2011 IL App (2d) 110282-U
No. 2-11-0282
Order filed December 12, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In Re MARRIAGE OF PRISCILLA DOHRMANN,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 96-DV-482
WILBERT DOHRMANN,	)	Honorable Suzanne C. Mangiamele,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Schostok concurred in the judgment.

ORDER

Held: Where husband and wife previously had entered into marital settlement agreement that provided for non-modifiable permanent maintenance, the trial court did not err in involuntarily dismissing husband's motion to reduce maintenance.

¶ 1 The trial court entered a judgment of dissolution ending the marriage of plaintiff, Priscilla Dohrmann, and defendant, Wilbert Dohrmann. Incorporated into the judgment was a marital settlement agreement by which Wilbert agreed to pay Priscilla $200 per month in permanent, non-modifiable maintenance. Wilbert petitioned to reduce maintenance, the trial court dismissed the petition involuntarily, and Wilbert appeals. We affirm.

¶ 2 I. FACTS

¶ 3 The parties were married in 1989, and a judgment for dissolution of marriage was entered in 1996. At the time of the dissolution, Wilbert was 68 years old and Priscilla was 65 years old. The judgment incorporated a marital settlement agreement that states "Wilbert shall pay to Priscilla for maintenance the sum of $200.00 per month commencing upon entry for Judgment for Dissolution of Marriage and pursuant to an Order for Income Withholding and said sum shall be payable each month thereafter." The maintenance provision further states that, pursuant to section 502 of the Illinois Marriage and Dissolution of Marriage Act (the Dissolution Act) (750 ILCS 5/502 (West 2010)), "the parties agree to be precluded from seeking modification of the terms contained in the agreement relating to payment of maintenance."

¶ 4 On November 30, 2010, Wilbert petitioned to modify maintenance, alleging that he could not afford the payments because his health had deteriorated. Section 510(a-5) of the Dissolution Act provides that "[a]n order of maintenance may be modified or terminated only upon a showing of a substantial change in circumstances." 750 ILCS 5/510(a-5) (West 2010). Courts in Illinois have held that "substantial change in circumstances" as required under section 510 of the Dissolution Act means that either the needs of the spouse receiving maintenance or the ability of the other spouse to pay that maintenance has changed. *In re Marriage of Neuman*, 295 Ill. App. 3d 212, 214 (1998). The party seeking modification of a maintenance order has the burden of showing that a substantial change in circumstances has occurred. *In re Marriage of Logston*, 103 Ill. 2d 266, 287 (1984).

¶ 5 In his petition, Wilbert alleged that he had never missed a maintenance payment during the 14 years since the dissolution. He also asserted that, at the time of the dissolution, he was retired but was able to work part time. However, in February 2010, he had undergone two surgical procedures and currently was suffering from chronic obstructive pulmonary disorder (COPD), which

requires daily oxygen treatment. Wilbert alleged that he was no longer employed and was living off limited income, which included a partial pension and social security proceeds. Wilbert alleged that his worsening health had created an extreme financial and health hardship that made it impossible for him to pay maintenance.

¶ 6 On December 16, 2010, Priscilla filed a motion to dismiss Wilbert's petition to modify maintenance. She argued that the martial settlement agreement barred modification, and therefore, Wilbert's petition must be dismissed pursuant to sections 2-619(a)(4) and 2-619(a)(9) of the Code of Civil Procedure (Code). See 735 ILCS 5/2-619(a)(4), (a)(9) (West 2010). Priscilla additionally argued that Wilbert's petition did not comply with a local rule that requires a financial affidavit to be attached to a pleading seeking monetary relief. Following a hearing, the trial court dismissed Wilbert's petition to modify maintenance, and this timely appeal followed.

¶ 7 II. ANALYSIS

¶ 8 Wilbert appeals the involuntary dismissal of his petition to modify maintenance based on a deterioration of his health and finances. A motion to dismiss pursuant to section 2-619 admits the legal sufficiency of the pleading, but asserts an affirmative defense or other matter that avoids or defeats the claim. *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450, 455 (2011). A dismissal under section 2-619 is reviewed *de novo*. *Barber*, 241 Ill. 2d at 455. A defendant may seek involuntary dismissal under section 2-619(a)(4) if the cause of action is barred by a prior judgment and also under section 2-619(a)(9) if the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim. 735 ILCS 5/2-619(a)(4), (a)(9) (West 2010). We agree with Priscilla that the non-modifiable maintenance provision in the marital settlement agreement is affirmative matter defeating Wilbert's petition.

¶ 9 Section 502 of the Dissolution Act states that 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 agreement. 750 ILCS 5/502(a) (West 2010). The terms of the agreement, except those providing for the support, custody, and visitation of children, are binding upon the court unless it finds that the agreement is unconscionable. 750 ILCS 5/502(b) (West 2010). Moreover, unless the agreement states otherwise, its terms shall be incorporated into the judgment. 750 ILCS 5/502(d) (West 2010).

¶ 10 Sections 502(f) of the Dissolution Act expressly permits the parties to enter into an agreement which precludes or limits modification or termination of maintenance under section 510. 750 ILCS 5/502(f), 510 (West 2010). The parties may agree their maintenance provisions will be nonmodifiable or modifiable only in accordance with the terms of the agreement. *In re Marriage of Brent*, 263 Ill. App. 3d 916, 922 (1994). The purpose of allowing the parties to agree, in advance, to the circumstances under which maintenance may be modified " 'maximizes the advantages of careful future planning and eliminates uncertainties based on the fear of subsequent motions to increase or decrease the obligations of the parties.' " *Brent*, 263 Ill. App. 3d at 922 (quoting Ill. Ann. Stat., ch. 40, par. 502, Historical and Practice Notes, at 403 (Smith-Hurd 1980) (quoting 9A U.L.A. 138 (1979))).

¶ 11 Where the parties agree to the terms under which maintenance may be modified or terminated, their terms would be incorporated into the judgment and would take precedence over the provisions for modification and termination as set forth in section 510 of the Act. *Brent*, 263 Ill. App. 3d at 922-23 (citing *In re Marriage of Tucker*, 148 Ill. App. 3d 1097, 1099 (1986)). However, the intent of the parties to preclude or limit modification or termination of maintenance must be

clearly manifested in their agreement. *Brent*, 263 Ill. App. 3d at 923 (citing *In re Marriage of Scott*, 205 Ill. App. 3d 561, 564 (1990)).

¶ 12 An agreement that clearly and expressly limits a court's ability to modify maintenance will preclude modification of maintenance upon grounds not specified in the agreement. *Brent*, 263 Ill. App. 3d 916, 924 (1994). For example, in *Simmons v. Simmons*, 77 Ill. App. 3d 740, 741 (1979), the parties agreed " 'in no event is the amount of alimony to be modifiable except for death or remarriage of wife.' " Eileen Simmons, the recipient spouse, requested an increase of maintenance based upon a substantial change in circumstances, and the trial court granted the request, ordering a modification of maintenance. *Simmons*, 77 Ill. App. 3d at 743. This court reversed the increase, concluding that the language of the parties' agreement was a clear expression of intent to severely restrict modification of maintenance. *Simmons*, 77 Ill. App. 3d at 743.

¶ 13 This case presents an example of a modification restriction that is even more severe than the one in *Simmons*. Here, the parties' marital settlement agreement provides that Wilbert shall pay Priscilla $200 per month commencing upon the entry of the dissolution judgment. The maintenance provision unambiguously states that "the parties agree to be precluded from seeking modification of the terms contained in the agreement relating to payment of maintenance." The plain and ordinary meaning of the language shows the parties' clear expression of intent to bar either from seeking modification of maintenance for any reason.

¶ 14 Wilbert does not seriously dispute that the parties unambiguously agreed that neither could seek modification of maintenance. Instead, Wilbert argues that trial courts should retain their authority to modify maintenance awards even when an express nonmodification agreement is in place. Wilbert's position is inconsistent with the well-settled rule that a court retains its authority to modify maintenance only where the language utilized by the parties is not an express preclusion

of modification. *Brent*, 263 Ill. App. 3d at 925. Wilbert has not set forth a compelling reason to depart from the rule, and we decline to do so.

¶ 15 Wilbert next argues that principles of unconscionability and a public policy interest in protecting the elderly weigh against the enforcement of the nonmodification clause of the maintenance provision. Unconscionability is a basis for a trial court to reject terms of a marital settlement agreement at the time the agreement is made, not several years after the judgment has been in effect. See 750 ILCS 5/502(b) (West 2010) (In fashioning the dissolution judgment, the parties' agreement regarding maintenance is binding upon the court unless the court finds it to be unconscionable). Two factors are considered when determining whether an agreement is unconscionable: (1) the conditions under which the agreement was made, and (2) the parties' economic circumstances resulting from the agreement. *In re Marriage of Richardson*, 237 Ill. App. 3d 1067, 1080 (1992). "The determination of unconscionability focuses on the parties' relative economic positions *immediately following the making of the agreement*." (Emphasis added.) *Richardson*, 237 Ill. App. 3d at 1080.; see also *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 24 (2006) ("[T]he issue of unconscionability should be examined with reference to all of the circumstances *surrounding the transaction*." (Emphasis added)); *In re Marriage of Tabassum*, 377 Ill. App. 3d 761, 778 (2007) ("Courts examining whether postmarital agreements are substantively unconscionable have focused on the parties' economic circumstances immediately following and resulting from the agreement").

¶ 16 Before accepting the nonmodification provision and incorporating it into the judgment of dissolution, the trial court determined that the parties understood the agreement fully. At the hearing, Wilbert testified that he understood that he would pay Priscilla $200 per month for the rest of her life and that both would be barred from seeking modification for any reason. Nothing in the

record before us suggests that the court considered the provision to be unconscionable. Wilbert's economic position 14 years after the entry of the judgment cannot be said to be his economic position "immediately following the making of the agreement." See *Richardson*, 237 Ill. App. 3d at 1080. Moreover, if an agreement can be declared unconscionable based upon a change in circumstances, agreements that may have been perfectly conscionable upon their making are perpetually subject to being declared unconscionable as time passes and conditions change. The resulting uncertainty would undermine the purpose of allowing the parties to agree, in advance, to the circumstances under which maintenance may be modified. See *Brent*, 263 Ill. App. 3d at 922.

¶ 17 Wilbert has cited no authority for the proposition that public policy or a substantial change in circumstances occurring years later are valid defenses to the enforceability of a nonmodification clause of a permanent maintenance provision. Although Wilbert's alleged health problems are unfortunate, they do not provide a basis for avoiding the terms of a marital settlement agreement that the trial court incorporated into the judgment of dissolution. The settlement agreement is affirmative matter defeating Wilbert's petition to reduce maintenance, and the trial court did not err in involuntarily dismissing the petition.

¶ 18 III. CONCLUSION

¶ 19 For the reasons stated, the involuntary dismissal of the petition to modify maintenance is affirmed.

¶ 20 Affirmed.