

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
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-3255-15T3

MICHAEL KRISS,

Plaintiff-Appellant,

v.

RITA KRISS,

Defendant-Respondent.

Argued February 15, 2018 – Decided March 5, 2018

Before Judges Haas, Rothstadt and Gooden
Brown.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Bergen County,
Docket No. FM-02-0129-12.

Steven M. Resnick argued the cause for
appellant (Ziegler & Zemsky, LLC, attorneys;
Steven M. Resnick, on the briefs).

Celine Y. November argued the cause for
respondent (November & Nunnink, LLC,
attorneys; Kate L. Hubschman, on the brief).

PER CURIAM

Plaintiff appeals from the June 28, 2013 Family Part order,
entered after a thirteen-day plenary hearing, which declared the

parties' 2004 reconciliation agreement void due to its unconscionable terms, and ordered plaintiff to pay defendant's counsel fees. Plaintiff also appeals from the provisions of the March 7, 2016 Dual Final Judgment of Divorce (FJOD), rendered following a seventeen-day trial, which, among other things, granted defendant open durational alimony, equitable distribution of plaintiff's business and a money market account, and additional counsel fees. We affirm substantially for the reasons set forth in the comprehensive decisions rendered by the trial judges who presided over each proceeding.¹

I.

The parties are fully familiar with the procedural history and facts of this case and, therefore, they will not be repeated in detail in this opinion. The parties were married in the Ukraine in June 1982, and moved to the United States in 1988. They have one child, who is emancipated.

During the marriage, plaintiff worked in various marble and stone businesses until 2001, when he formed Krisstone, LLC (Krisstone), a construction contracting company that specialized in tile and stone masonry work. When he began the business,

¹ Judge Lisa Firko conducted the plenary hearing concerning the enforceability of the Agreement, while Judge Ronny Jo Siegal handled the trial that resulted in the FJOD.

plaintiff owned 50% of Krisstone through a separate corporation. In 2006, he became the company's sole owner. Defendant worked as a bookkeeper.

In 1998, plaintiff filed a complaint for divorce, but withdrew it a couple of months later. Thereafter, plaintiff decided that the parties should close their joint bank accounts, and become "financially separated," with each depositing their income into their own checking accounts. Plaintiff paid the mortgage and household expenses, while defendant paid for food and her own personal expenses.

In 2003, plaintiff filed a second divorce complaint. Defendant wanted the family to remain intact, and begged plaintiff to drop his complaint. He stated that he would do so if she would sign the Agreement, which plaintiff's attorney drafted with no input from, or negotiation with, defendant's attorney.

Under the terms of the Agreement, defendant had to give up any interest in Krisstone as a condition for maintaining the marriage. In addition, the Agreement required her to waive alimony if the parties later divorced. In the Agreement, plaintiff promised "to pay for all carrying expenses associated with the [marital home] until it is otherwise disposed of, which expenses shall include, without limitation, the mortgage, property taxes, basic utilities, and reasonable and necessary repairs and

maintenance." Defendant signed the Agreement against the advice of her attorney and without fully reading it.

Immediately thereafter, plaintiff ordered defendant to resume paying half of the mortgage on the marital home, together with half of the insurance and maintenance costs. Defendant complied with this directive. With the exception of the well-appointed basement portion of the house where plaintiff spent most of his time and which he renovated to suit his needs, the home thereafter fell into disrepair. Defendant did not have a working bathroom for approximately one year and she and the parties' child had to take showers at the houses of their friends and neighbors.

In July 2011, plaintiff filed his third complaint for divorce, which resulted in the two orders that are the subject of plaintiff's appeal. Before proceeding to discuss the specific arguments he raises on appeal, we set forth our standard of review.

The scope of our review of the Family Part's orders is limited. We owe substantial deference to the Family Part's findings of fact because of that court's special expertise in family matters. Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). Thus, "[a] reviewing court should uphold the factual findings undergirding the trial court's decision if they are supported by adequate, substantial and credible evidence on the record." MacKinnon v. MacKinnon, 191 N.J. 240, 253-54 (2007) (alteration

in original) (quoting N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007)).

