Filed 11/2/18 Marriage of Booth CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of KRYSTINA and ROBERT BOOTH.	B285119
KRYSTINA BOOTH, Respondent, v. ROBERT BOOTH, Appellant.	(Los Angeles County Super. Ct. No. ND075610)

APPEAL from an order of the Superior Court of Los Angeles County, Ana Maria Luna, Judge. Affirmed.

Tredway, Lumsdaine & Doyle, Daniel R. Gold and Brandon L. Fieldsted for Appellant.

Brandmeyer Gilligan & Dockstader, Janet E. Dockstader and Nadine C. Orliczky for Respondent.

* * * * * * * * * *

The trial court entered a stipulated judgment of dissolution of the marriage of Robert and Krystina Booth, which recited that the parties retained a law firm "to serve as mediator for the parties in reaching this agreement" and that the parties "acknowledge and agree that [they were not] independently represented" by the law firm.

Robert moved to set aside portions of the stipulated judgment, claiming his consent to the judgment rested on three mistakes of fact. Robert claimed he mistakenly believed (1) the equalization payments to Krystina were in lieu of child support, (2) the community's business (rather than Robert) was responsible for the payments, and (3) the business was worth more than its actual value (based upon a postjudgment appraisal). The trial court denied the motion, finding Robert's supporting evidence was inadmissible under mediation confidentiality provisions of the Evidence Code. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Robert and Krystina married on January 26, 2002, and separated on September 22, 2015. They have two minor children. During their marriage, they started a business called Rock Steady Productions, Inc. (Rock Steady), which was their primary source of income. They were in marriage counseling when they decided to end their marriage, and their counselor referred them to Morrison, LaRossa, Price & Iturrioz (Morrison firm) to try to reach an amicable settlement. After the parties jointly retained the Morrison firm, Krystina filed a petition for dissolution of marriage, prepared by the firm. Ultimately, the parties reached a settlement agreement, which was memorialized by the firm, and the trial court entered their stipulated judgment on May 25, 2016.

The stipulated judgment awarded Rock Steady to Robert, valuing Krystina's 50 percent interest in the company at $1.5 million. The parties expressly agreed "with this value as being an accurate value of [Krystina's] 50 [percent] share." The judgment provided that Robert would buy out Krystina's interest in monthly "equalization" payments of $9,650, payable over 13 years. The judgment stated Robert was to make the equalization payments. Krystina waived spousal support, and the judgment stated child support was set at "$0." The court retained jurisdiction to revisit spousal support and equalization in the event Robert failed to make the required payments.

The stipulated judgment provided "[t]he parties acknowledge and agree that they jointly retained Morrison, LaRossa, Price & Iturrioz to serve as mediator for the parties in reaching this agreement. Both parties further acknowledge and agree that neither he nor she was independently represented by Morrison, LaRossa, Price & Iturrioz. [¶] . . . The parties further acknowledge and agree that they have had a reasonable opportunity to review this Stipulated Judgment and to consult with any attorney of his or her choosing to address any issues or concerns of that party."

On December 15, 2016, Krystina filed a request for modification of child support, seeking guideline child support on the basis that she was unable to work full time and support the children.

On January 30, 2017, the trial court entered an order awarding Krystina child support of $1,926 per month. The trial court reserved jurisdiction over child support and continued the hearing to March 29, 2017, and then a second time to June 27, 2017, to allow the parties time to complete discovery.

On May 25, 2017, Robert filed a motion to set aside portions of the stipulated judgment. The motion was brought under Family Code section 2122. Robert argued that he mistakenly believed the equalization payments to Krystina were in lieu of child support, reasoning that Krystina promised she would never seek child support. He further argued that "the parties' divorce attorney" represented Krystina "would only be able to request child support if there was a material change in circumstances, or if the equalization payments were not made." Robert also mistakenly believed that Rock Steady was responsible for the equalization payments. Lastly, Robert argued the monthly equalization payment was based on the "erroneous assumption" that the business was worth $3 million but an appraisal he obtained 10 months after the stipulated judgment valued the business at $477,600 at the time the stipulated judgment was entered.

Robert submitted a declaration with his motion, and numerous exhibits, including e-mail and text exchanges between Robert and Krystina, and among Robert, Krystina and an attorney at the Morrison firm. In his declaration, Robert averred that during the summer of 2015, the parties decided to dissolve their marriage. "Around that time, we were jointly seeing a marriage and family therapist in an effort to either save the marriage or dissolve the marriage as amicably as possible. When we realized the marriage was beyond saving, the therapist referred us to the attorneys at the law offices of Morrison, LaRossa, Price & Iturrioz to assist us with obtaining the divorce as amicably as possible."

Before consulting with the Morrison firm, the parties had a "kitchen table" discussion regarding the division of assets,

spousal and child support, and custody of their children. During the course of that discussion, the parties were able to agree to the value of Rock Steady. They reached an agreement "on all issues" of their dissolution.

The parties met with Jennifer LaRossa of the Morrison firm on September 23, 2015, and discussed with her the terms they had reached. They signed a retainer agreement with Ms. LaRossa that day. The agreement was captioned "Attorney-Client Agreement." The agreement was in the form of a standard retainer agreement, whereby the "attorney" agreed to provide "legal services" to the "client." Regarding the scope of services, the form agreement provided that the "[a]ttorney will provide those legal services reasonably required to represent Client," but did not specify what services were contemplated. However, under the section "Other Provisions" was the handwritten word "mediation."

Robert declared Ms. LaRossa agreed to prepare a petition for dissolution of marriage, and a stipulated judgment for the parties. She advised the parties they needed to prepare preliminary declarations of disclosure before she could draft the stipulated judgment.

On September 29, 2015, the parties signed a "Waiver of Conflict of Interest" provided to them by Ms. LaRossa's office, which stated: "We . . . hereby waive any conflict of interest that may arise as a result of each of us being represented by Morrison, LaRossa, Price & Iturrioz in the preparation of the Dissolution of Marriage of Booth. The scope of work to be performed on behalf of the parties is as Mediator."

Over the next "couple months," the parties worked on their disclosures and compiled the necessary documents. On

January 21, 2016, Krystina e-mailed her proposed terms of the settlement agreement to Ms. LaRossa. Robert e-mailed his proposed terms to Ms. LaRossa on February 28, 2016. Robert and Krystina exchanged a number of e-mails and text messages to finalize the agreement. Copies of these exchanges were appended to Robert's declaration. They also had discussions, which Robert summarized in his declaration, where Krystina made certain "promises" in exchange for Robert's assent to the agreement.

Ms. LaRossa memorialized the parties' final agreement, and Robert signed it on March 29, 2016. The trial court entered judgment on May 25, 2016.

In his declaration, Robert averred that based on representations by Krystina and Ms. LaRossa, he believed "the equalization payment . . . was to be in lieu of child support and spousal support, and that [Krystina] would not be able to come after me for child support unless there was a material change of circumstances or if Rock Steady stopped making the equalization payment." He also "believed, and continue[d] to believe, that Rock Steady, not myself, would be responsible under the terms of the stipulated judgment for paying the equalization payment" based on "numerous conversations" he had with Krystina. He also averred that he "mistakenly believed that the value of Rock Steady was worth several millions of dollars. I had never been involved in the appraisal or valuation of a small business before the stipulated judgment. I had no idea what kind of methods were used for appraising a small business. I recently had Rock Steady appraised [and] the fair market value of the business, as of March 3l, 2016 . . . was only $477,600." A copy of the appraisal report was appended to his declaration.

Krystina opposed the motion, arguing the parties' negotiations and discussions were in furtherance of mediation, and therefore were confidential under Evidence Code section 1119. She argued the Attorney-Client Agreement, Waiver of Conflict of Interest, and stipulated judgment each made clear that Ms. LaRossa acted as a mediator. Robert's declaration "recited his understanding of conversations with both Krystina and Ms. LaRossa which were materially related to the mediation and attached to his Declaration emails and documents exchanged during the mediation. All of this is confidential and inadmissible pursuant to [section] 1119." She asked the court "to strike everything from Robert's RFO which is confidential under the mediation privilege." She contended the only admissible evidence included in Robert's motion was the parties' agreement to mediate and the stipulated judgment.

Krystina testified in her declaration that it was her understanding the communications occurring in the course of the negotiation of their dissolution were "confidential as part of our mediation" and that their marriage therapist had referred them to the Morrison firm for purposes of mediation. She testified that "Robert's motion is almost entirely based on his recitation of confidential and inadmissible mediation communications." Appended to her opposition declaration were copies of the Attorney-Client Agreement, Waiver of Conflict of Interest, and the stipulated judgment.

