IN THE COURT OF APPEALS OF IOWA

No. 1-717 / 11-0368
Filed October 5, 2011

**IN RE THE MARRIAGE OF KAY BACON
AND GREGG BACON**

Upon the Petition of

KAY BACON,
Petitioner-Appellee,

And Concerning

GREGG BACON,
Respondent-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Colleen D. Weiland, Judge.

Former husband appeals the district court's denial of his petition to vacate the default decree entered in a dissolution proceeding. **AFFIRMED.**

Richard S. Piscopo, Jr. of Yunek Law Firm, Mason City, for appellant.

Kristy B. Arzberger of Arzberger Law Office, Mason City, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

SACKETT, C.J.

Gregg Bacon, appeals the district court's denial of his petition to vacate a default dissolution decree dissolving his marriage to Kay Bacon. Gregg asserts the district court erred in applying Iowa Rule of Civil Procedure 1.977 rather than rule 1.1012, and thereby, limiting his presentation of evidence. In addition, Gregg asserts that despite being afforded a limited opportunity to present evidence, he offered sufficient evidence to establish an irregularity or fraud under rule 1.1012 in the cross-examination of Kay. He asks the default decree be vacated and the case remanded for a hearing to determine an equitable division of the marital property. We affirm the decision of the district court.

I. BACKGROUND AND PROCEEDINGS. Kay filed a petition for the dissolution of her marriage to Gregg on February 1, 2010. Gregg, on February 9, 2010, signed an acceptance of service of the petition and a discovery order. The acceptance was filed with the court on February 11, 2010. Greg did not file an answer to the petition. On May 17, 2010, the court, pursuant to local rules, entered an order setting a hearing for default judgment, and had a copy of the order mailed to Gregg. The order advised Gregg that unless he acted prior to the time set for hearing, a default judgment would be entered against him. The order also advised him to seek legal advice as he may lose property or other important rights. The order also directed Kay to appear on June 21, 2010, to present evidence in support of a default judgment and also ordered her to provide the court with a proposed decree. Gregg asserts he did not receive this order.

On June 22, 2010, the court entered a default decree dissolving the marriage and dividing the property of the parties based on an affidavit of financial status filed by Kay. This default decree was mailed to Gregg by the court on June 24, 2010. Gregg asserts he did not receive this order either.

At some point in August or September of 2010, Gregg consulted an attorney and discovered a default decree had been entered. Gregg filed a petition to vacate the default decree asserting as grounds to support his petition that there was an irregularity or fraud practiced in obtaining the judgment under rule 1.1012(2).

Gregg's petition was heard by the district court on February 9, 2011. During the hearing Gregg testified he never received the order setting the hearing on the default or the default decree and stated he never received discovery requests from Kay's attorney either. He also testified that he did not change his address during the pendency of the dissolution action, and was receiving mail at three different locations.

Gregg also testified he disagreed with certain property values Kay included in her affidavit. However, during the hearing, the district court told Gregg and his attorney that it did not need the details about the discrepancies in the valuation of the property, because either it would set aside the decree and set the matter for a hearing to establish the values, or it would deny the petition to vacate and this information would be irrelevant. Gregg's attorney argued he was simply trying to prove there was a gross irregularity under the rule in the values assigned to the property in the decree. The court permitted limited

discussion on the matter stating it understood Gregg disagreed generally with the valuations made.

The court stated during the hearing that it had reviewed rule 1.1012—grounds for vacating or modifying a judgment—and rule 1.977—setting aside a default—and it thought rule 1.977 was more relevant to what the court was addressing, but that it would permit Gregg five minutes to try to support his claim for fraud or irregularity under rule 1.1012. Gregg continued to offer more evidence of discrepancies in the valuations Kay placed on the couple's property and his businesses.

Kay testified at the hearing of her attempts after she filed the petition for dissolution to enlist Gregg's help in identifying and valuing the couple's property. Her main source of communication with Gregg was email. She testified many times she would receive no response from Gregg to her inquiries, but she did the best she could to fairly and equitably value and allocate the property. She employed the services of professionals to value some of the property she was unable to value herself, including real estate, antique vehicles, and equipment. She also testified Gregg tended to let mail pile up, which Gregg conceded.

On February 9, 2010, the court filed its order denying Gregg's petition to vacate. The court found Kay made considerable effort to involve Gregg in the inventory and valuation of the marital property, but the efforts were unsuccessful. The court considered the factors in rule 1.977 for setting aside a default and found none of the factors applicable. Specifically the court found Gregg's assertions he did not receive the court's order setting the default hearing or the

court's default decree defied credibility. In addition the court noted Gregg's petition to vacate was filed more than sixty days after the entry of the judgment, and thus, Gregg could not succeed under rule 1.977.

In addition, the court found no evidence of irregularity or fraud under rule 1.1012. While Kay's financial affidavit may contain some errors or omissions, the evidence demonstrated to the district court that she completed her paperwork with diligence using the best information she had. The court found neither Kay nor Kay's attorney acted in any manner that would have indicated to Gregg the dissolution proceeding was dismissed or delayed, nor did Kay attempted to hide the relief sought. The court concluded the financial information and default decree was properly presented to the court, and the court entered the decree in the regular course of the court's business.

Gregg appeals from this ruling of the district court asserting the district court erred in applying rule 1.977 rather than rule 1.1012 to his petition to vacate the default decree, and erred in limiting the evidence he was allowed to introduce. He also asserts he introduced sufficient evidence of irregularity or fraud to warrant vacating the default decree.

II. SCOPE OF REVIEW. Actions to vacate a judgment under rule 1.1012 are law actions, and thus, the district court's findings are binding on us if supported by substantial evidence. *In re Marriage of Cutler*, 588 N.W.2d 425, 430–31 (Iowa 1999). A finding a party failed to prove an element of its case will be overturned on appeal only if we determine the element has been shown to exist as a matter of law. *Id*. at 431. The district court had considerable discretion

in deciding whether to grant a petition to vacate a judgment. *In re Marriage of Kinnard*, 512 N.W.2d 821, 823 (Iowa Ct. App. 1993). On appeal, we are more inclined to find an abuse of discretion when the judgment has not been vacated, than when the requested relief has been granted. *Id*.

III. APPLICATION OF RULE 1.977 OR RULE 1.1012. Gregg first contends the district court erred in considering his petition to vacate under rule 1.977, when he filed it under rule 1.1012. He also claims that because the court considered the petition under rule 1.977, it erred in limiting the evidence he was allowed to introduce.

The district court considered Gregg's petition under both rule 1.977 and rule 1.1012. While Gregg did not seek relief under rule 1.977, the district court considered that avenue of relief sua sponte and disregarded it. The burden to support setting a judgment aside under rule 1.977 is lighter than the burden to vacate a judgment under 1.1012. *See In re Marriage of Heneman*, 396 N.W.2d 797, 799 (Iowa Ct. App. 1986) (articulating the differences between setting aside a judgment under now rule 1.977 and vacating a judgment under now rule 1.1012 and noting "the amount of evidence required to support an application to vacate a final judgment is greater than that necessary to warrant setting aside a default judgment"). Gregg suffered no prejudice by the court consideration of his claim under both rules because rule 1.977 provides a "less stringent standard which [Gregg] nevertheless failed to fulfill." *Id.* at 801.

Next, we consider whether the court's consideration of rule 1.977 resulted in the court incorrectly limiting Gregg's presentation of evidence in support of his

petition under rule 1.1012. The court told Gregg and his attorney evidence Gregg disagreed with the values Kay placed on some of the parties' property was not relevant to its determination of whether to set aside the default or vacate the judgment.[1] The question is whether the evidence of the validity of the values Kay placed on the property was relevant to Gregg's petition to vacate the default judgment.

Rule 1.1012(2) provides a court can vacate a judgment for irregularity or fraud. "Irregularity" has been defined as

> [t]he doing or not doing that, in the conduct of a suit at law, which, conformably with the practice of the court, ought or ought not to be done. Violation or nonobservance of established rules and practices. The want of adherence to some prescribed rule or mode of proceeding; consisting either in omitting to do something that is necessary for the due and orderly conduct of a suit, or doing it in an unseasonable time or improper manner.

Cutler, 588 N.W.2d at 428–29. There are three guiding principles that assist a court in determining whether an irregularity has occurred. *Id.* at 429. They include, (1) a party suffers an adverse ruling due to action or inaction by the court or court personnel; (2) the action or inaction must be contrary to some prescribed rule, mode of procedure, or court practice involved in the conduct of the lawsuit; and (3) the party alleging the irregularity must not have caused, or had prior knowledge of the breach of the rule, mode of procedure, or practice of the court.

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[1] The court stated,

> "Mr. Piscopo, don't go into any details about this because, A, I'll either not set it aside and this would become irrelevant; or B, I will set it aside and it will be set on the trial calendar so there would be additional time to—a different time to prove up values on stuff."

Later the court again interrupted Gregg's testimony stating, "I think that exceeds the relevancy of what I have to determine in regard to making a default decree, but I wanted you to be able to make the point that there is a vast disagreement that's made."

Id. Gregg made no allegation and presented no evidence the court or its personnel acted or failed to act contrary to a rule, mode of procedure, or court practice with respect to the dissolution proceeding. Further, the evidence Gregg was seeking to offer—the disagreements he had over the values Kay placed on some of the marital property—was not relevant to establishing an irregularity under rule 1.1012. Only evidence that is relevant to a controversy is admissible. *See* Iowa R. Evid. 5.402. Because the evidence he wished to introduce was not relevant to his petition to vacate the default decree based on an irregularity, we find the district court did not err in precluding Gregg from admitting further evidence of the disagreements he had on the values placed on the parties' property.

Gregg also contends the default decree should be vacated under Iowa Rule of Civil Procedure 1.1012 based on fraud. To prove fraud a party must prove the following factors by clear and convincing evidence: "(1) misrepresentation or failure to disclose when under a legal duty to do so, (2) materiality, (3) scienter, (4) intent to deceive, (5) justifiable reliance, and (6) resulting injury or damage." *Cutler*, 588 N.W.2d at 430. In addition, not all fraud will justify vacating a final judgment. *In re Adoption of B.J.H.*, 564 N.W.2d 387, 392 (Iowa 1997). The fraud that will justify a judgment being vacated must be "extrinsic fraud." *Id.* Extrinsic fraud, "is some act or conduct of the prevailing party which has prevented a fair submission of the controversy." *Id*. at 391 (internal citations omitted). Extrinsic fraud includes a party lulling another into a false sense of security or preventing the party from making a defense. *Costello*

v. McFadden, 553 N.W.2d 607, 612 (Iowa 1996). Extrinsic fraud is fraud which keeps a party from presenting her case or prevents an adjudication on the merits. *Mauer v. Rohde*, 257 N.W.2d 489, 496 (Iowa 1977). "Examples of extrinsic fraud are a bribed judge, dishonest attorney representing the defrauded client, or a false promise of compromise." *Id*.

In contrast, intrinsic fraud is fraud that "inheres in the judgment itself; it includes, for example false testimony and fraudulent exhibits." *B.J.H.*, 564 N.W.2d at 391. "Intrinsic fraud occurs within the framework of the actual conduct of the trial and pertains to and affects the determination of the issue presented therein." *Mauer*, 257 N.W.2d at 496 (internal citations omitted). A party cannot obtain relief from a judgment based on fraud which is based on matters or issues which actually were or could have been presented and adjudicated at trial. *Gigilos v. Stavropoulos*, 204 N.W.2d 619, 621 (Iowa 1973).

Assuming without deciding for the purposes of Gregg's argument that Kay's financial affidavit was fraudulent, this does not justify vacating the default decree. A fraudulent affidavit is essentially false testimony, and as such, is intrinsic fraud which inheres in the judgment. The time to challenge such evidence is at trial, not in a petition to vacate the judgment. In *In re Marriage of Graves*, 132 Iowa 199, 204–05, 109 N.W. 707, 709 (1906) the Iowa Supreme Court cited with approval the rule announced by the California Supreme Court in *Pico v. Cohn*, 25 P. 970, 971–72 (Cal. 1891), that

> [w]hen [a party] has a trial, he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of trial is, if possible, to ascertain the truth from the conflict of

> evidence, and that necessarily, the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. . . . Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony; for, if this could be done once, it could be done again and again, *ad infinitum*.

This rule has been reaffirmed. *B.J.H.*, 564 N.W.2d at 392; *Costello*, 553 N.W.2d at 612; *In re Marriage of Cook*, 259 Iowa 825, 830, 146 N.W.2d 273, 276 (1966). Because intrinsic fraud, such as false testimony, cannot be grounds for vacating a judgment under rule 1.1012, the evidence Gregg was attempting to admit—that he disagreed with the values Kay placed on items of martial property—was not relevant. Thus, it was not an error for the district court to refuse to allow Gregg to continue to offer such evidence. Only evidence of extrinsic fraud is relevant when attempting to vacate a judgment based on fraud under rule 1.1012.

IV. IRREGULARITY OR FRAUD UNDER 1.1012. Gregg also claims the evidence he did present through cross-examination of Kay was sufficient to prove an irregularity or fraud under rule 1.1012. As a result, he claims we should reverse the district court's ruling and remand the case for further proceedings to determine an equitable division of property.

The evidence Gregg points to in support of his petition to vacate includes Kay's testimony on cross-examination she placed an estimate of $50,000 on one of Gregg's companies after Gregg informed her the company had a value of $500. She admitted the figure was a guess, and may have included items listed other places in the affidavit. She was unable to remember how she arrived at the

value she place on another of Gregg's businesses, and counted thirty head of alpaca when Gregg informed her he only owned six.

As stated above, evidence that Kay may have provided false or inaccurate testimony in her financial affidavit does not support a finding that the default decree should be vacated. This evidence could potentially support intrinsic fraud, but the only evidence that will support vacating a judgment under rule 1.1012(2) is evidence of extrinsic fraud or evidence of an irregularity. *B.J.H.*, 564 N.W.2d at 392; *Cutler*, 588 N.W.2d at 429. Gregg offered no evidence at the hearing Kay lulled him into a false sense of security or prevented him from making a defense. *See Costello*, 553 N.W.2d at 612. He offered no evidence to show Kay kept him from presenting his case or made false promises of compromise. *See Mauer*, 257 N.W.2d at 496. He also failed to offer any evidence the court or its personnel acted or failed to act contrary to a rule, mode of procedure, or court practice with respect to the dissolution proceeding, which could support a finding of irregularity. *See Cutler*, 588 N.W.2d at 429. We find Gregg failed to offer any evidence that would support vacating the default decree on the basis of fraud or irregularity under rule 1.1012(2).

V. ATTORNEY FEES. Kay requests an award of appellate attorney fees, and her attorney has filed a statement asserting her fees on appeal total $1900.00. Appellate attorney fees are not awarded as a matter of right, but it rests in our discretion. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997). In making this determination, we consider the needs of the requesting party, the opposing party's ability to pay, and whether the requesting

party was forced to defend the decision of the district court on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). In this case we believe an award of attorney fees is warranted, and award Kay $500 in appellate attorney fees.

AFFIRMED.