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NO. COA13-522

NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2013

DELORES KAY GARNER BINDER,  
Plaintiff,

v.

Guilford County  
No. 04 CVD 4810

RUDOLPH LUDWIG BINDER, JR.,  
Defendant.

Appeal by defendant from judgment entered 13 February 2013 by Judge Wendy Enochs in Guilford County District Court. Heard in the Court of Appeals on 26 September 2013.

*Schiller & Schiller, PLLC, by Kathryn H. Schiller, Alexis Q. Lackey, and David G. Schiller, for plaintiff-appellee.*

*Benson Brown & Faucher, PLLC, by Drew Brown and Robert A. Benson, for defendant-appellant.*

HUNTER, Robert C., Judge.

Rudolph Ludwig Binder, Jr. ("defendant") appeals from the trial court's judgment of equitable distribution. On appeal, defendant argues the trial court erred by: (1) failing to make findings of fact as to whether defendant had sufficient assets to pay the new distributive award, and (2) erroneously

classifying funds withdrawn by defendant from Hicone Properties, LLC as divisible property. After careful review, we affirm the trial court's judgment.

### **Background**

Defendant and Delores Kay Garner Binder ("plaintiff") were married on 8 October 1983 in Greensboro, North Carolina. They separated on 24 November 2003. As of the date of the separation, defendant owned Hicone Properties, LLC ("Hicone"), with its sole asset being Hicone Shopping Center ("the shopping center") located in Greensboro, North Carolina. Both parties stipulated that Hicone was a marital asset and was subject to equitable distribution.

The parties were divorced by judgment entered on 24 February 2005. A hearing was held on the parties' claims for equitable distribution of marital and divisible property. The trial court entered its judgment on 24 March 2011, ordering defendant to pay plaintiff a total distributive award of \$3,248,120.49. After appeal by both parties, this Court issued an unpublished opinion which affirmed in part and vacated and remanded in part the trial court's 24 March 2011 order. See *Binder v. Binder*, No. COA11-1502, 2012 WL 3571067, at \*4 (N.C. App. Aug. 21, 2012) ("*Binder I*").

On remand, the trial court was to clarify which portion of the \$2,183,762.00 withdrawn by defendant from Hicone during the postseparation period was divisible property. The trial court entered new findings of fact that defendant actively managed the shopping center during the postseparation period and that \$304,014.00 was a reasonable fee for those efforts. Therefore, the trial court concluded that \$304,014.00 was defendant's separate property and the remaining \$1,879,748.00 was divisible property. The trial court ordered defendant to pay plaintiff a new total distributive award of \$4,187,994.49. Defendant filed timely notice of appeal.

### **Discussion**

#### **I. Findings of Fact as to Defendant's Assets**

Defendant first argues that the trial court erred by failing to make a finding that he has sufficient assets to pay the new distributive award. We disagree.

Defendant unsuccessfully argued this issue in *Binder I*. The *Binder I* Court held that the trial court did not fail to make factual findings as to defendant's ability to pay the distributive award because it actually made an explicit finding that defendant did have the ability to pay, included with an assessment of his various business interests, withdrawals, and

distributions. *Binder I*, at \*4. The trial court here made these same findings after remand. The longstanding rule in this state is that "once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal." *Prior v. Pruett*, 143 N.C. App. 612, 618, 550 S.E.2d 166, 170 (2001) (citation and quotation marks omitted). "Even unpublished opinions, which are normally without precedential value, or an erroneous decision by the Court of Appeals becomes the law of the case for that case only." *Id.* at 618, 550 S.E.2d at 171. Therefore, we are bound by the Court's holding on this issue in *Binder I*. As such, defendant's argument is overruled.

## **II. Distributions from Hicone**

Defendant also argues that the trial court erred by classifying a portion of the distributions from Hicone as divisible property. We disagree.

Our standard of review as to these issues is well-settled: [w]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings,

conclusions of law are reviewable *de novo*. We review the trial court's distribution of property for an abuse of discretion.

*Romulus v. Romulus*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 715 S.E.2d 308, 311 (2012). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Divisible property is defined in part as:

All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.

N.C. Gen. Stat. § 50-20(b)(4)(a) (2011). Thus, divisible property is also "[p]assive income from marital property received after the date of separation, including but not limited to, interest and dividends." N.C. Gen. Stat. § 50-20(b)(4)(c) (2011).

Upon remand from this Court's decision in *Binder I*, the trial court was to clarify what portion of the \$2,183,762.00 withdrawn by defendant from Hicone after separation was divisible property. Although entered under its findings of

fact, the trial court's classifications of these distributions are more appropriately deemed conclusions of law. *Hunt v. Hunt*, 112 N.C. App. 722, 729, 436 S.E.2d 856, 861 (1993) ("Because the classification of property in an equitable distribution proceeding requires the application of legal principles, this determination is most appropriately considered a conclusion of law."). The trial court concluded that \$304,014.00 of the \$2,183,762.00 withdrawn by defendant from Hicone after separation was not divisible property because it was collected as income from his active efforts in managing the shopping center and that the remaining \$1,879,748.00 was divisible property as a distribution of passive income earned by a marital asset.

Contrary to defendant's argument, there is competent evidence to support the trial court's finding that defendant was withdrawing funds, in part, as compensation for his efforts in managing the shopping center. Defendant's own concession that he was putting forth "active efforts" in managing the property, such as "managing tenants, cleaning toilets, in addition to other daily activities[]" supports the trial court's finding that defendant was entitled to receive reasonable compensation for these active efforts. Further, neither party challenges the

trial court's findings that: (1) witnesses testified that three to five percent of the rents received by the shopping center would be a customary management fee; (2) five percent would be reasonable compensation for defendant's efforts here; and (3) five percent of the rents received by the shopping center equaled \$304,014.00. These uncontested findings are binding on appeal, and we find that they support the trial court's conclusion that \$304,014.00 was not divisible property pursuant to section 50-20(b)(4)(c) because it was active, not passive, income. See N.C. Gen. Stat. § 50-20(b)(4)(c) (2011) (divisible property includes "passive income" generated by a marital asset) (emphasis added).

As to the remaining \$1,879,748.00 that defendant withdrew after separation, neither party contests the trial court's findings of fact that evidence was presented which tended to show: (1) not all appreciation generated by an owner-operated business is the result of the owner's active efforts, and (2) the amount defendant withdrew from Hicone was not correlated to the amount of time he spent working at the shopping center. The trial court also made an uncontested finding of fact that the remaining \$1,879,748.00 withdrawn by defendant was a distribution of passive income earned by a marital asset.

Therefore, we hold that these findings of fact, as uncontested, are binding on appeal and support the trial court's conclusion that the \$1,879,748.00 withdrawn by defendant was divisible property. See N.C. Gen. Stat. § 50-20(b)(4)(c) (2011) (divisible property includes "passive income from marital property received after the date of separation"). Accordingly, we affirm the trial court's judgment as to this classification.

**Conclusion**

For the reasons stated above, we affirm the trial court's judgment.

AFFIRMED.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).