STATE OF MICHIGAN

COURT OF APPEALS

ROBERT LEONARD SAIN,

Plaintiff-Counterdefendant-Appellant,

V

BARBARA-JEAN BUTLER SULLIVAN,

Defendant- Counterplaintiff-Appellee.

UNPUBLISHED
December 9, 2003

No. 242606
Washtenaw Circuit Court
LC No. 00-000412-DM

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order denying plaintiff's motion for reconsideration of a consent judgment in this divorce action. On appeal plaintiff argues that the trial court abused its discretion when it did not permit plaintiff to offset his expenses, ordered plaintiff to pay defendant an agreed upon monetary adjustment to the marital estate in cash, non-qualified, non-tax-deferred funds, rather than in qualified, tax-deferred funds, and awarded defendant attorney fees. Because we find plaintiff's arguments unpersuasive on the issues, we do not find an abuse of discretion. We affirm and remand.

Plaintiff first argues that the trial court abused its discretion when it refused to permit plaintiff to offset his expenses for the period of October 2000 through April 2001. While plaintiff's brief alleges the trial court erred in disallowing his submission of "family expenses" paid "pursuant to the temporary order," we are left unclear regarding whether plaintiff challenges the trial court's order with respect to its disallowance of family expenses claimed "for the period October 2000 through April, 2001," or if he also challenges the deletion of plaintiff's expenses claimed for taxes, life insurance, charity, and medical. We could deem the issue abandoned since plaintiff failed to sufficiently brief the issue before this Court. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). However, since the issue is one of law and the record is factually sufficient on the matter, we will review the merits of the issue despite the nonconforming brief. *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 337; 512 NW2d 74 (1994).

"The initial question whether contractual language is ambiguous is a question of law." *Brucker v McKinlay Transport (On Remand)*, 225 Mich App 442, 447-448; 571 NW2d 548 (1997). "If the contractual language is clear and unambiguous, its meaning is a question of law,"

and "[q]uestions of law are reviewed de novo on appeal." *Id*. However, "[w]here the contractual language is unclear or susceptible to multiple meanings, interpretation is a question of fact." *Id*. "The factual findings of a trial court in a divorce case are to be reviewed for clear error. A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been committed." *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990).

We find that the trial court correctly disallowed plaintiff from claiming setoffs for the period of October 2000, through April 2001, albeit for the wrong reasons. The trial court held as follows:

> The court disallows any of Plaintiff's additional claimed family expenses for the period October 2000 through April 2001. Plaintiff has waived such expenses, in part, by failing to follow this Court's Order to timely provide such information at the end of each month, some expenses are clearly not family expenses, and Plaintiff's delay in providing a list of proposed expenses to Defendant, without supporting evidence, prejudiced the Defendant to timely and effectively contest the claimed expenses.

The parties' July 23, 2001 settlement agreement unambiguously states that plaintiff would pay defendant $16,699 unless the parties otherwise agreed, which they did not do. Our Supreme Court has held that an unambiguous contract reflects the parties' intent as a matter of law. Therefore, because the July 23, 2001 settlement agreement does not require the parties to provide each other with accountings for the period of October 2000 through April 2001, or that setoffs would be given, the parties are bound by their agreement that plaintiff would pay defendant $16,699 for the period before entry of the settlement agreement.

Also, we recognize that this Court has held that property divisions reached by the consent of the parties, and finalized in writing or on the record, cannot be modified by the court. *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999). The court is required to uphold such settlements and cannot set them aside absent fraud, duress, or mutual mistake. *Id*. "However, where any property settlement is ambiguous, the court has inherent power to interpret and clarify its terms," so long as the clarification does not change the substantive rights of the parties. *Bers v Bers*, 161 Mich App 457, 464; 411 NW2d 732 (1987). However, this Court does not construe "incompleteness to be an ambiguity," and a court may not make a new contract for the parties by attempting to clarify ambiguities where none exist. *Marshall v Marshall*, 135 Mich App 702, 709-711; 355 NW2d 661 (1984).

