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Cervantes v. Cervantes

VIOLA CERVANTES, Petitioner/Counter-Respondent,
v. EDWARD R. CERVANTES, Respondent/Counter-Petitioner
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action - Law, No. 2000-4076

Petition to vacate divorce decree for extrinsic fraud under section 3332 of the Domestic Relations Code; Counter-petition for attorney's fees under 42 Pa.C.S.A. 2503(9)

1. Extrinsic fraud relates to matters collateral to the judgment which have the consequence of precluding a fair hearing or presentation of one side of the case by keeping the defeated party away from court by false promise or compromise, or by keeping the defeated party ignorant of the action.
2. The petitioner has the burden of proving fraud by clear and convincing evidence.
3. Where wife obtained a divorce through counsel, but her share of husband's pension was not secured before the decree was entered, and wife alleged husband lulled her into believing that an allotment he created at her request during the pendency of the action would be permanent, but husband did not make any specific false statement to wife about the allotment being permanent and adopted a passive attitude toward the divorce, wife failed to prove extrinsic fraud by clear and convincing evidence, though she may have grounds for a malpractice action against former counsel for not securing her rights before entry of the decree.
4. Husband's petition for counsel fees was denied where he failed to show that wife's conduct in petitioning to vacate the decree was arbitrary, vexatious or in bad faith; simply because wife had a potential remedy against former counsel for money damages did not mean her motive for filing the petition was to vex husband insofar as there was a genuine factual dispute about what occurred between the parties before the divorce became final.

Appearances:

James K. Reed, Esq., *Counsel for Viola Summers*

Julie Gray Dorsett, Esq., *Counsel for Edward Cervantes*

OPINION

Herman, J., August 7, 2002

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Introduction

Viola Cervantes, now Viola Summers, filed a petition to vacate a divorce decree. The respondent, Edward Cervantes, answered the petition and filed a cross petition for counsel fees. The court held a hearing on both petitions on June 25, 2002 and counsel submitted briefs.

Factual Background

The parties were married on September 25, 1971 and separated on May 1, 2000. Viola filed for a consent divorce under section 3301(c) of the Divorce Code on November 21, 2000. The court entered a decree on April 9, 2001. On March 12, 2002, Viola petitioned to vacate the decree on grounds of extrinsic fraud. She alleges Edward intentionally misled her to believe her rights to his military pension had been secured through an allotment which he signed at her request during the pendency of the action.^[1] She also alleges counsel representing her at the time failed to protect her pension rights before the divorce was finalized.

Edward's pension payouts were automatically deposited into the parties' joint bank account during the marriage. Viola was the initiator of the divorce action. She testified she told counsel at their first meeting that she and Edward had already divided their personal property and the only remaining marital asset was Edward's military pension. She testified she clearly explained to counsel that she wanted to secure her share of this asset before the divorce was final, and that

she placed herself completely in his hands. Edward was unrepresented by counsel during the entire divorce action.

In February 2001, after the complaint was filed but before the decree was entered, Viola asked Edward to accompany her to the Carlisle barracks to complete the paperwork to ensure that one-half of the pension payouts would be directly deposited into her separate account. Edward readily agreed to the trip. Edward testified he never wanted the divorce, but accompanied Viola to Carlisle because he wanted to spend time with her. He also had told Viola throughout the pendency of the action that he would provide her with the allotment as long as they were married and she bore his name. A staff member at the barracks helped the parties complete the paperwork that day. The one-half allotment was automatically deposited into Viola's account beginning in either February or March of 2001.

Edward testified he knew on the day of the Carlisle trip that the allotment was voluntary on his part and he could terminate it at any time. He testified he knew this because he had done allotments several times during his military career. Viola, on the other hand, testified she was unaware at the time that the continuation of the allotment would be entirely at Edward's discretion. According to her testimony, she believed that the allotment constituted a permanent securing of her rights to her portion of his pension.

