

STATE OF MICHIGAN
COURT OF APPEALS

PAUL HOWARD SUTHERLAND,

Plaintiff/Counterdefendant-
Appellee,

v

KIMBERLY A. CREAMER SUTHERLAND,

Defendant/Counterplaintiff-
Appellant.

UNPUBLISHED

January 20, 2004

No. 240158

Leelanau Circuit Court

LC No. 99-005033-DM

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce. We affirm.

I. Facts and Procedure

After plaintiff filed for divorce, the parties agreed to binding arbitration of, among other issues, property division. The parties had three separate appraisals done for plaintiff's two businesses, Financial & Investment Management Group, Ltd. (FIMG), and Pension Service Design, Inc. (PSD). The first appraisal estimated the fair market value of plaintiff's combined businesses to be \$2,800,000, the second appraisal estimated the fair market value to be \$1,030,000, and the third appraisal estimated the fair market value to be \$2,010,717. At a later settlement conference, the parties stipulated to an independent appraisal of plaintiff's businesses that would be binding on the parties for purposes of the litigation. Defense counsel stated on the record that the parties agreed to have Joseph Cunningham, C.P.A., of Plante & Moran, L.L.P., do the appraisal, and that the appraisal would be binding. Plante & Moran subsequently estimated the investment value¹ of plaintiff's businesses to be \$308,000.

¹ In its appraisal, Plante & Moran defined "investment value" as: "the specific value of a business to a particular owner—distinguished from fair market value, which is impersonal and detached."

Defendant filed a motion for relief from the parties' stipulation, arguing that Plante & Moran should have considered the fair market value of plaintiff's businesses, as it said it would, rather than relying solely on the investment value. Defendant argued that she was entitled to relief from the stipulation based on mistake and unconscionable advantage. Plaintiff responded that Plante & Moran had informed the parties that it had the discretion to determine how much weight to give to each valuation method, so even if it did not consider the fair market value, it would not have been a mistake for Plante & Moran to rely solely on the investment value approach. Furthermore, plaintiff added that the stipulation did not specify that Plante & Moran would consider the fair market value of plaintiff's businesses in making its appraisal. The trial court denied defendant's motion, concluding that the appraisal was not unconscionable and was not the result of a mistake. Consequently, the arbitrator used Plante & Moran's appraisal value when distributing the parties' property. The judgment of divorce subsequently adopted the arbitrator's property division.

II. Analysis

A. Stipulation to Appraisal

Defendant argues that the trial court erred in denying her motion for relief from the stipulation. We disagree. A trial court's ruling on a motion to set aside a stipulation is reviewed for an abuse of discretion. *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 394; 573 NW2d 336 (1997); *Wilson v Gauck*, 167 Mich App 90, 95; 421 NW2d 582 (1988).

As a rule, parties are bound by their stipulations. *Thompson v Continental Motors Corp*, 320 Mich 219, 224-225; 30 NW2d 844 (1948). This Court observed in *Meyer v Rosenbaum*, 71 Mich App 388, 393; 248 NW2d 558 (1976), that "[a]s a matter of public policy, it is extremely difficult to find any rationale for permitting a litigant to eschew a bargain knowingly made in open court, on the record of the court, and with the intent that the court and opposite party should rely thereon." Nevertheless, because a stipulation is a type of contract, parties who seek to avoid a stipulation may use contract defenses. *Limbach, supra* at 394. Accordingly, a stipulation may be set aside where there is evidence of mistake, fraud, or unconscionable advantage. *Id.*

1. Mistake

Defendant first argues that the trial court should have set aside the stipulation based on mistake. Defendant cites *Thompson, supra* at 224-225:

"As a rule, parties are bound by their stipulations, but the courts will not permit a mistake to remain uncorrected when the opposite party has not been misled, a delay has not been suffered thereby, the documentary evidence of the mistake appears in the files and record before the court." *Basner v Defoe Shipbuilding Co*, 319 Mich 67, 72; 29 NW2d 140 (1947).

