NO. COA12-241

NORTH CAROLINA COURT OF APPEALS

Filed: 20 November 2012

JEANNE A. EBERT,
Plaintiff,

v.

Mecklenburg County
No. 08 CVD 25169

PAUL R. EBERT,
Defendant.

Appeal by Defendant from order entered 29 August 2011 by Judge Charlotte Brown in Mecklenburg County District Court. Heard in the Court of Appeals 12 September 2012.

Krusch & Sellers, P.A., by Rebecca K. Watts, for Plaintiff.

Thurman, Wilson, Boutwell & Galvin, P.A., by John D. Boutwell, for Defendant.

STEPHENS, Judge.

Procedural History and Factual Background

Defendant Paul R. Ebert and Plaintiff Jeanne A. Ebert, formerly husband and wife, entered into a Property Settlement, Alimony and Child Support Agreement ("the Agreement") on 5

November 2004. The Agreement required Defendant to pay Plaintiff $2,200 in monthly alimony for 36 months, and then, beginning in December 2007, $2,800 monthly for 120 months. The Agreement provided for termination of alimony upon either party's death or Plaintiff's cohabitation or remarriage. The Agreement's alimony provision also contained the following framework for renegotiation and modification of alimony:

> In the event that [Defendant]'s income shall be reduced by more than twenty percent (20%) from [Defendant]'s 2003 yearly income, the parties hereunder agree to renegotiate the amount of such alimony payments as set forth herein. Any such reduction hereunder shall be prospective only, and not retroactive.

The Agreement did not specify any manner or process for renegotiation, nor did it provide any guidance as to the amount of any reductions resulting from renegotiation.

Defendant timely paid full alimony to Plaintiff through August 2007. However, Defendant sent Plaintiff a letter dated 8 July 2007 that stated, in its entirety, "Jeanne [Plaintiff], This is all I can do. My income has been way off." In September 2007, Defendant began paying Plaintiff only $1,000 per month in alimony.[1] On 2 October 2007, Plaintiff sent Defendant

[1]The record reveals that, in December 2007, Defendant paid Plaintiff alimony in the amount of $1,600, but in subsequent months returned to paying her only $1,000.

an email with the subject line "medical/tuition" which stated, in its entirety, "1800 past due/2800 due by 10-10[.]" Defendant responded by an email stating, "I'm sorry but there is no way I can pay you this. My income is way down so we'll have to renegotiate per the agreement. Hopefully next year will be better."[2] In mid-October 2007, Defendant sent Plaintiff copies of parts of his 2003 and 2006 tax returns and stated that he wished to renegotiate the alimony payments. However, the parties never entered into renegotiations. Instead, on 13 November 2008, Plaintiff filed a complaint seeking specific performance of the Agreement.

Following a bench trial, on 29 August 2011, the court entered an Order for Specific Performance finding, *inter alia*, that Defendant had unilaterally decreased his alimony payments, that Plaintiff was in compliance with the Agreement, and that Defendant owed Plaintiff $78,600 in accrued alimony. The court also made a finding that Defendant's income had not been reduced by 20% from his 2003 income, but noted that this finding was not

---

[2]A single page printout appears in the record as part of Defendant's Exhibit E (along with the 8 July 2007 letter from Defendant). The page shows Plaintiff's 2 October 2007 email, including the "From," "Sent," "To," and "Subject" lines. At the top of the page above Plaintiff's email is the language quoted *supra*, apparently an email response from Defendant, but without any "From," "Sent," "To," and "Subject" lines appearing.

required in light of Defendant's unilateral reduction in alimony payments. The court also made findings about Defendant's ability to pay both the alimony required by the Agreement and the award of accrued alimony due Plaintiff. The court ordered Defendant to pay $35,000 upon entry of the order and entered judgment for the remaining $43,600. Defendant appeals.

Discussion

Defendant makes four arguments on appeal: that the trial court erred in (1) calculating his income and/or determining any reduction thereof; (2) finding and concluding that Defendant had the ability to comply with the Agreement; (3) modifying the terms of the Agreement; and (4) granting Plaintiff's claim for specific performance when Plaintiff failed to allege and prove that she had complied with the Agreement. We affirm.

Standard of Review

"In a trial without a jury, it is the duty of the trial judge to resolve all issues raised by the pleadings and the evidence by making findings of fact and drawing therefrom conclusions of law upon which to base a final order or judgment." *Small v. Small*, 107 N.C. App. 474, 477, 420 S.E.2d 678, 681 (1992).

> The facts required to be found are the ultimate facts established by the evidence

> which are determinative of the questions involved in the action and essential to support the conclusions of law reached. The requirement is designed to dispose of the issues raised by the pleadings and to permit a reviewing court to determine from the record whether the judgment — and the legal conclusions which underlie it — represent a correct application of the law.

Powers v. Tatum, 196 N.C. App. 639, 648, 676 S.E.2d 89, 95 (citation, quotation marks, and emphasis omitted), *disc. review denied*, 363 N.C. 583, 681 S.E.2d 784 (2009).

Generally, the standard of review of an order entered following a bench trial is "whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Curran v. Barefoot*, 183 N.C. App. 331, 334, 645 S.E.2d 187, 190 (2007). However, when considering an order allowing the equitable remedy of specific performance, we review only for an abuse of discretion. *Harborgate Prop. Owners Ass'n v. Mountain Lake Shores Dev. Corp.*, 145 N.C. App. 290, 295, 551 S.E.2d 207, 210 (2001) (citation omitted).

I. Findings of Fact re: Defendant's Income

Defendant first argues that the trial court erred in ordering specific performance because it miscalculated his income. We disagree.

Our careful review of the record and arguments on appeal suggests that Defendant is attempting to excuse his own admitted breach of the Agreement (by unilaterally reducing the alimony payments for September and October 2007) on the basis of Plaintiff's alleged *subsequent* breach (by failing to renegotiate the amount of alimony after October 2007). However, "[a] marital separation agreement is generally subject to the same rules of law with respect to its enforcement as any other contract[,]" *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 657, 347 S.E.2d 19, 22-23 (1986), and

> [a] party may not insist upon the performance of a contract or a provision of it where that party is personally guilty of a material or substantial breach of that contract or provision. The other party's duty to perform is excused by a material failure to perform contractual obligations or a material breach. Therefore, in the case of bilateral contracts, if either party commits a material breach of the contract, the other party should be excused from the obligation to perform further. Such a breach amounts to the nonoccurrence of a constructive condition of the exchange and justifies the injured party's suspension of performance and the termination of the contract.

17A Am. Jur. 2d *Contracts* § 685 (2012); *see also Lake Mary Ltd. P'ship v. Johnston*, 145 N.C. App. 525, 537, 551 S.E.2d 546, 555 ("The general rule governing bilateral contracts requires that

if either party to the contract commits a material breach of the contract, the other party should be excused from the obligation to perform further[.]") (citation omitted), *disc. review denied*, 354 N.C. 363, 557 S.E.2d 538 (2001).

Here, Plaintiff sought specific performance based on Defendant's unilateral decrease in his alimony payments by more than half. In his answer, Defendant countered that, due to an alleged 20% reduction in his income, he "informed . . . Plaintiff that he would, accordingly, reduce the alimony payments *as mandated by the Agreement*." (Emphasis added). At trial, Defendant admitted that he unilaterally reduced his alimony payments to Plaintiff beginning in September 2007, but did not request renegotiation until at least 2 October and did not provide Plaintiff any evidence of his purported reduction in income until 14 October.[3] However, the undisputed evidence at trial was that the Agreement *did not mandate any reduction* of Defendant's alimony payments under *any circumstances*, much less a unilateral reduction of more than 50% prior to seeking renegotiation. Rather, the Agreement provided a simple, specific framework for Defendant to seek reduction in alimony:

[3]The Agreement states that alimony payments are due on or before the tenth of each month. Thus, Defendant made two reduced payments (in September and October) before he provided evidence of his alleged income reduction to Plaintiff on 14 October.

(1) show that his income had been reduced by 20% from 2003 levels and (2) renegotiate the alimony amount with Plaintiff. ***Nothing*** in the Agreement permitted Defendant to ***unilaterally*** reduce his alimony payments by more than half prior to seeking renegotiation. Thus, at a minimum, Defendant acknowledges breaching the Agreement's alimony provision at least one month prior to Plaintiff's alleged breach of same.

Due to Defendant's admitted material breach of the alimony provision, Plaintiff was excused from performing further under that provision. *See Lake Mary Ltd. P'ship*, 145 N.C. App. at 537, 551 S.E.2d at 555. In turn, because Plaintiff was not required to renegotiate alimony due to Defendant's breach, Defendant's income and any reduction thereof were irrelevant. Thus, the trial court, as it noted in its order, was not required to make any findings of fact about Defendant's income. *See Powers*, 196 N.C. App. at 648, 676 S.E.2d at 95 (holding that a trial court need only make findings as to "the ultimate facts established by the evidence which are determinative of the questions involved in the action and essential to support the conclusions of law reached"). Thus, assuming ***arguendo*** that the court erred in the finding of fact that Defendant's income did not decrease by 20%, any such error had no impact on the trial

court's conclusions of law or order of specific performance. Accordingly, this argument is overruled.

II. Defendant's Ability to Comply

Defendant next argues that the trial court erred in concluding that he had the ability to comply with the alimony provisions in the Agreement. We disagree.

"Specific performance will not be decreed against a defendant who is incapable of complying with his contract." *Cavenaugh*, 317 N.C. at 657, 347 S.E.2d at 23. Thus, "when a defendant has offered evidence tending to show that he is unable to fulfill his obligations under a separation agreement or other contract the trial judge must make findings of fact concerning the defendant's ability to carry out the terms of the agreement before ordering specific performance." *Id.* However,

> [i]n finding that the defendant is able to perform a separation agreement, the trial court is not required to make a specific finding of the defendant's present ability to comply as that phrase is used in the context of civil contempt. In other words, the trial court is not required to find that the defendant possesses some amount of cash, or asset readily converted to cash prior to ordering specific performance.

Condellone v. Condellone, 129 N.C. App. 675, 683, 501 S.E.2d 690, 696 (1998) (citation and quotation marks omitted).

Here, as Defendant acknowledges, the trial court made the required findings about his ability to pay alimony under the Agreement, but asserts that the court "had doubts as to whether he actually had the present ability to comply with the Agreement and/or pay the arrears" and further, the court's findings "were based on errors, mistakes and/or assumptions about [Defendant's] actual income." As noted *supra*, the trial court was not required to make a finding of fact about Defendant's present ability to comply. *Id.* Further, a careful reading of Defendant's arguments about errors and mistakes by the trial court reveals that Defendant's only specific contentions are that the trial court failed to consider net losses which he contends exceeded short-term capital gains associated with inheritances he received following the death of his parents in 2007 and to consider his business expenses as well as his gross business receipts and sales. Thus, Defendant does not contend that any specific finding of fact is not supported by competent evidence. Rather, he appears to argue that (1) the trial court should have made additional findings of fact and (2) its conclusion of law that he had the ability to perform under the Agreement is not supported by the findings of fact that the court did make.

After careful review of the court's findings of fact and of the evidence in the record, we are not persuaded. The trial court found, *inter alia*, that: Defendant is the sole shareholder of his S corporation and controls all operations and assets thereof; Defendant's business had gross receipts and sales ranging between $433,148 and $670,530 during the years 2007 through 2009; Defendant's 2010 W-2 wages were $69,000; Defendant made a $30,000 contribution to his retirement fund in 2006, which had the result of reducing his taxable income for that year; the total equity of Defendant's business, of which he is the sole shareholder, has increased every year since 2006; and that in 2008, Defendant received in excess of $200,000 in assets in the form of an inheritance from his parents. These findings of fact are supported by competent evidence, including Defendant's own testimony and tax records, and in turn support the conclusion of law that Defendant had the ability to perform under the Agreement. This argument is overruled.

III. Modification of the Agreement

Defendant also argues that, because the order for specific performance did not recite the Agreement's renegotiation provision, the trial court erroneously modified the Agreement. We disagree.

We agree wholeheartedly with Defendant that a court's order for specific performance of terms of an unincorporated separation agreement cannot and "does not alter [the parties'] rights at law under the agreement." *Erhart v. Erhart*, 67 N.C. App. 189, 191, 312 S.E.2d 534, 535 (1984). However, nowhere in its order for specific performance does the trial court purport to modify the Agreement, and as Defendant notes in his brief, at trial the court specifically stated, "I can't modify that agreement." Thus, we are at a loss to understand why Defendant believes that the order modified the Agreement.

Defendant requests that we remand to the trial court with instructions "to include the renegotiation provision" in the order. To the extent Defendant believes the court purported to modify the Agreement by not reciting the entire contents of the Agreement in its order, he may rest assured that the order for specific performance could not and did not alter the parties' obligations or rights under the Agreement. *Id.* Defendant cites no authority (and we likewise know of none) holding that language from a separation agreement which is not quoted in an order for specific performance is modified, altered, or omitted from the agreement. This argument is overruled.

IV. Plaintiff's allegation and proof of compliance

Finally, Defendant argues that the trial court erred in granting Plaintiff's claim for specific performance because she failed to allege and prove that she had complied with the Agreement. We disagree.

"Specific performance of contracts is an equitable remedy of very ancient origin. . . . [A] decree of specific performance is designed to remedy a past breach of contract by fulfilling the legitimate expectations of a wronged promisee." 71 Am. Jur. 2d *Specific Performance* § 1 (2012). Thus,

> [t]he sole function of the . . . remedy . . . is to compel a party to do that which in good conscience he ought to do without court compulsion. The remedy rests in the sound discretion of the trial court[] and is conclusive on appeal absent a showing of a palpable abuse of discretion.

Harborgate Prop. Owners Ass'n, 145 N.C. App. at 295, 551 S.E.2d at 210 (citation omitted). Generally, "[s]pecific performance is available to a party only if that party has alleged and proven that he has performed his obligations under the contract[.]" *Cavenaugh*, 317 N.C. at 656-57, 347 S.E.2d at 22; *Whalehead Properties v. Coastland Corp.*, 299 N.C. 270, 283, 261 S.E.2d 899, 907-08 (1980). While the trial court found and concluded that Plaintiff had complied with her own obligations under the Agreement, our review of the record reveals that

Plaintiff did not allege her own compliance in her complaint. However, we also observe that Defendant never specifically sought to dismiss the complaint on the basis of Plaintiff's failure to ***allege*** compliance.

As to proof of Plaintiff's compliance with the alimony provision, at trial, Defendant argued that Plaintiff refused to renegotiate the amount of Defendant's alimony. As discussed *supra*, however, Defendant's breach of the alimony provision in September 2007 excused Plaintiff's subsequent performance thereunder. Thus, as of the date of Defendant's breach, Plaintiff was not required to comply with the alimony provision by entering renegotiations with Defendant. As to Plaintiff's compliance with the alimony provision prior to September 2007, her only obligation was to renegotiate *if* Defendant showed a 20% reduction in his income. All the evidence at trial was that, for reasons satisfactory to himself, Defendant chose instead to breach the provision in September 2007. In light of these circumstances, we see no "palpable abuse of discretion" by the trial court in ordering specific performance for Plaintiff. *Harborgate Prop. Owners Ass'n*, 145 N.C. App. at 295, 551 S.E.2d at 210 (citation and quotation marks omitted). Accordingly, the order for specific performance is

AFFIRMED.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).