IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 24-0063

IN RE MARRIAGE OF:

JOSEPH GHAHARI,

Petitioner and Appellee,

v.

HIRSA HIRAD,

Respondent and Appellant.

RESPONSE BRIEF OF APPELLEE

On Appeal from the Montana Eighth Judicial District Court, Cascade County, In re Marriage of: Ghahari v. Hirad, BDR-2021-0392 The Honorable Elizabeth A. Best, Presiding

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STATEMENT OF ISSUES

1. Whether the district court abused its discretion when it denied Appellant's Motion to Enforce the Marital Property Settlement Agreement; and if so, whether Appellant is entitled to the amount she seeks?

2. Whether the district court abused its discretion when it denied Appellant's request for attorney fees?

STATEMENT OF THE CASE

Appellant Hirsa Hirad ("Hirsa") has appealed from the Montana Eighth Judicial District Court, The Honorable District Court Elizabeth Best presiding, from a January 3, 2024, Order denying her October 17, 2023, Motion to Enforce Marital Property Settlement Agreement (MPSA), Motion for Entry of Judgment, Request for Interest and Attorney Fees. (D.C. Docs. 150, 161). The parties' final Decree of Dissolution was entered by the district court on April 5, 2023, pursuant to the Stipulated MPSA. (D.C. Doc. 149).

Pursuant to the parties' successful mediation and stipulated MPSA signed March 26, 2023, Appellee Joseph Ghahari ("Joe") paid off the mortgage on the marital home and remitted the remainder to Hirsa. She now owns the home free and clear, but insists she is due an additional $7,781.97 under the MPSA. Hirsa also seeks additional amounts from Joe in the form of pre-judgment and post-judgment interest. She also requests her attorney fees.

STATEMENT OF FACTS

Hirsa and Joe were married on July 23, 2011 in Colorado and subsequently had two children together. (Doc. 149). Hirsa is employed as a registered nurse and Joe is employed as a physician. After a mediation held March 25, 2023, the parties agreed to the terms of a final parenting plan and to a property settlement, with neither party receiving maintenance from the other, but Hirsa due an equalization payment either in the form of a lump-sum payment of $456,000 (the agreed value of the marital home), or a mortgage payoff, with the remaining funds distributed to her. (D.C. Docs. 144, 149). There is no "time is of the essence" clause. Specifically, Paragraph 6(d) of the MPSA provides:

> On or before July 24, 2023, Joe shall pay to Hirsa the sum of $456,000. Such funds shall be payable to "The Trust Account of VanEngen Law Office, PC for the benefit of Hirsa Hirad" and delivered to VanEngen Law Office, PC. In the alternative, Hirsa may elect to have Joe pay off the remainder of the mortgage on the Kingwood Drive property and remit the remainder made payable to her via a check for the remainder to VanEngen Law in the manner described above. Joe shall supply to Hirsa a payoff statement for the mortgage and a signed Quit Claim Deed, and if applicable proof that he has paid off that mortgage, at the time he provides Hirsa with the funds described herein. Upon receipt of the $456,000 or, in the alternative, when the mortgage on the home is paid in full and the remainder of the funds paid to Hirsa, Hirsa shall cooperate with Joe and Joe shall cooperate with Hirsa to execute a quitclaim deed to remove his name from the Title and/or remove his name from the mortgage. Removal of Joe's name from the mortgage/deed must be done within 60 days of the receipt of funds from Joe as described herein. Joe shall make timely monthly mortgage payments on the home until such time as he a) remits the entire sum, or b) remits payment for the payoff of the mortgage . . .

As clearly indicated by this language, Hirsa could elect a lump sum payment or elect to have Joe pay off the mortgage (with him still making mortgage payments until pay-off). The plain language does not obligate the mortgage pay-off to equal exactly $456,000.00. To that end, after the successful mediation, Joe discovered that he could not obtain a loan for $456,000.00 unless he first paid off the mortgage on the Kingwood Drive property (which was in his name only). He also learned that he could not remove his name from the mortgage, nor quitclaim the home to Hirsa, until the mortgage was paid in full. In short, there was no other option but to pay off the Kingwood Drive mortgage. At the time, it did not matter because it was Joe's understanding Hirsa was going to elect to have the mortgage paid off with the remaining funds distributed to her. (D.C. Doc. 157).

