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2013 IL App (3d) 120234-U

Order filed July 15, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
MARK G. HEXUM,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois,
Petitioner-Appellant,)	
)	Appeal No. 3-12-0234
and)	Circuit No. 10-D-633
)	
SHERRI A. HEXUM,)	Honorable
)	Michael Risinger,
Respondent-Appellee.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the parties freely and voluntarily agreed to the terms of the marital settlement agreement before the trial court and the agreement awarded property and maintenance based on statutory factors, the trial court did not err in denying the husband's motion to vacate the agreement incorporated into the judgment for dissolution.
- ¶ 2 Petitioner, Mark G. Hexum, appeals from the circuit court's order denying his motion to vacate the settlement agreement incorporated into the judgment for dissolution of

marriage. On appeal, he argues that the agreement was unconscionable and that it was obtained by coercion and fraud on the part of his wife's counsel and his counsel. We affirm.

¶ 3 Mark and respondent, Sherri A. Hexum, married on September 8, 1990. They had two children: Blake, born February 28, 1991, and Brandon, born October 17, 1993. During the marriage, Mark worked as a high level manager at Caterpillar, Inc, and Sherri stayed home with the children. Mark continues to work for Caterpillar. As a high level employee, Mark earns a base income in addition to which he receives yearly bonuses and stock option payments. At the time of dissolution, the parties' marital estate was worth approximately 1.4 to 1.8 million.

¶ 4 On October 20, 2010, Mark filed a petition for dissolution of marriage. Sherri responded and requested monthly maintenance in the amount of \$8,000. In May of 2011, the parties entered an order awarding primary physical custody of their minor son, Brandon, to Mark.

¶ 5 In September 2011, Mark filed a financial affidavit, reporting monthly mortgage payments for the marital home of \$4,610, and reflecting a base monthly gross income of \$16,397. After taxes and health and life insurance, Mark listed a base monthly net income of \$11,948. Between 2007 and 2011, Mark also received bonus payments ranging from \$41,312 to \$74,157.12 each year, and he exercised yearly stock options. In 2007, his stock redemption income was \$101,716; in 2008, it was 108,055; in 2010, it was 120,793.65; and in 2011, his stock option income was \$64,467.50. According to his affidavit, Mark's total income as shown on his 2010 federal income tax return was \$223,921.

¶ 6 On September 27, 2011, trial commenced on the issues of property distribution and maintenance. After Sherri testified, the trial court noted that the only disputed issues were maintenance and attorney fees and called a recess to allow the parties and their attorneys to discuss settlement. After several hours of negotiations, the parties requested that the trial court meet with counsel to discuss the issue of maintenance. The trial court stated that it would listen to the attorneys but indicated that its comments would not be binding and that a full trial would be held if there was no agreement. Counsel on both sides met with the trial court to discuss several issues, including maintenance. The issues discussed with the trial court were then reviewed with the parties and negotiations continued.

¶ 7 Later that afternoon, the parties informed the trial court that they had reached an agreement. On the record, Sherri's attorney stated that the parties had agreed that the martial home would be sold, they would keep their own vehicles, the two joint bank accounts would be split equally and they would keep their own checking and savings accounts. At the center of settlement negotiations were the terms of maintenance. Counsel informed the trial court that the parties had reached an agreement that Mark would pay Sherri \$6,250 per month in maintenance and that, in addition, he would pay her 35% of his yearly bonus pay and 35% of any stock options that he exercised. Finally, the parties agreed that Mark would purchase a life insurance policy worth \$250,000, naming Sherri as the beneficiary.

¶ 8 During the recitation of the terms of the agreement, Mark interjected seven times to ask questions and make comments. The court went off the record six times for further discussion and clarification. After the discussions were concluded and the questions were resolved, the trial court asked the parties if they voluntarily consented to its terms.

Specifically, the court asked Mark if he understood the terms of the agreement, if he wanted the document presented to be his agreement, if his act of accepting the agreement was his free and voluntary act, and if he wanted the court to enter the agreement into the dissolution judgment. Mark answered "yes" to all of these questions. The court asked Sherri the same questions; she also answered in the affirmative. The trial court then accepted the agreement and incorporated its terms into the final judgment for dissolution of marriage.

¶ 9 Within 30 days, Mark filed a motion to vacate the marital settlement agreement. In his motion, he alleged that after the attorneys discussed the issue with the court, Mark's attorney told him that the court indicated that it would impose maintenance at 50-60%, which could be \$10,000 or more. He alleged that he was forced to agree to 37.5% (\$6,250) in maintenance to avoid financial devastation.

