RENDERED DECEMBER 18, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002088-MR

THOMAS SCHRAGE — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE LISA O. BUSHELMAN, JUDGE
ACTION NO. 07-CI-01585

TRINA ELLIS SCHRAGE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE, AND STUMBO, JUDGES.

STUMBO, JUDGE: Thomas Schrage ("Tom") appeals from Findings of Fact and Conclusions of Law rendered by the Kenton Circuit Court in an action filed by Trina Schrage (now Trina Ellis) to dissolve the parties' marriage. Tom argued below that an Antenuptial Agreement entered into by the parties was ambiguous and therefore unenforceable by Trina. He now contends that the trial court erred in determining that the parties had stipulated as to the conscionability of the agreement, and that the court improperly concluded that the agreement was not

ambiguous. For the reasons stated below, we affirm the Findings of Fact and Conclusions of Law on appeal.

Tom and Trina were married on November 22, 1996. Before the wedding, they determined that Tom would sell his residence and move in with Trina. They also agreed that after moving in, Tom would build a garage, courtyard and sitting room addition on the home. After the couple was married, Tom built the garage and additions, and would later state that he paid for all of the improvements which cost more than $115,000.00.

About one month before the wedding, Tom and Trina met with an attorney for the purpose of drafting an Antenuptial Agreement. The agreement was drafted and mailed to Trina. The agreement set out as Trina's "separate property" her personal residence located in Villa Hills, Kentucky. It also identified as Tom's separate property "[s]upposed plans for a three car garage built on to Trina's house at 879 Squire Oaks Drive, Villa Hills, Kentucky to store Tom's automobiles (the garage is to remain on Trina's property if marriage is terminated)." The parties executed the agreement two days before the marriage.

At the time of their marriage, Tom worked as a real estate investor and developer, and Trina was a real estate agent. After about 10 years of marriage, Tom filed for bankruptcy in 2006. Trina later filed a petition for dissolution of marriage in Kenton Circuit Court. As part of that filing, Trina moved to enforce the Antenuptial Agreement. Trial on the matter was conducted on April 8, 2008, and July 21, 2008. On October 6, 2008, the Kenton Family Court rendered

Findings of Fact and Conclusions of Law. It found in relevant part that the house and lot located at 879 Squire Oaks, Villa Hills, Kentucky was Trina's non-marital property, because her ownership pre-dated the marriage and because Tom's name did not appear on the mortgage or deed. The court also determined that the "plans for the garage" were Tom's non-marital property per the Antenuptial Agreement, and that he had waived any right to the garage under Section 1 of the agreement. And finally, the court determined that because the parties stipulated to the conscionability of the agreement and because the agreement was not ambiguous, the agreement was not unconscionable and could not be interpreted beyond its four corners. This appeal followed.

Tom now argues that the Kenton Family Court erred in determining that the Antenuptial Agreement was enforceable by Trina. He maintains that the agreement is ambiguous because it is capable of more than one reasonable interpretation as to how to treat his non-marital contributions to the house on Squire Oaks. He also argues that the agreement is not valid under *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990), because it is unconscionable and was obtained under duress. In sum, Tom seeks an Order reversing the findings of the trial court and remanding the matter for further proceedings.

On the question of whether the Antenuptial Agreement is ambiguous, Tom contends that the agreement is unclear and is capable of more than one reasonable interpretation as to how to treat Tom's non-marital property. He directs our attention to the agreement language quoted above, which lists the house and lot

as Trina's separate property, characterizes the "supposed plans for a three car garage" as Tom's property, and states that "the garage is to remain on Trina's property if the marriage is terminated." Tom argues that on one hand, Trina claims that the plain meaning of the language is clear that upon the termination of the marriage, Trina keeps the house and Tom keeps the "supposed plans" for the garage. Tom maintains that on the other hand, Trina asked the trial court to infer that by keeping the house and the physical garage she also gets to keep Tom's non-marital contribution to the construction of the garage.

