STATE OF MICHIGAN

COURT OF APPEALS

RICHARD LAWRENCE PETTY, Plaintiff-Appellee,	UNPUBLISHED January 17, 2013
v	No. 305868 Lenawee Circuit Court
DEBRA LYNN LAUHARN, f/k/a DEBRA LYNN PETTY, Defendant-Appellant.	LC No. 05-028836-DO

Before: TALBOT, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of leave granted an order denying in part her motion to set a sum certain and payment plan pursuant to the parties' consent judgment of divorce. We reverse in part, vacate in part, and remand.

I. BASIC FACTS

The parties were married on May 29, 1976, and had three children, Bryn, Megan, and Ryan, who were adults when plaintiff filed for divorce on April 8, 2005.[1] During the course of their marriage, plaintiff acquired a 42% interest in Power Plus Products, LLC ("Power Plus"), and the parties (individually and jointly) held numerous retirement and brokerage accounts.

Throughout the pending divorce proceedings, defendant was concerned with the apparent evaporation of the retirement accounts. On December 31, 1999, the parties' total holdings were in excess of $800,000. But as of November 30, 2005, the balance of their holdings had diminished to around $5,000 or $6,000. Defendant wanted to have an accountant review the accounts to determine whether the funds were dissipated due to misappropriation by plaintiff. On November 30, 2005, the parties appeared in the trial court with their attorneys. Plaintiff stated that he had no objection to the hiring of Thomas Boldt, a CPA, to trace "any and all accounts" from the year 2000 forward.

[1] Defendant actually was the first to file for divorce in 2003, but that complaint was dismissed shortly thereafter.

On June 26, 2006, the trial court entered a "partial property settlement" order. Related to the appointment of Boldt, the order provided in pertinent part:

> Tom Bolt [sic] is appointed to trace any and all accounts of Plaintiff, Defendant, or joint accounts of the parties from January 1, 2000 to present in an effort to ensure that none of the parties' assets have been hidden or lost by Plaintiff or Defendant. Plaintiff and Defendant will cooperate and sign all documents necessary to do an accounting to trace any and all accounts of Plaintiff or joint accounts of the parties from the year 2000 forward and shall fully cooperate in all discovery requests. The purpose of the accounting is to ensure that no assets are concealed from either party and to see what happened to the parties' assets formerly held by the parties.

The order further provided that plaintiff shall use the joint account, totaling approximately $6,000, to make mortgage payments, tax payments, "and things of that nature on the marital real estate."

On September 26, 2006, the parties appeared in the trial court once again to place another property settlement on the record. Plaintiff was awarded the interest in Power Plus and, in return, he was required to pay defendant $120,000 by paying $12,000 annually for ten years. Plaintiff also waived his right to defendant's pension, and the parties agreed that they would split the balance of their retirement assets. Additionally, each party affirmed that they had not taken any withdrawals from these retirement accounts or taken any loans against them, and that each party would contribute the sum of $2,500 to commence Boldt's audit. Defendant's attorney further stated on the record:

> [MS. COXON:] Mr. Boldt's audit of the party's holdings as described in the June 26th, 2006 order, the parties stipulate that if it is found that any money was concealed, hidden or put in a place that we don't expect, not just transferred to another brokerage account or lost in the market, that the funds will be forfeited.
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> THE COURT: By either party?
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> MS. COXON: By either party. It's my understanding that the funds have not been invested in Power Plus Products, that they have not been sequestered off shore, that these are funds that were transferred simply from Prudential accounts to other accounts and that these funds are all traceable or they were lost in the market.
>
> But if we should find that there are funds that can't be accounted for then the party who made the withdrawal will have to forfeit those funds and pay the other party one hundred percent.

Plaintiff acknowledged to the trial court that he understood that this was part of the agreement.

On November 27, 2006, a consent judgment of divorce was entered. The judgment of divorce incorporated the terms regarding property division that had been placed on the record, including the requirement that plaintiff pay defendant $12,000 annually for ten years for his

award of the Power Plus interest. The judgment of divorce further provided that Boldt was appointed to trace any and all accounts, from January 1, 2000, to the present, "in an effort to ensure that none of the parties' assets have been hidden or lost by Plaintiff or Defendant" and "to ensure that no assets are concealed from either party and to see what happened to the parties' assets formerly held by the parties." The provision further provides, in relevant part:

> The parties agree that the $6,000.00 in their joint account on or about November 31, 2005 was to be used by Plaintiff for mortgage payments, tax payments, and things of that nature on the marital estate. The parties stipulate that if Mr. Boldt finds that any money was concealed, hidden, withdrawn or put in a place that is unexpected (not simply transferred to another brokerage account or lost in the market) or otherwise unaccounted for by the party that made the transfer or withdrawal, the wrongdoer shall pay the other party one hundred percent of the sum transferred or withdrawn from his or her separate funds. The parties stipulate that no funds in excess of the $60,000.00 initial investment were invested in Power Products Plus, and that there are no offshore accounts.

The consent judgment also provides that the parties "acknowledge and affirm that neither of them has made any withdrawal from any pension, 403(b), 401(k) or IRA, and that there has been no liquidation thereof."

Almost two years later, on November 24, 2008, Boldt issued a lengthy accounting report. In his cover letter, Boldt stated that he had "analyzed the activity in brokerage accounts, retirement accounts, and savings accounts held by Debra Petty, Richard Petty, Bryn Petty, Megan Petty, and Ryan Petty, during the period from December 31, 1999 through June 30, 2007." The letter listed the accounts that he examined: (1) Debra and Richard Petty jointly held brokerage accounts; (2) Richard Petty solely held brokerage accounts; (3) Richard Petty IRA accounts, (4) Debra Petty IRA accounts, (5) Richard Petty retirement accounts, (6) Bryn Petty brokerage accounts, (7) Megan Petty brokerage accounts, (8) Ryan Petty brokerage accounts, (9) Ryan Petty Roth IRA accounts, and (10) Comerica Bank savings account. Boldt further advised that he reviewed income tax returns for the years ending in December 31, 2000, through December 31, 2005.

Regarding the accounts, Boldt determined that the total balance as of December 31, 1999, was $858,814.80. During the period of review, there were deposits totaling $251,361.14, dividends and interest totaling $20,302.58, account fees totaling $49,324.02, market value losses totaling $602,639.15, and withdrawals totaling $466,529.04.[2] The overall balance as of June 30, 2007, was $11,986.31.

Relative to the issue on appeal, the only pertinent value is the $466,529.04 in withdrawals. In his report, Boldt analyzed every single withdrawal and attempted to track where

[2] While the sum total of withdrawals from all of these accounts was $466,529.04, no withdrawals were made from the Debra Petty IRA account and the Ryan Petty Roth IRA accounts.

each withdrawal went.[3] Of note, he determined that of $45,762.88 of the withdrawals were deposited into plaintiff's solely held Lenco Credit Union account; $10,000 went to cash; $3,387.29 went to plaintiff; $24,023 went to plaintiff's solely held Gunn Allen IRA; and $108,365.94 of the withdrawals were categorized as "unidentified withdrawals," where Boldt could not determine what happened with the money.

On April 13, 2009, defendant filed a "motion to set sum certain and payment plan following accounting pursuant to judgment of divorce and for other relief." In relevant part, defendant claimed that Boldt's analysis showed that plaintiff made numerous withdrawals from the retirement accounts and that, pursuant to the judgment of divorce, plaintiff was required to pay her 100% of the sums withdrawn. Defendant further claimed that Boldt discovered that plaintiff failed to deposit income tax refunds into the martial accounts, leaving the marital estate short by $49,000. Defendant also asserted that plaintiff failed to make the annual payments relating to the business awarded to him for the previous years and that plaintiff failed to pay for his share of Boldt's accounting. Defendant asked the trial court (1) to award her $412,645.58,[4] representing the previously undisclosed withdrawals discovered by Boldt and the tax refund that plaintiff failed to deposit; (2) to require plaintiff to pay Boldt all sums due and owing; and (3) to pay her $24,000 for failing to make his two annual payments as required under the judgment of divorce.

Related to the withdrawals, plaintiff claimed in his answer to the motion that the withdrawals were made for various familial expenses and that they were done "with defendant's knowledge and consent."

After Judge Timothy Pickard disqualified himself in the matter, the case was reassigned to Judge Margaret M.S. Noe, who then conducted an evidentiary hearing on June 15, 2010. Boldt provided testimony regarding the findings that were detailed in his report. In addition, he clarified that more than half of the money withdrawn came from accounts that only plaintiff had

[3] Boldt identified that there were no less than 65 withdrawals during the relevant time period, and they were made out or paid to the following: jointly held Lenco Credit Union account, plaintiff's solely held Lenco Credit Union account, Power Plus Products, Prudential Line of Credit, Care Free Systems, Cash, Central Corp Credit Union, First Bank USA, Jim Eaton, Michigan State University, State of Michigan, U.S. Treasury, Bryn Petty, Megan Petty, Richard Petty, LaSalle Bank Midwest, United Bank & Trust, Gunn Allen IRA, and plaintiff and defendant jointly.

[4] Defendant arrived at this amount in her motion because she incorrectly claimed that the amount of total withdrawals was $364,076.58. But that amount did not represent the total amount of withdrawals – instead it was the amount of withdrawals ($466,529.04) offset by the amount of deposits ($102,452.46).

sole control over.[5] Boldt further explained that there was a "fair amount" of moving from one account to another, which he believed was "somewhat unusual."

On November 12, 2010, the parties returned for the final hearing. Defendant testified that that she used to "keep track" of the finances and then plaintiff "started taking everything to work" and that she never saw any information until they met with their financial advisor, Bob Arnold, who indicated "that there was about $400,000 out there that wasn't accounted for." Defendant stated that this meeting occurred in May 2003, before the current divorce filing.[6] Defendant also claimed that she never received the $12,000 annual payments since the entry of the judgment of divorce. Lastly, she stated that she never withdrew any money from any of the retirement accounts at issue. Instead, she claimed that all of the familial expenses were addressed through their joint money market savings account. According to defendant, the retirement accounts were not to be touched.

Plaintiff acknowledged at the hearing that he signed the judgment of divorce, which indicated that he had not made any withdrawals from any retirement account, including his own 401(k). But he also admitted that this was incorrect because he did make withdrawals. He also claimed that he did not review Boldt's report. When asked about the over $400,000 in withdrawals, plaintiff admitted that he was responsible for making the withdrawals and closing the various accounts, and not defendant. He explained that he had to pay "these expenses,"[7] which included some expenses for the timeshares the parties had. When asked why he did not explain the existence or purpose of the withdrawals back in 2005 when they were conducting discovery, plaintiff responded, in pertinent part, "I don't know." When asked again at the end of the hearing why he did not disclose any of this information to Boldt, plaintiff said that Boldt never "asked" for it. Plaintiff asserted that any monies withdrawn from the accounts were used for marital purposes and, as such, he had not committed any "wrongdoing" under the judgment of divorce. But when asked about some specific withdrawals, such as the $90,000 withdrawal from a Fidelity account that closed that account on August 15, 2006, he could not recall what he did with the money. In fact, plaintiff could not specify where *any* withdrawal went:

> *Q.* I'm asking you to tell us what you did with these withdrawals.
>
> *A.* I'm telling you, I need to look to find out. I – I don't remember.

When the testimony had concluded, plaintiff argued that defendant had not met her burden of demonstrating that there was any concealment, fraud, or wrongdoing. Defendant argued that there was no dispute that plaintiff made the withdrawals and that he failed to provide any evidence of the disposition of those funds. The trial court denied defendant's motion in part and granted it in part. The trial court concluded that plaintiff owed defendant $48,000, the

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[5] Specifically, of the $466,529.04 in withdrawals, $246,519.32 were withdrawn from accounts that only plaintiff had sole control over.

[6] As previously noted, defendant filed for divorce in 2003, which was dismissed.

[7] Plaintiff later called these "living expenses" too.

evidence having established that plaintiff failed over the previous four years to make the $12,000 annual payments required by the judgment of divorce. With respect to the remainder of the motion, the trial court rendered the following ruling:

> I am – I am absolutely, positively not convinced that there's been any wrongdoing. There's been lots of insinuation, lots of suggestion, but I find no evidence of concealment, hidden assets, fraud, withdrawals. Yeah, there are withdrawals, but nothing to suggest that he spent money, that he had this lavish lifestyle, that he did something with it or that he buried it in a jar in the backyard. I – I can't find it. I cannot find it is put in a place that was unexpected. He testifies that he used it to spend on marital assets and I see nothing to contradict that. Given – even in the op – given opportunity to come up with that, I – I've gotta believe that it's not there or counsel would of taken the opportunity to – to secure it and bring it back before the Court.
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> * * *
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> I'm granting your motion. I am denying your request for relief. I find nothing in the record to support it. I can't find it. I see all kinds of speculation, but nothing to demonstrate or match your burden of proof.

II. ANALYSIS

Defendant argues that the trial court erred because it did not enforce the terms of the consent judgment of divorce. We agree.

"A divorce judgment entered by agreement of the parties represents a contract." *Rose v Rose*, 289 Mich App 45, 49; 795 NW2d 611 (2010). "[T]he interpretation of a contract is a question of law reviewed de novo on appeal, including whether the language of a contract is ambiguous and requires resolution by the trier of fact. An unambiguous contract must be enforced according to its terms." *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005) (citations omitted). "If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce contractual language as written, unless the contract is contrary to law or public policy." *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). Further, we review the trial court's factual findings for clear error. *McNamara v Horner*, 249 Mich App 177, 182; 642 NW2d 385 (2002). A finding is clearly erroneous if, after a review of the entire record, we are left with a definite and firm conviction that a mistake had been made. *Id.* at 182-183.

The pertinent part of the judgment of divorce provides the following:

> The parties stipulate that if Mr. Boldt finds that any money was concealed, hidden, withdrawn or put in a place that is unexpected (not simply transferred to another brokerage account or lost in the market) *or otherwise unaccounted for by the party that made the transfer or withdrawal, the wrongdoer shall pay the other party one hundred percent of the sum transferred or withdrawn from his or her separate funds*. [Emphasis added.]

As the movant, defendant was entitled to prevail upon a showing that plaintiff concealed or hid money, put the withdrawals in an "unexpected" place, or "otherwise unaccounted for" the withdrawals. In this regard, plaintiff and the trial court misinterpret the word "wrongdoer" as it is used in the consent judgment. Read in context, the word "wrongdoer" simply refers back to the immediately preceding noun phrase, "the party that made the transfer or withdrawal," and is properly interpreted simply to mean the party who concealed, hid, withdrew, or failed to account for any of the retirement funds, in contravention of the parties' stipulation.

The record is clear that plaintiff withdrew certain funds and closed various accounts and not only failed to disclose these withdrawals or closures prior to entry of the judgment of divorce, but also failed to account for the disposition of many of these funds. As a result, the trial court erred in denying defendant's motion on the basis that there was no "wrongdoing" or that defendant failed to show that plaintiff "spent money," had a "lavish lifestyle," or "did something with" the money. Therefore, we vacate the part of the trial court's order stating that "plaintiff does not owe the defendant any monies for claims of withdrawals under Mr. Boldt's accounting." We remand for the trial court to apply the plain language of the judgment of divorce and order plaintiff to pay defendant 100% of any funds that were previously concealed, hidden, placed in an "unexpected" place, or otherwise "unaccounted for."[8]

Reversed in part, vacated in part, and remanded for proceedings consistent with this opinion. Defendant, the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens

[8] On remand, the trial court should use the record already developed to determine whether a withdrawal or closure was concealed, hidden, "put in an unexpected place," or "otherwise unaccounted for." Because plaintiff's testimony did not provide much, if any, detail regarding the disposition of funds he admittedly withdrew and had not previously accounted for, the trial court, of necessity, may have to rely heavily upon Boldt's report in making its determinations.