SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1633-15T1
A-5325-15T1

A.C.,[1]

Plaintiff-Appellant,

v.

B.C.,

Defendant-Respondent.

Argued February 12, 2018 – Decided May 1, 2018

Before Judges Ostrer and Whipple.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Burlington County, Docket No. FM-03-1295-12.

A.C., appellant, argued the cause pro se.

Joseph F. Polino argued the cause for respondent (Polino and Pinto, PC, attorneys; Joseph F. Polino, of counsel and on the brief; Joseph M. Pinto, on the brief).

PER CURIAM

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[1] We use initials to protect the identity of the victim and the children.

In these consolidated matters plaintiff A.C. appeals from three orders of the Family Part enforcing a judgment of divorce entered between her and her ex-husband, defendant B.C. Because the trial court erred in vacating defendant's child support arrearages, we reverse and remand for the trial court to determine the amount of arrearages due and set a payment based on defendant's ability to pay.

Plaintiff and defendant were married in October 2000; the couple then had two children, aged ten and six at the time of the following incidents. In February 2012, defendant attempted to strangle plaintiff, and allegedly also attacked their oldest child. He was stopped by police, arrested, and charged with two counts of attempted murder. In December 2012, defendant pled guilty to one count of second-degree aggravated assault, and was sentenced to four years in prison. A Final Restraining Order (FRO) was entered prohibiting defendant from dissipating marital assets, granting plaintiff exclusive possession of the marital home, and requiring him to pay $299 per week in child support. He was further barred from all contact with plaintiff or the children. Plaintiff filed a complaint for divorce in May 2012.

In October 2012, the court entered an order modifying defendant's support obligations. He was ordered to pay $300 per

week in child support plus $100 towards arrears, and $300 per week in spousal support to plaintiff.

In February 2013, the court allowed defendant to obtain funds from retirement assets to pay child support and alimony arrearages accumulated to that point.

In June 2015, after a two-day trial, a final judgment of divorce was entered, and on June 24, 2015, the court entered a supplemental judgment of divorce (SJOD) granting plaintiff sole custody of the children and continuing the October 2012 child support order. Plaintiff was not granted alimony, due to "[p]laintiff's multiple failures to comply with [c]ourt [o]rders regarding financial disclosures and earning potential." Of defendant's three retirement accounts, only one was partially marital property, and a Qualified Domestic Relations Order (QDRO) was to be prepared for each plan to determine how much plaintiff would receive.

The court ordered the immediate sale of the marital home, "due to its deteriorating physical condition." The proceeds of the property sale were to be split equally between plaintiff and defendant, and defendant's share would be first applied to satisfy all child support arrearages. That same day, the court appointed a realtor for the listing, marketing, and sale of the home; plaintiff was to cooperate with him, provide him with a set of

keys to the property, and also remove all personal property from the marital home. The order authorized the realtor to access the home for these purposes and restrained the parties from interfering with his efforts. Further, the court reserved the right to appoint an attorney-in-fact if either party failed to cooperate. Plaintiff did not appeal from the SJOD or the order appointing the realtor.

In November 2015, the court ordered the parties to appear on defendant's motion to enforce the SJOD, and also permitted orders and certifications to be served on plaintiff by email, "as this is the only means of communication on record." On November 6, 2015, counsel for defendant appeared as directed, but plaintiff neither appeared nor filed opposition to the motion. When asked if plaintiff received notice of the hearing, counsel stated,

> [W]e do not know where to find [plaintiff] at any given time . . . she has refused . . . to divulge her location upon which she could be served with mail. The Court order permitted me to serve her, as I have been, through her email. And, frankly, her email works. It went through. I've had communications or have been copied by communications from her[.]

The realtor advised that the house could be sold at $120,000 as-is, due to its deteriorating condition. However, plaintiff had not removed her personal property from the property, and had engaged in behavior harassing the realtor, the accountant appointed to perform the QDROs, and defense counsel and his family.

The court stated that, "the court certainly finds no fault in the [p]laintiff not disclosing her present location consistent with the underlying policies of the Domestic Violence Act." However, "the court is satisfied that the [p]laintiff has continued to communicate with persons involved in the case by email," that she had been given notice of the hearing by email, and had chosen not to appear.

It entered an order authorizing the realtor to list the property as recommended, and executed the QDROs. Further, it restrained plaintiff from communicating with or harassing the court-appointed realtor, or any other person involved with the sale of the home; defendant's counsel and counsel's family, and from being present near defendant's counsel's home or office.

