SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4518-14T3

LEA BRANDSPIEGEL-ARBELY,

Plaintiff-Respondent,

v.

AVRAHAM ARBELY,

Defendant-Appellant.

Argued January 19, 2017 – Decided February 22, 2017

Before Judges Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Camden County, Docket No. FM-04-0913-12.

Avraham Arbely, appellant, argued the cause pro se.

Respondent has not filed a brief.

PER CURIAM

Pro se defendant Avraham Arbely appeals from an April 28, 2015 order entered following a divorce bench trial, awarding plaintiff Lea Brandspiegel-Arbely alimony, child support, equitable distribution, and counsel and expert fees. Defendant asserts the trial court erred in determining his imputed income,

thereby skewing the alimony award. Defendant also argues the trial court erred by ordering him to pay the back taxes on one of his investment properties. Last, defendant alleges the two judges who presided over his case were biased against him. Having considered plaintiff's arguments in light of the record and applicable principles of law, we affirm.

I.

We summarize the most pertinent portions of the record. Plaintiff and defendant married in 1989. They have two children together: a son, born in 1992, and a daughter, born in 1996. Plaintiff filed for divorce in December 2011.

Proceedings in this case began on May 3, 2012, before Judge Kathleen M. Delaney. The parties conducted pretrial conferences and motions between this date and February 22, 2013, during which time defendant was represented by counsel. On February 22, 2013, the court granted the application of defendant's attorney to withdraw as defendant's counsel. Thereafter, defendant represented himself for the remainder of the trial court proceedings. Counsel represented plaintiff throughout the proceedings in the Family Part.

On April 19, 2013, Judge Thomas J. Shusted, Jr., replaced Judge Delaney for a scheduled motion hearing and remained the trial judge for the remainder of the case. On September 18, 2013,

after a hearing, Judge Shusted entered the final judgment of divorce but reserved the economic issues for trial. Trial began in November 2013.

During trial, plaintiff presented expert testimony from Martin H. Abo, a certified public accountant (CPA) and forensic accountant. Abo testified regarding the report he prepared in an effort to determine plaintiff's income. According to Abo, he lacked necessary information for his analysis, and he described a substantial amount of the data he received as "incoherent." Abo stated he has "never had a case like this," noting substantial "missing pieces" due to "either omission or out and out not telling the truth." Abo further noted defendant certified he had supplied his accountant, Michael Saccomanno, CPA, with the documents Abo and plaintiff requested during discovery; however, Abo later spoke with Saccomanno, who denied ever receiving this documentation.

Despite these difficulties, Abo said he did review defendant's federal income tax returns from 2005, 2007, 2008, 2009, 2010, and 2011, which was "literally the only thing out of books and records that I had" regarding defendant's business. Abo used these returns to create a spreadsheet titled, "Reconstruction of Estimated Net Profit of Power Sound [&] Image" — defendant's business during his marriage. Analyzing these tax returns, Abo

determined defendant had failed to report a substantial amount of cash sales from his business to the IRS.

Abo referenced data from Risk Management Associates (RMA) for his calculations. The RMA database consists of information collected by banks on various industries; the banks receive financial information from their customers in the form of tax returns and financial statements, and they forward it to RMA to create the database. RMA uses the information — in this case, financials from "small electronic stores" — to "come up with peer groups that are representative" of the industry. Here, Abo "tried to apply some of the RMA data to what I was presented in the tax returns."

According to Abo's RMA figures, the industry average gross profit margin for electronics retail stores with sales up to one million dollars is 44.5%. As a "sanity check," Abo certified he used this guideline to adjust the sales and net income from defendant's business using a gross profit percentage of 40%, and 35% in the alternative, "based purely on the cost of materials [defendant] reported."

Defendant challenged Abo's use of the RMA figures during cross-examination. Specifically, he attempted to prove Abo used the wrong RMA category by highlighting language from the RMA, which stated it includes "[s]tereo stores except automotive."

Defendant maintained that his store sold only automotive electronics. Defendant also claimed his business included only wholesale sales and Abo therefore erred by applying the RMA for retail sales. Abo reiterated that he used the RMA to determine the profit margin for a business under one million dollars in sales.

Defendant claims he offered into evidence a competing report from Saccomanno. Defendant states he could not afford to pay Saccomanno to testify during trial.

Following trial, on March 2 and 3, 2015, Judge Shusted made various oral findings, including credibility determinations. Judge Shusted noted defendant's daughter testified that the family had an upper class lifestyle and found defendant "abandoned" the rest of his family. The judge also found Abo's testimony credible and stated he planned to "somewhat rely" on Abo's opinions when considering equitable distribution and alimony.

Judge Shusted also acknowledged defendant's arguments regarding the difference between wholesale and retail and the profit margins, stating the following:

> Certainly there really isn't any comparison in the type of store that Mr. Arbely has versus Best Buy or other particular entities. . . . [C]ertainly it was noted that it appeared to be that the business that Mr. Abo was evaluating was sold after the divorce complaint. So clearly this court finds that Mr. Arbely realized that . . . was his cash

> cow that he was trying to get rid of so that it wouldn't be in equitable distribution. It seems to be defunct now. I don't know how much value it has from there. I'll try to adjust, try to adjust equitably in regards to making a fair decision for all parties in this matter.

On April 2, 2015, Judge Shusted issued a written decision detailing his findings on equitable distribution, alimony, child support, and fees, and made additional written credibility findings regarding defendant. Specifically, the judge drew a negative inference against defendant due to his refusal to cooperate with Abo. He found defendant's "accuracy of recollection was very clear when he felt that the correct answer would [work] to his economic benefit. When proffers were made which indicate his unsavory dealings he feigned ignorance." The judge determined defendant's "candor was suspect at virtually every [c]ourt appearance," and there was "no inherent believability in his testimony."

Judge Shusted further found defendant's offered rebuttal CPA was a "ruse," as defendant had never provided the necessary proof of consultation, receipt of retaining letter, scope of services provided, or documents requested by plaintiff that defendant allegedly transferred to Saccomanno's office. As such, the judge relied solely on Abo's report and testimony in making his determinations on equitable distribution and alimony.

Judge Shusted awarded plaintiff durational alimony of $450 per week for fourteen years, retroactive to March 1, 2012, and ending on March 1, 2026. The judge determined permanent alimony was unnecessary because he granted plaintiff the marital home, investment properties, and the business property as equitable distribution.

Judge Shusted then detailed his decision pursuant to the statutory alimony factors of N.J.S.A. 2A:34-23(b). Relevant to this appeal, the judge imputed to defendant a yearly gross income of $95,000, explaining his calculation as follows:

> Defendant, says he is presently unemployed, certainly an inference can be drawn that there has been NO affirmative effort to seek a wage earning job. This Court finds he is clearly a talented, savvy, experienced sales person in electronics and car stereos. Based upon Mr. Abo's testimony and his report a probable income amount may be determined. Mr. [Abo] estimated a potential underreporting of income for five years at $1,184,902.00. An approximate average of his business income before costs would be $235,000.00 per year. If a responsible overhead of 60% was deducted from this gross there is clear proof by expert testimony of $95,000.00 per year to be imputed to this Defendant as gross income.
>
> Plaintiff, has not worked full-time at all during the marriage. She was dedicated to the children. Husband was supportive of this in the past.
>
> Defendant clearly has the ability to earn at a high level. The Court has relied on Plaintiff's expert to determine an average income for Defendant during the marriage.

> Defendant submitted no expert report, opinion or data to refute Mr. Abo's calculations.

On April 28, 2015, Judge Shusted issued an order formalizing his decision. This appeal followed.[1]

II.

We turn to defendant's arguments. Because the parties are pro se, it is important they understand the narrow scope of our review.

Our "review of a trial court's fact-finding function is limited." Cesare v. Cesare, 154 N.J. 394, 411 (1998). We will not disturb the trial court's findings unless they lack support in the record or are inconsistent with the substantial, credible evidence. Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 483-84 (1974). We must give due regard to the trial judge's credibility determinations based upon the opportunity of the judge to see and hear the witnesses. Cesare, supra, 154 N.J. at 411-12; see also Pascale v. Pascale, 113 N.J. 20, 33 (1988). In Family Part cases, because of the Family Part's special expertise, we must accord particular deference to fact-finding and to the conclusions that logically flow from those findings. Cesare, supra, 154 N.J. at 412-13. Although we owe no special

[1] In response to defendant's appeal, plaintiff filed a letter with the Appellate Division stating she was no longer able to pay her attorney or contest the case. She requested Judge Shusted's decision stand on its own merit.

deference to the trial courts' conclusions of law, Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), "we do not second-guess their findings and the exercise of their sound discretion." Hand v. Hand, 391 N.J. Super. 102, 111 (App. Div. 2007).

With those principles in mind, we first address defendant's contention the trial court erred by "imputing on him an arbitrary and unrealistically inflated income based on Martin Abo's 'misleading' expert report."

An alimony award should "assist the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage." Stenken v. Stenken, 183 N.J. 290, 299 (2005) (quoting Crews v. Crews, 164 N.J. 11, 16 (2000)). For purposes of calculating alimony and child support awards, a trial court may impute income to one or both spouses. Mowery v. Mowery, 38 N.J. Super. 92, 104-05 (App. Div. 1955), certif. denied, 20 N.J. 307 (1956); see also Tannen v. Tannen, 416 N.J. Super. 248, 261 (App. Div. 2010) (noting trial judge "may impute income" in the process of "determining an appropriate alimony award"), aff'd o.b., 208 N.J. 409 (2011).

