STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1777

In re the Marriage of: Cynthia Ann Sell Nelsen, f/k/a Cynthia Ann Sell, petitioner,
Respondent,

vs.

Daniel Kenneth Sell,
Appellant.

Filed September 17, 2012
Reversed
Connolly, Judge

Stearns County District Court
File No. 73-FA-08-3223

Kevin L. Holden, Holden Law Offices, St. Cloud, Minnesota (for appellant)

Kendra Hagen, Lynne Ridgway, Gray, Plant, Mooty, Mooty & Bennett, P.A., St. Cloud, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant challenges the district court's grant of respondent's motion to reopen the parties' dissolution judgment for fraud and hold an evidentiary hearing. Because we

conclude that the district court abused its discretion in its decision to reopen the judgment and erred in its decision to hold an evidentiary hearing, we reverse.

FACTS

In October 2010, appellant Daniel Sell and respondent Cynthia Nelson executed amendments to their Marital Termination Agreement (MTA). Both the MTA and the amended MTA gave respondent a cash settlement payment of $1,295,000.

Paragraph 20 of the amended MTA provided that respondent would receive $765,000 from the sale of three of the parties' properties by April 1, 2014; paragraph 31 of the amended MTA provided that respondent acknowledged having received $300,000 and that appellant would pay her $230,000 when the amended agreement was executed. The $230,000 was duly paid; thus, respondent received $530,000 in 2010 and would receive $765,000 by April 1, 2014, for the total $1,295,000. An amended judgment was entered in December 2010.

In February 2011, respondent learned that appellant had purchased an apartment building for $522,750; later, she learned that he had paid $400,000 of this amount by taking out two $200,000 mortgages on his residence. On the basis of this information, she moved to reopen the amended judgment on the basis of fraud, seeking either immediate full payment or an evidentiary hearing.

In her affidavit, respondent claimed that: (1) based in part on "the extensive discovery that we had completed" she believed appellant's representation "that he did not have the resources to pay the property settlement" and agreed to wait until April 2014 for payment; (2) upon inquiry, appellant's attorney had told respondent's attorney that

appellant paid the $522,750 for the apartment building with $400,000 in mortgages on his homestead, his earnings, and a gift from his father; (3) appellant had not sold or mortgaged any of his other properties; (4) she realized appellant had some earned income but he would not have "been able to earn and save over $650,000 in . . . seven months"; (5) she found it "very doubtful" that appellant's father had given any "substantial amount of money" to appellant; (6) during the divorce proceedings, appellant had admitted to her that he concealed assets and would tell her where the assets were hidden if their divorce settled out of court; and (7) she believed appellant had concealed assets because "[t]here was no other explanation for [his] ability to pay out over $650,000 in less than one year" after entry of judgment.

The district court granted respondent's motion to reopen the judgment and for an evidentiary hearing. Appellant challenges the grant of that motion.

D E C I S I O N

Except for provisions actually "dissolving the bonds of marriage, . . . the district court may, within one year of a dissolution judgment, relieve a party from the judgment and grant a new trial or other relief for fraud, misrepresentation, or other misconduct of the adverse party. Minn. Stat. § 518.145, subd. 2(3) (2010). "[T]he district court should treat such a motion [for relief under Minn. Stat. § 518.145, subd. 2] as it would a complaint in a separate action alleging fraud." *Doering v. Doering*, 629 N.W.2d 124, 130 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001). "A district court may grant summary judgment in a fraud claim only when there is no genuine issue of material fact

in dispute and where a determination of the applicable law will resolve the controversy." *Id.* (quotation omitted).

Doering reversed a district court's refusal to reopen a dissolution judgment without an evidentiary hearing on the issue of fraud, concluding that "[b]ecause appellant's affidavits are sufficient to present a fact question of fraud, appellant established good cause for an evidentiary hearing on his motion to reopen the judgment." *Id.* at 132. *Doering* is distinguishable: here, respondent's affidavit was not sufficient to present a fact question of fraud.

In the amended MTA, respondent agreed that appellant had already paid her $300,000 and would pay her a further $230,000 when that document was executed, on October 16, 2010. By agreeing to these payments, respondent implicitly acknowledged that they were consistent with appellant's disclosure of his assets, and she explicitly stated in her affidavit that she had done "extensive discovery" as to appellant's assets.

Because she agreed to appellant's payment of $530,000 to her during 2010, respondent presumably thought he had the funds to make those payments. Thus, her claim that appellant concealed assets is based exclusively on his purchase of an apartment building in early 2011. The parties' marriage had been dissolved by entry of judgment in June 2010, and respondent offers no legal support for her alleged right to discover information about how appellant funded a purchase made more than six months after the dissolution. Moreover, respondent concedes that appellant paid more than three-fourths

of the cost of the apartment building by mortgages on his residence;[1] she disputes only the funding of the remaining fourth, $122,750.

She rejects appellant's statement that this amount came from his earnings and from a gift from his father because, in her view, respondent would not have been able to earn and save that much in that time and she found it "very doubtful" that his father would have made a significant gift. She presents no evidence of concealed assets other than her personal belief that appellant could not have paid one-fourth the cost of the apartment building unless he had concealed assets. But this is not evidence of concealed assets.

In *Doering*, the party seeking to reopen the judgment submitted an affidavit stating that, while he knew the other party had a pension plan, he did not know its value, which was over $1,000,000; he also knew that the other party had bank and investment accounts before and during the dissolution of which he had not known either the existence of or the value. *Id*. at 127. Respondent's affidavit said nothing comparable. *See also Ronnkvist v. Ronnkvist*, 331 N.W.2d 764, 765-66 (Minn. 1983) (finding that one party's failure to inform the other of his negotiations for the purchase of additional stock prior to the stipulation and of the purchase of the stock after the stipulation but prior to the entry of judgment breached his duty to disclose and constituted fraud sufficient to set aside the judgment and the proposed purchase); *Hafner v. Hafner*, 237 Minn. 424, 431-34, 54 N.W.2d 854, 859-60 (1952) (finding that one party's failure to disclose to the other party that real property awarded to her did not reach the fence she considered to be the

[1] $400,000 is 76% of $522,750.

boundary of the property was a failure to disclose that amounted to fraud). Again, respondent alleged no comparable failure to disclose and identified nothing which had not been disclosed.

Because this record, even viewed in the light most favorable to respondent, lacks any evidence supporting respondent's allegation of failure to disclose other than respondent's conclusory allegation on the subject, the decision to reopen the judgment and hold an evidentiary hearing was error.

Reversed.