

STATE OF MICHIGAN
COURT OF APPEALS

RUTH E. HERRMANN,

Plaintiff-Appellee,

v

GLENN E. HERRMANN,

Defendant-Appellant.

UNPUBLISHED
October 16, 2012

No. 306568
Ingham Circuit Court
LC No. 09-003521-DO

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM.

Defendant, Glenn Herrmann, appeals as of leave granted a trial court order denying defendant's motion to terminate spousal support. For the reasons set forth in this opinion, we affirm in part and reverse in part.

I. FACTS & PROCEDURAL HISTORY

The parties entered into a consent judgment of divorce (JOD) on April 22, 2010. The consent judgment required defendant to pay monthly spousal support to plaintiff in the amount of \$625 for five years, beginning March 1, 2010. The judgment also provided that defendant's spousal support obligation would terminate upon plaintiff's death, or upon plaintiff's "cohabitation with an unrelated male."

The consent judgment of divorce was entered April 23, 2010. On April 29, 2010, plaintiff moved into the home of Ronald Cluley, a man to whom she is not related. After the initial payment on March 1, 2010, defendant did not make another payment for several months.

On May 3, 2011, defendant filed a motion to terminate spousal support, with a set of requests for admissions and interrogatories. Defendant argued that plaintiff had been cohabiting with Cluley since April 29, 2010, and the cohabitation terminated plaintiff's right to receive spousal support. In her sworn answers to the requests for admissions, plaintiff admitted that she began living with Cluley on April 29, 2010, that she was not related to Cluley, that she did not own or rent any other dwelling, and that she did not reside with anyone else.

At a hearing, plaintiff disputed that she was cohabiting with Cluley. Plaintiff admitted that she was residing with Cluley, but stated that it was not her desire to do so, and explained that the living arrangement was "secondary to financial issues." Plaintiff argued that although she

lived with Cluley, “living with” or “residing with” was not the same as cohabiting. Plaintiff argued that cohabitation is a legal term that this Court interpreted in *Smith v Smith*, 278 Mich App 198; 748 NW2d 258 (2008), and maintained that the trial court needed to apply the relevant factors identified in *Smith* to determine whether she was cohabiting with Cluley in this case. Plaintiff also argued that she was forced to move in with Cluley out of financial necessity. She maintained that it was defendant’s failure to pay spousal support that left her with no means of supporting herself and no other choice but to move in with Cluley.

The trial court agreed to hear testimony from plaintiff. On direct examination, plaintiff testified that she moved in with Cluley on April 29, 2010 “mainly” because of financial reasons. She had no money to rent an apartment, and her sister would not allow plaintiff to live with her. Plaintiff’s unemployment benefits had ended March 30, 2010. Before she moved in with Cluley, plaintiff discussed buying a house, but her poor credit prevented her from obtaining a mortgage. Plaintiff testified that if defendant had paid spousal support, she would have looked for another place to live. She also believed that her tax return would have enabled her to get a different place to live.

Plaintiff testified about the nature of her relationship with Cluley. She stated that they are both self-sufficient. Cluley cooks for himself. They bought their own groceries separately, and they each paid the other back if one of them borrowed something from the other. Plaintiff and Cluley did not have a joint bank account, and they did not open each other’s mail. Plaintiff maintained a post office box mailing address. Plaintiff testified that she and Cluley sometimes went places together on weekends, but they never took vacations together. They did not drive each other’s vehicle. Only on three occasions has Cluley driven plaintiff’s car. Plaintiff testified that she did not have a key to Cluley’s house, but used a garage door opener to access the home.

Plaintiff testified that she had some personal items in Cluley’s house such as clothing and toiletries, but stated that she stored other items in the attic at Cluley’s home and otherwise sold or gave away her personal property including her living room furniture. Plaintiff did not believe that she had a right to stay at Cluley’s house, and that at any time Cluley could ask her to leave.

On cross-examination, plaintiff admitted that she slept with and had a sexual relationship with Cluley. Plaintiff agreed that she had full reign of Cluley’s house, and could come and go from the home at any time. Plaintiff admitted that she used Cluley’s address on her W-4 forms at her place of employment. She also acknowledged understanding the terms of the divorce judgment and agreed that she knew the spousal support would terminate upon her cohabitation with an unrelated male. Plaintiff agreed that she moved in with Cluley seven days after the JOD entered “knowing that your right to spousal support would then be cut off.” Plaintiff testified that she had two adult children, five siblings, and “[p]robably hundreds” of other relatives in the local area. She admitted that she could have asked to live with one of them but she did not want to be a burden to them.

Defense counsel questioned plaintiff about her intention to live on her own, and the financial circumstances keeping her at Cluley’s house. Plaintiff testified that she intended to move out of Cluley’s home once she had “permanent employment.” Plaintiff agreed that she began working for her current employer on October 2, 2009, but she did not consider her job “gainful employment” because she had two “points” on her record and could be fired for missing

“five minutes time.” Plaintiff agreed that she had years of bad debt and knew that “finances were tight” when she signed the JOD.

The trial court questioned plaintiff. Plaintiff testified that there is no mortgage payment associated with Cluley’s house, and she did not pay rent to him. Plaintiff paid the utilities. She borrowed money from Cluley to make a car payment and her daughter’s tuition payment. Plaintiff used spousal support to pay her daughter’s tuition, and to pay off her car. Plaintiff also helped her son and his girlfriend with groceries from the spousal support payments. Plaintiff testified that she and Cluley had no plans to marry.

The trial court asked plaintiff if she and Cluley held themselves out as a couple in public. Plaintiff responded by stating that she and Cluley had a “very strange relationship.” She testified that she had family over to the house a couple times, including one holiday, but she stated that she did not consider the home to be her house and she only had an area in the gun room where she kept a computer. Plaintiff testified that she went to one holiday with Cluley, that she and Cluley did not have joint debt, and that Cluley had not even purchased a gallon of gas for her.

The trial court issued an order denying defendant’s motion to terminate spousal support. The court concluded that although plaintiff lived in the same house as Cluley, and they had a sexual relationship, their relationship did not amount to cohabitation. The court considered the first factor under *Smith*, the living arrangements and the extent to which plaintiff and Cluley shared a common residence and noted that, although the couple shared a residence together, plaintiff moved in “out of financial necessity.” The court noted that defendant had made only one spousal support payment and that defendant had failed to pay back-taxes pursuant to the terms of the JOD. The court next considered the personal relationship between plaintiff and Cluley, and found that, although plaintiff was involved in a sexual relationship with Cluley and slept in the same bed with him, “the relationship is one more of convenience and is not intended to be permanent.” The court noted that there was no testimony concerning monogamy, that marriage had not been considered, and that Cluley could ask plaintiff to leave at any time. Finally, the court addressed the financial arrangements between plaintiff and Cluley, the third factor in *Smith*, and concluded that plaintiff and Cluley did not share expenses or a bank account and did not own real or personal property together. The court also noted that plaintiff maintained some personal property at the residence and some elsewhere.

The trial court concluded that the totality of the circumstances did not amount to “cohabitation” and it denied defendant’s motion to terminate spousal support. After the trial court denied defendant’s motion for reconsideration, this Court granted defendant’s application for leave to appeal.

II. ANALYSIS

Defendant contends that the trial court erred when it relied on *Smith*, 278 Mich App at 198, to determine whether plaintiff cohabited with Cluley, and that, even if the court properly relied on *Smith*, the court clearly erred when it held that plaintiff was not cohabiting with Cluley in this case.

“A consent judgment is in the nature of a contract, and is to be construed and applied as such.” *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). The rules of contract interpretation apply to consent judgments. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003). If the meaning of term in a consent judgment is unclear or “equally susceptible to more than one meaning . . . interpretation is a question of fact, and the trial court may consider extrinsic evidence to determine the intent of the parties.” *Smith*, 278 Mich App at 200. “We review de novo as a question of law the proper interpretation of a contract, including a trial court’s determination whether contractual language is ambiguous.” *City of Flint v Chrisdom Props, Ltd*, 283 Mich App 494, 499; 770 NW2d 888 (2009).

“In general, consent judgments are final and binding upon the court and the parties, and cannot be modified absent fraud, mistake, or unconscionable advantage.” *Laffin*, 280 Mich App at 517. Courts respect “the freedom of individuals freely to arrange their affairs via contract,” and enforce unambiguous contracts as written. *Bloomfield Estates Improvement Ass’n, Inc v Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007) (quotation omitted). The primary goal in contract interpretation is to honor the intent of the parties. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 714; 706 NW2d 426 (2005). The language of the contract is the best indication of the parties’ intent. *Id.*

In *Smith*, 278 Mich App at 200, this Court found that the term “cohabitation” was “unclear” or “equally susceptible to more than one meaning,” and established a totality-of-the-circumstances test for trial courts to consider when determining whether cohabitation exists. Specifically, this Court gave examples of three categories for courts to consider when making such factual determination. *Id.* at 203. The first consideration is the couple’s living arrangements:

. . . First, courts may consider the living arrangements of the couple and the extent to which they shared a common residence. Did they both keep personal items such as clothing and toiletries at the residence? Did they both have keys to the residence? What mailing address did each party use? Did they share automobiles, or other personal property. Were household duties shared? How long did such arrangements exist? [*Id.*]

The second consideration is the nature of the couple’s relationship:

Second, courts may consider the couple’s personal relationship and whether it appeared relatively permanent. Did they engage in sexual relations? Was their relationship monogamous? Was marriage contemplated? Did they spend vacations and holidays together? How did the couple represent their relationship to their family, friends, and acquaintances, and how did those people view the relationship? [*Id.* at 203-204.]

