[Cite as *Presjak v. Presjak*, 2010-Ohio-1455.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

PHILIP M. PRESJAK,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0077**
- vs -	:	
CAROL A. PRESJAK,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 07 DR 426.

Judgment: Affirmed.

Matthew A. Pentz, Chase Bank Building, 106 East Market Street, #605, Warren, OH 44481-1103 (For Plaintiff-Appellee).

Robert S. Wynn, 7 Lawyers Row, P.O. Box 121, Jefferson, OH 44047 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Carol A. Presjak appeals the final decree of divorce issued by the Trumbull County Court of Common Pleas, Domestic Relations Division. Mrs. Presjak contends the trial court erred in distributing the marital property according to the parties' joint stipulations and the agreement that was reached during the final hearing as to the disposition of the marital home and tavern the parties owned.

{¶2} However, simply because Mrs. Presjak regrets her decision to allow Mr. Presjak to keep the marital home and to submit to a sealed bidding process on the

tavern, which she lost, she cannot now repudiate the agreement she entered into in open court, and which the trial court, accordingly, effectuated. Therefore, we affirm.

{¶3} **Substantive and Procedural Facts**

{¶4} Philip and Carol Presjak were married on February 13, 1998. Mr. Presjak filed for divorce in late 2007. The divorce was contested as to one central issue, the division of two marital assets, which consisted of the marital home and the "Hole in the Wall" Tavern, which the couple owned and operated.

{¶5} **Pretrial Proceedings**

{¶6} Several months into the divorce proceedings, in February 2008, Mr. Presjak filed a motion to list and sell the tavern business, including the real properties, the fixtures and equipment, and the liquor license due to an impending foreclosure. The magistrate granted the order, allowing the real estate broker to set the sale price and giving each party the opportunity to match any bona fide offer. Nearly a month later, the magistrate issued an order naming Zamarelli Real Estate Agency as the listing agent for the sale of the tavern. The magistrate again ordered that the agency would determine the "listing and sale price."

{¶7} The parties then filed a joint motion for a status conference in order to resolve an issue as to the broker's listing contract. Both believed that the contract lacked an exemption by either party to pay the broker's commission if either intended to bid or purchase the property. The parties believed that was the intent of the original listing agreement, which was understood by all the parties, including the court, and that they should have the first option to purchase. The parties urged the court to hold the

status conference without delay as the agency had already begun marketing the property, despite Mr. Presjak's refusal to sign the listing agreement with the realtor.

{¶8} At the status conference the magistrate found that only Mrs. Presjak signed the sales listing agreement, and that the realtor had found a ready and able buyer to purchase the business at $159,600. The magistrate ordered that each party would have the opportunity to match the price, directing each to submit a sealed bid by April 30, 2008. The magistrate further ordered the new owner to pay the other party the difference between the purchase price and the balances due on the mortgages as of April 30, 2008. Both parties were ordered to place $7,950 in their respective counsel's trust accounts until the court determined the realtor's commission earned for finding a bona fide purchaser.

{¶9} Mrs. Presjak filed a motion to set aside the magistrate's decision, claiming that although nothing had been filed with the court by the realtor, the realtor's counsel was included in the parties' status conference, and that solely from the realtor's counsel's testimony, the magistrate accepted the representation that the realtor had a ready, willing, and able buyer. Mrs. Presjak contended that neither party accepted the offer.

{¶10} The court then issued an agreed judgment entry on May 1, 2008, whereby both parties agreed to extend the deadline for the submission of the sealed bids to the court on or before May 20, 2008. Mrs. Presjak's motion to join a third-party defendant, Faith Presjak, the mother of Mr. Presjak and the holder of a mortgage on the couple's real property, was also granted.

{¶11} The court conducted an independent review of the record, the motion and the magistrate's report in dispute. The court overruled Mrs. Presjak's objections on the merits and ordered all previous orders issued by the magistrate to remain in effect.

