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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re Marriage of DINA OKHRIMOVSKAYA and VSEVOLOD OKHRIMOVSKI.	B277149 (Los Angeles County Super. Ct. No. BD488954)
DINA OKHRIMOVSKAYA, Respondent, v. VSEVOLOD OKHRIMOVSKI, Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen O. Diesman, Judge. Affirmed.

Lindemann Law Firm, Blake J. Lindemann for Appellant.

Jeffrey P. Alpert and Ashley L. Montgomery for Respondent.

Appellant Vsevolod "Seva" Okhrimovski (Seva) and respondent Dina Ohkrimovskaya (Dina), have been engaged in dissolution proceedings since 2008. Seva and Dina reached a comprehensive marital separation agreement in early 2009. However, they did not inform the trial court of their agreement until late 2012, when Seva filed a motion to enter the spousal support provisions of the agreement and set aside the rest due to his intervening personal bankruptcy. The trial court denied the motion and his request for a statement of decision, and Seva appealed. We affirmed in full and remanded the matter for further proceedings.

After remittitur, Dina filed a request for entry of judgment based on the parties' 2009 marital settlement agreement. Seva responded with a request to enter judgment in accordance with the judgment he obtained in his bankruptcy case. He also sought to modify spousal support. The trial court granted Dina's request and denied both of Seva's. Seva appeals, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Dina petitioned to dissolve the parties' marriage in July 2008. In February 2009, the court issued an order awarding Dina spousal support of $10,000 per month.

In March 2009, the parties executed a comprehensive marital settlement agreement they refer to as the "Deal Memorandum." In the Deal Memorandum, the parties agreed to, among other things, divide their community property and reduce Seva's spousal support obligation to $5,500 per month, an amount that "shall not be modifiable by either party at any time."

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[1] Some background facts have been taken from our previous opinion in this matter, *In re Marriage of Okhrimovskaya v. Okhrimovski* (Sept. 16, 2015, B250537 [nonpub. opn.].)

The Deal Memorandum included a provision stating that it was "a binding agreement that is enforceable pursuant to California Code of Civil Procedure section 664.6,"[2] and another stating that Dina's counsel was to prepare a stipulated judgment. Despite these provisions, neither party moved for entry of judgment pursuant to section 664.6.

In July 2009, a few months after signing the Deal Memorandum, Seva filed for Chapter 11 bankruptcy. The bankruptcy estate included all of the parties' community property as of the commencement of the bankruptcy case. (*In re McCoy* (Bankr. 9th Cir. 1990) 111 B.R. 276, 278.) Dina did not appear in the bankruptcy proceedings despite being served with at least some of the filings, nor did she object to Seva's proposed reorganization plan.

The bankruptcy court confirmed Seva's proposed reorganization plan in May 2011. Under the plan, all property of the bankruptcy estate vested in Seva, "free and clear of all Claims, liens, encumbrances, and Interests," and Seva was authorized to "operate its business and use, acquire and dispose of property and settle and compromise liabilities without supervision by the Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules, other than those restrictions expressly imposed by the Plan." One of the restrictions in the plan was that "any obligations of [Seva] under alleged agreement with Dina [the Deal Memorandum] shall be dischargeable or non-dischargeable to the extent set forth in Section 523 of the Bankruptcy Code and applicable state law." "The bankruptcy court has exclusive jurisdiction to determine the

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[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

dischargeability of debts." (*In re Marriage of Williams* (1984) 157 Cal.App.3d 1215, 1221.) The plan authorized Seva to "bring an adversary action [in the bankruptcy court] to determine the dischargeabilty of this debt."

Seva filed such an adversary action in June 2012, in which he sought a declaratory judgment that the Deal Memorandum provisions pertaining to the division of property (but not spousal support) were null and void because they had been rendered impossible in light of his reorganization plan. Pursuant to Evidence Code sections 452 and 459, and after providing the parties with an opportunity to present relevant information, we take judicial notice of the docket in that action, which indicates that Dina filed counterclaims alleging certain debts were not dischargeable under 11 U.S.C. § 523(a)(5) & (a)(15).[3] The adversary proceeding remains open and pending.

In December 2012, approximately a year and a half after his bankruptcy was discharged, Seva filed a "Request to Set Aside The Deal Memorandum and Modify Spousal Support" in the dissolution case. In that filing, Seva asked the family court to (1) find that the Deal Memorandum retroactively modified the court's spousal support order; (2) find that he had complied with the Deal Memorandum's provision concerning spousal support; and (3) order the Deal Memorandum set aside based on a change

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[3] These provisions state that "A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—(5) for a domestic support obligation; . . . (15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit."

in circumstances or mistake of fact, namely that the property divisions it contemplated were impossible in light of Seva's bankruptcy and reorganization plan. The trial court denied the motion, and we affirmed that decision in our previous opinion. We also affirmed the trial court's denial of Seva's untimely post-hearing request for a statement of decision.

In June 2015, while the previous appeal was pending, Seva filed a request for an order reducing his spousal support obligation to $2,500 per month and an accompanying income and expense declaration.

In December 2015, following our issuance of remittitur, Dina filed a request for entry of judgment "in accordance with the Deal Memorandum entered into on March 27, 2009 pursuant to California Code of Civil Procedure Section 664.6." Seva opposed the request.

Seva also filed a competing request for entry of judgment. In it, he made the following request: "Judgment should be entered consistent with, and not violative, of the Confirmation Judgment entered by the Chief Judge to the United States Bankruptcy Court to the Central District of California, the Hon. Sheri Bluebond, in May of 2011 ('Confirmation Judgment'). No party in interest has sought to appeal, reconsider, or vacate the Confirmation Judgment. The Confirmation Judgment is a final judgment and is subject to res judicata. Judgment herein should also be entered independently, based on the remittitur and the findings embodied in the remittitur on appeal. Pursuant to the Bankruptcy Court's Confirmation Order, '[t]he reorganization plan [Plan] awared [*sic*] Seva "100% of the Estate's assets as his sole and separate property." Thus, all community assets that were not liquidated during the course of the bankruptcy passed to

Seva.' (Court of Appeal Opinion, *Id*. at *4.) The Confirmation Judgment, nor the Court of Appeal Opinion relates to the amount of spousal support, and spousal [*sic*] support may be decided by this Court in connection with the concurrently pending RFO proceeding filed by Seva to be heard on April 26, 2016. Nothing in this final judgment will preclude Seva from seeking contempt against Dina based on her actions."

The court held an initial hearing on Dina's motion for entry of judgment—Seva's had not yet been filed—in January 2016. The court indicated at the outset that its tentative was to grant the motion. Seva's counsel raised numerous arguments against doing so, including the alleged primacy of his confirmed bankruptcy plan, the alleged impossibility and frustration of purpose precluding satisfaction of the Deal Memorandum, the court's alleged duty to reallocate the community property assets, and Dina's delay in seeking to reduce the agreement to a judgment. The court explained that it viewed these arguments as pertinent to "an enforcement issue" to be resolved after entry of the Deal Memorandum. The court continued, "Both parties in this matter were dilatory in not requesting a Deal Memorandum to be entered as a judgment. But it is not severable; therefore, I am not going to sever the Deal Memorandum and enter part of it and not enter other parts of it. It should be entered. It's a valid Deal Memorandum and it was entered knowingly between the parties. And at this point, once the judgment is entered, then you [Seva] already have a request for modification of spousal support on calendar in April so you can deal with that then and we can, you can then deal with the enforcement of the property provision which sounds like, by all agreements, would be pretty easy to enforce. Because the property is gone."

Seva's counsel argued that the court should hear his evidence related to an impossibility and frustration of purpose defense prior to entering judgment on the Deal Memorandum. He asserted that hearing such evidence was important, "especially since the Court of Appeal held it was impossible." The court responded that counsel was "misreading" our prior opinion, which "made a comment about impossibility," not "a finding."

The discussion then turned toward the ongoing adversary proceedings. To ensure that Dina's counsel, who was not representing her in the bankruptcy court, was "up to speed" on those proceedings, the court trailed the hearing to April 2016, the hearing date already scheduled for Seva's support modification motion. The matter subsequently was trailed a second time, to June 2016.

At the June hearing, Dina's counsel argued that granting her request for entry of judgment, as the court had indicated it was inclined to do, would render Seva's request for support modification moot. He further contended that "once you enter judgment pursuant to the deal memorandum, any enforcement of property provisions would be bound by whatever rulings there were in a bankruptcy court." Counsel echoed the court's earlier comments that Dina's ability to obtain the property division contemplated by the Deal Memorandum was "a different issue for enforcement." Seva's counsel disagreed. He contended that the bankruptcy plan "superseded the deal memorandum on almost every term except support."

After a short recess, the court reiterated its tentative: "to grant the request to enter judgment pursuant to the deal memorandum which was upheld by the Court of Appeals decision. And I agree with the statement this morning that the

bankruptcy proceeding issues are . . . to be addressed for enforcement of the judgment but not as to whether the judgment is entered pursuant to C.C.P. 664.6." Seva's counsel again voiced opposition, contending that "we can't enter anything on the deal memorandum" because "[t]he bankruptcy court has dealt with every single item in the deal memorandum except support." He further asserted that the bankruptcy court had issued an order in May 2016 "saying we're only supposed to go forward with support today." The hearing transcript indicates that Seva provided that order to the court, and that, according to the court, it "basically says, Plaintiff's [Seva's] request for order to modify support before the state court may proceed," but the order is not in the record on appeal.

The family law court concluded that the May order from the bankruptcy court "does not tell the state court that the only thing we can proceed on are the support proceedings." It accordingly made the following oral rulings: "[T]he deal memorandum, which bears the signatures of both parties, which was executed during the dissolution proceedings, meets the statutory requirements of 664.6. The Court of Appeals [*sic*] on November 19, 2015, issued a remittitur affirming the trial court's decision to deny respondent's request to set aside the deal memorandum. Respondent has just argued that the deal memorandum is a legal nullity because the terms were impossible and the frustration of purpose [*sic*]. However, I believe that grossly misstates the holding. As to the issue of whether the deal memorandum was impossible, the appellate court observed that the parties agreed to a division of property that eventually became impossible; but because they failed to timely inform the court of their agreement, the Court had no

opportunity to adopt [it] as the intended decision of the Court. The Court of Appeals [*sic*] opinion does not hold the deal memorandum had been rendered unenforceable or void. So the Court is not convinced the transfer of certain property out of respondent's estate during bankruptcy proceedings has rendered the entire deal memorandum impossible; but in either event, the Court agrees with petitioner's position that the deal memorandum may be entered as a judgment, and the issue of impossibility is an issue for later determination upon enforcement of the judgment."

Seva timely requested a statement of decision. After considering the parties' proposed statements and opposition papers, the court issued a final statement of decision on August 9, 2016, which it later corrected on August 16, 2016. In its statement of decision, the court reiterated and expounded upon the rulings it made in open court. The court explained that the bankruptcy court's order from May 2016 "is not confirming the validity of the request for spousal support, . . . but merely lifts the stay of the state court proceeding. It does not rule on the merits of the matters before the instant court and as such, contains no rulings entitled to res judicata or primacy under the Supremacy Clause of the United States' Constitution." The court further opined that our prior opinion "does not hold the Deal Memorandum has been rendered unenforceable or void. If any provision of the Deal Memorandum is no longer enforceable because of other pending matters or disposition of the property by one of the parties, that is a matter for enforcement of the judgment; it does not preclude entry of judgment. This Court found that the application of the doctrines of impossibility and frustration of purpose are issues for enforcement of the judgment,

not ones which preclude the entry of judgment. It was not the intention of this court to rule on whether those doctrines apply or how they apply to the enforcement of the judgment. Rather, this court retains jurisdiction over the judgment if there are continued disputes."

The court also rejected Seva's contention that entry of judgment on the Deal Memorandum was barred by the statute of limitations. It found the case he relied upon, *Pietrobon v. Libarle* (2006) 137 Cal.App.4th 992 (*Pietrobon*), inapposite, and held that "there is no such time limitation on requests for entry of judgment pursuant to marital settlement agreements."

The court granted Dina's motion to enter the Deal Memorandum as its judgment, implicitly denying Seva's competing request for entry of judgment on different terms. Because it found the Deal Memorandum provided for non-modifiable spousal support, it concluded that entry of judgment on the Deal Memorandum rendered moot Seva's request for modification of his support obligation. The court further held that "[i]f any provision of the Parties' agreement can no longer be performed or has been made impossible for any valid reason, then it is a matter to be raised in enforcement of the judgment and does not preclude entry of judgment." The court entered judgment in accordance with its statement of decision. It also terminated the parties' marital status, effective August 9, 2016.

Seva timely appealed on August 15, 2016, and subsequently filed an amended notice of appeal in September 2016.

In December 2016, prior to the filing of Seva's opening brief in this appeal, the bankruptcy court issued an amended order addressing Seva's pending motion for judgment on the pleadings

in the adversary proceeding. The order stated that any obligations Seva had under paragraph 9 of the Deal Memorandum—concerning two real properties—were nondischargeable "property settlement obligations of a kind set forth in 11 U.S.C. § 523(a)(15)." The order further stated that Seva's bankruptcy plan was "not inconsistent with, and does not prevent enforcement of, or excuse [Seva] from performing under, the provisions of [the Deal Memorandum] that govern Dina's rights with respect to" the property at issue.

DISCUSSION

The trial court granted Dina's motion for entry of judgment under section 664.6. That provision authorizes the trial court to enter judgment pursuant to the terms of the parties' written settlement. (§ 664.6.) It further permits the court to retain jurisdiction to enforce the settlement until performance is completed if the parties so request, as the parties did here. (*Ibid.*)

Section 664.6 is designed to advance the strong policy favoring settlement of litigation by providing an "expeditious procedure for enforcing settlement agreements." (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 910.) Section 664.6 motions are appropriate "even when issues relating to the binding nature or terms of the settlement are in dispute, because, in ruling upon the motion, the trial court is empowered to resolve these disputed issues and ultimately determine whether the parties reached a binding mutual accord as to the material terms." (*Id.* at p. 905.) "If the court determines that the parties entered into an enforceable settlement, it should grant the motion and enter a formal judgment pursuant to the terms of the settlement." (*Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1182.) If the court

concludes that the parties did not enter into an enforceable agreement, it should deny the motion; it cannot create new terms to make the settlement enforceable. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810; *Hernandez v. Board of Education of the Stockton Unified School District* (2004) 126 Cal.App.4th 1161, 1176 (*Hernandez*).)

The trial court's power under section 664.6 is "extremely limited"; it is "powerless to impose on the parties more restrictive or less restrictive or different terms than those contained in their settlement agreement" (*Hernandez*, *supra*, 126 Cal.App.4th at p. 1176), and it must accept or reject the agreement as a whole (see *Leeman v. Adams Extract & Spice, LLC* (2015) 236 Cal.App.4th 1367, 1375). Indeed, in the dissolution context, "The court's only role with regard to a proper stipulated disposition of marital property is to accept the stipulation and, if requested, to incorporate the disposition into the judgment." (*In re Marriage of Cream* (1993) 13 Cal.App.4th 81, 91.) "Nevertheless, a court 'may reject a stipulation that is contrary to public policy [citation], or one that incorporates an erroneous rule of law [citation].' [Citation.] The trial court has the duty to ensure that the stipulation is just and cannot act as a mere puppet. [Citation.] More importantly, a court cannot validly enter a judgment or order which is void even if the parties agreed to it. [Citations.]" (*Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 12-13; see also *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127 ["[S]ection 664.6 does not allow a court to endorse or enforce a provision in a settlement agreement or stipulation which is illegal, contrary to public policy, or unjust."].)

Seva does not dispute that he agreed to the terms of the Deal Memorandum, or otherwise assert that the court should not

have entered judgment on the agreement because its formation was faulty in some way. Instead, he contends that the court should have rejected the agreement because it incorporates erroneous rules of law and is unjust. He further argues that the court erred by entering judgment "even though the time to do so had expired under the applicable statute of limitations" and the equitable doctrine of laches, abdicated a duty imposed by *In re Marriage of Olson* (1980) 27 Cal.3d 414 (*Olson*) to reallocate the parties' assets and obligations, and violated his due process rights by declining to consider his claims that the Deal Memorandum was subject to the contract defenses of impossibility and frustration of purpose. We consider these claims in turn.

I. The judgment is not contrary to law.

Seva contends that the family law court should have rejected the Deal Memorandum because it "violates the bankruptcy court's confirmation order, which is entitled to primacy and a plea of res judicata," and is contrary to the law of the case doctrine and the rule of mandate. We review these legal questions de novo. (*Weddington Productions, Inc. v. Flick, supra,* 60 Cal.App.4th at p. 815.)

A. The judgment does not violate the bankruptcy confirmation order.

The bankruptcy court confirmed Seva's reorganization plan in 2011 and discharged his bankruptcy in 2012. As we noted above, the reorganization plan awarded Seva all property of the bankruptcy estate, subject to "any obligations of [Seva] under alleged agreement with Dina [ ] [the Deal Memorandum]," which the bankruptcy court ruled would "be dischargeable or non-dischargeable to the extent set forth in Section 523 of the

Bankruptcy Code and applicable state law." Seva claims the bankruptcy court thus "took control of community property and caused it to be divided," such that the trial court acted in contempt of that court—and in violation of the principles of res judicata and the Supremacy Clause—by granting Dina's section 664.6 motion. We disagree.

To the extent the Deal Memorandum transmuted the nature of or separated the interests in any of the community property, those changes were incorporated into the bankruptcy estate. Bankruptcy courts look to state law to determine the nature and extent of a debtor's interest in property (*In re Brace* (Bankr. 9th Cir. 2017) --- B.R. ----, at *3; *In re McCoy*, *supra*, 111 B.R. at p. 279), and California law provides that, in the absence of fraud, invalidity, or contrary language, a marital separation agreement becomes effective on the date of signing and is "independently valid and binding regardless of whether it was incorporated into a final judgment of dissolution." (*Litke O'Farrell, LLC v. Tipton* (2012) 204 Cal.App.4th 1178, 1183-1184; see also *In re McCoy*, *supra*, 111 B.R. at p. 280 ["Before the division occurs, *unless there is a contrary marital settlement agreement*, the property remains community property. . . ."] [italics added].) To the extent the Deal Memorandum awarded community property to Dina, that property was no longer liable for marital debts assigned to Seva, "with the exception that the award of community real property to one spouse that is subject to a lien remains liable for satisfaction of the lien, i.e, the lien remains enforceable to satisfy the underlying debt." (*Lezine v. Security Pacific Financial* (1996) 14 Cal.4th 56, 65; see also *In re Marriage of Turkanis and Price* (2013) 213 Cal.App.4th 332, 348-349.) Seva recognized that the Deal Memorandum could affect

the course of his bankruptcy, as his proposed reorganization plan explicitly sought to discharge "any liability owed to Dina Okhrimovski [*sic*] pursuant to agreement dated March 27, 2009"—the Deal Memorandum—which he alleged at that point was invalid due to fraud and duress.

The bankruptcy court did not cause Seva and Dina's marital property to be divided; their execution of the Deal Memorandum did. The bankruptcy court confirmed Seva's reorganization plan with the proviso that any obligations he had to Dina under the Deal Memorandum may not be dischargeable under applicable bankruptcy and state law. Adversary proceedings to determine whether and to what extent those obligations are dischargeable remain pending in the bankruptcy court. The bankruptcy court already has ruled in those proceedings that at least some of the property divisions in the Deal Memorandum are nondischargeable settlement obligations. It also has ruled that Seva's plan "is not inconsistent with, and does not prevent enforcement of, or excuse [Seva] from performing under" at least some portions of the Deal Memorandum.

Both the bankruptcy court's confirmation order and its rulings thus far in the adversary proceedings indicate that the confirmation order did not finally determine the property division. To the contrary, the ruling in the adversary proceeding recognized that Seva could not circumvent his obligations under the Deal Memorandum by means of his bankruptcy plan. It specifically ordered that Seva was "not prevented or excused by confirmation of the Plan from complying with the provisions of [the Deal Memorandum] governing what happens with" a particular piece of real property "in the event of its sale or

foreclosure." It further ordered the deed vesting title of that piece of community property in Seva "include on its face" language indicating that Seva "'takes interest conveyed herein subject to Dina's Claims/Interest to the extent as stated in . . . the State Court Judgment of Dissolution of Marriage . . . .'" The family law court did not act in contempt of the bankruptcy court by entering judgment on the Deal Memorandum to which Seva and Dina agreed prior to the bankruptcy.

It likewise did not violate principles of res judicata or supremacy. "'The doctrine of res judicata precludes parties or their privies from relitigating an issue that has been finally determined by a court of competent jurisdiction. [Citation.] "Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action." [Citation.]' [Citation.]" (*Nathanson v. Hecker* (2002) 99 Cal.App.4th 1158, 1162.) Judgments or orders entered in bankruptcy proceedings are final for purposes of res judicata unless or until they are modified or set aside by the court of issuance or reversed on appeal. (*Id.* at p. 1163.) The bankruptcy court's orders thus are final for purposes of res judicata, but only to the extent they finally determined any issue pertaining to the marital property or its disposition. For instance, if the bankruptcy court ordered a piece of real property sold, the family law court could not override that order by awarding the property to Dina. But the bankruptcy court did not finally determine all of the rights and obligations Seva may owe to Dina under the Deal Memorandum or other orders of the family law court. The family law court remains authorized to issue those orders, so long as they do not directly or indirectly nullify Seva's federal bankruptcy discharge by making

him accountable to Dina or others for discharged obligations. (*In re Marriage of Cohen* (1980) 105 Cal.App.3d 836, 843.)

B. The judgment does not violate the law of the case doctrine or the "rule of mandate."

In our previous opinion, we considered whether the trial court erred in denying Seva's request to, as he put it, "retroactively modify spousal support based on the written agreement of the parties (which was not made into a court order) but then set aside the Deal Memorandum because the actions in the bankruptcy court preclude [him] from being able to comply with the terms of the Deal Memorandum." Our conclusion that the trial court did not err in denying this request was the holding of the case, our "determination of a matter at law pivotal to its decision." (Black's Law Dictionary (10th ed. 2014) p. 849.)

The trial court was (and is) obligated to follow this holding under what Seva terms the "rule of mandate," the principle that decisions of the appellate court are binding upon the superior court. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.) It also was (and is) obligated to adhere to the "law of the case doctrine," which provides that the decision of an appellate court on a rule of law necessary to deciding a case conclusively establishes that rule and makes it determinative of the rights of the parties to that case throughout its duration. (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491.) The law of the case doctrine also applies to issues that were presented and decided in a prior appeal, even if those issues were not absolutely necessary to the determination whether the judgment appealed from should be reversed. (*People v. Boyer* (2006) 38 Cal.4th 412, 442.)

There is no indication in the record that the trial court disregarded our holding regarding Seva's motion. It did not, for

instance, grant the motion on remand; the trial court did not even indicate disagreement with our holding. Seva nonetheless argues the court violated the law of the case doctrine and the "rule of mandate" because it entered judgment on the Deal Memorandum in contravention of our "finding that the Deal Memorandum lacked any judicial imprimatur because the parties had waited too long to seek a court order on the Deal Memorandum." We disagree.

Our previous opinion indeed stated that "Seva inexplicably waited years to apprise the court of his bankruptcy and Dina's agreement to accept a substantially lesser amount of spousal support than that ordered by the court," and further stated that the Deal Memorandum "lacked any judicial imprimatur." It did not, however, causally link those two observations, nor did it make factual "findings" on either topic. The opinion merely explained the trial court did not abuse its discretion in concluding that Seva's motion to modify his spousal support and set aside the Deal Memorandum was untimely, and that *Olson*, *supra*, 27 Cal.3d 414 (discussed more fully below) did not apply because the parties, not the court, made the disputed property divisions. Our affirmance of the trial court's decision to deny Seva's motion because it was untimely, it lacked the necessary income and expense declaration, and the modification it sought was not cognizable, is not relevant to the current issue, whether entry of the Deal Memorandum was proper. Nothing in our previous opinion precluded the trial court's current findings or ruling.

II. Seva has not demonstrated the Deal Memorandum was unjust.

Seva contends the trial court erred by entering judgment on an unjust contract. He claims the Deal Memorandum is

unjust because "circumstances have changed, his performance under the contract would be impossible, and . . . he cannot afford to pay support of $5,500 [per month] based on his current income and expense declaration." He further asserts that we "previously affirmed the finding that the Deal Memorandum was inequitable," a proposition he suggests the trial court "implicitly agreed" with by reserving his defenses to enforcement. None of these assertions, which are unsupported by legal authority, rendered the Deal Memorandum or its reduction to a judgment unjust.

From the record before us, it does not appear that the trial court ever found the Deal Memorandum to be inequitable. When distinguishing *Olson*, *supra*, 27 Cal.3d 414 in our previous opinion, we stated that *Olson* was not applicable because the trial court in this case "had no opportunity to adopt the inequitable division as the intended decision of the court." This characterization was not a finding. Even if it was, "[w]henever, as in this case, the parties agree upon the property division, no law requires them to divide the property equally, and the court does not scrutinize the MSA to ensure that it sets out an equal division." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 666.) Divorcing spouses "are free to decide on an unequal distribution," no matter how unjust it may appear to an outside observer, "[a]s long as such agreement is based upon a complete and accurate understanding of the existence and value of community and separate assets that are material to the agreement." (*In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, 1349.) "The court's only role with regard to a proper stipulated disposition of marital property is to accept the stipulation and, if

requested, to incorporate the disposition into the judgment." (*In re Marriage of Cream*, *supra*, 13 Cal.App.4th at p. 91.)

Seva's alleged inability to pay the spousal support contemplated by the Deal Memorandum is of no moment in light of the nonmodifiable nature of the obligation. A trial court's discretion to modify a spousal support order is constrained by the terms of the parties' marital settlement agreement. The court may not simply reevaluate the spousal support award, "despite intervening, possibly unfair, changes of circumstance," if the parties agreed that the support was nonmodifiable. (*In re Marriage of Hibbard* (2013) 212 Cal.App.4th 1007, 1014-1015.) In *In re Marriage of Hibbard*, for instance, the parties agreed that spousal support would "only terminate" upon the husband's death or the wife's death or remarriage, and could not be reduced to less than $2000 per month in any circumstance. The trial court accordingly denied the husband's request to reduce his spousal support obligation to less than $2000 due to his post-traumatic stress disorder and inability to work, and the appellate court affirmed. (*Hibbard*, *supra*, at pp. 1014-1017, 1019.)

To the extent other portions of the Deal Memorandum may have become impossible for Seva to perform, he may, as we explain more fully below, pursue relief from the judgment.

III. The section 664.6 motion was not barred by section 337 or laches.

Seva contends Dina's motion to enforce the Deal Memorandum under section 664.6 was untimely under both "the applicable statute of limitations," which he contends is four years as provided by section 337, and the equitable doctrine of laches. We review the statute of limitations issue de novo, as the relevant facts are not in dispute. (*Sahadi v. Scheaffer* (2007) 155

Cal.App.4th 704, 713-714.) We review the laches issue for manifest injustice or lack of substantial evidence. (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1417.)

Section 337 sets a four-year statute of limitations on most "action[s] upon any contract, obligation, or liability founded upon an instrument in writing." Seva contends this statute of limitations is applicable to section 664.6 motions to enter judgment. For support he points only to *Pietrobon*, *supra*, 137 Cal.App.4th 992, which the trial court held was inapposite. We agree with the trial court's conclusion.

In *Pietrobon*, the parties agreed to a stipulated settlement of the plaintiff's lawsuit. (*Pietroban*, *supra*, at p. 994.) Defense counsel reduced the oral stipulation to writing, but only the plaintiff signed it. (*Ibid.*) The plaintiff subsequently dismissed the suit with prejudice. Shortly thereafter, defendant stopped meeting his obligations under the settlement agreement. (*Id.* at p. 995.) In response, "Plaintiff apparently sought to enforce the settlement agreement pursuant to the summary procedure set forth in section 664.6; however the trial court denied the requested relief *because it lacked jurisdiction following the voluntary dismissal of the underlying action.*" (*Ibid.*, italics added.) Nearly three years later, the plaintiff filed a separate lawsuit alleging that defendant breached the settlement agreement and committed fraud. (*Ibid.*) The defendant raised the two-year statute of limitations on oral contracts (§ 339) as an affirmative defense. (*Ibid.*) The trial court concluded the suit was timely under the applicable four-year limitations period for written contracts (§ 337) and entered judgment in plaintiff's favor. (See *Pietrobon*, *supra*, 137 Cal.App.4th at pp. 995-996.)

The defendant appealed, contending that the shorter limitations period for oral contracts should have applied because he never signed the settlement agreement. (*Pietroban*, *supra*, at p. 996.) The appellate court disagreed, finding that defendant had agreed to the terms of the writing, and further rejected the defendant's argument concerning the statute of frauds. (See *id.* at pp. 997-999.) As is most relevant here, the court noted that "Both parties agree that *section 664.6 does not control here* because the underlying matter had been dismissed and the parties had not requested that the court retain jurisdiction either in a writing signed by both parties themselves or orally before the court at the time of the stipulated settlement as provided in section 664.6." (*Id.* at p. 996, italics added.)

As is apparent from the portions of *Pietrobon* we have emphasized, the case is not pertinent here. The issue in *Pietrobon* was whether a suit alleging breach of an oral agreement reduced to writing and signed by only one of the parties was subject to the two-year statute of limitations governing oral contracts or the four-year statute of limitations governing written ones. The trial court did not enter judgment under section 664.6, and the parties agreed section 664.6 was not relevant. Here, in contrast, section 664.6 is crucial to the issues on appeal. Seva claims that a section 664.6 motion "must be brought by no later than four years after execution (if in writing), and two years, if orally." *Pietrobon* sheds no light on this claim.

Our own research has not uncovered any authority supporting Seva's contention that motions for entry of judgment of written settlement agreements pursuant to section 664.6 are subject to the four-year statute of limitations period set forth in section 337. That provision, and statutes of limitation generally,

govern the time periods for initiating new civil actions, not filing motions within preexisting civil actions. Section 312, for instance, generally provides that "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute." A motion filed pursuant to section 664.6 seeks to enforce an agreed-upon resolution of an existing civil action, not to commence a new one. Indeed, in *Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 441, the court observed that although the "lack of continuing jurisdiction to utilize section 664.6 does not preclude a party's enforcement of a settlement agreement by means of a separate action, matters such as statutes of limitation and the ability to bring an absent litigant back into court make enforcement of a settlement agreement under section 664.6 preferable to a separate suit." (*Ibid.*) This language suggests that section 664.6 is not subject to the same statutes of limitation as other enforcement mechanisms, such as a separate lawsuit—a new civil action—for breach of contact.

Courts also have held that failure to bring a section 664.6 motion within five years of an action's commencement does not warrant dismissal under section 583.310. "[O]nce there has been a settlement in open court, the court can reasonably assume the matter has been finally disposed of and will not go to trial, even though details of execution may remain; consequently, there is no compelling reason a settlement agreement must be reduced to judgment within five years." (*Canal Street, Ltd. v. Sorich* (2000) 77 Cal.App.4th 602, 608.) Seva has not offered a compelling reason a settlement agreement must be reduced to judgment within four years of being reached.

Nor has he offered a compelling argument for the application of the equitable doctrine of laches. While we previously observed that both he and Dina were dilatory in prosecuting the dissolution proceedings, delay alone, even of unreasonable duration, is insufficient to warrant application of the doctrine of laches. "A party asserting laches must show both unreasonable delay and prejudice resulting from the delay. [Citation.] A trial court's ruling regarding laches will be sustained if there is substantial evidence to support it." (*Martin v. Santa Clara Unified School Dist.* (2002) 102 Cal.App.4th 241, 257.)

Seva has not demonstrated how he was prejudiced by Dina's delay in filing her section 664.6 motion, nor did he make any such showing in the trial court. We accordingly do not overturn the trial court's implicit ruling on this issue.

IV. *Olson* and its progeny do not apply.

As he did in the previous appeal, Seva contends the family law court should have reallocated the agreed-upon property divisions set forth in the Deal Memorandum under *Olson*, *supra*, 27 Cal.3d 414, and *In re Marriage of Rives* (1982) 130 Cal.App.3d 138 (*Rives*) because circumstances changed between the time of the parties' agreement and the entry of judgment. As we explained previously, *Olson* and its progeny are inapposite to the facts of this case.

In *Olson*, the Supreme Court considered "the duties of a trial court in a dissolution proceeding when property is lost to the community during the period between the announcement of an intended decision and the entry of an interlocutory decree." (*Olson*, *supra*, 27 Cal.3d at p. 416.) There, the parties did not agree on a property division, so the family law court held a five-

day trial concerning the appropriate division of their community property. (*Id.* at p. 417.) Shortly after the trial concluded, the court issued a "Decision on Submitted Matter," which awarded the parties' marital residence to the wife and an equivalently valued amount of community property to the husband. (*Id.* at p. 418.) Prior to entry of judgment, the wife moved to reopen the proceedings because the marital residence had been foreclosed upon and sold at a sale from which neither party would receive proceeds. (*Ibid.*) She contended that, with the house removed from the community's assets, the court's division of community property was no longer equitable. (See *ibid.*) The court denied her motion to reopen and reduced its tentative decision to a final one. (See *id.* at pp. 419-420.)

The Supreme Court concluded that was error. It held that the "controlling statutory language," then contained in Civil Code section 4800, subdivision (a) and now codified in Family Code section 2550, mandated that the court divide the community estate equally. (*Olson*, *supra*, 27 Cal.3d at p. 421.) To divide community property equally, the family law court "'must distribute both the assets and the obligations of the community so that the residual assets awarded to each party after the deduction of the obligations are equal.'" (*Ibid.*) The family law court accordingly "was obliged" to "redistribute equally the residue of the property then remaining in the community" when it learned, prior to its entry of judgment, that there had been a substantial change in the nature of the community estate. (*Id.* at p. 422.)

In re Marriage of Rives, *supra*, 130 Cal.App.3d 138 followed *Olson* and arrived at the same conclusion. There, the court held a trial concerning the valuation and division of the couple's

community property. After trial, the court announced an intended decision valuing one of the couple's bee-related businesses, Rives Queens, at $90,000 and awarding it to the husband. (*Rives*, *supra*, 130 Cal.App.3d at p. 148.) The wife was to receive the other business, Rives Cages, and was to remain in control of both businesses in the interim. (See *id.* at pp. 147, 152.) Between the conclusion of the trial and the entry of judgment, wife "ignored the [Rives Queens] business, and allowed the bees to starve and the hives to be damaged by moth infestation, and failed to run the business[,] thereby destroying the continuity of the business as a going concern." (*Id.* at pp. 152-153.) She simultaneously "devoted her efforts to the cage business," which the court tentatively had awarded to her, building up the inventory and increasing its value. (*Id.* at p. 153.) The husband moved to reopen the issue of valuation of the decimated business, but the trial court denied his motion and entered judgment in accordance with its tentative. (*Id.* at p. 149.)

The appellate court reversed. Citing *Olson*, it held that the trial court should have reopened evidence to account for the changed circumstances after its announcement of intended decision but before its entry of judgment. (*Rives*, *supra*, at pp. 152-153.) The court concluded that, absent such a reopening, the court's property division "was neither fair in principle nor equal in result." (*Id.* at p. 152.) This was the same problem present in *Olson*: the trial court violated its statutory mandate to divide the community property equally. *In re Marriage of Johnson* (1983) 143 Cal.App.3d 57, 61, which Seva cites in his reply brief is indistinguishable from *Olson* and *Rives*; it involved a change in valuation of a boat between the court's tentative and final judgments.

Importantly for our purposes, the Supreme Court recognized in *Olson* that there are some circumstances under which an unequal division of property is permissible. (See *Olson*, *supra*, 27 Cal.3d at pp. 421, 422.) One of those circumstances is "upon the written agreement of the parties." (Fam. Code, § 2550.) "Whenever, as in this case, the parties agree upon the property division, no law requires them to divide the property equally, *and the court does not scrutinize the [marital settlement agreement] to ensure that it sets out an equal division.*" (*Mejia v. Reed*, *supra*, 31 Cal.4th at p. 666 [italics added].) Thus, the rationale behind the duty to redistribute articulated in *Olson*, *Rives*, and *Johnson*—the statutory obligation to divide property equally—is not present when the parties rather than the court divide the community property. That is why our previous opinion's discussion of *Olson* and *Rives* noted that "[t]he property division contemplated by the parties' Deal Memorandum lacked any judicial imprimatur." Because the family law court did not make a tentative property division that later became inequitable, there was nothing for it to reconsider under *Olson*, *Rives*, or *Johnson*.

Seva also cites *In re Marriage of Reilley* (1987) 196 Cal.App.3d 1119, 1124 (*Reilley*) for the proposition that "a trial court must vacate an agreement by the parties when changed circumstances occur prior to entry of judgment." *Reilley* does not support this proposition. In *Reilley*, like *Olson, Rives*, and *Johnson*, the court held a trial to divide the spouses' community property. At the trial, the parties stipulated that the fair market value of their second home, which the husband had been living in and renovating, was $120,000. (*Reilley*, *supra*, 196 Cal.App.3d at p. 1121.) Following trial, the court awarded the home (and its

mortgage) to the husband, and further concluded he was to be reimbursed for the entire amount he had spent on the renovations. (*Id.* at p. 1122.) The wife appealed, and the appellate court concluded the trial court's method of calculating the husband's reimbursement for the renovations was erroneous. (*Id.* at pp. 1122-1123.)

The wife also argued on appeal that the trial court should have to revalue the second home on remand, since husband subsequently sold the property for $160,000, well in excess of the $120,000 value to which the parties had stipulated. (*Id.* at p. 1124.) The appellate court held that "the trial court on remand should exercise its discretion whether to relieve wife from the stipulation and take evidence on the issue of fair market value," because trial courts "on remand may relieve a party of stipulations made at the prior trial." (*Id.* at pp. 1124-1125.) This holding—that the trial court had the discretion to relieve a party of her previous stipulation on remand—provides no support for Seva's contention that the family law court "must vacate an agreement by the parties when changed circumstances occur prior to entry of judgment."

V. Reservation of Seva's defenses did not violate his due process rights.

Seva finally contends that the trial court violated his due process rights by deferring consideration of his impossibility and frustration of purpose defenses to performance of the Deal Memorandum. He argues that these defenses will be lost because the Deal Memorandum will be "merged" into the judgment. We disagree.

When a marital settlement agreement is entered as a judgment or otherwise incorporated into a judgment, it "merges"

into the judgment and no longer can be enforced as a contract. (See Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2016) ¶ 9:443, p. 9-166.) Instead, it must be enforced as a judgment. (*Ibid.*) That means the parties no longer may enforce the terms of their agreement by bringing a breach of contract action, seeking specific performance, or pursuing other contractual remedies; they must seek performance through contempt, execution, or other judgment-specific methods. (See *ibid.*)

Seva contends it also means that he has no defenses to performance of the terms of the agreement. That is incorrect. First, Seva had no prior right to assert performance defenses because Dina never alleged he breached the agreement. Second, following entry of a judgment incorporating a marital settlement agreement, "any ground for avoiding the agreement [may] be pursued by statutory remedies to set aside the judgment, coupled with a motion to vacate the 'tainted' portions of the underlying agreement." (Hogoboom & King, *supra*, ¶ 9:446, p. 9-167.) Those statutory remedies include those provided in section 473, subdivision (b) ("The court may, upon any terms as may be just, relieve a party . . . from a judgment . . . taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect"). Family Code section 2122 also enumerates several grounds—and time limits—for a motion to set aside a judgment, including "mistake, either mutual or unilateral, whether mistake of law or mistake of fact." Limited equitable remedies, such as vacation of "tainted" portions of the marital settlement agreement, also may be available to a limited extent under Family Code section 2128, subdivision (c). (See *Id.* ¶¶ 9:446, 16:100, 16:154, p. 9-167.)

Here, the trial court specifically advised Seva that he would be permitted to assert his intended defenses in future proceedings. He may do so by affirmatively seeking relief from the judgment under one or more of the aforementioned provisions, or, like any other party subject to a judgment, responding defensively if and when Dina seeks to enforce the judgment. His due process rights are protected under either scenario.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.