SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2319-20

JENNIFER GUERCIO,

Plaintiff-Respondent,

v.

ROSARIO GUERCIO,

Defendant-Appellant.

Submitted December 7, 2022 – Decided December 27, 2022

Before Judges DeAlmeida and Mitterhoff.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FM-07-0168-15.

Jared A. Geist, attorney for appellant.

Offitt Kurman, PA, attorneys for respondent (Rawan Hmoud, of counsel and on the brief; Ilham S. Rose, on the brief).

PER CURIAM

Defendant, Rosario Guercio,[1] appeals from a March 8, 2021 order, which reaffirmed two earlier orders—dated May 8, 2019 and March 20, 2020—awarding plaintiff, Jennifer Guercio, counsel fees. We affirm, substantially for the reasons set forth in Judge Marcella Matos Wilson's well-reasoned opinions.

We discern the following facts from the record. The parties were married on October 18, 2008. The underlying divorce in this matter was filed on July 20, 2014. After three years of prejudgment litigation, the parties resolved their matrimonial matter by way of settlement on June 29, 2017, the scheduled trial date. The settlement finalized the divorce, and the core terms of the verbal agreement were placed on the record that day.

The two unresolved issues following the agreement were the determination of counsel fees and allocation of the court-appointed custody expert's fees. The June 29, 2017 transcript confirms that the parties agreed "to submit the issue of [c]ounsel fees and experts fees to Your Honor . . . for the [c]ourt's binding determination."

Finding all venue and jurisdiction requirements met, the family judge granted judgment of divorce (JOD) on June 29, 2017. The verbal settlement agreement was incorporated into the JOD by reference, with both parties

[1] Both parties refer to defendant as "Ross."

acknowledging their acceptance of that agreement, their intention to be bound under that agreement, and that neither party was forced nor coerced.

Despite the verbal agreement placed on the record on June 29, 2017, a written property settlement agreement (PSA) was not memorialized and entered by the family judge until January 8, 2019, after several enforcement motions filed by plaintiff. The judge deemed the PSA to be nunc pro tunc to June 29, 2017 and incorporated the parties' earlier verbal agreement. As pertinent here, paragraph 12 of the PSA once again addressed the determination of counsel fees and reallocation of expert fees, which provided as follows:

> The issues of counsel fees and reallocation of [expert] fees are reserved for the [c]ourt's binding determination with same to be determined based upon written submission without the necessity of a hearing or oral argument. Submissions to the [c]ourt for its binding determination on the issues of counsel and expert fees shall be simultaneously submitted to the [c]ourt no later than 60 days from the [c]ourt's entry of the within [j]udgment.

On May 8, 2019, following submissions by both parties on the matter, the family judge issued an order awarding plaintiff counsel fees in the amount of $37,204.58—the amount of counsel fees accrued by plaintiff from July 1, 2017 to May 8, 2019—to be paid within thirty days. The order included a lengthy written decision whereby the judge carefully considered each of the Rule 5:3-

5(c) factors.[2] In holding defendant liable, the judge reasoned that the bulk of litigation in this matter took place after the terms of the parties' agreement were put on the record on June 29, 2017, which was attributable to defendant's "unwillingness to be held to his agreement."

Defendant did not seek reconsideration of the May 8, 2019 order; rather, defendant filed his first appeal in this matter on July 21, 2019, two weeks after the deadline for compliance with the May 8 order. On August 8, 2019—while defendant's appeal remained pending—the family judge submitted a letter to the appellate clerk to supplement her decision, stating that her decision to award counsel fees was in error as there was no agreement between the parties, nor any pending motion before the court, to justify rendering a determination as to counsel fees incurred after the date that final JOD was entered.

In the interim, on July 2, 2019, plaintiff filed a motion to enforce the May 8, 2019 order. On December 6, 2019, the family judge denied plaintiff's enforcement motion without prejudice. In so doing, the judge declined to exercise jurisdiction in light of defendant's then-pending appeal. Five days

[2] Rule 5:3-5(c) articulates the factors that courts should consider in determining whether an award of counsel fees is appropriate in a given matter.

later—on December 11, 2019—defendant's appeal was administratively dismissed for failure to prosecute.

On January 7, 2020, plaintiff filed a timely notice of motion for reconsideration and enforcement. Pursuant to Rule 1:6-3(a), defendant's response to the pending motion was due on March 5, 2020; however, defendant failed to submit a timely response. On March 20, 2020, the judge granted plaintiff's motion in its entirety, deeming it unopposed, and directed defendant to pay the $37,204.58 in counsel fees previously awarded on May 8, 2019 within twenty days. The judge annexed a statement of reasons, stating: "[a]lthough this court corresponded to the Appellate Division on August 8, 2019 amplifying the record and identifying what this court believed to be an error at that time, the [d]efendant failed to perfect his appeal and failed to file any opposition to [p]laintiff's current motion."

On August 11, 2020, plaintiff moved for enforcement of the family judge's March 20, 2020 order and for it to be reduced to a judgment. On the same date, defendant moved to vacate the March 20, 2020 order. Defendant relied on Rule 4:50-1(e) to argue that it was inequitable to enforce an order "that the author of which admits is in error."

On March 8, 2021, the judge entered an order which: (1) denied defendant's application to vacate the March 20, 2020 order; (2) granted plaintiff's application to hold defendant in violation of litigant's rights for failure to pay the $37,204.58 as reaffirmed in the March 20, 2020 order and reduced the order to a judgment; and (3) granted plaintiff's application for counsel fees for the necessity of the motion and directed plaintiff to submit an updated certification. Further, the order explicitly supplied defendant with ten days to refute any cost put forth by plaintiff.

In a written opinion affixed to the March 8, 2021 order, the trial judge—after a brief summation of the facts—explained her reasoning for denying defendant's motion to vacate pursuant to Rule 4:50-1(e):

> On March 20, 2020, this Court entered an Order granting [p]laintiff's motion and directing [d]efendant to pay the counsel fee award of $37,204.58 within 20 days of the entry of the order. As part of the Court's order, a Statement or Reasons was attached which specifically addressed a letter that this Court wrote to the Appellate Division during the pendency of that action. The reason that this Court ordered [d]efendant to pay legal fees and costs despite this Court's correspondence was because the [d]efendant failed to perfect his appeal and failed to file any opposition to [p]laintiff's Notice of Motion at that time. The Court therefore ordered on March 20, 2020, that the May 8, 2019 decision remain unchanged and the [d]efendant was required to make the counsel fee payment of $37,204.58 as previously ordered . . . .

> Defendant is now seeking to vacate the Court's Order based upon that correspondence to the [A]ppellate [D]ivision. This Court has already addressed the reason for the enforcement of the Order on March 20, 2020 and the [d]efendant never filed an application with the Appellate Division nor did he file any motion for reconsideration of this court's March 20, 2020 order until August 11, 2020, some 5 months later. Defendant is out of time for the reconsideration of that Order and his motion to vacate the order is denied. Defendant could have perfected his appeal that was dismissed, filed a timely Motion for Reconsideration, or filed a timely appeal from this Court's Order of March 20, 2020, but he chose to do nothing. It would be grossly unfair to the [p]laintiff for this Court to dismiss the Order granting counsel fees and costs.

On April 9, 2021, the judge awarded plaintiff additional counsel fees in the amount of $2,283. The April 9, 2021 order included a written opinion which reasoned that defendant "failed to refute any charge set forth in [p]laintiff's updated Certification of Services despite [being] given an opportunity to do so."

On April 22, 2021, defendant filed a notice of appeal of the March 8, 2021 order only. On April 23, 2021, the appellate clerk's office informed defendant that the order he sought to appeal was interlocutory in nature due to the third paragraph, which dealt with the previously outstanding issue of additional counsel fees to be awarded by the family judge for plaintiff's filing of an enforcement motion. The correspondence provided defendant with a fifteen-day window to address the nonfinality of the March 8, 2021 order.

On May 10, 2021—nearly a month after the final order was entered by the judge—defendant's appeal was once again dismissed without prejudice for failure to prosecute. On the same day, the family judge entered final judgment in accordance with her March 8, 2021 order.

