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NO. COA09-1351

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

PERRI H. JACKSON,  
Plaintiff,

v.

Moore County  
No. 99 CVD 1242

DAVID R. PENTON,  
Defendant.

Appeal by defendant from judgment entered 11 May 2009 by Judge James P. Hill in Moore County District Court. Heard in the Court of Appeals 10 March 2010.

*Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Tobias S. Hampson, and Edward Eldred, for plaintiff-appellee.*

*Arthur M. Blue Law Office, P.A., by Arthur M. Blue, for defendant-appellant.*

STEELMAN, Judge.

The trial court did not err in holding that plaintiff was entitled to an award of attorney's fees pursuant to the provisions of a Separation Agreement that was incorporated into a divorce judgment. The trial court erred in the amount of attorney's fees awarded where most of the work pertained to the enforceability of a provision that the trial court held was void as against public policy.

I. Factual and Procedural Background

Plaintiff and defendant were married, but subsequently divorced. On 7 October 1998, the parties entered into a separation agreement and property settlement, which contained the following provisions relevant to this appeal: (1) defendant would pay plaintiff \$600.00 per month as alimony; (2) the alimony would be increased annually commensurate with increases in defendant's salary; (3) defendant would provide plaintiff annually with a copy of his tax return at the time he files with the Internal Revenue Service; and (4) defendant shall pay plaintiff all reasonable attorney's fees incurred in enforcing those obligations. On 22 November 1999, a judgment of divorce was entered that incorporated the Separation Agreement and Property Settlement.

On 26 April 2004, plaintiff filed a motion seeking to have defendant held in contempt of court for failure to provide income tax returns as required by the 22 November 1999 order of the court, and seeking attorney's fees. On 14 November 2005, defendant filed an amended motion seeking to have the provisions of the divorce judgment requiring automatic increases in defendant's alimony payments declared void as against public policy.

These matters were heard before Judge Hill on 30 November 2005. On 11 May 2009, Judge Hill entered an order containing the following rulings: (1) the provisions of the divorce judgment requiring automatic increases in defendant's alimony payments based solely upon increases in defendant's income were "unenforceable as against prevailing law and public policy;" (2) the provision requiring defendant to produce his annual income tax returns was an

enforceable provision of the court's judgment; (3) plaintiff was entitled to recover \$2,780.50 in attorney's fees.

Defendant appeals.

II. Delay in Entry of Order

". . . to no one will we refuse or delay, right or justice."

The Magna Carta, clause 40 (1215).

"Justice delayed is justice denied."

Attributed to William Gladstone, British Statesman; see also *Gohman v. City of St. Bernard*, 146 N.E. 291, 294 (Ohio 1924), overruled on other grounds by *New York Life Ins. Co. v. Hosbrook*, 196 N.E. 888 (Ohio 1935).

The record in this case reveals that plaintiff's motion was filed on 26 April 2004. The hearing was held on 30 November 2005. The order was signed by the presiding judge on 7 May 2009, three and one-half years later. The record is devoid of any explanation as to why this inordinate delay occurred. Regardless of whether any delay was caused by the attorneys in submitting the order to the court, the ultimate responsibility for the timely entry of orders rests upon the presiding judge. The order entered in this case was an order of the court, not an order of the parties. The trial court is admonished to enter its orders in a timely fashion so that disrepute and public censure will not fall upon the courts of this State. The trial court should give attorneys deadlines for the submission of orders. If the deadlines are not complied with, the trial courts have adequate tools at their disposal to compel

compliance. We note that plaintiff's appellate counsel was not her trial counsel.

### III. Plaintiff's Entitlement to Attorney's Fees

In his first argument, defendant contends that the trial court's order did not contain sufficient findings of fact and conclusions of law to support an award of attorney's fees pursuant to N.C. Gen. Stat. § 50-16.4. We disagree.

Paragraph 11 of the Separation Agreement that was incorporated into the divorce judgment of 22 November 1999 provided that defendant would pay alimony to plaintiff, and would provide plaintiff copies of his federal income tax returns filed with the Internal Revenue Service. This provision further states that, "Husband (defendant) shall pay to Wife (plaintiff) any and all reasonable attorney's fees incurred in enforcing this obligation." The trial court's order specifically referenced this provision, and found: "by terms of the Order, Defendant is liable to Plaintiff for reasonable attorney's fees seeking enforcement of all obligations in above-stated Paragraph 11." Thus, the trial court's award of attorney's fees was not based upon N.C. Gen. Stat. § 50-16.4 and defendant's arguments pertaining to that statute are inapposite.

