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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-2962-16T2

ROBERT P. WINES,

Plaintiff-Appellant,

v.

AUGUSTA WINES,

Defendant-Respondent.

Submitted April 9, 2018 – Decided May 2, 2018

Before Judges O'Connor and Vernoia.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Monmouth
County, Docket No. FM-13-1534-15.

Wilentz, Goldman & Spitzer, attorneys for
appellant (Jenna N. Shapiro and Joseph M.
Freda, III, of counsel and on the briefs).

James J. McGuire, Jr., attorney for respondent
(James J. McGuire, on the brief).

PER CURIAM

In this post-judgment matrimonial matter, plaintiff Robert
P. Wines successfully moved for an order compelling defendant
Augusta Wines's compliance with various provisions of their

Matrimonial Settlement Agreement (MSA), but the court denied plaintiff's request for attorney's fees incurred in filing the motion. Plaintiff appeals the court's denial of his attorney's fee request. We vacate the court's order denying the request and remand for further proceedings.

I.

The parties were divorced in 2016 following a twelve-year marriage. They have one child. The final judgment of divorce incorporated the provisions of the MSA, which the parties negotiated and signed. In pertinent part, the MSA required that defendant pay child support to plaintiff, reimburse plaintiff for the child's extracurricular activities and attendance at summer camp, maintain life insurance, cooperate in listing and selling the marital home, and reimburse plaintiff for certain expenses related to the marital home.

The MSA also includes an indemnification provision, stating that if either party

violates the provisions of [the MSA] without the written consent of the other party, the repudiating party will indemnify and save harmless the other party from expenses, costs, fees and increases that may arise as a result of such modification, nullification or repudiation. Should either party willfully fail to abide by the terms of [the MSA], the defaulting party will indemnify the other for all reasonable expenses and costs, including attorneys' fees incurred in successfully

enforcing [the MSA]. This provision is intended to be enforced as a freely bargained for contractual agreement, and a counsel fee claim for reimbursement pursuant to this provision is not intended to and shall not be subject to the Court's discretion under R. 4:42-9(a).

During the parties' February 3, 2016 divorce proceeding, defendant testified in response to questions from her counsel and plaintiff's counsel that the MSA was negotiated over several months, she entered into the agreement knowingly and voluntarily, and the MSA was fair and reasonable. After hearing testimony from both parties, the court found the parties entered into the MSA knowingly and voluntarily, and advised the terms of the agreement would be enforced.

In January 2017, plaintiff filed a motion in aid of litigant's rights seeking enforcement of defendant's obligations under various provisions of the MSA. Plaintiff asserted defendant willfully failed to pay child support, her share of the costs of the child's extracurricular activities and summer camp, and certain marital home expenses. Plaintiff also claimed defendant failed to provide evidence of a required life insurance policy and refused to cooperate in the listing and sale of the marital home. Plaintiff further sought reimbursement of attorney's fees and costs incurred in moving to enforce defendant's obligations under the MSA.

Defendant filed opposition to plaintiff's motion, but did not dispute plaintiff's entitlement to the outstanding child support and reimbursement of the expenses incurred for the child's extracurricular activities and summer camp. She asserted, however, she did not have sufficient income to cover the expenses, and claimed the parties had an oral agreement she would satisfy her financial obligations as she became able to do so. She also claimed she was entitled to a credit for monies owed to her by plaintiff under the MSA. Defendant further disputed that she took any action to preclude the sale of the marital home, arguing she merely sought the retention of a different and, in her view, more qualified real estate broker than the one plaintiff suggested.

After hearing oral argument, the court issued a written statement of reasons finding the MSA's plain language required defendant pay child support, her portion of the child's extracurricular activities and summer camp expenses, and certain marital home expenses. The court also found defendant was obligated to maintain a life insurance policy under the MSA. The court rejected defendant's claim that her financial difficulties and insufficient income excused her failure to comply with her obligations under the MSA, finding defendant's limited financial circumstances and income "were taken into account at the time of the MSA as part of the agreed upon terms therein."

The court also determined defendant was required to cooperate with the hiring of a qualified real estate broker and the listing of the marital home for sale. The court found defendant failed to provide "a compelling reason why she has not complied with the MSA to have the [marital home] sold," and directed she agree to the retention of a qualified real estate broker within twenty-one days.

Although the court granted plaintiff's motion to enforce various provisions of the MSA, it denied plaintiff's request for attorney's fees under the MSA's indemnification provision. The court found Rule 4:42-9 required that the attorney's fees request be determined based on a consideration of the factors in Rule 5:3-5(c).¹ The court stated it appreciated the policy of enforcing property settlement agreements, but determined that in the

¹ Rule 5:3-5(c) requires consideration of the

- (1) 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;
- (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 to enforce existing orders or to compel discovery; and
- (9) any other factor bearing on the fairness of an award.

exercise of its powers as a court of equity, the focus of any payments by defendant should be the benefit of the parties' child.

The court found defendant acknowledged her failure to make the required child support and other payments, and expressed a desire to make the payments. The court also noted that defendant explained "her failure to do so was based upon a lack of financial ability rather than a willful disregard of her obligation." The court concluded defendant's "financial resources should primarily – and more appropriately – go toward the obligations to the child rather than counsel fees." The court therefore did "not find good cause to award" plaintiff the requested attorney's fees. This appeal followed.

On appeal, plaintiff presents the following argument for our consideration:

POINT I

THE TRIAL COURT COMMITTED HARMFUL ERROR BY NOT ENFORCING THE INDEMNIFICATION CLAUSE SET FORTH AT PARAGRAPH 105 OF THE PARTIES' MATRIMONIAL SETTLEMENT AGREEMENT AND NOT AWARDING COUNSEL FEES AND COSTS.

II.

The decision to award counsel fees "in a matrimonial action rests in the discretion of the trial court[,]" Addesa v. Addesa, 392 N.J. Super. 58, 78 (App. Div. 2007), and will be disturbed "only on the 'rarest occasion,' and then only because of 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)). 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.'" Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigration & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

Plaintiff argues the court abused its discretion because it failed to give effect to the plain meaning of the MSA's indemnification provision, which requires reimbursement of attorney's fees and costs incurred by a party enforcing the MSA's terms.² Defendant contends plaintiff knew she would not be able to satisfy her obligations under the MSA when it was negotiated, rendering the indemnification provision "procedural[ly] and substantively unconscionable," and therefore unenforceable.

There is a "'strong public policy favoring stability of arrangements' in matrimonial matters." Konzelman v. Konzelman,

² Plaintiff argues only that the court erred by failing to award attorney's fees and costs in accordance with the MSA's indemnification provision. Plaintiff does not argue he was otherwise entitled to an award of attorney's fees under Rule 4:42-9. An issue not briefed on appeal is deemed waived. Jefferson Loan Co. v. Session, 397 N.J. Super. 520, 525 n.4 (App. Div. 2008); Zavodnick v. Leven, 340 N.J. Super. 94, 103 (App. Div. 2001).

158 N.J. 185, 193 (1999) (quoting Smith v. Smith, 72 N.J. 350, 360 (1977)). Matrimonial settlement agreements are "governed by basic contract principles," Quinn v. Quinn, 225 N.J. 34, 45 (2016), and "fair and definitive arrangements arrived at by mutual consent should not be unnecessarily or lightly disturbed," id. at 44 (quoting Konzelman, 158 N.J. at 193-94).

In interpreting matrimonial settlement agreements, we "should not rewrite a contract or grant a better deal than that for which the parties expressly bargained," and we must "discern and implement the intention of the parties." Id. at 45. However, "[a] narrow exception to the general rule of enforcing settlement agreements as the parties intended is the need to reform a settlement agreement due to 'unconscionability, fraud, or overreaching in the negotiations of the settlement[.]'" Id. at 47 (alteration in original) (quoting Miller v. Miller, 160 N.J. 408, 419 (1999)).

Here, the record establishes defendant agreed to the MSA's terms. At the February 3, 2016 dissolution proceeding, the court accepted defendant's testimony and found as a matter of fact that she knowingly and voluntarily entered into the MSA. The parties do not dispute the agreement unambiguously requires an award of attorney's fees and costs where a party successfully enforces the

MSA in response to the other party's "willful[] fail[ure] to abide by [its] terms."

We have previously held that a court's failure to give effect to an attorney's fee award provision in a matrimonial settlement agreement constitutes an abuse of discretion. In Strahan, we determined the trial court erred by awarding attorney's fees to the defendant in a matrimonial action where the pre-nuptial agreement provided that each party was "responsible for their own respective attorney's fees." 402 N.J. Super. at 317.

Here, although "'the law grants particular leniency to agreements made in the domestic arena' and vests 'judges greater discretion when interpreting such agreements'" where changes occur that were not "contemplated by the parties", Quinn, 225 N.J. at 45-46 (quoting Pacifico v. Pacifico, 190 N.J. 258, 266 (2007)), the court was required to "implement 'the common intention of the parties[,]'" and "enforce [the MSA] as written," id. at 46 (first alteration in original) (first quoting Tessmar v. Grosner, 23 N.J. 193, 201 (1957); and then quoting Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960)).³ In denying plaintiff's request for

³ Defendant did not assert there was a change in circumstances permitting an exercise of the court's discretion to modify the agreement. See generally Quinn, 225 N.J. at 49 (discussing court's discretion to modify a matrimonial settlement agreement based on a showing of changed circumstances).

attorney's fees and costs, the court cast aside the parties' agreement, did not apply basic contract principles in interpreting the MSA, and did not give effect to the parties' intentions as expressed in the MSA. See id. at 44-46. The court therefore erred by failing to consider plaintiff's application for attorney's fees and costs under the MSA's indemnification provision.

We are constrained to vacate the court's order denying plaintiff's request for attorney's fees and costs, and remand for the court to determine plaintiff's entitlement to attorney's fees and costs under the MSA. We do not offer any opinion on the merits of the request. Because the court did not apply the indemnification provision in its consideration of plaintiff's request, it did not address defendant's claim the provision is unenforceable, or determine if plaintiff established defendant's conduct was "willful," thereby permitting an award of attorney's fees under the MSA.⁴ We leave those and all other issues related

⁴ The MSA permits an award of attorney's fees and costs only where there is a "willful" violation of the MSA's terms. The court's statement of reasons does not include any express findings as to whether defendant's various failures to comply with the MSA's requirements were willful.

to the request for attorney's fees and costs for resolution on remand under the MSA and other applicable law.⁵

Vacated and remanded for 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.



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⁵ Plaintiff's entitlement to attorney's fees shall be determined under the MSA. If the court determines plaintiff is entitled to an award of attorney's fees under the MSA, the amount of the fees shall be determined in accordance with Rule 4:42-9(a) and Rule 5:3-5(c).