In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00364-CV

DANNY WILBURN GREEN, Appellant

V.

LISA A. GREEN, Appellee

On Appeal from the 284th District Court
Montgomery County, Texas
Trial Cause No. 08-04-04305 CV

MEMORANDUM OPINION

Danny Wilburn Green appeals from a final decree of divorce dissolving his marriage to Lisa A. Green and dividing the parties' marital estate. In issue one, Danny contends the trial court erred by failing to follow the terms contained in a binding mediated settlement agreement signed by Lisa that divided the parties' marital estate. In issue two, Danny challenges the trial court's implied finding that he made false statements of fact regarding his retirement account to secure Lisa's consent to the settlement agreement.

Background

Danny and Lisa married in 1995 and separated in 2008. In April 2008, Danny sued for a divorce. In June 2008, Danny, Lisa, and their respective attorneys signed an irrevocable settlement agreement. *See* Tex. Fam. Code Ann. § 6.602(b) (West 2006). Under the terms of the agreement, the property awarded to Danny included "100% of Teacher Retirement in His name[,]" the house the couple purchased during their marriage, and a life insurance policy on Danny's life issued by Canadian Life. The property awarded to Lisa included accounts and cash that the agreement reflects had an approximate value of $61,000. In July 2008, before the trial court executed the final decree, Lisa notified the trial court that she desired to revoke the settlement agreement. Lisa's written notice of revocation is based on allegations of duress, coercion, impaired capacity, and unfair tactics, as well as the contention that "Husband's nondisclosure of assets undermined the adequacy of the negotiations."

In August 2008, the trial court signed a judgment consistent with the parties' settlement agreement. Shortly after the trial court signed its August 2008 judgment, Lisa filed a motion for new trial. Lisa's motion for new trial alleges that at the mediation, she had no information regarding the majority of the parties' marital assets. Lisa's motion also complains that Danny failed to file a sworn inventory identifying the assets of the marital estate within the deadline required by the settlement agreement. In October 2008, the trial court granted Lisa's motion for new trial "in the interest of justice[.]"

After the trial court granted a new trial, Danny requested the Ninth Court of Appeals to order the trial court to immediately sign a judgment based on the mediated settlement agreement. *In re Green*, No. 09-09-00323-CV, 2009 WL 2616258 (Tex. App.—Beaumont, August 27, 2009, orig. proceeding [mand. denied]). We denied Danny's petition for writ of mandamus and noted that, while the trial court vacated the August 2008 judgment, it had not signed a new judgment that voided the parties' settlement agreement. *Id.* at *2.

In April 2010, the trial court conducted a bench trial of the disputed issues, including whether Lisa could avoid Danny's request to enforce the settlement agreement. After hearing the evidence and arguments of counsel, the trial court announced: "I'm going to take the property division portion of this case under advisement." In May 2010, the trial court signed a judgment dividing the parties' marital estate in a manner that does not follow the terms of the settlement agreement and that effects a division substantially more favorable to Lisa than the division achieved under the parties' settlement agreement. The trial court's May 2010 judgment does not expressly state that Danny committed fraud in procuring Lisa's agreement to the terms of the parties' settlement agreement.

On appeal, Danny argues that the trial court erred in failing to make a finding that the settlement agreement was procured by fraud, duress, coercion, or other dishonest means. Danny also argues that the trial court's implied findings that he made false

representations about the assets of the marital estate are not supported by legally or factually sufficient evidence.

Absence of Express Findings

In the trial of a divorce case, trial courts are required to make findings and conclusions that characterize the claims "on which disputed evidence has been presented[]" when presented with a request for findings of fact and conclusions of law conforming to the Texas Rules of Civil Procedure. Tex. Fam. Code Ann. § 6.711 (West 2006). In this case, neither party requested that the trial court make findings of fact and conclusions of law. *See* Tex. R. Civ. P. 296 (requiring request for findings and conclusions to be filed within twenty days after judgment is signed). Where no party requests findings of fact, appellate courts imply that the trial court made all fact findings necessary to support the trial court's judgment. *See Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003); *Black v. Dallas Cnty. Child Welfare Unit*, 835 S.W.2d 626, 631 n.10 (Tex. 1992).

Because the final judgment the trial court signed does not divide the property in accord with the parties' settlement agreement, and because neither of the Greens requested findings of fact, the implied findings in this case include all of the implied findings necessary to support a legal conclusion that Danny committed fraud. *See Sixth RMA Partners, L.P.*, 111 S.W.3d at 52. We overrule Danny's first issue, and hold that in

the absence of a request for findings of fact and conclusions of law, the trial court did not commit error by failing to make express findings.

Sufficiency Challenge to Implied Finding of Fraud

A trial court's division of property is reviewed under an abuse of discretion standard. *See Bell v. Bell*, 513 S.W.2d 20, 22 (Tex. 1974); *see also Moroch v. Collins*, 174 S.W.3d 849, 857 (Tex. App.—Dallas 2005, pet. denied). A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner, or when it acts without reference to any guiding principles. *See Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). Under an abuse of discretion standard in family law cases, legal and factual sufficiency of evidence complaints are not independent grounds of error but are merely factors in assessing whether the trial court abused its discretion. *See Granger v. Granger*, 236 S.W.3d 852, 856 (Tex. App.—Tyler 2007, pet. denied). The mere fact that a trial judge decides a matter within the court's discretionary authority in a different manner than an appellate court would in a similar circumstance does not demonstrate abuse of discretion. *Downer*, 701 S.W.2d at 242. As long as some evidence of a substantive and probative character exists to support the trial court's decision, there is no abuse of discretion. *Granger*, 236 S.W.3d at 855-56.

In nonjury trials, the trial court acts as the exclusive judge of the credibility of the witnesses and of the weight to be given their testimony. *See Beck v. Walker*, 154 S.W.3d

895, 901 (Tex. App.—Dallas 2005, no pet.). Generally, weighing the evidence, drawing inferences from the facts, and choosing between conflicting inferences is the factfinder's function. *See Ramo, Inc. v. English*, 500 S.W.2d 461, 467 (Tex. 1973); *Beck*, 154 S.W.3d at 901. In an appeal from a bench trial, the trial court's findings of fact "have the same force and dignity as a jury's verdict upon questions." *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). The trial court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them by the same standards that are applied in reviewing evidence supporting a jury's verdict. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996); *Anderson*, 806 S.W.2d at 794. Evidence is legally sufficient if it "would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). In evaluating the evidence's legal sufficiency, "we credit evidence that supports the verdict if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not." *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 793 (Tex. 2006) (citing *City of Keller*, 168 S.W.3d at 827).

In determining whether the evidence is factually sufficient to sustain a verdict, courts of appeals must weigh all the evidence, both for and against the finding. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). Because Lisa prevailed in the trial court on her claim of fraud, Danny must demonstrate that the trial court's implicit conclusion he committed fraud is "clearly wrong and unjust." *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). We further note that in reviewing the evidence, we are to defer to

the factfinder's determinations regarding the credibility of the testimony given by the witnesses, and we are not to "impose [our] own opinions to the contrary." *City of Keller*, 168 S.W.3d at 819 (footnotes omitted).

At common law, fraud is generally considered to have occurred when (a) "a party makes a material misrepresentation," (b) "the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion," (c) "the misrepresentation is made with the intention that it should be acted on by the other party," and (d) "the other party relies on the misrepresentation and thereby suffers injury." Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment* PJC 105.2 (2010). Under Texas law, a party to a contract has "a duty to abstain from inducing another to enter into a contract through the use of fraudulent misrepresentations." *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 46 (Tex. 1998). In this case, because there was no request for findings, and because the trial court's final judgment does not follow the settlement agreement, the implied findings include findings that Danny made material misrepresentations to induce Lisa to enter the settlement agreement, that the misrepresentations were made with knowledge of their falsity or that Danny made the misrepresentations recklessly without any knowledge of the truth and as positive assertions, that the misrepresentations were made with the intention that Lisa would act on them and enter the settlement agreement, and that Lisa relied on the

misrepresentations by entering the settlement agreement which caused her to suffer injury.

In issue two, Danny contends the evidence is factually and legally insufficient to support a finding of fraud. Danny confines his argument to two claims. First, Danny argues that the evidence does not show he intentionally failed to disclose information about the assets of the marital estate; second, Danny argues that Lisa failed to exercise due diligence to discover the amount of money in his retirement account as of the date of the mediation. However, Danny does not challenge the trial court's implied findings that his alleged failures to fully disclose were material, nor does he challenge the implied findings that Lisa relied on his alleged misrepresentations and thereby suffered injury. Additionally, Danny does not attack the trial court's implied finding that he told Lisa before or during the mediation that the value of his retirement plan was approximately $64,000.

We note the specific findings that Danny attacks in his issue two argument because "[i]n an appeal from a nonjury trial, an attack on the sufficiency of the evidence must be directed at specific findings of fact, rather than at the judgment as a whole." *Zagorski v. Zagorski*, 116 S.W.3d 309, 319 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (op. on reh'g) (appeal from the property division in a divorce case); *see also* 6 Roy W. McDonald & Elaine A. Grafton Carlson, *Texas Civil Practice* § 18:12 (2d ed.

1998 & Supp. 2010-11). Here, Danny confines his argument to whether he intentionally failed to disclose marital assets and to whether Lisa exercised due diligence.

With respect to the implied finding that Danny attacks, his alleged failure to disclose, we note that the trial court's judgment does not depend on an implied finding of nondisclosure. Instead, the trial court's implied findings concern misrepresentations about assets, not the failure to disclose their existence. Specifically, Lisa contends that the evidence demonstrates Danny misrepresented the market value of his teacher retirement plan, the cash value of a life insurance policy, and the value of the couples' home.

Having reviewed the record, we conclude there is some evidence in the record to support the trial court's implied finding that Danny falsely represented the market value of his teacher retirement account. During the trial, Danny testified that before the mediation, he and Lisa had not filed inventories and that neither side had provided the other with sworn evidence regarding the assets of the marital estate. According to Danny, his retirement account had a value of $189,000 when the mediation occurred. Based on a value of $189,000 and their thirteen year marriage, Danny explained that Lisa's community property interest in his retirement account was approximately $64,000. Danny explained that during the mediation, Lisa received various annuities and life insurance policies in exchange for her interest in his retirement account. The settlement agreement the parties signed reflects that Lisa received bonds, annuities, and life insurance policies valued at approximately $61,000. According to Lisa, she had no idea

about the value of the parties' marital estate when the mediation occurred. Various documents were admitted into evidence that provided the trial court with information about Danny's retirement plan. These include a letter from the retirement system that maintains Danny's plan indicating that he had a defined benefit plan "with the annuity paid on the basis of a statutory formula rather than the contributions deposited with [the retirement system]." The retirement plan documents reflect account balances based on Danny's contributions and accrued interest that are consistent with the values Danny used to calculate Lisa's interest in his retirement account. After the mediation, Danny filed an inventory representing that as of August 31, 2008, Lisa's community interest in his retirement plan had a market value of $64,814.

From this evidence, the trial court could have reasonably concluded that a representation based on a contribution and accrued interest approach falsely represented the market value of Danny's retirement account. Because Danny's retirement plan was a defined-benefit plan, the payments he was entitled to receive were to be received in the future. Danny apparently calculated the market value of his retirement plan by determining the amount of his contributions, adding the accrued interest, multiplying that sum by a proportional ownership ratio which he based on the number of years he and Lisa were married, and then dividing by the total number of years of his employment. However, the market value of benefits to be paid in the future should be determined by calculating the present value of the future payment stream. *See Shanks v. Treadway*, 110

S.W.3d 444, 446 (Tex. 2003); Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Family* PJC 203.1 (2010). According to a 2008 annual statement on Danny's retirement account which the trial court admitted, Danny was entitled to receive, upon his retirement, the sum of $5,148.20 per month for the remainder of his life under his defined-benefit retirement plan. At the time of the mediation, Danny was sixty years old, and he was eligible for retirement. The market value of Danny's retirement plan should have been calculated based on a present value calculation, and the evidence demonstrates that Danny did not use that approach in calculating his retirement plan's market value.

From the evidence before the trial court, the trial court could reasonably conclude that Danny's approach to calculating the retirement plan's market value significantly underestimated the plan's actual market value. The trial court could further reasonably conclude that Danny knew before the mediation that he had a defined-benefit plan, and that the market value of the plan could not be determined based on the contributions that he had made to the plan together with the plan's accrued interest. Based on the evidence, the trial court could reasonably conclude that Danny knew before and at the time the mediation that he was entitled to receive a sum certain paid monthly upon retiring for the remainder of his life under his retirement plan.

We conclude the record contains legally and factually sufficient evidence to show that Danny intentionally misrepresented the market value of his retirement plan. *See Boyd*

v. Boyd, 67 S.W.3d 398, 404-05 (Tex. App.—Fort Worth 2002, no pet.) (The court properly concluded that mediated settlement agreement was unenforceable where one spouse intentionally withheld information about substantial marital assets.). We further conclude the court did not abuse its discretion by refusing to enforce a settlement agreement obtained by fraud. *See In re Joyner*, 196 S.W.3d 883, 890 (Tex. App.—Texarkana 2006, pet. denied) ("A trial court is not required to enforce a mediated settlement agreement if it is illegal in nature or was procured by fraud, duress, coercion, or other dishonest means.")

The record also contains evidence that Danny misrepresented the cash value of a Canadian Life policy that insured his life. Danny testified that at the time of the mediation, he believed the policy had a cash value of approximately $5,000. Following the mediation, Danny gave Lisa a check for $5,000 containing a representation in the check's memo field that states "FACE VALUE/Canadian Life." Danny explained that when he surrendered the Canadian Life policy, he learned that its cash value was approximately $18,600. After learning the value exceeded the cash value he had placed on the Canadian Life policy, Danny tendered an additional check for $6802 to Lisa in an effort to split the additional value of that policy on an equal basis. We further conclude that the record contains legally and factually sufficient evidence to demonstrate that at the mediation, Danny misrepresented the cash value of the Canadian Life policy to be $5,000.

Danny also argues that Lisa's failure to exercise due diligence in investigating various facts should not prevent a court from enforcing their settlement agreement. However, under Texas law, the party seeking to avoid the enforcement of an agreement does not have a duty to use due diligence to discover whether representations that were made were fraudulent. *Koral Indus. v. Security-Conn. Life Ins. Co.*, 802 S.W.2d 650, 651 (Tex. 1990) ("Failure to use due diligence to suspect or discover someone's fraud will not act to bar the defense of fraud to the contract."). Lisa's failure to use diligence is not a defense to Lisa's claim of fraud. *See id.*

Finally, Danny argues that the settlement agreement provides Lisa with a better remedy for alleged nondisclosures because, under the settlement agreement, Lisa was entitled to receive the full value of any intentionally undisclosed asset. However, characterizing the retirement account and the Canadian Life policy as "undisclosed assets" mischaracterizes Lisa's claims. Lisa contends that these assets were fraudulently undervalued, not that they were undisclosed. Moreover, the trial court's implied findings establish fraud as a defense to enforcement of the parties' settlement agreement, and rescission is an equitable remedy available in cases of fraud. *See Bank One, Tex., N.A. v. Stewart*, 967 S.W.2d 419, 455 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). We conclude that the remedies available to Lisa are not limited to those contained in an unenforceable settlement agreement. We overrule Danny's argument that the trial court's implied findings are not supported by legally or factually sufficient evidence.

Danny raises additional arguments with respect to the trial court's implied findings on the issues of coercion, duress, and impaired capacity. Because we have determined that the trial court's implied findings support its legal conclusion on the issue of fraud, reviewing Danny's additional arguments would afford Danny no greater relief. Therefore, we do not address Danny's additional arguments. *See* Tex. R. App. P. 47.1.

Because Danny has not demonstrated the trial court erred by entering a judgment dividing the parties' marital estate in a manner that differs from the terms of the parties' settlement agreement, we affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on March 31, 2011
Opinion Delivered May 26, 2011
Before Gaultney, Kreger, and Horton, JJ.