{¶12} Mrs. Presjak sought a stay as to the May 20, 2008 bid deadline and requested an extension of that deadline for the purchase of the tavern because the parties were working on a "memorandum of understanding" to specifically identify any assets and liabilities associated with the operation of the tavern so that "the parties are completely aware of the exact terms of the bids they are submitting." Faith Presjak had claimed she held a mortgage against the tavern that had not been verified, which according to Mrs. Presjak, was previously unknown. The court granted an agreed extension until the middle of June so that the parties could determine the outstanding obligations on the property.

{¶13} At this point, the realtor's counsel filed a Notice of Appearance of Counsel together with a Notice of Opposition to Future Requests for Continuances, opposing any further requests by the parties to extend the bid deadline.

{¶14} Mrs. Presjak requested another status conference seeking additional time to obtain financing. Mrs. Presjak alleged that she was ready, willing, and able to obtain financing, but could not because of the pending foreclosure action filed by Faith Presjak.

{¶15} Accordingly, the court held a status conference noting that the parties had entered into an "auction sale" for the property. The magistrate issued an order scheduling a full-day hearing on the issue of realtor fees and set all other matters regarding the sale of the property for a three-day hearing.

{¶16} Mr. Presjak filed objections to the magistrate's order, reviewing that each party had filed their sealed bids and "memorandum of understanding" on June 30, 2008. Mrs. Presjak had the higher bid. Mr. Presjak understood that per the parties' agreement, Mrs. Presjak had thirty days to obtain financing. He argued the magistrate erred because the foreclosure was known at the time the parties entered into the terms of the agreement and that quite simply, Mrs. Presjak did not perform under those terms as she failed to obtain financing. Mr. Presjak urged the court to enforce the "memorandum of understanding" and overrule the magistrate's objections to resolve the case without undue delay.

{¶17} The "memorandum of understanding," signed by the parties and their respective counsel, was attached to Mr. Presjak's motion in opposition to Mrs. Presjak's objections. The memorandum provided that if the "winning" bidder cannot or does not perform according to the terms of the agreement, the "losing" bidder shall have the same opportunity to perform at his or her lower bid. The opportunity shifts to the "losing" bidder when the court makes the determination that the winner has not "performed." The agreement set forth all terms and condition of sale, including transfer of the liquor license, which was held in Mrs. Presjak's name.

{¶18} The realtor then filed a motion to enforce payment of the broker's commission, alleging it had no proof that each party had placed $7,950 in their respective counsel's trust accounts as ordered.

{¶19} The Final Divorce Hearing

{¶20} The court held the final hearing to resolve the contested issue as to the division of the marital home and tavern in late April 2009. Prior to taking testimony, the

parties stipulated on the record as to the agreed allocation of other assets and associated debts. As to the residence and tavern, the parties agreed that Mr. Presjak would retain the "owners' account" associated with the tavern. The parties further agreed that the septic system would be the responsibility of whoever assumed ownership over the tavern and associated liquor license; that the value of the marital residence was $165,000; and that the following mortgages existed: (1) a mortgage of $52,943 on the marital residence, (2) a mortgage of $67,109 on the tavern, and (3) the "Reiger mortgage" of $159,412.

{¶21} After the stipulations were read into the record by Mr. Presjak's counsel, Mrs. Presjak's counsel interjected with one clarification, solely on the issue of the items that were not marital property but appeared in the pictures taken to document the tavern contents and condition.

{¶22} After these stipulations were read into the record, the parties established the grounds for the divorce and the court urged them to resolve the outstanding issues, inquiring of each whether they indeed wanted possession of the marital home and/or tavern.

{¶23} After the parties conferred off the record, it was agreed that Mr. Presjak would retain the marital residence and pay Mrs. Presjak half the value of the home minus the mortgage. The sole issue remaining was the tavern, and the parties agreed to submit sealed bids. The parties also agreed they would trace the mortgages and update the balances so the court could incorporate the amounts into the final decree, which would also name the winning bidder of the tavern. With that agreement, the court granted the divorce.

{¶24} The Divorce Decree

{¶25} The court issued the divorce decree on July 1, 2009, incorporating and explicitly listing the parties' stipulations in its findings of facts. The court then made findings as to the parties' submitted bids. Mr. Presjak was the "winning" bidder, bidding $215,000 to Mrs. Presjak's $194,850. The court overruled the realtor's motion to enforce payment of a broker commission because the realtor was not a third-party defendant to the action.

{¶26} The court awarded Mr. Presjak the tavern along with the other stipulated tavern assets. It set forth its calculation of Mrs. Presjak's equity interest in the tavern, and ordered a net cash payment to Mrs. Presjak of $58,169.20 to be paid as soon as practicable. Both parties were ordered to cooperate in the transfer of the tavern and liquor license to Mr. Presjak.

{¶27} Post-Decree Motions

{¶28} Through new counsel, Mrs. Presjak filed a Civ.R. 60(B) motion for relief from judgment and requested a stay of the court's final decree of divorce. Mrs. Presjak averred, inter alia, that she intended to file an appeal; that the liquor license was held by an L.L.C., which was never made a party to the case; that she "does not understand the trial proceedings and what went on;" and that the tavern was her sole livelihood and the court erroneously accepted Mr. Presjak's bid.

{¶29} Mrs. Presjak filed her notice of appeal, and the trial court, several days later, denied both her motion to stay and motion for 60(B) relief from judgment.

{¶30} Mrs. Presjak requested a stay in this court, which was denied.

{¶31} Mrs. Presjak now raises three assignments of error for our review:

{¶32} "[1.] The trial court erred to the substantial prejudice of appellant when it accepted and utilized stipulations which were not assented to or agreed to by appellant or her counsel either orally or in writing.

{¶33} "[2.] The trial court it [sic] erred to the substantial prejudice of appellant when it permitted and incorporated into its trial procedure an impromptu bidding process by the parties with respect to the tavern business and realty.

{¶34} "[3.] The trial court erred when it proceeded to decide this case at the trial level when it did not have sufficient information before it to lawfully perform its duty as trier of fact."

{¶35} **Standard of Review**

{¶36} "A trial court's authority to enforce in-court settlement agreements is discretionary." *Tryon v. Tryon*, 11th Dist. No. 2007-T-0030, 2007-Ohio-6928, ¶22, quoting *Franchini v. Franchini*, 11th Dist. No. 2002-G-2467, 2003-Ohio-6233, ¶8; *Kilroy v. Kilroy,* 11th Dist. No. 2002-G-2470, 2003-Ohio-5214, ¶11. "As such, the trial court's decision will not be disturbed on appeal unless it is clear that the trial court's decision was unreasonable, arbitrary, or unconscionable." Id., quoting *Franchini* at ¶8, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶37} "Where the parties enter into a settlement agreement in the presence of the court, such an agreement constitutes a binding contract." Id. at ¶23, citing *Walther v. Walther* (1995), 102 Ohio App.3d 378, 383. "The enforceability of an in-court settlement agreement depends upon whether the parties have manifested an intention to be bound by its terms and whether these intentions are sufficiently definite to be

specifically enforced." Id., quoting *Franchini* at ¶9, citing *Normandy Place Assoc. v. Beyer* (1982), 2 Ohio St.3d 102, 105-106.

{¶38} **Stipulations between the Parties**

{¶39} In her first assignment of error, Mrs. Presjak contends the trial court erred by accepting joint stipulations during the final divorce hearing. Although she was present and her counsel made a clarification to the stipulations, she contends she neither affirmatively assented nor agreed to them. A review of the record, however, reveals this was, quite simply, not the case. Thus, we find this assignment of error to be without merit.

{¶40} "When the parties have agreed, without objection and with the judge's approval, to enter into stipulations for the record, the court will not consider objections to such stipulations on appeal." *Booth v. Booth*, 11th Dist. No. 2002-P-0099, 2004-Ohio-524, ¶9, quoting *DiGuilio v. DiGuilio*, 8th Dist. No. 81860, 2003-Ohio-2197, ¶32, quoting *In re Annexation of Territory of Riveredge Twp. to City of Fairview Park* (1988), 46 Ohio App.3d 29. "Further, it is well established in Ohio that a party may not appeal a judgment to which he has agreed." Id., quoting *DiGuilio*; accord *Bd. of Comm'rs of Montgomery Cty. v. Saunders*, 2d Dist. No. 18592, 2001-Ohio-1710, 5; *Fekete v. Fekete* (Feb. 24, 2000), 8th Dist. No. 74340, 2000 Ohio App. LEXIS 652, 16; *Grubic v. Grubic* (Sept. 9, 1999), 8th Dist. No. 73793, 1999 Ohio App. LEXIS 4200, 9, quoting *Thomas v. Thomas* (1982), 5 Ohio App.3d 94, 98 ("where 'a party has initiated negotiations leading to an "in-court" settlement stipulation incorporating essentially all of his demands, he should not be permitted to contend that the court in approving and adopting the bargain

he struck has acted so unfairly as to constitute an abuse of discretion as a matter of law'").

{¶41} Mrs. Presjak contends that neither she nor her counsel assented to the stipulations because the stipulations were orally read to the court at the beginning of the final divorce hearing by Mr. Presjak's counsel.

{¶42} A review of the transcript reveals Mrs. Presjak's agreement to the stipulations and that her counsel was actively involved in the process.

{¶43} As Mr. Presjak's counsel ended his recitation of the stipulations, he said: "***I think that sets forth the stipulations that we have entered into as far as I know. If there is anything additional or any clarification by all means --."

{¶44} Mrs. Presjak's counsel responded: "the only clarification that I would make, I believe when I took some pictures there were some items *** that those were not items that belonged to the bar."

{¶45} At that point, Mr. Presjak's counsel suggested that "[m]aybe in addition to submitting photos, Your Honor, maybe we could have a list of items that they believe are somehow non-marital. I guess that's what you are saying?

{¶46} "Mrs. Presjak's counsel: Yes. And we will provide that list.

{¶47} "Mr. Presjak's counsel: If there is a dispute we will approach the Court with that dispute. I think that sets forth the agreement."

{¶48} The court then proceeded to take testimony as to the grounds for divorce. At no time did Mrs. Presjak or her counsel indicate she did not agree to the stipulations, although she had a full opportunity to do so.

{¶49} Understandably, Mrs. Presjak is upset at the loss of the tavern, a family business to which she devoted so much time. But she cannot now contest the agreed-upon bidding process and the stipulations made on the record and in an open hearing, with both parties and their respective counsel present. The tavern was the central dispute in this contested divorce, and she actively participated in the bidding process carried out over many months with multiple requests on her part to extend time to complete the process. She did not object or voice any concern when given the full opportunity to do so at the final hearing.

{¶50} "Where parties reach a settlement agreement in a dispute, they waive their right to claim error and are barred from relitigating issues involved therein." *Perko v. Perko*, 11th Dist. Nos. 2002-G-2403, 2002-G-2435, and 2002-G-2436, 2003-Ohio-1877, ¶32, citing *Mentor v. Lagoons Point Land Co.* (Dec. 17, 1999), 11th Dist. No. 98-L-190, 1999 Ohio App. LEXIS 6217.

{¶51} As in *Perko*, Mrs. Presjak agreed, in open court, to the stipulated agreement that she now contests on appeal. Her counsel actively participated in the stipulations. Mrs. Presjak had every opportunity to stop the proceedings or express her dissent or confusion. Thus, Mrs. Presjak has waived her right to now claim errors to which she previously agreed to.

{¶52} "It is a well-settled rule of law that issues which were not previously raised at the trial court level cannot be raised for the first time on appeal." *Tryon* at ¶29, quoting *JP Morgan Chase Bank v. Ritchey*, 11th Dist. No. 2006-L-247, 2007-Ohio-4225, ¶27, citing *State v. Awan* (1986), 22 Ohio St.3d 120, paragraph one of the syllabus.

{¶53} Mrs. Presjak's first assignment of error is without merit.

{¶54} **Impromptu Bidding Process**

{¶55} In her second assignment of error, Mrs. Presjak alleges the trial court erred in engaging in an "impromptu bidding process" to resolve the dispute over the tavern. The record reveals a tortuous battle over the tavern and the martial home. The bidding process was not "impromptu" as Mrs. Presjak alleges, but rather, was a process agreed to on at least two prior occasions. The court, being more than fair, wanted to give the parties the opportunity to purchase the properties without delay due to the imminent foreclosure. Moreover, and most fundamentally, Mrs. Presjak voiced no objections to this process until she lost the bid. She had every opportunity to do so during the hearing. She actively participated in the hearing, indicating her consent to the proceedings.

{¶56} "Settlement agreements are favored by law. In divorce actions, the parties can reach a settlement agreement as to the issues in lieu of litigating those issues before the domestic relations court." *Perko* at ¶27, citing *Walther v. Walther* (1995), 102 Ohio App.3d 378. "When parties enter into a settlement agreement in the presence of the court, such an agreement constitutes a binding contract." Id. "So long as the court is satisfied that the settlement agreement reached by the parties was not procured by fraud, duress, overreaching, or undue influence, the court has the discretion to accept it." Id. "When parties to a divorce enter into an in-court settlement agreement, the court may accept the agreement even if one person tries to repudiate it. Neither a change of heart nor poor legal advice is a reason to set aside a settlement agreement." Id., citing *Van Hoose v. Van Hoose* (Apr. 7, 2000), 2d Dist. No. 99 CA 18, 2000 Ohio App. LEXIS 1536. "A settlement agreement eliminates the necessity of judicial resolution of a

controversy as the parties reached a compromise regarding their respective rights and obligations." Id., citing *Green v. Clair* (Feb. 14, 2001), 9th Dist. No. 20271, 2001 Ohio App. LEXIS 520.

{¶57} Further, "[i]n a contested divorce proceeding, the record must contain sufficient evidence of the value of the marital assets to support a determination that the division was reasonable." Id. at ¶28, citing *Bauer v. Bauer* (Apr. 2, 1981), 8th Dist. No. 42805, 1981 Ohio App. LEXIS 14005. "The requirements of R.C. 3105.171 may be impliedly waived when the parties clearly intend their agreement to be a complete settlement of all issues to be addressed, following disclosure of the assets in existence." Id., citing *Pawlowski v. Pawlowski* (1992), 83 Ohio App.3d 794. "There is no requirement that the marital assets be divided equally in a settlement agreement." Id., citing *Thomas v. Thomas* (1982), 5 Ohio App.3d 94. "Indeed, a trial court is under no duty to assess whether the terms of a property settlement agreement are equitable." Id., citing *Castro v. Castro* (Nov. 8, 2000), 7th Dist. No. 99 CA 249, 2000 Ohio App. LEXIS 5248. "After all, a party cannot assert that a court's approval of an in-court settlement is an abuse of discretion when it represents that party's bargain." Id. A trial court, however, still has an obligation to assess the voluntariness of the parties who are entering into the agreement. Id.

{¶58} Ownership of the marital residence and the tavern were the sole issues that made this divorce so hotly contested. Both parties wanted the properties and a foreclosure was imminent. The magistrate initially ordered the marital home to be sold and that the parties would each have an option to bid on the tavern. The parties eventually did so, after jointly drafting and signing a "memorandum of understanding for

sealed bid." After many continuances, the parties submitted their sealed bids, with Mrs. Presjak's bid being the highest. Unfortunately, she was unable to obtain financing per the agreement.

{¶59} The bidding agreement dissolved, and nearly a year later, during the final divorce hearing, the court inquired of each party whether there was any way they would consider settling the issue. Both were adamant that they wanted both the marital residence and the tavern. The court reminded them of the deal they had once made to conduct the initial bidding; and cautioned them that to the court, property values are just numbers, whereas to the parties it is much more -- a livelihood and a home.

{¶60} Mrs. Presjak conceded she would be willing to sell the house. An off-the-record discussion was then held, after which the parties reached an agreement as to the methods to be employed in the disposition of both the marital home and the tavern:

{¶61} "Court: Have we agreed on how to proceed?

{¶62} "Mr. Presjak's counsel: I believe so, Judge. I think we are going to agree to have a number introduced into evidence on each side. It's going to be, we will do that at the same time so one doesn't go before the other. We will do that in a sealed fashion.

{¶63} "Court: Right now you mean?

{¶64} "Mr. Presjak's counsel: As far as my client is concerned, yes.

{¶65} "Court: Are we all set?

{¶66} "Mrs. Presjak's counsel: Yes."

{¶67} At that point each party submitted a sealed bid, with the court directing the parties to mark the bids as exhibits. The court inquired whether the parties wished him

to announce the bids now or in a written order. The court then reiterated and confirmed the parties' agreement as to these assets:

{¶68} "Court: This is all we need. Everything will be in my hands. We have all the stipulations, all of the values. It's understood that, correct me if I am wrong folks, that Mr. Presjak is going to keep the house and buyout Mrs. Presjak at one half the appraised value less the mortgage. Is that correct?

{¶69} "Mr. Presjak's counsel: That's true.

{¶70} "Mrs. Presjak's counsel: Yes.

{¶71} "Court: And the other stipulations will be built into the order, and it's up to me to determine based on the bids submitted minus the mortgage or the, yes, the mortgage values, but those will be updated as of May 1. So we will have to wait until next week to get those."

{¶72} The court concluded the hearing as all issues were resolved, granted the parties a divorce on the grounds of incompatibility, and approved the stipulations with the agreement that the decree would detail the allocation of the assets.

{¶73} It is quite apparent that no objection was raised by either party regarding the bidding process. It bears repeating that "[w]here parties reach a settlement agreement in a dispute, they waive their right to claim error and are barred from relitigating issues involved therein." *Perko* at ¶32.

{¶74} Mrs. Presjak waived her right to appeal the trial court's division of the tavern because she agreed, in open court, to the process she now contests on appeal.

{¶75} Mrs. Presjak's second assignment of error is without merit.

{¶76} **Sufficient Facts**

{¶77} In her third assignment of error, Mrs. Presjak contends the trial court erred in failing to make findings pursuant to R.C. 3105.171. She suggests the court proceeded to value the marital assets without sufficient evidence as to their value. The trial court, however, was not required to value those assets as the parties stipulated to their value and as to how the court was to proceed in the distribution of those assets. The court had before it a valuation by the court-appointed realtor. The parties, however, entered into an agreement as to the value of the marital home, and further agreed that the issue of the valuation and distribution of the tavern would be resolved through a bidding process solely between the parties.

{¶78} Mrs. Presjak is correct in her assertion that "[i]n a contested divorce proceeding, the record must contain sufficient evidence of the value of the marital assets to support a determination that the division was reasonable." *Perko* at ¶28, citing *Bauer*.

{¶79} It is also clear, however, that the "requirements of R.C. 3105.171 may be impliedly waived when the parties clearly intend their agreement to be a complete settlement of all issues to be addressed, following disclosure of the assets in existence." Id., citing *Pawlowski*.

{¶80} Thus, as the Fifth Appellate District aptly noted in *Thomas,* "[t]he settlement herein was made before the court and the court adopted the settlement as to its judgment as to division of property ***. Under such circumstances, there was no requirement for any writing to be signed by appellant and appellee or their attorneys to evidence any conditions of the settlement. The settlement was read physically into the record and the court adopted that settlement as its own entry and appellant cannot now

be heard to say the court was in error in making an award in conformity with that settlement agreement which was represented by counsel for both parties to be their voluntary division of property." Id. at 98-99.

{¶81} The court effectuated the parties' agreement and, accordingly, Mrs. Presjak has waived any error as to that agreement. Mrs. Presjak's third assignment of error is without merit.

{¶82} The judgment of the Domestic Relations Division of the Trumbull County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.