STATE OF MICHIGAN

COURT OF APPEALS

RONALD E. COOK,

Plaintiff-Appellee,

v

PAULA A. COOK,

Defendant-Appellant.

UNPUBLISHED
July 6, 2010

No. 289805
Washtenaw Circuit Court
LC No. 05-001920-DO

Before: MURRAY, P.J., and SAAD and M.J. KELLY, JJ.

PER CURIAM.

In this domestic relations action, defendant appeals by delayed leave granted the trial court's order granting, in part, plaintiff's motion for relief from provisions of the parties' property settlement agreement and the trial court's order denying defendant's request to appoint a receiver, to accelerate property settlement payments, and for costs and attorney fees. Both orders were entered October 23, 2008. We affirm in part, and vacate in part the trial court's order, and remand this case for further proceedings consistent with this opinion.

I. BACKGROUND

At the heart of this appeal is the application and enforcement of the parties' property settlement agreement governing the distribution of assets. That agreement was incorporated into the parties' consent judgment of divorce, entered March 9, 2006, and provided for cash payments totaling $2,300,000 to defendant. Specifically, the settlement agreement provided that plaintiff was to pay an installment of $500,000 upon entry of the judgment of divorce and $50,000 within six months of that date. It is undisputed that plaintiff satisfied this obligation, so only $1,750,000 (pertaining to defendant's interest in the marital home and a condominium unit) is subject to the dispute before us.

Pursuant to ¶ 5(A)(3)(b) of the settlement agreement, plaintiff was required to pay defendant $1,750,000 in ten equal annual installments of $175,000, with the first payment due one year from the date of entry of the judgment of divorce. Interest was required for delinquent payments. As security, ¶ 5(G) of the agreement required plaintiff to maintain a life insurance policy of not less than $1,750,000 designating defendant as the beneficiary until the property settlement was satisfied. Also, plaintiff's interest in a 40-acre parcel in South Lyon, whose estimated worth was $1,500,000, served as additional security for plaintiff's $1,750,000 debt. The settlement agreement stated:

> Life Insurance and Real Estate as Security: Ron shall maintain a life insurance policy in an amount of not less than $1.75 Million to secure the $1.75 Million to be paid to Paula pursuant to the property settlement provisions provided in this Agreement. The insurance shall be maintained on a declining term, reduced to present day value basis, with Paula as the designated beneficiary. Ron shall submit evidence of a life insurance policy to Paula within thirty (30) days from entry of the Judgment of Divorce and shall provide, on an annual basis, evidence that the policy remains in existence. Once the property settlement amount has been satisfied, Paula's interest as a designated beneficiary shall automatically lapse and she shall have no interest of any kind in the life insurance proceeds. Additionally, Paula's right to receive $1.75 Million pursuant to paragraph 5(A)(3)(b) shall be secured by Ron's interest in approximately 40 acres located in South Lyon, Michigan . . . . The value of Ron's interest in this property is estimated to be $1.5 Million. Should this interest be sold or financed, Paula agrees to subordinate her debt or to extinguish her debt with the understanding that (if a sale) suitable replacement security will be provided. Ron shall provide verification that the property is owned by him and legally titled to provide collateral for Paula.

On September 16, 2008, plaintiff filed a motion entitled "relief from impossible property settlement provisions of judgment." In the motion, plaintiff, representing himself as a real estate developer and residential home builder, asserted that it was impossible for him to meet the payment schedule set forth in the settlement agreement because his net worth had gone from $30,000,000 on the date the consent judgment of divorce was entered to a "negative number." Plaintiff went on to detail his financial losses (citing various tax returns, income statements, balance sheets and personal expenses attached to his motion[1]) and requested the court take judicial notice that economic circumstances for real estate developers and builders in Michigan were "dire." Thus, having paid $175,000 in 2007 and $44,000 as of the date the motion was filed, and having been unable to negotiate a new arrangement with defendant, plaintiff requested the court adjust his payment schedule to $5,000 per month (with interest as set forth in the agreement) and re-evaluate his ability to pay in 12 months.