Lastly, it appointed an attorney-in-fact, Michael Rothmel, Esq., to execute all documents necessary at closing to effectuate the sale of the property "[i]n the event an agreement of sale is negotiated for the property and either party is unable or unwilling to attend and participate in the closing." Plaintiff was prohibited from contacting the attorney or his staff. Plaintiff filed her first appeal from this order, under Docket No. A-1633-15.

In December 2015, the court denied plaintiff's motion to stay the November 6, 2015 order. Plaintiff then filed an emergent

application seeking to stop the sale of the home, and alleging that the service by email was improper and therefore denied her due process by proceeding in her absence. This application was denied, this court reasoning that plaintiff was in fact appealing from the SJOD, and did not file for a stay in the trial court.

In May 2016, defendant was released from incarceration, and filed for a modification of his support obligations.

On June 22, 2016, the court entered an order after a hearing, at which, despite being served via email, plaintiff neither appeared nor filed opposition. The court ordered the marital property sold for $60,000.[2]

The court vacated all child support arrears, in the amount of $41,292.92, under Halliwell v. Halliwell, 326 N.J. Super. 442 (App. Div. 1999). Further, it vacated all spousal support arrears, in the amount of $21,304.84. Lastly, it reduced defendant's child support obligation to $100 per week, in recognition of the "significant change in circumstances" since defendant was now a convicted felon working for $11 per hour, a marked reduction from his previous salary of $90,000 per year. Plaintiff filed her second appeal, under Docket No. A-5325-15, from this order.

[2] In February 2016, the property was re-appraised, as it had been destroyed in a fire.

In September 2016, the court denied a request by plaintiff to stay the June 22, 2016 order; plaintiff then filed an emergent application with this court seeking a stay, which was denied as not containing a threat of irreparable injury. On November 8, 2016, plaintiff amended her appeal, under A-5325-15, to include the September 2016 order.

On appeal, plaintiff asserts that: (1) service by email was improper, and that the proceedings in her absence deprived her of her due process rights; (2) the restraining orders against her were improper; (3) the sale of the home and execution of the QRDOs was improper; and (4) the court improperly recalculated defendant's child support obligations and vacated his arrearages.

I.

Plaintiff argues the use of email to serve her with papers and notices regarding the hearings before the court was improper. After service of initial pleadings, service upon a party 'shall be made as provided in R. 4:4-4, or by registered or certified mail.' R. 1:5-2; see also R. 1:5-1. Under Rule 4:4-4(b)(1)(C)(3), "[i]f service cannot be made by any of the modes provided by this rule, any defendant may be served as provided by court order, consistent with due process of law." "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all

the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." O'Connor v. Altus, 67 N.J. 106, 126 (1975) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

Plaintiff asserts she provided her mailing address to the court "in every single motion for years" and asserts the court was "very well inform[ed] about [her] PO Box and was sending correspondence to her for years." However, she does not provide proof to support her assertions that the court knew of her address at the start of the litigation, and the only address in the record is the Mt. Laurel home, which was at first for sale, and later burned to the ground.

Most importantly, plaintiff has not certified that she did not receive the emails sent to her pursuant to the various court orders, only that it was not her preferred method of communication. Throughout the pendency of the proceedings, plaintiff was communicating with the realtor, the accountants, and defendant's counsel about the multitude of disputes she had. She cannot claim now that she was not receiving emails at that address, and that she had no notice of any proceedings.

An error will not lead to reversal unless it is "clearly capable of producing an unjust result." R. 2:10-2; see State v.

Macon, 57 N.J. 325, 337-38 (1971). We do not endorse the use of email service, however, given the circumstances surrounding these parties, and plaintiff's frequent use of her email address, the use of email to serve plaintiff with motion papers was "reasonably calculated under all the circumstances, to apprise [her] of the pendency of the action and afford [her] an opportunity to present [her] objections." O'Connor, 67 N.J. at 126; Rosa v. Araujo, 260 N.J. Super. 458, 463 (App. Div. 1992) (citations omitted). Even if the court and defendant were in possession of a reliable mailing address for plaintiff, any error present in substituting email service was harmless. Therefore, we decline to disturb the resulting orders based on the manner of service of defendant's motions.

II.

Plaintiff argues the trial court abused its discretion by ordering the sale of the marital home and the execution of the QDROs. As a threshold matter, the notices of appeal indicate plaintiff only appeals from the November 6, 2015, June 22, 2016, and September 15, 2016 orders, and not from the June 24, 2015 SJOD. "It is clear that it is only the orders designated in the notice of appeal that are subject to the appeal process and review." W.H. Indus., Inc. v. Fundicao Balancins, Ltda, 397 N.J.

