

STATE OF MICHIGAN
COURT OF APPEALS

KATHRYN L. MYERS, f/k/a KATHRYN L.
WINKELHAUS,

UNPUBLISHED
October 26, 2010

Plaintiff-Appellant,

v

CHARLES E. WINKELHAUS,

No. 290542
Washtenaw Circuit Court
LC No. 00-000026-DM

Defendant-Appellee.

Before: BORRELLO, P.J., JANSEN and BANDSTRA, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's February 28, 2008 order denying her motion to modify spousal support. We reverse and remand for further proceedings related to the amount of spousal support.

On April 17, 2001, the parties were divorced pursuant to a judgment that contained the parties' settlement agreement concerning spousal support. In the settlement agreement, plaintiff agreed to pay defendant \$7,000 per month in spousal support until 2015 or defendant's death, whichever occurred first. Under the terms of the agreement, spousal support was nonmodifiable absent plaintiff's showing of disability, involuntary loss of employment, or inability to work.

At the time the parties entered into the settlement agreement, plaintiff worked as a senior executive at Borders Group Inc. On January 29, 2003, plaintiff moved to modify spousal support based on her involuntary job loss. Thereafter, on April 16, 2003, a referee hearing was held during which plaintiff indicated that she accepted a severance package after the company's chief executive officer (CEO) removed her from her former position and offered her a different position within the company. Plaintiff explained that the new position was inferior, that it had not previously existed in the company and could easily be eliminated, and that it involved significant responsibility in an area (Information Technology) in which she had no experience or aptitude. Consequently, plaintiff indicated that she was effectively forced out of the company. Defendant did not dispute plaintiff's characterization of her job loss at the hearing, which ended with the parties' negotiating a resolution of several financial issues, including the division of certain marital assets, in the context of plaintiff's changed employment situation and the resulting agreed-to modification of her spousal support obligation.

On August 1, 2003, the trial court entered a consent order regarding interim spousal support to reflect the parties' agreement entered into at the referee hearing. That order provides in relevant part:

Plaintiff ... shall pay spousal support to defendant ... directly, in the amount of two thousand eight hundred dollars (\$2,800) per month from May 1, 2003 through March 31, 2004.

* * *

All other provisions of the Judgment of Divorce and Settlement Agreement dated March 29, 2001 pertaining to spousal support are incorporated herein and remain the order of the court.

The matter of spousal support for defendant after April 30, 2004 is hereby referred to Referee Barbara Kelly for a full referee hearing, to be held in approximately February 2004. The hearing may occur sooner if either party has a material change in income, being deemed plaintiff earning over \$160,000 per year or defendant earning over \$75,000 per year. Each party shall report to the other if they secure a position paying in excess of such amount. Deferral of the hearing is without prejudice to each party's right to retroactive adjustment. [Emphasis added.]

The referee held a second, belated, hearing in September 2004, during which defendant, for the first time, argued that plaintiff was not entitled to modify spousal support because she voluntarily left her employment at Borders. In a report and recommendation to the trial court, the referee rejected defendant's argument and found that the first hearing and the August 2003 consent order reflected defendant's concession that plaintiff was involuntarily terminated by Borders. Based on plaintiff's new employment, the referee recommended plaintiff pay defendant \$3,900 per month in spousal support. Defendant objected, and, after a substantial delay, in 2006, the trial court held that the August 2003 consent order did not resolve with finality the issue of whether plaintiff suffered an involuntary loss of employment. After an evidentiary hearing, on February 28, 2008, the trial court found that plaintiff voluntarily left her employment at Borders and therefore, she was not entitled to modify spousal support; accordingly, the court ordered plaintiff to pay defendant \$226,000 in arrears. On appeal, plaintiff contends that the trial court erred by holding that the consent order on interim spousal support did not resolve with finality the issue of whether Borders involuntarily terminated her employment. We agree.

Settlement agreements and consent judgments constitute contracts and are governed by the legal principles applicable to the construction of a contract. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). The existence and interpretation of a contract involves a question of law that this Court reviews de novo. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). "In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning." *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). Where contractual language is unambiguous, we "must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law." *Id.* In order to modify a contract, there must be mutual assent to the modification and this requirement is satisfied "where a modification is established through clear and convincing

evidence of a written agreement ... establishing mutual agreement to waive the terms of the original contract.” *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 373; 666 NW2d 251 (2003); see also *Adell Broadcasting Corp v Apex Media Sales, Inc*, 269 Mich App 6, 11; 708 NW2d 778 (2005). Whether mutual assent to modify a contract exists is determined according to an objective standard. *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992). There must be clear and convincing evidence to support a finding of modification. *Quality Products & Concepts Co*, 469 Mich at 373.

The parties’ 2001 settlement agreement provides in relevant part that plaintiff’s:

spousal support obligation will be nonmodifiable, upward or downward, except that [plaintiff] may petition to decrease or terminate the alimony obligation in the event of her ... involuntary loss of employment ... which results in a reduction or loss of compensation.

As previously noted, the August 1, 2003, consent order provides in relevant part as follows:

Plaintiff ... shall pay spousal support to defendant ... directly, in the amount of two thousand eight hundred dollars (\$2,800) per month from May 1, 2003 through March 31, 2004.

* * *

All other provisions of the Judgment of Divorce and Settlement Agreement dated March 29, 2001 pertaining to spousal support are incorporated herein and remain the order of the court.

The matter of spousal support for defendant after April 30, 2004 is hereby referred to Referee Barbara Kelly for a full referee hearing, to be held in approximately February 2004. The hearing may occur sooner if either party has a material change in income, being deemed plaintiff earning over \$160,000 per year or defendant earning over \$75,000 per year. Each party shall report to the other if they secure a position paying in excess of such amount. [Emphasis added.]

We conclude that the parties’ 2003 consent order amounted to a modification of the original spousal support agreement and necessarily resolved the issue of whether plaintiff’s job loss was involuntary. The plain language of the consent order clearly changed plaintiff’s obligation regarding spousal support payments to defendant, providing that plaintiff pay a significantly reduced amount (\$2,800 per month, not \$7,000) from May 2003 to March 2004. It further provided that, thereafter, future spousal support would be determined at a referee hearing, according to the parties’ respective incomes. Although the order does not explicitly reference plaintiff’s termination, it necessarily indicates that the parties agreed that plaintiff suffered an involuntary loss of employment such that a modification could be petitioned for by plaintiff.¹

¹ We note further that the issue of the appropriate monthly spousal support amount to be paid by plaintiff was resolved by the August 1, 2003 consent order, as part of the parties’ overall (continued...)

To reiterate, the original spousal support agreement required plaintiff to pay \$7,000 per month and was nonmodifiable absent plaintiff's involuntary loss of employment. Plaintiff moved to modify her spousal support agreement and claimed that she suffered an involuntary job loss. The parties attended a referee hearing, addressing this and other financial issues, and entered into an agreement defining plaintiff's new spousal support obligation. Had the issue concerning the involuntary nature of plaintiff's job loss been contested, spousal support could not have been modified. Thus, the parties plainly agreed to modify plaintiff's spousal support obligation, and in doing so, they necessarily and undeniably agreed that plaintiff suffered an involuntary job loss. Defendant did not contest the involuntary nature of plaintiff's job loss and instead agreed to modify the original spousal support arrangement. The consent agreement provided terms for plaintiff's new spousal support obligation up until March 2004, and provided that plaintiff's future obligation would be determined at a second referee hearing, based on the parties' respective employment situations at the time of that hearing. The agreement does not contain any language indicating that spousal support would revert to \$7,000 per month absent plaintiff's showing involuntary termination at a later date.

Based on the record before us, we conclude that plaintiff has shown by clear and convincing evidence that the parties mutually agreed to modify her spousal support obligation and that, in doing so, the parties necessarily and conclusively agreed that plaintiff suffered an involuntary loss of employment. *Quality Products & Concepts Co*, 469 Mich at 373. Therefore, the consent order necessarily and conclusively resolved the question whether plaintiff was entitled to modification of the spousal support agreement based on an involuntary loss of employment. The trial court's determination otherwise was in error.

Given our holding with respect to the issue discussed above, we find it unnecessary to address plaintiff's remaining arguments presented for review. The issue of the appropriate amount of spousal support to be paid by plaintiff is to be decided by the trial court on remand considering this Court's instant decision and the language of the trial court's August 1, 2003 Consent Order For Interim Spousal Support and Other Matters.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Richard A. Bandstra

(...continued)

settlement of additional issues regarding the allocation of certain marital assets. The transcript of the April 16, 2003 hearing plainly reflects that defendant knowingly proceeded with the understanding that plaintiff's job loss was involuntary, and that the discussion, and ultimate resolution of the parties' other financial issues, was informed by and accounted for the resulting reduction of spousal support for the remainder of the term for which plaintiff was to pay support.