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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0261-20

SHARON MILLER GROMEK,

Plaintiff-Respondent,

v.

VITOLD F. GROMEK,

Defendant-Appellant.

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Argued May 30, 2023 – Decided June 15, 2023

Before Judges Whipple, Mawla, and Smith.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Morris County, Docket No. FM-14-0006-10.

Vitold F. Gromek, appellant, argued the cause pro se.

Respondent has not filed a brief.

PER CURIAM

Defendant Vitold F. Gromek appeals from August 16, and November 4, 2020 Family Part orders. We affirm in all respects, but remand for the court to conduct an analysis of the factors in Rule 5:3-5(c), which govern counsel fees.

Plaintiff Sharon Gromek and defendant were married in May 1982 and divorced in July 1999. Defendant was ordered to pay alimony to plaintiff and child support for their two children, a daughter born in 1988 and a son born in 1990. The parties have continued to engage in extensive litigation since their divorce.[1]

Relevant to our discussion of the case history, after a fourteen-day plenary hearing, the trial court entered a December 10, 2014 order,[2] which, in part, required defendant to pay his children's undergraduate education expenses: $38,683.01 for his daughter and $44,853.97 for his son. The court also ordered defendant to pay $77,081.67 to plaintiff in counsel fees and granted defendant's request to have probation recalculate his alimony and child support arrears and credits.

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[1] This is their sixth appeal.

[2] Defendant did not provide the court's reasoning for this order in the record. However, it is reflected in our decision in Gromek v. Gromek, No. A-1494-15 (App. Div. June 5, 2018) (slip op. at 3-4).

By 2019, defendant had still not satisfied these obligations. The court, in a June 26, 2019 order, gave defendant one year—until July 31, 2020—to pay the remaining balance owed to plaintiff. If he failed to do so, his house would be listed for sale to satisfy the judgment. In January 2020, the court granted plaintiff's motion to require defendant to pay the interest accruing on the children's unpaid college loans. It also granted interest on the attorneys' fees owed under the 2014 order.

Then, in June of 2020, defendant asked the court to allow him to refinance his home to satisfy the outstanding judgments and counsel fees. Under a Fannie Mae guideline that became stricter due to the COVID-19 pandemic, the mortgage company needed three years of on-time payments before it could refinance defendant's mortgage. Because defendant previously modified his mortgage in August 2017, he would not be able to refinance his home until August 1, 2020—the day after the July 31, 2020 deadline. Consequently, he also asked for more time to make his final payment and requested November 1, 2020, as the new due date.

A hearing was held on August 7, 2020, after which the court granted defendant relief in part. Defendant was given until November 1, 2020, to pay "any and all judgments owed to [p]laintiff . . . ." If he was able to refinance his

house, the closing agent for the resulting sale was ordered to pay the amount defendant owed for the college expenses and attorneys' fees.

The court gave plaintiff power of attorney to sell the house if defendant failed to satisfy the judgments by November 1, 2020. In addition to awarding plaintiff her requested $3,667 in counsel fees at the hearing, the court also granted plaintiff an additional $7,231.50 in counsel fees in the order itself.

Furthermore, the judge rejected defendant's contention the COVID-19 pandemic caused the delay in refinancing his home. The order directing defendant to pay plaintiff was issued in June 2019, and the pandemic only had a major impact on daily life beginning in the spring of 2020. Instead, the court observed the reason defendant could not refinance his house until August 1, 2020—the day after his payments were due pursuant to the June 2019 order—was due to his "inability to demonstrate satisfaction [of] mortgage payments over a substantial period of time . . . ." The court continued it:

> certainly does not minimize the circumstances of . . . defendant, and his being a [seventy-one]-year-old male [and] still employed . . . . Counsel makes reference that the [c]ourt should only consider the circumstances in the . . . ["]good-faith basis["] of . . . defendant since June of 2019[. Q]uite candidly, on one side of the [c]ourt's acting as a court of equity . . . defendant . . . created the situation we're in, and the [c]ourt cannot ignore that. Under the circumstances, the [c]ourt will grant plaintiff's motion in part.

