2015 IL App (2d) 140142-U
No. 2-14-0142
Order filed March 12, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF WENDY F. ARDELEAN, n/k/a Wendy F. Schiller,	)	Appeal from the Circuit Court of Du Page County.
Petitioner-Appellee,	)	
and	)	No. 12-D-293
RONALD K. ARDELEAN,	)	Honorable Robert A. Miller,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Schostok and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in dismissing respondent's section 2-1401 petition to vacate a marital settlement agreement: respondent's allegations were sufficient to state a claim of unilateral mistake and diligence in raising it, and the agreement's nonmodification clause did not necessarily defeat that claim.

¶ 2 Ronald K. Ardelean, the respondent in a dissolution-of-marriage action, appeals from the dismissal of his "Motion to Clarify Judgment and for Declaratory Order," which the trial court treated, and he now treats, as a petition under section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2012)). In the petition, respondent sought modification of the marital settlement agreement (MSA) to remove wording that gave the petitioner in the action,

Wendy F. Ardelean, n/k/a Wendy F. Schiller, part of the nonmarital portion of his retirement funds. Respondent contends that, because his petition adequately alleged that the MSA was the result of a unilateral mistake for which relief was available, the court should not have dismissed the petition. We agree, and we therefore vacate the dismissal and remand the cause.

¶ 3 I. BACKGROUND

¶ 4 On February 10, 2012, petitioner filed her petition for the dissolution of her marriage to respondent, whom she had married at the end of 1999. The court entered the dissolution judgment on April 5, 2013. At the time, petitioner's counsel told the court that the parties were using certain figures to "get to an overall division of 55/45." Included in the judgment was an MSA that provided that the property and debts to be divided were credit-card debt, household items, some minor liquid assets, two cars, and respondent's retirement plans. The MSA gave petitioner 55% of respondent's International Brotherhood of Electrical Workers (IBEW) Local 701 Pension Plan, his IBEW Local 701 Savings Plan, and his Electrical Contractors' Association (ECA)-IBEW Local 134 Pension Plan—the plans to be divided by qualified domestic relations orders (QDROs). Respondent also agreed to pay petitioner $750 a month in maintenance for 12 months. The dissolution decree indicated that petitioner's counsel had drafted it; no such indication appeared specifically on the associated MSA.

¶ 5 Petitioner filed the QDROs on May 7, 2013. The QDROs for the IBEW Local 701 Pension Plan and the ECA-IBEW Local 134 Pension Plan gave petitioner 55% of the *entirety* of those plans. The QDRO for the IBEW Local 701 Savings Plan gave petitioner 55% of the *marital portion* of the plan.

¶ 6 On October 7, 2013, respondent filed a "Motion to Clarify Judgment and for Declaratory Order." In the motion as amended, respondent asserted that petitioner had never suggested

during the negotiations that she might receive a portion of the nonmarital property. He further asserted that, based on the court's pretrial recommendations, the parties had agreed that the MSA would allocate the marital property 45% to him and 55% to petitioner. Finally, he asserted that the orders entered did not realize this intent: those orders gave petitioner 55% of respondent's entire interest in the plans, including the nonmarital portions.

¶ 7 Respondent further alleged that he had established pension credit over 24 years, whereas the marriage had lasted 14 years. "[Respondent] was repeatedly reassured by his counsel that the denominator of the allocable portion was the number of years married in the Plan, and his counsel reasonably believed, based on his experience in matrimonial matters, [that] no other value of these assets was in play or at risk." However, when respondent's counsel asked petitioner's counsel what the intent in drafting had been, petitioner's counsel "responded that it was right that [petitioner] receive so much" because of petitioner's needs and respondent's behavior.

¶ 8 Respondent's affidavit, attached, stated that his counsel had told him that "the amount [his] wife would receive would be based on the number of years [they] were married and the number of years [he] was vested in these plans." Further, "shortly after the entry of the QDRO's ***, [he] received a telephone call from *** [the] Pension Administrator of [his] IBEW local who told [him] the way the QDRO's were worded all of [his] years of service, going back 24 years, were now in play, and [his] former wife would receive the entirety of [his] plans." He immediately contacted his attorney because the QDROs did not match his understanding of the parties' agreement.

¶ 9 Petitioner filed a "Motion to Strike and Dismiss Respondent's Amended Motion to Clarify Judgment and for Declaratory Order." She asserted that respondent's "motion" was, in

fact, a petition under section 2-1401. Invoking section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)), she argued that respondent had failed to allege any facts of the kind necessary to state a claim under section 2-1401. Invoking section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)), she also argued that the MSA explicitly made the property settlement nonmodifiable.

¶ 10 Respondent filed an "answer" to the motion. He asserted that his affidavit served as the necessary source of specific allegations of fact. He also argued that the bar on modifications should not be read to bar the court from making certain kinds of corrections to the judgment.

¶ 11 On January 13, 2014, the court granted petitioner's motion: "Respondent's Amended Motion is stricken & dismissed." Respondent filed a timely notice of appeal.

¶ 12 II. ANALYSIS

¶ 13 On appeal, respondent accepts the characterization of his filing as a section 2-1401 petition. Respondent cites *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986), as the applicable standard for the availability of section 2-1401 relief. *Airoom* states:

> "To be entitled to relief under section 2-1401, the petitioner must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief." *Airoom*, 114 Ill. 2d at 220-21.

Respondent argues that the MSA effected a disproportionate distribution and that the distribution was not the one that he expected. Treating the agreement in contract terms, he argues that a trial court can, in appropriate circumstances, reform a contract when the contract is the result of a unilateral mistake of fact; he thus argues for the existence of a meritorious claim or defense. He

cites *People v. Vincent*, 226 Ill. 2d 1, 15-18 (2007), for the proposition that review of a section 2-1401 petition's dismissal is *de novo*.

¶ 14 Petitioner responds that, among other things, *Vincent* is inapplicable here because it is a decision in a criminal case.

¶ 15 Turning to the merits of the matter, we conclude that, applying the *Airoom* standard and recognized exceptions to the diligence prongs, the trial court should not have dismissed respondent's petition; respondent's petition adequately stated a claim for relief from judgment based on a unilateral mistake. As we will discuss, the petition allows the inference that petitioner was sufficiently aware of respondent's confusion to have effectively committed a fraud. In the final portion of this decision, we will show that such an allegation is a basis to relax the diligence prongs of *Airoom*.

¶ 16 The parties do not agree on the applicable standard of review. We hold that it is *de novo*, based both upon this being a dismissal on a section 2-615 or 2-619 motion and upon this being the dismissal of a section 2-1401 petition.

¶ 17 Review of a dismissal for failure to state a claim is *de novo*, and in such review the court must grant the nonmoving party the benefit of all well-pleaded facts and any reasonable inferences that can be drawn from those facts. *Kanerva v. Weems*, 2014 IL 115811, ¶ 33. "A cause of action should not be dismissed under section 2-615 unless it is clearly apparent from the pleadings that no set of facts can be proven that would entitle the [nonmoving party] to recover. *Kanerva*, 2014 IL 115811, ¶ 33.

¶ 18 Petitioner's motion to dismiss also invoked section 2-619 of the Code.

> "[A] section 2-619 motion admits the legal sufficiency of the claims but raises defects, defenses, or other affirmative matter, appearing on the face of the complaint or

> established by external submissions, that defeats the action. [Citation.] Where a claim has been dismissed pursuant to section 2-619, the questions presented are whether there is a genuine issue of material fact and whether the defendant is entitled to judgment as a matter of law." *Aurelius v. State Farm Fire & Casualty Co.*, 384 Ill. App. 3d 969, 972-73 (2008).

As with a section 2-615 motion, a reviewing court gives the nonmoving party the benefit of all well-pleaded facts and any reasonable inferences that can be drawn from those facts; review of a dismissal under section 2-619 is likewise *de novo*. *Aurelius*, 384 Ill. App. 3d at 973.

¶ 19 Moreover, our supreme court made clear in *Vincent* that the propriety of any kind of dismissal (as opposed to denial) of a section 2-1401 petition is an issue of law and thus subject to *de novo* review. *Vincent*, 226 Ill. 2d at 15-18. Petitioner argues that *Vincent* is a criminal case and is thus inapplicable here. Such a limitation on *Vincent*'s applicability is inconsistent with the logic and language of the decision. Further, we have not hesitated to apply the holding of *Vincent* to the review of decisions on section 2-1401 petitions filed in civil cases. *E.g.*, *Domingo v. Guarino*, 402 Ill. App. 3d 690, 699 (2010). Even in *Rockford Financial Systems, Inc. v. Borgetti*, 403 Ill. App. 3d 321, 323-28 (2010), a decision in which we put forward a limited reading of *Vincent*, we did not suggest that *Vincent*'s applicability could be limited to criminal cases.

