

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000987-MR

THERESA M. SCHULTE

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NOS. 98-CI-00316 & 02-CI-00252

JOHN M. SCHULTE

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, JOHNSON AND MINTON, JUDGES.

JOHNSON, JUDGE: Theresa M. Schulte has appealed from an order of the Kenton Circuit Court entered on July 9, 2002, which dismissed her complaint against John M. Schulte, Theresa's former husband and the appellee herein. Having concluded that there was no genuine issue as to any material fact and that John was entitled to judgment as a matter of law, we affirm.

John and Theresa were married on January 2, 1971, in Fort Mitchell, Kentucky, when both were approximately 21 years

of age. On February 23, 1998, Theresa filed a petition for dissolution of marriage in the Kenton Circuit Court. In her petition for dissolution, Theresa asked, inter alia, for the division of the couple's marital property, to be awarded the care, custody and control of the couple's minor child, and for an award of spousal maintenance.

Theresa claims that on March 26, 1998, she and John entered into a written agreement which was allegedly signed by both parties and which had the appearance of having been notarized.¹ In this alleged agreement, John purportedly promised to pay Theresa \$5,000.00 per month "instead of paying alimony." Payments were to begin when the couple's pending divorce became final and continue until Theresa reached age 65. John denies that he ever entered into such an agreement.

On May 28, 1998, a proposed property settlement agreement was filed with the trial court. Approximately three months later, on August 24, 1998, the parties filed a revised property settlement agreement. These agreements filed with the trial court covered various issues related to the couple's marriage and pending divorce, including the division of real and personal property, and child support and child custody

¹ During the proceedings below, the trial court found that "the notary's signature did not contain any indication that the notary had utilized a seal during the notarization." In addition, the notary public who purportedly notarized the alleged March 26, 1998, agreement testified that she had no recollection of signing such a document, that she did not recognize John, and that it was her practice to use the notary seal when notarizing documents.

arrangements. However, the property settlement agreement made no mention of spousal maintenance, nor did it make any reference to John's alleged agreement to pay Theresa \$5,000.00 per month until she turned 65. On August 27, 1998, the trial court entered a decree dissolving the marriage between John and Theresa, and incorporated by reference the couple's property settlement agreement.

Approximately three and one-half years later, on January 30, 2002, Theresa filed a complaint in the Kenton Circuit Court claiming that John had breached the alleged March 26, 1998, agreement. Theresa claimed that John had failed to make any of the \$5,000.00 monthly payments after the couple's divorce became final in August 1998. In addition, Theresa alleged (1) that John "falsely represented to [Theresa] that he would pay her \$5,000.00 per month;" (2) that John knew his statement was false; (3) that John "intended to deceive" Theresa; and (4) that Theresa "relied justifiably on [John's] representations by failing to pursue alimony" against John as a part of the couple's divorce proceedings. Theresa asked for \$210,000.00 in back payments, plus \$5,000.00 per month beginning in late January 2002. Finally, Theresa asked for punitive damages "in an amount to be determined at trial" for John's alleged false representations.

On April 29, 2002, John filed a motion to dismiss. Among other things, John argued that the parol evidence rule and/or the merger doctrine precluded Theresa from enforcing the alleged March 26, 1998, agreement. John claimed that the couple's property settlement agreement resolved all of the issues related to the dissolution of their marriage, and that the alleged March 26, 1998, agreement could not be used to "modify" the terms of that property settlement agreement.

On July 9, 2002, the trial court granted John's motion to dismiss.² On July 18, 2002, Theresa filed a motion to vacate the trial court's previous order granting John's motion to dismiss. Approximately nine months later, on April 24, 2003, after a hearing had been conducted on the matter, the trial court determined that the parties' property settlement agreement, which was incorporated into the decree of dissolution, "effectively merged all prior agreements of the parties related to issues arising in their dissolution proceedings. . ." and it denied Theresa's motion to vacate. This appeal followed.

² The trial court determined that John and Theresa "did not have the right to form a separate contract regarding alimony" which was never seen by the trial court deciding all of the other issues related to John and Theresa's dissolution. The trial court also found that Theresa "knew or had reason to know [that] the separation agreement represented the final settlement of all issues arising out of the marriage," and that "any failure [on Theresa's part] to litigate alimony was not a result of a misrepresentation by [John]."

In ruling upon John's motion to dismiss, the trial court apparently considered matters that were outside the pleadings, which had the effect of converting John's motion to dismiss into a motion for summary judgment.³ Therefore, on appeal, we must apply the standard of review for a summary judgment.

Summary judgment is appropriately granted "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."⁴ In Paintsville Hospital Co. v. Rose,⁵ our Supreme Court held that when considering a motion for summary judgment, the movant has the burden of showing that the nonmoving party cannot prevail under any circumstances. The Supreme Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his

³ Pearce v. Courier-Journal, Ky.App., 683 S.W.2d 633, 635 (1985)(stating that "exhibits and affidavits were filed by the parties and were apparently considered by the court in reaching its conclusion. Although there is nothing in the record to indicate that the court formally converted the motion to dismiss into one for summary judgment, that is the procedural effect of what it did").

⁴ Kentucky Rules of Civil Procedure (CR) 56.03.

⁵ Ky., 683 S.W.2d 255, 256 (1985).

favor.”⁶ There is no requirement that we defer to the trial court, since factual findings are not at issue.⁷ “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor” [citation omitted].⁸

Theresa’s sole argument on appeal is that the trial court erred by granting John’s motion to dismiss. Specifically, Theresa claims that the couple’s alleged agreement wherein John purportedly promised to pay Theresa \$5,000.00 per month was a separate and “independent” contract from the couple’s property settlement agreement. Theresa therefore contends that she should be allowed to prove that John breached the alleged contract by failing to pay her \$5,000.00 per month. We disagree.

In Combs v. Morgan,⁹ the former Court of Appeals discussed the related doctrines of merger and novation:

“If a new agreement be made, which is inconsistent with the former agreement, so that they cannot subsist together, the old one is impliedly discharged by the new one.”
Am. & Eng. Ency. of Law, 1st Ed., Vol. 3, p.

⁶ Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

⁷ Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

⁸ Steelvest, 807 S.W.2d at 480.

⁹ 307 Ky. 711, 717, 211 S.W.2d 821, 825 (1948).

891. In Warvelle on Vendors, Vol. 2, p. 970, it is said:

"One of the most common forms of rescission by mutual agreement consists of what is termed novation; that is the entering into a new contract which takes the place of the original one and in which it is merged and extinguished. If the new contract in express terms rescinds the old one, no question can be asked; yet the same result follows, as a necessary implication, and takes place by operation of law, without any express agreement to that effect, whenever the new contract is manifestly in place of or inconsistent with a former one, or which renders a former contract impossible of performance."¹⁰

Assuming, arguendo, that John did promise to pay Theresa \$5,000.00 per month in the alleged March 26, 1998, agreement, this contract was clearly merged into and/or was substituted by the couple's property settlement agreement which was incorporated into the divorce decree. The couple's property settlement agreement reads in pertinent part as follows:

12. MUTUAL RELEASE: Except as otherwise provided, each party hereby releases and discharges completely and forever the other from . . . any [] property rights, benefits or privileges accruing to either party by virtue of the marriage relationship or

¹⁰ See also William S. Haynes, Kentucky Jurisprudence, Contracts § 24-8 p. 363 (1986)(noting that "[i]t is well established that a contract may be superseded or modified by novation or a subsequent contract wherein the obligations under the prior contract are discharged and the obligations under the new contract are substituted"); and 17A Am.Jur.2d Contracts § 527 (2004)(stating that "upon the execution of a valid substituted agreement, the original agreement becomes merged into it and is extinguished").

otherwise, whether the same are conferred by the statutory or common law of Kentucky or any other state of the United States. It is the understanding between the parties that this Agreement, except as otherwise provided by law, forever and completely adjusts, settles, disposes of and completely terminates any and all rights, claims, privileges and benefits that each now has or may have reason to believe each has against the other, arising out of the marriage relationship, and whether that same are conferred by the laws of the Commonwealth of Kentucky or of any other state, and which are now or may hereafter be in force and effect [emphases added].

13. UNDERSTANDING: The parties acknowledge that they have read all the terms and conditions of the Agreement. They acknowledge that they have fully understood all the terms and conditions, and agree that this Agreement represents and constitutes the entire understanding between them; that this Agreement is entered into freely and voluntarily without any coercion or duress by the others, and the arrangements herein are both fair and equitable [emphasis added].

Hence, even if John had at one point agreed to pay Theresa \$5,000.00 per month "instead of alimony," the subsequent property settlement agreement superseded this alleged prior agreement. The property settlement agreement clearly states that it constituted the "entire understanding between them," and that it "completely terminate[d] any and all rights, claims, privileges and benefits that each now has or may have reason to

believe each has against the other, arising out of the marriage relationship."

Thus, since the property settlement agreement made no provision for spousal maintenance, it was entirely inconsistent with the alleged March 26, 1998, agreement. Therefore, the alleged prior agreement merged with or was extinguished by the express terms of the property settlement agreement. Accordingly, John was under no obligation to pay Theresa \$5,000.00 per month and was entitled to judgment as a matter of law with respect to Theresa's breach of contract claims.

As a final matter, we note that Theresa has not argued that the trial court erred by dismissing her claims related to John's alleged false misrepresentations. Accordingly, we will not address that issue on appeal.

Based on the foregoing, the order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Thomas W. Amann
Covington, Kentucky

BRIEF FOR APPELLEE:

David B. Sloan
Suzanne Cassidy
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