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ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-17-36

OPINION DELIVERED: DECEMBER 6, 2017

WILLIAM A. BUCKINGHAM, JR.
APPELLANT

V.

CLARISSA GOCHNAUER (FORMERLY BUCKINGHAM)
APPELLEE

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SEVENTEENTH DIVISION
[NO. 60DR-09-31]

HONORABLE MACKIE M. PIERCE, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellee Clarissa Gochnauer and appellant William (Bill) A. Buckingham, Jr., filed competing motions for summary judgment, and the Pulaski County Circuit Court granted Clarissa's motion and simultaneously denied Bill's, finding that Bill had contractually bound himself to pay a portion of his military-retirement benefits to Clarissa. The trial court also granted Clarissa an attorney's-fee award and filed a "Military Pension Division Order" (MPDO). Bill argues on appeal that the trial court erred by (1) granting Clarissa summary judgment; (2) awarding attorney's fees to Clarissa; (3) filing the MPDO; and (4) modifying the parties' contract. We affirm.

I. *Statement of the Case*

The parties were divorced on March 9, 2009, after having been married for about twelve years. Their decree provides that "[t]he Memorandum of Understanding executed

as a contract between the parties is hereby incorporated in this Decree and the Court shall enforce said agreement[.]"

The contract contains the mediation agreement the parties entered into after formal negotiation and encompasses their joint-custody arrangement and visitation, child-support, and property-settlement agreements. Bill's retirement account is listed as a marital asset under the heading "Property Settlement & Financial Considerations." Paragraph 38 provides as follows:

> Bill will contact the appropriate Air Force retirement account personnel to inform them of the divorce and obtain and execute the necessary documents for Clarissa's one-half interest which accrued during the course of the marriage in his retirement account. He will give Clarissa copies of these documents and attach them to this agreement and Clarissa shall be responsible for effecting the QDRO[1] order for her one-half interest.

Bill filed a motion for declaratory judgment arguing that when the parties divorced, he had served only fifteen years in the military and had accrued no entitlement to military-retirement benefits. He claimed that Clarissa was demanding entitlement to a portion of the military retirement that he had begun receiving after twenty years of service, subsequent to the divorce. He sought a declaratory judgment "clarifying for the parties that since [he] had not served time sufficient to have earned the right to receive military-retirement benefits as of the time of their divorce, no property right in same had vested and, therefore, there was no such asset to be divided." Clarissa responded that she was entitled to the retirement "per the terms of the Decree."

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[1]"QDRO" stands for Qualified Domestic Relations Order, which is an order that provides for an alternate payee's right to receive all or part of any benefits due a participant under a pension or retirement-benefit plan. *See Black's Law Dictionary*, pg. 1275 (8th ed. 2004).

Clarissa filed a motion for summary judgment and claimed that Bill had retired from the United States Air Force on February 1, 2015, after twenty years and that he had begun thereafter to receive military retirement. She cited the decree and the attached "Memorandum of Understanding" as set forth above. She argued that she was entitled to one-half of the portion of retirement that had accrued during their eleven-year ten-month marriage.

Bill responded to Clarissa's summary-judgment motion and argued that as of the time of their divorce, he had accrued no entitlement to any military-retirement benefits. He cited *Christopher v. Christopher*, 316 Ark. 215, 871 S.W.2d 398 (1994), and *Holaway v. Holaway*, 70 Ark. App. 240, 16 S.W.3d 302 (2000), for the proposition that if a service member has not served enough time in the military at the time of the parties' divorce to have earned the right to military-retirement pay, then that right has not vested, and there is no asset to be divided upon the divorce. He argued that because his rights had not vested by the time they were divorced, Clarissa was not entitled to a portion of the benefit. Bill filed a countermotion for summary judgment and sought the same relief that he had requested in his declaratory-judgment motion, and he filed an amended motion for declaratory judgment that also asked for the same relief.

On August 10, 2016, the trial court filed an order granting Clarissa's motion for summary judgment and denying Bill's countermotion for summary judgment. The trial court held that even though Bill had not served enough time in the military at the time of the divorce to have earned the right to military-retirement benefits, the parties had

contemplated his future retirement and had chosen to enter into a binding contractual agreement to award Clarissa

> one-half of the funds which accrued during the course of the marriage. While there was no asset to be divided at the time, the parties made no mention of whether the right was vested at the time and [Bill] was free to contractually bind himself to payment according to the terms of the Memorandum of Understanding, which he has effectively done.

The trial court found that the parties had been married for eleven years and ten months of Bill's twenty years of military service. Thus, the trial court awarded Clarissa one-half "of [Bill's] military retirement for that period of time." In the trial court's letter to the parties dated August 10, 2016, the trial court wrote that the parties had contemplated Bill's future retirement when they contracted for Clarissa to receive one-half of the sum that had accrued during the marriage. The letter ended with the statement, "[Clarissa] is responsible for preparing and submitting the [QDRO].[2] [Bill] shall execute any documents necessary to effectuate the military-retirement payments to [Clarissa]."

A letter to the trial court from Clarissa's attorney, dated and filed on August 15, 2016, purported to enclose the QDRO and to copy Bill's attorney, allowing five days for any objection to the form of the order. On August 22, 2016, a letter to the trial court from Bill's attorney was file-marked, and it contained detailed objections to the QDRO that Clarissa's attorney had submitted.

In an August 12, 2016 motion, Clarissa asked for attorney's fees and costs in the amount of $3,909.30. The proposed order had been delivered to the trial court with an

[2]The trial court uses the term QDRO and MPDO interchangeably, even though QDRO refers to the division of civilian-retirement or pension plans and MPDO refers to military-retirement plans.

August 12, 2016 cover letter from Clarissa's attorney. The letter stated that opposing counsel had been copied and that he had five days to lodge any objections to the proposed order. The order granting attorney's fees and costs totaling $3,909.30 was filed on August 23, 2016.

On August 24, 2016, the MPDO was filed. On the same day, Bill filed a motion for relief under Arkansas Rule of Civil Procedure 59 (2016), arguing that the finding that Clarissa was entitled to one-half of his military retirement for the period of time they were married is "clearly contrary to the law." In his attached brief, he argued that the contract was unambiguous and provided that no benefits had "vested" or "accrued," and thus, there was nothing for the parties to divide once he retired.

On September 6, 2016, Bill filed a motion for relief under Arkansas Rules of Civil Procedure 59 and 60, complaining that his attorney did not receive the correspondence with the motion for attorney's fees and that the order was filed without his having the opportunity to respond as he was entitled, citing Arkansas Rule of Civil Procedure 6. A similar motion was filed on September 8, 2016, arguing that the MPDO was entered without his having due process and an opportunity to be heard. No orders resulted from these motions, and Bill filed his notice of appeal on October 20, 2016. He filed an amended notice of appeal on January 16, 2017, but no changes were included in the amended notice. This appeal followed.

II. *Summary Judgment*

The law on summary judgment is well settled. Summary judgment should be granted only when there is no issue of material fact left to be determined and the moving party is

entitled to judgment as a matter of law. *Po-Boy Land Co., Inc. v. Mullins*, 2011 Ark. App. 381, 384 S.W.3d 555. All evidence is viewed in the light most favorable to the "resisting party." *Id.* When the parties agree on the facts, such as when there are cross-motions for summary judgment on agreed facts, then we simply determine whether the appellee was entitled to judgment as a matter of law. *Hobbs v. Jones*, 2012 Ark. 293, 412 S.W.3d 844. In reviewing questions of law, appellate review is de novo. *Id.*

Bill argues that because no military-retirement pay had accrued during the course of the marriage, the trial court erred in granting Clarissa summary judgment and by denying his motion for summary judgment. He urges this court to interpret "accrued" to mean "vested." In doing so, he claims that because his retirement had not "vested" at the time of the parties' divorce and agreement, he did not contractually bind himself to pay anything because the precise language of their agreement limits her portion to half of that "which accrued during the course of the marriage."

