SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1344-16T2

V.T.,

Plaintiff-Appellant,

v.

K.T.,

Defendant-Respondent.

Submitted February 6, 2018 – Decided February 28, 2018

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Somerset County, Docket No. FM-18-0101-13.

The DeTommaso Law Group, LLC, attorneys for appellant (Andrew M. Shaw, on the briefs).

John W. Thatcher, attorney for respondent.

PER CURIAM

Plaintiff V.T. appeals from a March 1, 2016 order that vacated a Qualified Retirement Benefits Court Order (QRBCO) to distribute plaintiff's share of defendant K.T.'s Thrift Savings Plan (TSP) account, pursuant to Rule 4:50-1(f). Plaintiff also appeals from

an October 25, 2016 order that required her to distribute $54,000 to defendant by way of a new Qualified Domestic Relations Order (QDRO), denied plaintiff's motion for reconsideration, and awarded defendant $4000 in counsel fees. We affirm.

I.

The following facts are taken from the record. The parties were divorced on February 7, 2013. The issues in the divorce were resolved in a written Marital Settlement Agreement (MSA), negotiated through counsel. The MSA stipulated defendant had earned approximately $56,000 per year from his employment with the United States Postal Service and a local church, and that plaintiff earned approximately $35,000 per year from her employment with Somerset County and a local church. Thus, according to the MSA, "[t]he parties lived a very modest lifestyle."

Pursuant to the MSA, defendant agreed to pay plaintiff $700 per month in permanent alimony, and $924 per month in child support for the parties' two children. The remainder of the financial issues in the MSA focused on the parties' modest equitable distribution. Specifically, plaintiff was afforded the ability to retain the parties' former marital residence valued at approximately $179,000, provided she pay off the credit card debt, refinance, and pay off the mortgage and home equity line of credit totaling approximately $116,000. Thereafter, the MSA provided

"[a]ny remaining monies from the refinance shall be divided equally by the parties." The parties agreed to other contingencies regarding the refinance of the marital residence; however, the overall equitable distribution scheme was to equally share the equity of the residence.

The parties agreed to retain their respective automobiles, a 1999 Oldsmobile and a 2003 Volkswagen, without an offset in equitable distribution. They agreed to account for and equally distribute in-kind approximately $24,000 in savings bonds.

The MSA required the marital coverture portion of defendant's retirement accounts, including the TSP, be equalized within forty-five days. The equalization was to be adjusted to provide defendant a credit for his interest in the marital home. Specifically, the MSA stated:

> [Defendant] shall be entitled to a credit for one half of the difference between the appraisal price and the refinance monies actually obtained from the home. This credit shall be a non-tax adjusted credit against monies owed to [plaintiff] from [defendant's] thrift account . . . . By way of example only, if the home appraises for $179,000, and the maximum monies that are refinanced by [plaintiff] are $149,000, one half the difference of $30,000, namely $15,000 shall be credited in [defendant's] favor from [plaintiff's] share of the [TSP].

The amounts due each party from the refinance were unknown at the time of the MSA. However, afterwards the parties and their counsel executed a consent order that memorialized $13,175 would be credited to defendant's share of the TSP as his one-half share of the equity from the former marital residence. The consent order also defined the previously unknown amounts to be included in the future QRBCO.

Plaintiff, through counsel, submitted an application on behalf of the parties to pension evaluators at Troyan, Inc. (Troyan), for Troyan to determine the distribution of defendant's TSP pursuant to the MSA. Consistent with the MSA, the application stated plaintiff was to receive fifty percent of the funds in the account, less the $13,175 credit to defendant. Defendant's employer rejected Troyan's subsequent submission and the proposed distribution, stating:

> the court order does not meet [the] requirement [that the payee's entitlement be described in terms of a fixed dollar amount or as a percentage or fraction of the account as of a particular date] because it assigns [plaintiff] "an amount equal to [fifty percent] of the marital interest, Date of Marriage to End of Marriage Date 08/27/1988 to 07/02/2012; less the sum certain of $13,175.00 of the [TSP]" which is a non-qualifying computation.

Therefore, Troyan prepared the QRBCO, which did not include the $13,175 credit to defendant. Plaintiff's counsel signed the QRBCO, as did defendant's then-attorney. The court entered the order on February 13, 2015. When defendant received his copy of the signed QRBCO, he noticed it granted plaintiff $112,000 of his retirement account and would leave him with $53,000. Defendant's telephone calls and attempts to meet with his counsel were unsuccessful.

On June 29, 2015, defendant received a distribution notice from TSP, which confirmed plaintiff had received $111,693.90, leaving a remaining balance in the account of $53,180.38. Defendant hired new counsel who retained Pension Appraisers, Inc. to perform a valuation of the retirement account distribution. Pension Appraisers contacted Troyan regarding the QRBCO, however, Troyan advised that plaintiff's counsel "ha[d] not permitted [them] to discuss this matter with . . . Pension Appraisers, Inc." Plaintiff's counsel disputed the claim he forbade Troyan from speaking with defendant's expert and instead asserted he had not instructed Troyan "one way or the other" regarding sharing information with Pension Appraisers. When defendant's counsel attempted to arrange a conference between Troyan and Pension Appraisers he was informed plaintiff's counsel had not submitted

the "signed authorization forms" required to release the information.

The parties entered mediation to resolve unrelated post-judgment issues, but the mediation discussions evolved to include the dispute regarding the distribution of the TSP. Subsequent to mediation, the mediator circulated a proposed order, which included a provision that defendant and his counsel were permitted to access Troyan's records, and required Troyan to discuss all details of the work performed for the parties. Plaintiff refused to sign the proposed consent order.

Therefore, defendant filed a motion to vacate the QRBCO, which the motion judge granted on March 1, 2016. The order permitted defendant's counsel to obtain all information related to the QRBCO from Troyan, and required the parties and counsel to cooperate if more information was needed. The order permitted a sixty-day discovery period to complete the investigation and for the parties to execute a new QRBCO. The order required both parties to work directly with Troyan and cooperate with each other to prepare a new QRBCO, and "provide all relevant information and documentation regarding same without the express written approval of the other party."

As a result of the court-ordered information exchange, Pension Appraisers concluded plaintiff owed defendant $61,632.61.

Defendant's counsel proposed a resolution to the dispute, which plaintiff rejected. Plaintiff requested all documentation defendant had submitted to Pension Appraisers for her expert to review before she agreed to a revised QRBCO.

Defendant's counsel made several attempts to contact plaintiff's counsel to follow up on the status of her expert's investigation. Plaintiff, through counsel, responded that they were only "in the process" of having an independent expert review the materials provided and sought further documentation for the expert's review. Defendant's counsel complied and provided all of the documents Troyan had provided to him to plaintiff's counsel. Defendant's counsel requested the name of the independent expert plaintiff had hired, only to learn she had retained Troyan.

Because plaintiff had failed to produce an expert report, defendant filed a motion to enforce litigants rights, seeking: (1) the court to accept the Pension Appraisers valuation of the TSP; (2) directing Pension Appraisers to prepare a new QRBCO consistent with its report; (3) requiring plaintiff to return the overpayment she previously received from the TSP; and (4) requiring plaintiff to pay defendant's counsel fees for the enforcement application.

The day after defendant filed his motion, plaintiff produced Troyan's expert report, which conceded the previous distribution had been made in error and that defendant was owed $47,665.16.

Plaintiff also opposed defendant's motion and filed a cross-motion for reconsideration of the previous court order, and for a plenary hearing and other relief.

On October 25, 2016, the motion judge entered an order, which denied plaintiff's cross-motion and granted defendant's motion for Pension Appraisers to prepare a new QDRO. However, the judge denied defendant's request to adopt the Pension Appraisers' report, and instead ordered plaintiff to return $54,000.00 to defendant, which represented approximately one-half of the difference between the $61,632.61 in Pension Appraisers' report and the $47,665.16 in Troyan's report. The motion judge also granted defendant $4,000 in counsel fees.

On appeal, plaintiff argues the motion judge erred in granting the motion to vacate the QRBCO because defendant's error of submitting the initial QRBCO was one he could have protected himself from, and did not constitute the sort of mistake cognizable under Rule 4:50-1(a). Plaintiff also argues the judge was precluded from according relief under Rule 4:50-1(f) because it is not available when another grounds for relief is asserted. Plaintiff claims even if relief were available under Rule 4:50-1(f), defendant did not demonstrate the exceptional circumstances necessary to meet it. Plaintiff argues defendant's contention that his former counsel did not discuss the initial version of the

QRBCO and submitted it to the court for entry without defendant's authorization was a disputed fact, which the motion judge should have scheduled a plenary hearing to resolve. Lastly, plaintiff argues the motion judge's counsel fee award lacks adequate findings.

II.

We begin with our standard of review. The Supreme Court has stated:

> [F]indings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence. Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). . . .
>
> If the trial court's conclusions are supported by the evidence, we are inclined to accept them. Ibid. We do "not disturb the 'factual findings and legal conclusions of the trial judge unless . . . 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.'" Ibid. (quoting Rova Farms Resort, Inc. v. [Inv'rs] Ins. Co. of Am., 65 N.J. 474, 484 (1974)). "Only when the trial court's conclusions are so 'clearly mistaken' or 'wide of the mark'" should we interfere to "ensure that there is not a denial of justice." 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. G.L., 191 N.J. 596, 605 (2007)).
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> [Gnall v. Gnall, 222 N.J. 414, 428 (2015).]

"Appellate courts accord particular deference to the Family Part because of its 'special jurisdiction and expertise' in family

matters." Harte v. Hand, 433 N.J. Super. 457, 461 (App. Div. 2013) (quoting Cesare, 154 N.J. at 412). However, "[t]his court does not accord the same deference to a trial judge's legal determinations. Rather, all legal issues are reviewed de novo." Ricci v. Ricci, 448 N.J. Super. 546, 565 (App. Div. 2017) (citing Reese v. Weis, 430 N.J. Super. 552, 568 (App. Div. 2013)).

Our review of equitable distribution determinations is narrow. Valentino v. Valentino, 309 N.J. Super. 334, 339 (App. Div. 1998); Wadlow v. Wadlow, 200 N.J. Super. 372, 377 (App. Div. 1985). We decide only whether the trial court "mistakenly exercised its broad authority to divide the parties' property and whether the result was 'reached by the trial judge on the evidence, or whether it is clearly unfair or unjustly distorted by a misconception of law or findings of fact that are contrary to the evidence.'" Valentino, 309 N.J. Super. at 339 (quoting Wadlow, 200 N.J. Super. at 382). "A sharp departure from reasonableness must be demonstrated before our intercession can be expected." Wadlow, 200 N.J. Super. at 382 (quoting Perkins v. Perkins, 159 N.J. Super. 243, 248 (App. Div. 1978)).

We review a trial judge's enforcement of litigant's rights pursuant to Rule 1:10-3 under an abuse of discretion standard. Barr v. Barr, 418 N.J. Super. 18, 46 (App. Div. 2011). An award

"of counsel fees is discretionary, and will not be reversed except upon a showing of an abuse of discretion." Ibid.

III.

At the outset, we reject plaintiff's argument pursuant to Manning Eng'g, Inc. v. Hudson Cty. Park Comm'n, 74 N.J. 113 (1977), that the motion judge could not adjudicate defendant's motion pursuant to Rule 4:50-1(f). Although relief under Rule 4:50-1(f) "may be granted only where the court is presented with a reason not included among any of the reasons subject to" Rule 4:50-1(a) to (c), there was ample evidence for the motion judge to grant relief, independently, under Rule 4:50-1(f). Manning, 74 N.J. at 123.

In pertinent part, Rule 4:50-1 states: "On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: . . . (f) any other reason justifying relief from the operation of the judgment or order." Generally, "[c]ourts should use Rule 4:50-1 sparingly, [and] in exceptional situations[.]" Hous. Auth. of Morristown v. Little, 135 N.J. 274, 289 (1994).

"No categorization can be made of the situations which would warrant redress under subsection (f). . . . [T]he very essence of (f) is its capacity for relief in exceptional situations. And

in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice." DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 269-70 (2009) (quoting Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966)) (alterations in original). Relief under Rule 4:50-1 "is designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case." Manning, 74 N.J. 113, 120 (citing Hodgson v. Applegate, 31 N.J. 29, 43 (1959)).

The Supreme Court recently stated:

> Settlement of disputes, including matrimonial disputes, is encouraged and highly valued in our system. Indeed, there is a "'strong public policy favoring stability of arrangements' in matrimonial matters." . . . Therefore, "fair and definitive arrangements arrived at by mutual consent should not be unnecessarily or lightly disturbed." . . .
>
> A settlement agreement is governed by basic contract principles. Among those principles are that courts should discern and implement the intentions of the parties. It is not the function of the court to rewrite or revise an agreement when the intent of the parties is clear. . . . Thus, when the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result. See Sachau v. Sachau, 206 N.J. 1, 5-6, (2011) ("A court's role is to consider what is written in the context of the circumstances at the time of drafting and to apply a rational meaning in

> keeping with the expressed general purpose." (internal quotations and citations omitted)).
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> [Quinn v. Quinn, 225 N.J. 34, 44-46 (2016) (citations omitted).]

We have previously stated that:

> Only those agreements which are fair and equitable will be enforced when dealing with family law.
>
> The law grants particular leniency to agreements made in the domestic arena, and likewise allows judges greater discretion when interpreting such agreements. See N.J.S.A. 2A:34-23. Such discretion lies in the principle that although marital agreements are contractual in nature, "contract principles have little place in the law of domestic relations."
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> [Guglielmo v. Guglielmo, 253 N.J. Super. 531, 541-42 (App. Div. 1992) (quoting Lepis v. Lepis, 83 N.J. 139, 148 (1980)) (citations omitted).]

Here, after reciting the law governing an application for relief pursuant to Rule 4:50-1(f), the motion judge stated:

> [T]he original application to Troyan indicated that [p]laintiff would receive [fifty percent] of the marital portion of [d]efendant's retirement plan. An additional $13,175 credit was to be given to [d]efendant from the proceeds of the QDRO. As set forth in the [QRBCO] . . . [p]laintiff was to receive $84,235. According to [d]efendant's representation, [p]laintiff actually received about $112,000, while [d]efendant received about $53,000. . . . Based on the foregoing, the court finds it to be inequitable to allow the current distribution of [d]efendant's retirement plan to stand without giving

> [d]efendant a full opportunity to make the necessary inquiries of Troyan as to how the QDRO was completed.

We agree. As we noted, the parties' MSA recited the marital lifestyle was "very modest." The parties had little by way of assets after nearly a twenty-four year marriage, and defendant's TSP was the most valuable asset. Furthermore, after defendant paid plaintiff alimony and child support, plaintiff's receipts exceeded defendant's. Therefore, it was reasonable for the parties' MSA to adopt an equal division rubric for the marital assets and liabilities. Under these circumstances, plaintiff has not advanced a plausible argument why defendant's TSP would be divided in a manner whereby she received nearly seventy percent of the asset.

The motion judge did not abuse his discretion by applying Rule 4:50-1(f) to vacate the QRBCO. On their face, the facts demonstrate permitting the QRBCO to stand would be contrary to the intent of the parties' MSA and would work an unjust result. For these reasons, we are also satisfied a plenary hearing was not necessary to address the circumstance relating to the submission of the QRBCO by the parties' counsel to the court for signature.

The parties' intent regarding division of the TSP was clearly expressed in the terms of the MSA.[1]

IV.

Plaintiff challenges the motion judge's award of $4000 in counsel fees to defendant for the motion filed to enforce litigant's rights. Plaintiff argues the motion judge failed to analyze the requisite factors of Rule 5:3-5(c). She also asserts the judge's reasoning is unclear because he assumed the parties were in mediation to address the TSP and that plaintiff failed to comply with the mediator's order to execute a new QRBCO. Plaintiff also argues the motion judge's finding she acted in bad faith because she retained Troyan to prepare a rebuttal report to the Pension Appraiser's report was erroneous.

Rule 5:3-5(c) sets forth nine factors the court must consider in making an award of counsel fees in a family action. Essentially,

> in 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

[1] We note plaintiff does not contest how the motion judge determined the $54,000 sum, namely, to award one-half the difference of the figures determined by each party's expert. Although the better practice would have been to hold a plenary hearing before determining the figure, plaintiff's argument for a plenary hearing is limited only to the facts surrounding submission of the QRBCO by the parties' counsel to the court. R. 2:5-1(f)(1).

> 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) (emphasis omitted).]

Even when there is not a financial disparity between the parties, "where a party acts in bad faith the purpose of a counsel fee award is 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 v. Yueh, 329 N.J. Super. 447, 461 (App. Div. 2000)).

> Fees in family actions are normally awarded to permit parties with unequal financial positions to litigate (in good faith) on an equal footing. With the addition of bad faith as a consideration, it is also apparent that fees may be used to prevent a maliciously motivated party from inflicting economic damage on an opposing party by forcing expenditures for counsel fees. This purpose has a dual character since it sanctions a maliciously motivated position and indemnifies the "innocent" party from economic harm.
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> [J.E.V. v. K.V., 426 N.J. Super. 475, 493 (App. Div. 2012) (citations omitted) (quoting Kelly v. Kelly, 262 N.J. Super. 303, 307 (Ch. Div. 1992)).]

As the court noted in Kelly,

> where one party acts in bad faith, the relative economic position of the parties has little relevance. The purpose of the award is to protect the "innocent" party from unnecessary costs and to punish the "guilty"

> party. The court should afford protection and impose punishment regardless of the assets available to the innocent party. Accordingly, the need to produce economic information lessens as the "bad faith" of the party against whom fees are sought increases; conversely the court may not award fees in the absence of disclosure demonstrating economic disparity unless the moving party shows "bad faith".
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> [262 N.J. Super. at 307.]

The motion judge found that:

> Plaintiff acted in bad faith by demanding [d]efendant obtain information from Troyan, Inc., the preparer of the original [TSP's] QDRO only to turn around and utilize Troyan, Inc. to prepare her own expert report. In other words, [p]laintiff required [d]efendant to obtain material from Troyan only to herself use Troyan as her own expert. This course of action resulted in a significant delay that was both unneeded and unnecessary. . . .
>
> Defendant was not unreasonable in filing the present motion, as there had been a violation of a prior order by [p]laintiff. Defendant's motion is predicated upon [p]laintiff's noncompliance with the prior order. The court finds [p]laintiff's conduct to be unacceptable for reasons stated above.

Contrary to plaintiff's argument, the motion judge did not make a finding of bad faith because plaintiff retained Troyan. Rather, the judge found bad faith due to the delay plaintiff occasioned by failing to grant defendant timely access to Troyan's records, only to then return to Troyan when it suited her needs.

Moreover, the judge's finding regarding bad faith did not pertain to the mediation.

Finally, because the judge granted counsel fees as a part of a motion to enforce litigant's rights, and found plaintiff had acted in bad faith, he was not required to address the factors relating to the parties' financial circumstances, namely, Rule 5:3-5(c)(1), (2), (4), and (6). The record demonstrates counsel fees were warranted given the effort required of defendant to extract information from Troyan, to which plaintiff lent no assistance. Additionally, defendant prevailed and plaintiff did not. Therefore, the record adequately supports the award of counsel fees to defendant pursuant to the remaining applicable factors, specifically Rule 5:3-5(c)(3), (7), and (8).

Affirmed.