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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of TIHOMIR and ZLATKA
KIRILOV.

TIHOMIR KIRILOV,

Respondent,

v.

ZLATKA KIRILOV,

Appellant.

G049959

(Super. Ct. No. 12D005540)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Daphne Sykes Scott, Judge. Reversed in part and remanded.

John L. Dodd & Associates and John L. Dodd for Appellant.

The Law Offices of Saylin & Swisher, Brian G. Saylin and Lindsay L.
Swisher for Respondent.

* * *

Zlatka Kirilov (wife) appeals from the trial court's order granting Tihomir Kirilov's (husband) motion to set aside a portion of a stipulated judgment on the basis he had made a mistake with regard to the value of the former family home (home). She argues husband had not made a mistake of a fact under Code of Civil Procedure section 473 because the value of the home was an opinion, not a fact. We do not address this contention and instead conclude the trial court did not abuse its discretion in setting aside the judgment under Family Code section 2122 (all further undesignated statutory references are to this code). But we agree with wife's further arguments that the court erred in setting aside only that portion of the judgment concerning the home rather than the entire judgment, and in ordering the home to be appraised as of the date of its order setting aside the judgment instead of the date of the stipulated judgment. We reverse the judgment and remand the matter to the trial court.

FACTS

Wife and husband married in 1996 and separated in 2012. During that time, they had two children and purchased the home, into which they invested approximately \$30,000 worth of improvements.

After husband petitioned for dissolution in 2012, the court ordered him to vacate the home and gave wife primary use of it until the time of trial. Later, the parties stipulated wife would be awarded the home, with an estimated equity value of \$22,000 and a \$580,000 mortgage balance for a total value of \$602,000, contingent on her maintaining all necessary payments. Husband agreed to make an equalization payment of \$40,000 within 30 days after judgment was entered. The final judgment including these terms was signed by all parties and filed in July 2013.

Part of the judgment required wife to refinance the home. The judgment authorized the clerk of the court to sign the deed if husband failed to cooperate in the refinancing process. In October 2013, the refinancing documents were presented to husband for his signature but he refused to sign. The court granted wife's ex parte application for the clerk to sign the grant deed.

Husband filed a motion to set aside the portion of the judgment regarding the value of the home, to appraise the home for its current value, to have the equity in the home be equally divided between him and wife based on that new appraisal, and for wife to pay attorney fees and costs as sanctions. Husband declared that during negotiations, wife, who obtained a real estate license in 2007, "insisted that the [home] had a value of approximately \$602,000." She provided printouts from www.redfin.com (Redfin) showing the value of comparable homes in the area and refused to allow an appraiser to appraise the home. Additionally, she threatened to not let him see their children or take them on a pre-planned and pre-paid vacation to Bulgaria unless he did what she wanted. Husband declared he "felt backed into a corner" and that the stress from wife's threats led to his termination from his employment. Therefore, he "succumbed to [her] threats and demands, and relying on her supposed expertise in real estate and the Redfin printout she had provided," signed the judgment valuing the home at \$602,000. He had also relied on "her supposed expertise in real estate and the Redfin printout she had provided."

Husband stated he had refused to sign the refinancing documents because when he met with wife to do so, he discovered the bank had valued the home at \$699,000. He did not "understand how the value of the residence increased by approximately \$100,000 (or 16%) in four (4) months, and questioned the bank's valuation." Upon reviewing the Redfin website himself, he concluded wife had "manipulated" the estimate data by selecting comparable homes that supported her

desired value but which did not have the same amount of living space, features, and improvements as their home.

Based on these facts, husband argued the judgment as to the value of the home should be set aside on the grounds of fraud, perjury, duress, and mistake of fact under Code of Civil Procedure section 473, subdivision (b) and section 2122. Husband further requested the home be appraised at its current value and the equity equally divided between the parties. He also sought attorney fees and costs.

Although the court found “insufficient evidence of actual fraud, duress or perjury,” it determined husband “was led to believe a key fact which was other than it actually was” and granted the motion in its entirety under Code of Civil Procedure section 473, subdivision (b). It denied husband’s request for attorney fees.

DISCUSSION

1. Introduction

Husband sought to set aside the judgment under both Code of Civil Procedure section 473, subdivision (b) and section 2122. Because husband’s motion was filed within six months after entry of the judgment, he was entitled to seek relief under both statutes. Code of Civil Procedure “[s]ection 473 and the Relief From Judgment chapter (specifically . . . § 2122) now coexist, operating as alternative bases for relief, depending on when the application is filed. Within the six-month time limit under [Code of Civil Procedure] section 473, a litigant may seek relief from a family law judgment under either the statute’s mandatory provisions (where the litigant’s attorney is willing to swear to his own fault) or its discretionary provisions (where the court ‘may’ relieve a party of the consequences of his or her own mistake, inadvertence, surprise, or excusable neglect). Alternatively, the litigant may seek relief under any of the specific grounds

specified in . . . section 2122.” (*In re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 32.) The grounds for a motion to set aside a judgment under section 2122, subdivisions (a) through (f), are actual fraud, perjury, duress, mental incapacity, mistake, and the failure to comply with statutory disclosure obligations.

Here, wife contends husband’s “mistake” regarding the value of the home was not one entitling him to relief under Code of Civil Procedure section 473, subdivision (b), “because representation of a value of property is merely an opinion, not a ‘fact,’ as a matter of law.” Husband responds that wife waived this issue by not raising it in the trial court. But wife’s brief in opposition to husband’s set-aside motion specifically states husband’s reliance on wife’s assertion of the value of the home “does not constitute a mistake of fact worthy of relief under Code of Civil Procedure [section] 473.” While she did not say why it was not a mistake of fact, she did raise the issue.

Nevertheless, we need not decide whether the “mistake” was one entitled to Code of Civil Procedure section 473 relief because we conclude the court acted within its discretion in setting aside the judgment with regard to the home under section 2122. “We review the result, not the trial court’s reasoning.” (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 203.)

2. *Standard of Review*

Section 2121, subdivision (a) provides that a trial “court may, on any terms that may be just, relieve a spouse from a judgment” adjudicating support or the division of property, subject to the time limits and grounds set forth in the statute. The statutory phrase “may, on any terms that may be just” grants discretionary authority to the trial court. Thus, we review the court’s order on a motion to set aside a judgment under an abuse of discretion standard. (*In re Marriage of Walker* (2012) 203 Cal.App.4th 137, 146.) As such, it matters not whether, as husband contends, the doctrine of implied

findings applies because wife did not request a statement of decision. Under both this doctrine and the abuse of discretion standard of review, we infer all findings supported by substantial evidence in favor of the judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134; *Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 745 [implied finding inferred by appellate court only if supported by substantial evidence]; *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143 [under abuse of discretion standard of review, appellate court must accept trial court's implied findings of fact supported by substantial evidence].)

3. Relief under Section 2122

Section 2122, subdivision (e), provides: “As to stipulated or uncontested judgments or that part of a judgment stipulated to by the parties,” a motion to set aside the judgment may be based on “mistake, either mutual or unilateral, whether mistake of law or mistake of fact.” “[T]he failure of a spouse to disclose the existence or the value of a community asset . . . constitutes a basis for setting aside a judgment on the grounds of mistake under section 2122.” (*In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 144, fn. omitted (*Varner*); accord, *In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, 1345 (*Brewer*).)

In *Varner, supra*, 55 Cal.App.4th 128, the husband misrepresented the value of substantial assets and prevented the wife and her advisers from having access to information that would allow the assets to be valued. In moving to set aside the judgment under section 2122, the wife argued, similarly to husband here, that “husband failed to disclose the true value of the assets.” (*Id.* at p. 143.) To support her claim, the wife submitted documents showing the value of the assets was different from what husband testified to. (*Ibid.*)

The appellate court reversed the trial court's denial of the wife's motion to set aside the stipulated dissolution judgment. It reasoned, the "[h]usband's failure to disclose the value of the assets, or even to give wife's accountants access to the information from which the value could be derived, would constitute a violation of" the husband's obligation to provide "[a]ll material facts and information regarding the valuation of all assets that are contended to be community." (*Varner, supra*, 55 Cal.App.4th at p. 144.) It thus concluded that the husband's failure to disclose the existence or true value of a community asset allowed the wife to set aside the judgment under section 2122 on the ground of mistake. (*Ibid.* at p. 144; accord, *In re Marriage of Jones* (1998) 60 Cal.App.4th 685, 693; see *Brewer, supra*, 93 Cal.App.4th at p.1345 [under *Varner*, "spouses may be relieved of a stipulated judgment based upon incomplete or inaccurate information"].)

In *Brewer, supra*, 93 Cal.App.4th 1334, the wife, an executive employed by NBC, delivered to the husband during divorce proceedings a final declaration of disclosure stating the fair market value of her NBC pension was "unknown" and the fair market value of her NBC savings program was \$168,561. Based on that, they entered into a marital settlement agreement providing for an award to the wife of the community's interest in the NBC pension plan and savings program. The husband received an equalizing payment and other assets. The parties agreed to a stipulated judgment (based on their agreement), upon which judgment was then entered.

The husband filed a motion to set aside the judgment on the basis that the wife had not valued her NBC pension plan in her final declaration of disclosure or otherwise. (*Brewer, supra*, 93 Cal.App.4th at p. 1339.) He submitted the supporting declaration of an expert who stated the wife's interest in the NBC pension plan was worth over \$286,000 at the time of their agreement. The husband also submitted a complete annual statement of the wife's NBC savings program showing its worth was over

\$232,000 at the time of their agreement. The wife had not attached to her final declaration the pages reflecting that increased amount. The husband also asserted he made a unilateral mistake of fact because he did not understand the wife had both an NBC pension plan and an NBC savings program, believing instead she had only one retirement plan that he believed was worth only \$168,561. The trial court granted his motion to set aside the judgment, finding the wife's final declaration of disclosure failed to reveal both the value of her NBC pension plan and the current value of her NBC savings program. (*Id.* at p. 1341.) "The omission led to a mistake of fact regarding the value of" of the community's two largest assets. (*Id.* at p. 1342.)

On appeal, *Brewer, supra*, 93 Cal.App.4th 1334 discussed the spousal statutory duty of full disclosure, stating "spouses may be relieved of a stipulated judgment based upon incomplete or inaccurate information." (*Id.* at p. 1345.) It concluded the evidence supported the trial court's finding the husband made a unilateral mistake, in part, because he did not have accurate and complete valuations of his wife's retirement plans: "The valuation information [on the wife's final declaration of disclosure] about the [savings program] was neither current nor accurate." (*Id.* at p. 1346.) Also, the wife "never provided [the husband] with a valuation of" her pension plan. (*Ibid.*) Because the wife's retirement plans "were the largest community assets[,] their values were material to resolving the issues between the parties." (*Ibid.*) The husband "agreed to a resolution of the property issues based upon incomplete, inaccurate, and omitted information." (*Ibid.*)

Here, as in *Varner, supra*, 55 Cal.App.4th 128 and *Brewer, supra*, 93 Cal.App.4th 1334, the trial court found husband had been misled into believing the value of the home was lower than it actually was. This finding is supported by substantial evidence. Husband declared he believed wife had "manipulated" the valuation of the home by selecting only comparable homes that supported the value she desired without

consideration of the home's additional features and that he had relied on wife's "supposed expertise in real estate and the Redfin printout she had provided."

Wife contends *Varner, supra*, 55 Cal.App.4th 128 is inapposite because she "did not conceal the existence of any property" and that in *Varner*, it was not "the difference in the values of the residential property" but the "gross[] misrepresent[ation]" of the value of the husband's business assets. These distinctions are without a difference. Wife may not have concealed properties, and this case does not involve the value of a business, but the court did find wife had misled husband regarding the value of a substantial asset.

Wife maintains that although she had a real estate license, it was inactive and she was not a professional appraiser. Also, unlike in *Varner, supra*, 55 Cal.App.4th 128, husband was "represented by counsel at all material times," gave "no indication he has limited intelligence, or [that] he, even without an attorney or appraiser, could not have arrived at an independent opinion of the value of the home." He "had been fully aware the value represented may not be accurate," and knew "he had a right to discovery but voluntarily had waived it, as well as any further appraisal of the home. His attorney drafted the final judgment, which he signed voluntarily." Further, "[h]e, himself should have had a general idea of the value of the home," since he "participated in buying the home," "lived there for several years," "paid for the upgrades of the home," and "refinanced the mortgage." To this end, husband had opined in his mandatory settlement brief that he believed the home had a value of \$652,000. As to husband's argument that she "would not let an independent appraiser into the home," wife claimed "property sales are public record and could easily be accessed through the internet or periodicals to arrive at a value of property."

But these were all factual matters for the trial court to consider. "[T]he showing on appeal is wholly insufficient if it presents a state of facts . . . which . . .

merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.” (*Varner, supra*, 55 Cal.App.4th at p. 138.)

The same applies to wife’s distinctions of this case from *Brewer, supra*, 93 Cal.App.4th 1334. She argues that unlike a house, a pension plan has a definite value, and thus is a basic fact and not “a mere ‘opinion’”; the wife in *Brewer* was “in a superior position to obtain the information about the value of her pension because the documents were from her employer,” whereas both parties here “had equal access to relevant information used to determine the value of the home”; husband “was in the business of buying and selling on Ebay, a public internet market, so presumably he was aware of how to navigate the internet”; and because “[h]e also owned an E*Trade account . . . it can also be assumed he knew how to ascertain the value of fluctuating assets using the internet.” These facts provide at most a basis for a ruling different from the one made by the trial court here. They are insufficient to warrant a reversal.

Wife maintains that a judgment may not be set aside solely on the basis “it was ‘inequitable when made,’” quoting *In re Marriage of Heggie, supra*, 99 Cal.App.4th at p. 33. But that is not what the trial court did. Rather, the court acted within its discretion in finding husband had made a mistake in the value of the home after he had been misled by wife.

4. Failure to Set Aside Entire Judgment

Wife contends the court “erred in ordering only the part of the judgment concerning the [home] be set aside because [it] was an integral part of the negotiated settlement agreement.” We agree.

Section 2125 states, “When ruling on an action or motion to set aside a judgment, the court shall set aside only those provisions materially affected by the

circumstances leading to the court's decision to grant relief. However, the court has discretion to set aside the entire judgment, if necessary, for equitable considerations." Pursuant to this statute, the court set aside only that portion of the judgment regarding the home. But it abused its discretion in not setting aside the entire judgment for equitable reasons because husband would now continue to receive all he had bargained for under the terms of the stipulated judgment, plus half of the equity in the home. The court also improperly rewrote the terms of the stipulated judgment.

The stipulated judgment here contained an integration clause: "This is an integrated stipulation of judgment entered into by the parties because of the overall settlement. Therefore, if any term, provision, or condition of this stipulation is altered or held by a court of proper jurisdiction to be invalid, void, or unenforceable, and should enforcement of the remaining provisions then result in a substantial injustice to one party, the parties request and agree that the Court retain the jurisdiction to modify the remainder of the stipulation to the extent necessary to cure the injustice."

Here, enforcement of the remainder would be substantially unjust to wife because husband obtained more than what the stipulated judgment had provided while wife's terms remained the same. In exchange for the home, wife had waived spousal support after a long-term marriage, as well as any rights to child support arrears and all interest in their businesses, including all of the corresponding rights. Under the court's order, husband will receive half of the equity in the home, although he had not been awarded any equity under the original judgment. He would also continue to receive all of the benefits he received under the original judgment. This is inequitable and an abuse of discretion. The court's ruling altered the terms of the settlement agreement between the parties. A trial court is "not . . . empowered to rewrite the judgment for the parties." (*In re Marriage of Melton* (1994) 28 Cal.App.4th 931, 938.) And where an "agreement is integrated, it cannot be modified except upon consent of both parties." (*In re Marriage*

of Carletti (1975) 53 Cal.App.3d 989, 995; see *In re Marriage of Doud* (1986) 181 Cal.App.3d 510, 519.)

Because this case involves an integrated stipulation of judgment where the alteration of one term results in substantial injustice to wife, the judgment is reversed and the matter remanded to the trial court for further proceedings in light of this opinion.

5. *Ordering Home to be Appraised as of the Date of the Court's Order*

Wife contends the court abused its discretion in ordering the home appraised based on the current value at the time of its order, which was “over six months past the date of the stipulation and judgment, rather than ordering an independent retroactive appraisal, because the parties had stipulated to the value of all the other assets on the [date of the mandatory settlement conference]. The value as of the stipulation date was the agreed consideration.” We again agree.

““Marital settlement agreements incorporated into a dissolution judgment are construed under the statutory rules governing the interpretations of contracts generally.” [Citation.] “The basic goal of contract interpretation is to give effect to the parties’ mutual intent at the time of contracting. [Citations.] When a contract is reduced to writing, the parties’ intention is determined from the writing alone, if possible. [Citation.] ‘The words of a contract are to be understood in their ordinary and popular sense.’”” (*In re Marriage of Thorne & Raccina* (2012) 203 Cal.App.4th 492, 501-502.)

The stipulation judgment states, “The parties stipulate that the *current* equity value in the [home] is estimated to be \$22,000.00. The [home] has a mortgage balance of \$580,000.00 under both parties’ names.” By using the word “current,” the stipulation indicates the parties intended the date they entered into the stipulated judgment to be used as the date of valuation, *not* the date of the court’s order setting aside the judgment. The judgment is reversed for this additional reason.

DISPOSITION

The postjudgment order is reversed and the matter is remanded for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.