“Third, courts may inquire into the couple’s financial arrangements. Did they share expenses? Did they maintain joint accounts? Did they jointly own real or personal property? Did one party support the other?” *Id.* at 204. This Court held that “[w]hether cohabitation exists is a question for the finder of fact” and “[b]ecause no one factor defining a couple’s relationship

is dispositive on the question of cohabitation, the fact-finder should consider the totality of the circumstances in each particular case.” *Id.*

In this case, defendant contends that the trial court erred in turning to *Smith* to determine whether plaintiff cohabited with Cluley. Defendant argues that there was no dispute about the meaning of the term “cohabitation” because plaintiff’s testimony indicated that she understood the meaning of that term. However, plaintiff argued at the hearing that her living arrangement with Cluley did not amount to cohabitation and the parties’ JOD did not define the term. In *Smith*, this Court held that the meaning of the term “cohabitation” is “equally susceptible to more than one meaning” and that determination of whether cohabitation exists involves a factual inquiry into the totality of the circumstances. *Id.* at 200, 203. Accordingly, the trial court did not err when it relied on *Smith* and inquired into the facts and circumstances underlying plaintiff’s living arrangement.

Although, the trial court did not err when it turned to *Smith* to determine whether cohabitation existed, the court committed clear legal error when it applied *Smith* to the undisputed facts in this case.

The trial court found that plaintiff was not cohabiting with Cluley in part because plaintiff moved in with Cluley out of financial necessity. This amounted to legal error. *Smith* does not hold that cohabitation turns in part on whether or not a living arrangement is financially convenient for one of the parties. Rather, under *Smith*, the fact that one party supports the other financially weighs in *favor* of finding cohabitation. See *Smith*, 278 Mich App at 204, 206. Here, unlike in *Smith*, where the couple was not “financially interdependent,” *id.* at 206, in this case, plaintiff’s own testimony showed that Cluley provided her with support that was financially beneficial. Plaintiff testified that when she could not afford to live anywhere, she turned to Cluley. Plaintiff testified that she had cost Cluley “a lot” of money and she did not pay rent. Plaintiff did not consider her job stable enough to live on her own and she did not want to burden her family. Essentially, plaintiff was dependent on Cluley to provide her with shelter. Contrary to the trial court’s erroneous legal reasoning, the fact that plaintiff was financially incapable of living on her own and instead turned to Cluley for support, weighed in favor of finding cohabitation.

The trial court also committed clear error when it applied the *Smith* factors to the undisputed facts in this case. A review of those factors plainly shows that plaintiff cohabited with Cluley. The first cohabitation factor concerns the living arrangement of the couple and the “extent to which they shared a common residence.” *Smith*, 278 Mich App at 203. Here, plaintiff admitted that she moved in with Cluley on April 29, 2010, six days after the consent JOD was entered. Thus, as of the date of the hearing, she had resided exclusively at Cluley’s residence for over one full year. Unlike the periodic overnights at issue in *Smith*, in this case, plaintiff and Cluley fully shared a residence and both maintained it as their exclusive residence. Neither plaintiff nor Cluley owned or leased a separate home and there was no evidence that either individual spent significant time away from the residence or traveled for extended periods. Plaintiff testified that she kept her personal belongings including clothing, toiletries, and her computer at the home and she stored other personal property in the attic there. Essentially, plaintiff kept all of the personal items that she used on a day-to-day basis at the residence. Although plaintiff testified that she did not have a key to the residence, she had a garage-door

opener which allowed her to access the home whenever she wanted. Plaintiff agreed that she had free reign of the residence and could come and go as she pleased. Plaintiff also paid the utilities at the residence, and, although she maintained a separate post office mailing address, she received mail at the residence that Cluley did not open. Further, plaintiff held the residence out as her own home when she listed it on the W-4 tax form at her workplace. While plaintiff and Cluley did not share vehicles, when plaintiff's vehicle needed repairs, she relied on Cluley to help her. In addition, when plaintiff and Cluley shopped for groceries, they would at times purchase groceries for each other and then reimburse the other for the purchase. In sum, unlike the couple in *Smith*, in this case, plaintiff and Cluley extensively shared an exclusive residence together in a manner that showed they were dwelling together as "partners in life." *Id.* at 204.

