SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3207-15T1

ALI SHAHEED JONES-MUHAMMAD,

Plaintiff-Appellant,

v.

KRISTINE OTT,

Defendant-Respondent.

Submitted May 2, 2017 – Decided October 11, 2017

Before Judges Messano and Grall.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FM-07-1350-11.

W. Lois Kahagi, attorney for appellant.

Snyder Sarno D'Aniello Maceri & da Costa, LLC, attorneys for respondent (Angelo Sarno, of counsel and on the brief; Michelle A. Wortmann, on the brief).

PER CURIAM

Plaintiff Ali Shaheed Jones-Muhammad and defendant Kristine Ott married in 1997 and separated in 2007. Plaintiff filed the

complaint in 2010, and they were divorced on March 28, 2013.[1] The judgment incorporates their marital settlement agreement (MSA). Plaintiff appeals a post-judgment order enforcing equitable distribution of the marital residence, transfer of responsibility for making the mortgage payments, and plaintiff's assumption of sole responsibility for his unpaid income taxes. Defendant contends we should affirm.

The order resolves a motion defendant filed in March 2015, when she learned the principal balance on the mortgage was higher than stipulated in the MSA, and another she filed in October 2015, because a title search disclosed recorded federal income tax liens that exceeded the home's value. As a consequence of those liens, defendant could not close on a contract to sell the home for $384,000 scheduled for August 2015.

The February 26, 2016, order requires plaintiff to retake title to the home he conveyed and pay her $75,000 to address the loss she suffered as a consequence of the liens, and a $10,000 counsel fee. It requires plaintiff to pay the $75,000 in fifteen $5000 monthly installments commencing on March 15, 2016

[1] The judgment, a transcript of the first of two motion hearings and several exhibits submitted on the motions are not included in the record on appeal.

plus "interest on the total lump sum at 3% per annum" at the end of the term. The counsel fee was due by April 30, 2016.

Plaintiff acknowledges his liability and does not dispute the amount of the award. He contends the judge failed to consider his ability to pay the $75,000 award at the rate established. He also seeks reversal of the counsel fee, because it was not supported by an affidavit of services and exceeded the flat fee defendant was charged. With the exception of the counsel fee, which was awarded without a certification of services and must be remanded, we affirm.

I.

During the marriage, plaintiff's income was from his work as a performer, composer, recording artist, and producer. His income includes royalties and profit from business entities. While they were together, defendant assisted plaintiff, travelled with him when he was on tour and had no significant earnings. As stipulated in the MSA, plaintiff's average income was $211,000 during the four years preceding divorce and they imputed defendant's earnings at $35,000 annually. Plaintiff focused on music and entrusted his managers to handle his personal finances and write his checks.

Defendant agreed to accept reduced alimony for a limited duration, $3500 monthly for fifty-six months, as consideration for their agreement on equitable distribution.[2]

By way of the MSA provisions on equitable distribution, defendant was to acquire the marital residence and all of its equity free and clear of plaintiff's interest. Plaintiff had purchased the home prior to the marriage, and the title and mortgage were in his name. They agreed the home was worth $300,000, encumbered by no debt other than a mortgage securing a $230,000 loan from Chase Bank (Chase), and it had approximately $70,000 of equity. Plaintiff assured defendant he was "not aware of" any judgment or lien against the home other than the mortgage, and defendant gave him the same assurance. They agreed neither would "further encumber the residence."

In further consideration of the alimony, plaintiff assumed sole responsibility for his income tax liability and "promised to indemnify defendant and hold her" harmless with respect to "his liability (including taxes, penalties, interest and

[2] The parties had previously divided their personal property, and they agreed each would retain their bank and investment accounts — defendant a $60,000 annuity, and plaintiff an investment account worth less than $2000.

accounting/legal fees) assessed against him as a result of [his] failure . . . to pay any taxes, interest or penalties."[3]

The MSA addresses transfer of the home's title and responsibility for paying the mortgage from plaintiff to defendant. Plaintiff agreed to bring payments on the mortgage current by the date of divorce and make his first alimony payment on April 1, 2013. Defendant agreed to make the mortgage payments as of that date.

They did not follow the plan for transfer, but they had also agreed to "make sincere efforts between them to settle" before going to court. Plaintiff did not bring the mortgage payments current by the date of divorce, because he was in the process of securing a loan modification from Chase. The modification would not take effect unless he made three "trial" payments at the modified rate. He made the last "trial" payment on June 1, 2013, and the modification took effect on July 1.

To the extent plaintiff's loan modification brought payments current, it was accomplished by adding debt, $37,584.91, to the principal. The additional debt included past-due mortgage payments and interest and brought the balance

[3] The same paragraph of the MSA, includes a similarly stated obligation for defendant, but there is no indication she had any tax liability.

to $266,654.91. The monthly payments were lower, $1914.01, but payable over a term twice the length. Under the mortgage in place, the monthly mortgage payment was $2552.14, $1539.27 of which was for principal and interest, with interest at 2.852%.[4]

The parties' explanations for deviating from the payment plan were similar but not identical. By defendant's account in "late spring 2013," plaintiff told her he was behind on payments, promised to bring them current and said he would continue making them until he had. Plaintiff acknowledges the discussion and his promise to bring those expenses current but denies any agreement on future payments.

In any event, plaintiff did not give defendant the information she would need to pay the mortgage until much later. Starting in April 2013 and ending in February 2015, the parties exchanged emails discussing the home's carrying costs. Plaintiff discussed his struggle to bring the mortgage current. Defendant inquired about homeowner's insurance, the amount of the payments and the balance. In November 2014, he gave

[4] The amounts stated were reported by Chase in a loan modification agreement offered to plaintiff near the time of divorce. He was required to accept by March 23, 2013. The Chase documents indicate that $1012.87 of both the current and lower modified payments was for escrow covering property taxes and homeowner's insurance.

defendant the name of the lender who had purchased his loan and mortgage from Chase. Within two weeks of receiving that essential information, defendant obtained a statement showing a monthly payment of $3126.13, outstanding payments totaling $17,878.46, and $258,626 principal.[5] Despite defendant's several requests for documentation on loan modifications and payments, which she was not able to obtain from the lender, and a request from her attorney, plaintiff did not provide the information. The final request was made in February 2015.

By early March, defendant concluded she could not afford the payments, made some repairs and listed her home for sale. She also filed a motion to enforce plaintiff's obligations under the MSA. On June 8, the judge entered an order directing plaintiff to sign authorizations requiring the first and second mortgage lenders to release all relevant information. He reserved decision on relief.

While the first motion was pending, defendant received and accepted an offer to purchase the home for $384,000 in August 2015. In anticipation of the closing, she moved. The federal income tax liens disclosed by the title search amounted to

[5] The statement and figures are referenced in the certification defendant submitted on the motion, but the statement is not in the record on appeal.

$610,197.10. The liability reflected on the notices of tax lien was actually less: $521,841.67, when defendant discovered the liens in August 2015, and $258,366.60, when the judge signed the order at issue on this appeal in February 2016.[6] During the motion hearing, the judge indicated that the total was about $500,000. The observation demonstrates review of the notices, which indicated the balance would be significantly lower by February 2016.

On her second motion, defendant asserted plaintiff's violation of his obligation to disclose the income tax liens at the time of divorce and sought enforcement of their agreement on equitable distribution, which includes the hold harmless clause. She requested alternative forms of relief: an order compelling plaintiff to remove all recorded liens other than the mortgage

[6] The Notice of Federal Tax Lien associated with each recorded lien includes the following information: "For each assessment listed below, unless notice of the lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release[.]"

By August 2015, the last refiling date had passed for three of the four tax liabilities stated in the notice of lien recorded in 2006 and one of the liabilities stated in the lien recorded in 2008 had expired. By February 2016, all four liabilities recorded on the lien filed in 2006 and two of the liabilities listed on the lien recorded in 2008 had expired. The third liability listed on the lien recorded in 2008 will expire in December 2017, and the liabilities listed on the lien recorded in 2011, a total of $144,874, is scheduled to expire in December 2021.

and eliminate debt on the mortgage in excess of $230,000; or if he could not do that, an order compelling him to retake the deed, pay the expenses she incurred, and the $154,000 she lost with the sale.

Plaintiff filed a cross-motion. Acknowledging his sole responsibility for the tax liabilities and his obligation to address defendant's loss, he denied knowledge of the recorded liens at the time of divorce. He did not assert he was unable to pay defendant damages. He offered reasons for not knowing about the liens. His only requests were for the judge to consider defendant's failure to pay the mortgage as of April 1, 2013 and to have the agent representing him before the IRS attend the conference to report on the status of a compromise under negotiation that could reduce the obligation secured by the deed.

During the argument on that motion, the judge said he did not believe plaintiff's denial of awareness of the tax liens against the residence at the time of divorce, indicating the IRS gives notice and that plaintiff said he had been working with the IRS since 2013. As to ability to pay, the judge mentioned that plaintiff's group had just released a new album and he did not believe plaintiff was not making any money and acknowledged that he needed current information on the parties' financial

status. Stating he did not know whether plaintiff's claim that his managers failed to notify him was true or not, the judge said, "[t]hey're his liens."

Following a colloquy on solutions to address defendant's lost $384,000 contract, the judge suggested the attorneys consider a solution involving plaintiff retaking the home and extending alimony. Defendant's attorney advised they were discussing a settlement "along [those] lines," and the problem was "quantifying the amount" owed. Plaintiff's attorney responded: "Exactly." Plaintiff's attorney presented no argument about defendant's inability to pay, the judge entered an order directing exchange and submission of recent tax returns, case information statements (CISs) and written statements of their positions on damages with supporting documentation. The judge reserved decision on damages and counsel fees pending the submissions, and he denied all relief not addressed.

The tax returns and CISs revealed plaintiff earned at a slightly higher rate than he had during the four years preceding divorce. The average of his earnings between January 1, 2013

and October 31, 2015 was $239,172.[7] His CIS also reports monthly payments to the IRS and the State of the New Jersey in excess of $17,000.

The parties submitted their positions in writing in December 2015. Neither discussed legal principles governing enforcement and modification of MSAs but both set forth positions on damages. See Eaton v. Grau, 368 N.J. Super. 215 (App. Div. 2004). In response to the colloquy on the motion hearing, defendant's attorney indicated her client would accept payments on a monthly basis in the amount of $5000.

As to damages, both parties started with the $384,000 offer to purchase, reduced by the $230,000 debt on the mortgage stated in the MSA — $154,000. Defendant recognized the $154,000 should be reduced by the real estate commission stated in the contract of sale ($19,200). She sought additions to equity covering repairs she made prior to sale and carrying costs she paid after she moved.[8]

---

[7] The stated average is computed on the "Total income" reported on plaintiff's 2013 and 2014 1040s and the "Gross Earnings" from January 1 to October 31, 2015 reported on his CIS. Defendant notes that plaintiff's 2013 "Foreign Tax Credit" Form 1116 reports $2,119,866 "Gross income from all sources," including $844,597 "income from K-1s."

[8] The contract was submitted in this trial court but not on appeal.

Defendant also requested a counsel fee for services rendered on the motions in a total amount of $14,749.50, and she indicated a certification of services would "be submitted within a timeframe to be directed by the court." The judge awarded a $10,000 fee although the certifications provided earlier indicated defendant was charged a flat fee and, at that point, had received services that would have costs much less than $10,000.

Plaintiff's position statement does not include a discussion of his ability to pay, a payment schedule or the information in his tax returns or CIS. He simply requested reductions from the $154,000. One was for closing costs estimated at $25,000 to $28,000, which he suggested could be determined by preparing a "dummy" HUD-statement. In lieu of a reasonable rent, he sought a reduction equal to payments defendant would have made on the mortgage prior to the loan modification, $2552.14, for thirty-three months — the period between April 1, 2013 and date of his written submission. He also sought a reduction for late fees payable at the rate of $2526 monthly.

Consistent with the submissions, the judge predicated the award on the value of defendant's lost sale, $154,000, minus expenses that would have been incurred had the sale occurred.

The order provides the only explanation for the result: "$154,000 in equity, less $24,000 closing costs, less $55,000 (reasonable monthly rental costs imputed to defendant for the subject premises – i.e. [d]efendant cannot live rent free)." There is no explanation for payment of the $75,000 at the rate of $5000 monthly.

As to liability, the judge determined plaintiff "had actual and/or constructive knowledge that the tax liens attached to the marital residence at the time of [divorce]," resulting from his or his agents' conduct, and affecting the marketability of the residence to the extent that it was worthless to defendant.

As to counsel fees, the order indicates: Plaintiff "acted in bad faith with respect to his actions prior to, and subsequent to, the Judgment of Divorce," which caused defendant to file motions, including his failure to sign authorizations for defendant to speak with the mortgage lender and provide proof of life insurance. On those findings, the judge entered the order plaintiff appeals.

II.

Repeating what we said at the outset of this opinion, plaintiff acknowledges his liability and does not dispute the $75,000 award. He simply contends the judge failed to consider his ability to pay $5000 monthly. He also seeks reversal of the

counsel fees, because it was not supported by an affidavit of services and exceeded the flat fee defendant was charged.

If there were any doubt about plaintiff's acknowledgement of liability and acceptance of the amount, it is dispelled by assertions in his reply brief stating his "absolute intent to take on the responsibility for his income tax liability" and that "there is no issue of [plaintiff's] liability in this appeal." He criticizes the judge's failure to address his ability to pay and questions "whether the trial court properly considered [plaintiff's] ability to pay his acknowledged liability at the rate the trial court established in its ruling." Plaintiff contends the judge gave "unjustified weight" to disputed facts, relied on speculation rather than evidence, abused his discretion and failed to provide an adequate explication of his findings and reasons. See R. 1:6-6; R. 1:7-4(a).

A.

Motions to enforce or modify equitable distribution involve the exercise of judicial discretion. Eaton, supra, 368 N.J. Super. at 222; Whitfield v. Whitfield, 373 N.J. Super. 573, 575 (App. Div. 2004); Castriota v. Castriota, 268 N.J. Super. 417, 421-22 (App. Div. 1993). An exercise of discretion requires "a conscientious judgment" based on "the law and the particular

circumstances of the case before the court." Higgins v. Polk, 14 N.J. 490, 493 (1954); accord Hand v. Hand, 391 N.J. Super. 102, 111 (App. Div. 2007). And, an explanation of the factual and legal bases for discretionary determinations made on such motions is expected. R. 1:7-4(a); Klajman v. Fair Lawn Estates, 292 N.J. Super. 54, 61 (App. Div.) (quoting Curtis v. Finneran, 83 N.J. 563, 569-70 (1980)), certif. denied, 146 N.J. 569 (1996).

In the absence of a statement of findings and conclusions, review without remand is more difficult but not foreclosed. See Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (noting the commonality and propriety of affirming a valid determination entered on an erroneous basis); Castriota, supra, 268 N.J. Super. at 421-22 (declining to affirm denial of enforcement of equitable distribution as an unstated exercise of discretion, because equitable distribution in not subject to modification on a showing of changed circumstances); Rosenberg v. Bunce, 214 N.J. Super. 300, 304-05 (App. Div. 1986) (reviewing a denial of a motion to open a default judgment and reversing on the merits); see also R. 2:10-5; Esposito v. Esposito, 158 N.J. Super. 285, 291-92, 300 (App. Div. 1978) (exercising original jurisdiction to modify equitable

distribution and affirming determinations not raised on appeal where the judge had retired and the record was adequate).

In this case, a limited remand for more assiduous compliance with Rule 1:7-4(a) prior to our decision was not an option, because the judge is retired. But a remand for that reason is not necessary. We are in a position to address issues plaintiff raised in the trial court and on appeal to determine: whether a genuine dispute of material fact required a plenary hearing, see Harrington v. Harrington, 281 N.J. Super. 39, 47 (App. Div.), certif. denied, 142 N.J. 455 (1995); or whether undisputed and substantial credible evidence in the record as a whole permits an affirmance of the order, or part of it, for a different reason than the one stated by the judge. Isko, supra, 51 N.J. at 175; see Monte v. Monte, 212 N.J. Super. 557, 565 (App. Div. 1986) (noting this court's obligation to "decid[e] whether the determination . . . is supported by substantial credible proof on the whole record").

B.

In the trial court, plaintiff did not ask the judge to schedule payments of the $75,000 damage award and did not assert a lack of ability to pay. As the preceding discussion of the record demonstrates, plaintiff had three opportunities to raise the issue on the motion addressing the liens imposed as a

consequence of his tax liability: in opposition to the motion; during argument on the motion; and in his final submission stating his position on damages. He did not take it, and we decline to address the issue for that reason.

> It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available "unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest."
>
> [Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959), certif. denied, 31 N.J. 554 (1960)).]

This award, as defendant argues, enforces the MSA's scheme for equitable distribution — the marital residence and the hold harmless clause were what the parties bargained for. See Eaton, supra, 368 N.J. Super. at 224; Castriota, supra, 268 N.J. Super. at 421-22.[9] The judge's insistence on tax returns and CISs

[9] As to the residence, the hold harmless clause shielding defendant from plaintiff's tax liability was not conditioned on his ability to pay and the tax liability prevented its the sale.

As to the value of sale, plaintiff urged calculation based on mortgage payments defendant would have made. A calculation based on those payments would not have favored plaintiff.

(footnote continued next page)

dispels any concern that he based the payment schedule on unsupported assumptions equating plaintiff's celebrity status with wealth. The judge had tax returns. On the question of inability to perform his promise to hold defendant harmless, plaintiff had the burden of proof. See Morris v. Morris, 263 N.J. Super. 237, 244-45 (App. Div. 1993) (discussing the payor's

---

Had he brought the payments current and defendant had made them starting on April 1, 2013 and ending on August 1, 2015, the result would have been more favorable to her.

Defendant would have been making monthly payments of principal and interest in the amount of $1539.27, on an interest rate of 2.852%. She would have made twenty-nine payments, starting on April 1, 2013 and ending on August 1, 2015. Assuming the worst case scenario from the perspective of accruing equity in the home — that the April 1, 2013 payment was the first, the amount owed on debt would have been lower — between $208,595 (calculated at 2.8%) and $208,750 (calculated at 2.9%).

Had plaintiff's suggestion for a reduction based on payments and established costs of closing been used this would be the result: the period would be for twenty-nine not thirty-three months, because no payments would be made after closing: $384,000 - $209,000 (principal due) = $175,000 (equity) - $74,012.16 (29 total payments including escrow $2552.14 per payment) = $100,987.84 (equity - payments) - $19,204 (the only closing cost supported by evidence) = $81,783.78.

Moreover, reading the integrated agreement as a whole and recognizing that the residence and protection from tax liability was in consideration for the agreement on reduced alimony for a limited duration, more than the total of numbers on a HUD sheet was involved. Glass v. Glass, 366 N.J. Super. 357, 371-74 (App. Div.), certif. denied, 180 N.J. 354 (2004); Morris v. Morris, 263 N.J. Super. 237, 244 (App. Div. 1993) (finding no inequity in enforcing the parties' integrated agreement fashioned in light of husband's debt).

obligations to disclose and explain financial information in a similar situation).

C. Counsel Fees

We agree with plaintiff that the award of counsel fees must be vacated and remanded for reconsideration. The judge erred by considering it without a complete certification of services permitting assessment of the reasonableness of the fees charged. Here, a certification detailing services and a discussion of legal principles relied upon to award a counsel fee in excess of the flat fee charged were essential. See N.J.S.A. 2A:34-23; R. 4:24-9 (b)-(d); R. 5:3-5(c); Mani v. Mani, 183 N.J. 70, 93-95 (2005).

On remand, the judge should not accept the judge's conclusion, stated in the February 26, 2016 order, that plaintiff had actual knowledge of liens at the time of divorce and acted in bad faith by failing to disclose them. In the trial court and on appeal, plaintiff claimed that a genuine factual dispute precluded a finding that he knew about the liens at the time of divorce without a plenary hearing, and that point is well-taken.

The notices of tax liens and plaintiff's statement that he had been working with the IRS since 2013 reasonably supported an inference that plaintiff knew about the liens prior to divorce.

But plaintiff denied having that knowledge, and he provided sufficient plausible explanations to require a plenary hearing. We refer to plaintiff's assertions of reliance on business managers to handle his personal finances and write his checks; Chase's approval of the loan modification; and the silence on the subject of liens from the attorneys providing services in divorce proceeding given the MSA's contemplation of transfer of title by quit claim deed.[10]

The award of attorney's fees is vacated and remanded for consideration anew in conformity with this decision; the order of judgment appealed from is otherwise affirmed; jurisdiction is not retained.

[10] Had plaintiff disputed liability based on a knowing false representation that the residence was encumbered by liens other than the mortgage, we would have affirmed on a different ground — enforcement of the MSA's undisputedly applicable hold harmless clause.