SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2097-15T2

MANUEL LIM,

Plaintiff-Appellant,

v.

ROSEMARIE LIM,

Defendant-Respondent.

Submitted March 28, 2017 – Decided May 11, 2017

Before Judges Fasciale and Sapp-Peterson.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FM-07-163-12.

Charles P. Cohen, attorney for appellant.

Paula L. Crane, attorney for respondent.

PER CURIAM

This is an appeal of two post-judgment orders issued by the Family Part. The first is the November 6, 2015 order, which among

other relief granted to defendant Rosemarie Lim, directed plaintiff, Manuel Lim, to provide documents necessary to effectuate a Qualified Domestic Relations Order (QDRO) and denied plaintiff's cross-motion for a plenary hearing. The second order, entered January 8, 2016, denied plaintiff's motion for reconsideration, amended the May 27, 2015 Amended Final Judgment of Divorce (AFJOD), awarded counsel fees to defendant and denied his application for a stay of the order. We affirm both orders.

I.

The parties were married in 1993. Two children, who are not the subject of this appeal, were born of the union. Subsequent to their marriage, plaintiff secured employment with Burns and Roe, where he remained employed until his termination in June 2014. As part of his compensation package, plaintiff maintained a retirement savings account with Burns and Roe.

On July 18, 2011, plaintiff filed for divorce. Upon the completion of discovery, trial commenced and on October 8, 2014, the parties reached a settlement on the issues of child support, alimony, and equitable distribution, which defendant's counsel placed on the record. The provisions relevant to this appeal concern distribution of the Burns and Roe retirement account:

> As to the retirement accounts. First of all, the husband has a Burns and Roe retirement

> savings account, with an approximate value of $222,000 as of the date of complaint.
>
> That is a marital asset — asset completely. There — all — we're gonna [sic] — talking about QDROs — all the QDROs are going to be prepared . . . at joint expense. This particular — Burns and Roe retirement savings, from the date of the marriage — all of it is required after the date — from date of marriage to date of complaint and all investment experience is going to be divided 50/50 between the parties.

Plaintiff's counsel did not raise any objection.

The court directed the parties to submit a signed agreement and an AFJOD in approximately three weeks. Notwithstanding this directive, the proposed AFJOD was not submitted to the court until several months later. During those months, plaintiff objected to the exclusion from equitable distribution of another retirement fund held in defendant's name.

The proposed AFJOD was submitted under the five-day rule, Rule 4:42-1(c). Defendant filed no formal objection to the proposed AFJOD and the court entered the AFJOD, as proposed, on May 27, 2015. Paragraph 25 of the AFJOD states:

> As to the retirement accounts, the plaintiff has a Burns and Roe retirement savings account with an approximate value of $222,000 as of the date of Complaint. This is a marital asset and all Domestic Relations Orders are going to be prepared at joint expense. All of it is acquired from the date of marriage to date of complaint and all investment experience is going to be divided 50% to the plaintiff and 50% to the defendant.

In July 2015, plaintiff's counsel received a letter, dated July 20, 2015, from Rosemary Weiss, a (QDRO) consultant for Troyan, Inc. (Troyan), the pension expert the parties jointly selected. The letter indicated that plaintiff's Burns and Roe savings plan was terminated on June 27, 2014.

In response, plaintiff's counsel advised Troyan that the Burns and Roe account had been rolled over directly into an individual retirement account with Vanguard and attached a copy of the most recent Vanguard statement, which reported a balance in the account, as of June 30, 2015, in the amount of $353,775.50. This amount reflected a growth in the account of approximately $131,775.20, since July 18, 2011, the date the complaint was filed and also the date the parties agreed was the end date of the coverture period for purposes of equitable distribution.

On August 11, 2015, Troyan advised the parties that in order to determine defendant's share of the former Burns and Roe account, it required confirmation of plaintiff's termination date from Burns and Roe, as well as a "copy of each statement from the Savings Plan from July 18, 2011 to the date of transfer[.]" Plaintiff failed to provide this information, which resulted in a motion by defendant seeking an order directing plaintiff to provide the requested information.

Plaintiff responded to the motion by filing a cross-motion seeking in relevant part, the denial of defendant's motion and a determination that the sum of $222,000 was the total amount to be distributed between the parties. Plaintiff argued that any investment experience earned subsequent to the date he filed the divorce complaint should not be included in any distribution to defendant. Plaintiff additionally claimed that defendant's counsel incorrectly stated the terms of the settlement when she placed the settlement on the record on October 8, 2014, and that he never agreed to divide the investment experience on a 50/50 basis. Plaintiff also requested a plenary hearing to address the "distribution of pensions and/or retirement accounts."

The court conducted oral argument on November 6, 2015, and rendered an oral decision on that same date. In reaching its decision regarding distribution of the Burns and Roe account, the court stated that the distribution amount is "always whatever it is at the time of distribution and if there [are] increases or decreases due to market changes, due to passive changes, then the parties share that." In the order memorializing its decision also entered on November 6, 2015, the court stated:

> Plaintiff is not entitled to the investment experience that has accumulated on defendant's share of the account just as defendant is not entitled to the investment experience that has accumulated on plaintiff's share of the

> account. Troyan, Inc. shall determine the amount of investment experience to attribute to defendant's coverture share that has accumulated since that date.

The court denied plaintiff's request for a plenary hearing.

Plaintiff moved for reconsideration once again requesting a plenary hearing or, alternatively, seeking an order directing him to pay directly to defendant $111,000, "in order to fully and finally resolve this divorce litigation, without the need for a new or [another] amended Judgment of Divorce as required by Troyan's November 18, 2015 correspondence." The court conducted oral argument on the motion on January 18, 2016, and following oral argument denied plaintiff's motion.

In denying the motion, the court characterized the relief sought by plaintiff as "simply plaintiff's attempt at a fourth bite at the 'proverbial apple.'" The court specifically found that

> [t]he November 18, 2015 letter from Troyan indicates that plaintiff made no contributions to the IRA between the cut-off date of July 18, 2011 and September 2015. The principle funds in this account were deposited solely during the coverture period, meaning that the entire account, including investment experience shall be shared on a 50/50 basis pursuant to the parties' agreement.

The court highlighted that the Burns and Roe account, as of the date of the hearing on the reconsideration motion, had still

not been divided. Consequently, the court reasoned that "each parties' $111,000 share has been accruing investment experience while both shares are still in one account in plaintiff's name." The court concluded that defendant was therefore entitled to the investment experience earned on her share while it was being held in plaintiff's account. The court explained, "[i]f defendant's share had been earning investment experience in an account separate from plaintiff's share, plaintiff would not have a claim to that investment experience. Plaintiff cannot reap the rewards of defendant's share being invested in his name."

Addressing plaintiff's argument that Troyan's requirement for an AFJOD was proof that the settlement terms placed on the record on October 8, 2014, had changed, the court found the only thing that had changed was the name associated with the Burns and Roe account and that this name change was the basis for Troyan's request for an amended judgment. The court further explained that it was the same account, with the same funds, which had simply been rolled over to create a new account, now under the control of Vanguard rather than Burns and Roe. The court concluded that Troyan could not effectuate a QDRO on an account that no longer existed and it was this fact, which prompted the need for a further amendment of the AFJOD. The present appeal followed.

On appeal, plaintiff contends the parties' submissions in support of their motion and cross-motions returnable November 6, 2015, raised genuinely disputed issues that could only be resolved in a plenary hearing and, therefore, the trial court erred when it refused to conduct a plenary hearing to ascertain the parties' intent when they entered into the settlement agreement concerning the pension distribution of the Burns and Roe account. Plaintiff also urges this panel to exercise original jurisdiction and order distribution of all pensions/retirement funds during the period of coverture.

II.

We commence our analysis by highlighting our Supreme Court's most recent iteration of the import of marital settlement agreements:

> Settlement of disputes, including matrimonial disputes, is encouraged and highly valued in our system. "'strong public policy favoring stability of arrangements' in matrimonial matters." (quoting Smith v. Smith, 72 N.J. 350, 360 (1977)). This Court has observed that it is 'shortsighted and unwise for courts to reject out of hand consensual solutions to vexatious personal matrimonial problems that have been advanced by the parties themselves.' Ibid. (quoting Petersen v. Petersen, 85 N.J. 638, 645 (1981)). Therefore, 'fair and definitive arrangements arrived at by mutual consent should not be unnecessarily or lightly disturbed.' Id. at 193-94 (quoting Smith, supra, 72 N.J. at 358.) Moreover, a court should not rewrite a

> contract or grant a better deal than that for which the parties expressly bargained. Solondz v. Kornmehl, 317 N.J. Super. 16, 21-22, (App. Div. 1998).
>
> A settlement agreement is governed by basic contract principles. J.B. v. W.B., 215 N.J. 305, 326, (2013) (citing Pacifico v. Pacifico, 190 N.J. 258, 265 (2007)). Among those principles are that courts should discern and implement the intentions of the parties. Pacifico, supra, 190 N.J. at 266 (citing Tessmar v. Grosner, 23 N.J. 193, 201 (1957)). It is not the function of the court to rewrite or revise an agreement when the intent of the parties is clear. J.B., supra, 215 N.J. at 326, 73 (citing Miller v. Miller, 160 N.J. 408, 419 (1999)). Stated differently, the parties cannot expect a court to present to them a contract better than or different from the agreement they struck between themselves. Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43. (1960) (citations omitted). Thus, when the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result.
>
> [Quinn v. Quinn, 225 N.J. 34, 44-45 (2016).]

Guided by these principles, we note that "[a]pplications for relief from equitable distribution provisions contained in a judgment of divorce and property settlement agreements are subject to [Rule 4:50-1] and not, as in the case of alimony, support, custody, and other matters of continuing jurisdiction of the court, subject to a 'changed circumstances' standard." Pressler & Verniero, Current N.J. Court Rules, comment 6.1 on R. 4:50-1 (2017)

(citing Miller v. Miller, 160 N.J. 408, 418 (1999)); see also Harrington v. Harrington, 281 N.J. Super. 39, 48 (App. Div.), certif. denied, 142 N.J. 455 (1995).

Rule 4:50-1 (Rule) provides that relief may be obtained

> from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

In order to obtain relief under the Rule the party seeking such relief is required to present proof "of exceptional and compelling circumstances" justifying the relief sought because the Rule is "[d]esigned to balance the interests of finality of judgments and judicial efficiency against the interest of equity and fairness." Harrington, supra, 281 N.J. Super. at 48 (citing Baumann v. Marinaro, 95 N.J. 380, 392 (1984)). "[T]o establish the right to such relief, it must be shown that enforcement of the order or judgment would be unjust, oppressive or inequitable."

Ibid. (citations omitted). Relief under this Rule is granted sparingly and a party is entitled to a hearing on the application only upon a showing that there exists genuinely disputed issues of material fact supporting the relief sought. Barrie v. Barrie, 154 N.J. Super. 301, 303-04 (App. Div. 1977), certif. denied, 75 N.J. 601 (1978).

Moreover, not every factual dispute on a motion requires a plenary hearing. A plenary hearing is only necessary to resolve genuine issues of material fact in dispute. Eaton v. Grau, 368 N.J. Super. 215, 222 (App. Div. 2004); Harrington, supra, 281 N.J. Super. at 47; Adler v. Adler, 229 N.J. Super. 496, 500 (App. Div. 1988). Genuinely disputed issues of fact are those having substance as opposed to insignificance. Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 370 (Law Div. 2002), aff'd o.b., 362 N.J. Super. 245, certif. denied, 178 N.J. 32 (2003). A trial judge's decision whether to allow or deny such relief on one of the six specified grounds in the Rule should be "left undisturbed unless it results from a clear abuse of discretion." Pressler & Verniero, supra, comment 1 on R. 4:50-1 (citing U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012)).