"Imputation of income is a discretionary matter not capable of precise or exact determination[,] but rather require[es] a

trial judge to realistically appraise capacity to earn and job availability." Elrom v. Elrom, 439 N.J. Super. 424, 434 (App. Div. 2015) (alterations in original) (citation omitted); see also Storey v. Storey, 373 N.J. Super. 464, 474 (App. Div. 2004). If the court finds a parent to be voluntarily unemployed or underemployed without just cause, the court is required to impute income. Caplan v. Caplan, 182 N.J. 250, 265 (2005) (citation omitted); see also Child Support Guidelines, Pressler & Verniero, Current N.J. Court Rules, Appendix IX-A to R. 5:6A at www.gannlaw.com (2017). On appeal, a trial judge's "decision to impute income of a specified amount will not be overturned unless the underlying findings are inconsistent with or unsupported by competent evidence." Storey, supra, 373 N.J. Super. at 474-75 (citations omitted).

Defendant presents several challenges to Abo's expert report and testimony, which he contends led Judge Shusted to an incorrect calculation of his alimony. He argues the court failed to conduct an "impartial" economic analysis to determine his earning capacity and instead relied on Abo's "highly disputed and partially disproven report."

Defendant's most substantial argument is that Abo used the wrong RMA category to analyze his automotive electronics business, thereby "attribut[ing] to it a gross income that had no basis in

the industry." In support of this argument, defendant claims Abo admitted to using retail figures rather than wholesale figures, and to using an RMA category that actually excludes automotive electronics.

However, when defendant challenged Abo on cross-examination, Abo maintained he applied the correct RMA category based on Power Sound & Image's status as a business making under one million dollars. Abo further relied on the RMA figures as a "sanity check;" rather than applying the RMA profit margin of 44.5%, he actually used lower margins of 40% and 35% to analyze defendant's business. Moreover, Abo testified he resorted to using the RMA figures because of the significant lack of information provided by defendant. Judge Shusted reviewed this issue during his credibility findings and found Abo's explanation persuasive.

Therefore, under our deferential standard of review, we discern no error in Judge Shusted's reliance on Abo's expert findings. As noted, Judge Shusted found defendant failed to cooperate with Abo and lacked candor throughout the proceedings. Substantial evidence in the record supports Judge Shusted's determination that Abo was a highly credible witness, and defendant was not. See Cesare, supra, 154 N.J. at 411-12. We find no basis to disturb Judge Shusted's decision on this issue.

For these same reasons, we reject defendant's additional challenges to Abo's report and testimony. Defendant contends Abo erred by conflating two different properties to suggest defendant paid money towards the purchase of a house, failing to provide documents supporting his claim defendant earned between $200,000 to $300,000 in sales from credit cards, and denying knowledge of the date defendant finishing paying his mortgage. These arguments have no apparent connection to Judge Shusted's alimony award, but serve to challenge Abo's credibility as an expert. As noted, we defer to Judge Shusted's credibility determination.

Defendant also contends, because Abo obtained his bank statements by way of subpoena, Abo had no basis to claim it was "too costly" to reconstruct defendant's finances using these records. However, Abo certified these documents contained a "plethora of missing periods" and commingling of personal and business activities, such that any attempt to reconstruct defendant's finances through these means would entail an enormous hardship and expense to plaintiff. Since defendant raises this issue as a credibility challenge to Abo's report, we defer to Judge Shusted and find this argument lacks merit.

III.

Defendant raises two additional arguments. First, he claims the court erred by ordering him to pay all the back commercial

taxes on one of his investment properties located on Market Street in Camden, which defendant sold while the litigation was pending. In his final order, Judge Shusted granted plaintiff $12,000, representing her one-half share of the $24,000 tax lien on the properties. According to the order, defendant paid the lien using the property sale proceeds because he "had previously been required to pay those taxes pendente lite."

Defendant now argues this court should reverse this portion of the order. In support of his argument, defendant directs the court to a colloquy from a June 13, 2013 case management conference before Judge Shusted. At the beginning of this conference, plaintiff's counsel informed the court that Judge Delaney had previously entered a pendente lite order, requiring defendant pay all the bills on the property in the event of a sale. However, Judge Delaney did not immediately reduce this order to writing or state it on the record; instead, she apparently told all the parties of this decision off the record. In light of this information, Judge Shusted told the parties:

> [C]ertainly, if the parties can't resolve it, the — the Court's procedure is . . . that I will try the matter. And certainly, whatever evidence I have in regards to what was done or not in a proper or improper manner would be affected by prior Orders that I see in writing, or prior — if there's a — a transcript even if — even if Judge Delaney didn't reduce it to an Order, certainly, if I see that she said that, knowing that both parties are in

> the Courtroom and — it was not obeyed then you would win. But if that doesn't exist, then the division of the proceeds the way Mr. Arbely wants it may carry the day.

Defendant claims plaintiff failed to produce this order during trial, and therefore, plaintiff should share the burden of repayment. We reject this argument. Although defendant claims this order does not exist, Judge Shusted included it in his final analysis. Besides the above quotation from the case management conference, defendant provides no evidence to contradict Judge Shusted's finding. We will not disturb Judge Shusted's decision on this basis.

Last, defendant argues both Judge Delaney and Judge Shusted demonstrated impermissible bias against him throughout the proceedings. We find no support in the record for this claim. Instead, the record shows both judges conducted the proceedings in a fair and impartial manner. The argument thus lacks sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed.