[Cite as *Kessler v. Kessler*, 2010-Ohio-2369.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Patsy J. Kessler,	:	
Plaintiff-Appellee,	:	
		No. 09AP-740
v.	:	(C.P.C. No. 08DR-04-1582)
John C. Kessler,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 27, 2010

Frederick L. Berkemer, for appellee.

John C. Kessler, pro se.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations.

BROWN, J.

{¶1} John C. Kessler, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, in which the court issued a decree of divorce.

{¶2} Appellant, who is 72 years old, and Patty J. Kessler, plaintiff-appellee, who is 60 years old, were married October 29, 1994. There were no children born as issue of the marriage. The parties' underlying circumstances are somewhat undeveloped in the record, and the following facts have been assembled largely based upon various allegations by the parties for which there exists no corroborating evidence. Appellee

alleged she receives retirement income of $31,000 per year, while appellant receives retirement income of $32,000 per year. Appellant claimed appellee's monthly retirement income was $2,628 per month, while his retirement income was $1,287 per month. Appellant owned a residence prior to the marriage. Appellee sold a condominium during the marriage. Appellant owned several pieces of commercial real estate prior to the marriage, with some of the property having been transferred in and out of appellee's name during the marriage. The parties are jointly named on two mortgages. Some of the parties' financial accounts were held individually. Appellant operates a religious organization entitled Campaign For A Better America Ministries, Inc. ("CABA").

{¶3} On June 18, 2009, the parties signed a divorce settlement agreement and a memorandum of agreement, which were filed with the court. In the negotiations, appellant represented himself, while appellee was represented by counsel, Frederick Berkemer ("Berkemer"). In the divorce settlement agreement, the parties agreed that appellant would retain real estate titled in his name or in CABA; each would retain automobiles titled in his or her name; the parties would receive those household goods already in their possession, as well as those listed in the attached list of personal items; each would retain their own pension benefits and financial accounts in his or her name; and appellant would pay and hold appellee harmless on a line of credit on the "Red Fern" property and Richwood Bank mortgage, subject to the additional terms in the memorandum of agreement. In the memorandum of agreement attached to the divorce settlement agreement, the parties agreed to the following terms:

> 1. [Appellant] shall pay [appellee] for property division the sum of twenty-three thousand dollars ($23,000.00) by August 18, 2009. If necessary, [appellant] shall liquidate real estate to

> receive these funds. After 60 days this balance shall accrue interest at six percent (6%) API.
>
> 2. [Appellant] shall pay [appellee] an additional fifty thousand dollars ($50,000.00) for property division. If this amount is not paid in full within twelve months of this decree (6-18-2010) it shall accrue interest of six percent (6%) API on the balance. [Appellant] shall pay [appellee] one-third of net proceeds from sale of any real estate in his name, to be deducted from balance of $50,000.00. [Appellant] shall re-designate [appellee] as beneficiary of his $100,000.00 life insurance policy until balance of $50,000.00 is paid in full, and shall provide [appellee] with proof she is beneficiary.
>
> 3. If [appellant] defaults on either mortgage[,] [appellee] may obtain judgment and proceed to foreclose on real estate in name of [appellant] or CABA.
>
> 4. [Appellant] to give [appellee] mortgage on 6 W. State, 0 N. Mill (2)[, and] 11 N. Mill properties until all funds due are paid in full.

{¶1} On June 29, 2009, appellant filed a memorandum of misinterpretation of agreement dated June 18, 2009. In the memorandum, appellant claimed some information presented to him turned out to be different than what it actually was, he made a simplified offer to appellee that was pending before her, and appellee had a different interpretation than him of some of the terms in the agreement.

{¶2} On July 22, 2009, the trial court issued an agreed judgment entry-decree of divorce. The decree incorporated all of the terms from the divorce settlement agreement and a memorandum of agreement previously executed by the parties. The decree also added additional terms indicating that the parties waived valuation of the marital assets

{¶3} Appellant appealed the judgment of the trial court. On August 27, 2009, appellant filed a Civ.R. 60(B) motion in the trial court, which the trial court denied on

December 15, 2009. In the present appeal of the original decree of divorce, appellant asserts the following assignments of error:

> [I.] The Divorce Court erroneously failed to take into consideration, actions by the Appellant that clearly show that he did experience duress, overreaching and undue influence by the Plaintiff[']s Attorney, Frederick Berkemer. The "Preliminary Agreement" was poorly hand printed and totally put together by Frederick Berkemer as to what he wanted on June 18, 2009.
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> [II.] The Divorce Court erroneously failed to take into consideration, actions by the Appellant that ask for 6 items of Discovery, that he never received.
>
> [III.] The Divorce Court erroneously failed to take into consideration, Appellant's Sworn Affidavit Dated July 29, 2009, for a later hearing that occurred.
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> [IV.] The Divorce Court erroneously committed:
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> Title LXX-CRIMES CH.4 CRIMES AGAINST JUSTICE – I believe both Judge Pressie [sic] and Attorney, Frederick Berkemer knew or should have known they were not following correct legal procedures.
>
> [V.] The Divorce Court erroneously failed to take into consideration, the properties in the name of the Corporation Sole and the fact that they can[not] be attached by law or make any claim that they can be attached.

{¶4} Appellant argues in his first assignment of error that the trial court erred when it failed to take into consideration that he was under duress and appellee's attorney, Berkemer, exerted undue influence upon him in the execution of the divorce agreement. Specifically, appellant asserts Berkemer made misleading representations to him during negotiations that the trial court would put all of his real estate into a conservatorship and be sold; he had only one and one-half hours to negotiate the divorce agreement, giving him no time to think about other options; he did not understand the agreement in the

same manner as appellee when he signed it; and Berkemer had superior knowledge than him in dealing with divorce agreements.

{¶5} Absent fraud, duress, overreaching, or undue influence, a settlement agreement entered into by parties in a divorce is enforceable, if the parties intended to contract on its essential terms and intended to be bound by its terms. *Walther v. Walther* (1995), 102 Ohio App.3d 378. A settlement agreement " 'may be either written or oral, and may be entered into prior to or at the time of a divorce hearing. Where the agreement is made out of the presence of the court, the court may properly sign a journal entry reflecting the settlement agreement in the absence of any factual dispute concerning the agreement.' " *Haas v. Bauer*, 156 Ohio App.3d 26, 2004-Ohio-437, ¶16, quoting *Muckleroy v. Muckleroy* (Sept. 5, 1990), 9th Dist. No. 14443.

{¶6} Appellant's arguments suffer from several fatal flaws. Initially, there is no evidence in the record to demonstrate that Berkemer made misleading representations to him during negotiations, how long the negotiations lasted, or appellee's interpretation of the agreement. In a direct appeal, this court's review is limited to evidence presented at the trial level, and we cannot consider matters outside the record before us. *Columbus v. Brown*, 10th Dist. No. 05AP-344, 2005-Ohio-6102, ¶9, citing *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus. Thus, lacking evidence in the record regarding these issues, we are unable to review them.

{¶7} Furthermore, the Ohio Supreme Court has held that "[t]o avoid a contract on the basis of duress, a party must prove coercion by the other party to the contract. It is not enough to show that one assented merely because of difficult circumstances that are not the fault of the other party." *Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243, syllabus.

Here, appellant represented himself in what could be termed a complex case, as it involved multiple residential and commercial real estate parcels, pension and retirement accounts, a prior bankruptcy, various business transactions, inter-party loans, and a 14-year marriage. The trial was scheduled to commence the day the agreement was negotiated and executed, and appellant may well have felt pressure from this circumstance. Also, although appellant claims he only had one and one-half hours to negotiate the agreement, the case had been pending for well over one year at the time of the agreement. There is no evidence in the record that appellant could not have demanded a trial on the issues or asked for another continuance. From the record, it appears as though, in the end, it was appellant's decision whether to sign the agreement.

{¶8} In addition, as to appellant's argument that he signed the agreement under duress and undue influence because Berkemer had superior knowledge in dealing with divorce agreements, again, appellant was free to obtain counsel to negotiate on his behalf. Appellant essentially asks this court for some degree of leniency in light of his professed lack of legal education. However, it is well-settled in Ohio that litigants who choose to proceed pro se are presumed to know the law and correct procedure and are held to the same standard as other litigants. *Barry v. Barry*, 169 Ohio App.3d 129, 2006-Ohio-5008, ¶13. A litigant proceeding pro se cannot expect or demand special treatment. *Kilroy v. B.H. Lakeshore Co.* (1996), 111 Ohio App.3d 357, 363. Thus, appellant cannot rely upon Berkemer's superior legal knowledge to claim duress or undue influence. We also note that it appears from the record that appellant has significant business experience, as he owned several commercial real estate properties, pursued a patent during the time of the marriage, and operated CABA. There is no evidence in the record

that Berkemer took advantage of appellant or that appellant was incapable of understanding the terms of the agreement. For the above reasons, appellant's first assignment of error is overruled.

{¶9} Appellant argues in his second assignment of error that the trial court failed to take into consideration that appellant requested six discovery items that he never received. Specifically, appellant contends he requested various documents from Berkemer in a February 21, 2009 letter, which he also forwarded to the trial court, but he never received the requested documents. A review of the record reveals only one page of the letter appellant wrote to Berkemer and mailed to the trial court. Although the top of the page is entitled "Request for 6 items of Discovery," the page appears to be the final page of the letter and does not indicate which items appellant requested. Thus, the record is insufficient to review the matter. Notwithstanding, appellant could have also brought the matter to the attention of the trial court or filed a motion to compel discovery if he believed there were documents he requested, but did not receive. Appellant cannot claim any error on appeal when he failed to raise the issue before the court, despite the opportunity to do so. For these reasons, appellant's second assignment of error is overruled.

{¶10} Appellant argues in his third assignment of error that the trial court failed to take into consideration his sworn affidavit of July 29, 2009, for a later hearing that occurred. However, the trial court had already filed its agreed judgment entry-decree of divorce on July 22, 2009, when appellant filed his affidavit, and it is only the July 22, 2009 judgment that appellant appeals herein. Thus, appellant's July 29, 2009 affidavit is not

relevant to our review of the July 22, 2009 judgment. Accordingly, appellant's third assignment of error is overruled.

{¶11} Appellant argues in his fourth assignment of error that the trial court committed crimes against justice pursuant to "Title LXX-CRIMES—CH. 4 CRIMES AGAINST JUSTICE" because both the trial court and Berkemer knew or should have known they were not following correct legal procedures. Specifically, appellant contends that "everything" he presented to the trial court was ignored, and the trial court did not want to hear the matter and rushed a settlement. "Title LXX" appears to be an ancient code of the United States, with its contemporary embodiment in 42 U.S.C. 1985(2), which provides, in relevant part:

> Obstructing justice; intimidating party, witness, or juror
>
> [I]f two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws[.]

{¶12} However, claims under Section 1985(2) require an allegation of class-based animus. See *Zemsky v. New York* (2d Cir.1987), 821 F.2d 148, 150. Appellant has not claimed that the alleged conspiracy between the trial court and Berkemer to not follow the correct legal procedures was motivated by any racial or class-based invidious discrimination, and we find no facts in the record from which any such motivation could be inferred. Therefore, any claim under Section 1985(2) is unfounded. Appellant's fourth assignment of error is overruled.

{¶13} Appellant argues in his fifth assignment of error that the trial court failed to take into consideration that some of his real properties are in the name of his Corporation Sole, CABA, and cannot be attached by law. Initially, we note that appellant fails to specify in which real properties he claims CABA holds an interest, and there is no evidence in the record that CABA holds title to the real properties at issue here. The record does contain several documents from appellant's 2005 bankruptcy filing that show he had a fee simple interest in the properties individually named in the settlement agreement. Nevertheless, the problem with appellant's argument is that the trial court did not take any action in this case other than to sign the judgment entry the parties agreed upon. As mentioned earlier, in the absence of any factual disputes, a trial court may sign a journal entry incorporating a settlement agreement reached outside of the presence of the court because such an agreement constitutes a contract between the parties. *Muckleroy*. Here, both parties signed the agreed judgment entry that they submitted to the trial court and neither party raised any factual disputes at that time. Accordingly, the parties' agreed journal entry constituted a contract between them. Furthermore, although appellant also argues that Berkemer has placed liens on CABA property and such is illegal, the record is devoid of any evidence that Berkemer has placed liens on any CABA property. Therefore, this argument is without merit. For these reasons, appellant's fifth assignment of error is overruled.

{¶14} Accordingly, appellant's first, second, third, fourth, and fifth assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.

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