FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF CAROL A. SELLNER AND DONALD J. SELLNER

Upon the Petition of)

CAROL A. SELLNER,)

Petitioner-Appellee,) Filed October 23, 1984

And Concerning)

DONALD J. SELLNER,) 4-340
84-214

Respondent-Appellant.)

Appeal from the Iowa District Court for Delaware County - Peter Van Metre, Judge.

The husband moved to set aside the parties' dissolution decree on the grounds of mutual mistake and newly-discovered evidence. After stipulating to pay a $100,000 property settlement, the husband was unable to borrow the money using his farm as security. The trial court denied this motion to set aside, and the husband has appealed. AFFIRMED.

R. L. Donohue of Donohue Law Office, West Union, for respondent-appellant.

Thomas J. Hanson of Dolphin & Hanson, Manchester, and Walter L. McNamara, Cedar Rapids, for petitioner-appellee.

Considered by Oxberger, C.J., and Snell and Hayden, JJ.

SNELL, J.

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The parties' marriage was dissolved in August 1983. The dissolution decree incorporated a stipulation providing (1) that neither party would receive alimony; (2) that Donald would pay Carol a total of $400 per month in child support for the parties' two minor children; (3) that Donald would receive the parties' 200-acre farm and farm-related personal property; and (4) that Carol would receive a trailer court and $175,000 in cash. The first $100,000 of Carol's cash award was to be payable in a lump sum, with the remaining $75,000 to be payable in installments over eight years.

After the decree of dissolution was entered, Donald tried to borrow money against his farmland to pay the $100,000 lump sum property award. The loan was denied. He then filed a motion to set aside the dissolution decree, asserting that the stipulated property division had been made on the assumption of both parties that Donald could satisfy the lump sum property award by borrowing rather than by selling the farm. He argued that the decree should be set aside because it had been based on the mutual mistake of the parties and the court. He later amended the petition and added the second argument that the decree should be set aside because his inability to get a loan constituted newly-discovered evidence within the meaning of Iowa R. Civ. P. 252(f). Carol resisted the motion, disputing the claim that the stipulation had been based on an agreement that the cash property award would be funded only by a loan.

The trial court refused to set aside the decree. Donald has appealed from the denial of his motion to modify or vacate the judgment.

Our review of a proceeding for the vacation of a judgment is not de novo. In re Marriage of Bauder, 316 N.W.2d 697, 700 (Iowa Ct. App. 1981). The trial court has considerable discretion in deciding whether to afford relief when vacating a judgment. Id. We cannot find any facts in the record that indicate the trial court abused its discretion.

Iowa Rule of Civil Procedure 252 provides that a court may correct, vacate, or modify a final judgment or order on any of the following grounds:

> (a) Mistake, neglect or omission of the clerk;
>
> (b) Irregularity or fraud practiced in obtaining the same;
>
> (c) Erroneous proceedings against a minor or person of unsound mind, when such errors or condition of mind do not appear in the record;
>
> (d) Death of a party before entry of the judgment or order, and its entry without substitution of his proper representative;
>
> (e) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;
>
> (f) Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the trial, and was not discovered within the time for moving for new trial under R.C.P. 244.

Iowa R. Civ. P. 252.

We reject Donald's argument that the judgment should be set aside because it was based on a mutual mistake. A mutual mistake, even if proved, is not a ground for vacating a judgment under rule 252. Additionally, the record does not support his claim that both parties mistakenly believed he would be able to procure a loan to fund the $100,000 property settlement. Paragraph 8 of the decree states that Carol is to receive $100,000 cash to be paid on or before October 1. There is no language indicating that this $100,000 is contingent on Donald's procurement of a loan. Carol also testified that she did not enter the stipulation with the belief that the $100,000 payment was contingent on the receipt of a loan by Donald.

Donald's second argument is also without merit. He contends that the fact he could not obtain a loan constitutes "material evidence, newly discovered" and is a basis for modifying or vacating the judgment under Iowa Rule Civil Procedure 252(f).

Ordinarily, newly-discovered evidence under R.C.P. 252 is limited to evidence which existed at the time of trial but which, for excusable cause, the party was unable to produce at that time. Mulkins v. Board of Supervisors of Page County, 330 N.W.2d 258, 261 (Iowa 1983). There is ample evidence in the record to support the trial court's finding that Donald "utterly fails in his proof." Given the financial realities during the time this case was pending, Donald should have been aware of the difficulties involved in obtaining a loan. He has shown no "excusable cause" for not assessing the loan procurement possibilities earlier. Had he done so with reasonable diligence during the negotiations, he could have discovered the obstacles to obtaining the loan and proposed alternative settlement arrangements. The trial court properly ruled that the failure to obtain a loan did not constitute newly-discovered evidence.

AFFIRMED.