In *Wagner v Myers*, 355 Mich 62, 68; 93 NW2d 914 (1959), the Supreme Court discussed the quantum of proof necessary to demonstrate mistake of fact in a court-recorded stipulation:

The litigant who so asserts to a stipulation freely entered into in open court carries a heavy burden of persuasion. Every presumption of judicial care, of

professional competence, and of decretal stability is against the overthrow, in the appellate court, of such stipulation and of orders and decrees based thereon.

We conclude that the trial court in this case did not abuse its discretion in refusing to set aside the stipulation based on the alleged mistake. The record does not support defendant's claim that Plante & Moran was mistaken regarding which valuation method to use in conducting the appraisal of plaintiff's businesses. The parties' stipulation on the record did not specify the precise valuation method to be used in appraising plaintiff's businesses, and defense counsel conceded on the record at the hearing on her motion for relief from the stipulation that the parties "didn't ask for a specific methodology." In fact, it was only defendant who was mistaken regarding the valuation method Plante & Moran would use to appraise plaintiff's businesses. Defendant apparently assumed, based on the previous appraisals and out-of-court conversations with Cunningham,² that Plante & Moran's appraisal would use the fair market value or a blended approach that included the fair market value. But there is nothing in the parties' stipulation or anywhere else on the record indicating that defendant's assumption was correct. A unilateral mistake of fact, unsupported by the record, does not justify setting aside an in-court, on-the-record stipulation. *Meyer, supra* at 394. Accordingly, the trial court did not abuse its discretion in refusing to set aside the stipulation based on mistake.

2. Unconscionable Advantage

Second, defendant argues that the trial court should have set aside the stipulation because it created an unconscionable advantage for plaintiff. Defendant also argues in her reply brief that the result of the Plante & Moran appraisal was unconscionable because it did not take into account the fact that plaintiff draws a significant salary each year from the businesses, and the amount of plaintiff's salary impacts the amount of the appraisal. Defendant's arguments are without merit.

"This Court has suggested that a stipulation may be set aside where there is evidence of . . . unconscionable advantage." *Limbach, supra* at 394. There is a two-prong test for determining whether an agreement is unconscionable: "(1) What is the relative bargaining power of the parties, their relative economic strength, the alternative sources of supply, in a word, what are their options?; (2) Is the challenged term substantively reasonable?" *Hubscher & Son, Inc v Storey*, 228 Mich App 478, 481; 578 NW2d 701 (1998), quoting *Northwest Acceptance Corp v Almont Gravel, Inc*, 162 Mich App 294, 302; 412 NW2d 719 (1987). Reasonableness is the primary consideration regarding whether an agreement is unconscionable. *Id.* Even if the relative bargaining power of the parties is uneven under the first prong of the test, the agreement is enforceable if it is substantively reasonable. *Stenke v Masland Dev Co, Inc*, 152 Mich App 562, 573; 394 NW2d 418 (1986).

² Plaintiff contends that Cunningham explained to both parties that he had discretion to determine how much weight to give to each valuation method and that he would use the fair market value only as a "gut check" against the number he was going to come up with.

Defendant argues that the substance of Plante & Moran's appraisal was unconscionable. However, defendant does not argue that there was anything unreasonable about the parties' stipulation to be bound by Plante & Moran's appraisal of plaintiff's businesses. The terms of the stipulation—not the substance of the appraisal—constituted the agreement between the parties. The focus of the determination whether the stipulation is unconscionable is on the terms of the stipulation, not the resulting actions of an independent third party. Consequently, Plante & Moran's appraisal done according to the parties' stipulation does not render that stipulation unconscionably advantageous to plaintiff.³ Additionally, defendant has not alleged that plaintiff had unconscionably advantageous bargaining power in entering the stipulation. See *Limbach, supra* at 394. Therefore, we conclude that the trial court did not abuse its discretion in refusing to set aside the stipulation based on unconscionable advantage.⁴

B. Arbitrator's Award

³ Furthermore, because the stipulation did not explicitly specify that the Plante & Moran must use the fair market value to establish the appraisal value of plaintiff's business, Plante & Moran's decision to appraise plaintiff's businesses using the investment value was reasonable. In its appraisal, Plante & Moran explained that, in a divorce situation, determining the fair market value is not necessarily the appropriate method of determining the value of a business. Plante & Moran explained that determining the investment value can be a more appropriate way to determine the value of a business that is ongoing, such as plaintiff's. This Court has held that there is no one proper method to determine the value of businesses and business assets. *Kowalesky v Kowalesky*, 148 Mich App 151, 155-156; 384 NW2d 112 (1986). Therefore, it was reasonable for Plante & Moran to base its appraisal of plaintiff's businesses on the businesses' investment value.

⁴ In defendant's reply brief, she also argues that the Plante & Moran appraisal resulted in an unconscionable advantage to plaintiff because, in arriving at the appraisal amount, Plante & Moran deducted \$394,571 from the value of plaintiff's businesses based on the fact that FIMG had resolved to enter into an agreement to purchase Mission Shores Financial Management, L.L.C., for that price. According to defendant, the \$394,571 value of Mission Shores Financial Management should have been included in the marital assets. However, defendant did not apply in the trial court to have the arbitration award modified or corrected based on this alleged mistake. See MCL 600.5081(1); MCR 3.602(K)(1). Additionally, defendant did not raise this argument before the trial court and the trial court did not address or decide this issue. Therefore, this issue was not properly preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Furthermore, defendant's argument is without merit because, as previously discussed, this argument attacks the substance of Plante & Moran's calculations rather than the stipulation made between the parties. Therefore, Plante & Moran's alleged mistake in appraising plaintiff's property did not give plaintiff an unconscionable advantage in entering the stipulation. Even if, rather than attacking the validity of the stipulation, defendant directly attacked the arbitration award on these grounds, the arbitrator did not find any mistake in Plante & Moran's appraisal when dividing the marital assets. "Claims that quarrel with a binding arbitrator's factual findings are not subject to appellate review." *Krist v Krist*, 246 Mich App 59, 67; 631 NW2d 53 (2001).

Defendant argues that the arbitration award should be vacated and the trial court should be ordered to instruct the arbitrator to consider, in addition to Plante & Moran's appraisal of plaintiff's businesses, the three previous appraisals of plaintiff's businesses. However, defendant never applied in the trial court to have the arbitration award vacated. See MCL 600.5081(1); MCR 3.602(J)(1). Therefore, this argument was not preserved for appeal. Furthermore, the trial court's power to modify, correct, or vacate an arbitration award is very limited. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991). An arbitration award may not be vacated unless: (1) the award was procured by corruption, fraud, or other undue means; (2) the arbitrator evidenced partiality, corruption, or misconduct prejudicing a party's rights; (3) the arbitrator exceeded his powers; or (4) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or conducted a hearing to prejudice substantially a party's rights. MCL 600.5081(2); MCR 3.602(J)(1); *Dick v Dick*, 210 Mich App 576, 588; 534 NW2d 185 (1995). Here, the arbitrator properly adhered to the parties' stipulation to rely solely on Plante & Moran's appraisal when making the property distribution. As discussed, parties are bound by their stipulations. *Thompson*, *supra* at 224-225. Because there was no evidence of mistake, fraud, or unconscionable advantage surrounding the stipulation, the arbitrator properly relied on it, so the arbitration award may not be vacated. *Limbach*, *supra* at 394.⁵

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper

⁵ Plaintiff urges this Court to sanction defendant under MCR 7.216(C) for filing a vexatious appeal. Although defendant's arguments are ultimately unpersuasive, we do not believe that defendant's appeal was for purposes of hindrance or was without any reasonable basis for belief that there was a meritorious issue to be determined on appeal. MCR 7.216(C)(1)(a); *Resteiner v Sturm, Ruger & Co, Inc*, 223 Mich App 374, 377; 566 NW2d 53 (1997). Accordingly, we reject plaintiff's request to impose sanctions upon defendant.