We have closely examined the record and the law, and find no error. The cogent provisions of the Antenuptial Agreement state as follows:

> TRINA owns properties as reflected on Exhibit A which is attached hereto and made part of this Antenuptial Agreement, and TOM owns properties as reflected on Exhibit B which is attached hereto and made a part of this Antenuptial Agreement.
>
> TOM understands, acknowledges, and accepts that the properties and interest in the properties set forth on Exhibit A are and will always remain the separate properties of TRINA and shall make no claim or demand of ownership or interest in these properties.
>
> TRINA understands, acknowledges, and accepts that the properties and interest in the properties set forth on Exhibit B are and will always remain the separate properties of TOM and shall make no claim or demand of ownership or interest in these properties.
>
> . . . Any co-mingling of the separate properties of either party with the other's separate properties shall not in any way be considered an abandonment of any of the provisions of this Antenuptial Agreement and shall not affect the enforceability of any of the provisions of this Antenuptial Agreement.

Exhibits A and B, which are appended to the agreement and which are titled respectively as TRINA ELLIS SEPARATE PROPERTY and TOM SCHRAGE SEPARATE PROPERTY, list as Trina's separate property the house

and lot and as Tom's separate property "[S]upposed plans for a three car garage built on to Trina's house . . . ." Exhibit B goes on to state that "the garage is to remain on Trina's property if marriage is terminated."

Tom's argument centers on his claim that the Antenuptial Agreement is ambiguous – and therefore unenforceable – because it is capable of more than one reasonable interpretation as to how to treat his non-marital contributions to the house on Squire Oaks. In so doing, he directs our attention to the unpublished opinion in *Duke v. Duke*, 2008 WL 2468794 (Ky. App. 2008).[1] In *Duke*, a panel of this Court determined that the trial court properly found an Antenuptial Agreement to be ambiguous and therefore unenforceable in light of the totality of the circumstances including the parties' intent, the subject matter of the contract, the relatively short marriage of the parties, and the conditions under which the contract was entered. Tom seeks to analogize the *Duke* holding to the instant facts, wherein he contends that the Antenuptial Agreement at bar is equally ambiguous and therefore unenforceable.

We are not persuaded by Tom's argument on this issue. Tom's written argument is based on his contention that he used non-marital cash in the amount of approximately $115,000.00 to build the garage and other additions. This contention, which Tom states at page xi of his written argument and which is implicit throughout his claim of error, is not supported by the record. Tom does

[1] Unpublished opinions shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. CR 76.12(4)(c).

not cite to any testimony or documentary evidence from the circuit court proceeding to support his contention that his non-marital funds were used to build the garage. His sole citation to the trial transcript on this issue is found on page vi of his written argument, where he directs us to Volume II at page 18. Therein, Tom merely asserts that the garage cost about $115,000.00, and he makes no claim nor does he proffer any evidence in support of the contention that his non-marital assets were used in the construction of the garage.

KRS 403.190(3) creates a presumption that property acquired by the parties during a marriage is marital property:

> All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

See also, *Kleet v. Kleet*, 264 S.W.3d 610 (Ky. App. 2007), addressing the "tracing" process of tracking property's ownership or characteristics from the time of its origin to the present.

Tom has not provided any basis for rebutting the presumption that the assets used in the construction of the garage and related structures were marital, nor has he traced the $115,000.00 from its time of origin to the present. Since no evidence exists that Tom has a non-marital interest in the garage, it cannot reasonably be argued that the Antenuptial Agreement is ambiguous on this issue.

Accordingly, we find no error in the circuit court's determination that the Antenuptial Agreement is not ambiguous as to the disposition of the garage or the parties' respective interests therein.

Tom also maintains that the Antenuptial Agreement is invalid under the *Gentry* analysis because it is unconscionable and was obtained under duress. In support of his claim of unconscionability, Tom maintains that the agreement was drafted by Trina's counsel, with whom she had previously been romantically involved; that Tom and Trina met with the attorney for only half an hour to discuss their wishes; that Trina asked Tom to sign the agreement only 2 days before the wedding; and that the agreement's terms "were not fair, reasonable, just, equitable nor adequate."

As to his claim that the agreement is invalid because it was executed under duress, Tom directs our attention to *Tilton v. Tilton*, 130 Ky. 281, 113 S.W. 134 (Ky. 1908), which supports a finding of duress when "one party exercises dominance over the other . . . ." *Id*. Tom contends that Trina "dominated and controlled the entire process of the creation of the Antenuptial Agreement" by using her own attorney, personally drafting the Exhibits, and providing a copy of the agreement to him only two days before the wedding and without adequate time to consult his own counsel. Additionally, Tom stated that he believed the wedding may have not occurred if he did not sign the agreement. In sum, he argues that these facts demonstrate Trina's dominance over the creation and execution of the

agreement which was so pervasive as to support a determination that he executed the agreement under duress rendering it not valid.

On the issue of conscionability, the trial court must determine if the contract applied equally to both parties; if its terms were manifestly unfair; and, did it attempt to limit or deny maintenance or support. *Gentry*, 798 S.W.2d at 935. Tom contends that the circuit court improperly concluded that the parties had stipulated to the agreement's conscionability. *Arguendo*, even if this were true, our examination of the record and the written arguments has not revealed any basis for finding the Antenuptial Agreement to be unconscionable. The agreement applies equally to both parties, as it memorializes the parties' respective non-marital assets and the disposition thereof upon dissolution. Further, its terms are not manifestly unfair, and it does not attempt to limit or deny maintenance or support. Tom also acknowledged that he chose not to engage separate counsel in the drafting of the agreement. He testified that, "I knew I could have gone and hired an attorney, but I didn't, so I chose not to apparently." The trial court has broad discretion in determining conscionability. *Gentry*, 798 S.W.2d at 934. Even if it improperly concluded that the parties stipulated to conscionability, we find no basis in the record or the law for determining that the trial court erred in failing to find the agreement unconscionable.

As to Tom's contention that the agreement is not valid because he was forced to execute it under duress, we also find no error. "Duress is an actual or threatened violation or restraint on a man's person, contrary to law, to compel him

to enter into a contract or to discharge one." *Bond State Bank v. Vaughn*, 241 Ky. 524, 44 S.W.2d 527 (Ky. 1931), *citing Fratello v. Fratello*, 193 N.Y.S. 865 (N.Y. Sup. 1922). This definition has also been applied in the context of a dissolution of marriage proceeding. *Hargis v. Hargis*, 252 Ky. 198, 66 S.W.2d 59 (Ky. 1933).

> Duress is a relative, rather than a positive, term. Much depends on the situation of the parties, their relations to each other, physical and mental strength, and all the surrounding circumstances. Acts which might fall far short of duress under certain conditions might be ample under other conditions. The threat of an enraged boy to commence a criminal prosecution might be unworthy of notice; the same threat by a man of experience in the world might well cause anxiety; while the same threat by the state's official prosecutor could hardly fail to cause deep solicitude, if not actual terror. It is apparent also that a threat which would have no serious effect on a strong, experienced business man would be terrifying in the extreme to a nervous or weak person with little or no experience in the world. There are no arbitrary and unbending rules which can be applied in every case to determine the question. True, the person claiming duress must be so strongly influenced that his acts are not the result of his own will, but the threats which would accomplish that result in one case might be entirely insufficient in another.

State Bond Bank, *supra*, *quoting Coon v. Metzler*, 154 N.W. 377 (Wis. 1915).

So, to prevail on his claim of duress, Tom must demonstrate that the facts surrounding the execution of the Antenuptial Agreement so strongly influenced him that his signature on the agreement was "not the result of his own will." *Id*. His argument falls woefully short of demonstrating the level of duress sufficient to invalidate the agreement. Tom was an experienced real estate developer who had been through a previous marriage and dissolution, and there is

no basis in the record for concluding that the prospect of Trina's withdrawal from the engagement if he did not sign the agreement left him so distraught as to be unable to act in accordance with his own will.

In examining the validity of an Antenuptial Agreement, the trial court must engage in the following inquiry: "(1) Was the agreement obtained through fraud, duress or mistake, or through misrepresentation or non-disclosure of material facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed so as to make its enforcement unfair and unreasonable?" *Gentry*, 798 S.W.2d at 935. The Kenton Family Court undertook this analysis, and found no basis for invalidating the antenuptial contract to which the parties had voluntarily entered. This conclusion was not erroneous.

For the foregoing reasons, we affirm the Kenton Family Court's Findings of Fact and Conclusions of Law finding the Antenuptial Agreement to be enforceable.

ALL CONCUR.

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