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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002385-MR

JOHN C. MURRAY — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 01-CI-00799

LISSA MURRAY — APPELLEE

OPINION
AFFIRMING IN PART AND REMANDING

** ** ** ** **

BEFORE: STUMBO AND THOMPSON, JUDGES; SHAKE,[1] SENIOR JUDGE.

STUMBO, JUDGE: John Murray appeals from three orders of the Oldham Family Court, which concerned the enforcement of a Marital Settlement Agreement, the reopening of the agreement, and the awarding of attorney fees. Mr. Murray argues that Lissa Murray was not entitled to enforce certain aspects of the agreement, was

[1] Senior Judge Ann O'Malley Shake, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

not able to reopen the agreement, and should not have been awarded attorney fees. We find that the court acted correctly on all issues, but did not make the requested findings of fact needed for an award of attorney fees. For this reason, we remand this case to the trial court for findings on the issue of attorney fees only.

Mr. and Ms. Murray were married in 1985. A petition for dissolution of marriage was filed on December 28, 2001. On March 26, 2002, the parties entered into a Marital Separation Agreement to resolve all issues regarding the divorce. This agreement was incorporated into a final decree of dissolution of marriage entered April 29, 2002.

The part of the agreement at issue today dealt with the division of certain stock options that Mr. Murray owned. That section stated in pertinent part:

> The Respondent is the owner of certain of the following stock options, to wit: 1995 Pepsico SOIP, 1998, 1999, 2000, and 2001 Tricon SOIP . . . The parties further acknowledge and agree that the exercise of those stock options only occurs during certain "windows" of opportunity. They can only be exercised by the Respondent. They cannot be, under the terms of the respective plans, transferred one-half to the Petitioner and she then exercise her own independent business judgment on when or when "not to" exercise same. Unless the parties agree in writing to the contrary, each and every one of the aforementioned options shall be exercised at the first available "window" following the date of the entry of a Decree of Dissolution of Marriage which incorporates this Property Settlement Agreement by reference. If the Petitioner agrees in writing with the Respondent to delay exercise of the option to the "next window" of opportunity for sale, then the Respondent must keep the Petitioner advised of each and every "next window" of opportunity for exercise until all of the aforementioned options have been sold. Upon sale of

> each option, the "after-tax" value of the sale shall be divided equally between the parties.

The 1999, 2000, and 2001 Tricon SOIP are at issue here. They are stock option grants, not actual stock. Each grant had a grant term during which Mr. Murray could exercise the option. The grant terms were contingent on him remaining employed with his employer. For example, the 1999 stock grant had an option term of January 21, 2003, through January 20, 2009. As long as Mr. Murray was employed when this option term window was open, here as early as January 21, 2003, then he could exercise the stock option. According to the marital agreement, he would then owe Ms. Murray half of the money he received.

In 2006, Mr. Murray left his employment and had to cash out all his remaining stock options. On August 8, 2008, Ms. Murray filed a motion asking that Mr. Murray pay her the 50% of the stock grants listed in the agreement. Apparently, Mr. Murray had cashed in the 1999, 2000, and 2001 Tricon SOIP stock option grants, but had not given any of the money to Ms. Murray. During discovery, Ms. Murray discovered another stock option grant, 2002 Tricon, that was not disclosed during the property settlement negotiations, but about which Mr. Murray had knowledge. Ms. Murray also sought attorney fees in the amount of $13,986.

After a hearing on these issues, the trial court entered an order on June 4, 2009, holding that Ms. Murray was entitled to half the money Mr. Murray received when he exercised the Tricon stock options listed in the settlement

agreement. The court also awarded Ms. Murray $10,000 in attorney fees. It then reserved judgment on the issue of the 2002 Tricon stock option in order to allow the parties to submit briefs on the issue. Mr. Murray then moved to vacate the order and for essential findings of fact as to why Ms. Murray was awarded attorney fees. The court decided to take the motion under submission and rule upon it when it decided the merits of the 2002 Tricon stock option issue.

On October 29, 2009, the trial court entered an order finding that the 2002 Tricon stock option was marital property and that Ms. Murray was entitled to her share of the proceeds. Although the court also mentioned in passing Mr. Murray's motion to vacate and for findings, no findings in regard to the attorney fees were made and the court did not specifically rule on the motion to vacate. Mr. Murray then filed another motion to vacate and for findings of fact.

On December 2, 2009, the trial court entered an order denying both motions to vacate and reiterated the June 4, 2009 order and the October 29, 2009 order. Mr. Murray then filed another motion to vacate and for findings arguing that the December 2, 2009 order added details to the June and October orders that were not in the original orders. For example, the original June order stated generically that Ms. Murray was entitled to interest, but the December order actually stated what interest rate to use. He also argued that the trial court never issued the findings of fact he requested in his previous motions.

On December 23, 2009, Mr. Murray appealed the June, October, and December 2009 orders. On January 21, 2010, the trial court entered an order

denying Mr. Murray's last motion to vacate. The court noted that an appeal had been filed, but that it was entering the order to complete the record.

Mr. Murray's first argument on appeal is that the trial court erred in finding that the settlement agreement required the division of the 1999, 2000, and 2001 Tricon stock option grants. As both parties point out, settlement agreements are contracts. *Ford v. Ratliff*, 183 S.W.3d 199, 202 (Ky. App. 2006).

> When no ambiguity exists in the contract, we look only as far as the four corners of the document to determine that intent. *See 3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metro. Sewer Dist.,* 174 S.W.3d 440, 448 (Ky. 2005). "The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.,* 94 S.W.3d 381, 385 (Ky. App. 2002).

Abney v. Nationwide Mut. Ins. Co., 215 S.W.3d 699, 703 (Ky. 2006).

In the case at hand, the settlement agreement unambiguously states that the parties are to divide the 1999, 2000, and 2001 Tricon stock options. The terms of the agreement even contemplate the fact that these stock options were not available at the time of the execution of the agreement and that they would have to be sold off at a later date. The agreement also stated that the value received would be divided equally between the parties. The settlement agreement is an enforceable contract and the trial court did not err in awarding Ms. Murray her share of the listed Tricon stock options.

Mr. Murray argues in the alternative that should we find the trial court did not err in awarding Ms. Murray her half share of the stock options, then we should still remand it to the trial court for a recalculation based on when the stock options could have first been sold. Mr. Murray did not exercise the Tricon stock option grants at the first available window as was required by the settlement agreement. When he did sell, the stock options had increased in value and were worth more than they would have been had he sold them at the first available window. Mr. Murray argues that the settlement agreement required a "writing" should the parties decide not to sell the stock options at the first opportunity and that no writing existed. He claims that the stock options should be valued at their worth at the first window and not when he actually sold them.

We disagree with Mr. Murray. It was Mr. Murray's responsibility to sell the stock options at the first available window. Ms. Murray testified that she had no problem relying on Mr. Murray's expertise in deciding when to sell. Both parties chose to ignore the "writing" requirement and in fact, both benefited from the delay in selling the stock options. It would be inequitable to allow Mr. Murray to keep his additional benefit, but deny the same benefit to Ms. Murray.

Mr. Murray next argues that the trial court erred in finding that the 2002 Tricon stock option grant was divisible as marital property. We find no error.

> All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-

> ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property.

KRS 403.190(3). Here, the 2002 Tricon stock option grant was given to Mr. Murray before a decree of legal separation was entered. In addition, the provisions of a divorce decree relating to property division may be reopened if "the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state." KRS 403.250(1).

The trial court modified the property settlement and gave Ms. Murray her share of the 2002 Tricon stock options. It did this under two theories, but we will only discuss one because it is dispositive. The trial court found that the 2002 Tricon stock option grant was unassigned marital property.

> Kentucky law treats marital property not disposed of in the divorce decree as though it had already been distributed. *See Kidwell v. Mason,* 564 S.W.2d 534 (Ky. 1978) (holding that even though decree dissolving marriage made no provision for assignment of marital property, decree had same effect as if trial judge had specifically written therein that husband and wife each owned an undivided one-half interest in marital property).

Rayborn v. Rayborn, 185 S.W.3d 641, 644 -645 (Ky. 2006).

Mr. Murray argues that this stock option did not exist during the marriage and is therefore not marital property. This issue is similar to one in the case of *Sharber v. Sharber*, 35 S.W.3d 841 (Ky. App. 2001). In *Sharber*, James and Lisa Sharber were divorced in July of 1995. James was an employee of a branch of the Department of Defense. After his divorce, he was informed of an

incentive program for employees who elected to take early retirement. In James' case, if he elected to take early retirement, he would receive a bonus payment of $25,000. After he received the payment, the trial court found that Lisa was entitled to a portion of that bonus. The court found that James had worked for the Department of Defense for 27 years, and 11 of those were during the marriage. The court found that 11/27ths of the bonus was marital. James appealed arguing that the bonus could not be marital property because it was not available to him during the marriage; it was only offered to him after the divorce. Lisa argued that because the amount of the bonus was based on years of service, she should be entitled to that portion of the bonus earned during the marriage.

A previous panel of this Court stated:

> [w]e hold that the separation incentive bonus, even though the amount of the bonus is based on years of service reaching a maximum of $25,000, did not accrue during the marriage and thus is not subject to division as marital property. The possibility that James would receive this bonus did not exist during the marriage, which ended in July 1995. No right to receive the bonus existed while the parties were married because it was not offered to James, even though the statutory framework enabling the employer to offer such a bonus existed. It was only after the marriage ended that the bonus program was offered and implemented. This bonus is unlike a pension in that no interest, even a speculative one, existed prior to the offer of the bonus. No entitlement existed prior to the government's offer of the bonus in January 1996. Further, we are persuaded that the federal statute designates this type of bonus as something other than severance pay; it is instead a one-time bonus to induce federal workers to retire in order to reduce work force. The bonus is income received after the marriage.

> Accordingly, we reverse the decision of the [court] with respect to this issue.

Id. at 844-845.

Unlike the *Sharber* court, which found that the bonus did not exist during the marriage and was not marital property, we find that the 2002 Tricon stock option grant did exist during the marriage. The 2002 Tricon stock option grant was offered to Mr. Murray on December 31, 2001, and the decree of dissolution was not entered until April 29, 2002. The reality that he had received these stock options existed before the divorce became final, making them marital property. The trial court correctly found this stock option grant to be unassigned marital property and awarded Ms. Murray her share.

Mr. Murray also argues that the December 2, 2009 order should be set aside because the trial court was without jurisdiction to do anything but rule on his motions to alter, amend, or vacate. To better illustrate Mr. Murray's argument, we will need to set forth the pertinent parts of the December 2, 2009 order:

> IT IS HEREBY ORDERED that [John Murray's] Motions to Alter, Amend, or Vacate both the June 4, 2009 Order and the October 29, 2009 Order are hereby denied.
>
> IT IS FURTHER ORDERED that in accord with the June 4, 2009 Order, [Lissa Murray] shall have a common law judgment against [John Murray] for the sum of $150,157 for the marital stock options not divided per the parties' Property Settlement Agreement plus annual interest at 7.2% for years 2007, 2008 and 2009 in the amount of $34,825.20 or a total amount of $184,982.20. Any amount not paid within thirty days shall accrue interest at 12% per annum.

> IT IS FURTHER ORDERED that in accord with the October 29, 2009 Order, [Lissa Murray] shall have a common law judgment against [John Murray] for the sum of $29,526.78 for [Lissa Murray's] ½ share of the 2002 Tricon SOIP. Any amount not paid within thirty days shall accrue interest at 12% per annum.
>
> IT IS FURTHER ORDERED that in accord with the June 4, 2009 Order, [Lissa Murray] and her counsel David L. Vish shall have a common law judgment against [John Murray] for a total amount of $10,000 in attorney fees. Any amount not paid within thirty days shall accrue interest at 12% per annum.

Mr. Murray argues that this order should not state anything other than whether the court is sustaining or overruling his motions to alter, amend, or vacate. We note that this order does add terms to the previous orders. For example, the original June 4, 2009 order states that Ms. Murray is entitled to her share of the stocks listed in the settlement agreement, interest, and that she should get $10,000 in attorney fees. What it does not set forth is the specific dollar amounts and interest rates listed in paragraph two of the above December 2009 order.

We find that the December 2, 2009 order is valid in all respects. As long as there are post-judgment motions pending, such as Mr. Murray's motions to alter, amend, or vacate, finality is postponed and the trial court retains jurisdiction to make any changes necessary to its orders. *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 648 (Ky. 2007); *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 458 (Ky. 2002).

Mr. Murray's final argument is that Ms. Murray was not entitled to interest or attorney fees. As to the interest fees, Mr. Murray did not pay Ms.

Murray her share of the stock options listed in the settlement agreement. He kept the money he received and earned interest on it. Half of that money, and the interest earned on it, belongs to Ms. Murray, hence the 7.2% interest rate. Thereafter, the 12% interest rate is allowed by statute. KRS 360.040.

As to the attorney fees, KRS 403.220 states that a trial court can require one party to pay the attorney fees of another in dissolution cases. We note that Mr. Murray moved, pursuant to CR 52.02, that the court make findings of fact as to why Ms. Murray was entitled to attorney fees. The court never did so. Since Mr. Murray requested findings as to why attorney fees were warranted, and the court made no such findings, we remand this case on this issue only. *See Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004). On remand, the court will enter findings on why Ms. Murray was entitled to attorney fees.

Based on the above, we affirm the judgment of the trial court, but remand for findings as to attorney fees.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John K. Carter
LaGrange, Kentucky

BRIEF FOR APPELLEE:

David L. Vish
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