

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-11-00409-CV

KENT MORRISON ADAMS, Appellant

V.

JOANNE CATHERINE ADAMS, Appellee

On Appeal from the 317th District Court
Jefferson County, Texas
Trial Cause No. C-199,246

MEMORANDUM OPINION

Joanne Catherine Adams sued Kent Morrison Adams for breach of an alimony contract. The trial court granted Joanne's partial motion for summary judgment and later granted her final motion for summary judgment. On appeal, Adams challenges the trial court's decision to grant Joanne's summary judgment motions. We affirm the trial court's judgment.

Factual Background

In a final decree of divorce, Kent agreed to pay Joanne contractual alimony. The decree states that alimony payments are based on the disparity in the parties' earning

power and business opportunities, Joanne's health problems, Joanne's probable future need for support, the benefits Joanne would have received if the marriage had continued, and other factors that warrant Joanne's support by Kent. Neither party appealed from the decree. When Kent subsequently stopped paying alimony, Joanne sued Kent for breach of contract. In his answer to Joanne's petition, Kent raised a number of affirmative defenses.

In her summary judgment affidavit, Joanne testified that the decree obligated Kent to make monthly alimony payments for 120 months. She explained that Kent made a number of payments through December 2008. According to Joanne, Kent now owes several thousand dollars in unpaid alimony.

In his summary judgment affidavit, Kent claimed that the alimony payments were intended to compensate Joanne for her community interest in his law firm. Kent explained that Joanne assigned a \$3,090,000 value to the firm, while he maintained that the firm had no net fair market value. Kent testified that a certified public accountant valued Joanne's share at \$1,545,000, an amount with which Kent disagreed. Kent stated that he accepted the valuation in good faith, but refused to sign the inventory. Kent stated that it later became obvious that the valuation was erroneous. He explained that the firm had no net value because its liabilities exceeded its assets. Kent testified that the firm's lender terminated the firm's line of credit and began collections efforts. Kent

subsequently closed the firm. Because he believed the valuation of the firm to be erroneous, Kent stopped paying alimony.

In his deposition, a certified public accountant testified that he performed a business valuation of Kent's law firm for the purpose of determining a division of marital property in the Adamses' divorce. The accountant determined that Kent's 100% marital interest in the firm totaled \$1,545,000. The accountant explained that he derived the firm's fair market value by subtracting its liabilities from its assets. He assumed that the firm's accounts receivable and works in progress were 100% collectible, which he testified was not an unreasonable assumption. He testified that he based his conclusion on documents provided by Joanne's attorneys. However, the accountant requested other documents that were never provided. He testified that the firm's value would be \$0 if its assets equaled its liabilities, but that this was not the case when he prepared his report. The accountant stated that he had received no additional information that would affect his opinion.

According to Kent, the erroneous valuation resulted from fraud and the accountant's mental and emotional impairment,¹ professional negligence, and limited investigation into the firm's finances. He stated that the accountant failed to consider numerous factors and improperly assumed that the firm's accounts receivable were 100% collectible. Additionally, Kent believed that Joanne's attorneys failed to furnish the

¹ According to the record, the accountant's production and income decreased after his daughter died in an accident.

accountant with all the firm's financial records and failed to disclose the accountant's impairment; thus, Kent believed that the accountant's valuation was based on a fraudulent scheme.

Kent alleged that the decree contains mutual mistakes regarding the firm's fair market value. Kent opined that Joanne has been overpaid and sought to avoid her share of the firm's liabilities; thus, Kent believed that if Joanne prevailed, she would recover all assets of the community estate and no liabilities. Kent alleged that Joanne refused to develop a plan for repaying community obligations, participated in a fraudulent valuation, made detrimental statements regarding Kent and his new wife, and was trying to unjustly enrich herself. Kent stated that he would have to use his future earnings to pay any further alimony instead of paying from a community asset that existed at the time of the decree. He explained that it would be unconscionable to uphold the decree because he would have to file for bankruptcy. Kent alleged that the parties were mistaken about a material fact, *i.e.*, fair market value, and did not intend for Joanne to receive 100% of the community assets, which made the decree voidable.

In her partial motion for summary judgment, Joanne argued that Kent could not collaterally attack the final divorce decree. In its order granting Joanne's motion, the trial court dismissed Kent's affirmative defenses of mutual mistake, unjust enrichment, impossibility of performance, credit or offset, failure of consideration, fraud, and illegality as impermissible collateral attacks on the divorce decree.

In her motion for final summary judgment, Joanne sought a traditional summary judgment on her breach of contract claim and a no-evidence summary judgment on Kent's affirmative defenses of accord and satisfaction, equitable estoppel, laches, and payment. The trial court granted the motion, denied Kent's motion to reconsider the partial summary judgment, and ordered Kent to pay past-due alimony. The trial court did not specify the grounds for summary judgment. Additionally, the trial court found that Kent's counter-claims were based on the same facts as his affirmative defenses of credit or offset, fraud, and mistake, all disposed of by the partial summary judgment; therefore, Kent's counter-claims were precluded as a matter of law.

Standard of Review

We review a trial court's ruling on a traditional summary judgment motion *de novo*. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). We "must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented." *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam). We "consider all the evidence in the light most favorable to the nonmovant, indulging every reasonable inference in favor of the nonmovant and resolving any doubts against the motion." *Id.* at 756.

