

**IN THE CHANCERY COURT FOR THE 21ST JUDICIAL DISTRICT
AT WILLIAMSON COUNTY, TENNESSEE**

DEBORAH JEAN WALKER,

Plaintiff/Wife,

V.

BARRY LYLE WALKER,

Defendant/Husband.

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Case No. 34056

FILED 4-27-18
ENTERED 4-27-18
BOOK _____ PAGE _____
ELAINE B. BEELER, Clerk & Master

MEMORANDUM AND ORDER

This case came before the Court on April 23 and 24, 2018, for trial on the issue of enforceability of the parties' pre-nuptial agreement, which issue had previously been severed from the other issues in this contested divorce proceeding. Having carefully considered the evidence presented at the hearing, and the applicable legal standard, the Court decides the issue as set out in this Memorandum and Order.

PROCEDURAL HISTORY

The Parties have been in divorce litigation, off and on, since 2001 when Wife originally filed for divorce. The Parties reconciled and Wife's divorce action was dismissed by an Agreed Order entered in 2005. On October 19, 2017, Wife filed the present action asserting alternative grounds of irreconcilable differences and Husband's inappropriate marital conduct. On December 14, 2007, Wife filed her Amended Complaint for Divorce. On May 21, 2008, Husband asserted a counterclaim against Wife averring she was guilty of inappropriate marital conduct. Husband also sought enforcement of the parties' pre-marital agreement entered into on August 26, 1996.

On June 11, 2015, Husband moved for summary judgment enforcing the pre-marital agreement. On March 11, 2016, Husband filed the Amended Motion for Partial Summary

Judgment. By a Memorandum and Order entered March 7, 2017, this Court, J. Michael W. Binkley, denied Husband's motion. Judge Binkley determined that disputed issues of material fact existed with respect to whether Husband acted in good faith when he failed to disclose his undivided one-half interest in a condominium he owned as a tenant-in-common with Melva Joyner, a woman with whom he had a years-long relationship, prior to the marriage with Wife.

On August 3, 2017, the Court entered an order severing the issue of the pre-nuptial agreement's validity for trial apart from the other issues in the case. That trial was held April 23 and 24, 2018.

DISCUSSION

The Parties executed the pre-nuptial agreement (the "PNA") on August 26, 1996. Wife's attorney, Francine Kavin, acted as scrivener in preparing the PNA initial draft. Prior to executing the PNA, each Party prepared and delivered to Ms. Kavin an exhibit listing their assets. Wife's list was annexed to the PNA as "Exhibit A". Husband's list was annexed as "Exhibit B". Regarding these written disclosures, the PNA states:

[Wife] and [Husband] each represent to the other that (i) she or he, respectively, has disclosed to the other the nature and extend (sic) of her or his Separate Property and (ii) Exhibit "A" and Exhibit "B" *fully and fairly reflect the nature and extent of the said Separate Property of each of them, all to the best of her or his knowledge, respectively.*

PNA, p. 6, ¶ 5 (emphasis added).

On June 18, 1996, Husband and Melva L. Joyner executed, as "Grantees", a warranty deed with Freeman Webb Developers, Inc. as "grantor" taking joint title to a condominium located at 6680 Charlotte Pike, Nashville, Tennessee. Husband and Ms. Joyner also executed, as "Borrowers", a promissory note payable to Freeman Webb Mortgage Corporation, as well as a deed of trust, with Mimi S. Hurd as Trustee, securing the promissory note. The warranty deed,

promissory note, and deed of trust, were prepared by Mimi S. Hurd, a lawyer licensed to practice in Tennessee, who at the time was legal counsel to Freeman Webb Developers, Inc. and its affiliates. In order to prepare the warranty deed, promissory note, and deed of trust Ms. Hurd relied on information and documents in the files of Freeman Webb Mortgage Corporation including a purchase and sale agreement between the buyers and Freeman Webb Developers, Inc., and a mortgage application completed by the Borrowers.¹

In the closing of residential mortgage transactions in 1996, it was customary for mortgage lenders to have borrowers affirm, in writing, the accuracy of all information provided by the borrowers in their mortgage application.² Moreover, if the mortgage was to be one that “conformed” to the requirements of FHA, the borrower was required to affirm that he or she intended to use the property being purchased with the loan as the person’s residence.³

Husband does not dispute that when he submitted his list of assets to Ms. Kavin and executed the PNA, he in fact owned an undivided one-half interest in the Charlotte Avenue condominium with Ms. Joyner. Husband also admits the fact of his ownership was not disclosed in Exhibit B to the PNA, nor otherwise, to Wife prior to executing the PNA. Husband admits Wife learned of his ownership in Ms. Joyner’s residence from a listing of Husband’s taxable real estate holdings provided to Wife by the office of the Davidson County Tax Assessor. Husband also admits Wife first learned about his ownership in the condominium after the Parties were married. Husband claims that his failure to disclose the existence of his joint tenancy in Ms. Joyner’s condominium was nevertheless a good faith omission because at the time he submitted Exhibit B to Ms. Kavin, through and until Wife discovered the tenancy-in-common, Husband

¹ The Court credits the testimony of Ms. Hurd who testified in person at the trial. Ms. Hurd’s testimony was not impeached in any way. She withstood a careful cross-examination. The Court finds Ms. Hurd to have testified truthfully in every respect.

² Testimony of Michael Tubbs.

³ *Id.*

believed he had merely provided Ms. Joyner a guaranty to enhance her credit-worthiness and enable her to borrow the money necessary to purchase the condominium for herself. Husband claims he was surprised to learn that instead of executing a guaranty at the closing on June 18, 1996, he had instead executed a warranty deed and deed of trust.

Wife argues, in part, that Husband, a sophisticated and successful real estate investor, should be held to the state of knowledge manifested by the written instruments he executed at the June 18, 1996 closing. Wife cites *Burton v. Hardwood Pallets, Inc.* for the proposition that persons are “charged with knowledge of the content of the documents they signed.” No. E2003-01439-COA-R3-CV. 2004 WL 572350 (Tenn. Ct. App. Mar. 22, 2004). Applying what the *Burton* court characterizes as a “familiar rule” would end this inquiry in Wife’s favor resulting in the PNA being declared void.

Husband argues the Court must determine from the proof Husband’s subjective state of mind at the time he submitted Exhibit B as a disclosure of his assets. Husband also argues, apparently in the alternative, that if the Court finds Husband’s asset disclosure to have been knowing incomplete, it should nevertheless be excused because the value of the asset—an undivided one-half interest in Ms. Joyner’s condominium—was not material in light of all of Husband’s separate assets.

The parties agree Husband has the burden to prove by a preponderance of the evidence that his admittedly incomplete asset disclosure was made in good faith. Husband asserts that when he did not list the Joyner condominium as one of his assets in the PNA, he honestly believed he had merely provided Ms. Joyner with a guaranty. It is therefore Husband’s burden to prove the truth of his professed misunderstanding of what the unambiguous documents

conclusively demonstrate he actually did instead. From the complete proof, the Court finds Husband has fallen far short of his burden of proof.

Husband's professed ignorance of the true nature of his actions in respect of the Joyner condominium purchase is not worthy of belief. This is so for several reasons:

- Husband's testimony was thoroughly impeached on cross-examination by evidence of prior inconsistent statements Husband made during depositions. Husband compounded this impeachment by attempting, in court, to read into his deposition testimony words not reflected in the transcript.
- Husband's claim of mistake is utterly implausible. Ms. Hurd, a disinterested witness, and Mr. Tubbs, a witness called by Husband in rebuttal, testified without impeachment or challenge regarding the procedures routinely employed by mortgage lenders such as Freeman Webb Mortgage Corporation. It is inconceivable that any person of general competence could have honestly thought that by signing the documents executed by Husband at the June 18, 1996, closing they were merely providing a guaranty rather than participating as a co-borrower in the purchase of the condominium. The incredulity of Husband's claim of mistaken belief is even more palpable given Husband's occupation as a successful real estate entrepreneur.
- Husband's testimony offered in rebuttal to Ms. Hurd's testimony regarding her habit and routine practices in closing real estate transactions is, likewise, inherently unworthy of belief. Husband attempted to discredit Ms. Hurd by testifying that he recalled the June 18, 1996, closing with sufficient clarity to know that Ms. Hurd was not even present when he signed the warranty deed and deed of trust. Instead, Husband testified that he dealt with a man; and not just any man, but a man who knew and was acquainted with

Husband. A man who greeted Husband by name, and asked an “ice breaker” question about how things were going with Husband’s business at Marathon Village. Yet when asked by the Court for the man’s name, Husband was unable to provide it, and offered instead that perhaps he was thinking of some other closing transaction.

- Husband’s friend of more than thirty years, Ricky Stegelman, testified that Husband made no secret of the fact he and Melva Joyner had purchased a condominium together. According to Mr. Stegelman, Husband and Wife (who were not yet married) had broken off their relationship, and Husband said he intended to live with Ms. Joyner in the condominium. After Husband and Wife married, Husband told Mr. Stegelman that he had obtained a pre-nuptial agreement that was so favorable to Husband that “he could do anything he wanted to do” in the marriage so long as Wife never found out about the fact he and Ms. Joyner owned a condominium together. Mr. Stegelman was not impeached on cross examination, and the only challenge to his testimony in rebuttal was Husband’s opinion that Mr. Stegelman is a liar.⁴
- Wife contradicted Husband’s testimony in certain key details, including specifically the circumstances surrounding how Wife learned she had been deceived about Husband’s ownership interest in the Joyner condominium. Wife’s testimony survived cross-examination. Husband’s efforts to impeach her with evidence of prior inconsistent statements were largely minor quibbles over inconsequential points. The starkest contradiction between the Parties is their respective accounts of how Wife learned that Husband owned the condominium with Ms. Joyner. Husband testified he had dispatched Wife to the tax assessor’s office to compile a comprehensive list of properties he owned

⁴ Given the serial untruths offered by Husband in the trial of this case, his opinion on the character of other witnesses is of scant probative value.

that were subject to property tax. When Wife confronted him with what she had been provided, Husband was surprised and told her this had to be a mistake. Husband told Wife he had only provided a guaranty to Ms. Joyner, and he told her the tax assessor had made an error. Husband's point is that if he had guilty knowledge of having concealed the existence of the condo from Wife, he would not then send Wife on this errand. Wife testified Husband did not send her to the assessor's office. Instead, he had tasked her with making sure all of the tax assessment notifications received in his office were in line to be paid. Wife then, on her own initiative, telephoned the tax assessor office and asked for a comprehensive listing of Husband's properties, to confirm that Husband had indeed received all of the tax notices to which he was entitled. She discovered the condominium on the list the tax assessor sent her and when she confronted Husband with her discovery he immediately admitted the deception and begged to be forgiven.

If the Court were to ignore all other evidence and attempt to resolve this discrepancy only between the testimony of each of the Parties, Wife's version would be more credible. This is so because of what Husband did—or more precisely what he failed to do—immediately following Wife's discovery. Husband offered no evidence of any action he took immediately after learning of what he claims to have been a horrible mistake to rectify the situation. Instead, he continued to hold his co-tenancy interest for eight more years until Ms. Joyner ultimately sold the condominium.⁵

- Although she testified that she merely asked Husband to provide her a guaranty so that she could obtain a mortgage, Melva Joyner's testimony provided scant support for Husband's claim. Ms. Joyner⁶ claimed to have no memory of the June 18, 1996 closing,

⁵ Tr. Ex. 9.

⁶ She has since married and is now known as Melva J. Burns.

and appeared to dispute the genuineness of her signature on the warranty deed. She also denied having spoken to Husband or his attorneys prior to testifying in this case.⁷

- The processes and procedures associated with selling a condominium, especially one that is purchased with the proceeds of a loan, are too detailed and subject to regulatory scrutiny, that the Court simply cannot credit Husband's version of events.

Having found that Husband's failure to disclose his ownership interest in the Joyner condominium was not made in good faith, the Court must now determine whether this omission was material, thereby rendering the PNA void and unenforceable. Husband argues the materiality requirement applies to all general aspects of formation of prenuptial agreements and that materiality is essentially an economic question. In this instance, Husband's undivided one-half interest in the condominium amounts at most to 1.5% of the value of Husband's separate property. Wife argues in the alternative that materiality applies only to the knowledge component⁸, and has no applicability to the issue of good faith which is a function of the fiduciary nature of the relationship between engaged persons. In the alternative, Wife argues that materiality is not merely an economic question, but instead is determined from the nature of the particular asset at issue.

The Court concludes materiality depends upon the nature of the asset. In this case, the asset not disclosed is an ownership in the residence of a woman with whom Husband shared a years-long relationship prior to meeting Wife. The Parties, and several of their respective fact witnesses, testified that the presence of Ms. Joyner in Husband's business and social life was a source of stress for Wife. Husband and Wife's dating relationship was disrupted more than once

⁷ The court would have expected Husband's counsel to have interviewed Ms. Joyner if for no other reason than to learn what her testimony would be.

⁸ There are three components to the valid creation of a prenuptial agreement. Such agreements must be entered into "freely, knowingly, and in good faith." Tenn. Code Ann. § 36-3-501.

by the malign interference of Ms. Joyner. Indeed, their engagement was nearly called off due to some action involving Ms. Joyner in the days immediately prior to the wedding. Husband admitted on both direct and cross-examination that he believed Wife would have wanted to know about him owning a tenancy in common with Ms. Joyner and should have been told about it. In argument Husband's counsel referred to this admission as an indication of Husband's candor with the court.

There is no question that failing to disclose his ownership in the Joyner condominium was a material omission. Husband, however, argues that Wife should be held to her undertakings in the PNA expressing satisfaction with Husband's disclosures, and waiving any further disclosure by Husband beyond what is set out in Exhibit B.

Tennessee adheres to the customary rule that the first party to commit an uncured material breach of contract cannot thereafter seek to enforce the contract against the non-breaching party. *See e.g. Madden Phillips Const. Inc. v. GGAT Development Corp.*, 315 S.W.3d 800 (Tenn. Ct. App. 2009). In this case, Husband committed an uncured material breach by failing to make a good faith disclosure of all his assets. Therefore, he may not hold Wife to the covenants she made with respect to admitting satisfaction with Husband's disclosure. Indeed, the parties mutually represented that their disclosures were "all to the best of her or his knowledge, respectively." Husband breached this representation by concealing the fact he owned a tenancy in common with Ms. Joyner in her residence.

CONCLUSION

For the foregoing reasons, the Court finds Husband's disclosure of assets was not made in good faith. Consequently, the prenuptial agreement was not validly formed and is therefore unenforceable by Husband.

Having determined the issue in Phase I of the trial of this case, the Court on its own motion orders the Parties to advise the Court in writing filed and served, not later than fourteen days after entry of this Memorandum and Order, why the Court should not declare the parties divorced pursuant to Tenn. Code Annot. Sec 36-4-129.

All other matters are reserved.

IT IS SO ORDERD THIS 27 DAY OF APRIL, 2018.


JOSEPH A. WOODRUFF, Chancellor

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Order as entered by the Court has been forwarded postage prepaid, and/or emailed, and/or faxed, to:

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This the 27 day of April, 20168.


CLERK & Master