

STATE OF MICHIGAN
COURT OF APPEALS

DAVID GRAHAM,

Plaintiff-Appellant,

V

BARBARA GRAHAM,

Defendant-Appellee.

UNPUBLISHED

June 20, 2013

No. 309335

Oakland Circuit Court

LC No. 2009-759881-DO

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's order denying his motion for entry of an amended uniform spousal support order clarifying the spousal support "step-down" provision in the consent judgment of divorce. Because the language of the step-down provision is ambiguous and factual development is necessary to determine the parties' intent, we vacate the trial court's order and remand for further proceedings.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The parties were married on June 30, 1979, and plaintiff filed his complaint for divorce on June 2, 2009. On November 5, 2009, the trial court entered a consent judgment of divorce, which contained the following provision regarding spousal support:

B. Commencing on January 1, 2010, and continuing for 9 years thereafter (for a total of 108 months), or until Plaintiff's death, Defendant's death, Defendant's remarriage, or Defendant's cohabitation with another adult male, or until such time as Defendant's annual salary is \$77,000 or greater, whichever shall first occur, or until further order of the Court, Plaintiff, David Graham, shall pay modifiable monthly spousal support to Defendant, Barbara Graham, as provided below. Spousal support shall be modifiable downward only in the event of Plaintiff's decrease or Defendant's increase in income. Spousal support shall not be modifiable upward in the event Plaintiff earns more. All of the following payments are based on Plaintiff's annual base income of \$130,000.00 not including his bonus income, which is addressed specifically and separately in this Judgment. Except as otherwise provided in Section IX A of this Judgment:

1. If Defendant's annual income does not exceed \$33,000.00, Plaintiff shall pay spousal support of \$3,600 for a period of no longer than 36 months or until Defendant earns \$33,000, whichever comes first.

2. If Defendant's annual income exceeds \$33,000.00, but is less than \$44,000 Plaintiff shall pay spousal support of \$2,600.00 per month for a period of no longer than 36 months or until Defendant earns \$44,000, whichever comes first;

3. If Defendant's annual income exceeds \$44,000.00, but is less than \$55,000 Plaintiff shall pay spousal support of \$2,000.00 per month for a period of no longer than 36 months or until Defendant earns \$55,000, whichever comes first;

4. If Defendant's annual income exceeds \$55,000.00, but is less than \$77,000 Plaintiff shall pay spousal support of \$1,500.00 per month;

5. Should Defendant's annual income rise above \$77,000, Plaintiff shall pay no spousal support to Defendant. Should Defendant's income fall back below \$77,000, the provisions above (1-4) shall control.

In accordance with the spousal support provision, on January 1, 2010, plaintiff began paying defendant spousal support in the amount of \$3,600 each month. On June 27, 2011, plaintiff filed a motion to clarify the spousal support provision, arguing, in relevant part, that pursuant to the "step-down" provision, plaintiff's monthly spousal support obligation will decrease to \$2,600 beginning January 1, 2013. Plaintiff asserted that defendant erroneously interpreted the provision as obligating plaintiff to pay \$3,600 each month indefinitely. In response, defendant argued that the provisions of the consent judgment of divorce "speak for themselves," and no clarification is necessary.

On November 28, 2011, plaintiff filed a motion for entry of an amended uniform spousal support order clarifying the spousal support "step-down" provision. Plaintiff maintained that after he filed his motion to clarify the spousal support provision, the parties' attorneys reached an agreement regarding the meaning of the provision. According to plaintiff, his attorney and defendant's previous attorney agreed in September 2011 that, pursuant to the consent judgment of divorce, plaintiff's spousal support obligation would decrease to \$2,600 beginning on January 1, 2013. Plaintiff further asserted that the attorneys agreed that, at each 36-month interval, if not sooner based on an increase in defendant's income, there would be a "step down" in plaintiff's spousal support obligation. In support of his motion, plaintiff attached e-mails containing the attorneys' communications. Plaintiff also maintained that defendant's previous attorney prepared an amended uniform spousal support order reflecting the agreement and averred that defendant understood and acknowledged the step-down provision. Plaintiff asserted that defendant refused to sign the amended uniform spousal support order and thereafter retained new counsel.

In response, defendant argued that plaintiff's interpretation of his spousal support obligation was not consistent with the language of the spousal support provision in the consent

judgment of divorce. Defendant contended that plaintiff's reliance on e-mail communications containing settlement discussions was inappropriate and contrary to MRE 408. Defendant also argued that plaintiff included select, redacted e-mail communications and omitted others and that the communications were part of a larger settlement discussion involving other matters in addition to spousal support. Defendant asserted that she retained new counsel as a result of the breakdown in settlement negotiations. Further, defendant denied that her former counsel agreed to plaintiff's interpretation of the step-down provision.

The trial court denied plaintiff's motion, stating, in relevant part:

The spousal support provision is modifiable downward only in the event of Plaintiff's decrease or Defendant's increase in income. The modification provision applies only in situations regarding Defendant's annual income exceeding certain amounts.

The income fluctuations must be viewed as conditions precedent. A "condition precedent" is a fact or event that the parties intend must take place before there is a right to performance. A condition precedent is distinguished from a promise in that it creates no right or duty in itself, but is merely a limiting or modifying factor. It seems that Plaintiff seeks a ruling that will reduce his spousal support obligation regardless of Defendant's income. The Judgment provides, however, for downward modification only in the event of income fluctuations, specifically, as set forth in Section II, Paragraph B, 1-[4] [i.e., in the event that defendant's income exceeds certain, enumerated amounts].

Plaintiff filed a motion for reconsideration arguing that the parties, through their attorneys, had previously settled their dispute regarding the spousal support provision as evidenced by the attorneys' e-mail communications. Plaintiff asserted that, thereafter, defendant changed her mind and refused to execute documents in accordance with the agreement. Plaintiff further asserted that the trial court's opinion and order erroneously interpreted the spousal support provision instead of addressing plaintiff's request for entry of an amended uniform spousal support order based on the parties' agreement.

The trial court denied plaintiff's motion, stating that his submission of settlement discussions between his counsel and defendant's previous counsel was inappropriate and contrary to MRE 408. The court opined that defendant's retention of new counsel demonstrated her disagreement with her previous attorney's actions. The court also stated that it found no error with respect to its previous order denying plaintiff's motion for entry of an amended uniform spousal support order.

II. STANDARD OF REVIEW AND PRINCIPLES OF INTERPRETATION

A consent judgment of divorce is akin to a contract and is interpreted as such. *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). The interpretation of a contract, including whether contractual language is ambiguous, is a question of law that this Court reviews de novo on appeal. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). "The cardinal rule in interpretation of contracts is to ascertain the intention of the

parties.” *D’Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). “An unambiguous contract must be enforced according to its terms[.]” and “interpretation is limited to the actual words used[.]” *Burkhardt v Bailey*, 260 Mich App 636, 656-657; 680 NW2d 453 (2004). In such cases, “parol evidence is inadmissible to prove a different intent[.]” *Id.* at 656. “A contract is ambiguous when two provisions ‘irreconcilably conflict with each other,’ or ‘when a term is equally susceptible to more than a single meaning.’” *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007) (citations and brackets omitted). In other words, “[a] contract is ambiguous if the language is susceptible to two or more reasonable interpretations.” *D’Avanzo*, 223 Mich App at 319. “Only when contractual language is ambiguous does its meaning become a question of fact.” *Coates*, 279 Mich App at 504. When a contract is ambiguous, “factual development is necessary to determine the intent of the parties and summary disposition is inappropriate.” *D’Avanzo*, 223 Mich App at 319.

III. LEGAL ANALYSIS

The trial court erred by concluding that an increase in defendant’s income was a condition precedent to a decrease in plaintiff’s spousal support obligation. “A ‘condition precedent’ is a fact or event that the parties intend must take place before there is a right to performance.” *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999), quoting *Reed v Citizens Ins Co of America*, 198 Mich App 443, 447; 499 NW2d 22 (1993). The trial court’s determination that an increase in defendant’s income was a condition precedent to a decrease in plaintiff’s spousal support obligation rendered nugatory the phrases “no longer than 36 months or” and “whichever comes first” in the following subparagraph:

1. If Defendant’s annual income does not exceed \$33,000.00, Plaintiff shall pay spousal support of \$3,600 for a period of no longer than 36 months or until Defendant earns \$33,000, whichever comes first.

“[C]ourts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.” *Klapp*, 468 Mich at 468.

Because the spousal support provision in the consent judgment of divorce is susceptible to two or more reasonable interpretations, it is ambiguous. *D’Avanzo*, 223 Mich App at 319. Paragraph B provides that, absent certain circumstances not applicable here, such as defendant’s remarriage, plaintiff must pay spousal support to defendant for a nine-year period beginning on January 1, 2010, unless or until defendant’s annual salary is \$77,000 or greater. Thus, paragraph B entitles defendant to spousal support for nine years unless her income reaches \$77,000. Subparagraphs 1 – 4 set forth the amount of spousal support to which defendant is entitled. Subparagraphs 1 - 3 state that plaintiff must pay the amount specified “for a period of no longer than 36 months” if plaintiff’s income falls within a certain range or does not exceed a certain amount. The provisions are silent, however, regarding what shall occur if the 36-month period expires and defendant’s income does not increase, placing her in the next step down.

Subparagraph 1 entitled defendant to monthly spousal support in the amount of \$3,600 “for a period of no longer than 36 months” or until she earned \$33,000, whichever came first. Plaintiff argues that because the 36-month period ended on January 1, 2013, defendant is now

entitled to only \$2,600 each month, as set forth in subparagraph 2. Defendant's income, however, does not fall within the range specified in subparagraph 2, which provides:

2. If Defendant's annual income exceeds \$33,000.00, but is less than \$44,000 Plaintiff shall pay spousal support of \$2,600.00 per month for a period of no longer than 36 months or until Defendant earns \$44,000, whichever comes first[.]

Thus, it appears from the language of subparagraph 1 that defendant is no longer entitled to \$3,600 each month because the initial 36-month period ended, but she does not fall within the income ranges specified in the remaining subparagraphs and, as such, is not entitled to spousal support as set forth in those subparagraphs. In this sense, subparagraphs 1 – 3 irreconcilably conflict with paragraph B, which clearly states that defendant is entitled to spousal support for a nine-year period unless her income is \$77,000 or greater. Thus, the spousal support provision is ambiguous, and factual development is necessary to determine the parties' intent. Summary disposition was therefore inappropriate.¹ *D'Avanzo*, 223 Mich App at 319.

Plaintiff also argues that the trial court erred by disregarding the parties' agreement regarding the interpretation of the step-down provision. Plaintiff contends that defendant agreed to his interpretation of the step-down provision in September 2011, as evidenced by a series of e-mails that the parties' attorneys exchanged in August and September 2011. Plaintiff's argument lacks merit. At most, the e-mails are indicative of a possible "agreement to agree," although defendant's attorney stated in one e-mail, "I have little hope we can resolve this[.]" Thereafter, defendant retained new counsel. In any event, any purported agreement is not binding pursuant to MCR 2.507(G), which provides:

An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

In this case, the purported agreement was neither placed on the record nor reduced to a writing and signed by defendant or her attorney. Accordingly, the trial court did not err by disregarding the purported agreement.

Because the spousal support provision is ambiguous, and factual development is necessary to determine the parties' intent, we remand this case to the trial court for an evidentiary hearing. We note that the e-mails exchanged in August and September 2011 are not

¹ We note that numerous other factual scenarios not presented in this appeal may arise regarding which the spousal support provision is ambiguous. For example, if defendant earns \$35,000 for a period of time, thereby exceeding \$33,000 and rendering subparagraph 2 applicable, but her income thereafter drops to \$30,000, is she entitled to a new 36-month period of spousal support in the amount of \$3,600 pursuant to subparagraph 1 despite that plaintiff already paid spousal support in the amount of \$3,600 for 36 months?

indicative of the parties' intent with respect to the spousal support provision. "In determining the intent of the parties where the agreed language proves ambiguous, surrounding facts and circumstances may be considered for the purpose of interpretation, and statements of the parties contemporaneous with the making of the agreement are admissible as evidence." *Genesee Merchants Bank & Trust Co v Sefa*, 23 Mich App 423, 428; 178 NW2d 826 (1970) (emphasis added). Moreover, "attendant facts and circumstances explain the context in which the words were used and may reveal the meaning the parties intended." *Grosse Pointe Park v Mich Muni Liability & Prop Pool*, 473 Mich 188, 201; 702 NW2d 106 (2005) (emphasis added). Accordingly, only circumstances attendant to and statements made contemporaneously with the drafting of the provision are indicative of the parties' intent. Because the e-mails were exchanged after a dispute regarding the provision arose, nearly two years after the trial court entered the consent judgment of divorce, the e-mails are not evidence of the parties' intent at the time that the spousal support provision was drafted.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs are awarded pursuant to MCR 7.219, neither party having prevailed in full.

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Pat M. Donofrio