STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH LYNN GARNER,

Plaintiff-Appellant,

v

JOHN CHRISTOPHER GARNER,

Defendant-Appellee.

UNPUBLISHED
November 17, 2009

No. 283385
Osceola Circuit Court
Family Division
LC No. 06-010767-DM

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Plaintiff appeals as of right from the consent judgment of divorce issued by the circuit court following a bench trial. Plaintiff argued at trial and argues on appeal that the parties' prenuptial agreement entitles her to receive any real or personal property purchased during the marriage with money generated by business interests plaintiff owned before the marriage, as well as those acquired after the marriage with funds traceable to those business interests. The court found before trial that the prenuptial agreement was valid, but held that certain property acquired during the marriage was properly considered part of the marital estate and subject to division.[1] We agree, and thus affirm the decision of the circuit court. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff argues on appeal that because the trial court found that the parties' prenuptial agreement was valid, it was obligated to enforce the document according to its plain terms.

[1] The real property at the heart of the dispute between the parties consists of the following: (1) the Lamplighter restaurant (purchased before marriage); (2) a home on 210 South Fair Street (purchased before marriage); (3) the marital home located at 5159 70th Street (cabin and ten acres purchased before marriage); (4) an additional 50 acres located at 5159 70th Street (purchased and home remodeled after marriage); (5) a home on 343 Cherry Street (offer made before marriage, finalized after marriage); (6) the Chippewa Lake Restaurant and cabins (purchased after marriage); (7) property known as the Lake Miramichi property (purchased after marriage); (8) a condominium known as Unit 27 Northridge (purchased after marriage); and (9) a parcel of land known as Neguanee (purchased after marriage).

According to plaintiff, the plain terms of the agreement entitled her to receive all property purchased with income or profits from her premarital assets. The court rejected this argument. The specific property in dispute on appeal is the Chippewa Lake Restaurant and cabins and the Miramichi property; all other property contested below was awarded to plaintiff.

The prenuptial agreement provided, in pertinent part, as follows:

> WHEREAS the parties contemplate legal marriage . . . and WHEREAS it is the mutual desire of the parties to enter into this agreement whereby they will regulate their relationships toward each other with respect to property each of them own, and in which each of them may have an interest; and it is desired by the parties that their marriage shall not in any way change their legal right, or that of their heirs in the property of each of them;
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> NOW THEREFORE IT IS AGREED AS FOLLOWS:
>
> 1. That all properties of any kind and nature, real, personal or mixed, wherever the same may be found, which belongs to each party, shall be and forever remain the individual estate of said party, including all interest, rents and profits which may accrue therefrom.
>
> 2. That each party shall have at all times the full right and authority, in all respects, the same as each would have if not married, to use, enjoy, manage, convey and encumber such property as may belong to him or her.
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> * * *
>
> 5. That each party[ ] shall have no right as against the other by way of claim for support, alimony, attorney fees, costs or division of property, at such time as either party shall seek a divorce.
>
> 6. It is further agreed that this agreement is entered into with full knowledge on the part of each party, as to the extent and probable value of the other's property and of all the rights conferred by law upon each, in the estate of the other, by virtue of their marriage, but it is their desire that their respective rights to each other's estate shall be fixed by this agreement which shall be binding upon their respective heirs and legal representatives.

After finding that the parties' agreement was valid, the court stated that its decision did not necessarily have any bearing on "what the effect of this document is." The court continued:

> I'm not deciding what the consequence of commingled funds is. I am not setting aside or making any determination on what I perceive to be my principal obligation in this trial that's coming up and that is to do a fair and equitable distribution of the property between both parties.

Plaintiff argues on appeal that the court's primary objective should not have been to ensure that the property distribution was fair and equitable, but rather to enforce the terms of the

parties' contract. Plaintiff is correct that the court had a duty to enforce the prenuptial agreement. However, plaintiff's argument presumes that the contract is unambiguous and that this presumed clarity works in her favor on appeal. Although the trial court did not explicitly state so, it is clear from the entirety of the proceedings that the court found the agreement to be ambiguous. We review de novo a trial court's interpretation of a contract, including whether the language of a contract is unambiguous and must be enforced according to its plain terms. *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005).

Contrary to plaintiff's assertion, the court's repeated references to its primary obligation to provide a fair and equitable division of property is not at odds with its duty to interpret the prenuptial agreement. "The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances." *Berger v Berger*, 277 Mich App 700, 716-717; 747 NW2d 336 (2008). The existence and meaning of a prenuptial agreement is one of those circumstances, and may be dispositive in many situations, but it does not strip the court of its overarching obligation.

The trial court expressed a particular concern with the language found in paragraph five of the agreement. The language of this paragraph is very broad and could be read as indicating that none of the property at issue is marital property and all that remains for the court to determine is how the separate assets are to be segregated. This reading supposes that the parties intended that no marital estate would be created during the duration of the marriage.

However, reading the agreement as outlined above would essentially require this Court to violate a venerated rule of contract law by reading into the document a provision addressing after-acquired property. *Cottrill v Michigan Hosp Service*, 359 Mich 472, 476; 102 NW2d 179 (1960) (observing that courts may not read into a contract a provision not contained therein, and thereby reform or modify the contract). In *Reed*, this Court determined that the language of the prenuptial agreement at issue clearly contemplated the acquisition of separate assets over the course of the marriage. *Reed*, *supra* at 146-147. This conclusion was based in large part upon the following language found in the agreement:

> "Separate Property. Except as herein provided, each party shall have complete control of his or her separate property, and may enjoy and dispose of such property in the same manner as if the marriage had not taken place. The foregoing shall apply to all property now owned by either of the parties and to all property which may hereafter be acquired by either of them in an individual capacity." [*Id.* at 146.]

Significantly, there is no "after-acquired-property" provision in the prenuptial agreement in the case at hand.

Further, paragraph six refers to the parties' knowledge of "the extent and probable value of each other's property . . . in the estate of the other." This clearly only references the property owned at the time the agreement was executed because it is axiomatic that someone cannot know about what does not then exist (e.g., after-acquired property). Therefore, reading the preamble and paragraphs one and two of the agreement in the context of paragraph six, the words "own"

and "belong[s] to" are best understood as conveying a present-sense understanding of ownership, i.e., property in the parties' possession at the time the agreement was executed.

Plaintiff also argues that because during the marriage she purchased the Chippewa Lake Restaurant and the Lake Miramichi property with profits stemming from her premarital estate and loans obtained using premarital assets as collateral, these after-acquired properties should have been awarded to her. This argument is based on paragraph one of the prenuptial agreement, which provides that "all properties of any kind and nature, real, personal or mixed, wherever the same may be found, which belongs to each party, shall be and forever remain the individual estate of said party, *including all interest, rents and profits which may accrue therefrom*." (Emphasis added.) Regarding the Lake Miramichi property, we conclude that because plaintiff requested that it be awarded to defendant at the conclusion of trial, she cannot purse a different result on appeal. "Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997). In any event, for the reasons set forth below, we find no error in the distribution of the Lake Miramichi property, or in the distribution of the Chippewa Lake property.

Plaintiff testified that she purchased the Chippewa Lake Restaurant in 1998 for $120,000. The purchase was funded by a mortgage secured by the marital home and cash. Additionally, plaintiff stated she "had to pay . . . $18,000 of [defendant] and his ex-wife's back bills to get the loan." Between February and August 25, 1998, the building was significantly improved and changed so that it could operate as a restaurant. Specifically, plaintiff testified to spending over $98,000 during this process. Plaintiff asserted that all of the improvements were funded by monies flowing from the operation of the Lamplighter. Plaintiff also stated that she purchased the Lake Miramichi property for $22,000 in 2004, and as of trial there was nothing owing on it.

The terms "income" and "profit" have unique meanings. Compare definition for "income," p 778, with definition for "profit," p 1246, Black's Law Dictionary (8th ed). However, US Individual Income Tax form 1040, Schedule C, does use the terms interchangeably, and even directs the filer to enter the calculated net profit or loss on the line designated for business income on the 1040 form. Nevertheless, plaintiff testified that her average yearly business income during the course of the marriage was only $20,795. Plaintiff also stated that rental on the South Fair Street property "was taken out in labor," although she later qualified that by stating that some money changed hands "[f]rom time to time." These funds were not, however, reported as income on her taxes. Also, we note that defendant testified that the Lake Miramichi property was purchased with the parties' savings, not just with funds stemming from plaintiff. Given this testimony, along with the considerable acquisitions made in addition to the Chippewa Lake Restaurant and the Lake Miramichi property and the sheer amount of money expended, it is not an unreasonable conclusion that defendant contributed in some fashion to the purchase of the property.

In keeping with the testimony provided, and acknowledging the trial court's superior position to assess witness credibility, see *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001), we conclude that the court did not clearly err in crediting defendant for contributing to the purchase and development of the two post-marriage properties in dispute. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). Indeed, we simply are not left with a definite and firm conviction that the trial court made a mistake in awarding the Chippewa Lake Restaurant and cabins and the Lake Miramichi property to defendant. *Kitchen v Kitchen*, 465

Mich 654, 661-662; 641 NW2d 245 (2002). Even assuming that business income from the two restaurants could be considered profit within the meaning of the prenuptial agreement, the evidence nonetheless supports the finding that defendant contributed both financially and through his physical efforts to the purchase and development of the Chippewa Lake facilities and the Lake Miramichi property. As noted earlier, defendant stated that the Lake Miramichi property was purchased with some of the parties' savings, and he also stated that he "designed" and "built" the Chippewa Lake Restaurant and that he was responsible for its day-to-day operations during its first two years in business. There was also evidence that defendant helped, through his labor, to improve the Chippewa Lake property. Thus, it was proper for these properties to not be characterized merely as the sole property of plaintiff under the prenuptial agreement. See *Reed*, *supra* at 152 ("In general, assets a spouse earns during the marriage are properly considered part of the marital estate, and thus subject to equitable division.").[2]

In sum, the circumstances do not lead to a firm conviction that an inequitable result has been reached, and the property division is thus affirmed. *Sparks v Sparks*, 440 Mich 141, 152; 485 NW2d 893 (1992).

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering

[2] Moreover, a circuit court may invade a spouse's separate estate where the opposing party has "'contributed to the acquisition, improvement, or accumulation of the property.'" See *Reed*, *supra* at 152, quoting MCL 552.401.