This appeal followed. On appeal, defendant raises the following argument:

> POINT I
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> PURSUANT TO NEW JERSEY COURT RULE 4-50, AN ORDER ENTERED IN ERROR SHOULD BE VACATED. THIS IS SPECIFICALLY CONTEMPLATED IN SUBSECTION A OF THE COURT RULE.[3] THE JUDGE WHO WROTE THE ORDER ADMITTED IN THE AUGUST 9, 2019 LETTER THAT THE UNDERLYING AWARD OF THE COUNSEL FEES WAS IN ERROR. THUS THE ORDER ENFORCING IT SHOULD HAVE BEEN VACATED AS IT WAS ISSUED IN ERROR BY THE COURT'S OWN ADMISSION. DA 4-18

[3] Despite defendant's argument point heading, defendant did not raise any argument under subsection a at the trial level, nor did defendant brief the issue on appeal. As such, we decline to consider defendant's appeal pursuant to Rule 4:50-1(a). See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) ("[O]ur 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.'") (quoting Reynolds Offset Co. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)); see also Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived.") (citations omitted).

We find insufficient merit in defendant's contention to warrant extended discussion in a written opinion. Rule 2:11-3(e)(1)(E). We add the following brief comments.

An application to set aside an order pursuant to Rule 4:50-1 is addressed to the motion judge's sound discretion, "which should be guided by equitable principles." Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994). A trial court's determination under Rule 4:50-1 is entitled to substantial deference and will not be reversed in the absence of a clear abuse of discretion. U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012).

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 County Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. I.N.S., 779 F.2d 1260, 1265 (7th Cir. 1985)). "In other words, a functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue. It may be 'an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.'" Ibid. (quoting Coletti v. Cudd Pressure Control, 165 F.3d 767, 777 (10th Cir. 1999)). However, this court "accord[s] no deference to

the judge's interpretation of applicable law, which we review de novo." Barlyn v. Dow, 436 N.J. Super. 161, 170 (App. Div. 2014).

Rule 4:50-1 sets forth the various circumstances in which a party may obtain relief from a final judgment or order, including:

> (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under Rule 4:49; (c) fraud, misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

"The rule is 'designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case.'" Guillaume, 209 N.J. at 467 (quoting Mancini v. EDS ex rel. N.J. Auto. Full Ins. Underwriting Ass'n, 132 N.J. 330, 334 (1993)). "[J]ustice is the polestar and our procedures must ever be moulded and applied with that in mind." Jansson v. Fairleigh Dickinson Univ., 198 N.J. Super 190, 195 (App. Div. 1985).

Rule 4:50-1(e) provides a mechanism "for relief from judgment where . . . 'it is no longer equitable that the judgment . . . have prospective application.'" DEG, LLC v. Township or Fairfield, 198 N.J. 242, 265 (2009) (quoting R. 4:50-1(e)). "In essence, the rule is rooted in changed circumstances that call fairness of the judgment into question." Id. at 265-66. Our Supreme Court has set a "stringent standard" for relief under Rule 4:50-1(e): the movant bears the burden of proving both that circumstances have changed since entry of the order and that, "'absent the relief requested, [its enforcement] will result in extreme and unexpected hardship[.]'" Id. at 266 (quoting Little, 135 N.J. at 285).

Here, defendant has not satisfied his initial burden of showing changed circumstances that would call into question the fairness of the March 8, 2021 judgment, nor has he made a showing of extreme and unexpected hardship. To the extent he relies on the judge's letter supplementing the appellate record, it is manifest that it is defendant's own failures to diligently pursue his available remedies throughout this matter that have led to his inability to challenge the family judge's orders at this stage. Defendant failed to prosecute his initial appeal of the May 8, 2019 order; he failed to file any opposition to plaintiff's January 7, 2020 motion for reconsideration and enforcement; he failed to refute the additional counsel fees as set out by the March 8, 2021 order; and defendant

failed to prosecute his appeal of the March 8, 2021 order. These self-created failures do not give rise to a change in circumstances or unexpected hardship warranting relief. To the contrary, based on these circumstances, we agree with the family judge that "[i]t would be grossly unfair to the [p]laintiff . . . to dismiss the Order granting counsel fees and costs." We discern no abuse of discretion in the judge's denial of the motion to vacate.

Affirmed.