

STATE OF MICHIGAN
COURT OF APPEALS

MERVAT SABRY HASSAN,

Plaintiff-Appellee,

v

AHMED A. HASSAN, a/k/a DR. AHMED A.
HASSAN,

Defendant-Appellant.

UNPUBLISHED

November 25, 1997

No. 187946

St. Clair Circuit Court

LC No. 91-001168-DM

MERVAT SABRY HASSAN,

Plaintiff-Appellant,

v

AHMED A. HASSAN,

Defendant-Appellee.

No. 189458

St. Clair Circuit Court

LC No. 91-001168-DM

Before: Jansen, P.J., and Young and R.I. Cooper*, JJ.

PER CURIAM.

In Docket No. 187946, defendant Ahmed Hassan appeals by leave granted from a post judgment of divorce order denying his motion for a reduction in alimony and granting in part plaintiff's motion for enforcement of executory provisions of the judgment of divorce. In Docket No. 189458, plaintiff Mervat Sabry Hassan appeals by leave granted from the same order denying in part her motion for enforcement of the executory provisions of the judgment of divorce. We affirm in part, reverse in part, and remand for further proceedings.

* Circuit judge, sitting on the Court of Appeals by assignment.

On May 21, 1993, a judgment of divorce was entered dissolving the parties' marriage of twenty-two years. They had two boys, ages seventeen and fifteen years old at the time of the divorce. Plaintiff received physical custody of the children, and defendant had visitation rights. The judgment of divorce did not provide for any child support, but plaintiff was granted \$4,000 a month in alimony. At the time of the divorce, defendant had a successful medical practice in Port Huron in his specialty of geriatric emergency care, and he had an earning capacity of over \$300,000 per year. The judgment of divorce awarded defendant sole ownership of his medical practice. However, there were three commercial office buildings in which defendant operated his medical practice and diagnostic clinic. Plaintiff and defendant held the buildings as joint owners, and the judgment of divorce provided that they form a limited partnership for the purpose of selling the properties and distributing the proceeds. Defendant, as the general partner, was solely responsible for payment of all of the buildings' expenses until the buildings were sold, at which time the net proceeds from the sale were to be divided equally between the parties.

Under the partnership agreement, defendant could not mortgage, hypothecate, encumber, or cause to be lien any of the properties. However, on January 14, 1994, defendant remortgaged two of the buildings. On July 1, 1994, defendant sold two buildings and his medical practice for \$1,000,000. After subtracting certain costs from the proceeds from the sale, defendant had a net distribution of \$42,715.07, of which he gave \$21,357.35 to plaintiff as required by the judgment of divorce.

On August 4, 1994, defendant moved for reduction in alimony from \$4,000 to \$1,000 a month based on the substantial reduction in his medical practice income since selling it. Plaintiff, in turn, petitioned for enforcement of the judgment of divorce, arguing that defendant had breached the property settlement and his fiduciary duties by remortgaging the properties and selling them together with the non-partnership medical practice. Plaintiff sought to recover certain proceeds of the sale, as well as certain other monies defendant received in connection with the remortgaging of the properties before the sale.

The trial court denied defendant's motion for reduction of alimony, finding that defendant had voluntarily reduced the level of his medical practice income and that defendant had not established a change in circumstances. With respect to plaintiff's motion for enforcement of the judgment of divorce, the trial court found that defendant had breached his fiduciary duties by remortgaging the properties, and it awarded plaintiff \$11,384.18 in monies that defendant was able to apply to his mortgage liability as a result of the remortgaging, plus \$4,500 for an appraisal fee which defendant's bank refunded to him in connection with the refinancing. Plaintiff was also awarded \$4,369.54 of the property sale proceeds which defendant used to pay off sewer and road assessments on the properties. The trial court, however, denied plaintiff's request for other proceeds for failure to meet her burden of proof.

No. 187946

I

Defendant first contends that the trial court erred in denying his motion for reduction of alimony.

Modification of alimony provisions is authorized by MCL 552.28; MSA 25.106.¹ The modification of an alimony award must be based on new facts or changed circumstances arising after the judgment of divorce. *Ackerman v Ackerman*, 197 Mich App 300, 301; 495 NW2d 173 (1992). The party moving for modification has the burden of showing such new facts or changed circumstances. *Id.* The trial court's findings of fact regarding the existence of a change in circumstances are reviewed under the clearly erroneous standard of review. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). A finding is clearly erroneous if, on review of all the evidence present in the record, this Court is left with a definite and firm conviction that a mistake has been made. *Id.* If the findings of fact are upheld, this Court must then decide whether the dispositional ruling was fair and equitable in light of those facts. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).

