

¶ 3

FACTS

¶ 4 Diana and Steven entered into the union of matrimony on May 12, 1978. On March 1, 2004, the bonds were dissolved by an agreed judgment. The judgment of dissolution of marriage distributed numerous properties among the parties, including vehicles and two houses. This appeal concerns the distribution of the proceeds of the sale of a driving range.

¶ 5 The parties owned all the shares of SBOSCO Corporation, whose principal asset was the Route 66 Driving Range. Section K of the judgment addressed the distribution of the assets of the corporation. As part of the judgment, Diana agreed to assign all of her shares in the corporation to Steven, and in return, Steven was to "continue to pursue the sale" of the driving range. If the range was not sold within the current listing agreement, the parties agreed that the property would be relisted until sold in the joint names of the parties. Section K provided in part:

"It is further agreed that when the Route 66 Driving Range is sold, that [Steven] shall pay to [Diana] the sum of \$250,000.00 from the proceeds. It is further agreed that the \$100,000.00 sum held in CD's security for the property shall also be equally divided between [Steven] and [Diana] at the time of the sale of the driving range.

[Steven] shall arrange for that sum of \$250,000.00 to be paid directly to [Diana] at closing as a further allocation and distribution of marital property herein.

Further, if the Route 66 Driving Range sells for a net sales price in excess of \$500,000.00, [Steven] shall further arrange to be paid to [Diana] at closing as a further distribution of marital assets, an amount equal to one-half of the excess net sale proceeds received over and above \$500,000.00.

[Steven] is ordered to be charged with the responsibility of liquidating the assets and is required to keep [Diana] apprized of any and all significant events

regarding the marketing of the assets which are stipulated as follows:

1. Route 66 driving range building and land (loan outstanding \$368,570.00)
2. Route 66 driving range inventory/equipment (loan outstanding \$30,824.00)."

¶ 6 On December 14, 2005, Diana filed a two-count petition. In the first count, Diana sought an injunction against the sale of the range to Granite City News Co. Diana alleged:

"5. By the terms of the Judgment, [Diana] is to receive the first \$250,000 of the proceeds (page 7, paragraph K of Exhibit A).

* * *

9. [Diana], pursuant to the terms of the Judgment of Dissolution between the parties, transferred her interest in the corporation on certain conditions, including the payment of \$250,000 from the sale of the real estate constituting the Route 66 Driving Range. A copy of such Assignment is enclosed herewith, marked Exhibit C, and incorporated herein by reference.

10. On or about July 22, 2005, [Steven] acknowledged [Diana's] right to determine the purchase price of the sale of the property by signing the amendment to the Listing Agreement with [Diana] reducing the purchase price from \$800,000 to \$700,000. A copy of said document is enclosed herewith, marked Exhibit D and incorporated herein by reference.

11. [Steven] and SBOSCO, Inc.[,] in complete disregard of the rights of [Diana], entered into a Contract for Sale of Real Estate with *** Granite City News Co., a copy of which is enclosed herewith, marked Exhibit E and incorporated herein by reference. The terms of the sale are a purchase price of \$525,000 for the ground and all equipment.

12. Such purchase price is in complete violation of the agreement binding upon [Steven] and SBOSCO, Inc. to pay \$250,000 to [Diana] out of the sale of said property, as the liens and other indebtedness on the property are such that the net proceeds realized will not amount to \$250,000."

¶ 7 In count II, Diana requested that Steven be held in contempt. Diana alleged that Steven had failed to maintain health insurance for her and had manipulated the operations of the corporation. Diana alleged that Steven had "contrived and manipulated the affairs of the corporation to attempt to justify a sale of all of the corporate assets, for an amount far less than that agreed to by the parties and ordered by this Court in paragraph 'K' of Exhibit A." Diana sought costs and attorney fees.

¶ 8 On February 21, 2006, the parties entered into a stipulation to allow the sale of the property. The court ordered:

"Pursuant to the stipulation of the parties, the Court orders the real estate commonly known as the Route 66 Driving Range sold, pursuant to the Contract for Sale of Real Estate between SBOSCO, Inc., and Granite City News Co., for the purchase price of \$475,000.00. The deductions [to reach] net proceeds shall include those items specified in the real estate contract, a real estate commission of 6%, and only the mortgage on the Route 66 Driving Range building and land and the balance of the loan for inventory and equipment as described in the Judgment of Dissolution of Marriage of the parties.

The net proceeds check shall be made payable to [Diana]."

Shortly afterwards the driving range was sold.

