SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3745-15T4[1]
A-2593-16T4

SALVATORE PERILLO, JR.,

Plaintiff-Respondent,

v.

VICKIE A. WHITE,

Defendant-Appellant.

SALVATORE PERILLO, JR.,

Plaintiff-Appellant/
Cross-Respondent,

v.

VICKIE A. WHITE,

Defendant-Respondent/
Cross-Appellant.

Argued April 18, 2018 – Decided June 4, 2018

Before Judges Koblitz, Manahan, and Suter.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FD-20-2149-02.

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[1] These are back-to-back appeals consolidated for the purpose of this opinion.

Brian W. Kincaid argued the cause for appellant (in A-3745-15) and respondent/ cross-appellant (in A-2593-16) Vickie A. White (Fein, Such, Kahn, Shepard, PC, attorneys; Brian W. Kincaid, on the brief).

Bruce M. Pitman argued the cause for respondent (in A-3745-15) and appellant/ cross-respondent (in A-2593-16) Salvatore Perillo, Jr. (Starr, Gern, Davison & Rubin, PC, attorneys; Lynn B. Norcia and Bruce M. Pitman, on the brief).

PER CURIAM

In A-3745-15, defendant Vickie A. White appeals from specific paragraphs of the March 24, 2016 order that required her to pay $13,875 to plaintiff Salvatore Perillo, Jr. This was part of the carrying costs for a residence that was jointly owned by the parties. We affirm this order largely for the reasons provided by the Family Part judge.

In A-2593-16, plaintiff appeals from the January 19, 2017 order that denied his requests to reduce child support, for reimbursement from defendant for certain expenses, and for attorney's fees. Defendant filed a cross-appeal from paragraphs one through six of the January 19, 2017 order, which denied her request to modify child support and for discovery of financial information. We reverse the child support portion of the January 19, 2017 order and remand that portion to the Family Part. On remand, the Family Part judge shall require updated Case

Information Statements (CIS) with all required attachments and financial discovery, if necessary, to evaluate the applications. The other portions of the January 19, 2017 order are affirmed.

I

The parties were not married. Their child was born in 2001. They settled their child custody and removal litigation in 2004, after several days of trial. The agreement (Agreement) was incorporated into and made part of a judgment dated April 29, 2004. We relate such parts of the Agreement as are relevant to the issues in these appeals.

Under the parties' Agreement, they were to "exert every reasonable effort to maintain free access and unhampered contact between the child and each of the parties." The parties were not to "do anything to alienate the child's affections for the other, or color the child's attitude toward the other."

Plaintiff was to pay child support, which consisted of $500 per month and "his assuming the responsibility for, and the payment of, certain recurring home expenses at the home where the [d]efendant resides, and will reside, with the child." Under the Agreement, a house was to be purchased where defendant would reside with the child. The home and its mortgage were to be in the parties' joint names. Plaintiff would provide a down payment of up to $100,000. Plaintiff's regular child support obligation was

$500 per month and payment of "the monthly mortgage, taxes, homeowner's insurance, cable television and snow removal." Defendant was to pay "all telephone charges, utilities including electric, gas, water, sewer and lawn care." Regular and ordinary maintenance of the home, "e.g., repair of a washing machine, plumbing repairs, electric repairs, etc., which are ordinary in nature," were to be paid sixty percent by plaintiff and forty percent by defendant. However, capital improvements and major repairs, "e.g., new roof, new driveway, painting of the home, replacement of the heating or air conditioning system," were to be paid by plaintiff.

Under the Agreement, it was anticipated that defendant and the child would reside in this house until the child graduated high school and then it was to be sold. When that occurred, the Agreement provided that plaintiff would receive certain payments "off the top" of the proceeds, which included the initial down payment, mortgage pay down lump sums paid by plaintiff, closing costs that were advanced, capital improvements, and any major repairs. The net proceeds, after payment of any outstanding mortgage, broker's costs, closing costs and attorney's fees, were to be divided between the parties on a fifty-fifty basis. The judgment was the "full and complete[] understanding" of the parties.

Plaintiff purchased a home for $379,000 with a down payment of $100,000. Defendant and the child resided in the home. In 2009, defendant married. Plaintiff's child support obligation was modified in 2011, to remove his payment of $500 per month.

Plaintiff alleged that defendant violated the Agreement's provisions regarding contact and alienation of affection. Following an eight-day trial in 2013, a Family Part judge found defendant to be in violation of litigant's rights for among other things, "continually frustrat[ing] efforts of the [p]laintiff to have parenting time with the child." She was found to have violated the judgment "in a habitual and continuous manner." On November 13, 2013, the judge ordered defendant to vacate the home by January 15, 2014 and to obtain a new residence in the same school district. The house that they jointly owned was to be sold. The order provided that any "proceeds shall be divided pursuant to the judgment and settlement agreement."

The November 13, 2013 order modified plaintiff's child support effective January 15, 2014, by requiring him to pay $220 per week and included a "Child Support Guidelines-Sole Parenting Worksheet."[2] That order is not part of the current appeals.

[2] This worksheet reflected defendant's weekly gross income as $765 and plaintiff's as $2000. Plaintiff was responsible for the child's health insurance premium and was credited with 52 overnights per year.

Defendant and the child moved out of the house as ordered. Plaintiff claims that thereafter he discovered extensive damage throughout the house. He paid a contractor $4800 for repairs and $2300 for the installation of a French drain although he presented no receipts. The home was listed for sale, but when plaintiff could not sell it even after reducing the price, he leased it. It finally sold in March 2016 for $300,000.

A

In April 2015, plaintiff filed a motion, which is the subject of A-3745-15, to require defendant to pay all of the $4800 in repair costs and one half of the "carrying costs" consisting of $2500 per month that plaintiff paid for the mortgage, taxes and insurance. He also requested that defendant reimburse him for half of his losses because the house was purchased for $379,000 but sold for $300,000. He asked for payment of his attorney's fees.

Defendant opposed the motion and in July 2015, filed a cross-motion, seeking counsel fees. She denied any responsibility under the Agreement to pay for repairs or painting. She was only responsible to pay forty percent of "regular and ordinary" maintenance expenses that she approved. She disclaimed any responsibility to pay for the "mortgage, real estate taxes and homeowners insurance" on the residence.

On March 24, 2016, the Family Part order[3] required defendant to pay $13,875 to plaintiff, which was thirty percent of the $2500 per month carrying costs paid by plaintiff for the months after she moved out of the house (January 2014) until it was sold (March 2016), less the months that the property was leased. The order also denied plaintiff's application for reimbursement of $4800 in ordinary repairs; denied without prejudice reimbursement for installation of the French drain based on a lack of proof of the expense; denied without prejudice payment of fifty percent of the losses sustained on sale of the home, and required plaintiff to provide a letter from the mortgage company that the mortgage was up to date. The parties were to submit updated attorney's fee certifications.

In his oral decision, the judge found that many of the repair items constituted "ordinary and regular maintenance" under their 2004 Agreement but that because plaintiff had not consulted with defendant prior to undertaking these repairs, defendant was not

[3] The court heard oral argument on the motions on September 15, 2015. Other issues before the court on September 15, 2015, involved custody and parenting time. The parties appeared before the court on those issues on September 9, 2015. The parties reached agreement on "parenting time and removal and some financial obligations" and filed a consent order on November 9, 2015. Custody and parenting time issues are not part of this appeal. The parties did not resolve the reimbursement issues regarding the house. Further argument was heard on March 9, 2016, regarding those issues.

responsible for them. The French drain was a capital improvement under the Agreement, but plaintiff provided no proof of this expense, and the court denied payment without prejudice.

The court required defendant to pay thirty percent of the carrying costs until the home was sold. Noting that defendant was entitled to equity in the house as a half owner, the court found "it is only equitable that she be responsible for the carrying costs of the home until the home was sold." The court stated,

> even when she wasn't there, he continued to pay less in child support because no one was there. And she wasn't there. So certainly, she could have moved for more -- an increase in child support. He continued to claim the child on his tax return every year as it called for in the agreement. And, more importantly, he was getting the benefit of all the tax interest on the mortgage.
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> So the court finds that it is equitable that she pay something, but only 30 percent.

However, the court denied without prejudice plaintiff's request for defendant to pay him half of the home's loss in equity value because plaintiff had not presented proof as to his actual losses. The court found that the parties' 2004 Agreement did not "contemplate a change in circumstances" about defendant moving out before the child was eighteen or "what would happen if the house sold for less than what it was worth and there was a loss in the matter."

In April 2016, the judge denied both parties' applications for attorney's fees. An order for judgment was entered on May 2, 2016, against defendant in favor of plaintiff for $13,875 plus statutory interest.

