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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000203-MR

JAMES GARY BALE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE REED RHORER, JUDGE
ACTION NO. 99-CI-00392

SHARON ALICIA BALE

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: SCHRODER, TAYLOR AND VANMETER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a post-decree order interpreting a provision in the parties' settlement agreement which required appellant to keep appellee on his country club membership as a "significant other". The court ruled that because that provision was impossible to perform upon the remarriage of appellant, appellant was required to purchase a separate country club membership for appellee. We believe the

court properly interpreted the agreement and that the equitable remedy was likewise proper. Hence, we affirm.

Appellant, James Bale, and appellee, Sharon Bale were divorced in 2000 by a decree of dissolution which incorporated a settlement agreement the parties entered into on July 20, 2000. The settlement agreement contained the following provision:

FRANKFORT COUNTRY CLUB. The membership shall remain in the name of Husband. He shall be responsible for all monthly dues and assessments. He agrees to name Wife (Sharon Bale) as "significant other". Wife agrees to pay the expenses of her use. The children's expenses shall be divided equally.

The agreement contained no other provision relative to the country club membership. The agreement did, however, contain a provision stating that there could be no modification of the agreement except as agreed to in writing by both parties and that the agreement constituted the entire understanding between the parties.

James remarried in 2003. Consequently, according to the bylaws of the Franklin Country Club, Sharon could no longer retain her "significant other" status under James' membership. Thereafter, James claimed that he no longer had an obligation under the agreement to pay for Sharon's country club membership. On September 16, 2003, Sharon filed a motion to compel James to comply with the country club provision of the agreement and for

attorney fees and costs incurred in bringing the motion. In the motion, Sharon maintained that if the country club bylaws prohibit James from carrying her as a "significant other" under the membership, the court should make her whole by requiring James to purchase a separate membership for her.

In response to Sharon's motion, James filed a copy of the country club's bylaws and an affidavit from the country club general manager in which it was established that "significant other" status terminates when the member holding the membership marries, and the new spouse of the holding member acquires the membership rights formerly held by the "significant other". James argued that "significant other" is a term of art defined by the country club's bylaws of which Sharon was necessarily cognizant in entering into the agreement. Hence, he claimed he fully complied with the agreement by carrying Sharon on his membership as a "significant other" when he was unmarried, and that he was fully discharged from this duty when he remarried pursuant to the definition of "significant other" in the bylaws of the country club.

The court held a hearing on the motion on October 28, 2003. The court subsequently entered its order adjudging that the country club provision of the parties' agreement had become impossible to perform because of the remarriage of James and the operation of the bylaws of the country club. And since James'

remarriage was a voluntary act, the court ruled that James could not avoid enforcement of the contract provision. Accordingly, the court ordered that equity required James to purchase an individual membership for Sharon and pay all the monthly dues, fees and assessments associated with the membership. This appeal by James followed.

Under KRS 403.180(5), terms of a separation agreement incorporated into a decree are enforceable as contract terms. Interpretation of a contract is a matter of law to be decided by the court, and thus the standard of review of such a decision would be *de novo*. Cinelli v. Ward, 997 S.W.2d 474 (Ky.App. 1998). Both parties herein claim that the country club provision in the agreement is not ambiguous. Both parties agree that James had an obligation to pay for Sharon's country club membership as a "significant other". The parties are in disagreement over the effect James' remarriage had on this obligation.

James maintains that the term "significant other" is a term of art clearly derived from the bylaws of the Franklin Country Club. As such, he contends that his contractual duty to provide a membership for his "significant other" was discharged when the "significant other" status was terminated pursuant to those same bylaws.

In looking at the express wording of the country club provision in the agreement, we agree with the trial court that the promise to provide Sharon with a "significant other" country club membership was an unconditional and continuing obligation. There was nothing in the agreement stating that the obligation to provide the membership was contingent upon James remaining unmarried. Nor was there any language assigning a fixed term to the obligation.

We reject James' claim that the use of the term "significant other", which is a term of art that must be gleaned from the country club's bylaws, essentially made the obligation conditional per the language and operation of those bylaws. First, there was nothing in the parties' agreement incorporating by reference those bylaws into the agreement. See Bartelt Aviation v. Dry Lake Coal Co., 682 S.W.2d 796, 797 (Ky.App. 1985). In fact, there is no mention of the Franklin Country Club bylaws anywhere in the agreement.

Secondly, even if the term "significant other" is to be defined in the agreement according to the bylaws of the country club since there is no plain meaning of the term, see Cook United, Inc. v. Waits, 512 S.W.2d 493 (Ky. 1974), it does not follow that other language in the bylaws relating to that term would automatically be incorporated into the parties' agreement. Packer v. TDI Systems, Inc., 959 F. Supp. 192

(S.D.N.Y. 1997). The fact that a "significant other" is defined in the parties' agreement as a guest of an unmarried member of the club pursuant to the country club bylaws does not mean that when the member gets married and the "significant other" status is extinguished under further provision of the bylaws, that James' obligation under the parties' agreement would likewise be extinguished. The "inability to control the actions of a third person, whose co-operation is needed for the performance of an undertaking, is ordinarily not to be regarded as an impossibility avoiding the obligation." Raisor v. Jackson, 311 Ky. 803, 225 S.W.2d 657, 659 (1949). Just because the bylaws of the country club do not allow Sharon to continue being a "significant other" on James' membership does not excuse James from his obligation to provide Sharon a membership.

Also, regardless of whether "significant other" is a term of art to be defined from the bylaws of the country club, we agree with the trial court that James' voluntary act of getting married could not discharge his obligation under the agreement. "[I]t has long been held that a party to a contract cannot take advantage of his own act or omission to escape liability." Cowden Mfg. Co., Inc. v. Systems Equipment Lessors, Inc., 608 S.W.2d 58, 61 (Ky.App. 1980). It was James' voluntary act of getting remarried that triggered the provision in the bylaws (disallowing continuation of "significant other" status

upon marriage of the member) making the agreement impossible to perform as written.

James additionally claims that absent a clear waiver of his right to remarry as specifically provided for in KRS 403.010, the trial court's enforcement of the agreement was against public policy. We disagree. There is nothing in the parties' agreement or enforcement thereof prohibiting James from exercising his right to remarry. Nor is he being penalized for remarrying. He is merely being required to fulfill the unconditional promise he made in a contract he entered into prior to his remarriage to pay for his ex-wife's country club membership.

James next argues that the trial court erred in reforming the parties' agreement to require him to pay for a separate country club membership for Sharon. James and the trial court characterized the court's remedy as a reformation of the contract. In our view, however, the court did not reform the contract and change the basic obligations of either party. Rather, it merely ordered specific performance of James' promise to provide Sharon a country club membership. Whether the equitable remedy of specific performance is warranted in a case is within the discretion of the trial court. Byers v. Fuller, 58 F.Supp. 570 (E.D.Ky. 1945).

An order of specific performance . . . will be drawn as best to effectuate the purposes for which the contract was made and on such terms as justice requires. It need not be absolute in form and the performance that it requires need not be identical with that due under the contract.

RESTATEMENT (SECOND) OF CONTRACTS § 358(1) (1981).

Although the remedy fashioned by the court was not identical to the performance agreed to under the agreement, in that it ordered James to purchase a separate membership for Sharon instead of carrying her on his membership, such was necessary given the impossibility of performance brought about by his remarriage. As to James' contention that if he was in breach of contract, the court should have awarded monetary damages, we cannot say that the court abused its discretion in ordering specific performance given the potential inadequacy of said award because of the unique nature of the benefit. See London Bucket Co. v. Stewart, 314 Ky. 832, 237 S.W.2d 509 (1951). Specific performance may be awarded "upon a consideration of all the facts and circumstances of the case, with the view of subserving the ends of justice." Calhoun v. Everman, 242 S.W.2d 100, 103 (Ky. 1951). We believe that under the facts of this case, the court's award of specific performance was just and equitable, as it was the only way to make Sharon whole.

For the reasons stated above, the order of the
Franklin Circuit Court is affirmed.

TAYLOR, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

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