2019 IL App (1st) 180639-U

FIRST DIVISION
July 29, 2019

No. 1-18-0639

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DISTRICT RECOVERY, INC.; SHERRY RADWANSKI; DISTRICT ENTERPRISES, INC.; DISTRICT REBUILDERS, INC.; DISTRICT TOWING, INC.; and DISTRICT CRANE, INC.,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants and Counterdefendants,	)	
v.	)	No. 08 CH 10532
DENNIS RADWANSKI; DANIEL RADWANSKI; MICHELLE RADWANSKI; and INDEPENDENCE TOWING & RECOVERY, INC.,	)	Honorable Diane M. Shelley, Judge Presiding.
Defendants-Appellees and Counterplaintiffs.	)	

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justices Pierce and Walker concurred in the judgment.

O R D E R

¶ 1 *Held*: Affirming dismissal of the suit pursuant to a valid settlement agreement and affirming the trial court's denial of plaintiff's motion to vacate the settlement agreement on the grounds of procedural and substantive unconscionability.

¶ 2 Plaintiffs-appellants and counterdefendants—Sherry Radwanski and her companies District Recovery, Inc.; District Enterprises, Inc.; District Rebuilders, Inc.; District Towing, Inc.; and District Crane, Inc.—have been in litigation for many years with defendants-appellees—

Sherry's sons Dennis and Daniel (Danny) Radwanski, their company Independence Towing & Recovery, Inc., and Dennis's wife Michelle Radwanski—over the family businesses. Although the parties eventually agreed to settle, Sherry subsequently moved to vacate their settlement as procedurally and substantively unconscionable. Defendants-appellees have not appeared or filed any brief in this court, although the record indicates that their counsel was served with notice of this appeal. Therefore, we have considered this appeal on appellants' brief only. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) ("[I]f the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal."). For the following reasons, we affirm the trial court's rulings upholding the settlement and dismissing the case.

¶ 3 I. BACKGROUND

¶ 4 A. Pre-Settlement Litigation

¶ 5 Sherry is the sole shareholder, president, and director of District Enterprises, Inc., which serves as a holding company for several related organizations, including District Recovery, Inc.; District Rebuilders, Inc.; District Towing, Inc.; and District Crane, Inc., as well as the real estate where the Radwanski family business operates. On March 20, 2008, District Recovery filed a two-count complaint alleging that Dennis and Danny breached their fiduciary duties and converted company property. Sherry has been the director of District Enterprises since her husband, Dennis Sr., died in 1999.

¶ 6 District Recovery alleged that Dennis and Danny worked as salaried employees following the death of their father. Dennis worked in a managerial capacity for District and moved most of District's paperwork to his own home, where his wife Michelle performed payroll operations for District. Danny worked as a District tow truck driver. While working at

District Recovery, Dennis and Danny started Independence Towing & Recovery, Inc. (Independence Towing), a competing business, without Sherry's knowledge. They also took control of corporate phone numbers registered with District in order to redirect calls to their competing business. District Recovery alleged that it lost several standing contracts with its customers due to the actions of Dennis and Danny. In February 2008, Sherry fired Dennis for allegedly deceiving customers, and Danny also quit around that time.

¶ 7 After District Recovery filed its complaint against them, Dennis and Danny filed counterclaims against Sherry and her companies alleging fraud and promissory estoppel, and to collect money they contended they were owed.

¶ 8 Sherry and her two sons were also parties in two additional actions in DuPage County. The first, filed by Dennis and Daniel against Sherry in the chancery division, included various claims and counterclaims for personal property, including disputes over who owned baseball cards and remote-controlled radios. That lawsuit, which the trial judge described as "a family tragedy equal to the Oresteia," was finally resolved on March 12, 2013.

¶ 9 A second suit, in the probate division, involved the assets of Dennis Sr., who had died intestate, and ownership interests in the various family businesses. That suit was ultimately tried and the resulting judgment was affirmed by the second district in 2013. *In re Estate of Radwanski*, 2013 IL App (2d) 120139-U.

¶ 10 During this time, District Recovery's complaint in this case was amended multiple times to include additional parties and additional claims. The third amended complaint, filed on June 13, 2017, included claims for (1) breach of fiduciary duty, (2) tortious inducement of a breach of fiduciary duty, (3) tortious interference with contractual relations, (4) tortious interference with a business expectancy, and (5) conversion, based on allegations that Danny, Dennis, Michelle and

their competing company, Independence Towing, had taken control of District Recovery, converted District Recovery property to their own use, and improperly set up a competing business.

¶ 11 Following informal settlement talks between their attorneys, on August 7, 2017, the parties agreed to a settlement conference. Sherry attended on behalf of District Recovery, along with Bruce Rose, who was the attorney for District Recovery.

¶ 12 2. Settlement Conference

¶ 13 On August 31, 2017, the trial court facilitated the settlement conference. According to Sherry's affidavit, attached to her motion to vacate the settlement, in her initial meeting with her counsel and the judge, Sherry told the judge that she wanted Dennis and Danny to relinquish their one-sixth ownership interests in the LLC. Sherry had formed the LLC, as an estate planning device, after her husband died. Dennis and Danny were given membership interests in the LLC so that they would acquire the real property owned by the companies when Sherry died. Neither Dennis nor Danny had any other ownership interest in the family companies or property.

¶ 14 Sherry also told the judge at the settlement conference that she wanted Dennis and Danny to relinquish the corporate phone numbers they had taken from District Recovery. In addition, although she insisted that her claim was worth a minimum of $5 million, Sherry told the judge that, if these requests were met, she would settle for $500,000. According to her affidavit, the trial court's response to each of these requests was: "You're not getting that." Sherry reduced her demand to $250,000, an amount Sherry claims the trial court again told her she would not get. Sherry avers in her affidavit that, at this point, she began to feel uncomfortable, as though she was "being forced to bid against herself." Sherry also felt as though the trial court was advocating for Dennis and Danny, rather than trying to create a compromise.

¶ 15 According to an affidavit by Mr. Rose, also attached to the motion to vacate the settlement, Sherry kept making reduced demands and the court kept telling her she would not get that until Sherry said that she would settle for $30,000 and the trial court judge said that she believed the defendants would agree to that.

¶ 16 During their discussions at the settlement conference, Sherry and the judge disagreed about the value of the real property owned by the LLC. Sherry and her lawyer valued that property at about $1.1 million, but the court said that it was probably worth $3-5 million. Sherry also directed the trial court's attention to exhibits attached to District Recovery's amended complaint illustrating that Dennis had drawn money from District Recovery through unauthorized checks to build his own home. She estimated that $80,000 was owed to her from these unauthorized checks. Mr. Rose asserted in his affidavit that the trial court had ignored his request for the defendants' tax returns.

¶ 17 The trial court's account of the conference is detailed in the court's order denying Sherry's motion to vacate the settlement. According to the trial court, the conference lasted for several hours, ending well past regular working hours. The court said that "undivided attention" was given to the parties for this settlement conference, and the trial court "evaluated each party's position, identified which issues were negotiable, and made suggestions on possible counteroffers." The court made clear that in the course of these discussions, Sherry and her counsel had "ample opportunities to walk away from any proposed settlement agreement."

¶ 18 The handwritten document that the parties signed at the conclusion of the settlement conference outlines the following agreement: Sherry would retain all her interests in District Recovery, Dennis and Danny would relinquish their one-sixth ownership interest in the LLC, defendants would pay Sherry $30,000 in monetary damages, defendants would make available

for inspection a trailer for use by District Towing, and Dennis and Danny would relinquish their interest in an airport association. Dennis and Danny could keep their cell phone numbers but agreed not to use those numbers to infringe on District Recovery business. All parties signed that handwritten agreement, and it was agreed that Sherry's counsel would draft a more formal agreement.

¶ 19 2. Post-Settlement Litigation

¶ 20 After the August 31, 2017, settlement conference, issues arose that were not addressed in the parties' handwritten agreement including tax liability in connection with the transfer of the interest in the LLC and costs associated with the relocation and transfer of the trailer. The parties' lawyers had some discussions in an attempt to resolve these remaining issues but no new formal agreement was signed.

¶ 21 At a status conference on September 14, 2017, defendants advised the trial court that the parties had been unable to come to terms on a more formal agreement, and defendants intended to file a motion to enforce the handwritten settlement agreement from the August 31, 2017, settlement conference. On November 29, 2017, after full briefing, the trial court granted that motion in a written order.

¶ 22 On December 5, 2017, Sherry filed a motion to vacate the August 31, 2017, settlement agreement. Sherry claimed in the motion that she had been coerced by the trial court, had only signed the agreement under duress, and the resulting agreement was procedurally and substantively unconscionable. As noted above, the court provided its own account of what happened at the August 31, 2017, settlement conference in its February 2, 2018, written order denying Sherry's motion to vacate. After finding on February 2, 2018, that the parties had reached a valid settlement, on February 23, 2018, the trial court issued an order dismissing the

case.

¶ 23 II. JURISDICTION

¶ 24 Sherry filed a timely notice of appeal on March 22, 2018. We have jurisdiction under Illinois Supreme Court Rules 301 and 303, governing appeals from final judgments entered by the circuit court in civil cases. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. July 1, 2017).

¶ 25 III. ANALYSIS

¶ 26 On appeal, Sherry challenges the denial of her motion to vacate the settlement, arguing that the settlement "was procured by coercion and duress and resulted in an unconscionable agreement." Courts in Illinois look favorably upon settlements because they are peaceful and voluntary resolutions of disputes. *Cushing v. Greyhound Lines, Inc*., 2013 IL App (1st) 103197 ¶ 355. A settlement agreement is presumed to be valid and conclusive as to all matters unless there is an indication that the settlement was created by fraud, mistake, or that a party's interests were not fully and adequately represented. *Jackson v. Callan Publishing, In*c., 356 Ill. App. 3d 326, 341 (2005). "A settlement is considered a contract, and construction and enforcement of settlement agreements are governed by principles of contract law." *Haisma v. Edgar*, 218 Ill. App. 3d 78, 86 (1991). As a contract, a settlement agreement must contain an offer, an acceptance, and a meeting of the minds on its terms. *McAllister v. Hayes*, 165 Ill. App. 3d 426 427 (1976). Interpretation of a settlement agreement's terms and the parties' intentions are also governed by contract law, and the "plain and ordinary meaning" of each term will be used if the settlement is unambiguous. *Green v. Safeco Life Insurance Co.*, 312 Ill. App. 3d 577, 581 (2000).

¶ 27 The trial court's role in a settlement is limited; it cannot force parties to reach an agreement, but may encourage them to settle and may facilitate the settlement process. *K4 Enters*

v. Grater, Inc., 394 Ill. App. 3d 307, 323 (2009) (quoting *Gevas v. Ghosh*, 566 F.3d 717, 719 (7th Cir. 2009) (holding that a trial court's efforts encouraging parties to settle is not prohibited)). And while a trial court may "approve" a settlement, it cannot itself settle the case on behalf of the parties. *Cushing*, 2013 IL App (1st) 103197, at ¶ 355.

¶ 28 Reviewing courts also presume that the parties' attorneys have the authority to negotiate or create a settlement agreement on behalf of their clients. *Brewer v. National Railroad Passenger Corp.*, 165 Ill. 2d 100, 106 (1995). Unless it is explicitly stated otherwise, a party will be bound by her attorney's acts or omissions during a settlement conference. *In re Marriage of Marr*, 264 Ill. App. 3d 932, 935 (1994).

¶ 29 A settlement agreement created through coercion, fraud, or duress is void. *In re Gibson-Terry*, 325 Ill. App. 3d 317, 325 (2001). If a contract is void, then no party can choose to enforce the contract because it is treated as though it never existed. *In re Marriage of Newton*, 2011 IL App (1st) 090683 ¶ 39. In contrast, if a settlement agreement is unconscionable, then the agreement is merely voidable. *In re Gibson-Terry*, 325 Ill. App. 3d 317, 325 (2001). A voidable contract allows parties to either opt to perform under the contract, or declare the contract void. *Illinois State Bar Association Mutual Insurance Co. v. Coregis Insurance Co.*, 355 Ill. App. 3d 156, 164-65 (2004).

¶ 30 Illinois recognizes two forms of unconscionability: procedural and substantive. *Bishop*, 316 Ill. App. 3d at 1196. Sherry argues the parties' handwritten agreement following the settlement conference was both. We address her claims of procedural and substantive unconscionability in turn.

¶ 31 A. Procedural Unconscionability

¶ 32 In this case, Sherry's claim of procedural unconscionability is a claim of coercion by the

trial court. She argues that the trial court coerced her into settling by telling her that she was "not getting that" when she made specific settlement demands. Sherry also argues that the agreement is procedurally unconscionable because she had no meaningful choice in the settlement terms and there was no arm's length negotiation between the parties. We reject this argument.

¶ 33 To coerce a party, a trial court must threaten to or actually penalize a party for not accepting a proposed settlement agreement. *K4 Enters*, 394 Ill. App. 3d at 323 (quoting *Gevas*, 566 F.3d at 719). Although a trial court may facilitate and encourage settlement, it cannot force a settlement, either through threat of penalty or by establishing arbitrary settlement amounts. *Id.*; *Canel*, 34 Ill. 2d at 309. When, in its order of February 2, 2018, the trial court rejected Sherry's claims that the settlement was unconscionable and the result of coercion, the court noted that Sherry's counsel was present during all negotiations, clarified any ambiguous terms with opposing counsel, and reviewed the resulting agreement before allowing Sherry to sign it. The trial court said that it was not negotiating for any one party, but was simply there to facilitate the settlement conference. It evaluated both sides' positions to identify negotiable issues.

¶ 34 In our view, when the court said to Sherry, "You're not getting that," it was simply disagreeing with Sherry on the likelihood that her initial settlement offers would be favorably received by defendants. The trial court was not threatening to penalize Sherry and did not impose an arbitrary settlement amount on her. As the court noted in *Gevas*, "frank disagreement by a trial court is not coercion." *Gevas*, 566 F.3d at 719. Here, Sherry and her counsel had ample opportunities to walk away from the hours-long settlement conference if they were unsatisfied with its terms.

¶ 35 The cases Sherry relies on, in which courts were found to have improperly coerced settlements, all involved conduct far exceeding what Sherry complains of here. In *People ex rel*

Horwitz v. Canel, 34 Ill. 2d 306, 309 (1966), for example, our supreme court found that it was improper for the trial court to enter an order requiring the plaintiff to accept a specific settlement amount without any negotiations between the parties and to impose a penalty if the plaintiff continued the litigation. That is surely not what happened here. The trial court did not arbitrarily assign Sherry a settlement amount. Rather, while the court disagreed with Sherry that her suggested settlement amounts were realistic, there were substantial discussions between the trial court and both parties over the course of the negotiations. Nor did the court ever threaten to impose a penalty if Sherry did not accept the settlement.

¶ 36 In *James v. James*, 14 Ill. 2d 295, 303-307 (1958), our supreme court reversed a divorce decree because the trial court and the attorneys, including the wife's own attorney, made serious misrepresentations to the wife about the husband's assets and coerced her into accepting the divorce settlement. *James*, 14 Ill. 2d at 303-307. While Sherry did not agree with the court's assessment of the value of the real property owned by the LLC, Sherry does not suggest that there were misrepresentations made to her in this case and certainly does not suggest that her own attorney joined in with the court and opposing counsel to undermine her free will.

¶ 37 *Ott v. Little Co. of Mary Hospital*, 273 Ill. App. 3d 563 (1995), also does nothing to persuade us that this settlement was the result of improper conduct by the trial court. In *Ott*, the trial court appointed a guardian *ad litem* for the express purpose of approving a settlement that the minor's parents had rejected. *Id.* at 568. We affirmed the trial court's actions as appropriate. *Id.* at 578. Sherry relies on a statement we made in *Ott*, which was clearly *dicta*, acknowledging that the trial court's assertion that "the case was going to be settled before the guardian *ad litem* was appointed" was "premature" and could possibly "foster the impression of being excessively preemptive." *Id.* at 574. However, the trial court "clearly backed away" from that earlier

comment and proceeded to appoint a fully independent guardian *ad litem* to determine the child's best interests, who then approved the settlement. *Id.* at 574-75. If the case has any relevance here, it is only to affirm our well-established understanding that trial courts have a significant role to play in effectuating settlements.

¶ 38 And in *In re Gibson-Terry*, 325 Ill. App. 3d 317, 319, 323 (2001), this court held that the defendant, who claimed that he was coerced into a procedurally unconscionable divorce settlement agreement, was not coerced into the agreement because when he was asked about the agreement terms by the trial court, the defendant did not disagree with them. The agreement was also not procedurally unconscionable because the negotiations between the parties happened at arm's length with the aid of counsel and each party had a meaningful choice in forming the oral agreement. *Id.* at 326.

¶ 39 Like the defendant in *Gibson-Terry*, Sherry was given ample opportunities to negotiate a settlement agreement. *Id.* at 326. The trial court ensured that the parties—each accompanied by counsel—were able to negotiate at arm's length. And like the defendant in *Gibson-Terry*, Sherry never states that she disagreed with the terms of the handwritten agreement. *Id.* at 323.

¶ 40 In short, we reject Sherry's arguments that the trial court coerced her into signing the settlement agreement rendering the agreement procedurally unconscionable.

¶ 41 B. Substantive Unconscionability

¶ 42 Sherry also argues that the terms of the settlement agreement are so one-sided and unfair that they are substantively unconscionable, warranting vacatur. Substantive unconscionability arises when a contract's terms are against public policy, or are one-sided or oppressive. *In re Marriage of Callahan*, 2013 IL App (1st) 113751 ¶ 20. When an agreement is "so one-sided or oppressive, a court can determine that it is unconscionable even without taking into account the

conditions under which the agreement was made." *Id.*

¶ 43 An agreement violates public policy when it is capable of producing such harm that its enforcement would be contrary to the public interest. *Phoenix Ins. Co. v. Rosen*, 242 Ill. 2d 48, 55 (2011) (quoting *In re Estate of Feinberg*, 235 Ill. 2d 256, 265-66 (2009)). Courts assume that private individuals should have the power to contract as they see fit, and we therefore declare private contracts invalid and violative of public policy only on the rarest of instances. *Id.* A substantive unconscionability analysis requires that the contract is "so unfair that the court cannot enforce it consistent with the interests of justice." *Phoenix Ins. Co.*, 242 Ill. 2d at 60. However, not every "unfair" agreement is substantively unconscionable. *Id.* at 75-76.

¶ 44 While Sherry does not cite any authority on this point, we did find a settlement agreement to be substantively unconscionable in *Callahan* where, in a divorce proceeding, a wife received nonmodifiable maintenance covering only her living expenses—totaling only $175,000 for her entire life, while her husband retained the entire marital estate worth $1,500,000. *Callahan*, 2013 IL App (1st) 113751, ¶ 23. We stated that an agreement of this sort did not merely favor one party over the other, but was on its face so overly one-sided and oppressive as to be unenforceable. *Id.* This case is nothing like that.

¶ 45 Sherry argues on appeal that, as a result of numerous factual misunderstandings on the part of the trial court, the settlement agreement is substantively unconscionable, deprives her of any bargained-for benefits, and only allots her minimal damages. Sherry argues that the court erred in concluding that the settlement allowed her to retain the "family" towing business, because Dennis and Danny had not worked for the business for 11 years. Sherry claims that the trial court assumed that Dennis and Danny could succeed on their counterclaims against her to gain some part of that business but that those claims were wholly without merit. Sherry argues

that she was not given anything of value when she was awarded Dennis's and Danny's interest in the LLC because Dennis and Danny never had any ownership interest in the LLC; rather, they only had a membership in the LLC that could result in an ownership interest when Sherry died. She argues that she could have accomplished the same result by simply writing Dennis and Danny out of her will. And Sherry argues that any benefit to her as a result of this term was offset by her obligation to indemnify Dennis and Danny for tax consequences they incurred before returning their LLC memberships. She argues that the third-amended complaint details the millions in damages that she is legitimately owed, and that the $30,000 from the settlement agreement is not nearly enough to compensate her. Sherry also argues that the trial court mistakenly believed that she had received a trailer under the settlement when all she actually received was the ability to inspect a trailer and take it if she chose to.

¶ 46 The trial court responded specifically in its order to some of these concerns. It characterized Sherry's tax argument as a "red herring" because Sherry knew that for the past two years the LLC was operating at a loss, and Sherry had taken those losses; there was therefore no reason to expect any tax liability for 2017. The trial court also noted that the $5 million in damages and valuation that Sherry included in her third-amended complaint was not corroborated by any evidence or documentation. It noted that Sherry was given exactly what she requested in reference to the trailer. Importantly, even if the trial court viewed the agreement as a whole as being more valuable to Sherry than it actually was, this does not render the agreement so one-sided or oppressive as to be unconscionable.

¶ 47 Sherry clearly stands to gain benefits from the parties' agreement. All interest in the real estate LLC was transferred to Sherry, the entirety of the family towing business and property was to remain in her control, an interest in an airport association was transferred to her, and she was

awarded $30,000 in damages. Even if that could be construed as a better agreement for Dennis and Danny than it was for Sherry and even if the trial court believed that Sherry got more than she actually did under the agreement, the agreement was not so overly one-sided as to violate public policy and require vacatur. In short, the settlement agreement was not substantively unconscionable.

¶ 48 IV. CONCLUSION

¶ 49 For these reasons, we affirm the trial court's dismissal of this case and find that the settlement agreement reached by the parties was neither procedurally nor substantively unconscionable.

¶ 50 Affirmed.