

STATE OF MICHIGAN
COURT OF APPEALS

DANNY C. JONES,

Plaintiff-Appellee,

v

SILVIA A. JONES, a/k/a SILVIA A. Martin,

Defendant-Appellant.

UNPUBLISHED

April 22, 2004

No. 243882

Genesee Circuit Court

LC No. 97-185372-DO

Before: Donofrio, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order transferring her interest in the 11489 Peterson Drive, Clio, Michigan property to plaintiff. On appeal, defendant contends that plaintiff should be denied equitable relief because of unclean hands and that the trial court improperly voided material provisions of the consent judgment of divorce without an evidentiary hearing. We affirm in part, reverse in part, and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I

On July 17, 1997, plaintiff filed a complaint for divorce. The parties mediated, and agreed to a settlement facilitated by a mediator. On August 15, 2000, the trial court entered a consent judgment of divorce. The consent judgment entered indicated that the parties agreed to a property settlement, which would remain confidential unless petitioned by one of the parties. One of the provisions in the settlement granted defendant title and interest in the 11489 Peterson Drive property, and directed that upon full payment of plaintiff's indebtedness, defendant was to quit claim the 11489 Peterson Drive property to plaintiff. The settlement agreement further provided that if plaintiff failed to make an installment as provided for in the agreement he would be obligated to pay defendant \$5,000 for attorney fees and another provision providing that two payments more than fifteen days late would result in default allowing defendant to retain title of the property free and clear of any claim by plaintiff. On February 14, 2002, plaintiff sent a letter to defendant enclosing a payment (which he claims was a final payment) and a quit claim deed for transfer of the 11489 Peterson Drive property pursuant to the settlement agreement. On February 27, 2002, defendant responded and returned the check and quit claim deed stating that plaintiff was in default and owed an additional \$5,000 for a late payment.

On March 26, 2002, plaintiff filed a motion to enter order transferring defendant's interest in the 11489 Peterson Drive property to him, contending that he had tendered the full amount owed under the property settlement agreement. Plaintiff argued that he made timely installment payments to defendant as required by the agreement, and although he may have been late on one payment it did not trigger default. Plaintiff further argued that when he paid defendant on February 14, 2002, he actually overpaid her and, thus, she should have delivered the quit claim deed, and breached the agreement in failing to do so. On May 31, 2002, defendant filed a response, which requested an evidentiary hearing and claimed that plaintiff owed her a \$5,000 default fee pursuant to the terms of the property settlement agreement and funds for automobile insurance. The property settlement agreement was attached to defendant's motion, and it provided that if plaintiff fails to make an installment as provided in the agreement he owes defendant \$5,000.

At a motion hearing on June 10, 2002, plaintiff argued that he tried to make his final payment in full so he could get the 11489 Peterson Drive property defendant was holding as collateral, and that upon payment of the balance of \$10,349.22, the property should have been transferred to him. Defendant argued that the amount agreed upon was \$13,000, and that plaintiff was late on payments and, thus, when plaintiff tendered the check for \$2,008.84 it was returned because it was not full payment. Defendant further argued that plaintiff had not made full payment because he had triggered a \$5,000 attorney fee default provision, and a provision that allowed the property to remain titled in defendant's name.

On July 23, 2002 an order was filed, by the trial court, transferring defendant's interest in the 11489 Peterson Drive property to plaintiff. The trial court, interpreting the property settlement agreement, found that the property settlement agreement provided that the 11489 Peterson Drive property was security for the \$10,349.22 indebtedness and not for the attorney fee provision. With regard to the default provision, the trial court found:

Even if the court had found that attorney fees were secured by the property it finds the provisions unenforceable. The provisions are penalty provision [sic] and not provisions for liquidated damages. Under the terms of this paragraph the Plaintiff could be sixteen days late on the first payment and sixteen days late on the last payment and forfeit the property and all payments

* * *

If the attorney fees of \$5,000.00 are not considered a part of the indebtedness the payment of \$2,008.84 as satisfaction is not in controversy and the Defendant breached the contract by refusing the payment of \$2,008.84 and demanding attorney fees as part of the secured debt.

The trial court ordered:

1. The provisions for attorney fees of \$5,000.00 contained in the fifth paragraph under the heading titled "SETTLEMENT OF INDEBTEDNESS" is unenforceable as a penalty provision.

