Filed 4/30/18 Marriage of Copeland and Huberman CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re Marriage of MONICA LEE COPELAND and DOUGLAS ALAN HUBERMAN.	B267917 (Los Angeles County Super. Ct. No. BD550644)
MONICA LEE COPELAND, Respondent, v. DOUGLAS ALAN HUBERMAN, Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert B. Broadbelt, Judge. Affirmed.

Law Offices of Joel F. Tamraz and Joel F. Tamraz for Appellant.

Kermisch & Paletz, Lauren M. Lookofsky and William Kermisch for Respondent.

Monica Lee Copeland petitioned for dissolution of her marriage to Douglas Huberman. After a mediation, they entered into a settlement agreement, on which the family court entered judgment. Huberman now contends that the judgment must be reversed because it was based on a confidential and inadmissible mediation agreement and because the parties failed to comply with the Family Code's mandatory disclosure requirements. We reject these contentions and affirm the judgment.

BACKGROUND

Copeland and Huberman were married in 2006 and had two children. In August 2011, Copeland petitioned for dissolution of their marriage. On July 15, 2014, Copeland and Huberman signed a settlement agreement after a mediation. As relevant here, the agreement stated, "This document is an enforceable contract, with more formal documents to be drawn by bankruptcy and family law counsel, and this document may be used as an exhibit and filed with the court." According to the Los Angeles Superior Court docket, Copeland filed a request for an order and motion for entry of judgment, to which Huberman filed responsive papers. After a hearing, the trial court entered judgment based on the agreement and attached the agreement to the judgment.[1]

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[1] Neither the motion papers nor the reporter's transcript or a settled statement of the hearing are part of the record on appeal.

Huberman now appeals, contending that the judgment must be reversed because, first, the mediation agreement was a confidential document that could not be the basis for the judgment, and, second, the parties did not file declarations of disclosure under the Family Code.[2]

DISCUSSION

I. The mediation agreement could be the basis for the judgment.

Citing the general rule that documents prepared for purposes of mediation are generally inadmissible in civil proceedings (Evid. Code, § 1119, subd. (b)), Huberman contends that the mediation agreement could not be the "basis" for the judgment. However, Evidence Code section 1123 contains an exception to the general rule that mediation documents are inadmissible. The section provides that a "written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure," "if the agreement is signed by the settling parties" and any of specified conditions are satisfied, including the "agreement provides that it is admissible or subject to disclosure, or words to that effect," the "agreement provides that it is enforceable or binding or words to that effect," or all "parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure." (Evid. Code, § 1123; see also *In re Marriage of Daly & Oyster* (2014) 228 Cal.App.4th 505, 510-511; *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 191-192 ["a signed settlement agreement reached through mediation is exempt from this general rule if it

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[2] All further undesignated statutory references are to the Family Code.

'provides that it is enforceable or binding or words to that effect' "].) Here, the settlement agreement provides, "This document is an enforceable contract, with more formal documents to be drawn by bankruptcy and family law counsel, and this document may be used as an exhibit and filed with the court." By its own terms, the agreement was admissible and enforceable. Thus, the "parties agreed the court would enforce the document, which it could not do unless the document was disclosed to it." (*Daly*, at p. 511.) Huberman's argument that the agreement could not be the basis for the judgment is therefore wrong.

Further, the agreement, to be enforceable, did not have to be signed by the attorneys. Evidence Code section 1123 requires the parties to sign the agreement, which they did. Huberman's related protest that he would not have signed the agreement had he been represented at the mediation is similarly meritless. On this record, he did not move to set aside the agreement on that ground below. We therefore will not consider that argument for the first time on appeal. "Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider . . . . Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier." (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178.)

