2018 IL App (1st) 16-1812-U

SECOND DIVISION
January 30, 2018

No. 1-16-1812

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re the Marriage of:	)	Appeal from the
	)	Circuit Court of
SHARON COLE,	)	Cook County, Illinois.
	)	
Petitioner-Appellee,	)	No. 09 D 11214
	)	
and	)	Honorable
	)	Lisa Ruble-Murphy and
WARREN G. McELWAIN,	)	Edward Arce,
	)	Judges Presiding.
Respondent-Appellant	)	
	)	
(WILLIAM GRUZYNSKI, WILLIAM HOMES, LIMITED, KAREN DUBINSKI,	)	
	)	
Third-Party Respondents.)	)	

JUSTICE MASON delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court properly granted motion to enforce oral settlement agreement because the agreement was not contingent on the execution of a written agreed order, and the parties agreed to all material terms of the settlement. The trial court's presence during settlement negotiations serves to refute any claims that an oral settlement agreement was not reached. Because the parties reached a settlement relating to property issues, the trial court was not required to determine the property's classification or valuation.

¶ 2 In this protracted divorce proceeding, Warren McElwain appeals the trial court's order enforcing an oral settlement agreement entered into with Sharon Cole, his former wife, concerning residential development property located in Schaumburg, Illinois. McElwain disputes that an enforceable agreement was reached requiring him to pay Cole $750,000 in full satisfaction of her property interests. McElwain contends that memorializing the oral settlement agreement in a written agreed order was a precondition to enforcement of the oral agreement, and that condition was not fulfilled. McElwain also claims that the settlement agreement must be vacated because the trial court ordered him to pay Cole $750,000 as settlement without first determining the reasonable value of specific property and whether the property was a marital or non-marital asset. Finding the issues McElwain raises to be without merit, we affirm.

¶ 3 BACKGROUND

¶ 4 McElwain and Cole were married on September 15, 1989. McElwain is a licensed attorney and real estate developer, and Cole works for AT&T.

¶ 5 On December 8, 2009, Cole filed a petition for dissolution of marriage. Almost two and half years later and following a contested three-day trial with well over 100 exhibits, the trial court entered a judgment for dissolution of marriage (dissolution judgment) on May 22, 2012. The marital estate requiring distribution included, among other properties, the Village Square Development a/k/a Pleasant Landing a/k/a "Schaumburg Property," which had an uncertain value when the trial court entered the dissolution judgment. McElwain planned to develop the Schaumburg property for residential use. The dissolution judgment awarded Cole $205,000, consisting of: (1) $150,000 representing one half of the $300,000 that the court found McElwain dissipated from the marital estate; (2) $30,000 for her attorney's fees; and (3) $25,000 for rental income that McElwain collected, but failed to pay her pursuant to court order. The trial court

reserved certain issues for future determination and allocation, including allocation of the net proceeds from the sale of multiple properties owned by the parties as marital assets, and allocation of the parties' interest in the Schaumburg property.

¶ 6 Cole filed a motion to reconsider the dissolution judgment raising multiple claims of error. One such error was that the trial court should have made a finding of dissipation relating to McElwain securing a $1,000,000 home equity line of credit by forging her name on the loan documents without a power of attorney, and directing his secretary, a notary public, to notarize the documents. McElwain disputed the allegation, asserting that he told Cole about the loan. According to McElwain, he routinely signed Cole's name, and in this instance, he signed her name at the bank's request. Following a hearing on Cole's motion, the trial court denied the motion. The Illinois Attorney Registration and Disciplinary Commission (ARDC) later investigated a complaint raising the same forgery allegations, which McElwain again denied.[1] At the end of the investigation, the ARDC suspended McElwain from the practice of law for 30 days.

¶ 7 Because the trial court reserved matters for future allocation and determination, the contested ligation continued long after entry of the dissolution judgment. The parties' interest in the Schaumburg property was hotly contested. In fact, the parties engaged in substantial motion practice and discovery relating to the reserved issues, including the interest in the Schaumburg property, between the May 22, 2012 dissolution judgment date and May 15, 2014, the date trial was ultimately scheduled to commence. And, as early as June 2013, McElwain asserted that there were open issues between the parties that included income tax liabilities arising from the forgiveness of debt totaling approximately $6,300,000, which he claimed was a marital

[1] According to the disciplinary ruling from the ARDC, McElwain used the proceeds from the home equity line of credit loan on which he forged his wife's signature to purchase residential property in Chicago where his "female friend, her parents, and her brother" took up residence.

obligation. McElwain argued that the tax due on the cancelled debt (treated for tax purposes as taxable income) should be shared with Cole because the underlying debt was incurred during the marriage. McElwain also moved to declare certain lots of the Schaumburg property non-marital property and to determine the value of specific marital property. The trial court entered an order that these issues, along with the reserved issues, would be addressed at trial.

¶ 8 Also during the almost two years between the dissolution judgment and the scheduled trial, McElwain moved forward with his plans to develop the Schaumburg property and acquired the rights to redevelop the property from the Village of Schaumburg without which, according to him, the property was worthless. McElwain's development of the Schaumburg property entailed many complicated transactions, and to assist with the development and financing of the project, McElwain had various partners and business associates. McElwain's business partners, William Gruzinski and Karen Dubinski, were later joined as third-party respondents in the dissolution proceedings. Because McElwain transferred assets to himself and to various third parties relating to the reserved issues, the trial court entered a temporary restraining order prohibiting McElwain and his agents from transferring, encumbering, or concealing any of the assets listed in the dissolution judgment. McElwain violated the court's temporary restraining order. The trial court then issued another temporary restraining order, this time enjoining McElwain and now his partners "from any further actions transferring or encumbering any and all interest in the Schaumburg property." McElwain also violated a court order when he withdrew sums substantially in excess of court-approved amounts as draws from his real estate business.

¶ 9 On May 15, 2014, the date trial was set to commence, the parties participated in a pretrial settlement conference in chambers in an attempt to resolve the reserved issues, including disposition of the parties' interests in the Schaumburg property. During the negotiations, Cole

took the position that she was entitled to an award in excess of $1,000,000 and that McElwain should be required to restore certain property transferred out of the undistributed marital estate in violation of court orders. The trial court recommended a $750,000 settlement in full satisfaction of all outstanding property issues, which the trial judge found to be more than a fair number. The trial court's recommendation was based on: (1) the $205,000 awarded in the dissolution judgment; (2) Sharon's 50% interest in a $150,000 payment owed to McElwain; and (3) McElwain's transfer of property to himself and third parties in violation of previous court orders. The trial court advised McElwain that it would consider ordering all of the property that he previously transferred in violation of court orders to be returned to the marital estate. Any order granting such relief potentially would have been disruptive and damaging to McElwain's real estate development business, and developing the Schaumburg property was McElwain's livelihood. The trial court continued the matter to May 20 to give the parties time to think about the proposed settlement. On May 20, the parties participated in additional settlement negotiations, and the matter was continued to May 22. Meanwhile, the court remained ready to commence trial in the event the settlement talks failed.

¶ 10 On May 21, McElwain's counsel sent Cole's counsel an email stating: "$750,000 is a more than fair settlement agreement, which, if I were representing your client, I would work hard to protect. Warren has agreed to find the money. Even without security, when entered as a judgment, an agreed order awarding this amount to your client could be enforced with contempt sanctions." On May 22, the parties reached an oral settlement agreement, and the trial court entered an order stating in relevant part: "[t]he parties have reached an agreement in principle to settle all unresolved issues between them for a total payment of $750,000. *** Between today and the next status date of July 11, 2014, the parties shall, in good faith, attempt to conclude a

final Agreed Order resolving all matters between them." The trial court also continued the previously entered temporary restraining order.

¶ 11 Shortly after settlement, the parties exchanged drafts of an agreed order. In particular, McElwain sent Cole three proposed agreed orders. Every proposed order exchanged between the parties, including the orders proposed by McElwain, included reference to McElwain's obligation to pay Cole $750,000, which was to be in full satisfaction of all outstanding property issues. More specifically, the proposed agreed orders divided McElwain's $750,000 obligation into the following two separate payments: (1) $450,000 due by July 11, 2014 and (2) $300,000 due by November 30, 2014. Each draft order also included a provision providing that: (1) Cole's interest would be secured by a *lis pendens* against the property; and (2) McElwain would be solely responsible for any income taxes due for any joint return filed by the parties, including all tax, penalty and interest amounts. The parties ultimately did not submit an executed agreed order to the trial court before the July 11 status hearing because McElwain could not come up with the money to pay the settlement by that date.

¶ 12 During the July 11 status hearing, Cole's counsel reiterated, without objection from McElwain, that the parties had reached a settlement agreement requiring McElwain to pay Cole $750,000, and the first installment payment of $450,000 was due that day. A payment date for the remaining $300,000 had not been set because it depended on McElwain's ability to close on the sale of two lots at the Schaumburg property, which would generate proceeds McElwain would use to pay Cole the remaining $300,000 of the $750,000 settlement amount. Although a specific payment date had not been reached regarding the $300,000 balance, the parties reported that payment by November was anticipated. At the end of the status hearing, the trial court entered an "agreed order" stating that the parties had "reached an agreement on certain issues as

fully set forth in the transcripts in today's proceedings." The trial court also ordered McElwain to pay Cole $450,000 of the $750,000 settlement amount within 14 days. During the hearing, McElwain did not take the position that the parties had not reached an agreement to settle Cole's interest in the Schaumburg property.

¶ 13 On July 29, 2014, because McElwain had not tendered payment of the $450,000, Cole filed a petition for a rule to show cause why McElwain should not be held in contempt for failing to comply with the trial court's order. Following a hearing on the motion, the trial court entered a rule to show cause against McElwain for his failure to comply with the July 11 order directing him to pay Cole $450,000 within 14 days. The trial court also imposed statutory interest of 9% on the outstanding balance accruing from July 25–the payment due date previously ordered by the court. By August 19, Cole had received $335,000 of the $450,000; she received the remaining $115,000 in June 2015. But contrary to the court's order, McElwain's payments did not include any interest. McElwain later claimed that he only tendered payment of the $450,000 installment under pressure because the trial court threatened him both with contempt and to enter injunctions that would interfere with his development and sale of the Schaumburg property. Around the time McElwain paid the $450,000 installment in full, he first disputed his obligation to pay Cole the remaining $300,000.

¶ 14 In response to McElwain's change in position, Cole filed various motions to expedite and resolve the matter. In particular, Cole filed a petition to enforce the oral settlement agreement entered by the trial court on May 22, and reaffirmed on July 11. On October 19 during the hearing on Cole's motion, McElwain took the position that the remaining $300,000 was an "agreement in principle," but not an enforceable agreement. McElwain also argued that the oral settlement agreement was not binding because the parties intended that an executed written

agreed order was a condition precedent to the settlement's enforcement. The trial court disagreed with McElwain and explicitly stated:

> "[u]nequivocally these parties had an agreement in May of 2014 to resolve all the remaining issues for $750,000 because that is what the order says. The only issue was the timing for the payment of the $750,000 because I, the trial judge, did not want to be in a position of having to be forced to put Mr. McElwain in jail for failing to comply with the order. That is the only issue. *** There is just no question that these parties had an agreement to resolve all of the issues that were reserved in the Judgment for Dissolution of Marriage by Mr. McElwain paying $750,000."

Based on this reasoning, the trial court granted Cole's petition to enforce. The trial court also directed the parties pursuant to its May 22, 2014 order to present the court with a final agreed order. On the same day, McElwain filed a motion to declare income tax liabilities arising from the debt forgiveness as marital property, renewing his pre-settlement position that the underlying debt was incurred and went into default during the marriage.

¶ 15 Shortly thereafter, the parties complied with the trial court's order and tendered proposed agreed orders. McElwain objected to Cole's proposed agreed order asserting that a written agreed order was a condition precedent to any enforceable settlement between the parties, and he did not agree to an unconditional payment of $750,000. According to McElwain's proposed order, the contemplated $300,000 payment was subject to the unallocated marital liabilities associated with the forgiveness of debts incurred during the marriage.

