	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-004044-23
LYUDMILLA POPOVA, Plaintiff/Appellant, v. NAZIM TAGHIYEV, Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION-FAMILY PART MIDDLESEX COUNTY Docket No. FM-12-699-24J CIVIL ACTION SAT BELOW: HON. DANIEL H. BROWN, J.S.C.

PLAINTIFF/APPELLANT'S AMENDED BRIEF

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PRELIMINARY STATEMENT

This appeal stems from the Trial Court's denial of Plaintiff's right to due process when it granted Defendant's motion to enforce an alleged settlement prior to the scheduled return date of that motion and prior to the due date of Plaintiff's opposition. The judge became slanted against Plaintiff's anticipated argument after an extended off-the-record meeting with counsel in chambers, which resulted in his pre-determination. The judge's decision, in turn, resulted in Plaintiff being denied the opportunity to retain counsel of her choosing and it denied Plaintiff the opportunity to be meaningfully heard as provided to her in the Rules of Court.

After thirty-eight years of marriage, Plaintiff filed a Complaint for divorce. During a virtual mediation session, Plaintiff entered into a Memorandum of Understanding ("MOU") under duress, without complete discovery, and without fully understanding the issues. In support of her concerns and objections, immediately after the MOU was signed, Plaintiff sought to part ways with her attorney because he did not support her in the negotiations, and he did not answer her questions. During a Case Management Conference on June 14, 2024, the judge relieved Plaintiff's attorney by consent. The judge refused to afford Plaintiff sufficient time to retain a new attorney and chided her for seeking to retain a "third attorney." The judge spent the majority of the conference

explaining to Plaintiff why she should not oppose enforcement of the MOU based on the "facts" elicited primarily from the in-chambers meeting with counsel. The judge repeatedly interrupted Plaintiff when she tried to explain her position. The judge stated to Plaintiff no fewer than six separate times that she had counsel fee exposure if she did not agree with the MOU. Thereafter, at the court's inappropriate urging, Defendant filed a motion seeking to enforce the MOU, which the Trial Court granted without allowing Plaintiff the opportunity to respond. The court also awarded Defendant counsel fees and costs.

The issue currently before this Court is not the merits of the MOU, but the error of the Trial Court in predetermining Defendant's motion without affording Plaintiff the opportunity to submit opposition papers. Plaintiff had no notice or information that the court was going to hear Defendant's motion on short notice on July 31, 2024 (before her cross motion was even due to be filed). Plaintiff attempted to contact the court for clarification on the proceedings and to seek additional time, but she did not receive a response.

When Plaintiff obtained an interpreter because she did not have counsel and she wanted to ensure she would understand the proceedings, the court looked skeptically upon the interpreter issue. Before Plaintiff's papers were due under the Court Rules, Plaintiff wrote to the court requesting a two-week adjournment so that she could retain counsel and file a cross motion. Although

the court did not respond to Plaintiff's letter, her adjournment request was effectively denied when the court granted Defendant's motion on July 31, 2024, prior to the scheduled return date and prior to the date Plaintiff's papers were due. In other words, although the court was on notice that Plaintiff sought to file a cross-motion in opposition to Defendant's motion to enforce, it denied her that opportunity. Even without an adjournment, Plaintiff's papers would have been due the day *after* the court decided Defendant's motion. Plaintiff should have been permitted to submit a cross-motion to Defendant's motion. The court's prejudgment of the motion precluded Plaintiff from receiving the due process to which she was entitled.

The court also erred when it exceeded its authority by making findings of fact and conclusions of law regarding the MOU based on Defendant's certification and information elicited during the previous in-chambers meeting with counsel, to which the Plaintiff was not privy. The court further erred when it went beyond the requested relief sought by Defendant and opined on the adequacy and advocacy of Plaintiff's prior counsel, which was not part of Defendant's motion.

For the foregoing reasons, Plaintiff's appeal should be granted: the July 31, 2024 Order should be reversed, the portion of the JOD incorporating the MOU should be vacated, and the matter should be remanded to a new judge.

PROCEDURAL HISTORY

Plaintiff filed a Complaint for Divorce on September 14, 2023. (Pa17). Defendant filed an Answer and Counterclaim on October 12, 2023. (Pa21). Plaintiff filed an Answer to Counterclaim on November 15, 2023. (Pa28).

Following a Case Management Conference, on March 13, 2024, the parties were ordered to attend mediation. (Pa32). The Order scheduled trial for May 28, 2024. (Pa32).

On April 23, 2024, Plaintiff obtained a new attorney, Michael J. DeTommaso, Esq. (Pa36).

On May 21, 2024, the parties entered into an MOU[1]. (Pa50).

On June 19, 2024, a Case Management Conference ("CMC") was held, and an order was entered. (1T[2]; Pa35). At Plaintiff's request, Plaintiff's attorney, Mr. DeTommaso, was relieved as counsel by consent. (Pa35; 1T23-19 to -20). Defendant was given until July 10, 2024 to file a motion to enforce the MOU and trial was scheduled for July 31, 2024. (Pa35).

