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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of MICHELLE and  
TERRENCE HOWARD.

B268368

(Los Angeles County  
Super. Ct. No. BD538616)

MICHELLE HOWARD,

Petitioner and Appellant,

v.

TERRENCE HOWARD,

Respondent.

APPEAL from a post-judgment order of the Superior Court of Los Angeles County, Thomas Trent Lewis and Armen Tamzarian, Judges. Reversed.

Vakili & Leus, Sa'id Vakili, John A. Schlaff and Robert M. Zabb; Grignon Law Firm, Anne M. Grignon and Margaret M. Grignon for Petitioner and Appellant.

Ekins Kalt Weintraub Reuben Gartside and Thomas Paine Dunlap for Respondent.

## SUMMARY

Petitioner and appellant Michelle Ghent Howard appeals from an order granting the motion of respondent Terrence Howard to set aside spousal support provisions of a dissolution judgment and marital settlement agreement on the ground of duress pursuant to Family Code section 2122, subdivision (c).<sup>1</sup> Terrence<sup>2</sup> claimed that Michelle blackmailed him in a call he recorded in September 2011, and threatened to publicly release private recordings of a sensitive, intimate and sexual nature that would be embarrassing and could damage his career. As a result, Terrence claims he agreed, under duress, to a marital settlement agreement in September 2012 that obligated him to pay spousal support far in excess of what he would otherwise have been required to pay based on the parties' year-long marriage.

The trial court found that Terrence presented credible evidence that Terrence felt frightened and forced into signing the marital settlement agreement, which he would not have signed but for Michelle's threatening and coercive behavior. Giving due deference to the trial court's factual findings, we nevertheless conclude that the evidentiary record is insufficient as a matter of law to prove duress. Accordingly, we reverse.

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<sup>1</sup> Further undesignated statutory references are to the Family Code.

<sup>2</sup> The parties share a surname. For ease of reference, we shall refer to them by first name.

## FACTUAL AND PROCEDURAL BACKGROUND

### *Michelle Acquires Terrence's Private and Potentially Damaging Information Prior to Parties' Marriage*

Terrence is a well-known actor. The couple became engaged in May 2009, and married in January 2010. Shortly after they became engaged, Terrence accepted Michelle's offer to better preserve a recording of a conversation he had with his mother (who had since passed away), by downloading the recording from his dictaphone to a computer file. At the same time, without Terrence's permission, Michelle also downloaded to her laptop numerous private recordings from Terrence's electronic devices including audio and video tapes of a sexual nature. Terrence claims that those recordings, if released publicly, would greatly embarrass him and damage his career. Terrence learned Michelle had downloaded the tapes and asked Michelle to erase the files. She did not erase or return the tapes. As early as August 2009, during the engagement, Michelle had threatened—in one of many arguments the couple had throughout the course of their tumultuous relationship—to release the tapes, and told Terrence he was “mistaken” if he thought she was “going to be left with nothing.” Terrence claimed that, on another occasion during the engagement, when he asked Michelle to return the recorded materials, she said he would get them after he bought her “[her] own home in LA,” and was “paying [her] at least \$20,000 a month until [she was] satisfied.”

Nonetheless, the couple married, as planned, in January 2010. Terrence claims he was afraid of Michelle when he married her because she still had the tapes. He claimed he married Michelle primarily “because he loved her” but also because he feared her and “hope[d] that [he] could get those tapes back.” As he had during the couples’ engagement, Terrence “reasoned that it would be best to keep [Michelle] with [him] in hopes that maybe [he] could get that stuff back from her, and, if [he] could put [Michelle] in a good situation, maybe [he] wouldn’t have to worry about her trying to release those things.”

### *Dissolution, Reconciliation and Domestic Violence*

In January 2011, Michelle petitioned for dissolution of the marriage. Terrence testified that, after the couple separated, his “concern” that Michelle “would destroy [his] reputation” “if he didn’t give her what she wanted” increased greatly, to the point that he became “petrified” of her. Nevertheless, Terrence and Michelle attempted to reconcile in April 2011, but had separated again by July 2011.

On September 20, 2011, the parties participated in the telephone call that is pivotal to this proceeding. That call (hereafter, the “recorded call”) was recorded by Terrence, who has made it a lifelong practice to try to “record[] every second of [his] day.” The recording was played for the court, and a transcript was provided. During that call Michelle told Terrence she was “livid,” and “sick of the shit [he had] put [her] through.” She complained vociferously about the poor financial

situation in which Terrence left her and his failure to pay household expenses or support for which he had purportedly agreed to be responsible. Michelle made several references to the sex tapes. She told Terrence she had “shopped around,” believed she could “make a good two million dollars” off them and threatened to “bury” him if she sold them. In response to that call, Terrence had his accountant send \$40,000 in “blood money” to Michelle.

In early December 2011, Michelle obtained a protective order based on her declaration regarding multiple and ongoing instances of verbal harassment and physical violence by Terrence, which had begun a week after the couple married. Within two weeks, Terrence unsuccessfully sought a restraining order of his own claiming, in part, that Michelle was extorting him by threatening to reveal his private recordings. In December 2011 or January 2012, Terrence filed a report with the Los Angeles Police Department (LAPD) about Michelle’s purported blackmail. He later withdrew the complaint and “called off the investigation during the time of the . . . mediation” to save his career and because the LAPD had done “nothing,” even though he claimed that Michelle continued to attack and blackmail him.

On March 28, 2012, the entertainment media outlet TMZ published an article stating that Terrence had filed a criminal report with the LAPD because Michelle, with whom he was involved in an “epically bitter divorce battle” and who had “threatened to have him killed . . . by the Russians,” was “demanding money” from him in exchange for not releasing a “sex tape” and other “embarrassing”

information. TMZ reported that the LAPD was “in possession of the audio tape and [was] investigating the extortion claim.” TMZ noted that all of its information had been obtained from Terrence, and that Michelle, her counsel and the LAPD had declined to comment for the article.

### *The Parties Participate in Mediation*

On May 1, 2012, the parties and their respective attorneys participated in a voluntary day-long mediation with a retired family law judge acting as mediator. There was no signed agreement or recitation of an agreement on the record at the end of this single mediation session. No further mediation sessions were conducted, and neither the parties nor their counsel had any additional contact with the mediator after May 1, 2012.

By May 16, 2012, both parties had signed a document entitled “Agreement in Marriage of Howard.” Discussion and drafting continued and, by September 19, 2012, a slightly revised version of the earlier document was executed by both parties and their counsel as the final marital settlement agreement (settlement agreement).<sup>3</sup>

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<sup>3</sup> Terrence asserts that, although Michelle included the May 2012 version of the settlement agreement in the Appendix (Ex. 48), that document was neither offered nor received into evidence at the hearing. He is not correct. Terrence acknowledged at the hearing that the May 2012 document, which he recognized as the one signed by Michelle on May 11 and by him on May 16, 2012, as an “earlier version of what was ultimately presented to the court [as the parties’ final settlement

The May and September versions of the settlement agreement each contain an identical spousal support provision that provides that Terrence will pay Michelle base spousal support of \$5,800 per month for four and one-half years (retroactively to May 15, 2012), plus additional support of 21 percent of any gross earnings and residuals in excess of \$62,500 per quarter, with a cap of \$1,050,000 for the same length of time. The parties expressly agreed that the spousal support Terrence was to pay Michelle was non-modifiable as to “the amount, term or duration . . . for any reason or at all.”

Both versions contain a virtually identical provision requiring the parties to sign a “mutual permanent non-disclosure agreement” (NDA) by which the parties agreed to return all audio and video recordings and copies to one another. They also agreed that neither party would “publish, copy, distribute [or] disseminate any photographs of the other party, or the other party’s image, likeness or name.” A party’s violation of the NDA provision would subject him or her to liquidated damages of up to \$116,000.

Both versions of the settlement agreement include identical provisions reflecting that (1) the “parties understand that if this case went to trial, either party could do better or worse and that the full impact of this [settlement agreement] will not be known for many years. Nevertheless, each party is entering into this agreement freely and

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agreement].” The May 2012 document was admitted into evidence for the purpose of impeachment.

voluntarily and has had sufficient time to consider the terms of this deal memo”; (2) each party had received the advice of counsel and accountants; (3) each party acknowledged that the settlement agreement “resulted from mediation . . . and that at all times during the mediation each party was represented by counsel of his or her choice”; and (4) the parties had released of all claims “of every nature and kind, whether known or unknown, suspected or unsuspected.”

In December 2012, Michelle filed a motion to compel entry of the dissolution judgment. Terrence opposed that motion on the ground that the judgment Michelle sought to have entered failed accurately to reflect the parties’ September 2012 settlement agreement.<sup>4</sup>

The court rejected Terrence’s opposition and entered judgment on May 6, 2013. The judgment reflects the court’s explicit findings that, among other things, each party: (1) had represented “that this Judgment was entered into freely and voluntarily,” (2) “had represented and warranted that he or she was not acting under menace, duress, fraud, or undue influence of any kind whatsoever from any person, including the other party or his or his [*sic*] attorneys and/or agents in entering into this Judgment” and (3) had read the Judgment, and “has had ample opportunity to have it fully explained to him . . . and has had this Judgment its legal effect fully explained to each of them by their

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<sup>4</sup> Notably, Terrence did not oppose entry of the judgment on the ground that the settlement agreement upon which it was based was the result of duress. He did not raise this argument until May 2015.



respective counsel.” The judgment also generally recites the terms of the NDA, requiring the parties to keep information concerning the other’s personal, business, and creative affairs in strictly confidence. Michelle signed the NDA, but Terrence did not.

### *Post-Mediation Reconciliation and Terrence’s Remarriage*

In Fall 2013, Terrence and Michelle briefly attempted another reconciliation. They took a trip together to Costa Rica during which Terrence physically abused Michelle. She subsequently sought and Terrence stipulated to a second domestic violence protective order, which was entered in late September 2013.

In October 2013, Terrence married Mira Howard. A week after that marriage and a month after entry of the protective order against him, Terrence violated that order and called Michelle to profess his love for and desire to be reconciled with her.

### *Michelle Moves to Enforce the Judgment; Terrence Seeks to Have it Set Aside*

Terrence purportedly failed to pay spousal support and evaded collection efforts. At some point, Michelle learned he had redirected his earnings to business entities created after entry of the May 2013 judgment, and was violating the judgment in other ways. In August 2014 she sought an order enforcing the judgment and to have Terrence’s earnings assigned to her. The motion was set for hearing in mid-May 2015.

On May 5, 2015—the day before the statutory period to do so would have expired—Terrence filed the underlying Request for Order to Set Aside the Judgment based on Duress (RFO or motion). (§ 2122, subd. (c).) In his declaration in support of the RFO, Terrence stated that Michelle threatened him during the September 20, 2011, recorded call.<sup>5</sup> He claimed that he signed the settlement agreement only because Michelle engaged in blackmail and coerced him into agreeing to pay spousal support far in excess of what would ordinarily be required for a year-long marriage. Michelle opposed the RFO but did not submit a personal narrative declaration responding to the allegations of extortion or explaining her actions.

*Terrence Pursues Discovery and Michelle Seeks a Protective Order*

Terrence noticed Michelle’s deposition for July 2, 2015, and requested the production of various documents. Michelle’s counsel resisted, insisting that Michelle’s testimony as well as most of the requested information related to matters subject to mediation confidentially (sometimes referred to as mediation privilege) (Evid. Code, §§ 1119, 1125), and/or fell within the scope of the NDA (the disclosure of which could subject her to liability for liquidated damages).

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<sup>5</sup> Terrence claimed he was also threatened in electronic messages after the mediation, messages he attributed to Michelle. Communications received following execution of the settlement agreement are not relevant.

Michelle's counsel attempted unsuccessfully to negotiate a compromise which would permit Michelle to testify at deposition without subjecting her to liability under the NDA, or waiving mediation confidentiality.

On July 1, 2015, having been unable to reach a compromise with Terrence's counsel, Michelle's counsel filed an *ex parte* application seeking a broad protective/sealing order. She requested a stay of her deposition based on Terrence's refusal to waive the NDA, and sought to preclude production of documents for the period between April 6 and September 19, 2012, arguing they fell within the mediation privilege. The application was denied. The court deferred ruling on issues related to the mediation privilege or NDA, concluding such issues would be appropriately addressed in the context of a targeted motion to compel brought by Terrence after Michelle asserted specific objections at deposition.

Michelle's deposition was taken on July 24, 2015. She agreed to testify subject to Terrence's agreement to waive the penalty provisions of the NDA, a compromise Terrence rejected. On instruction of counsel, Michelle declined to answer questions or to produce documents predating entry of judgment. Terrence did not file a motion to compel Michelle's deposition testimony or the production of withheld documents. Instead, he filed a motion *in limine* seeking to bar Michelle from presenting direct testimony at the evidentiary hearing on the RFO regarding any matter, event or document predating the May 2013 judgment. Michelle in turn filed an *in limine* motion to exclude

Terrence’s use of “evidence in violation of the mediation privilege” or the NDA.

### *The Evidentiary Hearing*

A four-day evidentiary hearing began on August 11, 2015. Turning first to the parties’ *in limine* motions, the court stated its intention to bar Michelle from presenting direct testimony due to (1) her failure to file a narrative responsive declaration to the RFO in advance of the hearing, and (2) her refusal to respond to discovery regarding events outside of the mediation time frame based on her assertion that she was precluded from doing so by the NDA and or the mediation privilege. In the course of the hearing, the court requested briefing on the effect of Evidence Code section 1125, subdivision (a)(5), as to when the mediation terminated.<sup>6</sup> This question bore directly on Michelle’s contention that mediation confidentiality extended from at least May 1, 2012 to September 19, 2012, the date of the final signature on the settlement agreement, because all interim communications were “incident” to the mediation.

In her brief Michelle argued that Evidence Code section 1125, subdivision (a)(5) should be interpreted expansively. She asserted that,

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<sup>6</sup> Evidence Code section 1125, subdivision (a)(5) states that a mediation ends when “[f]or 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.”

because the parties' counsel had ongoing discussions and the final agreement recited that it was reached through mediation, the entire period from the agreement to participate in mediation to the date the settlement agreement was executed was encompassed by the mediation privilege. Terrence argued that public policy dictated that mediation confidentiality should not be used to insulate Michelle's criminal conduct, and that the court should consider the equity of the situation on its own merits. Relying on the statutory language, the court held that the mediation ended by May 12, 2012, as there had been no communication between the mediator and any party to the mediation for 10 calendar days after May 1, 2012, nor any agreement to extend this period of time. Accordingly, the mediation privilege had lapsed by the time the parties executed the September 2012 settlement agreement.

At the hearing Terrence testified that he was afraid of Michelle and had felt compelled by her threats to sign the settlement agreement. He also testified, however, that his reasons for signing the settlement agreement were conflicted. He admitted that he loved Michelle, but also said he feared her and wanted to regain the recordings and photographs. The trial court observed that Terrence had conflicting feelings, noting that even after he remarried, Terrence "was drawn back to Michelle based on a complex combination of fear and a morbid fatal attraction."

### *The Court's Ruling*

In its statement of decision the trial court found that Terrence, whose evidence had been uncontradicted, established a prima facie case that he acted under duress in signing the settlement agreement. The RFO was granted and the court set aside the settlement agreement and judgment, except with regard to marital status. This appeal followed.

### **DISCUSSION**

Michelle insists that the order vacating the judgment and marital settlement agreement on the ground of duress must be reversed because Terrence presented insufficient evidence to establish duress as a matter of law.<sup>7</sup> We agree.

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<sup>7</sup> Michelle also maintains that the judgment should be reversed because: (1) the evidence underlying Terrence's claim of duress is barred by mediation confidentiality; (2) the court erred in barring her from presenting direct testimony as a discovery sanction due to her failure to respond to deposition questions or produce documents based on the advice of counsel that doing so would subject her to liability under the NDA and/or violate mediation confidentiality; and (3) the court erred in denying her relief from her effective "default" under the mandatory provision of Code of Civil Procedure section 473, subdivision (b), based on her attorney's unequivocal admission of fault.

Inasmuch as we reverse the judgment based on our conclusion that the trial court erred in vacating the judgment because, as a matter of law, Terrence failed to establish duress, we confine our discussion, to the extent practicable, to the parties' contentions on this issue.

# 1. *Standard of Review*

Determination regarding a motion to set aside a judgment under section 2120 et seq., is a matter committed to the trial court’s discretion, and reversal generally will lie only where that discretion has been abused. (See *In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 684 (*Rosevear*); *In re Marriage of Kelkar* (2014) 229 Cal.App.4th 833, 845.) However, the court’s discretion must be guided by fixed legal principles. (*In re Marriage of Fini* (1994) 26 Cal.App.4th 1033, 1044.) A discretionary order made based on the application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion and is subject to reversal. (See *Perez v. Torres–Hernandez* (2016) 1 Cal.App.5th 389, 397.)

So long as the court has exercised its discretion in a legal manner, its decision will be affirmed on appeal if it is supported by substantial evidence. But “substantial evidence” does not mean “any” evidence. Substantial evidence is the amount of relevant evidence which a reasonable person would accept as adequate to support the conclusion reached. (*In re Marriage of Fregoso & Hernandez* (2016) 5 Cal.App.5th 698, 703.) Substantial evidence is that which is “reasonable, credible and of solid value.” (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) The focus is on the quality, not the quantity, of evidence. (*Ibid.*) “Substantial evidence is . . . not merely an appellate incantation designed to conjure up an affirmance. To the contrary, it is essential to the integrity of the judicial process that a judgment be supported by evidence that is at least substantial. An appellate court need not

‘blindly seize any evidence . . . in order to affirm the judgment. The Court of Appeal “was not created . . . merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review.” [Citations.]” (*Id.* at p. 652.)

2. *Legal Standard for Vacation of a Judgment Based on Duress*

Terrence sought to have the judgment and marital settlement agreement vacated based on his claim that Michelle’s threatening conduct during the recorded call constituted extortion or blackmail, and she frightened and coerced him into agreeing to pay spousal support far in excess of that which he would otherwise have had to pay.<sup>8</sup>

Section 2122 provides the exclusive grounds and time limits for motion or action to set aside a marital dissolution judgment based on duress. (*Rosevear, supra*, 65 Cal.App.4th at p. 684; *In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 89 (*Kieturakis*); § 2122, subd. (c) [motion to set aside a judgment based on duress must be brought within two years of the date of entry of judgment].) Terrence’s RFO was filed the day before this two–year period expired.

In order to grant relief under the statute, a trial court *must* “find that the facts alleged as the grounds for relief materially affected the

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<sup>8</sup> Although Terrence claimed Michelle committed other coercive acts, the trial court was focused, as are we, only on the recorded call. We also note that Terrence has not challenged any part of the settlement agreement other than the provision for spousal support.



original outcome and that the moving party would materially benefit from the granting of the relief.” (§ 2121, subd. (b); *In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, 1345.) As the moving party here, Terrence had the burden to present sufficient evidence to establish that he acted under duress, and also to show the duress caused him a material disadvantage. (*Kieturakis, supra*, 138 Cal.App.4th at p. 89; *Rosevear, supra*, 65 Cal.App.4th at p. 685.)

Section 2122, subdivision (c) does not define “duress.” Traditionally, “[d]uress . . . includes whatever destroys one’s free agency and constrains [him or her] to do what is against [his or her] will, and may be exercised by threats, importunity or any species of mental coercion . . . .” It is shown where a party “intentionally used threats or pressure to induce action or nonaction to the other party’s detriment. . . . *The coercion must induce the assent of the coerced party, who has no reasonable alternative to succumbing.* [Citation.]’ [Citation.]” (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1523 (*Balcof*), italics added; see also *In re Marriage of Broderick* (1989) 209 Cal.App.3d 489 (*Broderick*).) Under this standard, one court found no cognizable “duress” where the record showed that a complaining spouse’s consent to a stipulated judgment was “freely, knowingly and voluntarily given,” where she had three months to reflect on the agreement and obtain independent advice before signing the stipulated judgment, and had been thoroughly questioned by a settlement judge to ensure that she understood the agreement. (*Rosevear, supra*, 65 Cal.App.4th at pp. 685–686.)

Although duress may be a tort or a crime, most modern authorities view the true test as contractual. (See *In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, 743–744 (*Gonzalez*)). Under this test, ““a contract . . . obtained by so oppressing a person by threats regarding the safety or liberty of himself, or of his property . . . as to deprive him of the free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress. . . .” [Citation.]” (*Ibid.*) To justify setting aside a judgment premised on a marital settlement agreement, the party seeking relief must prove the offending party’s specific intent to exercise duress accompanied by a corresponding level of proximateness between the threat and the action it is purported to have caused. (*Ibid.*) The complaining party must also show that the duress so exercised control over him, that his will was absolutely subservient to the will of the offending party. This test does not turn on the nature of the threats, but on the state of mind induced in the victim. (*Id.* at p. 744.) Whether duress has occurred is viewed in light of the specific circumstances of a situation, taking into consideration the attributes or characteristics of the party claiming duress, including his or her ability to resist. (*Ibid.*) “The coercion must induce the assent of the coerced party, who has no reasonable alternative to succumbing.” (*In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 84 (*Baltins*)).

Clearly, the bar to establish duress is high. First, the party seeking relief must demonstrate that the other party’s threats were used intentionally to induce him to commit or to refrain from

committing certain acts to his own detriment. (*In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1073, fn. 6.) It is not enough to show that the coercion induced fear and caused the party seeking relief to do what the party engaging in duress wanted him or her to do. The succumbing party must show the duress utterly destroyed his free will. “It is well settled that a contract . . . may be set aside for duress only if it was “‘. . . obtained by so oppressing a person by threats regarding the safety or liberty of himself, or of his property . . . as to deprive him of the free exercise of his will.’”” (*Broderick, supra*, 209 Cal.App.3d at p. 499; *Gonzalez, supra*, 57 Cal.App.3d at pp. 743–744, 746; *Baltins, supra*, 212 Cal.App.3d at p. 84.) Put differently, it is not enough that threats were merely a factor in the moving party’s decision. They must be the dominating factor and actually deprive the moving party of free will. If there were other reasonable alternatives to succumbing to the threats, but the moving party chose instead to comply rather than to follow one or more of those alternatives, the party did not act under duress.

Second, as a related principle, no duress will be found if the moving party had mixed motives for agreeing to a contract. (*Broderick, supra*, 209 Cal.App.3d at p. 499.) As an example, no duress was found in *Broderick*, in which a wife, who had been the victim of past threats and domestic violence, conceded that she assigned a quitclaim deed to her husband because she wanted to leave him and needed money to do so. (*Ibid.*)

Third, passage of time between the alleged coercion and execution of a marital settlement agreement can defeat a claim of duress by rebutting the inference that a party was deprived of the exercise of free agency, or lacked any reasonable alternative but to agree to what he later claimed was a coerced agreement. (See *Rosevear, supra*, 65 Cal.App.4th at p. 686 [fact that alleged violence took place months before settlement agreement was signed rebutted inference of duress]; *Broderick, supra*, 209 Cal.App.3d at p. 499.) In short, if a contracting party has adequate time to reflect on the terms of a marital settlement agreement and to obtain legal advice, but nevertheless signs an agreement he later regrets, he is not a victim of duress. Rather, he is merely suffering “buyer’s remorse.” (*Rosevear, supra*, 65 Cal.App.4th at p. 686.)

Finally, mediated marital settlement agreements are presumed to have been reached free from duress. “Divorce mediators generally work to balance the negotiating power between the parties. This tends to produce agreements that are more fair and voluntary, rather than coerced.” (*Kieturakis, supra*, 138 Cal.App.4th at p. 85.) In *Kieturakis*, the court held that the party seeking to set aside a stipulated dissolution judgment based on duress failed to meet her burden where the only evidence of duress was her testimony that she signed the agreement under duress, while the settlement agreement itself expressly stated it was entered fairly and without duress. (*Id.* at pp. 76–77.)

### 3. *Terrence Failed to Establish Duress*

We view, with appropriate deference, the trial court's finding that Terrence credibly testified that he signed the settlement agreement because he feared Michelle would disclose embarrassing information if he refused to do so. Nevertheless, on this record, we cannot conclude that Terrence made a sufficient showing that Michelle subjected him to intentional threats or pressure to the point that he was deprived of the exercise of his free will, lacked any "reasonable alternative to succumbing" and was essentially forced to agree to pay excessive spousal support to prevent disclosure of the tapes and resulting reputational damage. (*Baltins, supra*, 212 Cal.App.3d at p. 84; see also *Balcof, supra*, 141 Cal.App.4th at p. 1523.)

Resolution of this case turned entirely on whether, as a direct result of the September 2011 call, Terrence was "extorted by Michelle by direct threats to sell material to the tabloid press in exchange for money or a favorable settlement." The court observed that Michelle failed to present credible (or any) evidence to explain her "actions in her threatening telephone call," leaving Terrence as the sole witness to testify about what transpired during that call. Based on a sparse but uncontradicted record, the court found credible Terrence's claim that he felt threatened by Michelle and forced into signing the agreement, and "would not have signed [it] but for the threat." Notwithstanding this finding, we conclude that Terrence failed as a matter of law to establish that the settlement agreement was the product of duress.

First, and importantly, Terrence failed to demonstrate that Michelle's threats and coercion utterly destroyed his free will. Indeed, he candidly testified that Michelle's threats "factor[ed] into [his] reasoning for signing the settlement agreement." The trial court did not find that when he executed the settlement agreement, Terrence was completely "overcome by threats, fear or violence," or that he was "induced to sign the document under circumstances which destroyed [his] free agency." (*Broderick, supra*, 209 Cal.App.3d at p. 499.) To destroy free agency, duress "must induce the assent of the coerced party, who has no reasonable alternative to succumbing." (*Baltins, supra*, 212 Cal.App.3d at p. 84.)

Here, Terrence had—and availed himself of—several reasonable alternatives to signing the agreement. In December 2011 he filed a police report accusing Michelle of extortion, and also sought a civil restraining order premised on her threatening behavior during the recorded call, and his fear that she might follow through on those threats. Two months later, Terrence contacted TMZ himself to reveal the existence of the very sex tapes that he allegedly feared Michelle would make public, and to express his belief that she was using those tapes to blackmail him. In addition, by his own admission, Terrence's decision to sign the settlement agreement was not driven entirely by duress. He conceded, and the court found, that he had mixed motives for agreeing to the generous support award: Terrence "professed a love for Michelle and a desire to regain the recordings and photographs. His *motives were conflicted*" and he "credibly testified that he was drawn

back to Michelle even after his subsequent remarriage based on a complex combination of fear and a morbid fatal attraction [and] was mesmerized by Michelle.” (Italics added.) Mixed motives are insufficient to establish duress. (*Broderick, supra*, 209 Cal.App.3d at p. 499 [contracting party does not act under duress where he or she admittedly has multiple motives for entering into the agreement].)

Second, Terrence and Michelle had a tumultuous relationship, which included such significant physical abuse by Terrence that Michelle had to obtain multiple protective orders. The court observed that, while Terrence was clearly “a bully,” he also could “be bullied,” and he had “met his match” in Michelle who was “plenty tough” herself. Mutual bullying does not describe a relationship in which one party’s will is subsumed by the other’s, and does not warrant setting aside a judgment as a matter of law. A contract “may be set aside for duress only if it was “. . . obtained by so oppressing a person by threats . . . as to deprive him of the free exercise of his will.”” (*Broderick, supra*, 209 Cal.App.3d at p. 499.)

Third, the passage of time—which provides room for thoughtful reflection and the ability to obtain sound advice—can defeat a claim of duress. Here, the threats made by Michelle during the recorded call in September 2011 were too remote to support a finding that Terrence was under duress when he executed the final settlement agreement in September 2012, an agreement virtually identical to one he had signed four months before. In *Rosevear*, a couple engaged in long-term negotiations throughout which the wife was intermittently represented

by a series of attorneys. (*Rosevear, supra*, 65 Cal.App.4th at pp. 676–679.) The parties reached an oral agreement after a day–long settlement conference before a panel of three temporary judges. (*Id.* at p. 679.) That agreement was read into the record and, three months later, the wife executed the stipulated judgment. (*Id.* at pp. 679–680.) Six months later, represented by new counsel, the wife moved to set aside the stipulated judgment and settlement agreement claiming she had executed it under duress by her prior attorney. (*Id.* at pp. 680–682, fn. 6, 686.) The appellate court found the wife’s motion to vacate had properly been denied. (*Id.* at pp. 686–687.) A transcript of a thorough voir dire conducted by a settlement judge reflected no hint of coercion. That, coupled with the fact that the wife waited three months after the settlement conference to execute the stipulated agreement “provide[d] strong evidence in support of the trial court’s conclusion that [she] failed to establish . . . duress.” (*Id.* at p. 686.) The court observed that, when a contracting party has had ample time to reflect and obtain advice, this is likely to be evidence of garden variety “buyer’s remorse” not duress. (*Id.* at p. 686.) Other courts have similarly found that threats more proximate than those at issue here were too remote to support a finding of duress. (See *Broderick, supra*, 209 Cal.App.3d at p. 499.)

Finally, the settlement agreement itself was carefully crafted and presumably reviewed by Terrence and his family law counsel over the course of four months. The inclusion of the NDA in that agreement, in exchange for a generous spousal support award, ensured Terrence the



protection he required in order to prevent Michelle from disclosing the private, intimate and potentially embarrassing materials about which he was concerned.<sup>9</sup>

In conclusion, there is no substantial evidence of duress. Accordingly, we shall reverse the order granting Terrence's RFO and direct the trial court to deny the request to vacate the judgment and underlying marital settlement agreement.

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<sup>9</sup> The trial court did not address the impact of the NDA's provisions on Terrence's claim of duress, noting only that the otherwise viable clause was part of an unenforceable settlement agreement.

## **DISPOSITION**

The judgment is reversed. The matter is remanded to the trial court with directions to vacate the August 24, 2015 order setting aside the judgment and marital settlement agreement, and to enter a new order denying Terrence's May 5, 2015 RFO to Set Aside the Judgment Based on Duress and reinstating the judgment. Michelle shall recover her costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.