¶ 9 On June 15, 2006, Diana filed her "First Amended Petition for Contempt." Diana alleged that the range had been sold and that Steven had failed to pay the balance of the \$250,000 to her. She also alleged that Steven had failed to make timely payments to the

mortgagee which increased the amount of the payoff by \$2,893.99 and that Steven made misleading statements to the title company concerning the loan on inventory and equipment "to the effect that Diana Boston was short changed \$27,736.07."

¶ 10 On April 29, 2009, the court entered an order finding that Steven had contemptuously failed to pay health insurance and fees for a time share, but denying Diana's other claims of contempt. The court noted that Diana's claim for contempt was based on Steven having intentionally operated the business at a loss, but that there was no credible evidence that Steven had purposefully tried to lower the value of the range.

¶ 11 The court rejected Diana's claim that Steven had agreed to pay her \$250,000 regardless of the sales price for the range. First, the court noted that the stipulated order of February 21, 2006, indicated that the parties had agreed to the terms of the sale and the allocation of the proceeds. The court stated:

"Since the parties explicitly stated [Diana] was to receive net proceeds, and since the parties knew there was a considerable mortgage on the property, and in view of the fact that the marital estate is funded through the sale of this asset, the conclusion is that [Diana] was to receive the proceeds after payment of the mortgage."

The court noted that Diana's assertion that the judgment of dissolution of 2004 referred to gross proceeds was belied by her allegation in her verified petition of December 14, 2005, that "the net proceeds realized will not amount to \$250,000." The court found that the \$250,000 in the original judgment referred to a net figure.

¶ 12 Diana appealed. Steven responded with an appellee's brief that contained a cross-appeal regarding the finding of contempt.

¶ 13 ANALYSIS

¶ 14 Diana asserts that the parties agreed in the judgment of dissolution that she is entitled to a payment of \$250,000 regardless of the amount of the sale. She contends that a payment

of that full amount was triggered by the sale of the property. Diana both misinterprets the judgment of dissolution and fails to account for the later order entered by the circuit court.

¶ 15 Diana's entitlement to the subject payment was contained in section K of the judgment. The plain language of section K operates as the foundation for an obligation, and not just a description of a triggering event. In section K, the parties "agreed that when the Route 66 Driving Range is sold, that [Steven] shall pay to [Diana] the sum of \$250,000.00 from the proceeds." Unambiguously, the payment was to be "from the proceeds." The ambiguity lies in whether these proceeds are gross or net profits from the sale.

¶ 16 The judgment as a whole supports a reading that "the proceeds" mentioned in section K were net. A marriage settlement agreement incorporated into a decree of judgment should, like a contract, be interpreted according to the plain language of the instrument. *Blum v. Koster*, 235 Ill. 2d 21, 33, 919 N.E.2d 333, 340 (2009). As with contracts in general, the intentions of the parties entering an agreement for divorce are to be gleaned from reading the instrument as a whole. *In re Marriage of Mulry*, 314 Ill. App. 3d 756, 760, 732 N.E.2d 667, 671 (2000).

¶ 17 Diana's reliance on the remainder of section K is misplaced. Diana points out that in the first paragraph of section K, in return for her transferring all of her interest in the corporation, Steven agreed to assume all indebtedness of the corporation and "hold her harmless from any liability that may ensue thereon." This paragraph, however, does not discuss the disposition of the property owned by the corporation. Most notably, the first paragraph is silent as to the mortgage and the sale of the driving range.

¶ 18 The second paragraph of section K details how the parties were to conduct the sale. This paragraph alludes to an existing 12-month listing agreement and orders Steven to continue pursuing the sale of the driving range. If the property was not sold within the term of the listing agreement, the parties agreed that it would be relisted in their joint names. At

no point is the mortgage on the property specifically addressed, but the paragraph alludes to the net profits from the sale in that the asset was to be "liquidated."

¶ 19 From its face, the mandate that the parties liquidate the corporate asset of the driving range indicates that a distribution was to be made from the net profits of sale after deduction of any mortgage. The conclusion of section K leaves no doubt that the parties intended this interpretation. In the last paragraph of section K, Steven was charged with the responsibility of "liquidating the assets," and those assets were listed along with the outstanding loans of \$368,570 and \$30,824 on the driving range building and inventory. The listing of these loans is a clear indication that they were to be accounted for in the liquidation of the assets. In other words, the proceeds referred to earlier in section K were the net profits after liquidation.

¶ 20 This reading is consistent with the remaining paragraphs in section K. After setting the obligation for payment "from the proceeds" in the third paragraph, the fourth paragraph establishes that Steven was responsible for arranging for the payment which he could consider a distribution of marital property. The next paragraph addressed the contingency that the parties would be able to sell for "a net sales price in excess of \$500,000," which is consistent with reading the phrase "from the proceeds" as referring to a net sales price.

¶ 21 Diana contends that nowhere else in the agreed judgment did Steven bargain for a release of the obligation to pay \$250,000. Diana's claim was contingent on the sale of the driving range. Steven's obligation was to pay her "from the proceeds" of the sale. Read in isolation, this phrase does not clearly define whether the proceeds are the gross total of sale or the net profits. Read as a whole, the agreement clearly indicates that these proceeds were limited to the net profit from sale of the driving range, not the gross total. As such, Steven had no obligation to pay Diana for any amount above the net proceeds.

¶ 22 Diana's conduct during the course of proceedings belies the interpretation she

advances on appeal. As the trial court pointed out:

"[Diana's] position, in the 2008 hearing, that the 2004 judgment referred to a *gross figure*, or gross proceeds, or that she was entitled to be paid prior to the repayment of the mortgagee bank, is contradicted by her earlier position in this case that the sum payable to her was to be payable from the net proceeds of the sale: [Diana's] verified petition in this case was that the prior sales price of \$525,000 'is in complete violation of the agreement binding upon [Steven] and SBOSCO to pay [Diana] out of the sale of said property, as the liens and other indebtedness on the priority are such that the net proceeds realized will not amount to \$250,000'. (Para. 12 of the 12-14-05 petition) According to [Diana] in her petition for contempt, the operative pleading setting out the issues, and as verified by [Diana], the understanding was that \$250,000 was a net figure.

Para[graph] 12 of [Diana's] verified petition for injunction, and the 2006 stipulation to sell order, are clear indications that [Diana] believed the \$250,000 in proceeds were net of the mortgage and costs of sale." (Emphasis in original.)

¶ 23 Diana contends that the circuit court improperly treated the allegations in her petition as judicial admissions. She asserts that the circuit court treated her pleadings as conclusions of law. *In re Marriage of Osborn*, 206 Ill. App. 3d 588, 594, 564 N.E.2d 1325, 1328 (1990). Diana's argument fails on several levels. First, the trial court's interpretation of section K stands independent from Diana's other pleadings. The document, when read as a whole, indicates that "the proceeds" were the net profits.

¶ 24 Moreover, the trial court did not treat the allegations in Diana's petition as judicial admissions. The trial court did not point to Diana's allegations in the other pleadings as conclusions of law, nor did the trial court point to her verified pleadings as an indication that otherwise clear language in the judgment of dissolution had a different meaning. Instead,

the trial court pointed to Diana's allegations as support for the proposition that the document was not actually ambiguous. In essence, the trial court was pointing out that Diana was being disingenuous. Diana's other pleadings were seen as factual evidence, or "clear indications," that she had agreed to the judgment of dissolution believing that her payment "from the proceeds" was limited to the net profits.

¶ 25 In addition, Diana fails to account for the order of February 21, 2006. In the order for sale, the court discussed the deductions needed to reach the net proceeds, including the mortgage on the building and the balance of a loan for inventory, "as described in the Judgment of Dissolution of Marriage of the parties." The court ordered the net proceeds check to be made payable to Diana. Even if Diana could plausibly assert that the phrase "from the proceeds" in the original judgment of dissolution could be interpreted in isolation to mean the gross proceeds, the later order would have modified the original judgment. See *In re Marriage of Adamson*, 308 Ill. App. 3d 759, 765, 721 N.E.2d 166, 173 (1999) (policy to allow parties to modify agreements). As the judgment of dissolution as a whole indicates the parties had limited the obligation to the net profit, the subsequent stipulation for sale merely clarified the process of carrying out the agreed terms of the judgment of dissolution.

¶ 26 In his brief as appellee, Steven asserts two claims as a cross-appeal. This court lacks jurisdiction to hear Steven's cross-appeal. Although Steven initially filed a notice of appeal, he later moved to dismiss the notice, and on June 17, 2009, the circuit court dismissed the appeal. Ill. S. Ct. R. 309 (eff. Feb. 1, 1981). Upon the filing of this order, jurisdiction became revested in the circuit court. Once the order was entered, the matter was to be treated as though the notice of appeal was never filed. Ill. S. Ct. R. 309 (eff. Feb. 1, 1981); *Bernstein & Grazian, P.C. v. Grazian & Volpe, P.C.*, 402 Ill. App. 3d 961, 966, 931 N.E.2d 810, 815 (2010). No notice of appeal from Steven is before this court, and we lack jurisdiction to hear his cross-appeal.

¶ 27 Accordingly, the order of the circuit court of Madison County is hereby affirmed.

¶ 28 Affirmed.