It was not until two months later, however, on June 1, 2023, that Hirsa's attorney first indicated that "Hirsa elects for Joe to provide her with the payment of $456,000 payable to "The Trust Account of VanEngen Law Office, PC for the benefit of Hirsa Hirad." (D.C. Doc. 157). However, Joe at this time had already proceeded with the mortgage pay-off process. (D.C. Doc. 157). Discussions between the parties' counsel took place in July, with undersigned indicating to opposing counsel on July 31, 2023, that while the July 23 deadline had passed, Joe was waiting for his loan to close, which would be "any day" and that "[h]e knows this is owing and past due and is on it." (D.C. Doc. 157).

Joe paid off the remaining mortgage on the property on August 4, 2023, and Hirsa's counsel acknowledged she received (and deposited) $232,040.54 from Joe on August 18, 2023. Joe arrived at this amount by subtracting the loan payoff amount of $223,959.46 (the amount at the time of the mediation/MPSA) from the equalization payment of $456,000.00. (D.C. Doc. 157). Indeed, the principal balance of the mortgage on March 1, 2023, was $225,474.12, and on April 1, 2023, was $223,696.78. (Appellant's Supp. Appx., Ex. 4).

Hirsa's argument on appeal relies on inherent misunderstandings, misassumptions, and mathematical miscalculations, including her conflation of the August pay-off amount of $219,049.15, with the $223,959.46 March pay-off amount. She also erroneously claims that Joe included the August mortgage payment ($2,871.66) in the $219,049.15 pay-off amount, which is not accurate. Two separate payments were made. She then subtracts this amount ($2,871.66) from the $219,049.15 to arrive at a purported pay-off credit to Joe of only $216,177.49, which she subtract from the calculated pay-off amount at the March mediation ($223,959.46) to arrive at a shortage of $7,781.97.

First, as argued below, the MPSA does not obligate the mortgage payout to equal precisely $456,000.00. Regardless, even if Hirsa was entitled to a pay-off value which added up to precisely $456,000.00, she actually received more than this amount. The MPSA presumes that Joe would make the monthly mortgage

payment of $2,871.66 for April, May, June, and July, but not the August payment since that was after the July 23 deadline. Joe made each of these mortgage payments on time, including August.[1] (Appellant's Supp. Appx. Ex. 4).

Thus, since the parties' mediation on March 25, 2023, and signing of the MPSA on March 26, 2023, Joe should be credited with five months of mortgage payments if the $219,049.15 pay-out is used for calculation purposes. This would equate to a total credit to Joe of $14,358.00 ($2,871.66 x 5 months). Adding this amount to the August pay-out price of $219,049.15 equals a total credit to Joe of $233,407.15. Subtracting this amount from $456,000.00 equals $222,592.85, revealing an *overpayment* to Hirsa of $9,447.69. ($232,040.54 - $222,592.85 = $9,447.69). This does not include the $1,771.33 in tax payments which should be credited to Joe (see discussion below), for a total *overage* to Hirsa of $11,219.02.

But even according to Hirsa's misguided rationale, if Joe is only credited with the mortgage payments after the July 23 deadline, he is entitled to credit of $2,871.66 (for August) and for the last eight days in July (7/24-7/31), which prorates to $741.07 ($2,871.66/31 days = $92.63/day x 8 days = $741.07). Adding $2,871.66 and $741.07 ($3,612.73) to $219,049.15 equals a credit to Joe of

[1] While Hirsa claims the $219,049.15 pay-off amount included the August mortgage payment, this is not supported by the record which shows Joe made a $2,871.66 payment on August 1, 2023, and the $219,049.15 transaction took place August 4, 2023. (Appellant's Supp. Appx. Ex. 4). Regardless, a 3-day late payment did not damage Hirsa and is within the generally accepted commercial "mailbox rule" window.

$222,661.88. ($456,000 - $222,661.88 = $233,338.12). Under this scenario, Hirsa would have been underpaid by only $1,297.58. ($233,338.12 - $232,040.54 - = $1,297.58). However, adding the post-mediation tax payments[2] to which the parties agreed Hirsa would be responsible for ($442.83/month x 4 months = $1,771.33), reveals that she actually received a $473.75 overpayment. ($1,771.33 - $1,297.58 = $473.75). In addition, the property taxes were disbursed on May 4, 2023, for July through December 2023, for which she also received the value.

It is apparent, and unfortunate, that misassumptions, timing issues, and miscalculations by both parties, their counsel (and likely the mediator) apparently complicated their original dispute, but it matters not because Hirsa ultimately received the marital home, free of debt, and nothing in the MPSA entitled Hirsa to precisely $456,000.00 under the mortgage pay-off option, which she has now elected.[3] In fact, as the detailed calculations above reveal, Hirsa actually received more than the amount she is now seeking on appeal, even when including her claim to pre-judgment and post-judgment interest.

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[2] On November 8, 2022, property tax in the amount of $2,657 was paid by Pennymac (out of escrow) for January through June of 2023. On May 4, 2023, Pennymac paid $2,657 in property tax for July through December. (Appellant's Supp. Appx. Ex. 4).

[3] In her Reply Brief in support of her Motion, she stated that "Hirsa has been clear all along that she sought full payment of the sums due her. However, that water is under the bridge and the mortgage appears to be paid off." (D.C. Doc. 160 at pgs. 2-3); *see also*, Opening Brief at pg. 12 ("Joe paid and should receive credit for his payment to Hirsa which was received by her attorney's office on August 18, 2023, in the amount of $232,040.54").

The only issue for the Court to resolve on appeal is whether Joe complied with the MPSA and whether the district court was within its discretion to deny the monetary relief requested by Hirsa. While Joe paid off the mortgage two weeks after the deadline, and did not write the $232,040.54 check to Hirsa until August 14, 2023, he complied with his contractual obligation with no substantial injustice suffered by Hirsa. Any interest she claims due for this period of time is offset by the overage she actually received. While Hirsa did not receive a $456,000.00 lump-sum payment (due to impossibility and waiver), she did receive equal value. Moreover, there was never any allegation that Joe acted in bad faith in delaying the loan closing or providing financial documentation to Hirsa.

Accordingly, it is Hirsa whose legal position is misplaced, if not pursued in bad faith. On October 18, 2023, Hirsa's counsel received documentation that the mortgage had been paid off on August 4, 2023, but she did not voluntarily dismiss her Motion to Enforce the MPSA, filed the day before on October 17, 2023, and continued to insist that Joe still owed her $223,959.46, with interest under the MPSA, and attorney's fees. (D.C. Doc. 150). Now, she claims "Joe still owes her $7,781.97 due under the MPSA, plus $1,580.37 interest for 7/24/23-8/4/23, plus $1,057.85 interest for 8/4/23-8/18/23, - for a total of $10,420.19, plus $2.45/day in pre and post judgment interest starting August 18, 2023 until the sums are paid in full" and also seeks attorney's fees. (Opening Brief at pg. 5).

The district court's order acknowledged Hirsa's unreasonable position:

> As with all other issues in this dissolution, this dispute was escalated unnecessarily. Hirsa acknowledges that the disputed MPSA payment was made as of the time of the filing of her Reply but insists that she is owed additional equalization funds, interest and fees. The Court is not persuaded. It is clear to the Court that unforeseen circumstances and misunderstandings resulted in delays. However, better communication would have likely resolved most of these problems without the necessity of Court involvement.

(D.C. Doc. 161).

STANDARD OF REVIEW

Property settlement agreements in marital dissolutions are reviewed under contract law, for correctness. *In re Marriage of Pfennigs*, 1999 MT 250, ¶ 13, 296 Mont. 242, 989 P.2d 327; *In re Marriage of Simpson*, 2018 MT 281, ¶ 10, 393 Mont. 340, 430 P.3d 999. A refusal to award interest is subject to the same standard of review. *In re Marriage of Debuff*, 2002 MT 159, ¶ 15, 310 Mont. 382, 50 P.3d 1070. A district court's discretionary decision associated with a motion to enforce a marital property settlement agreement is reviewed for an abuse of discretion, *In re Marriage of Weber*, 2004 MT 206, ¶¶ 14, 33, 322 Mont. 324, 95 P.3d 694, which occurs when a court acts arbitrarily without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice. *In re Marriage of Clark*, 2003 MT 168, ¶ 7, 316 Mont. 327, 71 P.3d 1228. An award of attorney fees is reviewed under the same deferential "abuse of discretion" standard of review. *Marriage of Simpson*, ¶ 10.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion when it denied Hirsa's motion to enforce the MPSA, and her associated request for interest and fees. An informed review of the record reveals Joe complied with the MPSA and exercised good faith in doing so. Any delayed equalization payment was frustrated by forces outside his control and the MPSA did not contain a "time is of the essence" clause. Hirsa now owns the marital home free and clear and Joe's payment to her of $232,040.54, satisfies his equalization payment obligations. While Hirsa did not receive a lump sum $456,000.00 equalization payment, she did receive equal value. Joe complied with the MPSA and Hirsa suffered no substantial injustice.

While Hirsa has now waived her argument that Joe's breach was his failure to pay a lump-sum equalization payment of $456,000.00, she seeks an additional $7,781.97 from him on the basis "simple math" shows the same is owing. As detailed above, however, it is Hirsa's "simple" math which is incorrect, and she actually received more than she was owed under the MPSA. It matters not, however, as nothing in the plain language of the MPSA entitled her to both own the home and also receive the balance after the mortgage pay-off in an amount which precisely equaled $456,000.00. Rather, the terms of the MPSA, provided that she could receive a lump-sum payment of $456,000.00, or alternatively, receive the home paid in full, with the remainder of the funds paid to her.

Accordingly, the district court correctly concluded that Joe did not breach the MPSA and that he did not owe Hirsa any additional equalization funds under its terms. Hirsa's position on appeal—that she is still owed an additional $7,781.97, along with interest and attorney's fees—is not only unreasonable, but it is mathematically flawed and not supported by the law. As such, her appeal must be rejected, and the district court's decision, affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DETERMINED JOE COMPLIED WITH THE MPSA AND THAT HIRSA IS NOT ENTITLED TO ANY ADDITIONAL EQUALIZATION FUNDS OR INTEREST THEREON.

"Property settlement agreements in marital dissolutions are governed by contract law." *In re Harms*, 2022 MT 41, ¶ 12, 408 Mont. 15, 504 P.3d 1108 (citing *In re Marriage of Mease*, 2004 MT 59, ¶ 20, 320 Mont. 229, 92 P.3d 1148); *see also*, § 40-4-201(5), MCA. In interpreting the terms of marital property settlement agreement, the Court's role "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." *Cortese v. Cortese*, 2008 MT 28, ¶ 10, 341 Mont. 287, 176 P.3d 1064 (quoting § 1-4-101, MCA). "[I]t is not the proper role of the judiciary to insert modifying language into clearly written and unambiguous instruments where the parties to the instrument declined to do so." *Creveling v. Ingold*, 2006 MT 57, ¶ 12, 331 Mont. 322, 132 P.3d 531.

When parties have stipulated to a division of property, a court must honor their agreement, absent a finding of unconscionability, which Hirsa has never argued or asserted on appeal. *Wagenman v. Wagenman*, 2016 MT 176, ¶ 14, 384 Mont. 149, 376 P.3d 121. "The public policy of the State of Montana is to promote the amicable settlement of disputes between parties to a marriage" and a court must honor the terms of a separation agreement to which the parties have agreed, and which is not unconscionable. *Wagenman*, ¶ 14.

Here, the plain language of the parties' MPSA provided two options for Hirsa—a lump-sum payment of $456,000.00 or a pay-off of the mortgage by Joe, with the remaining funds to Hirsa. Nothing in the agreement required a precise $456,000.00 calculation if Hirsa elected the pay-off, especially considering the five months discrepancy from the time of the agreement to the actual date of pay-off. The parties agreed at mediation to an equalization payment equal to what the house was worth ($456,000.00) and that the mortgage pay-off amount at that time was $223.959.46. After mediation, Joe paid the mortgage for the next five months, paid off the loan in August, and remitted the difference to Hirsa, which she accepted and deposited. Such acceptance amounts to both waiver and an accord and satisfaction. *See* § 30-3-311, MCA (accord and satisfaction); § 1-3-207, MCA ("[a]cquiescence in error takes away the right of objecting to it").

Considering Joe's payment of the mortgage for April-August, his eventual mortgage pay-out, and a check to Hirsa for the difference, this Court must conclude Joe complied with the MPSA. A "[s]light delay of payment" is not "a material breach" of a settlement agreement which does not contain a "time is of the essence" clause. *In re Abulyan*, 2019 Bankr. LEXIS 3046, 2019 WL 4745282 at *19-21 (9th Cir. BAP September 27, 2019). As detailed above, Hirsa actually received more than the amount she bargained for, and more than she now seeks on appeal. Regardless, she is ultimately only entitled to an "equitable" share of the marital property, not necessarily an "equal" division. *In re Marriage of Kostelnik*, 2015 MT 283, ¶ 18, 381 Mont. 182, 357 P.3d 912.

