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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

KARIMA MIAH,

Plaintiff and Respondent,

v.

HASSAN MIAH,

Defendant and Appellant.

B229487

(Los Angeles County
Super. Ct. No. SD025839)

APPEAL from judgment of the Superior Court of Los Angeles County,
David J. Cowan, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.)
Affirmed.

Sandra G. Kim and Hassan Miah, in pro. per., for Defendant and Appellant.

Buter, Buzard, Fishbein & Royce and Glenn S. Buzard for Plaintiff and
Respondent.

Appellant Hassan Miah¹ appeals from the trial court's denial of his motion to vacate a stipulated judgment on the ground of fraud. The gist of the claim is that the attorney who represented his wife misled Hassan into believing she was a neutral not aligned with either side, and that, relying on this, he did not retain his own counsel as he otherwise would have done. We conclude that denial of the motion to vacate was correct, and affirm.

FACTUAL AND PROCEDURAL SUMMARY

Hassan and Karima Miah were married in 1981 and separated in 2007. After they separated, Karima filed a petition for dissolution of marriage. They attempted to reach an agreement on division of their assets through mediation. David Smith, the mediator, was paid from community funds. During the mediation, Karima told Hassan she wanted to retain an attorney to advise her with regard to a marital settlement agreement (MSA). Karima was not comfortable with the mediator and wanted to find someone else. Hassan agreed if she found someone who was a "mediator type."

On April 30, 2008, Karima sent Hassan an email with the subject line "Mediation" stating she had "met with an advising attorney, Kimberley Davidson, who will be helpful to me in thinking things through for the MSA." Karima retained Davidson as her advising attorney. She and Hassan agreed to pay Davidson's fees from their joint account. Davidson sent Smith an email with the subject "Miah Mediation." It explained that Karima had retained her as an advising attorney and suggested the parties hire a neutral Certified Public Accountant (CPA). Davidson's email signature block described her as a "Family Law Mediator & Collaborator."

Smith replied to Davidson's email. He copied Hassan in his reply, although the original email was not sent to Hassan. In his reply, Smith wrote "There is

¹ Because the parties share the surname Miah, we refer to them by their first names.

always a problem with neutrality. Hassan might feel that anyone you [Davidson] recommend would have difficulty being neutral.” In reply, Davidson asked if Smith had a recommendation for a neutral accountant. Hassan stated he was agreeable to a neutral CPA looking at the documents and Karima would decide whom to use. The parties decided to use Ron J. Anfuso as their joint forensic accountant. Anfuso’s retainer agreement indicated a copy to Karima in care of Kimberly K. Davidson, Esq. at the Law Offices of Kimberly K. Davidson.

On August 21, 2008, Davidson emailed Hassan indicating she had met with Anfuso and commenting on the terms of the MSA Hassan had prepared. Davidson suggested converting the MSA into a judgment of dissolution. Davidson explained the test for determining whether an asset is community or not. Hassan responded that since “[Anfuso] did not provide me information at the same time he provided input to Karima, I would not consider him a neutral party. Therefore, my comments are based on a response to representatives for Karima Miah.” Because of this, Hassan said that he intended to obtain his own legal and financial counsel.

On September 10, 2008, Davidson emailed a draft of the MSA to Hassan “in response to your email counter offer of 9/3/08.” The draft identified Karima as Petitioner, Hassan as Respondent, and stated that “Attorney for Petitioner shall prepare the Judgment incorporating the points in this memorandum of understanding.”

Davidson said that she and Hassan drafted at least seven proposed judgments after negotiations and modifications. Each contained identical language indicating that Davidson represented Karima and that Hassan had consulted with independent counsel. Davidson told Hassan he should have his own attorney advise him and review the judgment before signing.

On November 3, 2008, Davidson sent Hassan an email concerning a provision of the MSA stating “it may be better to consider [the loan portion of support] additional spousal support so you can get a deduction. If that’s the case

then Karima would be taxed on it and then should probably not have to pay interest on the 'loan' portion If the support option doesn't benefit you and Karima, then we will call it a loan."

On November 14, 2008, Davidson's paralegal emailed Hassan stating, "I am preparing your Income & Expense Declaration from your draft. Since [Davidson] is Karima's advising attorney, it is necessary that we use your address on forms and for mailing purposes I will finish preparing your disclosure documents and mail them to you for review and signature."

In December 2008, the parties executed a final stipulated judgment, which incorporated the MSA. Davidson prepared Hassan's Declaration of Disclosure, a Joint Schedule of Assets and Debts, and an Income & Expense Declaration. The stipulated judgment identifies Karima as:

Karima L. Miah
c/o Kimberly Davidson, Esq. (SBN 188558)
25550 Hawthorne Boulevard, Suite 201
Torrance, CA 90505-6832
Telephone No: 310-791-3170
Attorney For (Name): Karima L. Miah, In Pro. Per.

The MSA recited that the parties' acknowledged they had a right and opportunity to seek advice from counsel; Hassan had consulted with counsel and Karima had consulted Davidson in connection with the judgment; each party was to pay one half the fees for the attorneys and the CPA; each had acknowledged and stipulated that he or she had sought the advice of counsel of their choosing in negotiations and in preparation of the judgment; and each had read the judgment, was aware of its contents and effects, and had entered into the judgment voluntarily.

Hassan conceded Davidson never said she represented him. He also did not recall her saying she was acting as a mediator. Davidson told Hassan many times that she was only Karima's advisor, and he told Davidson many times that he was a CPA and experienced in working on complicated business transactions and

contracts. Hassan said he could handle the negotiation but would have an attorney review the final agreement before he signed. Hassan acknowledged he knew he could have declined to approve the proposed judgment.

On June 17, 2010, Hassan filed a motion to vacate the judgment pursuant to Family Code section 2122, subdivision (a). The trial court denied his motion on October 19, 2010. The court found the judgment was not a product of mediation, Davidson did not owe a duty to Hassan, she did not mislead Hassan, and Hassan had failed to prove that vacating the judgment would materially benefit him. Hassan timely appealed from this order.

DISCUSSION

Hassan contends Davidson committed actual fraud. Further, he argues he did not and should not have known about the fraud until after he entered into the judgment when he consulted with an attorney. Karima counters that the claim is time barred and, in any case, fails on the merits. We agree with Karima that the claim is time barred. The trial court found the stipulated judgment was not procured by actual fraud and on that basis denied Hassan's motion to vacate. While the trial court ruled on the merits of the fraud claim, the timeliness of the motion also is an issue on appeal. As we shall explain, it is closely interwoven with the merits.

An order denying a motion to set aside a judgment is reviewed for abuse of discretion. (*In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 682.)

Hassan argues Davidson committed actual (extrinsic) fraud, which prevented him from fully participating in the proceeding. "Family Code section 2122 specifies 'the exclusive grounds and time limits for an action or motion to set aside a marital dissolution judgment' (*In re Marriage of Rosevear*[, *supra*,] 65 Cal.App.4th 673, 684) after the six-month deadline under Code of Civil Procedure section 473 has passed." (*In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 87.) A court may vacate judgment when actual fraud prevented a party from

fully participating in the proceeding. (Fam. Code, § 2122, subd. (a).) A “motion based on fraud shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the fraud.”

(Ibid.)

Karima argues Hassan knew or should have known Davidson was acting as her attorney, not as the attorney or mediator for both sides, by the time the parties entered the judgment. We agree. Hassan received numerous emails indicating Davidson was Karima’s advising attorney, and no communication stating that she was acting as counsel or as a mediator for both sides. In an email copied to Hassan, Smith stated that because of Davidson’s position, any CPA she recommended may not appear to be neutral. Anfuso’s retainer identified Karima in care of Davidson. Davidson’s paralegal stated in an email to Hassan that Davidson was Karima’s advising attorney. Hassan and Davidson negotiated at least seven drafts of the judgment each of which included a clause stating Davidson’s role as Karima’s advising attorney. The judgment he signed included this clause.

Hassan’s evidence to the contrary is Davidson’s email signature, her giving him legal advice, and the judgment listing Karima as acting in pro. per. We agree with the trial judge that the omission of the standard description “attorney at law” or the equivalent is problematic. But, Hassan presents no evidence that Davidson made any affirmative representation hiding her role. The emails show Davidson was not giving legal advice, but was negotiating the terms of the settlement with Hassan. The stipulated judgment was not misleading. It states each party sought advice from an attorney and specifically states Davidson advised Karima. From this evidence, Hassan should have known of Davidson’s role as Karima’s attorney by the time he entered into the stipulated judgment.

While the trial court ruled Davidson did not mislead Hassan and did not reach the issue of fraud, the two are closely related and rely on the same evidence. The trial court found Davidson did not obscure her role as Karima’s advising

attorney. Since her role was clear, Hassan knew or should have known she was not acting as a neutral when they entered the judgment. He did not bring his motion to vacate until more than a year after the judgment.² Because a motion to vacate based on fraud must be brought within a year of when the party bringing the motion knew or should have known of the fraud, Hassan's motion was time barred. We therefore affirm the trial court on the ground that Hassan knew or should have known Davidson's role by the time the parties entered into the judgment and thus the motion to vacate was not timely filed within the one-year statute of limitations.

DISPOSITION

We affirm the October 19, 2010 denial of Hassan's Motion to Vacate. Respondent to have her costs on appeal.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.

² The parties entered the judgment in December 2008 and Hassan appealed in June 2010. Hassan claims he did not know Davidson's role until meeting with an attorney within one year of appealing.