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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002191-MR

TED GEORGE DUPONT — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE D. MICHAEL FOELLGER, JUDGE
ACTION NO. 00-CI-00992

VIRGINIA MAE DUPONT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND MOORE, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

CAPERTON, JUDGE: This is an appeal from a September 18, 2006, judgment of the Campbell Family Circuit Court, whereby the court ordered the division of the parties' Fifth Third Bank stock in accordance with their partial property settlement agreement which had been incorporated into the decree of dissolution of marriage.

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Revised Statutes (KRS) 21. 580.

The parties, Ted Dupont and Virginia Dupont, now disagree as to what is an equitable division of an asset due to a delay of several years in transferring the asset, in the form of stocks, pursuant to the agreement which was incorporated into their divorce decree. The trial court ordered that the agreement, along with a subsequent mediation agreement, was to be enforced as the parties had agreed, despite the alleged inequity that might occur due to a delay in transfer. It is from this order that Ted appeals.

Ted argues that due to the delay in transferring the stock, a decline in stock price has occurred and, thus, to award Virginia one-half of the prior value would give her a share greater than one-half of the asset at its current value which was not contemplated by the party's property settlement agreement. Virginia argues that the trial court did not err when it required Ted to pay one-half of the account balance of the Fifth Third stock account as of the date of dissolution of marriage in accordance with the terms of the property settlement agreement. After a thorough review, we affirm the Campbell Family Circuit Court.

The petition for dissolution of the parties' marriage was filed on August 28, 2000. On January 7, 2002, the parties entered into a partial property settlement agreement, which was then incorporated into the decree of dissolution of marriage entered on January 18, 2002, as the court found that the property settlement agreement was not unconscionable. Within the property settlement agreement, the parties agreed to divide equally the Fifth Third Bank stock account using the account balances as of the date of the parties' marriage, August 5, 1984,

to the date of decree of dissolution.[2] It was further agreed that the parties would cooperate with one another to divide these accounts. Thereafter, Ted failed to transfer the stock to Virginia. Virginia filed a motion to compel and for contempt.[3] The court referred the parties to mediation.

On May 10, 2004, the mediation agreement was signed by the parties. In this agreement it was determined that the Fifth Third stock had a value of $266,871.84 and that Virginia was entitled to $133,435.92, an amount equal to one-half, pursuant to the decree of dissolution. Ted was to immediately sign any documents necessary to transfer the funds to Virginia. Ted again failed to transfer the stock and Virginia renewed her motion to compel. In response, on May 30, 2006, Ted argued that it would be unconscionable to divide the Fifth Third account based on a monetary sum as the account balance fluctuated daily and that the dollar amount presented at the mediation was illustrative only, thus the figure should not be used in calculating Virginia's share.[4] The trial court disagreed and ordered Ted to pay Virginia $200,209.28,[5] the amount agreed upon by the parties at the mediation.

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[2] Decree of Dissolution entered January 18, 2002.

[3] Ted argues that both parties are at fault for the lack of a successful transfer of stock. Ted offers no factual support for this argument.

[4] Further, in Ted's October 20, 2006 motion to reconsider, he argued that the stock split should not be in a dollar amount but instead should be in equal shares.

[5] The $200,209.28 was a combined dollar amount of all the investments, including the Fifth Third Bank stock of $133,435.92, in the mediation agreement. As all other assets excluding the Fifth Third Bank stock have been transferred, the only remaining amount in contest is $133,435.92.

Ted argues generally that the monetary figure ordered by the trial court represents a windfall to Virginia due to a decline in the stock price,[6] and specifically argues that the trial court erroneously relied upon an unenforceable mediation agreement because: the mediation agreement was patently vague, ambiguous, and internally inconsistent; the trial court's judgment was also vague, ambiguous, and inconsistent; a hearing to present extrinsic evidence should have been held since the contract language was ambiguous; there was a mutual mistake of the parties at the mediation; and the parties failed to have a meeting of the minds in regard to the mediation agreement. Ted's last argument is that the trial court violated the provisions of KRS 403.190 because the property division was unconscionable.

The multiple arguments presented by Ted essentially amount to two issues presented to this Court: one, did the trial court improperly determine that the property settlement agreement and the mediation agreement embodied an enforceable agreement between the parties; and two, whether the distribution of assets was unconscionable.

We first address whether the property settlement agreement and the mediation agreement constitute an enforceable agreement between the parties, and thus we look to the fundamentals of contract interpretation. The interpretation of a contract is a question of law. *Baker v. Coombs*, 219 S.W.3d 204 (Ky.App.2007). This includes the question of whether an ambiguity exists. *First Commonwealth*

[6] Ted argues the agreements envisioned an equal division of the assets and that the specific amount awarded to Virginia is much greater than a current equal division.

Bank of Prestonsburg v. West, 55 S.W.3d 829 (Ky.App.2000). Therefore, we review the trial court's decision *de novo*. *Baker* at 207. In interpreting the contract, the parties' intentions are discerned from the four corners of the document itself. Absent ambiguity, extrinsic evidence should not be considered and a court will interpret the contract terms by assigning language its ordinary meaning and without resort to extrinsic evidence. *Id. See also Hoheimer v. Hoheimer*, 30 S.W.3d 176 (Ky.2000).

In determining whether an ambiguity exists, a court must determine whether the contract provision may be interpreted in more than one way. *Transport Ins. Co. v. Ford*, 886 S.W.2d 901 (Ky.App.1994). As set forth in *Central Bank & Trust Co. v. Kincaid*, 617 S.W.2d 32 (Ky.1981), an ambiguous contract is one in which there is more than one different, yet reasonable, interpretation.

A review of the parties' settlement agreement and mediation agreement makes it clear that the date of dissolution was to be used to determine the value of the stock to be divided. The trial court correctly interpreted the agreement in this respect. There is no other reasonable interpretation of the plain language of the property settlement agreement establishing that the "parties shall equally divide the [Fifth Third Bank Stock] account using account balances as of the date of the parties' marriage, August 5, 1984, to the date of decree of dissolution".

Further, the mediation agreement explicitly sets forth the agreement of the parties as to the dollar amounts of the accounts, and as to Virginia's entitlement to $133,435.92 pursuant to the parties' decree. There was no ambiguity in the property settlement agreement or in the mediation agreement.[7] Therefore, no extrinsic evidence would have been introducible by the parties to alter the meaning of the agreements, thereby obviating the need for a hearing to introduce such evidence.

We next address Ted's argument that the mediation agreement is unenforceable due to mutual mistake. Ted argues that the parties clearly intended to divide the assets equally as evidenced by the agreements and that the mediation agreement dollar amounts were illustrative only.

In order for a contract to be construed contrary to its terms, the party claiming mistake must establish three elements:

> First, it must show that the mistake was mutual, not unilateral. Second, [t]he mutual mistake must be proven beyond a reasonable controversy by clear and convincing evidence. Third, it must be shown that the parties had actually agreed upon terms different from those expressed in the written instrument.

Abney v. Nationwide Mut. Ins. Co., 215 S.W.3d 699, 704 (Ky.2006) (internal citations omitted). It is simply not enough that one party intended a different result

[7] We likewise do not find internal inconsistency or vagueness in the mediation agreement signed by both parties, the property settlement agreement signed by both parties, nor the decree of dissolution of marriage entered by the trial court. We do not interpret the term "account balance" to be anything other than that stated in the mediation agreement, i.e., a dollar amount.

which appears to be the case sub judice.[8] *See Cantrell Supply, Inc. v. Liberty Mut. Ins. Co*., 94 S.W.3d 381 (Ky.App.2002).

There is nothing in the record to indicate a mutual mistake of the parties. The property settlement agreement clearly lists the point in time at which the assets were to be equally divided. The mediation agreement lists the assets in conformance with the property settlement agreement. Further, the parties agreed at the mediation that Virginia was owed the specified dollar amount. Ted offers no evidence of mutual mistake and thus the contract is not voidable.[9] Absent ambiguity, the contract terms are strictly enforced. Given that trial court properly construed the agreements, there was no error.

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[8] In order for Ted to be relieved of the duties imposed upon him by the agreements, he would need to set out the grounds for mutual mistake that necessitate reformation of the contract. Having failed to do so, the court properly strictly construed the contract pursuant to the terms contained within the writings and not based on Ted's sole interpretation. Indeed, as we have previously stated:

> It has long been the law in Kentucky that where the parties put their agreement in writing, all prior negotiations and agreements are merged in the instrument, and each is bound by its terms unless his signature is obtained by fraud or the contract be reformed on the grounds of fraud or mutual mistake, or the contract is illegal. Hopkinsville Motor Company v. Massie, 228 Ky. 569, 15 S.W.2d 423, 424 (1929); Childers & Venters, Inc. v. Soward, Ky., 460 S.W.2d 343 (1970).

Jones v. White Sulphur Springs Farm, Inc., 605 S.W.2d 38, 42 (Ky.App.1980.)

[9] Ted's argument that there was no meeting of the minds concerning the mediation agreement likewise fails as it is a mere parroting of the mutual mistake argument, based on the alleged intentions of the parties. There is no indication in the record that "[t]he facts or circumstances ... [failed to show the] making of the contract; that is, the meeting of the minds" did not occur either at the mediation agreement or the property settlement agreement. *Harlan Public Service Co. v. Eastern Const. Co.,* 71 S.W.2d 24, 29 (Ky.1934). In contrast the record supports a finding that there was a meeting of the minds exhibited by the two agreements.

We now address the argument that the division of assets was unconscionable. The property settlement agreement was signed by the parties, found by the trial court to be conscionable, and incorporated into the decree of dissolution of marriage, entered of record on January 18, 2002.

KRS 403.190 requires the trial court to divide the marital property in *just* proportions given the statutory factors outlined in section (1), which does not require an equal split of martial assets. *Brosick v. Brosick,* 974 S.W.2d 498 (Ky.App. 1998). In so doing, a trial court has wide discretion in dividing marital property; we may not disturb the trial court's rulings on property-division issues absent an abuse of discretion. *Smith v. Smith*, 235 S.W.3d 1 (Ky.App.2006).

The court has wide discretion in dividing the assets of the parties in an equitable manner. In that the time for filing an appeal challenging the agreement as unconscionable has long since past,[10] we assume that Ted challenges the division of assets as unconscionable due to the passage of time. Thus, we shall treat the "unconscionable" argument as one concerning the belated enforcement of the agreement.

The property settlement agreement set forth the particular assets, defined the dates to be used by the parties in calculating the valued thereof, and awarded each party one-half. Subsequently, the parties entered into a mediation agreement which not only assigned values to many of the parties assets, including

[10] CR 73.02 requires appeals to be taken within 30 days. As the decree of dissolution of marriage which incorporated the property settlement agreement was entered on January 7, 2002, the 30 day window has clearly lapsed.

the stock in question, but set forth the exact dollar amount each party should receive. Ted now argues that the stock account in question cannot be divided based upon the agreed date because it continually fluctuates, has decreased significantly since the agreed date, and thus would award Virginia a windfall, which was contrary to the parties' intentions.[11]

If we follow Ted's argument to its logical conclusion, then the stock account value is forever changing, one-half is forever elusive, and it could never be equitably divided using a dollar amount. Contrary to Ted's argument, the equitable way to divide an asset that fluctuates daily would be to pick a point in time where it would be easy to ascertain the value and assign each party an equitable percentage thereof. Such was the case here.

The inequity of which Ted complains arose when Ted failed to relinquish control over the stock in accordance with the agreement and allowed years to pass without transfer. While the mediation agreement was executed after the property settlement agreement, it did set forth a specific dollar amount each party was to receive and imposed upon Ted the duty to effect the transfer of the "funds".[12] Ted cannot profit from the delay he allowed to continue.

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[11] *See also* the motion to reconsider, where Ted urges the trial court to divide the account in equal shares, without setting forth specific values. As previously addressed, we do not agree with Ted that the property settlement agreement or the mediation agreement should be interpreted in terms of division of shares based on the plain language of the agreements. If Ted had desired the stock to be divided by number of shares, then the property settlement agreement should have so specified.

[12] The reference to "funds" in the mediation agreement is the term used to refer to the dollar amount that was to be transferred by Ted to Virginia "as soon as possible".

There is no evidence within the record that Virginia failed to help effectuate the transfer of the stock. As between the two parties, Ted was responsible for the transfer of the stock and now must bear the consequences of failing to transfer it. *See Bevins v. J.A. Coates & Sons*, 978, 96 S.W. 585, 587 (Ky.1906) (when one of two innocent parties must suffer because of a mistake, if it has resulted from the negligence of one of them, he must bear the consequences); and *Deposit Bank of Georgetown v. Second Nat. Bank,* 10 Ky.L.Rptr. 350 (Ky.1888) (the maxim that where one of two innocent parties must suffer he who has been the occasion of the loss must bear it**).** Therefore, any "inequity" occasioned by Ted's failure to transfer falls upon him.

Accordingly, in light of the reasoning set forth above, there was no error committed by the trial court, nor abuse of discretion, in awarding Virginia a set dollar amount based on the account balance as of the date of dissolution. Based on the foregoing analysis, we find no error and hereby affirm the judgment of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Holly A. Daugherty
Covington, Kentucky

BRIEF FOR APPELLEE:

Dean A. Pisacano
Covington, Kentucky