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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0748-15T2
A-1831-17T2

PATRICIA SETTINERI,

Plaintiff-Respondent,

v.

THOMAS SETTINERI,

Defendant-Appellant.

PATRICIA SETTINERI,

Plaintiff-Respondent,

v.

THOMAS SETTINERI,

Defendant-Respondent.

MJT, LLC,

Appellant.

Submitted February 27, 2018 – Decided April 13, 2018

Before Judges Fisher and Sumners.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FM-07-0517-12.

Caruso Smith Picini, PC, attorneys for appellant (in A-0748-15) and respondent (in A-1831-17) (Marcia DePolo, on the brief).

David Scillieri, attorney for appellant in A-1831-17.

Simon, O'Brien and Knapp, PC, attorneys for respondent (in A-0748-15 and A-1831-17) (John T. Knapp, on the brief).

PER CURIAM

The disputes before us involve post-judgment divorce matters. In A-0748-15, defendant appeals provisions of a September 4, 2015 trial court order providing that a receiver shall be appointed to take control over a family trust, MJT, LLC (the LLC), and that plaintiff is entitled to all transfers made from the trust to defendant between August 26, 2011 and the date of the order. He also contends that the court failed to address his request to terminate his alimony obligation under N.J.S.A. 2A:34-23. Additionally, the appeal includes defendant's challenge to provisions of a May 5, 2016 order that found him in contempt of the September 4 order and compelled him to turn over to the receiver twenty-five percent of all monies collected by the LLC.

During the pendency of defendant's appeal of those two orders, plaintiff sought to enforce them as they were not stayed and

defendant did not comply. Consequently, another court entered a July 14, 2017 order directing the tenant of the commercial property owned by the LLC to turn over twenty-five percent of its monthly rent to the receiver. Four months later, on November 16, 2017, a different court entered an order denying the LLC's motion to intervene and to stay the July 14 order, as well as the September 4 and May 5 orders.[1] After the LLC appealed that order in A-1831-17, we consolidated it with defendant's pending appeal for the purpose of this opinion.

For the reasons that follow, we affirm the September 4 order, but vacate and reverse the May 5 and July 14 orders pertaining to the appointment of a receiver to collect money from the LLC, and the November 16 order[2] and remand for further proceedings.

After contentious divorce proceedings, the parties' forty-three year marriage ended with the entry of a final judgment of divorce (FJOD) by default on September 16, 2013. Defendant's motion to vacate the FJOD was denied on January 31, 2014. We need

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[1] In its Statement of Reasons attached to the order, the trial court stated that it was denying the LLC's intervention request because under Rule 2:9-1(a), jurisdiction laid with our court due to the LLC's motion to intervene in defendant's appeal.

[2] We do not disturb the portion of the order denying plaintiff's application for counsel's fees.

not chronicle the litigation, as it is detailed in our June 4, 2015 decision affirming the denial of the motion to vacate. Settineri v. Settineri, No. A-2896-13 (App. Div. June 4, 2015) (slip op. at 8).[3] There is also no need to spend time discussing the acrimonious post-judgment enforcement proceedings that transpired during the pendency of that appeal, and shortly following our decision, culminating in the present appeals. Instead, we focus on the essential facts underlying the orders that form the basis for this decision.

Before doing so, we set forth the principles that guide our analysis. "[F]indings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)). "Because of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court fact[-]finding." Id. at 413.

"[I]n reviewing the factual findings and conclusions of a trial judge, we are obliged to accord deference to the trial

[3] We cite to our unpublished opinion to provide a full understanding of the issues presented and pursuant to the exception in Rule 1:36-3 that permits citation "to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law." See Badiali v. N.J. Mfrs. Ins. Grp., 429 N.J. Super. 121, 126 n.4 (App. Div. 2012).

court's credibility determination[s] and the judge's feel of the case based upon his or her opportunity to see and hear the witnesses." N.J. Div. of Youth & Family Servs. v. R.L., 388 N.J. Super. 81, 88 (App. Div. 2006) (citing Cesare, 154 N.J. at 394, 411-13). The trial court's "'feel of the case' [] can never be realized by a review of the cold record." N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008) (quoting N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 293 (2007)). "[W]e do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Rova Farms, 65 N.J. at 484. We may only "exercise [our] original fact[-]finding jurisdiction sparingly and in none but a clear case where there is no doubt about the matter." Ibid.

The crux of September 4 order relates to the prior order of January 31, 2014, which amended the FJOD to provide that "[p]laintiff is entitled to 50% of all income [d]efendant receives from the . . . trust, not the income generated from the [Thomas and Patricia Settineri Trust (the Trust)]."[4] The Trust was established through the last will and testament of defendant's

[4] We denied defendant's objection to this amendment. Settineri, (slip op. at 9).

father. Interest in the Trust is divided among defendant's brother, Joseph, who owns fifty percent, and defendant and plaintiff own the remaining fifty percent. Defendant is entitled to receive current net income from the trust with plaintiff receiving all of the net income upon her survival of defendant. The court found no merit to defendant's argument that all of the trust funds go into the LLC, set-up by defendant's family in 2011, in which defendant is a managing member with Joseph, with only a one percent stakeholder share. The court determined that the LLC was created to conceal "the transfer of the assets to the defendant's mother [Marie] and to deprive . . . plaintiff of any type of claim with regard to alimony equitable distribution. . . . And the transfers allegedly leave[s] defendant with no assets of his own." At the time, defendant argued he was insolvent; under the terms of the FJOD, he owed plaintiff over $200,000. Because defendant continued to violate discovery orders, the court appointed a receiver "to take possession of . . . any and all future monies from the trust to which he becomes entitled until his debt [to plaintiff] is satisfied."

Defendant claims that it is improper to award plaintiff any share of the trust income because it is contrary to Tannen v. Tannen, 208 N.J. 409 (2001), to award alimony based upon income derived from a testamentary beneficiary interest in a trust.

Defendant asserts that he has no present interest under the will because the trust conveyed a springing executory interest, "which is not yet ripe because [his mother] has not passed away." Defendant also argues that there is no evidence of fraudulent transfer of funds.

Defendant's contentions, however, are barred from being relitigated due to res judicata. See Velasquez v. Franz, 123 N.J. 498, 506 (1991) (citing Restatement (Second) of Judgments § 27 comment d (1982)); Culver v. Ins. Co. of N. Am., 115 N.J. 451, 460 (1989). When we affirmed the denial of defendant's motion to vacate the FJOD, we specifically found "no reason to intervene in the [court's] conclusions." Settineri, (slip op. at 11). This included the court's determination that plaintiff is entitled to receive half of the Trust's monthly income that defendant had been receiving prior to and after the divorce filing. Id. at 7. Thus, defendant can seek a "do-over" by the mere fact that the court has ordered a receiver to aid in the enforcement of the FJOD. "[A] court has the authority in appropriate circumstances to appoint a receiver to manage the property of a supporting spouse to assure compliance with . . . support obligations." Maragliano v. Maragliano, 321 N.J. Super. 78, 82 (App. Div. 1999); see also N.J.S.A. 2A:34-23.

As for the May 5 and July 14 orders, we agree with defendant that the court had no authority to appoint a receiver for the LLC since Marie, Joseph and the LLC were not parties to the enforcement litigation. That said, the court should not have entered the November 16 order denying the LLC's request to intervene.

In deciding plaintiff's efforts to enforce the FJOD, the court conflated the LLC with the trust. The LLC was created in 2012 and was capitalized by the commercial property valued at $2.6 million. It is owned as follows: forty-eight percent to Marie; twenty-five percent in trust to Joseph; twenty-five percent in trust to defendant – with his share going to plaintiff if she survives defendant; one percent to Joseph; and one percent to defendant. In accordance with Rule 4:53-1:

> No order appointing a custodial receiver under the general equity power of the court shall be granted without the consent of or notice to the adverse party, unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable damage will result to the applicant before notice can be served and a hearing had thereon. Such an order granted without notice shall give the adverse party leave to move for the discharge of the receiver on not more than 2 days' notice; and shall direct a corporation or a partnership for whom a custodial receiver has been appointed to show cause why a receiver should not be appointed under the power conferred by statute. No statutory receiver shall be appointed for a corporation without giving it notice and an opportunity to be heard; and an

> order appointing a statutory receiver for a corporation shall give the stockholders and creditors of the corporation leave, at a specified time and place, to show cause why the receiver should not be continued.
>
> [Emphasis added.]

Additionally, under Rule 4:50-1(d), an order is void where a required party is not served and given the opportunity to represent its interests. See Rosa v. Araujo, 260 N.J. Super 458, 462 (App. Div. 1992). Further, without apprising interested parties of an action, due process is not afforded them. O'Connor v. Abraham Altus, 67 N.J. 106, 126 (1975) (citation omitted). Since plaintiff did not notice the LCC nor two of its members, Marie and Joseph, the court did not have the authority to appoint a receiver to collect its income to give plaintiff or direct the LLC's tenant to pay a portion of its rent to the receiver.

In addition, considering defendant only owned a one percent share of the LLC, the court exceeded the LLC's operating agreement[5]

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[5] Article 7.5 provides:

> If . . . any [p]erson acquires all or any part of the LLC [i]nterest of a [m]ember . . . by operation of law or judicial proceeding, the holder(s) of said LLC [i]nterest shall be entitled to receive only the share of income, gain, deductions, credits, and losses and the return of contributions to which said [m]ember would otherwise be entitled, and said [p]erson shall have no right to participate in the

by ordering the receiver to give plaintiff twenty-five percent of all income collected by the LLC. See N.J.S.A. 42:2C-2 (defining a member's transferable interest as the amount of the LLC distributions the member can receive based upon the interest set forth in the operating agreement).

Furthermore, venue may also lie outside the court's Essex County vicinage. Under Rule 4:53-2, when there is an appointment of a receiver, venue shall be "in the county where the principal place of business of the corporation or partnership is located." Here, Article 2.1(e) of the LLC's operating agreement indicates that the principal place of business "shall be determined by the [m]embers as they deem advisable." According to the record, the LLC office is located in Bergen County (Elmwood Park).

Finally, defendant seeks retroactive alimony modification on the basis of retirement and a change in circumstances under the recently revised alimony statute, N.J.S.A. 2A:34-23.[6] Despite his claim to the court that his alimony needed to be reduced because he was living below the "poverty line," defendant failed to argue that any provision of the statute applied to his situation. Since

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> management of the LLC and vote on matters coming before the LLC.

[6] The revision became effective September 10, 2014, about a year prior to the September 4, 2015 order being appealed.

defendant did not raise this argument, and it does not go to the court's jurisdiction or concern a matter of public importance, we chose not to consider it. R. 2:5-4; Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (citation omitted).

In sum, the order of September 4, 2015 is affirmed, while the orders of May 5, 2016, July 14, 2017, and November 16, 2017 pertaining to the LLC are vacated. We remand for further proceedings consistent with this opinion, and we do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION