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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-49

Filed: 17 September 2019

Buncombe County, No. 17 CVD 2643

THOMAS C. TALLENT, Plaintiff,

v.

CHERYL POSTLEWAITE, Defendant.

Appeal by plaintiff from the equitable distribution judgment entered 13 August 2018 and pretrial ordered entered 27 March 2018 by Judge Susan Dotson-Smith in Buncombe County District Court. Heard in the Court of Appeals 21 August 2019.

Emily Sutton Dezio, PA, by Emily Sutton Dezio, for plaintiff.

Siemans Family Law Group, by A. James Siemens, for defendant.

YOUNG, Judge.

This appeal arises from an equitable distribution action. After review, we determine that the trial court did not err on the issue of valuation of marital assets and debts, nor did the trial court err on the introduction of evidence related to valuation of marital assets and debts. Since it was not preserved for appeal, we

decline to entertain the motion for sanctions argument. Lastly, the trial court did not err in its distribution of the dogs. Therefore, we affirm in part, dismiss in part.

I. Factual and Procedural History

Plaintiff-Appellant, Thomas C. Tallent (“Tallent”), and Defendant-Appellee Cheryl Postlewaite (“Postlewaite”), were married on 26 June 2009 in Buncombe County, North Carolina, and separated on 28 March 2017. Tallent filed for post-separation support, writ of possession, alimony, attorneys’ fees, interim distribution, and equitable distribution on 2 June 2017. Postlewaite filed responsive pleadings on 17 July 2017. All of the requisite affidavits were filed timely and in accordance with local rules.

A pretrial conference was scheduled on 26 January 2018. Tallent advised his attorney one month in advance that he would be out of town on the conference date, and his attorney indicated that she would seek to settle or continue the case. At the conference, Tallent’s attorney made an oral motion to continue, and requested that she be allowed to withdraw. Tallent’s attorney did not file a Motion to Withdraw, but Tallent was called from inside the courtroom and consented to her withdrawal. When Tallent’s attorney was allowed to withdraw, the trial court continued the matter for eleven days and scheduled the pretrial conference on 6 February 2018.

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After the 26 January 2018 pretrial conference, Postlewaite filed a Motion for Sanctions alleging unreasonable delay and a Notice of Hearing. The motion for sanctions was disposed of on 6 February 2018. The order to continue and withdraw required both parties to appear and submit proposed equitable distribution pretrial orders on 6 February 2018 with “no further notice required,” but it was not signed, filed, and delivered until during or after the hearing on 6 February 2018.

Tallent did not present a proposed final pretrial order on 6 February 2018. Postlewaite submitted a pretrial order, which included pre-determined valuations of all of the items of personal and real property. Postlewaite’s proposed order, with minor modifications, was adopted by the trial court on 27 March 2018. Tallent hired another attorney, Roger Smith (“Smith”), who made his appearance on 9 March 2018. The trial court relied upon the final pretrial order to establish valuations of all property at trial. The pretrial order was entered without objection while Tallent was represented by Smith. Tallent then participated in an equitable distribution trial, with the assistance of counsel.

II. Standard of Review

Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion.

Wienczek-Adams v. Adams, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted).

[W]hether to impose sanctions and which sanctions to impose under G.S. § 50-21(e) are decisions vested in the trial court and reviewable on appeal for abuse of discretion. In applying an abuse of discretion standard, this Court will uphold a trial court's order of sanctions under section 50-21(e) unless it is 'manifestly unsupported by reason.'

Crutchfield v. Crutchfield, 132 N.C. App. 193, 195, 511 S.E.2d 31, 34 (1999) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

III. Valuation of Marital Assets and Debts

In his first argument, Tallent contends that the trial court committed reversible error by not having competent evidence presented on the issue of valuation of the marital assets and debts. We disagree.

While Tallent contends that he was not allowed to present evidence of the issue of valuation, the pretrial order identified, classified, and valued certain marital property. By not objecting to the use of the pretrial order, Tallent consented to the use of that evidence for valuation. This is proper and within the scope of the trial court's authority pursuant to N.C. Gen. Stat. § 50-21(d), which provides that:

The final pretrial conference shall be conducted pursuant to the Rules of Civil Procedure and the General Rules of Practice in the applicable district or superior court, adopted pursuant to G.S. 7A-34. The court shall rule upon any matters reasonably necessary to effect a fair and prompt disposition of the case in the interests of justice.

N.C. Gen. Stat. § 50-21 (2018).

Furthermore, Tallent presented evidence of equitable distribution at trial on 18 April 2018 and 19 April 2018. Tallent testified about the value of instruments, and introduced exhibits to summarize the totality of the martial estate consistent with the 27 March 2018 pretrial order. At trial, Tallent chose to build his case around the 27 March 2018 pretrial order, not because he was compelled to, but rather because he desired for his evidence at trial to be consistent with the findings in the pretrial order. Tallent's strategy for taking this approach is plain upon review of his summary tendered at closing.

Tallent failed to show that the trial court's decision was unsupported by reason. The pretrial order consisted of competent evidence on the valuation of the martial assets and debts, and Tallent did not object to the use of the pretrial order at trial. Tallent relied on the information in the pretrial order at trial which further deflates his argument that the use of the pretrial order was unreasonable. The trial court did not abuse its discretion, and therefore, the trial court did not err.

IV. Motion for Sanctions

In his second argument, Tallent contends that the trial court committed reversible error by proceeding with Postlewaite's motion for sanctions without due process and appropriate notice to Tallent. For the following reasons, we dismiss this argument.

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The only appropriate sanction for purposeful delay in this case would have been an award of attorney fees pursuant to N.C. Gen. Stat. § 50-21(e)(2018). The trial court provided on 6 February 2018, “motion for sanctions heard...no attorney fees.” The pretrial order did not refer to any other sanctions. However, even if there had been sanctions in the pretrial order, Tallent did not object to the use of the pretrial order at trial, and therefore, the issue would not have been preserved for appeal. “[W]aiver . . . arises out of a party’s failure to properly preserve an issue for appellate review.” *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 194-95, 657 S.E.2d 361, 363 (2008). “[A] party’s failure to properly preserve an issue for appellate review ordinarily justifies the appellate court’s refusal to consider the issue on appeal.” *Id.* at 195-96, 657 S.E.2d at 364. Because Tallent failed to preserve the issue at trial we decline to entertain this argument.

V. Sanctions

In his third argument, Tallent contends that the trial court committed reversible error by sanctioning Tallent by disallowing him to put on evidence of valuation. We disagree.

As provided above, the only appropriate sanctions in this case would have been attorney fees, which were denied by the trial court. The 27 March 2018 pretrial order was not a sanction, but the result of an exhaustive pretrial process. The pretrial order is consistent with the competent evidence then before the court, including the

parties' equitable distribution affidavits and Tallent's testimony, and included specific items identified by Tallent in the pretrial conference. Tallent put on evidence as to valuation of property on 19 April 2019. Therefore, the decision of the trial court was supported by reason, and the trial court did not err.

VI. Distribution

In his last argument, Tallent contends that the trial court committed reversible error and abused its discretion by its distribution of the dogs. We agree.

The trial court has an obligation to make "specific findings regarding the value" of any property classified as marital, including the value of dogs. This obligation, however, exists only when there is credible evidence supporting the value of the asset. *Grasty v. Grasty*, 125 N.C. App. 736, 738, 482 S.E.2d 752, 754 (1997).

Here, the trial court did not value the dogs on the date of separation. As a result, the trial court erred by distributing the dogs to Postlewaite. Accordingly, we remand to the trial court for the entry of a new equitable distribution order for additional findings of fact regarding the value of the dogs, if there is evidence sufficient to support such findings. Such findings should be made without the taking of new evidence.

AFFIRMED IN PART, DISMISSED IN PART, AND REMAND IN PART.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).