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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **BERNARD GARCIA,**

3 Petitioner-Appellant,

4 v.

NO. 32,916

5 **JODEANE R. GARCIA,**

6 Respondent-Appellee.

7 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

8 **Sylvia F. LaMar, District Judge**

9 Mary Jo Snyder

10 Santa Fe, NM

11 for Appellant

12 Jodeane R. Garcia

13 Santa Fe, NM

14 Pro Se Appellee

15 **MEMORANDUM OPINION**

16 **WECHSLER, Judge.**

1 {1} Petitioner Bernard Garcia (Husband) appeals from the district court's order
2 denying him certain relief in connection with the division of property and allocation
3 of debts with Respondent Jodeane R. Garcia (Wife) and order denying his motion for
4 reconsideration. On appeal, Husband contends that the district court erred by (1)
5 failing to require Wife to reimburse Husband for an increase in mortgage payments
6 caused by Wife's recurring late or non-payments; (2) failing to require Wife to pay
7 "all or a major portion" of the balance of the second mortgage due to her actions or
8 inactions resulting in the sale of the community residence below its appraised value;
9 and (3) deciding that Wife was not obligated for rental payments for her occupancy
10 of the community residence during and after the divorce proceedings. We affirm.

11 **BACKGROUND**

12 {2} In the course of the dissolution of marriage proceeding, the parties entered into
13 a marital settlement agreement (MSA) on August 3, 2011 to resolve the issues
14 between them. On August 4, 2011, the court adopted the MSA as part of its final
15 bifurcated decree of dissolution of marriage and distribution of assets and debts. The
16 MSA acknowledged that the parties shared an equal community interest in their
17 former community residence, the Mesa Vista property. They agreed to place the Mesa
18 Vista property for sale, that Wife would continue to reside on the property pending
19 sale, and that Wife would make certain floor treatments at her expense. As to the two

1 mortgages on the property with Los Alamos National Bank (LANB), the parties
2 agreed that Husband would continue to pay the first mortgage and that Wife, as
3 consideration for her residing at the property, would pay the second mortgage. As to
4 property expenses, the parties agreed (1) that Wife would “keep the property in good,
5 clean and ‘showable’ condition for sale purposes at all times” and (2) that “[a]ny
6 exceptional or major repairs or required maintenance (e.g., furnace, roof, etc.) shall
7 first be discussed and agreed upon by the parties, and any resulting agreed-upon costs
8 shall then be equally divided between the parties.”

9 {3} On July 30, 2012, Husband filed an emergency motion for immediate
10 permission to accept sales offer/make counter-offers, and sell the residential property.
11 Wife, then a self-represented litigant, did not file a timely response. The district court
12 found, on August 17, 2012, that the Mesa Vista property had been on the market for
13 more than two years without any offers; that Wife had “failed to keep the property on
14 the market for sale, in good and clean condition, making it available to realtors, while
15 living in it rent-free[.]” The court further found that the property “had to be pulled off
16 the market due to non-access and poor condition”; that Wife had “consistently failed
17 to timely or fully pay the [second] mortgage, and is currently seriously in default”;
18 that “the value and condition of the property have fallen considerably” since Wife
19 declined to exercise her option to purchase the property; and that Wife has indicated

1 that she would not cooperate in the sale of the property. The district court ordered that
2 Husband be granted a limited power of attorney in order to complete a sale of the
3 property and to reduce or eliminate possible deficiencies. It required Husband to
4 prepare an accounting and reserved decision of Husband's request for "offset[s]"
5 pending the outcome of the sale of the property.

6 {4} The district court held a hearing on the "offsets" on March 11, 2013. Husband
7 and Joe Sabo, the parties' realtor, testified similarly to the district court's August 17,
8 2012 findings. More specifically, as stated in the court's March 13, 2013 order, Wife
9 insisted upon a higher offering price than an appraisal before the parties agreed in the
10 MSA to reduce the price over 45-day intervals; that the house was "in poor condition
11 (dog feces, urine in home)" and the yard was unkept; and that the home was difficult
12 to show because Wife required notice of showings. Husband testified that he hauled
13 out trash, scheduled clean-up visits, and tried to arrange for the pets. Husband took
14 possession of the property in July 2012, performed cleaning and repair, and placed
15 it back on the market. An offer was received for \$160,000, less than the original
16 appraised value of \$195,000 and less than the balances of the two mortgages. Wife
17 refused to consider the offer or make a counter-offer, leading to Husband's filing of
18 his emergency motion. The property sold on November 6, 2012 for \$160,000. Wife
19 testified that the property was always in disrepair and that she had reduced the

1 balance on the second mortgage to \$33,000 before she lost her unemployment
2 benefits and could no longer make the payments.

3 {5} The pay-off balance on the LANB second mortgage was \$49,611.09. The net
4 sales proceeds yielded \$16,377.63 as payment toward the mortgage. Husband
5 borrowed the balance, \$33,233.46, from LANB to pay off the second mortgage. The
6 loan included a finance charge of \$12,171.54, for a total amount of \$45,405.

7 {6} Husband requested the district court to offset amounts he owed Wife under the
8 division of their property by allocating to Wife the total amount of the promissory
9 note he secured to pay off the second mortgage balance of \$45,405. Husband also
10 requested that he be awarded from Wife his share of bills for utilities and taxes that
11 he paid in connection with the Mesa Vista property (\$905.11), cleanup and dump fees
12 also in connection with the Mesa Vista property (\$850), one-half of the LANB
13 appraisal fee (\$253.23), attorney fees (\$2500 minimum), rent for the Mesa Vista
14 property (\$7200), and excess mortgage payments that he made (\$6840).

15 {7} The district court entered its order on March 13, 2013. It awarded Husband
16 \$489.41 for utility bills, \$850 for property cleanup and dump expenses, \$253.23 for
17 one-half of the appraisal, \$22,702.50 for one-half of the promissory note, and \$2,500
18 for attorney fees. As a result, the district court offset the \$38,000 that Husband owed
19 Wife with \$26,795.14, leaving a balance due Wife of \$11,204.86. The district court

1 further reduced this amount by \$5,000 of the excess mortgage payments claimed by
2 Husband, resulting in a net balance due Wife of \$6204.86. Both parties filed motions
3 for reconsideration, which the district court denied.

4 **THE SECOND MORTGAGE**

5 {8} With respect to the increased balance on the second mortgage, Husband argues
6 on appeal that the district court erred by failing to require Wife to bear the total
7 increase because it resulted from Wife’s recurring non-payment of the mortgage
8 obligation. Husband makes two arguments: (1) that Wife should reimburse him
9 \$8188.81, one-half of the \$16,377.63 of community funds received as sale proceeds
10 paid to the LANB at closing on the second mortgage; and (2) that Wife “should pay
11 all or a major portion” of the remaining deficiency on the second mortgage that was
12 paid by a loan of \$45,405 (\$33,233.46 plus \$12,171.54 interest).

13 {9} The district court did not reimburse Husband any of the community funds
14 received as sale proceeds and divided the obligation on the \$45,405 loan equally
15 between the parties. Husband argues that the district court abused its discretion and
16 that he is entitled to reimbursement under the “hold harmless” provisions of the MSA.

17 {10} The district court’s March 13, 2013 order reflected the district court’s final
18 division of the parties’ property and debts. The court acted under its broad discretion
19 to make an equitable division of community property and debts. *See Arnold v. Arnold,*

1 2003-NMCA-114, ¶ 6, 134 N.M. 381, 77 P.3d 285 (reviewing district court’s decision
2 regarding valuation and distribution of community property for abuse of discretion).
3 An abuse of discretion is a decision that is “clearly untenable or contrary to logic and
4 reason.” *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 28, 329 P.3d
5 658 (internal quotation marks and citation omitted). It may occur if the district court’s
6 findings are not supported by substantial evidence. *Atherton v. Gopin*, 2015-NMCA-
7 ___, ¶ 25, ___ P.3d ___ (No. 32,958, June 18, 2015). In reviewing for substantial
8 evidence, we resolve all disputes and indulge all inferences in favor of the successful
9 party and disregard all contrary inferences. *Lahr v. Lahr*, 1970-NMSC-165, ¶ 2, 82
10 N.M. 223, 478 P.2d 551.

11 {11} In entering into the MSA, the parties sought to resolve their differences, and
12 the MSA became a binding obligation between them when it was approved by the
13 court. *See Wolcott v. Wolcott*, 1984-NMCA-089, ¶ 16, 101 N.M. 665, 687 P.2d 100
14 (“A separation agreement is binding on the parties, but is subject to such action as the
15 court, in its discretion, deems appropriate.”). We therefore look to the MSA to
16 determine if it addresses the issues that arose between the parties that are the subject
17 of this appeal.

18 {12} Husband argues that the “hold harmless” provisions of the MSA require that
19 Wife be responsible for the increase in the second mortgage payment that resulted

1 from her failure to make proper payments. Specifically, Husband refers to Clauses
2 III.2.f., III.3.a., and VII.12. of the MSA.

3 {13} Clause III.2.f. provides:

4 In consideration for being allowed to continue to reside at Mesa
5 Vista at this time without the payment of rent, Wife shall continue to pay
6 the monthly [second] mortgage amount through LANB, utilities and any
7 routine upkeep on the property. Wife shall keep the property in good,
8 clean and “showable” condition for sale purposes at all times. Any
9 exceptional or major repairs or required maintenance (e.g., furnace, roof,
10 etc.) shall first be discussed and agreed upon by the parties, and any
11 resulting agreed-upon costs shall then be equally divided between the
12 parties.

13 {14} Clause III.3.a. provides:

14 Wife shall assume as her sole and separate obligation, pay in
15 accordance with the terms thereof, and hold Husband safe and harmless
16 from all debts in her name, including her credit cards; leases; medical
17 bills; vehicle liens/loans; insurances; utilities and ordinary costs
18 associated with Mesa Vista property; attorney’s fees and costs and any
19 other debts to which she obligated herself.

20 (Emphasis omitted.)

21 {15} Clause VII.12. provides:

22 In the event either party to this Marital Settlement Agreement
23 defaults in his or her obligations hereunder, the party in default shall be
24 liable to the other party for all reasonable expenses incurred, including
25 attorneys’ fees, in the enforcement of obligations created by this [MSA].

1 {16} The MSA allocated to Wife the obligation to pay LANB the monthly payments
2 on the second mortgage. It also required Wife to pay utilities and routine upkeep and
3 “keep the property in good, clean and ‘showable’ condition.”

4 {17} We do not, however, read the MSA to include, as does Husband, a requirement
5 that Wife hold Husband harmless with respect to the second mortgage balances.
6 Clause III.2.f. of the MSA sets forth Wife’s obligations to make the mortgage and
7 utility payments and maintain the property, but it does not state any obligation for her
8 failure to do so or include any hold harmless language. *See Espinosa v. United of*
9 *Omaha Life Ins. Co.*, 2006-NMCA-075, ¶ 26, 139 N.M. 691, 137 P.3d 631 (“When
10 a contract or agreement is unambiguous, we interpret the meaning of the document
11 and the intent of the parties according to the clear language of the document, and we
12 enforce the contract or agreement as written.”); *cf. Herrera v. Herrera*, 1999-NMCA-
13 034, ¶ 9, 126 N.M. 705, 974 P.2d 675 (“All [marital] settlement agreements are
14 contracts and therefore are subject to contract law[.]”). While Clause III.3.a. does
15 include hold harmless language, it pertains, as relevant to Husband’s arguments, to
16 payments for utilities and maintenance for the Mesa Vista property. In this regard, the
17 district court found that Husband made payments for utilities, and property clean up
18 and dump expenses, and it reimbursed Husband for his share of these payments.

1 {18} Clause VII.12. addresses a default in a party's obligations under the MSA and
2 assigns liability to the defaulting party for the other party's expenses in enforcing the
3 MSA. Thus, the defaulting party would be required to pay the other party's costs and
4 attorney fees in bringing action to enforce the MSA. In this regard, the district court
5 required Wife to pay Husband's attorney fees in the amount of \$2500. However,
6 Clause VII.12. of the MSA does not include any requirement concerning the manner
7 in which a court dissolving a marriage should reallocate property or debt.

8 {19} After hearing the evidence, the district court determined that it would adjust the
9 property and debt division by requiring Wife to reimburse Husband for his
10 community share of utility bills, his payment of property cleanup and dump expenses,
11 his community share of the property appraisal fee, and \$2500 of his attorney fees. The
12 district court granted Husband \$5000 to balance his greater burden of paying the first
13 mortgage payments. It further determined that the parties would share equally the
14 debt obligation to pay off the second mortgage.

15 {20} In its order, the district court did not accept Husband's arguments that Wife
16 should bear financial responsibility for her payment history on the second mortgage
17 or failure to maintain the property. Indeed, there was evidence supporting Husband's
18 arguments: the parties did not dispute in the district court that Wife did not regularly
19 make the payments, and the district court found that the parties' real estate agent

1 testified that the asking price of the Mesa Vista property was too high because Wife
2 refused to reduce the price, and that the property was difficult to show because of the
3 notice Wife required and the property's condition. The parties also did not dispute
4 that community funds of \$16,377.63, the balance of the proceeds from the sale, were
5 applied to partially pay the outstanding second mortgage; or that husband obtained
6 a loan of \$45,405 to pay the remaining balance on the second mortgage.

7 {21} However, we cannot say that the district court abused its discretion. Although
8 the evidence indicates that Wife did not fulfill aspects of her obligations under the
9 MSA, the consequences of her actions are not clear, and the resulting financial
10 impacts are speculative. *Cf. Lovington Cattle Feeders, Inc. v. Abbott Labs.*, 1982-
11 NMSC-027, ¶ 26, 97 N.M. 564, 642 P.2d 167 (stating that “damages, to be
12 recoverable, must be proven with reasonable certainty and not be based upon
13 speculation”) While the second mortgage balance likely increased due to Wife's
14 failure to make regular payments, the district court did not have evidence before it
15 demonstrating a specific financial impact. Similarly, there was no evidence
16 identifying the financial effect of Wife's failure to cooperate in the sale of or her
17 failure to maintain the property. The parties' real estate agent testified that if the
18 property were kept up and repairs made, it could possibly have sold for its appraised
19 value of \$195,000, but that he would be “second guessing.” He thought that the sales

1 price “would have come close” to covering the mortgage payments. A district court
2 has broad discretion in equitably dividing community property and debts. *Arnold*,
3 2003-NMCA-114, ¶ 6. Based on the evidence before it, the district court did not
4 abuse its discretion.

5 **RENT FOR OCCUPANCY OF THE MESA VISTA PROPERTY**

6 {22} Husband also argues that the district court abused its discretion by failing to
7 award him rent for Wife’s occupancy of the Mesa Vista property. The MSA allowed
8 Wife to continue to reside at the property without rent in consideration for her paying
9 the monthly payments on the second mortgage, utilities, and routine upkeep.

10 {23} Husband relies on *Hertz v. Hertz*, 1983-NMSC-004, 99 N.M. 320, 657 P.2d
11 1169, in support of his position. In *Hertz*, the wife had argued that the district court
12 had abused its discretion in failing to assess an interest or rental value to the husband
13 for the time that he resided in the community residence after the parties’ divorce but
14 before the final judgment was entered dividing the community assets. *Id.* ¶¶ 36-37.
15 Our Supreme Court discussed that, for practical reasons, the common law right of co-
16 tenants to occupy common property may not be applicable in circumstances of
17 divorce. *Id.* ¶¶ 38-39. It explained that there may be a “constructive ouster, exclusion,
18 or an equivalent act” that would give rise to a fair rate of return on the community
19 interest of the non-possessing spouse. *Id.* ¶ 39. Our Supreme Court remanded to the

1 district court to determine whether there was a constructive ouster or exclusion, and,
2 if so, to further determine an appropriate rental value. *Id.*

3 {24} In this case, after the district court entered its final decree, it reserved
4 jurisdiction to address the distribution of the parties' real estate, including the Mesa
5 Vista property, subject to its sale or transfer. As part of the MSA, the parties
6 contemplated that the Mesa Vista property would be placed on the market for sale.
7 They agreed that Wife would live at the property without rent in consideration for her
8 paying the second mortgage and maintaining the property for its sale.

9 {25} Because of the MSA and the fact that the parties placed the property on the
10 market for sale, this case is not like *Hertz* in which the husband had exclusive
11 possession and control of the community residence for his own purposes. *Id.*
12 ¶¶ 36-39. The parties herein agreed to sell the property and to have Wife live there
13 to enable the sale. Wife stated that the property was always in disrepair and that she
14 maintained the property as well as she could. The parties' daughter and grandson also
15 lived at the property. Wife paid the second mortgage, reducing its balance to
16 approximately \$33,000, until she lost her unemployment benefits and did not have a
17 job. Husband lived with his parents during this time.

18 {26} The district court, after hearing the evidence and argument of the parties, orally
19 made its ruling that was incorporated into its March 13, 2013 order. It stated that the

1 parties were in the unfortunate position of having mortgages that exceeded the
2 property value. The court denied Husband's request for rental reimbursement because
3 the parties faced difficulties that were beyond their control, the MSA did not call for
4 rental payments, and the court was not going to punish Wife for failing to keep up the
5 property some time ago.

6 {27} Given the circumstances that the parties faced, their decisions regarding the
7 sale of the Mesa Vista property, the language of the MSA, and the overall purposes
8 of the MSA to divide the parties' community property and debt, the district court did
9 not abuse its discretion in denying Husband's request for rental payments. In
10 exercising its discretion to equitably divide the parties' interests, the court could
11 reasonably have determined that Wife was not obligated to pay rent on the Mesa Vista
12 property for the period she lived there pending its sale and that she should not be
13 punished for the condition of the property.

14 **CONCLUSION**

15 {28} We affirm the district court's order.

16 {29} **IT IS SO ORDERED.**

17
18

JAMES J. WECHSLER, Judge

1 **WE CONCUR:**

2

3 _____
3 **JONATHAN B. SUTIN, Judge**

4

5 _____
5 **RODERICK T. KENNEDY, Judge**