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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1613-20**

KIM MULHOLLAND,

Plaintiff-Respondent/
Cross-Appellant,

v.

ROBERT SWEIGART,

Defendant-Appellant/
Cross-Respondent.

Argued on February 9, 2022 – Decided May 18, 2022

Before Judges Gilson, Gooden Brown, and Gummer.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Camden County,
Docket No. FM-04-0736-12.

William J. Thompson argued the cause for
appellant/cross-respondent (Archer & Greiner, PC,
attorneys; Tara L. Hanna and Jennie A. Owens, on the
briefs).

Howard S. Mendelson argued the cause for
respondent/cross-appellant (Davis & Mendelson, LLC,
attorneys; Andrew T. Parsinitz, on the briefs).

PER CURIAM

In this post-judgment matrimonial matter, defendant Robert Sweigart moved to terminate his alimony obligation, contending he planned to sell his business and retire. Without conducting an evidentiary hearing, the motion judge denied that motion and defendant's subsequent reconsideration motion. Plaintiff Kim Mulholland cross-appeals the denial of her fee applications. We reverse the orders denying defendant's motions and remand for an evidentiary hearing.

I.

The parties married in 1982 and divorced in 2013. The judgment of divorce incorporated a Property Settlement Agreement (PSA) in which the parties agreed defendant had to pay plaintiff "permanent alimony of \$11,000 per month," beginning when the parties sold the marital home in 2014. The amount of alimony was based on plaintiff's imputed annual income of \$35,000 and defendant's agreed-upon annual income of \$416,000. The parties agreed defendant's alimony obligation would continue "for the natural lives of the parties, unless terminated by" the death of either party, plaintiff's remarriage, or the written and executed "[r]epudiation or modification of [the a]greement by mutual consent of the parties." At the time of the divorce, defendant was the

only shareholder of Camden Flooring Company, LLC and had been operating the business as its principal for approximately two decades. The PSA did not reference defendant's retirement or the future sale of his company.

In a June 7, 2019 order, the trial court granted plaintiff's first motion to enforce defendant's alimony obligation under the PSA. Plaintiff again moved to enforce defendant's alimony obligation in September 2019, and defendant cross-moved to reduce his alimony obligation effective September 1, 2019, and terminate it effective December 31, 2019, based on an alleged plan to sell his business and retire. The motion judge granted plaintiff's motion and denied defendant's cross-motion without prejudice, finding his motion was not ripe because defendant did not have a specific plan to sell the business.

About one year later, defendant again moved to modify his alimony obligation effective the date he filed the motion, to terminate his alimony obligation effective December 31, 2021, and for other relief. In support of the motion, defendant submitted a certification in which he stated he would soon turn sixty-eight years old and that during the marriage "it was anticipated that [defendant] would eventually sell the business and retire." He asserted he had been "operating [his] business at a reduced status due to [his] age and health" for the past two years, had "reduced [his] hours and responsibilities and [had]

transferred them to [his] employees," and had reduced his salary to \$285,358 in 2018 and \$184,523 in 2019 "to reflect that transfer and ease the transition to [his] retirement." He certified he had entered into an agreement to sell his business "with a target closing date of December 31, 2020" and attached an acquisition term sheet memorializing the proposed terms of the sale. Defendant also made representations regarding some of the factors set forth in N.J.S.A. 2A:34-23(j)(3).

The acquisition term sheet had an effective date of September 1, 2020, and a "[t]argeted [o]utside [c]losing [d]ate" of December 31, 2020. The term sheet provided defendant would serve as a consultant to the purchasing company for one year from the closing date for a salary of \$100,000. Defendant certified that after that year, he would "have no other income other than Social Security and rental income from [his] previously distributed rental properties." The term sheet expressly provided it was "not a binding agreement on [the purchasing company] or [defendant] to proceed with the transaction and [did] not impose any obligation or liability on any . . . party if the transactions contemplated [were] not consummated." Counsel reported at oral argument the closing had not occurred on the targeted closing date of December 31, 2020, or since then.

Plaintiff opposed the motion and cross-moved for enforcement of her rights under the PSA and counsel fees. She argued defendant had failed to make a prima facie showing of a substantial change in circumstances or of the factors under N.J.S.A. 2A:34-23(j)(3) warranting a modification of his alimony obligation. Plaintiff certified defendant during their marriage and at the time of the divorce had represented to her he would "work until [he] dies." She characterized his purported plans to sell the business and retire as "a ruse to attempt to evade" the permanent alimony obligation to which he had agreed seven years ago. She described the purported sale as "entirely speculative" and as a "sham transaction," with defendant's long-time employee and "right hand man" as the registered agent of the purchasing company. She also certified she did not work, but devoted herself to the care of their disabled grandchild, and was "wholly dependent on the alimony payments" agreed upon by the parties under the PSA. She stated she had only \$118,525 in retirement accounts.

After hearing oral argument, the motion judge placed his decision on the record. Citing Lepis v. Lepis, 83 N.J. 139 (1980), the motion judge denied defendant's motion to modify or terminate his alimony obligation, finding defendant had not shown changed circumstances, primarily because the "sale of the business has not occurred." The motion judge indicated defendant could

move for a modification of his alimony obligation when the sale of the business was finalized, but he was denying defendant's current motion because he could not "make decisions on conditioned precedents." The motion judge did not expressly reference N.J.S.A. 2A:34-23(j)(3) or engage in an analysis of the factors set forth in that statute. Instead, the judge stated defendant had to sell the business before he would consider the factors: "When that happens and he no longer owns the business, we can start looking at the factors and looking at the income and [if] it's appropriate to modify or . . . change it in whatever fashion we think is appropriate." The judge denied plaintiff's fee application. Months later, the motion judge issued an order memorializing his findings.

Defendant moved for reconsideration of the court's oral decision. In his supporting certification, defendant asserted he could not "finalize the sale of [his] business without knowing whether [he would] be granted relief as to [his] alimony obligation." He contended he could not "in good faith terminate [his] entire earning ability without specific authorization from the court, or an estimation of [his] alimony obligation going forward." He argued the motion judge "ha[d] specific statutory authority to consider and rule upon [his] prospective retirement application" and erred by finding he could not rule on the motion until defendant "was fully retired."

Plaintiff opposed defendant's motion and cross-moved for enforcement of the alimony obligation under the PSA, sanctions, and counsel fees. In support of her cross-motion, she maintained defendant had "taken no further action to sell his business" and had not presented a sufficient change in circumstances warranting a modification of his alimony obligation for the reasons the court had stated on the record.

After hearing oral argument, the motion judge denied the motion, finding "there was not a change of circumstances because . . . retirement is key to the sale of the business." The motion judge indicated defendant's actual retirement and sale of his business would "create changed circumstances . . . but we're not there yet." The judge denied plaintiff's fee application and memorialized his ruling in a written order that day.

On appeal, defendant argues the motion judge erred in denying defendant's motion by relying on Lepis, 83 N.J. 139, and failing to recognize defendant had a right to terminate his alimony obligation based on his prospective retirement under N.J.S.A. 2A:34-23(j). He also argues the motion judge failed to conduct a plenary hearing to make findings regarding the parties' factual disputes concerning defendant's purported retirement. Plaintiff argues the motion judge correctly denied defendant's motion due to lack of changed

circumstances and was not required to conduct a plenary hearing before rendering that decision. Plaintiff cross-appealed, arguing the motion judge erred in not addressing the factors set forth in Rule 5:3-5(c) concerning her fee application.

II.

We defer to findings of fact by family-part judges "when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998); see also Amzler v. Amzler, 463 N.J. Super. 187, 197 (App. Div. 2020). We review legal determinations, including statutory interpretations, de novo. Amzler, 463 N.J. Super. at 197. We review under an abuse-of-discretion standard a trial court's alimony-modification decision, Spangenberg v. Kolakowski, 442 N.J. Super. 529, 536 (App. Div. 2015), and reconsideration denial, Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

"The award of '[a]limony in New Jersey is primarily governed by statute.'" Landers v. Landers, 444 N.J. Super. 315, 320 (App. Div. 2016) (quoting Gayet v. Gayet, 92 N.J. 149, 150 (1983)). In 2014, our Legislature amended N.J.S.A. 2A:34-23, the alimony statute. Before that amendment, "a party seeking to modify an alimony obligation was required to 'demonstrate that changed circumstances have substantially impaired the ability to support himself or

herself.'" Amzler, 463 N.J. Super. at 197-98 (quoting Landers, 444 N.J. Super. at 320). "An income reduction resulting from a 'good faith retirement' after age sixty-five [was] a well-recognized change of circumstances event." Landers, 444 N.J. Super. at 320.

With the 2014 amendment to N.J.S.A. 2A:34-23, the Legislature "added a new subsection (j), which lists objective considerations a judge must examine and weigh when reviewing an obligor's request to modify or terminate alimony when an obligor retires." Id. at 321. Under that subsection, "[a]limony may be modified or terminated upon the prospective or actual retirement of the obligor." N.J.S.A. 2A:34-23(j) (emphasis added). Paragraph (3) of subsection (j) governs a court's review of a request to modify or terminate an alimony award "[w]hen a retirement application is filed in cases in which there is an existing final alimony order or enforceable written agreement established prior to the [September 10, 2014] effective date of this act" N.J.S.A. 2A:34-23(j)(3); see also Amzler, 463 N.J. Super. at 200. N.J.S.A. 2A:34-23(j)(3) requires a court, "[i]n making its determination," to:

consider the ability of the obligee to have saved adequately for retirement as well as the following factors in order to determine whether the obligor, by a preponderance of the evidence, has demonstrated that modification or termination of alimony is appropriate:

- (a) The age and health of the parties at the time of the application;
- (b) The obligor's field of employment and the generally accepted age of retirement for those in that field;
- (c) The age when the obligor becomes eligible for retirement at the obligor's place of employment, including mandatory retirement dates or the dates upon which continued employment would no longer increase retirement benefits;
- (d) The obligor's motives in retiring, including any pressures to retire applied by the obligor's employer or incentive plans offered by the obligor's employer;
- (e) The reasonable expectations of the parties regarding retirement during the marriage or civil union and at the time of the divorce or dissolution;
- (f) The ability of the obligor to maintain support payments following retirement, including whether the obligor will continue to be employed part-time or work reduced hours;
- (g) The obligee's level of financial independence and the financial impact of the obligor's retirement upon the obligee; and
- (h) Any other relevant factors affecting the parties' respective financial positions.

[N.J.S.A. 2A:34-23(j)(3).]

In denying defendant's motion without considering N.J.S.A. 2A:34-23(j)(3) or the factors enumerated in it, the motion judge misapplied the law.

The motion judge declined to consider those statutorily-required factors because defendant had not yet sold his business. With that reasoning, the motion judge ignored the clear and unambiguous language of the statute. Subsection (j) of the statute permits alimony to "be modified or terminated upon the prospective or actual retirement of the obligor." N.J.S.A. 2A:34-23(j). By requiring the actual sale of defendant's business before he would consider the provisions of N.J.S.A. 2A:34-23(j)(3), the motion judge ignored the word "prospective" in the statute. Courts cannot ignore statutory language.

Our "paramount goal" in interpreting a statute is to determine the "Legislature's intent." DiProspero v. Penn, 183 N.J. 477, 492 (2005). To achieve that goal, "we start with the words the Legislature used." Simadiris v. Paterson Pub. Sch. Dist., 466 N.J. Super. 40, 45 (App. Div. 2021). In reviewing the Legislature's words, we follow the "bedrock assumption that the Legislature did not use 'any unnecessary or meaningless language.'" Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 587 (2013) (quoting Patel v. N.J. Motor Vehicle Comm'n, 200 N.J. 413, 418-19 (2009)). We "must presume that every word in a statute has meaning and is not mere surplusage," In re Att'y Gen.'s "Directive on Exit Polling: Media & Non-Partisan Pub. Int. Grps.", 200 N.J. 283, 297-98 (2009), and we "give effect to every word" so that we do not

"construe the statute to render part of it superfluous," Med. Soc'y of N.J. v. N.J. Dep't of Law & Pub. Safety, 120 N.J. 18, 26-27 (1990). We also "ascribe to the statutory words their ordinary meaning and significance." DiProspero, 183 N.J. at 492.

In amending the alimony statute to provide that alimony "may be modified or terminated upon the prospective or actual retirement of the obligor" and by including the word "prospective" in that amendment, the Legislature by its plain language clearly intended that an obligor did not have to wait until after his or her actual retirement before moving to modify or terminate alimony. N.J.S.A. 2A:34-23(j). The motion judge erred in refusing to consider N.J.S.A. 2A:34-23(j)(3) until after defendant's actual sale of his business and retirement.

The motion judge abused his discretion by deciding the motions without an evidentiary hearing. We recognize "[a] hearing is not required or warranted in every contested proceeding for the modification of a judgment or order relating to alimony." Murphy v. Murphy, 313 N.J. Super. 575, 580 (App. Div. 1998); see also Bermeo v. Bermeo, 457 N.J. Super. 77, 83 (App. Div. 2018). However, "[w]hen presented with competing certifications that create a genuine dispute about material facts, a judge is not permitted to resolve the dispute on the papers; the judge must allow for discovery and if, after discovery, the

material facts remain in dispute, conduct an evidentiary hearing." Temple v. Temple, 468 N.J. Super. 364, 368 (App. Div. 2021).

With defendant's motion and plaintiff's cross-motion, the motion judge was presented with the parties' competing certifications, which clearly created genuine disputes about material facts. Defendant asserted "it was anticipated that [defendant] would eventually sell the business and retire." Plaintiff contended defendant repeatedly had told her he would work until he died. Defendant certified he had been "operating [his] business at a reduced status due to [his] age and health" and had entered into an agreement to sell his business which would render him "fully retired" one year after the transaction. Plaintiff certified defendant is in "good health" and his "alleged sale of his business and consequent retirement is nothing more than a ruse to attempt to evade" his alimony obligations. Defendant contends the sale of the business and his retirement would leave him with "nothing leftover with which to pay alimony." Plaintiff asserts defendant leads a lavish lifestyle. Plaintiff also certified she "would have never agreed to the other terms set forth [in the PSA] had [she] believed [she] would only be paid alimony for seven years."

We do not know what is true. We do not know whether, as he contends, defendant in good faith has planned for the sale of his business and retirement

or whether, as plaintiff contends, it is all a "sham." What we do know is that the motion judge should not have decided these motions without conducting an evidentiary hearing to resolve these material factual disputes.

In sum, we reverse the orders and remand for an evidentiary hearing and consideration of the motions pursuant to N.J.S.A. 2A:34-23(j)(3). We leave it to the motion judge, with input from counsel, to determine what, if any, discovery should be conducted before the evidentiary hearing. Because we are reversing the denial of defendant's motion and remanding, we do not reach plaintiff's cross-appeal of the denial of her fee applications.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION