NO. COA12-506
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

REBECCA CHAPMAN DIGH (now, Osborne),
Plaintiff

v. Burke County
No. 98 CVD 89

WILLIAM WALLACE DIGH,
Defendant

Appeal by Defendant from order entered 12 December 2011 by Judge Sherri W. Elliott in Burke County District Court. Heard in the Court of Appeals 9 October 2012.

C. Gary Triggs, P.A., by C. Gary Triggs, for Defendant.

LeCroy Law Firm, PLLC, by M. Alan LeCroy, for Plaintiff.

THIGPEN, Judge.

William Wallace Digh ("Defendant") appeals from an order denying his motion in the cause to modify, on the basis of mutual mistake, a domestic relations order designating a portion of his retirement benefits to Rebecca Chapman Osborne ("Plaintiff"). We conclude the trial court did not abuse its

discretion in denying Defendant's motion in the cause and affirm the trial court's order.

The evidence of record tends to show the following: Plaintiff and Defendant were married on 24 October 1976 and subsequently separated on 1 November 1995, after almost twenty years of marriage. Two children were born of the parties during their marriage, both of whom are now adults.

On 26 February 1998, a Consent Judgment ("1998 Judgment") was entered with respect to equitable distribution of the marital property. Defendant was a participant in the State of North Carolina Teachers' and State Employees' Retirement System, and a portion of his retirement benefits was subject to equitable distribution. In the 1998 Judgment, the trial court made the following findings of fact with regard to the portion of Defendant's retirement benefits designated to Plaintiff:

> (B) That the Plaintiff and Defendant have agreed that the Plaintiff shall be designated as the alternate payee of retirement benefits equal to fifty percent (50%) of the Defendant/Plan Participant's account which can be attributed to that amount *which accrued from the date of the parties' marriage (October 24, 1976) to the date of their separation (November 1, 1995)*, plus all interest accruing on the alternate payee's portion from the date of the parties' separation through the date the funds are disbursed to the alternate payee.

> (C) That the Plan Administrator is directed to make monthly payments directly to the Plaintiff of the amount which equals fifty percent (50%) of the Defendant's account, which can be attributed to that amount *which accrued from the date of the parties' marriage (October 24, 1976) to the date of their separation (November 1, 1995)*, plus all interest accruing on the alternate payee's portion from the date of the parties' separation through the date the funds are disbursed to the alternate payee.

(emphasis added). On the foregoing findings of fact, the trial court similarly concluded as a matter of law, the following:

> (B) That the Plaintiff . . . shall be designated as the alternate payee of retirement benefits equal to fifty percent (50%) of the Defendant/Plan Participant's account which can be attributed to that amount *which accrued from the date of the parties' marriage (October 24, 1976) to the date of their separation (November 1, 1995)*, plus all interest accruing on the alternate payee's portion from the date of the Parties' separation through the date the funds are disbursed to the alternate payee.
>
> (C) That the Plan Administrator is directed to make monthly payments directly to the Plaintiff of the amount which equals fifty percent (50%) of the Defendant's account, *which can be attributed to that amount which accrued from the date of the parties' marriage (October 24, 1976) to the date of their separation (November 1, 1995)*, plus all interest accruing on the alternate payee's portion from the date of the parties' separation through the date the funds are disbursed to the alternate payee.

Both Plaintiff and Defendant signed the 1998 Judgment, and the 1998 Judgment was notarized.

At the end of 2008, Defendant retired. In February 2009, Defendant received a letter from Plaintiff's counsel dated 5 February 2009. In the letter, counsel stated the following:

> Your ex-spouse, [Plaintiff], has retained this office to make sure she receives her share of retirement benefits as provided by the Judgment entered February 26, 2008[.] . . . Since your retirement at the end of 2008, [Plaintiff] was to begin receiving her share of your retirement when you did and I would calculate that to be about 28% of your retirement benefit. I do not know if you have received your first State retirement check but if it was not reduced by the amount [Plaintiff] is to receive, you will owe her that amount of each and every month that you receive the entire retirement amount rather than that amount reduced by [Plaintiff's] share. I have sent you this letter so you are aware that you need to pay this amount to [Plaintiff] if you are receiving the total benefit and that if it is not paid to her we will be forced to return to court.

On 16 February 2009, the trial court entered a Domestic Relations Order ("2009 Order") designating the following as Plaintiff's marital portion:

> 4. . . . The marital interest of the non-member ex-spouse in the, member's benefits payable by the Retirement System shall be calculated as follows: *fifty per cent (50%) of the amount determined by multiplying the member's total benefit by a fraction, the*

> *numerator of which shall be the total months of creditable service earned during the marriage, including creditable service purchased during the marriage, and the denominator of which shall be the member's total number of months of creditable service at the time of retirement or of a withdrawal of accumulated contributions*.
>
> 5. The formula set forth in Finding of Fact 4 shall be applied to all retirement benefits payable to the member of this his designated survivor(s) under any option contained in G.S. 135-5(g), as well as to any return of accumulated contributions made pursuant to G.S. 135-5(f) or G.S. 135-5(gl).

(emphasis added). Based on the foregoing and other findings of fact the trial court made the following conclusions of law:

> 5. The Retirement System shall distribute to the non-member ex-spouse her marital share of the member's benefits payable by the Retirement System, calculated pursuant to the provisions of Finding of Fact 4 and 5 of this order. In the event that a return of accumulated contributions becomes payable pursuant to G.S. 135-5(f) or G.S. 135-5(gl), then the Retirement System shall distribute to the nonmember ex-spouse her marital share of such a return of accumulated contributions, calculated pursuant to the provisions of Finding of Fact 5 of this order.
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> 6. The non-member ex-spouse shall receive her share of the member's retirement benefits at such time and in such payment form as said benefits are paid to the member.
>
> . . .

> 10. A copy of this Order shall be served upon the Administrator of the Teachers' and State Employees' Retirement System of North Carolina, and the Administrator shall determine, within a reasonable period of time, whether this Order can be administered by the Retirement System. This Order shall take effect immediately and shall remain in effect until further orders of this Court. Until this Order is accepted by the Retirement System, this Court retains jurisdiction to modify this Order as may be required or necessary.

On 9 July 2009, Defendant filed a motion in the cause ("2009 Motion") in which he petitioned the court to modify the 2009 Order. However, on 18 February 2011, Defendant voluntarily dismissed, without prejudice, his 2009 Motion.

On 17 May 2011, Defendant filed a second motion in the cause ("2011 Motion") in which he petitioned the court for a second time to modify the 2009 Order. Defendant again argued that "Defendant was lead to believe that a limited amount of his retirement would be transferred to the Plaintiff amounting [to] fifty percent (50%) of the retirement which was paid in between October 24, 1976, and November 1, 1995." Based on the foregoing, Defendant contended that "the division [of the retirement account] should have been on the active portion of the retirement accumulative during the marriage between the dates specified in the [1998 Judgment] and nothing more."

Defendant also argued that "Plaintiff failed to take reasonable steps at or near the time of the entry of the [c]ourt[']s Order [to] have the portion of the retirement transferred into her individual name for payment[.]" Defendant prayed that the court modify the 2009 Order, on the basis of a mutual mistake of fact, to reflect the agreement reach by the parties and memorialized in the 1998 Judgment.

On 12 December 2011, the trial court entered an order denying Defendant's 2011 Motion. From this order, Defendant appeals.

I. Modification and Mutual Mistake

In Defendant's sole argument on appeal, he contends the trial court erred by denying his 2011 Motion to modify the 2009 Order on the basis of mutual mistake. We find his argument without merit.

Although Defendant did not cite N.C. Gen. Stat. § 1A-1, Rule 60(b) (2011), or any other North Carolina Rule of Civil Procedure in his 2011 Motion, Defendant's motion to modify the 2009 Order was predicated on mutual mistake, which is, in substance, a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b). *See generally Harris v. Harris*, 162 N.C. App. 511, 514, 591 S.E.2d 560, 562 (2004) (reviewing the question of whether

there was a mutual mistake between the parties in the context of a consent judgment by employing the standard of review associated with Rule 60(b)). We review the trial court's denial of Defendant's 2011 Motion in accordance with the substance, not the form, of the motion. *See State ex rel. Davis v. Adams*, 153 N.C. App. 512, 514, 571 S.E.2d 238, 240 (2002) (stating that the "defendant did not refer to any statute in his motion pursuant to which his motion was being made[;] . . . [however,] moving papers that are mislabeled in other ways may be treated as motions under Rule 60(b) when relief would be proper under that rule") (internal citation and quotation marks omitted).

The trial court's ruling on a Rule 60(b) motion is "addressed to the sound discretion of the trial court and the court's ruling will not be disturbed without a showing that the court abused its discretion." *Danna v. Danna*, 88 N.C. App. 680, 686, 364 S.E.2d 694, 698, *disc. review denied*, 322 N.C. 479, 370 S.E.2d 221 (1988) (quotation omitted).

"A consent judgment is a contract of the parties that may be sanctioned and entered upon the records of a court[.]" *Chance v. Henderson*, 134 N.C. App. 657, 661, 518 S.E.2d 780, 782 (1999) (citation omitted). "The authority of a court to sign and enter a consent judgment depends upon the unqualified

consent of the parties thereto, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment." *Hill v. Hill*, 97 N.C. App. 499, 501, 389 S.E.2d 141, 142 (1990) (citation omitted). "[C]ourt ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case." *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983).

"Being a contract, [a consent judgment] cannot be . . . set aside except upon proper allegation and proof that consent was not in fact given or that it was obtained by fraud[1] or mutual mistake, the burden being upon the party attacking the judgment." *Blankenship v. Price*, 27 N.C. App. 20, 22, 217 S.E.2d 709, 710 (1975). "A contract may be avoided based on mutual mistake where the mistake is common to both parties and

[1]Defendant does not make an argument on appeal that either the 1998 Judgment or the 2009 Order was obtained by fraud. We must limit our review to the argument Defendant presents on appeal, which is whether there was a mutual mistake in the determination of the distribution of Defendant's retirement benefits to Plaintiff. *Beau Rivage Homeowners Ass'n v. Billy Earl, L.L.C.*, 163 N.C. App. 325, 327, 593 S.E.2d 120, 122 (2004) (stating that "[t]his Court must limit its review to the arguments and record presented on appeal").

because of it each has done what neither intended." *Stevenson v. Stevenson*, 100 N.C. App. 750, 752, 398 S.E.2d 334, 336 (1990). "In general, a unilateral mistake in the making of an agreement, of which the other party is ignorant and to which he in no way contributes, will not afford grounds for avoidance of the agreement." *Blankenship*, 27 N.C. App. at 22, 217 S.E.2d at 710.

Absent more specific language in the separation agreement to the contrary, the governing law in North Carolina regarding division of retirement benefits is N.C. Gen. Stat. § 50-20.1 (2011). Under N.C. Gen. Stat. § 50-20.1(d), an award of retirement benefits is determined by employing the following method:

> The award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested and nonvested pension, retirement, or deferred compensation benefit, to the total amount of time of employment. The award shall be based on the vested and nonvested accrued benefit, as provided by the plan or fund, calculated as of the date of separation, and shall not include contributions, years of service, or compensation which may accrue after the date of separation. The award shall include gains and losses on the prorated portion of the benefit vested at the date of separation.

N.C. Gen. Stat. § 50-20.1(d) (2011).

At the hearing on Defendant's motion, Plaintiff did not testify, and Defendant gave the following testimony on the issue of mutual mistake:

> Q. What was your understanding of what your wife was to get based on the order entered by Judge Brady?
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> A. Exactly what I had put in in my 15 years plus the interest, 50 percent is all she was supposed to receive.
>
> Q. And is that why you signed the agreement?
>
> A. Yes.
>
> Q. If you had understood at the time that she was to receive a life benefit of a percentage of your total life benefit, would you have signed that order?
>
> A. No, I would not.
>
> Q. If you had understood that prior to the time that you retired, would you have taken your money out?
>
> A. Yes.
>
> . . . .
>
> Q. Is it your belief that her share would have been the one-half of the $21,000 and change as shown in Exhibit A –
>
> A. Yes.
>
> Q. – or Exhibit 1, plus any accrued interest?
>
> A. And any interest, correct.

> . . . .
>
> Q. And you say your account balance at the time that you retired was 50 –
>
> A. About $60,000.
>
> Q. $60,OOO?
>
> A. Yes.
>
> THE COURT: His affidavit reflects it was $73,306. Not his affidavit – excuse me – Alice DeVane's.
>
> MR. BEYER: Okay. And, so, do you know what your life expectancy is at this time?
>
> A. Probably 77 or 80.
>
> Q. Okay. So if it's 77, for another 18 years, you will draw . . . more than $200,000 to go with the $43,000 you already received. So you'll get almost a quarter of a million dollars. And you're telling this court that you would have withdrawn that money from the account to spite yourself and your ex-wife?
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> A. You got that right.

The Defendant's testimony was the only testimonial evidence presented at the hearing. However, Ms. Alice S. DeVane, the "Educational Retirement Group – Team Lead of the Retirement Systems Division of the Department of State Treasurer," who had "access to the records of the Teachers' and State Employees'

Retirement System[,]" averred the following in an affidavit, which was submitted as evidence:

> (1) that [Defendant] became a member of the Teachers' and State Employees' Retirement System with his employment on May 14, 1980;
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> (2) that [Defendant] retired effective January 1, 2009 with total combined creditable service of 30.4999 years of service and total contributions and interest of $73,306.00;
>
> (3) that [Defendant] had 15.5000 years of service from May 14, 1980 to November 1, 1995 with contributions and interest in his account of $21,839.12 during that period;
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> (4) that [Defendant] chose the retirement allowance referred to as Option 6-3, Modified Joint and Survivor which entitles his beneficiary to receive a monthly payment for life in the same amount he received. However, if his beneficiary dies before he does, his monthly payments are increased to the amount payable under the maximum payment;
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> (5) that [Defendant] chose Anita C. Digh as the beneficiary for monthly survivorship benefit;
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> (6) That [Defendant]'s initial monthly benefit as of his retirement date was $1,729.39;
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> (7) that [Defendant]'s current gross monthly benefit is $1,729.39 less $439.44 being paid each month to ex[-]spouse, [Plaintiff];

> (8) that the General Statutes of the State of North Carolina do not prescribe a means of determining the present value or market value of a future benefit from a defined benefit plan, and the Retirement System does not have the ability to impute a present value of the future benefit of [Defendant] for this purpose, and
>
> (9) that the payroll reports are based on calendar months and the Teachers' and State Employees' Retirement System does not have the ability to prorate a member's monthly compensation.

Based on the foregoing evidence, the trial court made the following findings of fact and conclusions of law in open court:

> THE COURT: . . . I'm making findings of fact. And it is a finding of fact that North Carolina's Retirement System is a defined benefit plan, not a defined contribution plan. And pursuant to the defendant's affidavit from Alice DeVane, Educational Retirement Group Team Lead, Retirement systems Division, Department of State Treasurer, the general statues of the state of North Carolina do not prescribe a means of determining the present value or market value of a future benefit from a defined benefit plan. And the retirement system does not have the ability to impute a present value of the future benefit of [Defendant] for this purpose, period. Finding of fact. The defendant's motion in paragraph 3 indicates the defendant entered into the agreement with the firm belief that his entire plan would not be subject to division, nor would the beneficiary and any larger portion of the plan then amount to the set – amount set within the qualified

> domestic relations order. The defendant's entire plan was not subject to division. The only amount that the state divided which is in the qualified domestic relation board order, as well as Ms. DeVane's affidavit, is the portion earned during the term of the marriage, that there was no mistake of fact – mutual mistake of fact in entering into the qualified domestic relations order. There may have been a misunderstanding by the defendant, but it was not a mutual misunderstanding. Therefore defendant's motion to modify for improper calculations and motion to modify the prior order is denied.

Thereafter, the trial court entered a written order, memorializing the foregoing findings and conclusions. In the order, the trial court made the following pertinent findings of fact:

> 3. That the Plaintiff[']s counsel prepared a Qualified Domestic Relations Order which was filed with the Clerk of Superior Court for Burke County on Februruy 16, 2009 which established the Plaintiff[']s retirement benefit, also signed by Judge Brady, and the Plaintiff, as shown by the Affidavit of Alice S. DeVane, Educational Retirement Group - Team Lead of the Retirement Systems Division of the Department of State Treasurer, has received $439.44 per month, with the balance of the Defendant's initial monthly benefit of $1,729.39 being paid to the Defendant.
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> . . .
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> 5. That the Teachers' and State Employees' Retirement System, as shown by Ms. DeVane's Affidavit dated January 27, 2010, is a

defined benefit system and "the General Statutes of the State of North Carolina do not prescribe a means of determining the present value or market value of a future benefit from a defined benefit plan, and the Retirement System does not have the ability to impute a present value of the future benefit of [Defendant] for this purpose."

6. That the Defendant testified that if he knew the Plaintiff was to receive a monthly check for the duration of his life that he would have withdrawn all of the account balance from his retirement account rather than receive a monthly benefit for his lifetime.

7. That the Defendant's account balance at the time of his retirement with the State was $73,306.00 and he has received, since retiring, almost $43,200.00. That he is presently 59 years of age and testified he expects to live, statistically, another 18 years, during which time he would draw more than an additional $200,000.00 from his retirement account.

8. That at the payment rate of $1,729.39 per month, the Defendant's retirement account balance at the date of separation would be extinguished in 42.37 months.

9. That the Defendant contends the language of the Consent Order and the language of the Qualified Domestic Relations Order are not consistent. He further contends that paragraphs "B" or "C" of the Consent Order are significantly different than the provisions for payment in the Qualified Domestic Relations Order and that his payments should be pursuant to the Consent Order.

Based on the foregoing and additional findings of fact, the trial court made the following conclusions of law:

> 1. That the Court has jurisdiction over the parties and the subject matter and this matter is properly called for hearing with regards to those Motions filed by the Defendant on May 17, 2011.
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> 2. That the Qualified Domestic Relations Order entered by the Honorable Robert M. Brady in 2009 providing for the Plaintiff's share of the Defendant's retirement with the Teachers' and State Employees' Retirement System of North Carolina properly provided for the Plaintiff's marital interest to be paid by the Teachers' and State Employees' Retirement System of North Carolina, with the balance paid to the Defendant.
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> 3. That the Defendant's Motion in paragraph 3 indicates the Defendant entered into the agreement "with the firm belief his entire plan would not be subject to division, nor would the beneficiary and (sic) any larger portion of his plan [than] the amount set forth in the Qualified Domestic Relations Order."
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> 4. That the Defendant's entire plan was not subject to division. The only amount the State divided, which is in the Qualified Domestic Relations Order as well as Ms. DeVane's Affidavit, is the portion earned during the time of the marriage. That there was no mutual mistake of fact in entering into the Qualified Domestic Relations Order. There may have been a misunderstanding by the Defendant but it was not a mutual misunderstanding.

After thorough review of the record, we conclude the trial court did not abuse its discretion. As Plaintiff did not testify, and as no evidence was presented as to Plaintiff's understanding of the division of Defendant's retirement benefits in either the 1998 Judgment or the 2009 Order, we cannot say that the trial court abused its discretion in ruling that there was no mutual mistake, only a unilateral mistake. In this case, the record before the trial court was insufficient to support a conclusion that the "mistake [was] common to both parties and because of it each has done what neither intended." *Stevenson*, 100 N.C. App. at 752, 398 S.E.2d at 336. We affirm the order of the trial court denying Defendant's 2011 Motion.

AFFIRMED.

Judges McGEE and BRYANT concur.

Report per Rule 30(e).