

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA10-599

MICHAEL HANSEN

APPELLANT

V.

KRISTINE HANSEN

APPELLEE

Opinion Delivered October 5, 2011

APPEAL FROM THE SALINE
COUNTY CIRCUIT COURT
[NO. E01-1336-1]

HONORABLE ROBERT HERZFELD,
JUDGE

AFFIRMED

ROBIN F. WYNNE, Judge

Appellant Michael Hansen appeals from the circuit court's order awarding him damages for his ex-wife's breach of their property-settlement agreement, arguing that the court should have rescinded the entire agreement. We affirm.

The parties to this case were married and divorced twice: first from June 11, 1971, through May 18, 1988, and again from November 21, 1988, through January 3, 2002. Incorporated in—but not merged with—the divorce decree from their second marriage was a property-settlement agreement in which certain jointly held marital debts were divided between the parties. Each party agreed to be responsible for the debts assigned to them, and in the event either filed for bankruptcy, each agreed to not seek a discharge of any of the joint debts. Ms. Hansen was assigned responsibility for eight such debts. The agreement also addressed each party's tax responsibilities, divided their real and personal property, awarded Ms. Hansen a portion of Mr. Hansen's military retirement benefits, ordered the parties to

maintain existing insurance policies, and provided for Mr. Hansen's payment of alimony to Ms. Hansen.

In 2008, Ms. Hansen fell into financial hardship as a result of her medical problems and support of the parties' college-age son, who had medical issues of his own. Because of this, Ms. Hansen stopped making payments toward two credit cards—a Capital One card and a Regions Visa card—that had been assigned to her in the divorce decree. In October 2008, she filed for bankruptcy, seeking to discharge those debts, among others.

Mr. Hansen became aware of Ms. Hansen's hardship in October 2008 when the credit limit on his personal Bank of America card was lowered, apparently due to the arrearage on the Regions Visa account. In order to protect his credit rating, Mr. Hansen paid off the balance of the Regions card, which totaled \$418.73. In December 2008, Mr. Hansen learned that the Capital One card was also in arrears. However, he did not confront Ms. Hansen about that debt or make any effort to bring the account current. Instead, he hired an attorney, and on May 11, 2009, he presented Ms. Hansen with a demand letter seeking repayment of the \$418.73 paid to Regions Visa, \$3017 due to Capital One, and \$2100 in attorney's fees. Ms. Hansen offered to pay him back for the Regions account, to make arrangements for the Capital One account, and to pay \$300 toward Mr. Hansen's legal fees. Unsatisfied with this counteroffer, Mr. Hansen filed a complaint on June 24, 2009, seeking rescission of the settlement agreement or, in the alternative, money damages based on Ms. Hansen's breach of the contract.

At a bench trial held on January 21, 2010, Mr. Hansen testified that he believed his ex-wife's failure to make payments toward the two credit cards and her filing for bankruptcy had devastated his good credit rating. He argued that the only negative accounts listed on his credit report as of December 4, 2008, were the Capital One and Regions Visa accounts. He claimed to have had credit cards cancelled, to no longer qualify for a favorable rate in refinancing his home, to have been denied a gasoline charge card, and to have had drastic increases on the interest rates of other credit accounts—all due to Ms. Hansen's breach. According to Mr. Hansen, his credit score before the breach was 791, and by December 2008, it had dropped to below 640. Further, Mr. Hansen speculated that his homeowners' and automobile insurance rates would increase due to the negative accounts reflected on his credit report. He also blamed Ms. Hansen for two jobs for which his current wife applied but did not receive an offer. For this, he argued, rescission of the settlement agreement was the appropriate remedy. At the time of the trial, Mr. Hansen paid alimony to Ms. Hansen in the amount of \$1982 per month, pursuant to the settlement agreement.

Ms. Hansen admitted that she had failed to pay toward the two credit cards after experiencing financial difficulties in early 2008. She stated that she became overwhelmed and eventually filed for bankruptcy, but she did not know that she could have reaffirmed the joint debts in the bankruptcy proceeding. She testified that if she had known she could reaffirm them, she would have done so.

In its order entered on April 1, 2010, the circuit court found that, while Ms. Hansen had breached the settlement agreement, rescission of the entire agreement was not an

appropriate remedy. The court noted that Mr. Hansen's credibility was "very, very low," and found that his objective was not to repair his credit rating as he claimed but was "a barely concealed effort to throw out his divorce decree so he can stop paying alimony." The court found Ms. Hansen to be "without guile and to genuinely regret the circumstances which led her to make a minor breach of the settlement contract." The court ordered Ms. Hansen to pay \$418.73 as reimbursement for the Regions Visa account and to pay in full or bring into compliance the Capital One account within sixty days of its order. It denied Mr. Hansen's motion for attorney's fees in excess of \$9000, calling that amount "extraordinary," but instead awarded attorney's fees in the amount of \$500, plus \$120 in costs. Mr. Hansen appealed.

We review domestic-relations decisions de novo on the record, but we will not reverse a finding of fact by the trial judge unless it is clearly erroneous. *Frigon v. Frigon*, 81 Ark. App. 314, 315, 101 S.W.3d 879, 879–80 (2003). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.* at 315–16, 101 S.W.3d at 880. The trial court's conclusions of law, however, are not given the same deference. *Id.* In reviewing the trial court's findings, we give due deference to the trial court's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Williams v. Williams*, 82 Ark. App. 294, 301, 108 S.W.3d 629, 633 (2003).

For his appeal, Mr. Hansen contends that the trial court should have rescinded the settlement agreement instead of finding Ms. Hansen in contempt. He first argues that the trial court clearly erred by not finding that Ms. Hansen repudiated the settlement agreement.

When a party to a contract has, either by words or conduct, manifested a definite intention not to perform, that party has repudiated the contract, and the other party may treat the contract as ended. *Cox v. McLaughlin*, 315 Ark. 338, 344, 867 S.W.2d 460, 463 (1993). Mr. Hansen contends that Ms. Hansen demonstrated her intention not to perform by failing to make payments on the two credit card accounts, failing to notify Mr. Hansen of the non-payment, seeking to discharge the two debts in bankruptcy, and not complying with the demands in his May 11, 2009 letter. However, the record reflects that Ms. Hansen fully complied with the terms of the agreement for six years prior to this breach, and there was no indication that she had failed to make payments toward the other six debts assigned to her or that she breached any of her other obligations under the agreement. Furthermore, Ms. Hansen's offer—in response to the demand letter—to repay Mr. Hansen indicated that, in fact, she did intend to perform under the agreement. Therefore, we hold that the trial court did not clearly err in finding that there was no repudiation.

Mr. Hansen's second argument is that the trial court erred by finding that Ms. Hansen's breach was not material. A relatively minor failure of performance on the part of one party does not justify the other in seeking to escape any responsibility under the terms of the contract. *Vereen v. Hargrove*, 80 Ark. App. 385, 391, 96 S.W.3d 762, 765 (2003). In order to discharge one party's obligation to perform, the other party's breach must be material. *Id.* A material breach is a failure to perform an essential term or condition that substantially defeats the purpose of the contract for the other party. *Roberts Contracting Co., Inc. v. Valentine-Wooten Rd. Pub. Facility Bd.*, 2009 Ark. App. 437, at 8, 320 S.W.3d 1, 7. Where there is a material

breach, the injured party is entitled to rescission of the contract. *Econ. Swimming Pool Co. v. Freeling*, 236 Ark. 888, 891, 370 S.W.2d 438, 440 (1963).

We hold that the circuit court did not err in finding that, while Ms. Hansen's failure to pay on two credit cards and failure to reaffirm those debts in her bankruptcy proceeding constituted a breach of the settlement agreement, the breach was not material. Although Mr. Hansen argues that protection of his credit score was a "central benefit" of the agreement, the primary purpose was to divide the parties' debts and assets and allow them to lead separate lives. Thus, Ms. Hansen's breach involving two relatively small debts did not substantially defeat the purpose of the agreement. Furthermore, viewing the agreement as a whole and the breadth of obligations it covered, we agree with the trial court that failing to pay on these two accounts was a relatively minor breach. For several years before falling on hard times, Ms. Hansen upheld her end of the bargain as to the debts assigned to her and all other tax, insurance, and real property obligations under the agreement. The remedy employed by the trial court was proper.

Affirmed.

GLADWIN and GRUBER, JJ., agree.