint seeking monetary relief for defendant's breach of his contractual obligations. On 14 September 2007, defendant filed a motion to amend his pleadings pursuant to Rule 15 of the North Carolina Rules of Civil Procedure to add an affirmative defense alleging that plaintiff failed to mitigate her damages. On 23 October 2007, the trial court, hearing the matter on remand from our second opinion, denied defendant's motion to amend his pleadings. Although we note that the trial court's "leave shall be freely given when justice so requires," we agree with the trial court, and we do not think that Rule 15 of the North Carolina Rules of Civil Procedure should be construed so liberally as to allow defendant leave to amend his pleadings at this extraordinarily late stage in these proceedings. N.C. Gen. Stat. § 1A-1, Rule 15 (2007). See also *Franklin v. Winn Dixie Raleigh, Inc.*, 117 N.C. App. 28, 38, 450 S.E.2d 24, 31-32 (1994) (affirming denial of plaintiff's motion to amend pleadings more than seven months after being informed by the defendant that plaintiffs had not named the defendant properly), *aff'd*, 342 N.C. 404, 464 S.E.2d 46 (1995) (per curiam). From the inception of

these proceedings, defendant has been well-aware that central issues in this case concerned damages pursuant to a breach of contract claim; in short, defendant's motion is five years, and two appellate opinions too late.

Therefore, the trial court's finding that plaintiff properly performed her obligations regarding damages, and did not fail to mitigate her damages, is superfluous. However, we note that upon review of the prior orders and opinions in this matter, we agree with the trial court's finding.

Similarly, in view of the limited scope of the remand – recalculation of damages in light of credits owed to defendant – we hold that the trial court did not err in prohibiting the parties from bringing novel issues for resolution before the trial court. On remand, the only matters to be considered were (1) recalculation of damages owed to plaintiff in light of our instruction, and (2) recalculation of attorney's fees in light of defendant's having prevailed on the second appeal. *Roberts II*, 2007 WL 656322, at \*4.

Accordingly, we affirm the trial court's order granting summary judgment for plaintiff and awarding plaintiff damages for defendant's breach.

Because we affirm the trial court's order granting summary judgment for plaintiff and awarding plaintiff damages for defendant's breach, we also hold that plaintiff is entitled to reasonable attorney's fees pursuant to the parties' agreement. We affirm the trial court's order granting reasonable attorney's fees to plaintiff pursuant to the parties' premarital agreement and our

instructions in *Roberts I* and *Roberts II*. See *Roberts II*, 2007 WL 656322, at \*4; *Roberts I*, 173 N.C. App. at 364, 618 S.E.2d at 768.

For the foregoing reasons, we affirm the trial court's orders.  
Affirmed.

Judges STEELMAN and STROUD concur.

Report per Rule 30(e).