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BRADY DOUGAN *v.* TOMOKO HAMADA DOUGAN
(AC 28711)

McLachlan, Gruendel and Borden, Js.

Argued November 12, 2008—officially released May 19, 2009

(Appeal from Superior Court, judicial district of Stamford-Norwalk, Hon. Stanley Novack, judge trial referee.)

Gaetano Ferro, with whom were *Sarah E. Murray* and, on the brief, *Livia D. Barndollar*, for the appellant (defendant).

Gary I. Cohen, with whom were *Annmarie P. Bri-*

ones and, on the brief, *Marci Finkelstein*, for the appellee (plaintiff).

Opinion

McLACHLAN, J. The question raised by this appeal is whether the provision of a stipulated judgment requiring the payment of interest, upon default, from the date of the stipulated judgment to the date of default is enforceable. The defendant, Tomoko Hamada Dougan, claims that the court improperly (1) held such a provision of her stipulated dissolution judgment unenforceable and (2) refused to enforce the provision that it previously had found fair and equitable.[1] We agree and reverse the judgment of the trial court.

The parties married in November, 1988, in Tokyo, Japan. The parties had two children, born in 1992 and 1997, respectively. At the time of the dissolution, the plaintiff, Brady Dougan, was employed as a senior executive of one of the world's largest investment banks and financial institutions. He had a gross weekly income of $384,615.

Following more than one year of proceedings, the parties entered into a stipulation for judgment on June 16, 2005. Both parties were represented by experienced counsel during the proceedings and negotiations leading to the stipulation. The parties were assisted in reaching an agreement by an agreed upon attorney mediator.

The stipulation included a complete distribution of the nearly $80 million in assets held by the parties. As part of that property division, the plaintiff agreed to pay the defendant $15,325,000 by cash, check or the equivalent thereof in two installments.[2] The agreement provided that the plaintiff pay $7,825,000 within thirty days of the dissolution decree and the remaining $7.5 million "on or before June 16, 2006. That amount shall be fully secured. The [plaintiff] shall provide security within thirty days of the time of the decree dissolving the marriage of the parties. If the [defendant] believes the security to be unreasonable as to amount, terms or otherwise, the Stamford Court shall determine reasonable security and the decree of dissolution shall reserve jurisdiction for that purpose. In the event payment is not made when due, interest at ten [percent] per annum shall accrue from the date *hereof* until fully paid and the [plaintiff] shall be responsible for all of the [defendant's] costs of collection." (Emphasis added.)

At the dissolution hearing on June 17, 2005, the plaintiff testified that he was satisfied that he had had an ample opportunity to consider all of the issues implicated by the stipulated judgment and that taken as a whole and recognizing that every agreement is by its nature a compromise, the agreement was fair and reasonable. The plaintiff also testified that the parties had agreed on the property division, including the transfer of cash as set forth in the agreement, and he acknowledged that "time was of the essence" and that if the payment was not made on time, interest could be

imposed.

The parties negotiated the terms of the stipulation thoroughly. When questioned by the plaintiff's attorney, the defendant testified that during negotiations, she suggested that changes be made to paragraphs and sections of the agreement.[3] The court also asked the defendant if she was comfortable with the stipulation, and she confirmed that she was. The court then stated, "I think it's fair, by the way, if it means anything to you."

On June 17, 2005, the court found the stipulation for judgment "fair and equitable," rendered judgment of dissolution of the marriage and incorporated the stipulation for judgment by reference.

On June 28, 2006, the plaintiff paid the defendant $7.5 million.[4] Subsequently, the plaintiff paid the defendant $24,999.96, representing 10 percent interest from June 16 to June 28, 2006. The defendant moved for enforcement of the stipulation and requested that the court order the plaintiff to pay her interest in accordance with the terms of the judgment. The defendant argued that if the payment was not made on or before June 16, 2006, the agreement provided for interest at the rate of 10 percent *from the date of the stipulation* to the date the payment was made to the defendant. The court heard argument by the parties on the issue of whether the interest provision of the agreement was void as against public policy. On March 15, 2007, in its memorandum of decision, the court held that the provision for interest from the date of the stipulation was invalid and unenforceable because it was not a valid liquidated damages clause but "a provision, which has as its prime purpose the deterrence of a breach by the [plaintiff], which is an invalid purpose and is against public policy."[5] The defendant timely appealed.

I

The defendant first claims that the court improperly held unenforceable a provision of the parties' stipulated dissolution of marriage judgment requiring the payment of interest, upon default, from the date of the stipulated judgment to the date of default. Specifically, the defendant claims that such a provision is not invalid as against public policy. We agree.

The stipulation for judgment is an agreement by the parties that the court incorporated into the judgment and is a contract of the parties.[6] *Sachs* v. *Sachs*, 60 Conn. App. 337, 341–42, 759 A.2d 510 (2000). "[T]he construction of a written contract is a question of law for the court. . . . The scope of review in such cases is plenary. . . . Because our review is plenary, involving a question of law, our standard for review is not the clearly erroneous standard used to review questions of fact found by a trial court. Our review of the parties' agreement is plenary." (Citations omitted; internal quotation marks omitted.) Id., 342. Additionally, because

the parties agree as to the underlying facts, whether the challenged provision violates public policy is a question of law requiring our plenary review.[7] See *Sandford* v. *Metcalfe*, 110 Conn. App. 162, 168, 954 A.2d 188, cert. denied, 289 Conn. 931, 958 A.2d 160 (2008); see also *Gurski* v. *Rosenblum & Filan, LLC*, 276 Conn. 257, 266, 885 A.2d 163 (2005).

"Although it is well established that parties are free to contract for whatever terms on which they may agree . . . it is equally well established that contracts that violate public policy are unenforceable. . . . [T]he question [of] whether a contract is against public policy is [a] question of law dependent on the circumstances of the particular case, over which an appellate court has unlimited review." (Citations omitted; internal quotation marks omitted.) *Hanks* v. *Powder Ridge Restaurant Corp.*, 276 Conn. 314, 326–27, 885 A.2d 734 (2005), quoting *Gibson* v. *Capano*, 241 Conn. 725, 730, 699 A.2d 68 (1997); *Solomon* v. *Gilmore*, 248 Conn. 769, 774, 731 A.2d 280 (1999); *Parente* v. *Pirozzoli*, 87 Conn. App. 235, 245, 866 A.2d 629 (2005), citing 17A Am. Jur. 2d 312, Contracts § 327 (2004). Our Supreme Court has noted that "[t]he ultimate determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations."[8] (Internal quotation marks omitted.) *Hanks* v. *Powder Ridge Restaurant Corp.*, supra, 330.

It is well established that "a term in a contract calling for the imposition of a penalty for the breach of the contract is contrary to public policy and invalid . . . ." (Internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 203, 931 A.2d 916 (2007). Our Supreme Court has also recognized, however, that the government has an interest in encouraging private agreements that have been incorporated into decrees for dissolution, separation or annulment. See *Billington* v. *Billington*, 220 Conn. 212, 221, 595 A.2d 1377 (1991) ("strong policy that the 'private settlement of the financial affairs of estranged marital partners is a goal that courts should support rather than undermine' "). Negotiated settlement of these affairs conserves judicial resources and encourages private resolution of family issues. Additionally, the government has an interest in preserving and enforcing orders that were entered by the courts in dissolution proceedings after a determination that the judgment is fair and equitable. See General Statutes § 46b-66 (a) (court may accept stipulation for judgment only after inquiry and finding that it is fair and equitable under all circumstances). This conserves judicial resources because the courts are not forced to rework decrees to account for newly raised postjudgment arguments that are based on public policy. Otherwise, the public would have no confidence in the judiciary to resolve disputes in a conclusive manner.[9]

Additionally, in Connecticut, parties to a contract may bargain for a discount to ensure prompt performance. General Statutes § 36a-771 (d) acknowledges this practice in retail installment contracts and approves of it, as long as the contract contains language sufficient to apprise the parties of their rights and obligations. That statute provides: "Each retail installment contract . . . on a deferred payment schedule shall also contain an explanation of the *consequences of the failure* . . . to make . . . deferred installment payments under the contract in a timely manner, including a clear statement of whether or not *interest would be charged for the entire period of deferment* under the contract and, if so, the rate of such interest. . . ." (Emphasis added.) General Statutes § 36a-771 (d). Our legislature has not found it necessary to protect consumers from entering into such contracts but has protected them only from *unknowingly* doing so.

Finally, it is well and firmly established that "[t]he rendering of a judgment in a complicated dissolution case is a carefully crafted mosaic, each element of which may be dependent on the other." *Ehrenkranz* v. *Ehrenkranz*, 2 Conn. App. 416, 424, 479 A.2d 826 (1984); accord *Greco* v. *Greco*, 275 Conn. 348, 354, 880 A.2d 872 (2005); *Krafick* v. *Krafick*, 234 Conn. 783, 806, 663 A.2d 365 (1995); *Fahy* v. *Fahy*, 227 Conn. 505, 515, 630 A.2d 1328 (1993); *Sunbury* v. *Sunbury*, 210 Conn. 170, 175, 553 A.2d 612 (1989); *Picton* v. *Picton*, 111 Conn. App. 143, 149–50, 958 A.2d 763 (2008), cert. denied, 290 Conn. 905, 962 A.2d 794 (2009); *Chyung* v. *Chyung*, 86 Conn. App. 665, 668, 862 A.2d 374 (2004), cert. denied, 273 Conn. 904, 868 A.2d 744 (2005); *Quindazzi* v. *Quindazzi*, 56 Conn. App. 336, 339, 742 A.2d 838 (2000); *Cordone* v. *Cordone*, 51 Conn. App. 530, 533, 752 A.2d 1082 (1999); *Puris* v. *Puris*, 30 Conn. App. 443, 449, 620 A.2d 829 (1993); *Watson* v. *Watson*, 20 Conn. App. 551, 557, 568 A.2d 1044 (1990), rev'd in part on other grounds, 221 Conn. 698, 607 A.2d 383 (1992); *Daly* v. *Daly*, 19 Conn. App. 65, 70, 561 A.2d 951 (1989); *Cuneo* v. *Cuneo*, 12 Conn. App. 702, 710, 533 A.2d 1226 (1987). Although these cases concern appeals from dissolution judgments crafted by the court, the principle they reiterate is no less true when the parties have negotiated an agreement. Indeed, stipulations for judgment often include very delicately balanced and carefully negotiated terms in the resolution of important family issues. General Statutes § 46b-66 (a) recognizes this delicate balance and requires courts either to accept or to reject those agreements in their entirety.[10] When the court approves of a stipulated judgment, it cannot later be set aside "unless the parties agree to do so or it is shown that the judgment was obtained by fraud, accident or mistake." *Bernet* v. *Bernet*, 56 Conn. App. 661, 666, 745 A.2d 827, cert. denied, 252 Conn. 953, 749 A.2d 1202 (2000).

In the present case, the parties were both represented by counsel, they reached an agreement after a long negotiation period, and both testified that they participated actively in the negotiations and found the agreement fair, reasonable and in line with their expectations. There is no argument that the plaintiff was unaware of the full consequences of failing to make the required payment. He testified that time was of the essence and that he could have to pay interest if the property settlement payments were overdue. Additionally, the court found that the challenged provision was clear and unambiguous. The plaintiff, as a result of his bargain, had the use of $7.5 million for one year. His financial affidavit at the time of the judgment showed an estate of nearly $80 million, and the $7.5 million represented less than 10 percent of his assets at the time of the judgment. It would appear that the plaintiff could have made that payment at the time of the judgment. Instead, the plaintiff, an investment banker, had the use of the money with the knowledge that he would lose the benefit of no interest for that year if he failed to pay the defendant on time.

Accordingly, we do not find that it is against the public policy of the state to allow such a provision in a judgment of dissolution incorporating a settlement agreement approved by the court as fair and equitable when the parties, represented by counsel, entered into the agreement with knowledge of its terms following a long period of negotiations.[11] Furthermore, even if the provision was otherwise violative of public policy, we note that "[t]he principle that agreements contrary to public policy are void should be applied with caution and only in cases plainly within the reasons on which that doctrine rests; and it is the general rule . . . that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts. *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U.S. 353, 356, 357, 51 S. Ct. 476, 75 L. Ed. 1112 [1931]; 17 Am. Jur. 2d, Contracts, 174." (Internal quotation marks omitted.) *Collins* v. *Sears, Roebuck & Co.*, 164 Conn. 369, 376–77, 321 A.2d 444 (1973). In the present case, considering the totality of the circumstances and current societal expectations,[12] public policy weighs in favor of enforcing the agreement.[13]

II

The defendant also claims that the court, having previously found the parties' stipulation for judgment to be fair and equitable, improperly refused to enforce one of its provisions. The defendant argues that the plaintiff induced the court's error,[14] if any, because he testified that the stipulation for judgment was fair and equitable and asked the court to incorporate it into the dissolution of marriage judgment. The plaintiff argues that the challenged provision is an unconscionable penalty clause

and that the incorporation of the clause is void. We agree with the defendant.

At the dissolution hearing, the plaintiff requested that the court approve the stipulation for judgment as fair and equitable and incorporate the agreement into the dissolution judgment. He testified that he understood that time was of the essence and that he would be responsible for the payment of interest if his payment was late. The court found the stipulation for judgment fair and equitable and incorporated it into the dissolution judgment. The plaintiff now asks us to find that the parties' agreement included an unconscionable penalty clause. We find that the provision is not an unenforceable penalty. See part I of this opinion. Even if it were, however, this situation is in the nature of induced error. "Actions that are induced by a party ordinarily cannot be grounds for error. . . . A [party] can present a claim of relief from induced error only upon a showing that the error violated his constitutional rights." (Internal quotation marks omitted.) *Sachs* v. *Sachs*, supra, 60 Conn. App. 345; see also *Martin* v. *Martin*, 101 Conn. App. 106, 120 n.7, 920 A.2d 340 (2007). Although ordinarily, claims of induced error arise at the appellate level, we see no reason for trial courts to employ a different standard when they are presented with a collateral attack on a judgment. The plaintiff claims no constitutional violation, and, therefore, the court improperly refused to enforce the challenged provision.

The judgment is reversed and the case remanded for further proceedings in accordance with law.

In this opinion, BORDEN, J., concurred.

[1] The defendant also claims that the court improperly (1) found that the plaintiff, Brady Dougan, had paid a "significant price" for his late payment and (2) modified the parties' property division. Because we find merit in the defendant's claims concerning the validity of the stipulated judgment, we do not reach her remaining claims on appeal.

[2] The defendant also received one of the parties' residences, valued at $9.6 million, accounts totaling $143,336 and a 2000 BMW X5. The plaintiff received the remainder of the assets held by the parties.

[3] In addition, during the dissolution hearing, the following exchange occurred:

"[The Plaintiff's Counsel]: You understand that . . . the court, if it approves the agreement, will essentially provide that at the expiration of . . . five years, if the alimony has not ended by reason of the death of either party or [the defendant's] remarriage, it will end on that date and may not be extended?

"[The Plaintiff]: That's right.

"The Court: Remarriage terminates, cohabitation doesn't?

"[The Plaintiff's Counsel]: Yes, sir. There was a quid pro quo for the removal of a cohabitation provision."

[4] The first payment, due within thirty days of the dissolution decree, is not at issue in this appeal.

[5] The plaintiff also argued to the court that the provision was ambiguous. The court found that the provision was "clear and unambiguous." The plaintiff has not challenged that finding in this court.

[6] Marital separation agreements, like a number of other types of contracts, are construed differently because of the status or relationship of the parties involved. See, e.g., *Cadle Co.* v. *D'Addario*, 268 Conn. 441, 455–57, 844 A.2d 836 (2004) (burden and standard of proof different when one party is fiduciary of other); *Aetna Casualty & Surety Co.* v. *Murphy*, 206 Conn. 409, 416–18, 538 A.2d 219 (1988) (notice provisions of adhesion contract not

literally enforced); Home Solicitation Sales Act, General Statutes § 42-134a et seq. (contract voidable by buyer when conditions not met); General Statutes § 36a-771 (statutory requirements for retail installment contracts).

[7] The court made "findings" as to the parties' intent, but we note that the parties stipulated only to the circumstances of the late payments. Accordingly, the court's findings as to the parties' intentions must be taken from its interpretation of the contractual provisions.

[8] In evaluating current societal expectations, we must consider legislative enactments as an expression of those expectations. General Statutes § 36a-771 (d), effective October 1, 2003, is such an expression.

[9] The dissent suggests that these latter policies were not raised on appeal. We note, however, that the defendant briefed the issue in her principal brief by discussing (1) our well established public policy of encouraging the private settlement of cases, (2) the necessity that parties may rely on the reasonable expectation that the terms of a stipulated judgment will be enforced and (3) our Supreme Court's sparing invocation of public policy to prevent enforcement of a marital agreement or dissolution judgment.

[10] General Statutes § 46b-66 (a) provides in relevant part that in dissolution proceedings, "the court shall inquire into the financial resources and actual needs of the spouses and their respective fitness to have physical custody of or rights of visitation with any minor child, in order to determine whether the agreement of the spouses is fair and equitable under all the circumstances. *If the court finds the agreement fair and equitable, it shall become part of the court file, and if the agreement is in writing, it shall be incorporated by reference into the order or decree of the court.* . . ." (Emphasis added.)

It is thus the court's duty to make an initial determination of whether the agreement is *fair and equitable* before incorporating it into the judgment of the court. In addition, when the parties submit a stipulation for the court's approval, it must either accept or reject the agreement as a whole. See *Bank of Boston Connecticut* v. *DeGroff*, 31 Conn. App. 253, 256, 624 A.2d 904 (1993).

[11] The dissent asserts that our decision "does not reveal either the legal or factual basis for [our] conclusion [but] focuses on certain public policy considerations favoring stipulated judgments in family cases." Although it is true that we focus on the policy considerations surrounding this case, we do that because the judgment of the trial court was that the provision was "*void against public policy.*" (Emphasis added.) Accordingly, we focus our analysis on the competing public policies of ordinary contract law and family law.

Contrary to the dissent's suggestion, we do not claim that the provision is one setting forth liquidated damages. If anything, the provision appears to set forth a discount for prompt payment. Regardless, however, we need not decide whether the provision sets forth a penalty or a discount because the best resolution of the competing policy interests on the facts of this stipulated dissolution judgment is that the provision should be enforced. In light of General Statutes § 36a-771 (d), it is not even clear that retroactive interest payments are considered as against the public policy of the state. Certainly, in some circumstances, the legislature has determined that they are not against public policy. See General Statutes § 36a-771 (d).

The dissent cites only § 356 (1) of 3 Restatement (Second), Contracts (1981), which provides in relevant part: "A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty." We note, however, that § 354 of the Restatement governs the imposition of interest as damages. Comment (a) of that section provides in relevant part: "If the parties have agreed on the payment of interest, it is payable not as damages but pursuant to a contract duty that is enforceable as is any other duty, subject to legal restrictions on the rate of interest." Id., § 354, comment (a).

Finally, despite the dissent's suggestion, we do not perceive the public policy against the enforcement of contract penalties "insignificant." In this case, we do not find the penalty, if any, to be impermissible. To the extent there are competing public policy considerations, the public policies in favor of enforcement outweigh the public policy against.

[12] See footnote 8.

[13] This opinion has not directly responded to each assertion of the dissent because the opinions speak for themselves; however, we disagree with the dissent's assertion that an opinion that enforces a judgment incorporating the bargained for provisions of a separation agreement increases "the level of uncertainty associated with marital dissolution judgments and decrease[s] the citizenry's confidence in its judiciary." See dissenting opinion, 413.

[14] The defendant has not raised the related issue of judicial estoppel, and we therefore do not address it. We note that there are two elements to the doctrine of judicial estoppel: "First, the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and second, the prior inconsistent position must have been adopted by the court in some manner. *Bates* v. *Long Island* [*Railroad*] *Co.*, 997 F.2d 1028, 1038 (2d Cir.), cert. denied, 510 U.S. 992, 114 S. Ct. 550, 126 L. Ed. 2d 452 (1993)." (Internal quotation marks omitted.) *SKW Real Estate Ltd. Partnership* v. *Mitsubishi Motor Sales of America, Inc.*, 56 Conn. App. 1, 8 n.6, 741 A.2d 4 (1999), cert. denied, 252 Conn. 931, 746 A.2d 793 (2000).