STATE OF MICHIGAN

COURT OF APPEALS

CARLY N. DEMIL, Plaintiff-Appellee,	UNPUBLISHED October 20, 2015
v	No. 323205 St. Clair Circuit Court
ANDRE M. DEMIL, Defendant-Appellant.	LC No. 12-002376-DM

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

PER CURIAM.

In this case involving plaintiff's motion to compel compliance with a divorce judgment, defendant appeals by leave granted a June 16, 2014, circuit court order directing that the parties' 2011 and 2012 income tax refunds be equally split between the parties. For the reasons set forth in this opinion, we affirm.

I. FACTS

On June 14, 2013, the parties placed a settlement on the record in this divorce action wherein they agreed to divide the parties' 2012 joint federal income tax refund. Plaintiff's counsel indicated that the refund was "in the approximate amount of $2,372," which would be divided equally. Plaintiff's counsel informed the court that the parties had just signed the tax return that day and that the parties would divide the refund upon receiving a check from the Internal Revenue Service (IRS). When questioned by his attorney, defendant agreed with plaintiff's representations regarding the parties' agreement. Defendant also represented to the court on the record that he had disclosed "all property and all debt of which you have knowledge," and that he had disclosed all of his assets.

On September 9, 2013, the trial court entered a judgment of divorce that stated the following regarding the parties' 2012 federal tax refund:

> IT IS FURTHER ORDERED AND ADJUDGED that the parties shall equally divide any refund they receive from the 2012 Federal Tax returns [sic]. The Defendant shall provide proof of the refund received directly to the Plaintiff within one week of receipt.

On November 13, 2013, plaintiff filed a motion to compel defendant to comply with the terms of the judgment of divorce. Plaintiff argued that, after extensive conversations with the IRS, she was advised that the parties' federal tax refund for tax year 2012 was approximately $34,000 and that defendant used $23,000 of those funds to prepay his 2013 tax obligation. Plaintiff requested that the trial court enter an order requiring that the $34,000 tax refund be divided equally.

In response, defendant denied that the parties received an income tax refund in the amount of $34,000. Defendant argued that the parties' income tax returns had always included income from Nationwide Construction (Nationwide), a company owned by defendant's father, and that Nationwide tax return sums had always been paid to defendant's father and did not constitute income to defendant. Defendant asserted that that structure had been in place for estate planning and income tax purposes and that it had been fully disclosed during discovery.

At a May 2, 2014, evidentiary hearing, plaintiff testified that she signed what she believed to be the parties' 2012 tax return at the courthouse on June 14, 2013, immediately before the parties entered their settlement on the record. She testified the she did not review the form before she signed it and did not know the amount of the tax refund at that time. Plaintiff maintained that she did not receive a full copy of the tax return until September 2013 at which time she realized that the amount of the tax refund was $34,318 and that the tax return had been electronically filed in April 2013, a few months before the settlement had been placed on the record. Plaintiff testified that, according to the tax return, $23,000 of the $34,318 was applied toward defendant's 2013 tax debt. Plaintiff also testified that she did not file a joint tax return with defendant for tax year 2013 because she and defendant were divorced by that time. According to plaintiff, the parties' federal income tax refund had always been approximately $35,000. Plaintiff denied that a significant portion of those funds were always turned over to defendant's father.

Defense counsel attempted to question plaintiff regarding whether a portion of the tax refund constituted earnings related to defendant's ownership interest in a company called "RMD Holdings." Counsel stated that plaintiff had waived any entitlement to defendant's earnings connected to RMD Holdings. The trial court disallowed the line of questioning on the basis that the judgment of divorce spoke for itself and that the purpose of the hearing was to enforce the judgment of divorce. Defense counsel then asked plaintiff whether she had waived her claim to any portion of the tax refund that was related to defendant's interest in RMD Holdings. The trial court refused to allow plaintiff to answer the question on the basis that it called for a legal conclusion. Plaintiff admitted that when she signed the judgment of divorce, she waived any interest that defendant possessed in RMD Holdings.

Defendant testified that he was employed by RMD Holdings and earned approximately $75,000 annually in W-2 income. He testified that he also had an ownership interest in the company. According to defendant, plaintiff did not sign the parties' 2012 income tax return on the morning before their settlement was placed on the record. Rather, he claimed that she signed a form to correct a mailing address. Defendant maintained that neither party had signed the tax return because it had been filed electronically by the parties' accountant. Defendant testified that, historically, when the parties received a tax refund, he wrote a check to his father for a portion of the refund. Defendant maintained that his ownership interest in RMD Holdings did

not generate income and that he gave his father a portion of his income tax refund on the advice of his accountant for income tax purposes. Defendant testified that he turned over to his father any income received as a result of defendant's ownership interest in the company. Defendant acknowledged that he received a check in the amount of $11,318, the difference between the $34,318 refund and the $23,000 payment toward his future tax debt.

On cross-examination, defendant admitted that according to the 2012 tax return, $23,000 of the tax refund was to be applied to his tax obligation for tax year 2013. Defendant also admitted that he never had a conversation with plaintiff regarding whether she agreed to apply $23,000 toward his future tax obligation. Defendant further admitted that he had a tax refund check for tax year 2011 in the amount of approximately $11,000. Defendant testified that he did not consider the check to be marital property because "it was for losses from RMD Holdings carried back in 2012."

Defense counsel then called Kevin McCarthy, RMD Holdings' accountant, to testify. The trial court refused to allow McCarthy to testify regarding which portion of the 2012 tax refund directly resulted from defendant's business interest. Defense counsel argued that the judgment of divorce provided that plaintiff waived any claim to defendant's interest in RMD Holdings. The trial court stated that plaintiff did not waive her interest in the personal income tax refund and that if the parties had intended to apply $23,000 toward future tax debt, that matter should have been placed on the record.

On June 16, 2014, the trial court issued an opinion and order granting plaintiff's requested relief, reasoning in pertinent part as follows:

> $11,318 Tax Refund received by Defendant
>
> Although the language contained in the Judgment of Divorce does not mirror the exact language that was placed on the record at the June 14, 2013 hearing, the Court finds the Judgment language generally consistent with and therefore an accurate characterization of the language that was placed on the record. After that hearing took place, both parties also had the opportunity to review the Judgment. Both approved it as to form and content. The Court therefore finds that the tax refund received by the Defendant, in the amount of $11,318, shall be divided equally between the parties. . . .
>
> $23,000 from tax overpayment that was applied to Defendant's 2013 estimated personal taxes
>
> When the parties placed their settlement on the record on June 14, 2013, Defendant clearly testified that he had disclosed all assets of which he had knowledge. He later testified (at the May 2, 2014 evidentiary hearing) that he knew $23,000 of the parties' 2012 tax overpayment would be applied to his 2013 personal taxes but that he had not discussed this with Plaintiff. Plaintiff testified that she learned of the $34,318 tax overpayment and the $23,000 payment towar[d] Defendant's 2013 estimated personal taxes in September of 2013, after

she requested and received a copy of the parties' joint 2012 Federal income tax return from the accountant.

A tax overpayment, which a taxpayer can either elect to have refunded or apply against a subsequent year's tax liability, is clearly an asset – yet Defendant failed to disclose the amount of the overpayment – and $23,000 he would be receiving from it – to Plaintiff. By failing to do so, he committed a fraud on the Plaintiff. By representing to the Court at the June 14, 2013 hearing that he had disclosed all assets of which he had knowledge, he committed a fraud on the Court.

It is difficult to believe that, had it been disclosed to her, Plaintiff would have agreed to apply $23,000 of a significant tax overpayment to Defendant's estimated personal income tax liability for the following year, the year during which they were to be divorced and for which they would not be filing a joint tax return. Had Plaintiff known Defendant had done this, she would likely have insisted she be paid one-half of the $23,000 or, at the very least, be awarded additional property of equivalent value. . . .

The Court therefore finds that Plaintiff is entitled to one half of $23,000 . . . .

2011 Income Tax Refund

Plaintiff also learned after she filed her Motion to enforce the Judgment of Divorce that Defendant is holding a check for the parties' 2011 joint income tax refund in an amount of approximately $8000. As this tax refund was never mentioned at the June 4, 2013 settlement hearing, the Court is left to conclude that Defendant knew about it and Plaintiff did not. This income tax refund should also be divided equally between the parties. . . .

Defendant filed a motion for reconsideration, arguing that both plaintiff and her attorney were aware during the course of this proceeding that defendant owns stock in RMD Holdings, which operates under the name Nationwide. Defendant contended that both parties, their attorneys, and their tax preparer, Michael J. Dekoski, met via speakerphone in a conference room immediately before the settlement was placed on the record. Defendant relied on Dekoski's affidavit, wherein Dekoski asserted that he informed all of the participants in the conference about the credit payment to the following year's tax liability for "[defendant's] RMD/Nationwide . . . interest and income. . ." and a payment to defendant's father.

Dekoski's affidavit further stated that he explained to plaintiff and her attorney that the parties' net tax refund would be approximately $2,372, but that when Nationwide's CFO prepared defendant's 2012 tax analysis, the amount ended up being $3,600. Dekoski averred that the parties understood during the conversation that their net tax refund was expected to be approximately $2,372 and that that was why plaintiff agreed to split that amount. Defendant therefore argued that there was no intent to mislead plaintiff or her attorney and that the trial court erred by excluding evidence regarding the manner of calculating the parties' net tax refund.

The trial court denied defendant's motion, stating that defendant merely reasserted the same arguments addressed in the June 16, 2014, order.

Defendant applied for leave to appeal the trial court's order, arguing that the court erred in failing to enforce the parties' agreement as stated on the record by relying on the "2012 Tax Refund" clause in the judgment of divorce, by excluding evidence regarding the manner of calculating the 2012 net tax refund, by ordering that the parties split the 2011 tax refund, by concluding that defendant committed fraud, and by denying defendant's motion for reconsideration. This Court granted defendant's application for leave to appeal on February 26, 2015.[1]

II. ANALYSIS

Although defendant presents seven separate issues for review in his brief on appeal, all of the issues essentially assert the same thing—i.e. that the circuit court erred in arriving at its interpretation of the clause in the parties' judgment of divorce that governed the 2012 tax refund.

"Where a judgment of divorce is entered pursuant to an agreement of the parties, the agreement is a contract, which this Court will enforce absent a showing of factors such as fraud or duress." *Thornton v Thornton*, 277 Mich App 453, 456; 746 NW2d 627 (2007). While a trial court's overall interpretation of a contract is a matter of law that we review de novo, *id.*, "the meaning of an ambiguous contract is a question of fact that must be decided by" the trial court, *Klapp v United Ins. Group Agency, Inc.*, 468 Mich 459, 470-471; 663 NW2d 447 (2003). "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made." *Chelsea Investment Group LLC v Chelsea*, 288 Mich App 239, 251; 792 NW2d 781 (2010). We will "give deference to the trial court's superior ability to judge the credibility of the witnesses who appeared before it." *Glen Lake–Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004) (internal quotation marks and citation omitted).

"A contract is ambiguous when its words may be reasonably understood in different ways." *Hellebuyck v Farm Bureau Gen Ins Co of Michigan*, 262 Mich App 250, 254; 685 NW2d 684 (2004). A contract may also be latently ambiguous "when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts create the necessity for interpretation or a choice among two or more possible meanings." *Shay v Aldrich*, 487 Mich 648, 668; 790 NW2d 629 (2010) (internal quotation marks and citations omitted).

