SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3217-16T2

KATHY LONDON,

Plaintiff-Appellant,

v.

JODY LONDON,

Defendant-Respondent.

Submitted March 21, 2018 – Decided April 20, 2018

Before Judges Currier and Geiger.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Atlantic County, Docket No. FM-01-0205-10.

Ford, Flower, Hasbrouck & Loefflad, attorneys for appellant (Robert Loefflad, on the brief).

Goldenberg, Mackler, Sayegh, Mintz, Pfeffer, Bonchi & Gill, attorneys for respondent (Michael A. Gill, on the brief).

PER CURIAM

Plaintiff Kathy London appeals from a March 1, 2017 post-judgment order: compelling the parties to list their condominium unit in a short-sale, with each party being equally liable for any

deficiency balance and tax consequences; denying plaintiff's request to equally divide the net rental income and profits generated by the condominium unit; and denying the parties' respective requests for counsel fees and costs for the motion. For the reasons that follow, we affirm.

We glean the facts from the record. The parties were married on November 4, 2000. During the marriage, they purchased a condominium unit in Galloway Township, New Jersey (the condominium) as an investment property. On October 18, 2011, the trial court entered a dual final judgment of divorce with stipulations (FJOD). As part of their stipulations, the parties agreed

> to maintain the condominium . . . . Any and all repairs associated with the [c]ondominium shall solely be [defendant's] responsibility. If the condominium is the subject of a short sale, both parties shall cooperate fully to accomplish the short sale. Each shall share equally in the short fall amount or tax consequences. The parties acknowledge there is currently a tenant occupying the [condominium]. [Defendant] receives all the rental monies from same. [Defendant] shall be solely responsible to maintain all the expenses associated with the condominium. The property shall continue to be listed for sale. The parties agree to share equally in the short fall or profits from the sale of the condominium. [Defendant] shall provide a quarterly accounting to [p]laintiff] of the expenses/profits for the [condominium].

On October 5, 2012, the parties entered into a consent order. Under paragraph twelve of the consent order, the parties agreed to the following additional terms regarding the condominium:

> Both parties will retain joint ownership of [the condominium]. Defendant shall manage and retain any profits or bear any losses. On June 30th and December 31st of each year beginning 2012, [d]efendant shall provide [p]laintiff with a spreadsheet accounting for the property. If at any point a party believes the property has increased in value such that a sale will not result in a loss or short-sale, such party may obtain a [comparative market analysis (CMA)] to support a listing of the property. If the parties cannot agree on the listing, they shall first mediate the issue and if mediation fails, either party may file a motion.

Plaintiff alleges that in 2015, she discovered defendant had forged her name to an escrow refund check issued by the mortgage lender and deposited the check into his checking account. The escrow refund check resulted from defendant's successful real estate tax appeal of the condominium's assessed value, which occurred sometime after entry of the October 5, 2012 consent order. Plaintiff concedes defendant was entitled to retain the proceeds of the escrow refund check pursuant to the terms of the consent order. Plaintiff moved to compel defendant to either refinance the condominium to remove her name from the mortgage loan obligation or sell the condominium by way of a short sale. On

September 22, 2015, defendant filed a responsive certification, stating:

> The [c]onsent [o]rder states that if at any point a party believes the property has increased in value and a sale will not result in a loss or short sale, such party may obtain a comparative market analysis to support a listing of the property. . . . The whole purpose of [p]aragraph [twelve] of the [c]onsent [c]rder was to keep us from having to lose money on a sale or short sale. The reason that this was negotiated was due to the fact that neither one of us wanted to force the other to sell the property at a loss and each come up with [fifty percent] of the differential at closing.

The results of plaintiff's motion is not part of the record.

On March 28, 2016, defendant moved to compel a short sale of the condominium. On May 6, 2016, the court denied defendant's motion and directed the parties "to confer on the issue of allocation of profits, losses, and tax liability on a short sale of the property."

Because the respective positions of the parties leading up to the applications under review have been extensively briefed and are relevant to the issue of counsel fees, we briefly recount them. On May 31, 2016, plaintiff's counsel wrote to defendant's counsel stating plaintiff was willing to "consent to the short sale so long as the net profits are evenly divided between the parties; or, alternatively, [defendant] agrees to be solely

responsible for the tax liability related to the short sale." On June 3, 2016, defendant's counsel responded by providing tax documents and other information related to the condominium's rental income and expenses. Counsel also stated he would "be responding to [plaintiff's] proposals shortly." On July 7, 2016, plaintiff's counsel demanded a response to the settlement proposal, indicating that if a response was not received from defendant by July 15, 2016, plaintiff would move to enforce litigant's rights and seek reimbursement of her attorney's fees and costs.

On July 15, 2016, defendant's counsel communicated that plaintiff's settlement proposal was rejected. He then proposed "a deed in lieu of foreclosure" and stated that "[a]ccording to the mortgage company, completing this process allows us to release the property back over to the mortgage company and releases us from having to pay the tax consequences of a short sale." On July 25, 2016, defendant's counsel forwarded documents related to the deed in lieu of foreclosure process to plaintiff's counsel. On July 27, 2016, plaintiff's counsel responded, expressing skepticism that the deed in lieu of foreclosure would "release the parties 'from having to pay the tax consequences of a short sale.'" Counsel also stated that "[i]f [defendant] wants to assume sole

responsibility for any possib[le] tax consequences, then he may keep 100% of the profits."

On August 19, 2016, counsel sent an e-mail stating plaintiff "remains ready, willing and able to cooperate with the Deed-in-Lieu process so long as [defendant] agrees that if the mortgage lender does issue a 1099, he will be solely responsible for the taxes." On September 22, 2016, plaintiff moved to enforce the May 5, 2016 order and the October 5, 2012 consent order. Plaintiff sought to compel defendant to cooperate with the short sale or deed-in-lieu of foreclosure of the condominium. She also sought to make the parties equally responsible

> for any deficiency balance left on the mortgage loan obligation following the short-sale or [d]eed-in-[l]ieu of [f]oreclosure, or, to the extent the mortgage company forgives any such deficiency balance, each of the parties shall be [fifty percent] responsible for any tax consequences related to the short sale, deed-in-lieu of foreclosure of debt forgiveness.

Plaintiff's motion also sought an award of attorney's fees and costs.

Defendant filed a cross-motion to enforce litigant's rights by requiring plaintiff to cooperate in the short sale process pursuant to paragraph thirteen of the FJOD. Defendant also sought an award of attorney's fees and costs.

On March 1, 2017, the trial court issued the following oral decision:

> The parties were divorced some seven years ago and under their divorce agreement the defendant assumed sole responsibility for the maintenance, operation and maintenance of the condominium which was being rented and he would assume all the profits and losses associated with that. There's some language in dispute as to sale of the condominium — can it be sold or should it be sold — it's now operating at a loss because there was an increase in the mortgage rate, and the plaintiff's position is that the defendant cannot sell the condominium, and if he does, . . . then he should bear all the losses involved since he has all the, quote, profits from the operation. The defendant's position is that he's been losing money and this thing will continue to lose money for, you know, [seven] to [ten] years and the plaintiff virtually conceded that it might take that long until the equity actually is more than the mortgage.
>
> So the plaintiff — first request is the property to be sold, and I have decided that it should be sold and that if there's a short sale or if there is a deficiency it will be divided equally between the parties. As I explained on the record and I maintained, that there is a difference between operating losses and profits and as an operator and what happens with regard to the equity owners in the property, they're two different things.
>
> [During the divorce] they disputed about everything and one of them was the operation of the condominium and it pretty much was agreed okay, [defendant] would operate the condominium as a rental property but you have all the headaches but you also take the profit if there's profit but if there's loss . . .

> you have to deal with that. Which is different than the language about the . . . sale.
>
> I think the sale is permitted by the agreement, it's the only thing that makes some sense. It seems completely inequitable to require the defendant to keep taking this loss for [ten] years or however long it takes until he possibly can sell it without sustaining a loss on capital while he has an operating loss every month. That seems unreasonable. So I am going to allow — there's a sale and to the extent there's any remaining liability, it will be divided equally between the parties.

The trial court ordered the parties to list the condominium "for sale and cooperate in good faith in a short[-]sale, if necessary." The trial court denied plaintiff's request to equally divide any net rental income and profits. The court also declined to award counsel fees and costs to either party.

This appeal followed. Plaintiff raises the following points:

> POINT I
>
> THE [OCTOBER 5, 2012] CONSENT ORDER WAS CLEAR AND UNAMBIGUOUS. ACCORDINGLY, IT SHOULD BE ENFORCED ACCORDING TO ITS TERMS.
>
> POINT II
>
> THE EQUITABLE DISTRIBUTION PROVISIONS OF A MARITAL SETTLEMENT AGREEMENT MAY NOT BE MODIFIED BASED ON SUBSTANTIAL CHANGED CIRCUMSTANCES.
>
> POINT III
>
> [DEFENDANT'S] ARGUMENT THAT THE CONSENT ORDER DID NOT SUPERSEDE THE FINAL JUDGMENT OF

DIVORCE SHOULD BE BARRED BY THE DOCTRINE OF JUDICIAL ESTOPPEL.

POINT IV

[DEFENDANT'S] INTERPRETATION OF THE CONSENT ORDER WOULD RENDER IT MEANINGLESS. ACCORDINGLY, THE [DEFENDANT'S] INTERPRETATION SHOULD BE REJECTED (Not Argued Below).

POINT V

THE TRIAL COURT ERRED IN DENYING [PLAINTIFF'S] REQUEST FOR AN AWARD OF COUNSEL FEES AND COSTS.

In Point I, plaintiff argues the October 5, 2012 consent order expressly obligated defendant to cover all losses related to the condominium and prohibits its sale if it would result in a short sale or loss to the parties. Plaintiff contends the consent order should be enforced according to its clear and unambiguous terms. Plaintiff asserts that defendant "should not be heard now to claim the agreement is unconscionable because he may incur modest operating losses over the course of the next few years."

"A [matrimonial] settlement agreement is governed by basic contract principles." Quinn v. Quinn, 225 N.J. 34, 45 (2016) (citing J.B. v. W.B., 215 N.J. 305, 326 (2013)). "It is not the function of the court to rewrite or revise an agreement when the intent of the parties is clear." Ibid. (citing J.B., 215 N.J. at 326). "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." Ibid. (citing Sachau v. Sachau, 206 N.J. 1, 5-6 (2011)). However, "the law grants particular leniency to agreements made in the domestic arena" and vests "judges greater discretion when interpreting such agreements." Pacifico v. Pacifico, 190 N.J. 258, 266 (2007) (quoting Guglielmo v. Guglielmo, 253 N.J. Super. 531, 542 (App. Div. 1992)). "Nevertheless, the court must discern and implement the common intention of the parties and enforce [the mutual agreement] as written[.]" Quinn, 225 N.J. at 46 (first alteration in original) (citations omitted).

The parties entered into two settlement agreements — the FJOD stipulations and the October 5, 2012 consent order. Plaintiff argues because the terms of the October 5, 2012 consent order were clear and unambiguous, the trial court erred in ruling defendant did not have to cover all losses related to the condominium and that he was permitted to sell the condominium through a short sale. We are unpersuaded by this argument.

Plaintiff relies on paragraph twelve of the consent order, which states:

> Both parties will retain ownership of [the condominium]. Defendant shall manage and retain any profits or bear any losses. . . . If at any point a party believes the property has increased in value such that a sale will not result in a loss or short-sale, such party may obtain a CMA to support a listing of the

> property. If the parties cannot agree on the listing, they shall first mediate and if mediation fails, either party may file a motion.

However, the language of paragraph twelve of the consent order does not apply to a sale of the condominium at a loss. Here, defendant demonstrated he was suffering a net operating loss on the condominium each month. It is undisputed that the mortgage loan balance far exceeds the fair market value of the condominium. The sale of the condominium for a profit is not feasible. Under these circumstances, paragraph twelve of the October 5, 2012 consent order must be read in light of paragraph thirteen of the FJOD, which states, in part:

> If the condominium is the subject of a short sale, both parties shall cooperate fully to accomplish the short sale. Each shall share equally in the short fall amount or tax consequences. . . . [Defendant] receives all the rental monies from [the tenant]. He shall be solely responsible to maintain all the expenses associated with the condominium. The property shall continue to be listed for sale. The parties agree to share equally in the short fall or profits from the sale of the condominium.

The trial court recognized that under paragraph thirteen of the FJOD there is a difference between operating losses and profits and what happens with regard to the equity owners in the property in the event of a sale. Indeed, the clear and unambiguous language of paragraph thirteen renders each party equally responsible for

the "short fall or profits from the sale of the condominium," including short sales.

Moreover, plaintiff moved to compel defendant to cooperate with a short sale or deed in lieu of foreclosure. She also requested the court:

> Direct[] each of the parties [to] be [fifty percent] responsible for any deficiency balance left on the mortgage loan obligation following the short-sale or [d]eed-in-[l]ieu of [f]oreclosure, or, to the extent the mortgage company forgives any such deficiency balance, each of the parties shall be [fifty percent] responsible for any tax consequences related to the short sale, deed-in-lieu of foreclosure or debt forgiveness.

The March 1, 2017 order partially granted the relief sought by plaintiff, compelling the sale of the condominium and equally dividing the responsibility of any losses resulting from the short sale or deed in lieu of foreclosure.

In Point II, plaintiff argues the transitioning of the mortgage loan obligation from interest-only payments to payments that included principal reduction is not "a sufficient basis under the law to modify the parties' agreement." Both parties are in agreement that it is inappropriate to modify an equitable distribution award based upon changed circumstances. See Rosen v. Rosen, 225 N.J. Super. 33, 35-36 (App. Div. 1988).

The record does not support plaintiff's assertion that defendant raised the issue of changed circumstances as a basis for modifying the FJOD. Moreover, paragraph thirteen of the FJOD envisioned the short sale of the condominium. Accordingly, defendant need not rely upon a changed circumstances analysis to request the court to compel a short sale.

Plaintiff further argues defendant's position that the consent order did not supersede the final judgment of divorce should be barred by the doctrine of judicial estoppel. Plaintiff claims the positions expressed by defendant in his September 22, 2015 and November 3, 2016 certifications are inconsistent.

In his September 22, 2015 certification, defendant stated: "The whole purpose of [p]aragraph [twelve] of the [c]onsent [o]rder was to keep us from having to lose money on a sale or short sale." In his November 3, 2016 certification, defendant stated:

> I want the [c]ourt to note that Paragraph [twelve] did not change any language concerning the short sale of the property. Paragraph [twelve] was merely inserted as an addition to [p]aragraph [thirteen] of the [FJOD] to help resolve issues that were occurring concerning the listing of the property and management and costs of the property. The only change that was made to the provisions dealing with the condominium were that if the market increases to the point where it would not be a short sale that either party was able to suggest the property be sold without a loss. Nothing in [p]aragraph [twelve] modified the [FJOD] wherein the

> [condominium] was required to be short [sold] and the parties were supposed to cooperate with such.

Plaintiff suggests defendant first argued the consent order superseded the FJOD with regard to the sale of the condominium, then subsequently changed his position, claiming the consent order merely supplemented but did not supersede the FJOD.

The doctrine of judicial estoppel bars a party from asserting contradictory positions in the same or in a subsequent legal proceeding. Cummings v. Bahr, 295 N.J. Super. 374, 385 (App. Div. 1996). "[J]udicial estoppel is an 'extraordinary remedy,' which should be invoked only 'when a party's inconsistent behavior will otherwise result in a miscarriage of justice.'" Kimball Intern., Inc. v. Northfield Metal Products, 334 N.J. Super. 596, 608 (App. Div. 2000) (quoting Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (3d Cir. 1996)).

Here, the purportedly inconsistent positions do not result in a miscarriage of justice. Both parties made affirmative requests to the trial court to compel a short sale of the condominium and to direct that each be fifty percent responsible for any mortgage loan deficiency balance and tax consequences. Plaintiff's September 22, 2016 motion addressed the allocation issue by specifically requesting each party be made responsible for fifty percent of the losses and tax consequences. During oral

argument, plaintiff reiterated her position that she wanted a short sale or a deed in lieu of foreclosure. Plaintiff's counsel went on to state that plaintiff "want[s] a fair allocation of who's going to take those losses." Thus, even if the terms of the FJOD were not used to allocate liability for the losses related to the short sale, the trial court could have relied on both party's affirmative requests. We find no basis to apply judicial estoppel in this matter.

We next address plaintiff's argument regarding defendant's interpretation of the consent order. Plaintiff contends defendant's cross-motion to force a short sale and compel plaintiff to share equally in the losses and tax consequences is based on an interpretation of the consent order which renders it meaningless. We disagree.

Defendant's interpretation of the consent order does not render any of its provisions meaningless. Defendant acknowledges that a CMA and mediation are required by the consent order for a profitable sale. The divorce settlement contemplated that the condominium would be sold through a short sale. To that end, the FJOD allocated the liability of each party equally in the event that a short sale does occur. In contrast, the consent order envisioned a circumstance where a party believed the condominium could be sold profitably and created a process in which a short

sale could be avoided. Thus, the consent order provided a method of avoiding a short sale if a CMA demonstrated the condominium could be sold profitably. Either party may submit a CMA that would show the condominium "has increased in value such that a sale will not result in a loss or short-sale . . . . If the parties cannot agree on the listing, they shall first mediate the issue."

Finally, plaintiff argues the trial court erred in denying her application for an award of counsel fees and costs, contending defendant acted in bad faith by intending to deceive or mislead the court. We are unpersuaded by this argument.

A trial court in its discretion may award counsel fees and costs "to be paid by any party to the action, including, if deemed to be just, any party successful in the action, on any claim for . . . enforcement of agreements between spouses . . . and claims relating to family type matters." R. 5:3-5(c). "In determining the amount of the fee award, the court should consider . . . the results obtained[.]" R. 5:3-5(c)(7). "[A] fee award is accorded substantial deference and will be disturbed only in the clearest case of abuse of discretion." Yueh v. Yueh, 329 N.J. Super. 447, 466 (App. Div. 2000) (citing Rendine v. Pantzer, 141 N.J. 292, 317 (1995)). The same standard of review applies to the denial of counsel fees.

We recognize "that if 'deemed just,' an award of attorney's fees may be made in favor of any party, whether or not prevailing." Pressler & Verniero, Current N.J. Court Rules, cmt. 4.1 on R. 5:3-5 (2018) (citing Kingsdorf v. Kingsdorf, 351 N.J. Super. 144, 158 (App. Div. 2002)). Additionally, "the reasonableness and good faith of the positions advanced by the parties" is a factor to be considered by the trial court. R. 5:3-5(c)(3).

We discern no abuse of discretion by the trial court in denying an award of counsel fees and costs to plaintiff. Plaintiff was not a successful party with respect to the issues contested by defendant either before or during the trial court proceedings and has not obtained any favorable results on appeal. Nor do we find evidence that defendant acted in bad faith warranting a counsel fee award.

Any remaining arguments not specifically addressed in this opinion are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.