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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4441-15T4

C.C.,

Plaintiff-Respondent/
Cross-Appellant,

v.

R.C.,

Defendant-Appellant/
Cross-Respondent.

Submitted October 31, 2017 – Decided December 26, 2017

Before Judges Reisner, Gilson, and Mayer.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Middlesex
County, Docket No. FM-12-2496-03.

Snyder, Sarno, D'Aniello, Maceri & Da Costa,
LLC, attorneys for appellant/cross-respondent
(Richard A. Outhwaite, on the briefs).

Drescher & Cheslow, PA, attorneys for
respondent/cross-appellant (Robert E.
Goldstein and Lauren E. Caesar, on the brief).

PER CURIAM

In this post-judgment-divorce matter, defendant R.C.¹ appeals from a May 13, 2016 order denying his motion to reduce or terminate his alimony obligation, without an evidentiary hearing. Plaintiff C.C. cross-appeals from the provision of the order denying her request for attorney's fees. We affirm because defendant did not establish a change of circumstances warranting a reduction or termination of his alimony, and the Family Part did not abuse its discretion in denying attorney's fees to plaintiff.

I.

The parties were married in 1981, and divorced in 2004. They have three children, who are all emancipated. At the time of their divorce, the parties entered into a property settlement agreement (PSA), which was incorporated into their judgment of divorce (JOD). Under the PSA, defendant agreed to pay plaintiff \$800 per week in alimony "until the remarriage of the Wife or the death of either the Husband or the Wife, whichever event shall occur first[.]" The PSA was silent on the issue of whether cohabitation or any other change of circumstances would affect alimony. The PSA also stated that it was governed by the laws of New Jersey.

¹ We use initials to protect the parties' privacy interests. See R. 1:38-3(d).

At the time of their divorce, defendant was self-employed by a stump removal company that he partially owned. His case information statement (CIS) submitted in 2003, showed that he was earning approximately \$70,000 per year. Plaintiff was unemployed, but in the PSA, defendant contended that plaintiff "ha[d] the ability to earn income."

Defendant has twice moved to reduce or terminate his alimony obligation. In April 2013, defendant filed a motion contending that his financial circumstances had worsened, and that plaintiff was cohabiting with D.C. The Family Part found that defendant did not establish a prima facie showing of cohabitation, but allowed discovery concerning the parties' financial circumstances. Plaintiff then served defendant with discovery demands. When defendant failed to fully respond, the court ordered defendant to produce all of the requested discovery. Defendant failed to comply with that order, and on February 24, 2014, the court entered an order dismissing defendant's first motion for failure to comply with discovery demands. Defendant did not appeal that order.

Instead, in September 2015, defendant filed a second motion seeking to reduce or terminate his alimony obligation. Defendant contended that his financial circumstances had worsened, plaintiff's financial circumstances had improved, and plaintiff was cohabiting with D.C. The Family Part allowed discovery on the

parties' current financial circumstances and whether plaintiff was cohabiting with D.C. In that regard, the court allowed discovery from plaintiff, but precluded discovery from D.C.

Thereafter, the parties engaged in discovery. Defendant's tax returns for 2013 and 2014 showed gross annual incomes of \$95,375 and \$83,601, which he derived from a U-Haul franchise that he partially owned and from rental property income. Defendant did not produce information about his income in 2015. The CIS he submitted in September 2015 stated that his net year-to-date income was "\$0." The CIS, however, listed his monthly expenses as \$7,876, and stated that he was a partner in two businesses; an industrial park, and a tree landscaping service. In her discovery responses, plaintiff maintained that she was still unemployed and that her principal source of income was alimony.

In April 2016, plaintiff moved for summary judgment arguing that defendant could not show a change in the parties' financial circumstances or cohabitation and, therefore, there was no need for a plenary hearing. Plaintiff also requested an award of attorney's fees and costs. Defendant filed opposition. The court heard oral argument, and on May 13, 2016, the court entered an order granting summary judgment to plaintiff, dismissing defendant's request for a reduction or termination of his alimony

obligation, and denying plaintiff's request for attorney's fees and costs.

The court explained the reasons for its decision in an oral opinion on May 13, 2016. On August 10, 2016, the court issued a written amplification of its decision under Rule 2:5-1(b), after defendant filed a notice of appeal and plaintiff filed a notice of cross-appeal.

The Family Part found that defendant failed to establish a change in circumstances warranting a modification or termination of his alimony. With regard to financial circumstances, the court held that defendant had "abandoned" that argument. Nevertheless, the court also found that defendant had not provided sufficient information to establish a change in his financial circumstances.

Turning to cohabitation, the court found that, following discovery, defendant failed to uncover any evidence that plaintiff was cohabiting with D.C. Specifically, the Family Part found that there was no evidence that plaintiff and D.C. were financially supporting each other.

The Family Part also denied plaintiff's request for attorney's fees and costs, finding that defendant did not file his post-judgment motion in bad faith, and that plaintiff's affidavit of services did not comply with the governing rules.

II.

On appeal, defendant argues that the Family Part erred in (1) dismissing his initial motion for failure to comply with discovery, (2) granting summary judgment, (3) allowing some discovery on the issue of cohabitation, but then granting summary judgment without a plenary hearing, and (4) not considering plaintiff's increased "economic good fortune." In her cross-appeal, plaintiff contends that we should reverse the Family Part's denial of her request for attorney's fees and costs and remand that issue.

Having considered the arguments presented, we affirm. We will first address defendant's appeal, focusing on whether he made a showing of a change in financial circumstances or cohabitation. Thereafter, we will address plaintiff's cross-appeal.

A. Defendant's Appeal

Defendant filed a post-judgment motion seeking to reduce or terminate his alimony obligation. Here, the parties had entered into a PSA, which is an enforceable settlement agreement. Quinn v. Quinn, 225 N.J. 34, 44 (2016). A settlement agreement is governed by basic contract principles. Id. at 45 (citing J.B. v. W.B., 215 N.J. 305, 326 (2013)). Accordingly, a court's role is to discern and implement the intention of the parties as expressed in the agreement. Ibid.

In their PSA, the parties did not expressly address whether alimony could be modified or terminated if the parties had a change in their financial circumstances, or if plaintiff cohabited with another person. Nevertheless, it has long been established that alimony may be revised and altered by the court from time-to-time as circumstances may require. N.J.S.A. 2A:34-23. In September 2014, the Legislature amended the alimony and maintenance statute, N.J.S.A. 2A:34-23, "to more clearly quantify considerations examined when faced with a request to establish or modify alimony." Spangenberg v. Kolakowski, 442 N.J. Super. 529, 536-37 (App. Div. 2015). The amendment became effective September 10, 2014. L. 2014, c. 42, §1. The Legislature, however, clarified that [the amendments]

shall not be construed either to modify the duration of alimony ordered or agreed upon or other specifically bargained for contractual provisions that have been incorporated into:
a. a final judgment of divorce or dissolution;
b. a final order that has concluded post-judgment litigation; or
c. any enforceable written agreement between the parties.

[Quinn, 225 N.J. at 51 n.3 (quoting L. 2014, c. 42, §2).]

"This additional statement signals the legislative recognition of the need to uphold prior agreements executed or final orders filed before adoption of the statutory amendments." Spangenberg, 442 N.J. at 538.

The PSA here was entered in 2004, before the September 10, 2014 amendment to N.J.S.A. 2A:34-23 became effective. Nevertheless, the PSA does not include any provisions prohibiting the modification of alimony. Instead, the PSA stated that it would be governed by New Jersey law and, at the time the PSA was executed, New Jersey law provided that alimony could be modified if a party demonstrated changed circumstances, including both a change in financial circumstances or cohabitation. Quinn, 225 N.J. at 49 (citing Lepis v. Lepis, 83 N.J. 139, 152 (1980)). Moreover, even if a PSA does not expressly provide for the cessation of alimony payments upon cohabitation, a court can modify or terminate alimony if such cohabitation changes the financial circumstances of the cohabiting party. Ibid. (citing Gayet v. Gayet, 92 N.J. 149, 153-54 (1983)).

The moving party bears the burden of showing changed circumstances that warrant modifying or terminating alimony. Lepis, 83 N.J. at 157. A plenary hearing is only required when a party demonstrates "the existence of a genuine issue as to a material fact[.]" Id. at 159. In Lepis, the Court recognized a non-exhaustive list of factors that give rise to changed circumstances warranting modification of alimony. Id. at 151. Similarly, in N.J.S.A. 2A:34-23(k) and (l), the Legislature identified the factors a court shall consider when a party seeks

to modify alimony. Among the factors to be considered both under Lepis and the amended N.J.S.A. 2A:34-23(k), are changes in the respective financial circumstances of the parties. N.J.S.A. 2A:34-23(k)(7); Lepis, 83 N.J. at 151.

Moreover, N.J.S.A. 2A:34-23(1) specifically sets forth requirements for a "self-employed party seek[ing] modification of alimony because of an involuntary reduction in income[.]" Such a party "must include an analysis that sets forth the economic and non-economic benefits the party received from the business, and which compares these economic and non-economic benefits to those that were in existence at the time of the entry of the [JOD]." N.J.S.A. 2A:34-23(1).

Here, defendant made no showing of a change in his, or plaintiff's, economic circumstances. At the time defendant entered into the PSA, his income was approximately \$70,000 per year. In moving to modify his alimony, defendant did not submit proof establishing his income for 2015. Discovery, however, revealed that in 2014 defendant's gross income was \$83,601, which was over \$13,000 more than he was making when he entered into the PSA. Just as critically, defendant owned two businesses, but failed to submit an analysis that set forth the economic and non-economic benefits he received from those businesses. See N.J.S.A. 2A:34-23(1).

Defendant also failed to show that plaintiff's economic circumstances had substantially improved. Defendant contended that plaintiff had spent approximately \$10,000 more annually than she received in alimony. In response, plaintiff submitted a certification explaining that under the PSA she received the marital home, sold the home in 2013 for \$650,000, and bought a new home for \$360,000.

In summary, our review of the record establishes that there were no genuine issues of material fact in dispute that warranted a plenary hearing on the basis of a change in financial circumstances.

The second ground for defendant's request to modify or terminate his alimony was plaintiff's alleged cohabitation with D.C. Our Supreme Court has stated that a finding of cohabitation

is based on those factors that make the relationship close and enduring and requires more than a common residence, although that is an important factor. Cohabitation involves an intimate relationship in which the couple has undertaken duties and privileges that are commonly associated with marriage. These can include, but are not limited to, living together, intertwined finances such as joint bank accounts, sharing living expenses and household chores, and recognition of the relationship in the couple's social and family circle.

[Konzelman v. Konzelman, 158 N.J. 185, 202 (1999).]

In addition, N.J.S.A. 2A:34-23(n) provides for the suspension or termination of alimony obligations when the dependent spouse cohabits with another person. The definition of cohabitation is flexible and specific to the particular circumstances involved.

In relevant part, the statute provides:

Cohabitation involves a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household.

When assessing whether cohabitation is occurring, the court shall consider the following:

- (1) Intertwined finances such as joint bank accounts and other joint holdings or liabilities;
- (2) Sharing or joint responsibility for living expenses;
- (3) Recognition of the relationship in the couple's social and family circle;
- (4) Living together, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive intimate personal relationship;
- (5) Sharing household chores;
- (6) Whether the recipient of alimony has received an enforceable promise of support from another person within the meaning of [N.J.S.A. 25:1-5(h)]; and
- (7) All other relevant evidence.

[N.J.S.A. 2A:34-23(n).]

In evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship. A court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis. Ibid.

Here, defendant made no showing that could satisfy the definition of cohabitation as set forth in Konzelman or N.J.S.A. 2A:34-23(n). Following discovery, defendant provided no evidence that plaintiff and D.C. were involved in a mutually supportive intimate personal relationship, in which they had undertaken duties and privileges that are commonly associated with marriage or a civil union. In that regard, there was no showing of intertwined finances, a sharing of living expenses, or a recognition of the relationship in the couple's social and family circle. See N.J.S.A. 2A:34-23(n)(1) to (3); Konzelman, 158 N.J. at 202. Consequently, defendant was not entitled to a plenary hearing, and his motion to modify or terminate alimony was properly dismissed.

The analysis we have set forth addresses three out of the four arguments raised by defendant on appeal. His additional argument concerns the dismissal of his first motion for failure to comply with discovery. The motion that defendant filed in 2013

was dismissed on February 24, 2014. Defendant did not file an appeal from that order and, thus, it is not before us.

B. Plaintiff's Cross-Appeal

In her cross-appeal, plaintiff contends that the Family Part erred in denying her request for attorney's fees and costs. Specifically, she argues that defendant should have been ordered to pay for her attorney's fees and costs because he is in a better financial position and his post-judgment motion to modify alimony was filed in bad faith.

An award of attorney's fees in a matrimonial action rests in the discretion of the Family Part. R. 5:3-5(c); Tannen v. Tannen, 416 N.J. Super. 248, 285 (App. Div. 2010) (citing Eaton v. Grau, 368 N.J. Super. 215, 225 (App. Div. 2004)). On appeal, the Family Part's decision regarding attorney's fees will be upheld absent a showing of abuse of discretion. Tannen, 416 N.J. Super. at 285. Findings by the trial court are binding on appeal "when supported by adequate, substantial credible evidence." Reese v. Weis, 430 N.J. Super. 552, 567 (App. Div. 2013) (quoting Cesare v. Cesare, 154 N.J. 394, 411 (1998)).

In deciding whether to award attorney's fees, and the amount of the award, 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; (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.

[R. 5:3-5(c).]

An application for attorney's fees must also include an affidavit of services that complies with and includes the information required by Rule 4:42-9(b), (c), and (d). Ibid.

Here, the Family Part applied the relevant factors under Rule 5:3-5(c), and found that although defendant made more money than plaintiff, his motion was not filed in bad faith. In that regard, the Family Part found that

[t]he fact that a gentleman is residing in the home [with plaintiff] for five, maybe six, maybe seven nights a week, to a lay person certainly would give rise . . . to an interpretation that there is cohabitation going on . . . therefore, each party is going to be responsible their own counsel fees and costs.

The Family Part's findings were supported by substantial credible evidence in the record, and we discern no basis to disturb those findings. Evaluated in context, we also discern no abuse of discretion because the court did not specifically enumerate every factor. See Reese, 430 N.J. Super. at 585 (affirming the denial

of attorney's fees where the trial court found that each party was capable of paying their own fees and that neither party had acted in bad faith, despite the court's failure to address every factor under Rule 5:3-5(c)).

The Family Part also found that the affidavit of services submitted by plaintiff's counsel was not in compliance with Rule 4:42-9 and Rule 5:3-5(c). The basis for that finding is unclear. A review of the affidavit of services submitted by plaintiff's counsel demonstrates that it complied with the governing rules. Nevertheless, we still affirm the denial of plaintiff's request for attorney's fees because the court gave a correct alternative basis for its decision.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION