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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of ELSA and NHIEN H.
CHAU.

B265261

ELSA CHAU,

(Los Angeles County
Super. Ct. No. BD558797)

Respondent,

v.

NHIEN H. CHAU,

Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Tamara Hall, Judge. Reversed.

Rombro & Associates, S. Roger Rombro and Nhien H. Chau, in pro. per., for Appellant.

Elsa Chau, in pro. per., for Respondent.

* * * * *

In this marital dissolution action, husband Nhien H. Chau appeals the trial court's order denying his motion to set aside the marital settlement agreement and the corresponding judgment. Husband's motion contended that the settlement agreement with wife Elsa Chau resulted from "extrinsic fraud" due to wife's concealment of various assets during settlement negotiations. Husband contends the trial court abused its discretion when it ruled on the motion, as the court relied on Code of Civil Procedure section 473 in making its ruling. However, the motion was not brought under section 473, but rather on the basis of extrinsic fraud. Wife contends the trial court did not base its ruling on section 473, and weighed the evidence and found in favor of wife. We agree with husband that the only fair reading of the record indicates that the court did not consider the actual legal basis for husband's motion, and therefore failed to exercise its discretion in ruling on husband's motion. We reverse.

BACKGROUND

Husband and wife married in 1988. In February 2012, wife filed a petition for dissolution of marriage. On October 8, 2013, the parties entered into a settlement agreement, providing for the division of assets upon dissolution, and each waiving their right to receive spousal support. On April 23, 2014, wife filed a motion for entry of judgment based on the settlement agreement under Code of Civil Procedure section 664.6. Husband opposed the motion, arguing that his attorney did not allow him to meaningfully participate in the negotiations, that his attorney told him that he was not entitled to spousal support, and therefore that he "must" waive it, and that he was not allowed to read the agreement before signing it. The motion was heard on July 31, 2014. The court granted the motion, but judgment was not entered until April 29, 2015. The judgment awarded wife a residence in Norwalk, among other assets, and awarded husband a Gardena property, among other assets. Husband was to make an equalization payment of \$120,000 to wife.

On May 8, 2015, husband filed a request for an order, asking the court to "set[] aside [the] October 8, 2013 Settlement Agreement and July 31, 2014 Order granting [wife's] motion for entry of Judgment." Husband argued that the settlement agreement

and order granting the motion for entry of judgment should be set aside because they were “obtained due to [wife’s] fraud.” The memorandum sought to “set aside [the] marital settlement agreement[] based on considerations of equity.”

Specifically, the memorandum and supporting declaration urged that wife had concealed the existence of two community vehicles, failed to disclose rental income she was receiving from the Norwalk property after their separation, that she mischaracterized “her separate property interest in the community Gardena property” and “misrepresented the community interest in [wife’s] 401K.”

Wife filed a responsive declaration denying most of the allegations of fraud.

On June 11, 2015, the trial court denied husband’s “request for an order to set aside pursuant to Code of Civil Procedure section 473.” Consistent with the court’s minutes, the reporter’s transcript of the hearing reflects that the motion was “denied pursuant to Code of Civil Procedure section 473.”

On June 29, 2015, husband filed a notice of appeal from the “Judgment (family law) filed 4/29/15.”¹

DISCUSSION

Husband contends the trial court abused its discretion by denying his motion under Code of Civil Procedure section 473, when the motion contended that the settlement and judgment were procured by fraud, and made no mention of section 473. We agree.

Code of Civil Procedure section 473, subdivision (b) permits the trial court to grant relief from a judgment, order or other proceeding taken against a party by “mistake, inadvertence, surprise, or excusable neglect.” A motion under section 473 must be brought “within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.” (*Ibid.*)

¹ Wife has not argued in her appellate brief that the notice of appeal is defective for failing to identify the post-judgment order which is the subject of this appeal. Under the rules of liberal construction, the notice of appeal is adequate to preserve husband’s appellate challenge. (*Luz v. Lopes* (1960) 55 Cal.2d 54, 59; Cal. Rules of Court, rule 8.100(a)(2).)

Relief from a judgment is also available under Family Code sections 2121 and 2122. Section 2121 provides that “the court may, on any terms that may be just, relieve a spouse from a judgment, or any part or parts thereof, adjudicating support or division of property . . . based on the grounds, and within the time limits, provided in this chapter.” (§ 2121, subd. (a).) Section 2122 provides that a party may move to set aside a judgment based on “actual fraud” among other bases. (§ 2122, subd. (a).) A motion for relief under this section must be brought “within one year after the date on which the complaining party either did discover, or should have discovered, the fraud.” (*Ibid.*)

A party may elect to bring a motion to set aside under *either* Code of Civil Procedure section 473 or Family Code section 2122, subject to the time limits of those sections. (*In re Marriage of Thorne & Raccina* (2012) 203 Cal.App.4th 492, 499, fn. 3.) That is, a motion under Code of Civil Procedure section 473 is not the preferred or sole basis for relief from a judgment, and each section provides different grounds for relief. (Code Civ. Proc., § 473, subd. (b); Fam. Code, § 2122, subds. (a)-(f); see *In re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 32 [Code Civ. Proc., § 473 and Fam. Code, § 2122 “coexist, operating as alternative bases for relief”].)

Once the timeframes provided by Code of Civil Procedure section 473 and Family Code section 2122 have expired, a court also has the inherent equitable power to set aside a judgment or other order for extrinsic fraud. (*In re Marriage of Thorne & Raccina*, *supra*, 203 Cal.App.4th at pp. 499, fn. 3, 500-501; see also *Potter v. Moran* (1966) 239 Cal.App.2d 873, 880.) “[Equitable] Relief may be sought either by motion or by an independent action [citation], and the nature of the relief available is not restricted to setting aside the former judgment; to the contrary, the court has power to provide any appropriate equitable remedy” (*In re Marriage of Adkins* (1982) 137 Cal.App.3d 68, 76-77.)

Our review is for abuse of discretion. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257 [Code Civ. Proc., § 473]; *In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, 1346 [Fam. Code, § 2122]; *Aldrich v. Aldrich* (1928) 203 Cal. 433, 437 [extrinsic fraud].)

Here, the trial court expressly stated that it was denying husband's request for relief under Code of Civil Procedure section 473. However, husband did not seek relief under this section. Instead, husband sought relief on the basis of *fraud*, and Family Code sections 2121 and 2122 permit a court to set aside a judgment based on fraud. Because the trial court failed to exercise its discretion under either Family Code section 2122 or its inherent equitable powers, both of which provide relief on the basis of fraud, we conclude that the court's order must be reversed, and that the request for an order should be reconsidered under the bases stated in the supporting memorandum. (See, e.g., *Sanford v. Rasnick* (2016) 246 Cal.App.4th 1121, 1133 [the failure to exercise discretion is an abuse of discretion].)

The parties have not briefed how the timing of the settlement, judgment, and motion may impact which standard the trial court applies in assessing fraud (e.g., Fam. Code, § 2122 or the court's equitable powers), and that issue was not raised below. Therefore, the trial court should first determine whether to consider the motion under section 2122 or under its inherent equitable powers.

DISPOSITION

The order is reversed, and the matter is remanded. Appellant is awarded his costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.