The second cohabitation factor concerns the nature of the couple's relationship and takes into account whether the relationship appeared permanent. *Id.* at 203-204. The trial court clearly erred in applying this factor when it concluded that plaintiff's relationship with Cluley "is not intended to be permanent." At the time of the hearing, plaintiff had resided exclusively with Cluley for over a year and there was no evidence that she had plans to move out. The permanency of plaintiff's relationship was demonstrated by the length of time that she lived with Cluley and her failure to move out for several months after she began working again. In particular, plaintiff began working on October 2, 2009. At the time of the hearing, she had maintained full-time work for over a full year, yet she continued to live with Cluley. Additionally, plaintiff's actions showed that she did not plan on moving out any time soon. Plaintiff testified that her personal property was stored away at Cluley's house in the attic and "everything else was either sold or I gave my living room furniture to my oldest daughter." Thus, contrary to the trial court's finding that plaintiff maintained property "elsewhere," there was no evidence that plaintiff stored her property anywhere but at Cluley's home. Plaintiff did not put her belongings in storage to move in with Cluley, which would suggest a more temporary arrangement. Instead, plaintiff put some belongings in Cluley's attic and sold and gave away most of her other property. This evidence shows that plaintiff's living arrangement with Cluley was intended to be permanent. Indeed, plaintiff's relationship with Cluley amounted to much more than a casual acquaintance and involved more than periodic overnight visits. Plaintiff and Cluley had an affair before the divorce was final. Although there was no testimony concerning monogamy, and neither individual was interested in marriage, plaintiff and Cluley were involved in an ongoing sexual relationship with each other for over one full year at the time of the hearing and the two slept in the same bed together on a nightly basis. In addition, plaintiff had a family holiday at the residence and she had the freedom to invite people over to the house and she and Cluley had previously gone on weekend trips together. In sum, contrary to the trial court's finding, the second *Smith* factor weighs heavily in favor of cohabitation.

The third and final *Smith* factor concerns the couple's financial arrangements and includes inquiry into whether the couple shared expenses, maintained joint property or accounts together, and whether one party supports the other. *Smith*, 278 Mich App at 204. In this case, unlike in *Smith*, where the couple was not "financially interdependent," here, plaintiff's own testimony showed that she was dependent on Cluley. As discussed above, plaintiff lived with Cluley when she could not afford to live anywhere else. She was dependent on Cluley for shelter. Plaintiff did not pay rent and she testified that she was costing Cluley "a lot of money." Therefore, even though the parties did not share joint accounts or own any property together, this factor weighs in favor of cohabitation.

In sum, the totality of the circumstances plainly shows that plaintiff and Cluley cohabited together. Plaintiff maintained a permanent residence with Cluley where the couple lived together on a continuous basis. The home was the couple's exclusive residence where they slept and engaged in an ongoing sexual relationship. Neither plaintiff nor Cluley owned or leased other property, and there was no evidence that either individual spent significant time away from the residence or traveled for extended periods of time. Plaintiff kept her belongings at the residence, she had a garage-door opener to the residence, and had free range to use the residence and come and go as she pleased. Plaintiff helped with the utilities at the home, both individuals received mail there and plaintiff used the address on the tax forms at her work. Plaintiff had a family holiday at the residence and she had freedom to invite people over to the home. Furthermore, plaintiff was dependent on Cluley to provide shelter for her, Cluley expended a large amount of money on plaintiff and she did not have to pay rent. On this record, we find that trial court erred when it concluded that plaintiff was not cohabiting with Cluley.

Next, defendant contends that the trial court erred when it denied his request for attorney fees and costs. We review a trial court's ruling on a request for costs and attorney fees for an abuse of discretion. *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id.*

"Awards of costs and attorney fees are recoverable only where specifically authorized by a statute, a court rule, or a recognized exception." *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997).

Defendant contends that he was entitled to fees and costs under two court rules, a statute, and a recognized exception for fraudulent conduct. However, defendant has failed to show that he was entitled to fees and costs under any of the cited authority. Defendant failed to show how he was entitled to fees under MCR 3.206(C) because he has not shown how plaintiff refused to comply with a previous court order. Similarly, defendant fails to show how he is entitled to fees and costs under MCL 600.2591 and MCR 2.114(F), where he cannot show that he prevailed on all his claims in the lower court, and where he cannot show that plaintiff advanced a "frivolous" defense to his motion to terminate spousal support. With respect to defendant's claim regarding fraudulent or unlawful conduct, defendant has failed to show how plaintiff committed an act of fraud or any unlawful conduct that he relied on and consequently suffered an injury because of such reliance. See *Hord v Environmental Research Institute of Mich*, 463 Mich 399, 404; 617 NW2d 543 (2000) (setting forth elements of fraud). Here, absent a court order terminating spousal support, defendant was compelled to make spousal support payments to the FOC. Defendant cannot show that plaintiff's conduct caused him to make the payments and his argument is devoid of merit. In sum, the trial court did not abuse its discretion in denying defendant's request for attorney fees and costs.

Affirmed in part, reversed in part. We do not retain jurisdiction. No costs are awarded to either party. MCR 7.219(A).

/s/ Amy Ronayne Krause

/s/ Stephen L. Borrello

/s/ Michael J. Riordan