¶ 20 Turning to the merits of the matter, we now discuss respondent's allegations and the inferences that we may draw from them; as we will later discuss, petitioner's degree of awareness is critical to whether respondent is entitled to relief.

¶ 21 In the proceedings on the motion to dismiss, respondent was entitled to, first of all, an inference that petitioner *should have known* that respondent had not agreed to the transfer of his

nonmarital property. The petition and its adjuncts establish for our purposes that petitioner knew that the MSA transferred nonmarital property to her but respondent did not. They further establish that, prior to the MSA's drafting, the parties had agreed to a 55/45 distribution of the marital property but respondent was not aware of negotiations for the transfer of nonmarital property to petitioner. We must also accept an inference that petitioner's counsel drafted the MSA. We draw this from petitioner's counsel's acknowledgment that he was aware of the MSA's contents when respondent's counsel was not.

¶ 22 One can properly infer that the mismatch was *not* the result of a misunderstanding about what property was to be distributed. This is so because transfers of nonmarital property are atypical in dissolution decrees. Illinois dissolution law bars a trial court from disposing of nonmarital property except by agreement of the parties. See 750 ILCS 5/503(d) (West 2012). As a result, the starting assumption is that the property portion of a dissolution decree is a distribution of *marital* property. Unless counsel for respondent and petitioner *explicitly* discussed transfers of nonmarital property, they did not agree to such a transfer. Moreover, petitioner's counsel should have been familiar enough with dissolution practice to know this, and thus he knew or should have known that the MSA was not what respondent expected. We note that, although petitioner had claimed that respondent had dissipated assets in the dissolution action could be relevant to the sort of settlement that the parties might expect, its existence by itself is not sufficient to suggest an agreed distribution of nonmarital property.

¶ 23 That petitioner knew or should have known that respondent had not agreed to the transfer of his property is merely the *minimum* reasonable inference to which respondent is entitled on the record as it currently stands. The change between the negotiation outcome and the MSA served petitioner's immediate interests extremely well. On the current facts, the inference that

petitioner deliberately tried to get respondent to unknowingly accept the MSA is an acceptable inference. We emphasize, however, that this inference is applicable only to the case in its current procedural posture, which examines only respondent's side of the matter.

¶ 24 Respondent argues that his petition successfully pleaded a unilateral mistake for which relief is available. Taking into account the inferences just described, we agree. Initially, we note that settlement agreements are, before they are anything else, contracts, so that principles of contract law apply, in the general case, to the enforcement of such settlements. *E.g.*, *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 18. "When a party seeks to vacate a property settlement incorporated into a judgment of dissolution of marriage, all presumptions are in favor of the validity of the settlement." *In re Marriage of Bielawski*, 328 Ill. App. 3d 243, 251 (2002). However, Illinois authority recognizes a limited number of bases on which courts may vacate an MSA. The recognized bases are most commonly stated to be that the agreement is unconscionable or that it was entered into as a result of duress, coercion, or fraud. *E.g.*, *In re Marriage of Arjmand*, 2013 IL App (2d) 120639, ¶ 29.

¶ 25 A further difference between contracts and many MSAs is that, while a contract by its nature can, after its acceptance, be changed only by the parties' agreement, a court may modify some terms of an MSA, as when circumstances have changed. See *In re Marriage of Dellitt*, 213 Ill. App. 3d 155, 157 (1991) (a contract-based settlement not incorporated into a judgment was, as a contract, not subject to judicial modification). Illinois dissolution law allows the parties to agree to make some MSA terms that ordinarily would be subject to modification into nonmodifiable ones. See 750 ILCS 5/502(f) (West 2012) ("Except for terms concerning the support, custody or visitation of children, the judgment may expressly preclude or limit modification of terms set forth in the judgment if the agreement so provides."). Petitioner and

respondent agreed to make such terms nonmodifiable except by mutual agreement. This provision made the MSA more conventionally contract-like than it would have otherwise been.

