SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4635-15T1

ESTER SHIRA FRIEDMAN,

Plaintiff-Respondent,

v.

CHAIM FRIEDMAN,

Defendant-Appellant.

Submitted September 27, 2017 – Decided October 24, 2017

Before Judges Alvarez and Geiger.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Ocean County, Docket No. FM-15-1285-14.

August J. Landi, attorney for appellant.

Keith Winters & Wenning, LLC, attorneys for respondent (Brian D. Winters, on the brief).

PER CURIAM

We dismiss this appeal from a May 19, 2016 default judgment of divorce. Defendant Chaim Friedman must file an application in the trial court, pursuant to Rule 4:50-1 or on other grounds as he may deem appropriate, in order to set aside the divorce decree.

Plaintiff Ester Shira Friedman and defendant were married in 1998 and have seven children. The oldest child was born in 1999, and the youngest children, a set of twins, were born in 2010.

Defendant claims that beginning in 2008, he experienced financial reversals from which he has never recovered. Whether this was the product of his claimed bipolar disorder, changes in the economy, or both, is not important to our decision.

Defendant filed a Case Information Statement (CIS), Rule 5:5-2, in July 2014, setting forth joint lifestyle expenses for the family totaling $10,865 monthly. That figure was approximately $200 less per month than the expenses listed on plaintiff's CIS. If either party attached documentation to the CIS he or she filed, it was not included in the appendices.

On his CIS, defendant claimed a net average weekly income of only $1,000, far less than his own reckoning of the family's needs. In his CIS, defendant did not specify his sources of income, stating only that he "[t]akes funds when available[,]" and that his annual salary was "[a]s yet undetermined."

Defendant alleged that the parties were in serious financial trouble when they separated in 2013, and that plaintiff filed bankruptcy to discharge her share of the marital obligations. He stated that his businesses, whatever they may have been, are

defunct, and that all his real estate holdings, including the marital residence titled in both names, were under water.

Since the separation, defendant has contributed little towards the support of his former wife, who essentially did not work outside the home during the marriage, or towards the support of his seven children. Plaintiff's CIS indicated that she and the children received food stamps monthly and that she earned meager pay as an intermittent babysitter, and later as a part-time teacher's aide. In September 2015, defendant paid $5,000 on account of support arrears, as a result of which the first default entered against him was set aside. In addition to that $5,000 payment, as a further condition of vacating the default, defendant was ordered to cooperate with discovery. He did not. It is possible that he later also paid $1,400 to avoid a utility service shut-off for the marital home, then occupied by the children and their mother.

When defendant convinced the trial judge to set aside the first default in September 2015, contingent upon the $5,000 payment and compliance with discovery obligations, it was no doubt also attributable to defendant's submission of a certification explaining his circumstances as we have described them, and a letter from a psychiatric nurse who had been treating defendant since 2004. She opined that he suffered from bipolar disease,

controlled to a limited extent by medication. Since defendant allegedly did not have access to funds with which to pay for treatment, medical insurance, or daily medication, he had gone through periods of time while the divorce was pending in which he was unmedicated. Although it was then probable that defendant was residing in New York, he claimed he was virtually homeless. Nowhere did defendant indicate what efforts, if any, he had made to secure employment, the status of his defunct corporations, or the status of his three rental units in Trenton.

An unallocated support order of $475 per week was initially entered in 2014, a period of time in which defendant was represented and appears to have been participating to some extent in the divorce proceedings. Defendant was then also ordered to pay Schedule A shelter expenses and Schedule B transportation costs, including payments on plaintiff's 2012 Honda.

Defendant never cooperated with discovery, never paid any expert's fees as ordered, or any counsel fees on plaintiff's behalf. She filed some sixteen motions in an effort to move the matter along and enforce the support orders.

In May 2015, defendant's driver's license was suspended and a bench warrant was issued for his arrest because of his arrears. A second default entered against him in January 2016. From what

we can discern from the record, there has been virtually no contact between defendant and the children since the parties' separation.

Before the default divorce hearing, a proposed form of order was forwarded to defendant's counsel. Prompted by his receipt of the proposed judgment of divorce, the attorney appeared but could not explain defendant's absence. The judge would not allow defendant's attorney to cross-examine the plaintiff. The judge barred cross-examination because of defendant's disregard for his obligation in the litigation over a period of years.

The divorce judgment requires defendant to pay $7,500 a month in alimony and $3,000 a month in child support. The judge's decision was based solely on the 2014 CISs filed by the parties. Plaintiff was awarded ownership of the marital home and a power of attorney that would enable her to sign any paperwork necessary to address the pending mortgage foreclosure. Defendant was awarded sole ownership of any remaining assets, including his rental units.

The judge granted custody of the children to plaintiff. No visitation was specified, however, the judgment states "defendant's parenting-time shall be by agreement between the parties and in a manner that serves and protects the best interest of the children."

An amended judgment was filed thereafter, in which the judge amplified his legal reasoning. At this point, defendant owes well

in excess of $30,000 in child support arrears, no doubt increasing exponentially as the current obligation of $10,500 a month goes unpaid.

Defendant now raises the following points on appeal:

> Point One
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> The Trial Judge['s] ruling at Final Hearing barring cross-examination by Defendant's counsel, resulted in a denial of due process.
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> > [a] The Trial Court erred by continuing a Bench Warrant for Defendant's arrest without conducting an ability to pay hearing.
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> > [b] The Court erred by not lifting the Bench Warrant for Defendant's arrest so that he could be present at Final Hearing, and consult with counsel.
> >
> > [c] The Trial Court's findings as to Defendant's financial circumstances were arbitrary, capricious, and contrary to the ground truth in this case; given the foreclosures of record, abandoned Trenton properties, and the modest earnings reflected in tax returns; and Appellant's long-standing psychiatric history.
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> Point Two
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> The financial compliance conditions imposed by the June 8, 2015 Order vacating Default was entered without taking testimony of the parties, leading to an onerous and oppressive result, given Appellant's dire financial circumstances and lack of resources or income to comply.

Point Three

Appellant's fundamental constitutional liberty rights to parent the children are abridged. The seven Friedman children were not represented by R.5:8A counsel during these proceedings.

Point Four

The Final Judgment of Divorce based upon pendente lite Orders entered on competing certifications is infirm and non-reviewable on Appeal as there are no findings of fact or conclusions of law. The present status severely abridges the rights of seven children requiring remand.

Based on the record available to us, this family is in dire straits. Plaintiff, whose principal role during the marriage was to care for her children, has struggled alone with the responsibility of feeding and caring for them in a home she knew was under threat of foreclosure. Her utilities were cut off, or under threat of being cut off, at various times while the divorce was pending because she could not pay the bills. She and the children relied on food stamps to make ends meet.

If defendant is to be believed, his struggles with crippling mental health issues have cost him his marriage, his relationship with his children, his home and other assets, and his work. Assuming for the moment that defendant's certification filed long-ago was truthful in that he was unemployed because he was

unemployable, continuing to accumulate ruinous arrears that by statute cannot be discharged, is not going to advance anyone's best interests. Nor is it in the children's best interest to have no contact with their father.

Nonetheless, this case, like all others, must be addressed by way of existing precedent. The notice of appeal encompasses the default judgment of divorce and the amended judgment of divorce. But it is well established that appeals must be dismissed when taken against a judgment by default. Haber v. Haber, 253 N.J. Super. 413, 416 (App. Div. 1992). As we said in Haber:

> The reason underlying this rule is that the very theory and constitution of the court of appellate jurisdiction is only the correction of errors which a court below may have committed, and a court below cannot be have said to have committed an error when its judgment was never called into exercise, and the point of law was never taken into consideration, but was abandoned by acquiescence or default of the party who raised it.

Ibid.; see also Pressler and Verniero, Current N.J. Court Rules, comment 4.4 on Rule 4:50-1. ("This rule ordinarily provides the sole recourse for relief from default judgment; direct appeal does not lie.")

It is the trial judge, not an appellate panel, who is in the best position to assess the merits of a defaulted litigant's contentions. See N.J. Div. of Youth & Family Servs. v. T.R., 331

N.J. Super. 360, 364 (App. Div. 2010). Additionally, in fairness to plaintiff: "[d]efendant's voluntary conduct in absenting himself from the proceedings should not give him a better advantage on direct appeal than he would have as a movant under R[ule] 4:50-1 where he is obligated to prove both excusable neglect and a meritorious defense." Haber, supra, 253 N.J. Super. at 417.

These rules of law are particularly suited to this case. The record we have is wholly devoid of information that would enable us to meaningfully weigh the merits of the final judgment of divorce. Neither CIS is particularly enlightening, and if supported by documentation, none was provided to us.

We know nothing regarding defendant's earnings at the time the judgment was entered, or beforehand for that matter, and whether $10,500 per month is fair or realistic. We do not know if the disposition of the assets had any impact on either party, as the CISs indicated all real estate was under water, and may have since been foreclosed upon.

Assuming defendant's mental health is an issue, and that he has not seen his children for several years, there may be a need for a reunification plan developed with the aid of a counselor or therapist before contact is resumed. Only a Family Part judge has the authority and ability to fairly revisit the judgment in this

case, if defendant demonstrates some or all aspects of it warrant reconsideration.

The initiative for filing the appropriate Rule 4:50-1 or other motion rests with defendant. This appeal is not only procedurally barred, it is simply a poor substitute for meaningful resolution in the trial court. Every day that passes is another day defendant has no contact with the children, plaintiff likely receives no support, and defendant continues to accumulate non-dischargeable debt.

Appeal dismissed.