In reply, Robert argued that Ms. LaRossa acted as the parties' attorney, and she gave him legal advice. Robert testified he never understood Ms. LaRossa to be acting as a mediator. He also testified that "[b]efore signing the Stipulated Judgment, I read it through, but I didn't understand a lot of it. Many of the

words and clauses were unfamiliar legal jargon, and I thought Ms. LaRossa would advise me of any aspects of the Stipulated Judgment that were inconsistent with our previously stated agreement or contrary to my best interest."

Alternatively, Robert argued that Krystina failed to show how each conversation and statement set forth in his declaration was tied to a mediation session, and therefore protected by mediation confidentiality.

At the hearing on Robert's motion, the trial court concluded "[t]he judgment clearly reflects that the parties were in a mediation with a different law firm. . . . [¶] So, in terms of the court doing anything, considering any of the declaration or any of the evidence that you want to present . . . under [the mediation privilege], I can't take any of that information into account. [¶] All those conversations and disclosures are all confidential . . . ." The trial court denied the motion.

The notice of ruling, prepared by Robert's counsel, stated that "[t]he Court's denial of [Robert's] set-aside request is based on its finding that mediation confidentiality . . . applies to, and excludes from the Court's consideration, the entirety of [Robert's] declarations and other evidence submitted in support of [Robert's] set-aside request, except for the Judgment of Dissolution entered on May 25, 2016."

Robert timely appealed.

DISCUSSION

Robert contends the trial court erred when it found that Ms. LaRossa was the parties' mediator instead of their attorney. Alternatively, he contends the court erred when it concluded the privilege applied to all of the parties' communications. Lastly, he contends the trial court should have granted his motion to set

aside portions of the stipulated judgment based on the parties' inaccurate valuation of Rock Steady. We are not persuaded.

Whether the trial court erred in concluding a particular statement is sufficiently connected to a mediation to be protected from disclosure is an evidentiary ruling subject to our review for an abuse of discretion. (*Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 160 (*Wimsatt*).) A motion to set aside a stipulated judgment is also reviewed for abuse of discretion. (*In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, 1346; *In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 682, 686 (*Rosevear*).) " ' "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." ' [Citations.] The burden is on the complaining party to establish abuse of discretion. [Citations.] The showing on appeal is insufficient if it presents a state of facts which simply affords an opportunity for a difference of opinion." (*Rosevear*, *supra*, at p. 682.)

Evidence Code section 1119, subdivision (a), provides: "No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery . . . ." Subdivision (c) further provides: "All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential." Mediation is broadly defined as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." (§ 1115,

subd. (a).) Mediation confidentiality provisions "are clear and absolute," and "[e]xcept in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected." (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 118.)

1. Ms. LaRossa Was Retained as a Mediator Rather Than an Attorney.

Robert contends the Attorney-Client Agreement and Conflict of Interest waiver demonstrate an attorney client relationship, rather than an agreement to mediate their marriage dissolution. He contends that neither agreement explains the legal effect of participating in mediation, and that both agreements contemplate a representative relationship. He points to no authority *requiring* any particular form of agreement for mediation, or requiring that the agreement explain the legal consequences of mediation. Instead, he simply asks us to reweigh the evidence. (*Rosevear*, *supra*, 65 Cal.App.4th at p. 682.)

The parties' agreements with the Morrison firm contained language often found in retainer agreements between attorneys and their clients, but both agreements also specified that the Morrison firm would act as the parties' mediator. The stipulated judgment, which Robert acknowledges having read, provided that the parties "jointly retained Morrison, LaRossa, Price & Iturrioz to serve as mediator for the parties in reaching this agreement. Both parties further acknowledge and agree that neither he nor she was independently represented by Morrison, LaRossa, Price & Iturrioz." These facts support the trial court's conclusion that Ms. LaRossa acted as the parties' mediator, not as their attorney.

Nor are we persuaded that Ms. LaRossa's act of preparing pleadings and drafting the stipulated judgment are irreconcilable

with the role of a neutral mediator. (Evid. Code, § 1115, subd. (a).) Robert has pointed us to no authority holding that these acts compel a finding that Ms. LaRossa acted as the parties' attorney, rather than a mediator.

It was Robert's burden to demonstrate an abuse of discretion. On this record, we can find no abuse of discretion for the trial court's conclusion that Ms. LaRossa acted as the parties' mediator.

2. Scope of Mediation Confidentiality

Robert contends Krystina did not meet her burden of demonstrating that each of his proffered communications is protected by mediation confidentiality.

When determining whether mediation confidentiality applies, the "context, and content of the communication all must be considered. Mediation confidentiality protects communications and writings if they are materially related to, and foster, the mediation. [Citations.] Mediation confidentiality is to be applied where the writing or statement would not have existed but for a mediation communication, negotiation, or settlement discussion." (*Wimsatt*, *supra*, 152 Cal.App.4th at p. 60.)

Here, we need not decide whether the evidence supports the trial court's conclusion that the parties' "kitchen table" discussion (at which they arrived at a value for Krystina's shares of Rock Steady), and each of their later negotiations, were materially related to the mediation, as Robert has failed to demonstrate prejudicial error by the exclusion of his declaration. He has not identified any statement in his declaration, whether made at the kitchen table discussion or at another time, which, if it had been considered by the court, would justify setting aside

the stipulated judgment. (*Loftleidir Icelandic Airlines v. McDonnell Douglas Corp.* (1984) 158 Cal.App.3d 83, 95-96.)

Nor do we think Robert could establish prejudice on this record. Krystina testified the kitchen table discussion occurred after the parties were referred to an attorney to mediate their divorce, and was intended to foster their mediation. Robert's evidence supported a similar conclusion. Both parties' evidence showed that after their meeting with Ms. LaRossa, they continued to discuss the terms of their settlement, with the goal of having Ms. LaRossa memorialize their agreement to achieve an amicable dissolution of their marriage.

Moreover, Robert does not argue on appeal the trial court erred in excluding from evidence the 10-months-after-the-fact appraisal of Rock Steady based on the mediation privilege. The court correctly excluded the appraisal, which was inadmissible to challenge the beliefs and assumptions of the parties that preceded the stipulated judgment.

3. Duration of Mediation Confidentiality

Alternatively, Robert contends the only confidential communications occurred during the parties' September 23, 2015 meeting with Ms. LaRossa, and the mediation ended shortly thereafter pursuant to Evidence Code section 1125, subdivision (a)(5). That section provides that a mediation ends when 10 calendar days pass and "there is no communication between the mediator and any of the parties to the mediation relating to the dispute." (*Id.,* subd. (a)(5).)[1] He contends "[t]here

---

[1] Evidence Code section 1125, subdivision (a) provides that: "For purposes of confidentiality under this chapter, a mediation ends when any one of the following conditions is satisfied: [¶] (1) The parties execute a written settlement agreement that fully

is no evidence of any communication between Ms. LaRossa and any of the parties from September 30, 2015 to January 20, 2016, or from January 22, 2016 to February 27, 2016." There are two significant problems with Robert's argument. First, this argument was never advanced to the trial court. (*Kennedy v. City of Ukiah* (1977) 69 Cal.App.3d 545, 554 ["it is well settled that an appellate court will not consider points not raised below"].) And, more importantly, there is simply no evidence that the parties ceased communicating with the mediator at any time before entry of the stipulated judgment. We cannot interpret silence in the record as proof that the mediation had ended.

4. Valuation of Rock Steady

Lastly, Robert argues that the trial court should have granted his motion based on the parties' inaccurate valuation of Rock Steady.

---

resolves the dispute. [¶] (2) An oral agreement that fully resolves the dispute is reached in accordance with Section 1118. [¶] (3) The mediator provides the mediation participants with a writing signed by the mediator that states that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121. [¶] (4) A party provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121. In a mediation involving more than two parties, the mediation may continue as to the remaining parties or be terminated in accordance with this section. [¶] (5) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement."

Family Code section 2122 permits a family court to set aside a judgment in whole or in part on several grounds, including mistake of fact. (*Id.*, subd. (e).) While "spouses may be relieved of a stipulated judgment based upon incomplete or inaccurate information," (*In re Marriage of Brewer & Federici*, *supra*, 93 Cal.App.4th at p. 1345), the trial court's evaluation of Robert's claim of mistake necessarily implicated at least some, if not all of the parties' confidential mediation discussions concerning the valuation of the business. Without knowing how the parties arrived at the value set forth in the stipulated judgment, Robert's belated and self-serving appraisal does not demonstrate a "mistake." Therefore, Robert cannot demonstrate the trial court abused its discretion in denying his motion on this basis.

DISPOSITION

The order is affirmed. Respondent is awarded her costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.