Hirsa's claimed entitlement to an additional $7,781 is based on faulty math as her calculation wholly discounts the house payments made by Joe for April through the mortgage pay-off in August for which she received the benefit of, and fails to include her share of the property tax obligations for April-June, and the benefit of the tax payment on May 4, 2023, for July through December. A party cannot elect one option under a contract, but claim breach of the other. *Dow v. Safeco Ins. Co. of Am.*, 2023 U.S. Dist. LEXIS 88194, *5-6, 2023 WL 3572444 (reasoning that "technical breach" of underpaid losses by Safeco was a "purely academic" argument by virtue of the fact plaintiff "elected to have the property repaired and receive payment for the actual and necessary costs of those repairs").

Hirsa's argument must be rejected on both contract principles and equitable grounds. This Court has applied the principles of equity in other settlement agreement disputes, and specifically in the context of dissolution cases. Generally, these are cases in which it is clear that one party is attempting to enforce a provision of an agreement to "stick it to" the other party. For example, in *In re Marriage of Stoneman*, 2008 MT 448, ¶¶ 37-40, 348 Mont. 17, 199 P.3d 232, this Court declined to strictly enforce the terms of a dissolution decree by requiring forfeiture of the other's interest in a home when mortgage payments were missed on the basis equity required consideration of the party's motivation "to create difficulties for the other." *Stoneman*, ¶ 38.

The same result is demanded here. Under both principles or equity, and a reasonable interpretation of the plain language of the MPSA, Hirsa's arguments on appeal are without merit. Joe complied with the material terms of the MPSA by paying off the mortgage on the marital home and remitting the balance to Hirsa. Hirsa's calculation of a shortage is erroneous, and regardless, she received more than an equitable division. Because she was not due any additional equalization funds, and/or the amount was not certain, she is not entitled to any pre-judgment interest thereon. *Williams v. Williams*, 2011 MT 63, ¶ 28, 360 Mont. 46, 250 P.3d 850; *see also*, § 27-1-211, MCA.

Similarly, because Joe does not owe Hirsa any additional equalization funds under the MPSA, she is not entitled to any post-judgment interest. *In re Marriage of Mannix*, 242 Mont. 137, 140, 788 P.2d 1363, 1365 (1990) (entitlement to post-judgment interest relies on the prerequisite that a person is obligated by court-judgment for a specific amount). The district court's decision should be affirmed.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING HIRSA'S REQUEST FOR ATTORNEY FEES.

Hirsa offers little authority in support of her request for fees, let alone explain how the district court abused its discretion in failing to award them to her. While she attempts to place all blame on Joe's "unreasonable" and "inexplicable" failure to pay her $7,781, it is Hirsa that is "unreasonable" in failing to consider the plain language of the MPSA and her receipt of the marital home free and clear of any mortgage obligations. It is evident from this record that Joe complied with the terms of MPSA in good faith and Hirsa received the equitable benefit of her bargain, if not more so. As such, no award of attorney fees was justified and the district court did not abuse its discretion in denying the same.

Indeed, this Court has held that an award of attorney fees "must be based on necessity, must be reasonable, and must be based on competent evidence." *In re Marriage of Zander*, 262 Mont. 215, 227, 864 P.2d 1225, 1233 (1993). If based on equity, an award of attorney fees is "rarely" justified. *McCann v. McCann*, 2018 MT 207, ¶ 29, 392 Mont. 385, 425 P.3d 682.

CONCLUSION

As established by the above arguments and legal authorities, the district court did not abuse its discretion, or otherwise err, when it denied Hirsa's Motion to Enforce the MPSA. Accordingly, Joe respectfully requests the Court to affirm the district court's decision in all respects.

Respectfully submitted this 25th day of September, 2024.

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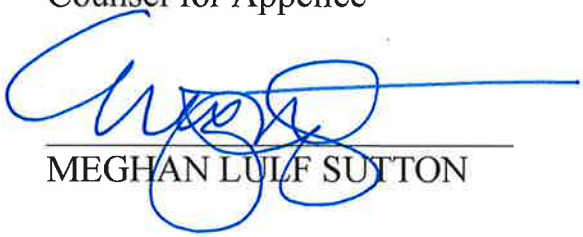

MEGHAN LULF SUTTON

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this response brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 (3,497) words, excluding certificate of service and certificate of compliance.

/s/ Meghan Lulf Sutton
MEGHAN LULF SUTTON

CERTIFICATE OF SERVICE

I, Meghan Lulf Sutton, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-25-2024:

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