SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1044-21

MERCEDES B. PERRY,

Plaintiff/Respondent,

v.

GUSTAV PERRY,

Defendant/Appellant.

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Argued January 23, 2023 — Decided February 7, 2023

Before Judges Whipple, Mawla, and Smith.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FM-02-1124-17.

Robert E. Epstein argued the cause for appellant (Manzi Epstein Lomuro & DeCataldo, LLC, attorneys; Robert E. Epstein, of counsel and on the briefs; Aislinn M. Koch, on the briefs).

David R. Tawil argued the cause for respondent (Lindabury McCormick Estabrook & Cooper, PC, attorneys; David R. Tawil, of counsel and on the brief).

PER CURIAM

Defendant Gustav Perry appeals from a July 7, 2021 order adjudicating his post-judgment motion and plaintiff Mercedes B. Perry's cross-motion related to the parties' Marital Settlement Agreement (MSA). Defendant also appeals from two November 13, 2021 orders denying his motion for reconsideration and granting plaintiff's cross-motion for enforcement and counsel fees. We affirm.

The parties were married for over three decades when they entered a detailed MSA and divorced in 2018. Throughout the marriage, defendant was employed as a real estate broker in New York City and later was the executive director of sales for a real estate brokerage firm. Plaintiff worked as a health advocate in a New York City hospital.

A daughter and son were born of the marriage. The daughter was emancipated, and the son was nearly eighteen years old and unemancipated when the parties divorced. The MSA granted the parties joint legal custody of the son, stating: "[Defendant] acknowledge[s] that he has no present relationship with [the son]. Both parties will abide by the recommendations of [the son's therapist] . . . ." The therapist's report was attached to the MSA and concluded there was "no evidence" of plaintiff influencing the children against defendant and "in fact each child has his/her own issues with him." The MSA provided the son would continue in therapy, including while away at college and

stated: "[Defendant] reserves his right to file an application under Newburgh v. Arrigo,[1] and [plaintiff] reserves her right to object to said application."

The MSA's child support provision stated: "This is an 'above Guidelines'[2] case as represented by the parties' respective Case Information Statements [(CISs)] filed in this matter. Child support has been calculated utilizing the parties' approximate incomes of $350,000 for [defendant] and $100,000 for [plaintiff], and incorporating [defendant's] alimony obligation to [plaintiff] . . . ." The agreement recited defendant would pay child support of $1,800 per month, which would step down to $1,500 per month when the son entered college, "and then further reduce[] to $1,000 per month when the parties start contributing for [the son's] college expenses on [a sixty percent defendant]/[forty percent plaintiff] basis . . . ."

The MSA's college provision contemplated a 529 account the parties had for the son would cover the first two years of college before the parties' obligation to pay their respective share commenced. It also cross-referenced the parties' agreement regarding the ability to file a Newburgh application contained in the child support provision.

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1 88 N.J. 529 (1982).

2 The New Jersey Child Support Guidelines. R. 5:6A.

The alimony provision memorialized the parties' marriage was "of long duration." Further, "[c]onsistent with the parties' respective earning capacities as reflected on their [CISs], alimony has been calculated utilizing the parties' approximate incomes of $350,000 for [defendant] and $100,000 for [plaintiff]." The MSA obligated defendant to pay plaintiff open duration alimony of $70,000 per year, payable in monthly installments of $5,833.33.

Because plaintiff's position at her hospital was being terminated, the remainder of the alimony subparagraphs recounted what would happen if plaintiff received a severance package and became reemployed. The parties agreed "in the event [plaintiff's] severance concludes without [her] securing new employment at her prior salary, . . . that this may be considered a 'change in circumstances[,]' which will subject [defendant's] obligations to [plaintiff], and [plaintiff's] obligations herein, to review and/or modification." If plaintiff was not "re[]employed by the end of her severance, . . . then . . . upon [her] request, . . . [defendant] agree[d] to enter into [b]inding [a]rbitration to resolve . . . [the] revised amount of alimony to be provided."

The equitable distribution was essentially equal. The parties agreed to sell the marital residence and divide the net proceeds equally, defendant retained two New York City investment properties and agreed to refinance and pay

plaintiff one-half of the equity in them, and retirement accounts were equally divided. The parties agreed to bear their own counsel fees except if they had to file an enforcement application, in which case the party seeking enforcement could seek a court award of counsel fees.

In March 2021, defendant filed a pro se post-judgment motion seeking relief from the support arrears accumulated with probation, modification of alimony and child support, and termination of his obligation to pay for college. His certification acknowledged the MSA was based on an income of $350,000 but asserted his income had declined since the divorce due to the pandemic, leading his salary to be cut beginning January 31, 2020, and ultimately losing his job in June 2020. Defendant regained employment, but no longer earned a salary and was compensated only by commission. He certified the investment properties were not producing income because of vacancies and lower rent caused by the pandemic.

Regarding college, defendant claimed he had no relationship with the children because plaintiff alienated them. He asserted he had not seen or spoken with the son, except when the son asked for money, and his attempts to have a relationship with him were rejected.

Plaintiff's opposition noted defendant was $78,000 in arrears and had come to court with unclean hands, because he refused to pay any support resulting in multiple enforcement actions by probation. She noted defendant continued to maintain the investment properties and had not been terminated, but instead shifted from salary to commission pay. She certified defendant continued to vacation, play golf, and enjoy "high[-]end restaurants."

Plaintiff also opposed defendant's request to modify child support and college. She certified the son was attending UCLA and had a 3.8 GPA. Further, the step down in child support was predicated on the parties paying their respective share of college, and defendant had not done so. She pointed out defendant provided no proof of his efforts to repair the relationship with the son.

The motion judge entered the July 2021 order accompanied by a written statement of reasons. She found defendant failed to demonstrate a substantial change in circumstances warranting relief from his obligations. She noted his pay "merely shifted from salaried to commission." The evidence of his financial circumstances was "nebulous, as the only financial information provided . . . are his 2018 and 2019 tax returns, which illustrate income far in excess of $200,000 annually." The judge noted defendant's CIS showed assets totaling $2,917,500 and provided no evidence "his investments have been impacted by the pandemic,

and the depth and duration of COVID-19 on the New York City real estate market cannot be predicted." Further, defendant chose to encumber rather than sell the investment properties, his tax returns showed an increase in rental income in 2018 and 2019, and his "own handwritten 'chart' annexed to his CIS demonstrates that he continues to generate over $14,860 in gross income monthly [from the properties], which is entirely self-serving and not based upon any tangible evidence before the [c]ourt."

The judge noted defendant was in court on February 17, 2021, as a result of a probation enforcement application. He continued to be employed with the parent company of his previous employer since August 2020 but failed to pay court-ordered support. The court ordered defendant to pay $15,000 by February 23, 2021, "[y]et while [he] clearly has assets from which to draw, [he] did not make that payment until March 3, 2021." The judge concluded defendant had unclean hands and

> [t]here is no question . . . [he] engaged in self-help and unilaterally reneged on the responsibilities to which he agreed to under the MSA by accruing vast sums of arrears. It was not until the entry of the . . . February 17, 2021 [o]rder that he attempted to seek relief from this [c]ourt, which is woefully deficient and fails to provide even a scintilla of evidence of his present financial circumstances.

The judge reached the same conclusion regarding defendant's request to be relieved from his college contribution obligation. She also dismissed the argument the son was alienated, noting the "evidence indicates [the son] continues to communicate with . . . [d]efendant, albeit through email."

The judge granted plaintiff's request for counsel fees. She ordered plaintiff's counsel to file an affidavit of services.

Defendant retained counsel and moved for reconsideration. He claimed he could not earn the $350,000 set forth in the MSA. This sum was comprised of $150,000 salary and "overrides" or commissions on sales during his tenure as a sales director. He certified the court erred by not finding a change in circumstances because his income was $100,000, $110,000, $130,000, and $200,000 less than $350,000 from 2017 to 2020, respectively.

Defendant's certification attached news articles describing the pandemic's impact on the New York real estate market and asked the court to take judicial notice of them. He certified he searched for new employment and attached emails, texts, and WhatsApp messages to "contacts/friends" in his field as proof of his job search. He ultimately found a commission-based job as an independent contractor and his year-to-date earnings were approximately $17,000 plus approximately $24,000 in unemployment income.

Defendant argued his assets were limited, the investment properties were encumbered, and the court should not make him pay support using an asset he received in equitable distribution. Although he was able to rent some of the apartments in the buildings the total rent receipts were less than $13,000 per month. He certified he withdrew funds from his 401k prior to the pandemic and took a loan against it to meet expenses. He claimed he cut his budget "by more than half" to scale back expenses.

Defendant asserted the court re-wrote the MSA when it failed to reduce child support to $1,000 per month because the MSA required the step down upon the depletion of the son's 529 account. He alleged he should be relieved of his college contribution obligation because he did "not at all have a relationship with" the son, was never consulted about him attending UCLA, and had experienced a change in circumstances.

Defendant contended the court should reconsider its award of counsel fees due to the change in circumstances. Although he acknowledged he had not met his financial obligations for alimony and child support, he attempted to "make a payment of some kind to [p]laintiff every month . . . ."

Plaintiff cross-moved for enforcement, including enforcement of the July 2021 order, and sought counsel fees. She argued defendant continued to operate

in bad faith and had failed to make an arrears payment until filing the motion for reconsideration and even then, the sum failed to approximate the unpaid arrears and college expenses totaling $84,500. She pointed out defendant's CIS showed his rent receipts were $14,689 per month. Plaintiff alleged when defendant's earned income, rental income, and personal expenses such as auto, travel, meals, cell phone, and train expenses were added back into his income, the total income exceeded $210,000.

The trial judge issued the November 2021 order denying the motion for reconsideration and made written findings. Although she found the motion did not meet the legal standard for reconsideration, she adjudicated it on the merits. The judge found defendant failed to demonstrate a prima facie showing of a change in circumstances and "to the extent [he] contends his plight is due to the pandemic, that change is a temporary change in circumstances." She determined defendant "failed to demonstrate that he has made meaningful efforts to find remunerative employment." She reiterated defendant had "unclean hands as he has been essentially non-compliant with his [c]ourt ordered obligations for years."

The judge took judicial notice of the news articles and noted they discussed the pandemic increased the prices of single-family homes

"particularly in the suburbs contiguous to New York City, including Bergen County." The judge noted defendant's firm handled residential sales in New York, Connecticut, New Jersey, and Florida, and concluded "[i]t simply defies credulity that [d]efendant would continue to focus his efforts on a declining market where other markets within striking distance of New York City are not only thriving but have seen an unprecedented boom." The judge also found defendant failed to conduct a good faith job search because the proof provided comprised of emails to colleagues and was "no more than . . . [a] 'shout out' and an anemic effort to find comparable remunerative employment."

The judge analyzed defendant's 2017-2020 tax returns. She noted there was no evidence to support the claim he derived $150,000 from overrides or commissions. Defendant's income since the divorce was "comprised of salary and net profits from his real estate holdings. . . . Therefore, the source of his stipulated income in the [MSA] remains a mystery, particularly since he did not include a copy of his 2016 tax returns with either application."

The judge also found defendant's assertion he could no longer pay support "mystifying and lack[ed] credulity." His CIS budget showed he spent $1,750 per month on restaurants, sports and hobbies, vacations, entertainment, and alcohol and tobacco "while maintaining that he was completely unable to pay a

thin dime toward his support obligations." Defendant vacationed in Miami when he filed his motion for reconsideration and yet his CIS "[s]chedule A and B expenses increased exponentially to the tune of $24,991 per month . . . ." This sum annualized to $299,892 and exceeded his 2019 and 2020 income by $78,248 and $140,310, respectively. Although defendant's credit card debt increased, it did not account for the shortfall between his increased expenses and income.

Defendant failed to convince the judge the pandemic impacted his investments. The net worth reported on his CIS increased from $631,000 to $886,000 between 2017 and 2021. His investments grew as well during this time. She found defendant's rental income calculations "somewhat dubious" because he assigned no value to a former rental unit that was now his home, yet he benefitted by having no rent or mortgage expense. She noted he omitted a unit from his chart of rented units and the $21,000 per month he represented as his total rental income was $20,000 more than the rent he "realized in 2019, when his rental income was at the highest." The judge also determined the expenses defendant claimed for the investment properties were "grossly overstated," and "more than double" the expenses he claimed in 2019 and 2020.

The judge denied defendant's request for relief from the college obligation because his relationship with the son was already fractured when he agreed to

pay sixty percent of the college expense. Further, he was not entitled to relief because of his unclean hands and failure to show a change in circumstances.

The judge granted plaintiff's request for counsel fees. She reviewed the Rule 5:3-5(c) factors and concluded all but one supported an award of fees to plaintiff. The judge found defendant's reconsideration application was not filed in bad faith because the relief denied in the July 2021 order was denied without prejudice. However, defendant "consistently refused to meet his financial obligations" and plaintiff prevailed in enforcing the MSA. The judge awarded plaintiff $12,575 in counsel fees associated with the initial enforcement motion and $6,527.50 representing one-half of the counsel fees she incurred on the second enforcement motion.

On appeal, defendant argues the judge erred by: not finding a prima facie change in circumstances due to the downturn in his income; compelling him to use assets he received in equitable distribution to pay alimony; failing to analyze the N.J.S.A. 2A:34-23(k) factors and hold a plenary hearing; ignoring the MSA's clear step-down provisions for child support; not holding a Newburgh hearing due to the son's estrangement; and awarding counsel fees despite plaintiff's lack of need and the evidence not supporting an award. At oral argument, defendant's

counsel emphasized that if the judge's decision stands, defendant will never be able to have a court review his financial circumstances.

"The scope of appellate review of a trial court's fact-finding function is limited. The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)). "[T]he appellate court must give due recognition to the wide discretion which our law rightly affords to the trial judges," and disturb such determinations only where the court abused its discretion. Larbig v. Larbig, 384 N.J. Super. 17, 21, 23 (App. Div. 2006) (quoting Martindell v. Martindell, 21 N.J. 341, 355 (1956)). We reverse only if there is "'a denial of justice' because the family court's 'conclusions are . . . "clearly mistaken" or "wide of the mark."'" Parish v. Parish, 412 N.J. Super. 39, 48 (App. Div. 2010) (quoting N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008)). We also review the denial of a reconsideration motion for an abuse of discretion. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

"This court does not accord the same deference to a trial judge's legal determinations." Ricci v. Ricci, 448 N.J. Super. 546, 565 (App. Div. 2017). "Rather, all legal issues are reviewed de novo." Ibid.

Pursuant to these principles, we affirm substantially for the reasons expressed in the motion judge's written opinions. We add the following comments.

Because marital agreements are voluntary and consensual, they are presumed valid and enforceable. See Massar v. Massar, 279 N.J. Super. 89, 93 (App. Div. 1995). However, "[d]espite an agreement to provide spousal support without limitation as to time, '[t]he duties of former spouses regarding alimony [and other forms of support] are always subject to review or modification by our courts based upon a showing of changed circumstances.'" Glass v. Glass, 366 N.J. Super. 357, 370 (App. Div. 2004) (first alteration in original) (quoting Miller v. Miller, 160 N.J. 408, 419 (1999)); see also N.J.S.A. 2A:34-23 (support orders "may be revised and altered by the court from time to time as circumstances may require").

"The party seeking modification has the burden of showing such 'changed circumstances' as would warrant relief from the support or maintenance provisions involved." Lepis v. Lepis, 83 N.J. 139, 157 (1980) (citation omitted). A court is required to hold a plenary hearing where the moving party has demonstrated a prima facie change in circumstances. Ibid. "[P]rima facie . . . [evidence is] evidence that, if unrebutted, would sustain a judgment in the

proponent's favor." Baures v. Lewis, 167 N.J. 91, 118 (2001). The proper inquiry is "whether the change in circumstance is continuing and whether the agreement or decree has made explicit provision for the change." Lepis, 83 N.J. at 152. Therefore, "[t]emporary circumstances are an insufficient basis for modification." Innes v. Innes, 117 N.J. 496, 504 (1990).

Pursuant to these principles, we reject defendant's assertion the record established a prima facie case of change in circumstances. The record supports the judge's findings defendant provided insufficient objective evidence the pandemic created a substantial change in circumstances such that the parties' detailed and comprehensive MSA should be modified. Indeed, defendant offered nothing more than an assertion to explain how the $350,000 income figure used to calculate his support obligations was derived. The MSA memorialized the income figures were "based upon the incomes that had historically been earned by each of them during the latter years of the marriage[,]" yet defendant provided no objective evidence of his historic earnings by means of a tax return, pay statement, or correspondence from his former employer. This evidence was critical to explaining his earnings and convincing the judge there was a change in circumstances especially because

the carefully worded MSA stated the $350,000 figure represented defendant's earning capacity.

As we have previously stated, earning capacity is not limited to a parties' actual income, but rather their "potential earning power," which the "court has every right to appraise realistically . . . ." Elrom v. Elrom, 439 N.J. Super. 424, 435 (App. Div. 2015) (citation omitted). "Accordingly, '[b]oth when setting child support and in reaching a proper alimony award, a judge must examine not only each party's income, but also [their] earning ability.'" Id. at 436 (first alteration in original) (citation omitted). Therefore, defendant's task here comprised more than presenting the motion judge with tax-returns showing a post-judgment decline in income; he needed to explain why he could not earn $350,000.[3]

In this regard, defendant's explanation was lacking. His job search was sporadic, casual, and comprised of approximately ten contacts over the course of one year. Defendant's job search coupled with his CIS budgets showing

[3] The law and the omissions in defendant's submissions we have described, in addition to the motion judge's rulings denying defendant's motions without prejudice, make it self-evident that contrary to his argument on appeal, he has not been foreclosed from demonstrating a prima facie change in circumstances assuming he presents competent evidence to the court in the future. This argument lacks sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

increased and significant personal expenditures, ongoing rent receipts, greater assets, and the ability to maintain investment properties, do not paint a picture of financial distress warranting relief from his obligations just three years after entering the MSA. For these reasons, the trial judge's finding defendant failed to make a prima facie showing of a change in circumstance was not an abuse of discretion, and no plenary hearing or review of defendant's alimony and child support obligations was required.

We reject defendant's argument the motion judge could not consider the rental income from the investment properties because they were awarded to him in equitable distribution. The only such restriction applies to the legislative prohibition on using income from a retirement asset awarded in equitable distribution for the purposes of calculating alimony. N.J.S.A. 2A:34-23(b). The investment properties were not retirement assets and were fair game for the purposes of discerning defendant's ability to pay alimony. This is even more so as regards child support and college contributions. See N.J.S.A. 2A:34-23(a)(3) (permitting the consideration of "[a]ll sources of income and assets of each parent"); Newburgh, 88 N.J. at 545 (requiring consideration of "the financial resources of both parents").

Defendant's arguments regarding the judge's denial of the step down in child support and a Newburgh hearing lack merit. The MSA clearly premised the child support step down on the parties contributing to the son's college education, which defendant failed to do. A Newburgh hearing was not required on account of the lack of relationship between defendant and the son. The parent-child relationship is only one of twelve factors for consideration in the payment of college, Newburgh, 88 N.J. at 545, and like the motion judge, we are unconvinced the evidence in the record supports defendant's claims the relationship deteriorated due to plaintiff's or the child's conduct. Indeed, as the motion judge noted, the evidence shows defendant and the son do communicate via text and Facebook. Although we draw no conclusions regarding the quality, mode, and frequency of their communications, we are unconvinced either a Newburgh hearing or relief from the college obligation is warranted under the facts present.[4]

Finally, defendant's challenge to the counsel fee awards lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). Counsel

[4] Although it is not integral to our decision, we note that given the lack of a showing of change in circumstances and the son's academic success, we are likewise unpersuaded defendant would prevail at a hearing on the Newburgh factors addressing financial considerations and academic aptitude. 88 N.J. at 545.

fee determinations rest firmly within the trial court's discretion and are only disturbed in clear cases of an abuse of discretion. Rendine v. Pantzer, 141 N.J. 292, 317 (1995); Yueh v. Yueh, 329 N.J. Super. 447, 450 (App. Div. 2000). That did not occur here.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION