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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PAMELA A. MOZER,

Plaintiff and Appellant,

v.

MICHAEL AUGUSTINE, as
Trustee, etc.,

Objector and Respondent.

B288162

(Los Angeles County
Super. Ct. No. BP168773)

APPEAL from an order of the Superior Court of
Los Angeles County, Barbara R. Johnson, Judge. Affirmed.

Pamela A. Mozer, in pro. per., for Plaintiff and Appellant.

Sacks, Glazier, Franklin & Lodise, Kenneth M. Glazier,
Matthew W. McMurtrey and John A. Scheerer, for Objector and
Respondent.

Pamela A. Mozer petitioned for a court order as a surviving spouse under Probate Code section 850,¹ asserting her husband had, throughout their marriage and without her consent, improperly transferred community property assets to an existing irrevocable trust established for the benefit of his children. In a voluntary mediation during which Mozer was represented by counsel, Mozer and the trustee of the irrevocable trust executed a written settlement agreement resolving Mozer's claims to trust property. However, when the trustee petitioned the probate court to approve the settlement agreement, Mozer opposed it, arguing the settlement agreement was invalid. Following a hearing, the court confirmed the settlement agreement and dismissed Mozer's section 850 petition with prejudice. On appeal Mozer contends her agreement to settle her claim to trust property was procured by the mediator's fraud, undue influence and failure to disclose pertinent conflicts of interests, making the agreement voidable at her option.² We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Establishment of the Jojazak Irrevocable Trust

The Jojazak Irrevocable Trust was established in 1984 by a cousin of Gerald Schneiderman for the benefit of Schneiderman's then three minor children. Schneiderman fathered three more

¹ Statutory references are to this code unless otherwise stated. Section 850, subdivision (a)(3)(A), authorizes the filing of a petition for a court order by any interested person when a trustee is in possession of property claimed by another.

² The order denying Mozer's section 850 petition is an appealable order. (§ 1300, subd. (k); *Estate of Redfield* (2011) 193 Cal.App.4th 1526, 1534.)

children after the irrevocable trust was established, including one child with Mozer after they married in 1997. The trust was later modified to name all six of Schneiderman's children as beneficiaries, including Mozer's minor son. Schneiderman died in December 2011.

2. Mozer's Section 850 Petition

On November 24, 2015 Mozer filed a petition by surviving spouse pursuant to section 850. In her operative second amended petition, Mozer alleged Schneiderman had gifted substantial community property assets to the trust throughout their marriage without her consent. Mozer requested the trustee provide an accounting and the court impose a constructive trust for her benefit on her share of community assets contained in the trust. Mozer alleged the trust contained more than \$60 million and Schneiderman had died intestate with few, if any, assets.

3. The Trustee's Response

The trustee of the Jojazak Irrevocable Trust, Michael Augustine, objected to Mozer's second amended petition. The trustee argued, among other things, Schneiderman had transferred his separate property to the trust, not community property. The trustee also argued that Mozer, who is an attorney, had served as trustee of the trust for six years during her marriage to Schneiderman, belying her assertion that she had no idea that Schneiderman had gifted any assets to the trust during their marriage. Moreover, in response to Mozer's allegation that Schneiderman had transferred community property to the trust to defraud his creditors and make himself judgment proof, the trustee alleged Mozer had actively contributed to that scheme and thus was barred by unclean hands from seeking relief. Mozer's minor son and trust

beneficiary, by and through his guardian ad litem, joined the trustee's objection to Mozer's petition.

4. *The Voluntary Mediation and Settlement Agreement*

Mozer and the trustee agreed to attempt to resolve their dispute through voluntary mediation. To that end, they mutually engaged Reva Goetz, a retired Los Angeles Superior Court judge who had served in the probate department, as mediator. The mediation took place on March 14, 2017. Both Mozer and the trustee appeared with their respective counsel, and the parties and their counsel interacted with the mediator outside the other party's presence. At the end of the mediation Mozer and the trustee executed a document entitled Settlement Agreement and Mutual General Release (Settlement Agreement). The Settlement Agreement provided the trustee would give Mozer \$450,000, to be paid in installments over a nine-year period, in exchange for Mozer's dismissal with prejudice of her section 850 petition and release of all her claims to trust property. Because the payments would involve trust assets and affect trust beneficiaries who were not parties to the agreement, the Settlement Agreement, by its terms, required court approval.³

³ Paragraph 2 of the Settlement Agreement provided in part, "All of the terms and conditions of this Agreement are subject to the express approval of the Los Angeles Superior Court hearing the Litigation. Upon execution of this Agreement by all Parties, the Trustee will promptly seek that Court's approval of this Agreement The Parties agree to take all reasonable steps necessary to obtain such approval. Pending judicial review of this Agreement, this Agreement shall remain binding upon each of the Parties and no Party may withdraw from this Agreement unless approval of this Agreement is denied by the Court on its merits"

The Settlement Agreement also contained the following acknowledgment concerning the parties' counsel: "Each of the Parties acknowledges that he or she has been represented by independent legal counsel throughout the negotiations, which culminated in the execution of this Agreement, and that he or she has executed this Agreement with the consent and on the advice of such independent legal counsel. Each Party further acknowledges that, prior to the execution of this Agreement, he or she or his or her respective counsel, or both, have had an adequate opportunity to make whatever investigation or inquiry they deem necessary or desirable with respect to the subject matter of this Agreement."

5. The Trustee's Petition To Confirm the Settlement Agreement

On March 22, 2017 the trustee petitioned for court approval of the settlement. Before her opposition was due, Mozer, representing herself, moved to rescind the Settlement Agreement, alleging the mediator had induced her agreement by means of fraud, undue influence and duress. In addition, Mozer asserted she would have never consented to the mediation before Judge Goetz or the ensuing settlement had she known of Judge Goetz's several undisclosed conflicts of interests.

At the hearing on the trustee's petition to approve the settlement, the court told Mozer her purported motion to rescind was an improper vehicle to oppose the confirmation petition in probate court. The court dismissed Mozer's rescission motion without prejudice and continued the hearing to permit her to file an opposition to the petition to confirm the Settlement Agreement.

6. Mozer's Opposition to the Petition To Confirm Settlement

On June 27, 2017 Mozer, still self-represented, filed her opposition to the confirmation petition, again contending her agreement was procured by the mediator's fraud, duress, undue influence and undisclosed conflicts of interests that undermined the mediator's impartiality. In particular, Mozer alleged the mediator had led her to believe she had relinquished her right to community property in a prenuptial agreement, and a postnuptial agreement purporting to revoke the prenuptial contract applied prospectively only, severely undermining Mozer's claims to existing trust assets. In "reliance on the knowledge and expertise of a former probate court judge," Mozer continued, she signed the Settlement Agreement. However, Mozer alleged, the next day Mozer conducted her own legal research and learned the mediator's representations concerning the legal effect of Mozer's pre- and postnuptial agreements had been wrong, and Mozer did, in fact, have a valid claim to all property Schneiderman had transferred to the trust throughout their marriage.

Mozer alleged she became suspicious of the mediator's motives in suggesting she had a weak case and, upon further investigation, discovered the mediator had "extensive connections" with the trustee and/or the trustee's counsel. Mozer asserted: (1) Before her retirement as a Los Angeles County Superior Court Judge, Judge Goetz had ruled in favor of the trustee's counsel in unrelated court actions on multiple occasions; (2) Judge Goetz and the trustee's counsel had contributed to the same nonprofit organizations, including the Harriett Buhai Center for Family Law and the Constitutional Rights Foundation; (3) an associate of the trustee's counsel had written

the only positive profile on Judge Goetz that Mozer could find on the Internet; and (4) Judge Goetz had appointed the trustee to serve as a conservator in 2011 in a high profile conservatorship proceeding. In addition, in response to the court's inquiry at the hearing on the petition to approve the settlement, the trustee stated he had litigated before Judge Goetz several times in his 44-year career as a probate attorney and had participated in unrelated cases that Judge Goetz had mediated. Mozer argued that, had she known of these associations with the trustee and/or his counsel, she would have never agreed to engage Judge Goetz as a mediator, let alone consent to the settlement.

7. The Court's Ruling and Entry of Order Dismissing Mozer's Section 850 Petition

Following a hearing, the court approved the Settlement Agreement and stayed its order for 35 days. The court denied Mozer's request for a one-year stay to permit her to file and litigate to conclusion a rescission action in the superior court, denied Mozer's motion for reconsideration of the rulings approving the settlement and denying her request for a one-year stay and entered an order dismissing Mozer's section 850 petition with prejudice.

DISCUSSION

1. The Court Did Not Err in Confirming the Settlement and Dismissing Mozer's Section 850 Petition

Mozer does not dispute that she signed the Settlement Agreement or that the Settlement Agreement, if enforceable, bars her claims to trust property. Rather, relying on Civil Code section 1689, subdivision (b), which authorizes a party whose consent to a contract is obtained by fraud, duress or undue influence to obtain rescission of the contract, Mozer contends the

mediator unlawfully induced her acceptance to the agreement by falsely representing the law governing her section 850 claim and thereby making her believe, erroneously, her claim to trust property was unlikely to succeed. Accordingly, she argues, the agreement is voidable. (See *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 415 [fraud in the inducement occurs when ““the promisor knows what he is signing but his consent is induced by fraud[;] mutual assent is present and a contract is formed, which, by reason of the fraud, is voidable””], italics omitted.)

a. Mozer’s objections to the Settlement Agreement are predicated on confidential communications

Each of Mozer’s allegations of the mediator’s fraud, duress or undue influence is premised on statements the mediator made during the mediation. Those communications are statutorily protected as confidential and inadmissible. (See Evid. Code, §§ 1119, subds. (a)-(c) [communications during mediation are protected as confidential], 1127 [no party may compel testimony of mediator concerning communications during mediation]; *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 123 (*Cassel*) [all communications made during course of mediation are confidential absent express statutory exception; mediation confidentiality statutes are strictly construed, even when the equities in the case may favor contrary result]; *Foxgate Homeowners’ Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 15 (*Foxgate*) “[t]o carry out the purpose of encouraging mediation by ensuring confidentiality, the statutory scheme . . . unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception”].)

Mozer identifies no statutory exception or provision in the parties’ agreement that would allow a court to disregard the

statutory protections afforded the mediator's communications. Rather, Mozer contends it is fundamentally unfair to apply the confidentiality statutes to protect the mediator and, by extension, to preserve an unfair settlement at her expense. Mozer's policy argument does not justify disregarding the Legislature's mandate. (Cf. *Cassel*, *supra*, 51 Cal.4th at pp. 123-124, 133 [confidentiality statutes apply even when their effect is to shield an attorney from a legal malpractice action; "[w]here competing policy concerns are present, it is for the Legislature to resolve them"]; *Foxgate*, *supra*, 26 Cal.4th at pp. 14-17 [same]; see *Kurtin v. Elieff* (2013) 215 Cal.App.4th 455, 475-476 ["the *Cassel* decision itself confronted and rejected the idea that enforcing the mediation privilege statutes 'in strict accordance with their plain terms' deprives a civil litigant of due process"].)

Mozer alternatively alleges the trustee told her counsel in a premediation settlement conference that her minor son, a trust beneficiary, would be economically harmed by lengthy litigation that could very well deplete trust assets. Mozer contends that statement, made one day before the mediation, was not protected by the confidentiality statutes; and, she asserts, it amounted to economic duress. Neither contention has merit. By Mozer's own admission, the statement was made in a premediation settlement conference to discuss the mediation. (See Evid. Code, § 1119 [communications made "for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation" are protected by the mediation privilege]; *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 150-151 [mediation privilege "is not limited to those communications made "in the course of the mediation"" but includes communications between participants in a mediation consultation or a conference in preparation for

mediation].) It also did not remotely rise to the level of economic duress. (See *Tarpy v. County of San Diego* (2003) 110 Cal.App.4th 267, 277 [economic duress will vitiate a coerced party's consent to an agreement; it may arise out of a wrongful act so coercive as to "cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract"].)

Mozer further asserts she "mistakenly relied" on statements by the mediator about the legal effect of a prenuptial and postnuptial agreements between her and Schneiderman; the trustee knew that Mozer and the mediator were mistaken about the legal effect of those agreements and Mozer's right to trust property when Mozer signed the Settlement Agreement; and the trustee took advantage of Mozer's ignorance. She argues the Settlement Agreement was thus founded on a unilateral mistake that negated her consent to the Settlement Agreement. (See *Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1673-1674 ["California law allows rescission of contract for a unilateral mistake only 'when the unilateral mistake is known to the other contracting party and is encouraged or fostered by that party'"]; *Merced County Mut. Fire Ins. Co. v. State of California* (1991) 233 Cal.App.3d 765, 772 [same]; see Civ. Code, § 1578, par. 2 [unilateral mistake of law will make contract voidable when it involves "[a] misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify"].)

Again, Mozer's claim of mistake is premised on confidential communications made to her during the mediation. Even if she could substantiate her claim of mistake with admissible, nonprivileged evidence, which she cannot, the court did not err in

rejecting it. The parties disagreed on the legal effect of Mozer's pre- and postnuptial agreements on her trust claims. At the end of the mediation Mozer, aware of the parties' different interpretations of those marital agreements and in consultation with her counsel, decided to sign the Settlement Agreement. There was no mistake that would vitiate Mozer's consent to the Settlement Agreement.

b. *The court did not err in rejecting Mozer's objection to the settlement based on the mediator's undisclosed conflicts of interests*

Relying on Evidence Code section 1115's definition of mediation as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement," and rule 3.855(b) of the California Rules of Court⁴ requiring a court-appointed mediator to disclose certain business, financial or personal affiliations that can undermine impartiality,⁵ Mozer contends Judge Goetz failed to disclose material conflicts of interests that undermined her role as a "neutral person." In particular, Mozer

⁴ Further references to rule or rules are to the California Rules of Court.

⁵ Rule 3.855(b), provides, "(1) A mediator must make reasonable efforts to keep informed about matters that reasonably could raise a question about his or her ability to conduct the proceedings impartially, and must disclose these matters to the parties. These matters include: [¶] (A) Past, present, and currently expected interests, relationships, and affiliations of a personal, professional, or financial nature; and [¶] (B) The existence of any grounds for disqualification of a judge specified in Code of Civil Procedure section 170.1."

asserts, Judge Goetz failed to disclose (1) she and the trustee's counsel had contributed to the same well-known charities several years earlier; (2) an associate of the trustee's counsel, who currently works for the trustee, wrote a positive profile on Judge Goetz "on the internet"; (3) the trustee, an experienced probate lawyer, litigated cases in which Judge Goetz served as the bench officer, and Judge Goetz appointed the trustee to serve as a conservator in a high profile conservatorship matter in 2011; and (4) the trustee admitted during the hearing that he had participated in unrelated proceedings Judge Goetz had mediated.

At the threshold, by their terms the disclosure requirements of rule 3.855 apply to court-ordered mediations (see rule 3.835 ["[t]he rules in this article apply to all court mediation programs for general civil cases, as defined in rule 1.6, unless otherwise specified"]), not to voluntary mediations as occurred in the case at bar. And, contrary to Mozer's contention, Evidence Code section 1115's definition of "neutral person" does not provide the statutory authority for applying those rules to a voluntary mediation. (See *Travelers Casualty & Surety Co. v. Superior Court* (2005) 126 Cal.App.4th 1131, 1139-1140 [a "neutral person" defined in Evidence Code section 1115 refers not to the mediator's mindset or subjective opinions, but to his or her lack of authority to decide the case, thereby allowing the parties the flexibility and their own agency to decide whether and how to resolve their case].)

Even were we to hold the disclosure rules mandated for court-ordered mediations applied, by analogy, to voluntary mediations, however, none of the professional contacts Mozer has identified comes close to a past or present business or financial relationship requiring disclosure under rule 3.855. Implicitly

recognizing this failing, Mozer emphasizes that Judge Goetz and the trustee and/or his counsel shared “an expected business relationship,” an assertion Mozer bases on the “well-known fact” that “everyone uses Judge Goetz” to mediate probate matters, thus making it likely the trustee and his counsel will call on Judge Goetz again to mediate other cases for them. This argument, too, fails. Absent an actual business arrangement, this assertion, rooted in a claim of institutional bias rather than a direct conflict of interest, does not constitute any violation of the Rules of Court.

In sum, Mozer has failed to demonstrate the court’s ruling rejecting her conflict-of-interest claims was erroneous as a matter of law. That failure is fatal to her appeal. (See *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 734 [where party fails to carry its burden in the trial court, the inquiry on appeal is whether the evidence compels a finding in favor of the appellant as a matter of law]; *Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 769 [same].)

2. *Mozer’s Remaining Arguments Lack Merit*

After the court announced its ruling approving the Settlement Agreement, Mozer requested the court stay its order until a lawsuit seeking rescission of the Settlement Agreement could be filed and decided. The court granted a limited 35-day stay, presumably to permit Mozer to petition this court for a writ of mandate. Mozer did not file a petition for writ of mandate. Instead, she moved under Code of Civil Procedure section 1008 for reconsideration of the court’s rulings approving the settlement and denying her stay request. The court denied Mozer’s motion for reconsideration and entered an order dismissing her section 850 petition with prejudice.

On appeal Mozer contends the court abused its discretion in denying that portion of her motion for reconsideration that sought an extended stay of the order confirming the Settlement Agreement. (See *New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212 [trial court’s ruling on a motion for reconsideration under Code of Civil Procedure section 1008 is “reviewed under abuse of discretion standard”].)⁶ She argues her motion was timely and identified what she claims were new facts and law that justified reconsideration and the relief she had requested.

Mozer misapprehends the nature of the “new facts” or “new law” required for a proper motion for reconsideration under Code of Civil Procedure section 1008. Mozer’s motion presented additional information not in her original papers regarding the time it takes to complete a civil action through trial and case law concerning conflicts of interest and inconsistent rulings. None of this material was unknown or not reasonably available to Mozer before the court’s rulings. Rather, as she candidly acknowledges in her appellate brief, she had not included it previously because “it could not have been known in advance of the Court’s rulings that the Court would have such limited understanding of

⁶ The order denying Mozer’s motion for reconsideration, made before entry of the final appealable order dismissing her section 850 petition with prejudice, is reviewable as an interlocutory order subsumed in the final appealable order. (See *Estate of Stoddart* (2004) 115 Cal.App.4th 1118, 1126 [distinguishing between postjudgment orders denying motion for reconsideration and prejudgment orders denying reconsideration; the former is not appealable; the latter, however, is subsumed in the appeal from the final judgment]; *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285, fn. 2 [same].)

conflicts of cases and the length of time needed to complete a State Court action.” In essence, Mozer simply argues she did not fully brief her request for a stay because she did not believe it was necessary to do so. It was not an abuse of discretion for the court to reject this explanation as inadequate. (See Code Civ. Proc., § 1008, subd. (e) [“[n]o application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section”]; *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 839 [“[c]ourts have construed section 1008 to require a party filing an application for reconsideration or a renewed application to show diligence with a satisfactory explanation for not having presented the new or different information earlier”].)

DISPOSITION

The order dismissing Mozer’s section 850 petition is affirmed. The trustee is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

FEUER, J.

STONE, J.^{*}

^{*} Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.