# STATE OF MICHIGAN

# COURT OF APPEALS

GIL ANNE CRISMAN-MCQUARRIE,

Plaintiff-Appellant,

v

NEIL ALAN MCQUARRIE,

Defendant-Appellee.

UNPUBLISHED
March 18, 2008

No. 273266
Washtenaw Circuit Court
LC No. 01-002816-DM

Before: Saad, C.J., and Murphy and Donofrio, JJ.

PER CURIAM.

In this divorce action, plaintiff appeals as of right the consent judgment of divorce that was entered based upon an incorporated settlement agreement, which plaintiff claims, contrary to the trial court's ruling, is unenforceable on various grounds. Plaintiff contends that the settlement agreement is invalid and unenforceable on the basis of fraud, duress, mutual mistake, extreme stress, and failure of consideration. Plaintiff also maintains that the settlement agreement's arbitration provisions are void and unenforceable under MCL 600.5072 and that the judgment of divorce contains provisions that were not included in the parties' settlement agreement. The crux of the problem in this case is that the Internal Revenue Service (IRS), through a recorded notice, officially placed a $216,275 federal tax lien on the marital home on April 19, 2006, which was after the settlement agreement, pursuant to which plaintiff was to receive the marital home, was reached on April 6, 2006.[1] We affirm.

We review both a trial court's finding on the validity of the parties' consent to a settlement agreement and a trial court's decision whether to hold an evidentiary hearing under MCR 2.119(E)(2) for an abuse of discretion. *Lentz v Lentz*, 271 Mich App 465, 474-475; 721 NW2d 861 (2006); *Williams v Williams*, 214 Mich App 391, 399; 542 NW2d 892 (1995). An abuse of discretion occurs when the trial court chooses an outcome falling outside a principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

[1] The settlement agreement did provide that defendant would pay "any taxes, interest, and/or penalties owed to the IRS by virtue of his income during the marriage, including any balance owed on the 1999 taxes, the last year the parties filed a joint return."

An agreement to settle a lawsuit, including an agreement regarding the distribution of assets in a divorce action, is governed by the principles generally applicable to the interpretation of contracts. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006); *MacInnes v MacInnes*, 260 Mich App 280, 289; 677 NW2d 889 (2004). "Settlements, duly arrived at by the parties and placed on the record in open court in the presence of counsel, are entitled to a high degree of finality." *Tinkle v Tinkle*, 106 Mich App 423, 428; 308 NW2d 241 (1981). "It is a well-settled principle of law that courts are bound by property settlements reached through negotiations and agreement by parties to a divorce action, in the absence of fraud, duress, mutual mistake, or severe stress which prevented a party from understanding in a reasonable manner the nature and effect of the act in which she was engaged." *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990); see also MCR 2.507(G)(agreements by parties made in open court or evidenced by a writing are binding). "Generally, contracts between consenting adults are enforced according to the terms to which the parties themselves agreed." *Lentz, supra* at 471.

We first dispose of plaintiff's arguments that are predicated on duress and extreme stress. To succeed on a claim of duress, the party claiming duress must establish that he or she was illegally compelled or coerced to act by fear of serious injury to his or her person, reputation, or fortune. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 681-682; 591 NW2d 438 (1998). On review of the entire lower court record, and given that plaintiff expressly indicated that she was competent to execute the settlement agreement and expressly waived any claim that she was unable to understand the settlement agreement because of medication issues, duress, or her closed head injury,[2] there is no basis to set aside the settlement agreement premised on duress or severe stress, nor would an evidentiary hearing be of assistance. Furthermore, there is no contention that, had the marital home not been subsequently encumbered by the IRS lien, plaintiff would still wish to have had the settlement agreement rescinded on the basis of duress or severe stress. This tends to vitiate her argument.

With respect to mutual mistake, a release or settlement agreement may be set aside based on mutual mistake if the party claiming mistake can show that, at the time the agreement was reached, both parties were mistaken concerning an *existing fact* that was material to the agreement. *Gortney v Norfolk & Western R Co*, 216 Mich App 535, 542; 549 NW2d 612 (1996). Regardless of plaintiff's strained attempts to frame this issue in a manner that fits the doctrine of mutual mistake, the mistake did not concern a fact *existing* at the time the settlement agreement

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[2] We recognize plaintiff's claim that the stressful situation and other circumstances invalidated her apparent consent and waiver. "Where a party alleges that his or her consent, while actually given, was influenced by circumstances of severe stress, the standard to be applied is that of mental capacity to contract." *Howard v Howard*, 134 Mich App 391, 396; 352 NW2d 280 (1984). Under this standard, the person must be of sufficient mind to reasonably understand the nature and effect of his actions, and "it must appear not only that the person was of unsound mind or insane when [the contract] was made, but that the unsoundness or insanity was of such a character that he had no reasonable perception of the nature or terms of the contract." *Id.* (citation and internal quotation marks omitted). The record does not reflect that plaintiff lacked the mental capacity to contract.

was reached because the notice of federal tax lien had not yet been executed, served, and recorded.[3] Plaintiff's own argument belies a mutual mistake claim, wherein her brief she states, "If neither party was aware that a Notice of Federal Tax Lien *would be* executed and recorded within two weeks of the execution of the Settlement Agreement, then the Settlement Agreement was premised upon mutual mistake." (Emphasis added.) The emphasized language speaks to a future event.[4] Accordingly, the mutual mistake argument fails, and an evidentiary hearing on the matter would be of no benefit.

