2011 IL App (2d) 110148-U
No. 2-11-0148
Order filed November 29, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF BERNARD PETERS,	)	Appeal from the Circuit Court
	)	of Du Page County.
Petitioner-Appellee,	)	
	)	
and	)	No. 08-D-2032
	)	
AYSE PETERS,	)	Honorable
	)	Rodney W. Equi,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

Held: The trial court properly determined that the terms of the parties' marital settlement agreement were clear and unambiguous, and therefore, did not require extrinsic evidence to ascertain the parties' intent. The trial court also properly determined that respondent was not entitled to indemnification for attorney fees under the provisions of the marital settlement agreement. We affirmed the judgment of the trial court.

¶ 1 In September 2009, the trial court dissolved the marriage between petitioner, Bernard Peters, and respondent, Ayse Peters. The judgment for dissolution incorporated a marital settlement agreement (the agreement) between the parties. In September 2010, respondent sought attorney fees pursuant to the agreement that she incurred in connection with a third party lawsuit. Following a hearing, the trial court denied respondent's petition for attorney fees. Thereafter, respondent filed

a motion to reconsider and a petition for rule to show cause, which sought the same relief. The trial court conducted a hearing, and denied both of respondent's petitions. Respondent filed a timely notice of appeal, contending that (1) the terms of the agreement are ambiguous, and therefore, require extrinsic evidence to properly ascertain the parties' intent, and (2) the trial court erred when it determined that respondent was not entitled to attorney fees under the terms of the agreement. We affirm.

¶ 2 At issue in this postdissolution matter is the interpretation of Article VIII of the agreement. Article VIII provided for how certain debts were to be administered. Specifically, one contingent debt involved a promissory note, which represented a loan to the parties by The Pampered Chef, Ltd. (Pampered Chef). Paragraph A.5 of Article VIII of the agreement referenced pending litigation concerning the enforcement of the Pampered Chef note and provided:

> "Bernard assumes the obligation for the payment, if any, of the note which is the subject of the case of The Pampered Chef v. Peters, case number [09-L-772], pending in the Eighteenth Judicial Circuit, and shall save, indemnify and hold Ayse F. Peters harmless from any liability with respect thereto to the Pampered Chef, LTD., or any subsequent holder of that promissory note."

Paragraph C of Article VIII of the agreement provided as follows:

> "Except as otherwise indicated, each party shall pay any and all debts incurred in his or her name since their separation. Each party shall indemnify and hold the other party harmless for any expenses, damages or other detriments which either party may incur by the other party's violation of this ARTICLE of this Agreement, including reasonable Court costs and attorney[] fees."

¶ 3 On November 9, 2009, in case No. 09-L-772 (the Pampered Chef litigation), the trial court entered a judgment in favor of Pampered Chef and against petitioner for $1.755 million, plus interest. In the November 9 order, the trial court also stayed enforcement of the judgment pending further order. Thereafter, on January 13, 2010, the trial court in the Pampered Chef litigation allowed immediate enforcement of $1,302,317.45 against petitioner, which amount petitioner had paid in partial satisfaction of the judgment. On January 25, 2010, the trial court entered an agreed order in the Pampered Chef litigation staying "further collection efforts" pending further order of the court. The November 9, 2010, January 13, 2010, and January 25, 2010, orders of the trial court in the Pampered Chef litigation reflect that no judgment was entered against respondent.

¶ 4 On March 22, 2010, respondent filed a petition for indemnification. Respondent alleged that, pursuant to paragraph A.5 of Article VIII of the agreement, petitioner "agreed to indemnify and hold safe and harmless the respondent from any liability with regard to the Pampered Chef matter." Respondent acknowledged in paragraph 6 that no judgment had been rendered against her in the Pampered Chef litigation. However, in paragraph 10, respondent alleged that she was presently being harmed because she was required to defend Pampered Chef's "attempt to impose a nearly two -million dollar judgment against her." Respondent further alleged that she had incurred and would continue to incur substantial attorney fees "in an attempt to avoid a similar judgment from being entered against her on an obligation for which [petitioner] agreed to be responsible."

¶ 5 On April 28, 2010, petitioner filed a motion to strike petitioner's petition for indemnification pursuant to section 2-615 and 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615, 619 (West 2010)). Petitioner alleged that respondent's petition for indemnification was legally deficient because, *inter alia*, the judgment was entered against petitioner and not respondent; there was no judgment against respondent; the Pampered Chef litigation proceedings were stayed pending

the resolution of petitioner's counterclaim against Pampered Chef; the pleading made no representation that petitioner had violated the terms of the dissolution judgment or that he was in indirect civil contempt for a failure to comply with any terms. Petitioner also alleged that respondent's petition should be involuntarily dismissed because, *inter alia*, even though respondent has filed a derivative claim against Pampered Chef, her matter was undetermined, and there was no judgment against her; in the absence of a disposition of her counterclaim, any indemnification by petitioner would be premature; no petition for rule to show cause had been filed against petitioner; and respondent alleged no statutory basis for respondent's petition for indemnification. Petitioner also filed an affidavit in support of his section 2-619 motion to dismiss, which averments were substantively similar to his allegations contained in his motion.

¶ 6 On September 10, 2010, respondent filed a petition for attorney fees and costs pursuant to paragraph A.5 of Article VIII of the agreement contained in the judgment of dissolution. Respondent's petition alleged that, even though no money judgment had been rendered against her, she had incurred and would continue to incur attorney fees in defending against the debt from the Pampered Chef litigation, "all of which" was petitioner's responsibility pursuant to Article VIII. Respondent further alleged that, pursuant to paragraph A.5 of Article VIII of the agreement, petitioner should be required to reimburse her for all attorney fees she had incurred and would continue to incur in the Pampered Chef litigation. Respondent requested attorney fees and costs totaling $41,645.50.

¶ 7 On September 16, 2010, petitioner filed his response memorandum in opposition to petitioner's petition for attorney fees and costs. Petitioner argued that respondent's petition was not for indemnification of any judgment or damages award entered against her, but rather for payment of attorney fees she incurred. Petitioner argued that the indemnification provision the parties entered

into, paragraph A.5, did not allow for reimbursement of respondent's legal fees. Petitioner argued that paragraph C of Article VIII specifically provided for the recovery of attorney fees in the event either party breached an obligation under the agreement and the other party was compelled to seek recovery arising out of the breach. Petitioner concluded that the inclusion of specific language in paragraph C evinced the parties' intent to leave out the payment of attorney fees in the indemnity clause invoked in respondent's petition for fees.

¶ 8 On October 20, 2010, the trial court conducted a hearing. In addition to requesting attorney fees pursuant to the agreement, respondent also requested attorney fees pursuant to section 508 of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/508 (West 2010)). The trial court rejected respondent's argument, reasoning that respondent was attempting to avoid the enforceability of the agreement the parties had entered into. The trial court found that the language of paragraph A.5 of the agreement was clear and unambiguous. The trial court determined that paragraph A.5 of Article VIII of the agreement was not a "hold harmless" provision but an indemnification provision. The trial court stated that the indemnification provision was specific as to which portions of the Pampered Chef litigation were subject to indemnification. The trial court noted that respondent was seeking indemnification for liability that she incurred to her law firm and not to Pampered Chef or any subsequent holder of the promissory note. Following arguments of the parties, the trial court denied respondent's motion for indemnification, including the attorney fee petition, but granted leave to amend. The trial court further stated that it was denying the motion on the basis of the specific language in the agreement, which required only indemnification for those amounts that respondent was found liable to pay to Pampered Chef, which still owned the promissory note.

¶ 9 On November 17, 2010, respondent filed a motion to reconsider the trial court's October 20 order, as well as a petition for rule to show cause. In her motion to reconsider, respondent argued that the trial court misapplied the law to the facts of the case. Respondent argued that petitioner was in violation of paragraph A.5 of Article VIII of the agreement by his failure to pay his obligation under the promissory note. Respondent asserted that, as a result, she was entitled to attorney fees under paragraph C of Article VIII incurred in connection with the Pampered Chef litigation. Respondent's petition for rule to show cause sought fees under paragraphs A.5 and C of Article VIII of the agreement. In her prayer for relief, respondent also requested attorney fees pursuant to section 508(b) of the Act (750 ILCS 5/508(b) (West 2010)).

¶ 10 On December 10, 2010, petitioner filed a consolidated response memorandum in opposition to respondent's motion to reconsider and petition for rule to show cause. Petitioner argued that he and respondent "freely and fairly negotiated a specific indemnification clause related to payment of a Promissory Note to The Pampered Chef, Ltd." Petitioner argued that the "clear, unambiguous language of that clause" was silent on respondent's ability to recover attorney fees in connection with the Pampered Chef litigation. Petitioner argued that respondent's motion to reconsider was improperly brought because respondent was not asking the trial court to reconsider any matter but, rather, asking the trial court to consider a new argument not previously made. With respect to respondent's petition for rule to show cause, petitioner argued that respondent did not claim either that respondent had neglected to assume the obligation of the promissory note or that respondent has failed to indemnify respondent for the promissory note obligation. Petitioner argued that respondent, therefore, could not claim he was violating any provision of the agreement. Petitioner also argued that respondent's petition for rule to show cause should be rejected because respondent was attempting "an end-run" to avoid the agreement. Petitioner argued that the parties were fully aware

of the Pampered Chef litigation when they were negotiating the agreement, and had the parties meant for petitioner to pay for respondent's legal fees in the Pampered Chef litigation, they should have reduced that to writing.

¶ 11 On January 10, 2011, the trial court conducted a hearing on respondent's motion to reconsider and her petition for rule to show cause. With respect to the motion to reconsider, respondent argued that paragraph C of Article VIII of the agreement provided for attorney fees if petitioner was found to have violated any provision of Article VIII. Respondent argued that petitioner failed to hold her harmless in that she incurred attorney fees in defending herself in the Pampered Chef litigation. In denying respondent's motion to reconsider, the trial court stated:

> "And so there is nothing that she owes to the Pampered Chef Limited yet. There is a stay of the proceedings.
>
> I guess whether or not there's a stay of the proceedings, there's no judgment that's been entered against her. She owes nothing to the Pampered Chef; and therefore, there is nothing for [petitioner] to indemnify her for. ***
>
> Now, you want to say that she has expended attorney[] fees so that she doesn't owe the Pampered Chef anything, maybe, but that's not part of the indemnification in the marital settlement agreement."

¶ 12 With respect to respondent's petition for rule to show cause, petitioner argued that, under section 508 of the Act, respondent was required to establish that petitioner violated an order or a judgment of the court for a rule to issue. Respondent argued that in the agreement, petitioner agreed "to hold her harmless" and he had not done that. Following arguments of the parties, the trial court denied respondent's petition for rule to show cause, noting that there was no violation of the court's order. Respondent timely appealed.

¶ 13 Respondent challenges the language of the agreement and the trial court's rulings on respondent's requests for attorney fees. With respect to the language of the agreement, respondent contends that the trial court erred when it determined that the terms of Article VIII of the agreement were clear and unambiguous. When interpreting a marital settlement agreement, courts seek to give effect to the parties' intent. *Allton v. Hintzsche*, 373 Ill. App. 3d 708, 711 (2007). The language used in the agreement is usually the best indication of the parties' intent. *Id.* at 711. When the terms of the agreement are unambiguous, we determine the parties' intent solely from the language of the agreement. *Id.* An ambiguity exists when an agreement contains language that is susceptible to more than one reasonable interpretation. *Id.* Where the language is ambiguous, parol evidence may be used to decide what the parties intended. *Id.* All the provisions of the agreement should be read as a whole to interpret it and to determine whether an ambiguity exists. *Rich v. Principle Life Insurance Co.*, 226 Ill. 2d 359, 371 (2007). An ambiguity is not created simply because the parties disagree on the meaning of any provision. *Id.* at 372.

¶ 14 Our review of the agreement, including the provisions of Article VIII in particular, reveals no ambiguities. We can, and the trial court did, ascertain the parties' intent solely from the language of the agreement. See *In re Marriage of Wassom*, 352 Ill. App. 3d 327, 330-31 (2004). Paragraph A.5 of Article VIII of the agreement clearly provides that parties intended for petitioner to pay the promissory note executed in favor of Pampered Chef, or any subsequent holder of the Pampered Chef promissory note. Paragraph A.5 clearly provides that the parties intended for petitioner to indemnify respondent in the event she became liable to Pampered Chef as a result of the Pampered Chef litigation. Paragraph C clearly provides for the recovery of attorney fees in the event either party breached an obligation under Article VIII and the other party was compelled to seek recovery arising out of the breach, including attorney fees. The specific inclusion of attorney fees in

paragraph C evinces the parties' clear intent to leave out the payment of attorney fees in paragraph A.5. See *In re Marriage of Hendry*, 409 Ill. App. 3d 1012, 1018 (2011) (employing the well-known maxim of construction, *inclusio unius est exclusio alterius*, or the inclusion of one is the exclusion of the other, in interpreting a provision of the parties' marital settlement agreement). Accordingly, we conclude that the trial court properly found the language of Article VIII clear and unambiguous.

¶ 15 Next, with respect to her petition for attorney fees, her motion to reconsider, and her petition for rule to show cause, respondent contends that the trial court misinterpreted the provisions contained Article VIII of the agreement. Respondent asserts that petitioner has violated paragraph A.5 of Article VIII of the agreement by his failure to "simply pay" in full the obligation to Pampered Chef. Respondent also argues that the trial court misinterpreted the agreement when it stated that petitioner's duty to pay would accrue if and when Pampered Chef obtained a "judgment" against respondent. Respondent argues that the trial court failed to consider paragraph C of Article VIII, which made it incumbent on petitioner to pay any damages incurred by respondent, expressly including attorney fees, in the event he did not pay Pampered Chef. Respondent concludes that, because of petitioner's failure to pay the entire Pampered Chef obligation, he is in violation of the agreement and obligated to pay respondent's attorney fees.

¶ 16 Illinois law is clear is that rules of contract construction are applicable to the interpretation of provisions in a judgment of dissolution, and the primary objective is to effectuate the intent of the parties. *In re Marriage of Carrier*, 332 Ill. App. 3d 654, 658 (2002). When the terms of the judgment of dissolution are unambiguous, the intent of the parties is determined solely from the language of the judgment. *Wassom*, 352 Ill. App. 3d at 330-31. Because the interpretation of a marital settlement agreement is a question of law, our review is *de novo*. *Hendry*, 409 Ill. App. 3d at 1017.

¶ 17 In the current matter, paragraph A.5 of Article VIII of the agreement clearly provides that, if respondent were found to be liable to Pampered Chef or any subsequent holder of the Pampered Chef promissory note, petitioner would indemnify her for that liability. "[A] cause of action on an indemnity agreement does not arise until the indemnitee either has had a judgment entered against him for damages[ ] or has made payments or suffered actual loss." *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 199 (1989). Here, the record reflects, and respondent even admitted in her March 2010 initial petition for indemnification, that no judgment had been rendered against her in the Pampered Chef litigation. Neither party disputes that respondent does not owe anything to Pampered Chef. At this point, respondent has sustained neither loss nor liability. As a result, no cause of action for indemnification has accrued in her favor, and the trial court was correct in denying her petition for attorney fees and her motion to reconsider.

¶ 18 For similar reasons, we reject respondent's argument regarding the trial court's ruling on her petition for rule to show cause. The record clearly reflects that petitioner has paid in excess of $1.3 million of the judgment that had been entered against him in the Pampered Chef litigation, and the remaining balance of the judgment from the Pampered Chef litigation has been stayed entirely. Insofar as the alleged contempt was based on petitioner's purported violation of paragraph A.5, we find no error in the trial court's finding and refusal to issue a rule to show cause.

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 20 Affirmed.