SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2726-20

MICHELLE SABATINI,

Plaintiff-Appellant,

v.

LOUIS SABATINI,

Defendant-Respondent.

Submitted May 2, 2022 – Decided May 27, 2022

Before Judges Firko and Petrillo.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Atlantic County, Docket No. FM-01-0772-15.

Michael K. McFadden, attorney for appellant.

Ackerman & Alsofrom, LLP, attorneys for respondent (Daniel D. Alsofrom, on the brief).

PER CURIAM

Plaintiff Michelle Sabatini appeals from a May 10, 2021, order entered by the Chancery Division, Family Part in this post-judgment matrimonial matter.

The trial court denied her motion to vacate the final judgment of divorce (FJOD) and set aside the Interspousal Agreement, also referred to as the Memorandum of Understanding (MUA). The judge denied plaintiff's request for counsel fees and awarded counsel fees to defendant Louis Sabatini in the amount of $13,704 in a separate order and opinion dated May 28, 2021, which plaintiff also appeals from. The judge issued a memorandum of decision for the May 10, 2021, order and later a submission pursuant to Rule 2:5-1(b). We affirm the first order denying plaintiff's motion in all respects and vacate the subsequent order awarding fees to defendant and remand for further proceedings.

I.

We glean the salient facts from the record. The parties were married in August 1996 and had no children. On April 10, 2015, plaintiff filed a complaint for divorce. Thereafter, defendant filed an answer and a counterclaim for divorce. On July 17, 2015, a prior judge ordered pendente lite relief.

Some six weeks later, on August 28, 2015, the parties entered an MUA apparently without the benefit of counsel. Plaintiff executed the MUA in the presence of a notary public on September 18, 2015; defendant first executed the MUA in the presence of the same notary and then later in the presence of his attorney. In the MUA, the parties agreed to waive discovery and acknowledged

a voluntary disclosure of financial information, which was satisfactory to both of them. There was a mutual waiver of alimony. Plaintiff has a Ph.D. in education and was a tenured professor at Stockton University. Defendant was gainfully employed as an emergency care physician.

As to equitable distribution, defendant retained the former marital home, a Florida home, which were both encumbered, as well as property in Nicaragua, Central America. Plaintiff retained her $1,000,000 UBS account; defendant retained his $780,000 Schwab 401(k) plan; and plaintiff kept her TIAA-CREF retirement benefits free of any claim from defendant. Other assets and debts were divided. In consideration for receiving the real properties, defendant agreed to pay plaintiff $920,000 over a five-year installment plan. The MUA indicates the parties entered the agreement "free from persuasion, fraud, under influence" or duress of any kind.

On December 3, 2015, the prior judge heard a motion filed by defendant to put through an uncontested divorce as the parties had executed the MUA. Plaintiff and her lawyer appeared for the oral argument. Plaintiff's counsel was present at the time and informed the court, as he had in a written submission, that he had not been in contact with plaintiff and was seeking to be relieved as counsel. That said, plaintiff's counsel advised that he had consulted at some

length with plaintiff that day about the MUA and that there was some confusion over how it might affect plaintiff's pending criminal prosecution. Moreover, plaintiff's counsel noted that despite what the MUA appeared to indicate, he had not previously seen the agreement or approved it. On that latter point, counsel expressed reservations about the effect of the agreement on plaintiff's criminal case. Plaintiff expressed specific concerns herself but not at all about the contents of the MUA, indeed she acknowledged that she had already received some of the equitable distribution funds promised under the agreement. Plaintiff's reservations were about the implications of the divorce and its impact on spousal privilege.

Defense counsel strenuously objected to plaintiff's counsel being heard in any fashion on the substance of the MUA or the finalization of the divorce as all plaintiff's counsel had filed was a motion to be relieved. Defense counsel further objected to any additional delays or to the court's review of the substance of the MUA, instead insisting that the court's focus should be as to whether it was knowingly and voluntarily entered into.

Despite defense counsel's objections, the prior judge determined that some additional time should be afforded to plaintiff and her attorney to confer, as they had not done so since execution of the MUA, so as to ensure all concerns raised

at the hearing could be fairly addressed. The matter was adjourned and given a new date.[1]

On the scheduled return date, January 12, 2016, there was an uncontested divorce hearing which resulted in entry of the FJOD incorporating the MUA. Plaintiff did not appear at the January hearing and her attorney (who did appear and who continued to state his objections to the MUA) was relieved as counsel. Plaintiff's attorney further noted that despite the more than one month since the last hearing, plaintiff had not been in contact with him. The court granted plaintiff's counsel's motion to be relieved.

Although the prior judge noted that he could not make a finding as to whether plaintiff had entered into the MUA knowingly and voluntarily given her absence from the hearing, he found that her execution of the agreement and her acceptance of monies owed thereunder constituted "an agreement that she was satisfied with and wanted to work . . . ." The divorce was finalized and the matter was completed.

On December 2, 2020, nearly five years later, plaintiff moved to set aside the FJOD and the MUA. By this time, plaintiff was remarried. Plaintiff

[1] The original return date given in court was adjourned with notice to plaintiff of the new date.

disavows knowledge of the hearing where the FJOD was entered and claims that defendant committed perjury when he testified at that hearing that she signed the MUA. Plaintiff maintains her purported signature on the MUA was a forgery even though it was notarized (an unverified letter supposedly from the notary denying having notarized plaintiff's execution of the MUA accompanied the motion). Plaintiff also alleged forgery in connection with a deed filed relative to a property in the State of Florida. Proof of the alleged forgery came from a report of a handwriting expert who did not examine the MUA but only the property deed filed in the State of Florida. Plaintiff further alleged that she was coerced, arguing that the MUA should set aside "as it was derived by [d]uress by [t]hreat and [u]ndue [i]nfluence" and that the MUA was unfair and unconscionable on its face.

All request for relief was opposed by defendant who filed a notice of cross-motion. Defendant argued that the FJOD was not, and could not be, "void," as a matter of law as there was no lack of jurisdiction and no deprivation of due process. He further highlighted the inconsistency in plaintiff's argument that her signature was forged on the MUA while simultaneously arguing her agreement to the terms of the MUA was coerced. Defendant disputes the whole notion of forgery as unsupported by any evidence. Significantly, defendant

highlighted significant monies that were transmitted to the plaintiff, all of which were consistent with the terms of the MUA. Defendant professed oversight as to what he said to the prior judge regarding the transfer of the Florida property and that it had indeed been transferred prior to the entry of the FJOD but that doing so was consistent with the parties' agreement which imposed all costs on him for the mortgage, taxes, and other upkeep. Citing the passage of time and plaintiff's functional acquiescence to many of the MUA's terms, defendant argued that plaintiff's efforts to void the FJOD and the MUA were not rooted in reality and that relief has been sought well out of time.

On May 10, 2021, the court entered the first of the two orders under appeal. This first order was accompanied by a comprehensive memorandum of decision. The trial judge thoroughly canvassed the record and recounted the procedural history. The judge made specific findings and conclusions citing applicable case law and governing standards. The judge ultimately concluded that plaintiff signed the MUA and there was sufficient notice of the planned hearing where the FJOD would be entered. The court found no evidence of fraud or legal basis to conclude the either the FJOD was void or should be vacated. The court directed the parties to address the dispute over the Florida deed, if any, in the State of Florida. The court awarded fees and costs to the defendant

but reserved decision on the calculation of same until additional submissions were received.

On May 28, 2021, the judge issued a second order, also under appeal, awarding defendant $13,809 in fees and costs and setting forth his analysis as to why same was warranted in a supplement to his earlier decision.

On appeal, plaintiff argues:

(1) The judge abused his discretion by not ordering a plenary hearing.

(2) The judge erred in granting defendant counsel fees and costs.

(3) The judge erred in failing to vacate the FJOD and agreement based on defendant's fraud.

(4) The judge erred in failing to set aside the agreement based on duress by threat and undue influence.

(5) The judge erred in failing to vacate the FJOD and agreement under Rule 4:50-1(f).

(6) The judge erred in failing to find the FJOD was void under Rule 4:50-1(f).

(7) The judge erred in failing to set aside the FJOD and agreement based on newly discovered fraud.

(8) The judge erred in awarding defendant counsel fees.

II.

Addressing plaintiff's arguments, we begin with our well-settled standard of review. Our review of the Family Part's orders is limited. Cesare v.

Cesare, 154 N.J. 394, 411 (1998). We owe substantial deference to the Family Part's findings of fact because of that court's special expertise in family matters. Id. at 413. While we owe no special deference to the judge's legal conclusions, Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995),"'the factual findings and legal conclusions of the trial judge'" should be left undisturbed unless we are "'convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice' or when we determine the court has palpably abused its discretion." Parish v. Parish, 412 N.J. Super. 39, 47 (App. Div. 2010) (quoting Cesare, 154 N.J. at 412). Thus, we will only reverse the judge's decision when it is necessary to "ensure that there is not a denial of justice because the family court's conclusions are [] clearly mistaken or wide of the mark." Id. at 48 (alteration in original) (internal quotation marks omitted) (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)).

When set against this standard, we find no merit in plaintiff's appeal of the May 10, 2021, order. The judge methodically filtered through the competing certifications and legal arguments and reached a decision grounded in the record. By no measure could we conclude that his findings and conclusions "are so

manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Parish, 412 N.J. Super. at 47 (quoting Cesare, 154 N.J. at 412).

We conclude there is ample basis to affirm for the reasons stated by the court in its written opinion. We add some additional observations to highlight those particular points that work most significantly in our determination that none of plaintiff's arguments have merit. Prior to the divorce being entered, the prior judge held a hearing on December 3, 2015, with both parties and both counsel present. Plaintiff's counsel stated on the record at that time he did not think his client should have signed the MUA. That articulated expression of professional judgment aside, there was no allegation of forgery and the terms of the MUA were already being implemented. Plaintiff did not appear at the final hearing, but defendant appeared with his attorney. Even though plaintiff claims she did not receive notice of the final hearing date, she engaged in a course of conduct consistent with the MUA. Finally, plaintiff remarried in November 2019. We accept as well supported by the record, the court's conclusions that plaintiff lacks "veracity" and her "motivations" were suspect.

Moreover, the judge found plaintiff asserted "irrational arguments" about the status of the divorce proceedings. There was no evidence of forgery, duress,

or coercion as plaintiff claimed. The judge was correct in his analysis. No plenary hearing was warranted. A plenary hearing is not inexorably required in every post-judgment matrimonial dispute. See, e.g., R. 5:8-6 (requiring plenary hearings in custody matters only where the contested issues are "genuine and substantial"); see also Barblock v. Barblock, 383 N.J. Super. 114, 124 (App. Div. 2006) (no plenary hearing was required to authorize mother's relocation of her children out of state, over the father's objection, where no material factual disputes were demonstrated).

In this instance, the plaintiff has come forward with no competent evidence supporting her arguments nor has she offered any persuasive or rational explanation when confronted with the discrepancies between what she is saying now as opposed to what the record reflects actually happened at the time the agreement was executed, and the parties appeared in court. Neither can she reconcile her re-marriage with the notion that she was unaware of her divorce, nor has she adequately explained her participation in the acceptance of monies owed as per the MUA without question or reluctance.

The idea that a plenary hearing is warranted because of fraud allegations, was given detailed treatment at the outset of the court's written opinion. The judge noted that "to establish a prima facie case of fraud warranting a plenary

hearing, there must be perjurious testimony that was not discoverable by reasonable diligence." City of Linden, Cnty. of Union v. Benedict Motel Corp., 370 N.J. Super. 372, 396 (App. Div. 2004). This evidence, as the trial court noted must be "clear, convincing and satisfactory . . . ." Gigallon v. Bond, 279 N.J. Super. 265, 267 (App. Div. 1995) (quoting Shammas v. Shammas, 9 N.J. 321, 328 (1952)). The court recounted the history including the differences between what was said to the prior judge, that the agreement was signed under duress, and what was said in the motion, that the agreement was not signed at all, and found this was not believable. Citing the prior judge's findings in 2016, the passage of time, plaintiff's conduct in the intervening five years, and the acceptance of substantial monies along the way, the court found that the evidence offered in support of a fraud or forgery fell well short of "clear and convincing."