The trial court found that defendant was capable of earning over \$300,000 a year, while plaintiff was without formal education or skills, and that the earning capacity of the parties was widely disparate. The trial court rejected defendant's arguments that there was a change in circumstances, and specifically stated that defendant was not forced to sell his medical practice. The trial court noted other alternatives such as defendant deferring sale for five years, purchasing plaintiff's interest or entering into a rental agreement with her, or relocating in the area where defendant was established. The trial court concluded that defendant voluntarily reduced his income.

On review of the record evidence, we find that the trial court's factual findings are not clearly erroneous. Thus, we are not left with a definite and firm conviction that the trial court clearly erred in finding that there existed no change in circumstances warranting a reduction of the alimony.

II

Next, defendant argues that the trial court erred in finding that he violated his fiduciary duty by remortgaging the buildings.

The property settlement provisions of the judgment of divorce awarded defendant sole ownership of his medical practice, but awarded plaintiff a 50% ownership interest in the three commercial office buildings located in Port Huron which were being used for defendant's medical clinics. Defendant was named as the general partner, while plaintiff was the limited partner as set forth in the partnership agreement. Under § 5.3.10 of the partnership agreement, defendant, as the general partner "shall not [m]ortgage, hypothecate, encumber, [or] cause to be liened, any of the real estate." In this case, defendant remortgaged two buildings on January 14, 1994. Specifically, he granted a mortgage in the amount of \$408,324.47 to the National Bank of Detroit (\$162,516.48 on one building and \$221,874.96 on the second building). He consolidated the two previously separate mortgages on these two buildings into a single new mortgage.

On July 1, 1994, defendant sold two of the buildings and his medical practice for \$1,000,000. Of this amount, \$400,000 was allocated to the medical practice while \$600,000 was allocated to the two buildings. Of the \$600,000, defendant paid off the mortgage he took out in January 1994, thereby leaving the third building unencumbered. Defendant also paid off other expenses associated with the

properties, including: \$93,658.17 to Michigan National Bank, \$730.38 to the Township of Fort Gratiot for sewer charges, \$8,008.70 to Fort Gratiot for road charges, \$36,000 to the realtor as the sales commission, \$1,920 to Lawyer's Title Company, \$13,275 for attorney fees, \$2,000 for accounting fees, \$660 for revenue stamps, and \$100 as consideration of the deed. Subtracting these costs (\$561,377.23) from the proceeds of the sale of the buildings (\$604,092.30), defendant had a net distribution of \$42,715.07, of which he gave one-half (\$21,357.35) to plaintiff as required by the judgment of divorce and the partnership agreement.

The trial court ruled that by remortgaging the buildings, defendant violated the terms of the partnership agreement because this constituted mortgaging or hypothecation and required approval of the limited partner. The trial court's ruling in this regard is correct. The clear and unambiguous language of the partnership agreement states that defendant was not permitted to mortgage, hypothecate, encumber, or cause to be liened any of the real estate. Defendant's action of combining the mortgages on two of the buildings falls squarely within the restrictions of the partnership agreement. When defendant took out the new, consolidated mortgage on the two buildings, the buildings were still burdened with a debt. Further, as correctly noted by the trial court, defendant's action in remortgaging the two buildings into a single mortgage did not benefit the limited partner. More importantly, the limited partner (plaintiff) never approved the remortgaging and defendant, when he remortgaged the buildings did not create a partnership account in which the bank was to deposit any proceeds. Rather, the money went to defendant rather than to the partnership. Therefore, the trial court properly found that defendant's remortgaging of the two buildings constituted a breach of his fiduciary duties under the partnership agreement.

III

Defendant also argues that the trial court erred in awarding plaintiff \$4,500 for the appraisal fee, \$11,384.18 in monies applied by defendant toward his mortgage liabilities, and \$4,369.54 for the sewer and road assessments. Section 1.6.5 of the partnership agreement provides the following:

Until the sale of each property, the General Partner shall be responsible for and pay all expenses in connection therewith, including, but not limited to, monthly mortgage payments, utilities, property taxes, insurance maintenance and the like and shall hold the Limited Partner harmless from and indemnify her against any liability in connection therewith. Neither the General Partner nor his affiliates shall be required to enter into leases on the respective properties, but shall make all of the aforesaid payments and pay the Limited Partner her guaranteed payments pursuant to Section 6.2 hereof, irrespective of whether or not the respective properties are leased.

The trial court correctly concluded that the sewer and road assessments were expenses in connection with the property, and that defendant, as the general partner, was solely responsible for paying those assessments. These assessments had nothing to do with the sale of the properties, therefore, defendant improperly deducted them from the sale of the buildings when he was to give plaintiff one-half of the

proceeds. Thus, the trial court did not err in awarding plaintiff \$4,369.54 for the road and sewer assessments.

