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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000519-MR

MARK EDWIN HARRIS — APPELLANT

v. — APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. MICHAEL DIXON, JUDGE
ACTION NO. 09-CI-00457

PAMELA JOYCE HARRIS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Mark Harris ("Mark") appeals from a judgment entered by the Jessamine Circuit Court, Family Division, following his divorce from Pamela Harris ("Pamela"). Mark contends the family court erroneously converted his owed equalization payments under the parties' settlement agreement into a lump-sum judgment. After careful consideration, we affirm.

The underlying facts of this case are largely undisputed. Mark and Pamela were married on June 20, 1981, in Boyd County, Kentucky. The parties had one minor child at the time of dissolution. Mark filed a petition for dissolution of the marriage in Jessamine Circuit Court, Family Division on May 12, 2009. The parties thereafter negotiated a fifteen-page separation and property settlement agreement, in which they agreed upon numerous aspects of their separation and how to dispose of the significant assets accumulated during the marriage. The parties' settlement agreement was comprehensive, and we need discuss only the most salient points. The parties agreed to share joint custody of their son, with Pamela as the primary residential parent and Mark agreeing to pay child support, insurance costs, and education expenses. The parties agreed to retain their individual bank and investment accounts and waive interest in each other's account funds. The parties also indicated they had previously divided household goods and personalty to the satisfaction of each.

Of particular relevance to this appeal, the agreement gave Mark ownership of the most significant assets accumulated during their twenty-seven years of marriage. Mark retained his interest and ownership in two trusts and four separate limited liability corporations (LLCs), free and clear of any claim by Pamela. Furthermore, the agreement provided Mark with all right, title, and interest in the marital home, with Pamela waiving all interest in the property. In

exchange for waiving her interests in these assets, paragraph (13) of the settlement agreement required Mark to make equalization payments to Pamela, as follows:

> In order to equalize the parties' shares of the marital estate, Husband shall pay to Wife the sum of $2,000,000 as follows: $1,500,000 to be paid on or before December 31, 2009 and $100,000 per year for five (5) years thereafter on or before January 10 of each year commencing January 10, 2011. The total amount paid to Wife is $2,000,000. Commencing January 10, 2010, if the amount required to be paid has not been timely paid then interest will attach at a rate of 12% per annum on the unpaid arrears until said arrears is paid in full. For instance, on January 11, 2010, if Husband has not paid the $1,500,000 owed by December 31, 2009, 12% interest per annum will begin to accrue on the unpaid $1,500,000 (but not on the remaining $500,000 not yet due) and will continue to accrue until the arrearage has been paid in full.

Several other provisions in the settlement agreement relied on the initial $1,500,000 payment. For example, paragraph (14) required Mark to pay Pamela maintenance, in the amount of $2,500 per month, until she received the $1,500,000 payment, her remarriage, or her death, whichever would first occur.[1] The agreement also required Mark to pay Pamela's mortgage (paragraph (14)), credit card debts (paragraph (11)), and automobile expenses (paragraph (9)) until the first payment of $1,500,000 on December 31, 2009.

[1] It appears Pamela remarried at some point between the filing of the appeal and submission of the parties' briefs. We do not consider whether Mark's required maintenance payments should have terminated on her remarriage, as Mark did not specifically appeal on this issue.

To ensure compliance, paragraph (17) of the settlement agreement contained a default provision, requiring a breaching party to pay attorney's fees, court costs, expenses relating to enforcement of the agreement, and "such other damages as any court may award[.]" Finding the settlement agreement was not unconscionable, the family court incorporated this document into the decree of dissolution of marriage entered August 3, 2009.

Unfortunately, Mark began to serially breach his financial obligations under the agreement. Mark did not make the $1,500,000 payment by December 31, 2009. Pursuant to the agreement, he was then required to continue maintenance while twelve percent interest accumulated on the initial $1,500,000 payment. The parties entered an agreed order on July 23, 2010, wherein Mark agreed to pay Pamela $10,000, payable toward his accrued interest, and the deadline for his $1,500,000 payment would be extended to October 30, 2010. In exchange, Pamela agreed to refrain from taking legal action to enforce the agreement until that time. Mark subsequently failed to pay Pamela the promised amount by October 30, 2010. In a second agreed order, entered December 6, 2010, Pamela agreed to extend the deadline yet again, to April 1, 2011. For his part, Mark agreed to pay an additional $50,000, "over and above the amounts, plus accruing interest" he already owed to Pamela, to be paid "upon [Mark's] closing on the deal currently in progress regarding [his] business." It later became

apparent that Mark, through one or more of his LLCs, had planned to develop and sell a renewable energy power plant in southern Ohio, and this sale did not materialize as he had expected.

When Mark failed to pay as promised by April 1, 2011, pursuant to the second agreed order, Pamela's forbearance finally reached its end. She retained new counsel and moved the family court to enforce the settlement agreement, determine default, and issue sanctions for breach, to include the possibility of contempt. Her motion points out how Mark failed to pay the following:

> (1) the required $1,500,000 by December 31, 2009;
>
> (2) the first of five consecutive yearly $100,000 payments, pursuant to the settlement agreement;
>
> (3) the belated $1,500,000 by April 1, 2011, pursuant to the second agreed order;
>
> (4) the $50,000 payment promised in the second agreed order;
>
> (5) two maintenance payments of $2,500 each, for the months of August and September 2011;
>
> (6) Pamela's automobile expenses;
>
> (7) unreimbursed medical expenses for Pamela and the minor child;
>
> (8) health insurance premiums for Pamela and the minor child;

(9) timely payment of child support; and

(10) minimum monthly payments on Pamela's credit cards.

Pamela then moved the family court to compel Mark to pay the promised $1,500,000, with twelve percent interest, as required by the settlement agreement.

In his response to Pamela's motion, Mark asserts an inability to pay which is based on the power plant business investment not proceeding as planned. He asserts the parties anticipated that Mark might not have the money to pay by the deadline, pointing to the terms of the agreement which allow for the accumulation of interest based on the delay. Furthermore, he asserts at this time that both parties were aware of the difficulties and uncertainty in the power plant venture, asserting, "It is clear that neither party believed this deal would take as long as it has to go through[.]"

At some point during discovery, the family court heard evidence suggesting Mark had income over approximately two years, in 2009 and 2010, amounting to $830,000. The family court entered an order on December 12, 2011, finding Mark in contempt for his repeated failure to pay Pamela what he owed. The court ordered him to serve thirty days in the Jessamine County Detention Center, with a purge amount set at the monthly maintenance of $2,500 owed to Pamela. The court's order further specified how this contempt sanction and purge amount would occur on the first of each month thereafter, until Mark paid the

$1,500,000 lump sum owed to Pamela pursuant to the second agreed order. The court also ordered Mark to pay various other obligations accruing under the settlement agreement. Pamela moved the court for clarification of its order and for entry of a judgment. The court granted Pamela's motion and entered a final judgment on February 13, 2012, finding Mark owed Pamela $1,600,000 in principal, prejudgment interest in the amount of $398,843.45, and interest accruing at twelve percent *per annum* thereafter until paid in full. Between 2012 and 2017, the parties unsuccessfully attempted to resolve their differences utilizing this Court's prehearing conference procedures. This appeal followed.

ANALYSIS

As a preliminary matter, we note Mark has failed to comply with the briefing requirements provided in CR[2] 76.12(4)(c)(v). This rule requires:

> An "ARGUMENT" conforming to the statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

Mark's brief merely states, "To the best of Appellant's counsel's knowledge, all relevant issues were preserved for appeal." This is grossly insufficient. The

[2] Kentucky Rules of Civil Procedure.

reason behind the rule "is not so much to ensure that opposing counsel can find the point at which the argument is preserved, it is so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration." *Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. App. 2012). Beyond the lack of adequate preservation statements, the brief also contains minimal supportive references.

It is possible Mark could not cite to a point wherein arguments were preserved because his counsel did not view video of the contempt hearing. Mark's counsel asserts in a footnote how he "made a diligent attempt to locate the video footage" of the hearings in the week before his brief was due, but states the videotapes were unavailable to him because the Administrative Office of the Courts removed the videocassettes from the Jessamine County Circuit Clerk's office. (Appellant's Brief, pp. 10-11 n.2.) In our review of the record, we can confirm there seems to be no video of the November 7, 2011 contempt hearing from which the family court entered its subsequent order. It is the appellant's obligation "to ensure a complete record—containing all relevant videos, CDs and DVDs—is certified to the appellate court." *Gambrel v. Gambrel*, 501 S.W.3d 900, 902 (Ky. App. 2016). "If evidence is missing from the record, we must assume that the trial court's decision is supported by the record." *King v. Commonwealth*,

384 S.W.3d 193, 194 (Ky. App. 2012) (citing *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006) and *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985)).

We would be well within grounds to strike Mark's brief for its failure to substantially comply with the rules. CR 76.12(8)(a); *Oakley*, 391 S.W.3d at 378. Instead, we elect to proceed with our review and deem any omissions in the record to support the decision of the family court, pursuant to *King*, *supra*. Counsel should be aware that such leniency may not be forthcoming in the future.

This is a divorce case in which the issues before this Court involve interpretation of a property settlement agreement. "[J]udicial review of a property settlement agreement to determine its meaning is simply a matter of contract interpretation. . . . As such, an appellate court's review of a lower court's interpretation of a property settlement agreement is *de novo*." *Sadler v. Buskirk*, 478 S.W.3d 379, 382 (Ky. 2015) (citations omitted). "In the absence of ambiguity in the contract, we look only to the words contained within the four corners of the agreement to determine the parties' intentions." *Id*. (citations omitted).

Here, Mark makes four separate arguments in which he asserts the family court (1) erroneously converted a contingent contractual obligation into a judgment, (2) erroneously foreclosed Mark's ability to invoke mutual mistake as a remedy, (3) unfairly and unreasonably entered judgment against Mark, and (4)

violated CR 52.01 by failing to specifically state findings of fact and conclusions of law in its judgment. None of these claims have merit.

In his first issue, Mark argues his $1,500,000 payment, due on or before December 31, 2009, was contingent upon the completion of his business deal. He asserts both parties expected the business deal would occur by that date and the fact that it did not creates an ambiguity in the agreement. Mark points to the provisions allowing him extra time to pay, in exchange for which he would owe Pamela maintenance and certain other expenses as outlined in the settlement agreement, as evidence that the lump-sum payment was contingent or ambiguous on this business deal. However, there is nothing in the settlement agreement itself indicating a contingency on the basis of the business deal. The business deal is an extrinsic factor to the settlement agreement; therefore, the family court would have erred if it had allowed its existence to alter the terms of the agreement. A trial court commits clear error when it admits extrinsic evidence to vary the terms of an unambiguous contract. *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000).

As to the second part of this argument, the settlement agreement requires payment of $1,500,000, without any ambiguity. The agreement gives Mark some leeway as to *when* the payment will occur, but this leeway should not be read as allowing for the possibility that the payment might *never* occur. Such a reading would do violence to the portion of the agreement which unambiguously

provided the lump sum to Pamela. "Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible." *City of Louisa v. Newland*, 705 S.W.2d 916, 919 (Ky. 1986). Accordingly, we decline Mark's invitation to find error in the family court's judgment on the basis of a contingent or ambiguous settlement agreement.

For his second argument on appeal, Mark asserts the family court's entry of judgment against him prevented him from asserting a contractual defense based on mutual mistake regarding the value of Mark's power plant business deal. However, there is nothing in the record to suggest the family court took any action to prevent Mark from asserting this argument prior to its judgment. Mark could have made this argument to the family court at any point between the entry of the dissolution decree on August 3, 2009, and entry of the judgment from which he appeals on February 13, 2012. We will not review the issue of mutual mistake itself, because Mark's argument presupposes the argument was not made to the family court. "The Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

For his third issue, Mark argues entry of the judgment was unfair and unreasonable, based on his change in circumstances.

> A separation agreement which was originally determined not to be unconscionable may later be modified if due to

> a change in circumstances the agreement has become unconscionable. However, the party challenging the agreement as unconscionable has the burden of proof.

Bailey v. Bailey, 231 S.W.3d 793, 796 (Ky. App. 2007) (citations omitted). We have repeatedly held that a party may make a bad bargain in a settlement agreement, but this does not render the agreement unconscionable. *Mays v. Mays*, 541 S.W.3d 516, 525 (Ky. App. 2018) (citing *Peterson v. Peterson*, 583 S.W.2d 707, 712 (Ky. App. 1979)). Furthermore, "[t]he family court is in the best position to weigh the evidence and determine if a separation agreement is unconscionable[.]" *Id*. at 524 (citing *Shraberg v. Shraberg*, 939 S.W.2d 330, 333 (Ky. 1997)). We defer to the discretion of the family court on this determination and we will not disturb it absent an abuse of discretion. *Id*. (citations omitted).

Here, although Mark may not have the assets he originally believed he would attain, the record reflects he possessed significant assets, as well as *all* of the significant assets attained during the twenty-seven-year marriage. As the appellee brief aptly puts it, "Pamela essentially walked away from the marital estate with a promise[.]" We discern no abuse of discretion in the family court's issuance of a judgment.

For his final issue on appeal, Mark argues the family court's judgment erroneously failed to specifically state findings of fact and conclusions of law, as required under CR 52.01. However, the judgment from which Mark appeals was

the result of a motion hour decision by the family court. CR 52.01 states, "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02." "Civil Rule 52.01 does not require a trial court to make findings on motions." *Klopp v. Klopp*, 763 S.W.2d 663, 665 (Ky. App. 1988). In addition, Mark failed to request findings from the family court. When a party does not request findings of fact from the trial court, we will not consider the lack of findings as an issue on appeal. *Whicker v. Whicker*, 711 S.W.2d 857, 860 (Ky. App. 1986); CR 52.04.

CONCLUSION

For the foregoing reasons, we affirm the Jessamine Circuit Court, Family Division's order entered February 13, 2012.

ALL CONCUR.

BRIEF FOR APPELLANT:

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