While we owe no special deference to the judge's legal conclusions, Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), we will not disturb the judge's "'factual findings and legal conclusions . . . 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' or when we determine the court has palpably abused its discretion." Parish v. Parish, 412 N.J. Super. 39, 47 (App. Div. 2010) (quoting Cesare, 154 N.J. at 412). We will only reverse the judge's decision when it is necessary to "'ensure that there is not a denial of justice' because the family court's 'conclusions are [] "clearly mistaken" or "wide of the mark."' " Id. at 48 (alteration in original) (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)).

II.

Turning to the issues raised by plaintiff, we begin with the denial of his cross-motion to enforce the Agreement, which he filed in response to defendant's motion to compel production of plaintiff's financial records.

After defendant filed a motion to compel the production of plaintiff's financial records, plaintiff cross-moved to enforce

the Agreement. Defendant opposed the cross-motion, arguing that the Agreement should be declared void.

In considering the parties' motions, Judge Firko applied the six-factor test we established in Nicholson v. Nicholson, 199 N.J. Super. 525, 531 (App. Div. 1985), the seminal case governing the enforcement of reconciliation agreements. In Nicholson, we stated that courts "must proceed with care" when enforcing reconciliation agreements "where the consideration for a spousal promise is said to be the willingness of the other spouse to continue the marriage." Ibid. We also identified six factors for courts to consider when deciding whether to enforce reconciliation agreements: (1) whether the marital rift was substantial when the promise to reconcile was made; (2) whether the agreement complied with the statute of frauds; (3) whether the circumstances under which the agreement was entered into were fair to the party charged; (4) whether the agreement's terms were conscionable when it was made; (5) whether the party seeking enforcement acted in good faith; and (6) whether changed circumstances rendered literal enforcement inequitable. Id. at 532.

At the plenary hearing, defendant testified that plaintiff never provided her with any tax returns or documents relating to Krisstone, and never disclosed his income to her. She repeatedly stated that she had been willing to "do anything" plaintiff asked

in order to keep the family together. While defendant engaged an attorney, who advised her not to sign the Agreement, defendant ignored that advice.

Defendant's attorney testified that plaintiff and his attorney did not provide him with any information from which he could determine the value of the family's expenses, assets, or liabilities. Plaintiff did submit a Case Information Statement, but it was incomplete, and did not contain any valuation for Krisstone.

Plaintiff testified that the Agreement was his idea and that every time defendant asked him to return to the marital bedroom, he asked her when she would sign the Agreement. He admitted that Krisstone was very profitable, earning millions of dollars through large commercial projects, including several shopping malls. Plaintiff claimed that he and defendant orally agreed to modify the Agreement after it was signed to require her to pay 50% of the carrying costs on the marital home.² The parties stipulated to the admission of a joint expert report that set the value of plaintiff's interest in Krisstone at \$500,000 as of April 2004, when the Agreement was signed.

² However, Paragraph 32 of the Agreement stated that "no modification" of the Agreement "shall be valid unless same is freely and voluntarily entered into in writing and duly executed by the parties in the same form and manner as [the] Agreement."

Judge Firko found defendant's testimony credible, and plaintiff's account much less so. She concluded that the Agreement's terms governing the equitable distribution of Krisstone and defendant's waiver of alimony were unconscionable and that defendant signed the Agreement under duress, as she "honestly[] testified that she would have signed anything to save the marriage."

On appeal, defendant argues in Point I that "the trial court should have enforced the . . . Agreement." Applying our deferential standard of review, we reject this contention and affirm substantially for the reasons set forth in Judge Firko's thoughtful oral opinion. Cesare, 154 N.J. at 412. We add the following comments.

Judge Firko's declaration that the Agreement was "void ab initio" was plainly supported by substantial credible evidence in the record as viewed through the prism of the Nicholson factors.³ The circumstances at the time plaintiff presented the Agreement to defendant were certainly not fair to defendant under factor three of the Nicholson test. As we stated in Orqler v. Orqler,

³ As to factors one and two, the parties agreed there was a substantial rift in the marriage and that the Agreement complied with the statute of frauds.

237 N.J. Super. 342, 349 (App. Div. 1989), a case involving an antenuptial agreement:

[A]n essential precondition to the validity of such an agreement is ". . . [sic] full disclosure by each party as to his or her financial conditions, including the nature and extent of assets, income, and anything else which might bear on the other party's conclusion that the proposed agreement is fair, and his or her decision to enter into the agreement."

[Ibid. (quoting Marschall v. Marschall, 195 N.J. Super. 16, 29 (Ch. Div. 1984)).]

Here, the judge found that plaintiff did not provide defendant with full financial disclosure relative to his income or the value of Krisstone before she signed the Agreement. As a result, the judge concluded "[t]here was insufficient information for defendant to make a permanent waiver of alimony in a case [that] could be a permanent alimony case" and that defendant had no "opportunity to ascertain and become acquainted with the income of [plaintiff's] business" before waiving her right to equitable distribution of Krisstone.

Plaintiff argues that defendant cannot complain about the terms of the Agreement because she was represented by an attorney when he presented it to her. However, although defendant received advice from her attorney, that advice was clearly not "meaningful"

absent a full disclosure of the value of Krisstone and plaintiff's "true financial worth." Orqler, 237 N.J. Super. at 350.⁴

Moreover, the record fully supports Judge Firko's conclusion that defendant signed the Agreement under duress and "was intimidated by plaintiff into signing the . . . Agreement with the threat of a pending divorce complaint looming over her." As the judge found, defendant signed the Agreement "all in an effort to save the marriage. She was not dealing with reality. This was just a process that she had to do to satisfy her husband to dismiss the complaint for divorce. She, clearly, was not rational."

For similar reasons, the judge properly found that factor four of the Nicholson test weighed in favor of invalidating the Agreement because its terms as to alimony and equitable distribution were unconscionable at the time they were made and at the time plaintiff sought enforcement. In light of the lack of full financial disclosure at the time the Agreement was executed, it was neither fair nor equitable to bar defendant from receiving alimony in this long-term marriage or equitable distribution of the parties' assets, including Krisstone.

Judge Firko's finding that plaintiff did not act in good faith under the fifth Nicholson factor also finds strong support

⁴ Indeed, the attorney told defendant that the Agreement was inequitable for these very reasons.

in the record. After plaintiff obtained defendant's signature on the document, he immediately violated the provision that required him to pay all of the carrying costs of the home. He ordered defendant to resume paying half of the mortgage and insurance costs, and he allowed the portion of the home where defendant and the parties' child lived to fall into disrepair to the point where it became virtually unlivable for a time.⁵

Finally, even if the Agreement had been fair at its inception, circumstances had changed by the time of plaintiff's third complaint for divorce so as to render enforcement inequitable under the sixth Nicholson factor. By that time, plaintiff had assumed sole ownership of Krisstone and the value of the company had nearly doubled in value, from \$500,000 to \$900,000.

In sum, Judge Firko's findings and conclusions relative to the Nicholson factors are supported by substantial, credible evidence. We therefore affirm her determination that the Agreement was unenforceable.

⁵ Contrary to plaintiff's argument in Point II, the record does not support his claim that the parties orally modified the terms of the Agreement at defendant's request to require her to make these payments. The judge found that defendant credibly testified she never asked plaintiff to modify the Agreement in this fashion, and that he "made her" make the payments.

III.

In Point III, plaintiff argues that "no alimony should have been awarded to" defendant. We disagree.

With regard to alimony, a trial judge must consider and weigh thirteen statutory factors in determining whether an award of alimony is appropriate, and the amount and duration of any such award. Gnall v. Gnall, 222 N.J. 414, 429 (2015); N.J.S.A. 2A:34-23(b). Alimony findings will not be disturbed on appeal unless the trial court either "clearly abused its discretion," or "failed to consider all of the controlling legal principles," or "made mistaken findings, or reached a conclusion that could not reasonably have been reached on sufficient credible evidence present in the record after considering the proofs as a whole." J.E.V. v. K.V., 426 N.J. Super. 475, 485 (App. Div. 2012). "Substantial weight should be given to the judge's observations of the parties' demeanor and credibility." Ibid.

Judge Siegal thoroughly considered each of the statutory factors in her written decision, and ordered plaintiff to pay defendant \$42,000 per year in open durational alimony. As the judge noted, this was a long-term, twenty-nine year marriage. According to the parties' joint forensic expert, plaintiff earned \$192,307 per year before taxes, while defendant earned approximately \$70,000. The judge found that the parties' marital

lifestyle totaled \$13,288 net per month, or \$159,456 net per year. Based upon these calculations, the judge determined that plaintiff had the clear financial ability to pay defendant alimony in order to meet her demonstrated need. In so ruling, Judge Siegal rejected plaintiff's claim that the parties did not have a "marital lifestyle" because they each paid for their own expenses during the marriage, finding that plaintiff's assertion was simply "not credible."

After reviewing the record, we conclude that Judge Siegal's factual findings are fully supported and, in light of those facts, her legal conclusions are unassailable. We therefore affirm the alimony award substantially for the reasons that the judge expressed in her well-reasoned opinion.

IV.

In Point IV, plaintiff next argues that Judge Siegal erred when she granted equitable distribution of Krisstone and one of his money market accounts to defendant. Again, we disagree.

A trial judge must evaluate sixteen factors in determining how the parties' assets should be equitably distributed. N.J.S.A. 2A:34-23.1. The judge must also make "specific findings of fact on the evidence relevant to all issues pertaining to . . . equitable distribution, including specifically, but not limited to, the factors" listed in the statute. Ibid.

"Where the issue on appeal concerns which assets are available for distribution or the valuation of those assets, . . . the standard of review is whether the trial judge's findings are supported by adequate credible evidence in the record." Borodinsky v. Borodinsky, 162 N.J. Super. 437, 443-44 (App. Div. 1978). "However, where the issue on appeal concerns the manner in which allocation of the eligible assets is made," a reviewing court "determine[s] whether the amount and manner of the award constituted an abuse of the trial judge's discretion." Id. at 444.

Applying these standards, we conclude that the trial court neither erred in identifying or valuing Krisstone and the money market account as assets subject to equitable distribution, nor abused her discretion in their allocation. Judge Siegal devoted over thirty-five pages of her eighty-one page written decision to a discussion of the equitable distribution factors as applied to the information provided by the parties and their joint forensic expert at the trial.

Turning first to plaintiff's business, the uncontradicted expert testimony, which the judge found was "sound and credible," demonstrated that plaintiff's 100% ownership interest in Krisstone was valued at \$900,000 as of December 31, 2010. After applying the statutory factors, the judge determined that defendant was

entitled to one-third of Krisstone's value, \$300,000, as her equitable share of the business. The judge further ordered that this amount should "be credited against what [p]laintiff owes [d]efendant for her retention of the marital residence[.]"

The judge properly rejected plaintiff's argument that Krisstone was only worth about \$200,000. As noted above, the joint expert's valuation was uncontradicted and, in arguing otherwise, plaintiff failed to submit any competent documentation supporting his assertion that the value of the company was falling. Therefore, we detect no basis for disturbing Judge Siegal's determination on this point.

Plaintiff next argues that his Valley National Bank money market account (MMA) should not have been subject to equitable distribution because it contained "actual business funds" and "no longer existed" at the time of the trial. However, the record simply does not support plaintiff's claim.

