Circuit Court for Montgomery County
Case No.: 427957V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 138

September Term, 2018

CONSTANDINO SOFILLAS

v.

EVA IBOLYA TELEKI SOFILLAS

Graeff,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Salmon, J.

Filed: May 16, 2019

Constandino Sofillas ("Mr. Sofillas"), and Eva Ibolya Teleki Sofillas ("Ms. Sofillas"), were divorced on October 18, 2016 in the Circuit Court for Montgomery County, after more than twenty-five years of marriage. A "Voluntary Separation and Property Settlement Agreement" executed on August 1, 2013 ("the PSA"), was incorporated, but not merged, into the divorce judgment.

Less than two months after they were divorced, Mr. Sofillas filed in the same court a civil action against Ms. Sofillas for breach of the terms of the PSA. Ms. Sofillas filed a counter-complaint for breach of the PSA and sought specific performance of certain of its terms and the sale of certain jointly titled real property. She prayed a jury trial.

Following a two-day trial, the case was submitted to the jury on a special verdict sheet. The jurors found that both parties had breached the PSA; awarded Mr. Sofillas $20,101 in damages; and awarded Ms. Sofillas $228,373 in damages. The court entered separate judgments in those amounts.[1] The court also entered a separate order reflecting the parties' agreement to sell their interest in a timeshare.

Mr. Sofillas appeals from the judgments entered against him, presenting three questions, which we have rephrased:

> I. Did the circuit court err by permitting the claims for breach of the PSA to be tried to a jury?
>
> II. Did the circuit court err by making certain evidentiary rulings?

[1] The judgment in favor of Ms. Sofillas was entered on November 13, 2017 in an incorrect amount. A corrected judgment was entered two days later.

III. Did the circuit court err by permitting enforcement of the terms of the PSA even though it (allegedly) was void for vagueness?

For the following reasons, we answer those questions in the negative and shall affirm the judgments of the circuit court.

I.

FACTS AND PROCEEDINGS

Mr. Sofillas and Ms. Sofillas were married on May 28, 1989. Three children were born to the marriage, all of whom were over 18 at the time of the divorce. Prior to the divorce, the parties owned a house located at 22220 Canterfield Way in Germantown ("the Marital Home"). They also owned a townhouse at 21210 Watercress Circle in Germantown ("the Watercress Property") that they rented. Finally, they each owned a one-third interest, along with their eldest son, in a timeshare property located in Ocean City, Maryland ("the Timeshare").

A. The PSA

On August 1, 2013, the parties executed the PSA.[2] The pertinent terms of their agreement were as follows.

In Paragraph 1, they agreed to live separate and apart.

Paragraph 2 governed real property owned by the parties. They agreed that Mr. Sofillas would continue to live in the Marital Home until the tenant in the Watercress Property moved out, at which time he would move into that property. Ms. Sofillas then

[2] Neither party was represented by counsel in regard to the preparation and execution of the PSA. It was drafted by Ms. Sofillas using forms she found on the internet.

would be permitted to move back into the Marital Home "until such time as the property, through mutual agreement, is sold" with the proceeds of the sale to be split evenly.

The Watercress Property would "remain as a rental if possible to generate income[,] which shall be used to help pay off bills." The Watercress Property would "then be occupied by [Mr. Sofillas]" and both parties would "remain on the Deed until such time as the property, through mutual agreement, is sold" with the proceeds to be split evenly.

In Paragraphs 3, 4, and 5, the Sofillases released each other from any obligation for spousal support, for any debts incurred by the other after the date of the PSA, except as specifically provided, and for court costs and attorneys' fees.

Paragraph 6, titled "Other Joint Expenses," provided that the parties would jointly be responsible for the expenses associated with a first mortgage, a second mortgage, a home equity line of credit on the Watercress Property, insurance (homeowners, medical, and automobile), telephone and cell phone bills, home maintenance, utilities, grocery bills, family travels, credit card bills, and "any other recurring monthly bills and expenses not listed until they are divorced and each then liable for their own expenses." They further agreed to "split the cost of the rental [Ms. Sofillas] shall find to live in." After the divorce, the Sofillases agreed that they would continue to share "joint responsibility" for their "children's incurred expenses – including but not limited to educational expenses."

At Paragraph 7, the parties disclaimed any interest in each other's retirement assets except that they agreed that they would equalize their pensions by taking money from Ms.

Sofillas's pension and moving it to Mr. Sofillas's pension (while accounting for penalties incurred by Ms. Sofillas for the early withdrawal).

At Paragraph 8, the parties agreed that they would each retain possession of any personal property that "came from or belongs to the family of each" and of any gifts received by each individually during the marriage. They agreed that the proceeds from the sale of their "sports and other memorabilia collection" would be divided equally "even if [sic] after the marriage has been dissolved." They also agreed that they would divide by mutual agreement other jointly titled personal property and/or sell it and share equally in the proceeds.

At Paragraph 9, they agreed to file joint federal and state income tax returns so long as they were legally eligible to do so.

B. <u>The Divorce Case</u>

The parties continued to live together in the Marital Home until January 2014, when Ms. Sofillas moved into a rental property. In June 2014, Mr. Sofillas moved into the Watercress Property. The parties sold the Marital Home in a short sale in December 2014.[3]

On January 20, 2015, Ms. Sofillas filed for divorce in the circuit court. On October 18, 2016, following a hearing before a family law magistrate, the parties were granted an absolute divorce. As previously mentioned, the PSA was incorporated, but not merged, into the divorce judgment.

[3] The parties bought the Marital Home for $699,000 and sold it for $450,000.

C. The Civil Suit

Less than two months later, Mr. Sofillas filed the instant action for breach of the PSA. He alleged that Ms. Sofillas breached Paragraph 7 of the PSA by refusing to equalize their pensions; that shortly after the execution of the PSA, she had drawn $49,000 on the home equity line of credit without his consent, causing the monthly payments to rise; that Ms. Sofillas had received their federal income tax refund for 2014 but had not split the refund with him; that they had not sold their interest in the Timeshare[4]; and that they were disputing ownership of various items of personal property. He asked the court to order Ms. Sofillas to deposit $49,000 back into the home equity line of credit; to award him damages of $150 per month since September 2013 to account for the increase in the monthly payments on the line of credit, and one-half of the 2014 income tax refund; to order Ms. Sofillas to sign over her interest in the Watercress Property to Mr. Sofillas; to order Ms. Sofillas to transfer money from her pension to Mr. Sofillas; to order the sale of their interest in the Timeshare, with the proceeds to be divided evenly between Mr. Sofillas, Ms. Sofillas, and their son; and to award him attorneys' fees and other appropriate relief.

Ms. Sofillas filed a counter-complaint and a demand for a jury trial. In Count I, she alleged that Mr. Sofillas had breached the PSA by selling and gifting sports memorabilia without her consent and without sharing the profits and by refusing to sell the remaining memorabilia collection; by refusing to return certain personal property to Ms. Sofillas and by refusing to sell and/or divide their remaining jointly titled personal property; by refusing

[4] The Timeshare is not specifically mentioned in the PSA.

to share in joint educational expenses for their children; by not paying half of the cost of Ms. Sofillas's rental expenses from August 2013 until they were divorced in October 2016; by not paying his share of jointly acquired credit card debt and other joint bills; and by continuing to live in the Watercress Property without consistently paying the mortgage and/or the monthly payments on the home equity line of credit; and that he failed to disclose his ownership interest in certain real property in Pennsylvania. In Count II, Ms. Sofillas sought specific performance of the terms of the PSA relative to the sale of sports memorabilia, the division of personal property, and the sale of the timeshare. In Count III, she requested that the court order the sale of the timeshare, with the proceeds divided three-ways. In Counts IV and V, Ms. Sofillas asked the court to order the Watercress Property sold, with the proceeds divided evenly.

Mr. Sofillas filed an amended complaint in which he added an allegation that Ms. Sofillas had "unjustly [taken] items accumulated during the marriage" and attaching a four-page list of 95 items of property and the alleged value of each item.

The case was tried to a jury over two days in November 2017. In his case, Mr. Sofillas testified and called: 1) Ms. Sofillas; 2) John Sofillas, his brother; and 3) the parties' daughter. In her case, Ms. Sofillas called Rodney Currence, who was admitted by the court as a sports memorabilia expert. During the trial, the parties came to an agreement to sell their interest in the timeshare. They further stipulated that the Watercress Property was valued at $377,000.

In his testimony, Mr. Sofillas admitted that he had refused to cosign student loans for one of their children, but claimed he could not afford to pay for his children's higher education expenses.[5] He claimed to have sold most of the sports memorabilia collection for cash to numerous individuals and to have realized from the sales between $5,800 and $6,000, which he offered to split with Ms. Sofillas. Ms. Sofillas's expert witness opined that the sports memorabilia collection had a conservative value of between $15,000 and $20,000, however.

In her testimony, Ms. Sofillas admitted to making the withdrawal from the home equity line of credit, but claimed that she did so with Mr. Sofillas's knowledge and consent for the purpose of paying down higher interest student loans for their children. She admitted that she had not taken steps to transfer to Mr. Sofillas any portion of her pension accounts, but disputed that he was entitled to half of one individual retirement account that she inherited upon her father's death. She testified that the parties had about $120,000 in equity in the Watercress Property and that she had asked Mr. Sofillas to move out of that property so that they could sell it and split the net proceeds. She introduced documentary evidence and testified about numerous joint expenses incurred before the parties were divorced that she alone had paid.

[5] At the time of trial, Mr. Sofillas has not worked outside the home for more than ten years. His income consisted of $2,500 per month in long-term disability insurance benefits. He had previously worked as a chef but was forced to retire due to hip and knee problems.

The case was sent to the jury on a special verdict sheet comprising four multi-part questions. As to Mr. Sofillas's claims, in Question 1, the jurors were asked to decide if Ms. Sofillas breached the PSA. If they answered "Yes" to that question they were directed to proceed to Question 2 and to determine what, if any, damages Mr. Sofillas incurred relative to Ms. Sofillas's withdrawal of $49,000 from the home equity line of credit and her alleged breach of the agreement to equalize the parties' pensions. As we shall discuss, the court concluded that there was no evidence from which the jury could award damages relative to Mr. Sofillas's claim that Ms. Sofillas had wrongfully taken personal property belonging to him.

As to Ms. Sofillas's counterclaims, in Question 3, the jurors were asked to decide if Mr. Sofillas had breached the PSA. If the answer was "Yes" to that question the jurors were directed to proceed to Question 4, which asked what, if any, damages Ms. Sofillas incurred related to: "Sports and other memorabilia collection"; "The personal property of [Ms. Sofillas]"; "Gifts to [Ms. Sofillas]"; "The joint property of the parties"; "The educational expenses of the parties' children"; "The rental costs of [Ms. Sofillas]'s rental property"; "The agreed upon joint expenses"; "The credit card expenses"; and "The [Watercress Property]."

The jurors found that both parties had breached the PSA. They awarded Mr. Sofillas $20,101 in damages relative to the equalization of the parties' pension accounts, but did not award him any damages relative to Ms. Sofillas's withdrawal of funds from the home equity line of credit. On her counterclaims, the jurors awarded Ms. Sofillas $10,000 for

sports memorabilia; $9,135 for personal property; $50,500 for educational expenses for the children; $18,000 for rental property expenses she incurred; $73,238 for agreed upon joint expenses; $7,500 for credit card expenses; and $60,000 for her share of the equity in the Watercress Property.

The court entered judgments in favor of each party on November 13, 2017 and, two days later, entered a corrected judgment as to Ms. Sofillas. On November 17, 2017, the court entered an order directing the sale of the Timeshare, as agreed upon by stipulation during trial.

Eleven days later, Mr. Sofillas moved for a new trial or, in the alternative, to amend the judgment arguing, *inter alia*, that the case was "[n]ot [a]ppropriate for [r]esolution by a [j]ury"; that the PSA was unenforceable for vagueness; that the jury's verdict awarding Ms. Sofillas half the equity in the Watercress Property was inconsistent with a ruling made by the court during trial interpreting the PSA to permit Mr. Sofillas to live at the Watercress Property until the parties mutually agreed to sell it; and that the court erred by not admitting into evidence an exhibit listing the personal property Mr. Sofillas claimed and its value. Before the court could rule upon that motion and before Mr. Sofillas noted this appeal, he filed a voluntary petition for bankruptcy, triggering the automatic stay provision set forth at 11 U.S.C. § 362(a). Thereafter, while the stay remained effective, the circuit court issued an order denying Mr. Sofillas's post-trial motion. That order was of no effect, however. *See Kochhar v. Bansal*, 222 Md. App. 32, 39-42 (2015) (with some limited exceptions, actions taken in violation of the automatic stay are void *ab initio* and with no effect). After

the Bankruptcy Court granted relief from the stay, Mr. Sofillas petitioned for *in banc* review pursuant to Md. Rule 2-551. He subsequently withdrew his *in banc* petition and noted the instant appeal which, for the reasons noted below, was timely.[6]

[6] Ms. Sofillas moved to dismiss the appeal as untimely in the circuit court and before this Court. By order of this Court dated May 31, 2018, her motion was denied. She does not renew her motion to dismiss the appeal in her brief. We explain why the appeal was timely.

Because Mr. Sofillas's motion for a new trial was filed beyond ten days and, thus, did not toll the running of the 30-day time to appeal, he would ordinarily have been obligated to note his appeal no later than December 18, 2017. Before that date, however, he filed for bankruptcy, triggering the automatic stay. The bankruptcy stay did suspend the running of the 30-day time to appeal. *See, e.g., In re Hoffinger Indus., Inc.*, 329 F.3d 948, 952-53 (8th Cir. 2003) (holding that if the time to appeal has not expired prior to the filing of a bankruptcy petition then 11 U.S.C. § 108(c) extends the period in which an appeal may be noted until the later of the applicable statutory period or 30 days after the expiration or termination of the automatic stay); *Farley v. Henson*, 2 F.3d 273, 275 (8th Cir. 1993) (automatic stay applies to an "appeal brought by a debtor from a judgment obtained against [him] as a defendant"); *accord In re Byrd*, 357 F.3d 433, 440 (4th Cir. 2004).

On February 2, 2018, the Bankruptcy Court entered an order granting relief from the automatic stay to permit Mr. Sofillas to pursue the instant appeal. By operation of the Federal Rules of Bankruptcy, the order granting relief from the stay did not take effect for 14 days, or until February 16, 2018. *See* Fed. R. Bankr. P. 4001(a)(3) ("An order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise."). Pursuant to 11 U.S.C. § 108(c), Mr. Sofillas had 30 days from that date to note an appeal, or until March 18, 2018. Because that date fell on a Sunday, however, the deadline was extended until Monday, March 19, 2018, which is the day he noted this timely appeal. *See* Md. Rule 1-203(a) (computation of time).

Mr. Sofillas's filing of an *in banc* petition in the circuit court also did not deprive this Court of jurisdiction because, before his petition was heard or ruled upon, Mr. Sofillas withdrew the petition and noted this appeal. *See* Md. Rule 2-551(h) (stating that if a party "seeks ***and obtains*** review under this Rule[, he or she] has no further right of appeal")(emphasis added)). Because the *in banc* petition was withdrawn prior to any review in the circuit court, Mr. Sofillas did not forfeit his right to appeal from the judgments.

II.

DISCUSSION

A. Question One

Mr. Sofillas contends that it was improper for Ms. Sofillas's claims against him to be tried to a jury because, in her counter-complaint, she made "inherently equitable claims" for specific performance, for sale in lieu of partition, and for transfers of property. He maintains, moreover, that testimony and evidence at trial improperly focused upon "the contributions of the parties towards the acquisition of income during the marriage," which is not proper in a breach of contract action.

Ms. Sofillas responds that these issues are wholly unpreserved. We agree.

Ordinarily, an appellate court will not decide any non-jurisdictional issue "unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). Mr. Sofillas made the argument he raises on appeal for the first time in his motion for a new trial or to amend the judgment.[7] As this Court explained in *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 483 (2002), "[o]ne may not preserve an issue *nunc pro tunc*" by raising it in post-trial motions. To the extent Mr. Sofillas challenges the denial of his motion for a new trial, for the reasons discussed above, the order entered by the trial

[7] In fact, at trial, it was Mr. Sofillas's attorney (not his counsel on appeal) who attempted to place equitable issues before the jury, arguing in his opening statement that the jury should decide what was fair and equitable under the terms of the PSA. Ms. Sofillas's attorney objected to this framing, arguing that the jury should only be permitted to decide if the PSA had been breached and, if so, what damages, if any, each party incurred as a result. The court agreed with Mrs. Sofillas, sustaining the objection and admonishing Mr. Sofillas's counsel to refocus his opening remarks on the contract issues.

court denying the motion for a new trial was a nullity because it was entered before the grant of relief from the automatic stay, and thus there is no ruling for this Court to review. In any event, even if this issue had been preserved, we would find no merit in it. A separation agreement that is incorporated but not merged into a judgment of divorce "survives as a separate and independent contractual arrangement between the parties" that may be enforced through a breach of contract action. *See Johnston v. Johnston*, 297 Md. 48, 56-58 (1983). Though Ms. Sofillas did plead in the alternative, making equitable claims, only the breach of contract claims raised in her counter-complaint were before the jury for decision.

B. Question Two

Mr. Sofillas contends that the trial court erred by ruling, after the close of all the evidence, that his Exhibit 7, which was the list of personal property he alleged that Ms. Sofillas had wrongfully retained, had not been admitted into evidence. Ms. Sofillas's attorney brought to the court's attention that Exhibit 7 had not been admitted during a discussion of the parties' proposed verdict sheets. At that time, the trial judge checked with the courtroom clerk, who verified that the exhibit had been marked for identification, but not admitted.[8] Consequently, the court granted Ms. Sofillas's motion to strike a

[8] The transcript bears this out. When Mr. Sofillas's attorney asked that Exhibit 7 be "marked as an exhibit and entered into evidence," Mr. Sofillas had not identified the list or testified as to how he had compiled it or how he had arrived at the values for the items of property. After Mr. Sofillas's attorney made that request, the court did not rule that it be admitted. The parenthetical notation in the transcript that the exhibit was "received in evidence" is mistaken.

damages question from the verdict sheet relative to that property. During this entire discussion, Mr. Sofillas's attorney was silent. He did not argue, as he does on appeal, that Exhibit 7 had, in fact, been admitted. Having failed to bring this alleged error to the court's attention at a time when the court could have taken some action to remedy it, Mr. Sofillas may not complain on appeal that Exhibit 7 (and the claim for damages arising from it) should have gone before the jury.

Mr. Sofillas next contends that the court erred by permitting Ms. Sofillas to testify as to her interpretation of certain provisions of the PSA, while sustaining her attorney's objections to his attempts to testify as to his interpretation. Appellant's trial counsel did not object to Ms. Sofillas's testimony about the agreement, however, and thus appellant may not be heard to complain on appeal that the court erred by permitting appellee to so testify. *See* Md. Rule 5-103(a)(1) (necessity of an objection to preserve a claim of error as to a ruling admitting evidence). Moreover, the court did not abuse its discretion by sustaining objections when Mr. Sofillas was questioned about the terms of the PSA. Contrary to the argument being made on appeal, Mr. Sofillas was not being asked to testify to his understanding of the meaning of certain terms in the PSA. Rather, he was being asked to testify as to the existence, *vel non*, of certain terms in the PSA.[9] The PSA was in

[9] For example, his counsel asked him whether the PSA stated that the sports memorabilia collection had to be sold at "the appraised value." After an objection to that question was sustained, the court suggested that Mr. Sofillas's counsel instead refer to the terms of the PSA. Thereafter, Mr. Sofillas's counsel read the relevant portion of the PSA to Mr. Sofillas and then questioned him about it.

evidence and, thus, Mr. Sofillas's testimony as to the substance of the PSA was not relevant.

C. Question Three

In his final assertion of error, Mr. Sofillas contends that the PSA was unenforceable for vagueness. Like the other issues raised on appeal, this argument is unpreserved, if not affirmatively waived. Mr. Sofillas filed a complaint for breach of the PSA and argued that the terms could and should be enforced against Ms. Sofillas to his benefit. Mr. Sofillas did not object to the verdict sheet, which permitted the jurors to award damages to Ms. Sofillas for breach of the terms of the PSA that he now argues are unenforceable. Having raised this argument for the first time in his post-trial motion, we decline to address it on appeal. *See Steinhoff*, 144 Md. App. at 484 ("a post-trial motion to reconsider is not a time machine in which to travel back to a recently concluded trial in order to try the case better with hindsight").

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED.

COSTS TO BE PAID BY THE APPELLANT.