VERMONT SUPREME COURT
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Case No. 24-AP-029

Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

JUNE TERM, 2024

John P. Maille* v. Kathleen Kirkpatrick (Maille) } APPEALED FROM:
} Superior Court, Franklin Unit,
} Family Division
} CASE NO. 292-12-19 Frdm
Trial Judge: Mary Miles Teachout (Ret.)

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals the family division's order granting defendant's motion to amend the parties' final divorce decree. We affirm.

The trial court made the following findings in its order. The parties were married for thirty-four years and have four children. In December 2019, plaintiff filed for divorce. Attached to his complaint was a seven-page stipulation signed by both parties on a printed court form entitled "Final Stipulation, Property, Debts, and Spousal Support." In paragraph five, the stipulation indicated that plaintiff's military disability payment and combat-related special compensation would be divided between the parties, with "$1896 to be transferred to Defendant—Checking Account Monthly."

The parties reconciled for a few months while the divorce was pending and moved to dismiss the case. A hearing was scheduled on the motion for August 2020. By then, they had separated again and wanted to pursue the divorce. In October 2020, plaintiff began making monthly deposits of $1900 into defendant's checking account.

In December 2020, the parties jointly filed an amendment to their stipulation on property division that gave husband possession of the marital home. They did not amend any other portion of the stipulation. The court found that this amendment indicated the parties had ratified the unamended terms of the December 2019 stipulation.

In March 2021, the court case manager conducted a conference with the parties to determine whether they had resolved all issues and could qualify for an uncontested divorce. Both parties appeared remotely by telephone. The case manager reviewed the terms of the previously submitted agreements with the parties and typed them into the court stipulation form. The court found defendant to be credible in her testimony that the case manager specifically reviewed the term in paragraph five requiring plaintiff to make monthly payments of $1896 into defendant's checking account and there were no disagreements or changes. The parties did agree

to change the terms concerning the house, and the case manager noted the change in the margin. There was no comparable notation next to paragraph five.

The parties were not physically present to review the case manager's typed version of the proposed final stipulation. She sent an electronic version to both parties by email. Defendant reviewed the document and noted that it identified the division of plaintiff's retirement asset and the figure $1896 in paragraph five. She believed it was complete and signed and returned it by email. Plaintiff also signed electronically. The case manager then sent the parties printed copies of the stipulation. Neither party noticed at that time that the words "account monthly" were missing from paragraph five on the printed forms.

The parties agreed to waive a final hearing. On April 17, 2021, the court issued a final order and decree of divorce that incorporated the property stipulation prepared by the case manager.

Plaintiff continued to make monthly payments of $1900 to defendant's checking account through April 2022. He did not indicate to her that the payments were for anything other than the obligation stated in paragraph five of the stipulation. The timing of the payments, method of depositing them into defendant's account, and amounts matched the obligation in paragraph five.

Plaintiff began having trouble meeting his expenses and decided to sell the marital home. He did not make a payment to defendant in May 2022. On May 31, 2022, defendant filed a motion to enforce, seeking an order that plaintiff continue to make monthly payments. In response, plaintiff claimed for the first time that the final order only required him to make a single payment of $1896 and that all other payments were made to satisfy defendant's $35,000 share of the home equity. The court found this position to be disingenuous because plaintiff never informed defendant of this belief, the payments were consistent with the obligation under paragraph five, and plaintiff was not required to pay defendant her share of the home equity until March 2024. The court did not credit plaintiff's testimony that the parties abandoned the original version of paragraph five when they briefly reconciled, because they did not file a new agreement after their second separation and instead only sought to amend the provision governing the home, and because they reaffirmed paragraph five at the case manager conference. The court also did not credit plaintiff's testimony that he believed defendant had agreed to a one-time payment, as this would have been a significant change in her financial settlement and was inconsistent with plaintiff's actions during and after the divorce.

The court concluded that due to a mistake, the stipulation prepared by the case manager did not reflect the parties' actual agreement. It reformed the stipulation to state that $1896 was to be transferred to defendant's checking account monthly and ordered plaintiff to pay defendant for the missed payments.

Plaintiff appealed to this Court, and we reversed. Maille v. Kirkpatrick, No. 23-AP-111, 2023 WL 6786095, at *1 (Vt. Oct. 13, 2023) (unpub. mem.) [https://perma.cc/Z5QH-4KV9]. We explained that once a settlement agreement is adopted by a court and incorporated into a final divorce order, it can be set aside only pursuant to a motion filed under Vermont Rule of Civil Procedure 60(b). Id. at *3. To the extent the family division considered defendant's motion to enforce to be a request under Rule 60(b)(1) to set aside the final order on the ground of mistake, we held the grant of relief was error because such a motion must be filed within one year of judgment. Id. at *4. However, we took no position on whether relief would be available under a different subsection of the rule. Id.

In November 2023, defendant filed a motion for relief from judgment under Rule 60(b)(6). Plaintiff opposed the motion, arguing that defendant was really seeking relief on the ground of mistake, and could not use Rule 60(b)(6) to circumvent the one-year time limit for such a motion.

The trial court agreed that defendant's motion would be untimely if it were based on mistake. It concluded, however, that defendant was essentially arguing that by continuing to make monthly payments for a full year after the divorce without claiming they were for anything other than his obligation under paragraph five, plaintiff gave her no reason to doubt that the order required them to be made and caused her to lose her opportunity to seek relief from the inaccurate divorce order under Rule 60(b)(1). The court noted that defendant had agreed not to receive spousal maintenance or any funds from plaintiff's father's trust. Other than a portion of the home equity, which she would not receive until three years after the divorce, the monthly payments from plaintiff's retirement income were the major financial interest she would receive from the parties' thirty-four-year marriage. The court concluded that plaintiff was equitably estopped from claiming that the payments he made were advances towards defendant's share of the home equity or that the erroneous decree accurately represented the parties' final agreement. The court concluded that modification of the decree was warranted under Rule 60(b)(6) to avoid an unjustified hardship to defendant. Plaintiff appealed.

Rule 60(b)(6) permits the court to modify or vacate an order for "any other reason justifying relief from the operation of the judgment." A motion for relief from judgment under Rule 60(b) "is addressed to the discretion of the trial court and is not subject to appellate review unless it clearly and affirmatively appears from the record that such discretion was withheld or otherwise abused." Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 149 Vt. 365, 368 (1988) (quotation omitted).

On appeal, plaintiff first argues that the court erred in considering extrinsic evidence of the parties' agreement because the March 2021 stipulation prepared by the case manager is clear on its face. We apply contract principles when interpreting a divorce decree. Towslee v. Callanan, 2011 VT 106, ¶ 5, 190 Vt. 622 (mem.). While extrinsic evidence is ordinarily not admissible to vary the terms of an unambiguous contract, that was not the purpose for which the evidence was offered here. Rather, defendant argued that the decree did not reflect the parties' true agreement. In such cases, we have held that the court may consider relevant extrinsic evidence. See Shearer v. Welch, 126 Vt. 106, 109 (1966) (holding that trial court erred in excluding extrinsic evidence "designed to show that the contract, through error of the draftsman, did not speak the true agreement of the parties"); Barry v. Harris, 49 Vt. 392, 395 (1876) (explaining that parol evidence rule is relaxed when court is exercising equitable power to reform mistake in written instrument; "the court will ascertain the contract that the parties in fact made, and this must necessarily, in most cases, rest in parol").

Plaintiff next contends that the omission of the words "account monthly" from the final March 2021 stipulation must have been deliberate because the electronic version of the document contains only the words "$1896 (checking)." Plaintiff failed to raise this argument below and thereby did not preserve it for our review. Even if his argument were properly preserved, we fail to see any error. The trial court agreed that the words "account monthly" were missing from the final stipulation but found that this omission was unintentional based on defendant's testimony and other evidence in the record.

Turning to the primary issue on appeal, we conclude that the trial court acted within its discretion in granting relief from the erroneous order under Rule 60(b)(6). "[R]elief from judgment under V.R.C.P. 60(b)(6) is, by its very nature, invoked to prevent hardship or injustice and thus is to be liberally construed and applied." Cliche v. Cliche, 143 Vt. 301, 306 (1983). Such relief "is available only when a ground justifying relief is not encompassed within any of the first five classes of the rule." Pierce v. Vaughan, 2012 VT 5, ¶ 10, 191 Vt. 607. "The rule does not protect a party from tactical decisions which in retrospect may seem ill advised, and it is not an open invitation to reconsider matters concluded at trial." Penland v. Warren, 2018 VT 70, ¶ 7, 208 Vt. 15 (quotations and citations omitted). However, the rule "is available and appropriately used to provide relief from a final property-division order where extraordinary circumstances justify relief to prevent hardship or injustice." Id. (quotations omitted).

We disagree with plaintiff's argument that defendant was precluded from relief because the ground for her motion fell squarely within Rule 60(b)(1). The basis for the motion was not simply the mistake in the final decree, but the fact that plaintiff's conduct prior to and after the divorce led her to believe that the judgment reflected the parties' agreement that plaintiff would make monthly payments, and prevented defendant from discovering the error until after it was too late to file a motion to reopen the judgment on the ground of mistake. The grounds for defendant's motion encompassed more than simply a mistake was made. The court held that plaintiff was equitably estopped from attempting to enforce the erroneous decree by his actions.

Plaintiff claims that the court erred in finding that the elements of equitable estoppel were met here. Under the doctrine of equitable estoppel, "[a] person is estopped from denying the consequences of his conduct where that conduct has been such as to induce another to change his position in good faith or such that a reasonable man would rely upon the representations made." Precious Metals Assocs., Inc. v. Commodity Futures Trading Comm'n, 620 F.2d 900, 908 (1st Cir. 1980) (quotation omitted). There are four elements of equitable estoppel:

> (1) (t)he party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

My Sister's Place v. City of Burlington, 139 Vt. 602, 609 (1981).

The record supports the trial court's conclusion that estoppel was available to defendant here. While plaintiff argues that he testified that his payments were not made pursuant to paragraph five but rather were made towards satisfying defendant's share of the home equity, the court did not find defendant to be credible in this testimony, or in his testimony that the parties reached a different agreement. Notably, plaintiff did not refute defendant's testimony that at the case manager's conference, the case manager reviewed with both parties the provision stating that defendant would receive monthly payments, and no alterations were discussed or made. Contrary to plaintiff's argument, the court did not find that plaintiff deliberately made the payments to cut off defendant's rights under Rule 60(b)(1), nor was such a finding required. Rather, it found that his conduct was sufficient to lead defendant to believe that plaintiff would continue making payments on a monthly basis. The record also supports the court's finding that until plaintiff stopped paying, defendant was ignorant of the court's mistake or that plaintiff claimed that he was not required to make the paragraph five payments, and that she relied on his conduct to her detriment.

Plaintiff argues that the court did not follow the "law of the case." It is unclear which ruling plaintiff is referring to, but his argument is unavailing regardless. As noted above, Rule 60(b) allows a party to seek relief from a final property division in a divorce. Penland v. Warren, 2018 VT 70, ¶ 7; cf. Cliche, 143 Vt. at 306 (rejecting argument that doctrine of res judicata precludes litigant from making direct attack under Rule 60(b) upon judgment before court that rendered it). Plaintiff incorrectly asserts that this Court held in the previous appeal that the omission of the words "account monthly" from the final divorce stipulation was a mistake that could only be remedied under Rule 60(b)(1). We did not so rule. Rather, we held to the extent the trial court had relied on a theory of mistake in granting defendant's motion to enforce, it erred because the motion was filed more than a year after the final judgment. Maille, 2023 WL 6786095, at *1. We expressly took no position on the availability of relief under other provisions of the rule.

The court found that defendant's motion was brought within a reasonable time and did not seek to relieve her from a failed tactical decision or to reconsider matters concluded at trial, and plaintiff does not challenge these findings. The court therefore acted within its discretion in granting relief pursuant to Rule 60(b)(6).

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

Nancy J. Waples, Associate Justice