With respect to the appraisal fee and other monies associated with the mortgage liabilities, § 6.4 of the partnership agreement provides that plaintiff was to receive one-half of the net proceeds of the sale of the buildings. Specifically, net proceeds is defined as “the Gross Sale Price of the Real Property sold, less all commissions, title policy costs, recording costs, revenue stamps and other costs directly or indirectly attributed to said sale, less the amount of the Mortgage at the date of the sale on said property and less the amount of any ‘capital expenditure’ on such property made after the date of this Agreement.” At the time that defendant remortgaged the buildings, he issued a cashier’s check in the amount of \$11,384.28 to National Bank of Detroit, which consisted of two monthly mortgage payments, the mortgage application, and over \$2,000 was placed into the partnership account. Under § 5.2.3 of the partnership agreement, defendant was responsible for the mortgage payments until the properties were sold. Further, because defendant improperly remortgaged the buildings to his benefit only, the trial court did not clearly err in awarding plaintiff \$11,384.18.² Defendant cannot be entitled to monies generated as a result of his breach of his fiduciary duties.

With respect to the \$4,500 awarded by the trial court for the appraisal fee, we find that this award was error because the appraisal fee for the remortgaging was waived and returned to defendant. Therefore, the waiver of the appraisal fee left defendant with a zero balance. However, because defendant did deduct this amount, the trial court did not err in awarding this amount back to plaintiff. Defendant clearly cannot deduct an item that was returned to him and he could not properly deduct an item where he was not entitled to remortgage the properties in the first place. Therefore, we affirm the award of \$4,500 to plaintiff for the appraisal fee as not being inequitable under these facts.

No. 189458

IV

Plaintiff first argues that defendant breached his fiduciary duty and misallocated the \$1,000,000 of the sales transaction for the two buildings and the medical practice. We agree with plaintiff that defendant breached his fiduciary duty under the partnership agreement and that he misallocated the sales proceeds. Therefore, the trial court clearly erred in ruling that plaintiff’s claim that defendant misallocated the proceeds from the sale was not supported by the evidence.

According to the May 11, 1994 purchase agreement, the purchasers paid defendant \$325,000 for the assets of the medical practice, \$75,000 for defendant’s covenant not to compete, and \$600,000 for the two buildings. Plaintiff asserts that these amounts are erroneous because defendant was awarded all of the stock of his medical practice in the judgment of divorce, and it was to his benefit to skew the value of the medical practice in his favor. The trial court also noted that defendant’s “actions required careful scrutiny at the time of the sale since the value of the practice might have been skewed in his favor.” Plaintiff notes that according to defendant’s corporate tax return for July 1, 1993, through June 30, 1994, defendant’s medical practice had only \$63,318 in total assets. Therefore, the selling

price of \$325,000 is grossly inflated by defendant where he valued the assets of the medical practice at \$325,000 just one month before listing his medical assets at \$63,318 on his corporate tax return. Because only defendant would receive any monies from the sale of the medical practice, he was certainly motivated to allocate a portion of the sale price of the buildings to the medical practice, which would conflict with his fiduciary duties to plaintiff to sell the properties at market value and at an arm's length transaction.

Plaintiff also questions the \$600,000 purchase price allocated to the two buildings where the buildings had been recently appraised at \$765,000. The buildings were appraised at \$765,000 when defendant refinanced them. Pursuant to § 5.6 of the partnership agreement, defendant was required to sell the buildings at an arm's length transaction and at market value. Clearly, defendant did not sell the buildings at market value³ and was motivated to skew the value of the medical practice in his favor. Therefore, the trial court did not err in finding that defendant breached his fiduciary duty under the partnership agreement.

However, we must disagree with the trial court's finding that defendant did not misallocate the proceeds from the sale of the buildings and his medical practice. The evidence presented clearly shows otherwise. Having found that defendant breached his fiduciary duty by not selling the building at market value, defendant cannot then profit thereby. Therefore, we believe the equitable result is to award plaintiff \$82,500 for this breach of fiduciary duty. This amount represents one-half of the amount of the difference between the assessed value (\$765,000) and the selling price (\$600,000).

We also find that defendant misallocated the \$600,000 when he deducted certain amounts that should not have been as set forth in the partnership agreement. As set forth in § 6.4, net proceeds includes the gross sale price of the property, less the amount of the mortgage on the date of sale. Defendant correctly deducted \$93,658.17 paid to Michigan National Bank for the balance of the mortgage, and \$53,955 for other expenditures not challenged by plaintiff. However, defendant improperly deducted the road and sewer assessments and the trial court properly awarded plaintiff her amount with respect to these assessments (see Issue III, *supra*). Defendant also deducted \$405,024.98 to National Bank of Detroit to pay off the mortgage on the two buildings sold. This was improper because defendant used \$221,874 of the \$600,000 to pay off the mortgage on the third unsold building. This was not an allowable deduction from the net proceeds of the sale of the two buildings because the third building was not sold. Defendant breached his fiduciary duty under the terms of the partnership agreement when he used the proceeds from the sale of the two buildings to pay off the third unsold building, thereby reducing the amount of proceeds owed to plaintiff.

Accordingly, we believe that the proper distribution of proceeds should have been: \$93,658.17 to Michigan National bank for the mortgage on the first building, \$162,516.48 to National Bank of Detroit for the mortgage on the second building, and \$53,955 for other various costs not contested by plaintiff, for a total of \$310,129.65. The net proceeds total \$293,962.65, which represents the gross proceeds from the sale of the buildings (\$604,092.30) less the allowable distributions (\$310,129.65). Plaintiff is entitled to one-half of the net proceeds (\$146,981.32) less the amount received (\$21,357.53) for a total of \$125,623.79.⁴

Therefore, we find that the trial court erred in failing to award plaintiff the amount she was owed pursuant to § 6.4 of the partnership agreement (50% of the net proceeds resulting from the sale as net proceeds is defined in the partnership agreement). On remand, the trial court is to award plaintiff a total of \$208,123.79 (\$125,623.79 plus \$82,500).

Plaintiff also contends that she is entitled to \$110,500 as one-half of the amount used to pay off the mortgage on the third unsold building, which mortgage amount was \$221,000, since defendant improperly paid off the mortgage with proceeds from the sale of the two buildings. However, we have already found that defendant improperly deducted \$221,000 from the proceeds and eliminated that amount from the proper deductions of the sale of the two buildings. Moreover, plaintiff will be entitled to one-half of the net proceeds of the sale of the third building. Since there is no longer a mortgage on the third building, the net proceeds will be significantly higher. That is, there will be no mortgage to deduct from the sale proceeds. Therefore, there will be no windfall to plaintiff or defendant. Plaintiff will receive one-half of the net proceeds at the time of the sale of the building as provided for in the partnership agreement.

Plaintiff also argues that she is entitled to \$22,280.95 for other expenses that defendant improperly deducted. However, plaintiff makes no citation to the record to support her claims. Plaintiff cannot leave it to this Court to search the lower court record to find support for her argument. Therefore, we deem that this argument is abandoned. We cannot award plaintiff over \$22,000 where she offers no support for this amount.

V

Lastly, plaintiff argues that the trial court erred in denying her request to be reimbursed for approximately \$3,900 in medical expenses incurred on behalf of the children.

The trial court ruled that plaintiff had not sustained her burden of proof for medical bills, and that, except for emergencies, the parties were required to consult with each other before medical expenses were incurred. The judgment of divorce specified the following with respect to medical expenses for the children:

IT IS FURTHER ORDERED AND ADJUGED that Defendant shall be responsible for and shall pay the reasonable and necessary costs of all hospital, medical, dental (including orthodontia), prescription drug, optical, psychological and psychiatric care for the minor children of the parties. The Defendant shall maintain and pay for comprehensive Blue Cross/Blue Shield hospital and medical insurance (or its equivalent) covering the minor children. The parties shall consult with one another regarding non-emergency medical treatment for the minor children, including orthodontic care. The parties shall cooperate in obtaining and providing such receipts, bills, and insurance forms as may be necessary for tax or insurance purposes. The Defendant's obligation with respect to said children shall continue until said children have graduated from college, notwithstanding the fact that they have attained the age of majority.

We find that the trial court did not err in denying plaintiff's request for reimbursement of medical expenses. The trial court's findings that plaintiff had not consulted with defendant before the medical expenses were incurred and that plaintiff had not sustained her burden of proof are not clearly erroneous. Plaintiff has failed to provide any evidence that she complied with the judgment of divorce before incurring the medical expenses. Accordingly, the trial court's ruling in this regard was proper.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff may tax costs in Docket No. 187946 only. No taxable costs pursuant to MCR 7.219 in Docket No. 189458, neither party having prevailed in full.

/s/ Kathleen Jansen

/s/ Richard I. Cooper

¹ Additionally, the judgment of divorce set the rate of alimony at \$4,000 a month for a period of 120 months, subject to petition of modification of the amount, but not the duration, of the payments.

² We note that there is a ten-cent discrepancy between the trial court's award to plaintiff and the amount actually paid to the bank.

³ Defendant relied upon the assessment value of \$765,000 when he remortgaged the two buildings, so his claim that the buildings were sold at only \$600,000 is highly self-serving. Defendant also had four more years under the partnership agreement in which to sell the buildings. Thus, there was no rush for defendant to sell the buildings. This evidence certainly indicates a non-established "fair market value" for the two buildings sold.

⁴ This amount differs from the amount proffered by plaintiff in her brief because her figures do not account for the deduction of the mortgages remaining on the two sold buildings. These deductions are proper pursuant to the partnership agreement.