STATE OF MICHIGAN

COURT OF APPEALS

KATHERINE H. HANLEY,

Plaintiff-Appellee,

v

PAMELA ANN SEYMOUR,

Defendant-Appellant.

UNPUBLISHED
June 24, 2021

No. 355033
Oakland Circuit Court
LC No. 2017-160810-CK

Before: GLEICHER, P.J., and CAVANAGH and LETICA, JJ.

PER CURIAM.

In this dispute concerning the enforcement of a settlement agreement, defendant appeals as of right the trial court order granting plaintiff's motion for entry of a pocket judgment against defendant. On appeal, defendant argues that the trial court erred by entering the pocket judgment because plaintiff was the first party to breach the settlement agreement, and that the liquidated damages provision was unconscionable. We affirm.

I. FACTUAL BACKGROUND

Plaintiff is married to defendant's ex-husband, Gregory Hanley (Gregory). This case arises from an agreement in a prior case, settling plaintiff's civil stalking and intentional infliction of emotional distress claims against defendant.

In August 2017, the parties placed the agreement on the record in court. In relevant part, the agreement required defendant to pay plaintiff $25,000 as an initial payment, followed by 80 monthly $500 payments, for a total payment of $65,000. Because there was a personal protection order (PPO) prohibiting defendant from contacting plaintiff, the payments were to be made via an electronic fund transfer. The monthly $500 payments would be due "on the first day of each month commencing September the 1st, 2017. There [would] be a seven-day grace period in the event [defendant's] late." And, in the event of a default, a pocket judgment for $200,000 plus interest would be entered. The settlement also included a provision whereby defendant agreed to accept a

lower percentage of attorney fees Gregory was slated to receive in connection with a then-pending Arizona lawsuit.[1]

Despite agreeing to the terms of the settlement orally on the record, defendant declined to sign a written settlement agreement. The trial court dismissed the case with prejudice, noting that the parties had placed "the full and final settlement upon the record." Defendant had made an initial $30,000 payment to plaintiff, but after the court dismissed the case, defendant requested her money back, arguing that there was no settlement agreement because the parties had not signed the anticipated written documents.

In September 2017, plaintiff filed the instant action to enforce the earlier settlement agreement. The trial court made a series of rulings, which collectively held that the settlement agreement placed on the record was binding under MCR 2.507(G),[2] that defendant had no valid defenses to enforcement, and that the $200,000 pocket judgment was not an illegal penalty. The trial court held that no party was, at that time, in breach of the agreement.

Nothing further occurred in the trial court for over a year and a half, until plaintiff returned to the trial court requesting entry of the pocket judgment. Plaintiff argued that defendant had made payments as required by the agreement until making a $500 payment on or about March 25, 2020. Because defendant was paying a month ahead, this payment covered defendant's April 2020 obligation; however, defendant had not made the required payments for May, June, or July 2020. After an evidentiary hearing, the trial court held that defendant had failed to make required payments, triggering plaintiff's right to entry of the pocket judgment under the settlement agreement. The trial court denied defendant's amended motion for reconsideration and relief from judgment. This appeal follows.

II. ENTRY OF THE POCKET JUDGMENT

Defendant first argues that the trial court erred by entering the pocket judgment. We disagree.

A trial court's factual findings will not be overturned unless they are clearly erroneous. *Pioneer State Mut Ins Co v Wright*, 331 Mich App 396, 405; 952 NW2d 586 (2020).

> A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. In applying the clearly erroneous standard, regard is given to the special opportunity of the trial court to judge the credibility of the witnesses who

[1] Under the divorce judgment, defendant was entitled to a percentage of the attorney fees Gregory's law firm would receive for handling the matter.

[2] "An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney."

> appeared before it. [*In re Forfeiture of $19,250*, 209 Mich App 20, 29; 530 NW2d 759 (1995) (citations omitted).]