Clear and convincing evidence is evidence that is not open to more than one interpretation. It is:

> evidence that produces in your mind a firm belief or conviction that the allegations sought to be proved by the evidence are true. It is evidence so clear, direct, weighty in terms of quality, and convincing as to cause you to come to a clear conviction of the truth of the precise facts in issue. The clear and convincing standard of proof requires that the result shall not be reached by a mere balancing of doubts or probabilities,

> but rather by clear evidence which causes you to be convinced that the allegations sought to be proved are true.
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> [Bhagat v. Bhagat, 217 N.J. 22, 46 (2014) (citing Model Jury Charge (Civil), 1.19 Burden Of Proof – Clear and Convincing Evidence (rev. Aug. 2011)).]

By no calculus can the evidence offered meet this standard.

As to plaintiff's allegations that she did not have notice of the January 2016 hearing before the prior judge and was unsure if she was actually divorced, the court found this to be particularly incredible, describing this line of argument as "hypocrisy at its most obvious." The court again described plaintiff's course of conduct of accepting money consistent with the terms of the MUA and getting re-married as working greatly to undermine her credibility ultimately concluding the argument to be "irrational." Based on our review of the entire record, we are satisfied that the incredulousness expressed by the judge reflects his studied sense of the evidence and should not be second-guessed and certainly not for the purpose of determining the need for a plenary hearing.

Plaintiff's duress and coercion argument was also dispensed with by the judge who found no plenary hearing was necessary to address this argument. Not only had plaintiff waived any argument on these grounds by accepting payment from defendant, but she was offered – and by her absence declined –

an opportunity by the prior judge years earlier, on December 3, 2015, to have a hearing that would address "whether or not this was a knowing . . . willing . . . agreement that she wanted." Plaintiff failed to appear for that hearing in January 2016 and failed to communicate with her attorney between the two court dates (which was the very purpose of adjourning the matter from December to January). The lack of merit in this argument is patent and, like the trial court, we see no reason why a plenary hearing would have been required to address these issues.

The trial court refused to consider a letter from the notary public whose name and stamp appears on the MUA nor would the court consider a limited opinion from a handwriting expert regarding the authenticity of the plaintiff's signature on a State of Florida property deed. Relying on Rule 1:6-6, the court determined that the letter of the notary did not constitute an affidavit and neither the expert report nor the notary's letter were certified to as required by the Rule. The court concluded that these shortcomings were fatal defects rendering the proposed evidence inadmissible and properly declined to consider them.

Mere appending of documents to court filings, like motions, does not constitute compliance with Rule 1:6-6. Celino v. Gen. Acc., Inc., 211 N.J. Super. 538, 544 (App. Div. 1986). These kinds of documents must be

incorporated by reference in an appropriate affidavit or certification which properly authenticates material which is not otherwise admissible. Ibid. As we have said, "[t]hese are not merely formal requirements. They go to the heart of procedural due process." Ibid. The court's refusal to consider the proffered evidence was legally correct and thus the dispute of fact that might have been created by their admission never manifested. This proposed evidence does not further the argument that a plenary hearing was required as the evidence was not properly before the court.

We affirm the court's decisions on each of these points for the reasons explained and are satisfied that the conclusory and unsubstantiated allegations did not entitle plaintiff to a plenary hearing on the issues raised. As we said in Hand v. Hand:

> Because of their special expertise in family matters, we do not second-guess their findings and the exercise of their sound discretion. See Cesare, 154 N.J. [at] 413 (1998). We recognize "[j]udicial discretion connotes conscientious judgment, not arbitrary action; it takes into account the law and the particular circumstances of the case before the court." Higgins v. Polk, 14 N.J. 490, 493 (1954). That is precisely what happened here. After carefully reviewing the submissions in light of the applicable law, the trial court correctly concluded there was no need for a plenary hearing . . . ."
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> [391 N.J. Super. 102, 111 (App. Div. 2007) (Emphases added).]

As to plaintiff's timing argument, the court reasoned that the motion to be relieved of the judgment pursuant to Rule 4:50-1(d) was not brought within a reasonable time. Firstly, the court saw no basis to conclude that judgment was in fact void or the product of fraud. The defendant had maintained since December 2015 that plaintiff had signed the MUA and he had said so on the record in court. If there was a forgery, plaintiff had known of it since at least December 2015.

This leads to the court's second point. In December 2015, the plaintiff did not argue forgery but rather duress. If, in fact, the plaintiff's signature was the product of coercion or duress she squandered an invitation to make that argument when she had counsel in December 2015 and the prior judge adjourned the finalization of divorce for more than one month to allow plaintiff an opportunity to confer with counsel and present any such argument if she desired to do so. As has been stated she failed to contact her attorney thereafter and failed to appear for that hearing. Thus, the divorce was finalized, and the MUA incorporated therein. In the years that followed plaintiff accepted hundreds of thousands of dollars from defendant.

The judge assessed the meaning of all of this and said "even if the court were to believe some fraud may have occurred, waiting five years from the day

she already knew about that claim is unreasonable." We agree. There is nothing complained of that was unknown to the plaintiff whether her grievance be fraud or duress. Since December 2015 she was on notice of defendant's position regarding her execution of the agreement voluntarily and with full understanding of its import. In an abundance of caution, the prior judge offered her an opportunity to challenge defendant's assertion in that regard. Her failure to do so was at her own peril. Five years, on this record, is, as the court found, unreasonable.

III.

In his May 28, 2021, order awarding attorneys' fees, the judge analyzed RPC 1.5(a), and referenced Rule 4:42-9(a), and Rule 5:3-5(c). We review a trial court's order concerning attorneys' fees under an abuse of discretion standard. Strahan v. Strahan, 402 N.J. Super. 298, 317 (App. Div. 2008) (citing Rendine v. Pantzer, 141 N.J. 292, 317 (1995)). On this point we agree with plaintiff that the court's failure to address all of the relevant factors and award fees anyway constitutes a mistaken exercise of discretion. Thus, we reverse and remand.

Rule 5:3-5(c) states a court should consider nine factors, including the "reasonableness and good faith of the positions advanced by the parties . . . ."[2] Rule 5:3-5(c) provides the judge:

> [s]hould consider, in addition to the information required to be submitted pursuant to R[ule] 4:42-9, the following factors: (1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties both during and prior to trial; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained; (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award.

Plaintiff correctly points out that, at best, only three of the factors were considered and that, more importantly, the court did not discuss the parties' ability to pay their own fees or contribute to the fees of another; the financial circumstances of the parties; and the amount of fees previously paid to counsel by each party. In response, defendant argues that he knows of no case that requires every factor be written down and thus the court should be affirmed. This response is unavailing. Our review of the opinion confirms that the factors

[2] In awarding attorney's fees, N.J.S.A. 2A:34-23 requires a court "to consider the factors set forth in the court rule on counsel fees [Rule 5:3-5(c)], the financial circumstances of the parties, and the good or bad faith of either party."

were not enumerated in the judge's written opinion. But more important than enumeration is consideration of the factors in some discernible form or fashion.

> In a nutshell in awarding counsel fees, the court must consider whether the party requesting the fees is in financial need; whether the party against whom the fees are sought has the ability to pay; the good or bad faith of either party in pursuing or defending the action; the nature and extent of the services rendered; and the reasonableness of the fees.
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> [Mani v. Mani, 183 N.J. 70, 95 (2005) (citing Williams v. Williams, 59 N.J. 229, 233 (1971)) (stating when awarding counsel fees "courts focus on several factors, including wife's need, husband's financial ability to pay and wife's good faith in instituting or defending action").]

To ignore or overlook at least these factors, if not all of them, puts the integrity of the award in question. We offer no opinion as to whether the outcome would have been any different if all the factors were considered. We leave that decision, at this time, to the trial court.

On remand the trial court shall, within sixty days, render its decision on the attorney fee award anew and shall specifically express its findings and conclusions in consideration of all factors required by RPC 1.5(a), Rule 4:42-9(a) and Rule 5:3-5(c), either in enumerated fashion or some other manner. All other arguments raised on appeal, to the extent we have not addressed them expressly, lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E). The

order of May 10, 2021, is affirmed. The order of May 28, 2021, is vacated and the matter is remanded for further proceedings as set forth herein. 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