At trial, plaintiff stipulated that he owned the MMA as of July 12, 2011, and that it contained \$153,400. Judge Siegal rejected plaintiff's assertion that this account was used solely for business reasons because documentation submitted at trial demonstrated that plaintiff used it for personal purposes. For example, plaintiff took \$100,000 from the MMA to give the parties' child a loan, removed \$10,000 to establish a college fund for

their grandchild, and withdrew additional amounts for litigation-related expenses. Immediately after the judge ordered plaintiff to access money in the MMA for the parties' joint legal expenses, plaintiff removed at least \$50,000 from it for his own use. Under these circumstances, Judge Siegal properly determined that the MMA was a marital asset subject to equitable distribution and ordered that the parties equally share it.

Therefore, we affirm Judge Siegal's equitable distribution determinations.

V.

Finally, plaintiff argues in Point V that both judges incorrectly ordered him to pay counsel fees.⁶ This argument also lacks merit.

The award of fees and costs in matrimonial matters is left to the discretion of the trial court; reversal is only appropriate when the trial court has abused its discretion, exceeded its authority, or made a determination that is not supported by the record. Mani v. Mani, 183 N.J. 70, 94-95 (2005) (citing Williams v. Williams, 59 N.J. 229, 233 (1971)). It "is warranted only when

⁶ Judge Firko ordered plaintiff to pay defendant \$76,710.07 in counsel fees following the plenary hearing on the enforceability of the Agreement. Judge Siegal ordered plaintiff to pay defendant \$40,200 in counsel fees incurred by her in connection with the trial in the dissolution case.

a mistake must have been made because the trial court's factual findings are 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]'" Reese v. Weis, 430 N.J. Super. 552, 567 (App. Div. 2013) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)).

"New Jersey does not subscribe to a system that 'loser pays.' Statutory provisions, N.J.S.A. 2A:34-23, court rules, R. 5:3-5(c), R. 4:42-9(a), and interpretative case law, see, e.g., [Mani, 183 N.J. at 94-95], clearly outline necessary considerations when imposing a counsel fee award." Ricci v. Ricci, 448 N.J. Super. 546, 580 (App. Div. 2017). In exercising its discretion, the trial court must abide by N.J.S.A. 2A:34-23, requiring consideration of "the factors set forth in the court rule on counsel fees, the financial circumstances of the parties, and the good or bad faith of either party." Mani, 183 N.J. at 94 (quoting N.J.S.A. 2A:34-23). If the court performs its obligation under the statute, and we conclude there is "satisfactory evidentiary support for the trial court's findings, '[our] task is complete and [we will] not disturb the result, even though [we] . . . might have reached a different conclusion were [we] the trial tribunal.'" Reese, 430 N.J. Super. at 568 (quoting Beck v. Beck, 86 N.J. 480, 496 (1981)).

Applying these principles, we are satisfied that both judges properly granted defendant's counsel fee applications, and we affirm the judges' determinations substantially for the reasons set forth in their thorough decisions. We add the following comments.

Plaintiff first argues that Judge Firko's counsel fee ruling should be reversed because she "took a mechanical approach" in addressing defendant's request. However, the record plainly does not support plaintiff's claim. As detailed in her extensive oral opinion, Judge Firko reviewed defendant's attorneys' billing rates and billing history records. She then considered the applicable factors, and made detailed findings concerning same, including the parties' ability to pay and whether they acted in good faith during the plenary hearing.

Plaintiff's challenge to Judge Siegal's counsel fee determination is likewise unavailing. Contrary to plaintiff's argument, the judge also considered all of the appropriate factors and detailed her findings in a twenty-page section of her written decision. Because the judge's findings are fully supported by the record, there is no basis for disturbing them.

As for the balance of any of plaintiff's arguments not expressly discussed above, they are without sufficient merit to

warrant discussion in a written opinion. R. 2:11-3(e)(1)(A) and
(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION