

IN THE SUPREME COURT OF THE STATE OF NEVADA

GAY J. MEYERS,
Appellant,

vs.

J. KIM MEYERS,
Respondent.

J. KIM MEYERS,
Appellant,

vs.

GAY J. MEYERS,
Respondent.

No. 50158

FILED

APR 29 2010

No. 50158

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *S. Young*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

These are consolidated appeals from post-divorce decree district court orders resolving the valuation and distribution of community assets and denying attorney fees. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

Appellant in Docket No. 50158, Gay J. Meyers, was married to her husband, respondent in Docket No. 50158, J. Kim Meyers, for 23 years. Kim filed for divorce from Gay in 2002. After a year and a half of litigation in the divorce proceeding, Gay and Kim entered into a marital settlement agreement (MSA). After disputes arose regarding the validity of the MSA, the district court entered an order memorializing the MSA and adopting certain stipulations to that order along with entering a decree of divorce. More disputes developed over the district court's order

and (4) selecting the date of distribution for all issues involved in the divorce. sy

pertaining to Kim's payments to Gay and his good-faith efforts to participate in the discovery process.¹

On appeal, Gay argues that the district court abused its discretion in failing to enforce the MSA in regard to the amount of community assets awarded to her. Gay takes issue with the district court's division of: (1) the proceeds of Great Basin Surgical Center (GBSC) stock, (2) distributions paid to Kim from GBSC, (3) Kim's 2003 tax refund, (4) rent from the office building owned by Gay and Kim, and (5) a retainer refund given to Kim from one of his attorneys.² Based on the following, we reverse the order of the district court in Docket No. 50158 and we remand to the district court for proceedings consistent with this order.

¹The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

²Gay argues that the district court abused its discretion in: (1) valuing the fair rental value for office space leased by Alpine Sports Medicine, (2) failing to award her rents paid by Alpine Sports Medicine in an amount reflecting the fair rental value, and (3) failing to award her money based on certain unaccounted for cash withdrawals by Kim. We conclude that these arguments are without merit and require no further discussion. Therefore, we affirm the district court on these issues. Gay also argues that the district court abused its discretion in failing to sanction Kim for his actions in accordance with the marital settlement agreement and not awarding her attorney fees and costs. Our disposition in this matter renders this issue moot and, as such, we do not address it further here. In his appeal in Docket No. 50171, Kim argues that the district court abused its discretion in failing to award him attorney fees and costs. Our disposition in this matter renders Kim's appeal in Docket No. 50171 moot and, as such, we do not address it further here.

Standard of review

We will generally uphold a district court's ruling in a divorce proceeding if that ruling is supported by substantial evidence and is otherwise free from a plainly appearing abuse of discretion. Williams v. Waldman, 108 Nev. 466, 471, 836 P.2d 614, 617 (1992). "Where a trial court, sitting without a jury, has made a determination upon the basis of conflicting evidence, that determination should not be disturbed on appeal if it is supported by substantial evidence." Id. (quoting Lubbe v. Barba, 91 Nev. 596, 600, 540 P.2d 115, 118 (1975)).

Contract interpretation

Gay argues that the district court abused its discretion in its rulings on certain assets because the district court did not properly apply the terms of the MSA and the stipulations to the MSA. We agree. As such, the issues presented by Gay in this appeal are properly issues of contract interpretation.

"Generally, when a contract is clear on its face, it 'will be construed from the written language and enforced as written.'" Canfora v. Coast Hotels & Casinos, Inc., 121 Nev. 771, 776, 121 P.3d 599, 603 (2005) (quoting Ellison v. C.S.A.A., 106 Nev. 601, 603, 797 P.2d 975, 977 (1990)). As such, "[t]he court has no authority to alter the terms of an unambiguous contract." Id.; see also Kaldi v. Farmers Ins. Exch., 117 Nev. 273, 281, 21 P.3d 16, 21 (2001).

We will now review the various asset awards by the district court.

Proceeds of the GBSC stock

In August 2003, Kim sold the stock owned by him and Gay in GBSC. Kim moved the proceeds of this sale to a bank account in Utah.

During their MSA negotiations, Kim disclosed to Gay that he had sold the GBSC stock and placed the proceeds, \$204,000, in the Utah bank account.

The MSA states that Gay should receive 75 percent of the assets in the Utah bank account that were the result of the GBSC stock sale. However, during the course of this litigation, Kim repeatedly failed to provide Gay or the court with documentation on the balance of the Utah bank account or the sale price of the GBSC stock. Without being provided with documentation, the district court accepted Kim's proffered amount of \$104,000 in awarding Gay her portion of sale proceeds from the Utah bank account.

We conclude that the district court abused its discretion in its award to Gay from the GBSC stock sale. Without proper documentation of the proceeds received by Kim from that sale, the district court could not properly effectuate the MSA. The award to Gay of the proceeds of the GBSC stock sale without knowing the true amount of the proceeds from that sale is a plainly apparent abuse of discretion by the district court. As such, we remand to the district court to make a determination of the proper amount of the proceeds to be awarded Gay from the GBSC stock sale after Kim provides the district court and Gay with the full and proper documentation of this sale.

Distributions from the GBSC stock

Gay and Kim had historically received cash dividend distributions from their GBSC stock. Gay repeatedly requested documentation of the dividends paid to Kim in 2003, but these documents were never disclosed to her by Kim. However, there was reference made to these distributions on a 2003 Schedule K1 and an email from GBSC that Kim had received cash distributions of \$92,820. The district court made no distribution of this cash distribution to Gay.

We conclude that the district court abused its discretion in failing to award Gay a portion of the cash dividend distribution allegedly received by Kim from GBSC as reflected in the 2003 Schedule K1. Although the district court requested documentation of these distributions, Kim never provided them. The district court accepted as true Kim's argument that he may never have received this cash distribution. However, without proper documentation it was plainly an apparent abuse of discretion for the district court to blindly accept Kim's unsupported argument, as this conclusion cannot be supported by substantial evidence, especially when there was evidence of a possible cash distribution received by Kim in the 2003 Schedule K1. As such, we remand to the district court to make a division of the cash dividend distribution received by Kim as reflected in the 2003 Schedule K1 after Kim provides the district court with the full and proper documentation of this transaction. We further instruct the district court to make this award to Gay in accordance with the MSA in the form of a 75 percent award to Gay of the amount of the cash dividend distribution received by Kim.

Kim's 2003 tax return

Kim received a tax refund of \$42,740 in 2004. Kim did not disclose this to Gay before, during, or after, the preparing and signing of the MSA. Gay only learned about the tax refund when she received a copy of it in 2007, almost two years after the parties entered into the MSA. The district court awarded Gay a one-half interest in the tax refund and ordered Kim to pay Gay interest of 4.13 percent on the asset.

We conclude that the district court abused its discretion in awarding Gay a one-half interest in the tax refund. We will defer to the district court's judgment that Kim did not conceal this asset. However, the district court did not apply the MSA to this cash asset as it would have

been deposited in a bank account subject to the MSA. As such, we remand to the district court to make an award to Gay of 75 percent of the tax refund received by Kim in 2004.

Rents from the office building owned by Gay and Kim

Gay argues that the district court abused its discretion in its awarding to her of rents collected by Kim from Jessica Guyer a tenant of the office building owned by the parties. There was evidence presented to the district court, including Guyer's own statements, that she had been paying \$2000 per month in rent since January 2003. However, the district court made no distribution of the rent paid by Guyer in 2003 and found that Guyer must have been mistaken about the year she began paying rent to Kim for renting space in the office building.

We conclude that the district court abused its discretion in failing to award Gay a portion of the rent paid by Guyer in 2003. The district court's finding that Guyer must have been mistaken as to the year she began paying rent is not supported by substantial evidence and, in fact, the evidence presented to the district court, including Guyer's own statement, was that she began paying rent in January of 2003. As such, we remand to the district court to make an award to Gay of 75 percent of the rental payments made by Guyer to Kim in 2003.

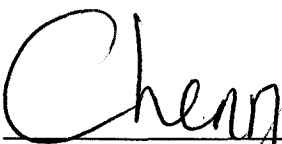
Retainer refund paid to Kim

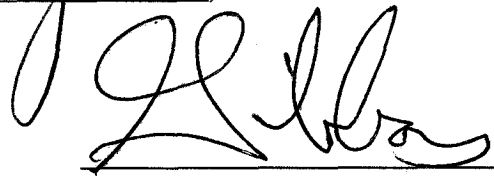
The district court authorized each party to withdraw \$25,000 from a joint bank account to pay attorney fees. Kim was briefly represented by one attorney with whom a retainer was paid of \$25,000. Kim and his attorney broke off their relationship and the portion of the retainer paid by Kim was refunded. The district court found that Kim did not have to account for the refunded retainer because it would violate attorney-client privilege.


NRS 49.095(3) states that a client has the right to have his communications with his attorney privileged if those communications are “[m]ade for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest.”

We conclude that the district court abused its discretion in finding that the retainer refund was a privileged communication between Kim and his attorney and, thus, did not require Kim to account for the retainer refund. The refunding of a retainer after the breakdown of an attorney-client relationship cannot be said to be a privileged communication in furtherance of rendition of legal services. Gay did not request the district court to inquire into the reasons for Kim’s termination of his relationship with his attorney, but only to have Kim account for where he put that money after it was refunded by the attorney. As such, we remand to the district court to make a determination as to where the retainer refund received by Kim went after being refunded, and then to make a determination if that money should be divided according to the MSA and a portion awarded to Gay. In light of the foregoing discussion, we

ORDER the judgment of the district court in Docket No. 50158 AFFIRMED IN PART REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Saitta

cc: Hon. Andrew J. Puccinelli, District Judge
Carolyn Worrell, Settlement Judge
Lemons Grundy & Eisenberg
Nancy L. Porter
Elko County Clerk