Plaintiff also argues fraud in the inducement, contending that if there was no mutual mistake and defendant was aware of an impending federal tax lien at the time of the settlement agreement, defendant was guilty of fraudulently inducing plaintiff to execute the agreement.

"A promise regarding the future cannot form the basis of a misrepresentation claim." *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998). However, this Court in *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639,640; 534 NW2d 217 (1995), explained an exception to the rule under the law of fraud:

> While plaintiff is correct in asserting that, in general, actionable fraud must be predicated on a statement relating to a past or an existing fact, Michigan also recognizes fraud in the inducement. Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon. Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party. [Citations omitted.]

We first note that plaintiff makes no claim that defendant made any affirmative representations at the time of settlement that no tax liens would be forthcoming. Plaintiff's speculative claim is that defendant remained silent about any potential tax lien during settlement negotiations, assuming that he was even aware that a lien would be recorded. The existing record does not support this contention, and it is unnecessary to conduct an evidentiary hearing on the matter because the fraud claim fails on its face. This Court made clear in *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 689-691; 599 NW2d 546 (1999), that reliance on a false representation must be reasonable in order to support a fraud claim. Both parties here were fully aware of the large outstanding tax bill, and plaintiff obtained defendant's agreement that he would be responsible for the entire tax debt. It reasonably should have been known by plaintiff, as well as defendant, that with such an outstanding tax debt the recordation of a lien on the marital home by the IRS was looming on the horizon and was a distinct possibility. Indeed,

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[3] The notice of federal tax lien was prepared and signed by an IRS employee on April 10, 2006, which is four days after the settlement agreement was reached. The notice had to have been received sometime after April 10, and the notice was recorded by the Washtenaw Register of Deeds on April 19, 2006.

[4] Mere contemplation by IRS personnel of filing a tax lien before it was actually executed by the IRS lacks concreteness and is simply too speculative to constitute an existing fact for purposes of our discussion and the mutual mistake doctrine.

while a federal tax lien under 26 USC 6323(a) does not become valid as against a property interest until proper notice has been given, 26 USC 6321, cited by plaintiff herself, makes clear that

> [i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Assuming that defendant was aware of the impending tax lien at the time of settlement and intentionally remained silent in an attempt to fraudulently induce plaintiff to execute the agreement, any reliance by plaintiff on defendant's silence was patently unreasonable. Moreover, plaintiff took affirmative steps to enforce the settlement agreement, instead of repudiating the agreement, after ascertaining the facts with respect to the tax lien; therefore, the fraud claim is untenable. *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 628; 692 NW2d 388 (2004).

Plaintiff also argues that because of the IRS tax lien on the marital home, there was a failure of consideration. Plaintiff failed to preserve this argument below, "and we need not address issues first raised on appeal." *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 104; 693 NW2d 170 (2005). Regardless, the argument substantively fails.

Generally, courts will not inquire into the adequacy of consideration. *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 239, 241; 644 NW2d 734 (2002). "It has been said '[a] cent or a pepper corn, in legal estimation, would constitute a valuable consideration.'" *Id.* (citation omitted; alteration in original). However, "[t]here is no enforceable contract where there is a failure of consideration." *Adell Broadcasting Corp v Apex Media Sales*, 269 Mich App 6, 12; 708 NW2d 778 (2006). Failure of consideration that warrants rescission occurs when there exists a failure to perform a substantial part of the contract or failure of one of its essential terms, or when the contract would not have been made if default in that particular had not been expected or contemplated. *Id.* at 13-14.

First, plaintiff should have contemplated the possibility that a tax lien on the home would be recorded. Second, according to the terms of the settlement agreement, plaintiff received, among other things, permanent spousal support, defendant's assumption of all debts to unsecured creditors, payment of the SunTrust mortgage to prevent foreclosure on the marital home, and the requirement that defendant move from the home. Also, until and if the IRS actually forecloses the lien on the home and completes the foreclosure process, plaintiff has the benefit of residing in the home. Furthermore, consistent with the settlement agreement, defendant is ultimately financially responsible for the tax debt relative to plaintiff. Of course, this may not prevent the IRS from foreclosing on the lien,[5] but any satisfaction of the outstanding tax debt by way of a

[5] We give plaintiff the benefit of the doubt that the IRS can foreclose on the lien and that she has no defenses to protect the home, which may not be the case.

foreclosure sale on the home, while eliminating any continuing liability by defendant to the IRS, would demand that defendant becomes obligated to plaintiff to reimburse her for her losses due to the foreclosure equal to at least the tax debt that defendant was required to pay under the agreement. In that same vein, plaintiff can certainly takes steps before any foreclosure to try and force payment of the tax debt by defendant through enforcement of the agreement and judgment so that plaintiff can forestall a foreclosure. In sum, we cannot find a failure of consideration.

Plaintiff's next argument is that the various arbitration provisions contained in the settlement agreement are void and unenforceable because of a failure to comply with MCL 600.5072. There are three arbitration provisions contained in the settlement agreement, which agreement is expressly incorporated into the judgment and made fully enforceable. The arbitration provisions call for submission to arbitration relative to potential disputes that might arise between the parties. MCL 600.5072(1) provides, in part, that "[t]he court shall not order a party to participate in arbitration unless each party to the domestic relations matter acknowledges, in writing or on the record, that he or she has been informed in plain language of all of the following: . . ." The statute proceeds to list numerous arbitration principles and concepts. MCL 600.5072(1)(a) to (i).

"The domestic relations arbitration act permits parties to agree to binding arbitration . . . . It contains numerous protections for them, including mandatory prearbitration disclosures and detailed procedural requirements. MCL 600.5072." *Harvey v Harvey*, 470 Mich 186, 189; 680 NW2d 835 (2004). A court's stipulated order for binding arbitration is sufficient to send a matter to arbitration if the order meets the criteria of MCL 600.5071 and MCL 600.5072(1)(e), and if the parties satisfy MCL 600.5072(1)(a) to (d). *Miller v Miller*, 474 Mich 27, 35; 707 NW2d 341 (2005).

First, this issue was never presented to the trial court, "and we need not address issues first raised on appeal." *Polkton Charter Twp, supra* at 104. Second, the issue is simply not ripe for review. The parties have not been ordered to participate in arbitration as of yet, which conceivably may never occur; therefore, MCL 600.5072 has not been triggered. Plaintiff makes no claim that there are outstanding matters currently needing resolution by way of arbitration. The doctrine of ripeness precludes the adjudication of hypothetical or contingent claims before an actual injury has been sustained, and an action is not ripe if it rests on contingent future events that may not occur as anticipated or may not occur at all. *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 371 n 14; 716 NW2d 561 (2006). Here, *if* a dispute arises between the parties in the future that is covered by one of the arbitration provisions, and *if* plaintiff at that time wishes to challenge the applicability of the relevant arbitration provision, the trial court will have the opportunity to address any challenge under MCL 600.5072, *Harvey*, and *Miller*. While it appears on the existing record that MCL 600.5072 has not been satisfied and that any future challenge by plaintiff on the basis of MCL 600.5072 would likely be successful, these are contingent future events that may not occur as anticipated or may not occur at all. Indeed, if a dispute arises and plaintiff desires to proceed with arbitration, as well as defendant for that matter, the parties can satisfy MCL 600.5072 by placing an acknowledgment on the record or in a writing in compliance with MCL 600.5072.

Plaintiff's final argument on appeal is that the consent judgment of divorce includes provisions that were not agreed to by the parties. A court cannot enter a judgment pursuant to the consent of the parties that deviates in any material respect from the parties' underlying

agreement. *Kloian, supra* at 461. We recognize of course that there are numerous provisions that must be included in divorce judgments pursuant to court rule and statute. See e.g., MCR 3.211 and MCL 552.101. Ultimately, plaintiff's claim boils down to a challenge regarding a single provision, which is entitled "Advice of Counsel," and which provides:

> Each party hereto acknowledges that while they have had access to advice of legal counsel during the course of these legal proceedings, this Judgment is entered into of his or her own volition, and that by virtue of the settlement herein, the parties herein have avoided further attorney fees, further legal proceedings, and ultimately, a trial which could have produced a significantly different result, favorable or unfavorable, than the agreement set forth herein. The parties likewise acknowledge, through their signatures hereon, their satisfaction with this Judgment, the efforts and representation by their attorney in negotiating this Judgment, and that, except for issues within the continuing jurisdiction of this Court, this is a full, final and binding Judgment.

This provision did not arise out of the settlement agreement, nor are we aware of any court rule or statute that supports the inclusion of such a provision. Indeed, it would appear to be fairly unique language for a judgment. We can only speculate why it was included in the judgment. Nevertheless, plaintiff, through her attorney, drafted and sought inclusion of the provision that is now being challenged by plaintiff. "On numerous occasions, this Court has denied a party the right to raise an appellate challenge when the party harbored an error as an 'appellate parachute.'" *Valentine v Valentine*, 277 Mich App 37, 40; 742 NW2d 627 (2007) (citations omitted). Taking a line from the *Valentine* panel, "We do so again." *Id.* The issue was effectively waived.

Affirmed.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Pat M. Donofrio