Additionally, in awarding plaintiff counsel fees, the court found defendant violated litigants' rights because he had not satisfied his obligations under the previous orders. It stated:

> Pursuant to Rule 5:3-5, the only reason we are here before this [c]ourt is to enforce a prior order where there has been non-compliance.
>
> I note today is August 7th, 2020, and certainly by no contested fact with this [c]ourt, defendant has not satisfied his obligations under the previous two orders. Regarding defendant's attempt and/or acting in bad faith, quite candidly, waiting until March[,] . . . the inception of COVID, even taking . . . defendant's representations, and I will . . . , there is no question of fact, that he began his refinancing attempts in December[. T]hat doesn't excuse the six months prior to that where it should have been in motion instead of waiting for the [eleventh] hour to proceed with this refinance.

Defendant moved again in July 2020, requesting the court: hold "a plenary hearing to resolve significant mathematical discrepancies in [his] probation account"; suspend enforcement of his "alleged" alimony and child support arrears; allow him to retire at the age of seventy-four; and terminate alimony so he could support himself. On November 4, 2020, the court denied defendant's request for a plenary hearing, because it had been explored on

numerous occasions and previously adjudicated. Defendant had been given "several opportunities" to fix any discrepancies in the probation account.

The court granted defendant's request to retire at age seventy-four, after considering the factors in N.J.S.A. 2A:34-23(j)(1). It reasoned though defendant had a history of failing to meet his financial obligations in a timely manner, defendant had by this time been "able to refinance his residence to satisfy his outstanding debt." Additionally, he still had an outstanding alimony obligation and other money he owed to plaintiff. Given the totality of the circumstances, the court found "both [p]laintiff and [d]efendant are provided the opportunity to prepare for [d]efendant's ultimate retirement" if he retires at the age of seventy-four.

The court denied defendant's motion to terminate alimony. Utilizing the factors in N.J.S.A. 2A:34-23(k), the court found defendant did not meet his burden to show changed circumstances because he still had one asset—his house. Additionally, defendant wrote in his certification he had a higher income, suggesting he was still able to meet his obligations. Lastly, the court remarked defendant had failed to make any timely payments to plaintiff for the previous ten years.

The court granted plaintiff $1,833.50 in counsel fees. It found defendant incurred unnecessary legal fees to litigate issues he had already been provided several opportunities to litigate. Because the court granted the request for his retirement, it did not award fees for this portion of defendant's motion. This appeal followed.

We review legal decisions of trial courts de novo. Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019). However, "[b]ecause of the family courts' special jurisdiction and expertise in family matters, [we] . . . accord deference to family court factfinding." Cesare v. Cesare, 154 N.J. 394, 413 (1998). Thus, we uphold the Family Part's findings of fact "when supported by adequate, substantial, credible evidence." Id. at 411-12 (citing Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974)).

At the outset, we reject defendant's argument the court erred in allowing the matters to proceed without plaintiff's Case Information Statement (CIS), which "reflects a . . . current financial picture of the parties." Crews v. Crews, 164 N.J. 11, 27 (2000). Rule 5:5-2(a) says a CIS "shall be filed and served in all contested family actions . . . in which there is any issue as to custody, support, alimony or equitable distribution." In both proceedings, the issues were how much defendant owed and how to enforce that obligation. The court repeatedly

referenced defendant's non-compliance throughout the years. Thus, plaintiff's financial status was irrelevant for the court to resolve these issues.

I.

August 16, 2020 Order

The August 16 order: 1) gave defendant an extension to refinance his house; 2) if he was able to refinance his house on time, he would pay plaintiff and her lawyers what he owed; 3) if he was not able to refinance on time, plaintiff would have power of attorney to sell the house; and 4) awarded plaintiff counsel fees of $3,667 and $7,231.50.

According to the November 4 order, defendant was able to refinance his house. He takes issue with the amount awarded plaintiff in the order and the counsel fees.[3]

Defendant first argues the court failed to enforce the December 10, 2014 order, which in part required him to pay the children's undergraduate expenses.

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[3] Defendant presents the report prepared by Stephan Chait, a forensic accountant, in his argument regarding the August 16 order. He asserts the court erred in failing to consider the report. However, Chait's report had to do with defendant's arrears, which he claims were incorrectly calculated by probation. The order only concerns payment of his children's college loans and interest, in addition to counsel fees. Thus, the court did not err in failing to consider the accountant's report because it was not relevant.

He asserts he is being forced to pay his daughter's graduate loans and the interest accumulated on the undergraduate loans in violation of that order.

