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19-P-777

Appeals Court

PATRICIA ANN FRANZOSA vs. STEVEN DOMINIC FRANZOSA.

No. 19-P-777.

Essex. March 10, 2020. - August 5, 2020.

Present: Milkey, Lemire, & McDonough, JJ.

Probate Court, Divorce, Findings by judge, Report of material facts. Divorce and Separation, Judgment, Separation agreement, Division of property, Findings, Objections to judgment becoming final. Contract, Separation agreement, Misrepresentation.

Complaint for divorce filed in the Essex Division of the Probate and Family Court Department on December 16, 2016.

The case was heard by Frances M. Giordano, J., and a statement of objections, filed on February 5, 2018, also was heard by her.

Mary-Ellen Manning for the husband.

Daniel P. Tarlow for the wife.

MCDONOUGH, J. Steven Dominic Franzosa (husband) and Patricia Ann Franzosa (wife) were divorced on December 7, 2017, pursuant to a judgment of divorce nisi (judgment nisi)

incorporating their separation agreement of the same date. The husband thereafter filed a statement of objections, pursuant to Mass. R. Dom. Rel. P. 58 (c), seeking to prevent certain aspects of the judgment nisi from becoming absolute¹ on the basis that the wife had allegedly misrepresented her financial circumstances to procure a more favorable property and alimony settlement. Following a two-day evidentiary hearing, a judge of the Probate and Family Court issued an order dismissing the husband's statement of objections, from which the husband now appeals. We affirm.

Background. We summarize the relevant facts found by the judge, supplementing them with undisputed evidence in the record. See Pierce v. Pierce, 455 Mass. 286, 288 (2009). The parties were married in 1983. During the marriage, the husband was the primary wage-earner, working full-time as a firefighter. The wife was the primary caregiver to the parties' three children, and also worked part-time in a public school cafeteria. The parties enjoyed a modest, "middle income" lifestyle during their long-term marriage.

In 2006, the wife's parents executed a deed transferring their interest in a house located in Revere (Revere home) to the

¹ A judgment of divorce nisi becomes absolute (i.e., final) after ninety days. See G. L. c. 208, § 21.

wife and her two siblings, Michael and Camille.² In September 2016, Michael purchased Camille's interest in the Revere home and took out a mortgage on the property, which the wife signed as a "Non-Applicant Title Holder."

In December 2016, the wife initiated a divorce action. On December 7, 2017, the parties executed a separation agreement and presented it to the Probate and Family Court, along with their financial statements listing their respective incomes, expenses, assets, and liabilities. The separation agreement provided, in relevant part, that: (1) the husband would pay the wife weekly alimony of \$300, which obligation would be secured with a \$100,000 life insurance policy benefiting the wife; (2) the parties would share equally in the net proceeds from the sale of the marital home; (3) the wife would retain her interest in the Revere home; (4) the parties would equally divide the husband's pension and annuity; and (5) in consideration of the parent plus education loan incurred by the husband on behalf of the parties' children, the wife would pay the husband \$10,000 from her share of the marital home proceeds, waive her one-half share (worth \$23,056.72) of the husband's 457 plan, and pay the husband an additional \$7,665, upon the sale or refinance of the

² Although a second deed was executed at the same time, granting the wife's parents a life estate in the Revere home, that deed was never recorded.

Revere home. On December 7, 2017, the parties and their respective attorneys appeared for a hearing before a judge of the Probate and Family Court, during which both parties testified that they understood and voluntarily executed the separation agreement, they had an opportunity to discuss the agreement with their attorneys, they believed the agreement was fair and reasonable, and they had accurately reported their incomes, expenses, assets, and liabilities. On the same day, the judge approved the separation agreement and incorporated it into the judgment nisi.

In February 2018, the husband filed a statement of objections pursuant to Mass. R. Dom. Rel. P. 58 (c), with supporting affidavits, seeking to prevent the judgment nisi from becoming final as to (1) the amount and duration of alimony; (2) the treatment, value, and division of the Revere home; (3) the parties' contributions to the parent plus loan; and (4) the division of marital assets, other than the husband's pension. In support thereof, the husband alleged that the wife made several misrepresentations regarding her income, assets, and liabilities, upon which the husband relied to his detriment when executing the separation agreement. A two-day evidentiary hearing on the husband's statement of objections was held before the same judge who approved the parties' separation agreement. Both parties, and the wife's brother, testified at the

evidentiary hearing. On September 28, 2018, the judge issued an order, with supporting findings, dismissing the husband's statement of objections. The present appeal by the husband followed.

Discussion. A defendant may seek relief from a judgment of divorce nisi by filing a statement of objections pursuant to Mass. R. Dom. Rel. P. 58 (c), "for any cause sufficient in law." Sheffer v. Sheffer, 316 Mass. 575, 577 (1944).³ Here, the "cause sufficient in law", id., as asserted by the husband in his rule 58 (c) statement of objections, was the wife's alleged misrepresentation of her income, assets, and liabilities at the time of the divorce. See Sampson v. Sampson, 223 Mass. 451, 457 (1916) (misrepresentation permissible ground to support statement of objections). Essentially treating the husband's misrepresentation claims as though they had been raised in a motion for relief from judgment pursuant to Mass. R. Civ. P. 60 (b), 365 Mass. 828 (1974),⁴ the judge ultimately concluded

³ "At any time before the expiration of ninety days from the entry of a judgment of divorce nisi, the defendant . . . may file in the Registry of Probate a statement of objections to the judgment becoming absolute, which shall set forth specifically the facts on which it is founded and shall be verified by affidavit." Mass. R. Dom. Rel. P. 58 (c).

⁴ Although the judge referred to Mass. R. Dom. Rel. P. 60 (b), "the language of Mass. R. Dom. Rel. P. 60 is identical to the language of Mass. R. Civ. P. 60. Therefore, all references herein will be to the Massachusetts Rules of Civil Procedure." Sahin v. Sahin, 435 Mass. 396, 398 n.4 (2001).

that the husband was not entitled to relief under either rule 58 (c) or rule 60 (b). See Honer v. Wisniewski, 48 Mass. App. Ct. 291, 294 (1999) (motions decided according to substance rather than label). See also Giner v. Giner, 11 Mass. App. Ct. 1023, 1025-1026 (1981) (claim of fraudulent misrepresentation raised in wife's statement of objections could be raised in rule 60 [b] motion). Cf. Innis v. Innis, 35 Mass. App. Ct. 115, 118 (1993) (applying rule 60 [b] [6] principles to claims raised in statement of objections). We review the judge's decision for an abuse of discretion or other error of law. See Gaw v. Sappett, 62 Mass. App. Ct. 405, 414 (2004).⁵

To prevail on a claim of misrepresentation raised in a rule 60 (b) (3) motion, the moving party has the burden of establishing, by "clear and convincing evidence," Gaw, 62 Mass. App. Ct. at 408, "a false statement of a material fact made to induce the [moving party] to act, together with reliance on the false statement by the [moving party] to the [moving party's] detriment." Zimmerman v. Kent, 31 Mass. App. Ct. 72, 77 (1991). Here, the judge made the following relevant findings, based on her assessment of the witnesses' credibility and the documentary

⁵ "[A] judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made 'a clear error of judgment in weighing' the factors relevant to the decision such that the decision falls outside the range of reasonable alternatives" (citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

evidence submitted at trial. See Gaw, supra at 409. The judge found that the wife's December 7, 2017 financial statement (submitted to the court on the same day that the parties executed the separation agreement) contained inaccuracies as to both the wife's income and assets. The judge specifically found that the wife underreported her income and incorrectly listed her brother's \$178,000 mortgage as an encumbrance on the Revere home, artificially reducing the equity value of her one-third interest in the property.⁶ Although the husband claimed that the wife also misrepresented the value of the Revere home by listing its assessed value, rather than its actual fair market value, the judge disagreed, finding that the wife had clearly disclosed that the value listed was the property's "assessed value," subject to "a certified appraisal."⁷ The judge found that the wife was financially "unsophisticated," and that her finances had historically been managed by others (including the husband). The judge ultimately concluded that the wife did not "knowingly" misrepresent her income and assets at the time of the divorce, and that the inaccuracies in her financial statement "were not

⁶ Although the judge's findings indicated that the brother's mortgage balance was \$180,000, the wife actually reported the balance as \$178,000 on her December 7, 2017 financial statement.

⁷ The judge also found that the wife failed to report certain accounts on her financial statement; however, those accounts were either not in the wife's control, or their value was de minimis.

material to the ultimate division of assets or award of alimony." The judge also implicitly declined to credit the husband's claim that the inaccuracies "interfered with the settlement process" and caused him to agree to an excessive alimony award and an inequitable property division. Instead, the judge found that the husband's claims were merely a "'morning after' effort to retreat from an agreement now thought to be ill-advised." Innis, 35 Mass. App. Ct. at 118.

The husband contends that the judge, in concluding that the wife's inaccurate financial disclosures did not amount to misrepresentation, improperly focused on the wife's lack of intent to deceive. The husband further contends that the judge erred as a matter of law in finding that the inaccuracies were not material. We address the husband's arguments in turn.

1. Intent. In establishing the elements of misrepresentation, "[w]here the plaintiff proves 'a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge . . . it is not necessary to make any further proof of an actual intent to deceive.'" Zimmerman, 31 Mass. App. Ct. at 77, quoting Snyder v. Sperry & Hutchinson Co., 368 Mass. 433, 444 (1975). The husband argues that the judge improperly focused on the wife's

lack of knowledge regarding the errors on her financial statement.⁸

While it is true, as a general matter, that "[t]he speaker need not know 'that the statement is false if the truth is reasonably susceptible of actual knowledge, or otherwise expressed, if, through a modicum of diligence, accurate facts are available to the speaker,'" Zimmerman, 31 Mass. App. Ct. at 77, quoting Acushnet Fed. Credit Union v. Roderick, 26 Mass. App. Ct. 604, 605 (1988), this court has, on at least two prior occasions, expressed doubt as to whether an unintentional misstatement may warrant relief under rule 60 (b) (3). See Southwick v. Planning Bd. of Plymouth, 72 Mass. App. Ct. 266, 269 (2008) ("It is questionable whether the judge had discretion to grant . . . relief under rule 60 [b] [3] on account of an unintentional misrepresentation"); Gaw, 62 Mass. App. Ct. at 411-413. Accordingly, we cannot say that the judge erred in considering, as one of many relevant factors, that the wife's misstatements were not deliberately made for the purpose of

⁸ The husband argues, in the alternative, that the wife's actions amounted to "other misconduct" under rule 60 (b) (3), as discussed in Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988), which does not require "proof of nefarious intent or purpose as a prerequisite to redress." Id. at 923. However, because the husband did not make this argument below, it is waived. See Carey v. New England Organ Bank, 446 Mass. 270, 285 (2006) ("An issue not raised or argued below may not be argued for the first time on appeal" [citation omitted]).

inducing the husband's detrimental reliance. See id. at 407-408 (discerning no error in denial of wife's rule 60 [b] [3] motion where judge found "the wife's evidence did not clearly and convincingly demonstrate the kind of calculated, fraudulent conduct that warrants relief under rule 60 [b] [3]," and there was no indication "that the [husband's] nondisclosure was the product of . . . a deliberate plan to defraud the wife or the court").

Moreover, the judge found that the husband "manifestly was aware on [December 7, 2017,] of the matters later tendered in support of" his statement of objections. Innis, 35 Mass. App. Ct. at 117. See Ojeda-Toro v. Rivera-Mendez, 853 F.2d 25, 29 (1st Cir. 1988) ("a party may not prevail on a Rule 60 [b] [3] motion on the basis of fraud where he or she has access to disputed information or has knowledge of inaccuracies in an opponent's representations at the time of the alleged misconduct").⁹ The judge specifically found that, at the time of the divorce, the husband was already familiar with the amount of rental income typically received by the wife, as he was responsible for overseeing the preparation of their joint tax

⁹ "As a general principle, the Massachusetts Rules of Civil Procedure are given the same construction as the cognate Federal rules" and, "[i]n all pertinent respects, Mass. R. Civ. P. 60 (b) is identical to [Fed. R. Civ. P. 60 (b)]." Sahin, 435 Mass. at 400 n.7.

returns.¹⁰ See Mahaney v. John Hancock Mut. Life Ins. Co., 6 Mass. App. Ct. 919, 920 (1978) (plaintiff cannot prove reasonable reliance if it should "have been obvious to him that something was radically wrong with the figures given to him"). With respect to the value of the wife's interest in the Revere home, the judge found that the husband was aware that the wife had listed its assessed value on her December 7, 2017 financial statement, and the husband could have sought a certified appraisal but "took no steps to obtain a valuation." The judge further found that, although the wife incorrectly listed her brother's mortgage as an encumbrance reducing the value of her interest in the Revere home, the husband, who was represented by counsel throughout the divorce proceedings, "could easily have confirmed how title was held" and "who the obligors were on the mortgage." See Kirtz v. Kirtz, 12 Mass. App. Ct. 141, 146 (1981) (where husband failed to disclose values for certain assets during divorce proceedings, and wife failed to take depositions, present expert testimony, or research publicly available information to ascertain value of those assets, wife's request for reallocation of property based on husband's alleged misrepresentation was properly rejected). Accordingly, to the

¹⁰ The judge found that the husband was aware that the wife received rental income of \$3,800 in 2016, which is only slightly less than what she received in 2017.

extent the husband had actual knowledge, or ignored information readily available to him, regarding the wife's inaccurate financial disclosures, see Ojeda-Toro, supra, we discern no error in the judge's implicit conclusion that the husband failed to sustain his heavy burden of proving, by clear and convincing evidence, see Gaw, 62 Mass. App. Ct. at 408, that his reliance on the wife's misstatements was reasonable. See Mahaney, supra.

2. Materiality. The husband next contends that the judge erred, as a matter of law, in finding that the inaccuracies in the wife's December 7, 2017 financial statement were not material. We disagree.

In the context of misrepresentation, "materiality" is "defined as whether 'a reasonable man would attach importance [to the fact not disclosed] in determining his choice of action in the transaction in question.'" Zimmerman, 31 Mass. App. Ct. at 78, quoting Rogen v. Ilikon Corp., 361 F.2d 260, 266 (1st Cir. 1966). "A misrepresentation is material if it is shown that the misrepresentation was one of the principal grounds, though not necessarily the sole ground, that caused the plaintiff 'to take the particular action that the wrongdoer intended he should take as a result of such representations and that otherwise he would not have taken such action.'" National Car Rental Sys., Inc. v. Mills Transfer Co., 7 Mass. App. Ct.

850, 851 (1979), quoting National Shawmut Bank v. Johnson, 317 Mass. 485, 490 (1945).

Although the husband argues that the wife underreported her income by eighty-seven percent, the judge's findings reflect that the wife underreported her wages and rental income from the Revere home by approximately \$141 per week,¹¹ or twenty-six percent. The judge found the discrepancy in the wife's income to be immaterial; implicitly rejecting the husband's claim that the wife's failure to accurately disclose her income at the time of the divorce led him to agree to an excessive alimony obligation of \$300 per week.¹² This determination appears to

¹¹ The wife reported wages of \$371.90 per week (\$19,338.80 per year) and rental income of \$28.84 per week (\$1,499.68 per year). The judge found, however, that the wife's 2017 W-2 indicated actual wages of \$23,846.86 (\$458.59 per week) and that the wife received total rental income of \$4,310 in 2017 (\$82.88 per week). Accordingly, the judge's findings reflect that, in December 2017, the wife's actual gross weekly income was \$541.47, rather than \$400.74. Although the husband asserts that the judge found the wife to have even higher wages, those additional wages pertain to the wife's second job obtained in 2018, and are thus irrelevant to determining whether the wife misrepresented her income in 2017. The husband further argues that the wife failed to report additional trust and estate income; however, the judge did not make such a finding.

¹² The husband also argues that the wife, in failing to accurately report her income, misrepresented herself as being "too cash poor" to contribute to the parent plus loan, thus causing the husband to agree to assume an unfair and disproportionate share of that debt. However, as found by the judge, the wife agreed to contribute to nearly one-half of the parent plus loan balance, notwithstanding her inaccurately reported income.

have been based, at least in part, on the judge's assessment of the husband's credibility, which we see no reason to disturb. See Johnston v. Johnston, 38 Mass. App. Ct. 531, 536 (1995). Indeed, the husband's \$300 per week alimony obligation can hardly be deemed excessive given that it is well within the Alimony Reform Act's percentage guidelines (even after adjusting for the wife's actual, higher income), see G. L. c. 208, § 53 (b),¹³ and it is less than the temporary alimony order of \$340 per week in effect during the pendency of the divorce proceedings. We therefore discern no abuse of discretion in the judge's determination that the wife's failure to report a modest portion of her income was not material.¹⁴ Compare Hager v. Hager, 6 Mass. App. Ct. 903, 903 (1978) (judge warranted in finding misrepresentation where husband substantially underreported his annual income by nearly \$65,000 and claimed

¹³ The \$300 alimony award is equivalent to approximately thirty percent of the difference between the wife's actual income of \$541.47 per week, and the husband's income of \$1,533.44 per week. See G. L. c. 208, § 53 (b) ("the amount of alimony should generally not exceed the recipient's need or [thirty] to [thirty-five percent] of the difference between the parties' gross incomes").

¹⁴ We likewise discern no error in the judge's implicit determination that the husband's reliance on the wife's reported wages was not detrimental as it did not result in an excessive alimony obligation, and did not alter the judge's original determination that the separation agreement was fair and reasonable. See Gaw, 62 Mass. App. Ct. at 413.

his stock shares were "valueless" despite knowing their actual value to be over \$1 million).

We likewise discern no abuse of discretion in the judge's determination that the wife did not materially misrepresent her assets. The husband claims that the wife understated the value of her interest in the Revere home by \$99,000, by (1) using the property's assessed value of \$307,300¹⁵ (rather than its fair market value of \$428,000, a figure stipulated to by the parties after the divorce in 2018); and (2) incorrectly including her brother's \$178,000 mortgage.¹⁶ As discussed herein, supra, the judge found no misrepresentation in the wife's use of the assessed value.¹⁷ The judge did find, however, that the wife

¹⁵ Although the judge's findings referred to an assessed value of \$276,200, the wife reported the assessed value of the Revere home as \$307,300, on her December 7, 2017 financial statement.

¹⁶ The husband also argues that the wife overstated her liabilities by \$195,000 on her financial statement, by including her brother's mortgage and a \$15,000 loan incurred to purchase her mobile home. The wife did not, however, list those debts as liabilities; rather, she listed them as encumbrances reducing the equity value of her real property interests. Although the husband claims that the wife should not have included the \$15,000 loan because she paid it off, the judge's findings reflect that the payoff occurred in February 2018, after the divorce.

¹⁷ Because the husband's misrepresentation claim relates to the wife's financial disclosures made in December 2017, the fact that the parties later stipulated to a fair market value of \$428,000 for the Revere home has no bearing on whether the wife misrepresented the value of that asset at the time of the divorce.

incorrectly listed the \$178,000 mortgage as an encumbrance on the property, despite having no obligation to repay it. Although this error had the effect of artificially reducing the equity value of the wife's one-third interest in the Revere home by approximately \$59,333.33 (one-third of \$178,000), the judge nevertheless concluded that the error was "not material to the ultimate division of assets." The judge declined to credit the husband's assertion that, if he had known the true value of the wife's interest in the Revere home, he would have sought to have it included in the marital estate for purposes of equitable distribution. We see nothing in the record requiring us to disturb that determination. See Johnston, 38 Mass. App. Ct. at 536. Even taking into account the \$59,333 in equity missing from the wife's financial statement, the parties are still left with roughly equal assets,¹⁸ consistent with both the spirit of their agreement to divide their assets relatively equally, and the judge's findings reflecting approximately equal contributions to the marital enterprise. See Moriarty v. Stone, 41 Mass. App. Ct. 151, 157 (1996) ("The parties' respective

¹⁸ Although the wife omitted \$59,333 in equity from her December 2017 financial statement, it appears that the husband also omitted assets (a truck and a motorcycle) worth \$23,000 from his December 2017 financial statement. See Clair v. Clair, 464 Mass. 205, 214 (2013) (appellate court "may consider any ground apparent on the record that supports the result reached in the lower court" [citation omitted]).

contributions to the marital partnership remain the touchstone of an equitable division of the marital estate").

In sum, we discern no error in the judge's ultimate determination that the wife's inaccurate financial disclosures made at the time of the divorce were not material and did not amount to misrepresentation. See Gaw, 62 Mass. App. Ct. at 413 (denial of wife's rule 60 [b] [3] motion proper where "the judge's findings and conclusion . . . establish[ed] that, to the extent the husband's challenged nondisclosures fell short" of "the highest standards of good faith and fair dealing" applicable to "[p]arties to a separation agreement," "[the nondisclosures] were nonculpable in the circumstances, and their consequences did not impair the fairness and reasonableness of the equitable division of the marital property, which 'cannot be considered in a vacuum'" [citations omitted]). Contrast Demeter v. Demeter, 9 Mass. App. Ct. 860, 860 (1980).^{19,20}

Order dated September 28,
2018, dismissing statement
of objections affirmed.

¹⁹ The husband's other contentions "have not been overlooked. We find nothing in them that requires discussion." Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

²⁰ The wife's request for damages and double costs pursuant to Mass. R. A. P. 25, appearing in 481 Mass. 1654 (2019), is denied.