

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DAGMAR R. ADAMS,

Appellee

v.

ANGELO S. MORINI,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 707 WDA 2012

Appeal from the Order Dated April 9, 2012
In the Court of Common Pleas of Mercer County
Civil Division at No(s): 1988-806, 2012-1129, 528 DR 1990

BEFORE: FORD ELLIOTT, P.J.E., BOWES, & DONOHUE, JJ.

MEMORANDUM BY BOWES, J.:

FILED: May 14, 2013

Angelo S. Morini appeals from the April 9, 2012 order granting Dagmar R. Adams's petition to enforce payment of arrearages for alimony and entering judgment in her favor in the amount of \$92,513.38, plus interest. After review, we affirm.

The facts relevant to our review are as follows. Mr. Morini and Ms. Adams were divorced on or about May 10, 1990. The parties negotiated a property settlement agreement, which provided alimony for Ms. Adams:

ALIMONY. Husband agrees to pay Wife the sum of \$2,500 per month alimony for a period of 26 years beginning August 1, 1990, the payments of which shall be terminated earlier only upon the death of Wife, and it is the specific intent of the parties that this Agreement shall not terminate be [sic] remarriage [sic] of either party. . . . The purpose and intent of the parties is that the payment of alimony is nonmodifiable by either party regardless of physical and/or financial circumstances of the parties or if either spouse remarries.

Settlement Agreement, 7/17/90, at ¶13.

At various times over the years, due to financial hardship suffered by Mr. Morini, the parties modified the alimony payments. On February 9, 2012, Ms. Adams filed a petition to enforce payment of arrearages. A rule to show cause issued and a hearing was held on the petition on March 28, 2012, which Mr. Morini attended via telephone. He did not contest that he owed \$92,513.38 in arrearages. However, Mr. Morini took the position that alimony was prohibited by statute on the facts herein, and that enforcement of the settlement agreement violated public policy and was contrary to contract principles of impossibility, unconscionability, and a duty to mitigate damages. The trial court rejected Mr. Morini's arguments and granted judgment in favor of Ms. Adams.

Mr. Morini filed a timely appeal and complied with the trial court's order to file a Pa.R.A.P. 1925(b) concise statement of issues complained of on appeal. He raises four issues for our review:

1. Whether the trial court erred in failing to apply 23 Pa.C.S.A. §3701(e) and 23 Pa.C.S.A. §3706 and prohibiting Appellee from collecting alimony during all periods of time in which she remarried and lived with a member of the opposite sex.
2. Whether the trial court erred by enforcing the arrea[ra]ge of alimony owed by the Appellant to Appellee as such enforcement is contrary to public policy.
3. Whether the trial court erred by enforcing the arrearage of alimony owed by Appellant to Appellee as such enforcement is contrary to contract principles of impossibility, unconscionability, or failure to mitigate damages.

4. Whether the trial court erred by failing to limit the Appellee's right to enforce and/or execute on her judgment.

Appellant's brief at iii-iv (footnote omitted).

All of Mr. Morini's issues implicate legal issues. Hence, our standard of review is *de novo* and the scope of our review is plenary. **See Fizzano Bros. Concrete Products, Inc. v. XLN, Inc.**, 42 A.3d 951 (Pa. 2012). In reviewing a court's order upholding a marital property settlement agreement, we are limited to determining whether the trial court clearly abused its discretion or committed an error of law. **See Cioffi v. Cioffi**, 885 A.2d 45, 48 (Pa.Super. 2005).

Our discussion begins with the principles of Pennsylvania jurisprudence that apply in this case. It is well settled that the law of contracts governs a marital settlement agreement between spouses unless the agreement provides otherwise. **Kraisinger v. Kraisinger**, 928 A.2d 333, 339 (Pa.Super. 2007). In interpreting an agreement, the court must ascertain the intent of the parties. **Kripp v. Kripp**, 849 A.2d 1159, 1163 (Pa. 2004). In cases of a written contract, the intent of the parties is the writing itself, and when the terms of a contract are clear and unambiguous, the intent of the parties is to be ascertained from the document itself. **Hutchinson v. Sunbeam Coal Corp.**, 519 A.2d 385, 390 (Pa. 1986).

Mr. Morini's first claim is that alimony is barred by statute, specifically 23 Pa.C.S. §§ 3701(e)¹ and 3706,² where, as here, the recipient is remarried or living with a member of the opposite sex. He maintains that these statutes apply regardless of whether the alimony was the result of a property settlement agreement or a court-ordered award. Thus, Mr. Morini contends Ms. Adams's remarriage ten years ago relieved him of any further obligation to pay alimony. Recognizing that his position is contrary to our holding in ***Woodings v. Woodings***, 601 A.2d 854 (Pa.Super. 1992), Mr. Morini suggests that in ***Woodings***, we failed to appreciate the uniqueness of an alimony provision contained in a property settlement and the fact that it

¹ Title 23 Pa.C.S. § 3701(e), "Modification and termination."

An order entered pursuant to this section [relating to alimony] is subject to further order of the court upon changed circumstances of either party of a substantial and continuing nature whereupon the order may be modified, suspended, terminated or reinstated or a new order made. Any further order shall apply only to payments accruing subsequent to the petition for the requested relief. Remarriage of the party receiving alimony shall terminate the award of alimony.

² The provision, 23 Pa.C.S. § 3706, "Bar to alimony," states:

No petitioner is entitled to receive an award of alimony where the petitioner, subsequent to the divorce pursuant to which alimony is being sought, has entered into cohabitation with a person of the opposite sex who is not a member of the family of the petitioner within the degrees of consanguinity.

is incorporated into the order of court. Mr. Morini argues that because it constitutes an order of court, it is subject to the statutory bar.

The trial court relied upon **Woodings, supra**, in holding that neither statute applied where the alimony was agreed to by the parties rather than court-awarded. We agree that **Woodings** controls here. Furthermore, it is apparent from our decision in that case that we were mindful of the fact that settlement agreements are incorporated in court orders. We held in **Woodings** that:

Alimony due under an agreement of the parties, even if incorporated in a court Order, is paid as a result of the agreement and not of an award. Section 401.1(c) [now Section 3105(c) forbids modification of an agreement for alimony, and by implication an attempt to terminate a provision of the agreement would be beyond the powers of the court unless expressly provided in the agreement. The reason for this interpretation is that section 401.1 (now section 3105) is a legislative expression limiting the jurisdiction of the court as expressed in sections 301, Jurisdiction, and 302, Residence and domicile of parties (now section 3104), in modification of agreements, while permitting civil enforcement procedures pursuant to section 501, Alimony, subsection (f) (now section 3701(f)). Whenever the court approves an agreement for payment of alimony voluntarily entered into between the parties, the agreement shall constitute the Order of the court and may be enforced as provided in section 503, Enforcement of arrearages (now section 3703).

Woodings, supra at 856. Thus, the fact that the agreement regarding property generally, and alimony specifically, is incorporated into the court order does not convert it into court-awarded alimony. It remains an agreement between the parties subject to general contract principles.

Mr. Morini attempts to distinguish **Woodings** on another basis. He argues that the court viewed the alimony provision in that case as a trade-off, suggesting that the wife accepted a smaller share of the marital estate in exchange for alimony. Appellant's brief at 3. Mr. Morini continues that there was no such finding here and that the alimony provision was merely a rehabilitative provision, which Ms. Adams no longer needs.

Ms. Adams counters that alimony was not rehabilitative but the result of a hard-fought negotiated settlement, and the record supports her version of the events. The agreement recites that "it is the desire of the Parties after long and careful consideration to adjust, compromise, and settle all property rights and all rights into or against each other's property or estate[.]" Settlement Agreement at 1. Both parties were represented by counsel and acknowledged that they were fully informed of the nature of the marital assets and their rights. Counsel for Ms. Adams told the court that, prior to the agreement, there were "very intense settlement negotiations" and Ms. Adams relinquished her right to part of the marital assets. N.T., 3/28/12, at 6. The Settlement Agreement confirms that Ms. Adams waived any right to Mr. Morini's retirement plans, pensions or IRAs, and assigned all rights to ownership in the stock of Galaxy Cheese Company, a very lucrative company, to Mr. Morini. Settlement Agreement at ¶(9)(c). Furthermore, it was agreed that the alimony payments were tax deductible to Mr. Morini and taxable income to Ms. Adams. **Id.** at ¶13.

The record confirms that the Agreement was the result of a bargained-for exchange between the parties. Hence, we agree with the trial court that **Woodings** governs herein and the parties' settlement agreement controls. The parties agreed that, "there be no modification of the alimony provisions other than by death of Wife. Specifically, the terms and conditions shall not terminate or be modifiable upon the remarriage of either party." Settlement Agreement at ¶13. **See also** ¶13 ("The purpose and intent of the parties is that the payment of alimony is nonmodifiable by either party regardless of physical and/or financial circumstances of the parties or if either spouse remarries."). Hence, Ms. Adams's remarriage did not relieve Mr. Morini of his contractual alimony obligation.

Next, Mr. Morini contends that enforcement of the arrearages is contrary to public policy. Specifically, Ms. Adams is financially secure while Mr. Morini maintains that his sole income is Social Security and that he is "on the verge of destitution." Appellant's brief at 4. In essence, he argues that enforcement of the contractual provision is punitive rather than rehabilitative, as alimony is intended to be, and that it should be terminated and all outstanding arrearages waived.³ Mr. Morini cites no authority for such a proposition.

³ The settlement agreement also provided that, "as security for alimony payments," Mr. Morini would create an irrevocable life insurance trust that would continue to pay all alimony due upon Mr. Morini's death. He agreed to (*Footnote Continued Next Page*)

On the other hand, Ms. Adams maintains that there is a strong public policy in favor of enforcing settlement agreements and the trial court agreed, citing **Woodings, supra** at 857-858. We concur, finding a strong public policy underpinning the enforcement of contracts generally. We conclude that this policy is evidenced further by 23 Pa.C.S. § 3701(f), the provision in the Divorce Code that authorizes the court to enforce approved alimony agreements voluntarily entered into between the parties using methods outlined in a different provision. Hence, Mr. Morini's argument is unavailing.

Alternatively, Mr. Morini concedes that contract law governs, but argues that it is impossible for him to comply with the terms of the marital settlement agreement due to declining health and financial limitations. At the very least, Mr. Morini alleges he is entitled to a finding of temporary disability that would suspend his obligations, or perhaps even complete discharge, "as the burden of performance greatly exceeds the benefit of the bargain[.]" Appellant's brief at 6.

The trial court rejected Mr. Morini's impossibility argument, citing **Step Plan Services, Inc. v. Koresko**, 12 A.3d 401 (Pa.Super. 2010). While a court may excuse performance under a contract based upon the occurrence
(Footnote Continued) _____

pay all premiums on that policy and not to borrow against its cash value. Settlement Agreement at ¶13. The trial court noted that Mr. Morini apparently failed to maintain funding of the trust, but that the issue was not before it. Trial Court Opinion, 6/21/12, at 2 n.2.

of a truly unexpected event that thwarts performance, the trial court found no such circumstances existed herein.⁴ The parties anticipated that there could be a change in financial fortune or health as evidenced by the provision that, “[t]he purpose and intent of the parties is that the payment of alimony is nonmodifiable by either party regardless of physical and/or financial circumstances of the parties or if either spouse remarries.” Settlement Agreement at 10. Accordingly, the purported impossibility cannot be raised due to the contract language.

Next, Mr. Morini argues that due to his age, health, and significant change in financial condition, it is unconscionable, punitive and confiscatory to enforce the agreement regarding alimony. He asks this Court to declare the agreement unenforceable and relieve him of his alimony obligation. Almost as an afterthought, he asserts that he had no choice but to “accept the alimony provision” or “continue with burdensome and costly litigation.” Appellant’s brief at 6.

“Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” **Sams v. Sams**, 808 A.2d 206, 211 (Pa.Super. 2002). The trial court correctly

⁴ Generally, an individual’s financial position cannot be a basic assumption of a contract and, hence, will not excuse performance. **See** Restatement (Second) of Contracts § 261 (1981) Comment b.

found that it is the circumstances surrounding the formation of the agreement, rather than Mr. Morini's present circumstances, that are relevant to a conscionability determination. The court found no evidence that Mr. Morini lacked any meaningful choice in accepting the alimony provision, or that the provision, viewed in the context of the entire settlement agreement, unreasonably favored Ms. Adams.

After a thorough review of the record, we agree. Both parties acknowledged when they entered the Agreement that they "received independent legal advice from counsel of his or her own selection[,]" that they were familiar with the financial facts, and informed of their legal rights and obligations. Settlement Agreement, ¶(1). Furthermore, they agreed that, "this Agreement is in the circumstances fair, reasonable and equitable; that it is being entered into freely, voluntarily and in good faith; and that the execution of this Agreement is not the result of duress, undue influence, coercion, collusion and/or improper or illegal agreement." **Id.** The alimony provision, when viewed in the context of the entire agreement, did not unreasonably favor Ms. Adams. Hence, Mr. Morini's unconscionability claim fails.

Alternatively, Mr. Morini maintains that he should be excused from his obligation because Ms. Adams failed to mitigate damages. He avers that she should have sought employment or some other alternate source of income to cover the shortfall from his inability to pay the entire monthly amount.

Again, we find no basis for relief. Contractually, Ms. Adams is entitled to receive \$2,500 per month in alimony from Mr. Morini, regardless of her income from other sources. Thus, we cannot conceive of any action she could take to mitigate her damages, and this argument affords Mr. Morini no relief.

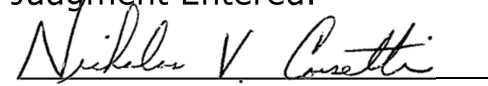
Finally, Mr. Morini asserts a vague claim that the trial court erred in refusing to limit Ms. Adams's right to execute on the judgment in light of the substantial change in his circumstances. He asks this Court to remand and direct the trial court to modify the judgment to prohibit its enforcement against Mr. Morini "absent [his] death or substantial change in his financial condition." Appellant's brief at 8. The trial court noted that Mr. Morini did not request such relief below and the record supports the trial court's conclusion. Even if he had, the trial court found there was no authority for the court to do so, and we agree. Mr. Morini's alleged financial distress and the relative financial conditions of the parties are of no moment in determining whether Ms. Adams was entitled to execute on her valid judgment.

For all of the foregoing reasons, we affirm the order of the trial court entering judgment on the alimony arrearages.

Order affirmed.

J-S02022-13

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Cussetti", is written over a horizontal line.

Deputy Prothonotary

Date: 5/14/2013