SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4729-13T4

GINO S. RAMUNDO,

Plaintiff-Appellant,

v.

RITA RAMUNDO, n/k/a
RITA FORCELLATI,

Defendant-Respondent.

Submitted December 14, 2016 – Decided February 24, 2017

Before Judges Alvarez and Accurso.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FM-02-1648-11.

George J. Cotz, attorney for appellant.

Sunshine, Atkins, Minassian, Tafuri, D'Amato, Beane & Buckner P.A., attorneys for respondent (Christian L. Beane, on the brief).

PER CURIAM

Plaintiff Gino S. Ramundo appeals from certain equitable distribution aspects of a May 8, 2014 final judgment of divorce, as well as the trial court's award to defendant Rita Ramundo of

expert fees and a portion of her counsel fees. After our review of the record, we affirm.

I.

The parties married in 1998 and had two children, currently sixteen and twelve years old. During the pendency of the divorce proceedings, filed in December 2010, the issues related to parenting time were frequently contested.

On February 8, 2013, the assignment judge in the vicinage in which the divorce was filed advised counsel that an unidentified doctor had "related to a jurist that [plaintiff] had 'paid off' a psychiatrist to provide a report falsely diagnosing his wife as suffering from borderline personality disorder for the purpose of obtaining custody of their children and to avoid paying child support." The assignment judge also stated that he was "not satisfied that there [was] sufficient competent evidence presented to warrant [his reporting] this allegation to the authorities." Plaintiff's counsel requested a conference, however, the assignment judge responded it was unnecessary and that plaintiff could "proceed as [he] deemed appropriate."

The attorney also requested conferences with the presiding judge of the Family Part, Judge Bonnie Mizdol, as well as the judge who had presided over the matter, Judge William DeLorenzo. No conference was conducted.

Plaintiff's counsel raised the issue again on the record at the beginning of the December 9, 2013 proceeding. We set forth the relevant portions of the colloquy:

> [PLAINTIFF'S COUNSEL]: But before that, Judge, . . . with all respect to the [c]ourt, I would like the Court to address the question of whether Your Honor had any involvement in communicating that malicious gossip about [plaintiff] bribing a psychiatrist to Judge Doyne.
>
> I had addressed this to Your Honor last February. Your Honor said, at that time, that you felt that Judge Doyne had dealt with it, but you never addressed whether you were involved. The fact remains that Judge Doyne told us that a jurist, who he did not name, had brought this to his attention, was not Judge DeLorenzo.
>
> THE COURT: Are you asking me whether I'm the jurist that brought it to his attention?
>
> [PLAINTIFF'S COUNSEL]: Yes, Your Honor.
>
> THE COURT: The answer is no.
>
> [PLAINTIFF'S COUNSEL]: Thank you, Judge. I appreciate that. And I think my client was entitled to know whether you sitting on this case had been involved in that.
>
> So that being put aside, Judge, the other thing I want to bring to your attention is that Friday after we turned in our papers --
>
> THE COURT: Let me -- let me be clear about it. As the Presiding Judge of the Division the issue was brought to my attention by another Judge, and I therefore relayed that

> information to Judge Doyne, but am I the reporting Judge of the incident or was it brought to me? The answer is no.
>
> [PLAINTIFF'S COUNSEL]: I'm satisfied with that answer, Your Honor.
>
> THE COURT: Okay.
>
> [PLAINTIFF'S COUNSEL]: I think that's more than adequate.

Despite the fact the matter had been pending for some time, discovery had not been completed. A third Family Part judge conducted mediation sessions, during which defendant repeatedly raised the issue of discovery.

On May 13, 2013, Judge DeLorenzo heard a number of motions. When defendant raised the issue of further discovery, the judge denied the request.

On May 21, 2013, with the consent of both parties, Judge Mizdol conducted an intensive settlement conference (ISC). Plaintiff's counsel later certified that at the ISC she objected to further discovery. On May 31, 2013, Judge Mizdol held a second ISC. The parties' forensic financial experts participated: Stephan Chait for plaintiff, and Thomas Reck for defendant. At the conclusion of the second ISC, the judge instructed both parties to provide a summary of "loose ended" discovery issues, as counsel agreed that some might have "significant" effect on the progress of the case.

On June 25, 2013, Judge Mizdol held a third ISC with counsel and their experts. Discussions were held in chambers but the parties were not present.

On June 27, 2013, Judge Mizdol signed an order regarding discovery issues that "must be addressed before meaningful settlement negotiations [could] continue." She ordered plaintiff to submit, within thirty days, specific documents concerning his various businesses or a certification stating that the documents did not exist.

According to Judge Mizdol, "[p]laintiff [did not] object to the entry of that order, did not seek reconsideration of that order, [and] did not appeal that order." At a later proceeding, plaintiff's counsel admitted "when your Honor made that order, we certainly agreed with it."

Defendant complied with her obligations under the order. Plaintiff provided a short response out of time.[1] On August 15, 2013, defendant's counsel wrote to Judge Mizdol advising of plaintiff's non-compliance with the June 27, 2013, order. He attached Reck's detailed list of the outstanding items.

[1] In a later proceeding, plaintiff's counsel admitted that his client "gave a very disorganized and incomplete response." On appeal, plaintiff admits that he produced "some — but far from all — of the documents identified on the June 27th Order."

On September 25, 2013, Judge Mizdol held a fourth ISC. According to defendant's counsel, plaintiff's counsel approached him and his client and said there would be "no further discovery in this matter." Plaintiff's counsel denied making that statement.

In a later proceeding, Judge Mizdol said that she was told by plaintiff's counsel during the fourth ISC that no further discovery would be provided. Counsel were then brought into open court, where Judge Mizdol advised that violations of the June 27, 2013, order would not be tolerated. She "warned the plaintiff, in no uncertain terms, that his failure to comply would result in sanctions, suppression of evidence, and counsel fees."

On October 9, 2013, defendant moved to strike plaintiff's pleadings, draw negative inferences, bar presentation of evidence, and limit plaintiff's trial participation to cross-examination. Defendant attached as an exhibit Reck's detailed certification regarding the outstanding discovery. Reck certified that as a result of missing documentation, he was unable to account for over $3 million included in the marital estate that was in the plaintiff's sole control. On October 29, 2013, plaintiff provided a certification addressing some outstanding discovery.

On November 14, 2013, Judge Mizdol heard oral argument on defendant's motion. She acknowledged that on October 29, plaintiff had delivered additional documents to defendant, and that Reck had

subsequently identified documents that remained outstanding. Judge Mizdol found in part:

> Just because the discovery in this matter is complex, it doesn't relieve a party of that duty. And the only person who can account for the trail of the monies is the plaintiff, himself, not some third party. Plaintiff is the only one who can account for the $3 million. And Mr. Wreck's [sic] report makes clear to this [c]ourt that any argument that these were new found discovery requests as of June 27th, 2013, the day this [c]ourt entered the order, is not accurate. It demonstrates that these requests date back to 2011 and 2012. And they long predated the final discovery order.
>
> I find the plaintiff's responses willfully deficient. I find them demonstrative of a disregard, a flagrant disregard of what which [sic] is required by our court rules. The time to have complied is long gone. I am not going to permit plaintiff another extension of discovery. In accordance with [Rule] 4:23-2, I am going to limit plaintiff's participation at trial. I will not permit there to be trial by ambush. It will not be tolerated. Plaintiff had nearly three years to comply with discovery.
>
> The complaint will be stricken. The defendant will proceed on her counterclaim. And the plaintiff's participation will be limited to cross-examination.

The judge signed an order on November 14, 2013, holding plaintiff in violation of litigant's rights for failure to comply with the June 27, 2103 order, striking his complaint, barring him from presenting any evidence, and limiting his participation to

cross-examination of witnesses. She further directed that negative inferences would be drawn against him at trial "where applicable."

Plaintiff moved for reconsideration of the November 14, 2013, order. On December 3, 2013, defendant cross-moved for an order denying plaintiff's motions and for counsel fees and costs. After oral argument on December 9, 2013, the day trial was set to begin, Judge Mizdol largely denied the reconsideration motion. She allowed plaintiff to present testimony with regard to custody and parenting time. Judge Mizdol signed an order to that effect the same day.

II.

Plaintiff is a very successful chiropractor, and the owner of Comprehensive Health Associates (CHA), which offers chiropractic as well as physical therapy services. Additionally, plaintiff owns numerous investment real estate properties and a business spun off from his chiropractic practice. Three days into the trial, December 12, 2013, plaintiff moved before Judge DeLorenzo to be permitted to call witnesses and offer evidence on financial issues, which application was denied.

Based on Reck's testimony, the trial judge concluded that in 2009, plaintiff earned $409,000, in 2010 in excess of $310,000, in 2011 approximately $322,000. Plaintiff's 2012 income was,

according to the judge, "unknown as his tax return for that year was not provided until after the November 14, 2013 order and not considered by [] Reck as beyond the discovery end date."

Reck valued CHA using an income approach—capitalization of earnings method. He began by determining the practice's gross revenue, about $1.6 million a year. Reck added back or "normalized" that number with expenses that the business paid for but were not legitimate business expenses, such as the purchase of a Mercedes Benz and a Chevrolet Colorado truck, allowing fifty percent of those costs. He also noted that staff salaries increased by $206,000 in 2010 without explanation. Reck suspected that CHA was paying the expenses of All Care, a new business that plaintiff had started that year. He opined that the five-year average of normalized pre-tax income was $489,000.

Reck then determined plaintiff's "reasonable compensation," which is the amount the business would pay someone to perform the services the owner provides. He found plaintiff's reasonable compensation was $150,000 based on survey data from ERI, Indeed, and Risk Management Associates, all resources commonly used to determine reasonable compensation. Reck acknowledged that he never received a breakdown of the time plaintiff spent performing chiropractic services and physical therapy services, the number of patients plaintiff saw, or the number of hours he worked. Had

Reck received all of the information, his assessment of reasonable compensation may have been different. After considering the reasonable compensation, the normalized pre-tax income available to capitalize was $338,982, which was a five-year average of pre-tax income minus the reasonable compensation.

Reck then determined the discount rate, which considers the riskiness of a business and the rate of return a person would accept in exchange for the risk. Reck considered that: the practice had a long-standing relationship with a number of area physicians; the practice was well established and well known in the community; plaintiff and his staff had a lot of experience; the practice had a strong referral base from attorneys, doctors, and insurance agents; the service locations were expanding; the practice had a small staff; and that parking problems limited the number of patients who could be seen and therefore operating costs increased because some patients needed to be picked up. Reck set the discount rate at 23%. He then obtained a long-term growth rate of 3%, which was subtracted from the discount rate. He reduced the income by taxes of 30%, which reduced the $338,000 to $237,000. He multiplied that by 1.03, which was the long-term growth rate, then divided by the capitalization rate of 20%, to obtain a value of $1,222,000 as of December 31, 2010.

Reck performed a market approach analysis as a check on the income approach. Using comparison data from the Institute of Business Appraisers, he obtained twenty-seven sales of chiropractic businesses and nineteen sales of physical therapy businesses; sixteen of them were within the appropriate time frame, and four of them had revenue of about $1.2 million. Reck also used two other databases, Biz Comps and Pratt's Stats, to obtain appropriate comparable transactions. Using the comparables, Reck set the value for CHA at $983,000. He noted that the number did not include CHA's accounts receivable, which would have been added to that number. He did not include it because he did not have the figure.

Although plaintiff began the business in October 1996, prior to the parties' August 1998 marriage, Reck did not calculate a premarital value. Despite requesting the relevant tax returns from plaintiff for that time period, they were never provided.

On the stand, Reck acknowledged numerous times that plaintiff did not provide some of the requested information, preventing him from making adjustments and calculations he might otherwise have made. He was, for example, unable to perform an excess earnings analysis, i.e., "goodwill" analysis, due to a lack of documentation. Had Reck received other information, values may

have changed upward or downward. Reck generated the "best analysis possible" with the available information.

Plaintiff had at least twenty investments in real property. Defendant retained Robert McNerney to value three of the condominiums the parties jointly owned in North Bergen and Ridgefield. Using a sales comparison approach, McNerney valued the properties at $800,000, $350,000, and $940,000.

At defendant's request, in May 2013 Michael Filip appraised the marital home in Old Tappan using a sales comparison approach. He explained in detail his selection and application of the comparable values and his adjustments for differences. The tax assessment for the property in 2013 was $868,381 and, from Filip's experience in that municipality, the actual value was usually seven to fifteen percent lower than the assessment, making the property worth between $776,000 and $817,000. He opined that the marital property was worth $800,000 as of May 2013. Filip also opined that the 2013 assessments were lower than those in 2010, when the town completed a reevaluation and because the town had an oversupply of houses at the middle and higher ends of the market.

The parties lived an upper-middle-class lifestyle. In addition to the marital residence, they owned a home in Ortley Beach, which was not appraised, and timeshares. Over the years,

both parties had driven a $100,000 Mercedes. Plaintiff drove a Range Rover and two Porsches; and defendant had driven two Cadillac Escalades. The family "did not go without" anything during the marriage; defendant's budget during the marriage was approximately $23,000 a month.

The judge rendered an eighty-four-page detailed, comprehensive, and cogent written decision. Item by item, he thoroughly described the documents introduced into evidence and the expert testimony, explaining how it informed his judgment. Among other things, he noted that based on the records defendant did produce, Reck was unable to account for approximately $2,779,566 to $5,822,109 in missing investment funds.

The judge further noted that plaintiff, subsequent to the filing of the divorce complaint, made unilateral decisions regarding assets that were indisputably jointly owned. For example, plaintiff received Sandy storm damage funds for repairs on the parties' vacation home at Ortley Beach, which was titled in both names. Plaintiff began reconstruction, and neither accounted to defendant regarding the proceeds nor consulted her about the repairs. Additionally, plaintiff mortgaged the property without defendant's knowledge. Both signatures on the document were notarized by plaintiff's mother. Defendant, however, had not signed it.

During the trial, plaintiff

> invoked his Fifth Amendment right not to answer questions relating to a charge filed by the Bergen County Prosecutor against the plaintiff for stalking the defendant, contempt, as well as, "stalking whether on parole or probation[.]" The plaintiff entered the pretrial intervention program [] with specified conditions which included (i) no contact with the defendant; (ii) the plaintiff would submit to a psychiatric/psychological evaluation . . . .

Apparently, plaintiff had retained a private investigator for $10,000, although on the stand he said he could not recall hiring him. The criminal charges arose from either plaintiff or his private investigator having placed a GPS tracking device on defendant's car.

In addition to the GPS incident, plaintiff made a series of unfounded reports regarding the children to the Division of Child Protection and Permanency. The court found these calls were unwarranted. Not surprisingly, in light of this history, in addition to plaintiff's abject failure to comply with numerous discovery orders, and his demeanor while testifying, the court found him to be incredible. The judge found defendant generally credible.

Defendant, throughout the marriage, worked in her family's seasonal nursery business. She earned approximately $44,900 per

year, which was a higher hourly wage than would ordinarily be paid to a clerk.

The judge amended his initial judgment of divorce on June 19, 2014, in order to clarify certain issues. Generally, with regard to the real estate, if the parties were unable to reach an agreement, the properties would be listed for sale; the judge even designated the listing broker. The judge allocated net proceeds of sale at sixty percent to defendant and forty percent to plaintiff, except for the Ortley Beach property. As to that property, plaintiff alone was to be charged for the mortgage, with any remaining balance to be divided equally. The judge adjusted and specified credits and debits as to individual accounts the parties had disposed of unilaterally. He also ordered plaintiff to pay defendant $300,000 in counsel fees, which he reduced to judgment, and expert fees of $100,000.

Now on appeal, plaintiff raises the following points for our consideration:

> POINT I: JUDGE MIZDOL SHOULD HAVE RECUSED HERSELF.
>
> POINT II: THE PROCEEDINGS ON JUNE [25] WERE PROCEDURALLY IRREGULAR AND DEFECTIVE.
>
> POINT III: THE NOVEMBER 14TH ORDER WENT FAR BEYOND WHAT WAS NECESSARY AND APPROPRIATE TO ADDRESS ANY FAILURES TO PROVIDE DISCOVERY.

POINT IV: THE COURT SHOULD HAVE ACCEPTED PLAINTIFF'S CURE IN THE INTERESTS OF JUSTICE.

POINT V: IT WAS ERROR FOR JUDGE MIZDOL TO IGNORE THE TRIAL JUDGE'S RECENT ORDER AND RE-OPEN DISCOVERY AND ORDER EXTENSIVE NEW DISCOVERY ON A CASE THAT WAS ALREADY [TWO AND A HALF] YEARS OLD IN THE ABSENCE OF A MOTION.

POINT VI: THE TRIAL COURT'S FINDINGS AS TO THE VALUE OF PLAINTIFF'S MEDICAL PRACTICE [WERE] NOT SUPPORTED BY CREDIBLE EVIDENCE.

POINT VII: THE TRIAL JUDGE ERRED BY ACCEPTING VALUES ON REAL ESTATE ASSETS THAT WERE NEITHER AS OF THE DATE OF FILING NOR DATE OF TRIAL.

POINT VIII: THE TRIAL JUDGE ERRED IN AWARDING DEFENDANT['S] COUNSEL FEES AND EXPERT FEES.

III.

We find plaintiff's contention that Judge Mizdol should have recused herself to be entirely lacking in merit. Her continued involvement was not contrary to Canon 3A(6) nor did it give rise to the appearance of impropriety, contrary to Canon 2. Judges routinely preside over matters where negative information about one party or another is presented.

Furthermore, plaintiff waived any objection to the judge's involvement. He said he was "satisfied" with her explanation of the fact she was only the "middleman" conveying information from a third jurist to the assignment judge, characterizing it as "more than adequate." Under the invited error doctrine, "trial errors that 'were induced, encouraged, or acquiesced in or consented to

by defense counsel ordinarily are not a basis for reversal on appeal.'" State v. A.R., 213 N.J. 542, 561 (2013) (quoting State v. Corsaro, 107 N.J. 339, 345 (1987)). That principle of law gives voice to "the common sense notion that a 'disappointed litigant' cannot argue on appeal that a prior ruling was erroneous 'when that party urged the lower court to adopt the proposition now alleged to be error.'" Ibid. (quoting N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 340 (2010)). This point does not warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

IV.

Plaintiff contends both that the June 25, 2013 proceedings were "procedurally irregular and defective[,]" and that Judge Mizdol erred in reopening discovery because Judge DeLorenzo had previously denied defendant's request. Plaintiff also asserts that the order should not have issued because no motion was pending.

Although literally accurate, the latter contention overlooks the in-chambers conferences from which the order resulted. The parties consented to the ISCs. Nor was the order required to be prepared in open court as plaintiff argues. Rule 1:2-1 only provides that the majority of proceedings are to be conducted in open court, but the rule specifically authorizes in-chambers

settlement conferences. The rule is silent with regard to the preparation of orders by the court.

Judge Mizdol, who invested substantial time in attempting to settle this dispute, had met for many hours with counsel and the parties' experts. She spent hours reviewing the parties' submissions. Therefore, the June 27, 2013 order was an appropriate exercise of her administrative and judicial authority, and was grounded in her familiarity with the particulars of the case.

Moreover, plaintiff's argument that Rule 4:23-5(c) applies is inapposite. That rule controls when an individual party files a motion to compel discovery. The challenged order in this case resulted from settlement conferences and was not issued as a result of a motion. The judge relied upon Rule 4:23-2(b). That rule authorized the action taken. Ibid. ("If a party . . . fails to obey an order to provide . . . discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just . . . ").

Similarly unavailing is plaintiff's argument that the law of the case barred Judge Mizdol from issuing the June 27, 2013 discovery order since on May 10, 2013 Judge DeLorenzo denied defendant's request for additional discovery. The law-of-the-case doctrine simply does not apply to this situation.

The law-of-the-case doctrine is intended to avoid relitigation of previously resolved issues but is not an absolute rule. Jacoby v. Jacoby, 427 N.J. Super. 109, 117 (App. Div. 2012). It is a discretionary rule, one which requires the "judge to balance the value of judicial deference for the rulings of a coordinate judge against those 'factors that bear on the pursuit of justice and, particularly, the search for truth.'" Ibid. (citing Hart v. City of Jersey City, 308 N.J. Super. 487, 498 (App. Div. 1998)). The doctrine is intended to serve the interests of justice and is not intended to be used as a shield to avoid a sanction for improper conduct.

Furthermore, the law-of-the-case doctrine applies only to a ruling on the merits. Lombardi v. Masso, 207 N.J. 517, 539 (2011). A ruling regarding discovery is not one on the merits. Additionally, even if this had been a ruling on the merits, the law-of-the-case doctrine "does not obligate a judge to slavishly follow an erroneous or uncertain interlocutory ruling." Gonzales v. Ideal Tile Importing Co., 371 N.J. Super. 349, 356 (App. Div. 2004), aff'd, 184 N.J. 415 (2005), cert. denied, 546 U.S. 1092, 126 S. Ct. 1042, 163 L. Ed. 2d 857 (2006).

Judge Mizdol's decision to require further discovery was far from "spur of the moment." She spent days discussing the case with the parties and their experts and, in the judge's own words,

"[p]hysically [going] through each and every entity with both counsel and the experts to determine that which was missing from the production of documents." Judge Mizdol explained that "meaningful settlement discussions" could not continue without complete discovery.

If the lack of adequate discovery rendered settlement discussions unfruitful, it stands to reason that the lack of that discovery would hinder a thorough examination of the issues at trial.

Even if Judge DeLorenzo's decision had been on the merits, application of the law-of-the-case doctrine is discretionary. Judge Mizdol learned through her participation in the settlement conferences that the lack of discovery was hampering the progression of the case, a fact Judge DeLorenzo lacked when he made his ruling. To have relied on the law-of-the-case doctrine would not have served the interests of justice, as significant information in plaintiff's sole control that pertained directly to the assets at issue was outstanding. Hence, Judge Mizdol did not err in conducting the June 25, 2013 proceedings nor entering the June 27 discovery order.

V.

Plaintiff's third and fourth points address his claim that the November 14, 2013 order was unjust because, among other things, it barred him from participating in the trial with regard to equitable distribution other than the cross-examination of witnesses.[2] We conclude that the order was necessary in the interest of justice in light of the parties' substantial assets and plaintiff's concerted efforts at avoiding the disclosure, including the whereabouts of millions of dollars.

After meeting with the parties and the experts, the judge signed the June 27, 2013 order detailing the precise discovery that plaintiff was compelled to provide within thirty days. A week after the deadline, plaintiff provided a response that his own attorney deemed "very disorganized and incomplete" and "garbage."

In another settlement conference in September, the judge warned plaintiff that he would be subject to sanctions if he did not produce necessary information and in good faith participate

[2] The November 14 order barred plaintiff from participating in the trial at all, aside from cross-examination of witnesses. A December 9, 2015 order amended the November 14 order to permit plaintiff to present affirmative proofs regarding parenting and custody issues.

in the valuation process. On October 9, defendant formally moved for sanctions. On October 29, plaintiff provided more discovery.

On November 14, Judge Mizdol heard oral argument on defendant's discovery motion. Plaintiff's counsel argued that after receiving the motion, plaintiff "began to diligently work on assembling materials that were in [the] order" and made "a very substantial" production of documents. Plaintiff could not get other documents because, he claimed, either they "do not exist" or his business partners would not produce them. Accountings were not provided, though plaintiff also claims he provided the underlying documentation. He pointed to the fact that in 2012, plaintiff had allowed Reck access to his records storage facility as the equivalent of compliance with discovery orders.

The judge found that the argument concerning the opening of the storage facility was specious because it was "up to . . . plaintiff's counsel to cull through that information, to put it in a sensible format and to present it." We agree. It was plaintiff's obligation to put the information together in a logical order; to just open the door for an expert to cull through hundreds, if not thousands, of pages of information makes a mockery of the discovery process.

The judge noted that at nearly three years old, this was the oldest case on the calendar. She found it was "despicable [] that

we are having this conversation [about discovery] at all, at this stage of the proceeding." The judge said that she had spent "hours upon hours weeding through everything that had been provided previously and sitting and doing an order, a discovery order which was no less than . . . six pages in length, which outlined every single document that was to be provided for each and every entity."

Plaintiff's responses were out of time and grossly inadequate. Although he had produced some documentation in October, the judge found that the documentation should have been produced "two years ago." The delay in production made Reck's job more costly and difficult. Further, the judge detailed the still-missing discovery, and noted that plaintiff never certified that his former attorneys (one of whom was his brother) and accountants ever had the records in their possession. For example, HUD-1 forms from sales of properties in which plaintiff had an interest were missing, although they should have been in the possession of his real estate attorney. Similarly, K-1 forms and some tax returns were not provided and were presumably in plaintiff's accountant's possession.

The judge found plaintiff's actions "unconscionable" and said:

> I'm not about to extend a discovery deadline when we are three years into a case, . . . [and] this case is 1,036 days old. And we're

> not going to have a trial by ambush, because the [c]ourt is not going to tolerate that. So he's not going to be able to produce all these things at the time of trial, because it's a day late and a dollar short at this point in time.

The judge characterized plaintiff's behavior as a "flagrant" and "willful disregard" of the court's June 27, 2013 order. We agree that striking plaintiff's complaint and limiting his participation at trial to cross-examination was proper. His failure to comply, when ordered to do so over and over was not just contumacious, it had real and immediate effects on his family's financial well-being.

During oral argument on the motion for reconsideration, plaintiff's counsel represented that the Friday before the Monday trial was set to begin, plaintiff had submitted an additional 100 pages of documents, which he claimed left only two HUD-1 statements outstanding. He said that "under the gun of this latest Order, a lot of other stuff was found."

After hearing argument, Judge Mizdol recounted the history, then stated:

> Only when faced with the most drastic of sanctions did plaintiff attempt to, again, provide deficient discovery. . . . On October 29th he provided additional documents still containing tremendous deficiencies, and those deficiencies because each one of the particularized paragraphs of the June 27th Order required an accounting of funds

> received, including accounts into which the funds were deposited, and ultimate disposition.
>
> I found that the plaintiff's failure to provide that discovery was willful, that it was a flagrant disregard of the rules by which this Court is required to abide. And that the June 27th Order was not a demand for discovery, it was a Court Order mandating discovery. . . .
>
> Under the gun, today, today is the trial date of this matter. This is not trial by ambush. That's why we have Court Rules. That's why we have Court Orders.

Now, on appeal, plaintiff contends that only one document was not provided that Friday——a handwritten cash receipts journal for 2010. The position is not supported by the record. No list was made of the identity of the documents, but it was, according to the judge, far more than just one page. In any event, the production of 100 pages of discovery on a Friday before a Monday trial date was a maneuver that could have brought the trial to a halt. Nor is the argument that the discovery was unnecessary a tenable position at this late date.

Plaintiff states that discovery is intended to allow cases to be resolved on the merits, a proposition with which everyone can agree. By his failure to timely comply with his discovery obligations, plaintiff slowed progress towards that goal.

The controlling rule under which Judge Mizdol issued her order was Rule 4:23-2, captioned "Failure to Comply with Order." It was not an order issued under Rule 4:23-5, the rule discussed in the cases cited by plaintiff in support of his contention that Judge Mizdol erred in denying reconsideration.

Rule 4:23-2(b) states that if a party "fails to obey an order to provide or permit discovery" the court may make an order "refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the introduction of designated matters in evidence," Rule 4:23-2(b)(2), or "striking out pleadings or parts thereof . . . or dismissing the action or proceeding or any part thereof with or without prejudice, or rendering a judgment by default against the disobedient party." R. 4:23-2(b)(3).

