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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

SYLVIA SCHNOPP, Appellant, v. EDDIE K. SCHNOPP, Respondent.	2d Civil No. B236111 (Super. Ct. No. D227954) (Ventura County)

Sylvia A. Schnopp appeals from the trial court's orders (1) modifying child support; (2) denying her request to receive as additional child support a portion of stock option gains realized by her former husband, respondent Eddie K. Schnopp; and (3) denying her request for reasonable attorney fees and costs. We affirm.

Factual and Procedural Background

The parties married in August 1985 and separated in November 1994. They have two children: one born in October 1991 and the other in May 1994. A judgment of dissolution was entered in December 1996. The judgment ordered the parties to comply with a Marital Settlement Agreement (MSA). The MSA required respondent to pay monthly support of $366 for the elder child and $524 for the younger child. The MSA further required him to pay to appellant "as additional child support the sum of 8 percent of any gross bonus he receives." The term "bonus" was defined "as the gross amount of

incentive based compensation, other than nominal gifts." This appeal "turns" on the meaning of the specific definition.

In August 2010 appellant filed a motion requesting (1) "a modification of the existing child support order to the guideline amount," (2) a determination that stock options received by respondent qualified as a "bonus" within the meaning of the MSA, (3) an order requiring respondent to pay to appellant her eight per cent share of the stock options bonus, and (4) reasonable attorney fees and costs. Appellant filed an income and expense declaration showing average monthly income of $5,099 and average monthly expenses of $6,161. The $5,099 figure included a salary of $3,833 from California Welcome Center, but this employment ended on August 13, 2010.

In opposition to appellant's motion, respondent declared that the stock options issued by his former employer, Power-One, were not "incentive based" compensation and therefore did not qualify as a bonus within the meaning of the MSA. Respondent's employment with Power-One terminated in 2005. Respondent filed an income and expense declaration showing an average monthly loss of $225,000 and average monthly expenses of $25,837. The losses arose from respondent's interest in three limited liability companies. Respondent received no income from salary or wages.

In February 2011 the parties filed updated income and expense declarations. Appellant's declaration showed average monthly income of $819 and average monthly expenses of $6,844. Respondent's declaration showed an average monthly loss of $2,000 and average monthly expenses of $24,244.

In March 2011 the trial court conducted an evidentiary hearing on whether respondent's stock options constituted a bonus within the meaning of the MSA. Appellant testified that, when she signed the MSA, she interpreted the MSA's definition of "bonus" as "cover[ing] anything over and above a base salary," including stock options.

Martin Wertlieb, an executive compensation consultant, testified as an expert witness for appellant. Wertlieb opined that any gains respondent "realized on stock options are incentive-based compensation . . . under the formula of the marital settlement

agreement; therefore, . . . the 8-percent formula should apply." Wertlieb testified that such gains constitute incentive-based compensation because the purpose of granting the options was to provide an "incentive . . . to stay [with the company until the options vest] and to perform in such a way as to help the value of company stock increase." According to Wertlieb, in 2005 respondent exercised all of his "in-the-money" options and realized a gain of over $1 million. He did not pay any portion of this gain to appellant as additional child support.

Respondent, the former chief financial officer of Power-One, testified that he had always interpreted "incentive-based compensation" to mean "[p]erformance-based bonuses that were paid." Such compensation was "linked . . . to exceeding goals, meeting goals, your personal performance." When he signed the MSA, respondent understood that any gains realized from stock options would not be incentive-based compensation but instead would be "just compensation as a result of selling a long-term asset that I held." Respondent explained that Power-One did not issue stock options based on an employee's performance. Instead, the company used stock options as "a retention tool." Power-One wanted employees to have enough unvested options to deter them from leaving: "[A]s options vested, the amount they would forfeit by leaving the company was less. And so we had . . . gotten a consultant to come in . . . that kind of gave us the outline that said if you're at this level within the company, you should have X amount [of options] on the table [i.e., unvested] as a good retention tool." The Board of Directors would be asked to approve the issuance of additional options if "the amount that's on the table falls below the recommended amount to retain these people."

Steve Goldman, the former president and chief executive officer of Power-One, testified on respondent's behalf. According to Goldman, the purpose of the stock options was to retain present employees and provide "an incentive for new hires." The options were also used "as a means of replacing base salaries for employees in order to reserve cash for the company." Neither the issuance of options nor their vesting was based on an employee's performance.

Melissa Dugan, a former director of Power-One, testified consistently with Goldman. Dugan noted that, unlike the stock option plan, Power-One had a bonus plan that was based on performance. "The bonus plan was designed to motivate and drive performance towards specific objectives. There was a component of the plan that was based on individual performance as well as a component that was based on company performance towards specific goals."

In its written ruling, the trial court concluded that the MSA was ambiguous as to whether respondent's stock options qualified as bonus compensation. The trial court therefore considered extrinsic evidence in ascertaining the intent of the parties when they signed the MSA. The court accepted the testimony of respondents' witnesses and rejected Wertlieb's testimony: "While the expert opinion of Mr. Wertlieb was informative, the court does not believe that definition [of bonus compensation] was in the minds of the parties when they negotiated and executed the MSA." Thus, the court found "that the parties did not intend to include stock options as a form of bonus." The court denied appellant's request to pay to her, as additional child support, eight per cent of respondent's stock option gains.

As to appellant's request for "a modification of the existing child support order to the guideline amount," the trial court imputed to her the $3,800 monthly salary that she had earned as a former employee of California Welcome Center. The court concluded that this imputation was justified because appellant testified that she had voluntarily "terminated her employment less than two weeks after filing for a modification." Furthermore, appellant had "stated on her Income and Expense Declaration, 'I intend to replace this source of income with marketing and business consulting work. I do not expect a change in income at this time.' " Using a Dissomaster calculation, the court ordered respondent to pay to appellant monthly child support of $247 from September through November 2010. Thereafter, appellant was ordered to pay to respondent monthly child support of $587.

Both parties requested an award of reasonable attorney fees and costs. The court denied the requests because it found "that an order for either party to pay the other's fees

and costs would constitute an undue hardship." The court noted that "[r]espondent is unemployed and has not worked since June, 2005."

Interpretation of MSA: General Principles

"Marital settlement agreements incorporated into a dissolution judgment are construed under the statutory rules governing the interpretations of contracts generally. [Citations.]" (*In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1439.) " 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ.Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ.Code, § 1638.)" (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) "Extrinsic evidence is admissible, however, to interpret an agreement when a material term is ambiguous. [Citations.]" (*Wolf v. Walt Disney Pictures and Television* (2008) 162 Cal.App.4th 1107, 1126.) A term " ' "is ambiguous when it is capable of two or more constructions, both of which are reasonable." [Citation.]' [Citation.] Whether language in a contract is ambiguous is a question of law. [Citation.]" (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 912.) " 'Extrinsic evidence is "admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible" [citations], and it is the instrument itself that must be given effect. [Citations.]' [Citations.]" (*U. S. Leasing Corp. v. DuPont* (1968) 69 Cal.2d 275, 284.)

Because the Bonus Provision in the MSA Is Ambiguous,
Extrinsic Evidence Was Admissible To Explain Its Meaning

Appellant contends that the bonus provision of the MSA is not ambiguous. We disagree. Paragraph 5.a. of the MSA states that "Husband and Wife's employers pay, at their discretion, performance bonuses." In view of this statement, it is reasonable to infer, as the trial court did, that the bonus provision at issue here encompasses only performance-based compensation. But in the next sentence, the MSA defines "bonus" as the "gross amount of incentive based compensation." Incentive-based compensation is not necessarily related to performance. "Incentive compensation . . . is generally understood as an ' "inducement to employees to procure efficient and faithful service." ' [Citations.]" (*Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 621.) Stock options are

commonly used as incentive compensation, and their issuance or vesting may not be linked to performance: "If any of the various purposes of stock option plans can be said to bear emphasis, it is probably that of providing incentive. 'One of the most widespread programs for providing employees with additional incentive and creating an identification of interest between the company and the key employees is a stock option plan.' [Citation.] 'Share options are a form of incentive compensation based on the idea that good management results in higher prices which render the share option valuable.' [Citations.]" (*In re Marriage of Hug* (1984) 154 Cal.App.3d 780, 785-786; see also *Newberger v. Rifkind* (1972) 28 Cal.App.3d 1070, 1075 ["stock options are given to employees as an inducement to continue employment or to put forth greater efforts."])

The bonus provision's reference to both "performance bonuses" and "incentive-based compensation" creates an ambiguity as to whether the provision applies to respondent's stock options. "The fact that both parties in good faith question the true meaning of the words and phrases they have used in their agreement is of itself some evidence that the agreement is ambiguous. [Citations.]" (*Jacobson v. Jacobson* (1963) 211 Cal.App.2d 580, 583.) "Where, as here, the written agreement before the court is ambiguous and its meaning uncertain, extrinsic evidence is admissible to explain what the parties meant by the language they have used. [Citation.]" (***Ibid***.) Thus, the trial court properly admitted extrinsic evidence as an aid in determining whether the parties intended the bonus provision to encompass respondent's stock options.

The Bonus Provision Does Not Encompass Respondent's Stock Options

Both parties testified as to their subjective understanding of the type of compensation covered by the bonus provision. Appellant interpreted the provision as "cover[ing] anything over and above a base salary," including stock options. Respondent, on the other hand, interpreted the provision as applying only to "[p]erformance-based bonuses that were paid." Since neither the issuance nor the vesting of respondent's stock options was based on performance, respondent understood that the bonus provision did not encompass his options.

"While this 'subjective intent' evidence was conflicting, it was not *competent* extrinsic evidence, because evidence of the undisclosed subjective intent of the parties is irrelevant to determining the meaning of contractual language. [Citations.]" (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166, fn. 3.) "California recognizes the objective theory of contracts [citation], under which '[i]t is the objective intent, . . . rather than the subjective intent of one of the parties, that controls interpretation' [citation]." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 956.) " 'The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. [Citations.]' [Citations.]" (*People v. Shelton*, *supra*, 37 Cal.4th at p. 767.)

Appellant's expert, Martin Wertlieb, opined that any gains respondent "realized on stock options are incentive-based compensation . . . under the formula of the marital settlement agreement." But Wertlieb's opinion is not competent evidence of the objective intent of the parties when they signed the MSA. "[T]he interpretation of contractual language is a legal matter for the court . . . and '[e]xpert opinion on contract interpretation is usually inadmissible.' [Citation.]" (*In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 51.)

The question is whether the bonus provision allowing increased child support applies generally to incentive compensation irrespective of performance, or whether it applies only to incentive compensation based on performance. If it applies generally to incentive compensation irrespective of performance, then it encompasses respondent's stock options. All of the witnesses agreed that one of the purposes of the options was to provide an incentive for employees to remain with the company until their options vested. If, on the other hand, the bonus provision applies to incentive compensation based on performance, the provision does not encompass respondent's stock options. Respondent's witnesses testified that the issuance of the options was not linked to performance and that

the vesting schedule was the same for all employees irrespective of their performance. As indicated, the trial court expressly credited this testimony.

There is no competent conflicting extrinsic evidence on whether the parties intended the bonus provision to apply generally to incentive compensation irrespective of performance, which would include respondent's stock options, or only to incentive compensation based on performance, which would not include his stock options. "When a trial court's interpretation of a written agreement is appealed and no conflicting extrinsic evidence was admitted, the interpretation of the contract is a question of law which we review de novo. [Citations.]" (*Nava v. Mercury Cas. Co.* (2004) 118 Cal.App.4th 803, 805.) Accordingly, we independently determine the meaning of the bonus provision.

The bonus provision is included in paragraph 5 of the MSA. Paragraph 5.a. provides, "The parties have agreed to a formula to allocate the bonuses they have received or will receive during calendar years 1995 and 1996." The paragraph lists the bonuses received by respondent: "[Respondent] received a $15,000 bonus in 1995 and a $40,000 bonus in 1996." The paragraph then sets forth the formula for allocating these bonuses between the parties.

Paragraph 5 does not mention stock options. But respondent testified that in April 1996 Power-One had issued stock options to him. If the parties had intended these stock options to constitute a bonus within the meaning of paragraph 5, they would have said so. Paragraph 5 specified respondent's bonus compensation in 1996. It follows that the bonus provision does not encompass respondent's stock options. This construction of the MSA reasonably harmonizes the first sentence of paragraph 5, which refers to "performance bonuses," with the second sentence, which refers to "incentive-based compensation." "Courts must interpret [contracts] to try to give effect to every clause and harmonize the various parts with each other. [Citation.]" (*Friedman Professional Management Co., Inc. v. Norcal Mut. Ins. Co.* (2004) 120 Cal.App.4th 17, 33-34.)

Appellant argues that "[t]here is no evidence that [respondent] disclosed [the April 1996 stock options] to [her] or that [she] knew about this fact when the parties executed

the MSA on October 30, 1996." We disagree. Respondent testified that, during the divorce proceedings, appellant's counsel had sought discovery from Power-One. "[I]n that discovery [counsel] did . . . in fact receive evidence that [respondent] owned stock and stock options with Power[-]One." Appellant testified that her counsel had "actually joined Power[-]One to the [divorce] proceedings." Power-One signed the MSA to indicate its approval "as to form only." In paragraph 36 of the MSA, the parties acknowledged that they are "fully and completely informed as to the facts relating to the subject matter of this Agreement." Thus, it is reasonable to infer that appellant knew about the April 1996 stock options when she signed the MSA. [1]

Appellant contends that respondent "affirmed in the MSA that he had not received" the stock options issued in April 1996. Appellant relies on paragraph 13 of the MSA, where respondent specified the proceeds he had received from the sale of Power-One on September 30, 1995. In paragraph 13.d., respondent "acknowledges and agrees that he has not received and is not entitled to any additional compensation, including but not limited to shares of stock or stock options, resulting from the sale of Power-One." But this provision does not encompass the April 1996 stock options. There is no evidence that these options were additional compensation for the 1995 sale of Power-One. Appellant testified that the April 1996 stock options were issued for retention purposes.

Evidentiary Hearing on Modification of
Child Support and Attorney Fees

Appellant argues that the trial court erroneously denied her request for an evidentiary hearing on (1) whether the amount of monthly child support payable by respondent should be modified, and (2) whether she should be awarded reasonable attorney fees and costs. Appellant asserts, "The trial court neither provided a finding of

[1] In its written order following the evidentiary hearing, the trial court stated: "The company was joined in the action, and signed off on the MSA, and thus it can be assumed that the parties knew about the existence of stock options."

good cause nor stated any reasons on the record or in writing for its refusal to receive live testimony on the issue of [respondent's] income." On the contrary, the court stated that appellant was not entitled to an evidentiary hearing because she had not filed and served a witness list as required by Family Code section 217, subdivision (c).[2] Appellant's counsel did not dispute the alleged statutory noncompliance and did not request a continuance for the purpose of filing and serving the required list.

Appellant claims that, on February 28, 2011, she filed and served the required witness list. But that list was for the hearing on March 2, 2011, which pertained only to whether respondent's stock options constituted a bonus within the meaning of the MSA. Furthermore, that list was inadequate because it did not set forth "a brief description of the anticipated testimony" of each witness. (Fam. Code, § 217, subd. (c).)

Even if the trial court had erroneously denied appellant's request for an evidentiary hearing, the error would not have been preserved for appeal because appellant has failed to show that she made an offer of proof of her witnesses' proposed testimony. (*Magic Kitchen LLC v. Good Things Intern. Ltd.* (2007) 153 Cal.App.4th 1144, 1164-1165; *Gutierrez v. Cassiar Min. Corp.* (1998) 64 Cal.App.4th 148, 161.) "In general, a judgment may not be reversed for the erroneous exclusion of evidence unless 'the

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[2] Family Code section 217 provides:

"a) At a hearing on any order to show cause or notice of motion brought pursuant to this code, absent a stipulation of the parties or a finding of good cause pursuant to subdivision (b), the court shall receive any live, competent testimony that is relevant and within the scope of the hearing and the court may ask questions of the parties.

"(b) In appropriate cases, a court may make a finding of good cause to refuse to receive live testimony and shall state its reasons for the finding on the record or in writing. The Judicial Council shall, by January 1, 2012, adopt a statewide rule of court regarding the factors a court shall consider in making a finding of good cause.

"(c) A party seeking to present live testimony from witnesses other than the parties shall, prior to the hearing, file and serve a witness list with a brief description of the anticipated testimony. If the witness list is not served prior to the hearing, the court may, on request, grant a brief continuance and may make appropriate temporary orders pending the continued hearing."

substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means.' (Evid.Code, § 354, subd. (a); [citations]. This rule is necessary because, among other things, the reviewing court must know the substance of the excluded evidence in order to assess prejudice. [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 580.)

Disposition

The orders appealed from are affirmed. Respondent shall recover his costs on appeal.

NOT FOR PUBLICATION .

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Ellen Gay Conroy, Judge

Superior Court County of Ventura

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Guy C. Parvex, Jr., and John C. Castellano, for Appellant.

Sumalpong & Sumalpong, for Respondent