Neither party argues that the July 23, 2001 settlement agreement is not binding. The July 23, 2001 agreement states that the parties would continue to split the marital expenses of the familial home in the sixty-eight percent/thirty-two percent ratio "per the [c]ourt [o]rder" until plaintiff moved out of the familial home, and that "either party had the right to petition the [c]ourt for resolution of any dispute as to what is to be included/excluded." This Court has held that "[t]he primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349-350; 605 NW2d 360 (1999). The plain language of the July 23, 2001 settlement agreement unambiguously evinces the parties' intent for the trial court to resolve any disputes regarding what constitutes

marital expenses under the terms of the February 16, 2001 temporary order for the period *after* the parties entered the July 23, 2001 settlement agreement.

Under the terms of the agreement plaintiff was not entitled to claim setoffs for the period October 2000 through April 2001. Our Supreme Court has held that where the language of a contract is unambiguous, it must be construed and enforced as written, for "an unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Quality Products v Nagel Precision*, 469 Mich 362, 375; 669 NW2d 812 (2003). As a matter of law, the language of the July 23, 2001 settlement agreement does not provide plaintiff with the ability to claim a thirty-two percent setoff for marital expenses incurred during the period of October 2000 through April 2001, or June through July 23, 2001.

We affirm the trial court's ruling disallowing plaintiff from claiming marital expenses for the period of October 2000 through April 2001 because the trial court "reached the right result, albeit for the wrong reason." *Griffey v Prestige Stamping, Inc*, 189 Mich App 665, 669; 473 NW2d 790 (1991). However, because the trial court allowed defendant to claim a setoff for family expenses incurred during that period, and allowed both parties to claim setoffs for the period of June through July 23, 2001, we remand the case to the trial court for an order requiring plaintiff to pay defendant the sum of $16,699, pursuant to the July 23, 2001 settlement agreement, with no setoff for either party.

Plaintiff next argues that the trial court abused its discretion in holding that plaintiff had to pay defendant a monetary adjustment to the marital estate in cash, non-qualified, non-tax-deferred funds, rather than in qualified, tax-deferred funds. The parties agreed that plaintiff would make a payment of $72,450 to equalize the amounts awarded to each party after the distribution of certain assets from the marital estate. However, in the July 23, 2001 settlement agreement, beside the typewritten portion entitled "C. Marital Property" discussing the cash adjustment to be made in order to equalize the property, there is a handwritten notation that states "from non-qualified funds. No. To be decided later." Our review of the record reveals that apparently this point had not been discussed further by the parties. In any event, the trial court's April 16, 2002 opinion states that defendant argues plaintiff "has failed to pay [d]efendant the cash adjustment of $72,450.00 as agreed in the settlement agreement of the parties." The trial court ordered plaintiff to remit such payment to defendant on or before April 30, 2002. In its May 1, 2002 adoption of the consent judgment prepared by defendant, the trial court stated that plaintiff must make a "cash adjustment."

Now, plaintiff argues that he should be able to pay in tax-deferred funds. However, plaintiff himself admits that allowing such payment would result in defendant having to bear the tax burden, or defendant's having to leave the monies in an IRA or similar account in order to avoid the taxes and penalties. As such, plaintiff admits that if he were to pay in tax-deferred funds, plaintiff would effectively receive a sum less than the agreed upon amount. If plaintiff paid in tax-deferred funds, he would have to pay an amount higher than the adjustment amount of $72,450 in order for defendant to receive a sum certain of $72,450 in cash. Because this is the case, contrary to plaintiff's assertions, it is plaintiff's proposition, rather than the trial court's holding, that would have the effect of changing the substantive rights of the parties. Accordingly we find that the trial court's ordering plaintiff to pay the amount in cash upholds the parties' agreement, does not change the parties' substantive rights, and is not an abuse of discretion.

Finally, plaintiff argues that the trial court abused its discretion in awarding defendant attorney fees because defendant's ability to sustain her legal fees is at least equal, if not greater, than plaintiff's ability. This Court reviews "a trial court's decision to award attorney fees for an abuse of discretion." *Gates v Gates*, 256 Mich App 420, 437-438; 664 NW2d 231 (2003). "An abuse of discretion occurs only where the result 'is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Id*. at 438.

The trial court based its award of attorney fees for the period of August 24, 2001 through January 31, 2002 on two findings: (1) that there is a gross discrepancy between the parties' separate incomes and estates demonstrating a showing of necessity or need sufficient to award her attorney fees and, (2) that plaintiff's actions in failing to prepare the judgment of divorce by August 24, 2001 were clearly unreasonable because they caused the case to be dismissed for lack of progress and necessitated defendant's preparation of a motion to reinstate and a proposed judgment. The court also found that defendant was forced to file motions to require plaintiff to pay court-ordered family expenses.

With respect to the trial court's holding that defendant has demonstrated a showing of necessity or need sufficient to support an award of attorney fees, MCR 3.206(C) provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay.

Also, this Court has held that "[a]ttorney fees in a divorce action are not recoverable as of right," and that "[a]ttorney fees and costs are to be awarded only where necessary to preserve the party's ability to carry on or defend the action." *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001).

Defendant did not allege sufficient facts to show that she could not pay all or part of her attorney fees and expenses during the period of August 24, 2001 through January 21, 2002, or that plaintiff was able to pay them. At the hearing on January 10, 2002, defendant alleged that the parties' 2000 joint tax return showed that plaintiff received in excess of $100,000 in earned income, while defendant's earned income was only approximately $55,000. In an affidavit, defendant stated she had been unable to pay attorney fees incurred after August 24, 2001, when the judgment of divorce should have been entered, causing her to be in arrearage over $12,000.

Defendant's showing that plaintiff had an earned income of double that of defendant in 2000 and that defendant was delinquent in paying her attorney fees does not constitute a sufficient allegation of facts to show that defendant was unable to bear all or part of her attorney fees, or that plaintiff was able to pay them. Additionally, while the trial court was presented with itemized lists of the parties' expenses, defendant's itemized expense list was only for the months of June and July 2001, and thus is not indicative of her expenses or ability to incur attorney fees for the period August 24, 2001 through January 21, 2002. Accordingly, we find that the trial

court abused its discretion in awarding defendant attorney fees on the basis of her inability to sustain her legal fees.

We are then left with the contention that plaintiff should pay defendant's attorney fees based on his actions causing dismissal, delay, and compelling defendant to file additional motions. In *Milligan v Milligan*, 197 Mich App 665, 667-668; 496 NW2d 394 (1992), this Court reviewed an instance where defendant repeatedly fell into arrearages on child support payments, necessitating plaintiff to bring show-cause motions and retain an attorney. In holding that the trial court's award of attorney fees was not an abuse of discretion, this Court noted that "[d]efendant's repeated delinquencies forced plaintiff to take the present action, given his record of noncooperation with the friend of the court." *Id*. 671. In so ruling, this Court held that "[a]ttorney fees are authorized when the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation." *Id*. We find *Milligan*, instructive to the facts of this case where plaintiff's actions and inactions caused unreasonable delays, and obligated defendant to file additional motions. As such, we affirm the trial court's award of attorney fees for the period of August 24, 2001 through January 31, 2002.

Defendant also requests that this Court award her appellate fees and costs under MCR 3.206(C) and MCR 7.216(C)(1), alleging that she is unable to bear all or a portion of her expenses, and that the issues presented by plaintiff were meritless. Again, we do not believe defendant has presented sufficient factual allegations to show that she is unable to bear all or a portion of her expenses, and we deny her request on that basis. And, although we do not find in favor of plaintiff, we do not find his appeal vexatious and decline to award defendant appellate fees.

Affirmed and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio