STATE OF MICHIGAN

COURT OF APPEALS

LAURI A. NEILL, f/k/a LAURI A. SCHMOKE, Plaintiff-Appellant,	UNPUBLISHED April 7, 2011
v	No. 294878 Manistee Circuit Court
RAYMOND E. SCHMOKE, M.D., Defendant-Appellee.	LC No. 02-011013-DM

Before: FITZGERALD, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order that denied, in part, her motion to enforce judgment and granted, in part, defendant's motion for relief from judgment. This appeal stems from a provision in the parties' consent judgment of divorce that provided for defendant to pay plaintiff $1,074,000 in exchange for her share of the parties' marital residence. We reverse and remand.

We review a trial court's decision to grant or reject relief from judgment for an abuse of discretion. *Fisher v Belcher*, 269 Mich App 247, 262; 713 NW2d 6 (2005). An abuse of discretion occurs when a trial court selects an outcome that lies outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The interpretation of divorce judgments and court rules are questions of law, which are subject to de novo review. *Holmes v Holmes*, 281 Mich App 575, 587; 760 NW2d 300 (2008); *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

The relevant provision from the judgment of divorce provided:

> IS FURTHER ORDERED AND ADJUDGED that Defendant shall pay to Plaintiff the sum of [$1,074,000] upon ***the sale of the marital premises*** or within five years of the entry of the judgment whichever occurs earlier, and said sum shall be considered a money judgment fully executable thereon after five years from the entry of this judgment. Upon sale of the property, all outstanding amounts owed for spousal support and the buy-out of Defendant's practice shall be fully satisfied from the proceeds of the sale. If Defendant receives an offer to purchase the home for less than $3.2 million, then he may approach Plaintiff suggesting a lesser cash sum, and Plaintiff intends to remain open to the possibility of less, especially if the property sells quickly. [Emphasis in original.]

The marital residence did not sell, and after five years, a money judgment was entered in favor of plaintiff for the amount above.[1] Defendant subsequently moved for relief from judgment, essentially attacking the above provision of the judgment of divorce. Defendant relied on contractual defenses—frustration of purpose and impossibility—to support his position. The trial court accepted the issue as framed by defendant and granted his motion on the grounds asserted by defendant.

However, once a provision in a judgment of divorce is reduced to a money judgment, the money judgment is fixed and not subject to modification. See *McMath v McMath*, 174 Mich App 576, 586; 436 NW2d 425 (1989), and *Corley v Corley*, 79 Mich App 499, 501-502; 261 NW2d 65 (1977). The trial court failed to analyze defendant's motion under the appropriate court rule with respect to the $1,074,000 money judgment, instead concentrating its analysis on whether relief should be granted from a provision in the judgment of divorce. This was erroneous because plaintiff sought to enforce the money judgment and, regardless of defendant's arguments, defendant sought relief from that money judgment. Thus, the trial court abused its discretion by granting defendant's motion from relief from the $1,074,000 money judgment; indeed, it considered the wrong judgment and misapplied the relevant law. *Bynum v ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002) ("[w]here the trial court misapprehends the law to be applied, an abuse of discretion occurs"). The money judgment, unlike the consent judgment of divorce, was not a contract and was not subject to the contractual defenses on which the trial court relied to grant relief.

Moreover, on this record, we conclude that defendant was not entitled to relief as a matter of law from the money judgment on any of the grounds specified in MCR 2.612(C)(1). A trial court may relieve a party from a final judgment "[o]n motion and on just terms," on the following grounds:

> (a) Mistake, inadvertence, surprise, or excusable neglect.
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> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
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> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
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> (d) The judgment is void.
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> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise

[1] A $125,000 money judgment was also entered in favor of plaintiff at that time for her share of defendant's medical practice.

> vacated; or it is no longer equitable that the judgment should have prospective application.
>
> (f) Any other reason justifying relief from the operation of the judgment. [MCR 2.612(C)(1).]

The record does not reveal that relief was warranted on grounds of mistake, inadvertence, surprise, or excusable neglect, because the plain language of the consent judgment of divorce made clear that the parties intended for the sum owed to plaintiff to become a money judgment after five years. MCR 2.612(C)(1)(a). Further, there was no newly discovered evidence presented and no evidence of fraud, misrepresentation, or other misconduct by plaintiff. MCR 2.612(C)(1)(b) and (c). Additionally, the judgment was not void. MCR 2.612(C)(1)(d). Moreover, the judgment had not been satisfied, released, or discharged; a previous judgment on which the money judgment was based had not been reversed or vacated; and money judgments do not have prospective application. MCR 2.612(C)(1)(e); see *Kalamazoo River Study Group v Rockwell Int'l Corp*, 355 F3d 574, 587 (CA 6, 2004). As such, the only remaining ground on which to grant defendant's motion would have been MCR 2.612(C)(1)(f).

> In order for relief to be granted under MCR 2.612(C)(1)(f), the following three requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice. [*Heugel v Heugel*, 237 Mich App 471, 478-479; 603 NW2d 121 (1999).]

As noted, subsections a through e were inapplicable. With respect to the second element, it is clear that plaintiff's substantial rights would be detrimentally affected if the money judgment were to be set aside. Indeed, the parties entered into a consent judgment of divorce wherein plaintiff specifically conveyed her interest in the marital residence to defendant. In exchange, plaintiff was to receive an express sum of money either when that property sold or after five years, whichever occurred earlier. After the five-year period passed, plaintiff had a fully executable money judgment. Plaintiff is entitled to receive the benefit of the contract she negotiated.

The trial court improperly modified the consent judgment of divorce, purportedly to rebalance the contractual equities struck by the parties. See *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005) ("[w]e reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions"). This case is somewhat analogous to *Zeer v Zeer*, 179 Mich App 622, 625; 446 NW2d 328 (1989), wherein we concluded that the opposing party's "substantial rights in the excess proceeds on sale of the marital residence were clearly quite detrimentally affected by [the trial court's] modification [of a judgment]." The trial court in the present case gave no regard to whether plaintiff's substantial rights would be detrimentally affected if the money judgment were to be set aside. *Heugel*, 237 Mich App at 478-479. Just as

in *Zeer*, 179 Mich App at 625, plaintiff's substantial rights in the $1,074,000 money judgment, transmuted from the judgment of divorce by passage of time, were detrimentally affected by the setting aside of the judgment.

With respect to the third element, the trial court, in discussing the doctrine of frustration of purpose, suggested that the collapse of the real-estate market in Michigan was an extraordinary circumstance. However, the consent judgment of divorce provided that the parties contemplated that the marital residence might not sell quickly, or even after several years, as evidenced by the inclusion of the five-year limit to sell that property, after which plaintiff's right to the $1,074,000 money judgment was to take effect. There is no indication that plaintiff took advantage of the marital relationship, as in *Heugel*, 237 Mich App at 481, or engaged in any other misconduct to obtain the money judgment.[2] "Generally, relief is granted under subsection f only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered." *Id.* at 479; see also *Altman v Nelson*, 197 Mich App 467, 478; 495 NW2d 826 (1992).

While the real-estate market downturn was unfortunate, it cannot be characterized as entirely unforeseeable or extraordinary. When parties make a deliberate, strategic decision to settle, they cannot be relieved from such a decision merely because their assessment of the consequences was incorrect. *United States v Bank of NY*, 14 F3d 756, 759 (CA 2, 1994). Moreover, two equally positioned parties negotiated the provision at issue in the judgment of divorce, which included a term that transmuted the sum owed to plaintiff into a money judgment after the passage of time. Absent any misconduct on the part of plaintiff, we are loath to set aside the money judgment. *Marshall v Marshall*, 135 Mich App 702, 712; 355 NW2d 661 (1984). We conclude that there was no "extraordinary circumstance" sufficient to allow the setting aside of the money judgment. *Heugel*, 237 Mich App at 478-479. Even assuming that the collapse of the real-estate market was an "extraordinary circumstance," it was insufficient to overcome the detrimental effect on plaintiff's substantial rights that would result by setting aside the money judgment. See *id*.

We note that there are public-policy considerations that favor the finality of judgments. See *Wayne Creamery v Suyak*, 10 Mich App 41, 51; 158 NW2d 825 (1968). After analyzing the applicable facts and law, we find that the trial court abused its discretion by granting defendant's motion.

Although not strictly necessary for our disposition of this appeal, we also note that the trial court misapplied the doctrines of frustration of purpose and impossibility. Because the

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[2] Further, we note that the marital residence was lost in foreclosure after defendant stopped making mortgage payments in 2008. The trial court found that this occurred because defendant was forced to take out a mortgage with unfavorable terms. However, it must be noted that defendant voluntarily increased his total debt at various points and purposefully took on various additional expenses.

money judgment was not executory and the decline of the real-estate market was not unforeseeable, the doctrine of frustration of purpose did not apply. See *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 134-135; 676 NW2d 633 (2003). With respect to the doctrine of impossibility, the trial court opined that defendant's age of 57 necessarily precluded him from satisfying plaintiff's $1,074,000 money judgment. However, even though defendant was entering the later stages of his career as a physician, he earned more than $290,000 each year from 2006 to 2008. Moreover, he has a substantial sum in a retirement account. "Subsequent events which in the nature of things do not render performance impossible, but only render it more difficult, burdensome, or expensive, will not operate to relieve the contractor." *Chase v Clinton Co*, 241 Mich 478, 484; 217 NW 565 (1928). There was no indication that defendant's earning potential would be reduced in the near future, other than by his desire to retire. The trial court erroneously used the doctrine of impossibility as a justification to grant defendant's motion. *Id.*

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

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Patrick M. Meter