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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000765-MR
AND
NO. 2016-CA-001057-MR

ROBERT SAMUEL SAUNDERS — APPELLANT/CROSS-APPELLEE

v.

HEIDI SAUNDERS (now WALKER) — APPELLEE/CROSS-APPELLANT

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE BROWN, JUDGE
ACTION NO. 13-CI-501683

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JONES, AND NICKELL, JUDGES.

NICKELL, JUDGE: Robert Samuel Saunders ("Bob") has appealed from the January 7, 2016, order of the Jefferson Circuit Court, Family Division, requiring him to tender documents to his ex-wife, Heidi Saunders (now Walker), dividing certain assets as set forth in their Marital Settlement Agreement ("MSA"), and the

April 26, 2016, denial of his motion pursuant to CR[1] 59.05 to alter, amend or vacate the prior ruling which further ordered him to pay a portion of Heidi's attorney's fee. On cross-appeal, Heidi challenges the trial court's denial of her motion to strike portions of Bob's post-judgment motion for relief. Following a careful review of the record, the briefs and the law, we affirm.

Bob and Heidi were divorced by decree of dissolution entered on September 15, 2014. Incorporated into the decree was the parties' negotiated MSA. The detailed and comprehensive MSA resulted from a lengthy mediation at which both parties were represented by counsel. At issue in this appeal is whether the trial court appropriately interpreted and ordered enforcement of a single section of the MSA—section I.C.—related to the division of two investment funds. That section reads as follows:

> C. CHRYSALIS VENTURES FUNDS II AND III:
>
> 1. Heidi shall assume a limited partnership interest in Chrysalis Ventures Funds II and III and those Funds' related entities for one-half (1/2) of the combined General and Limited Partnership interests that Bob owns in those Funds II and III and those Funds [sic] related entities. The parties shall mutually cooperate in the drafting and execution of the documents necessary to effectuate the equal division of these assets. For all of these entities, one hundred percent (100%) of the committed

[1] Kentucky Rules of Civil Procedure.

> capital has been called; nonetheless, Bob shall indemnify and hold Heidi harmless from any and all liability arising from her status as a limited partner in these Funds II and III and those Funds [sic] related entities.

On or about May 22, 2015, Bob sent documents to Heidi's financial planner for his review regarding transfer to Heidi of one-half of Bob's interest in Chrysalis Ventures Fund III ("Fund III"). By cover letter, Bob claimed to have no personal interest in Chrysalis Ventures Fund II ("Fund II") and, therefore, no transfer to Heidi was warranted. The transfer documents omitted any mention of Fund II. Believing the tendered documents did not comport with the express requirements of the MSA, Heidi refused to execute the documents.

On September 15, 2015, Bob moved the trial court to "compel [Heidi's] performance required by Section I.C." of the MSA. The motion requested Heidi be required to execute the tendered transfer documents and that he be awarded attorney's fees and costs associated with seeking enforcement of the agreement. The matter came on for a hearing on December 11, 2015. Bob introduced no evidence at the hearing regarding Fund II and vehemently objected to introduction of any and all reference, evidence or explanatory testimony regarding Fund II. Heidi was permitted to briefly testify regarding her belief the tendered transfer documents did not comport with the requirements of the MSA because they did not include Fund II nor the "related entities" of either Fund II or

III. At the conclusion of the hearing, the trial court took the matter under submission.

On January 7, 2016, the trial court entered its order denying the motion to compel, concluding the tendered documents did not comport with the plain language of the MSA as they made no mention of Fund II. The court ordered Bob to tender transfer documents specifically dividing Funds II and III as called for in the MSA. Bob was awarded $500 in attorney fees for Heidi's failure to comply with transfer requirements related to two other marital assets which are not pertinent to this appeal.

Bob subsequently moved pursuant to CR 52 and 59 to alter, amend or vacate the January 7, 2016, order. He asserted disposition of Fund II was not before the court as no motion referencing that asset had ever been filed. Bob also contended he was not permitted an opportunity to present facts and evidence showing Heidi was not entitled to division of Fund II under the terms of the MSA or that he had no personal interest in Fund II. He asserted he would have presented substantial testimony on these issues at a "proper" hearing. In reply to Heidi's response in opposition to the motion, Bob made numerous new legal arguments and presented multiple factual assertions and documents not previously included on the record. Both parties moved to strike portions of the other's pleadings. Heidi subsequently moved the court for an award of attorney fees.

The trial court denied Bob's post-judgment motion for relief, finding the motion sought

> to enforce provision C.1. [sic] of the Marital Settlement Agreement which is clearly labeled Chrysalis Ventures Funds II and III, with Chrysalis Ventures Funds II and III linked throughout the provision. The Court specifically rejects [Bob's] assertion that the Court is limited to enforcing only the words in the provision that [Bob] wishes to enforce.

The trial court concluded the MSA was not ambiguous and clearly awarded Heidi a one-half interest in Funds II and III, as it had previously held in its January 7, 2016, order. Both motions to strike were denied. The trial court awarded Heidi $5,000 in attorney fees. This appeal and cross-appeal followed.

On direct appeal, Bob argues the trial court erred as a matter of law in concluding Fund II was divisible and compounded its error when it denied his post-judgment motion for relief. He further contends the trial court should have ordered Heidi to execute the tendered transfer documents for Fund III. Finally, he challenges the trial court's award of attorney fees to Heidi. On cross-appeal, Heidi alleges the trial court erred in denying her motion to strike Bob's allegedly improper arguments and exhibits offered in support of his post-judgment motion for relief.

Bob first challenges the trial court's order regarding divisibility of Fund II. He presents a multifaceted attack on this part of the court's ruling.

However, a review of the record reveals large portions of his arguments were never presented to the trial court for consideration. Attempting to present new reasons supporting his position at this late date is improper. The time to make these arguments was in the trial court. It is axiomatic that a party may not "feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321, 327 (Ky. 2010) (citations omitted)). To the extent the trial court was not presented these additional arguments, nor given the opportunity to rule thereon, we shall not consider them for the first time on appeal.

Bob believes the trial court erred in ruling on Fund II at all, asserting that asset was not properly before the court for decision. Bob fails to comprehend his motion—and indeed statements of his own counsel—specifically requested the trial court enforce the plain language of Section I.C. of the MSA based only on the four corners of the document. Bob's motion did not, in any way, limit itself to Fund III. There can be no logical dispute interpretation and enforcement of the entirety of Section I.C. was properly before the trial court. Bob's attempts to cherry pick the language to be applied to the exclusion of the remainder of the section was—and is—improper.

At the hearing, Bob's counsel—for unknown reasons—took every opportunity to exclude any and all reference, evidence or explanatory testimony regarding Fund II. On appeal, he contends the trial court deprived him of the opportunity to present evidence regarding the makeup, ownership, and background of Fund II. This assertion plainly contradicts reality. Bob employed a strategy to prohibit the introduction of evidence regarding Fund II and keep the trial court from entering a ruling on that asset. After the trial court ruled contrary to how he believed it should, Bob completely changed tack and attempted to introduce the very sort of evidence he previously fought so vigorously to exclude. He argued he did not now and had never before had a personal interest in Fund II, claiming he would have testified to and presented evidence of same had he been permitted to do so at the hearing. These untimely efforts were unavailing, and while Bob's protests have only grown louder, their substance remains unchanged.

The language of Section I.C. of the MSA is plain and unambiguous, clearly referencing and dividing Chrysalis Funds II and III. Bob sought enforcement of the provision. Heidi agreed the provision should be enforced. The trial court examined the language of the MSA, concluded the parties had agreed to evenly divide Funds II and III without limitation, and ordered Bob to comply with the express requirements of the MSA. We discern no error in the trial court's decision to enforce the clear language of the parties' mediated agreement.

In his post-judgment motion to alter, amend or vacate the trial court's ruling, Bob attempted to introduce evidence purporting to support his argument Fund II was not divisible, primarily relying on his own self-serving declarations and attaching new exhibits which had not previously been introduced into the record. CR 59.05 simply provides: "A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." However, "[a] party cannot invoke [CR 59.05] to raise arguments and introduce evidence that could and should have been presented during the proceedings before entry of the judgment." *Hopkins v. Ratliff,* 957 S.W.2d 300, 301 (Ky. App. 1997) (quoting 7 Kurt A. Philipps, Jr., *Kentucky Practice*, CR 59.05, cmt. 6 (5th ed.1995) (footnote omitted)). Bob does not argue the proffered evidence could not have been produced prior to the trial court's ruling, apart from his ill-conceived notion it was the trial court which prevented him from doing so. As previously stated, Bob made a calculated decision to avoid and object to any and all reference to Fund II at the hearing and was successful in keeping this information out of the record. His attempt to foist blame on the trial court for the silent record is improper. If, as he so vehemently now argues, he believed he held no divisible interest in Fund II, he could and should have presented the evidence and made the arguments either before or at the hearing.

Bob's *post hoc* attack is unpersuasive and simply cannot carry the day. The trial court correctly denied his post-judgment motion for relief.

Bob next contends the trial court erred in refusing to require Heidi to execute the transfer documents related to Fund III. He asserts since no dispute exists as to Heidi's entitlement to one-half of that asset and the MSA compels her to "execute, acknowledge and deliver" the transfer documents, all conditions have been met and Heidi should have been made to sign the tendered instruments. In his view, the trial court's failure to order Heidi to do so constitutes an abuse of discretion. Bob cites no authority supportive of his position. Further, his argument ignores the reality the tendered documents do not comply with the language of the MSA requiring him to transfer to Heidi one-half of "Funds II and III and those Funds' related entities." The trial court so ruled and we discern no indication of any error. Bob's unsupported assertions to the contrary are without merit and require no further discussion.

Finally, Bob argues the trial court exceeded its authority in granting Heidi an award of attorney fees. The basis of his challenge is wide-ranging beginning with discussion of the "American Rule" related to awards of attorney fees which generally requires each litigant to bear his own costs. Bob then asserts any potential exception to the American Rule is inapplicable because Heidi did not

"prevail" nor did she prove existence of the eight factors[2] mentioned in *Sexton v. Sexton*, 125 S.W.3d 258, 272-73 (Ky. 2004), required to permit an award of fees. Additionally, Bob contends the trial court did not find any disparity in the relative financial resources of the parties sufficient to invoke the fee-shifting language contained in KRS[3] 403.220. Further, Bob argues a fee-shifting provision from the MSA was inapplicable because no default occurred, Heidi did not file a motion to enforce the agreement, and her legal fees were incurred "in defense, not pursuit" of enforcement.

> Generally, with respect to attorney's fees, Kentucky follows the American Rule of individual party responsibility rather than the fee shifting practice of some states and some other nations. *Louisville Label, Inc. v. Hildesheim*, 843 S.W.2d 321, 326 (Ky. 1992). *See Knott v. Crown Colony Farm, Inc.*, 865 S.W.2d 326, 331 (Ky. 1993), holding that without an attorney's fees statute, any such recovery must derive from the underlying contract.

O'Rourke v. Lexington Real Estate Co. L.L.C., 365 S.W.3d 584, 586 (Ky. App. 2011). In the case at bar, the MSA contains a specific fee-shifting provision. "If this contract is valid, its provisions are all binding and effective from A to Izzard. If this contract is consistent with public policy, its provision for [an] attorney fee must be respected and honored as the bargain of these parties and as one to be

[2] Inexplicably, Bob omits one of the eight factors from his discussion of *Sexton* and refers several times to the "seven factors."

[3] Kentucky Revised Statutes.

upheld by legal sanction." *Corrigan v. Corrigan*, 305 Ky. 695, 700, 205 S.W.2d 495, 498 (1947).

It is undisputed the MSA is valid and not unconscionable. No argument has been advanced that any portion of it is against public policy. Thus, there being no need to resort to application of statutory or other legal concepts which would normally govern the allowance of fees, Bob's arguments related to exceptions to the American Rule and the provisions of KRS 403.220 are inapposite. As with our previous discussion, we need look only to the plain language of the MSA to determine the parties' respective rights and obligations. If the requirements set out in the parties' agreement are met, an award of attorney fees is authorized and only if an abuse of discretion occurred in granting the award will it be disturbed.

Section III.C. of the MSA states:

> [i]n the event of a default by either party of any term of this Agreement and if the other party prevails in litigation to enforce said term of this Agreement, then the defaulting party shall be responsible for and shall pay in full the costs and attorney's fees incurred by the prevailing party in pursuing enforcement of this Agreement.

Bob argues this section is inapplicable as there was no default, no motion by Heidi for enforcement, and Heidi's expenses were incurred in "defense" rather than "pursuit." Bob's assertions miss the mark.

First, Bob clearly defaulted when he ignored the plain language of the MSA and refused to tender compliant transfer documents to Heidi related to Funds II and III and their related entities. Even today, Bob continues his refusal to comply with the MSA and valid court orders. The trial court's failure to explicitly use the term "default" in its order is of no consequence. His assertion to the contrary is without merit. There was a default.

Next, the plain language of the fee-shifting provision of the MSA requires only that there be "litigation to enforce" a term. Nothing in that provision restricts its application to the person instigating the enforcement action. This is logical because in instances such as the one at bar, both parties made known their desire to comply and enforce Section I.C. To hold otherwise would lead to absurd results. Taken to its logical conclusion, Bob's position could easily result in a "race to the courthouse" whereby one party, knowing he is in error, could file volleys of motions—whether having any merit whatsoever—before their opponent could press the matter, simply to stave off the possibility of having to pay the opposing party's attorney fees. Alternatively, Bob's interpretation would result in duplicative motions being filed in any enforcement squabble to ensure an award of attorney fees remains a viable option for the prevailing party. We cannot countenance either of these outcomes. Enforcement litigation was commenced and that is all the fee-shifting provision of the MSA requires.

Similarly, Bob's assertion Heidi was not entitled to an award of fees because she was merely "defending" her position rather than "pursuing" enforcement is yet another semantic argument that does not hold water. The record clearly reflects Heidi's intention was to enforce the language of the MSA. She stated her position and asserted its correctness throughout the proceedings. The mere fact she was the respondent and not the movant does not mean, as Bob suggests, Heidi was defending rather than pursuing compliance with the terms of the MSA.

Next, there can be no doubt Heidi was the prevailing party. Bob was seeking an order requiring Heidi to execute transfer documents covering only Fund III, based on his belief Fund II was indivisible. Heidi asked the court to order Bob to comply with the language of the MSA and transfer to her a one-half interest in Funds II and III and those Funds' related entities. The trial court rejected Bob's position and he was ordered to tender transfer documents strictly complying with the MSA—as Heidi asserted he should. Clearly, Heidi prevailed.

The requirements of the MSA permitting an award of attorney fees were met. Thus, we now need only determine whether the trial court abused its discretion in granting the award it did. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.

1999). Heidi requested attorney fees in the amount of $17,886.65; the trial court awarded her $5,000. The MSA calls for the losing party to pay the prevailing party's costs and fees in full, meaning the abuse of discretion in this case, if any, would be in the trial court's refusal to grant Heidi the entirety of the amount requested. However, it is axiomatic "[t]he amount of an award of attorney's fees is committed to the sound discretion of the trial court[.]" *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990). The trial court was in the best position to determine the appropriate amount of fees to award. It obviously did not believe Heidi was entitled to nearly eighteen thousand dollars related to the enforcement action as it awarded less than one-third of that amount. Based on our review of the record, and giving due deference to the trial court's decision, we discern no abuse of discretion in the attorney fee award.

Based on our resolution of the direct appeal, Heidi's arguments on cross-appeal related to the propriety of Bob's arguments in and attachments to his CR 59.05 motion are moot. No further discussion is warranted.

For the foregoing reasons, the judgment of the Jefferson Circuit Court, Family Division, is AFFIRMED.

ALL CONCUR.

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