B

Beginning in August 2016, the parties filed motions that are the subject of appeal A-2593-16. In August 2016, defendant filed a motion seeking an increase in child support based on changed circumstances, to modify the parties' 2004 Agreement to require financial disclosure by plaintiff, and to permit her use of the tax exemption for the minor child. She claimed plaintiff was a "wealthy and successful business person who owns several businesses including restaurants, a banquet hall and a liquor store." She argued it was not equitable to restrict inquiry into plaintiff's income, which she claimed was greater than the amount used by the court in 2013. Child support had not been adjusted in more than three years. She requested discovery and a hearing.

In November 2016, plaintiff filed opposition to defendant's motion and a cross-motion to reduce child support. In his supporting certification, plaintiff explained that his income in 2016, was less than what the judge had used in 2013, and he exercised more overnights with his son than he previously had been credited. His calculations reflected that a reduction in child

support was warranted, not an increase. He claimed defendant had the ability to control her income as a flight attendant by selecting the routes and times she wanted to fly.

Plaintiff's cross-motion asked for an order requiring defendant to pay one hundred percent of the losses he sustained when he sold the house and fifty percent of capital improvements he made to the property. Plaintiff sold the house on March 18, 2016, for $300,000. He claimed his losses totaled $93,350, consisting of a $70,000 loss on the sale price, closing costs of $18,050, and capital improvements of $2900 for a fence and $2400 for a French drain.

Defendant's reply filed in December 2016 denied any responsibility to pay plaintiff. The property was leased to tenants after she moved out. Plaintiff was suing one of the tenants for $10.056.36 in damages to the property. The $13,875 that she was ordered to pay was being held by counsel in an account. The Agreement did not require her to make other payments. Plaintiff did not disclose his income for purposes of calculating child support because he did not include any individual tax returns with his CIS. Also plaintiff's CIS claimed $10,000 per month in expenses but income of $5000 per month. She claimed that he failed to disclose certain businesses and had relinquished a number of his overnight visits.

The January 19, 2017 Family Part order that denied these motions was appealed by both parties and is the subject of appeal A-3745-15. The judge denied the requests to modify child support finding that the 2004 Agreement "contemplated" there would be "flexibility" in plaintiff's income and that child support "would be set at the maximum amount under the child support guidelines" even though there were fluctuations in the income of plaintiff. The order denied defendant's request for financial disclosure by plaintiff.

The court also denied plaintiff's cross-motion for reimbursement of losses incurred in selling the house. Because "the real estate property was an investment," the court declined to hold defendant responsible "for that loss or the capital improvements." The court denied both parties requests for counsel fees.

C

In appeal A-3745-15, defendant argues that the court's order erroneously modified their 2004 Agreement because that agreement did not include any provision that required defendant to pay any portion of the carrying costs while the house was listed for sale. Defendant contends that the court erred in allowing plaintiff to assert and then to rely on facts that were not part of the record.

She argues that plaintiff should have been required to produce a mortgage statement before requiring her to pay carrying charges.

In appeal A-2593-16, plaintiff contends that the court erred by denying modification of his child support obligation and by denying his requests for reimbursement of losses from the sale of the house and of attorney's fees. For the first time on appeal, plaintiff argues that the court erred by not applying the law of joint venture, characterizing the 2004 Agreement as a joint venture between plaintiff and defendant. In defendant's cross-appeal, she argues the court erred by not permitting discovery about plaintiff's finances and by denying her request to increase child support.

II

We accord "great deference to discretionary decisions of Family Part judges," Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012), in recognition of the "family courts' special jurisdiction and expertise in family matters." N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 343 (2010) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Hitesman v. Bridgeway, Inc., 218 N.J. 8, 26 (2014)

(citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

We discern no error in the court's March 24, 2016 order that required defendant to pay thirty percent of the carrying costs for the period after she was ordered to vacate the home and until it was sold, less the time it was rented. "The equitable authority of a court to modify support obligations in response to changed circumstances, regardless of their source, cannot be restricted." Lepis v. Lepis, 83 N.J. 139, 148 (1980). "[C]ourts possess broad equitable powers to accomplish substantial justice." Kiken v. Kiken, 149 N.J. 441, 455 (1997) (citing Weitzman v. Weitzman, 228 N.J. Super. 346, 358-59 (App. Div. 1988)).

The carrying costs were part of plaintiff's child support under their Agreement. It provided that "[t]he [p]laintiff's financial obligations set forth in this Agreement are in the nature of child support, both in terms of the contributions toward the expenses of the home and the direct child support set forth in this Agreement."

The court's November 13, 2013 order, requiring defendant to vacate the home and for the home to be sold, were significant changes in circumstances. Plaintiff's child support was recalculated under the Guidelines based on this change in circumstances and the parties' incomes at the time. His child

support obligation was increased. The carrying charges of $2500 per month were a vestige from the prior arrangement. The court found it was equitable for defendant to share in reimbursing some of this amount because she and the child no longer lived in the house and plaintiff was paying child support based on the Guidelines. However, plaintiff benefited from the ability to deduct mortgage interest and real estate taxes from his federal and state taxes and to claim the child as a deduction. Thus, the court determined as a matter of equity that defendant's reimbursement contribution was thirty percent of the carrying costs.

Although the court did not express it, defendant's responsibility for thirty percent of the carrying costs also was reflective of each party's percentage of net income based on the Guidelines worksheet incorporated with the November 13, 2013 order. Thus, the thirty percent was a calculation of her relative ability to contribute to the costs.

We are not persuaded the Family Part judge relied on facts outside of the record in entering the subject order. The comments that are cited by defendant as problematic either relate to issues that were resolved in defendant's favor or were evident from the 2004 Agreement itself.

Defendant never contested plaintiff's assertion that his carrying charges for the property were $2500 per month. Although plaintiff was required to produce a statement that the mortgage was current, it does not appear defendant asked for verification of plaintiff's monthly carrying charges and, thus, it was not necessary for the trial court to order this.

We decline to address the joint venture issue that defendant raises in connection with A-2593-16 because it was not raised before the Family Part. Appellate courts "will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co. v. Summer, 58 N.J. Super. 542 (App. Div. 1959)). The issue implicates neither constitutional nor jurisdictional concerns.

In A-2593-16, both parties appeal the court's order that denied their applications to modify child support. The court erroneously assumed that the Agreement precluded any modification of child support. "[T]he right to support belongs to the child." Martinetti v. Hickman, 261 N.J. Super. 508, 512 (App. Div. 1993). Child support orders are always subject to judicial review upon a

showing of changed circumstances. Kiken, 149 N.J. at 456. See Lepis, 83 N.J. at 157. "There is . . . no bright line rule by which to measure when a changed circumstance has endured long enough to warrant a modification of a support obligation." Donnelly v. Donnelly, 405 N.J. Super. 117, 128 (App. Div. 2009) (quoting Larbig v. Larbig, 384 N.J. Super. 17, 23 (App. Div. 2006)). As children age, their needs may increase. See Shaw v. Shaw, 138 N.J. Super. 436, 441-42 (App. Div. 1976); Walton v. Visgil, 248 N.J. Super. 642, 647 (App. Div. 1991).

The parties' Agreement could not preclude a modification in child support upon a showing of changed circumstances. Indeed, it already had been modified in November 2013. Both parties presented evidence to warrant a review. The last modification was in 2013, more than five years ago. We reverse the January 19, 2017 order to the extent that it denied the parties' applications for modification of child support. We remand the child support issue to the Family Part for consideration of an appropriate child support amount. In doing so, the Family Part shall request updated CIS's and require all appropriate supporting materials.

We see no error by the court in its January 19, 2017 order that denied plaintiff's request for reimbursement of certain expenses nor do we consider the court's order inconsistent with the March 24, 2016 order that is the subject of the appeal in A-

3745-15. The 2004 Agreement did not treat regular and ordinary maintenance or capital improvements as child support; instead, the parties were to agree on the expenses for regular and ordinary maintenance, while plaintiff was responsible for capital improvements and major repairs. Thus, the fact that the trial court treated carrying costs differently from these other types of expenses was supported by their differing treatment under the parties' Agreement. To the extent that the Agreement did not address losses that occurred when the house was sold, in contrast to potential gains, which were addressed in the Agreement, the court did not err in finding there was no obligation on the part of defendant to reimburse plaintiff for these losses. The parties did not include this term in their agreement nor had the agreement characterized these losses as child support.

Finally, we review an order that declines to award attorneys' fees under an "abuse of discretion" standard. Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005). "[A]buse of discretion is demonstrated if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Ibid. (citing Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)). We find no misapplication

of discretion in the court's orders that denied attorney's fees to both parties.

In A-3745-15, we affirm. In A-2593-16, we reverse on the issue of child support modification and remand that issue to the Family Part; we affirm on the other issues. We do not retain jurisdiction.