Here, there is absolutely no proof of mistake, newly discovered evidence, fraud, overreaching, unconscionability, or any other enumerated ground to warrant modification of the

equitable distribution provisions of the AFJOD. On the contrary, at the time the settlement regarding the Burns and Roe retirement provision was placed on the record and eventually incorporated into the Amended Final Judgment of Divorce, both parties were represented by counsel. Neither party raised any objection to this specific provision, either on the day the settlement was placed on the record, prior to the issuance of the AFJOD, or during the five-day period the proposed AFJOD had been submitted to the court pursuant to Rule 4:42-1(c). Indeed, under Rule 4:42-1(c), the court, in its discretion could have listed the matter for a hearing had an objection to the proposed judgment been raised by plaintiff at that time.

The record further reveals that prior to placing the settlement on the record, the court cautioned both parties:

> I want you to listen carefully as counsel places the settlement on the record. You're going to be questioned as to whether you understand it, whether you agree to all the terms, OK? This is a settlement. Once you acknowledge that you understand it and you agree to it, there's no going back, OK? So, I just want to be clear that — [because] it seems like every time we make one step forward we take five steps back.

After defendant's counsel placed the terms of the settlement on the record, the court questioned both parties regarding their

understanding of the agreement and willingness to be bound by the terms articulated on the record.

The following colloquy occurred, first between plaintiff and his attorney, then between plaintiff and the court, and finally between plaintiff and defendant's counsel:

> MR. COHEN: Plaintiff, you heard the terms of the settlement as they were placed on the record just now, by Ms. Crane. This settlement was based upon compromises that were made over the past several days, and possibly even earlier. Do you understand the terms of the agreement?
>
> PLAINTIFF: Yes, I do.
>
> MR. COHEN: Under all of the circumstances, do you find same to be reasonable and fair in order to end this divorce litigation on this date?
>
> PLAINTIFF: I don't think it's fair, but I'll agree to it.
>
> THE COURT: Well, in the spirit of compromise and negotiation, recognizing you didn't get everything you wanted, she didn't get everything she wanted, but you compromised, you met in the middle or -- or part way in so that you could resolve this, and you wouldn't have to go through the expense and the stress of a trial. Under those circumstances, do you think it's fair and reasonable?
>
> PLAINTIFF: Yes.
>
> . . . .

> THE COURT: Anybody force or make you sign it -- well, anybody make -- force or make you enter into this agreement against your will?
>
> PLAINTIFF: No.
>
> THE COURT: Okay. Anybody promise you anything other than what's been placed on the record today?
>
> PLAINTIFF: No.
>
> THE COURT: Have you had enough time to review this agreement and discuss it with your attorney?
>
> PLAINTIFF: Yes.
>
> . . . .
>
> MS. CRANE: Plaintiff, you understand that you can't come back and say, oh, I forgot this and you didn't handle this and we didn't do that —
>
> PLAINTIFF: I agree.
>
> MS. CRANE: -- this is the -- what I placed on the record is the entire agreement. All other claims or charges are waived.
>
> PLAINTIFF: Right.

Additionally, it is undisputed that the Burns and Roe account was acquired during the marriage and therefore deemed a marital asset. As the court noted in the statement of reasons:

> . . . the account was not divided at [the time the divorce complaint was filed] and still has not been divided. Thus each parties' $111,000 share has been accruing investment experience while both shares are still in one account in plaintiff's name. Defendant is

> entitled to the investment experience earned on her share while it is being held in plaintiff's account. If defendant's share had been earning investment experience in an account separate from plaintiff's share, plaintiff would not have a claim to that investment experience. Plaintiff cannot reap the rewards of defendant's share being invested in his name.

Moreover, as highlighted by the court during the January 8, 2016 hearing, the Burns and Roe account was described on October 8, 2014, as having an "approximate value of $222,000," because at the time of the settlement was placed on the record, plaintiff had yet to provide any documentation associated with the account, notwithstanding that the parties were in trial.

Turning to plaintiff's claim of newly discovered evidence, the court properly found that Troyan's requirement for a new Amended Judgment of Divorce was not, as plaintiff urged, proof that the settlement terms had changed. Rather, the court correctly found that once Troyan discovered that plaintiff's Burns and Roe account had been terminated and rolled over into Vanguard, the judgment needed to be amended to reflect the account's new name. Thus, while the name associated with the funds changed, the terms of the settlement remained consistent. Therefore, plaintiff's claim of newly discovered evidence lacks merit.

However, assuming plaintiff's claim of newly discovered evidence as a basis for relief from judgment had any facial merit,

in order to obtain such relief, the party seeking the relief must demonstrate "that the evidence would probably have changed the result, that it was unobtainable by the exercise of due diligence for use at the trial, and that the evidence was not merely cumulative." Quick Chek Food Stores v. Twp. of Springfield, 83 N.J. 438, 445 (1980) (citing State v. Speare, 86 N.J. Super. 565, 581-82 (App. Div.), certif. denied, 45 N.J. 589 (1965)). All three requirements must be met. See ibid. Here, this information was only "new" because plaintiff failed to produce any documentation regarding the Burns and Roe account, or at the very least notify defendant that the account had been rolled over into a different IRA. Plaintiff failed to do so prior to trial, while the settlement was being placed on the record during the trial or after the trial.

To summarize, substantial, credible, and undisputed evidence in the record demonstrates that plaintiff's amended cross-motion failed to meet the standards for relief from judgment under the Rule. Moreover, the record demonstrates plaintiff's understanding of the terms of the settlement and his knowing and voluntary assent to its terms. Under such circumstances, a plenary hearing was not necessary to ascertain the intent of the parties. In short, we discern no basis on this record from which we may conclude the

court abused its discretion in denying the relief sought by plaintiff.

III.

Finally, plaintiff contends the court improperly awarded attorney's fees to defendant after it denied his cross-motion. The court awarded defendant $2,527.50 in counsel fees, which included the court's consideration of defense counsel's time expended in preparing and addressing the motions as well as the oral arguments conducted on the two post-judgment motions.

We review a trial court's award of fees again under an abuse of discretion standard, Yueh v. Yueh, 329 N.J. Super. 447, 466 (App. Div. 2000) (citation omitted), and such an award will be disturbed "only on the 'rarest occasion[.]'" Strahan v. Strahan, 402 N.J. Super. 298, 317 (App. Div. 2008) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)). In Yueh, supra, the court held conduct that increases litigation costs through recalcitrance, defiance of court orders or misrepresentation will support an award of attorney's fees. 329 N.J. Super. at 459-60.

Here, while the court failed to express its findings in the January 8, 2016 Statement of Reasons appended to its order, the record clearly and convincingly demonstrates that the counsel fee awarded to defendant was the direct result of plaintiff's noncompliance with previously entered orders.

Plaintiff failed to notify defendant or the court that as of June 27, 2014, his Burns and Roe account no longer existed under that name. In fact, on the day the settlement agreement was placed on the record, the account had not been in existence for approximately two months. Yet, plaintiff allowed the settlement to be placed on the record with specific reference to the account in detailing the terms of the settlement, without alerting the court that the account no longer existed.

After the settlement was placed on the record and knowing that a pension expert would be preparing a QDRO, plaintiff still failed to apprise defendant, defendant's attorney or Troyan of the termination of the Burns and Roe account and its direct rollover into the Vanguard account. Once Troyan discovered that the Burns and Roe account no longer existed, it requested specific documentation and information about the status of the funds. Plaintiff failed to respond to this request. This ultimately generated significant additional work not only for defendant's counsel, but also for Troyan. The court noted in its November 6, 2015 order, that plaintiff had yet to provide the documents required by Troyan.

Irrespective of the merits of plaintiff's claims in his cross-motion, the pension expert was going to need all of the requested documentation. Thus, no reasonable argument could have been

advanced justifying plaintiff's ongoing failure to provide the requisite documents to Troyan. Consequently, the award of counsel fees here was not so wide of the mark that we can conclude the court mistakenly exercised its discretion in rendering the award.

Finally, given our conclusion that the court properly denied plaintiff's request for a relief from judgment and for a plenary hearing, there is no basis for this court to consider plaintiff's final argument that we exercise original jurisdiction to resolve the pension distribution issue.

Affirmed.