The first rule of interpretation of a contract is to give the language employed the meaning that the parties intended. *Singletary v. Singletary*, 2013 Ark. 506, 431 S.W.3d 234. In construing any contract, we must consider the sense and meaning of the words used by the parties as they are taken and understood in their plain and ordinary meaning. *Id.* The best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it, as it may be safely assumed that such was the aspect in which the parties themselves viewed it. *Id.* It is also a well-settled rule in construing a contract that the intention of the parties is to be gathered, not from particular words and phrases, but from the whole context of the agreement. *Id.*

This court recently reviewed a circuit court's decision to construe an agreement contained within a divorce decree by using the following framework:

> A court has no authority to modify an independent contract that is made part of a divorce decree. While the agreement is still subject to judicial interpretation, we must apply the rules of contract construction in interpreting the agreement. When a contract is unambiguous, its construction is a question of law for this court, and the intent of the parties is not relevant. When contracting parties express their intention in a written instrument in clear and unambiguous language, it is the court's duty to construe the writing in accordance with the plain meaning of the language employed. The parol-evidence rule is a rule of substantive law in which all antecedent proposals and negotiations are merged into the written contract and cannot be added to or varied by parol evidence. When a contract is plain, unambiguous, and complete in its terms, parol evidence is not admissible to contradict or add to the written terms. When the meaning of the words is ambiguous, parol evidence is admissible to explain the writing.

Haggard v. Haggard, 2017 Ark. App. 542, at 5–6, 530 S.W.3d 903, 906–07 (internal citations omitted).

Clarissa contends that a latent ambiguity exists and that parol evidence is necessary to interpret their agreement. Bill argues that by ruling as it did, the trial court, in effect, found that the language was unambiguous. We agree with Bill. The trial court did not find that the agreement was ambiguous; instead, it determined that the parties had agreed that Clarissa should receive one-half of the military retirement that had accrued during the parties' marriage and that, despite the fact that Bill did not owe her anything at the time of the divorce, he had bound himself to a contract to pay her a portion of his military retirement. Parol evidence was not necessary for the trial court's determination.

But, we also agree with Clarissa's contention that the common understanding of "accrued" is not "vested." She claims that it is commonly understood that retirement accrues, or adds up, as time goes forward, and that is a reasonable and honest interpretation.

We further agree that Bill's interpretation would render the paragraph meaningless. If Bill's interpretation had prevailed, the paragraph would have simply stated that Clarissa would not receive any of Bill's military-retirement pay. *See Cont'l Cas. Co. v. Davison*, 250 Ark. 35, 463 S.W.2d 652 (1971) (holding that construction that neutralizes any provision of a contract should not be adopted if the contract can be construed to give effect to all provisions).

We also agree with Clarissa's reasoning that paragraph 38's existence is the best indication inside the document of what the parties intended "accrued" to mean. There was no valid reason to place obligations on Bill to contact individuals, execute documents, give Clarissa copies of the documents, and then have Clarissa draft a QDRO if "accrued" meant "vested," which in turn would equate to "zero." *See Cont'l Cas. Co.*, *supra*. Instead, as the trial court interpreted in its order, both parties were using "accrued" to differentiate between Clarissa receiving a *portion* of one-half of Bill's military retirement and her receiving one-half of his entire military retirement reflecting his twenty-year service. Accordingly, we affirm the trial court's order granting Clarissa summary judgment and denying Bill's motion for summary judgment.

III. *Attorney's Fee*

Bill argues that the trial court abused its discretion in awarding Clarissa an attorney's fee and costs without affording him an opportunity to appear and be heard on the motion. The motion for attorney's fees was filed on August 12, 2016, and Bill was served on the same day. The order granting the fees and costs was filed on August 23, 2016. Included in the addendum of Bill's brief is a cover letter to the trial court dated August 12, 2016, and

purporting to copy Bill's attorney with the letter, which enclosed the motion for attorney's fees and presented the proposed order, giving Bill's attorney five days to object. However, Bill argues that his attorney did not receive the letter and proposed order, discovering it only after he had "downloaded that order from the electronic filing system."

Bill argues that Rule 6 allows ten days to respond to a motion and that weekends are to be excluded in the computation. Ark. R. Civ. P. 6(a) & (c). Thus, he contends that the order was filed before his response was due. He also argues that he was denied procedural due process under the Fourteenth Amendment to the United States Constitution, citing *Mathews v. Eldridge*, 424 U.S. 319 (1976). He contends that the premature entry of the trial court's order without having given him an opportunity to oppose the motion was an error of law, which is an abuse of discretion. *Downum v. Downum*, 101 Ark. App. 243, 274 S.W.3d 349 (2008).

However, Bill's argument is not preserved for appellate review. Bill failed to preserve his argument because his postjudgment motion—wherein he argues that his attorney did not receive the correspondence with the motion for attorney's fees and that the order was filed without his having the opportunity to respond as he was entitled—was not appealed. The deemed-denied ruling was not mentioned in Bill's notice of appeal or amended notice of appeal. *See Rose Care, Inc. v. Ross*, 91 Ark. App. 187, 209 S.W.3d 393 (2005) (where this court held that because Rose Care's notice of appeal did not mention the deemed denial of the new-trial motion or that an appeal was being taken from any order other than the original judgment, we could not reach the issues that were solely raised in the new-trial motion).

Bill's notice of appeal lists the order on attorney's fees; however, Bill does not mention in his notice of appeal or the amended notice of appeal the deemed denial of his postjudgment motion that included the arguments presented to the trial court regarding the attorney's-fees order. Without the postjudgment motion and the deemed denial included in the appeal, we cannot reach Bill's argument because the trial court's ruling is not before this court. Ark. R. App. P.–Civ. 3(a) & (e) (2016); *Tate-Smith v. Cupples*, 355 Ark. 230, 244 n.3, 134 S.W.3d 535, 543 n.3 (2003) (holding that when a posttrial motion has been deemed denied, the only appealable matter is the original order and that any previously filed notice of appeal must be amended to appeal from the deemed-denied motion).

IV. *MPDO and Due Process*

The trial court entered its MPDO on August 24, 2016. Bill claims that the order is void ab initio because he was afforded no opportunity to appear and be heard in opposition, which was in derogation of his right to due process. Further, Bill asserts that this order was entered without any motion being filed by Clarissa requesting it, in violation of Arkansas Rule of Civil Procedure 7 (2016).[3]

In contrast, Clarissa contends that the MPDO should be affirmed. We agree. The trial court asked Clarissa to prepare the MPDO in its August 10, 2016 letter to the attorneys, which explained the trial court's reasoning for granting Clarissa summary judgment and notified the parties of its decision. The MPDO was submitted to the trial court and

[3]Rule 7 provides that an application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

delivered to opposing counsel on August 15, 2016. Bill responded to the proposed order with his objections on August 22, 2016. He did not include a request for a hearing in his letter outlining his objections. The MPDO was then filed on August 24, 2016.

Bill responded in writing to the proposed order, and he never asked for a hearing prior to the MPDO's filing. Accordingly, we hold that Bill's argument that he was denied due process is without merit given that no request for a hearing was raised before the entry of the MPDO. *See* Ark. R. Civ. P. 78(c) (providing in part that unless a hearing is requested by counsel or is ordered by the court, a hearing will be deemed waived, and the court may act on the matter without further notice after the time for reply has expired).

V. *MPDO and Modification of Contract*

The MPDO entered in this case provides that Clarissa shall receive one-half of the "marital share" of Bill's military-retirement pay. "Marital share" is defined in the order as "a fraction made up of 154 months of marital pension services, divided by the total months of [Bill's] military service." Bill contends that there is no "marital share" because, as the trial court recognized, at the time of the divorce, Bill's right to military-retirement pay had not vested. Bill contends that by ordering that Clarissa is entitled to a portion of his military retirement, the trial court fundamentally and impermissibly modified the parties' contract.

Bill made the same argument when he addressed the summary-judgment ruling. Because we affirmed the trial court's ruling that Clarissa was entitled to summary judgment based on the contract, Bill's argument that the MPDO modified the parties' agreement cannot be sustained.

Affirmed.

GLOVER and HIXSON, JJ., agree.

Tripcony, May & Associates, by: *James L. Tripcony*, for appellant.

Wright Law Firm, by: *Victor D. "Trey" Wright III*, for appellee.