¶ 26 Here and in the general case, relief is available for a unilateral mistake when the nonmistaken party is sufficiently culpable. In the case of an ordinary contract, the claim can be one for unilateral mistake simpliciter, negligent misrepresentation, or fraudulent misrepresentation, depending on the nonmistaken party's degree of responsibility for the mistaken party's error and the harm to the mistaken party. These bases for relief may also provide the unconscionability, duress, coercion, or fraud necessary for relief to be available from an MSA. As we will explain, the allegations and inferences here bring respondent's claim within the range of unilateral mistakes for which relief is available.

¶ 27 Respondent has alleged a "mistake" in the relevant sense. We note that, here and in all our discussion of relevant contract principles, we rely primarily on the analysis in the Restatement (Second) of Contracts, as Illinois courts often have. See, *e.g.*, *Jordan v. Knafel*, 378 Ill. App. 3d 219, 231 (2007) (exemplifying such reliance and noting implicit reliance in prior authority). When a document that is put forward as the embodiment of an agreement between parties does not properly reflect the terms of that agreement, failure by a party to recognize the discrepancy is a "mistake" in the sense that the Restatement uses that term: "[a]n erroneous belief as to the contents *** of a writing that expresses the agreement is *** a mistake." Restatement (Second) of Contracts § 151 Cmt. a at 383 (1981).

¶ 28 We now turn to the circumstances under which relief is available for a unilateral mistake. Unilateral mistake simpliciter can serve as a basis for avoiding a contract if the result is unconscionable (Restatement (Second) of Contracts § 153(a) (1981)) or "the other party had reason to know of the [first party's] mistake or his fault caused the mistake" (Restatement

(Second) of Contracts § 153(b) (1981)) and the mistake was material. As noted, unconscionability is a basis for relief from an MSA. However, to get relief based on unconscionability, respondent would need to show an unconscionable *net effect* on him by the MSA's enforcement on him. See Restatement (Second) of Contracts § 153 Cmt. c at 395 (1981). He has not attempted here or below to point to how he has made that showing. Therefore, the remaining possible avenue of relief for respondent is fraud—duress or coercion being plainly inapplicable.

¶ 29 The rule for when a contract is reformable based on a fraudulent misrepresentation requires that the nonmistaken party have acted with a specific kind of purposefulness—essentially, intending that the other party make the mistake. To simplify somewhat, it is fraudulent misrepresentation for a party to add new terms to the written version of an agreement for the purpose of getting the other party to assent to a term that he or she would not otherwise accept. This is so even if the first party never overtly states that the writing embodies the agreement.

¶ 30 The Restatement recognizes that a "misrepresentation" can occur without an overt statement. Although the Restatement's basic definition of a misrepresentation is simply "an assertion that is not in accord with the facts" (Restatement (Second) of Contracts § 159 (1981)), nondisclosure is the equivalent of a misrepresentation in certain limited circumstances. For our purposes, those circumstances most notably include when that party knowingly allows the other party to act on a mistake about the contents of document that is purported to be the embodiment of an existing agreement. When the contents of a writing made to evince an agreement are at issue, a party's nondisclosure of contents of that writing is equivalent to an explicit

misrepresentation of the contents when the party knows that the other party is mistaken about the contents. Restatement (Second) of Contracts § 161(c) (1981).

¶ 31 "If a fact is intentionally withheld for the purposes of inducing action, this is equivalent to a fraudulent misrepresentation." Restatement (Second) of Contracts § 161, Cmt. b at 432 (1981). In the circumstances where one party fraudulently misrepresents the "the contents or effect" of a document that "evidenc[es] or embod[ies] in whole or in part an agreement," the court "may reform the [document] to express the terms of the agreement" provided that the mistaken party "was justified in relying on the misrepresentation" and no third-party interest is at issue. Restatement (Second) of Contracts § 166 (1981).

> "Th[is] rule *** applies to the case where only one party is mistaken and the other, although aware of the mistake, says nothing to correct it. In that case his non-disclosure is equivalent to an assertion that the writing is as the other understands it to be [citation]. *** Reformation is not precluded by the mere fact that the party who seeks it failed to exercise reasonable care in reading the writing, but his reliance on the misrepresentation must be justified and the right to reformation is therefore subject to the rule on fault stated in § 172." Restatement (Second) of Contracts § 166, Cmt. a at 450 (1981).

The requirement that reliance must be justified is narrow: it does not impose on a party a duty to check the accuracy of a representation. Rather, "[a] recipient's fault in not knowing or discovering the facts before making the contract does not make his reliance unjustified unless it amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing." Restatement (Second) of Contracts § 172 (1981).

¶ 32 The reasonable inferences we described above are sufficient to prevent involuntary dismissal of a claim based on fraudulent misrepresentation. As noted, one may infer that, in

essence, petitioner presented respondent with an MSA that differed from the negotiated agreement with the intent that he make a concession that he did not intend. That is fraud by misrepresentation.

¶ 33 Justice requires the applicability of the principles we have described to the negotiation and execution of an MSA. For a written settlement agreement to serve the ends of justice, it *must* properly embody the agreement that the parties have negotiated. To permit one party to change an MSA to his or her benefit while allowing the other party to believe that it embodies a different agreement is contrary to serving such ends of justice.

¶ 34 We further hold that, again for purposes of avoiding dismissal, respondent satisfied both of *Airoom*'s diligence prongs. The first prong is "due diligence in presenting this defense or claim to the circuit court in the original action." *Airoom*, 114 Ill. 2d at 221. In this context, in which the source of the claim and the entry of the final order are scarcely separable, this first diligence prong is best understood as requiring only that respondent have been sufficiently nonnegligent for the claim to exist. As we noted, for fraudulent misrepresentation, nonnegligence is equivalent to a lack of bad faith. Nothing here suggests bad faith—though petitioner will be free to raise that as a defense—so respondent has satisfied *Airoom*'s first prong. The second prong is "due diligence in filing the section 2-1401 petition for relief." *Airoom*, 114 Ill. 2d at 221. Respondent filed the petition approximately six months after the MSA's entry and five months after the QDROs' entry. On the current facts as they must be taken, a court cannot conclude *as a matter of law* that respondent did not exercise diligence in filing his petition.

¶ 35 In any event, it has long been the law that the diligence elements can be "relaxed" in extraordinary circumstances, including fraud or fundamental unfairness. *E.g.*, *In re Marriage of Harnack*, 2014 IL App (1st) 121424, ¶ 60. We note, however, that the supreme court's decision

in *Vincent* disturbed our courts' longstanding mode of applying a relaxed standard; it did this by making clear that courts are not to decide section 2-1401 petitions on equitable principles (*Vincent*, 226 Ill. 2d at 15-16). Still, the holding of *Vincent* does not strongly imply that fraud-based relaxation of the diligence standard cannot occur. Such relaxation is amenable to being decided as a matter of law, and this amenability is clearest as to fraud, which is not ordinarily a matter for the courts' discretion anyway. See, *e.g.*, *Minch v. George*, 395 Ill. App. 3d 390, 398 (2009) (stating that the standard of review for rejecting a claim of fraud in a marriage settlement was *de novo* or manifest-weight-of-the-evidence was dependent on whether the court had reached the stage of weighing evidence). To the extent that relaxation of diligence standards remains proper post-*Vincent*—an issue not yet clearly decided, respondent has pleaded a basis for it by adequately pleading fraudulent misrepresentation.

¶ 36 We also hold that the trial court could not properly dismiss the petition under section 2-619. The sole basis that petitioner raised under that section was that the parties had made the MSA nonmodifiable except by agreement. We agree with the limited precedent that suggests that a nonmodifiction clause in an MSA does not bar a court from making changes under the circumstances where an MSA can otherwise be set aside. *Cf. In re Marriage of Habermehl*, 135 Ill. App. 3d 105, 111 (1985) (an agreement with a nonmodifiability clause could stand where no showing of fraud, overreaching, or unconscionability was made). This is a necessary rule. Nonmodifiability agreements allow parties to agree to have extra stability, but they cannot reasonably be taken to immunize an improper agreement from the trial court's review. We further point out that the law of unilateral mistake applies to contracts in general. As we noted, ordinary contracts are by their nature expected to be modifiable only by agreement of the parties. A nonmodification clause thus adds nothing that would not be inherent to an ordinary contract.

Such a clause therefore is not relevant to the application of rules taken from contract law. As the nonmodification clause does not defeat respondent's claim, it could not be a proper basis for dismissal under section 2-619 of the Code.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we vacate the trial court's dismissal of respondent's section 2-1401 petition and remand the cause for further proceedings. As we previously noted, we hold only that respondent's petition is sufficient to survive petitioner's motion to dismiss. We express no opinion on the ultimate merits of respondent's claim for relief under section 2-1401.

¶ 39 Vacated and remanded.