¶ 10 At the hearing on the motion, Mark testified that he felt the agreement was "shoved down [his] throat and that was all—the only option [he] had," that he did not realize that his entire paycheck would be used to pay maintenance and the mortgage, and that he was told the trial court was leaning toward a maintenance figure of 50-60% of his gross income. He further testified that he did not understand the agreement, that every time he raised a point he was "shut down," and that he did not know he could talk to his attorney while the settlement agreement was recited to the court.

¶ 11 Following Mark's testimony, Sherri moved for a directed verdict. The trial court granted her request and directed a verdict denying Mark's motion to vacate the marital settlement agreement. The court found that Mark's motion was merely an attempt to vacate an order he agreed to based on "buyer's remorse." It found no evidence of coercion and

determined that the agreement was not unconscionable. Thereafter, the court entered a final judgment of dissolution, which incorporated the terms of the settlement agreement.

¶ 12

ANALYSIS

¶ 13

A marital settlement agreement is construed in the same manner as any other contract. *In re Marriage of Doermer*, 2011 IL App (1st) 101567. Typically, a settlement agreement is not subject to appellate review because an agreed order is a memorialization of the agreement between the parties and not a judicial determination of the parties' rights. *In re Haber*, 99 Ill. App. 3d 306 (1981). When a party seeks to vacate a settlement incorporated into a judgment for dissolution of marriage, all presumptions are in favor of the validity of the settlement agreement. *In re Marriage of Bielawski*, 328 Ill. App. 3d 243 (2002). Nevertheless, a marital settlement agreement may be set aside if it is shown that the agreement is unconscionable or was obtained through coercion, duress or fraud. *In re Marriage of Gorman*, 284 Ill. App. 3d 171 (1996). The determination of whether a valid settlement occurred is in the trial court's discretion and we will not reverse a court's decision unless it is contrary to the manifest weight of the evidence. *Kim v. Alvey, Inc.*, 322 Ill. App. 3d 657 (2001). In other words, we will reverse the decision only if the opposite conclusion is clearly apparent or where those findings are palpably erroneous or wholly unwarranted. *K4 Enterprises, Inc. v. Grater, Inc.*, 394 Ill. App. 3d 307 (2009).

¶ 14

I. Unconscionability

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Mark first argues that the marital settlement agreement was unconscionable because he had no meaningful choice in the matter and the terms overwhelmingly favored Sherri.

¶ 17 Section 503(d) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/101 *et seq.* (West 2012)) requires the division of marital property upon the dissolution of marriage. 750 ILCS 5/503(d) (West 2012). Marital property must be divided in "just proportions considering all relevant factors," including the duration of the marriage and the reasonable opportunity of each spouse for future acquisition of capital assets and income. 750 ILCS 5/503(d) (West 2012). "Just proportions" does not necessarily mean mathematical equality, but the distribution must be equitable under the circumstances. *In re Marriage of Morris*, 266 Ill. App. 3d 277 (1994).

¶ 18 A marital settlement agreement is unconscionable if there is "an absence of a meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *In re Marriage of Steadman*, 283 Ill. App. 3d 703 (1996). An agreement that favors one party over another is not necessarily unconscionable. *Gorman*, 284 Ill. App. 3d at 181. "To rise to the level of being unconscionable, the settlement must be improvident, totally one-sided or oppressive." *Id.* at 182. To determine whether an agreement is unconscionable, the court must consider (1) the conditions under which the agreement was made, and (2) the economic circumstances of the parties that result from the agreement. *Bielawski*, 328 Ill. App. 3d at 251. A court should not set aside an agreement merely because a party has second thoughts. *Gorman*, 284 Ill. App. 3d at 180.

¶ 19 Here, Mark and Sherri were married for 21 years and had two children. During the marriage, Mark worked in upper level management at Caterpillar and Sherri stayed at home with the children. The record reflects that the parties quickly resolved the issue of custody but could not agree as to property and maintenance. For nearly a year, dissolution

proceedings continued. Both sides filed petitions for contempt and dissipation of marital assets. On the day of trial, the parties decided to negotiate the remaining issues. During negotiations, both parties were represented by counsel. Following a lengthy recess, the parties presented a negotiated marital settlement agreement to the court with supporting exhibits outlining the division of marital assets and calculation of maintenance. At that time, Mark swore under oath that he understood the terms of the agreement, that he wanted the agreement to be incorporated into the dissolution judgment, and that his signature represented his free and voluntary acceptance of those terms. Thus, the conditions under which the agreement were made demonstrate that it was not unconscionable.