"A no-evidence summary judgment motion . . . is essentially a motion for a pretrial directed verdict; it requires the nonmoving party to present evidence raising a genuine issue of material fact supporting each element contested in the motion." *Timpte*

Indus., Inc. v. Gish, 286 S.W.3d 306, 310 (Tex. 2009). We review the summary judgment evidence in the light most favorable to the party against whom summary judgment was rendered. *Id.* We credit evidence favorable to that party if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not. *Id.*

Partial Summary Judgment

In issues one and two, Kent contends that the trial court improperly granted Joanne’s partial summary judgment motion and dismissed his affirmative defense of mutual mistake as a collateral attack on the divorce decree. Kent argues that the parties were mutually mistaken as to the fair market value of the law firm and that his affidavit creates a fact issue regarding the question of mutual mistake.² He argues that he directly attacks the divorce decree.

“A collateral attack is an attempt to avoid the binding force of a judgment in a proceeding not instituted for the purpose of correcting, modifying, or vacating the judgment, but in order to obtain some specific relief which the judgment currently stands as a bar against.” *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005). Like other final, unappealed judgments which are regular on their face, divorce decrees and judgments are not subject to collateral attack. *Hagen v. Hagen*, 282 S.W.3d 899, 902 (Tex. 2009). A divorce decree must be void, not voidable, for a collateral attack to

² Kent raised numerous affirmative defenses in the trial court, but limits his appeal from the partial summary judgment to the doctrine of mutual mistake. He does not challenge the dismissal of his other affirmative defenses.

be permitted. *Id.* at 901. “Errors other than lack of jurisdiction over the parties or the subject matter render the judgment voidable and may be corrected only through a direct appeal.” *Id.* at 902. Contractual defenses constitute impermissible collateral attacks on a prior agreed judgment when they seek to abrogate the terms and obligations of the judgment instead of seeking to enforce or interpret the decree’s terms. *Shoberg v. Shoberg*, 830 S.W.2d 149, 152 (Tex. App.—Houston [14th Dist.] 1992, no pet.); *Spradley v. Hutchison*, 787 S.W.2d 214, 220 (Tex. App.—Fort Worth 1990, writ denied).

In the trial court, Kent argued that the alimony provision failed under the doctrine of mutual mistake and requested to be discharged from any obligation under the decree. The doctrine of mutual mistake, however, makes an agreement voidable. *See Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990). The record does not indicate that Kent pursued either a direct appeal or a bill of review to challenge the decree. Nor does Kent challenge the trial court’s jurisdiction. The unappealed decree is regular on its face and is not subject to collateral attack. *See Hagen*, 282 S.W.3d at 902. While a divorce decree is governed by the law of contracts and may be attacked via a contractual defense, such a defense may not be used to abrogate the terms of the decree. *Shoberg*, 830 S.W.2d at 152; *Spradley*, 787 S.W.2d at 220. Kent’s attempt to avoid the alimony provision pursuant to the doctrine of mutual mistake amounts to an impermissible collateral attack on the decree. *See Reiss v. Reiss*, 118 S.W.3d 439, 443 (Tex. 2003); *see also Shoberg*, 830 S.W.2d at 152; *Spradley*, 787 S.W.2d at 220; *Peddicord v. Peddicord*, 522 S.W.2d

266, 267 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).³ For this reason, the trial court properly granted Joanne's partial motion for summary judgment. We overrule issues one and two.

Final Summary Judgment

In issue three, Kent contends that the trial court improperly granted Joanne's motion for traditional and no-evidence summary judgment.

When there are multiple grounds for summary judgment and the order does not specify the ground on which the summary judgment was granted, the appellant must negate all grounds on appeal. *State Farm Fire & Cas. Co. v. S.S. & G.W.*, 858 S.W.2d 374, 381 (Tex. 1993); *Ellis v. Precision Engine Rebuilders, Inc.*, 68 S.W.3d 894, 898 (Tex. App.—Houston [1st Dist.] 2002, no pet.); see *Bailey v. Gulf States Utils. Co.*, 27 S.W.3d 713, 716-17 (Tex. App.—Beaumont 2000, pet. denied). If summary judgment may have been rendered, properly or improperly, on a ground not challenged, the judgment must be affirmed. *Ellis*, 68 S.W.3d at 898.

On appeal, Kent contends that the alimony provision in the decree should be abrogated or reformed under the doctrine of mutual mistake and that his affidavit raised a

³ In his concurrence in *Peddicord*, on which both parties rely, Justice Keith explained that “the ‘fraud or mistake’ limitation upon the finality of [] consent judgments . . . is confined to situations wherein a direct attack is made upon such judgments[,]” *i.e.*, by direct appeal or bill of review. *Peddicord v. Peddicord*, 522 S.W.2d 266, 269 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.) (Keith, J., concurring). Justice Keith further explained that “[t]he ‘fraud and mistake’ and contractual defense line of cases refer to direct attacks; the ‘contract interpretation’ doctrine applies in subsequent proceedings between the parties and their privies, not to *alter* the judgment but to *determine and enforce* the order entered.” *Id.* at 269-70 (emphasis added).

fact issue regarding whether the parties were mutually mistaken as to the firm's market value. We have already concluded that the trial court properly dismissed Kent's affirmative defense of mutual mistake as a collateral attack on the divorce decree. Moreover, Kent does not challenge each ground on which summary judgment may have been rendered. Under these circumstances, we conclude that Kent has waived error regarding the trial court's decision to grant Joanne's final summary judgment motion. *See id.* We, therefore, overrule issue three and affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on December 6, 2011
Opinion Delivered December 22, 2011

Before McKeithen, C.J., Gaultney and Kreger, JJ.