

Circuit Court for Montgomery County
Case No. 160030FL

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

Nos. 1657 & 1664

September Term, 2019

FREDERICK P. SMITH

v.

ESTHER D. SMITH

Fader, C.J.,
Nazarian,
Shaw Geter,

JJ.

Opinion by Fader, C.J.

Filed: November 13, 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.

Frederick P. Smith (“Husband”), the appellant, contends that the Circuit Court for Montgomery County erred “by entering a final money judgment against” him upon confirming an arbitration award in favor of his former spouse, Esther D. Smith (“Wife”), the appellee. The arbitrator had ordered Husband to pay Wife \$132,907 in alimony arrears that the arbitrator determined was overdue under the terms of the parties’ marital settlement agreement. Upon confirming the award, the circuit court entered a money judgment against Husband in the same amount.

In this appeal, Husband expressly declines to challenge the circuit court’s confirmation of the arbitration award, but nonetheless challenges the court’s entry of the money judgment. Husband’s appeal is premised on a fundamental misunderstanding of the role of a court in considering a petition to confirm an arbitration award. Once the court decided to confirm the arbitration award, it was obligated to enter a money judgment consistent with that award, which it did. We discern no error by the circuit court in entering the money judgment and, therefore, will affirm.

BACKGROUND

The Settlement Agreement

This dispute centers on the alimony provisions of the parties’ 50-page settlement agreement, dated December 6, 2011, which they entered in connection with their divorce. The agreement was incorporated, but not merged, into the circuit court’s 2012 judgment of absolute divorce. The agreement provided for two “phases” of alimony payments. During Phase I, which lasted from January 1, 2012 through February 1, 2018, Husband was to pay

alimony of \$27,500 per month, subject to adjustment only in the event of an “economic disaster” befalling Husband. Phase I alimony is not at issue in this appeal.

During Phase II, which commenced March 1, 2018 and will last until March 1, 2023, Husband is required to pay “alimony in the amount equivalent to 15% of Husband’s income.” For purposes of Phase II alimony, Husband’s income is limited to that received from “medical services . . . reflected on his IRS Form W2 and IRS Form K1s from his professional corporation,” and includes “wages, profits, and dividends from Husband’s professional corporation or any successor entity or any other entity for which Husband provides substantial medical services, and any other wages, salary or other compensation for personal services.” Such income is to be paid monthly, “calculated initially using Husband’s income . . . for the previous calendar year.”

Sections 6.3 and 6.4 of the settlement agreement provide for a “true-up” calculation of Husband’s Phase II alimony obligation once Husband’s 2018 tax returns are finalized, “no later than November 30th of each year.”¹ Section 6.4 of the settlement agreement specifies the “True Up Procedures” for the recalculation. Specifically, each year, once Husband provides his executed tax returns (no later than November 30), the parties are to determine whether the amount paid “for the preceding year is correct.” If not, and if Husband paid too little, he is required to make up for the shortfall in two equal shares in the next two alimony payments. If Husband paid too much, he may deduct the amount of the overpayment in equal shares over the next eight alimony payments.

¹ In other words, the “true-up” for Husband’s 2018 alimony obligations was to occur when he provided his 2018 tax returns, no later than November 30, 2019.

In section 6.5 of the settlement agreement, the Smiths agreed to submit any disputes concerning the calculation of Husband’s Phase II income to an arbitrator, “who shall determine, in the Arbitrator’s sole and absolute discretion, the amount of Husband[’s] Phase II Income for the period(s) in dispute.”² The agreement prohibits Husband from reducing the “level of alimony payable to Wife” during the arbitration process. The arbitrator’s decision “shall be binding on the parties.”

The Arbitration

Beginning March 1, 2018, Husband began paying Wife alimony of \$14,577 a month based on his calculation of his 2017 income. Wife contended that Husband had miscalculated the amount of his 2017 income, based on the definition of income provided in the settlement agreement, and initiated the agreement’s dispute resolution process.³ The arbitrator ultimately agreed with Wife, concluded that Husband should have been paying \$25,653 per month based on his 2017 income, and calculated that he therefore owed

² The agreement named a specific arbitrator, Walter Pennington, CPA, and included a provision permitting him to appoint a successor, who “shall be a duly licensed certified public accountant practicing in Montgomery County, Maryland.” Here, Mr. Pennington was unavailable and selected his successor. Neither party challenges the selection of the successor arbitrator.

³ The crux of the dispute before the arbitrator concerned whether Husband was entitled to take into account certain losses incurred in 2017 in calculating his income for purposes of making the Phase II alimony payments during 2018. The arbitrator determined that he was not. Husband does not contest that determination in this appeal, so we do not address it further.

\$132,907 in arrears.⁴ The arbitrator ordered that amount to be paid in two equal installments of \$66,453 each, payable with the next two monthly alimony payments.

Husband filed a petition to vacate or modify the arbitration award. Wife filed a counter-petition to confirm the arbitration award. After the court consolidated the two actions and held a hearing, the court granted Wife’s petition, denied Husband’s petition, ordered that the amount of the alimony payment be modified to \$25,653 per month, and entered judgment against Husband and in favor of Wife “in the amount of \$132,907 for alimony arrearage for the period March, 2018 through and including February, 2019, as set forth in the Arbitration Award.” After the court denied Husband’s motion to alter or amend the judgment, Husband noted a timely appeal.

DISCUSSION

The Maryland Uniform Arbitration Act, §§ 3-201 through 3-234 of the Courts and Judicial Proceedings Article (2020 Repl.), “is a comprehensive statute governing the arbitration process in Maryland.” *WSC/2005 LLC v. Trio Ventures Assocs.*, 460 Md. 244, 252 (2018). Once an award is issued, a party may move to correct, modify, or vacate the award. Cts. & Jud. Proc. §§ 3-223, 3-224. The court must modify or correct the award if: (1) “[t]here was an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award”; (2) the award addressed “a matter not submitted to [the arbitrators] and the award may be corrected without affecting the merits of the decision upon the issues submitted”; or (3) “[t]he award

⁴ The arbitrator’s initial award was in a slightly different amount. After Husband identified a calculation error, the arbitrator adjusted the award to \$132,907.

is imperfect in a matter of form, not affecting the merits of the controversy.” *Id.* § 3-223(b).

The court must vacate an arbitration award if:

- (1) An award was procured by corruption, fraud, or other undue means;
- (2) There was evident partiality by an arbitrator appointed as a neutral, corruption in any arbitrator, or misconduct prejudicing the rights of any party;
- (3) The arbitrators exceeded their powers;
- (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement, refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of § 3-213 of this subtitle, as to prejudice substantially the rights of a party; or
- (5) There was no arbitration agreement as described in § 3-206 of this subtitle, the issue was not adversely determined in proceedings under § 3-208 of this subtitle, and the party did not participate in the arbitration hearing without raising the objection.

Id. § 3-224(b). A court may also vacate an arbitration award “for manifest disregard of the law.” *WSC/2005 LLC*, 460 Md. at 252.

By contrast, if a party petitions the court to confirm the award, the court is required to do so “unless the other party has filed an application to vacate, modify, or correct the award within the time provided[.]” Cts. & Jud. Proc. § 3-227(a) & (b). If the court confirms the award, “a judgment shall be entered in conformity with the order.” *Id.* § 3-228(a). Such a “judgment may be enforced as any other judgment.” *Id.*

“A circuit court’s decision to grant or deny a petition to vacate or confirm an arbitration award is a conclusion of law, which we review without deference.” *WSC/2005 LLC*, 460 Md. at 253.

THE CIRCUIT COURT DID NOT ERR IN ENTERING A FINAL MONEY JUDGMENT AGAINST HUSBAND.

Husband’s approach to this appeal is confusing. On the one hand, he expressly declines to contest the circuit court’s confirmation of the arbitration award. His reply brief is particularly adamant on that point, stating that he has made “it painstakingly clear that he does not seek to challenge the substance of the arbiter’s award,” and that his appeal “explicitly does not concern the confirmation or vacating of the arbiter’s award.” On the other hand, he contends that the circuit court erred in entering a money judgment based on that arbitration award. Those positions are inconsistent. As Wife points out, § 3-228(a) of the Courts Article requires a court that grants a motion to confirm an arbitration award to enter judgment “in conformity with the order.” Here, the arbitrator’s award calculated Husband’s 2017 income and determined that based on that calculation, Husband owed Wife \$132,907 in alimony arrears. As a result, had the court confirmed the arbitration award without entering a money judgment against Husband in that amount, it would have failed to comply with the clear mandate of § 3-228(a).

Husband nonetheless argues that the circuit court erred in entering a money judgment because, he contends, the arbitrator’s award was not final. The reason the award was not final, he asserts, is because the amount of the initial Phase II alimony calculation, based on Husband’s 2017 tax returns, was always tentative, pending the “true-up” required after receipt of Husband’s 2018 tax returns (toward the end of 2019). Thus, he argues: (1) the award was “not yet ripe for adjudication”; and (2) entering a money judgment “contravenes the plain language of the Settlement Agreement.” (Emphasis removed).

With respect to ripeness, Husband’s contention that the arbitration award was somehow “contingent” and not final because the amount owed was subject to a later “true-up” procedure misunderstands the award. The arbitrator calculated (1) the amount of Husband’s 2017 income, (2) the amount he should have paid wife on a monthly basis from March 2018 through February 2019, based on his 2017 income, and (3) the difference between that amount and the amount he actually did pay. There was nothing tentative, uncertain, or contingent about the award, which was final and ripe for confirmation in every meaningful way when the court issued its ruling in July 2019.

It is, of course, correct that the true-up procedure that the parties were to engage in a few months later was likely to result in an adjustment, simply because it was to be based on Husband’s income as reflected on his 2018 tax returns, rather than his 2017 tax returns. If so, that procedure (with or without an arbitrator’s involvement) would have then altered Husband’s obligation going forward from the point of recalculation in either the next two (in the case of an underpayment) or eight (in the case of an overpayment) months. But the true-up procedure would not have altered in any way the fact or amount of Husband’s underpayment from March 2018 through February 2019. All of that was settled finally through the arbitration and, therefore, was ripe for review and action by the circuit court.

Husband’s contention that the plain language of the settlement agreement does not permit entry of a money judgment until after the conclusion of the true-up procedure stems from a misunderstanding of his obligations under the agreement. As an initial matter, we must first determine whether the interpretive issue raised by Husband was within the scope

of the arbitrator’s “sole and absolute discretion,” or was for the circuit court to determine in the first instance. If the interpretive issue was for the arbitrator, then it was no business of the court to review that interpretation unless Husband identified an appropriate ground to vacate or modify the award. *See, e.g., Nowak v. NAHB Research Ctr.*, 157 Md. App. 24, 36 (2004) (stating that where “the issue in dispute clearly falls within [the] scope” of an arbitration clause, it is “for the arbitrator, not the court” (quoting *NRT Mid-Atl., Inc. v. Innovative Props., Inc.*, 144 Md. App. 263, 280-81 (2002))). On the other hand, if the interpretive issue fell outside the scope of what the parties agreed to submit to arbitration, then it was appropriate for the circuit court to interpret the contract in the first instance.

We conclude that the interpretive issue—whether entry of a money judgment to enforce Husband’s overdue alimony payments was appropriate based on the arbitrator’s calculation of Husband’s 2017 income—was properly for the circuit court. The dispute resolution provision of the settlement agreement specifically identifies the narrow issue the Smiths agreed to submit to arbitration as “the amount of Husband[’s] Phase II Income for the period(s) in dispute.”⁵ The dispute resolution provision does not include within the scope of the arbitration a determination regarding the timing or enforcement of Husband’s payment obligations that may be affected by the calculation decision. Such questions were, therefore, properly for the circuit court to decide in the first instance. We now turn to the court’s resolution of those questions.

⁵ Consistent with that narrow, financially oriented scope, the parties identified a certified public accountant as the arbitrator and required that any successor arbitrator also be a certified public accountant.

“The interpretation of a contract . . . is a question of law, subject to *de novo* review by an appellate court.” *4900 Park Heights Ave. LLC v. Cromwell Retail 1, LLC*, 246 Md. App. 1, 19 (2020) (quoting *Erie Ins. Exch. v. Estate of Reeside*, 200 Md. App. 453, 461 (2011)). We interpret contracts—including marital settlement agreements, *see Petitto v. Petitto*, 147 Md. App. 280, 299 (2002)—“under the objective theory of contract interpretation.” *4900 Park Heights Ave.*, 246 Md. App. at 19 (quoting *Credible Behavioral Health, Inc. v. Johnson*, 466 Md. 380, 393 (2019)) (internal quotations omitted). Our “primary goal . . . is to ascertain the intent of the parties in entering the agreement,” *id.*, by “consider[ing] the contract from the perspective of a reasonable person standing in the parties’ shoes at the time of the contract’s formation,” *Ocean Petroleum, Co. v. Yanek*, 416 Md. 74, 86 (2010). “[U]nless a contract’s language is ambiguous, we give effect to th[e] language as written,” *id.*, and are cognizant that our “interpretation should not permit an absurd or unreasonable result,” *Middlebrook Tech, LLC v. Moore*, 157 Md. App. 40, 66 (2004).

Here, the plain language of the parties’ contract establishes that Husband was obligated to make monthly payments to Wife throughout the 12-month period beginning March 1, 2018, in the amount of 15% of his 2017 income, as defined in the settlement agreement. The agreement did not permit Husband to pay less if he thought his actual 2018 income would be less than his 2017 income, nor did it excuse his paying less based on an undercalculation of his 2017 income. Instead, the agreement establishes a firm and definite obligation to pay specific amounts of money (albeit subject to calculation) at specific times.

When the arbitrator determined that Husband had miscalculated his 2017 income and, consequently, had underpaid his obligation to Wife by more than \$10,000 per month, the effect was thus to establish his liability to her for \$132,907 in past due alimony.⁶

The true-up procedure established by the settlement agreement does not retroactively invalidate the obligation to pay the initial monthly alimony payments at the time and in the amounts required by the agreement, nor does it render that obligation unenforceable. Instead, the true-up procedure provides a separate mechanism to adjust future payments to account for differences between Husband's 2017 and 2018 income. Thus, had Husband actually paid 15% of his 2017 income as properly calculated and as and when required, then the difference between that and 15% of his 2018 income should have been paid or recouped, as the case might have been, through future monthly alimony payments as per the agreement. But the prospect of that future adjustment did not absolve Husband from the obligation to make the earlier payments as required by the agreement. The circuit court was thus correct to enter a money judgment for the full amount of Husband's underpayments in connection with its confirmation of the arbitration award.

⁶ We agree with Husband on one point, which is that the arbitrator erred in ordering him to make up his underpayment over the course of the next two monthly alimony payments in May and June 2019. The provision of the settlement agreement that permits Husband to spread a payment over the course of the succeeding two alimony payments is the true-up provision in section 6.4 of the agreement. That does not apply here, where the issue is not a true-up based on the difference between his 2017 and 2018 income, but Husband's underpayment based on his miscalculation of his 2017 income. Because there is no provision in the agreement that would permit him to spread his obligation to make up those underpayments over time, they became due immediately. That error is not relevant to our decision, however, because in either case, the circuit court acted appropriately in entering a money judgment upon confirmation of the award in July 2019.

Notably, were we to accept Husband's interpretation of the settlement agreement, his obligation to make initial alimony payments for any particular year of Phase II alimony would be rendered wholly illusory. According to Husband, the arbitrator was authorized to make a determination regarding his 2017 income and calculate the amount of his underpayment, but neither the arbitrator nor the court was empowered to enforce that determination. If accepted, that interpretation would render his payment of alimony in any amount before a true-up a matter of pure grace on his part.⁷ That is manifestly contrary to the clear intent and requirements of the settlement agreement. It would also render the arbitration proceeding itself a worthless exercise.

Finally, Husband complains that this outcome will force him to pay judgment-rate interest on the money judgment even though the true-up process may ultimately result in a conclusion that he actually owed less than that amount. The flaw in that argument is that he did not owe less. To the contrary, at the times the payments came due, he owed precisely the amount determined by the arbitrator. Any adjustments to payments in the future that may appropriately follow from the true-up process would not alter what he had been obligated to pay in the past. If Husband failed to pay that amount, even after the court

⁷ Husband has taken the position that the risk of this result, if any, is applicable only to the first year of Phase II alimony, because in future years, his initial obligation would be based on income identified in tax returns that would already have been either agreed upon by the parties or decided by an arbitrator. But that is decidedly not so, because under his interpretation, his obligation to make any initial alimony payment is unenforceable by a money judgment until completion of the true-up process for that year, which need not even begin until November of the following year.

correctly entered judgment against him, then interest at the judgment rate is the expected and required consequence.

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