

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA** **CIVIL ACTION**

D G,
Former husband,

vs.

Case No. XX DR YYY N

S G,
Former wife,

ORDER GRANTING FORMER HUSBAND’S MOTION TO DISMISS

This matter having come before the court on *Date omitted* /2015 on the former husband’s “Motion to Strike Former Wife’s Verified Amended Motion for Relief From Final Judgment, Etc.” filed *Date omitted* /2015, it is ordered:

1. The record, the pending motions, and the issues

The record

This action began on 12/10/2013 when the former husband filed a petition for dissolution of marriage. The former wife filed a counter petition on 1/3/2014. The pleadings agree that the parties married on 5/11/1991, they separated on 9/4/2013, and they have no minor children. The husband was then 77, the wife 71.

Both parties have been represented by counsel throughout this case. Financial affidavits have been filed, discovery has been conducted, and the parties’ compliances with disclosure have been filed, all before the settlement agreement was signed.

The parties filed a settlement agreement on 8/27/2014. The former wife signed it on 8/20/2014 and the former husband on 8/25/2014. Both were represented by counsel when it was signed.

So, this agreement is a postnuptial settlement agreement entered into during a lawsuit for dissolution of marriage. A motion to set aside such an agreement is governed by the decisions of *Casto v. Casto*, 508 So.2d 330 (Fla. 1987); *Petracca v. Petracca*, 706 So.2d 904 (Fla. 4th DCA 1998); *Crupi v. Crupi*, 784 So.2d 611 (Fla.5th DCA 2001); *Macar v. Macar*, 803 So.2d 707 (Fla. 2001); and *Parra de Rey v. Rey*, 114 So.3d 371 (Fla. 3d DCA 2013).

A final judgment was signed on 9/17/2014 that incorporated the parties’ settlement agreement. The former wife filed a motion to set aside the judgment on 9/29/2014, and she amended that motion on 10/24/2014. By an order dated 12/14/2014 the court granted her motion and set aside the final judgment, although the dissolution of the marriage was not set aside. So, the issues of equitable distribution, alimony, and fees and costs have not been finally decided.

The court granted the former wife’s motion to set aside the judgment because under Rule

12.540 the judgment was void for violation of due process since it was entered without a trial order or without a trial having been held, which grounds was raised in paragraph 8 of the former wife's motion. *See, e.g., Bennett v. Ward*, 667 So.2d 378 (Fla. 1st DCA 1995); *Merrigan v. Merrigan*, 947 So.2d 668 (Fla. 2d DCA 2007). The former husband signed and filed a waiver of the trial and a trial order in his "Special Interrogatories," in which he requested the entry of a judgment on the agreement, but the former wife did not sign and file such a waiver.

The former wife's pending motion

The former wife filed a "Verified Amended Motion for Relief From Final Judgment Pursuant to [Rule] 12.540" on *Date omitted* /2015. This is the former wife's pending motion.

The reference in the title of this motion to Rule 12.540 and a request for "relief from judgment" is erroneous because there is no final judgment on the issues of equitable distribution, alimony, and fees and costs. In the final paragraph of the motion the former wife asks the court to set aside the parties' settlement agreement. So, the former wife's pending motion is a motion to set aside a postnuptial settlement agreement entered into during a dissolution action.

The legal basis stated in the former wife's pending motion is "misrepresentation" or "fraud," which is the first basis for setting aside a postnuptial settlement agreement under the decision of *Casto, supra*.

The second basis for setting aside such an agreement under *Casto*, that is, "unfairness" or "unreasonableness," is not available for a marital settlement agreement entered into during dissolution litigation. *Petracca, Crupi, Macar, and Parra de Rey, supra*. The postnuptial agreement in *Casto* was entered into some months before a suit was filed, and the later case law determined that for an agreement entered into after a suit is filed "unfairness" or "unreasonableness" cannot be a basis to set it aside because the parties had ample opportunity to learn about their finances before they agreed to settle the case.

Although the legal basis for the former wife's motion is the case law cited above and not Rules 1.540 and 12.540, the case law under those rules concerning the requirements for pleading and proving "misrepresentation" or "fraud" applies to her pending motion.

The former husband's subject motion

On *Date omitted* /2015 the former husband filed a "Motion to Strike" the former wife's pending motion. The Rules of Procedure permit a "motion to strike" for the purpose of removing "... redundant, immaterial, impertinent, or scandalous matter from any pleading ...," Rule 1.140(f), or to remove a "sham" pleading. Rule 1.150.

The former husband's motion is not concerned with such matters in the former wife's motion so it is improperly labeled as a "motion to strike." In fact, it is a motion challenging the legal sufficiency of the former wife's pending motion. As such, it is a motion to dismiss her motion for failure to state a claim for relief.

The first paragraph of his motion states its basis, that the former wife's motion "fails to state a valid legal claim for relief" and that it is "legally insufficient." So, his motion is actually a

motion to dismiss for failure to state a cause of action under Rule 1.140(b)(6), because the former wife's pending motion begins a pendent action within this action for dissolution of marriage. Her motion is a "claim for relief," that is, a claim seeking to set aside a post marital, post filing settlement agreement. Rule 1.110(b).

2. Ruling

2.1 The former husband's motion is granted

The former husband's motion is granted because the former wife's pending motion does not concisely and plainly state the ultimate facts particular to this case that show she is entitled to set aside the agreement on the basis of fraud.

All "claims for relief" must contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." Rule 1.110(b)(2).

Further, "... in all averments of fraud ... the circumstances constituting the fraud ... shall be stated with such particularity as the circumstances may permit." Rule 1.120(b).

So, a motion to set aside a settlement agreement on the basis of fraud

"... must clearly and concisely set out the essential facts of fraud, and not just legal conclusions. ... [the motion] must specify the fraud. ... In addition to specifying the fraud, the motion should explain why the fraud, if it exists, would entitle the movant to have [the agreement] set aside.

In many cases, the term 'fraud' is loosely used to label all conduct which has displeased an opposing party. Requiring ... fraud to be stated with particularity allows a trial court to determine whether the movant has made a prima facie showing which would justify relief ... Where fraud exists, it is not so subtle a concept that it cannot be described with precision. If a motion on its face does not set forth a basis for relief, then an evidentiary hearing is unnecessary." *Flamenbaum v. Flamenbaum*, 636 So.2d 579, 580 (Fla. 4th DCA 1994).

And Hembd v. Dauria, 859 So.2d 1238, 1240 (Fla. 4th DCA 2003): "Hembd failed to state the alleged fraud with sufficient particularity to require an evidentiary hearing on the motion. ... To obtain a hearing ..., the law required Hembd to demonstrate a prima facie case of fraud, not just nibble at the edges of the concept."

And Myers v. Myers, 652 So.2d 1214, 1216 (Fla. 5th DCA 1995), in which the wife's "vague and conclusory" allegations of fraud were insufficient "to state a cause of action for fraud, and therefore the Wife was not entitled to affirmative relief upon the entry of a default against the Husband."

And Quittner v. Quittner, 725 So.2d 1168 (Fla. 3d DCA 1998), in which the trial court order granting the former husband's motion to set aside the marital settlement agreement was reversed

because the evidence failed to prove the former wife's misrepresentations were material or that he had relied on them when he entered into the agreement.

"Florida Rule of Civil Procedure 1.120 requires that a cause of action for fraud be pled with particularity. The complaint must allege:

- (a) that there was a misrepresentation of a material fact;
- (b) that the defendant knew the falsity of the representation;
- (c) that the defendant made the representation intending that the plaintiff would rely on it in doing an act desired by the defendant; and
- (e) that the plaintiff's reliance caused damage. *Citation omitted.*

Allegations contained in a pleading are insufficient if they are too general, vague or conclusory. *Citations omitted.* Where the elements of a cause of action are not pled, they may not be inferred from the context of the allegations. *Citations omitted.*" *Myers v. Myers*, 652 So.2d 1214, 1215 - 1216 (Fla. 5th DCA 1995). (*Paragraphing added.*) *See also Johnson v. Davis*, 480 So.2d 625 (Fla. 1985).

Regarding *reliance*, a party's reliance on the misrepresentation must be *justified*. If he knows the statement is false or "*if its falsity is obvious to him*", his reliance is not justified. *Besett v. Basnett*, 389 So.2d 995 (Fla. 1980), at 997 citing s. 541 of the Restatement of Torts (1976). (*Emphasis added*)

Regarding the *materiality* of a misrepresentation, ultimate facts showing a misrepresentation was material to the agreement must be stated. A general allegation of materiality is conclusory and so insufficient.

The foregoing are the legal elements of fraud. The ultimate facts of fraud particular to a specific case must be pleaded in a claim for relief. It is not enough to recite in the claim the foregoing legal elements for pleading and proving fraud. Rather, the pleader must concisely state the particular ultimate facts that amount to fraud. Rule 1.110(b). The facts of every claim of fraud are unique, while the legal elements of every claim of fraud are the same.

The unique facts of a particular claim of fraud must be pleaded concisely and plainly. *Id.* If they are not so pleaded, there is no right to a hearing to attempt to prove the unpleaded facts and there is no need for any discovery into the unpleaded facts.

2.2 No discovery will take place pending further order

See Carter v. Carter, 3 So.3d 397 (Fla. 4th DCA 2009), in which discovery into the husband's finances was denied because the wife's motion to set aside the agreement had not pleaded "fraud or misrepresentation ... with specificity."

Further, if a legally sufficient motion is filed discovery is limited to the factual basis of the motion, *Carter, supra; Petracca, supra*, and discovery into the parties' finances is improper.

2.3 Leave to file an amended motion is granted

The former wife is granted 30 days leave to file and serve an amended motion. *See, e.g., Johnson v. Johnson*, 738 So.2d 508 (Fla. 1st DCA 1999), in which the appellate court instructed the trial court to grant the appellant leave to amend a motion to set aside based on fraud if the motion is legally insufficient.

The amended motion shall not contain any citations of law, not a statute, a rule or a case.

The amended motion shall state only facts in separate paragraphs that address the foregoing legal elements of fraud and the requirement to plead particularly.

2.4 Former husband may file a response

If the former wife files and serves an amended motion the former husband has 30 days leave thereafter to file and serve a response to the motion.

The response shall not contain any citations of law, not a statute, a rule or a case.

The response shall admit or deny the particular, separate factual allegations of the former wife's motion.

If no response is filed, then the former husband shall be deemed to have generally denied all of the former wife's factual allegations.

If the response raises factual matters as an affirmative defense, it shall state only the facts showing an affirmative defense.

If the response challenges the legal sufficiency of the amended motion, it shall state only that the motion is legally insufficient and state concisely how it is so insufficient.

Done and ordered in Fort Myers, Lee County, Florida, this _____

R. Thomas Corbin, Circuit Judge

Copies provided to:

Luis Insignares, Esq., and Cary Alan Cliff, Esq.