¶ 16 Before the court entered either order, McElwain sought reconsideration of the trial court's order granting Cole's petition to enforce. On October 26, 2015, during a hearing on his motion, McElwain argued that the parties had reached an agreement *in principle* expressly

subject to a comprehensive written agreed order. According to McElwain, he felt extremely pressured and somewhat coerced into reaching the settlement agreement. McElwain also argued that performance of the alleged oral agreement had become impossible, impracticable, and unconscionable due to tax implications arising from the forgiveness of debt, and to force McElwain to pay an additional $300,000 was unfair. McElwain further argued that the trial court refused to hear his motions regarding the valuation and characterization of specified marital property. As to that allegation, the trial court explained to McElwain that the court was not required to rule on those particular matters because the parties had reached a settlement. The trial court also disagreed with McElwain's bases for reconsideration, and denied his motion. The court indicated that it had received a proposed agreed order from both parties and would enter one of the orders after its review.

¶ 17 On December 3, 2015, the trial court entered Cole's proposed agreed order and incorporated minor revisions. McElwain moved to vacate the December 3 order, again arguing that a written agreed order was a precondition to enforcement of the oral settlement agreement. Because the trial judge who presided over the parties' case throughout the litigation had retired, a different trial judge ruled on McElwain's motion to vacate. Finding that McElwain's arguments in his motion were the same substantive arguments already considered and rejected by the original trial judge, the trial court denied his motion to vacate. The trial court further held that the December 3 order "merely effectuated the oral agreement which the Court ruled should be enforced." McElwain timely appealed.

¶ 18 ANALYSIS

¶ 19 As a preliminary matter, Cole claims that McElwain's motion to vacate the December 3, 2015 agreed order was an impermissible second posttrial motion because his motion to

reconsider the order granting her petition to enforce the oral settlement agreement was his first posttrial motion. Cole's position is incorrect because McElwain's motion to vacate the December 3 order was the only posttrial motion filed, and that motion was timely filed within 30 days of the December 3 final order. McElwain's motion to reconsider was not a posttrial motion because, unlike the December 3 order, the trial court's order granting Cole's petition to enforce was not a final appealable order, and he filed his motion to reconsider the ruling on Cole's motion to enforce before the December 3 final order. Consequently, there is no basis to dismiss McElwain's appeal as untimely.

¶ 20 Likewise, we find no merit in Cole's claim that McElwain's appeal should be dismissed because he is appealing an agreed order and not a judicial resolution of the parties' rights. Cole claims that McElwain is appealing the December 3 order, which she asserts memorialized the parties' agreed settlement reached in May 2014, but, in actuality, McElwain's claim here is that there was no settlement and, hence, no agreed order could be entered. Accordingly, dismissal on this basis is not warranted.

¶ 21 Lastly, Cole claims that McElwain's appeal is moot because 9.5 months after filing his notice of appeal, McElwain paid the disputed $300,000, satisfying the $750,000 judgment in its entirety. But McElwain made the payment pursuant to a court order, which he contends was improperly entered because the parties had not, in fact, reached an oral settlement agreement. Thus, McElwain's $300,000 payment was compulsory and not voluntary. Consequently, McElwain has not forfeited his ability to challenge the court's agreed order by making the payment the court required him to make. See *Pinkstaff v. Pennsylvania R.R. Co.*, 31 Ill. 2d 518, 523 (1964) (judgment debtor's payment or satisfaction of a money judgment does not bar his or her ability to challenge the judgment on appeal).

¶ 22 On the merits, McElwain challenges the trial court's finding that the parties reached an oral settlement. Although McElwain advocates for a *de novo* standard of review, this court has repeatedly held that we will not disturb the trial court's finding that an oral settlement was reached unless it is against the manifest weight of the evidence. *Condon & Cook, L.L.C. v. Mavrakis*, 2016 IL App (1st) 151923, ¶ 57; *In re Marriage of Baecker*, 2012, IL App (3d) 110660, ¶ 25; *K4 Enterprises, Inc. v. Grater, Inc.*, 394 Ill. App. 3d 307, 312 (2009). A finding is against the manifest weight of the evidence "only when the findings appear to be unreasonable, arbitrary, or not based on evidence, or when an opposite conclusion is apparent." *Vaughn v. City of Carbondale*, 2016 IL 119181, ¶ 23.