The Supreme Court outlined Rule 4:23-2(b)'s purpose in Abtrax Pharmaceuticals, Inc. v. Elkins-Sinn, Inc., 139 N.J. 499 (1995):

> Discovery rules are designed to further the public policies of expeditious handling of cases, avoiding stale evidence, and providing uniformity, predictability and security in the conduct of litigation. The discovery rules were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits to the end that judgments rest upon real merits of the causes and not upon the skill and maneuvering of counsel. If the discovery rules are to be effective, courts must be prepared to impose

> appropriate sanctions for violations of the rules.
>
> [Id. at 512 (internal citations and quotation marks omitted).]

The Court recognized competing interests, however, in the right to an adjudication of the controversy on the merits. Id. at 513. "Because of these competing policies, and because of the varying levels of culpability of delinquent parties, a range of sanctions is available to the trial court when a party violates a court rule." Ibid. (quoting Zaccardi v. Becker, 88 N.J. 245, 252-53 (1982)). After citing Rule 4:23-2(b), the Court continued:

> In respect of the ultimate sanction of dismissal, this Court has struck a balance by instructing courts to impose that sanction only sparingly. The dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases in which the order for discovery goes to the very foundation of the cause of action, or where the refusal to comply is deliberate and contumacious. Since dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party, or when the litigant rather than the attorney was at fault. Moreover, the imposition of the severe sanction of dismissal is imposed not only to penalize those whose conduct warrant it, but to deter others who [might] be tempted to violate the rules absent such a deterrent.
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> [Id. at 514-15 (internal citations and quotation marks omitted).]

While the sanction of dismissal should be imposed sparingly, "a party invites this extreme sanction by deliberately pursuing a course that thwarts persistent efforts to obtain the necessary facts." Id. at 515.

The imposition of sanctions is within the sound discretion of the trial court. Id. at 513. The standard of review is whether the trial court abused its discretion, "a standard that cautions appellate courts not to interfere unless an injustice appears to have been done." Id. at 517.

There is a "natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction. . . ." Id. at 517-18 (quoting Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 642, 96 S. Ct. 2778, 2780, 49 L. Ed. 2d 747, 751 (1976)). But we also have to be

> sensitive to the legitimate concerns expressed by the trial [court] that if our discovery rules are to have any meaningful impact upon our civil dockets they must be strictly enforced. [Moreover, we [are] [] mindful of the perils and gravitational pull of the slippery slope wherein the efficacy of our rules is destroyed by the gradual cumulation of exceptions. We recognize the imposition of the severe sanction of dismissal is imposed not only to penalize those whose conduct warrants it, but to deter others who may be

> tempted to violate the rules absent such a deterrent.
>
> [Id. at 518 (quoting Jansson v. Fairleigh Dickinson Univ., 198 N.J. Super. 190, 196 (1985)).]

Dismissal is not an abuse of discretion where the trial court, "find[s] deliberate and contumacious conduct and [] conclud[es] that the extreme sanction of dismissal was appropriate." Id. at 520.

Defendant, the financially dependent spouse with whom the children reside, had been demanding discovery for over two years. Plaintiff, who had sole control of the information, knew the items he was supposed to provide by a date certain. He produced nothing until after the deadline, and the documents he turned over prior to the last ISC were insufficient. Only when defendant moved for sanctions did more documents appear, and even then plaintiff failed to significantly comply or to satisfactorily explain his inability to comply, document-by-document.

Only after his complaint was dismissed and his participation in the trial limited, did he appear with additional material he claimed complied with prior orders, doing so on the last business day before trial. This conduct was clearly willful, "deliberate and contumacious," and justified the judge's exercise of discretion. See Abtrax, supra, 139 N.J. at 514.

The risk parties face who do not comply with discovery orders is that experts will then produce opinions based on less than ideal information. In this case, plaintiff's failure to account for millions of dollars raises still unanswered questions as to whether defendant actually received her fair share of marital assets, even with the adjustment the Family Part judge made in his allocation. Plaintiff's failure to comply impacted his family's financial situation and the swift and fair administration of justice. In this case, plaintiff claims the expert opinions were fatally flawed——but if to defendant's favor, it is entirely the result of his own conduct. It is just as likely, however, and perhaps more so, that it was defendant who was shortchanged.

Plaintiff's assertion that last minute witnesses often trigger short adjournments is absolutely true. Wymbs v. Twp. of Wayne, 163 N.J. 523, 543 (2000). Plaintiff argues from that body of law that since Reck was not scheduled to testify until February 25, 2014, he had ample time to study the new information plaintiff produced at the eleventh hour. But this case does not involve a surprise witness. This case involves plaintiff's years of avoiding disclosure, exercising unilateral control over marital assets, and a fundamental lack of respect for and compliance with discovery orders. He knew his obligations and ignored them.

VI.

Plaintiff also complains that the trial court's findings as to the value of his medical practice were "not supported by credible evidence." We reach the contrary conclusion.

"There are [] few assets whose valuation impose as difficult, intricate and sophisticated a task as interests in close corporations." Steneken v. Steneken, 183 N.J. 290, 296 (2005) (quoting Torres v. Schripps, Inc., 342 N.J. Super. 419, 435 (App. Div. 2001)). "There is no single formula that will apply to each enterprise." Bowen v. Bowen, 96 N.J. 36, 44 (1984). "Valuation techniques, regardless of the approach selected, are to be measured against a reasonableness standard." Steneken, supra, 183 N.J. at 297. "The reasonableness of any valuation depends upon the judgment and experience of the appraiser and the completeness of the information upon which his conclusions are based." Bowen, supra, 96 N.J. at 44 (quoting Lavene v. Lavene, 162 N.J. Super. 187, 193 (Ch. Div. 1978)). Valuing closely held corporations "is inherently fact-based and thus not an exact science." Torres, supra, 342 N.J. Super. at 435 (internal quotations omitted).

The scope of appellate review of a trial court's findings is limited. Clark v. Clark, 429 N.J. Super. 61, 70 (App. Div. 2012).

> The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence. We

> accord particular deference to the judge's factfinding because of the family courts' special jurisdiction and expertise in family matters. Reversal is warranted only when a trial court's findings reflect a mistake must have been made because the factual findings are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.
>
> [Ibid. (internal citations and quotation marks omitted).]

Specifically, a family part judge has "broad discretion" in allocating assets subject to equitable distribution. Id. at 71.

> [T]he nature of judicial discretion requires a trial judge to determine whether to act, and if so, to render a decision "guided by the spirit, principles and analogies of the law, and founded upon the reason and conscience of the judge, to a just result in the light of the particular circumstances of the case."
>
> [Id. at 72 (quoting Smith v. Smith, 17 N.J. Super. 128, 132 (App. Div. 1951), certif. denied, 9 N.J. 178 (1952)).]

We reverse only if the findings were mistaken, the determination could not reasonably have been reached on sufficient credible evidence present in the record, or the trial judge failed to consider all of the controlling legal principles. Ibid.

Relying on Reck's report, the judge found CHA to be worth $1,220,000 as of January 2011. He also found that although plaintiff had started his practice approximately twenty-two months prior to the marriage, plaintiff failed to provide the

documentation necessary to determine the pre-marital portion. Nonetheless, factoring in that plaintiff "has an ongoing business risk," the judge awarded defendant only a 33% interest in the business, amounting to $402,600.

Plaintiff argues for numerous reasons that the judge should not have accepted Reck's value of $1,200,000 for CHA. He maintains that although Reck testified that plaintiff had a "stable base of referrals" from which to generate new business, Reck did not know how "personal" that base was to plaintiff and "acknowledged that he had no factual basis for making that conclusion."

In fact, Reck testified that plaintiff had numerous lawyers referring clients to him as a result of workers' compensation and accidents, with the expectation that plaintiff would assist in litigation. He admitted he did not know what, if anything, plaintiff did to cultivate the referrals. However, he also testified that the persons making the referrals could be "as happy with Dr. Buyer as they would be with Dr. Ramundo. I don't know." In short, this was a valid point developed on cross-examination, but a minor one not capable of undermining Reck's entire analysis.

Plaintiff next argues that Reck "admitted" that he "arbitrarily excluded certain expenses, which, if included, would have yielded a substantially lower value for the practice." This argument is misleading. In fact, when asked directly if his

exclusion of these expenses was arbitrary, Reck said no. Reck explained why he excluded fees paid over the years to William Delassi, a marketer: plaintiff and Delassi had no written contract, plaintiff could not quantify the gross revenue Delassi's efforts were bringing to the practice, and plaintiff did not provide any invoices from Delassi for services rendered. Reck thoroughly explained his reasoning and thus established a solid basis for his decision to remove those fees from operating expenses.

Similarly, plaintiff argues that Reck "could not explain" why plaintiff's own purchase of a practice in 2009 for $200,000 was not a relevant comparative sale. Had this sale been included, it "could have given the best indicator of the value of Plaintiff's practice, and would have dramatically altered Mr. Reck's conclusions." Again, this argument is misleading.

Reck addressed plaintiff's purchase of All Care and said he did not use the sale because the practice was "purchased from someone who was basically phasing themselves out, retiring, looking to get rid of . . . the practice." Thus, contrary to plaintiff's contention, Reck did address this issue and explained his reasons for not including a practice that was coming to a close in his calculations regarding plaintiff's very busy practice. Moreover, Reck used the sales comparison approach as a

secondary method to check his findings under the primary method, the income approach.

Many of plaintiff's other arguments——that Reck did not know the years between 2006-2011 in which comparable sales took place, that he admitted that the unknown geographic location of sales could be relevant, that he did not know if sales were repeated across the three databases, that reporting was voluntary and might reflect self-selection, and that the sales may not be real or have been made by distressed owners——are solely related to the sales comparison approach. While that method was used as a "check," it was not Reck's primary method. These arguments do not undermine Reck's methodology using the income approach.

Plaintiff also argues that Reck erred in not reducing the value of CHA by the premarital portion of the asset and in placing the burden of proving the exempt portion on plaintiff. Reck admitted that he made no allowance for the premarital portion of CHA, despite the fact that plaintiff started the business about twenty-two months prior to his marriage to defendant. Reck was unable to determine that value because plaintiff failed to provide certain tax returns from that time period, despite Reck's repeated request. In other words, Reck lacked the information because plaintiff did not disclose it.

Plaintiff cites Sculler v. Sculler, 348 N.J. Super. 374, 380-81 (Ch. Div. 2001) for the proposition that defendant had the burden of "proving the value of the non-exempt portion of an active immune asset." However, "the burden of establishing immunity from distribution of a particular marital asset or portion of an asset rests upon the spouse who asserts it." Pacifico v. Pacifico, 190 N.J. 258, 269 (2007); see Landwehr v. Landwehr, 111 N.J. 491, 504 (1988); Painter v. Painter, 65 N.J. 196, 214 (1974). Even the case plaintiff cites, Sculler, acknowledges that the burden of proof is on the spouse asserting immunity. Sculler, supra, 348 N.J. Super. at 380. If plaintiff had wanted to argue that part of his business was immune from equitable distribution, he bore the burden of proof.

Similarly without merit is plaintiff's argument that Reck did not address "the fundamental question of how a newly-licensed [sic] chiropractor could buy, or why an established chiropractor would buy, this practice at his ascribed value of $1,200,000." This argument is circular: if a buyer wanted to buy the business and believed it was worth $1,200,000, the buyer would buy it. If a buyer did not believe the business was worth Reck's value, he or she would not buy it. Because an actual sale was not occurring, it was the job of the experts to determine the value. Reck opined

it was worth $1,200,000. It was up to the judge to determine whether Reck's opinion was credible.

Plaintiff also argues that Reck's valuation should not have been accepted because he neglected his professional obligation to be "thorough and complete" when he failed to consider the documentation plaintiff submitted the weekend before trial and thus, he was "trying to give a time-of-trial (early 2014) value to the practice, rather than a time-of-filing value (early 2011) without using the most current data available to him."

This contention is wholly without merit. First, plaintiff did not comply with his discovery obligations in a timely fashion and was thus precluded by the court from belatedly submitting the documentation; consequently, Reck was precluded from considering it. Second, Reck made clear that his valuation of CHA was accurate as of December 31, 2010, just two weeks prior to the filing of the complaint.

As pointed out in Torres, supra, 342 N.J. Super. at 435, valuation of closely held businesses is not "an exact science." Reck's job was complicated by plaintiff's refusal to comply with the discovery process. As a result, negative inferences were drawn against plaintiff. Using the documentation he did have, however, Reck provided reasonable and competent testimony that the judge thoroughly reviewed and considered. The judge found Reck's

testimony to be credible and to be adequately corroborated by the documentation he had. His thoughtful reliance upon that expert testimony was not an abuse of discretion. No "injustice appears to have been done." See Abtrax, supra, 139 N.J. at 517.

VII.

Plaintiff also disputes the real estate valuations relied upon by the trial judge. The judge ordered all jointly held properties to be sold, unless the parties otherwise agree, and he allocated the proceeds between them. The parties will therefore receive actual market value at the time of the sale. In light of the equitable distribution process the judge ordered, he did not err. This argument is so lacking in merit as to not warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

VIII.

Finally, plaintiff contends the judge erred in ordering him to pay $100,000 in expert fees and $300,000 in counsel fees. We see no abuse of discretion in the award.

Rule 4:42-9(a)(1) states: "No fee for legal services shall be allowed . . . except [i]n a family action . . . pursuant to Rule 5:3-5(c)." Rule 5:3-5(c) says that in determining the amount of the fee 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 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.

Where one party has substantial income and the other does not, "[t]hat disparity alone would suggest some entitlement . . . to a fee allowance." Lavene, supra, 148 N.J. Super. at 277. However, a disparity in incomes cannot be the sole basis for an award. Accardi v. Accardi, 369 N.J. Super. 75, 90-91 (App. Div. 2004).

J.E.V. v. K.V., 426 N.J. Super. 475, 492 (App. Div. 2012), states:

> "An award of counsel fees is only disturbed upon a clear abuse of discretion." City of Englewood v. Exxon Mobile Corp., 406 N.J. Super. 110, 123 (App. Div.), certif. denied, 199 N.J. 515 (2009). An appellate court will disturb a trial court's determination on counsel fees only on the "rarest occasions, and then only because of a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317 (1995).

The judge found that plaintiff had an annual earning capacity of between $350,000 and $500,000, while plaintiff had an earning capacity of between $45,000 and $50,000. However, he also

considered the alimony awarded, which gave defendant additional annual income of $150,000.

The judge also found that plaintiff engaged in bad faith when he refused to respond appropriately to defendant's discovery demands and placed a GPS on defendant's car contrary to law. He was "not candid which prolonged the trial," "did not account for missing marital assets," and "dissipated marital assets [by] spending considerable sums on third parties."

Defendant certified that she had been billed $453,483.02 for legal services and over $100,000 in expert fees. She was successful in advancing her positions as to equitable distribution, alimony, and custody. Only after correctly analyzing the applicable law did the judge award defendant $300,000 in counsel fees and $100,000 in expert fees.

Plaintiff maintains that defendant was not entitled to counsel fees because she did not prevail on all the issues. Specifically, the judge did not designate her the "parent of primary residence," despite her request. Defendant responds that plaintiff demanded sole custody without an expert's testimony, thus causing a substantial portion of the trial to be unnecessarily devoted to custody.

The judge considered plaintiff's request for sole custody in light of his work schedule, which alone made it "hard to envision"

how he would balance his work and his children. Contrary to plaintiff's trial assertions, the judge found the children were safe with defendant and found that plaintiff "offered virtually no evidence to indicate that there are any problems with the children's relationship with the [d]efendant." The judge also observed that plaintiff "continue[d] to maintain, without any expert proof, that the [d]efendant has a mental illness." He awarded joint legal custody. Despite these findings, the fact that a majority of the trial was spent on the custody issue, and that defendant was "successful" on her position regarding custody, the judge did not attribute bad faith to plaintiff for advancing his custody claims.

The judge did find that plaintiff acted in bad faith with regard to discovery. Remarkably, plaintiff disagrees, stating, "suffice it to say that the record is devoid of such evidence." As addressed at length supra, plaintiff thwarted discovery and flouted court orders, causing enormous and costly unnecessary disruptions to the swift resolution of this case. The judge's finding of bad faith was amply supported in the record.

Further, the judge found that plaintiff was "not candid," which prolonged the trial, and did not account for missing marital assets. He also dissipated marital assets. Plaintiff does not dispute these findings.

In addition to plaintiff's bad faith in several realms, he had a far greater ability to pay counsel fees than defendant, a fact that he does not contest. The judge thoroughly considered all of the factors concerning counsel fees. We see no abuse of discretion on these orders either.

Affirmed.