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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2339-15T3

JACQUELINE R. HERSCH,

Plaintiff-Respondent,

v.

NATHAN J. HERSCH,

Defendant-Appellant.

Submitted May 3, 2017 – Decided July 28, 2017

Before Judges Accurso, Manahan and Lisa.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Essex
County, Docket No. FM-07-2100-09.

Greenbaum, Rowe, Smith & Davis, LLP,
attorneys for appellant (Andrea J. Sullivan,
of counsel and on the brief; Stephanie G.
Reckord, on the brief).

Wolkstein, Von Ellen & Brown, LLC, attorneys
for respondent (Marisa Lepore Hovanec, of
counsel and on the brief).

PER CURIAM

Defendant Nathan J. Hersch appeals from aspects of three
post-judgment orders compelling him to pay \$111,542.38 in
additional alimony and \$68,841.25 in additional child support

for the years 2010 through 2013 in accordance with the parties' marital settlement agreement, awarding plaintiff Jacqueline R. Hersch \$10,000 in counsel fees for defendant's unreasonable and bad faith behavior in resisting payment, and denying his requests for a plenary hearing, reconsideration and to modify his alimony and child support on the basis of changed circumstances. Because we agree Judge Casale correctly interpreted the plain language of the parties' agreement, no evidentiary hearing was required, and the remaining rulings Mr. Hersch challenges were reasonable and not an abuse of discretion, we affirm.

The parties were divorced in 2010 after fifteen years of marriage and two children, both now teenagers. Mr. Hersch is a high-earning executive compensation and benefits specialist in the financial services industry. Although he has been laid off more than once, the record reveals he has also become re-employed at the same or higher levels of compensation. Ms. Hersch is a product manager. She was earning over \$80,000 at the end of the marriage.

Both parties were represented by counsel in the divorce, and their marital settlement agreement was the product of extensive negotiation. It is over thirty pages long and contains sixty-eight paragraphs, several with subparts. Ten

paragraphs addressing alimony and child support are relevant to this dispute. They are as follows, with emphasis added.

Base Child Support

11. Husband shall pay Wife \$16,900 per year in base child support for the calendar year (or such amount as applicable and adjusted for the calendar year in proportion to the full calendar year, for example, 3 months for 2010) directly to Wife for the two minor children, it being understood that such base child support shall be paid in equal installments of \$704.16 due on the first day and fifteenth day of each month beginning on the first month after the execution of this Agreement via either direct deposit or ACH.

Additional Child Support

12. Commencing with the entire calendar year 2010 and continuing thereafter until emancipation of the children, Husband shall pay additional child support of eight (8%) percent from the gross amount of any bonus, incentive award, deferred compensation or other form of compensation whether in the form of forgivable loans, money, stock, stock options, stock warrants or otherwise when received as cash income to Husband.

. . . .

14. Notwithstanding anything to the contrary in this Agreement, if Husband receives any bonus, incentive awards, deferred compensation or other form of compensation whether in the form of forgivable loans, money, stock, stock options, stock warrants or otherwise during the period he is obligated to pay child support, but which are not received as cash income during such period in which he is required to pay child

support, he will be required to pay child support for such income pursuant to Paragraph 12 when the bonus, incentive award or deferred compensation is received as cash income. By way of example, if Husband receives a bonus while [the youngest child] is in his senior year of college which is not realized as income until the following year after [the youngest child] has been emancipated, Husband will still owe Wife child support on that bonus pursuant to Paragraph 12. At all times Husband shall keep Wife advised in writing of the foregoing forms of compensation, as well as the statements referred to in preceding Paragraph 7.

Base Alimony

26. Husband shall pay Wife base alimony of \$27,000 per year for a period of twelve (12) years and three (3) months beginning on the first month after the execution of this Agreement. Thus, by way of illustration, but not limitation, if alimony commences on October 1, 2010, the term for the payment of alimony shall expire on December 31, 2022. Base alimony shall be paid in equal installments of \$1,125 on the first day and fifteen[th] day of each month via either direct deposit or ACH. Alimony shall be taxable to Wife and deductible by Husband under the applicable provisions of the Internal Revenue Code.

27. Base alimony is based on Husband having a base salary of \$225,000, and Wife having a base salary of \$90,000. In the event Husband's base compensation exceeds \$275,000 or Wife's base compensation exceeds one hundred forty thousand dollars (\$140,000), such excess for each of them shall be considered bonus compensation and subject to paragraph 29. Husband further agrees not to

arrange a compensation package which defeats the objective of this Agreement.

