

Circuit Court for Baltimore County
Case No: 03-C-17-003909

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 3357

September Term, 2018

DONZELLA BURTON MCCLEARN

v.

RICHARD K. MCCLEARN

Beachley,
Shaw Geter,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: May 1, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In June 2017, following four years of marriage, Donzella Burton McClearn, appellant, and Richard K. McClearn, appellee, executed a voluntary separation and property settlement agreement which was incorporated, but not merged into a final judgment entered in the Circuit Court for Baltimore County. The agreement set forth provisions regarding the division of the parties’ proprietary interests in three assisted living facilities: Assisted Living at Buckingham Manor, LLC (“Buckingham Manor”), Berkshire Hills Assisted Living, LLC (“Berkshire Hills”), and Garrison Estates Assisted Living, LLC (“Garrison Estates”). Per the agreement, Mr. McClearn transferred his complete interests in Buckingham Manor and Berkshire Hills to Ms. McClearn. In exchange, she agreed to pay him \$2,500 a month for a period of three years, beginning on July 5, 2017. With respect to Garrison Estates, the agreement provided as follows:

The parties have a silent partner that owns Fifty Percent (50%) interest in Garrison. Thus, the parties agree that Husband and Wife shall share the expenses for Garrison Twenty-Five Percent (25%) each (for the remaining Fifty Percent interest) until December 31, 2017. The Wife shall not be responsible for any expenses related to Garrison after December 31, 2017. That parties shall share the monthly profit at the rate of Twenty-Five Percent (25%) each (for the remaining Fifty Percent Interest), from July 2017 until December 31, 2017...[T]he Husband shall become the responsible party at Garrison as of January 1, 2018 and the lease agreement thereto shall be changed solely into Husbands name only – as of that same date. The Wife shall continue to keep the assisted living facility license in her name until the license expires (two years). Once the license expires, the Husband must establish his own corporate entity and obtain his own assisted living facility license in his name. The Husband shall pay Five Hundred Dollars (\$500.00) per month directly to Wife, beginning January 1, 2018 until the license is no longer in Wife’s name – no longer than January 1, 2020; for the use of her assisted living facility license.

In February 2018, following alleged breaches of the separation agreement by both parties, Mr. McClearn filed a “Petition to Enforce Agreement,” alleging that Ms. McClearn had failed to comply with her monthly payment obligations and requesting that the amount owed, including attorneys’ fees, be reduced to judgment. Following an October 2018 hearing, the circuit court granted Mr. McClearn’s petition, awarding him \$26,500 for the unpaid, past due amounts owed by Ms. McClearn and \$2,640 in attorney’s fees. On appeal, Ms. McClearn raises the following issues for the Court’s consideration:¹

1. Did the trial court err when it determined that the appellant breached the Voluntary Separation and Property Settlement Agreement?
2. Was the trial court in error in determining that the appellee had not first materially breached the contract, thus causing a total breach?

For the following reasons, we shall affirm the judgment of the circuit court.

DISCUSSION

“A separation agreement is subject to the general rules governing other contracts.” *Campitelli v. Johnston*, 134 Md. App. 689, 696 (2000). Pursuant to Maryland Rule 8-131(c), we review an action tried without a jury “on both the law and the evidence” and “will not set aside the judgment of the trial court on the evidence unless clearly erroneous.” We will not hold that a trial court’s evidentiary findings are clearly erroneous “[i]f there is any competent evidence to support the factual findings below.” *Meyr v. Meyr*, 195 Md. App. 524, 545 (2010). In the present appeal, upon review of the record, we hold that there was competent evidence to support the circuit court’s findings that both parties breached

¹ The appellee has not filed a brief for our consideration of the present appeal.

their respective payment obligations as set forth in the separation agreement and that Mr. McClearn was entitled to judgment in the amount of \$26,500.

“A breach of contract is generally defined as a failure, without legal excuse, to perform any promise that forms the whole or part of a contract.” *Weaver v. ZeniMax Media, Inc.*, 175 Md. App. 16, 51 (2007) (internal quotation and citations omitted). Because Mr. McClearn relinquished his proprietary interests in Buckingham Manor and Berkshire Hills, Ms. McClearn was contractually obligated to make \$2,500 in monthly payments to him beginning on July 5, 2017.

The record reveals that Ms. McClearn made the requisite payments to Mr. McClearn in July 2017 and August 2017. In August of 2017, due to emergency water damage, one of Ms. McClearn’s assisted living facilities was required to “shut down for a couple of months.” There was a verbal agreement between the parties, therefore, that Ms. McClearn would pay \$1,500 for the next four months, for the period beginning September 2017 through December 2017. Accordingly, Ms. McClearn made four monthly payments of \$1,500 during this period. The record does not disclose, however, that there was agreement between the parties about whether the unpaid \$4,000 from this period would be waived altogether or whether it would remain outstanding to be paid at some later date. Moreover, the separation agreement provided that “[n]o modification or waiver of any of the terms of [the separation agreement] shall be valid unless made in writing, and signed by the parties.” It was reasonable for the circuit court, absent the requisite written memorialization of modification or waiver, to find that Ms. McClearn owed the unpaid \$4,000 stemming from this four-month period.

In January 2018, the month that Ms. McClearn agreed to resume her \$2,500 monthly payments to Mr. McClearn, she failed to do so. Further, she failed to make any payments to Mr. McClearn for ten months, beginning in January 2018 and continuing through October 2018. During this ten-month period, \$25,000 in past due payments accrued. Thus, including the four months of partial payments, her cumulative debt to Mr. McClearn totaled \$29,000.

As to Mr. McClearn, the circuit court found that he was also in breach of the separation agreement. Per the separation agreement, in exchange for his use of Ms. McClearn’s license to run Garrison Estates, Mr. McClearn was obligated to pay Ms. McClearn \$500.00 per month beginning on January 1, 2018 until the license “was no longer in [Ms. McClearn’s] name.” Mr. McClearn, however, did not make the requisite payment in January 2018, nor did he make any payments to Ms. McClearn thereafter. Mr. McClearn asserted that he received a new license in May 2018, terminating his payment obligation to Ms. McClearn as of June 2018. Based on the foregoing, it was reasonable for the circuit court to determine that Mr. McClearn’s total obligation to Ms. McClearn for his five months of nonpayment was \$2,500. It was also reasonable for the court to reduce Ms. McClearn’s debt to Mr. McClearn by the \$2,500 which he owed, thereby directing her to pay \$26,500 rather than \$29,000. Moreover, because the agreement provided that any party in breach would “indemnify and hold the other party harmless from any such breach, including, but not limited to, reasonable attorneys’ fees,” it was proper for the court to award attorney’s fees for Mr. McClearn’s related legal expenses.

We are not persuaded by Ms. McClearn’s assertion that she had a valid legal excuse for her non-performance of the payment provisions set forth in the settlement agreement. Though she asserts that Mr. McClearn breached the separation agreement first, the nonpayment of her full \$2,500 obligation in September 2017, in the absence of a written modification or waiver, constituted a breach in the separation agreement. Her first nonpayment, therefore, occurred months before Mr. McClearn’s first nonpayment in January 2018.

We are also not persuaded that Mr. McClearn’s nonpayment in January 2018 constituted a “material breach” as Ms. McClearn asserts. A breach is material when it “is such that further performance of the contract would be different in substance from that which was contracted for.” *Barufaldi v. Ocean City, Chamber of Commerce, Inc.*, 196 Md. App. 1, 23 (2010) (internal quotations and citation omitted). Mr. McClearn’s failure to pay \$500 for the use of Ms. McClearn’s license to run Garrison Estates did not change or alter the parties’ mutual obligations with respect to the Berkshire Hills and Buckingham Manor facilities. Mr. McClearn agreed to and ultimately relinquished his right to these properties, and, in return, Ms. McClearn agreed to pay him \$2,500 a month for three years. Had Ms. McClearn been permitted to forego payment of this obligation, she would have been unjustly enriched with the two properties and Mr. McClearn would have been deprived the benefit of the bargain to which the parties agreed. Mr. McClearn’s nonpayment of the \$2,500 did not deprive Ms. McClearn her full proprietary interest in either Berkshire Hills or Buckingham Manor and, therefore, did not release her from her promise to pay. Though Ms. McClearn asserts that she “cannot be adequately compensated for the loss of Garrison

Estates” after Mr. McClearn failed to “maintain ownership” of the property, it remains that she bargained away her interest in the property when she entered into the settlement agreement. Mr. McClearn’s subsequent action, or inaction, with regard to the management of Garrison Estates does not void the parties’ agreement. Attorney’s fees aside, the circuit court’s judgment placed both parties in the position they would have been in had they both complied, in full, with the terms of the separation agreement.

For the foregoing reasons, we hold that the circuit court did not err in determining that Ms. McClearn had breached the parties’ settlement agreement and in assessing a \$26,500 judgment against her stemming from the breach.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**