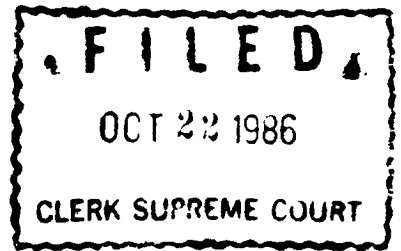


IN THE COURT OF APPEALS OF IOWA



CAROL A. NEWCOMER,)

Plaintiff-Appellant,)

vs.)

CHARLES A. NEWCOMER,)

Defendant-Appellee.)

Filed October 22, 1986

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6-169
85-1559

Appeal from the Iowa District Court for Polk County (No. CL061-35814)

- A. M. Critelli, Judge.

Plaintiff appeals from the trial court's ruling on defendant's motion to dismiss in this tort action brought by plaintiff to recover her share of the value of stock which plaintiff alleges defendant misrepresented during the parties' 1983 dissolution proceedings. **AFFIRMED.**

Denny Drake, Des Moines, for plaintiff-appellant.

Roger T. Stetson of Belin, Harris, Helmick, Tesdell, Lamson, Blackledge & McCormick, Des Moines, for defendant-appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

DONIELSON, P.J.

Plaintiff appeals from the trial court's ruling granting defendant's motion to dismiss the present tort action brought by plaintiff to recover her share of the value of stock which plaintiff alleges defendant misrepresented during the parties' 1983 dissolution proceedings. Plaintiff instituted the present action after filing an application to modify the dissolution decree which is currently pending in district court. The question on appeal is whether the plaintiff can simultaneously maintain two separate and independent suits against the same defendant arising out of the same facts and requesting the same remedy. The plaintiff contends that the trial court erred by misapplying the doctrine of election of remedies. Plaintiff contends that the second element of the doctrine, inconsistency between remedies, is not present in the case. We affirm the judgment of the district court.

The marriage of plaintiff and defendant was terminated by stipulated decree on May 3, 1983. Pursuant to the stipulation, two shares of Americana C-G Company, Ltd. stock owned by the parties were transferred to the defendant for his sole ownership in an attempt to achieve an equal division of property. Plaintiff contends that defendant represented that the two shares had an actual value of \$5,000 each at the time of the dissolution proceeding.

Plaintiff claims it was her understanding that the five \$1,000 payments to be made by defendant to plaintiff between 1984 and 1989, as provided for in the stipulated agreement, represented payment for plaintiff's share of the stock. Shortly after the decree was entered, defendant sold the shares for \$85,000 each upon the sale of Americana C-G Company, Ltd.'s assets.

On November 30, 1983, plaintiff filed an application to modify the dissolution decree, seeking payment in damages for her share of the higher value of the stock. The parties and the trial court agreed to treat the application as

a petition to vacate or modify final judgment pursuant to Iowa Rules of Civil Procedure 252 and 253. This modification action is currently pending in Polk County district court and substantial discovery has already taken place.

On May 2, 1985, plaintiff filed the present action on four theories of recovery: violations of the Iowa Uniform Securities Act, an equitable constructive trust, negligent misrepresentation, and fraudulent misrepresentation. On June 20, 1985, defendant filed a motion to dismiss claiming that plaintiff's petition was a collateral attack on the stipulated dissolution decree and contending that this second suit was an impermissible splitting of a single cause of action.

In deciding to sustain defendant's motion, the trial court considered facts outside the petition by taking judicial notice of the collateral dissolution action. In its ruling, the court found that plaintiff was precluded from bringing the present action because she elected to bring the dissolution modification action under Iowa Rules of Civil Procedure 252 and 253 and was bound by that choice.

Our scope of review is limited to the correction of errors at law. Iowa R. App. P. 4. The district court's findings of fact are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

The plaintiff contends that the trial court erred in granting defendant's motion to dismiss by basing its decision on the doctrine of election of remedies. Plaintiff argues that even though she filed what was essentially a petition to vacate or modify the final judgment in the parties' divorce decree, she is not barred from seeking further relief in an independent action in equity. Plaintiff additionally argues that the recovery sought in each suit is different and that at least some of the issues set forth in the independent action could not be joined in the rule 252 action.

Though the plaintiff contends that the trial court misapplied the doctrine of election of remedies, the main issue appears to be whether or not a party

may bring both a rule 252 action and an independent equitable action in seeking relief from a stipulation incorporated in a final divorce decree. Neither party in the present case has cited authority which directly addresses the issue, nor have we found any upon our own independent examination. Several cases, however, in which the Iowa Supreme Court has interpreted the nature and scope of rule 252, provide insight in determining the proper remedies available.

In Graves v. Graves, 132 Iowa 199, 200, 109 N.W. 707 (1906), the plaintiff requested a new trial and a modification of the parties' divorce decree on the grounds that her husband had given false testimony regarding the character and amount of his property. The plaintiff claimed that she did not discover defendant husband's fraud until after the one-year statute of limitations had passed. Id. at 201, 109 N.W. at 707. The trial court granted a new trial, but declined to issue a modification. Id. The defendant husband alleged on appeal that the trial court erred in granting a new trial. Id. The Iowa Supreme Court, in interpreting Iowa Code section 4091 (a predecessor to the present rule 252), opined:

Section 4091 et seq of the Code provide for a new trial upon application by petition within one year, where the final judgment or order was obtained by fraud practiced in obtaining the same. Contention is made that these statutes provide the exclusive remedy and that as the action was not commenced within one year, the application should have been denied. Ordinarily this claim is correct, but where fraud is not discovered within a year, courts of equity have jurisdiction to grant new trials or modifications of the original decree.

Id. at 203, 109 N.W. at 708 (emphasis added). The Graves court further opined that "if the plaintiff discovered the alleged fraud and false swearing within a year, or, by the use of reasonable diligence on her part might have discovered it within that time, she would not be allowed to prosecute this proceeding in equity." Id. at 206, 109 N.W. at 709. See also Sorenson v. Sorenson, 254 Iowa

817, 825, 119 N.W.2d 129, 134 (1963) (holding that "[i]t is a well established rule that if alleged fraud by use of reasonable diligence might have been discovered within the one-year limitation then applicant should not be allowed to prosecute this proceeding in equity).

In In re Marriage of Knott, 331 N.W.2d 137 (Iowa 1983), the Iowa Supreme Court, in holding that the statutory right to modification of a divorce decree due to a change in circumstances did not apply to property division, discussed the procedures by which a party may obtain a modification of a property division due to fraud. The court stated:

Despite the compelling circumstances surrounding this case, we find the principle announced in Knipfer v. Knipfer, 259 Iowa 347, 356, 144 N.W.2d 140, 145 (1966), controlling. There, as here, the applicant for modification relied on the statute authorizing modification of divorce (dissolution) decrees upon a change of circumstances. We stated:

We now hold the financial provision made for defendant in the decree, being a property division, is not subject to modification under the authority of the statute in the absence of fraud, duress, coercion, mistake or other grounds as would justify the setting aside or changing a decree in any other case.

We followed the above rule in In re Marriage of Johnson, 299 N.W.2d 466, 467-68 (Iowa 1980). The "grounds as would justify the setting aside or changing a decree in any other case," Knipfer, 259 Iowa at 356, 144 N.W.2d at 145, are found in Iowa Rule of Civil Procedure 252.

The above cited cases appear to suggest that where a party to a divorce proceeding discovers fraud within the one-year statute of limitations provided by Rules 252 and 253 and files a motion to set aside or vacate that judgment within that time period, that party is precluded from bringing an independent suit in equity. The trial court, however, concluded that a party similarly situated to the present plaintiff could file either a rule 252 motion or an independent

equitable action, based on the interpretation afforded Federal Rule of Civil Procedure 60(b).

Federal Rule 60(b) is the counterpart to our own rule 252. Rule 60(b) provides that upon motion a court may relieve a party from a final judgment, order, or proceeding for fraud if filed within one year after the final judgment or order. Most important to the present case, rule 60(b) provides that "[t]his rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order or proceeding . . . or to set aside a judgment for fraud upon the court." The reference to "independent action" in this "saving clause" is to what had been historically known simply as an independent action in equity to obtain relief from a judgment. Wright and Miller, Federal Practice and Procedure § 2268 (1973); Bankers Mortgage Co. v. United States, 423 F.2d 73, 78 (5th Cir. 1970), cert. denied, 399 U.S. 927, 90 S. Ct. 2242, 26 L. Ed. 2d 793. Under this rule, however, it is recognized that resort to an independent action may be had only rarely and then only under unusual and exceptional circumstances. Wright and Miller, Federal Practice and Procedure, § 2868 (1973). While rule 60(b) does contemplate two separate and distinct procedures for obtaining relief, it does not necessarily follow that these two procedures may be pursued simultaneously. In H. K. Porter Co., Inc. v. Goodyear Tire & Rubber Co., 536 F.2d 1115, 1118 (6th Cir. 1976), the Sixth Circuit opined that when the federal district court in Ohio dismissed an independent action transferred from Colorado because the allegations were duplicitous of those in the 60(b) motion before it, the substantive rights of the parties were not altered since the motion could be treated interchangeably with an independent action. 536 F.2d at 1118.

At least one other state jurisdiction has considered the question of whether a party may maintain an independent action along with a filing of a motion

to set aside or vacate. In Oehme v. Oehme, 10 Kan. App. 2d 73, 691 P.2d 1325 (1984), the plaintiff alleged that had fraudulently induced her to enter into a property stipulation agreement. The Kansas Court of Appeals, in construing K.S.A. 60-260, modeled after Federal Rule 60(b), held that a party alleging fraud in the inducement of a property settlement incorporated in a divorce decree may seek relief either by reforming the judgment under K.S.A. 60-260 or by maintaining an independent tort action. 10 Kan. App. 2d at ____, 691 P.2d at 1328. It is important to note, however, that the plaintiff in Oehme did not seek to set aside or modify the final judgment. It is also important to note that K.S.A. 60-260, the counterpart to Iowa rule 252, contains the provision that such rule "does not limit the power of a court to entertain an independent action to relieve a party from judgment . . .", language noticeably absent from Iowa rule 252. The court in Oehme additionally noted that res judicata was irrelevant to that case because unlike the case of Blair v. Duncan, 216 Kan. 718, 533 P.2d 1224 (1975), wherein the court dismissed the husband's suit for fraud because such issue had already been litigated pursuant to a motion to set aside, "no such motion has been filed or litigated." (emphasis added)

While the issue is close, we believe that a party seeking relief from a fraudulent inducement to enter into a property stipulation incorporated in a divorce decree may seek relief either by filing a timely motion pursuant to rule 252 or by an independent equitable action. Iowa Code section 614.1(4) (1985) specifically provides that those actions grounded upon relief for fraud may be brought within five years from the time the fraud was discovered. Where, however, a party seeks to set aside or vacate a final order or decree by filing a timely motion under rule 252, such party may not later bring an independent equitable action.

The plaintiff in the present action seeks to set aside or vacate the property division. At the same time, plaintiff also in effect seeks to affirm the judgment by filing an independent action in equity and obtain punitive damages. The basic relief sought in each action is a more equitable division of the value of the stocks sold by plaintiff's husband. We have held that a stipulation, such as the one involved in the present case, which constitutes a concession of some rights as consideration for those secured, are "entitled to all the sanctity of an ordinary contract and where the status quo cannot be reestablished the stipulation should be set aside only in a plain case of fraud" Graen's Mens Wear v. Stille-Pierce Agency, 329 N.W.2d 295, 300 (Iowa Ct. App. 1983). The stipulation in the present case is thus to be treated as a contract. Where a contract has been procured by fraud, the defrauded party upon discovery may pursue certain courses of action, one being rescission, the other by affirmance and recovery of damages. United Forest Products Co. v. Baxter, 452 F.2d 11, 16 (8th Cir. 1971).

In the present case, the plaintiff chose to file a rule 252 motion to set aside or vacate the property division incorporated in the final divorce decree. Plaintiff in that action seeks relief on the grounds that because her husband knew the value of the stocks was much higher than he represented when negotiating the property settlement, it would be unjust for him to keep the benefits from the sale of the stock at the higher value. It therefore follows that plaintiff may not in effect attempt to affirm the stipulation and attempt to recover damages. See Williams v. Hair Stadium, Inc., 334 N.W.2d 354, 355 (Iowa Ct. App. 1983). Though this remedy is initially triggered by an election of a remedy, the end result is not dependent on the doctrine of election of remedies, but rather stems from the fact that once the terms of the stipulation have been rescinded, no further right to relief pursuant to the stipulation exists.

We therefore believe that the trial court was correct in dismissing plaintiff's independent action. The plaintiff, upon choosing to set aside or vacate the property stipulation under rule 252, was precluded from bringing a further independent equitable action. Because of our holding, we need not address the issue of res judicata.

AFFIRMED.