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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2600-21

ALBERT M. DEVINCENTIS
and KELLEY DEVINCENTIS,

Plaintiffs-Respondents,

v.

BRIAN M. SHANNON,

Defendant-Appellant.
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Submitted September 28, 2023 – Decided October 18, 2023

Before Judges Enright and Paganelli.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FD-02-0653-21.

Nicholas R. Doria, attorney for appellant.

Heimbuch & Solimano, PC, attorneys for respondents (William J. Heimbuch, on the brief).

PER CURIAM

In this Family Part matter, defendant, Brian M. Shannon appeals from the April 22, 2022 order awarding counsel fees to plaintiffs Albert M. and Kelly DeVincentis.[1] We find the trial court violated defendant's due process rights, by failing to provide notice of the motion hearing and failing to afford him an opportunity to present argument on plaintiffs' motion. Therefore, we vacate the April 22, 2022 order and remand for further proceedings.

I.

This matter involves defendant, his two children, and plaintiffs, who are the children's maternal uncle and his wife. Defendant was divorced from his wife, the children's mother. After the mother's death, the children initially lived with defendant, but later moved in with plaintiffs.

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[1] Defendant's Case Information Statement (CIS) indicates he is appealing from the March 29, 2022, and April 22, 2022 orders, but his Notice of Appeal indicates he is only challenging the order of April 22. Defendant has only briefed the issues involved with the April 22, 2022 proceeding and order. "An issue not briefed on appeal is deemed waived." Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011). Therefore, we limit our review to the April 22, 2022 order.

On April 12, 2021, plaintiffs commenced a non-dissolution[2] action against defendant, seeking, among other things, temporary custody of the children and child support.

On June 29 and July 19, 2021, the parties entered into consent and amended consent orders. The orders provided for defendant's payment of child support retroactive to January 23, 2021. However, the orders were silent as to the amount of defendant's monthly child support obligation.

On November 5, 2021, the parties entered into another consent order. This order repeated that defendant's child support obligation was retroactive to January 23, 2021, and established that "defendant w[ould] pay $1[,]700 per month in child support to plaintiffs . . . ."

On February 4, 2022, plaintiffs filed a motion seeking, among other relief, enforcement of the prior orders including "[e]stablishing child support arrears" and reimbursement of the counsel fees they incurred "solely because the [d]efendant . . . failed to provide support for his children, as he agreed to do in

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[2] "[T]he 'non-dissolution' docket includes actions for 'non-parent relatives seeking custody, child support and/or visitation regarding minor children.'" B.C v. N.J. Div. of Child Prot. & Perm., 450 N.J. Super. 197, 205 (App. Div. 2017) (citing R.K. v. D.L., 434 N.J. Super. 113, 131 (App. Div. 2014), quoting Acting Admin. Dir. of the Courts Memorandum, "Revised Procedures," (September 2, 2011)).

[the] July 19, 2021 [c]onsent [o]rder." On March 17, 2022, defendant filed a cross-motion, requesting the court schedule an ability to pay hearing for his child support arrears. He argued that he did not have the ability to make the child support payments provided for in the November 5, 2021 consent order.[3]

On March 28, 2022, the judge heard argument on the cross-applications. The judge permitted each counsel to briefly comment about plaintiffs' counsel fee application. Plaintiffs' counsel stated this was an "obvious case to award counsel fees" because "defendant had not been compliant with the order." Defendant's counsel countered that the prior orders did not provide a "date by which [defendant] was supposed to make payment" against his arrears, so that we he was not in violation of the orders.

The judge advised plaintiffs' counsel:

> I am going to reserve . . . on your request for fees. I will also give you an opportunity if you wanted to amend your application . . . to include the ability to pay hearing since we're now going to have to return on another date for that proceeding as well.

The judge then told the attorneys:

> I am going to reserve on the counsel fees because there is an entire separate proceeding now that's going to be

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[3] See R. 5:25-3(c)(2); Pasqua v. Council, 186 N.J. 127, 141 n.2. (2006) (an ability to pay hearing is required before the court seeks to order coercive incarceration of the obligor due to willful failure to pay child support).

> conducted in a few weeks . . . for the ability to pay. And I will allow [a] supplement [to the] application at that time. And the court will consider not only whether or not there is an ability to pay, but pursuant to Kelly versus Kelly, whether there's bad faith on the part of the [d]efendant in not paying and not even making any partial payments.

The judge scheduled the ability to pay hearing for April 22, 2022, and ordered all child support payments to be made no later than April 29, 2022. The court entered an order that provided, in pertinent part:

> Both parties appeared with counsel on plaintiff[s'] application for enforcement of the July 19, 2021 consent order, [and] the Nov. 5, 2021 order providing for financial support of defendant's children and for counsel fees . . . and on defendant's cross application for an [a]bility [t]o [p]ay hearing [and] time payments for outstanding financial support of the children . . . . For the reasons set forth on the record[,] the court orders payment . . . by April 29, 2022 . . . . Defendant's application for an [a]bility [t]o [p]ay hearing is granted; defendant shall provide financial documentation including but not limited to an updated CIS by April 11, 2022. The parties will return to court for the ability to pay hearing on April 22, 2022 at 8:30 a[.]m[.] via Zoom.

On April 4, 2022, defendant withdrew his request for the ability to pay hearing. Plaintiffs' counsel responded, the next day writing: "[w]hile we have no objection to the [d]efendant's request, I wish to point out that our application

for counsel fees was reserved at the time of oral argument. I would ask that our fee application be addressed at this time."

According to defense counsel, he did not receive any notice that the court would proceed on April 22, 2022, as scheduled, to hear argument on plaintiffs' counsel fee application.

On the morning of April 22, 2022, neither defense counsel, a solo practitioner, nor his secretary were in his office. The judge's chambers called his office and left a voice message stating there was a hearing before the judge that morning. Moreover, the judge's chambers sent an email message to defense counsel's office, at 8:54 a.m., and requested that he "please log in as soon as possible-thank you!"

At 9:03 a.m.[4], the judge opened the hearing. Plaintiffs' counsel entered his appearance. The judge noted that the matter was "on [only for] consideration of counsel fees for the [p]laintiffs." The judge observed that, "for some reason [defense counsel] failed to appear" and the court was unable to reach defense counsel. The judge further noted that, prior to going on the record, plaintiffs' counsel advised that he was willing to "waive oral argument and just have the [c]ourt make a determination on the papers." The judge stated that this was

[4] The court times are taken from the transcript.

"fine" and, without articulating any reasons why argument was no longer necessary, decided to "make a determination on the papers" and "simply read the decision into the record and enter an order." Plaintiffs' counsel left the hearing, and the record was paused.

The judge went back on the record at 9:06 a.m. The judge issued an oral opinion and stated, "after having reviewed all of the documentation that was provided," plaintiffs should be awarded their counsel fees. The judge found that: (1) "[p]laintiffs' application was necessitated by the [d]efendant's failure to comply with his financial obligations"; (2) defendant's argument in opposition to plaintiffs' motion was "disingenuous"; (3) "defendant [is] in violation of litigant's rights"; and (4) "[d]efendant's bad faith [was] the most compelling in this analysis." The judge closed the record at 9:19 a.m.

Later that same morning, at 11:26 a.m., defense counsel replied to the earlier email from chambers and stated:

> I had not received any notice that the fee application of plaintiff[s'] counsel was going to be heard this morning. That is why I was not in my office when you called.
>
> I did not receive any notice of the hearing as to counsel fees.
>
> Kindly advi[s]e the [j]udge of the failure of notice.

In an email response at12:47 p.m., chambers stated that "[t]he notice was placed on the record at the last [c]ourt date-thank you[.]"

On April 26, 2022, defense counsel wrote to the judge and explained his absence from the April 22, 2022 hearing.[5] Defense counsel explained: (1) they "always appeared in a timely manner"; (2) they did not have notice that the counsel fee application would be heard on April 22, 2022; (3) the judge's statement that she would allow the fee application to include time spent for the appearance at the ability to pay hearing would have required a date after the ability to pay hearing so defendant could submit any objections to the fee application; (4) the March 29, 2022 order indicated that "[t]he court reserve[d] on [p]laintiff[s'] counsel fees request" and "[t]he parties w[ould] return for the [a]bility to [p]ay [h]earing on April 22, 2022 at 8:30 a.m. via [Z]oom." Therefore, defense counsel understood that because, the request for the ability to pay hearing was withdrawn "a new date would be set to address the issue of

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[5] Defense counsel's contact with chambers, on the morning of the scheduled hearing and by letter a few days later, belies any notion that his failure to appear was a waiver of oral argument by defendant. "Waiver is the voluntary and intentional relinquishment of a known right. An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights. . . .The party waiving a known right must do so clearly, unequivocally and decisively." Knorr v. Smeal, 178 N.J. 169, 177 (2003) (internal citations omitted).

[p]laintiff[s'] counsel fees"; and (5) while he recognized the judge "may not see the need to reschedule a hearing" he requested "an opportunity to submit written objections to [p]laintiff[s'] attorney's request for counsel fees."

In response to the April 26, 2022 letter, the judge's chambers indicated that they would "pass this on to [H]er [H]onor-thanks, all."[6]

On April 27, 2022, defendant filed this appeal.

II.

Our Court has addressed due process as follows:

> The Fourteenth Amendment of the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." This Court has held that although "Article I, paragraph 1 of the New Jersey Constitution does not [specifically] enumerate the right to due process, [it] protects against injustice and, to that extent, protects 'values like those encompassed by the principle[s] of due process.'" Doe v. Poritz, 142 N.J. 1, 99 (1995). (alteration in original) (internal citations omitted in original).
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> Due process is "a flexible [concept] that depends on the particular circumstances." Id. at 106 . . . At a minimum, due process requires that a party in a judicial hearing receive "notice defining the issues and an

[6] While we recognize that "[j]udges are accorded wide discretion in exercising control over their courtrooms and trial proceedings," Martin v. Newark Pub Schs., 461 N.J. Super. 330, 340 (App. Div. 2019), here there is no explanation as to why chambers did not reschedule oral argument.

> adequate opportunity to prepare and respond." (internal citations omitted).
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> [H.E.S. v. J.C.S, 175 N.J. 309, 321-22 (2003).]

"The minimum requirements of due process . . . are notice and the opportunity to be heard." Poritz, 142 N.J. at 106. In the matter at bar, defendant was provided with neither.

Initially, it is unrefuted that after defendant withdrew his request for an ability to pay hearing, defense counsel did not get notice that the court would hold a hearing, regarding plaintiffs' counsel fee application, on April 22, 2022. Moreover, although the judge acknowledged the necessity for hearing argument, having scheduled it for April 22, 2022, defendant was denied the opportunity to be heard.

Therefore, without defendant having notice or an opportunity to be heard, substantive findings were made that: (1) defendant "fail[ed] to comply with his financial obligations"; (2) defendant's argument was "disingenuous"; (3) "defendant [was] in violation of [plaintiffs'] rights"; and (4) defendant acted in "bad faith." Additionally, the judge entered an order, imposing the obligation for defendant to pay plaintiffs' attorneys' fees. Under these circumstances, we find defendant's due process rights were violated.

Although plaintiffs' proffered arguments address the substance of the judge's order and defendant's due process argument, we decline to address the substance of the judge's order and solely address the procedural errors leading to the entry of the order. Nonetheless, we note that:

> [w]here a person has been deprived of property in a manner contrary to the most basic tenets of due process, "it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." . . . [O]nly "wiping the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." The Due Process Clause demands no less in this case.
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> [Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 86-87 (1988) (citations omitted).]

In addressing defendant's due process concerns, plaintiffs contend that defendant's argument is "contorted." Plaintiffs assert that: (1) their "application for counsel fees was ripe for disposition at the time of oral argument on March 28, 2022"; (2) once defendant withdr[ew] his application for an ability to pay hearing, and that hearing did not take place, "there would be no additional evidence for the [c]ourt to consider, and the counsel fee application could then be decided"; and (3) by April 22, 2022, "the motion judge had considered two . . . certifications from the [p]lantiff . . . , two . . . certifications of services

submitted by the [p]laintiffs' counsel, the [d]efendant's ten[-]page certification, in which he addressed the [p]laintiffs' application for counsel fees, and an oral argument that stretched on for well over one . . . hour."

We reject plaintiffs' arguments related to defendant's due process contentions. Initially, the judge scheduled argument for April 22, 2022. Therefore, the judge must have determined that substantive issues were raised and argument was necessary. Rule 5:5-4(a), Motions in Family Actions, provides:

> Motions in family actions shall be governed by R. 1:6-2(b) except that, in exercising its discretion as to the mode and scheduling of disposition of motions, the court shall ordinarily grant requests for oral argument on substantive and non-routine discovery motions and ordinarily deny requests for oral argument on calendar and routine discovery motions.

"This provision has generally been interpreted to require oral argument 'when significant substantive issues are raised and argument is requested.'" Palombi v. Palombi, 414 N.J. Super. 274, 285 (App. Div. 2010) (quoting Mackowski v. Mackowski, 317 N.J. Super. 8, 15 (App. Div. 1998)). "The denial of oral argument when a motion has properly presented a substantive issue to the court for decision 'deprives litigants of an opportunity to present their case fully to a court.'" Ibid.

We recognize that "the Family Part rule does not mandate oral argument for substantive motions." Clarksboro, LLC v. Kronenberg, 459 N.J. Super. 217, 220 (App. Div. 2019). However, in the exercise of its discretion, the judge must explain on the record, the basis for denying a request for oral argument. Raspantini v. Arocho, 364 N.J. Super. 528, 532 (App. Div. 2003), see also Clarksboro, 459 N.J. Super. at 221 ("[T]he court did not provide a case-specific reason for denying oral argument . . . . ").

In Palombi, the trial court detailed, for all six post-judgment orders on appeal, why it determined that oral argument was unnecessary. The trial court's explanations allowed us to conclude that "[a] review of the issues presented and the circumstances in each of the motions . . . shows that the trial court did not abuse its discretion in deciding the motions without oral argument." Palombi, 414 N.J. Super. at 286. Here the judge did not indicate, on the record, that argument was unnecessary.

Moreover, on April 22, 2022, before entering an appearance, plaintiffs' counsel waived the right to argue. Counsel's appearance and waiver suggests, at the very least, that oral argument was contemplated and refutes the notion that it was wholly unnecessary.

Therefore, we determine that the court's failure to provide defense counsel with notice of oral argument and failure to allow defendant to be heard orally after defendant withdrew his request for an ability to pay hearing violated defendant's due process rights and requires us to vacate the April 22, 2022 order and remand for the motion judge to permit oral argument.

Vacated and remanded.

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

CLERK OF THE APPELLATE DIVISION