Circuit Court for Baltimore County
Case No. 03-C-05-011410

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1792

September Term, 2019

LISA W. DE KOOMEN

v.

JOOST J. DE KOOMEN

Beachley,
Gould,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: November 23, 2020

On July 11, 2018, appellant Lisa de Koomen ("Lisa") filed in the Circuit Court for Baltimore County a petition to vacate an October 30, 2006 divorce judgment, alleging in substance that her former husband, appellee Joost de Koomen ("Joost"), fraudulently concealed marital assets in negotiations leading up to the execution of a property settlement agreement. After Joost moved to dismiss, Lisa filed an amended petition, which is the operative pleading in this appeal. In addition to requesting vacation of the judgment of divorce, Lisa's amended petition sought to set aside the property settlement agreement incorporated, but not merged, into the divorce decree, and to "[r]e-open the parties' divorce case for litigation regarding division of marital assets and spousal support." In the alternative, Lisa requested the court to "void the Agreement as it relates to division of marital assets . . . and alimony," or find that Joost breached the "Full Disclosure" provision of the marital agreement and grant her a monetary award based on assets Joost allegedly failed to disclose. Joost moved to dismiss Lisa's amended petition for failure to state a cause of action. After a hearing, the court issued a written opinion and order granting Joost's motion to dismiss.

Lisa timely appealed and presents the following questions for our review, which we have rephrased:

1. Did the trial court err in granting Joost's Motion to Dismiss based on its determination that Lisa failed to state a claim upon which relief could be granted?

2. Did the trial court improperly convert the motion to dismiss into a motion for summary judgment by considering and relying on material outside of Lisa's amended petition?

3. Were Lisa's due process rights violated when the trial judge refused to recuse himself?

We hold that the circuit court erred in dismissing Lisa's breach of contract claim, but affirm the court's dismissal of Lisa's other claims.

FACTUAL AND PROCEDURAL BACKGROUND

The parties married in 1994, and after separating in 2003, they executed a Separation and Property Settlement Agreement (the "Agreement") on October 17, 2006. The Agreement purported to resolve all issues arising out of their marriage, including alimony and the division of the parties' real and personal property. On October 30, 2006, the circuit court issued a Judgment of Absolute Divorce, into which the Agreement was incorporated without merger.

Nearly twelve years later, Lisa filed a "Petition to Vacate Judgment of Divorce for Purposes of Setting Aside Marital Settlement Agreement and for Modification of Alimony." After Joost moved to dismiss, Lisa filed an amended petition. In her amended petition, Lisa alleged that Joost fraudulently concealed evidence in the divorce proceeding that, had it been disclosed, "would have resulted in a more equitable division of marital assets and . . . a proper amount of alimony." Lisa's amended petition pleaded five separate counts to support her request to vacate the divorce judgment and set aside the Agreement: 1) that Joost's intentional concealment of material financial evidence constituted extrinsic fraud that warranted vacation of the judgment pursuant to Rule 2-535(b); 2) that Lisa's recent discovery of Joost's fraudulent conduct in the divorce action constituted newly-discovered evidence warranting a new trial as provided in Rule 2-535(c); 3) that in light of

Joost's fraudulent conduct, the court should exercise its discretion pursuant to Md. Code (1984, 2019 Repl. Vol.) § 8-103 of the Family Law Article ("FL"), which authorizes a court to "modify any provision of a deed, agreement, or settlement with respect to alimony or spousal support"; 4) that the provisions of the Agreement regarding alimony and distribution of marital assets should be rescinded as a result of Joost's fraudulent concealment of material evidence; and 5) that Joost breached the "Full Disclosure" provision of the Agreement by concealing his assets and income.

Joost moved to dismiss the amended petition, asserting that it failed to state a claim upon which relief could be granted. In addressing Lisa's claims, Joost responded that Lisa's fraud allegation did not constitute extrinsic fraud as contemplated by Rule 2-535(b); that Lisa could not rely on the newly-discovered evidence provision of Rule 2-535(c) because that Rule only authorizes the granting of a new trial if the party files a motion within thirty days of entry of judgment; and that, because the Agreement provided for non-modifiable alimony, FL § 8-103(b)(2) expressly precluded the court from modifying Lisa's alimony award. As to the fraud and breach of contract counts that Lisa added in her amended petition, Joost essentially asserted that Lisa failed to sufficiently allege a factual basis to support those claims.

On September 5, 2019, the court held a hearing on Joost's motion to dismiss. The court thereafter issued a Memorandum Opinion and Order in which it granted Joost's motion and dismissed Lisa's amended petition. Lisa timely noted this appeal.

DISCUSSION

I. Motion to Dismiss

We have explained the appropriate standard of review from the grant of a motion to dismiss as follows:

> "The proper standard for reviewing the grant of a motion to dismiss is whether the trial court was legally correct. In reviewing the grant of a motion to dismiss, we must determine whether the complaint, on its face, discloses a legally sufficient cause of action." In reviewing the complaint, we must "presume the truth of all well-pleaded facts in the complaint, along with any reasonable inferences derived therefrom." "Dismissal is proper only if the facts and allegations, so viewed, would nevertheless fail to afford plaintiff relief if proven."

Higginbotham v. Pub. Serv. Comm'n of Md., 171 Md. App. 254, 264 (2006) (quoting *Britton v. Meier*, 148 Md. App. 419, 425 (2002)). "[A]n appellate court applies the same standard [as the circuit court] and assesses whether that decision was legally correct." *Patton v. Wells Fargo Fin. Md., Inc.*, 437 Md. 83, 95 (2014).

A. Counts I and IV

In Count I of her amended petition, Lisa sought to vacate the divorce judgment based on Rule 2-535(b), which provides: "On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity." She alleged that Joost committed extrinsic fraud which precluded her from "bringing her Counter-Complaint for Divorce before the fact finder." To support this claim, Lisa alleged that, because Joost restricted her access to marital funds, she was unable to hire "effective, aggressive counsel" and thus was compelled to enter into the Agreement rather than litigate her counter-complaint. She also asserted that Joost "manipulated [her]

emotions" by convincing her of the possibility of reconciliation if she acceded to his financial demands. Lisa alleged that an individual who formerly worked with Joost, Rogier Buker, notified her in 2013 that Joost "purposely minimized his income and diverted marital cash assets in order to reduce the marital estate." In Lisa's view, because these allegations sufficiently alleged extrinsic fraud as contemplated by Rule 2-535 (b), the court was required to vacate the judgment of divorce.

We disagree and hold that the circuit court properly dismissed Count I pursuant to our decision in *Hresko v. Hresko*, 83 Md. App. 228 (1990). In *Hresko*, a husband and wife entered into a voluntary separation agreement which was incorporated but not merged into the parties' divorce decree. *Id.* at 230. Pursuant to their settlement agreement, wife reserved the right to buy husband's interest in the family home. *Id*. Following their divorce, wife exercised her option and paid husband $30,000 in cash for his interest in the family home. *Id*. Surprised that wife had purchased his interest with cash, husband concluded that wife had hidden some of her monetary assets and that she had defrauded him during property settlement negotiations. *Id*. Husband moved to revise the divorce judgment based on wife's allegedly fraudulent conduct. *Id.* Wife moved to dismiss and, after a hearing, the court dismissed husband's motion to revise judgment. *Id.* at 230-31.

On appeal, this Court noted that, "[i]n an action to set aside an enrolled judgment or decree, the moving party must initially produce evidence sufficient to show that the judgment in question was the product of fraud, mistake or irregularity." *Id*. at 231 (citing *Fleisher v. Fleisher*, 60 Md. App. 565, 570 (1984)). Regarding fraud, we explained that "the type of fraud which is required to authorize the reopening of an enrolled judgment is

extrinsic fraud and not fraud which is intrinsic to the trial itself." *Id*. (citing *Schneider v. Schneider*, 35 Md. App. 230, 238 (1977)). We defined intrinsic fraud as fraud related to issues regarding the original action, or issues that were or could have been actually litigated. *Id*. at 232. In contrast, we described extrinsic fraud as fraud that "actually prevents an adversarial trial[,]" the type of fraud that prevents "the actual dispute from being submitted to the fact finder at all." *Id*. (citing *Fleisher*, 60 Md. App. at 571).

We recognized a split of authority regarding whether to treat the concealment of assets as intrinsic or extrinsic fraud, but ultimately concluded that such actions constitute intrinsic fraud. *Id*. at 233-35. Accordingly, we held that the trial court correctly dismissed husband's motion to revise the judgment because the fraud alleged was not extrinsic to the trial itself. *Id*. at 236.

Lisa's allegations that Joost restricted her access to marital funds, manipulated her emotions, and misrepresented his income and marital assets constitute allegations of intrinsic fraud as defined in *Hresko*. The claims in *Hresko* and those in the instant case are similar in that they are based on "[m]isrepresentations or concealment of assets made in negotiations leading to [a separation agreement] later incorporated into a divorce decree." *Id.* at 235. The husband in *Hresko*—and Lisa here—both sought to vacate the judgment as a result of the fraudulent concealment of financial circumstances in property settlement negotiations. In our view, *Hresko* controls and the court properly dismissed Count I because Lisa's claims of intrinsic fraud do not warrant reopening an enrolled judgment. The *Hresko* Court's conclusion is equally apt here:

> To rule otherwise would be to subject every enrolled divorce decree that includes a property settlement to revision upon discovery of alleged fraud in the inducement of the settlement. Public policy of this state demands an end to litigation once the parties have had an opportunity to present in court a matter for determination, the decision has been rendered, and the litigants afforded every opportunity for review.

Id. at 236.[1]

Count IV of Lisa's amended petition sought rescission of the Agreement. In support of that claim, Lisa reiterated many of her Count I claims, asserting that she was fraudulently induced to enter into the Agreement as a result of Joost's "fraudulent concealment of income and assets." Because the Agreement was incorporated in the divorce judgment, *Hresko* likewise precludes Lisa from rescinding the Agreement based on Joost's alleged fraudulent conduct.[2]

B. Counts II and III

Lisa makes no appellate argument that the court erred in granting Joost's motion to dismiss Count II, which requested a new trial pursuant to Rule 2-535(c) based on newly-discovered evidence, and Count III, which requested the court to modify alimony pursuant to FL § 8-103. Accordingly, we shall not consider the propriety of the court's dismissal of

[1] We note that *Hresko* only held that a *judgment* incorporating a separation agreement may not be vacated based on intrinsic fraud. In Part I. C., *infra*, we shall address whether a party may pursue claims arising from a non-merged separation agreement independent of the enrolled judgment.

[2] At oral argument, Lisa's counsel candidly conceded that if we were to conclude that *Hresko* mandated dismissal of Count I, Court IV would likewise suffer the same fate.

these counts.[3]

C. Count V

Count V challenges the Agreement under contract principles. An agreement, such as the one in this case, that is incorporated but not merged into a divorce decree "survives as a separate and independent contractual arrangement between the parties," and remains enforceable as a separate contract. *Johnston v. Johnston*, 297 Md. 48, 56–58 (1983); *see also Janusz v. Gilliam*, 404 Md. 524, 539 n.10 (2008) ("[A]fter the entry of the final judgment, the Agreement remain[s] as an independent contract."). Thus, a breach of contract action is generally available to an aggrieved party to the contract. *See Wilson v. Wilson*, 223 Md. App. 599, 610–11 (2015) (noting that an incorporated but not merged marital settlement agreement "may be enforced as a judgment or as an independent contract[,]" and "[i]n the latter instance . . . is subject to general contract law" (quoting *Fultz v. Shaffer*, 111 Md. App. 278, 298 (1996))), *overruling on a separate issue recognized in Hurt v. Jones-Hurt*, 233 Md. App. 610 (2017).

Count V of the amended petition alleged a breach of the Agreement's "Full Disclosure" provision. Paragraph 16, titled "Full Disclosure," provides:

> The herein Agreement of the parties is made upon the assumption that each of the parties hereto has made a full, complete and total disclosure to the other, of the nature and extent of all the assets and obligations of the parties.
>
> In the event that one or both of the parties has failed to disclose specific assets, then in that event, this Agreement shall become null and void

[3] We acknowledge and appreciate counsel's express statement at oral argument that Lisa abandoned any claim of error related to Counts II and III.

> only as to any such assets, and the [c]ourt shall, upon such subsequent discovery of assets of either party, retain full jurisdiction to approximately divide such additional assets appropriately, and the concealing party shall be responsible for the payments of all related counsel fees and court costs.
>
> Specifically, this Agreement shall have no binding effect whatsoever upon any property not disclosed by either party hereto, one to the other and described herein or disclosed in the parties' divorce case.

Lisa alleged that Joost "breached his obligations under the terms of the contractual agreement between the parties when he failed to disclose bank accounts, significant financial assets, income and business assets at the time of divorce." Unlike Count IV, which requested rescission of the Agreement in full, Count V targeted Joost's alleged breach of the "Full Disclosure" provision of the Agreement.

We begin with Rule 2-303(b):

> Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings are required. A pleading shall contain only such statements of fact as may be necessary to show the pleader's entitlement to relief or ground of defense. It shall not include argument, unnecessary recitals of law, evidence, or documents, or any immaterial, impertinent, or scandalous matter.

The authors of Maryland Rules Commentary confirm that "[t]he intent and spirit of the rules of pleading are reflected by the mandate that pleadings be simple, not technical, and by the underlying philosophy that these rules be construed 'to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable delay.'" Paul V. Niemeyer & Linda M. Schuett, *Maryland Rules Commentary* 323 (5th ed. 2019). Additionally, Rule 2-305 states that "[a] pleading that sets forth a claim for relief . . . shall contain a clear statement of facts necessary to constitute a cause of action[.]"

We conclude that the court erred in dismissing Lisa's breach of contract action. To withstand a motion to dismiss a breach of contract claim, the plaintiff must "allege with certainty and definiteness facts showing a contractual obligation owed by the defendant to the plaintiff and a breach of that obligation by defendant." *RRC Northeast, LLC v. BAA Md., Inc.*, 413 Md. 638, 655 (2010) (emphasis removed) (quoting *Cont'l Masonry Co., Inc. v. Verdel Constr. Co., Inc.*, 279 Md. 476, 480 (1977)); *Yousef v. Trustbank Sav., F.S.B.*, 81 Md. App. 527, 533 (1990).

In Count V of her amended complaint, Lisa alleged that Joost breached the Agreement's "Full Disclosure" clause. That provision stated, in substance, that a party's failure to disclose "specific assets" rendered the Agreement "null and void only as to any such assets." The "Full Disclosure" provision further authorized the court "to approximately divide such additional assets appropriately," and required that the "concealing party" pay all counsel fees and court costs. Notably, Count V did not seek to upset the enrolled judgment. In her amended petition, Lisa expressly identified Joost's contractual obligation to fully disclose his assets as well as the contract's remedies for any breach of that obligation. In our view, Lisa sufficiently alleged that Joost breached the contract by failing to disclose to her all of his assets prior to the execution of the Agreement.[4] The court therefore erred in dismissing Lisa's breach of contract action (Count V of the amended complaint).

[4] We expressly reject the circuit court's conclusion that the Full Disclosure provision of the Agreement "is not an obligation of the contract, rather a condition precedent of the contract."

II. Motion for Summary Judgment

Lisa next asserts that by considering "material outside" the amended petition, the trial court improperly converted Joost's motion to dismiss into a motion for summary judgment. She also makes the corollary argument that, even if the court properly "transmuted" the motion to dismiss into a summary judgment motion, it erred in granting summary judgment in Joost's favor. Joost responds that, because the court limited its decision to the four corners of Lisa's complaint and the attached exhibits, it properly considered the motion as a motion to dismiss rather than one for summary judgment. We agree with Joost.

Before we address the substance of Lisa's argument, we note that we have already determined that the court improperly dismissed Lisa's breach of contract claim (Count V). That claim shall be considered on remand to the circuit court. We also reiterate that Lisa has made no appellate argument that the court erred in dismissing Counts II (motion for a new trial based on newly-discovered evidence) and III (Lisa's request for modification of alimony pursuant to FL § 8-103). That leaves only Counts I and IV, Lisa's motion to vacate the divorce judgment pursuant to Rule 2-535(b) and her request to rescind the Agreement. In denying Lisa's Rule 2-535(b) motion, the court determined pursuant to *Hresko* that Lisa's claims did not constitute extrinsic fraud. There is absolutely no indication in the court's written opinion dismissing Count I that it relied on "material outside" the amended complaint. Indeed, the court expressly stated that "the facts pertinent to the trial court's analysis of a motion to dismiss are limited to the four-corners of the complaint and its incorporated exhibits, if any." Although the court did not expressly address Count IV, it

clearly did not rely on anything outside the pleadings and, in any event, Count IV is controlled by *Hresko*. Thus, not only did the court articulate the governing standard for a motion to dismiss, it appropriately applied that standard. As noted previously, we discern no error in the court's dismissal of Counts I and IV of the amended petition based on *Hresko*.

III. Recusal

At the outset of the hearing on the motion to dismiss, Judge Finifter disclosed that Joost's attorney and his law firm had been "heavily involved" in his 2018 election campaign. Lisa's attorney volunteered that she may have attended a campaign fundraiser for Judge Finifter. The court indicated that it would entertain a recusal motion from either party. Joost's attorney promptly declined the court's offer, but Lisa's attorney asked to confer with her client. After a brief recess, Lisa's attorney moved for recusal, stating:

> And after consulting with my client about that issue, my client is requesting that another judge be assigned, just because she has concerns about impartiality.

After another brief recess, the court denied Lisa's recusal motion, reasoning as follows:

> The rule that governs this is 18-102.11, disqualification. And it says: "A Judge shall disqualify himself or herself in any proceeding in which the Judge's impartiality may reasonably be questioned."
>
> I considered the fact that, you know, I put on the record that Mr. Ward and his firm, I guess, were involved in the campaign, I guess, financially and I guess with sweat equity in the campaign. And Ms. Lester you indicated that you perhaps attended a fund raiser. I really believe I can be fair and impartial in the case.
>
> I don't believe that my impartiality can reasonably be questioned. It certainly doesn't fall into any of the half dozen or dozen specific circumstances that are listed in that rule of 18-102.11.

Lisa claims the court violated her "due process rights" and otherwise abused its discretion in denying her motion to recuse.

Under the Maryland Code of Judicial Conduct, "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Rule 18-102.11(a). Additionally, "[a] judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment." Rule 18-102.4(b). In deciding whether recusal is appropriate in this context, courts apply an objective standard: "whether a reasonable member of the public, knowing all the circumstances, would be led to the conclusion that the judge's impartiality might reasonably be questioned." *Surratt v. Prince George's Cty.*, 320 Md. 439, 465 (1990) (quoting *In re Turney*, 311 Md. 246, 253 (1987)). There is a strong presumption "that judges are impartial participants in the legal process, whose duty to preside when qualified is as strong as their duty to refrain from presiding when not qualified." *Jefferson-El v. State*, 330 Md. 99, 107 (1993) (citing *Boyd v. State*, 321 Md. 69, 74 (1990)). "[A] judge's decision not to recuse himself or herself will be overturned only upon a showing of an abuse of discretion." *S. Easton Neighborhood Ass'n v. Town of Easton*, 387 Md. 468, 499 (2005) (citing *Surratt*, 320 Md. at 465).

Earlier this year, the Maryland Judicial Ethics Committee issued an opinion[5] concerning "the recusal rules for campaigning judges in proceedings when they have

[5] *See* Md. Jud. Eth. Comm. Op. Req., 2020 WL 1856123 (April 7, 2020).

received campaign contributions from the attorneys who are appear before them." *Id.* at *1. The Committee concluded that "judges are not required to recuse themselves from all proceedings when they have received campaign contributions from the attorneys who are appearing before them." *Id.* The Committee echoed Maryland case law that recusal may be required if "reasonable minds" would "perceive impropriety given the circumstances." *Id.* at *5. The Committee noted that its analysis was consistent with a Florida Supreme Court Judicial Ethics Advisory Committee Opinion that determined recusal was not required even where the attorney was a member of the judge's re-election committee. *Id.* at *4-5.

Turning to the instant case, all we know from the record is that Joost's attorney and his law firm had been "heavily involved" in Judge Finifter's 2018 election campaign and that Lisa's attorney may have attended an election fundraiser. We note that this case was not heard until nearly a year after the November 2018 election. The record is silent as to the amount of any financial contributions Joost's attorney or law firm made to the campaign or the extent of non-financial contributions. There also was no indication whether the presiding judge and Joost's counsel had a personal relationship that may have warranted further inquiry. On this record, including Judge Finifter's unsolicited disclosure concerning Joost's attorney's involvement in his election campaign, we readily conclude that no reasonable person would question Judge Finifter's impartiality. Accordingly, Judge

Finifter's denial of Lisa's recusal motion did not constitute an abuse of discretion.[6]

CIRCUIT COURT FOR BALTIMORE COUNTY'S GRANT OF MOTION TO DISMISS AFFIRMED AS TO COUNTS I, II, III, AND IV AND REVERSED AS TO COUNT V OF APPELLANT'S AMENDED PETITION. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE EQUALLY DIVIDED BETWEEN THE PARTIES.

[6] We likewise reject Lisa's due process argument. "[C]onstitutionally based claims, suggesting that failure to disqualify may result in a denial of due process, are successful 'only in the most extreme of cases.'" *Boyd*, 321 Md. at 74. The facts here are not sufficiently egregious to support a constitutional due process claim.