2016 IL App (1st) 132128-U

THIRD DIVISION
June 22, 2016

No. 1-13-2128

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| IN RE THE MARRIAGE OF CATHERINE BOROWSKI, | ) | Appeal from the Circuit Court of Cook County. |
| Petitioner-Appellee, | ) | |
| | ) | No. 12 D 5704 |
| v. | ) | |
| ZIEMOWIT SMULKOWSKI, | ) | The Honorable Dominique C. Ross, |
| Respondent-Appellant. | ) | Judge Presiding. |

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PRESIDING JUSTICE MASON delivered the judgment of the court.[1]
Justice Fitzgerald Smith concurred in the judgment.
Justice Pucinski dissented.

## ORDER

¶ 1 *Held*: In divorce case, where husband sought judicial relief based upon the existence of a marital settlement agreement, the mend-the-hold doctrine barred the husband from later arguing that the agreement was too indefinite to be enforced.

¶ 2 Respondent Ziemowit Smulkowski appeals the circuit court's judgment dissolving his marriage to petitioner Catherine Borowski following a prove-up of the parties' oral marital settlement agreement. On appeal, Ziemowit argues that there was no enforceable agreement and that the court erred in incorporating the agreement into its judgment dissolving the couple's

[1] This matter was recently reassigned to the author.

marriage. We disagree. Earlier in the litigation, Ziemowit moved to vacate the agreement based on Catherine's alleged material breach of its terms. He cannot now "mend the hold" by claiming that no enforceable agreement existed in the first place. Accordingly, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Catherine and Ziemowit married on June 28, 2003, and separated on May 14, 2012. The couple did not have any children. On June 11, 2012, Catherine filed a petition for dissolution of marriage based on irreconcilable differences.

¶ 5 The matter was scheduled for trial on April 8, 2013. On that date, the parties appeared before the court with their respective attorneys, and Catherine's attorney informed the court that the parties had reached a settlement agreement. The court stated that, in the past, the parties had supposedly reached agreement on certain issues, such as maintenance, and then proceeded to re-argue those issues. The trial court stated, "You do not get to keep coming back and putting things on the table just because you have resolved an issue. It's not up for renegotiation. Once you have said that you agree, you agree." Neither party expressed disagreement with this statement by the court. The court then suggested that they proceed immediately with an oral prove-up on the settlement agreement; again, neither side raised any objections.

¶ 6 During the prove-up, Catherine testified that in accordance with the terms of their agreement, she would receive maintenance in the amount of 17.5% of Ziemowit's "gross employment income for a period of four years, 48 months, following the entry of [j]udgment." The amount of maintenance would not be subject to modification, but it was subject to termination in the event of her death, remarriage, or the occurrence of any of the statutorily delineated factors. Catherine further testified that she understood that the maintenance payments

were taxable to her and deductible by Ziemowit. With respect to the parties' assets and liabilities, Catherine acknowledged that a balance sheet had been compiled and that the assets were to be divided on a "50/50 basis." When specifically asked about three private equity investments made by the couple (KMR/Frontenac, MPM and MCP Opportunity II), Catherine testified that she would receive 50% of any distributions received in connection with those investments, but she would be responsible for paying a "50% share of any capital calls" as well as 50% of the taxes assessed on those investments. If she failed to pay any capital calls, Ziemowit had the option of paying her share, which would result in him owning 100% of the private equity investment. Moreover, Ziemowit would assume full ownership of the MCP Opportunity III private equity investment, but he would return Catherine's $34,000 capital investment. Catherine provided additional testimony about the parties' tax responsibilities. She testified that first quarter taxes incurred in 2013 would be paid from the marital estate prior to the equal distribution of assets. Outstanding 2012 federal taxes and outstanding California and Illinois state taxes for 2012 and the first quarter of 2013 would be divided as follows: Ziemowit would pay 65% and Catherine would pay 35%.

¶ 7 With respect to the couple's real estate, Catherine testified that Ziemowit would retain property located at 2446 West Superior in Chicago and that she would receive properties located at 4428 West Monroe and 3916 West Monroe. The properties remained subject to their respective mortgages. The couples' four cars were divided evenly between them, with Ziemowit being awarded his 1996 Porsche 911 and a 2007 FJ Cruiser and Catherine maintaining ownership of a 2008 Toyota FJ Cruiser and a 2003 BMW 540. Catherine further testified that the parties had agreed to pay their own attorney fees without contribution from each other and to be responsible for their own debts. Because Ziemowit had accumulated a greater amount of

retirement proceeds, Qualified Domestic Relations Orders would be utilized to equalize the couple's retirement accounts.

¶ 8 After discussing the parties' financial and property distributions, Catherine testified that the parties had also agreed to a no-contact provision. Specifically, Ziemowit was not to contact Catherine or her mother unless there was a need to discuss payments or other issues pertinent to the parties' settlement. In return, Catherine agreed not to disseminate any information regarding the parties' MSA to Christian Bremmer, the husband of Ziemowit's current girlfriend, Gosia Bremmer.[2] On cross-examination, Catherine acknowledged that she was obligated to remove Ziemowit's name from the mortgage taken out on one of the West Monroe properties within 90 days and to indemnify him against any liabilities relating to that mortgage.

¶ 9 Ziemowit testified that his understanding of the MSA was "substantially the same" as Catherine's, though he did not provide further testimony about the terms of the agreement. He also confirmed that nobody forced or coerced him into entering into the agreement.

¶ 10 At the conclusion of the prove-up, the trial court found that there had been an irretrievable breakdown of the marriage. It further found that the terms of the MSA, as testified to by the parties, were fair, reasonable, and not unconscionable, and the parties entered into the agreement freely and voluntarily. Accordingly, the court stated:

> "[I]t is hereby ordered that a Judgment for Dissolution of Marriage dissolving the bonds of matrimony between the parties is awarded.
>
> The Judgment—the written Judgment shall be submitted within seven days of today's date. Except as otherwise provided in the agreement, each party is awarded all the property in their respective name[s], possession and control. Maintenance has been

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[2] Based on the record, it appears the Bremmers were also in the middle of a contentious divorce.

waived by [Ziemowit]. As to [Catherine], [Ziemowit] shall pay 17.5% of his gross income from his employment source only as and for maintenance to [Catherine] for a period of 48 months. This amount is non-modifiable and shall terminate within 48 months *** if all the payments have been made.

Each party shall be responsible for their own debts as provided in the agreement. Both [Catherine] and [Ziemowit] are present in court and represented by counsel. Both parties shall be responsible for their own attorneys' fees.

And judgment for Dissolution of Marriage is continued for the written Judgment that will be brought within seven days.

Good luck to both of you and do understand that this Judgment is going to be entered with or without your signature."

¶ 11 Three days later, on April 11, 2013, Ziemowit filed an emergency motion in which he alleged that Catherine violated the no-contact provision of the parties' MSA by meeting with Mr. Bremmer on April 9, 2013. In reciting the background of the case, Ziemowit stated:

"4. On April 8, 2013, after pretrial and much discussion, the parties entered into an overall settlement agreement via oral proveup.

* * *

6. Ziemowit 'entered into' the overall agreement in reliance on Catherine's no contact agreement and her representations relating thereto. (the use of the phrase 'entered into' or similar words in this Emergency Petition is not a concession that Ziemowit entered into any sort of agreement with Catherine on April 8, 2013, as his agreement was contingent on the truthfulness of Catherine's representations and warranties made in open court under oath)."

Based on Catherine's alleged violation of the agreement, Ziemowit sought an adjudication of criminal contempt against Catherine and also sought to have the MSA vacated.

¶ 12 The parties appeared for a hearing on Ziemowit's emergency motion on April 15, 2013. Catherine testified that Mr. Bremmer and his children had visited her at her home on April 9. They discussed Mr. Bremmer's trip to Puerto Rico, his children's school, and Catherine's home and cats. Catherine denied that she discussed any of the details of her divorce or the parties' settlement agreement with Mr. Bremmer. Following Catherine's testimony, the circuit court denied Ziemowit's motion in its entirety, reasoning that the no-contact clause simply precluded Catherine from discussing details of the parties' MSA with Mr. Bremmer and did not preclude them from talking about other matters.

¶ 13 On April 22, 2013, the parties submitted written drafts of the MSA to the court, in accordance with the court's order. Ziemowit's draft MSA stated: "The parties entered into an oral Marital Settlement Agreement on April 8, 2013. Ziemowit objects to said agreement being entered in writing today, as reflected in his [April 11 motion], which was denied." The draft MSA incorporated the terms of the parties' April 8 agreement "by reference only," but it did not articulate any of those terms.

¶ 14 The case was continued to April 25, 2013. On that date, the court, having reviewed the versions of the MSA provided by both parties, stated that Catherine's draft MSA was "almost verbatim" what was testified to at the prove-up, while Ziemowit's draft MSA contained "extraneous language" and omitted any mention of the mutual no-contact order. The court stated, "I don't know why [Catherine's version of the] Marital Settlement Agreement wouldn't be the one that is entered ***."

¶ 15 In response, Ziemowit argued that the MSA was unenforceable because it omitted material terms. Specifically, he stated that after the April 8 prove-up, there had been a capital call for one of the parties' joint private equity investments, the MCP III investment. He argued that the parties' lack of knowledge of the capital call pertaining to the MCP III investment at the time of the prove-up meant that there was no meeting of the minds. The court disagreed, stating: "[T]here is a meeting of the minds because you have a document, and an agreement that is going to happen with that particular investment. That is the meeting[] of the mind[s]." The court explained that the timing of the capital call was irrelevant given the parties' agreement.

¶ 16 Ziemowit raised additional objections to enforcement of the MSA. He argued that it would leave him insolvent and that he therefore "could not have reached that agreement." He also challenged the maintenance provision, arguing that the definition of income in Catherine's written draft was broader than what the parties had actually agreed to. The trial court rejected both of these arguments. Over Ziemowit's objection, it entered a judgment of dissolution of marriage pursuant to "the written Judgment and Agreement."

¶ 17 ANALYSIS

¶ 18 On appeal, Ziemowit argues that the circuit erred in finding that the parties had reached an enforceable marital settlement agreement. He states that the terms of the parties' alleged oral agreement were "anything but definite and certain"; rather, the oral agreement omitted essential terms regarding the parties' division of assets and the calculation of maintenance. In particular, the parties neglected to allocate their checking/savings accounts, brokerage accounts, and retirement accounts, which were worth over $1,000,000. Catherine argues that Ziemowit's argument is entirely meritless, as the circuit court repeatedly found. She contends that the parties' oral agreement, as testified to during the prove-up hearing, was sufficiently definite to

ascertain how the marital estate would be divided. The disputed accounts would be divided on a "50/50 basis," in accordance with Catherine and Ziemowit's testimony at the prove-up.

¶ 19 It is well-settled that the law favors the amicable settlement of property rights during marital dissolution proceedings. *In re Marriage of Hightower*, 358 Ill. App. 3d 165, 169 (2005); *In re Marriage of Lorton*, 2013 Ill. App. 3d 823, 825 (1990). Section 502(a) of the Illinois Marriage and Dissolution of Marriage Act reflects this principle and provides, in pertinent part: "To promote amicable settlement of disputes between parties to a marriage attendant upon the dissolution of their marriage, the parties may enter into a written or oral settlement containing provisions for disposition of any property owned by either of them, [and] maintenance of either of them ***." 750 ILCS 5/502(a) (West 2012).

¶ 20 A marital settlement agreement, whether it is oral or written, is a contract governed by principles of contract law. *In re Marriage of Haller*, 2012 IL App (5th) 110478, ¶ 26. For a contract to be binding, there must be an offer, an acceptance, and a meeting of the minds as to the terms of the agreement. *Id.* A meeting of the minds occurs "where there has been assent to the same things in the same sense on all essential terms and conditions." *Id.* The agreement's terms must be sufficiently definite and certain for the court to determine what the parties have agreed to do, employing proper rules of construction and applicable principles of equity. *Id.* As long as this condition is met, it is not necessary that the agreement explicitly provide for "every collateral matter or every possible future contingency which might arise." (Internal quotation marks omitted.) *Id.* ¶ 28.

¶ 21 Initially, Catherine argues that Ziemowit is precluded from denying the existence and enforceability of the MSA because he admitted to its existence in his April 11 motion where he sought to have Catherine held in contempt of court for violating its terms. We agree. Under the

mend-the-hold doctrine, Ziemowit may not admit the existence of the agreement in seeking to have its terms enforced and, failing in that effort, later take the position that no agreement existed. As was aptly stated by the California Court of Appeals, "One may not alter one's *** argument as the chameleon does his color, to suit whatever terrain one inhabits at the moment." *Aerojet-General Corp. v. Superior Court*, 211 Cal. App. 3d 216, 240 (1989).

¶ 22 Illinois has recognized the mend-the-hold doctrine for over a century:

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to amend his hold. He is estopped from doing it by a settled principle of law." *Schuyler County v. Missouri Bridge & Iron Co.*, 256 Ill. 348, 353 (1912).

Accord *Trossman v. Philipsborn*, 373 Ill. App. 3d 1020, 1042 (2007) (quoting *Schuyler*); see also *Rural Electric Convenience Cooperative Co. v. Illinois Commerce Comm'n*, 118 Ill. App. 3d 647, 654 (1983) (where plaintiff's administrative complaint asserted a right to relief upon certain grounds, and plaintiff sought to introduce a new ground for relief after all evidence in the case had been heard, such change in position was barred by the mend-the-hold doctrine). This principle is typically applied in contract cases to prevent a party from trying to evade performance of his contractual duties for one reason, and then, in the middle of litigation, switching to another reason. It is an equitable doctrine "developed to redress unfair and arbitrary conduct of the repudiating party." *Trossman*, 373 Ill. App. 3d at 1044.

¶ 23 For instance, in *Larson v. Johnson*, 1 Ill. App. 2d 36 (1953), defendants repudiated a contract on grounds of misrepresentation and fraud. Later, defendants abandoned this defense in

favor of a new one, namely, that the contract was too indefinite to be enforced. *Id.* at 39. The court refused to allow defendants to alter their defense in such a fashion, explaining:

> "Reading the record here, it becomes clear that defendants for their own reasons, having nothing to do with their present defense of uncertainty, repudiated the contract and that at the time they did so, the only reason they could think of was that given in their carefully prepared letter of April 10, 1950, that is, misrepresentation and fraud. *** Sometime during the proceeding, when it must have appeared to them that they could not sustain this charge of fraud, they shifted their ground to the indefiniteness of the lease provision." *Id.* at 48.

Under these circumstances, the principles of "equity and good conscience" dictated that defendants should be held to their original position. *Id.*; see also *Harbor Insurance Co. v. Continental Bank Corp.*, 922 F.2d 357, 362 (7th Cir. 1990) (describing *Larson* as "an authoritative exposition of Illinois law").

¶ 24 As the *Larson* decision demonstrates, the mend-the-hold doctrine is typically applied as an equitable principle arising from the duty of good faith and fair dealing imposed upon all parties to contracts. *Harbor Insurance*, 922 F.2d at 363. "A party who hokes up a phony defense to the performance of his contractual duties and then when that defense fails (at some expense to the other party) tries on another defense for size can properly be said to be acting in bad faith." *Id.* Thus, it has been suggested that if a party's stance changes because of pretrial discovery or other new information, that change should not be considered a forbidden attempt to "mend the hold," since "it is not bad faith to change one's position on the basis of information that could not have been acquired earlier." *Id.* at 364.

¶ 25 *Potter v. Fon du Lac Park District*, 337 Ill. 111 (1929), is also instructive. The *Potter* plaintiff contracted to sell land to defendant. When defendant refused to pay the purchase price, plaintiff sued for breach of contract. *Id.* at 112-13. In its answer, defendant argued that its nonperformance was justified because plaintiff breached the contract. Specifically, plaintiff was supposed to give land to the state so that a road could be built to defendant's property, and plaintiff failed to do so. *Id.* at 114. (The evidence showed this allegation to be false. *Id.* at 115.) Later, defendant argued that no valid contract was formed because the plaintiff's signatory lacked proper authorization to enter into the contract. The *Potter* court rejected this argument, stating, "The charge in the answer of breach of contract is in effect an admission in the record of the existence of such contract." *Id.* at 119. Although the court did not explicitly reference the mend-the-hold doctrine, the underlying principle is the same: having sought relief based on plaintiff's alleged breach of the contract, defendant could not later argue its nonexistence.

¶ 26 We find the present case to be analogous to *Potter* and *Larson*. In his April 11 emergency motion, Ziemowit alleged that Catherine had violated a material term of the MSA, namely, the no-contact provision. Ziemowit argued that Catherine's breach of the agreement should subject her to criminal contempt and was also grounds for vacating the agreement. Plainly, at that point in the litigation, Ziemowit's stance was that the parties reached a definite agreement on April 8, but the agreement was rendered invalid by Catherine's alleged breach. The court found that no breach had occurred and denied Ziemowit's motion on April 15. A scant ten days later, on April 25, Ziemowit was back in court with a new (and contradictory) reason why he did not have to abide by the terms of the agreement: his claim that the agreement was too indefinite to be enforced. This kind of chameleon conduct is exactly the sort of conduct prohibited by the mend-the-hold doctrine.

¶ 27 Furthermore, the record does not show that any new information came to light between April 11 and April 25 that would justify Ziemowit's dramatic change of position. It is specious to suggest that the parties were not aware of over $1,000,000 in assets at the time they entered into the settlement agreement. As is obvious from Catherine's recitation of the terms of the parties' agreement and the schedule of assets included in the record, Catherine and Ziemowit accumulated substantial valuable assets during the course of their marriage and were both represented by counsel during the negotiation of the MSA. They did not, as Ziemowit suggests, forget to allocate substantial assets not covered by the terms of the MSA. Rather, to the extent that Catherine did not specifically discuss the allocation of certain assets, they would be divided on a "50/50 basis," per her testimony. Allowing Ziemowit to use the existence of these assets to invalidate the agreement at this late juncture would be entirely arbitrary. See *Trossman*, 373 Ill. App. 3d at 1043-44 (mend-the-hold doctrine only applies where there is arbitrariness, detriment, unfair surprise, or prejudice to the opposing party). It would also be detrimental to both parties, insofar as it would subject both of them to the time and expense of further proceedings, despite the fact that they both agreed to a settlement before the court.

¶ 28 In this regard, we note that the parties had a history of "agreeing" on certain issues and then later putting those issues back on the table. To prevent further such occurrences, the trial court explicitly admonished the parties before the prove-up that "[y]ou do not get to keep coming back and putting things on the table just because you have resolved an issue. It's not up for renegotiation. Once you have said that you agree, you agree." Ziemowit made no objection to this statement, nor did he raise any challenge to the existence of the MSA during the prove-up. Rather, he testified that the terms of the agreement were substantially as Catherine stated in her testimony. Particularly in light of this circumstance, as well as the other reasons above, we find

that in the interest of "equity and good conscience" (*Larson*, 1 Ill. App. 2d at 48), Ziemowit may not mend his hold by asserting that the MSA is too vague to be enforced.

¶ 29 CONCLUSION

¶ 30 The trial court did not err in incorporating the terms of the parties' settlement agreement into the judgment dissolving the parties' marriage. The judgment of the trial court is affirmed.

¶ 31 Affirmed.

¶ 32 JUSTICE PUCINSKI, dissenting.

¶ 33 I respectfully dissent. I am unpersuaded by Catherine's argument and the majority's conclusion that Ziemowit is precluded from denying the existence and enforceability of the MSA based on his emergency petition to vacate, which he filed three days after the parties' oral prove-up hearing. Although Ziemowit's petition contained a statement that "the parties entered into an overall settlement agreement via oral proveup," the petition also contained explicit language disavowing the existence and enforceability of the purported agreement. Within the body of the petition, Zeimowit specifically states: "[T]he use of the phrase 'entered into' or similar words in this Emergency Petition is not a concession that Ziemowit entered into any sort of agreement with Catherine on April 8, 2013 ***." When read in its entirety, Ziemowit's petition cannot, as Catherine argues, constitute a judicial admission because it is not a clear and unequivocal statement concerning the existence of an enforceable MSA. See, *e.g.*, *Dunning v. Dynegy Midwest Generation, Inc.*, 2015 IL App (5th) 140168, ¶ 50 (recognizing that a judicial admission will only be found where the particular statement, viewed in context, is clear and unequivocal).

¶ 34 I am further unpersuaded by the majority's reliance on the mend-the-hold doctrine, a legal construct not specifically referenced by either of the parties. Most commonly employed in insurance contract disputes to preclude insurers from denying a claim on one basis and then changing the basis for the denial during litigation (*Smith v. Union Auto Indemnification Co.*, 323

Ill. App. 3d 741, 746 (2001)), the mend-the-hold doctrine only applies when "the offending party change[s] the initial reason for not performing a contract to a *completely* different reason during litigation." (Emphasis added.) *Liberty Mutual Insurance Co. v. American Home Assurance Co.*, 368 Ill. App. 3d 948, 958 (2006). In finding that the mend-the-hold doctrine applies to the case at bar, the majority concludes that Ziemowit's petition to vacate "[p]lainly" demonstrated that "at that point in the litigation, [his] stance was that the parties reached a definite agreement on April 8, but the agreement was rendered invalid by Catherine's breach." I do not believe that this conclusion is warranted given that Ziemowit explicitly disavowed entering into any sort of enforceable agreement with Catherine in that very same petition. As such, I do not believe that his subsequent challenge to the enforceability of the MSA is so completely different from his initial challenge such that the mend-the-hold doctrine applies.

¶ 35 Finally, I am similarly unable to agree with the majority's categorization of Ziemowit's challenge to the enforceability of the MSA as "specious." The record clearly demonstrates that the parties failed to address with specificity the allocation of their checking/savings accounts, brokerage accounts and retirement accounts during the prove-up hearing. Although the parties agreed to an "equal division" of the marital estate, neither Catherine nor Ziemowit provided any detailed testimony concerning the division of those accounts, the assets of which totaled over $1,000,000. Moreover, while the balance sheet identified the various accounts, they were not allocated to either party. In contrast, the balance sheet clearly allocated other marital assets, including real estate, vehicles, and private equity investments to the individual parties. Given the scope of the parties' marital estate and liabilities, it was not enough for the parties to assent to an "equal division"; rather it was essential for the parties to detail the specific manner in which the assets were to be allocated. See *Haller*, 2012 IL App (5th) 110478, ¶ 26 (recognizing that for a

contract to be enforceable, the terms must be sufficiently "definite and certain"). This is especially true given the fact that Ziemowit assumed a larger share of tax and other liabilities. Indeed, the circuit court recognized the deficiency of the parties' testimony concerning the distribution of its marital estate in a subsequent order, in which it found that they "did not address the division of cash accounts." Ultimately, given the parties' failure to specifically address the division of these assets during the prove-up hearing, I would conclude that the terms of the MSA were not sufficiently certain and definite and that the agreement was incomplete and unenforceable. I would thus reverse the portion of the circuit court's judgment that incorporates the MSA and remand for further proceedings to resolve those matters.