The trial court's award of attorney's fees was based upon the express language contained in Paragraph 11 of the Separation Agreement. Since defendant does not address whether the trial

court properly awarded attorney's fees pursuant to that provision, any such argument is deemed waived pursuant to N.C.R. App. P. 28(b)(6), and we do not reach this issue. We do note that our Supreme Court, in the case of *Bromhal v. Stott*, 341 N.C. 702, 705, 462 S.E.2d 219, 221 (1995), sanctioned the use of attorney's fees provisions in Separation Agreements.

This argument is without merit.

#### IV. Attorney's Fees Based on Contempt Powers

In his second and third arguments, defendant contends that the trial court was without authority to enter an award of attorney's fees pursuant to its contempt powers. We disagree.

As stated in section III, above, the basis of the trial court's award of attorney's fees was the express language contained in paragraph 11 of the Separation Agreement. It was not based upon its contempt powers.

These arguments are equally inapposite and are without merit.

#### V. Reasonableness of Amount of Attorney's Fees

In his fourth and final argument, defendant contends that the amount of attorney's fees was unreasonable. We agree, and remand this matter to the trial court for further proceedings.

The order of the trial court held that the provisions of the incorporated Separation Agreement providing for periodic automatic increases in alimony was unenforceable. Plaintiff did not cross-appeal this ruling. Plaintiff's motion for contempt based upon this provision was dismissed. The trial court further found that:

Defendant's Court-ordered obligation to provide copies of Defendant's annual income tax returns to Plaintiff was an enforceable provision of the Order in this Cause. Had defendant complied with this obligation, earlier resolution of this matter may well have been affected. . . . Defendant is liable to Plaintiff for reasonable attorney's fees seeking enforcement of all obligations in above-stated Paragraph 11.

The record in this matter reveals that defendant provided the income tax returns to plaintiff's counsel on 21 May 2004. Plaintiff does not contend that this submission was in any manner deficient. The trial court's order referenced the "Attorney Fee Affidavit" of plaintiff's counsel. This affidavit reveals total attorney time of 16.7 hours and .3 hours of paralegal time. The amount sought in the affidavit was \$2,780.50, the exact amount awarded by the trial court.

However, the first time entry shown in the affidavit was on 7 June 2005, a year and two weeks after the production of the tax returns by defendant. The time spent was for routine telephone calls and correspondence with opposing counsel, scheduling and calendaring of this case, and preparation for the hearing. The vast bulk of the preparation time appears to be for legal research on the enforceability of the alimony escalation provision contained in the Separation Agreement that was incorporated into the divorce decree. The trial court's premise in awarding attorney's fees was that had defendant complied with his obligation to provide the tax returns, the matter could have been resolved earlier. Based upon the "Attorney Fees Affidavit," all of the attorney's fees were incurred long after the tax returns were produced. The bulk of the

attorney's fees pertained to research attempting to enforce an alimony escalation provision that the trial court found to be contrary to the public policy of this State.

The provisions of Paragraph 11 required that any attorney's fees awarded be "reasonable." We hold that fees awarded to enforce a provision of the Separation Agreement that was unenforceable was not reasonable. Reasonable fees would be for preparation of the motion seeking the tax returns, the discovery resulting in the production of the tax returns, and the review of the documents produced.

#### VI. Conclusion

We affirm the trial court's ruling that plaintiff was entitled to recover attorney's fees pursuant to the provision of Paragraph 11 of the incorporated Separation Agreement. We vacate the amount of attorney's fees awarded and remand to the trial court for a new hearing on the amount of attorney's fees consistent with this opinion. The trial court, in its discretion, may receive additional evidence at this hearing. *Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 413 (2003) ("[w]hether on remand for additional findings a trial court receives new evidence or relies on previous evidence submitted is a matter within the discretion of the trial court.").

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges BRYANT and BEASLEY concur.

Report per Rule 30(e).