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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001529-MR

ROBERT MARK NAYLOR — APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE LUCINDA CRONIN MASTERTON, JUDGE
ACTION NO. 13-CI-03641

MEGAN DUFFIELD NAYLOR — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, LAMBERT AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Robert Mark Naylor (Mark) appeals from the findings of fact, conclusions of law and order entered by the Fayette Family Court denying his motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.02, seeking to set aside a mediated settlement agreement incorporated into a decree of dissolution of marriage.

Mark and Megan Duffield Naylor were married on November 27, 1996, and had three children, two of whom were minors when the parties divorced. In August 2013, Mark filed a petition for dissolution of marriage in the Fayette Family Court.

The marital estate consisted of four primary assets: the family residence; a newly developed apartment building; Mark's interest in a company that owned and managed two Famous Dave's restaurants; and Mark's primary business, which was his partial ownership of an architectural and engineering firm.

In the weeks prior to a mediation set for January 17, 2014, Mark engaged an expert to value the business interests and Megan engaged an expert to review that work as well. The value used at mediation was a compromised value of $829,500 for Mark's interests in the businesses. Also, in the weeks before mediation, the parties prepared and exchanged preliminary verified disclosure statements. Regarding the apartment complex, an appraisal was done and it was valued at $1,875,000. Both parties incorporated that appraisal into their disclosures. Both parties listed the marital home at a value of $900,000 in their respective disclosure statements.

The parties reached a mediated settlement agreement. However, there is no value assigned or target sale price for the apartment complex or the marital

home stated in the agreement. The agreement does contain the following provision:

> Equalization: Husband has received the entire marital interest in the parties' businesses in the amount of $829,500.00. Wife will receive all of the proceeds of the first of the parcels of real property described below [the apartment complex and marital home] to sell, up to $794,500. Wife will also receive proceeds from the sale of the second of properties in an amount that will bring her total receipt of funds up to $794,500, which amount represents $829,500.00 to Wife, less Wife's $35,000.00 agreed upon share of the parties' 2013 tax liability. Should the proceeds of the sale of the properties exceed the sum of $794,500.00, the parties will equally divide the excess. Should the proceeds be less than $794,500.00, Husband shall have 60 days following the last closing to pay Wife the difference to bring her total receipt up to $794,500. Husband will secure the amount of the payment required to equalize the assets with life insurance from the date of the last closing until paid.

In summary, under the terms of the agreement, Mark is required to pay Megan $829,500 for his receipt of the parties' marital interest in the businesses from the net proceeds of the sale of the marital residence, the parties' apartment complex and any other necessary source within 60 days of the last real property closing. The mediated settlement agreement was found not to be unconscionable by the family court and incorporated by reference in the parties' decree of dissolution entered on February 6, 2014.

On July 29, 2014, the apartment complex sold for $1,760,000, netting $167,927.22 to Megan. Knowing that the apartment sold for $90,000 less than the

appraised value at the time of mediation and fearing that the marital home might sell for less than $900,000, Mark filed a CR 60.02 motion on February 2, 2015, seeking relief from the mediated settlement agreement or, in the alternative, reformation of that agreement. The trial court deferred disposition of the motion until the marital home sold.

After two years on the market, the marital home sold on December 11, 2015, for $655,000, netting $293,248.50, which was paid to Megan. This amount was less than the $900,000 set forth in the parties' disclosure statements.

By the time the trial court granted a hearing and the hearing held on June 30, 2017, Megan had received $460,175.72 generated from the sale of the two properties. Therefore, under the terms of the mediated settlement agreement, Mark owed Megan an additional $334,324.28.

Mark argued both parties were under the mistaken belief that the marital estate was worth $1,659,000 based, in part, on the values the parties assigned to the apartment complex and marital home. However, after the apartments and marital home sold for substantially less than those values, the marital estate was only $1,289,676. He argues the equalization provision in the mediated settlement agreement is unconscionable because a $334,324.28 payment will award Megan 64.3% of the marital estate and Mark 35.7%.

After a hearing, the family court found that the parties contemplated that the values used in the mediation agreement may not be the same as the actual sale price of the properties and the equalization payment structure contemplated that possibility. The family court found that the actual sale prices of the properties was not newly discovered evidence warranting relief under CR 60.02. Finally, the family court found that the mediated settlement agreement was not unconscionable either when executed or at the time of enforcement and there was no extraordinary reason to justify relief from the agreement. This appeal followed.

Kentucky encourages the amicable resolution of a divorce action by settlement agreement. Kentucky Revised Statutes (KRS) 403.250(1) provides that such agreements incorporated into a decree of dissolution of marriage "may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state." The reopening of a judgment under Kentucky law is governed by CR 60.02.

Relief under CR 60.02 is exceptional and is to be granted cautiously and available "only under the most unusual and compelling circumstances." *Age v. Age*, 340 S.W.3d 88, 94 (Ky.App. 2011). The decision to grant or to deny a CR 60.02 motion lies within the sound discretion of the trial court. *Id.* We will not disturb the circuit court's decision absent an abuse of that discretion. *Id.* Only a decision that is "arbitrary, unreasonable, unfair, or unsupported by sound legal

principles" constitutes an abuse of discretion. *Id*. (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

CR 60.02 sets forth six grounds upon which relief from a final judgment may be granted. Mark predicates his request for relief upon three of those grounds: mutual mistake as to the value of the properties at the time the mediated settlement agreement was executed, CR 60.02(a); the sale price of both parcels was newly discovered evidence, CR 60.02(b); and a result which divides that marital estate 64.3% to 35.7% under an agreement that sought equalization of assets is fundamentally unfair. CR 60.02(f). We conclude that none of the grounds relied upon by Mark warrants the relief he seeks.

Mark argues that the settlement agreement was based on the mutual mistake that the value of the apartment complex was $1,850,000 and the value of the marital home was $900,000. As a threshold matter, to be a mutual mistake sufficient to set aside a contractual agreement, the mistake must be one as to a material fact affecting the agreement. *Abney v. Nationwide Mut. Ins. Co.*, 215 S.W.3d 699, 704 (Ky. 2006). Mark and Megan assigned values to the properties based on their opinions as to what each property was worth. Those opinions were not facts.

Moreover, the parties knew that the values assigned to the apartment complex and marital home may not be accurate. Although Mark claims to have

been unaware the property sometimes sells for less than its appraised value when he signed the mediated property settlement agreement, the terms of the agreement show otherwise. The parties obviously contemplated that there could be shortfall between the funds owed to Megan by Mark and the funds realized from the real property sales. The equalization provision specifically provided for such an event requiring Mark to pay any shortfall within 60 days after giving Megan the sales proceeds and Mark's agreement to secure any shortfall with a life insurance policy until paid in full. Moreover, in an email presented as evidence at the hearing and sent by Mark to Megan just nine days after the mediation, Mark wrote:

> Remember under our agreement, I owe you $829,000 somehow . . . this will be a combination of the sale of the house, the sale of MM [Marquis Middle Apartments] and then if that is not enough, I will have to come up with a way to pay you. . . . I am very concerned that the two sales will not generate enough money . . . so I am hoping we can be as fair as possible about all of this.

In light of the terms of the equalization provision and Mark's email, it is disingenuous for Mark to argue that he did not know the properties might sell for less than he and Megan believed they were worth. Therefore, relief under CR 60.02(a) is unavailable.

We also agree with the family court that relief under CR 60.02(b) is not available. As set forth in *West Vale Homeowners' Ass'n, Inc. v. Small*, 367 S.W.3d 623, 628 (Ky.App. 2012):

> Certainly, CR 60.02 affords the trial court the discretion to reopen a judgment or order for the consideration of newly discovered evidence, which was unavailable to the court at the time of judgment. It does not, however, allow for a judgment to be reopened and altered on the basis of facts which occurred after the judgment was entered. Certainly, newly *discovered* evidence—materials thought no longer to exist, witnesses unable to be located, or documents unable to be located for discovery—would qualify for reconsideration of the judgment under this rule.

The parties' decision to sell the apartment complex and the marital home for less than what they believed the properties to be worth is not newly discovered evidence. It was a decision made after the mediated settlement agreement was executed. If we agree with Mark's understanding of the meaning of "newly discovered evidence," it would eviscerate the concept of the finality of a marital property settlement agreement which, by its terms, requires property to be sold to effectuate the distribution of marital property. In a fluctuating real estate market, it is often the case that when sold, real property sells for more or less than the values the parties agreed upon months or years earlier.

Mark's final argument, and that which he argues most vehemently, is that, if enforced, the equalization provision will mean that Megan receives 64.3% of the marital estate as compared to the 35.7% he will receive. He contends that the agreement is now unconscionable and, therefore, fundamentally unfair to warrant relief under CR 60.02(f).

Unconscionability is defined as "manifestly unfair or inequitable." *Wilhoit v. Wilhoit*, 506 S.W.2d 511, 513 (Ky. 1974). A property settlement agreement cannot be said to be unconscionable solely because "it is a bad bargain." *Peterson v. Peterson*, 583 S.W.2d 707, 712 (Ky.App. 1979). As stated in *Shraberg v. Shraberg*. 939 S.W.2d 330, 335 (Ky. 1997) (Cooper, Justice, concurring) (citation omitted):

> [A] party seeking to set aside a separation agreement can satisfy his or her burden of proof by evidence of fraud, undue influence or overreaching. Absent such evidence, the movant must prove that the agreement is so one-sided as to be not just a bad bargain, but so clearly detrimental to the movant's interest as to create a *prima facie* case, *i.e.*, a rebuttable presumption, that the agreement is manifestly unfair or inequitable. If the movant's evidence is insufficient to satisfy this burden, the motion to set aside the agreement must be denied. But if the movant's evidence proves *prima facie* that the agreement is manifestly unfair or inequitable, the burden of going forward shifts to the proponent of the agreement to produce evidence to explain why it would not be manifestly unfair or inequitable to enforce it.
>
> The trial judge is in the best position to determine whether, under the totality of the circumstances, a particular settlement agreement is manifestly unfair or inequitable. The judge's decision in that regard can be tested on appeal by application of the "clearly erroneous" standard for review.

There is no evidence of fraud, undue influence or overreaching. Therefore, Mark was required to prove that the agreement is "so one-sided" that it is "clearly detrimental" to his interest. *Id*. He failed to do so.

It is clear that Mark desired to keep the parties' substantial business interests as his sole property. To do so, he agreed to pay Megan $829,500. That agreement cannot be said to be one-sided or clearly detrimental.

Moreover, Megan testified that her agreement to accept $829,500 as the equalization payment was based on numerous factors other than the parties' agreed values assigned to the apartment complex and the marital home. She testified that when she decided to settle upon $829,500 as a fair final settlement, she did so based on a statement of financial conditions dated December 10, 2012, some 13 months prior to the mediation, which listed the marital home value as $714,000 based on a "recent appraisal" and used significantly higher values for the businesses than the parties assigned to the businesses.

Megan also testified that when agreeing on the $829,500 equalization payment, she considered that Mark was receiving all the income-producing property, including the architecture firm. Additionally, in reaching the agreement, she was forgoing what she believed to be meritorious dissipation arguments and believed she could have traced a substantial nonmarital interest in the marital home. She testified that she would not have agreed to use the $829,500 as the business value figure unless she was receiving $829,500 as the equalization payment.

Mark is well-educated and an experienced business man who was represented by counsel at the mediation who is now dissatisfied with the agreement he made. As it turned out, he may have fared better if he and Megan had agreed to sell the businesses and properties and then divide the proceeds. However, that was not the agreement. The family court's finding that the mediated settlement agreement is not unconscionable is support by substantial evidence and is affirmed.

For the reasons stated, the order of the Fayette Family Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Anita M. Britton Lexington, Kentucky	Ann D'Ambruoso Lexington, Kentucky