Defendant responded that although it was appropriate for the court to take judicial notice of economic circumstances, those circumstances, as well as the state of plaintiff's finances, were irrelevant to the enforcement of the settlement agreement. Defendant concluded that since no legal authority permitted the court to "undo" the settlement agreement, and liquidation of plaintiff's assets would be sufficient to satisfy his obligation, dismissal of plaintiff's motion and an award of attorney fees, costs, and sanctions was appropriate. In a separate motion, defendant also requested appointment of a receiver to effectuate the terms of the consent judgment and

[1] Plaintiff's tax returns reveal an adjusted gross income of -$1,614,436 for 2007 and -$901,588 for 2006, plaintiff's income statement for the period ending August 31, 2008, indicated a net loss of $31,853, and plaintiff's balance sheet of September 8, 2008, indicated a negative net worth of $438,803.

settlement agreement, acceleration of the balance of plaintiff's 2008 installment, and attorney fees and miscellaneous costs as provided in the settlement agreement. [2]

After plaintiff filed his reply, the court dispensed with oral argument as permitted under MCR 2.119(E)(3) and on October 24, 2008, entered opinions and orders on both parties' motions. Regarding plaintiff's motion, the court held, after reviewing the relevant sections of the security agreement, that since execution on the life insurance policy was not an option, "[p]laintiff's inability to pay/default on payments trigger[ed] the Defendant's security interest" in plaintiff's 40-acre parcel, thereby rendering his outstanding obligation to defendant $29,000 plus interest.[3] The court ordered payment of that amount by December 31, 2008, and required plaintiff to transfer the property free of unpaid taxes and encumbrances.

With respect to the miscellaneous cost allegations of defendant's motion, the court (1) denied defendant's request for car lease and painting payments under MCR 2.119(A)(1)(b) for failure to plead with particularity and present evidence supporting these allegations; (2) granted plaintiff's request for payment of helicopter lessons upon her submission of the relevant invoice and verification; and (3) denied defendant's claim to retrieve personal property in the marital home, with the exception of two paintings, for lack of specificity and because defendant waived any claim to such items having waited 18 months since entry of the consent judgment of divorce to make this claim. Finally, the court denied defendant's requests for appointment of a receiver and acceleration of payments since the only remedy contemplated by the settlement agreement and consent judgment for defaulted payments was interest, and denied defendant's request for attorney fees, "find[ing] irony in the fact that Plaintiff file[d] a Motion for Relief from Judgment and 9 days later, Defendant file[d] this motion and then ask[ed] for attorney fees." The instant appeal ensued.

II. ANALYSIS

A. RELIEF FROM JUDGMENT

On appeal, defendant first asserts that the court erred in partially granting plaintiff's motion and transferring the 40-acre parcel in lieu of the cash payments required in the settlement agreement. "A divorce judgment entered upon the settlement of the parties . . . represents a contract, which, if unambiguous, is to be interpreted as a question of law." *Holmes v Holmes*, 281 Mich App 575, 587; 760 NW2d 300 (2008) (quotation marks and citation omitted). We review questions of law, including matters of contractual interpretation, de novo. *Klapp v United*

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[2] These costs included: the $3,400 lease payment of defendant's Mercedes Benz CLK 320, helicopter lessons for defendant's son, and the remaining cost of $4,000 for a painting allegedly valued at $8,000. Defendant also alleged that plaintiff precluded her from removing personal items from the martial home.

[3] The court indicated that $29,000 was the amount owed to defendant to satisfy the entirety of the $1,750,000 debt after accounting for the payments plaintiff had already tendered ($175,000 in 2007 and $46,000 in 2008) and the settlement agreement's estimated value of the 40-acre parcel of $1,500,000.

Ins Group Agency, Inc, 468 Mich 459, 463; 663 NW2d 447 (2003). A trial court's factual findings in a divorce action are reviewed for clear error. *McNamara v Horner* (*After Remand*), 255 Mich App 667, 669; 662 NW2d 436 (2003). To the extent defendant's claim involves the interpretation and applicability of a court rule, our review is also de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

The fundamental goal regarding the construction or interpretation of a contract, including a settlement agreement, is to honor the parties' intent by reading the document as a whole and applying the plain language used in the contract. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007); *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349-350; 605 NW2d 360 (1999). Where the contractual language is clear and unambiguous, courts must interpret and enforce the contract as written. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). In such instances, despite a court's equitable authority to modify a judgment of divorce to reach an equitable result, *Hagen v Hagen*, 202 Mich App 254, 258; 508 NW2d 196 (1993), a court may not modify an unambiguous settlement agreement incorporated into a judgment of divorce to "rebalance the contractual equities" or because it considers another interpretation more reasonable unless the agreement resulted from fraud, duress, or mutual mistake, *Holmes*, 281 Mich App at 594-595.

Turning to the court's ruling, based on the unchallenged documentation supplied by plaintiff, the court determined that plaintiff was unable to meet his payment obligation in accordance with the settlement agreement.[4] The parties' agreement clearly contemplated such a scenario by providing two forms of security for the $1,750,000 property settlement: a life insurance policy and, additionally, plaintiff's interest in the approximately 40-acre parcel in South Lyon. As the court observed, the proceeds from the life insurance policy were unavailable. Therefore, the only remaining security provided in the settlement agreement was plaintiff's interest in the 40-acre parcel. Consequently, the court correctly applied the plain language of the agreement in awarding that security to defendant in partial satisfaction of plaintiff's outstanding obligation under the agreement.

In reaching our conclusion, we are cognizant that plaintiff framed his motion as one seeking relief from judgment. And as defendant correctly points out, MCR 2.612 governs such motions. However, "this Court is not bound by plaintiff's choice of labels for [his] action because this would exalt form over substance[,]" *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989), and the relief granted in this case was not relief from judgment. Rather, the trial court–after finding plaintiff was unable to make cash payments–applied the unambiguous language of the settlement agreement's security provision contemplated for just such a circumstance.[5] Such an order was well within the court's competence where under the consent judgment of divorce the court "expressly retain[ed] jurisdiction to enforce the agreement between the parties in the event the assets are not distributed as contemplated by this Judgment

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[4] Defendant does not directly challenge this finding.

[5] Black's Law Dictionary (7th ed) defines security, in part, as "[c]ollateral given or pledged to guarantee the fulfillment of an obligation . . . ."

of Divorce." Thus, as the court's order was in no way premised upon MCR 2.612, we need not address defendant's arguments premised on that rule further.

Defendant counters that even applying the plain language of the settlement agreement, the court erred where it made no valuation of the property's current market value before ordering the transfer of plaintiff's interest. Defendant argues that although the 40-acre parcel was security for the payments, the agreement denotes only an "estimate" as to its value, and nothing in the agreement says that she loses all remedies above and beyond receipt of the security. We agree. Although the settlement agreement does not specifically condition this security upon the property's current market value being equal to the agreement's estimated valuation of $1,500,000, we note that "estimate" means only "a rough or approximate calculation." Webster's New Collegiate Dictionary (1980). Hence, although the parties agreed to use the 40 acres as security, they only estimated that its value would be $1,500,000, which, if correct, would have fulfilled plaintiff's obligations. The trial court, however, never determined the actual value. Consequently, we remand this case to the trial court to determine the actual value of the 40 acres at the time it was transferred to defendant. Once that value is determined, and similar to how the trial court calculated the amounts owing to defendant in its opinion and order, that actual value should be deducted from the amount plaintiff owed to defendant under the divorce judgment.

Defendant's claim that the court's judgment amounted to an improper modification of or substitution to the settlement agreement, however, is not sustainable in view of the court's application of the plain language of the security provision explained previously. Indeed, contrary to defendant's argument, the court, by denying plaintiff's request to modify the pay schedule to $5,000 per month, avoided making what would have been an improper modification to the contract. To argue the opposite, as defendant does, that application of the security provision served as a substitute remedy, is nonsensical. Additionally, the court's invocation of the security provision did not make plaintiff's interest in the 40-acre parcel defendant's "sole remedy," where the court additionally awarded defendant $29,000 plus the interest on the defaulted payments as required in the security agreement.

Before moving on, we note that defendant insinuates wrongdoing on plaintiff's behalf since "as near as Defendant can tell, Plaintiff seems to have known from the moment he signed the settlement agreement that he had no intention of following it, and instead simply waited for the usual ebb and flow of business to provide him a moment of low tide to file this motion." Such rank conjecture, however, without a shred of support in the record is incapable of garnering further attention from this Court. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Similarly, defendant's assertion that taxes are owed on plaintiff's interest is completely unsupported by the record, and therefore requires no additional analysis. Accordingly, for the reasons previously stated,[6] the court properly interpreted the settlement agreement and awarded defendant the security due therein.

