Opinion issued December 29, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00659-CV

JAMES KEITH BARGER, Appellant

V.

CARI JOAN BARGER, Appellee

On Appeal from the 311th District Court
Harris County, Texas
Trial Court Case No. 2007-40641

MEMORANDUM OPINION

This is an appeal from the trial court's clarification of contractual alimony as awarded in a divorce decree found by the trial court to be ambiguous. *See* TEX. FAMILY CODE § 9.008(b). Although the trial court erred by failing to file findings of fact and conclusions of law as requested, the error was harmless. Regardless of

whether the disputed order was ambiguous, the trial court did not err by clarifying it. Accordingly, we affirm.

Background

When Cari and Keith Barger divorced in 2007, they had two minor children. Keith agreed to pay contractual alimony. The Agreed Final Decree of Divorce provided that Keith would pay Cari $5,500 per month for 24 months or until the sale of a house, $5,000 per month until October 1, 2014, and then $4,200 per month "for an indefinite term" "until terminated in accordance with" the decree. Under a separate subheading entitled "Marriage or Cohabitation of Receiving Party Contingency," the original divorce decree provided that the contractual alimony payments would decrease to $2,000 per month, ending on October 1, 2014, if Cari remarried or cohabitated with someone "in a conjugal relationship" prior to October 1, 2014. The payments would terminate immediately if she remarried or cohabitated with someone in a conjugal relationship after October 1, 2014. This was the only provision in the original divorce decree that specifically provided for the termination of contractual alimony payments. The decree otherwise specified that the contractual alimony obligation survived Keith's death, and it was silent as to the effect of Cari's death, the involuntary unemployment of Keith, or the possibility that he might earn less money.

In December 2009, Keith renegotiated with Cari about contractual alimony and responsibility for their children's college costs. They and their lawyers exchanged emails regarding the proposals. In one email, Keith stated that he would be "willing to remove" the provision that Cari would lose alimony upon remarriage or cohabitation if they had an agreement.

Cari's attorney sent a fax to Keith's attorneys, who were drafting a settlement agreement. The attorney outlined her and Cari's understanding of the substance of the agreement, including that "spousal maintenance" "does not terminate on Keith's death, but remains an obligation of his estate," and that it "does not terminate on Cari's death, remarriage or cohabitation." She asked Keith's attorneys to confirm this understanding. About an hour later, Keith emailed Cari saying that her attorney was "already playing games based on the document she sent over." He also said that without a "full agreement," his lawyers would not engage in further "back and forth" negotiation with her lawyer but would "plan to go to trial."

Keith's attorneys sent a proposed settlement agreement to Cari's attorney for review. It provided that Keith would pay Cari $815,000, over a period of time, of which some would be child support and some would be contractual alimony. The proposed settlement agreement made no mention of marriage, cohabitation, or the impact that either would have on Keith's payments to Cari.

Cari's attorney responded with a letter, which detailed the flaws in the proposal and requested changes. Cari's attorney did not object to or mention the absence of language pertaining to marriage, cohabitation, or the impact that either would have on Keith's payments to Cari.

Keith, Cari, and their attorneys subsequently signed a "Binding Informal Settlement Agreement," which included the schedule by which Keith would pay Cari $815,000 representing the total amount of child support, college payments for their children, and contractual alimony. The settlement agreement did not mention remarriage or cohabitation. It did, however, include other general provisions, such as:

> All relief requested by either party in the underlying case that is not addressed within this Binding Informal Settlement Agreement is denied.
>
> . . . .
>
> All relief requested by either party in this suit and not specifically addressed herein shall be denied.
>
> . . . .
>
> Each signatory to this settlement has entered into same freely and without duress after having consulted with professionals of his or her choice. Each party has been advised by his or her respective attorney, and each party's attorney has approved this Binding Informal Settlement Agreement before executing it.
>
> . . . .

> The provisions of the Binding Informal Settlement Agreement shall be effective immediately as a contract and shall supersede all other agreements of the parties with respect to the subject matter hereof.
>
> . . . .
>
> This Binding Informal Settlement Agreement is signed voluntarily and with the advice and consent of counsel on February 11, 2010. Each attorney for each client who signed this Binding Informal Settlement Agreement was present when his or her client signed this Binding Informal Settlement Agreement. The provisions of this Binding Informal Settlement Agreement are intended to and shall be incorporated into an Agreed Order which accurately reflects all terms of settlement set forth herein.

On March 3, 2010, the trial court entered a reformed order, which was based on the settlement agreement. Under a heading for "Contractual Alimony," the reformed order stated that its intent was to "restructure the contractual alimony provisions set forth in the Agreed Final Decree of Divorce dated October 19, 2007."

The "Terms, Conditions, and Contingencies" of the reformed order provided that Keith would pay contractual alimony to Cari in accordance with the schedule in the order "unless otherwise specifically stated herein." Unlike the original divorce decree, the reformed order did not set forth an indefinite term for payments from Keith to Cari. Instead, it set forth a payment schedule of: $15,000 due on February 26, 2010; 51 monthly payments of $3,000 beginning on March 1, 2010; 126 monthly payments of $3,000 from June 1, 2014, through November 1, 2024; and a payment of $2,000 on December 1, 2024.

The reformed order also provided that contractual alimony payments would end on Cari's death and could be abated in the event of Keith's involuntary unemployment or reduced if he had a reduction in income. The reformed order set forth the income tax consequences to each party as payor or payee of contractual alimony. Finally, the order concluded with a "Relief Not Granted" provision, which stated: "IT IS ORDERED that all relief requested in this case and not expressly granted is denied. All other terms of prior orders not specifically modified in this order shall remain in full force and effect." The reformed order was signed and "approved and consented to as to both form and substance" by both Cari and Keith.

In April 2010, Cari remarried, and according to Keith, he learned of her remarriage a year later. Meanwhile, Keith continued to pay $3,000 in monthly alimony from May 2010 through May 2014. In July 2014, Cari filed a "Motion to Enforce and Clarify Decree of Divorce." In this motion, she sought child support, health-care expenses, the agreed college support, and past-due alimony for the month of June 2014 in the amount of $3,000 based on the reformed order. In addition, she pleaded for clarification, stating, "If any portion of the decree is insufficiently clear for enforcement by contempt, movant requests that it be clarified." In response, Keith filed a petition for declaratory judgment, seeking a declaration that "his contractual obligations to make monthly alimony payments to

Cari" had been extinguished when she "sought to enforce such payments." Keith also filed a petition to recover overpayment of spousal support.

On March 11, 2015, the trial court heard Cari's motion to enforce and Keith's petition for declaratory judgment. After comparing the contractual alimony provisions of the original divorce decree to the reformed order and hearing argument from counsel, the court ruled that the contractual alimony provisions of the reformed order were ambiguous. The court then held an evidentiary hearing to determine what the parties intended when the marriage and cohabitation provision was omitted from the reformed order.

Cari testified that Keith approached her in 2009 about modifying the contractual alimony provision in the divorce decree because he "didn't want to pay it any longer." She testified that in the course of their discussions he told her that the "cohabitation or remarriage clause would be taken out." Cari recalled asking whether it was possible that Keith might continue to cover health insurance for their college-aged children. She testified that Keith's attorney told her that because she "got the cohabitation and remarriage clause removed out of the decree, that there was no way that he was going to agree to extend the health insurance through college."

Keith's testimony directly contradicted Cari's. He testified that he did not agree to remove the cohabitation or remarriage clause, that when he signed the settlement agreement it was not his intention to remove that clause, and that at that

time, he had "a reasonable belief that she was already cohabitating" with the man whom she eventually married.

The parties also introduced documentary evidence, such as email, text, and fax communications showing their negotiations. In one email, Keith wrote, "I said ok to keep marriage [sic] after marriage or co-hab but everything will have to terminate on my death or on your death. Plus the stipulations on job loss etc." At the hearing, Keith testified that he wanted to stop paying her immediately if she got married, but he was talking about keeping the reduced alimony payments as provided by the original divorce decree—$2,000 per month through October 1, 2014 if she married before October 1, 2014. He also said that his payments of $3,000 per month from 2010 through 2014 were not made in accordance with the reformed order but in an attempt to accelerate the payments due under the original divorce decree. The original divorce decree had no provision for prepayment.

The court denied all relief sought by Keith. The reformed order had stated that its intent was to "restructure the contractual alimony provisions set forth in the Agreed Final Decree of Divorce dated October 19, 2007; which shall be reformed as set forth herein." The court revised the reformed order to clarify that "these modifications shall reform and restructure all the provisions contained in the Agreed Final Decree of Divorce dated October 19, 2007, as relates to contractual alimony."

Keith timely filed a request for findings of fact and conclusions of law and a past-due notice of findings of fact and conclusions of law. The trial court did not enter findings of fact or conclusions of law. Keith appealed.

Analysis

In three issues, Keith challenges the trial court's failure to enter findings of fact and conclusions of law, its ruling that the contractual alimony provision of the reformed order was ambiguous, and its order clarifying the contractual alimony provision of the reformed order.

I. Failure to enter findings of fact and conclusions of law

In his first issue, Keith argues that the trial court erred by failing to enter findings of fact and conclusions of law and that the appeal should be abated to require allow the court to do so.

When findings of fact and conclusions of law properly have been requested, a trial court's failure to file findings and conclusions is presumed reversible error, unless the record affirmatively shows that the requesting party was not harmed by their absence. *Alsenz v. Alsenz*, 101 S.W.3d 648, 651–52 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (citing *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996)). "If a party is prevented from presenting his case on appeal, he has been harmed." *Id.* at 652. But when "there is only a single ground of recovery or a single defense, the appellant suffers no harm because the reason for the trial court's judgment is clear,

and the appellate court does not have to guess the reason for the trial court's decision." *Pham v. Harris Cty. Rentals, L.L.C.*, 455 S.W.3d 702, 706 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

There is no dispute that Keith properly requested findings of fact and conclusions of law. The dispute in this case was very narrow: did Keith agree to eliminate the provision that would terminate payment of contractual alimony because of Cari's remarriage? Two types of evidence were adduced at the hearing pertinent to this question: the documentary evidence and the parties' testimony. The documentary evidence provided circumstantial evidence about the parties' negotiations, but none of the documents provided a direct answer to the question. The parties' testimony did: Cari testified that Keith agreed to eliminate that provision, Keith testified that he did not.

This is not a case with multiple claims or defenses and a summary disposition that has left an appellant unable to narrow his contentions for appeal because he does not know the court's reasons for ruling. *See id.* The court as factfinder was the sole judge of the credibility of the witnesses and made its determination based on their directly contradictory testimony. *See HTS Servs., Inc. v. Hallwood Realty Partners, L.P.*, 190 S.W.3d 108, 111 (Tex. App.—Houston [1st Dist.] 2005, no pet.). We need not guess the reason for the trial court's decision. It only could have been based on

a determination that Cari's testimony was credible and that Keith's was not. This is not a determination that is subject to reversal on appeal. *See id.*

The lack of findings of fact and conclusions of law in this case has not prevented Keith from presenting his legal challenge alleging a lack of ambiguity in the reformed order, or the propriety of the trial court's clarification of that order. Keith does not identify any issue that he was unable to brief as a result of the trial court's failure to make findings of fact and conclusions of law. *See Guillory v. Boykins*, 442 S.W.3d 682, 694 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

We hold that the record affirmatively shows that Keith was not harmed by the absence of findings of fact and conclusions of law. *See Alsenz*, 101 S.W.3d at 651–52. We overrule his first issue.

II. Ambiguity of reformed order

In his second issue, Keith argues that the trial court erred by concluding that the reformed order was ambiguous.

In the trial court, Keith initially asserted that the remarriage and cohabitation provision was ambiguous. In his "Answer to Second Amended Motion to Enforce and Clarify Decree of Divorce," Keith pleaded that the "order sought to be enforced is incapable of enforcement, in that it is ambiguous and is not clear and specific enough in its terms" that he would know "what duties or obligations are required."

At the March 3, 2010 hearing, Keith argued for an interpretation of the modified order based on the four corners of the document without resort to parol evidence. That is, he argued that the modified order did not modify or supersede the marriage or cohabitation provisions of the original divorce decree. His lawyer argued, "We cannot get to parol evidence unless you find that somehow . . . these contracts are ambiguous." The attorney further explained: "If the modified order does not specifically state that it's modified, then the terms of the agreed final decree remain in full force and effect. That is actually stated on the last page of the order . . . where it says, 'Relief not granted. It is order[ed] that all relief requested in this case not expressly granted is denied. All other terms of the prior order not specifically modified in this order shall remain in full force and effect."'

On appeal, Cari argues that the modified order was unambiguous, and she asserts that she took that position in the trial court as well. But at the March 3, 2010 hearing it was Cari who sought a ruling from the trial court that would allow the introduction of parol evidence about the parties' intent and the continuing validity of the marriage and cohabitation clause. The court found the modified order ambiguous, and both Cari and Keith presented evidence.

An agreement for contractual alimony which is incorporated into a divorce decree or an order modifying such a decree is contract subject to the usual rules of contract interpretation. *See Hallsted v. McGinnis*, 483 S.W.3d 72, 75 (Tex. App.—

Houston [1st Dist.] 2015, no pet.); *Broesche v. Jacobson*, 218 S.W.3d 267, 271 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). When a written contract is modified, it need not "restate all essential terms of the original agreement." *BACM 2001-1 San Felipe Road Ltd. P'ship v. Trafalgar Holdings I, Ltd.*, 218 S.W.3d 137, 145–46 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). Instead, a "modification alters only those terms of the original agreement to which it refers, leaving intact those unmentioned portions of the original agreement that are not inconsistent with the modification." *Id.* at 146.

"In construing a contract, a court must ascertain the true intentions of the parties as expressed in the writing itself." *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011). To determine the intent of the parties, we examine the entire writing and strive to harmonize and give effect to all provisions in the contract, so that no provision is rendered meaningless. *In re Serv. Corp. Int'l*, 355 S.W.3d 655, 661 (Tex. 2011); *Internacional Realty, Inc. v. 2005 RP West, Ltd.*, 449 S.W.3d 512, 523 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). In doing so, we give contract terms "'their plain and ordinary meaning, unless the contract indicates that the parties intended a different meaning.'" *Reeder v. Wood Cty. Energy, LLC*, 395 S.W.3d 789, 794–95 (Tex. 2012) (quoting *Dynegy Midstream Servs., L.P. v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009)).

Whether a contract is ambiguous is a question of law, which we review de novo. *Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 449 (Tex. 2015). "'A contract is ambiguous when its meaning is uncertain and doubtful or is reasonably susceptible to more than one interpretation.'" *Dynegy*, 294 S.W.3d at 168 (quoting *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996)).

A simple lack of clarity or disagreement between parties does not necessarily render a term ambiguous. *See DeWitt Cty. Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999). In his brief, Keith relies on several cases for the general proposition that the parties' different interpretations of contractual provisions do not necessarily create an ambiguity. *See, e.g.*, *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994); *Hallsted*, 483 S.W.3d at 75. But when a contract is susceptible to two or more reasonable interpretations, a fact issue arises which must be resolved by the trier of fact. *See Ashford Partners, Ltd. v. ECO Res., Inc.*, 401 S.W.3d 35, 38–39 (Tex. 2012).

In this case, Cari and Keith's dispute centers on the continuing validity of the marriage and cohabitation clause which appeared in the original divorce decree but not the reformed order. It stated:

Marriage or Cohabitation of Receiving Party Contingency—

> If before October 1, 2014 CARI JOAN BARGER marries or cohabitates with someone in a conjugal relationship, JAMES KEITH BARGER will pay to CARI JOAN BARGER $2,000.00 per month as alimony, in two installments per month of $1,000.00 each, with the first

> installment of $1,000.00 beginning on the first day of the month following the marriage or cohabitation of Receiving Party with someone in a conjugal relationship and a like amount of $1,000.00 on the 1st and 15th day of each month thereafter until October 1, 2014. The payments of $2,000.00 will terminate on October 1, 2014.
>
> If after October 1, 2014 CARI JOAN BARGER marries or cohabitates with someone in a conjugal relationship, the alimony will terminate at the marriage or cohabitation of Receiving Party with someone in a conjugal relationship, including remarriage to Paying Party.

Keith contends that the provision is still valid because the reformed order stated: "All other terms of the prior orders not specifically modified in this order shall remain in full force and effect." The marriage or cohabitation provision was not mentioned in the reformed order. Keith argues, therefore, that it remains in full force and effect.

Cari contends that the marriage or cohabitation clause was a terminating event in the original divorce decree which was specifically modified by the new schedule of payments and exceptions in the modified order, which included terminating events. She argues, therefore, that the reformed order intentionally modified and excluded the marriage or cohabitation provision, as opposed to retaining it as an unmodified term of a prior order. This is a reasonable interpretation.

We need not resolve whether Keith's competing interpretation also was reasonable, as the same outcome results either way. If it was not a reasonable interpretation, we would hold that the trial court correctly applied the unambiguous

order. Alternatively, even if we considered Keith's interpretation to be reasonable, the consequence would be that the modified order was ambiguous and would have been a question of fact for the fact finder, which, in this case, was the trial court. *Cf. Internacional Realty*, 449 S.W.3d at 523–27. This was resolved in Cari's favor when the court determined that the modified order should be further clarified and that that she was still entitled to contractual alimony in spite of her remarriage. We overrule the second issue.

III. Clarification of reformed order

In his third issue, Keith argues that the trial court erred by substantively changing the parties' agreement because they agreed that the contractual alimony provisions in the reformed order would not supersede the contractual alimony provisions in the original divorce decree.

We review a trial court's ruling on a post-divorce motion for enforcement or clarification for an abuse of discretion. *Gainous v. Gainous*, 219 S.W.3d 97, 103 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). A trial court abuses its discretion only if it reaches a decision so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law. *Intercontinental Terminals Co. v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 892 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *see also Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). "A trial judge may clarify the

property division she ordered in a divorce decree by specifying more precisely the manner of carrying out that property division; the court may not alter the substantive division of the property." *Karigan v. Karigan*, 239 S.W.3d 436, 438 (Tex. App.—Dallas 2007, no pet.); *accord Dechon v. Dechon*, 909 S.W.2d 950, 956 (Tex. App.—El Paso 1995, no writ). "A clarification order is an enforcement order, and a trial court has broad discretion in enforcing its judgments." *Karigan*, 239 S.W.3d at 439. "Enforcement orders are limited to those in aid or in clarification of the prior order." *Able v. Able*, 725 S.W.2d 778, 779 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

In this case, the trial court as factfinder determined that the parties intended to eliminate the marriage and cohabitation provision, and its order clarifying that did not substantively alter the parties' agreement. Accordingly, we hold that the court did not abuse its discretion by clarifying the reformed order. We overrule the third issue.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Bland, Massengale, and Lloyd.