2. The provision allowing Defendant to keep the property if Plaintiff makes any two non-consecutive payments more than fifteen days late contained in fifth paragraph under the heading titled "SETTLEMENT OF INDEBTEDNESS" is unenforceable as a penalty provision.

3. The Defendant shall immediately sign a quit claim deed transferring the real property commonly known as 11489 Peterson Drive, Clio Michigan, to Plaintiff upon payment by the Plaintiff of the amount of \$2,008.84.

Defendant filed a application for leave to appeal on September 16, 2002. Plaintiff filed an answer, and on October 21, 2002, defendant filed a motion to amend the application to state that plaintiff stopped payment on five checks totaling \$2,500, not ten checks totaling \$5,000. On December 26, 2002, this Court granted defendant's motion to amend the application for leave to appeal and granted leave to appeal limited to the issues raised in the application.

II

Defendant's first issue on appeal is that plaintiff must be denied relief because of his unclean hands. We disagree.

Equity actions are reviewed de novo. *Stachnik v Winkel*, 394 Mich 375, 383; 230 NW2d 529 (1979). The unclean hands doctrine is "invoked by the Court in its discretion to protect the integrity of the Court." *Id.* at 386. Our Supreme Court in *Rose v The National Auction Group, Inc*, 466 Mich 453, 462; 646 NW2d 455 (2002), indicated that:

[T]he preservation of the integrity of the judicial system means no court acting in equity can allow its conscience to be moved to give such a plaintiff relief. Indeed, the maxim that one "who comes into equity must come with clean hands" is "the expression of one of the elementary and fundamental conceptions of equity jurisprudence." 2 Pomeroy's Equity Jurisprudence, ch I, § 397, p 90, § 398, p 92 (1941). The courts of this state have held similarly.

Defendant contends that we should invoke the unclean hands doctrine because plaintiff stopped payment on the checks, made late payments, and failed to make a payment after January 2002. Plaintiff had a valid reason in opposition to each of defendant's contentions. The motion transcript indicates that the checks on which plaintiff stopped payment were not part of the indebtedness owed under the property settlement or if they were the issue had already been resolved. The record suggests that the December 2001 payment, if late, was the product of a secretarial mistake. And, the failure to make a payment after January was due to defendant's refusal of plaintiff's tendered payment. Defendant has not shown unclean hands. Defendant did not make a sufficient showing of bad faith or intent to deceive, which would justify invoking the doctrine of unclean hands to protect the integrity of the court. See *Attorney General v Ankersen*, 148 Mich App 524, 544-545; 385 NW2d 658 (1986). The trial court was not permitting plaintiff to benefit from his own misconduct. We decline to invoke the unclean hands doctrine.

III

Defendant's remaining issues on appeal are that the trial court impermissibly modified and voided sections of the consent judgment of divorce by determining that the attorney fee provision and the default provision allowing defendant to keep the property upon two non-consecutive payments more than fifteen days late were unenforceable. We agree.

A court can clarify ambiguous language in a property division reached by consent of the parties provided it does not change their substantive rights. *Bers v Bers*, 161 Mich App 457, 464; 411 NW2d 732 (1987). But a court cannot modify property divisions reached by the consent of the parties, and finalized in writing or on the record. *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999); *Bers, supra* at 463-464. The trial court is bound to uphold such settlements and cannot set them aside absent fraud, duress, mutual mistake or severe stress. *Quade, supra*; *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990); see also *Marvin v Marvin*, 203 Mich App 154, 157; 511 NW2d 708 (1993). The trial court improperly modified the property division reached by the consent of the parties without a finding of fraud, duress, mutual mistake or severe stress that resulted in the modification.

Defendant contends that the trial court erroneously modified the consent judgment by voiding terms that were consented to by the parties. Defendant's argument with regard to the attorney fee provision and the default late payment provision is meritorious. The trial court erred in determining that the attorney fee and default for late payments provisions were unenforceable penalty clauses. Defendant indicates that she bargained for the penalties because plaintiff had a history of non-payment or late payments. If that is the case, the trial court's effective elimination of those penalties deprived defendant of the benefit of her bargain. There is no showing or contention that the default provisions were the result of fraud, duress, mutual mistake, or severe distress. The case on which the trial court relied in ruling that the provisions were unenforceable penalties, *Davidow v Wadsworth Mfg Co*, 211 Mich 90; 178 NW 776 (1920), does not establish that the provisions were unenforceable.¹ Even if the provisions in the property settlement in this case were in the nature of a penalty and even if they were harsh, the fact remains that they were the product of the parties' negotiations and should not have been disturbed by the trial court absent fraud, duress, mutual mistake or severe stress. *Keyser, supra* at 271-272. Apparently, defendant bargained for a penalty in the event that plaintiff's monthly payments were not made on time. The trial court's findings and order to the contrary resulted in the trial court improperly modifying the parties' consent judgment. Defendant claims that plaintiff was late on his payments and, thus, has triggered these provisions. Therefore, we remand for an evidentiary hearing for the trial court to decide this matter.

¹ In *Davidow*, the Court invalidated on due process grounds a 1913 statute requiring an employer who failed to pay its employees wages due to pay liquidated damages. The Court ruled that the statute imposed a penalty in the guise of liquidated damages and was confiscatory. *Davidow, supra* at 102.

With regard to the default provision allowing defendant to keep the property upon two non-consecutive payments by plaintiff, on remand the trial court needs to make findings regarding when and if plaintiff made two payments that were more than fifteen days late. And, if prior to plaintiff offering \$2,0008.84 in February 2002, there were not two payments more than fifteen days late, in light of the settlement's provision that plaintiff could prepay all or part of the balance of his debt, the trial court was correct in concluding that defendant was in breach of the agreement when she refused plaintiff's tender of \$2,008.84. The refusal of tender for a reason not found in the language of the securing instrument discharges any lien on the property, see *Federal Discount Corp v Rush*, 269 Mich 612; 257 NW 897 (1934), so that plaintiff's subsequent nonpayment and resort to court did not trigger the default provision. Therefore, if plaintiff did not make two payments more than fifteen days late prior to February 2002, which the record suggests that he did not, the default provision was not triggered. See *id.*

With regard to the attorney fee provision, if the trial court finds that defendant failed to make an installment as provided by the agreement defendant is entitled to \$5,000 under the express terms of the property settlement. We note the above limitation, based on defendant's failure to accept tender of payment, does not apply to the \$5,000 attorney fee provision because as the trial court correctly determined the provision for attorney fees was not secured by the property. This provision in the property settlement agreement was ambiguous, and we find that the trial court was correct in its clarification that the attorney fee provision was not secured by the property and its conclusion did not change the parties' substantive rights. See *Bers, supra* at 464.

Further, although, the record suggests² that the proper amount of plaintiff's indebtedness under the agreement was \$10,349.22, on remand, the trial court is directed to make findings and determine the proper amount of indebtedness. Defendant continues to claim that the proper amount of indebtedness was \$13,000 and plaintiff throughout the proceedings has contended that it was \$10,349.22 because at the time the agreement was entered he had paid \$2,000 and had overpaid for defendant's automobile insurance.

IV

We reverse and remand to the trial court for an evidentiary hearing. On remand, the trial court is directed to determine the proper amount of indebtedness. The trial court is also directed to determine whether defendant defaulted under the settlement agreement. If the trial court finds that defendant did not make an installment as provided for in the agreement, defendant is entitled to \$5,000 for attorney fees. With regard to the default provision for two payments more than fifteen days late, the trial court is directed to determine if plaintiff was late by more than fifteen

² During the trial court proceedings, plaintiff contended that the amount was reduced from \$13,000 to \$10,349.22 because prior to entry of the consent judgment \$2,000 worth of payments were made and plaintiff overpaid for defendant's automobile insurance. Defendant's concession on appeal that at least \$2,000 in checks were honored before entry of the consent judgment supports that \$10,349.22, as opposed to \$13,000, was the agreed upon secured indebtedness.

days on two payments prior to the February 2002 offer of \$2,008.84, which defendant declined. If plaintiff was more than fifteen days late on two payments prior to the February 2002 payment, defendant is entitled to the property free and clear of any claim by plaintiff, but if plaintiff was not more than fifteen days late on two payments prior to the February 2002 attempted payment, the default provision was not triggered.³ The trial court's decision not to invoke the unclean hands doctrine and its determination that the attorney fee provision of the settlement agreement was not secured by the 11489 Peterson Drive property are affirmed.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Richard Allen Griffin
/s/ Kathleen Jansen

³ Based on our resolution, it is unnecessary to vacate the consent judgment of divorce as requested by defendant.