2015 IL App (1st) 143358-U

SIXTH DIVISION
December 4, 2015

No. 1-14-3358

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF THERESA WALLOGA, Petitioner-Appellee, and MICHAEL WALLOGA, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 09 D 5809 Honorable Jeanne Cleveland Bernstein, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justice Hoffman concurred in the judgment.
Justice Hall dissents.

ORDER

¶ 1 ***Held:*** In this divorce case, the circuit court found that a marital settlement agreement required the husband to pay his share to the wife for certain bonuses he received from his new employer. We reverse, finding that the martial settlement agreement does not require payment regarding the particular bonuses in question.

¶ 2 BACKGROUND

¶ 3 Petitioner Theresa Walloga and respondent Michael Walloga were married in 1982 and have five children. On March 18, 2011, the trial court entered a judgment for dissolution of

marriage, incorporating both a joint parenting agreement regarding their last remaining minor child and a marriage settlement agreement (MSA).

¶ 4 Article III of the MSA addressed Michael's maintenance and child support obligations. Sections 3.1(a) and (c) required Michael to pay $5,750 per month in maintenance and $2,500 per month in child support. Section 3.1(a) also stated: "The maintenance payments by MICHAEL to THERESA pursuant to this paragraph shall be non-modifiable as to amount except upon MICHAEL and/or THERESA filing a petition to modify based upon a substantial change in circumstances; provided, however, that the substantial change in circumstances is not a consequence of MICHAEL's voluntary part-time status, MICHAEL's voluntary retirement and the like."

¶ 5 Section 3.1(d)(i) of the MSA frames the dispute before us. It states:

> "MICHAEL has historically received an annual discretionary cash award of variable compensation (hereinafter referred to as 'cash bonus') from his employer, HSBC. MICHAEL has historically received this annual bonus in February of each year, with the compensation received being paid for work done in the year 2009. For so long as Michael has an obligation to pay Maintenance to THERESA, and for so long as he continues to receive this aforementioned discretionary annual cash bonus, MICHAEL shall pay, as unallocated family support, 50% of the gross of MICHAEL's cash bonus, up to $100,000.00 (i.e. the gross maximum amount payable to THERESA shall be $50,000.00) to THERESA. Upon the minor child's emancipation, for so long as

> he is obligated to pay maintenance, and for so long as he is still receiving the aforementioned discretionary cash bonus, in addition to the support obligation detailed in paragraph 3.1(a) above, MICHAEL shall pay, as maintenance, 40% of the gross of his cash bonus, up to $100,000.00 (i.e. the maximum amount payable to THERESA shall be $40,000.00) to THERESA. Such payments pursuant to this paragraph shall be made directly by MICHAEL to THERESA within 14 days of MICHAEL receiving his annual bonus. MICHAEL shall provide THERESA with documentary proof of the amount of his annual cash bonus, in the form of his paystub, contemporaneously with making payment to THERESA. For as long as MICHAEL has a support obligation to THERESA and/or the minor child MICHAEL shall not be permitted to elect or request to receive his discretionary cash bonus as stock or other benefits in lieu of payment in the form of a cash bonus."

¶ 6 When the couple divorced, Michael was employed by HSBC and was eligible to receive an annual discretionary cash bonus in February of each year, with the bonus received for work completed in the previous year. On January 22, 2013, Michael received a written offer to work for The McGraw-Hill Companies (McGraw-Hill) and changed employers before receiving his annual bonus from HSBC. The McGraw-Hill offer stated that Michael would be eligible to participate in the company's 2013 "Financial 2013 QCCR (Quality, Criteria, Compliance and Risk) Incentive Plan." The offer stated that "[p]ayment under the Plan, if any, will be based on the degree of achievement of the established functional goals and objectives and your individual

performance and contribution throughout the year. The payments under this plan are discretionary and will be based on your manager's assessment of your performance within the provisions of the pool-based program." The offer also stated that, for 2013, Michael's incentive opportunity "will be guaranteed at $150,000.00, less applicable deductions" and would be payable in two installments: "$60,000.00 will be paid to you as a bonus advance on or about March 15, 2013. If within 12 months of your start date, you voluntarily separate from the McGraw-Hill Companies, you agree to repay this amount in full to the McGraw-Hill Companies. The second installment of $90,000.00 will be payable on or close to the Plan payout date of March 15, 2014. Payment is subject to your being employed and in good standing at the time of the payout." The offer also included a "one-time signing bonus in the amount of $25,000.00." If Michael voluntarily left McGraw-Hill within 12 months of his start date, he was required to repay the signing bonus in full.

