SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4350-14T2

DEBRA A. AMIR,

Plaintiff-Respondent,

v.

YEHUDA A. AMIR,

Defendant-Appellant.

Submitted February 1, 2017 – Decided February 27, 2017

Before Judges Carroll and Gooden Brown.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Atlantic County, Docket No. FM-01-152-06.

Yehuda Amir, appellant pro se.

Goldenberg, Mackler, Sayegh, Mintz, Pfeffer, Bonchi & Gill, attorneys for respondent (Michael A. Gill, on the brief).

PER CURIAM

In this post-judgment matrimonial matter, plaintiff Debra Amir and defendant Yehuda Amir were married on November 9, 1991, and their dual judgment of divorce (JOD) was entered on January 9, 2007, following an eight-day trial. Defendant appeals from an

April 10, 2015 order denying his motion to vacate the equitable distribution provisions of the 2007 JOD, and an April 24, 2015 order awarding plaintiff $4405 in counsel fees and costs. For the reasons that follow, we affirm the April 10, 2015 order, but reverse the award of counsel fees and remand for the trial court to make the requisite findings of fact and conclusions of law.

I.

This is now the third time defendant appeals the trial court's equitable distribution award.[1] We incorporate by reference the extensive factual background and procedural history of this dispute as detailed in our thirty-four-page unpublished opinion. Amir v. Amir, Nos. A-4662-06, A-0098-07, A-1802-07 (App. Div. Aug. 19) (slip op. at 2-18), certif. denied, 200 N.J. 500 (2009). We remanded for the trial court to reconsider certain aspects of the equitable distribution award, but rejected the balance of defendant's arguments. Id. (slip op. at 33-34).

On remand, the trial court slightly reduced the equitable distribution award to plaintiff from $1,268,819 to $1,200,152.38. Defendant moved for reconsideration, arguing that certain assets, including a business known as Souvenir City that he established

[1] The matter was also previously before us on an unrelated issue of parenting time. Amir v. Amir, No. A-2772-08 (App. Div. Dec. 2, 2011).

prior to marriage, should not have been subject to equitable distribution. Defendant also claimed he did not have the ability to comply with the remand order, and he asked the court to reduce his equitable distribution obligation by allocating one of his business properties to plaintiff.

The trial court denied the reconsideration motion on April 30, 2010. The court found that all of the issues raised by defendant had "been dealt with before" and there was no valid reason "to redo the divorce." Defendant appealed the April 30, 2010 order, arguing that the trial court erred in refusing to allow testimony regarding his ability to effectuate payment of the judgment, and that he should receive credit for values of the real estate as of the date of the court's memorandum of decision. We affirmed in an unpublished opinion, concluding that defendant's arguments lacked merit. Amir v. Amir, No. A-4812 (App. Div. Feb. 22, 2012) (slip op. at 4) (citing R. 2:11-3(e)(1)(E)). We added the following comment:

> In response to defendant's arguments, plaintiff contends there is no basis in the record to modify the trial court's equitable distribution decision. We agree. Defendant did not advance a Rule 4:50-1(f) claim in support of his motion for reconsideration, and there has been no showing that enforcement of the JOD, as modified by the order dated March 3, 2010, "would be unjust, oppressive, or inequitable." Schwartzman v. Schwartzman, 248

N.J. Super. 72, 77 (App. Div.), certif. denied, 126 N.J. 341 (1991).

[Id. (slip op. at 4-5).]

On April 2, 2012, we denied defendant's motion for reconsideration and awarded plaintiff $10,000 for counsel fees incurred in the second appeal.

Certain events occurred in the interim that warrant discussion in order to lend context to the present appeal. Defendant filed for bankruptcy, and on January 19, 2011, the bankruptcy court lifted the automatic stay so that plaintiff could continue her collection efforts, including completing a sheriff's sale of three commercial properties owned by defendant. On February 4, 2011, the trial court found defendant's objection to the sheriff's sale "without merit," and ordered the Atlantic County Sheriff to transfer ownership of the three commercial properties that were sold at sheriff's sale to plaintiff. On February 7, 2011, we denied defendant's application for permission to file an emergent appeal.

In an April 8, 2011 order, the trial court, among other things, (1) denied without prejudice defendant's request for a credit against his judgment pursuant to MMU of New York, Inc. v. Greiser, 415 N.J. Super. 37 (App. Div. 2010) on the basis that his application was premature; (2) granted plaintiff permission to

remove defendant from the three commercial properties she now owned by virtue of the sheriff's sale; and (3) awarded plaintiff a $5900 counsel fee. On July 1, 2011, the court declined to exercise jurisdiction over defendant's motion to vacate the sheriff's sale due to the pending appeal, and upheld its prior $5900 counsel fee award.

After the second appeal was decided, defendant filed a motion in the trial court in September 2012, seeking a "fair market value" credit for the property plaintiff obtained, which defendant contended exceeded her equitable distribution entitlement. Alternatively, defendant sought a plenary hearing on that issue. The court denied the motion on November 9, 2012, finding that the requested relief was not "appropriate at this time." The court indicated that it would in the future "consider, and if necessary, hold a [p]lenary [h]earing" if the parties were unable to agree on any equitable credits due defendant upon plaintiff's sale of the three properties. The court also enjoined defendant from interfering with the sale of the properties, designated as Units R-20, R-21, and R-22, and directed that within twenty days defendant pay plaintiff the $10,000 counsel fee we awarded her on the second appeal.

In January 2013, defendant moved to compel plaintiff to provide a copy of the listing agreement and contract for the sale

of Unit R-21 and place the proceeds of any sale in escrow pending a final determination of the amount of the credit defendant claimed he was due. On February 22, 2013, the trial court denied defendant's request to place the sales proceeds in escrow. However, the court ordered plaintiff to provide defendant with the contract of sale for Unit R-21 and the listing agreements for the properties, and to keep defendant informed of the status of the properties "going forward."

In October 2013, defendant filed a motion to set a discovery schedule and a plenary hearing to determine the credit due him against the equitable distribution award. At that time, defendant indicated that one unit was already sold and there was a contract to sell a second unit, R-22. The trial court denied the motion in a December 6, 2013 order, accompanied by a comprehensive nineteen-page written opinion. In pertinent part, the court reasoned:

> Defendant's application for a plenary hearing is DENIED at this time. The [c]ourt notes that [d]efendant has not cited any case law indicating that a plenary hearing on the issue of the credits due should be held prior to the sale of all three properties, or that the proper valuation of the properties should be fixed at some point prior to their sale to a bona-fide third-party purchaser. Defendant's counsel in his brief cites the case of MMU, which the [c]ourt previously determined would be controlling in a plenary hearing. The [c]ourt notes, however, that the

> valuation used in MMU was not determined until after the property at issue in that matter was sold to a bona-fide third-party buyer. In this case, two of three properties remain unsold, although both parties agree that one of the two is under contract at this time. Plaintiff has asserted that the third property continues to be listed for sale. While a plenary hearing may be necessary to determine what credit [d]efendant is entitled to, such a hearing is not yet timely as two of three properties remain unsold. Therefore, [d]efendant's request is DENIED. Any credit that [d]efendant may be due from the sale of the three properties will be considered when all three properties are sold, as would any offsets [p]laintiff may claim for tax liens and other encumbrances she asserts were on the properties when she acquired them.

Defendant did not appeal the December 6, 2013 order. Instead, in October 2014, he filed a motion pursuant to Rule 4:50-1(e) and (f) seeking to vacate the 2007 JOD and any related orders enforcing the judgment. Defendant argued that the intent of the JOD was to award him sixty-one percent of the marital assets and plaintiff the remaining thirty-nine percent. However, according to defendant, the court's decision to award payment to plaintiff to equalize the distributions, rather than distribute the assets in kind, ultimately resulted in plaintiff receiving ninety percent of the current assets. Stated another way, defendant contended that the reduced value of the commercial properties due to changed economic circumstances since the entry of the JOD effectively left

plaintiff with the majority of the marital assets and consequently rendered the equitable distribution award unfair and inequitable.

The trial court denied defendant's motion on April 10, 2015. In a comprehensive fourteen-page written opinion, the court carefully recounted the procedural history, noting it had "painfully reviewed the two full cabinets of filings in this case." The court concluded "[t]here [were] no compelling or truly exceptional circumstances that would warrant vacating a judgment that has received careful and thorough review by multiple courts." The court determined that no plenary hearing was necessary because of "the very extensive record of findings of facts developed by the [t]rial [c]ourt in the trial conducted in 2006 and subsequent hearings, as well as the record of two Appellate Division decisions, and the various orders entered in bankruptcy court," and the absence of any genuine issue of material fact.

The court found that defendant was using the Rule 4:50-1 motion to again attack the validity of the initial equitable distribution award as well as the legality of the sheriff's sale "that resulted in [plaintiff] obtaining the properties awarded to him in the [JOD] . . . despite the fact that he had state court review and bankruptcy court review and authorization." The court further noted that defendant was "the architect of his own problems" and that his "recalcitrant approach . . . has resulted

in more than eight years of extended and expensive litigation[,]" during which defendant was "found by the courts to be uncooperative and not totally forthcoming." The court therefore determined "[i]t would be totally inequitable and prejudicial to [plaintiff] to reopen the Judgment based on the history of this case."[2]

On April 24, 2015, the trial court ordered defendant to pay plaintiff $4405 in counsel fees. As noted, plaintiff now appeals from the April 10 and April 24, 2015 orders.

II.

A.

A trial court's decision on a Rule 4:50-1 motion for relief from judgment or order "warrants substantial deference, and should not be reversed unless it results in a clear abuse of discretion." U.S. Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 467 (2012). An abuse of discretion will be found "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Ibid. (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)).

Rule 4:50-1 provides:

[2] In its opinion, the court noted that, to date, two of the three units had been sold. Unit 21 sold on April 16, 2013, and defendant received a $199,280.68 credit from the sale. Unit 22 sold on February 18, 2014, and defendant's tentative credit from that sale was $319,140.82.

> [T]he court may relieve a party or the party's legal representative 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.

A trial court should conduct a plenary hearing on a Rule 4:50-1 motion if "the evidence shows the existence of a genuine issue of material fact." Eaton v. Grau, 368 N.J. Super. 215, 222 (App. Div. 2004). A plenary hearing is unnecessary if it "would adduce no further facts or information." Fineberg v. Fineberg, 309 N.J. Super. 205, 218 (App. Div. 1998).

Relief under Rule 4:50-1(f) "is available only when truly exceptional circumstances are present." Guillaume, supra, 209 N.J. at 484 (quoting Hous. Auth. of Morristown. v. Little, 135 N.J. 274, 286 (1994)). We have previously determined that "a change in financial circumstances standing alone does not satisfy

the R. 4:50-1(f) standard." Connor v. Connor, 254 N.J. Super. 591, 601 (App. Div. 1992).

> Unlike alimony, which is directly related to the ability to pay, equitable distribution is simply an allocation of the assets amassed in the past due to the joint efforts of the parties. A later change in a party's financial life is essentially irrelevant to that allocation and is no basis for modification. Plaintiff's entitlement to the equitable distribution portion of the alimony is thus absolute.
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> [Id. at 602.]

Here, the court's finding "that the facts of this case do not warrant the extraordinary step [of] vacating the award of equitable distribution" fully comports with Connor, supra, 254 N.J. Super. at 601, because defendant's argument is based solely on a change in financial circumstances. As the court pointed out during oral argument, if the economy had caused the value of the properties to rise, plaintiff would not be entitled to an increase in the amount due her via equitable distribution. Consequently, a downturn in the parties' economic fortunes should likewise not diminish that distribution. Id. at 602. Moreover, the record amply supports the court's conclusion that "[i]t would be totally inequitable and prejudicial to [plaintiff] to reopen the [JOD]" because defendant's "main approach to this case has been to avoid

paying his former wife" and he was therefore "the architect of his own problems."

B.

Defendant argues that the court's prior decisions in which it indicated it would "consider the issue of a 'fair market value' credit . . . at a future time and hold a plenary hearing, if necessary" constitute the law of the case. Consequently, he contends that the court erred in failing to conduct a plenary hearing to determine what credits are due him in connection with plaintiff's operation and sale of the commercial properties. Defendant also cites to MMU, supra, 415 N.J. Super. at 45, for the proposition that "even in the absence of express statutory authorization, a court has inherent equitable authority to allow a fair market value credit in order to prevent a double recovery by a creditor against a debtor." We do not find these arguments persuasive.

Under the law of the case doctrine, a "legal decision made in a particular matter 'should be respected by all other lower or equal courts during the pendency of that case.'" Lombardi v. Masso, 207 N.J. 517, 538 (2011) (quoting Lanzet v. Greenberg, 126 N.J. 168, 192 (1991)). The rule is "non-binding" and "intended to 'prevent relitigation of a previously resolved issue.'" Ibid. (quoting In re Estate of Stockdale, 196 N.J. 275, 311 (2008)).

Moreover, the doctrine only applies when "one court is faced with a ruling on the merits by a different and co-equal court on an identical issue." Id. at 539 (citations omitted).

Initially, we reject defendant's argument because it relates to prior orders that are not the subject of this appeal. The April 10, 2015 order was entered in response to defendant's motion to vacate the JOD. Defendant sought a "plenary hearing to determine the appropriate manner of equitable distribution," rather than a calculation of the fair market value credits due under the equitable distribution order. It is well-settled that we review "only the judgment or orders designated in the notice of appeal[.]" 1266 Apartment Corp. v. New Horizon Deli, Inc., 368 N.J. Super. 456, 459 (App. Div. 2004) (citing Sikes v. Twp. of Rockaway, 269 N.J. Super. 463, 465-66 (App. Div.), aff'd o.b., 138 N.J. 41 (1994)). See also R. 2:5-1(f)(3)(A). Stated differently, any arguments raised by defendant that fall outside the four corners of the Notice of Appeal likewise fall outside the scope of our appellate jurisdiction in this case, and are therefore not reviewable as a matter of law.

Moreover, none of the court's prior orders mandated a plenary hearing on this issue, and the December 6, 2013 order specifically provided that consideration of a fair market value credit would only be appropriate after all three properties are sold. Because

only two of the three properties have been sold, the law of the case doctrine simply fails to support defendant's contention that the trial court erred in failing to hold a plenary hearing to determine the fair market value credit. For all these reasons, we affirm the April 10, 2015 order.

C.

Finally, defendant argues that the April 24, 2015 counsel fee award should be set aside because the court failed to consider the factors enunciated in Rule 5:3-5(c) and did not make the requisite findings of fact and conclusions of law. We agree.

Subject to the provisions of Rule 4:42-9, the Family Part may award counsel fees in its discretion. R. 5:3-5(c). The court should consider:

> (1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties both during and prior to trial; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained; (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award.
>
> [Ibid.]

Here, the judge made insufficient findings and conclusions of law in connection with the $4405 counsel fee award to plaintiff. The order simply recited "the court having considered the factors set forth in [Rule] 5:3-5(c)," with no further elaboration. "Simple omnibus references to the rules without sufficient findings to justify a counsel fee award makes meaningful review of such an award impossible, thus necessitating a remand." Loro v. Colliano, 354 N.J. Super. 212, 227-28 (App. Div.) (reversing and remanding where the trial court simply ordered the defendant to pay the plaintiff's counsel fees "[p]er R. 4:42-9(a), R.P.C. 1.5, and R. 5:3-5(a)"), certif. denied, 174 N.J. 544 (2002); see also Barr v. Barr, 418 N.J. Super. 18, 47 (App. Div. 2011) (holding that even where the trial court considered the parties' conduct, defendant's ability to pay, and the actual fees incurred when awarding counsel fees to the plaintiff, remand was nevertheless appropriate because the trial court neglected to "analyze the parties' relative incomes or plaintiff's ability to pay her own counsel fees"). We are therefore compelled to reverse the award of counsel fees and remand for further proceedings in conformity with this opinion.

Affirmed in part and reversed in part. We do not retain jurisdiction.