Super. 455, 458 (App. Div. 2008) (citing Sikes v. Twp. of Rockaway, 269 N.J. Super. 463, 465-66 (App. Div. 1994)).

As such, this court will review the provisions authorizing the sale of the home and the adoption of the QDROs as enforcement actions. A ruling on an enforcement motion in a matrimonial action "is reviewed for abuse of discretion, with deference to the expertise of Family Part judges." See Costa v. Costa, 440 N.J. Super. 1, 4 (App. Div. 2015) (citations omitted). This deference applies "unless it is determined that they went so wide of the mark that the judge was clearly mistaken." N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007). If the record as a whole supports a finding that a party has violated an order, and so long as there is a rational explanation consistent with law and the evidence, this court will not disturb the judge's discretionary choice of a remedy. Milne v. Goldenberg, 428 N.J. Super. 184, 197-99 (App. Div. 2012); see e.g., P.T. v. M.S., 325 N.J. Super. 193, 219-20 (App. Div. 1999).

Under the SJOD, the home "shall be sold as soon as possible, due to its deteriorating physical condition." The court then appointed a realtor, who, based on a "comparative analysis" done for the property, initially estimated the house should be listed for $150,000.

Once the realtor was able to gain access[3] to the home, he saw immediately that "the house was a train wreck," "the exterior and interior of the home have been neglected and are in disrepair," "the inside is packed full of debris, and there are strong, obnoxious odors throughout the house." He advised that "a total clean out and renovation are necessary to make the house habitable." In his opinion, "the only market for this property is an investor who will buy it 'as is' and clean it out, re-list it and re-sell it." As a result, he determined the market value to be $120,000. Based on the foregoing, and the fact that the property was a wasting asset causing harm to plaintiff through losing value, the court authorized the sale of the home at the price suggested by the realtor.

Before the property could be sold, it was destroyed in a mysterious fire, and despite being responsible for maintaining homeowners insurance, plaintiff had not done so. New comparative market analyses on the property estimated the reasonable sale price of the empty lot at $60,000; the court ordered it sold at this amount. We cannot say that the determination to sell at this

[3] Plaintiff refused to provide the realtor with keys, forcing him to hire a locksmith, only to find that plaintiff had barricaded the front door with "furniture and many other items."

amount was an abuse of discretion, as it was amply supported by evidence in the record.

Plaintiff also claims that under the terms of the SJOD, there were three retirement plans in question, therefore three QDROs were to be prepared, and the adoption of only two QDROs in the November 6, 2015 order was improper. At the outset, the SJOD does not specify the number of QDROs to be prepared, and only directs that the QDROs created must divide the marital portion of the three retirement plans equally between the parties.

Of the defendant's three retirement plans with Lockheed, (1) the Capital Accumulation Plan would be considered almost completely a marital asset, and would have entitled plaintiff to $2,771.70; (2) the Performance Sharing Plan was mostly pre-marital and a small percentage was marital property; and (3) the Pension Plan for Employees in Participating Bargaining Units was also partially marital and pre-marital property.

Defendant's counsel suggested instead of giving plaintiff the $2,771.70 due from the Capital Accumulation Plan, plaintiff may share in the entire balance of the Performance Sharing Plan. The end result was that plaintiff walked away with more than if they had strictly abided by the marital/pre-marital splits. This also saved costs which would have resulted from the preparation of a third QRDO. Despite this, the accountant informed plaintiff, "if

you would like to treat each account individually instead of receiving a larger balance from the Performance Sharing Plan, please remit an additional $700 and all of [defendant's] Performance Sharing Plan quarterly statements[.]" There is no indication in the record that plaintiff did so or otherwise responded in any way to these requests, and the two resulting QDROs distribute the proceeds of the Performance Sharing Plan and the Pension Plan for Employees in Participating Bargaining Units.

Since the judgment required the retirement plans be split equally, in the most technical sense, the court violated the SJOD by approving the two QDROs. However, any error from this is harmless. Plaintiff walked away from the transaction with more money than she was actually entitled to, both because the value of the plans she shared in were more and because unnecessary costs were saved. As such, since the decision of the court was supported by credible evidence, and we cannot say the result was capable of producing an unjust result, the orders authorizing the sale of the home and execution of the QDROs are affirmed.

III.

Next, plaintiff argues the trial court abused its discretion in imposing restraints preventing her from contacting certain people involved with the sale of the home. Notably, plaintiff was prohibited from contacting and harassing the realtor or his staff,

defense counsel's family, and the attorney-in-fact or his staff. The decision to award preliminary relief, such as the issuance of restraints, "summons the most sensitive exercise of judicial discretion." Crowe v. De Gioia, 90 N.J. 126, 132 (1982); see Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 395 (App. Div. 2006) (citation omitted).

In determining whether to grant a stay or preliminary injunction, we must consider: (1) whether an injunction is "necessary to prevent irreparable harm"; (2) whether "the legal right underlying [the applicant's] claim is unsettled"; (3) whether the applicant has made "a preliminary showing of a reasonable probability of ultimate success on the merits"; and (4) "the relative hardship to the parties in granting or denying [injunctive] relief." Crowe, 90 N.J. at 132-34. "The time-honored approach in ascertaining whether a party has demonstrated a reasonable likelihood of success requires a determination of whether the material facts are in dispute, and whether the applicable law is settled." Waste Mgmt. of N.J., Inc. v. Union Cty. Utils. Auth., 399 N.J. Super. 508, 528 (App. Div. 2008) (citations omitted).

In his certification dated October 27, 2015, the realtor asserted plaintiff showed up at his office, with her children, and "created a loud and annoying scene which lasted until the police

were called." He alleged she made false statements alleging she had not received communications regarding the property, and "was in the complete dark about the circumstances of the sale." When the police arrived and told her to leave, she refused to give her identification, and eventually left. She came back shortly after, but left before the police were involved again.

Further, defendant's counsel asserted plaintiff engaged in cyberstalking, evidenced by her referencing his wife and children in several emails to the accountant performing the QDROs. She made references to his being involved in the Italian mafia, had accused him of being a pedophile, and she "ha[d] been seen sitting in her car, outside of [his] office, for whatever reason." He requested a restraining order prohibiting plaintiff from making such attacks, from appearing at his office, and directing her to conduct all communication by phone, email, or mail.

Plaintiff asserts Mr. Rothmel is her appointed attorney, and asks "how is [he] supposed to defend his [client's] interest if [he] does not know what[] plaintiff's interest is without contacting her?" An attorney-in-fact is "one who is designated to transact business for another." Black's Law Dictionary 124-25 (7th Ed. 1999). He may be appointed by the court to perform certain tasks, such as executing documents. See Joel v. Morrocco, 147 N.J. 546, 551 (1997).

Mr. Rothmel was appointed attorney-in-fact for the sole purpose of executing all documents necessary to effectuate the sale of the property, "[i]n the event an agreement of sale is negotiated for the property and either party is unable or unwilling to attend and participate in the closing." (emphasis added). Thus, he was not appointed specifically for plaintiff's benefit, but could act in the stead of either party. Further, Mr. Rothmel's appointment by the court was limited, and did not extend to general advocacy on behalf of either party. It just so happened that it was necessary for him to act for plaintiff, as the court determined more than once that she was unlikely and generally unwilling to cooperate with the sale of the house, a conclusion we cannot say was error based on the record. He could just have easily have been acting on behalf of defendant. Given the limited nature of Mr. Rothmel's role, and given plaintiff's history of harassment of other parties to the sale, it was not an abuse of discretion for the court to preempt this behavior and restrain her at this time.

Though the judge did not make explicit findings with regards to each Crowe factor, the evidence in the record supports the restraints. There is no reason why he should have permitted plaintiff to harass the realtor, defendant's counsel's family, or Mr. Rothmel, and plaintiff did not dispute the facts alleged by

the individuals she harassed. We will not disturb the restraints on plaintiff.

IV.

Plaintiff next argues it was error for the trial court to modify defendant's child support obligation based on a finding of changed circumstances. Rulings from requests for modifications are "reviewed for abuse of discretion, with deference to the expertise of Family Part judges." Costa, 440 N.J. Super. at 4 (citing Hand v. Hand, 391 N.J. Super. 102, 111-12 (App. Div. 2007)). "Our courts are authorized to modify alimony and support orders 'as the circumstances of the parties and the nature of the case' require." Halliwell, 326 N.J. Super. at 448 (quoting N.J.S.A. 2A:34-23). These obligations "are always subject to review and modification on a showing of changed circumstances." Ibid. (quoting Lepis v. Lepis, 83 N.J. 139, 146 (1980)). "The party seeking modification has the burden of showing such 'changed circumstances' as would warrant relief from the support or maintenance provisions involved." Lepis, 83 N.J. at 157 (quoting Martindell v. Martindell, 21 N.J. 341, 353 (1956)).

