IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-57

Filed: 1 August 2017

Catawba County, No. 10 CvD 3703

JOHN JOSEPH WOLFE, Plaintiff,

v.

CAROL FAZIO WOLFE, Defendant.

Appeal by Defendant from an equitable distribution judgment entered 16 March 2016 by Judge Robert A. Mullinax, Jr. in Catawba County District Court. Heard in the Court of Appeals 19 September 2016.

LeCroy Law Firm, PLLC, by M. Alan LeCroy, for Defendant-Appellant.

Jonathan McGirt and Sandlin Family Law Group, by Deborah Sandlin, for Plaintiff-Appellee.

INMAN, Judge.

Defendant-Appellant Carol Fazio Wolfe ("Ms. Wolfe") appeals from the trial court's equitable distribution judgment. Specifically, Ms. Wolfe argues the trial court erred by (1) failing to apply New York state law in the equitable distribution judgment; (2) failing to follow the parties' agreement in the distribution of certain real property; and (3) imposing an unequal distribution of the parties' assets. After

careful review, we vacate the equitable distribution judgment and remand for a new trial consistent with this opinion.

I. Factual and Procedural History

On 8 May 1998, Ms. Wolfe and Plaintiff-Appellee John Joseph Wolfe ("Mr. Wolfe") executed a prenuptial agreement (the "Agreement"). The Agreement defines certain property as "separate property" under its own terms, and further provides:

> property defined as separate property under the laws of the State of New York and under the laws of any state in which the parties reside or may reside, to the extent that such definitions shall not conflict with the provisions hereof, shall also be deemed separate property for the purposes of this agreement.

The Agreement defines "marital property" as property jointly titled in the name of the parties, purchased from a joint account, or acquired in exchange for marital property, and any appreciation in value or income derived therefrom. It provides that marital property shall be "equitably divided between the parties according to law and each party shall retain his or her separate property."

The Agreement also includes a choice of law provision, which reads, in relevant part:

> [T]he provisions of this Agreement and the interpretation thereof shall be construed and governed *solely* by the internal law of the State of New York . . . , notwithstanding the fact that the parties may from time to time reside elsewhere. Specifically, because the parties may, from time to time after their wedding, reside in a community property state, they affirmatively state after conferring with counsel

> that they are waiving *all community property and other rights provided by the laws of any other state, jurisdiction or country* in favor of the rights afforded them under this Agreement as construed under New York Law.

(emphasis added).

Despite terms requiring the application of New York law and that marital property be "equitably divided . . . according to law," the Agreement provides that the parties "elect to '*opt out*' of . . . [New York] Equitable Distribution Law," but that that "[e]ach party specifically waives any right or rights either may have against the other for the equitable distribution of marital property except as may be otherwise specifically set forth in this agreement."

The parties married in New York state following the execution of the Agreement. After purchasing two homes, the parties amended the Agreement to address the specific disposition of these properties and any profits or proceeds derived therefrom in the event of their sale during the marriage or upon the death of one of the parties. The amendment explicitly states that any unmodified provisions of the Agreement are still in effect, and that in the event of a conflict the amendment controls.

After moving to North Carolina, the parties separated on 16 November 2010. On 18 November 2010, Mr. Wolfe filed a complaint for equitable distribution, child

custody, and child support.[1] Mr. Wolfe thereafter filed a motion for summary judgment on 1 December 2011. At the summary judgment hearing, Ms. Wolfe submitted a brief and New York case law concerning the waiver of equitable distribution by way of marital agreements under that state's law and its applicability to the Agreement in this case. The court entered partial summary judgment in favor of Mr. Wolfe on 2 March 2012, concluding that "[t]he [A]greement provides clear and specific terms by which the parties are bound[,]" and making separate and marital property classifications as to certain specific property as provided in the Agreement, while leaving open for trial the classification of other property subject to the court's jurisdiction.

On 16 August 2012, a divorce judgment was entered. Following several pre-trial motions and orders, this matter was brought to trial on 27 October 2014. At trial, counsel for Ms. Wolfe did not submit any case law or argument concerning the applicability of New York law.

The trial court entered its equitable distribution judgment on 16 March 2015; the judgment applied North Carolina's equitable distribution statute in arriving at its equitable distribution award. Ms. Wolfe thereafter filed Rule 59 and 60 motions on 26 March 2015, requesting a new trial and relief from the equitable distribution judgment. The trial court denied these motions but acknowledged in its order that

[1] Mr. Wolfe filed an Amendment to the Complaint on 1 December 2010, acknowledging the Agreement.

the Agreement was "valid, enforceable and clear[,]" and that it had considered the New York law offered in the summary judgment hearing in issuing its equitable distribution award.

Ms. Wolfe appeals the equitable distribution award on several grounds, all of which require us to interpret the terms of the Agreement and apply its provisions. Specifically, Ms. Wolfe argues that the Agreement required the trial court to apply New York equitable distribution law to the division of marital property, which both parties acknowledge the trial court did not do.

Mr. Wolfe argues that the Agreement prohibits the application of New York equitable distribution law, so that the trial court properly applied North Carolina law in its equitable distribution judgment.

We conclude that the Agreement's New York choice of law provision governs its interpretation, so that we must apply New York's principles of contract construction in determining the existence of and resolving any inconsistencies or ambiguities. Applying those principles, we agree with Ms. Wolfe's interpretation of the Agreement and her argument that the trial court erred in applying North Carolina equitable distribution law. Accordingly, we vacate the trial court's judgment and remand for a new trial consistent with this opinion.

II. Analysis

Issues of contract interpretation are reviewed *de novo*. *Price & Price Mech. of N.C., Inc. v. Miken Corp.*, 191 N.C. App. 177, 179, 661 S.E.2d 775, 777 (2008). We apply that standard to three issues requiring resolution on appeal: (1) whether the Agreement is governed by New York law; (2) if so, how does New York law interpret the Agreement; and (3) whether the trial court's interpretation and application of the Agreement in its equitable distribution judgment comports with that law.

The answer to the first issue is clear: New York law plainly applies to the interpretation of the Agreement. Unless it lacks a reasonable basis or is contrary to North Carolina law or public policy, an unchallenged choice of law provision in a contract requires the court to apply the chosen state's laws irrespective of whether the parties "petitioned the trial court to apply [the chosen state's] law . . . ." *Federated Fin. Corp. of Am. v. Jenkins*, 215 N.C. App. 330, 333, 719 S.E.2d 48, 51 (2011). This principle applies to valid marital agreements that include a New York choice of law provision. *Behr v. Behr*, 46 N.C. App. 694, 696, 266 S.E.2d 393, 395 (1980).[2] Here, the Agreement not only contains a choice of law provision that calls for application of New York law, it also explicitly waives the application of any other state's laws:

> [The] Agreement and the interpretation thereof shall be

[2] Mr. Wolfe argues that because the parties filed "Equitable Distribution Affidavits expressly acknowledg[ing] North Carolina equitable distribution jurisdiction . . . [,]" Ms. Wolfe cannot seek application of New York's equitable distribution laws. However, a North Carolina court with jurisdiction over an equitable distribution action involving the interpretation and application of a marital agreement containing a choice of law provision does not invalidate such a provision. *See Franzen v. Franzen*, 135 N.C. App. 369, 370, 520 S.E.2d 74, 75 (1999) (interpreting, in a North Carolina equitable distribution action, an antenuptial agreement with an Ohio choice of law provision under that state's law).

> construed and *governed solely by the internal law of the State of New York* . . . . Specifically, . . . [the parties] affirmatively state after conferring with counsel that they are waiving all community property *and other rights provided by the laws of any other state, jurisdiction or country in favor of the rights afforded them under this Agreement as construed under New York Law*.

(emphasis added).

Thus, we look to New York law to reconcile the apparent conflict contained in the Agreement waiving New York's equitable distribution law but also requiring marital property to be "equitably divided . . . according to law."

In resolving this issue, we acknowledge that the North Carolina Supreme Court in *Leonard v. Johns-Manville Sales Corp.*, 309 N.C. 91, 305 S.E.2d 528 (1983), held that "[t]he party seeking to have the law of a foreign jurisdiction apply has the burden of bringing such law to the attention of the court." 309 N.C. at 95, 305 S.E.2d at 531. Mr. Wolfe contends that because Ms. Wolfe failed to present any evidence as to New York equitable distribution law at trial, *Leonard* precludes us from finding any error in the trial court's interpretation of the Agreement. We disagree, in part because of a key distinction between the legal issue in *Leonard* and in this case.

In *Leonard*, the foreign state had no constitutional, statutory, or case law addressing the legal issue in dispute, and the Supreme Court rightly acknowledged that "the courts of this state will not speculate what law such [a foreign] jurisdiction might adopt and will apply the law of North Carolina." 309 N.C. at 95, 305 S.E.2d at

531. Here, New York has ample law concerning the interpretation of contracts and the resolution of contractual inconsistencies and ambiguities.

Also, N.C. Gen. Stat. § 8-4 requires that "[w]hen any question shall arise as to the law of . . . any other state or territory of the United States . . . the court *shall* take notice of such law *in the same manner as if the question arose under the law of this State*." (emphasis added). This statute applies in equal measure to cases brought before this Court. *See La Grenade v. Gordon*, 60 N.C. App. 650, 655, 299 S.E.2d 809, 813 (1983) (noting in an appeal concerning the validity of a contract that "[w]hen our courts are confronted with cases involving questions of the law of foreign [jurisdictions], G.S. 8-4 requires that *we*, *sua sponte*, take notice of such law.") (emphasis added). Thus, as Ms. Wolfe has raised the issue of New York law as applied to the Agreement and equitable distribution in this case, we are required to take notice of New York law and apply it. A party's actions or inactions at trial cannot serve as a waiver relieving us of N.C. Gen. Stat. § 8-4's statutory command. *See, e.g., Sugg v. Baker*, 258 N.C. 333, 335-36, 128 S.E.2d 595, 597 (1962) (noting that a waiver by the parties "does not relieve the court of the [statutory] duty to declare and explain the law arising on the evidence of the respective parties [under the now-repealed N.C. Gen. Stat. § 1-180].").

Our analysis of the second issue—how New York law applies to interpret the Agreement—begins with a review of relevant New York law and that state's

principles of contract interpretation. New York law provides that "[a]s with all contracts, prenuptial agreements are construed in accord with the parties' intent, which is generally gleaned from what is expressed in their writing." *Van Kipnis v. Van Kipnis*, 11 N.Y.3d 573, 577, 900 N.E.2d 977, 980, 872 N.Y.S.2d 426, 429 (2008). "When determining the intent of the parties to a prenuptial agreement the court will apply the principles of contract interpretation." *Bennett v. Bennett*, 103 A.D.3d 825, 826, 960 N.Y.S.2d 179, 180 (2013) (citations omitted).

"The proper inquiry in determining whether a contract is ambiguous is whether the agreement on its face is reasonably susceptible of more than one interpretation." *Arrow Commc'n Labs., Inc. v. Pico Prods., Inc.*, 206 A.D.2d 922, 922-23, 615 N.Y.S.2d 187, 188 (1994) (internal quotations omitted); *see also Tallo v. Tallo*, 120 A.D.3d 945, 946, 991 N.Y.S.2d 500, 501 (2014) (applying this principle to a matrimonial settlement). Ambiguity may also exist where contractual provisions are inconsistent, *Collins v. Harrison-Bode*, 303 F.3d 429, 433-34 (2d Cir. 2002), or the contract in its totality fails to disclose the parties' intent. *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 997 N.Y.S.2d 339, 21 N.E.3d 1000 (2014). "Ambiguity is determined within the four corners of the document[,]" and "language should not be read in isolation because the contract must be considered as a whole." *Brad H. v. City of New York*, 17 N.Y.3d 180, 185-86, 951 N.E.2d 743, 746, 928 N.Y.S.2d 221, 224 (2011) (citations omitted). However, "[c]ourts should not strain to find contractual

ambiguities where they do not exist." *Diaz v. Lexington Exclusive Corp.*, 59 A.D.3d 341, 342, 874 N.Y.S.2d 77, 78 (2009). When it comes to perceived inconsistencies in contractual language, "[a] party cannot create ambiguity in a contract by urging a conflict between two provisions that can reasonably be reconciled by the court." 28 N.Y. Prac., Contract Law § 9:25 (2017) (citing *G & B Photography, Inc. v. Greenberg*, 209 A.D.2d 579, 581, 619 N.Y.S.2d 294, 296 (1994)). In short, there is no ambiguity for inconsistency "where two seemingly conflicting contract provisions reasonably can be reconciled, [as] a court is *required* to do so and to give both effect." *Moulton Paving, LLC v. Town of Poughkeepsie*, 98 A.D.3d 1009, 1012, 950 N.Y.S.2d 762, 766 (2012) (internal citations and quotations omitted) (emphasis in original).

Because ambiguity lies where more than one reasonable interpretation of a contract exists, *Arrow Commc'n*, 206 A.D.2d at 922-23, 615 N.Y.S.2d at 188, we turn to more specific, fundamental tenets of New York contract construction to identify any permitted interpretations of the Agreement. That state's courts "have long and consistently ruled against any construction which would render a contractual provision meaningless or without force or effect." *Ronnen v. Ajax Elec. Motor Corp.*, 88 N.Y.2d 582, 589, 671 N.E.2d 534, 536, 648 N.Y.S.2d 422, 424 (1996) (citations omitted). "The rules of construction of contracts require us to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect." *Muzak Corp. v. Hotel Taft Corp.*,

1 N.Y.2d 42, 46, 133 N.E.2d 688, 690, 150 N.Y.S.2d 171, 174 (1956). "When interpreting a contract, such as a prenuptial agreement, the court should arrive at a construction that will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized." *Noach v. Noach*, 53 A.D.3d 602, 603, 861 N.Y.S.2d 946, 947 (2008) (internal citations and quotations omitted).

Because ambiguity may also exist where there are seemingly inconsistent contractual provisions, *Collins*, 303 F.3d at 433–34, and we are required by New York law to reconcile those provisions if possible, *Moulton Paving,* 98 A.D.3d at 1012, 950 N.Y.S.2d at 766, we must also look to that state's decisions for direction in resolving any conflicting language. When provisions within a contract appear to conflict, New York applies the principle that "a contract which confers certain rights or benefits in one clause will not be construed in other provisions completely to undermine those rights or benefits." *Ronnen*, 88 N.Y.2d at 590, 671 N.E.2d at 537, 648 N.Y.S.2d at 425 (citations omitted). New York's courts have "likewise noted that 'inconsistency provisions'—*i.e.* those that dictate which of two contract provisions should prevail in the event of an inconsistency—'are frequently enforced by courts.' " *Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc.,* 112 A.D.3d 78, 83, 973 N.Y.S.2d 187, 191 (2013) (quoting *Bank of N.Y. Mellon Trust Co., N.A. v. Merrill Lynch Capital Servs. Inc.*, 99 A.D.3d 626, 628, 953 N.Y.S.2d 36 (2012)). "It is well

settled that trumping language such as a 'notwithstanding' provision 'controls over any contrary language' in a contract." *Warberg*, 112 A.D.3d at 83, 973 N.Y.S.2d at 191 (quoting *Handlebar, Inc. v. Utica First Ins. Co.*, 290 A.D.2d 633, 635, 735 N.Y.S.2d 249 (2002)).

In applying "trumping language," New York abides by the mandate that "the effect of a 'notwithstanding' clause will prevail 'even if other provisions of the contract[ ] might seem to require . . . a [conflicting] result.' " *Warberg*, 112 A.D.3d at 83, 973 N.Y.S.2d at 192 (quoting *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18-19, 113 S.Ct. 1898 (1993)).

The Agreement between Mr. and Ms. Wolfe includes the following "trumping language:" "The parties specifically . . . elect to 'opt out' of the provisions of the [New York] Equitable Distribution Law. Each party specifically waives any right or rights either may have against the other for the equitable distribution of marital property *except as may be otherwise specifically set forth in this agreement*" (emphasis added). Therefore, any provisions specifically requiring an equitable distribution according to the chosen law of the Agreement prevail over this waiver in the Agreement. Accordingly, applying New York law, the Agreement must be interpreted to provide for an equitable distribution under the Agreement's chosen law of New York where stated; the Agreement in this case specifically calls for the application of New York

law to its provisions (while waiving rights under any other states' laws) and requires that "marital property shall be equitably divided . . . according to law."

Our final review of New York contractual law concerns whether there is an ambiguity for lack of discernible intent, *Ellington*, 24 N.Y.3d at 244, 21 N.E.3d at 1003, 997 N.Y.S.2d at 342, and we therefore look to the specific means by which parties waive New York's equitable distribution statute. New York allows for the contractual waiver of its equitable distribution scheme in two ways: "First, parties may expressly waive or opt out of the statutory scheme governing equitable distribution. Second, parties may specifically designate as separate property assets that would ordinarily be defined as marital property subject to equitable distribution under [New York's equitable distribution statute]." *Van Kipnis*, 11 N.Y.3d at 578, 900 N.E.2d at 980, 872 N.Y.S.2d at 429 (internal citations omitted). "[T]he intent to override the rules of equitable distribution—whether by express waiver, or by specifically designating as separate property assets that would otherwise be considered marital property under New York law—must be clearly evidenced by the writing." *Tietjen v. Tietjen*, 48 A.D.3d 789, 791, 853 N.Y.S.2d 118, 120 (2008).

Because New York law requires us to reach a harmonious construction if at all possible, we pay particular attention to the language in the paragraph of the Agreement opting out of New York's equitable distribution statute that reads "[e]ach party specifically waives any right or rights either may have against the other for the

equitable distribution of marital property *except as may be otherwise specifically set forth in this agreement*." (emphasis added). In the provision concerning the division of marital property, the Agreement states "marital property shall be equitably divided between the parties *according to law* and each party shall retain his or her separate property." (emphasis added). And, we note again that the Agreement's choice of law provision states that New York law governs its terms and interpretation thereof while expressly "waiving all . . . other rights provided by the laws of any other state, jurisdiction, or country in favor of the rights afforded them under this Agreement as construed under New York Law."

Reviewing the Agreement consistent with New York's principles of interpretation supports the conclusion that the parties intended to take property out of the bounds of that state's equitable distribution statute.[3] However, we must determine the extent of that intent, as the Agreement explicitly "opts out" of New York's equitable distribution statute but also states that "marital property shall be equitably divided between the parties according to law."

[3] The parties apparently sought to waive New York's equitable distribution statute under both permitted methods: by explicitly opting out *and* by creating a separate and marital property scheme that differed from New York's statute. The latter was accomplished in the Agreement by defining "marital property" as "any property acquired by the parties . . . which property has been placed or titled in the joint names of the parties or purchased and paid for from a joint account." New York's statute, by contrast, defines marital property as "[a]ll property acquired by either or both spouses during the marriage . . . regardless of the form in which title is held, except as otherwise provided in agreement . . . ." Domestic Relations Law § 236(B)(1)(c).

The parties put forth conflicting interpretations of the Agreement. Ms. Wolfe contends that marital property must be equitably divided pursuant to New York law, while Mr. Wolfe contends that marital property is to be equitably divided under North Carolina law as a court of competent jurisdiction and in light of the Agreement's "opt out" provision. Applying New York principles of contract construction,[4] we hold that the Agreement is reasonably susceptible only to Ms. Wolfe's interpretation and that the contract is not reasonably susceptible to Mr. Wolfe's interpretation.

Ms. Wolfe's interpretation, consistent with New York law, allows us to properly reconcile the Agreement's seemingly inconsistent provisions and discern the parties' intent so as to avoid "strain[ing] to find contractual ambiguities where they do not exist." *Diaz*, 59 A.D.3d at 342, 874 N.Y.S.2d at 78. Briefly: (1) the "opt out" provision waives New York equitable distribution law except as otherwise set forth in the Agreement; (2) the mandate that marital property be equitably divided "according to law" is such an exception to the "opt out" provision; and (3) the choice of law clause in favor of New York and waiving the rights and application of all other states' laws demands application of New York law to the contractually provided equitable

[4] A court examining a contract for ambiguity under New York law is permitted to engage in some contract interpretation, including resolving any inconsistencies if possible and rejecting interpretations that leave a provision meaningless. *See, e.g.,* N.Y. Prac., Contract Law § 9:21.

distribution of marital property consistent with the exception to the "opt out" provision. We therefore decline to hold an ambiguity exists under New York law.[5]

We reach this conclusion in part due to the simple logic of the Agreement when considered under the "well-established principles . . . [that] [w]hen interpreting a written contract, the court should give effect to the intent of the parties as revealed by the language and structure of the contract, and should ascertain such intent by examining the document as a whole." *Vill. of Hamburg v. Am. Ref-Fuel Co. of Niagara, L.P.*, 284 A.D.2d 85, 89, 727 N.Y.S.2d 843, 846 (2001) (internal citations omitted). If the parties intended to opt out of New York's equitable distribution statute in its entirety, then the opt-out provision alone would have sufficed under New York law—the parties would not have needed to create a separate scheme of separate and marital property whereby "marital property shall be equitably divided between the parties according to law," with New York law being the only possible law referenced, as the parties agreed "that the provisions of this Agreement . . . shall be . . . governed solely by the internal law of the State of New York" and expressly "waived all . . . other rights provided by the laws of any other state . . . ." In other words, because the "opt out" language would negate the previous terms in the Agreement defining separate and marital property and providing that "marital

[5] We note that no ambiguity was found at the trial level, with the court stating in its summary judgment order that "[t]he agreement provides clear and specific terms by which the parties are bound" and in its post-judgment Rule 59, 60, and 62 orders that "the Court found the agreements to be valid, enforceable and clear and distributed the parties' property in accordance with [its] terms . . . ."

property shall be equitably divided," we hold that a complete waiver of New York's equitable distribution scheme was not intended, but instead applied only to separate property. This construction comports with New York's "principle that a contract which confers certain rights or benefits in one clause will not be construed in other provisions completely to undermine those rights or benefits." *Ronnen*, 88 N.Y.2d at 590, 671 N.E.2d at 537, 648 N.Y.S.2d at 425 (citations omitted). Here, equitable distribution rights in marital property were expressly conferred on both parties "according to law," meaning New York's, as is consistent with the choice of law provision and the waiver of all other rights bestowed by all other jurisdictions. We will not read the Agreement to rob the parties of these expressly provided rights.

The language of the "opt out" provision also supports our interpretation: rather than an unqualified waiver, the paragraph goes on to provide that "[e]ach party specifically waives any right . . . for the equitable distribution of marital property *except as may be otherwise specifically set forth in this agreement*." (emphasis added). Given New York's policy of recognizing "inconsistency provisions" and "trumping language," *Warberg*, 112 A.D.3d at 83, 973 N.Y.S.2d at 191, an interpretation that applies this waiver exception to the specific provision that "marital property shall be equitably divided . . . according to law" is consistent with the Agreement's governing law. And, while it is true that the sentence "opt[ing] out" of New York law appears clear in isolation:

> [S]ingle clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are a part. . . . In a written document the word obtains its meaning from the sentence, *the sentence from the paragraph*, and the latter from the whole document . . . .

Tinnerholm v. State, 179 N.Y.S.2d 582, 592 (N.Y. Ct. Cl. 1958) (emphasis added) (internal citations and quotations omitted).

In short, it appears from a complete reading of the Agreement, applying principles of New York law regarding contract ambiguities and interpretation, that the intent of the parties was to bring property designated as separate outside the scope of New York's equitable distribution statute, but to maintain the application of that law to the division of designated marital property. Mr. Wolfe's interpretation that North Carolina law could conceivably apply in light of a full waiver of New York's equitable distribution scheme, though superficially attractive, fails upon closer scrutiny because it does not comport with New York's principles of contract interpretation. Specifically, this reading would impermissibly render inoperative the choice of law provision's mandate that "the provisions of this Agreement . . . shall be construed and governed solely by the internal law of the State of New York" and that the parties "affirmatively . . . waiv[e] all . . . other rights provided by the laws of any other state . . . ." *See Ronnen*, 88 N.Y.2d at 589, 671 N.E.2d at 536, 648 N.Y.S.2d at 424.

Mr. Wolfe's argument that "[i]t is entirely reasonable and appropriate [that] the trial court would use North Carolina equitable distribution law when called upon to interpret the term 'equitable [sic] divided' " advocates that we completely disregard the Agreement's mandate that "the provisions of this Agreement and the interpretation thereof shall be construed and governed solely by the internal law of the State of New York" and the express waiver of the laws of all other jurisdictions.

Because Ms. Wolfe's interpretation harmonizes apparently conflicting provisions, rather than rendering them without effect, we adopt her interpretation that New York equitable distribution law applies as to property defined as "marital property" under the Agreement. *Natixis Real Estate Capital Trust 2007-HE2 v. Natixis Real Estate Holdings, LLC*, 149 A.D.3d 127, 133-34, 50 N.Y.S.3d 13, 18 (2017) (noting that "[i]t is a cardinal rule of contract construction that a court should avoid an interpretation that would leave contractual clauses meaningless[.] . . . Moreover, conflicting contract provisions should be harmonized, if reasonably possible, so as not to leave any provision without force and effect[.]") (internal quotations and citations omitted). In short, Ms. Wolfe's interpretation resolves any inconsistencies without rendering provisions meaningless, discloses the intent of the parties by "giving a practical interpretation to the language employed and reading the contract as a whole," *Ellington*, 21 N.E.3d at 1003, and presents the only "reasonable" interpretation under New York law.

Even if we determined Ms. Wolfe's argument, like Mr. Wolfe's, also ran afoul of New York contract interpretation law such that no reasonable interpretation of the Agreement existed, we point out that state's rule that, in resolving an ambiguity between two provisions "totally repugnant to one another, . . . the first of such clauses shall be received and the subsequent one rejected." *Honigsbaum's, Inc. v. Stuyvesant Plaza, Inc.*, 178 A.D.2d 702, 703-04, 577 N.Y.S.2d 165, 166 (1991) (internal citations omitted). Thus, because the Agreement's mandate that "marital property shall be equitably divided between the parties according to law" and its provisions waiving rights under any other state's laws appear before the "opt out" of New York's equitable distribution law, the latter would be discarded in favor of the two earlier provisions in the event of a repugnancy between them. *See id.* at 703-04, 577 N.Y.S.2d at 166.

Having determined that New York law applies to the equitable distribution of marital property as defined in the Agreement, our final examination on appeal is whether the trial court applied New York's equitable distribution statute to the marital property in its judgment.

Ms. Wolfe advances, on the back of specific New York case law, several discrete conflicts between that state's equitable distribution law and North Carolina's. By way of several (inexhaustive) examples, New York law requires the consideration of future spousal support in the form of "maintenance[.]" N.Y. Domestic Relations Law

§ 236B(5)[d](6); *compare* N.C. Gen. Stat. § 50-20(f) (2015) ("The court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties."). New York law also includes a "rebuttable presumption that counsel fees shall be awarded to the less monied spouse." N.Y. Domestic Relations Law § 237(a); *compare Robinson v. Robinson*, 210 N.C. App. 319, 337, 707 S.E.2d 785, 797 (2011) ("Attorney's fees . . . are not recoverable in actions for equitable distribution."). Additionally, an equitable distribution award under New York law is subject to a different standard where, as here, the parties have been married for ten or more years. *See Granade-Bastuck v. Bastuck*, 249 A.D.2d 444, 671 N.Y.S.2d 512 (1998).

It is unclear from the record what New York law the trial court had before it in rendering its final judgment.[6] However, the final judgment reflects on its face that the trial court applied North Carolina law in its equitable distribution award. In its findings of fact, the trial court noted that "[i]n considering whether an equal distribution would be equitable, the Court considered all of the evidence relating to

[6] In its post-judgment Rule 59, 60, and 62 orders, the trial court found that while Ms. Wolfe advanced no New York law at trial, it nonetheless "carefully considered . . . the New York law and New York cases cited in [Ms. Wolfe's summary judgment] Memorandum and the arguments of counsel advanced in the . . . summary judgment hearing." While those orders excerpt a portion of Ms. Wolfe's summary judgment memorandum, there is no indication of what other law was presented at the summary judgment hearing, and the transcript of that hearing was not included in the record on appeal.

statutory factors set out in North Carolina General Statute 50-20(c)[.]" The next finding in the judgment states:

> *Based on the foregoing*, the Court has determined and finds as a fact that an unequal division of *marital* . . . assets and debts would be equitable. . . . The Court finds that *based upon the above referenced factors* that an *equitable distribution of marital property* would distribute sixty-five percent (65%) of the marital estate to the Plaintiff and thirty five [sic] percent (35%) of the marital estate to the Defendant.

(emphasis added). Finally, the court concluded "[t]hat the real and personal property described in the above paragraphs is the *marital*, separate, and divisible property of the parties as defined in North Carolina General Statute 50-20(b)[,]" and "[t]hat an unequal division of property as provided below is equitable and fair considering all of the evidence *and statutory factors*." (emphasis added). Because the judgment on its face did not apply New York law consistent with the interpretation of the contract reached on *de novo* review, we vacate and remand for proceedings consistent with this opinion.

Because we vacate the trial court's judgment we do not address whether New York law would permit an unequal distribution as was awarded in this case; the trial court may indeed come to such a distribution if permitted by New York law when the issue is argued before it.

Ms. Wolfe also contends that the trial court erred in its distribution of real property located at 61 Warner Lane, Syosset, New York (the "Warner Property").

Both parties agree with the trial court's determination that the Warner Property is marital property subject to the Agreement. Likewise, they also agree that, per the terms of the Agreement, Ms. Wolfe is to receive a reimbursement of $300,000.00 for her contribution of separate property in that amount towards the purchase of the Warner Property. The trial court, as mandated by the Agreement, is required to make this reimbursement and then distribute any net profits as marital property "equitably divided between the parties according to [New York equitable distribution] law." Because the Warner Property is marital property, we include in our remand the requirement that the trial court's final award first reimburse each party for separate property contributed toward the purchase of any marital asset, including the Warner Property, with any net profits after reimbursement distributed as marital property under New York equitable distribution law per the Agreement.

Finally, because we vacate the trial court's judgment and remand on the above grounds, we need not address Ms. Wolfe's final argument that an unequal distribution in this case was error under both New York and North Carolina law. The parties may present arguments as to the proper equitable distribution of marital property under New York law before the trial court, which will order such distribution in its sound discretion.

III. Conclusion

Reviewing the Agreement *de novo*, we determine that New York law governs its interpretation consistent with its choice of law provision. Because New York law requires us to: (1) determine the intent of the parties from the whole of the document without ignoring context; (2) harmonize all provisions of the Agreement without rendering any one provision meaningless; and (3) give effect to inconsistent provisions and refrain from reading away expressly granted rights, we hold that the only reasonable interpretation of the Agreement consistent with those principles requires the equitable distribution of marital property pursuant to New York law given the Agreement's grant of equitable distribution rights. As a result, and with no other reasonable interpretations before us to create an ambiguity in the Agreement, we vacate the trial court's order applying North Carolina law to the equitable distribution of marital assets in this matter, and remand for a new trial consistent with this opinion.

VACATED AND REMANDED FOR NEW TRIAL.

Chief Judge MCGEE and Judge STROUD concur.

Report per Rule 30(e).