Viola went to counsel's office on April 2, 2001 to sign an Affidavit of Consent, and a Waiver of Notice of Intention to Request Entry of a Divorce Decree. His paralegal presented her with these documents; she did not see counsel that day and had not seen him since their first meeting. The Waiver of Notice stated as follows: "I understand that I may lose rights concerning alimony [and] division of property...if I do not claim them before a divorce is granted." Viola testified she has difficulty understanding legal terminology, yet she admitted she did not completely read these documents and did not ask to speak with counsel so that he could explain them to her, or so that she could ask him whether the allotment amounted to a permanent protection of her share of the pension. Counsel presented the divorce filings to the court a few days later, including the Praeceptum to Transmit Record which stated that no economic claims remained pending. No post-marital agreement or court order was filed or signed to permanently secure Viola's share of Edward's pension.

The parties tried unsuccessfully to reconcile shortly after the decree was entered. Edward was particularly unhappy about this failed attempt to reconcile. Upon learning of Viola's remarriage in November, Edward consulted two attorneys to confirm that he could legally halt the allotment. He was told he could and promptly did so. Viola discovered in December that the allotment was no longer being deposited into her account.

Viola was employed full-time at the time the divorce became final. Her current husband was laid off at the time of their marriage. She has worked at two nursing homes since then. She had been enrolled in a paid training program to become a medical assistant but was no longer in that program as of two days before the hearing. She testified she plans to return to the program in September. According to her testimony, she was a homemaker during the marriage at Edward's request and therefore gave up her own career aspirations. Viola did not present the court with specifics about this last point.

Viola contends that Edward deliberately concealed from her the voluntary, temporary nature of the allotment, leading her to believe he was cooperating with her desire to permanently protect her pension rights. She contends that his fraud, together with counsel's ineffectiveness, resulted in the loss of those rights. Viola told the court she would like to file a malpractice action against counsel but has not yet done so.

Discussion

A divorce decree can be vacated for extrinsic fraud within five years of its entry. Extrinsic fraud "relates to matters collateral to the judgment which have the consequence of precluding a fair hearing or presentation of one side of the case." 23 Pa.C.S.A. section 3332. It refers to "some act or conduct of the prevailing party which has prevented a fair submission of the controversy. Among these are the keeping of the defeated party away from court by false promise or compromise, or fraudulently keeping him ignorant of the action." Justice v. Justice, 612 A.2d 1354 (Pa.Super. 1992), appeal denied, 621 A.2d 581.

To prove fraud, the petitioner has the burden of showing by clear and convincing evidence that (1) a representation was made; (2) which was material to the transaction at hand; (3) which was made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading the other person to rely on it; (5) the other person justifiably relied on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. Sewak v. Lockhart, 699 A.2d 755 (Pa.Super. 1997); Gibbs v. Ernst, 647 A.2d 882 (Pa. 1994).

Viola contends that Edward knew during their trip to Carlisle that she was concerned about securing her share of his pension, and that even though he knew the allotment was entirely voluntary on his part and could be unilaterally terminated at any time, he deliberately lulled her into believing that the allotment constituted a permanent guarantee of her rights. She alleges that Edward's conduct in asking two attorneys after the divorce was final whether he was free to terminate the allotment is further evidence that he planned all along to foster this misconception in order to induce her to forego further efforts to secure her rights through the courts.

After considering all the evidence, we find Viola has failed to prove by clear and convincing evidence that Edward's conduct amounted to extrinsic fraud. There is insufficient evidence Edward made any statement to her on the day in question or at any other time which constituted a misrepresentation about the nature of allotment or his intentions as to how long it would continue. Viola has not shown to this court's satisfaction that Edward knew she was unaware of the temporary nature of allotments but intentionally misled her on that point or made any promises or offers to compromise specifically designed to discourage her from securing her rights through the court. In fact, Viola did not dispute that Edward had done allotments several times during the course of his military career, which should have given her reason to know the allotment was voluntary. Furthermore, Edward testified he specifically told Viola during the

pendency of the action that he did not intend to voluntarily support her once she divorced him, stopped using his name or remarried.

Viola herself was the active initiator of the legal action: she was the one who consulted counsel to obtain the divorce; she filed the action; she approached Edward with a request to accompany her to Carlisle to commence an allotment. All the while Edward was unrepresented and adopted a distinctly passive approach to the action. This is therefore not a situation where a husband made ongoing representations to his wife during negotiations between their respective counsel of his intention to finalize their property settlement, thereby inducing her to waive her right to litigate economic issues. Fenstermaker v. Fenstermaker, 503 A.2d 185 (Pa.Super. 1985).

We are constrained to conclude that Viola's primary grievance lies more with an alleged failure in the attorney-client relationship than with any conduct on Edward's part. Although the current proceeding is not a malpractice action, we do not have former counsel's version of events, and therefore the question of counsel's competence is not squarely before the court, we do note the following: Viola testified she has trouble understanding legal documents. Assuming we accepted this testimony, the clear language in the Waiver can in no sense be considered legal jargon, but if she did not fully understand it, she could have asked counsel to explain it to her. She also could have told counsel about her own actions in having Edward commence the allotment and inquired as to whether this was enough to protect her rights. This alone is sufficient for the court to reject the notion that she justifiably relied on anything Edward said or did during the pendency of the action. In this respect, the facts are more like those in Ratarsky v. Ratarsky, 557 A.2d 23 (Pa.Super. 1989), in which the court held that a husband's concealing of an asset did not constitute extrinsic fraud where his wife's counsel had ample opportunity to review the specifics of the asset but failed to do so.^[2]

Viola urges the court to use its equitable powers to effectuate economic justice between the parties. Beamer v. Beamer, 479 A.2d 485 (Pa.Super. 1984); 23 Pa.C.S.A. section 3323(f).^[3] She points to the long duration of the marriage, and contends she agreed at Edward's request to forego her own professional aspirations in order to remain a homemaker. She did not present any specifics to the court on this latter point, however, and even if she had, such specifics unfortunately cannot compensate for her failure to prove by clear and convincing evidence that Edward's actions or inactions amounted to fraud.

We next address Edward's cross petition. A litigant can recover counsel fees where "the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith." 42 Pa.C.S.A. section 2503(9). Edward argues that Viola has a potential remedy at law in the form of a malpractice suit against her former counsel for money damages which is more likely to produce tangible results than her attempt to have the decree vacated. He also argues that her motive in filing this petition now has less to do with any fraud he purportedly committed than with the recent shaky employment situation in her household.

We disagree with both of Edward's points on this issue. As to the first, the mere fact that Viola still has the option of filing a malpractice action against her former counsel does not mean her decision to file her petition was arbitrary or made in bad faith insofar as it raised a legitimate question as to the nature of Edward's conduct. Although we have concluded after a full evidentiary hearing that the root of her grievance lies with prior counsel's conduct, there is an insufficient basis to find her motive in pursuing this petition was merely to vex Edward. delCastillo v. delCastillo, 617 A.2d 26 (Pa.Super. 1992), appeal denied, 634 A.2d 1116. Edward's second point on this issue might ring true if Viola had delayed for a substantial period of time before filing her petition. As it stands, she acted promptly in consulting new counsel, with a delay of only approximately three months between December of 2001 when she first realized the allotments had been stopped, and March 12, 2002 when she filed her petition to vacate. Under these circumstances, we must deny Edward's petition for counsel fees.^[4]

ORDER OF COURT

Now this 7th day of August, 2002, the court hereby denies the petition filed by Viola Summers to vacate the divorce decree; court hereby denies the cross petition for counsel fees filed by Edward Cervantes.

[1]An allotment is "a portion of a military person's pay, set aside for his or her dependents." Webster's II New Riverside University Dictionary, 1984.

[2]Counsel for Edward cites Major v. Major, 518 A.2d 1267 (Pa.Super. 1986). That case is not strong support for Edward's position because the wife in Major did not raise extrinsic fraud as an issue, and therefore the court was not in a position to conclude that the husband's failure to disclose his military pension constituted extrinsic fraud.

ction provides:

nial causes, the court shall have full equity power and jurisdiction and may issue injunctions or other orders which are necessary to protect the interests of the parties or to effectuate the purposes of this part and may grant such other relief or remedy as equity and justice require against either party or against any third person over whom the court has jurisdiction and who is involved in or concerned with the disposition of the cause.

[4]The record was held open to allow Edward's counsel to provide the court with information about fees he incurred in responding to Viola's petition. Counsel did not submit that information but this causes Edward no prejudice because we find he is not entitled to those fees to any event.