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[6] We reject plaintiff's argument that the tender-back rule of *Stefanac v Cranbrook Ed Community* (*After Remand*), 435 Mich 155, 159; 458 NW2d 56 (1990), bars defendant's claims on appeal
(continued…)

B. APPOINTMENT OF A RECEIVER

Defendant next argues that court erred in failing to appoint a receiver. While we review a court's decision to appoint a receiver for an abuse of discretion, interpretation of unambiguous contract provisions are reviewed, as previously stated, de novo. *Klapp*, 468 Mich at 463; *Reed v Reed*, 265 Mich App 131, 161; 693 NW2d 825 (2005). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The Legislature has vested circuit courts with broad jurisdiction to appoint receivers in all cases where authorized by law. MCL 600.2926. "This statute has been interpreted as authorizing a circuit court to appoint a receiver when specifically allowed by statute and also when no specific statute applies but 'the facts and circumstances render the appointment of a receiver an appropriate exercise of the circuit court's equitable jurisdiction.'" *Reed*, 265 Mich App at 161, quoting *Petitpren v Taylor School Dist*, 104 Mich App 283, 294; 304 NW2d 553 (1981). "The purpose of appointing a receiver is to preserve property and to dispose of it under the order of the court." *Reed*, 265 Mich App at 162.

In requesting a receiver, defendant demands that "unlike the trial court, [we] adhere[] to Michigan law" and reverse the trial court's order that was "non-sense" in order to rectify plaintiff's effort to "bamboozle" the trial court. However, such a tone does not reflect the sober review of the law and appraisal of facts necessary before embarking on what Michigan Courts have described as the "harsh" and "extreme" measure of appointing a receiver. *People ex rel Dougherty v Israelite House of David*, 246 Mich 606, 618; 225 NW 638 (1929); *Reed*, 265 Mich App at 161. Indeed, the trial court's order merely invoked the very remedy to which the parties themselves agreed in the event plaintiff was unable to satisfy his obligation to defendant. What is more, this was not a case where plaintiff had a history of "unimpressive performance[,]" *Reed*, 265 Mich App at 162, or where "less intrusive means" were unavailable and other approaches had failed, *Petitpren*, 104 Mich App at 294. On the contrary, plaintiff satisfied his obligation in 2007 and supplied documentation–unchallenged by defendant–in requesting an adjustment of the payment schedule. Even then, however, the court declined to grant plaintiff the remedy he requested and instead awarded defendant the security due to her under the agreement and the interest penalty required for late payments.

Defendant's belief that plaintiff may in the future choose not to honor the court's order is speculative and not ripe for review, and of course could be addressed in a subsequent motion before the trial court if necessary. In any event, given the facts before us at this juncture, we find the court's refusal to appoint a receiver a prescient exercise of discretion.

(…continued)

because the instant case does not involve a legal claim in contravention of a settlement agreement as required to invoke that rule. Rather, defendant maintains, albeit incorrectly, that the trial court in fact failed to properly *enforce* the settlement agreement.

C. ATTORNEY FEES

Finally, defendant argues the court erred in failing to award attorney fees as provided in the settlement agreement. Generally, our review of divorce-related attorney fees is for an abuse of discretion. *Unthank v Wolfe*, 282 Mich App 40, 66; 763 NW2d 287 (2008), vacated in part on other grounds 483 Mich 964 (2009). However, as attorney fees in this case are governed by an unambiguous contract provision, our review is de novo. *Klapp*, 468 Mich at 463.

Defendant rightly points out that ¶ 7 of the settlement agreement mandates attorney fees in the event of default. However, for that provision to apply, the non-defaulting party must incur attorney fees "in seeking or obtaining enforcement of the Agreement of Judgment of Divorce." In this case, it was plaintiff *rather than defendant* who commenced post-judgment proceedings by seeking modification of the payment schedule. Furthermore, defendant's motion to appoint a receiver, accelerate payment, and for attorney fees was not only filed after plaintiff's motion, but also the heart of that motion sought remedies not provided under the agreement (i.e., for acceleration of payment and appointment of a receiver). In other words, defendant sought attorney fees after filing a motion that, strictly speaking, did not seek enforcement of the agreement. Attorney fees are not appropriate under these circumstances.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

No costs, neither party having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Henry William Saad
/s/ Michael J. Kelly