The trial court's conclusions of law are reviewed de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). Settlement agreements are governed by principles of contract law, and "[t]he existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

Settlement agreements generally "cannot be modified" because they "are favored by the law . . . ." *Clark v Al-Amin*, 309 Mich App 387, 395; 872 NW2d 730 (2015) (quotation marks and citation omitted). A party "is bound by the settlement agreement absent a showing of mistake, fraud, or unconscionable advantage." *Plamondon v Plamondon*, 230 Mich App 54, 56; 583 NW2d 245 (1998). "When contract language is clear, unambiguous, and has a definite meaning, courts do not have the ability to write a different contract for the parties . . . ." *Mahnick v Bell Co*, 256 Mich App 154, 159; 662 NW2d 830 (2003). "The determination of whether contract language is clear and unambiguous is a question of law." *Id*. Courts must not create ambiguity, *id.*, and words in a contract are to be given "their plain and ordinary meaning that would be apparent to a reader of the instrument," *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

First, defendant argues that she sent plaintiff's counsel a $3,000 check in April 2020, which may have been lost in the mail, and that plaintiff should bear the risk of mail being lost because plaintiff failed to establish the agreed account for electronic payments. However, the trial court expressly found that "[d]espite the Defendant's testimony to the contrary, she did not mail or otherwise tender payments on a timely basis for several months."

At the evidentiary hearing, defendant testified about the history of payments under the settlement agreement. In August 2017, defendant made two payments: a $25,000 lump-sum check and a $5,000 check because she "wanted to pay ahead." For July and August 2018, defendant wrote personal checks for $500, payable to plaintiff's counsel, Marc Drasnin, personally. Defendant's September 2018 check was for $500, payable to Drasnin's Interest on Lawyers Trust Account (IOLTA). Following the personal check dated September 1, 2018, defendant used a processing center to send the monthly checks. These checks were all for $500, made payable either to Drasnin's IOLTA account or to "Marc Drasnin IOLTA legal fees," and were remitted by Seymour Property, LLC. But, in April 2020, defendant consulted Francie, a "legal attorney," who recommended that she stop sending the payments to Drasnin. On the basis of that advice, defendant did not remit a payment for $500 to Drasnin or his IOLTA account. Instead, defendant asserted that she wrote a personal check on April 17, 2020 for $3,000 that was payable to plaintiff and mailed it to Drasnin's office.

Defendant testified that the alleged April 2020 payment was for a larger amount than her previous payments because she wanted to pay off the settlement. But instead of writing a check for the full amount, she made a $3,000 payment first to see if Drasnin "would respond on it." Defendant sent the check by regular mail, as opposed to certified or registered mail, because Drasnin had allegedly rejected her registered mail previously. Defendant never called or emailed Drasnin to confirm his receipt of the check. And although defendant had her friend call Drasnin's office earlier in 2020, she did not have a friend call about the mailed check.

Furthermore, in March 2020, defendant sent e-mails to Drasnin, possibly by mistake, discussing her plans to file bankruptcy and that "there are payments and fees that are due," but that she did "not have the money . . . ." Defendant also e-mailed Drasnin on April 7, 2020, less than two weeks before her alleged payment, stating that "no funds will be distributed until" an electronic payment method was established, and asking if he wanted the outstanding amount "added to the bankruptcy."

Drasnin testified that during April 2020, the attorneys at his office would be the ones who sorted any mail that was received. If the attorney who was sorting the mail came across a check and it was not apparent to whom the check was intended, "[t]he check would be placed on our board and left there for the appropriate recipient." Because defendant's check was allegedly made out to plaintiff, "[a] notice would be circulated amongst the lawyers to figure out who the rightful person was." But Drasnin's office never received the check that defendant purportedly mailed.

The trial court found defendant's testimony "less than credible," and afforded it "no weight" with regard to the issue of whether defendant attempted to make timely payment. In contrast, the court found Drasnin's testimony credible. "[R]egard is given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Forfeiture of $19,250*, 209 Mich App at 29. The trial court's finding that defendant never sent her alleged April 2020 check was not clearly erroneous. As such, defendant's argument that her check may have gotten lost in the mail and that this should not be held against her fails.

Defendant also argues that the settlement agreement entitled her to notice that she was in default before the seven-day grace period began to run. This notice was never provided, and once defendant attempted to make payment, she learned of plaintiff's motion for entry of the pocket judgment. When the settlement agreement was placed on the record, no mention was made regarding whether the grace period would begin to run from the first of the month automatically, or whether the grace period would only begin to run once defendant had notice that her payment was late. The trial court found that defendant never attempted to make the alleged April 2020 payment, and this finding was not clearly erroneous. Having made timely payments for 22 months, defendant was on notice that she did not make the payments for May, June, or July 2020. Therefore, even if defendant had to know she was in default before the grace period began to run, the grace period ran long before plaintiff moved for entry of the pocket judgment.[3]

Defendant also argues that plaintiff committed the first substantial breach of the settlement agreement by failing to set up an account into which defendant could make electronic payments. "[O]ne who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 613; 792 NW2d 344 (2010) (quotation marks and citation omitted). But this rule only applies if the initial breach was substantial, which requires the trial court to consider whether the nonbreaching party received the expected benefit. *Able Demolition v Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007).

[3] Moreover, even if we accepted defendant's assertion that she made the $3,000 payment on April 17, 2020, that payment would still have been late, and defendant would still have been in default.

The trial court held that there was clear and convincing evidence that the parties had modified the settlement agreement by their conduct to allow for payments by check, so the failure to set up the account for electronic payment was no breach at all. See *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364-365; 666 NW2d 251 (2003) (holding that contracting parties may modify a contract where their course of conduct establishes a mutual intent to modify the contract). Here, the settlement agreement required defendant to make the payments via an electronic fund transfer. Whether it was plaintiff or defendant's duty to set up the electronic transfer is immaterial because either (1) defendant waived the settlement term by making her payments by check or (2) plaintiff waived the settlement term by accepting the payments by check. Therefore, the parties' course of conduct evidenced a waiver of the electronic payment requirement, thereby modifying the contract to permit defendant to make the monthly payments by check. See *id*. at 373-374 ("[W]hen a course of conduct establishes by clear and convincing evidence that a contracting party, relying on the terms of the prior contract, knowingly waived enforcement of those terms, the requirement of mutual agreement has been satisfied.").

Even assuming that plaintiff's failure to set up an account for defendant's electronic payment was a breach, it was not a "substantial" breach. The main benefits defendant expected to receive under the settlement agreement were dismissal of plaintiff's case against her and Gregory's promise to waive certain fees and not oppose cancelation of sanctions against defendant in a separate case.[4] The electronic account was included in the settlement agreement as a way for defendant to comply with her payment obligations while protecting her from violating the no-contact order with plaintiff. Without the electronic payment option, defendant was still able to make her payments by check to avoid default while still not contacting plaintiff. Therefore, even if plaintiff breached the settlement agreement, the breach was not substantial because defendant obtained the benefits of the settlement agreement. See *Able Demolition*, 275 Mich App at 585.

III. MOTION FOR RELIEF FROM JUDGMENT

Defendant next argues that the trial court erred by denying her motion for relief from judgment. We disagree.

A trial court's decision on a motion for relief from judgment is reviewed for an abuse of discretion, as is a motion for reconsideration. *In re Ingham Co Treasurer for Foreclosure*, 331 Mich App 74, 77; 951 NW2d 85 (2020). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id*. (quotation marks and citation omitted).

Defendant moved for relief from judgment under MCR 2.612(C)(1)(f) on the basis that the liquidated damages contained in the pocket judgment constitute an illegal penalty because they are excessive and punitive. "A liquidated damages provision is simply an agreement by the parties fixing the amount of damages in the event of a breach and is enforceable if the amount is reasonable

[4] The parties' performance of the settlement agreement obligations that related to separate cases involving Gregory is not at issue in this appeal.

with relation to the possible injury suffered and not unconscionable or excessive." *St Clair Med, PC v Borgiel*, 270 Mich App 260, 270-271; 715 NW2d 914 (2006).

While "[t]he issue whether a liquidated damages provision is valid and enforceable is a matter of law that this Court reviews de novo," *id.* at 270, our review in this case is in the context of the denial of a motion for relief from judgment.

> In order for relief to be granted under MCR 2.612(C)(1)(f), the following three requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice. Generally, relief is granted under subsection f only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered. [*Heugel v Heugel*, 237 Mich App 471, 478-479; 603 NW2d 121 (1999).]

The liquidated damages in this case do impose a significant penalty. Instead of the approximately $24,000 defendant had left to pay plaintiff under the settlement agreement, defendant was ordered to pay a $175,030.36 judgment.[5] The trial court recognized that although the penalty might at first seem unreasonable, "[d]efendant's unrelentingly egregious behavior against the [p]laintiff has resulted in . . . myriad harms to the [p]laintiff and her family over several years." Therefore, the liquidated damages provision in this case was "a rational and reasonable deterrent to an immediate (or delayed) flagrant breach of the payment terms, which would almost certainly result in additional protracted litigation." Defendant has not identified any extraordinary circumstances, nor any improper conduct by plaintiff, which would suggest that relief is warranted under MCR 2.612(C)(1)(f). The trial court did not abuse its discretion by failing to grant relief from judgment under MCR 2.612(C)(1)(f). See *Heugel*, 237 Mich App at 478-479.

Defendant also argues that it is no longer equitable for the settlement agreement, or at least the pocket judgment amount, to be enforced against her under MCR 2.612(C)(1)(e). A party "is bound by the settlement agreement absent a showing of mistake, fraud, or unconscionable advantage." *Plamondon*, 230 Mich App at 56. Defendant suggests that the test for unconscionability is met here.

"In order for a contract or contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present. Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term." *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 143-144; 706 NW2d 471 (2005) (citations omitted). Substantive unconscionability does not exist simply because a provision "is foolish for one party and very advantageous to the other. Instead, a term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience." *Id.* at 144 (citations omitted). Defendant makes no attempt to show that the value of the pocket judgment was so extreme that it

[5] The judgment was based on the $200,000 pocket judgment, less amounts already paid, plus statutory interest.

shocks the conscience and defendant had the option of continuing to trial rather than entering into the settlement agreement. As such, defendant cannot show that the settlement agreement was unconscionable.

Defendant appears to argue that the pocket judgment provision is substantively unconscionable, or otherwise inequitable, because she made the settlement agreement in this case with the expectation of a large payout from Gregory. Because the expected payout did not materialize, defendant argues that she should not be forced to pay the $200,000 (minus the amount she paid plus statutory interest) in liquidated damages under the pocket judgment. The payment defendant refers to was her interest in specific attorney fees from a class action lawsuit Gregory had litigated and won at the trial court level in an unrelated matter. Defendant was entitled to a 10% interest in the fees under the terms of her divorce. In the settlement agreement at issue here, defendant *reduced* her interest in the attorney fees to 6.5%. After the settlement agreement in this case was reached, Gregory's victory was overturned on appeal, meaning he did not recover attorney fees.

Defendant's argument fails. First of all, defendant did not agree to the pocket judgment in return for an interest in the attorney fees. Her interest in the fees already existed, and the only change effected by the settlement agreement in this case was to *reduce* defendant's interest in the fees. Secondly, defendant's interest in the attorney fees was only ever a *possibility* that she would receive a payment—absent a successful outcome of the underlying action, no attorney fees would be due, and defendant's interest would be worth nothing. That defendant's interest turned out to be worthless may have disappointed defendant, but defendant's mistaken belief or hope that attorney fees would be paid does not transform the parties' settlement agreement into one that shocks the conscience. See *Clark*, 268 Mich App at 145.

The settlement agreement, including the pocket judgment, does not meet the test for unconscionability. To the extent a pocket judgment entered under a settlement agreement over a party's objection can be modified under MCR 2.612(C)(1)(e), see *Fort Gratiot Charter Twp v Kettlewell*, 150 Mich App 648, 655-656; 389 NW2d 468 (1986) (affirming modification of consent judgment under MCR 2.612(C)), the trial court did not abuse its discretion in holding that relief from judgment was unwarranted. For the reasons already discussed, it was not outside the range of principled outcomes to determine that entry of the pocket judgment was equitable notwithstanding the failure of defendant's interest in the attorney fees Gregory ultimately received.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh
/s/ Anica Letica