SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2184-16T1

DONNAJEAN KAFADER, f/k/a NAVAS,

Plaintiff-Respondent,

v.

LOUIS G. NAVAS,

Defendant-Appellant.

Submitted December 4, 2017 – Decided January 18, 2018

Before Judges Messano and Vernoia.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Ocean County, Docket No. FM-15-1453-00.

Goldstein Law Group, LLC, attorneys for appellant (Edward A. Wojciechowski, of counsel and on the brief).

Respondent has not filed a brief.

PER CURIAM

Defendant Louis G. Navas appeals from a Family Part order denying his motion to terminate or modify his alimony obligation to his ex-wife, Donnajean Kafader. We reverse.

I.

After seventeen years of marriage, plaintiff and defendant divorced in August 2000. Their property settlement agreement (PSA) required defendant to pay plaintiff $150 per week in permanent alimony "until the death of either party or the remarriage of [plaintiff]."

Defendant unsuccessfully moved to modify or terminate the alimony obligation in 2003, 2004 and 2006. The 2003 and 2004 orders state that defendant's motions were denied following hearings. Defendant's 2006 motion was denied because he failed to: file a case information statement; present any evidence showing his efforts to obtain employment; provide documentation concerning his alleged health problems; and supply complete tax returns.

In June 2016, defendant moved to terminate or modify his alimony obligation due to an alleged "significant change in circumstances and inability to pay." He claimed a significant reduction in his income and health issues, and that plaintiff was cohabiting with a paramour.

In his supporting certifications, defendant detailed his claim that plaintiff was cohabiting, explained his purported reduction in income and described his alleged health issues. He provided his federal and state tax returns for the years 2000 to 2015, a case information statement, and three doctor's letters

describing various health issues. He also submitted photographs of plaintiff and her alleged paramour together.

Plaintiff filed opposition and a cross-motion.[1] In her certification, plaintiff denied cohabiting with the alleged paramour, and asserted defendant misrepresented his income in his prior motions and was doing so again. Plaintiff claimed defendant was self-employed, derived his income solely from the operation of his construction company, and artificially and inaccurately reduced his alleged personal income by paying personal expenses with corporate funds.

After oral argument, the court found defendant failed to demonstrate changed circumstances sufficient to permit a modification of his alimony obligation, and denied defendant's motion without a plenary hearing. The court found that because the PSA listed only the death of the parties and plaintiff's remarriage as the bases upon which alimony could be terminated, the parties intentionally excluded cohabitation as grounds for modification. Relying on our Supreme Court's decision in Quinn v. Quinn, 225 N.J. 34 (2016), the court concluded it must enforce

[1] We do not address plaintiff's cross-motion. The court denied the relief requested and plaintiff did not appeal from the court's order.

the PSA and, based on its interpretation of the PSA, modification of alimony based on cohabitation was not authorized.

The court also rejected defendant's reliance on his purported health issues because the doctor's notes were "stale" and otherwise did not establish the issues interfered with defendant's ability to work or earn an income.

The court rejected defendant's contention that his alleged reduced income constituted a changed circumstance warranting modification of alimony. In its oral opinion, the court found that defendant, as a self-employed contractor, was required to provide more detailed financial information to support his claimed reduction in income. The court's order states defendant produced "some of the documents necessary to meet the prima facie standard" of changed circumstances and that plaintiff "points to documents" which defendant did not submit that would "aid the [c]ourt in determining the viability of [d]efendant's position[]." The court, however, did not identify the information it found lacking. The court also concluded it did "not have the financial accounting expertise" to determine, based on defendant's submissions, if he made a prima facie showing of changed circumstances.

The court denied defendant's motion without prejudice. This appeal followed.

Defendant makes the following arguments on appeal:

POINT I

THE TRIAL COURT ERRED AND MISINTERPRETED QUINN V. QUINN, 225 N.J. 34 (2016), BY HOLDING THAT SINCE THE PARTIES' PROPERTY SETTLEMENT DID NOT PROVIDE FOR TERMINATION OF ALIMONY BASED UPON COHABITATION, COHABITATION WAS NOT AN ISSUE IN THE CASE IN ANY RESPECT, COMPLETELY IGNORING THE LAW ON WAIVERS.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT SUBMITTED SOME DOCUMENTS TO MEET A PRIMA FACIE STANDARD UNDER LEPIS, BUT THAT PLAINTIFF POINTED TO OTHER DOCUMENTS NOT SUBMITTED WHICH WOULD AID THE COURT AND THUS DENIED DEFENDANT'S MOTION AND A PLENARY HEARING.

II.