¶ 7 Michael received the $60,000 bonus advance on March 8, 2013 and the $25,000 signing bonus on March 15, 2013. Theresa received no bonus payments from Michael in 2013. On February 13, 2014, Michael sent to Theresa a check for $30,000. On March 7, 2014, Michael received a bonus totalling $140,000 from his employer. Two weeks later, he sent Theresa a check for $20,000.

¶ 8 On August 4, 2014, Theresa filed a petition for rule to show cause against Michael for his failure to pay her the required unallocated family support under the MSA.[1] Theresa argued that Michael owed her $12,500 in unallocated family support attributable to the signing bonus and

[1] Michael's opening brief mentions that Theresa filed a motion to modify child support and unallocated family support on May 21, 2013. This motion is included in the appendix to his brief, but is not in the record. Parties are not permitted to supplement the record by attaching documents that are not included in the record on appeal to their briefs or appendices. *In re Parentage of Melton*, 321 Ill. App. 3d 823, 826 (2001). It is the responsibility of the respondent, as appellant, to provide an adequately complete record of the proceedings that is sufficient for reviewing the issues raised on appeal. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

$30,000 from the $140,000 bonus he received in 2014. She also claimed Michael owed her a total of $42,500 in unpaid maintenance under section 3.1(d)(i) of the MSA.

¶ 9 In response, Michael denied that he was obligated to pay Theresa any portion of the signing bonus under the terms of the MSA. Michael also denied that he owed Theresa any additional amounts from the other bonus he received from McGraw-Hill. He affirmatively argued that he received one cash bonus, which was paid in two separate installments, and that he paid Theresa the full amount of unallocated family support as required by section 3.1(d)(i) of the MSA.[2]

¶ 10 On October 22, 2014, Theresa's petition for rule to show cause came before the court. The parties, however, agreed that the court should hear the dispute under the context of enforcing the judgment of dissolution of marriage rather than as a contempt proceeding.

¶ 11 Theresa argued below that Michael received a $60,000 bonus in 2013, but violated the MSA when he did not pay Theresa $30,000 of that bonus within 14 days. Michael paid Theresa the $30,000 on February 13, 2014, nearly one year after he received the bonus. Michael did not pay Theresa any amount from the $25,000 signing bonus he received. Theresa argued that she was entitled to receive 50% of any cash bonuses received by Michael up to $100,000, with Theresa being entitled to a maximum of $50,000 in any given year. For 2014, Michael received a $140,000 bonus, from which he paid only $20,000 to Theresa. She argued that she was entitled to receive an additional $30,000 attributable to that bonus. Theresa claimed she was owed a total of $42,500 from the 2013 and 2014 bonuses. She pointed out that Michael paid taxes on those amounts in both 2013 and 2014, which demonstrated Michael received separate bonuses, rather than one bonus in two installments. She asserted that the MSA clearly provides that she is to

[2] An agreed order entered on August 28, 2014 stated that Michael's additional child support obligations, including the child support portion of the additional unallocated family support obligation, were terminated.

receive a percentage of Michael's bonuses on a yearly basis. In addition, she argued that she was not a party to Michael's employment contract with McGraw-Hill and, as such, should not be bound to the bonus distribution procedure for a particular employer.

¶ 12 Michael argued below that the MSA specifically states that Theresa is only entitled to receive a percentage of a discretionary bonus. He noted that the McGraw-Hill written offer stated that the guaranteed incentive opportunity of $150,000 was payable in two installments. The $60,000 advance bonus he received in March 2013 was a bonus advance that did not vest until he maintained employment with McGraw-Hill for one year. The second half of the bonus also was payable to Michael only after he remained employed and in good standing with McGraw-Hill for one year. Michael argued that even though he received a partial payment from the bonus in 2013 and that the amount he received was taxable in that year did not mean that Theresa was entitled to receive a percentage of that amount in the same year. The $150,000 was subject to a "clawback" if he did not remain employed with McGraw-Hill. He kept the $60,000 in a bank account until he complied with the terms of his employment contract to remain employed for one year. Michael received a total performance bonus of $200,000 in 2013 and 2014. He argued that he paid Theresa her $50,000 share of that bonus by sending her checks totaling $30,000 on February 13, 2014 and $20,000 on March 21, 2014. Finally, he contended that Theresa was not entitled to a percentage of the signing bonus because that bonus was not discretionary and, therefore, did not fall within the language of section 3.1(d)(i) of the MSA.

¶ 13 The trial court first noted that Michael did not receive a discretionary bonus from HSBC in 2013 for the work he completed in 2012 because he changed employers. The court stated that Michael would have received a $90,000 bonus from HSBC in 2013 if he had remained employed with that company. According to the court, "[t]he equivalent of that bonus [from HSBC which

he did not receive] was these two bonuses that he got in 2013 [from McGraw-Hill]." The court explained that Michael "gave up whatever potential bonus he had at his other employer to take this new job." The court then found as follows:

> "The equivalent approximately is the money he received as his [from McGraw-Hill], I'm putting it in quotes, signing bonus and the advance on the other bonus. That's [Theresa's] 2013 share. She gets half of that.
>
> And then for 2014 is a bonus which is very similar to what he got before, maybe slightly higher, and she gets her equivalent of that for her 2013 bonus, and then if he gets a bonus at the end of this year, which is coming up very fast, she'll get it in 2015. She will get her share of the bonus every year just like he did."
>
> To suggest that she would do without a bonus in 2013 because he chose to change jobs isn't realistic because they anticipated every bonus he got, she got half of it. That's the deal he made in the Marital Settlement Agreement.
>
> * * *
>
> And he paid taxes on these amounts in separate years, and she was definitely not a party to his employment contract, nor would it alter his obligations under [the] MSA.
>
> So I am finding that he owes her half of his signing bonus from 2013 and half of - - $50,000 for 2014 for a total of $42,500."

¶ 14 After additional arguments by Michael, the trial court continued, "The issue which you seem to want to ignore is that he got a bonus and money every year. She's entitled to get her share of the bonus every year. He can't glop the two together, skip a bonus by making a contract with a new employer to deprive her of her share of his bonus."

¶ 15 The trial court entered a written order on the same date, incorporating its oral findings, from which Michael appeals.

¶ 16 ANALYSIS

¶ 17 Michael contends that under his employment agreement, the discretionary cash bonus from McGraw-Hill, which was paid in two installments, constitutes a single bonus for work completed in 2013. According to Michael, regardless of the amounts paid and the dates on which he was paid, under the terms of the MSA, the $150,000 guaranteed amount should be viewed as one bonus when applying section 3.1(d)(1) of the MSA. Michael asserts the trial court erred by reading his employment contract to contain two separate incentive plan bonuses, an error created by focusing on when the bonus was paid, rather than by simply following the contract language, which explicitly refers to the guaranteed amount as one bonus payable in two installments. Michael also contends that even if the court did not err in its interpretation of the MSA, he did not have a vested interest in the $60,000 bonus advance until one year after his employment commenced. In addition, Michael argues the signing bonus does not constitute an annual discretionary cash bonus subject to additional unallocated family support pursuant to section 3.1(d)(i) of the MSA.

¶ 18 The terms of a marital settlement agreement are binding on the parties and the courts. *Blum v. Koster*, 235 Ill. 2d 21, 32 (2009). Marital settlement agreements are contracts and, therefore, the rules governing the interpretation of contracts apply. See *In re Marriage of*

Murphy, 359 Ill. App. 3d 289, 300 (2005). "The primary goal of contract interpretation is to give effect to the parties' intent by interpreting the contract as a whole and applying the plain and ordinary meaning to unambiguous terms." *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 636-37 (2008). "As a general rule, the parties' intentions are determined from their final agreement." *Kehoe v. Commonwealth Edison Co.*, 296 Ill. App. 3d 584, 590 (1998). Illinois follows the "four corners rule for contract interpretation in that, " '[a]n agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used.' " *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999) (quoting *Western Illinois Oil Co. v. Thompson*, 26 Ill. 2d 287, 291 (1962)). "If the language of the contract is facially unambiguous, then the contract is interpreted by the trial court as a matter of law without the use of parol evidence." *Id.* "The interpretation of a martial settlement agreement is reviewed *de novo* as a question of law." *Blum*, 235 Ill. 2d at 33.

¶ 19 This case presents the classic problem of fitting a square peg into a round hole. Section 3.1(d)(i) specifically describes the discretionary bonus structure as it applied to Michael's former employer, HSBC. It states that Michael "has historically received an annual discretionary cash award of variable compensation *from his employer, HSBC*." (Emphasis added.) The paragraph also states that Michael "has historically received *this annual bonus* in February of each year," and "[f]or so long as Michael has an obligation to pay Maintenance to THERESA, and for so long as he continues to receive *this aforementioned discretionary annual cash bonus*, MICHAEL shall pay, as unallocated family support, 50% of the gross of MICHAEL's cash bonus, up to $100,000.00 (i.e. the gross maximum amount payable to THERESA shall be $50,000.00) to THERESA." (Emphases added.) When drafting the MSA, the parties apparently did not

contemplate that Michael would leave his employ with HSBC to work for some other employer with a different bonus structure.

¶ 20 Because of its HSBC-specific language, we must find that section 3.1(d)(i) uniquely applies to the distribution of a discretionary annual bonus only from HSBC. For Theresa to obtain relief, the court would have to modify the MSA in some manner. Article III of the MSA specifically contemplates modification "based on a substantial change in circumstances," but the parties did not litigate this dispute under that standard. Similarly, section 510 (a-5) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/510 (a-5) (West 2014)) provides that "[a]n order for maintenance may be modified or terminated only upon a showing of a substantial change in circumstances." When considering a potential modification, the trial court considers a number of statutory factors, including "any change in the employment status of either party and whether the change has been made in good faith," and "the increase or decrease in each party's income since the prior judgment or order from which a review, modification, or termination is being sought." 750 ILCS 5/510 (a-5)(1), (7) (West 2014).

¶ 21 Although we understand the parties' desire to resolve the issues in a quick and resolute fashion, the language of section 3.1(d)(i) does not specifically provide for the distribution of Michael's annual bonus to Theresa from an employer other than HSBC. We find the court erred when it interpreted the MSA as requiring a 50% distribution of the 2013 McGraw-Hill $60,000 bonus, the 2013 McGraw-Hill $25,000 signing bonus, and the 2014 McGraw-Hill $140,000 bonus. We therefore reverse the order without prejudice to further proceedings to modify the MSA.

¶ 22 Michael also contends that the court miscalculated the amount of additional child support due. He claims that he owes $6,844.80 in additional child support instead of the $11,408 he paid

to Theresa from his bonus. Because he raises this argument for the first time on appeal, he has forfeited review of it. "[A] party who does not raise an issue in the trial court forfeits the issue and may not raise it for the first time on appeal." *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill. App. 3d 669, 695 (2010).

¶ 23 CONCLUSION

¶ 24 The judgment of the circuit court is reversed.

¶ 25 Reversed.

¶ 26 JUSTICE HALL dissenting:

¶ 27 I respectfully dissent. The majority determined that the language of section 3.1(d)(i) of the MSA provides for a distribution of Michael's annual bonus to Theresa only from HSBC. The majority states in part: "Because of its HSBC-specific language, we must find that section 3.1(d)(i) uniquely applies to the distribution of a discretionary annual bonus only from HSBC. For Theresa to obtain relief, the court would have to modify the MSA in some manner. Article III of the MSA specifically contemplates modification 'based on a substantial change in circumstances,' but the parties did not litigate this dispute under that standard."

¶ 28 As a result of these findings, the majority reasoned that "the court erred when it interpreted the MSA as requiring a 50% distribution of the 2013 McGraw-Hill $60,000 bonus, the 2013 McGraw-Hill $25,000 signing bonus, and the 2014 McGraw-Hill $140,000 bonus." I disagree.

¶ 29 A marital settlement agreement is a contract, governed by the principles of contract law. *In re Marriage of Haller*, 2012 IL App (5th) 110478, ¶ 26. In this case, maintenance is an essential term of the contract. The parties negotiated the terms for maintenance. It is well settled that in order to obtain modification of a prior award of maintenance, the moving party must

establish that there has been a substantial change in circumstances since the prior award was rendered. See *In re Marriage of Anderson*, 409 Ill. App. 3d 191, 198 (2011).

¶ 30 A voluntary change in employment that results in diminished financial status may constitute a substantial change in circumstances if undertaken in good faith and not prompted by a desire to evade responsibility. *In re Marriage of Barnard*, 283 Ill. App. 3d 366, 369 (1996); *Cohn v. Cohn*, 122 Ill. App. 3d 763, 765-66 (1984). I do not believe that Michael's decision to change employers constitutes a substantial change in circumstances under the unambiguous terms of the parties' maintenance agreement. Michael's employment with McGraw-Hill did not alter or modify his underlying maintenance obligation that Theresa shall receive 50% of his bonuses up to $100,000 in every year that he receives one, not to exceed $50,000.

¶ 31 Michael is entitled to change employment and employers. However, this court should not require his former wife and child to subsidize his decisions in this regard when those decisions do not constitute substantial changes in circumstances under the unambiguous terms of the parties' maintenance agreement. I would affirm the trial court's ruling of October 22, 2014, rather than reverse the court's ruling without prejudice to allow further proceedings to modify the MSA and perhaps require a needless expenditure of resources by the litigants and the trial court.