Additional Alimony

29. Commencing with the entire calendar year 2010 and continuing thereafter until the term of alimony expires and subject to above paragraph 27 hereof, Husband shall pay additional alimony for each year of the twelve (12) years and three (3) months for an amount equal to twenty-five (25%) percent of the difference between the gross of the sum-total of (a) his bonuses, incentive award, deferred compensation or other form of compensation whether in the form of money, stock, forgivable loans, stock options or stock warrants when received as cash income and (b) Wife's total compensation bonus, incentive award or other form of compensation whether in the form of bonuses, incentive awards, deferred compensation or other forms of compensation, whether in the form of money, stock, forgivable loans, stock options or stock warrants when received as cash income. Additional alimony shall be paid to Wife within seven (7) days after receipt of any bonus, incentive award, deferred compensation or other form of compensation whether in the form of money, stock, stock options, stock warrants when realized as cash income by Husband as long as Husband has already received from Wife her aforesaid financial information. Thus, by way of illustration, but not limitation, if the Wife received a bonus totaling \$10,000 and Husband[] received [a] bonus totaling \$110,000, Wife would receive \$25,000 as "Additional Alimony."

30. The parties agree that the additional alimony calculation for 2010 will not include the signing bonus received by Husband from Capital One in January 2010.

31. Husband shall not pay additional alimony as described in Paragraph 29 on any of his adjusted gross earned income as reported on his federal tax return over and above Five Hundred Thousand and 00/100 (\$500,000.00) Dollars for a calendar year; provided, however, the aforesaid Five Hundred Thousand and 00/100 (\$500,000.00) Dollar limitation shall be increased to Five Hundred Fifty Thousand and 00/100 (\$550,000.00) Dollars on October 1, 2016.

32. With regard to the payment of "Additional Alimony," the parties shall exchange tax information including W-2s, 1099s, K-1s, 1040s, stock awards, stock options, stock warrant and any other document reasonably necessary to reflect an award of compensation, each year within seven (7) days of receipt of such information. Husband shall be obligated to convert all awards, stock, stock options and stock warrants into cash within one (1) year of receiving such award unless Wife consents in writing to a longer period of time. Her consent shall not be unreasonably withheld. At all times, Husband must furnish Wife with written notice of such awards.

. . . .

35A. Computation and Payment of Additional Child Support and Additional Alimony. With regard to the additional child support and additional alimony to be paid by Husband to Wife, all calculations as to the amount of Husband's income will be made on the basis of what he has to report as earned income for a given year. However, if awards to Husband are not in cash but in other forms of remuneration, for example, stock awards, stock options and stock warrants, Husband shall not have to pay such additional child support or alimony until such stock awards,

stock options or stock warrants are converted into cash in accordance with the provisions of this Agreement.

The divorce judgment was entered in September 2010. Mr. Hersch was laid off a year later, in September 2011. He received \$364,576.42 in severance pay, \$277,000 of which he received in 2011 and \$87,576.42 in 2012. He was re-employed in January 2012, but was laid off again in October 2013. He received severance pay of \$248,958.31, \$68,750 of which was received in 2013 and \$180,208.31 in 2014. Mr. Hersch was re-employed in January 2014 and laid off a year later in January 2015. He received severance pay of \$386,507 in 2015. He was still unemployed at the time the orders appealed were entered in late 2015 and January 2016.

There is no dispute but that Mr. Hersch would owe additional alimony under the marital settlement agreement if his severance payments were treated as compensation.¹ He argues, however, that "he considered his severance[] packages as damages for having been terminated from his position," and that Ms.

¹ Mr. Hersch conceded in the trial court that he owed additional child support based on his receipt of severance payments "[b]ecause that's just a flat 8 percent." Accordingly, the dispute as to whether Mr. Hersch's severance payments are compensation is limited to the calculation of additional alimony. Mr. Hersch's objections to the child support award are based on the calculation discussed infra.

Hersch's view that the severance was compensation represented a dispute of fact warranting a plenary hearing. Further, he asserts that "severance payments are not compensation as defined by New Jersey law." He contends:

At best, severance pay becomes compensation if it replaces compensation lost as a result of termination of employment. Thus, it is effectively a "rear view mirror" or lookback form of payment definition.

To effectuate such a lookback, the amount of severance would be divided by the amount of compensation to determine, if the severance document itself did not, the amount of time that severance replaced compensation. If, however, the recipient of severance, which is, as [Mr. Hersch] certified, more in the nature of damages for job termination than in the nature of compensation, replaced compensation, a payor of alimony or child support could not seek modification of those payments based on changed circumstances because circumstances would not have changed by dint of the severance.

The trial judge rejected both arguments, as do we. First, we reject Mr. Hersch's contention that the parties' differing interpretations of their marital settlement agreement necessitated a plenary hearing. Our courts treat marital settlement agreements as contracts and interpret them accordingly. Pacifico v. Pacifico, 190 N.J. 258, 265 (2007).

"[T]he judicial interpretive function is to consider what was written in the context of the circumstances under which it was written, and accord to the language a rational meaning in keeping with the expressed general purpose." Owens v. Press Publ'g Co., 20 N.J. 537, 543 (1956). "Where the 'principal purpose' of the parties is found, 'further interpretation of the words of contract should be such as to attain that purpose, if reasonably possible.'" Ibid. (quoting Corbin on Contracts, § 545). Construction of contract language is generally a question of law unless its meaning is unclear and turns on conflicting testimony. Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001).

As Judge Casale reasoned:

[W]hen you look at the plain language of the marital settlement agreement, the severance pay would have to be included as income for purposes of the alimony, additional alimony calculation. The language is extremely broad. The only thing it excluded was the signing bonus. I also think that under any reading of I.R.S. regulations, that the severance pay was meant and is replacement income.

And I don't buy the Defendant's version that it's a release of a specific damage claim. It's severance pay for employment. It's includable as wages. And it's includable as income under any reading of the I.R.S. regulations here. Therefore, I find that it should be included within the additional alimony calculation.

. . . .

And when I read the marital settlement agreement, it's broad. It was negotiated to try to prevent the Defendant from manipulating his income into other forms of unearned income. The Defendant's argument that unemployment income is earned income, but the severance pay is not does not carry weight with this Court.

Here, as the trial judge found, the language of the parties' settlement agreement is clear and its intent unambiguous, making a plenary hearing unnecessary. See Segal v. Lynch, 211 N.J. 230, 264-65 (2012) ("[A] plenary hearing is only required if there is a genuine, material and legitimate factual dispute."). By its express terms, Mr. Hersch's obligation to pay additional alimony (as well as additional child support) is calculated based on "what he has to report as earned income for a given year." The agreement obligates him to pay additional alimony based on the amount of his "adjusted gross earned income as reported on his federal tax return," between \$275,000 and \$500,000. His severance pay is indisputably reportable as earned income on his federal tax return. See 26 U.S.C. § 3401(a) (defining wages); 26 C.F.R. § 31.3401(a)-1(b)(4) (noting "[a]ny payments made by an employer to an employee on account of dismissal, that is, involuntary separation from the service of the employer, constitute wages regardless of whether the

employer is legally bound by contract, statute, or otherwise to make such payments"); 26 U.S.C. § 61(a) and 26 C.F.R. § 1.61-2(a)(1) (treating severance pay in the same manner as salary and wages for federal income tax and withholding purposes); Meehan v. Comm'r, 122 T.C. 396 (2004) (treating severance pay as salary and wages for purposes of IRS continuing wage levy). Moreover, Mr. Hersch reported his severance payments and included them on his federal tax returns on line #7, "Wages, salaries, tips, etc."

Further, no case supports Mr. Hersch's novel view that under New Jersey law "the amount of severance [is to] be divided by the amount of compensation to determine, if the severance document itself did not, the amount of time that severance replaced compensation."² New Jersey treats severance as does the federal government, as a form of wages. Owens, supra, 20 N.J.

² The only case Mr. Hersch cites in support of this theory, Reinbold v. Reinbold, 311 N.J. Super. 460 (App. Div. 1998), he concedes is "not precisely analogous." The question presented in that case was whether an early retirement incentive offered after the complaint for divorce was filed but earned during the marriage as a reward for service, was "includable in the pot for equitable distribution." Id. at 472. We held that it was, distinguishing it from the defendant's severance pay, which was intended as "the replacement for future earnings component of defendant's benefit," and like all future earnings "is not subject to equitable distribution." Id. at 471. Far from supporting Mr. Hersch's position, the case is consistent with both New Jersey and federal law that severance pay is a form of wages.

at 545-46 (characterizing severance pay as "terminal compensation[,] . . . a means of recompense for the economic exigencies and privations and detriments resulting from the permanent separation of the employee from service for no fault of his own").

Our Supreme Court long ago rejected the theory that "severance pay is intended only to provide for the period of unemployment when the employee is discharged." See Adams v. Jersey Cent. Power & Light Co., 21 N.J. 8, 15 (1956). Were that the case, the Court reasoned, "it would be mere unemployment compensation relating merely to the period of unemployment and the actual wage loss." Ibid. Instead, the Court determined that severance pay had "other objectives," including "the readjusting of the employee's life to altered circumstances. It is not a gratuity but a compensation earned by service." Id. at 15-16. Accordingly, we find no support for Mr. Hersch's argument that severance payments are not considered compensation under our law.

The obvious purpose of the parties' marital settlement agreement was to adjust alimony in response to an increase in compensation by either party, regardless of how that compensation might be characterized, except when specifically excluded, such as in the case of Mr. Hersch's 2010 signing

bonus. Considering "what was written" in the agreement, "in the context of the circumstances under which it was written," and according the words "a rational meaning in keeping with the expressed general purpose," Owens, supra, 20 N.J. at 543, we have no hesitation in concluding, as did the trial court, that Mr. Hersch's severance payments were properly included as earned income for purposes of calculating additional alimony.

Applying those same interpretive principles, we similarly dispose of Mr. Hersch's argument that the amounts for additional child support in the order were incorrectly calculated. Mr. Hersch contends the court "failed to properly shift alimony paid to [Ms. Hersch] from [Mr. Hersch's] income and add it to her income before analyzing additional child support," as called for in the Child Support Guidelines. This is, however, not a Guidelines case. See Caplan v. Caplan, 182 N.J. 250, 264-66 (2005); see also Child Support Guidelines, Pressler & Verniero, Current N.J. Court Rules, Appendix IX-A, ¶ 20 to R. 5:6A at www.gannlaw.com (2017).

There is nothing in the parties' detailed agreement that suggests they intended that alimony paid to Ms. Hersch should be deducted from Mr. Hersch's income before calculating any additional child support due. Although the parties in several places in their marital settlement agreement used hypothetical

examples to demonstrate how a particular calculation was to be computed, they did not do so in the case of additional child support. Instead, the agreement provides simply that "Husband shall pay additional child support of eight (8%) percent from the gross amount of any bonus, incentive award, deferred compensation or other form of compensation whether in the form of forgivable loans, money, stock, stock options, stock warrants or otherwise when received as cash income to Husband." Because the language is clear that the eight percent is on "the gross amount" of any compensation, we reject his effort to make a more favorable agreement for himself than the one he negotiated.³ See Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999) (noting "it is not the function of the court to make a better contract for the parties, or to supply terms that have not been agreed upon").

Judge Casale's decision to deny Mr. Hersch's application to modify his base alimony and child support obligations is

³ Mr. Hersch does not explain how the court "ignored the [marital settlement agreement's] express limitation that only [Mr. Hersch's] income between \$275,000 and \$500,000 was to be considered" in calculating additional alimony, and the alleged error is not obvious to us. We thus do not address it. See 700 Highway 33 LLC v. Pollio, 421 N.J. Super. 231, 238 (App. Div. 2011) (noting the failure to adequately brief an issue permits the court to treat it as waived).

supported by adequate, substantial and credible evidence in the record and thus will not be disturbed on appeal. See N.J.S.A. 2A:34-23; Lepis v. Lepis, 83 N.J. 139, 145 (1980); Storey v. Storey, 373 N.J. Super. 464, 470 (App. Div. 2004). Mr. Hersch was separated from his most recent employment in January 2015, ten months before he applied to modify his support obligations. In addition to his demonstrated ability to find re-employment in similar situations in the recent past, the record reveals Mr. Hersch received gross pay of \$426,956.04 in the first two months of 2015 and anticipated income in a new venture of \$200,000 in 2016. Given that his base alimony obligations were premised on income of \$225,000, and that his gross income in the years since the divorce had ranged from a low of \$330,000 to a high of \$695,000, we cannot find the court erred in finding he had not met his burden of proving changed circumstances of a permanent nature.

We likewise find no error in Judge Casale's orders setting a schedule for payment of arrears and awarding Ms. Hersch \$10,000 in counsel fees; decisions that are likewise committed to the Family Part judge's sound discretion. See Eaton v. Grau, 368 N.J. Super. 215, 225 (App. Div. 2004) (counsel fees); Mastropole v. Mastropole, 181 N.J. Super. 130, 141 (App. Div. 1981) (arrearages). Judge Casale initially ordered Mr. Hersch

to pay only \$400 per month toward his support arrears of \$180,383.60. Following review of the parties' updated case information statements, which for Mr. Hersch revealed gross assets of over \$2,000,000, almost twice Ms. Hersch's gross assets,⁴ and 2015 income of over \$400,000, the judge ordered Mr. Hersch to pay down his arrears by \$100,000 within ten months in \$20,000 increments.

We perceive no error in that ruling or in the court's decision to award Ms. Hersch fees on the motions. The court's findings, that Mr. Hersch obfuscated and delayed providing a true picture of his finances, are amply supported in the record. The trial judge considered the relevant factors contained in Rule 5:3-5(c). The fee award, which was approximately half of the fees requested, was in accord with both the Rule and the parties' agreement⁵ and well within the court's considerable discretion. See Tannen v. Tannen, 416 N.J. Super. 248, 285 (App. Div. 2010), aff'd o.b., 208 N.J. 409 (2011).

⁴ The case information statements also revealed a significant disparity in the parties' net assets.

⁵ Paragraph sixty-four of the marital settlement agreement provides the party defaulting in performing any obligation shall pay the prevailing party's fees in any action to enforce.

In sum, we affirm the trial court's orders of August 27,
2015, October 30, 2015 and January 29, 2016.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION