

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

CV,		:	NO. 11-20,473
	Plaintiff	:	
		:	
	vs.	:	
		:	
GV,		:	
	Defendant	:	IN DIVORCE

OPINION & ORDER

AND NOW, this 2nd Day of **April, 2012**, this order is entered after a hearing on March 14, 2012 regarding Wife’s Petition for Contempt/ Enforcement of Separation and Property Settlement Agreement filed January 20, 2012. Present at the hearing was Wife with her counsel, Rebecca Reinhardt, Esquire, and Husband with his counsel, Melody L. Protasio, Esquire.

Background

The parties to this action were separated September 13, 2007. On or about October 23, 2007 Husband requested and received a pension estimate (“modeling statement”) from Wyeth, the plan administrator at the time.¹ At a later date Husband did request an updated modeling statement however Husband continued to rely on the modeling statement from 2007. After negotiations, in which both parties were represented by their perspective counsel, Husband and Wife entered into a Marital Property Settlement Agreement (agreement) on May 25, 2011. The agreement was later

incorporated into the Divorce Decree on August 8, 2011. The values enumerated in the agreement were based on good faith estimates as current appraisals were not obtained.² As for the value of Husband's pension he in good faith relied on the 2007 modeling statement which reported that his payout would be approximately \$120,000. In the agreement under section B (4) Husband contracted to transfer to Wife \$123,643.80 of his IRA and \$60,000 of his pension.

On or about June 23, 2011 Husband received notification from the pension plan administrator that an error in the modeling statement had been found which resulted in the actual payout amount being significantly lowered at approximately \$92,000 instead of the before \$120,000. Husband promptly notified Wife. Sometime in June of 2011 Husband provided Wife with a copy of the 2007 modeling statement. Husband suggested to Wife that instead of the agreed upon \$60,000 pension amount Wife get fifty percent of the approximately \$92,000. Husband testified that he had viewed the agreement as being based off of a fifty-fifty division. Wife refused a fifty-fifty division of the pension. Wife testified that even though the agreement worked out close to a fifty-fifty division of the marital assets her intent had always been to walk away from the divorce with the sum of \$350,000.

To date all of the terms of the agreement but the rollover of Husband's IRA and pension are complete. Due to the fact that Husband has failed to comply with the terms of the agreement Wife is seeking a finding of contempt, attorney's fees, immediate

¹ The pension plan administrator has since changed to Pfizer/Fidelity.

² There was testimony from Husband that the marital residence had been appraised approximately 2 years prior but an appraisal was not presented to the Court.

transfer of monies and statutory interest. Husband is seeking reformation of the provision relating to the pension resulting in a fifty-fifty division. Husband's position is that he should not be penalized when he in good faith relied on a 2007 modeling statement which at the time he did not fully understand but relied on the fiduciary duty of the plan administrator. Wife's position is that she was not aware that the modeling statement was from 2007, she did not see the statement until June 2011, and that the agreement was not simply a fifty-fifty division of assets.

Analysis

Property Settlement Agreements, such as the one in this case, are governed by contract law. *Kripp v. Kripp*, 849 A.2d 1159, 1163 (Pa. 2004) (citing *Vaccarello v. Vaccarello*, 757 A.2d 909, 914 (Pa. 2000); see also *Krizovensky v. Krizovensky*, 624 A.2d 638, 642 (Pa. Super. 1993). Under Pennsylvania contract law a settlement will not be set aside except upon 'a clear showing of fraud, duress, or mutual mistake.' *Step Plan Servs. v. Koresko*, 2010 Pa. Super. 232, 12 a.3d 401, 409 (quoting *Felix v. Giuseppe Kitchens & Baths, Inc.*, 2004 Pa Super 120, 848 A.2d 943, 947 (Pa. Super 2004)). In this case there are no allegations of fraud or duress; Husband avers a case of mutual mistake. "The doctrine of mutual mistake of fact serves as a defense to the formation of a contract and occurs when the parties to the contract have an erroneous belief as to a basic assumption of the contract at the time of formation which will have a material effect on the agreed exchange as to either party. A mutual mistake occurs when the written instrument fails to ... set forth the "true" agreement of the parties." *Id.* at 410.

Restatement (Second) of Contracts

§ 152. When Mistake Of Both Parties Makes A Contract Voidable

(1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

(2) In determining whether the mistake has a material effect on the agreed [***34] exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise.

....

Comment (a.) [T]he contract is voidable by the adversely affected party if three conditions are met. First, the mistake must relate to a "basic assumption on which the contract was made." Second, the party seeking avoidance must show that the mistake has a material effect on the agreed exchange of performances. Third, the mistake must not be one as to which the party seeking relief bears the risk. The parol evidence rule does not preclude the use of prior or contemporaneous agreements or negotiations to establish that the parties were mistaken. However, since mistakes are the exception rather than the rule, the trier of the facts should examine the evidence with particular care when a party attempts to avoid liability by proving mistake. The [***334] rule stated in this Section is subject to that in § 157 on fault of the party seeking relief. It is also subject to the rules on exercise of the power of avoidance stated in §§ 378-85.

Restatement (Second) of Contracts § 152 (1981). See also *Hart & Hart v. Arnold*, 2005 Pa. Super 328, 884 A.2d 316, 333; *Step* at 411.

Husband argues that due to a mutual mistake, both parties reliance on an inaccurate modeling statement, provision B (4.) should not be binding. Wife argues that this is not a case of mutual mistake; she did not rely on the modeling statement as she did not see the statement until after the agreement was signed; and the agreement in its entirety should remain intact. A finding of mutual mistake may be entered regardless of whether both parties agree to the fact that mutual mistake exists. *Bollinger v. Central Pennsylvania Quarry Stripping and Construction Co.*, 229 A.2d 741, 742 (Pa. 1967)

(citing *Kutsenkow v. Kutsenkow*, 414 Pa. 610, 612 (1964)). In order for mutual mistake to be found the party claiming mutual mistake has the burden of proving mutual mistake through clear, precise and convincing evidence. *Gocek v. Gocek*, 612 A.2d 1004, 1006 (Pa. Super. 1992) citing (*Bugen v. New York Life Insurance Co.*, 408 Pa. 472, 184 A.2d 499, 500 (1962)).

A contract entered into under a mutual misconception as to an essential element of fact may be rescinded or reformed upon the discovery of the mistake if (1) the misconception entered into the contemplation of both parties as a condition of assent, and (2) the parties can be placed in their former position regarding the subject matter of the contract. In other words, mutual mistake occurs when a fact in existence at the time of the formation of the contract, but unknown to both parties, will materially affect the parties' performance of the contract.

Step at 410. Due to the fact that all the terms of the agreement with the exception of the rollover of the IRA and pension are complete Husband is seeking reformation of the agreement not rescission. When a mutual mistake prevents the contract from conforming to the true intention of the parties the contract may be reformed. *Philadelphia Electric v. Borough of Lansdale*, 424 A.2d 514, 518 (Pa. Super 1981) (citing *General Electric Credit Corporation v. Aetna Casualty & Surety Company*, 437 Pa. 463, 263 a.2d 448 (1970)) *see also Bollinger*. Under this doctrine Husband must prove that the intent of the parties at the time of contracting was an equal fifty-fifty division of the martial assets. *Id.* Historically Lycoming County has taken the stance that reformation of contract should be used sparingly as an equitable remedy as it is not the job of the Court to alter or draft contracts for the parties. *Calhoun v. Calhoun*, Honorable Clinton W. Smith President Judge presiding filed September 27, 2001 to case number 01-21,115.

Wife argues that this is not a case of mutual mistake because she did not rely on the 2007 modeling statement as she did not see the statement until after the agreement was signed. Wife's stance, similar to Husband's, is that there was a rush to get the agreement signed and the divorce finalized. In that rush there were no appraisals done, Wife testified that she used good faith estimates when filling in the numbers during the negotiations and she used the number that Husband provided as to the pension. She further clarifies that she went into the negotiations with a dollar figure in mind that she needed in order to be provided for after the divorce; the dollar figure worked out as being close to fifty-fifty but regardless fifty-fifty was never her intent. Wife further argues that if the Court does find mutual mistake Husband bears the risk of the mistake because he was aware that he was relying on old and insufficient information and he still proceeded with the agreement. Wife directed the court to *Restatement (Second) of Contracts § 154* which states:

A party bears the risk of a mistake when

- (a) the risk is allocated to him by agreement of the parties, or
- (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
- (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

Restatement (Second) of Contracts § 154 (1981) *see also Step* at 410-11.

The Court does not doubt that Husband relied on the modeling statement from 2007 however Husband failed to prove through clear, precise and convincing evidence that Wife either relied on that statement or was aware that the number Husband provided

was from a 2007 statement. In light of finding that this is not a case of mutual mistake the property settlement agreement in entirety will remain in full force and effect.

Further the Court finds that Husband is in willful non-compliance and contempt of the property settlement agreement. The Court acknowledges that Husband was disputing the Pfizer/Fidelity pension amount and that the appeal process was lengthy however Husband was not prevented from completing the IRA rollover as agreed to in section B (4)(a) which has still not been completed. Furthermore, Husband received a lump sum payout from Pfizer/Fidelity sometime in mid-July 2011 at a minimum Husband could have done a partial QDRO or transfer of the funds as he was well aware that Wife got at least half of the \$91,968.92 which he received.

Husband shall immediately take all steps necessary to transfer to Wife the sum of \$183,643.80 (\$123,643.80 from his IRA and \$60,000 from his pension). Wife shall additionally receive interest at a rate of six percent (6%) from July 15, 2011 until the date the transfer is completed. Husband shall additionally pay counsel fees to Wife's counsel in the amount of \$300.00 said payment shall be made by June 1, 2012.

Wherefore, Wife's Petition for Contempt/ Enforcement of Separation and Property Settlement Agreement is **GRANTED**.

BY THE COURT,

Joy Reynolds McCoy, Judge