The trial court made a finding there was a "significant change in circumstances," and set the new child support obligation at $100 per week, down from $300 per week. The finding was based on the fact that before his incarceration, defendant was making

$90,000 a year employed as an engineer at Lockheed Martin. Since his release, and now burdened with a felony conviction, defendant obtained employment as an electrician's assistant at $11 per hour. As a result "a $300 a week child support award would be oppressive" and "inconsistent with the facts." This new level of support would hopefully "allow [defendant] to maintain his employment and perhaps in the future better his position at this juncture."

Plaintiff has made no showing that the trial court's finding of changed circumstances was "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974) (citations omitted). As such, we will not disturb the trial court's modification of defendant's child support obligations.

V.

Plaintiff also argues it was error of the trial court to vacate the support arrearages. We agree as to the arrearages for child support, but not for spousal support. Specifically, plaintiff asserts the court misinterpreted and misapplied Halliwell. Questions of law determined by the trial court require de novo review by the appellate court. Smith v. Millville Rescue Squad, 225 N.J. 373, 387 (2016) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Whether prior spousal support orders should be enforced, and the extent to which a spouse should be required to pay arrearages, lies within the court's discretion. Weitzman v. Weitzman, 228 N.J. Super. 346, 358 (App. Div. 1988). "On an application to determine the amount of arrearages and to compel their payment, the court has discretion to determine whether the prior support order or judgment should be enforced and whether and to what extent a spouse should be forced to pay arrearages." Mastropole v. Mastropole, 181 N.J. Super. 130, 141 (App. Div. 1981) (citations omitted.)

In October 2012, plaintiff was initially granted pendente lite spousal support at $300 per week. However, based on plaintiff's refusal to comply with repeated requests by the court for information regarding her financial status, the SJOD did not award plaintiff alimony. In that time, defendant accrued over $21,000 in spousal support arrears.

During the June 22, 2016 hearing, the court decided, because the "plaintiff has failed to abide by a multitude of pretrial and post-trial orders with regard to disclosure of financial information," and based on the fact that the divorce court did not grant alimony, to vacate the entirety of the spousal support arrears.

Plaintiff has made no showing that the judge abused his discretion by this decision, and has not shown that this court should disturb the judge's choice of a remedy. Milne, 428 N.J. Super. at 197-99. She alleges that defendant has "[one] million dollars in four 401K's that previously were held to cover child support and alimony" and should now be used to satisfy the arrearages. However, all retirement assets were subject to equitable division through the SJOD, and were used in 2013 to pay then-existing arrearages. Plaintiff provides no evidence to support the existence of previously undisclosed accounts, or any actions on the part of defendant to hide assets.

We reach a different conclusion regarding the child support arrearages, also vacated by the June 2016 order of the trial court. "Child support is a continuous duty of both parents," and the right to the support is the child's alone. Halliwell, 325 N.J. Super. at 455 (citations omitted). Parents cannot waive the obligation to pay and the child's right to support. Martinetti v. Hickman, 261 N.J. Super. 508, 512 (App. Div. 1993).

Further, under N.J.S.A. 2A:17-56.23a, past due payments owed pursuant to child support orders cannot be modified retroactively "except with respect to the period during which there is a pending application for modification[.]" See also Mallamo v. Mallamo, 280 N.J. Super. 8, 13-14 (App. Div. 1995) (recognizing that prior to

legislative action in 1993, the decision to modify or vacate child support arrears was within the discretion of the trial court).

However, when a parent who owes child support is incarcerated, issues can arise from the resulting non-payment of support. Under Halliwell, a defendant who has child support obligations and is subsequently incarcerated should make a motion to suspend payment on his obligations, and thereafter will not be held in violation of litigant's rights and subject to additional enforcement proceedings. 326 N.J. Super. at 446. However, upon release, such a defendant is required to make payments to reduce any arrearages. The court should reinstate a defendant's support obligation, and "based upon his ability to pay, he will be required to pay an arrearage which will be established commensurate with his income." Id. at 460.

Based on our de novo review, the trial court here erred by vacating the past due child support arrearages. As such, we reverse on this issue and remand for the trial court to calculate, based on defendant's ability to pay, the amount of arrearages due and set an appropriate payment.

All remaining arguments are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed in part, reversed in part. We do not retain jurisdiction.