In this case, the pertinent language of the consent judgment of divorce read as follows:

> IT IS FURTHER ORDERED AND ADJUDGED that the parties shall equally divide any refund they receive from the 2012 Federal Tax returns. The

[1] *Demil v Demil*, unpublished order of the Court of Appeals, entered February 26, 2015 (Docket No. 323205) (JANSEN, J., would have denied leave to appeal).

> Defendant shall provide proof of the refund received directly to the Plaintiff within one week of receipt.

There was a latent ambiguity in this language that necessitated the circuit court's interpretation. *Shay*, 487 Mich at 668. Specifically, the amount of the refund from the 2012 tax returns became unclear. The record indicates that at the time the judgment was entered, plaintiff understood that the amount of the refund was approximately $2,372; later, IRS documents showed that the actual amount of the refund was over $34,000. Accordingly, it was unclear which amount represented the "refund" referenced in the judgment and the circuit court properly proceeded to hold an evidentiary hearing to consider extrinsic evidence to interpret the meaning of the phrase. See e.g. *Klapp*, 468 Mich at 470-471. Defendant's multiple arguments in his brief on appeal essentially boil down to challenging the circuit court's factual findings that formed the basis for its interpretation of the contract. As noted, we will not find factual error unless we are left with a "definite and firm conviction that a mistake was made." *Chelsea*, 288 Mich App at 251.

A. DIVISION OF 2012 TAX REFUND

The record indicates that, at the time the judgment was entered, plaintiff understood that the 2012 tax refund was about $2,300. Plaintiff later testified at the evidentiary hearing that she was unaware that the tax refund was actually $34,318 and that it had been electronically filed a few months before the settlement was placed on the record. Plaintiff denied that a large portion of the parties' tax refunds were historically turned over to defendant's father. In contrast, defendant testified that the parties did not sign the tax return on the day that the agreement was entered on the record and that the parties historically gave a large portion of their refund to his father. Defendant admitted that, with respect to his 2012 refund, he received a tax refund check in the amount of $11,318 in addition to a $23,000 credit for tax year 2013. Defendant acknowledged that he never discussed with plaintiff whether she agreed to apply anything to his future tax obligations.

The trial court did not clearly err in concluding that, under the terms of the consent agreement, the parties were to divide the 2012 tax refund of $34,318 evenly. The trial court's decision was based on its factual findings including a finding that plaintiff was more credible than defendant. While defendant asserts that plaintiff was aware of the total amount of the 2012 tax refund when the divorce judgment was entered, defendant was present when the parties' consent agreement was placed on the record and he did not correct plaintiff when she indicated that the refund was for approximately $2,300. Rather, defendant represented that this was a correct characterization of the refund and that he did not have any other assets to disclose to the court. Defendant's conduct at the settlement hearing at best amounted to an omission. Given defendant's lack of candor, the trial court could have found that plaintiff was more credible than defendant and we will not second-guess the trial court's assessment of the weight and credibility to be assigned to plaintiff's testimony. *Glen Lake Ass'n*, 264 Mich App at 531.

Alternatively, the circuit court had authority to amend the parties' consent agreement and order the parties to divide the $34,318 based on its finding that defendant perpetrated fraud upon plaintiff and the court. "Michigan's contract law recognizes several interrelated but distinct common-law doctrines—loosely aggregated under the rubric of 'fraud'—that may entitle a party to a legal or equitable remedy if a contract is obtained as a result of fraud or misrepresentation."

Titan Ins Co v Hyten, 491 Mich 547, 555; 817 NW2d 562 (2012). "These doctrines include actionable fraud, also known as fraudulent misrepresentation; innocent misrepresentation; and silent fraud, also known as fraudulent concealment." *Id*. The elements of actionable fraud are as follows:

> (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he [sic] thereby suffered injury. [*Id*. (quotation marks and citations omitted).]

Alternatively, under the doctrine of innocent misrepresentation,

> if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby either at law or in equity. [*Id*. at 556 (quotation marks and citations omitted).]

Finally, the doctrine of silent fraud "holds that when there is a legal or equitable duty of disclosure, [a] fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud." *Id*. at 557 (quotation marks and citations omitted).

In this case, the court did not clearly err in finding that defendant perpetrated a fraud upon plaintiff at the time the agreement was entered. As noted above, defendant was present when the consent agreement was placed on the record. Plaintiff represented that she believed that the 2012 tax refund was for approximately $2,300 and that the parties had signed the tax return that day when in fact the return had been submitted several months ago and the refund was worth over $34,000. Defendant was present and did not dispute these assertions and misrepresented to the court that he had disclosed all of his assets. Furthermore, defendant admitted at the evidentiary hearing that he never discussed with plaintiff whether she agreed to allow him to credit $23,000 of the 2012 tax refund to his 2013 tax year. The evidence supported that, at best, defendant omitted critical information about the 2012 tax refund.

It was apparent at the settlement hearing that plaintiff and the court both were under the impression that the value of the 2012 tax refund was approximately $2,300 when it fact it was for over $34,000. Defendant did not disclose this to the court and defendant failed to disclose the true amount of the refund even after it was issued. Rather, the true amount of the refund only came to light apparently because plaintiff inquired of the IRS. On this record, the circuit court did not err in finding that there was "clear, satisfactory and convincing evidence" of fraud. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008) (quotation marks and citations omitted); *Titan Ins Co*, 491 Mich at 555.

Defendant also argues that, in dividing the 2012 tax refund, the trial court abused its discretion in excluding evidence "as to the parties' net-net-tax refund history, or tax treatment arising from or related to [defendant's] separate property interest in his father's business. . . ." on relevance grounds. This argument lacks merit. The consent agreement provided that the parties would divide the 2012 refund evenly. Defendant cannot dispute that the total amount of the refund was over $34,000. Accordingly, once the court determined the total amount of the refund, the accounting methods used to arrive at that figure were irrelevant and the court did not abuse its discretion in excluding the proffered evidence.

In short, the circuit court did not clearly err in its factual findings underlying its interpretation of the consent agreement including its finding of fraud, it did not abuse its discretion in excluding defendant's proffered evidence, and it did not it did not legally err in its division of the $34,318. *Thornton*, 277 Mich App at 456; *Klapp*, 468 Mich at 470-471.

B. DIVISION OF 2011 TAX REFUND

At the evidentiary hearing, defendant admitted that he had a 2011 tax refund check for $11,000 and agreed that he failed to disclose the funds as marital property. Defendant failed to disclose this property to the circuit court at the settlement hearing after explicitly informing the court that he had disclosed all of his assets. The court ordered that the parties split the $11,000 check evenly. Defendant contends that the court erred in doing so.

In ordering that the $11,000 be equally divided between the parties, the circuit court essentially reformed the parties' consent agreement to include the 2011 tax refund in addition to the 2012 refund. At the settlement hearing, defendant did not disclose the 2011 $11,000 tax refund check. Instead, defendant represented to the court that he had disclosed "all property and all debt" of which he had knowledge. Irrespective of defendant's belief that the check was not marital property, defendant misled the court when he stated that he had disclosed all of his assets. In dividing the 2011 refund, the court indicated that defendant failed to mention the 2011 refund and that defendant "knew about it and Plaintiff did not." Having reviewed the record, we are not left with a definite and firm conviction that this finding was a mistake and the finding would have allowed the circuit court to reform the agreement and divide the 2011 refund under any of the three doctrines discussed above. See *Titan Ins Co*, 491 Mich at 555. At best, defendant's conduct amounted to innocent misrepresentation; alternatively, the facts supported the circuit court finding that defendant perpetrated actionable or silent fraud in failing to disclose the asset. *Id*. In sum, the circuit court did not err in dividing the 2011 tax refund.[2]

[2] Given that defendant has failed to show error, contrary to his assertion on appeal, the circuit court did not abuse its discretion in denying defendant's motion for reconsideration. MCR 2.119(F).

Affirmed. Plaintiff may tax costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Donald S. Owens