UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0947

September Term, 2015

BRIAN BROWN

v.

SARAH BROWN

Meredith,
Woodward,
Friedman,

JJ.

Opinion by Woodward, J.

Filed: June 23, 2016

Brian Brown, appellant, and Sarah Brown, appellee, executed a separation agreement on July 3, 2014, after almost seven years of marriage. In the agreement, the parties agreed to waive their respective claims for alimony, and stated that such waiver would not be subject to court modification.

Nevertheless, on September 4, 2014, Sarah filed a Complaint for Absolute Divorce in the Circuit Court for Garrett County and requested that the court (1) set aside the separation agreement on the grounds of inducement, fraud, duress, misrepresentation, unconscionability, or coercion, and (2) award her alimony. The court found that the agreement was valid, but that Brian "c[ould]n't enforce the waiver," because he materially breached the agreement by failing to make loan payments on Sarah's car. The court awarded Sarah $550 per month in alimony for a term of three years.

On appeal to this Court, Brian raises two issues for our review, which we have rephrased as questions:[1]

[1] Brian's issues, as presented in his brief, are as follows:

1. Whether the lower court erred in awarding alimony after the court found that there had been no undue influence in in [sic] entering the Separation Agreement, and that the waiver of alimony was enforceable, regardless of a finding of material breach.

2. If alimony was not deemed waived, did the lower court abuse its discretion in its application of the factors in determining a fair and equitable award, if any, of alimony.

1. Did the trial court err in ruling that, because Brian materially breached the separation agreement, the alimony waiver provision in the agreement was unenforceable?

2. If alimony was not waived, did the trial court abuse its discretion in its award of alimony?

For reasons set forth herein, we answer the first question in the affirmative and thus need not reach the second question. Accordingly, we reverse the judgment of the circuit court and remand the case to that court.

BACKGROUND

On September 15, 2007, Brian and Sarah were married in Garrett County, Maryland. On February 5, 2009, the parties had one child. On May 13, 2014, the parties separated.

On July 3, 2014, the parties executed a Voluntary Separation and Property Settlement Agreement ("the separation agreement"). The relevant part of the parties' separation agreement provides the following:

> 9. **Alimony and Spousal Support**. It is the parties' mutual desire that hereafter they shall each maintain and support himself or herself separately and independently of the other. Accordingly, and in consideration of this Agreement, **Wife releases and discharges Husband, absolutely and forever, for the rest of her life from any and all claim or right to receive from Husband temporary, definite, or indefinite alimony, support, or maintenance for the past, present or future.** Husband releases and discharges Wife, absolutely and forever for the rest of his life from any and all claim or right to receive from Wife temporary, definite, or indefinite alimony, support, or maintenance for the past, present or future. Husband understands and recognizes that, by the execution of this Agreement, he cannot at any time in the future make any claim against Wife for alimony, support, or maintenance. **Wife understands and recognizes that, by the execution of this Agreement, she cannot at any time in the future make any claim against Husband for alimony,**

> **support or maintenance. The parties agree that the provisions of this paragraph with respect to alimony, spousal support, and/or maintenance are not and shall not be subject to any court modification.**

(Emphasis added).

Further, the separation agreement provided: (1) Sarah would continue to reside in the marital home; (2) both parties would make all mortgage payments on a separate rental property that they owned as joint tenants with the right of survivorship; and (3) Brian would assume all responsibility for the loan payments on Sarah's car for a period of two years, and, after that two-year period, pay $200 per month toward the car loan until the loan was paid in full.

On September 4, 2014, Sarah filed a Complaint for Absolute Divorce in the circuit court on the grounds of adultery. In the complaint, Sarah alleged:

> 11. On or about July 3, 2014, [Sarah] was induced to sign a proported [sic] Voluntary Separation and Property Settlement Agreement prepared by an attorney hired by [Brian].
>
> 12. The alleged Agreement was procured by fraud, duress and/or misrepresentation an[d] is unconscionable.
>
> 13. At the time the alleged Agreement was procured, [Sarah] and [Brian] were in a confidential relationship and [Brian] was in a dominate [sic] position over [Sarah].
>
> 14. The alleged Agreement was procured by coercion.

Sarah requested, among other relief, that the court set aside and vacate the separation agreement and award Sarah indefinite alimony, or, in the alternative, rehabilitative alimony.

On September 24, 2014, Brian filed his Answer and a Counter-Complaint for Limited Divorce and Motion to Enforce Voluntary Separation & Property Settlement Agreement. Brian denied Sarah's allegations regarding the separation agreement and alleged that

> the parties entered in to a hand-written agreement on May 31, 2014, wherein they agreed to shared custody of their minor daughter. The parties adhered to their agreement for approximately three months. As contemplated by the parties in their hand-written agreement, [Brian] hired an attorney to prepare a Voluntary Separation & Property Settlement Agreement. [Brian] submitted a draft Voluntary Separation & Property Settlement Agreement (hereinafter referred to as "proposed agreement") to his wife on three separate occasions. Sarah [ ] made requests for changes to each proposed agreement. The changes by Sarah [ ] did not affect the shared custody arrangement agreed upon by the parties. Once a final proposed agreement included all changes proposed by Sarah [ ], on or about July 3, 2014, the parties signed the Voluntary Separation & Property Settlement Agreement. Thereafter, Sarah [ ] began accusations of infidelity of [Brian] and began refusing to abide by the terms of their agreement.

(Alterations in original) (citations omitted). Brian also requested that the separation agreement "be incorporated but not merged into the Judgment of Absolute Divorce." On October 20, 2014, Sarah filed an answer to Brian's counter-complaint, in which she repeated the request for relief found in her complaint.

On January 5, 2015, the court held a hearing and granted an absolute divorce. The court reserved on the issue of alimony at the request of Sarah's attorney.

On February 4, 2015, Sarah filed a Request to Set Hearing on Alimony. The next day, Brian filed a Response & Opposition to Request to Set for Hearing on Alimony. On February 10, 2015, the court issued an order granting Sarah's request. On March 9, 2015,

Sarah filed a Notice of Intent to Present and Argue Alimony Guidelines, as well as an Alimony Submission.

On April 28, 2015, the trial court held the hearing on the alimony issue and, after receiving testimony and argument from both parties, ruled that (1) the separation agreement was not unconscionable or a product of undue influence,[2] and (2) Brian materially breached the separation agreement by failing to make the loan payments on Sarah's car and, as a result, Brian "c[ould]n't enforce the waiver" of alimony. The court thus concluded that it could award alimony. After taking evidence and hearing argument on alimony, the court issued an oral ruling awarding Sarah rehabilitative alimony in the amount of $550 per month for three years. On June 2, 2015, the court issued a Judgment of Divorce.

Brian filed his timely notice of appeal on June 30, 2015.

STANDARD OF REVIEW

In an action tried without a jury, this Court "review[s] the legal rulings of a trial court de novo." *Allen v. Allen*, 178 Md. App. 145, 148, *cert. denied*, 405 Md. 63 (2008). As to factual findings, we "give great deference to a hearing judge's first-level factual and credibility determinations." *Id.* (citations and internal quotation marks omitted).

DISCUSSION

Brian argues that the trial court erred in awarding alimony after determining that the separation agreement was valid. According to Brian, Maryland statutory law is clear that

[2] At the alimony hearing, Sarah did not pursue her claims of inducement, fraud, duress, misrepresentation, or coercion.

courts cannot modify a waiver of alimony in a separation agreement that specifically states, as this separation agreement did, that it is not subject to court modification. Brian asserts that the court erred in disregarding Sarah's agreement to waive alimony, because "[t]he statutes do not provide discretion to courts to modify alimony agreements in the event of breach." Therefore, according to Brian, the lower court erroneously found that, because Brian breached the agreement, such breach allowed the court to make an alimony award.

Sarah did not file a brief in this case.

I.

Validity of Separation Agreement

Family Law § 8-103(c) provides:

> **The court may modify any provision of a** deed, **agreement**, or settlement **with respect to alimony or spousal support** executed on or after April 13, 1976, regardless of how the provision is stated, **unless there is**:
>
> **(1) an express waiver of alimony or spousal support; or**
>
> **(2) a provision that specifically states that the provisions with respect to alimony or spousal support are not subject to any court modification.**

Md. Code (1984, 2012 Repl. Vol.), § 8-103(c) of the Family Law Article ("FL") (emphasis added).

This Court explained the law governing a married couple's separation or property settlement agreement in *Fultz v. Shaffer*:

> "Marital property" is merely a term created to describe a status of property acquired during marriage, which, however titled, may give rise to potential inequity upon dissolution of marriage. It is this inequity that is corrected by way of a monetary award. **Couples** seeking to avoid the vagaries attendant upon such an award **often enter into agreements whereby** these property issues, as well as **matters of alimony** and child support, **are resolved**. The right to make these agreements, sometimes termed property settlement agreements, is without question. Indeed, FL § 8-105 provides the court with power to enforce the provisions of a settlement agreement; **an agreement that has been incorporated, but not merged, into the final decree, may be enforced as a judgment or as an independent contract. In the latter instance, a settlement agreement is subject to general contract law.**

111 Md. App. 278, 297-98 (1996) (emphasis added) (citations omitted).

A separation agreement, like any other contract, is presumed valid and, *absent a material breach*, cannot be rescinded unless there is a finding that the agreement is unconscionable or a product of fraud, duress, or undue influence. *See Vincent v. Palmer*, 179 Md. 365, 370-72 (1941) ("However, when a contract has been entered into between competent parties, it is not within the power of either party to rescind it without an option to do so or without the consent of the other party, in the absence of fraud, duress, or undue influence . . . ."); *Maslow v. Vanguri*, 168 Md. App. 290, 316 (2006) (noting that "[s]ettlement agreements are enforceable as independent contracts," and that "public policy considerations favor the enforcement of settlement agreements").

Here, Sarah sought to have the separation agreement set aside due to inducement, fraud, duress, misrepresentation, coercion, or unconscionability, but the trial court decided that the separation agreement was a valid agreement. Sarah did not file a cross-appeal

regarding the validity of the separation agreement, and thus we shall accept the court's determination of its validity. *See* Md. Rule 8-131(a).

II.

Rescission Upon Material Breach

We stated in *Maslow* that a material breach of a contract generally allows for rescission of that contract:

> **In general, "[w]here . . . there has been a material breach of a contract by one party, the other party has a right to rescind it." However, rescission will not be granted "for casual or unimportant breaches, but only for a substantial breach tending to defeat the object of the contract." Instead, rescission is permitted when "the act failed to be performed [goes] to the root of the contract or . . . render[s] the performance of the rest of the contract a thing different in substance from that which was contracted for."** Put another way, rescission is not available as a remedy when the breach is "slight." Consequently, "substantial performance under a contract permits the recovery of damages," rather than rescission.

168 Md. App. at 323-24 (emphasis added) (alterations in original) (citations omitted).

In *Maslow*, we also explained when rescission, as opposed to an award of damages, would be the appropriate remedy by quoting from *Vincent*:

> "*Qualifying the rule that rescission requires the joint will of the parties, the general principle has been well established that* ***if there has been well established breach of a contract, and the injury caused thereby is irreparable, or if the damages that might be awarded would be impossible or difficult to determine or inadequate, the injured party may invoke the aid of equity to obtain a rescission.*** *A Court, however, will not grant a rescission for casual or unimportant breaches, but only for a substantial breach tending to defeat the object of the contract.*"

Id. at 327 (bold emphasis added) (italics in original) (citations omitted) (quoting *Vincent*, 179 Md. at 373).

The Court of Appeals explained in *Lazorcak v. Feuerstein* the options available to the non-breaching party once a material breach has occurred:

> When a contracting party is displeased with the other's performance he may follow either of two alternative courses of action, if under the facts they are open to him: (1) he can reaffirm the existence of the contract and seek specific performance when appropriate or claim damages for its breach, or (2) he can repudiate the contract altogether and request rescission. *Kemp v. Weber*, 180 Md. 362, 365-366, 24 A.2d 779 (1942); Corbin on Contracts, § 1102 (1964).

273 Md. 69, 74-75 (1974).

The Court continued:

> **Clearly a failure, to whatever degree, of a party to perform his part of a contract, though it may give rise to a suit for damages, does not in and of itself act to rescind that contract. Instead, as a general rule, the party seeking rescission must indicate to the other party at least the intent to restore the parties to the relative positions which they would have occupied if no such contract had ever been made, and this as soon as the disenchanted party learns of the facts. This offer of restoration or tender back must, at a minimum, demonstrate an unconditional willingness to return to the other party both the consideration that was given by that party and any benefits received under the contract.** This effort to resume the status quo is required as, if a party who knows the facts which would justify rescission, does any act which recognizes the continued validity of the contract or indicates that he still feels bound under it, he will be held to have waived his right to rescind. As this Court stated in *Kemp v. Weber*, *supra*:
>
> > "When a party to a contract is faced by some failure in carrying out its terms on the part of the other party, he

> has, in general, either a right to retain the contract, and collect damages for its breach, or a right to rescind the contract and recover his own expenditures. Obviously he cannot do both. **The contract cannot be in effect, and at the same time rescinded. If in effect, he can get damages; if rescinded, he must return his benefits, and receive his expenditures. He cannot, of course, retain the benefits and get back his expenditures.** He would then be receiving a free gift of whatever he got under the contract. He, therefore, has a choice.
>
> "All the authorities hold that such choice must be exercised as soon as the party ascertains the facts, and is informed of the failure on the part of the other party. The reason for this is clear. Having then a knowledge of the facts, he is not deceived. If he is unwilling to take the benefits accrued or accruing under the contract, he has an opportunity to disavow it, get back what he has put out, and place himself in approximately the same position in which he would have been had no contract been made. If he does not do this, but continues receiving the benefits coming to him under the contract, he has affirmed the contract after knowing the facts. He may have been deceived in the first instance, but he is not deceived after he knows. Making his choice after he knows, he must abide by it.

Id. at 75-77 (emphasis added) (citations omitted).

In the instant case, the trial court found that Brian materially breached the agreement. Such breach, however, does not entitle Sarah to a rescission of the agreement, because (1) the breach did not go to the heart of the agreement, (2) damages resulting from the failure to pay the car loan payments were easily calculable, and (3) Sarah did not offer to restore the benefits she had received from the agreement. In other words, an award of compensatory damages would have been more appropriate than rescission. *See id.* at 74-77; *see also*

Vincent, 179 Md. at 373 ("[I]f there has been well established breach of a contract, and the injury caused thereby is irreparable, or if the damages that might be awarded would be impossible or difficult to determine or inadequate, the injured party may invoke the aid of equity to obtain a rescission."); Restatement (Second) of Contracts § 359(1) ("Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.").

III.

Failure to Enforce Alimony Waiver Provision in Separation Agreement

Even though the separation agreement was valid and Sarah was not entitled to rescission based on a material breach, the trial court did not enforce Sarah's waiver of alimony in that agreement.

The case *Brees v. Cramer* is instructive on this issue. *See* 322 Md. 214 (1991). In *Brees*, the husband and wife executed a separation agreement, which included the following provisions, among others:

> —mutual releases of obligations for alimony, support and maintenance;
>
> —**mutual releases from all "rights, claims, demands or obligations arising out of or by virtue of the marital relation of the parties, including** . . . right of election regarding the estate of the other, or to take against the Will of the other, [and **the] right to act as executor or administrator of the estate of the other**"; and
>
> —promises by each party to insure that party's life for not less than $83,000 (the amount of the debt secured by the family home) with policy proceeds payable to the other party until sale of the family home, and then, optionally, to [the parties' minor child].

> Included among the life insurance covenants were [the husband's] promise "to leave the Wife as the beneficiary of at least $34,000.00 in Federal Employees Government Life Insurance" and [the wife's] promise to "leave the Husband as the beneficiary of at least $25,000.00 in Federal Employees Government Life Insurance . . . ."

Id. at 217-18 (emphasis added) (citations omitted).

After the husband died, the wife learned that the husband had changed the beneficiary on his life insurance policy from her to their son, in contravention of the terms of the separation agreement. *Id*. at 218. The wife petitioned to be the personal representative of the husband's estate, but the Orphans' Court refused to appoint her as personal representative because of her relinquishment of that right in the parties' separation agreement; the circuit court affirmed. *Id.* at 219. The Court of Appeals issued a writ of certiorari on its own motion before the case was considered by this Court. *Id*. The Court held that the wife's waiver of her rights in the husband's probate estate was not dependent on the performance of the husband's promise to provide insurance for the wife's benefit. *Id*. at 220-21. The Court explained:

> **First, breach of a covenant in a prenuptial or separation agreement does not, *ipso facto*, excuse performance of another covenant by the other party.** *Schnepfe v. Schnepfe*, 124 Md. 330, 92 A. 891 (1914) (wife's breach of prenuptial agreement, by deserting husband, does not relieve husband's estate of liability under husband's promise to bequeath a specific sum of money to wife). And *see* D. Thomas, Maryland Divorce and Separation Law, at 4-25 (MICPEL 4th ed. 1987) ("Where one breaches a provision in a marital settlement agreement which is not dependent upon other provisions, enforcement of the other provisions is unaffected"). **Thus, a clearer expression of the intent of the parties than appears in this instrument is required before concluding that the parties to the**

> **Agreement intended the waiver of rights in [the husband's] probate estate to be dependent on insurance for [the wife's] benefit.**

Id. at 221 (emphasis added).

At the alimony hearing in the case *sub judice*, the trial court issued the following findings of fact and conclusions of law with regard to Brian's breach of the separation agreement:

> **You know, under the circumstances here, I am going to find a material breach on [Brian's] part.** You know, I plugged that into the broader context. This is a family law matter. We've got a marriage. There's not a whole lot involved as sometimes these things go. I mean, there's no bank accounts, security aspects, et cetera. Got a seven and a half year marriage at this particular point. Child support's, basically, been pinned down. Really the only issue is alimony. I mean he made a comment about because—and I understand, this has been happening since Adam and Eve. He says because she was withholding visitation, that he didn't have to make certain payments. That's not the way it works. You can't withhold child support, for instance, because you're not getting visitation. I understand the human emotional reaction to it, but there's other ways of enforcing it. I just make that comment.
>
> **The car business, at the time, was important;** transportation, her, the daughter. It sounds to me, based on the evidence I have, that even though she ends up with a, I guess, a newer car, perhaps a lesser payment, **she didn't get the benefit of the bargain. He's supposed to pay for two years, totally.**
>
> **Under circumstances, apparently, she's incurred some debt, et cetera, so I find that to be, given what's in play here, to be material, and I would find, therefore, because he breached it, he can't enforce the waiver. It's a material breach.**
>
> So, we're here then on the alimony issue.

(Emphasis added).

Brian does not argue that the trial court erred in ruling that he materially breached the separation agreement; rather, he argues that, despite the court's finding that such breach occurred, the court lacked the power to refuse to enforce the alimony waiver provision in the separation agreement. We agree with Brian and shall explain.

Both exceptions to the trial court's ability to modify an alimony or spousal support provision contained in FL § 8-103(c) were present in the separation agreement: the parties expressly waived alimony, and the waiver provision specifically stated that it was not subject to court modification. This Court and the Court of Appeals have repeatedly held that FL § 8-103(c) clearly prohibits courts from modifying alimony provisions in separation agreements where either exception is present. *See, e.g.*, *Langston v. Langston*, 366 Md. 490, 504-05 (2001) (noting that a trial court "is bound by [the parties' separation] agreement as the agreement relates to alimony," and that if such agreement precludes court modification, "then the court is bound by those terms"), *abrogated on different grounds by Bienkowski v. Brooks*, 386 Md. 516 (2005); *Schneider v. Schneider*, 335 Md. 500, 516 (1994) (noting Maryland's public policy "favoring the enforcement of agreements for spousal support"); *Brees*, 322 Md. at 221 ("First, breach of a covenant in a prenuptial or separation agreement does not, *ipso facto,* excuse performance of another covenant by the other party."). As a result, the trial court here was prohibited by FL § 8-103(c) from modifying the alimony provision in the separation agreement.

Furthermore, as in *Brees*, there was no evidence in the separation agreement of the parties' intent to condition the alimony waiver provision on the car payment provision, such

that the breach of one provision would excuse the performance of the other provision. *See* 322 Md. at 221 ("Thus, a clearer expression of the intent of the parties than appears in this instrument is required before concluding that the parties to the Agreement intended the waiver of rights in [the husband's] probate estate to be dependent on insurance for [the wife's] benefit.").

Thus, under the facts of the instant case, once the trial court decided that a material breach occurred, it had three choices: award damages, require specific performance, or, if appropriate under the law set forth above, rescind the entire agreement; only once the separation agreement was rescinded could Sarah request alimony. *See Lazorcak*, 273 Md. at 75-77; *Vincent*, 179 Md. at 373. Accordingly, the court erred by refusing to enforce the alimony waiver provision in the separation agreement.

III. Abuse of Discretion in Alimony Award

Next, Brian argues that, if alimony was not waived, the trial court "abused its discretion in its application of the factors in determining a fair and equitable award, if any, of alimony." Because we hold, for reasons discussed *supra*, that the trial court erred in not enforcing the alimony waiver provision, we need not reach appellant's second question regarding whether the court abused its discretion in awarding alimony or the amount thereof.

JUDGMENT OF THE CIRCUIT COURT FOR GARRETT COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR ENTRY OF JUDGMENT OF ABSOLUTE DIVORCE CONSISTENT WITH THIS OPINION; APPELLEE TO PAY COSTS.