¶ 23 A settlement agreement is governed by contract law. *K4 Enterprises, Inc.*, 394 Ill. App. 3d at 312. Oral settlement agreements are binding where there is an offer, acceptance, and a meeting of the minds as to the terms of the agreement. *Id.* An enforceable settlement agreement requires the material terms of the agreement to be definite and certain. *Id.*

¶ 24 Here, the trial court's finding that the parties had reached an oral settlement agreement on May 22, 2014, was not against the manifest weight of the evidence. There was a meeting of the minds on the material terms of the parties' agreement–to settle the reserved issues in exchange for the payment of $750,000 to Cole–and the undetermined payment dates for the total settlement amount was an ancillary issue. See *Rose v. Mavrakis*, 343 Ill. App. 3d 1086, 1093 (2003) (parties' failure to specify the time of performance does not bar enforcement of a settlement agreement). In other words, although the timing of McElwain's payment of the $750,000 had not been set (primarily in an effort to accommodate his financial needs), his obligation to make the payment in two installments had. Importantly, there was nothing left to determine regarding the ownership and disposition of the Schaumburg property or the other

reserved matters. The "agreement in principle" language in the trial court's order had no effect on the validity of the parties' oral settlement agreement because the parties' settlement agreement was clear, certain, and definite in its material provisions. And by its very nature of being presented to the court, the settlement agreement was enforceable. *In re Marriage of Haller*, 2012 IL App (5th) 110478, ¶ 30; *In re Marriage of Lorton*, 203 Ill. App. 3d 823, 827 (1990).

¶ 25 Although the trial court's order further contemplated that the parties, in good faith, would tender a final executed agreed order, such reference to a future writing did not bar enforcement of the oral settlement agreement. The trial court's expectation that the parties' oral settlement agreement would be reduced to a written agreed order did not negate the parties' oral contract reflecting their assent to resolve all reserved issues in exchange for McElwain's payment of $750,000 to Cole, nor did it reduce their oral agreement to mere negotiations. *Ceres Illinois, Inc. v. Illinois Scrap Processing, Inc.*, 114 Ill. 2d 133, 143 (1986); *In re Marriage of Haller*, 2012 IL App (5th) 110478, ¶¶ 29-30; *In re Estate of Glassman*, 257 Ill. App. 3d 102, 107 (1993). Because the contemplated final agreed order was intended only to memorialize the parties' oral settlement agreement, their bargain was binding. *Ceres Illinois, Inc.*, 114 Ill. 2d at 143.

¶ 26 Moreover, McElwain cannot reasonably dispute that he agreed to the settlement when it was reached on May 22, 2014. McElwain's counsel sent Cole's counsel an email the day before the settlement encouraging Cole to accept the proposed $750,000 settlement amount contending it was "more than fair." McElwain's counsel also tendered three proposed agreed orders to Cole's counsel shortly after the settlement, each consistently documenting McElwain's agreement to pay Cole $750,000 in settlement of all outstanding reserved issues. Although McElwain disputes the trial court's December 3 agreed order finding that a $750,000 settlement

had been agreed to, that order mirrored the proposed orders drafted by the parties promptly after settlement in all material respects.

¶ 27 Importantly, McElwain did not disavow the $750,000 settlement immediately after it was reached or during the next status hearing on July 11 where the terms of the settlement agreement were again reiterated in open court. Rather, McElwain first disputed the existence of an agreement to settle more than a year later and only after he finally tendered payment of the $450,000 in full–close to a year past the court imposed payment due date. McElwain claims that the $300,000 installment was conditional "because we are still trying to work it out," but the only detail left to work out was when McElwain would have the funds to tender payment, which had no bearing on his agreement to make the payment. *Rose*, 343 Ill. App. 3d at 1093. Although McElwain begrudgingly paid the $450,000 installment, we cannot overlook the fact that he substantially complied with the parties' settlement by tendering that payment in satisfaction of his obligations under the settlement. It is apparent that McElwain's belated objection to the $750,000 settlement amount is a classic case of buyer's remorse. Apart from McElwain's own arguments, there is nothing in the record supporting a claim that the parties did not unequivocally reach a settlement on the outstanding reserved issues.

¶ 28 McElwain's public policy argument as a basis for invaliding the oral settlement agreement is not persuasive either. According to McElwain, established public policy governing property settlements prohibits enforcement of oral settlements involving substantial financial assets if a party objects to the settlement. To support his position, McElwain relies on *In re Marriage of Lakin*, 278 Ill. App. 3d 135 (1996), and *In re Marriage of Chaltin*, 153 Ill. App. 3d 810, 812 (1987). In both *Lakin* and *Chaltin*, the court refused to enforce an alleged oral settlement agreement because at least one party objected to the oral settlement before the trial

court entered judgment. *Lakin*, 278 Ill. App. 3d at 140; *Chaltin*, 153 Ill. App. 3d at 814. But both cases are distinguishable because the party objecting to the settlement did so promptly and did not wait to object for more than a year like McElwain. *Lakin*, 278 Ill. App. 3d at 138; *Chaltin*, 153 Ill. App. 3d at 812. Contrary to McElwain's position, public policy considerations actually weigh in favor of enforcing the oral settlement agreement because to do otherwise would encourage the refusal to honor negotiated settlements based on a belated change of heart.

¶ 29 Moreover, because the trial court participated in the settlement negotiations and entered an order on the day of settlement stating that the parties had reached a $750,000 settlement on the reserved issues, McElwain's statute of frauds defense has no applicability here. See *Rose*, 343 Ill. App. 3d at 1097 (an exception to the statute of frauds' written requirement has been recognized if an oral agreement is reached during settlement negotiations in the presence of a trial judge). The trial court's participation in the settlement negotiations allowed the trial court to definitively reject McElwain's untimely challenge to the existence of an agreement. *K4 Enterprises, Inc.*, 394 Ill. App. 3d at 316. Without doubt, the trial court's presence during the settlement negotiation was crucial given the proceedings' tortured history.

¶ 30 Likewise, there is no merit in McElwain's argument that enforcing the settlement agreement was unconscionable. Cole's refusal to release a *lis pendens* on the property expected to generate the revenue to pay her the settlement amount and the tax implications of $7,500,000 in cancelled debt were not unforeseen events that made it impossible for McElwain to perform. These events were contemplated by the parties as documented in their proposed written agreed orders and factored into the amount McElwain was required to pay as settlement. The fact that McElwain claims to have incurred additional tax liabilities associated with the forgiveness of certain debt does not change the parties' agreement that he would be responsible for all tax,

penalties and interest amounts. Similarly, given McElwain's repeated failure to tender the settlement payments when due, McElwain cannot reasonably complain that Cole's efforts to protect her right to payment of the settlement amount by refusing to release the *lis pendens* somehow interfered with development of the Schaumburg property. Both future tax implications and recording *lis pendens* on the Schaumburg property were contemplated by the parties during settlement, and there is no basis to find that there were unforeseen events rendering McElwain's performance impossible or unfair.

¶ 31 The record fully supports the conclusion that the parties reached a valid oral settlement agreement, and enforcement of that agreement was not contingent on an executed agreed order. Because a binding oral settlement agreement existed, the trial court had inherent authority to enter the December 3 order as an agreed order. Consequently, the trial court did not err in granting Cole's petition to enforce the oral settlement agreement and denying McElwain's motion to vacate enforcement of the settlement agreement.

¶ 32 Finally, McElwain claims that the trial court erred in ordering him to pay a distribution to Cole in full satisfaction of her property interests even though the trial court made no determination regarding: (1) whether the property was marital or non-marital and (2) the valuation of the property. Because the trial court did not rule on these open issues, McElwain asserts his due process rights were violated.

¶ 33 Again, the record belies McElwain's contentions. McElwain claims that issues relating to the classification and valuation of specific property, in particular the Schaumburg property, were unresolved before the trial court ordered payment of the $750,000 settlement amount to Cole for her interest in the property. But there was no need for a judicial determination on those matters because the parties reached a settlement in full satisfaction of Cole's interest in the property.

Consequently, McElwain's claim that his due process rights were violated because judicial determinations were not made with respect to the characterization and valuation of property has no merit.

¶ 34 For these reasons, we affirm the trial court's order enforcing the parties' oral settlement agreement, as well as its order denying McElwain's motion to vacate.

Affirmed.