2014 IL App (3d) 130430-U

Order filed September 30, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

In re MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
JUDITH M. HORNER,	)	Tazewell County, Illinois.
	)	
Petitioner-Appellee and	)	
Cross-Appellant,	)	
	)	Appeal No. 3-13-0430
v.	)	Circuit No. 90-D-597
	)	
ERNIE L. HORNER,	)	
	)	
Respondent-Appellant and	)	The Honorable
Cross-Appellee.	)	Jerelyn D. Maher,
	)	Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Lytton and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: In a case involving a dispute regarding the wife's interest in the husband's pension, the appellate court held that: (1) the marital settlement agreement between the parties was not ambiguous with regard to the pension; (2) *laches* did not bar the wife's petition for entry of a Qualified Illinois Domestic Relations Order (QILDRO); (3) the wife forfeited her argument that equitable estoppel barred the wife's QILDRO petition; and (4) the circuit court did not abuse its discretion when it denied the wife's request for interest on the arrearage.

¶ 2 The petitioner-appellee and cross-appellant, Judith Horner, filed a petition for the entry of a Qualified Domestic Relations Order (QDRO), and later a motion for the entry of a Qualified Illinois Domestic Relations Order (QILDRO), alleging that the respondent-appellant and cross-appellee, Ernie L. Horner, had not paid her one-half of his pension after he retired, as required by the parties' marital settlement agreement (MSA). After a hearing, the circuit court ruled in favor of Judith, and the arrearage was later set at $139,062.74, although the court denied Judith's request for interest on that amount. On appeal, Ernie argues that: (1) the circuit court erred when it found that the MSA's pension provision was unambiguous; (2) *laches* operates to bar Judith's petition for entry of a QILDRO; and (3) equitable estoppel operates to bar Judith's petition for entry of a QILDRO. In her cross-appeal, Judith argues that the court erred when it denied her request for interest on the arrearage. We affirm.

¶ 3 FACTS

¶ 4 Judith and Ernie were married in 1972 and divorced in 1991. On January 25, 1994, the circuit court entered a second bifurcated judgment of dissolution. After noting that both parties were present in court, the order contained, in relevant part, the following provision regarding the parties' MSA:

> Plaintiff shall have a one-half equity interest in and to any and all pension-retirement benefits belonging to Defendant. However, the issue of whether Plaintiff shall receive, or continue to receive, one-half of said pension may be reviewed ~~prior to distribution~~ if Plaintiff receives an inheritance from her mother. The Court shall retain jurisdiction for this purpose." [Strikeout in original.]

The words, "or continue to receive," were added by interlineation.

¶ 5 On April 18, 2012, Judith filed a petition for the entry of a QDRO, alleging that Ernie had retired some time ago, but that she had not received her one-half equity interest in Ernie's pension. Judith requested that the circuit court divide that equity and award her retroactive benefits. Along with a response, Ernie filed a petition for the review provided by the MSA's pension provision. Ernie claimed that Judith had in fact received an inheritance from her mother and requested that the court therefore deny Judith's claim for half of his pension. Ernie also filed a supplement to his petition in which he asserted *laches* as a defense to Judith's claim.

¶ 6 On November 27, 2012, the circuit court held a hearing on all pending matters. Ernie testified that he retired effective January 1, 2000. He stated that he never paid any pension benefits to Judith because they had a verbal agreement that she would not receive any part of his pension and he would not receive any part of her inheritance. Ernie claimed that this verbal agreement was made prior to their dissolution in 1991, although on cross-examination he stated that the conversation occurred "during and after the '91 judgment and before the '94 judgment." Ernie also testified that he never told Judith that he had retired, but he believed she knew about it via conversations with their kids at family functions and because they lived in a small town in which "[e]verybody knows everything about everybody."

¶ 7 Judith testified that she learned of Ernie's retirement through her family's lawyer approximately two to three years prior to the hearing. She did state that she had previously heard rumors that Ernie had retired, and she claimed that Ernie was supposed to tell her when he retired. She also testified that she never had any discussion with Ernie regarding a connection between his pension and her inheritance.

¶ 8 On January 3, 2013, the circuit court issued its written order. The court found that the provision in question from the MSA was not ambiguous. The court found that the plaintiff was

clearly entitled to one-half of the defendant's pension, and her interest in that pension could be reviewed pursuant to the second sentence of the provision, which did not serve to automatically terminate her interest in that pension if she received an inheritance from her mother. The court also rejected Ernie's *laches* defense, finding that Judith did not have to do anything to trigger her entitlement, that Judith did not mislead Ernie into not petitioning for the review provided by the provision, and that Ernie was "prejudiced by his own inaction of hoping he could continue to take 100% of his pension without sharing with his wife." The court also denied Ernie's petition for the review provided by the MSA's pension provision.

¶ 9 Ernie filed a motion to reconsider, which included for the first time a claim that equitable estoppel operated to defeat Judith's claim. The circuit court denied Ernie's motion.

¶ 10 On July 8, 2013, after a hearing, the circuit court entered an order that granted Judith's May 23, 2013, motion to enter a QILDRO. During the hearing, the court inquired into the matters of interest and tax consequences with regard to the arrearage. It was noted that Ernie had already paid the taxes on the gross amount; however, no evidence was presented on any calculations associated with the tax ramifications of the arrearage. With regard to interest, the court denied Judith's request for pre-judgment interest on the $139,062.74 judgment against Ernie. In so ruling, the court stated:

> "At this point, there's no money. The interest kind of is a, that's why I'm asking about the taxes, the reason I was asking this question -- because the arrearage can be set, judgment on that, then statutory interest. If I were to compute, and I don't think -- that's what I meant -- I don't think you have the computations in front of me to figure what her half would be credited back with the taxes he paid for her tax rate for all these years."

Ernie appealed, and Judith filed a cross-appeal.

¶ 11 ANALYSIS

¶ 12 On appeal, Ernie argues first that the circuit court erred when it found that the MSA's pension provision was unambiguous. Ernie contends that it is in fact ambiguous, and the court should have therefore allowed parol evidence regarding the alleged verbal agreement he had with Judith regarding the connection between his pension and her inheritance.

¶ 13 We construe an MSA like any other contract and ascertain the parties' intent from the MSA's language. *Blum v. Koster*, 235 Ill. 2d 21, 33 (2009). Language is ambiguous if it is "reasonably susceptible to more than one meaning." *In re Marriage of Davis,* 286 Ill. App. 3d 1065, 1067 (1997). The interpretation of an MSA's provisions presents a question of law; accordingly, our review is *de novo*. *In re Marriage of Bolte*, 2012 IL App (3d) 110791, ¶ 17.

¶ 14 In this case, the MSA provision at issue reads as follows:

> Plaintiff shall have a one-half equity interest in and to any and all pension-retirement benefits belonging to Defendant. However, the issue of whether Plaintiff shall receive, or continue to receive, one-half of said pension may be reviewed ~~prior to distribution~~ if Plaintiff receives an inheritance from her mother. The Court shall retain jurisdiction for this purpose." [Strikeout in original.]

Our review of the MSA reveals no ambiguity in the pension provision. The first sentence clearly granted Judith an interest in one-half of Ernie's pension. The second sentence modified the first sentence only in that it provided for the potential to review whether Judith would actually receive that interest. Ernie provides no persuasive arguments as to how the pension provision is ambiguous. Accordingly, we hold that the circuit court did not err when it found that the pension provision was unambiguous.

¶ 15 Second, Ernie argues that *laches* operates to bar Judith's petition for entry of a QILDRO.

¶ 16 *Laches* is an equitable doctrine which can operate to bar a party's recovery when that party's delay in bringing suit was unreasonable, and when the delay in bringing suit prejudiced that party's opponent. *Marshall v. Metropolitan Water Reclamation Dist. Retirement Fund*, 298 Ill. App. 3d 66, 74 (1998). Whether *laches* applies is a contextual matter within the circuit court's discretion. *Id.* We will not disturb the court's ruling on whether *laches* applies unless the court abused its discretion. *Id.*

¶ 17 Our review of the record in this case reveals no error in the circuit court's rejection of Ernie's *laches* defense. The circuit court found that MSA did not require Judith to take any action to trigger her entitlement to one-half of Ernie's pension, that Judith did not mislead Ernie so as to prevent him from petitioning for the review provided by the provision, and that Ernie was "prejudiced by his own inaction of hoping he could continue to take 100% of his pension without sharing with his wife." Given that he was required to pay Judith one-half of his pension by the unambiguous terms of the MSA, his protestations that Judith should have initiated her claim earlier and that he will suffer "financial ruin" if the court's judgment is upheld are unpersuasive. Under the circumstances of this case, we hold that the circuit court did not abuse its discretion when it rejected Ernie's *laches* defense.

¶ 18 Third, Ernie argues that equitable estoppel operates to bar Judith's petition for entry of a QILDRO.

¶ 19 Affirmative defenses raised for the first time in a motion for reconsideration are forfeited. See *RBS Citizens, National Assoc. v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 189 (2011); *Enterprise Recovery Systems, Inc. v. Salmeron*, 401 Ill. App. 3d 65, 76 (2010); 735 ILCS 5/2-613 (West 2012) (affirmative defenses must be set forth in the answer or reply to the complaint).

Equitable estoppel is an affirmative defense. *R and B Kapital Development, LLC v. North Shore Community Bank and Trust Co.*, 358 Ill. App. 3d 912, 921 (2005). In this case, Ernie raised his equitable estoppel argument for the first time in his motion for reconsideration. Under the applicable law, Ernie has forfeited this argument on appeal, and we therefore decline to address the argument's merits.

¶ 20 In her cross-appeal, Judith argues that the circuit court erred when it denied her request for interest on the arrearage.

¶ 21 The decision whether to award interest on an unpaid property distribution pursuant to an MSA is a matter within the circuit court's discretion. *In re Marriage of Carrier*, 332 Ill. App. 3d 654, 660 (2002).

¶ 22 Our review of the record in this case reveals nothing to indicate the circuit court erred when it denied Judith's request for interest on the arrearage. When the question of interest was being discussed, the court inquired into past or possible tax consequences when it established a net amount of the pension. See 750 ILCS 5/503(d)(12) (West 2012) (requiring the court to consider tax consequences when dividing marital property). Ernie had paid the taxes on the gross amount in the past, but no evidence was presented on any calculations associated with the tax ramifications of the arrearage. Given the lack of evidence presented to the court, the court did not err either in refusing to consider tax consequences any further in the order on the arrearage or in the denial of Judith's request for past interest. See *In re Marriage of Dodge*, 184 Ill. App. 3d 495, 504-05 (1989) (ruling that the trial court did not err in not considering tax consequences of a division of property because no evidence of those consequences was presented to the court). Given all of the circumstances of this case, we hold that the circuit court

did not abuse its discretion when it ruled against Judith on her request for interest. See *Carrier*, 332 Ill. App. 3d at 660.

¶ 23 CONCLUSION

¶ 24 The judgment of the circuit court of Tazewell County is affirmed.

¶ 25 Affirmed.