STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA LYNN HOSEA

Plaintiff-Appellee,

v

TEDDY LEE HOSEA,

Defendant-Appellant.

UNPUBLISHED
March 7, 1997

No. 189276
Genesee Circuit Court
LC No. 93-175911-DM

Before: MacKenzie, P.J., and Wahls and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. We reverse and remand.

Defendant first contends that the trial court erred when it determined that the antenuptial agreement was unenforceable. We agree. In a divorce case, we review a trial court's factual findings under the clearly erroneous standard. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A finding of fact is clearly erroneous if, after a review of the entire record, we are left with the definite and firm conviction that a mistake was made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990).

This Court has specifically found that antenuptial agreements governing the division of property are generally enforceable,[1] provided that the following three criteria are considered: (1) was the agreement obtained through fraud, duress, or mistake, or misrepresentation or nondisclosure of material fact; (2) was the agreement unconscionable when executed; and (3) have the facts and circumstances changed since the agreement was executed so as to make its enforcement unfair and unreasonable. *Booth v Booth*, 194 Mich App 284, 288-289; 486 NW2d 116 (1992); *Rinvelt v Rinvelt*, 190 Mich App 372, 379-382; 475 NW2d 478 (1991). Where an antenuptial agreement is challenged, the burden of proof and persuasion is on the party challenging its validity. *Booth, supra* at 289; *Rinvelt, supra* at 380, 382.

In the instant case, the procedural aspects are important. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) alleging that there existed no genuine issue of a material fact.

Specifically, defendant asserted that the antenuptial agreement entered into between the parties was enforceable; therefore, plaintiff had no interest in the assets listed on exhibit A of the antenuptial agreement and/or the proceeds from the sale of those assets. In support of his motion, defendant attached the antenuptial agreement, incorporated affidavits setting forth the parties' respective properties, submitted an additional June 23,1994 affidavit defendant prepared in addressing allegations contained in plaintiff's complaint regarding various properties, and attached pertinent portions of plaintiff's deposition. In response, plaintiff filed a brief, a copy of an article written by Attorney Fred Morganroth entitled "Drafting Considerations For Enforceable Pre-Nuptial Agreements," a notice of disciplinary action against Teddy L. Hosea by General Motors Corporation, and another copy of Teddy Hosea's affidavit of June 23, 1994. Moreover, both parties implicitly stipulated that the parties had entered into the document entitled "Antenuptial Property Agreement" and attached to defendant's answer to the complaint. In addition, plaintiff's deposition testimony confirmed that both she and defendant had entered into the agreement.

MCR 2.116(G)(3), (4) and (5) provide in relevant part:

> (3) Affidavits, depositions, admissions, or other documentary *evidence* in support of the grounds asserted in the motion are required
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> * * *
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> (b) when judgment is sought based on subrule (C)(10).
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> (4) When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. *If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.*
>
> (5) The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10). [Emphasis added.]

Defendant's motion for summary disposition, supported by the agreement, affidavit, and deposition testimony, comported with MCR 2.116(C)(3)(b). Thus, plaintiff was required to respond to defendant's motion via "affidavits, depositions, admissions, or other documentary evidence." None of the materials submitted with plaintiff's brief in opposition constitutes the requisite evidence to rebuff a (C)(10) motion. Specifically, although plaintiff submitted defendant's June 23, 1994 affidavit ostensibly in an effort to counter defendant's motion, that affidavit did not "set forth specific facts showing that there is a genuine issue for trial" as it had nothing to do with whether the antenuptial agreement was enforceable. MCR 2.116(G)(4). We believe that this failure, coupled with the fact that it was plaintiff's burden to prove that the antenuptial agreement was unenforceable, should have resulted in summary disposition for defendant. MCR 2.116(G)(4).

Patently, this fatal procedural omission was overlooked. Moreover, although the trial court set forth various factual findings to support its opinion and conclusions, the only findings supported by any evidence were its findings that the parties had lived together for four years before plaintiff became pregnant with defendant's child and that although defendant and defendant's attorney told plaintiff that she could hire her own attorney, she did not do so before signing the agreement. All of the remaining "factual findings" were, instead, simply the trial court's adoption of assertions, all hearsay, set forth in plaintiff's brief. Additionally, the trial court was clearly erroneous in its finding that the parties had agreed that each was "making full, complete and fair disclosure to the other of all assets and liabilities." The title of the document itself was "Antenuptial Property Agreement" and the plain terms of the antenuptial agreement required only that the parties divulge their respective properties. We review the trial court's findings of fact for clear error, i.e., whether after analyzing the record we are left with a definite and firm conviction that the lower court erred. MCR 2.613(C); *Poirier v Grand Blanc Twp*, 192 Mich App 539, 548; 481 NW2d 762 (1992). Because of these unsupported facts, we are left with a definite and firm conviction that the trial court erred in its fact finding.

First, plaintiff admitted in her deposition that she read the agreement, that defendant's counsel read the agreement out loud to both of them while inviting questions about the terms of the agreement, and that defendant's counsel informed her of her right to get an attorney but she chose not to because "I trusted Gary [Lambert]'s judgment. That's the only reason." We find no case law supporting the conclusion that a party to a contract can ignore requests that he or she obtain counsel and then use the absence of counsel as vehicle for avoiding enforcement of the agreement. See *Hockenberry, supra* at 376.

Second, plaintiff also explained during her deposition that the "agreement was put together to protect Ted's assets in the event that I, without cause, walked out of the marriage and tried to take advantage of him," that "[i]t was to protect him in case I only married him to get his house," and "[m]y opinion of the prenuptial agreement or my understanding of what it was for was so I couldn't marry him, and in a short period of time leave the marriage and make him sell everything that he had before we were married." While plaintiff may not have been able to recite verbatim the contents of the antenuptial agreement, it appears that she understood the purpose and impact of the agreement.

Third, even accepting the court's finding that plaintiff failed to disclose his liabilities and income, we hold that this omission is not fatal to the enforceability of the antenuptial agreement. Indeed, the antenuptial agreement specifies that the parties made "a full, complete and fair disclosure of their *respective properties* to each other" and attached summaries of their assets to the agreement. Again, we find no cases where one party who fully disclosed all assets but failed to disclose liabilities and income was deemed to have fraudulently induced another to sign the agreement or failed to disclose a material fact sufficient to void the antenuptial agreement. Cf. *In re Benker Estate*, 416 Mich 681, 688-690; 331 NW2d 193 (1992); see, generally, *In re Halmaghi Estate*, 184 Mich App 263, 266-267; 457 NW2d 356 (1990). Indeed, there is no requirement that in order to constitute full and fair disclosure, parties to an antenuptial agreement must disclose all of their liabilities and sources of income in addition to their assets. *In re Benker Estate, supra* at 684; *Booth, supra* at 289. Here, the parties

to this contract apparently chose to disclose only their respective assets, i.e., neither party advised the other of his or her liabilities or sources of income.

We also believe the trial court erred, in part, in its analysis of the facts in this case to the applicable law as set forth in *Booth, supra,* and *Rinvelt, supra*; consequently, its legal conclusion was clearly erroneous. From our reading of the trial court's opinion, it appears that the only factor the trial court considered was whether the agreement was obtained through fraud, duress, or mistake, or misrepresentation or nondisclosure of material fact. See *Booth, supra; Rinvelt, supra.*

With respect to the finding of duress, even if the trial court's factual findings had been supported by the evidence, we find no duress occurred as a matter of law. Black's Law Dictionary (6th ed), p 504, defines "duress" as follows:

> Any unlawful threat or coercion used by a person to induce another to act (or to refrain from acting) in a manner he or she otherwise would not (or would). Subjecting [a] person to improper pressure which overcomes his will and coerces him to comply with [a] demand to which he would not yield if acting as [a] free agent. . . . Application of such pressure or constraint as compels man to go against his will, and takes away his free agency, destroying power of refusing to comply with unjust demands of another. . . . [I]f a party's manifestation of assent to a contract is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim. [Emphasis added.]

It also explains that "coercion" may include "actual, direct, or positive [complusion], as where physical force is used to compel act[ion] against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to another to do what his free will would refuse." *Id.* at 258.

Here, the trial court concludes that plaintiff may have been under duress because she was distraught about the fact that she was an unmarried mother, she was not represented by counsel, and she was financially dependent upon defendant. The only finding of fact supported by the record, however, is that plaintiff chose to rely on defendant's attorney rather than obtain a separate legal opinion. MCR 2.116(G)(4). All of the court's other "findings" are merely reiteration of the assertions contained in plaintiff's brief in opposition to defendant's motion to enforce the antenuptial agreement.[2] Without more, we find no duress, as a matter of law, that compelled plaintiff to sign the antenuptial property agreement against her own free will.

Plaintiff had the burden of persuading the court that the antenuptial agreement should not be enforced. She failed to do so, while, on the other hand, defendant did prove the existence of a valid, binding agreement. So, in light of the fact that we find that the agreement was not induced by duress, *Rinvelt supra* at 380, and given the trial court's failure to make valid findings of fact or conclusions of law regarding two of the three factors set forth in *Booth, supra* and *Rinvelt, supra*, we vacate the trial court's opinion and order and remand for entry of summary disposition in favor of defendant and for any appropriate modification of the divorce judgment necessitated by this decision.

Reversed and remanded for further proceedings consistent with this opinion. *Booth, supra* at 288-289; *Rinvelt, supra* at 380. We do not retain jurisdiction. Defendant being the prevailing party, he may tax costs pursuant to MCR 7.219.

/s/ Barbara B. MacKenzie
/s/ Myron H. Wahls
/s/ Jane E. Markey

[1] See *In re Benker Estate*, 416 Mich 681, 688-690; 331 NW2d 193 (1982), which held that valid antenuptial agreements must be fair, equitable, and reasonable under the facts and circumstances of the case and must be entered into voluntarily with an understanding of his or her rights and the extent of the rights that each party is waiving.

[2] After noting that deposition testimony referred to in plaintiff's brief and the court's opinion was not attached or in the lower court record, with the exception of the several pages of plaintiff's testimony provided by defendant, this Court requested the transcripts assuming their inadvertent omission. Plaintiff's counsel, however, advised us of his objections to their being submitted and, in fact, stated in his January 28, 1997 letter to this Court, "[T]o the best of my recollection, at no time was there ever any introduction of the discovery depositions of either one of the parties into the record and they simply are not evidence." Thus, we must rely on the limited record the parties have apparently agreed to.