

RENDERED: APRIL 14, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002632-MR

MIRIAM E. AKIN (FORMERLY HART)

APPELLANT

v. APPEAL FROM FAYETTE FAMILY COURT
HONORABLE JO ANN WISE, JUDGE
CIVIL ACTION NO. 02-CI-04191

CURTIS W. HART

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

MINTON, JUDGE: Miriam E. Akin (formerly Hart) appeals from an order denying her motion to set aside the property settlement agreement in the dissolution of her marriage to Curtis W. Hart. We affirm.

About three months into their marriage dissolution proceedings, but before any discovery had taken place, Miriam and Curtis, each represented by counsel, signed a property

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

settlement agreement on January 18, 2003. Under the agreement, Curtis became obligated to pay Miriam two up-front cash payments: \$100,000 not later than January 25, 2003, and \$400,000 not later than February 18, 2003. Three more \$125,000 annual installments were due no later than February 18, beginning in 2004. The settlement agreement stated that "[e]ach party represents and warrants that he or she has disclosed to the other during the course of this proceeding all assets in which either of the parties may have an interest. *Any asset which has not been disclosed shall be divided equally between the parties.*" (Emphasis added.) As contemplated by the parties, the settlement agreement was approved and incorporated by reference in the Decree of Dissolution of Marriage entered in February 2003.

Three days after he signed the settlement agreement, Curtis received a \$510,000 bonus from his employer, Central Rock, Inc. This prompted in a motion from Miriam to set aside the settlement agreement under Kentucky Rules of Civil Procedure (CR) 60.02, or, in the alternative, to distribute equally Curtis's bonus check, which Miriam contended was an undisclosed asset. In addition, Miriam argued that she was entitled to a portion of Curtis's shares of stock in Central Rock because Curtis had failed to disclose that a portion of those shares had been bought with marital funds.

The family court held an evidentiary hearing on Miriam's motion. The family court eventually issued an amended opinion and order, finding that Curtis's bonus was not an undisclosed asset because Miriam knew that he received an annual bonus. As for the Central Rock stock, the family court found that Curtis knowingly failed to list a portion of it as a marital asset on his preliminary verified disclosure statement, but that his dishonesty was not actionable fraud because Miriam actually knew of the marital aspect of this stock. So the family court denied Miriam's motion. Miriam then filed this appeal.

Miriam raises two issues on appeal. First, she contends that the trial court erred by denying her motion to divide Curtis's bonus equally, either by setting aside the separation agreement or by declaring the bonus an undisclosed asset which, under the express terms of the agreement, must be divided equally. Second, Miriam contends that the trial court erred by not finding that the marital aspect of the Central Rock stock was an undisclosed asset.

A property settlement agreement is an enforceable contract,² which a court may not disturb unless the contract is

² Pursley v. Pursley, 144 S.W.3d 820, 826 (Ky. 2004).

unconscionable.³ A court may not find an agreement to be unconscionable "absent some showing of fraud, undue influence, overreaching or manifest unfairness."⁴ Because a trial court is in the "best position to judge the circumstances surrounding the agreement," we defer to the trial court's findings regarding whether a separation agreement is unconscionable unless those findings are clearly erroneous.⁵ Similarly, we may not disturb a trial court's decision to deny a motion under CR 60.02 unless that decision is an abuse of discretion.⁶

The family court found that Curtis's bonus was not an undisclosed asset because Miriam "did know prior to the execution of the property settlement agreement that [Curtis] was eligible to receive a yearly bonus from Central Rock in the first quarter of each year, that he almost always received a bonus[,] and that the amount of the bonus fluctuated greatly. The only information about the bonus not known by [Miriam] was exactly when it would be received and the exact amount of the bonus."

Although the family court's findings are not the only possible inferences permitted by the evidence, the family

³ See KRS 403.180(2).

⁴ Pursley, 144 S.W.2d at 826.

⁵ Peterson v. Peterson, 583 S.W.2d 707, 712 (Ky.App. 1979).

⁶ Dull v. George, 982 S.W.2d 227, 229 (Ky.App. 1998).

court's findings are supported by the record. Curtis testified that he had received a bonus annually for the past ten to fifteen years, usually in March, and that the bonus had fluctuated from \$22,000 to \$477,000. And Curtis testified that he always told Miriam the amount of his bonus.

Similarly, Miriam testified that she was aware that Curtis had received a bonus in previous years. Actually, Miriam's testimony on this point was inconsistent. She testified once that she was unaware of Curtis's having received a bonus for the previous two years but later testified that she was aware that Curtis had received annual bonuses in the past. The family court, as the finder of fact, has the discretion to choose which evidence to believe and which to disbelieve, even if that conflicting evidence comes from the same witness.⁷ In addition, Curtis testified that he knew that he would likely receive a bonus in 2003; but at the time he entered into the settlement agreement, he did not know either the amount or date he would receive the bonus.

According to Curtis, he knew he would need about \$500,000 to give to Miriam to make the initial payments under the agreement, so, on the Monday following the Saturday on which he signed the settlement agreement, he asked J. Cooper Hartley, the president of Central Rock, if he could borrow money from the

⁷ See, e.g., Magic Coal Co. v. Fox, 19 S.W.3d 88, 96 (Ky. 2000).

company. Curtis testified that Hartley then sought and received permission from Central Rock's majority shareholder to pay Curtis his bonus a few weeks early so he would not have to borrow the money. Hartley's affidavit corroborates Curtis's testimony.

Furthermore, both Miriam and James Green, one of her attorneys, testified that they had examined Curtis's tax returns and were aware that Curtis's income fluctuated from year to year. Green testified that the wide fluctuations in Curtis's income would have "probably" caused him to ask questions as to why that fluctuation existed and, furthermore, that he was aware that Curtis had received bonuses in the past. In addition, Thomas Clay, another of Miriam's attorneys testified that a potential bonus for Curtis was "an item of concern," though Clay testified that he did not have any knowledge that Curtis could receive a bonus of over \$500,000. Finally, Miriam testified that she thought her lawyers were "smart enough" to discern the existence of bonuses when they reviewed Curtis's W-2 forms before she agreed to settle her case.

In summary, the record contains evidence that: Curtis had historically received bonuses; Miriam was aware of those bonuses; Miriam's attorneys were aware of Curtis's tax returns and history of receiving bonuses; and Curtis did not know the precise amount of his 2003 bonus, nor when he would receive it,

at the time he signed the settlement agreement. So the trial court's decision that the bonus was not an undisclosed asset is supported by the record. This means that we may not find it to be clearly erroneous.

Furthermore, since Miriam had knowledge of the probability of Curtis receiving a bonus when she entered into the agreement, and since his 2003 bonus was not vastly greater than the \$477,000 bonus he received in 2000, the fact that Curtis received an slightly larger bonus earlier than usual does not make the settlement agreement so grossly unfair as to entitle Miriam to relief under CR 60.02. In short, we find that the trial court did not abuse its discretion when it denied Miriam relief under CR 60.02.

Curtis owned stock representing a twenty-five percent ownership interest in Central Rock. Curtis bought his Central Rock stock before he married Miriam. But he borrowed \$150,000 from Central Rock to finance a portion of his Central Rock stock before his marriage to Miriam; and he repaid that \$150,000 during the marriage using marital funds. So both Curtis and Miriam now agree that the stock he financed with marital funds is marital property. However, on his preliminary verified disclosure statement, which he filed with the court before entering into the settlement agreement, Curtis listed all the Central Rock stock as being his nonmarital property. For that

reason, Miriam later sought to set aside the settlement agreement based on Curtis's misrepresentation.

The family court's findings on this issue are as follows:

Petitioner [Curtis] did make a material misrepresentation to Respondent [Miriam] in these proceedings which was not true. He failed to disclose to Respondent in his Preliminary Verified Disclosure Statement that there was a marital component of Central Rock. Petitioner knew that part of his purchase of Central Rock stock was during the marriage and the purchase was accomplished with marital funds. Despite this knowledge, Petitioner verified, under oath, in his Preliminary Verified Disclosure Statement, that Central Rock was an asset that was entirely nonmarital and did not list any part of his ownership of Central Rock as marital in nature. Petitioner, an established business person, never denied that he knew, when filling out and signing the Preliminary Verified Disclosure Statement, that these were the facts. The Court finds that he knew this representation to be false at the time. The Court further finds that Petitioner deliberately misrepresented these facts in the Preliminary Verified Disclosure Statement to induce Respondent to believe there was no marital component of Central Rock or to induce her not to inquire further as to Petitioner's interest in Central Rock.

However, despite these findings, this Court cannot reopen the property settlement in this case because the testimony of Respondent's counsel at trial established that the false representation on the Preliminary Verified Disclosure Statement did not affect these proceedings because Respondent did not rely on these representations to her detriment. The Respondent not only knew of the marital

stock purchase, but she and her counsel discussed this issue before the property settlement was executed. James M. Green, attorney for the Respondent, testified that Respondent told him of repayment of a loan during the marriage that was used to purchase stock in Central Rock. Armed with this knowledge and the assistance of very able counsel, Respondent voluntarily elected to execute the property settlement agreement. Therefore, these acts of Petitioner do not constitute fraud as defined by Kentucky law in United Parcel Service Co. v. Rickert, [996 S.W.2d 464 (Ky. 1999)].

As a prefatory note, the trial court seemed to believe that Curtis did not really commit fraud because Miriam did not rely on his misrepresentations. Indeed, reliance is an element of fraud under United Parcel Service Co. v. Rickert.⁸ But the trial court erred to the extent it believed that actual fraud was necessary to set aside a settlement agreement. The Kentucky Supreme Court has held that "fraud, deceit, mental instability or the like, are not required to obtain invalidation of a separation agreement."⁹ Rather, all that is required is "a showing of fundamental unfairness as determined 'after considering the economic circumstances of the parties and any other relevant evidence' KRS 403.180(2)."¹⁰ Thus,

⁸ 996 S.W.2d at 468.

⁹ Shraberg v. Shraberg, 939 S.W.2d 330, 333 (Ky. 1997).

¹⁰ *Id.*

whether Curtis's actions fit within the strict definition of fraud is largely irrelevant.

The record does contain some evidence to support Miriam's contention that she had no knowledge that a portion of the Central Rock stock was marital property. Miriam predictably testified that she did not know about the Central Rock stock's marital component when she agreed to the terms of the settlement agreement. Rather, Miriam testified that she was aware that Curtis had taken out a loan from Central Rock; but she thought the loan was used to finance property repairs and improvements. Similarly, Attorney Clay also testified that he had no knowledge of the marital aspect of a portion of Curtis's Central Rock stock.

But Attorney Green testified to the contrary. In his testimony, Green testified that he "recall[ed] conversations with Genie [Miriam] regarding repayment of a loan with marital funds and that money was used to buy an interest [in Central Rock]."

The family court might well have come to a different conclusion, but Green's testimony is substantial evidence supporting the finding that Miriam had knowledge of the marital aspect of the Central Rock stock. Having found that Miriam had this knowledge, the family court's later finding was logical that Miriam did not rely on Curtis's false representation on his

disclosure statement. Thus, the marital component of the Central Rock stock was not an undisclosed asset because Miriam knew about it—it had already been disclosed to her at the time of the settlement.

Clearly, Curtis erred and acted dishonorably when he failed to disclose a marital aspect of the Central Rock stock. We do not condone such behavior. But since Miriam, arguably, knew of Curtis's misrepresentation and did not, consequently, rely to her detriment upon that misrepresentation, we cannot say that the trial court clearly erred by finding that the settlement agreement was not unconscionable, especially in light of the fact that the settlement agreement provided for Marilyn to receive \$875,000 in cash within four years.

In this case, we may well have come to different conclusions than did the family court. But the family court's decisions are supported by substantial evidence. Thus, the opinion and order of the Fayette Family Court is affirmed.

ALL CONCUR.

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