STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL HARTMAN, Plaintiff-Appellant,	UNPUBLISHED August 7, 2012
v	No. 304026 Oakland Circuit Court
ANDREA HARTMAN, Defendant-Appellee.	LC No. 2009-764033-DM

Before: DONOFRIO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's refusal to set aside a settlement agreement and judgment of divorce on the basis of apparent impropriety committed by the arbitrator/mediator and defense counsel. The trial court properly declined to set aside the settlement agreement and judgment of divorce. Therefore, we affirm.

FACTS AND PROCEDURAL HISTORY

This case arose out of a divorce action terminating a 23-year marriage. The parties were ordered to mediation. The parties agreed to a mediator and when mediation failed, the parties agreed to binding arbitration using the mediator as the arbitrator. In accordance with the signed arbitration agreement the arbitrator issued some awards covering minor issues. But before final arbitration on the major issues, the parties agreed to again attempt to mediate the divorce and reach a settlement agreement utilizing the services of the arbitrator as a mediator. Mediation failed.

The parties did reach a settlement agreement. However, what took place during the course of this mediation is disputed between the parties. Plaintiff asserts that the mediator made statements regarding her feelings about the case. Knowing her feelings and the fact that she would also be the arbitrator, plaintiff proposed the settlement, feeling that he had no real choice. Defendant asserts that the mediator actually had an "informal" role throughout the proceeding, and it was plaintiff and his representatives who proposed the final agreement. Regardless, a settlement agreement was drafted and signed.

By the date set for entry of the final judgment of divorce, even though both parties had reached a settlement agreement, a few issues were still outstanding. At the hearing, plaintiff asked his counsel to state on the record that he had concerns about the arbitrator acting as a

neutral third party. While he did not ask to have the settlement agreement set aside, he wanted it on the record that he had "had concerns about . . . the mediation being done by the arbitrator." The nature of those concerns was not further articulated.

Because of the outstanding issues, the judge originally wanted to continue the matter for two weeks, but defense counsel stated that he was going to be out of town. Therefore, the final judgment was continued for four weeks. Plaintiff's counsel contacted the arbitrator to inform her of the dates. The arbitrator informed plaintiff's counsel that she was also going to be out of town in Florida and staying at the home of defense counsel while he would also be present. Plaintiff's counsel then contacted defense counsel to request a new arbitrator to handle the remaining issues. Defense counsel refused the request. While the arbitrator and defense counsel were in Florida, defense counsel contacted plaintiff's counsel via fax threatening to ask the arbitrator to ask the court for sanctions.

Thereafter, plaintiff's counsel filed a motion to remove the arbitrator and have a new one assigned. Defendant responded by stating that the arbitration awards were a moot point because a settlement had been reached. Plaintiff then filed an amended motion to remove the arbitrator and obtain relief from the settlement agreement. Defense counsel argued that he felt what occurred between himself and the arbitrator was no more than ordinary hospitality and that numerous attorneys, including judges, have stayed at his Florida home. The trial court ultimately denied plaintiff's motion, stating that there was no appearance of impropriety because the parties ultimately reached a settlement agreement and that the trip to Florida occurred 30 days after the mediation. The final issues were resolved by the trial court, and a judgment of divorce was entered.

STANDARD OF REVIEW

Plaintiff argues that the issue is whether the court erred in refusing to review an arbitrator's award. However, it is truly only about setting aside a settlement agreement. Therefore, plaintiff is incorrect in arguing that this Court must review the award de novo. Instead, the trial court's decision regarding the validity of a consent settlement agreement is reviewed for an abuse of discretion. *Lentz v Lentz*, 271 Mich App 465, 474-475; 721 NW2d 861 (2006). An abuse of discretion is found to have occurred "when the trial court's decision is outside the range of reasonable and principled outcomes." *Shawl v Spence Bros, Inc*, 280 Mich App 213, 222; 760 NW2d 674 (2008).

THE CONSENT SETTLEMENT AGREEMENT

Generally, parties are bound by their settlement agreement, unless there is a showing of "fraud, duress, [or] mutual mistake." *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990) (internal citations omitted). Plaintiff argues that the contract between the parties should be set aside due to fraudulent misrepresentation, mutual mistake, violation of public policy, and unconscionability.

In order to set aside an agreement for fraudulent misrepresentation, plaintiff must prove that "(1) defendant made a material representation; (2) the representation was false; (3) defendant knew, or should have known, that the representation was false when making it; [and]

(4) defendant made the representation with the intent that plaintiff rely on it . . . " *Foreman v Foreman*, 266 Mich App 132, 141; 701 NW2d 167 (2005). Plaintiff argues that the false representation was that the arbitrator was neutral; however, plaintiff does not substantiate this argument with any evidence to prove that she actually acted with clear bias. As discussed below, there is no evidence of actual bias.

Next, plaintiff argues that a mistake of fact also mandates a reversal of the lower court's decision. This Court explained in *Casey v Auto Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006) that in order to reform the contract, plaintiff must "prove a mutual mistake of fact, or mistake on one side and fraud on the other, by clear and convincing evidence." This Court also explained that a unilateral mistake alone is not sufficient. *Id*. While plaintiff argues that the mistake involved is that the arbitrator was impartial and that there was no social relationship between the arbitrator and defense counsel, this alleged mistake is unilateral and, therefore, not enough to warrant a reversal. Again, plaintiff has not provided evidence to prove that what occurred between the arbitrator and defense counsel rises to the level of clear actual partiality.

Next, plaintiff correctly points out that if we were to find that the contract violated public policy, it would be unenforceable. This Court explained this principle in *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 58; 672 NW2d 884 (2003), stating "that contracts that violate our ethical rules violate our public policy and therefore are unenforceable" (internal citations omitted). However, we would have to find a clear violation of the Michigan Rules of Professional Conduct (MRPC). Plaintiff argues that MRPC 8.4 was violated. Under MRPC 8.4(b), a violation can occur when an attorney "engage[s] in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of criminal law." Plaintiff has failed to show that any of the enumerated circumstances happened. Plaintiff's counsel admitted at oral argument that he had referred neither defense counsel nor the arbitrator to the Attorney Grievance Commission. Therefore, because it is unclear that a violation of the ethical rules did occur, this argument lacks merit.

Lastly, plaintiff's unconscionability argument only addresses half of the requirements for setting aside an argument on that basis. While plaintiff makes an argument for procedural unconscionability, he lacks any argument as to substantive unconscionability. Plaintiff has failed to argue or show this Court how he would have obtained a different result. He has also failed to show how the outcome was prejudiced or unfair. Both procedural and substantive unconscionability must be present in order for a contract to be set aside for it being unconscionable. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 143; 706 NW2d 741 (2005).

The procedural unconscionability is essentially the conduct of the arbitrator and defense counsel. MCR 3.216(k) governs the standard of conduct for mediation. It states that "[t]he State Court Administrator [(SCAO)] shall develop and approve standards of conduct for domestic relations mediators designed to promote honesty, integrity and impartiality in providing court-connected dispute resolution services." The SCAO's Standard of Conduct for Mediators emphasizes not only the importance of remaining impartial, but also the importance of *appearing* impartial. Under Standard 4, "conflicts of interests," it states that a conflict can occur if it can "reasonably be seen as raising a question about impartiality." Standard 3, "Impartiality" states

that, "if at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw."

There is no case law directly on point dealing with an appearance of partiality by an arbitrator or mediator under similar circumstances to those at bar. However, the Michigan Court Rules state that "the rule for disqualification of a mediator is the same as that provided in MCR 2.003 for the disqualification of a judge." MCR 3.216(E). MCR 2.003(C)(1) states that a judge should be disqualified if a judge "has failed to adhere to the appearance of impropriety standard set for in Canon 2 of the Michigan Code of Judicial Conduct." Canon 2 states that,

> "A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." [Code of Judicial Conduct, Canon 2]

This Court has held that actual bias or prejudice is not necessary where "experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Gates v Gates*, 256 Mich App 420, 441; 664 NW2d 231 (2003) (internal citations omitted). The Supreme Court in *Cain v Michigan Dep't of Corrections*, 451 Mich 470, 536 n 22; 548 NW2d 210 (1996), clarified that while an actual showing of prejudice or bias is the general standard, "the appearance of impropriety may be sufficient to disqualify a judge after evaluation of the totality of the circumstances." *Id.*

The totality of the circumstances in the case at bar rises to a level that would have required the arbitrator to be removed from arbitrating or mediating the remaining matters. However, the final matters that remained outstanding at the time of the arbitrator's and defense counsel's vacation together were settled by the judge. The arbitration awards issued before the settlement agreement became moot because the settlement agreement handled those matters. The only issue not moot is whether the settlement agreement can be set aside. We find that it cannot.

Plaintiff has failed to show that he would have received a different result if not for the social relationship between the arbitrator and defense counsel. This Court will not consider an argument that has not been sufficiently developed. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009). Plaintiff simply fails to present a sufficiently developed or supported argument as to substantive unconscionability and, therefore, has waived this argument on appeal. *Phillips v Jordan*, 241 Mich App 17, 24 n 2; 614 NW2d 183 (2000).

Because none of the requirements to set aside a settlement agreement have been met, the decision of the lower court to uphold the agreement is affirmed.

Affirmed.

/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra