SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2412-20

KIM CHARLES,

Plaintiff-Respondent/
Cross-Appellant,

v.

WALTER CHARLES,

Defendant-Appellant/
Cross-Respondent.

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Submitted April 4, 2022 – Decided May 5, 2022

Before Judges Mayer and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Somerset County, Docket No. FM-18-0580-13.

Lawrence Law, attorneys for appellant/cross-respondent (Daniel A. Burton and Jeralyn L. Lawrence, of counsel and on the briefs).

DeTorres & DeGeorge, LLC, attorneys for respondent/cross-appellant (Kristen E. Blucher and Rosanne S. DeTorres, of counsel and on the briefs).

PER CURIAM

Defendant Walter Charles appeals from a March 19, 2021 order denying his motion to terminate alimony based on his ex-wife's alleged cohabitation. Plaintiff Kim Charles cross-appeals from the same order denying her cross-motion for counsel fees incurred in opposing defendant's motion. We affirm both orders on appeal.

After twenty-four years of marriage, defendant and plaintiff divorced in February 2014. Defendant and plaintiff have three children but only the youngest child is unemancipated. The parties signed a marital settlement agreement (MSA), which they incorporated into their final dual judgment of divorce (FDJOD). The MSA provided:

> [w]ife's cohabitation with an unrelated adult in a relationship tantamount to marriage or civil union shall be considered a change of circumstances allowing the [h]usband to request a review of his alimony obligation pursuant to New Jersey case law . . . . The [h]usband would be entitled to plenary hearing on that issue unless the [c]ourt determines to reduce or eliminate alimony in a manner acceptable to the [w]ife without the need for a plenary hearing.

Seven years after the FDJOD, defendant moved to terminate his alimony obligation based on plaintiff's cohabitation with her fiancé, Ira Ray (Ray). Defendant submitted a certification in support of his motion alleging plaintiff

and Ray had an intimate, continuous, and exclusive relationship for six years, triggering the cohabitation provision in the MSA.

Defendant did not retain a private investigator to shadow plaintiff's day-to-day activities to support his cohabitation claim. Rather, defendant submitted a certification providing the following information in support of his motion.

In 2014, defendant believed plaintiff became engaged to Ray. In 2015, plaintiff moved to Flemington, the same town where Ray resided. Plaintiff and Ray owned separate homes, but their homes were in walking distance of each other.

Defendant also described Ray's active involvement in the youngest child's life. For example, defendant stated Ray regularly attended the youngest child's dance recitals and other events, attended graduations, drove the youngest child to the airport,[1] guided the youngest child in selecting an SAT prep course and preparing her college applications, tutored the youngest child in math, and offered to assist plaintiff in purchasing a car for the youngest child. Additionally, defendant asserted Ray was invited to events for his daughters that were otherwise limited to immediate family members, such as graduations.

[1] Because defendant relocated to another state, the youngest child needed to travel by air for her parenting time with defendant.

Defendant further certified Ray paid for a family dinner after one dance recital performed by the youngest child. He noted plaintiff and Ray regularly bought dinners for each other. Defendant also stated plaintiff used the last name "Ray" in some of her email communications.

Plaintiff opposed defendant's motion and filed a cross motion seeking counsel fees. In her certification, plaintiff stated she and Ray never shared a residence. However, plaintiff conceded her family, friends, and social circles recognize her long-term relationship with Ray. Plaintiff admitted she began dating Ray in 2014 but explained they became engaged in 2019 and announced their engagement in separate Facebook updates.

Plaintiff challenged the allegations in defendant's certification. While plaintiff admitted Ray offered to loan her money to buy a car for the youngest child, plaintiff certified she declined Ray's loan offer. The issue was resolved when defendant agreed to provide the youngest child with one of his cars. Plaintiff clarified she relocated to a home in Flemington because she had friends who lived in the town. Plaintiff also explained Ray stepped in as a father-like figure by assisting the youngest child with schooling decisions and career advice because defendant moved to a distant state.

On March 19, 2021, the Family Part judge denied defendant's motion. The judge found defendant failed to establish a prima facie case of cohabitation under N.J.S.A. 2A:34-23(n) because there was no evidence plaintiff shared finances with Ray, lived with Ray, or relied on Ray for financial support. The judge explained "an engagement to marry is not the equivalent of cohabitation." He further noted plaintiff admitted to being engaged to Ray in August 2019 but certified the two lived in separate residences, did not share expenses, maintained separate bank accounts, and undertook no duties or responsibilities commonly associated with marriage. Regarding Ray's interactions with plaintiff's children, the judge held the evidence defendant provided did "not prove cohabitation." Based on the "scant allegations contained in [the] motion record," the judge concluded defendant "failed to establish a prima facie case of cohabitation" and denied defendant's request to terminate alimony or, in the alternative, allow discovery and conduct a plenary hearing.

The judge also denied plaintiff's cross-motion for counsel fees incurred in opposing defendant's motion to terminate alimony. The judge explained "[w]hile unsuccessful, defendant's motion had a colorable basis in its factual assertions and the court does not find bad faith."

On appeal, defendant argues the family part judge erred in denying his motion because he established a prima facie case of cohabitation based on the factors under N.J.S.A. 2A:34-23(n). On appeal, defendant acknowledges presenting limited evidence of plaintiff's financial entanglement and shared living expenses with Ray. However, defendant asserts the lack of evidence as to the financial factors for determining cohabitation did not preclude his establishing a prima facie case of cohabitation under Temple v. Temple, 468 N.J. Super. 364 (App. Div. 2021).

Our review of a trial court's decision to modify or terminate alimony is limited. "[E]very motion to modify an alimony obligation 'rests upon its own particular footing and the appellate court must give due recognition to the wide discretion which our law rightly affords to the trial judges who deal with these matters.'" Larbig v. Larbig, 384 N.J. Super. 17, 21 (App. Div. 2006) (quoting Martindell v. Martindell, 21 N.J. 341, 355 (1956)). Our review of a motion to terminate "alimony is limited to whether the court made findings inconsistent with the evidence or unsupported by the record, or erred as a matter of law." Reese v. Weis, 430 N.J. Super. 552, 572 (App. Div. 2013).

Alimony "may be revised and altered by the court from time to time as circumstances may require." N.J.S.A. 2A:34-23. A motion to terminate or

suspend alimony requires a showing of "changed circumstances." Lepis v. Lepis, 83 N.J. 139, 146 (1980). A prima facie showing of cohabitation constitutes sufficient changed circumstances under Lepis. See Gayet v. Gayet, 92 N.J. 149, 154-55 (1983). "[A]limony may be terminated or modified pursuant to a consensual agreement . . . ." Temple, 468 N.J. Super. at 368 (citing Konzelman v. Konzelman, 158 N.J. 185, 193-94 (1999)).

Cohabitation has been defined as "an intimate relationship in which the couple has undertaken duties and privileges that are commonly associated with marriage." Konzelman, 158 N.J. at 202. "A mere romantic, casual or social relationship is not sufficient to justify the enforcement of a settlement agreement provision terminating alimony. Such an agreement must be predicated on a relationship of cohabitation that can be shown to have stability, permanency and mutual interdependence." Ibid. Cohabitation "is based on those factors that make the relationship close and enduring and requires more than a common residence." Ibid.

In 2014, the Legislature amended the cohabitation statute to provide:

> [a]limony may be suspended or terminated if the payee cohabits with another person. Cohabitation involves a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil

union but does not necessarily maintain a single common household.

When assessing whether cohabitation is occurring, the court shall consider the following:

(1) Intertwined finances such as joint bank accounts and other joint holdings or liabilities;

(2) Sharing or joint responsibility for living expenses;

(3) Recognition of the relationship in the couple's social and family circle;

(4) Living together, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive intimate personal relationship;

(5) Sharing household chores;

(6) Whether the recipient of alimony has received an enforceable promise of support from another person within the meaning of subsection h. of [N.J.S.A.] 25:1-5; and

(7) All other relevant evidence.

In evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship. A court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis.

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

Recently, this court held a party seeking to terminate alimony based on cohabitation need not "check off all six boxes [under N.J.S.A. 2A:34-23(n)] to meet the burden of presenting a prima facie case, [otherwise] a finding of cohabitation [would] be as rare as a unicorn." Temple, 468 N.J. Super. at 370. Moreover, "the statute does not contain the alpha and omega of what ultimately [may] persuade a court that a[n] [ex-]spouse is cohabitating." Ibid. A party seeking to terminate alimony must present enough evidence for the "trier of fact [to] conclude the supported spouse and another are in 'a mutually supportive, intimate personal relationship' in which they have 'undertaken duties and privileges that are commonly associated with marriage or civil union.'" Id. at 371 (quoting N.J.S.A. 2A:34-23(n)).

We will not disturb the Family Part judge's determination, unless we conclude: (1) the trial court failed to consider all the required cohabitation factors under N.J.S.A. 2A:34-23(n); (2) the trial court failed to grant defendant the benefit of all reasonable inferences in determining whether the facts support a finding of cohabitation; (3) the trial court's conclusion "could not reasonably have been reached . . . after considering the [evidence] as a whole." Heinl v. Heinl, 287 N.J. Super. 337, 345 (App. Div. 1996); see also Temple, 468 N.J. Super. at 368-69.

In Temple, the plaintiff, as the supporting spouse, submitted ample evidence of cohabitation warranting and scheduling a plenary hearing. 468 N.J. Super. at 371-75. The plaintiff in that case presented the following evidence of cohabitation: the defendant, as the supported spouse, and the claimed cohabitant lived together and had a fourteen-year relationship; the claimed cohabitant referred to the defendant as his wife on social media posts over a period of many years as well as in a Mother's Day church publication which listed the defendant under the claimed cohabitant's last name; the defendant and the claimed cohabitant traveled and participated in events extensively from 2012 through 2019; over the fourteen year relationship, the two were together for holidays and family functions; the defendant resided in the claimed cohabitant's home at the shore and the claimed cohabitant resided at the defendant's apartment in New York City; photographs of the defendant engaging in household responsibilities and using a key and access code to enter and exit the claimed cohabitant's home; and the defendant and the claimed cohabitant sanitized their social media accounts to delete evidence of their cohabitation after the plaintiff's attorney requested preservation of records upon the filing of a motion to terminate alimony based on cohabitation. Ibid. When presented with this plethora of

evidence, we held the plaintiff presented a prima facie case of cohabitation "to entitle him to discovery and an evidentiary hearing." Id. at 375.

However, the evidence in this matter is very different from the evidence presented in Temple. Here, defendant failed to proffer overwhelming evidence establishing plaintiff and Ray were cohabitating. To the contrary, the judge determined defendant presented "scant evidence" of cohabitation and defendant's limited evidence supported only two of the seven statutory factors governing cohabitation. Defendant offered no photographs depicting plaintiff and Ray attending events, vacationing, or performing household chores. Additionally, defendant did not retain a private investigator to observe and document plaintiff's regular or recurring marriage-like activities with Ray. Nor did defendant proffer any third-party affidavit or certification from friends or family describing a mutually supportive, intimate personal relationship with plaintiff and Ray undertaking duties and privileges commonly associated with marriage.

At best, the evidence marshalled by defendant demonstrated plaintiff and Ray had an adult dating relationship since 2014, becoming engaged in 2019. Unlike the many social media posts adduced in Temple, defendant only cited two separate Facebook posts announcing plaintiff's and Ray's engagement. Nor

did defendant present any photographic or other surveillance evidence demonstrating plaintiff and Ray spent considerable time in each other's homes or had keys as proffered to the trial court in Temple. Moreover, unlike the facts presented in Temple, plaintiff and Ray maintained separate homes and households and defendant submitted no evidence to the contrary.

Additionally, while the motion judge considered plaintiff's and defendant's certifications, he did not resolve any factual disputes contained in the competing certifications. Rather, the judge considered defendant's proffered evidence and concluded the evidence was insufficient under N.J.S.A. 2A:34-24(n) to establish a prima facie case of cohabitation. Having reviewed the record, we are satisfied the judge did not abuse his discretion when he concluded defendant failed to demonstrate a prima facie case in support of cohabitation to warrant discovery and a plenary hearing.

On the cross-appeal, plaintiff argues the judge erred in denying her motion for counsel fees. We disagree.

We "will disturb a trial court's determination on counsel fees only on the 'rarest occasion,' and then only because of clear abuse of discretion." Slutsky v. Slutsky, 451 N.J. Super. 322, 365 (App. Div. 2017) (quoting Strahan v. Strahan, 402 N.J. Super. 298, 317 (App. Div. 2008)). An abuse of discretion occurs

where the decision is "made without a rational explanation, inexplicably depart[ing] from established policies, or rest[ing] on an impermissible basis." Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

We are satisfied the motion judge properly denied plaintiff's cross-motion for counsel fees. Although the judge concluded defendant provided only "scant allegations" in support of his cohabitation claim, the judge found defendant's motion had a colorable basis in its factual assertions and thus was not filed in bad faith. We are satisfied the quantum of evidence garnered by defendant in support of his cohabitation motion is not dispositive of plaintiff's counsel fee request. The issue, as properly framed by the motion judge, is whether defendant had a colorable basis for filing his motion. On this record, the judge did not abuse his discretion in denying plaintiff's request for counsel fees.

Affirmed.