The decision to modify an alimony obligation "based upon a claim of changed circumstances rests within a Family Part judge's sound discretion." Larbig v. Larbig, 384 N.J. Super. 17, 21 (2006). An alimony determination will not be overturned on appeal absent an abuse of discretion. See Rolnick v. Rolnick, 262 N.J. Super. 343, 360 (App. Div. 1993) (holding that vacating a court's findings as to modification of alimony requires a determination "that the trial court clearly abused its discretion"). "An abuse of discretion 'arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012) (citations omitted). "A trial

court's interpretation of the law and the legal consequences that flow from established facts are not[, however,] entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Consideration of a motion to modify alimony requires application of the standard established by our Supreme Court in Lepis v. Lepis, 83 N.J. 139 (1980). The moving party must first make a prima facie showing that "changed circumstances have substantially impaired the ability to support himself or herself." Id. at 157. To determine whether there is a prima facie showing of changed circumstances, a judge must consider the terms of the order at issue and compare the facts as they were when that order was entered with the facts as they are at the time of the motion. See, e.g., Faucett v. Vasquez, 411 N.J. Super. 108, 129 (App. Div. 2009).

"There is . . . no brightline rule by which" a court measures a change in circumstances. Larbig, 384 N.J. Super. at 23. "Each and every motion to modify an alimony obligation 'rests upon its own particular footing and [we] must give due recognition to the wide discretion which our law rightly affords to the trial judges who deal with these matters.'" Donnelly v. Donnelly, 405 N.J. Super. 117, 127 (App. Div. 2009) (quoting Larbig, 384 N.J. Super. at 24). If a prima facie showing is made, the court must then

determine if a plenary hearing is warranted. Lepis, 83 N.J. at 159; see also Crews v. Crews, 164 N.J. 11, 28 (2000) (noting the party seeking modification must make a prima facie showing of changed circumstances before being entitled to a hearing).

Here, defendant's motion was founded on three purported changed circumstances: plaintiff's alleged cohabitation; his health issues; and his claimed reduction in income. We address in turn each of the alleged changes in circumstances upon which defendant relied.

The court did not decide whether defendant made a prima facie showing that plaintiff cohabited, and instead determined cohabitation was not an issue because the PSA did not expressly list cohabitation as grounds for modification. Defendant contends the court misapplied the principles in Quinn, where the Court held in part that a PSA expressly providing for termination of alimony upon the supported spouse's cohabitation is enforceable. 225 N.J. at 50.

Unlike in Quinn, the court here was not presented with a request to enforce a clearly stated PSA provision. The parties' PSA does not directly bar modification of alimony based on cohabitation. Instead, the court inferred the parties agreed cohabitation would not provide grounds for alimony modification because the PSA refers to only the death of the parties and

plaintiff's remarriage as grounds for alimony termination. In Quinn, however, the Court observed that "[i]n the absence of an agreement that permits the obligor former spouse to cease payment of alimony, [it has] permitted a modification of alimony, including cessation of alimony, in the event of post-divorce cohabitation . . . ." Id. at 49; see also Lepis, 83 N.J. at 146 (citations omitted) ("[A]limony . . . orders define only the present obligations of the former spouses. Those duties are always subject to review and modification on a showing of 'changed circumstances.'"). Thus, the Court recognized that in the absence of an agreement concerning cohabitation, it may constitute a changed circumstance supporting modification or termination of alimony. Quinn, 225 N.J. at 49.

In our view, the court here erred by inferring the parties agreed cohabitation would not constitute grounds supporting a modification or termination of alimony. The PSA's language did not compel such an inference. The PSA's silence on the issue of cohabitation may have constituted a recognition that in the absence of an express agreement, the law permits a supporting spouse to rely on cohabitation as a changed circumstance supporting the termination or modification of alimony. Ibid. We conclude the court erred by determining the parties agreed plaintiff's cohabitation would terminate alimony and that the holding in Quinn

precluded consideration of defendant's cohabitation claim.[2] See id. at 45 ("To the extent that there is any ambiguity in the expression of the terms of a settlement agreement, a hearing may be necessary to discern the intent of the parties at the time the agreement was entered and to implement that intent.").

Nevertheless, the court correctly rejected defendant's claim. The party moving for the modification of alimony has the burden of presenting competent evidence establishing a prima facie case of changed circumstances. See R. 1:6-6; Lepis, 83 N.J. at 157-59. Defendant did not sustain that burden because his cohabitation claim was supported by nothing more than hearsay statements attributed to unidentified third-parties, and a few pictures showing plaintiff and her alleged paramour together. He offered no competent evidence showing plaintiff was cohabiting and therefore failed to satisfy his burden of making a prima facie showing of changed circumstances.

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[2] We decide only that the PSA does not require an inference that the parties agreed cohabitation would not permit a modification or termination of alimony. In the event defendant relies on cohabitation in the future to support a request to modify or terminate alimony, plaintiff is not precluded from presenting evidence that the parties agreed cohabitation would not support a modification or termination of alimony, and that the PSA's language reflected that agreement. PSAs are governed by the general principles of contract interpretation. Barr v. Barr, 418 N.J. Super. 18, 31 (2011).

Defendant similarly failed to present competent evidence showing how his health issues affected his ability to work or earn his prior level of income. Defendant submitted three doctor's letters in support of his claim, two of which predated defendant's motion by over six years. None of the letters state that the ailments described affect defendant's ability to work or earn an income. We discern no abuse of discretion in the court's finding that defendant failed to make a prima facie showing of changed circumstances based on his health issues.

However, we agree with defendant's argument that the court erred by finding he failed to make a prima facie showing his reduction in income constituted a changed circumstance warranting a plenary hearing. An "increase or decrease in the supporting spouse's income" has been long recognized as a changed circumstance supporting the modification of alimony. Lepis, 83 N.J. at 151; accord Martindell v. Martindell, 21 N.J. 341, 355 (1956). The moving party must demonstrate that the "'changed circumstance . . . substantially impaired the [moving party's] ability to support himself or herself.'" Foust v. Glaser, 340 N.J. Super. 312, 316 (App. Div. 2001) (quoting Lepis, 83 N.J. at 157).

A "change in . . . income" is "only one part of the calculus to be considered in ruling upon" a motion for reduction in alimony.

Donnelly, 405 N.J. Super. at 129. The court must not only consider "the parties' earnings but also how they have expended their income and utilized their assets." Id. at 130.

A temporary change in income does not support a modification of alimony. See Lepis, 83 N.J. at 151 ("Courts have consistently rejected requests for modification based on circumstances which are only temporary . . . ."). Where, as here, a self-employed party seeks an alimony modification, "what constitutes a temporary change in income should be viewed more expansively" because the individual is "in a better position to present an unrealistic picture of his or her actual income than a W-2 earner." Donnelly, 405 N.J. Super. at 128-29 (quoting Larbig, 384 N.J. Super. at 23).

The court found defendant failed to make a prima facie showing of changed circumstances based on his reduced income because he failed to provide certain information plaintiff argued should have been supplied, but the court did not identify. The court also determined it lacked the financial accounting expertise to consider the information defendant provided.

We first observe the court's lack of financial accounting expertise did not render defendant's showing inadequate and was irrelevant to a proper assessment of whether defendant demonstrated changed circumstances. Moreover, we are convinced the court erred in finding defendant failed to make a prima facie

showing there was a change in his income supporting a possible modification of his alimony obligation.

Defendant supplied a significant amount of information in support of his motion, including his tax returns for each of the fifteen years following the establishment of his alimony obligation in 2000 and prior to the 2016 filing of his motion. He filed a case information statement and described in detail the circumstances he claims caused a reduction in his income. He explained that the court established his alimony obligation in 2000 based on an imputed income of $78,000,[3] showed that over the three years prior to the filing of his motion, his income progressively declined from $75,993 in 2013 to $40,623 in 2015, and certified the reduction was the result of market conditions beyond his control. See, e.g., Lepis, 83 N.J. at 151 (finding a reduction in income may constitute a changed circumstance warranting modification of alimony); Donnelly, 405 N.J. Super. at 128-29 (explaining that a permanent reduction in income may support a modification of alimony).

Defendant's prima facie showing of changed circumstances does not end the inquiry. We remand for the court to decide whether

[3] Defendant provided a child support guidelines worksheet from 2000 showing the court determined defendant's child support obligation based on an annual income of $78,000.

there are genuine issues of material fact necessitating a plenary hearing. See R.K. v. F.K., 437 N.J. Super. 58, 62 (App. Div. 2014) (quoting Lepis, 83 N.J. at 159) (finding that once a moving party makes a prima facie showing of changed circumstances, "the court must decide whether to hold a hearing"). The court shall determine what, if any, discovery is required to address any alleged factual disputes, and based on the exchange of discovery may determine a plenary hearing is unnecessary. See Lepis, 83 N.J. at 158-59. For example, the court may direct that defendant produce the information plaintiff argued was missing from defendant's submissions in its assessment of whether a plenary hearing is required.

The court has the discretion to decide the motion exclusively on the papers. See Avelino-Catabran v. Catabran, 445 N.J. Super. 574, 592-93 (App. Div. 2016); Faucett, 411 N.J. Super. at 128; Shaw v. Shaw, 138 N.J. Super. 436, 440 (App. Div. 1976). A plenary hearing is "required only 'when the submissions show there is a genuine and substantial factual dispute . . . , and the trial judge determines that a plenary hearing is necessary to resolve the factual dispute.'" Avelino-Catabran, 445 N.J. Super. at 592-93 (alteration in original) (quoting Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007)).

Reversed and remanded for further proceedings in accordance with this opinion. 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