IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-630

Filed: 21 April 2015

Catawba County, No. 04-CVD-2494

JULIE ERIKSSON KIELL, Plaintiff,

v.

CHARLES STEVEN KIELL, Defendant.

Appeal by defendant and cross-appeal by plaintiff from order entered 3 January 2014 by Judge Mark L. Killian in Catawba County District Court. Heard in the Court of Appeals 5 November 2014.

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

Crowe & Davis, P.A., by H. Kent Crowe, for defendant.

DAVIS, Judge.

Charles Steven Kiell ("Defendant") appeals and Julie Eriksson Kiell ("Plaintiff") cross-appeals from the trial court's 3 January 2014 order confirming the arbitrator's judgment of equitable distribution on remand as the final judgment, ordering Defendant to pay $22,494.00 to Plaintiff, and awarding Plaintiff $2,187.50 in attorneys' fees. On appeal, Defendant contends that the trial court erred in (1) rejecting an alleged stipulation between the parties concerning two life insurance policies; and (2) awarding attorneys' fees to Plaintiff. In her cross-appeal, Plaintiff

asserts that the trial court improperly calculated the passive appreciation of the two life insurance policies at issue. After careful review, we affirm in part, vacate in part, and remand for further proceedings.

Factual Background

Plaintiff and Defendant were married on 20 June 1993 and separated on 28 August 2003. No children were born of the parties' marriage. Following their separation, Plaintiff filed a complaint in Catawba County District Court seeking divorce from bed and board, post-separation support, equitable distribution, alimony, and attorneys' fees in August 2004. Defendant moved to compel arbitration under N.C. Gen. Stat. § 50-43 pursuant to the arbitration provision of a collaborative law agreement the parties had entered into in August 2003. Plaintiff contended that the collaborative law agreement was void due to fraud or, alternatively, that Defendant's breach of the agreement entitled her to rescission. She also asserted that she was entitled to a jury trial on her fraudulent inducement and breach of contract claims.

This matter is before the Court for the third time. *See Kiell v. Kiell*, 179 N.C. App. 396, 633 S.E.2d 827 (2006) (*"Kiell I"); Kiell v. Kiell*, 221 N.C. App. 669, 729 S.E.2d 127 (2012) (unpublished) ("*Kiell II").* In *Kiell I*, we held that Plaintiff was not entitled to a jury trial on her fraud and breach of contract claims and "without expressing any opinion on the enforceability or scope of the Collaborative Agreement's arbitration provisions" remanded to the trial court for proceedings in

accordance with the North Carolina Uniform Arbitration Act and the North Carolina Family Law Arbitration Act. *Kiell I*, 179 N.C. App. at 401, 633 S.E.2d at 830. The parties agreed to arbitration on remand, and arbitration hearings were held before W. Wallace Respess, Jr. ("the arbitrator") between April and October of 2008. Following several initial orders concerning alimony and equitable distribution, the arbitrator issued an amended order of alimony on 1 September 2009 and a second amended judgment of equitable distribution on 2 February 2011. The trial court confirmed the arbitrator's amended order of alimony and second amended judgment of equitable distribution as final judgments in the matter by order entered 5 July 2011. Plaintiff appealed from that order, asserting that "the arbitrator committed a number of errors of law and errors of calculation in determining the equitable distribution award and that the trial court erred in confirming the award." *Kiell II*, 221 N.C. App. 669, 729 S.E.2d 127, slip op. at 4.

On appeal, we affirmed the bulk of the trial court's order confirming the arbitrator's amended order of alimony and second amended judgment of equitable distribution but reversed the portion of the order concerning the valuation of two Northwestern Mutual Life Insurance policies ("the life insurance policies") and remanded so that the "evident miscalculation of the divisible value of the policies" could be corrected. *Id.* at 12. Pursuant to our opinion in *Kiell II*, the trial court remanded the matter to the arbitrator, who entered the Judgment of Equitable

Distribution on Remand on 29 April 2013, finding that the total divisible value of the life insurance policies was $44,988.00 and ordering Defendant to pay Plaintiff $22,494.00. The trial court entered an order confirming the arbitrator's Judgment of Equitable Distribution on Remand on 3 January 2014. Defendant timely appealed, and Plaintiff timely cross-appealed from the 3 January 2014 order.

Analysis

I. Defendant's Appeal

A. Stipulation

Defendant's first argument on appeal is that the trial court erred by disregarding an alleged stipulation by the parties concerning the life insurance policies. He contends that "the official transcript reflects that Plaintiff apprised the Arbitrator that the insurance policies were the property of the Defendant without reservation."

Initially, we note that the "official transcript" Defendant refers to is attached as an appendix to his brief and is not included within the record on appeal. It is well established that this Court's review is "limited to the record on appeal, verbatim transcripts *constituted in accordance with Rule 9* [of the North Carolina Rules of Appellate Procedure], and any other items filed with the record in accordance with Rule 9(c) and Rule 9(d)." *Kerr v. Long*, 189 N.C. App. 331, 334, 657 S.E.2d 920, 922 (emphasis added) (concluding that this Court was unable to review contents of

witness's deposition testimony when testimony was quoted in appellant's brief but not included within record on appeal in accordance with Rule 9), *cert. denied*, 362 N.C. 682, 670 S.E.2d 564 (2008).

As we have previously explained, this Court "can judicially know only what appears of record. . . . Matters discussed in a brief but not found in the record will not be considered by this Court." *N.C. Concrete Finishers, Inc. v. N.C. Farm Bureau Mut. Ins. Co.*, 202 N.C. App. 334, 337, 688 S.E.2d 534, 536 (2010) (citation omitted). Because the transcript at issue was not included in the record in accordance with Rule 9, we are precluded from considering it. *See id.* at 337-38, 688 S.E.2d at 536 (holding that "documents attached as appendices to [appellant's] brief" and not as part of record on appeal would not be considered by this Court in its review of trial court's order).

However, evidence within the record on appeal — that is, evidence properly before this Court — indicates that both life insurance policies were acquired during the course of the parties' marriage and, therefore, were classified as marital property. Thus, any alleged agreement before the arbitrator that the insurance policies themselves be distributed to Defendant would not negate the fact that the policies were marital property and whatever passive appreciation that had accumulated between the date of the parties' separation and the date of distribution would constitute divisible property. *See* N.C. Gen. Stat. § 50-20(b) (2013) (explaining that

marital property "means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties" and that appreciation of marital property that occurs "after the date of separation and prior to the date of distribution" and is not "the result of postseparation actions or activities of a spouse" is divisible property); *see also* N.C. Gen. Stat. § 50-20(a) (explaining that only marital and divisible property are subject to distribution in equitable distribution proceeding). Accordingly, Defendant's argument is without merit and is overruled.[1]

B. Attorneys' Fees

Defendant next argues that the trial court erred in awarding Plaintiff attorneys' fees because it "failed to make the necessary findings of fact to support such an award." We disagree.

"This Court has held that the contempt power of the district court includes the authority to award attorney fees as a condition of purging contempt for failure to comply with an order." *Middleton v. Middleton*, 159 N.C. App. 224, 227, 583 S.E.2d 48, 49-50 (2003). Here, the trial court determined that Plaintiff was entitled to a partial award of attorneys' fees from Defendant based on Defendant's failure to timely

[1] Defendant also makes a brief, related argument that the trial court lacked subject matter jurisdiction to distribute a portion of the proceeds of the life insurance policies to Plaintiff. Defendant contends that the trial court acted in excess of its jurisdiction by "disgorg[ing] Defendant of . . . property" that the parties stipulated was his property. For the same reasons as explained above, we reject this argument.

comply with the trial court's alimony order. The trial court noted that following the entry of the order confirming the arbitrator's alimony award on 5 July 2011, Plaintiff filed a motion to show cause seeking to hold Defendant in contempt for failing to comply with the alimony order and that a show cause order was entered on 2 November 2011. The trial court further found that (1) Defendant tendered a check to Plaintiff in the amount of $26,037.64 in satisfaction of his alimony obligation on 14 June 2013; (2) since the entry of the alimony order in 2011, Defendant has had the means and ability to comply with the alimony order but failed to do so until 14 June 2013; (3) Defendant's failure to timely comply with the alimony order was "willful and without just cause or excuse, and therefore constitutes contempt of this Court"; and (4) accordingly, "Plaintiff is entitled to recover the portion of her attorney's fees incurred in preparation and filing of the Motion to Show Cause for non-payment of alimony and in the hearings related thereto."

We conclude that these findings are sufficient to support an award of attorneys' fees to Plaintiff based on Defendant's contempt. *See Hartsell v. Hartsell*, 99 N.C. App. 380, 390, 393 S.E.2d 570, 576 (1990) ("[T]he contempt power of the district court does include the authority to award attorney's fees as a condition of purging contempt for failure to comply with . . . [an] order."), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).

The trial court found that an award of $2,187.50 was a reasonable amount of attorneys' fees for the 12.5 hours Plaintiff's counsel expended "in the preparation, filing, and litigation of the Show Cause Motion for Contempt for non-payment of alimony." The trial court noted that it was relying upon Plaintiff's counsel's affidavit of attorneys' fees, which it incorporated into the order by reference. Unfortunately, the affidavit of attorneys' fees referenced by the trial court is not included in the record on appeal. However, as Defendant has failed to challenge the reasonableness of the specific amount of fees awarded and we have determined that there was, in fact, a legal basis for an award of attorneys' fees given Defendant's failure to timely comply with the trial court's order, we decline to assume that the fee awarded was improper. *See State v. Kinlock*, 152 N.C. App. 84, 89, 566 S.E.2d 738, 741 (2002) ("An appellate court is not required to, and should not, assume error by the trial court when none appears on the record before the appellate court." (citation, quotation marks, and brackets omitted)), *aff'd per curiam*, 357 N.C. 48, 577 S.E.2d 620 (2003); *Miller v. Miller*, 92 N.C. App. 351, 353, 374 S.E.2d 467, 468 (1988) ("It is the appellant's responsibility to make sure that the record on appeal is complete and in proper form."). As such, Defendant's argument on this issue is likewise overruled.

II. Plaintiff's Cross-Appeal

In her cross-appeal, Plaintiff asserts that the arbitrator utilized arbitrary dates when calculating the passive appreciation of the life insurance policies in the

Judgment of Equitable Distribution on Remand and that, consequently, the trial court erred in confirming the arbitrator's award as the final judgment. We agree.

"Judicial review of an arbitration award is confined to determination of whether there exists one of the specific grounds for vacation of an award under the arbitration statute." *Semon v. Semon*, 161 N.C. App. 137, 141, 587 S.E.2d 460, 463 (2003) (citation, quotation marks, and brackets omitted). Pursuant to the Family Law Arbitration Act, an arbitration award may be modified or corrected under several circumstances, including when "[t]here is an evident miscalculation of figures . . . in the award." N.C. Gen. Stat. § 50-55(a)(1) (2013). Indeed, in *Kiell II*, we remanded so that the miscalculation concerning this very issue could be corrected. *See Kiell II*, 221 N.C. App. 669, 729 S.E.2d 127, slip op. at 12 ("The arbitrator found that there was no passive appreciation post-separation; any increase in the value of the policies after the date of separation was due solely to defendant's payment of premiums. The record shows that this was a miscalculation. . . . of the divisible value of the policies which must be corrected on remand.").

In the present appeal, we are once again compelled to conclude that the arbitrator miscalculated the value of the divisible portion of the life insurance policies. "'Passive appreciation' refers to enhancement of the value of property due solely to inflation, changing economic conditions, or market forces, or other such circumstances beyond the control of either spouse." *Brackney v. Brackney*, 199 N.C.

App. 375, 385-86, 682 S.E.2d 401, 408 (2009) (brackets omitted). Pursuant to N.C. Gen. Stat. § 50-20(b)(4)(a), "[a]ll 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" which is not "the result of postseparation actions or activities of a spouse" (and is therefore passive) is divisible property. Our General Statutes make clear that in equitable distribution proceedings, the valuation of divisible property is assessed as of the date of distribution. *See* N.C. Gen. Stat. § 50-21(b) (2013) (explaining that divisible property "shall be valued as of the date of distribution").

Here, pursuant to the mandate of our prior opinion in *Kiell II*, the arbitrator considered the passive appreciation of the two life insurance policies in order to calculate the divisible value of those policies. In calculating their divisible value, the arbitrator made the following pertinent findings of fact:

> 8. As of the date of separation the Northwestern Mutual Life Insurance Policy number 167 had a cash value of $65,935.00. From Plaintiff's Exhibit Number 22, Policy Number 167 had a cash value as of December 31, 2008, of $126,395.00. There is a difference in cash value of $60,460.00. During the period from the date of separation on August 28, 2003, through December 31, 2008, the Defendant paid premiums of $35,386.00. The passive appreciation for policy number 167 was therefore $25,074.00.
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> 9. With regard to Northwestern Mutual Life Insurance Policy number 570, on the date of separation policy 570 had a cash value of $27,407.00. Pursuant to Plaintiff's Exhibit

> Number 22, policy number 570 had a cash value as of April 21, 2008, of $69,721.00 which resulted in growth of cash value of $42,314.00. During the period from the date of separation through April 21, 2008, the Defendant paid premiums of $22,400.00 resulting in passive appreciation of $19,914.00.
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> 10. The total passive appreciation of both policies was $44,988.00.
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> 11. In order to comply with the mandate of the Court of Appeals . . . , the Defendant must pay to the Plaintiff the sum of $22,494.00.

The trial court utilized these same figures in its order confirming the arbitrator's Judgment of Equitable Distribution on Remand and ordering Defendant to pay Plaintiff $22,494.00.

It is clear from the above-quoted findings that the arbitrator did not value these policies as of the date of distribution as required by N.C. Gen. Stat. § 50-21(b). Although the divisible portion of the life insurance policies had not been distributed to the parties by the arbitrator until his 29 April 2013 order, the arbitrator nevertheless used dates from 2008 — approximately five years before the actual distribution — to calculate the passive appreciation of the policies. Moreover, the record demonstrates that there was, in fact, revised and current information concerning the values of the life insurance policies before the arbitrator on remand.

Accordingly, it was error and an evident miscalculation of the divisible value of the policies for the arbitrator to base the computation of passive appreciation on

values taken five years before the actual date of distribution. *See* 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 12.57(b), at 191 (5th ed. 2002) ("The date of valuation for divisible property . . . is the date of distribution, and the evidence of value may extend to the date of trial and any post-trial hearings that may precede the actual distribution."). As such, we must remand this action once more so that the divisible portion of the life insurance policies may be properly valued and distributed to the parties. *See Fox v. Fox*, 114 N.C. App. 125, 133, 441 S.E.2d 613, 618 (1994) (explaining that when portion of equitable distribution judgment is vacated, trial court is obligated to find new date of distribution values for property at issue).

Conclusion

For the reasons stated above, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges ELMORE and GEER concur.

Report per Rule 30(e).