II. Disclosure declarations

Nor is the failure of any party to comply with the mandatory disclosure requirements of the Family Code a ground to set aside the judgment. Under section 2105, parties must serve each other with final declarations of disclosure and a current income and expense statement "before or at the time the parties enter into an agreement for the resolution of property or support issues." (§ 2105, subd. (a); *Lappe v. Superior Court* (2014) 232 Cal.App.4th 774, 781.) The parties also "shall execute and file with the court a declaration signed under penalty of perjury stating that service of the final declaration of disclosure . . . was made on the other party" before judgment is entered. (§ 2106.) A judgment entered when the parties have failed to comply with the disclosure requirements may be set aside to the extent the nondisclosure "materially affected" the judgment. (§ 2105, subd. (c).)

Huberman attempts to show that the alleged failure to exchange disclosure declarations materially affected the judgment by referring to matters outside the record on appeal. That miniscule record merely contains the superior court docket, the petition for dissolution, a declaration under the uniform child custody jurisdiction, the summons, the judgment, a minute order, notice of entry of judgment, and notices regarding the appeal. The record contains nothing to substantiate claims Huberman makes in his opening brief about, for example, Copeland's treatment of the children and Huberman's corporate assets and liabilities. In addition, although he filed a response to Copeland's request for entry of judgment, Huberman did not provide us with copies of those documents. Without those documents, we cannot evaluate his argument that the court erred in entering judgment.

As appellant, it was Huberman's burden to provide an adequate record for review. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141; *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003 & fn. 2.) Without a proper record, the evidence is conclusively presumed to support the judgment. (*Cosenza v. Kramer* (1984) 152 Cal.App.3d 1100, 1102.)

Nor has Huberman shown that the judgment should be set aside under section 2107. Section 2107 concerns the remedies a party who has complied with disclosure requirements may seek against a noncomplying party. (See also *In re Marriage of Steiner & Hosseini* (2004) 117 Cal.App.4th 519, 527-528 (*Steiner*).) Subdivision (d) of that section provides, in part, that "if a court enters a judgment when the parties have failed to comply with all disclosure requirements of this chapter, the court shall set aside the judgment. The failure to comply with the disclosure requirements does not constitute harmless error." (§ 2107, subd. (d).) Huberman, the noncomplying party, seeks to use section 2107, subdivision (d) against the complying party, Copeland, who, according to the Los Angeles Superior docket, filed a final declaration of disclosure on July 16, 2015.

We, like other courts, will not countenance using section 2107 in such an absurd manner. To read section 2107, subdivision (d) "to mean that a *non*-complying party can unilaterally undo a judgment after trial when he or she would have to comply to obtain disclosure before trial creates a most perverse set of incentives: As apparently happened in the case before us, a party could *deliberately* not comply with disclosure requirements, keep mum, see if the trial results in an acceptable judgment, and then have the opportunity to obtain a better result by pulling the non-disclosure card out of his or her sleeve on

appeal or new trial motion. That is the sort of absurdity of statutory result that courts simply do not countenance." (*Steiner*, *supra*, 117 Cal.App.4th at p. 528; see *In re Marriage of Woolsey* (2013) 220 Cal.App.4th 881, 894 [after encouraging his former wife to engage in mediation, husband "may not be heard to complain about his own failure to serve the final financial disclosure"]; *In re Marriage of Campi* (2013) 212 Cal.App.4th 1565, 1576 [where husband misrepresented to trial court that he had complied with preliminary disclosure requirement, he could not rely on section 2107, subdivision (d)].)

It would be especially absurd to set aside the judgment where, as here, Huberman has failed to clear the constitutional hurdle. That is, our California Constitution provides that no judgment may be set aside or new trial granted unless there has been a miscarriage of justice. (Cal. Const. art. VI, § 13.) To the extent the "harmless error" provision of section 2107, subdivision (d) conflicts with the California Constitution, the constitution trumps the Family Code. (*Steiner*, *supra*, 117 Cal.App.4th at p. 527.) That being the case, Huberman has failed to show that entry of judgment resulted in a miscarriage of justice.

DISPOSITION

The judgment is affirmed. Copeland shall recover her costs on appeal.

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DHANIDINA, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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