¶ 20

B

¶ 21

As to the economic circumstances of the parties after the agreement, the financial status of the parties does not unreasonably favor either spouse. An agreement is unconscionable only if it is totally one-sided and oppressive. See *Gorman*, 284 Ill. App. 3d at 182. In this case, Mark is paying maintenance in the amount of \$6,250 per month, in addition to 35% of his yearly bonus income and 35% of any stock option income. Sherri has no monthly income, no bonus income and no stock options. The agreement gives Sherri \$6,250 per month before taxes and leaves Mark with approximately \$6,000 in net income after taxes, not including 65% of his bonus income and 65% of his stock redemption income. Given the length of the parties' marriage, Mark's ability to generate income and Sherri's lack of future earning potential, the maintenance agreement is not one-sided or oppressive.

¶ 22

II. Coercion and Fraud

¶ 23

Mark also claims that the marital settlement agreement should be vacated based on

coercion and/or duress and fraud because both Sherri's attorney and his attorney made false statements that the trial court would enter a judgment requiring him to pay 50-60% of his gross salary as maintenance if he refused to agree to a settlement.

¶ 24

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¶ 25

Coercion and duress have been defined as "the imposition, oppression, undue influence, or the taking of undue advantage of the stress of another, whereby that person is deprived of the exercise of her free will." *In re Marriage of Flynn*, 232 Ill. App. 3d 394, 399 (1992). The person asserting coercion or duress bears the burden of proving it by clear and convincing evidence. *Gorman*, 284 Ill. App. 3d at 180.

¶ 26

Our review of the record establishes that there is no evidence, let alone clear and convincing evidence, that would rise to the level of coercion to justify vacating the settlement agreement. Mark was well aware of the assets each of the parties held, was not unsophisticated in financial matters, was represented by competent counsel throughout the proceedings, was advised as to possible maintenance outcomes, and voluntarily and freely entered into the agreement before the trial court. Mark argues that his attorneys coerced him into the agreement by advising him that he would be ordered to pay 50% of his gross income if he went to trial. However, Mark's own questions during the recitation of the terms of the agreement belie his argument that he was coerced into the settlement agreement. Mark asked several questions as did his counsel during the course of the September 27 hearing. Each time Mark interjected, the court discussed the matter either on or off the record. In some instances, both parties were given time to discuss the issues with their attorneys before the hearing continued. In addition, Mark specifically questioned the court regarding the subject

of the modification of permanent maintenance. The court explained that maintenance was modifiable if a change in circumstance was shown and went off the record to further discuss the issue. Mark's participation and his interactive discussions with the court and the attorneys contradict his claim that counsel forced him to agree to a marital settlement agreement in which he agreed to pay 37.5% of his gross income as maintenance.

¶ 27 Here, Mark acknowledged to the court that he agreed to the terms of the settlement and that he wished to make the agreement part of the dissolution judgment. He chose to settle the maintenance issue rather than go to trial and agreed to pay \$6,250 per month in maintenance. Although he may have felt some anxiety and pressure to do so during the negotiations on September 27, 2011, he was not "deprived of his free will."

¶ 28 B

¶ 29 Mark's claim of fraud also must fail. Initially, we reject Mark's argument because it was not raised in the trial court below. Therefore, the issue is forfeited. See *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 85 (issue or argument not raised in the trial court is forfeited and may not be raised on appeal).

¶ 30 Even if the issue was not forfeited, the evidence Mark presented at the motion to vacate hearing failed to sustain an allegation of fraud. To prove fraud, the plaintiff must establish (1) a false statement of material fact known or believed to be false by the party making it, (2) intent to induce another party to act, (3) action by the other party in reliance on the truth of the statement, and (4) damage to the other party relying on such a statement. *In re Marriage of Roepenack*, 2012 IL App (3d) 110198. The record shows no indication of fraud by either Sherri's counsel or Mark's counsel. At the hearing on the motion to vacate,

Mark was the only witness to testify, and his self-serving testimony is not clear and convincing evidence that Sherri's attorney and his attorney made a false statement. Even if Mark's attorney informed Mark that he could be ordered to pay 50-60% of his income as maintenance if he went to trial, Mark failed to demonstrate that counsel knew the statement was false when he made it. It appears that the trial court advised both attorneys during negotiations that there were several options as to the issue of maintenance. After discussing the case with the trial court, Mark's attorney discussed those options with Mark and advised him that he did not have to agree to a settlement on the issue of maintenance. Based on the record before us, Mark failed to present a meritorious claim of fraud.

¶ 31

CONCLUSION

¶ 32

The judgment of the circuit court of Peoria County denying Mark's motion to vacate the marital settlement agreement is affirmed.

¶ 33

Affirmed.