In the 2014 order, the judge ordered defendant to pay $38,683.01 for the daughter's undergraduate loans and $44,853.97 for the son's, totaling $83,536.98. Defendant had not paid any of this by 2020, so the court again, in January 2020, ordered him to pay this same amount plus the interest accumulated on the loans by July 31, 2020.

Defendant's argument the court ordered him to pay his daughter's graduate school loans is based on a misunderstanding of the evidence plaintiff presented the trial court in her cross-motion. Plaintiff provided the court with a chart of the children's loans, which included two Citizens Bank loans that were apparently taken out for the daughter's graduate education. They are listed, with their respective loan numbers, on the chart detailing the daughter's educational expenses for 2010-2011—when she attended a graduate program at the University of Pennsylvania. Thus, this was an apparent misstatement in plaintiff's cross-motion.

However, the misstatement is of no moment, because the total amount the court ordered defendant to pay in December 2014, and again in January 2020, is the same as the amount the court ordered on August 16, 2020: $83,536.98. That

total was for the undergraduate loans of both children. Thus, based on our review, the court did not require defendant to pay the loans for the daughter's graduate education in contravention of the December 2014 order.

Defendant also asserts error in the court's January 2020 order requiring him to pay the interest on the undergraduate loans. He reiterates his counsel's arguments at the August 2020 hearing, contending because he is already responsible for paying interest on the judgment under Rule 4:42-11(a), plaintiff should not be able to "double dip" and receive interest on the loans as well.

We reject this argument. The order to pay interest on the loans is part of the judgment. A parent may be held responsible for college expenses—including those paid for with loans. Guglielmo v. Guglielmo, 253 N.J. Super. 531, 548 (App. Div. 1992). This may include interest on the loans incurred for undergraduate education. Khalaf v. Khalaf, 58 N.J. 63, 72 (1971). This is especially relevant here, where the interest has accrued in large part due to defendant's delay in satisfying his obligations. Additionally, we note defendant did neither sought reconsideration or relief from, nor appealed from the January 2020 order.

Defendant also argues the court erred in awarding plaintiff counsel fees, contending the judge did not consider the appropriate factors. Counsel fees in

family actions are awarded pursuant to Rule 5:3-5. An allowance for fees and costs is discretionary, Eaton v. Grau, 368 N.J. Super. 215, 225 (App. Div. 2004), but Rule 5:3-5(c) requires the court to consider the following factors:

> (1) the 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 both during and prior to trial; (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 incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award.

The court here explained the following in awarding fees to plaintiff in August 2020:

> This matter that is before the [c]ourt is here certainly because defendant has not satisfied his previous obligations under the [December 10, 2014 order].
>
> Said another way, defendant is in violation of litigants' rights and under the circumstances for this application, plaintiff is entitled to attorney[s'] fees under this application. Pursuant to [Rule] 5:3-5, the only reason we are here before this [c]ourt is to enforce a prior order where there has been non-compliance.
>
> I note today is August 7th, 2020, and certainly by no contested fact with this [c]ourt, defendant has not satisfied his obligations under the previous two orders. Regarding defendant's attempt and/or acting in bad

> faith, quite candidly, waiting until March[,] . . . the inception of COVID, even taking the defendant's representations, and I will . . . , there is no question of fact, that he began his refinancing attempts in December, that doesn't excuse the six months prior to that where it should have been in motion instead of waiting for the [eleventh] hour to proceed with this refinance.
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> Therefore, this [c]ourt finds that defendant's application is in bad faith, notwithstanding the COVID pandemic, and will grant attorneys' fees on this application pursuant to the [Rule] 4:42-9 certification that was submitted in this matter requesting $3,667.

The August 16 order noted this amount, referring to it as "interest" on the existing counsel fees in some places, and additionally awarded the plaintiff $7,231.50 with no explanation. In its discussion of counsel fees at the hearing, the court did not address the factors found in Rule 5:3-5(c). Rather, it based the decision to award plaintiff attorneys fees on the bad faith of defendant in filing the motion and a finding he was in violation of litigants' rights for not complying with the December 2014 and January 2020 orders.

We understand that where bad faith is in play, the economic considerations for awarding counsel fees are generally inapplicable. Kelly v. Kelly, 262 N.J. Super. 303, 307 (Ch. Div. 1992). However, this still requires the court to pass upon the Rule 5:3-5(c) factors, which include a consideration of a parties' good faith. See R. 5:3-5(c)(3); Barr v. Barr, 418 N.J. Super. 18, 47

(App. Div. 2011). Because the court did not do this, we remand for the court to conduct a proper analysis under the rule and explanation of the basis for the $7,231.50 award.[4]

Defendant argues the court erred in considering his delay in refinancing his house in its decision to award counsel fees. He points to the letter from the mortgage company he received on June 29, 2020, which informs him he would not be able to refinance until August 1, 2020. He contends the delay was not in his control and thus he cannot be considered to have acted in bad faith.

"Examples of bad faith include misusing or abusing process, seeking relief not supported by fact or law, intentionally misrepresenting facts or law, or otherwise engaging in vexatious acts for oppressive reasons." Slutsky v. Slutsky, 451 N.J. Super. 332, 367 (App. Div. 2017) (citing Borzillo v. Borzillo, 259 N.J. Super. 286, 293-94 (Ch. Div. 1992)). "When [a party]'s conduct bespeaks an honest attempt to press a perceived, though ill-founded and perhaps

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[4] To the extent defendant argues the court erred in continuing to enforce counsel fees awarded in previous orders—totaling $85,072.81—we decline to address what has not been raised in a timely appeal. See L.T. v. F.M., 438 N.J. Super. 76, 91 n.5 (App. Div. 2014) (alteration in original) (quoting State v. Rambo, 401 N.J. Super. 506, 520 (App. Div.), certif. denied, 197 N.J. 258 (2008), cert. denied, 556 U.S. 1225 (2009)) ("It is a fundamental [principle] of appellate practice that we only have jurisdiction to review orders that have been appealed to us.").

misguided, claim, he or she should not be found to have acted in bad faith." Ibid. (alteration in original) (quoting Tagayun v. AmeriChoice of N.J., Inc., 446 N.J. Super. 570, 580 (App. Div. 2016)).

The trial court, accepting defendant's version of the facts, noted defendant did not make any attempt to comply with the June 2019 order until December 2019, leaving himself only a few months to satisfy his obligation. His lawyer even stated at the hearing that no action was taken toward refinancing prior to March 2020, the beginning of the pandemic. Though defendant blames the delay on COVID-19, this is, as the trial judge found, irrelevant. According to the letter, Fannie Mae's guideline that the company would need "[three] years of on[-]time payments" before it could issue defendant a new mortgage did not only exist during the pandemic, but rather "bec[a]me stricter during C[OVID]-19."

Thus, defendant, after being given one year to meet his obligations—which he had failed to pay in the four years prior—did nothing for several months and then requested an extension. The court's determination this constituted bad faith was not an abuse of discretion.

II.

November 4, 2020 Order

The November 4 order: 1) denied defendant's request for a plenary hearing; 2) denied defendant's request to terminate alimony; 3) granted defendant's request to retire at seventy-four; and 4) awarded plaintiff counsel fees.

Defendant alleges there are discrepancies in his probation account. He points to the Chait forensic accounting report, which claims defendant overpaid $56,191.09 as of July 31, 2020. Although the court acknowledged this constituted a dispute of fact, it denied defendant's motion. Citing First Nat'l Bank of Freehold v. Viviani, 60 N.J. Super. 221, 225 (App. Div. 1960), the court concluded a plenary hearing was unnecessary because the issue had been "fully explored" and "correctly [ad]judged." Indeed, the October 2015 order gave defendant ninety days to address any problems with probation. According to the court, defendant "took no action" at that time. When defendant moved for a plenary hearing in January 2020, the court denied the request for the same reason, finding defendant was "re-litigating issues from prior filed motions that ha[d] been previously addressed."

The court thus treated the request for a plenary hearing at issue in the November 2020 order as a motion for reconsideration of the January 2020 order and found it untimely under Rule 4:49-2. It also concluded defendant failed to

demonstrate any errors the court may have made or any evidence the court failed to consider.

A decision to grant or deny a plenary hearing is reviewed for abuse of discretion. U.S. Bank Nat. Ass'n v. Curcio, 444 N.J. Super. 94, 111 (App. Div. 2016) (citing Colca v. Anson, 413 N.J. Super. 405, 421-22 (App. Div. 2010)). Because the court found the issue had already been adjudicated and defendant otherwise failed to show any errors or material the court failed to consider, a hearing would have "adduce[d] no further facts or information." Fineberg v. Fineberg, 309 N.J. Super. 205, 218 (App. Div. 1998). Further, the record shows that after defendant submitted Chait's report to the court in July 2020, probation did conduct another audit, dated September 18, 2020, and found no errors. The audit indicated defendant owed $19,544.06 in arrears as of August 30, 2020. We discern neither an abuse of discretion nor any legal errors requiring reversal.

We reject defendant's argument the court should have granted his request to terminate alimony. In particular, he contends "[p]laintiff's claims of financial distress are not supported by the facts" and again points out plaintiff did not submit a CIS. He also says the court failed to consider the payments he did make after the divorce. Defendant considers the court's refusal to suspend or

terminate alimony "essentially [a denial of] the ability to retire at [seventy-four]"—a request the court had granted.

We review a trial court's decision to grant or deny a modification of alimony for abuse of discretion. Bermeo v. Bermeo, 457 N.J. Super. 77, 84 (App. Div. 2018). The party requesting modification of alimony has the burden to show "changed circumstances" warranting relief. Lepis v. Lepis, 83 N.J. 139, 157 (1980). N.J.S.A. 2A:34-23(k) instructs a court to consider a non-exhaustive list of factors in determining whether there are changed circumstances, including:

> (1) The reasons for any loss of income;
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> (2) Under circumstances where there has been a loss of employment, the obligor's documented efforts to obtain replacement employment or to pursue an alternative occupation;
>
> (3) Under circumstances where there has been a loss of employment, whether the obligor is making a good faith effort to find remunerative employment at any level and in any field;
>
> (4) The income of the obligee; the obligee's circumstances; and the obligee's reasonable efforts to obtain employment in view of those circumstances and existing opportunities;
>
> (5) The impact of the parties' health on their ability to obtain employment;

> . . . .
>
> (7) Any changes in the respective financial circumstances of the parties that have occurred since the date of the order from which modification is sought;
>
> (8) The reasons for any change in either party's financial circumstances since the date of the order from which modification is sought . . . ;
>
> . . . .
>
> (10) Any other factor the court deems relevant to fairly and equitably decide the application.

"When the movant is seeking modification of an alimony award, that party must demonstrate that changed circumstances have substantially impaired the ability to support himself or herself." Lepis, 83 N.J. at 157. "Only after the movant has made [a] prima facie showing [of changed circumstances] should the respondent's ability to pay become a factor for the court to consider." Ibid.

However, the burden may also be met by showing the obligee's financial situation has significantly improved and thus alimony is no longer necessary. Stamberg v. Stamberg, 302 N.J. Super. 35, 42 (App. Div. 1997). In that case, the person requesting modification must simply tell the facts suggesting the likelihood of improvement. Id. at 43-44. But those facts need to be specific; general assertions, without more, will not be sufficient. Donnelly v. Donnelly, 405 N.J. Super. 117, 131-32 (App. Div. 2009).

Defendant argued paying alimony would impair his ability to support himself. The trial court found he had not met his burden to show changed circumstances. Though he said he had no assets, the court observed he still possessed his house. The court further noted defendant had recently obtained a new job that gave him a higher income—$122,000 per year. Moreover, "[f]or over ten . . . years[, d]efendant has failed to make timely . . . payments to [p]laintiff to properly prepare for retirement."

We conclude the court's decision did not rest on an impermissible basis, consider irrelevant factors, or rest on findings not in the record. Elrom v. Elrom, 439 N.J. Super. 424, 434 (App. Div. 2015) (first citing Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002), then Storey v. Storey, 373 N.J. Super. 464, 479 (App. Div. 2004)). The facts cited by the court show defendant can pay the alimony owed plaintiff.

To the extent defendant argues the continuation of alimony means he will not be able to prepare for retirement, we defer to the court's finding that "both [p]laintiff and [d]efendant are provided the opportunity to prepare for [d]efendant's ultimate retirement."

Finally, in granting plaintiff counsel fees for the November 4 order, the court mentioned Rule 5:3-5 and Rule 1:10-3. It noted defendant's application

"reassert[ed] arguments litigated by [d]efendant several times," referring in particular to the discrepancies in the probation account. As with the August 16 order, the court should have addressed each factor in Rule 5:3-5(c). Barr, 418 N.J. Super. at 47.

Based upon the court's explanation, we cannot determine whether the court considered the Rule 5:3-5(c) factors. Thus, we remand for the court to conduct a proper analysis of these factors.

We do not address defendant's remaining arguments as they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed in part and remanded in part. We do not retain jurisdiction.

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