SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0343-16T4

S.B.P.,

Plaintiff-Respondent,

v.

D.J.P.,

Defendant-Appellant.

Submitted March 7, 2018 – Decided April 12, 2018

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FM-02-2023-12.

Santo J. Bonanno, attorney for appellant.

Philip C. Puglisi, attorney for respondent.

PER CURIAM

Defendant D.J.P. appeals from an August 22, 2016 order awarding counsel fees to plaintiff S.B.P., now known as S.B.S. We affirm.

The parties were married on October 21, 2007, and divorced on February 12, 2013. The final judgment of divorce incorporated

the terms of the Matrimonial Settlement Agreement (MSA) entered into by the parties.

Two children were born of the marriage: a daughter, born in 2010, and a son, born in 2012. The MSA provides for joint legal custody of the children, with plaintiff designated as parent of primary residence and defendant designated as parent of alternative residence. The MSA further provides that after their son reached the age of one, defendant would have supervised parenting with the children on alternate Saturdays, with the supervision being provided by defendant's mother. The MSA also required defendant to undergo substance abuse and psychological evaluations and to follow any treatment recommendations. Defendant was also required to complete the Alternatives to Domestic Violence Counseling Program and thereafter continue with individual counseling. The MSA further provides each party would be responsible for their own counsel fees and costs.

Frequent motion practice has led to the entry of numerous post-judgment orders. A February 18, 2014 order denied parenting time for defendant's mother, denied defendant's application for unsupervised parenting time, and determined defendant's mother was no longer permitted to supervise defendant's parenting time. The order also denied the application to compel defendant to continue unification therapy. A June 15, 2015 order denied defendant's

emergent application for unsupervised parenting time on Father's day. A June 26, 2015 order established an interim parenting time schedule for two days. A subsequent order awarded defendant gradually increasing parenting time. A September 8, 2015 order denied defendant's motion for reconsideration of the June 26, 2015 order, denied plaintiff's cross-motion, and denied both parties' applications for counsel fees and costs. A February 4, 2016 order appointed a parenting coordinator "to assist the parties to resolve conflicts related to parenting schedule and to address the resumption of parenting time" by defendant. The order further provided that if "either party has been recalcitrant and/or non-cooperative and thereby has interfered with the parenting coordinating process," the affected party "may then petition the court for appropriate relief, including, but not limited to[,] [s]anctions, counsel fees, and the remedies set forth in Rule 5:3-7."

On June 3, 2016, defendant applied for an order to show cause to: (1) increase his parenting time on their daughter's upcoming birthday; (2) allow pick-up and drop-off in Emerson because plaintiff was moving to Morris Plains, making it more difficult for defendant to exercise his parenting time; (3) allowing his mother to be present during his parenting for more than two hours per month; and (4) increasing his parenting time due to plaintiff's

12.5-hour work shifts. The application was converted to a motion returnable on a date after their daughter's birthday due to scheduling issues. Plaintiff filed opposition and a cross-motion seeking to restrain defendant from filing meritless applications and for an award of counsel fees and costs. On July 21, 2016, defendant filed another application for an order to show cause regarding his parenting time schedule and pick-up and drop-off location.

On August 5, 2016, the motion judge heard oral argument on the pending applications and issued an oral decision: (1) determining defendant's request for additional parenting on their daughter's birthday to be moot; (2) denying defendant's request to pick up and drop off the children in Emerson; (3) denying defendant's request for specific parenting time on July 23 and July 24, 2016; (4) denying plaintiff's request to restrain defendant from filing frivolous, meritless applications; and (5) granting plaintiff's application to compel defendant to cooperate with the court-appointed parenting coordinator.

With regard to cooperation with the parenting coordinator, the judge noted: "The parties were supposed to work out parenting issues with their parenting coordinator." The judge explained the order appointing the parenting coordinator "requires both parties to act with good faith and fair dealings." The judge was not

convinced defendant "has made a good-faith effort to try to negotiate the issues." He then stated:

> Now dad, you can roll your eyes. You can shake your head. You can hit your table, whatever you want, but as far as I'm concerned, based on what I've seen here, dad, you are not acting in good faith and fair dealings.

As to the award of counsel fees to plaintiff, the judge stated:

> The court does not believe that all of [defendant's] requests are frivolous. At least some of [defendant's] request, including the order to show cause that was filed while the motion was pending, was not consistent with the premise of good faith and fair dealings. [Defendant] has been running up . . . unnecessary counsel fees instead of trying to work out issues with [plaintiff] through the parenting coordinator. I don't deem it appropriate to go back and award counsel fees for prior motions as [plaintiff] requested.

The judge directed plaintiff's counsel to submit a certification of services for the period between June 6 and August 5, 2016, afforded defendant an opportunity to object, and, at defendant's request, directed both parties to submit Case Information Statements (CIS) and their 2015 income tax returns. The parties filed CIS's.

Plaintiff's counsel timely submitted an affidavit of services. The affidavit disclosed counsel has been a member of the bar since 1982 and his practice is primarily devoted to

matrimonial law. He has served as a Matrimonial Early Settlement Panel panelist for over twelve years and is a certified family law mediator. Counsel billed plaintiff at the rate of $400 per hour. The affidavit addressed each of the factors set forth in RPC 1.5(a). The attached billing records disclose counsel expended approximately eighteen hours on behalf of plaintiff from June 7, 2016, to August 5, 2016, for services totaling $7309.36. In addition, counsel incurred a $50 filing fee on behalf of plaintiff. Accordingly, plaintiff sought an award of $7359.36.

Although given the opportunity to do so, defendant did not submit any objection to counsel's fee certification. Indeed, in his reply brief, defendant's counsel states: "The amount of counsel fees that were being requested and the certification of services were not being contested regarding accuracy." Thus, defendant does not contest the hourly rate or billable hours charged by plaintiff's counsel. Instead, defendant contends the trial court overstated his ability to pay plaintiff's counsel fees by failing to consider the $1060 per month he pays for child support and his having to borrow money from third parties in order to meet his expenses and pay his child support. He further contends that when the child support plaintiff receives is added to her net income, her budget does not exceed her available funds. He also contends

the trial court failed to allocate any part of plaintiff's fixed shelter expenses to her fiancé who resided with her.

On August 22, 2016, the judge awarded plaintiff $7359.36 in counsel fees and costs to be paid by defendant within thirty days. Defendant requested the trial court provide its basis for the ruling. On September 16, 2016, the judge issued a written statement of reasons. The judge stated, in part:

> Thereafter, on July 21st [defendant] filed an Order to Show Cause requesting emergent relief to permit him to pick up and drop off the minor children in Emerson and to permit him to have visitation with the children on two days in late July. That very issue was raised by the parties with their parent coordinator, Cynthia Johnson, on June 14, 2016 and defendant "absolutely refused" to address the issue with Ms. Johnson.
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> . . . .
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> Since this request did not involve a situation demanding immediate action due to a situation involving "immediate and irreparable harm," the application for immediate relief sought in the Order to Show Cause was denied[] and converted into a Motion.
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> On June 26, 2015[,] Judge Sattely had previously ruled that defendant "shall pick-up and drop-off the minor children for his parenting time at [his mother's] residence." In 2016[,] defendant filed Motions with regard to that Order which resulted in further Orders of January 22nd, February 4th and May 27th[,] all of which refused to lift the restriction that Judge Sattely ordered. There was no

> change in circumstances warranting a re-visit of the issue.
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> The attempt to obtain emergent relief bordered on frivolous.
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> On the cross-motion, the plaintiff pointed out that she had incurred thousands of dollars in counsel fees due to the defendant's excessive motion filings. It was pointed out that the defendant had several multi-week and multi[-]month absences and it was pointed out that the defendant had stopped seeing the children and did not call his daughter on her birthday, June 26th.
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> As part of the cross-motion the plaintiff requested an award of counsel fees. . . . The [c]ourt was satisfied that at least some of the defendant's request, including the Order to Show Cause that was filed while the motion was pending was done in bad faith and was frivolous. The defendant had caused plaintiff to incur unnecessary counsel fees instead of trying to work out the issues with the plaintiff and the parent coordinator. The request for award of counsel fees covered the day the defendant filed his initial motion up to and including the return date of the hearing.

With regard to the financial circumstances of the parties, the judge stated:

> Although plaintiff is employed as a Nurse in New York[,] [s]he has covered the vast majority of the costs of raising the family and had to withdraw from her retirement [plan] just to pay bills and been forced to defend and file motions mostly due to defendant's unreasonable demands. It was asserted that plaintiff has had to borrow money to pay attorney's fees on several occasions.

> Defendant earned in excess of $61,000 in 2015 and netted in excess of $45,000. His Case Information Statement lists his Schedule A, B and C expenses of approximately $41,700.

With regard to the ability of the parties to pay their own fees and pay the fees of the other party, the judge stated: "A review of the plaintiff's CIS shows that her monthly expenses exceed her monthly income by thousands of dollars. She has had to take more than $16,000 from her retirement account and, even with that withdrawal, is left with a shortfall of more than $5,000 annually."

As to the past history of dealings between the parties, the judge stated:

> There has been a history of court events between these parties including [m]otions for [r]econsideration, many times by the defendant, all of which caused plaintiff to file responses or to bring affirmative claims to protect her or the children's rights. Even though they have been [o]rdered to address parenting issues with the coordinator, defendant declined and, if dissatisfied with the Coordinator's decisions, he files [m]otions. It must be noted that the filings by the defendant have been so numerous that plaintiff sought an Order precluding defendant from filing motions. That request was denied.

The judge further noted defendant was previously ordered to pay counsel fees and costs of $3500 to plaintiff. The judge further stated:

> The award of counsel fees should also serve as notice to the defendant that the practice of filing motions, not based on good faith and fair dealings, are not an appropriate manner to resolve issues. These parties have the benefit of the experienced parent coordinator to address issues of parenting time.

This appeal followed. On appeal, defendant argues the trial court erred in refusing to address visitation and awarding counsel fees to plaintiff equivalent to fifteen percent of his annual income despite her alleged ability to pay for her own fees. He also asserts his parenting time applications were not made in bad faith.

We first note defendant's notice of appeal identifies only the August 22, 2016 order as the order being appealed. It is well-settled that we review "only the judgment or orders designated in the notice of appeal." 1266 Apartment Corp. v. New Horizon Deli, Inc., 368 N.J. Super. 456, 459 (App. Div. 2004) (citing Sikes v. Twp. of Rockaway, 269 N.J. Super. 463, 465-66 (App. Div. 1994)); see also R. 2:5-1(f)(3)(A). In addition, we conclude defendant abandoned any argument relating to the trial court's decision regarding parenting time by failing to brief that issue. See Zavodnick v. Leven, 340 N.J. Super. 94, 103 (App. Div. 2001) (indicating the failure to present an argument relating to an appeal renders that appeal "abandoned"). Accordingly, defendant's appeal shall be limited to review of the August 22, 2016 order

awarding plaintiff counsel fees. We decline to review any prior visitation rulings.

Defendant challenges the award of $7359.36 in counsel fees and costs to plaintiff. Defendant argues the trial court improperly analyzed the requisite factors of Rule 5:3-5(c). Specifically, defendant asserts the trial court overstated his ability to pay counsel fees and failed to take into consideration plaintiff's higher income and the child support payments she received in assessing the parties' ability to pay. Defendant further asserts the trial court failed to allocate any part of the food and fixed shelter expenses to the fiancé with whom plaintiff was residing.

Fee allowances may be made in family actions pursuant to Rule 5:3-5(c). R. 4:42-9(a)(1). The trial court must consider nine factors in making an award of counsel fees:

> (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.

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

The Supreme Court distilled these factors to their essence by explaining:

> [I]n awarding counsel fees, the court must consider whether the party requesting the fees is in financial need; whether the party against whom the fees are sought has the ability to pay; the good or bad faith of either party in pursuing or defending the action; the nature and extent of the services rendered; and the reasonableness of the fees.
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> [Mani v. Mani, 183 N.J. 70, 94-95 (2005) (citing Williams v. Williams, 59 N.J. 229, 233 (1971); Mayer v. Mayer, 180 N.J. Super. 164, 169-70 (App. Div. 1981)).]

The decision to award counsel fees in a matrimonial action lies within the sound discretion of the Family Part judge. See Williams v. Williams, 59 N.J. 229, 233 (1971); Addesa v. Addesa, 392 N.J. Super. 58, 78 (App. Div. 2007); R. 5:3-5(c). "Appellate courts accord particular deference" to the Family Part's findings "because of its 'special jurisdiction and expertise' in family matters." Harte v. Hand, 433 N.J. Super. 457, 461 (App. Div. 2013) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998)). "We will disturb a trial court's determination on counsel fees only on the 'rarest occasion[s],' and then only because of [a] clear abuse of discretion." Strahan v. Strahan, 402 N.J. Super. 298, 317 (App. Div. 2008) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)).

Notably, defendant has not included the CIS's or income tax returns upon which his argument is based in his appendix, and they are not part of the appellate record. A party on appeal is obliged to provide the court with "such other parts of the record . . . as are essential to the proper consideration of the issues." R. 2:6-1(a)(1). The CIS's and income tax returns are essential to any meaningful analysis of the parties' respective income and budgets. Defendant's failure to supply this critical financial information substantially impedes our ability to effectively review the trial court's findings and conclusions.[1] Based on the truncated record before us, defendant has not demonstrated the trial court overstated his income or failed to adequately consider plaintiff's income level, other available funds, and budget.

Defendant also contends his applications were not made in bad faith. "Fees in family actions are normally awarded to permit parties with unequal positions to litigate (in good faith) on an

[1] The failure to provide the CIS's and income tax returns is compounded by the woefully deficient statement of facts section of defendant's brief, which fails to set forth "a narrative chronological summary incorporating all pertinent evidence" that is "supported by references to the appendix and transcript." R. 2:6-2(a)(5); see also Walters v. YMCA, 437 N.J. Super. 111, 120-22 (App. Div. 2014) (discussing impact of the failure "to clearly and accurately narrate the salient facts of a case, followed by a precise citation to the page number in the appendix or transcript"). Defendant's statement of facts, which is only one sentence long, does not set forth any of the pertinent underlying facts and contains only a single citation to the record.

equal footing." J.E.V. v. K.V., 426 N.J. Super. 475, 493 (App. Div. 2012) (quoting Kelly v. Kelly, 262 N.J. Super. 303, 307 (Ch. Div. 1992)). However, "where one party acts in bad faith, the relative economic position of the parties has little relevance." Kelly, 262 N.J. Super. at 307. Stated another way, "[t]he argument between the parties over their 'real' income, net worth and monthly needs would not be as significant if defendant were truly the person in bad faith." Yueh v. Yueh, 329 N.J. Super. 447, 461 (App. Div. 2000). Thus, while a financial disparity between the parties affecting their respective ability to pay might otherwise militate against an award of counsel fees, one who acts in bad faith can be compelled to pay counsel fees "to protect the innocent party from unnecessary costs and to punish the guilty party." Welch v. Welch, 401 N.J. Super. 438, 448 (Ch. Div. 2008) (citing Yueh, 329 N.J. Super. at 461).

The motion judge found the filing of the order to show cause application "bordered on frivolous" and "was not consistent with the premise of good faith and fair dealings." He concluded defendant caused plaintiff to incur unnecessary counsel fees by filing inappropriate motions and orders to show cause rather than utilizing the court-ordered parenting coordinator. The motion judge further found at least some of defendant's application "was

done in bad faith and was frivolous." Each of these findings is amply supported by the record.

We find no basis to disturb the counsel fee award. The trial court addressed each of the factors in Rule 5:3-5(c), making specific findings as to the applicable factors and finding other factors inapplicable. The trial court's findings and conclusions are supported by the record before us. The court also properly took into account defendant's conduct, including his bad faith, lack of fair dealings, and failure to try to resolve parenting time issues through the parenting coordinator, which caused plaintiff to unnecessarily incur considerable legal expenses. Accordingly, we discern no abuse of discretion by the trial court.

Affirmed.