On July 10, 2024, Defendant filed a motion to enforce the MOU, to incorporate the MOU into a Final Judgment of Divorce ("JOD"), and for counsel

[1] The MOU is also referred to as a "term sheet" interchangeably throughout the record.
[2] "1T" refers to the June 19, 2024 transcript; "2T" refers to the July 31, 2024 transcript.

fees and costs. (Pa38). The Notice of Motion had blank spaces instead of listing a return date. (Pa38). Defendant's motion was ultimately scheduled to be returnable on August 16, 2024. (Pa37).

On July 15, 2024, Plaintiff, now self-represented, wrote a letter to the Trial Court. (Pa80). Plaintiff's letter enclosed a Marital Settlement Agreement ("MSA") signed by Plaintiff which contained a few changes and an email from Defendant's attorney rejecting Plaintiff's changes. (PCa63-PCa82). The Trial Court did not respond to Plaintiff's letter.

On July 24, 2024, Plaintiff wrote a letter to the Trial Court requesting an adjournment of the August 16, 2024 motion hearing and scheduling an in-person CMC to try and resolve the matter. (Pa82).

The parties appeared before the court on July 31, 2024, which was the previously scheduled trial date, and which preceded the motion return date of August 16, 2024. (2T). On that date, and without notice, the Trial Court heard oral argument on Defendant's motion and entered an Order granting Defendant's request to enforce the MOU and incorporate it into a JOD, and granting Defendant's request for counsel fees and costs. (Pa6-Pa14). The court also entered a JOD incorporating the MOU that same day. (Pa15).

Plaintiff filed a Notice of Appeal of the July 31, 2024 Order on August 23, 2024. (Pa1).

STATEMENT OF FACTS

The parties were married on April 2, 1985. (2T18-12 to -13). Plaintiff filed the Complaint for Divorce thirty-eight (38) years later. (Pa17). The parties were married in Kyrgyzstan, a part of Russia, and are immigrants to the United States. (Pa17). At the time the divorce proceedings began, Plaintiff was 68 years of age and Defendant was 66. (PCa33). They have one son, who is thirty-eight years of age and is emancipated. (Pa17; Pa23).

On March 13, 2024, the court entered an Order which scheduled a pretrial conference on April 30, 2024, and trial on May 28, 2024. (Pa32). It also scheduled mediation with Ann Fabrikant, Esq on April 12, 2024. (Pa34).

Approximately one month later, on April 23, 2024, Plaintiff obtained a new attorney, Mr. DeTommaso. (Pa36). The previously scheduled court appearances were adjourned to permit the parties to mediate their matter with Ann Fabrikant, Esq. (1T4-9 to -11).

Less than one month after obtaining her new counsel, the parties attended mediation on May 21, 2024, via Zoom. (Pa41). That mediation resulted in an MOU being executed via DocuSign by the parties. (Pa50-Pa58).

On June 19, 2024, the parties and their counsel appeared before Judge Brown for a CMC on what was supposed to be a trial date. (Pa35; 1T4-9 to -11). During the conference, Plaintiff sought to relieve Mr. DeTommaso as her

counsel and the court granted her request. (Pa35; 1T10-5 to -8).

Prior to the June 19, 2024 proceedings commencing on the record, counsel conferenced with Judge Brown in Chambers for an extended period of time. (1T12-18 to -22; 1T4-19 to -20). Plaintiff reports that Judge Brown's demeanor and treatment toward her changed markedly after the in chambers conference with counsel. This is confirmed by his remarks made to her thereafter on the record.

Once the June 19 conference was on the record, Plaintiff explained to Judge Brown that he only heard one side of the story from Mr. DeTommaso in chambers. (1T12-18 to -22). She stated that when she met with Mr. DeTommaso, he told her that ***he had no idea what to do with her, that he should not take her case, and that he should let her first attorney finish the case***. (1T13-17 to -24). Plaintiff felt that Mr. DeTommaso was giving up on her (1T13-25 to 14-2) and that he did not have a strategy to achieve the best possible scenario for her in the outcome of this case. (1T13-13 to -16). Plaintiff stated that, essentially, she did not feel her attorney was vigorously representing her interests; he did not have a goal for her case nor did he have a strategy to achieve any goals. (1T13-5 to 14-2). Judge Brown stopped Plaintiff to inform her that even if her claims had any merit, they would not be a basis for the court not to enforce the MOU. (1T14-3 to 15-21). Plaintiff stated that she felt as though she did not have an

attorney on her side at the second mediation. (1T16-2 to -16). Judge Brown again stopped Plaintiff and stated that he would not entertain this with her. (1T16-23 to -24).

Plaintiff attempted to explain to Judge Brown that she did not agree with every paragraph in the MOU because she felt like she was "pressed to sign it." (1T5-18 to -20). Plaintiff attempted to explain that she had questions about the terms of the MOU, which she posed to both her attorney at the time and the mediator, which were unanswered; Plaintiff did not understand nor agree to the terms of the MOU. (1T6-2 to -7). Regardless of whether the terms of the MOU are fair, reasonable or equitable, she could not certify to entering into the "agreement" freely or voluntarily, nor could she represent that the MOU was signed without coercion or duress. (Pa96). Instead, Plaintiff explains she was crying, begging for someone to explain the "agreement" to her but she was ignored. She was not helped by her attorney but angrily berated and told she had no choice. Plaintiff attempted to explain the situation to Judge Brown at the CMC, but Juge Brown did not allow it. (1T20-17 to -19).

During the same conference on June 19th, Judge Brown directed Defendant to file a motion to enforce the MOU no later than July 10, 2024 and warned Plaintiff of her potential exposure to several thousands of dollars in counsel fees if she forced the filing of this motion. (Pa35; 1T9-14 to -15; 1T28-

22 to 29-6). He continued that "the facts" do not look clear to him on how Plaintiff could show that the MOU should not be enforced, and that Plaintiff is "not exactly standing in a favorable position." (1T20-6 to -11). Judge Brown opined that if, hypothetically, Plaintiff's attorney did not perform ethically, that it is not a basis to set aside the MOU. (1T21-23 to 22-2). Throughout the CMC, Judge Brown stated to Plaintiff no fewer than *six separate times* that she had counsel fee exposure if she were to contest enforcement of the MOU. (1T11-22 to -24; 1T20-4; 1T28-16 to -24; 1T33-5 to 34-3; 1T8-6 to 10-1).

Also at the June 14, 2024 CMC, Judge Brown assured Plaintiff that she would have an opportunity to respond to Defendant's motion to enforce. (1T17-19 to -20). He indicated, however, that there was a "distinct possibility" that he will enforce the MOU. (1T19-15 to -18). He stated that Plaintiff has "a lot going against [her] based on the factual scenario that I'm aware of." (1T29-11 to -13). He reiterated again that Plaintiff has counsel fee exposure and a lot of things going against her. (1T33-17 to 34 -3). Judge Brown also informed Plaintiff about all of the case law that will be attached to his decision and which he had already printed out with regard to how the State of New Jersey favors consensual settlements entered into by the parties. (1T27-6 to 29-6).

The June 19, 2024 Order scheduled trial for July 31, 2024. (Pa35). Judge Brown noted, "that trial date may have to be adjourned early August" depending

on how the return date of Defendant's motion falls. (1T37-19 to -21).

On July 10, 2024, Defendant filed a motion to enforce the MOU, to incorporate the MOU into a JOD, and for counsel fees and costs. (Pa38-Pa39). The motion was scheduled to be heard on August 16, 2024. (Pa37).

On July 15, 2024, Plaintiff, self-represented, wrote to Judge Brown seeking clarification of the proceedings. (Pa80). A copy of the MSA was enclosed. (PCa63-PCa82). Plaintiff signed the MSA, but she would not attest to the fairness or voluntariness of her signature, as she indicated in the document. (Pa80; PCa63-PCa82). Specifically, where the MSA states, "both parties fully understand all of the provisions of this agreement and believe them to be fair, just, adequate, and reasonable and accordingly accept such provisions freely and voluntarily" Plaintiff wrote in, "wife disagrees with the foregoing statement." (PCa64-PCa65). Where the MSA states, "[t]he parties have already divided their personalty and marital property to their mutual satisfaction and reaffirm this division" Plaintiff wrote in, "wife disputes this statement." (PCa70). Where the MSA states that the parties retained counsel of their own choosing and have been advised regarding every aspect of the agreement Plaintiff wrote in, "wife disputes this statement." (PCa74-PCa75). Plaintiff crossed out the portion of the MSA which states that "they are entering into this Agreement freely and voluntarily." (PCa78). Where the MSA states that the parties are satisfied with

their attorneys Plaintiff wrote in, "wife does not agree with this statement." (PCa78). Defendant rejected Plaintiff's proposed changes to the MSA. (Pa81).

The court did not respond to Plaintiff's letter. (Pa80).

Plaintiff then wrote to the court on July 24, 2024 and requested a brief adjournment of the motion and a CMC to assist in addressing this impasse to try and conclude the case. (Pa82). Again, Plaintiff sought to clarify the court's expectations and proceedings, in light of the previously scheduled July 31, 2024 trial date. (Pa82; Pa35). Plaintiff indicated that the family division, at which she appeared in person, was unable to offer her guidance as to the previously scheduled July 31, 2024 trial date. (Pa82). She also requested an interpreter to ensure she understood the proceedings. (Pa82). Plaintiff indicated that she needed additional time to properly respond to Defendant's motion and specifically requested that the August 16, 2024 motion return date be adjourned at least two weeks so that she could consult with an attorney and prepare a cross motion. (Pa82). Plaintiff stated that a slight delay in the motion date would not prejudice the Defendant in any way. (Pa82). Defendant had not yet made any support payments to Plaintiff as required under the MOU, nor had he made any of the equitable distribution payments to Plaintiff as required under the MOU. (2T9-23 to 10-12; Pa50-Pa52). The court did not respond to Plaintiff's July 24, 2024 letter.

The parties appeared before Judge Brown on the previously scheduled trial date of July 31, 2024. (2T3-15 to -23). Judge Brown did not address the fact that the motion hearing was pending for August 16, 2024, some two and a half weeks thereafter. (Pa37; 2T, generally). Judge Brown also did not address the fact that even absent an adjournment, Plaintiff's formal response to the pending motion was not due until the following day, August 1, 2024. (2T, generally).

Without any notice to Plaintiff, Judge Brown converted the July 31, 2024 trial date into a hearing on Defendant's motion. (2T7-25 to 8-1).

At the hearing, Judge Brown mocked Plaintiff for her request and use of an interpreter. When Plaintiff asked if she should speak Russian, Judge Brown stated, "the Court requested and secured the services of the interpreter at the financial expense of the judiciary and I may be mistaken, but I don't believe you needed the interpreter previously. So, in light of the fact that you're the one who requested the interpreter, you should certainly speak in your given language and let her translate to English." (2T8-8 to -17).

Plaintiff was not asked if she was ready to proceed with oral argument on the motion. (2T7-25 to 8 to -3). Judge Brown did not explain how he intended to proceed that day, i.e. that the trial date was converted into a hearing on Defendant's motion and that Defendant's motion was being heard over two

weeks earlier than previously scheduled. (2T4-1 to -2).

When Plaintiff appeared on July 31, 2024, she had no idea that Judge Brown was going to hear and decide the motion prematurely or that she would be denied an opportunity to respond to the pending motion in its entirety. Plaintiff understood that per the court rules her response to the motion was due August 1st, if her adjournment request was denied. Judge Brown was aware that Plaintiff sought to file a cross motion because she stated her intent to file in her July 24, 2024 letter. (Pa82). However, Plaintiff was denied the opportunity to file a cross motion when Judge Brown entered an order on Defendant's motion on July 31, 2024, one day before Plaintiff's response was due and over two weeks prior to the scheduled return date of the motion.

The July 31, 2024 Order granted Defendant's request to enforce the MOU and incorporate it into a JOD. (Pa6; Pa12). It also awarded Defendant counsel fees and costs in the amount of $3,500. (Pa12; Pa14). That same day and as part of the same proceeding, Judge Brown issued a JOD incorporating the MOU. (Pa15-Pa16; 2T21-21 to 22-1). Plaintiff was not given the opportunity to be heard on the merits of the matter. She filed a Notice of Appeal on August 23, 2024. (Pa1).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PREDETERMINED THIS MATTER AND VIOLATED PLAINTIFF'S RIGHT TO DUE PROCESS WHEN IT DECIDED DEFENDANT'S MOTION PRIOR TO THE SCHEDULED RETURN DATE WITHOUT NOTICE, DENIED PLAINTIFF THE OPPORTUNITY TO FILE A RESPONSE IN THE TIME PERMITTED UNDER THE COURT RULES, AND DENIED PLAINTIFF'S REQUEST FOR AN ADJOURNMENT TO OBTAIN COUNSEL. (Pa6-Pa14; 1T19-16 to -18; 2T7-15 to -19).

"At a minimum, due process requires that a party in a judicial hearing receive notice defining the issues and an adequate opportunity to prepare and respond." H.E.S. v. J.C.S., 175 N.J. 309, 321 (2003)(quotation and citation omitted). The party must be given the "opportunity to be heard at a meaningful time and in a meaningful manner." Thomas Makuch, LLC v. Twp. of Jackson, 476 N.J. Super. 169, 187 (App. Div. 2023) (internal quotation and citations omitted). There can be no adequate preparation or notice "where the issues litigated at the hearing differ substantially from those outlined in the notice." H.E.S., 175 N.J. at 322.

A. The Trial Court violated Plaintiff's right to due process when it decided Defendant's motion before Plaintiff's opposition was due under the Court Rules and analyzed the enforceability of the MOU without having heard from Plaintiff.

Defendant's motion was returnable August 16, 2024. Pursuant to Rule

5:5-4(c) and the notice appended to Defendant's notice of motion as required by Rule 5:5-4(d), Plaintiff's opposing papers were due 15 days prior to the return date, which would have been ***August 1***, 2024. The court nevertheless decided Defendant's motion on ***July 31***, 2024, prior to the date by which the Court Rules allow Plaintiff to respond. Plaintiff's intent to file a formal response to Defendant's motion was explicitly stated to the court in her July 24, 2024 letter. (Pa82). In addition, during the June 19, 2024 CMC Plaintiff was assured she would have an opportunity to respond to Defendant's motion to enforce. During that same CMC, the court also stated that the July 31 trial date may need to be adjourned depending on the motion return date, providing further assurance to Plaintiff that she would be permitted to respond to Defendant's motion as permitted under the Court Rules. Yet, the court disregarded its prior statements when it *sua sponte* converted the July 31 trial date into a motion hearing without notice to Plaintiff and decided Defendant's motion prematurely without affording Plaintiff the opportunity to file her cross motion. In doing so, the court violated Plaintiff's right to due process by preventing her from meaningfully responding to Defendant's motion.

The Trial Court exceeded its authority when it made findings of fact and conclusions of law regarding the MOU based solely on Defendant's certification and "facts" elicited during the in chambers meeting with counsel on June 19,

2024. In its July 31, 2024 Order, the court attempted to analyze the enforceability of the MOU. It did so notwithstanding that it did not yet have Plaintiff's certification, which would have been due on August 1, and notwithstanding that Plaintiff had no notice the motion would be heard and therefore was not prepared to argue her case orally that day. On July 31, 2024, Judge Brown also issued a JOD which incorporated the terms of the MOU without ever allowing Plaintiff to be heard on the merits of the matter.

In the JOD, the court states that it "has taken no testimony and has made no findings of fact with regard to the fairness or adequacy" of the MOU. (Pa16). Yet, the enforcement and enforceability of the MOU were the subject of Defendant's motion, which the court deemed to be enforceable when it granted Defendant's motion just minutes prior to incorporating the MOU into the JOD. The Trial Court's order and judgment are inconsistent with one another.

Marital agreements are only enforceable to the extent that they are fair and just. Petersen v. Petersen, 85 N.J. 638, 642 (1981) (citations omitted). "A spousal agreement may be reformed when it is unconscionable, it is the product of fraud or overreaching by a party with power to take advantage of a confidential relationship, or when, due to common mistake or mistake of one party accompanied by concealment of the other, the agreement fails to express the real intent of the parties." Addesa v. Addesa, 392 N.J. Super. 58, 66 (App.

Div. 2007) (internal citations and quotations omitted).

In this case, the court states that Plaintiff "fails to demonstrate in any way that enforceability of the parties' [MOU] would be inequitable, unconscionable or punitive." (Pa12). Of course, Plaintiff had no way to demonstrate anything to the court because she was denied the opportunity to meaningfully respond to Defendant's motion. But, even still, during the June 19, 2024 CMC, Plaintiff told Judge Brown that she felt like she was "pressed" to sign the MOU (1T5-19 to -20) and that she had questions about its terms which neither her attorney nor the mediator answered. (1T6-2 to -7). If Plaintiff had been permitted to present her arguments and evidence to the court and she demonstrated that she was coerced or forced into signing the MOU, then coercion would be an appropriate basis to *not* enforce its terms. The Trial Court was biased against Plaintiff and had already predetermined the matter, which blinded it from considering that Plaintiff may have a legitimate claim.

The court also found that "Plaintiff does not substantiate that there is any basis to avoid enforcement of the [MOU]." (Pa12). Yet, in the draft MSA that Plaintiff supplied to the court in her letter, she crossed out the sentence that states the parties "are entering into this Agreement freely and voluntarily." (Pa96). The logical indication of this change is that Plaintiff is *not* entering into the Agreement freely and voluntarily. Accordingly, this change provides

additional evidence that Plaintiff was forced or coerced into signing the MOU, which she could have demonstrated if she had been given the opportunity to meaningfully present her position to the court.

Marital settlement agreements have been vacated or reformed in cases where a party did not have adequate representation from counsel and where a party was pressured into entering into the agreement. Addesa v. Addesa, 392 N.J. Super. 58, 69, 72-73 (App. Div. 2007)(agreement found unconscionable where wife not represented by counsel, at husband's urging, wife had no experience in financial matters, and terms of agreement did not reflect stated intent of fifty-fifty split of marital estate); Peskin v. Peskin, 271 N.J. Super. 261, 278 (App. Div. 1994) (JOD incorporating settlement vacated where defendant improperly coerced into settling by court's comments); Guglielmo v. Guglielmo, 253 N.J. Super. 531, 542 (App. Div. 1992)(agreement unconscionable and modified where attorney who mediated settlement was related to husband, parties did not have independent counsel, and wife had no idea what the family's finances were); c.f. Konzelman v. Konzelman, 158 N.J. 185, 199 (1999) ("Fairness requires that each party be adequately represented by independent counsel and that both parties completely understand the nature of the agreement.")(citation omitted).

Here, the court opined that "[b]esides Plaintiff's assertions about Mr.

DeTommaso, her objections to the [MOU] are beyond overbroad and are non-specific and would not be a basis to avoid enforcement . . . .” (Pa10-Pa11). The court cannot properly reach this conclusion when it has precluded Plaintiff from filing her response and meaningfully presenting her position. How could the Trial Court evaluate Plaintiff’s claims on the merits when she never had the opportunity to present them? Nevertheless, even without being able to fully present her case, it is clear from the limited record that Plaintiff felt pressured into signing the MOU, that she did not fully understand the MOU because her questions were not answered, she was not satisfied with her attorney, and she did not sign freely and voluntarily. Contrary to the court’s findings, these claims could form a basis to avoid enforcement. Plaintiff must be given a fair opportunity to present her case before it is dismissed.

It is well established that “trial judges cannot resolve material factual disputes upon conflicting affidavits and certifications.” Harrington v. Harrington, 281 N.J. Super. 39, 47 (App. Div. 1995)(citations omitted). But in this case, the court did not allow Plaintiff to present a certification or evidence to demonstrate a material factual dispute. Notwithstanding this problematic lack of evidence, the court still determined that “there is no material issue in dispute warranting a plenary hearing.” (Pa10). In addition, the court’s analysis focuses on whether an agreement between the parties *exists* and discusses Harrington

and Willingboro. (Pa10-Pa11, citing Harrington, 281 N.J. Super. 39; Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242 (2013)). Those cases were about whether an agreement existed when the terms were agreed upon orally and no writing existed. However, the *existence* of an agreement is not the issue here because the MOU exists, and it was signed by the parties after mediation. The issue here is, should the MOU be *enforced* if Plaintiff was forced to sign it and did not understand its terms. Should the MOU be enforced if it is not fair to Plaintiff as a result of her being forced to sign? The mere existence of an agreement does not mean that it is enforceable, nor does it mean that there is no genuine dispute of material fact warranting a plenary hearing. See Petersen, 85 N.J. at 642 (marital agreements only enforceable to the extent that they are fair and just); Harrington, 281 N.J. Super. at 47 (holding that plenary hearing required even if court finds binding agreement). The court's decision focused on the wrong issue when it prematurely dismissed Plaintiff's claims without having given her a meaningful opportunity to present them.

Furthermore, at the June 19 CMC, the court stated that Plaintiff would be permitted to respond to Defendant's motion and that the July 31 trial date may even need to be adjourned depending on when the return date of the motion falls. When Plaintiff reached out to the court and the family division to understand

what was going to happen on July 31 in light of the August 16 motion return date, *no one gave her an answer*. Instead, Plaintiff was blindsided with a motion hearing on July 31 without the benefit of having an attorney to represent her and without having been given the opportunity to file her cross motion and opposition to Defendant's motion. Accordingly, the court improperly denied Plaintiff's right to due process.

POINT II

THE TRIAL COURT WAS BIASED AGAINST PLAINTIFF AND PREDETERMINED THE MOTION AND THEREFORE A NEW JUDGE SHOULD BE ASSIGNED ON REMAND. (Not raised below).

This Court has the authority to direct that a different judge consider the matter on remand in order to preserve the appearance of a fair and unprejudiced hearing. See Entress v. Entress, 376 N.J. Super. 125, 133 (App. Div. 2005); Carmichael v. Bryan, 310 N.J. Super. 34, 49 (App. Div. 1998). The appearance of objectivity, impartiality, and fairness in court proceedings has long been and continues to be a priority in our state. Accordingly, where the belief that the proceedings were unfair is objectively reasonable, even the mere *appearance* of bias may require disqualification. State v. Presley, 436 N.J. Super 440, 447-48 (App. Div. 2014)(citations omitted). "The Supreme Court has distilled these principles to this question: 'Would a reasonable, fully informed person have

doubts about the judge's impartiality?'" Id. at 448 (citations omitted); see R. 1:12-1(g)(the judge shall be disqualified for "any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so.").

Furthermore, Pursuant to Rule 1:12-1(d), the judge of any court shall be disqualified if the judge "has given an opinion upon a matter in question in the action. . . ." R. 1:12-1(d). Where a judge has expressed their opinions and may have a commitment to their findings, assignment to another judge is appropriate. Freedman v. Freedman, 474 N.J. Super. 291, 308 (App. Div. 2023)(citation omitted); Carmichael v. Bryan, 310 N.J. Super. 34 at 49.

In this case, Judge Brown's bias against Plaintiff and predetermination of the issues is evident from his statements to Plaintiff and his disparate treatment of the parties. Therefore, remand to a different judge is required.

During the June 19, 2024 CMC when Plaintiff indicated that she felt the second mediation was unfair toward her because she was "shut down several times" and her questions were not answered by her attorney or the mediator (1T6-2 to-7), Judge Brown's response was to defend Plaintiff's then-attorney and explain at length why she should not pursue opposing the MOU. He spoke extensively about how his personal experience with Plaintiff's attorney "would not support the claim that [Plaintiff] made," and how language in the MOU was

pointed out to him in chambers that "is a problem for [Plaintiff] . . . . That language is not good for a party who's seeking to set aside and not be bound by that Memo of Understanding." (1T6-14 to 8-5). Judge Brown continued, stating that "there is a litany of case law," that Plaintiff may end up being bound by the terms of the MOU, and that she has "counsel fee exposure." (1T8-6 to 10-1). Just because Judge Brown had prior experiences with Plaintiff's then-attorney which differed from Plaintiff's experiences with him, it does not mean that Plaintiff's claims should be automatically discounted. As such, Judge Brown's prior experiences should not form the basis for disbelieving and outright dismissing Plaintiff's claims without giving her the opportunity to present her case. Judge Brown's prior experiences with Plaintiff's then-attorney, which differed from Plaintiff's experiences, caused Judge Brown to form a bias against Plaintiff. Judge Brown opined that if, hypothetically, Plaintiff's attorney did not perform ethically, that it is not a basis to set aside the MOU. (1T21-23 to 22-2). This statement demonstrates 1) that Judge Brown prejudged the issues, and 2) that he refused to consider that Plaintiff could have been improperly coerced into signing the MOU by her attorney, which could, in fact, form a basis to set aside the MOU. See Addesa, 392 N.J. Super. at 66 ("A spousal agreement may be reformed when . . . it is the product of fraud or overreaching by a party with power to take advantage of a confidential relationship")(internal quotation and

citation omitted).

Throughout the CMC, Judge Brown indicated to Plaintiff no fewer than *six separate times* that she had counsel fee exposure if she were to contest the MOU. (1T11-22 to -24; 1T20-4; 1T28-16 to -24; 1T33-5 to 34-3; 1T8-6 to 10-1). After the fifth and sixth time, Judge Brown continued to explain that Defendant's attorney may also seek counsel fees for the CMC that day and for preparing the motion to enforce, even if Plaintiff ultimately accepted the MOU, and thus Plaintiff had exposure. (1T34-25 to 35-23). The judge's repeated insistence to Plaintiff that she had counsel fee exposure clearly demonstrated that he had already determined that the MOU was enforceable regardless of any argument Plaintiff may make. In fact, Judge Brown explicitly stated that there was a "distinct possibility" that he will enforce the MOU (1T19-15 to -18) and that Plaintiff has "a lot going against [her] based on the factual scenario that I'm aware of." (1T29-11 to -13). He continued that "the facts" do not look clear to him on how Plaintiff could show that the MOU should not be enforced and that Plaintiff is "not exactly standing in a favorable position." (1T20-6 to -11). How could Judge Brown already know "the facts" when he barley let Plaintiff speak and only discerned "the facts" from an in chambers meeting with counsel? Plaintiff has grave concerns over what transpired behind closed doors to cause Judge Brown to immediately shut down her claims and suddenly treat her so

negatively.

In addition, the judge deemed Plaintiff's two letters be oppositions to Defendant's motion, notwithstanding the fact that she explicitly requested an adjournment of the August 16 return date "[t]o consult with counsel and to prepare the necessary cross application." (Pa82). That is, Plaintiff's letter, which was not a certification, served to inform the court that she intended to file a formal opposition to Defendant's motion. The judge's bias against Plaintiff and predetermination of the issues caused him to completely disregard Plaintiff's statement of intent to file a cross motion. In turn, the judge entered his decision prior to the date Plaintiff's papers were due under the Court Rules, even absent an adjournment.

During the June 19, 2024 CMC, the judge harped on the fact that any new attorney Plaintiff retained would be her "third attorney," referring specifically to the fact that it would be her third attorney at least six different times. (1T17-23 to -24; 1T19-4 to -6; 1T23-23; 1T31-9; 1T37-1 to -2; 1T37-13 to -14). By way of example, he states "you're certainly free to retain an attorney, what would be your *third attorney* in this case" (1T17-23 to -25), "if you want to retain a *third attorney*, your *third attorney* in this case" (1T19-5 to -6), and "to the extent that you retain counsel, a new counsel, *a third attorney* in this case." (1T36-25 to 37-2)(emphasis added). Plaintiff tried to explain that Mr.

DeTommaso pressured her into signing the MOU, did not vigorously represent her interests, and did not answer her questions. But, the judge's view of Plaintiff prevented him from taking her claims seriously, which resulted in him faulting Plaintiff for wanting a new attorney.

Judge Brown seems to punish Plaintiff for wanting to retain a "third attorney" by effectively preventing her from retaining one after Mr. DeTommaso was relieved. At the June 19, 2024 CMC, he ordered Defendant to file his motion by July 10 and stated to Plaintiff that he would not allow any additional time for her to obtain an attorney (even though the judge simultaneously indicated the matter could be adjourned depending on the return date of the motion). (Pa35; 1T22-21 to 23-6). At that same CMC, Plaintiff informed the judge that she had already spoken to another attorney, but they declined to work with her because there was not enough time to evaluate the case. (1T24-5 to -8). She stated that "this means I am on my – on my own and I cannot get attorney –" (1T24-8 to -9). Judge Brown's response to Plaintiff was that she could keep Mr. DeTommaso (1T24-10 to -13), notwithstanding that Plaintiff had already made it clear that he pressed her into signing the MOU and did not answer her questions. Plaintiff did not feel as though Mr. DeTommaso was vigorously representing her; she felt that, with him, she did not have an attorney on her side. (1T13-5 to 14-2; 1T16-2 to -16). Plaintiff informed Judge

Brown that the attorney she wants to retain can only meet with her on June 26. (1T36-9 to -13). Judge Brown completely disregarded Plaintiff's concerns that she may need more time to retain the attorney she wants and informed her that the 26th is "the only . . . date that one attorney in particular is available," that "there are tens of thousands of attorneys in the State of New Jersey," and it is "completely [her] prerogative" to wait until the 26th if she wants. (1T36-12 to -20). Judge Brown therefore improperly curtailed Plaintiff's ability to retain counsel of her choosing even though a slight delay would not cause any prejudice to Defendant. See Luedtke v. Shobert (Luedtke), 342 N.J. Super. 202, 214 (App. Div. 2001)("While calendar objectives are not to be lightly disregarded, they must always 'be pursued consistently with and not counter productively to the real business of the courts, which is to dispense substantial justice on the merits.'") (quoting Fusco v. Fusco, 186 N.J. Super. 321, 329 (App. Div. 1982)).

In addition, Judge Brown created a hypothetical scenario which he improperly used to justify denying Plaintiff additional time to retain a new attorney. He stated to Plaintiff "[a]re you going to be given the opportunity to hire a new attorney and delay matters and then come back and tell me you're – you're *disenchanted with attorney number three*? No, and I'm not playing that game with you." (1T25-12 to -16)(emphasis added). In other words, the judge

denied Plaintiff additional time to obtain a new attorney based on a hypothetical scenario where Plaintiff was dissatisfied with her not-yet-retained attorney's services. Plaintiff's dissatisfaction with Mr. DeTommaso and a hypothetical scenario are not evidence of Plaintiff delaying the matter, which had not even been pending for a year at that time, nor are they appropriate reasons for the court to deny Plaintiff the opportunity to obtain counsel. Furthermore, Defendant would not be prejudiced by any additional delay because he had not yet begun to pay Plaintiff alimony or equitable distribution as required under the MOU. The parties' only child is a thirty-eight year old adult; not a child caught in the middle of the parties' divorce, and thus not a basis to expedite the proceedings. The only one prejudiced by Plaintiff being afforded additional time is Plaintiff because she was not receiving any alimony from Defendant. Judge Brown's refusal to allow Plaintiff any additional time to obtain an attorney, his refusal to take Plaintiff's complaints about Mr. DeTommaso seriously, and his fabrication of a hypothetical scenario to deny Plaintiff's request demonstrate his bias against Plaintiff.

In his decision, Judge Brown stated that the MSA enclosed with Plaintiff's pro-se letter was "unlabeled in violation of R. 5:5-4(g)." (Pa8). However, that rule addresses the requirements for exhibits attached to certifications and not enclosures to letters. Conversely, the judge made no mention that Defendant's

notice of motion, which was prepared and filed by an attorney, failed to include the most basic prerequisite of stating "the time and place when it is to be presented to the court," as required by Rule 1:6-2(a). (Pa38). Judge Brown went out of his way to note Plaintiff's alleged Rule violation after denying her additional time to retain an attorney. The purported violation was that Plaintiff did not properly label an "exhibit," which would be an inconsequential violation because at worst it may cause a slight inconvenience to anyone trying to locate the unlabeled enclosure to Plaintiff's letter, which contained only two enclosures. To the contrary, Defendant's failure to designate the time and place the motion would be heard in his Notice of Motion thwarted the underlying purpose of the Rule requiring such a document because the absence of such basic information precluded Plaintiff from receiving proper notice. The judge's disparate treatment of the parties' Rule violations is further evidence of impartiality against Plaintiff.

Moreover, without the benefit of Plaintiff's certification, Judge Brown also opined on the sufficiency of Plaintiff's legal representation during mediation and in entering into the MOU. (Pa10). The court stated, "as previously noted by this Court, there is nothing before this Court to remotely suggest that there would be a basis for an ethics complaint or malpractice claim against Mr. DeTommaso or that such claims would have any merit whatsoever." (Pa10).

Rhetorically, how could the judge reach this conclusion when Defendant filed a motion to enforce the MOU (i.e. nothing about legal malpractice) and Plaintiff was precluded from filing her cross-motion and opposing certification? The judge seemingly disregarded Plaintiff's experiences with her prior counsel without allowing her the opportunity to fully present her claims.

At the hearing, the judge also seemed to take umbrage that Plaintiff requested an interpreter. When Plaintiff asked if she should speak Russian, Judge Brown stated, "the Court requested and secured the services of the interpreter at the financial expense of the judiciary and I may be mistaken, but I don't believe you needed the interpreter previously. So, in light of the fact that you're the one who requested the interpreter, you should certainly speak in your given language and let her translate to English." (2T8-8 to -17). It is clear from the prior CMC that although Plaintiff can speak and understand English to an extent, there remains a large margin for error. This is especially so when considering that even native English speakers who are not attorneys struggle to understand legal concepts and jargon, and when considering that Plaintiff did not have an attorney to further explain things to her. For instance, at the CMC when Plaintiff was trying to explain that she was not satisfied with her attorney the following exchanges occurred:

> Plaintiff: -- because with his 20 years experience, he never told me that he has goal particular for my case.

> Court: Say that one more time.
>
> Plaintiff: Goal. He did not have goal.
>
> Court: Oh.
>
> . . .
>
> Plaintiff: Okay. So, this – did I understand you correctly, so it is okay for me have no attorney on my side right in – in front of second mediation. So, practically, my attorney giving up on me. Is it okay?
>
> Court: What is your question?
>
> [(1T13-1 to -3; 1T16-2 to -7).]

The above exchanges clearly indicate that there is a language-based communication issue that exists between Plaintiff and the court. The use of an interpreter would alleviate this issue and was, therefore, an appropriate request by Plaintiff. In good faith, Plaintiff requested an interpreter to ensure she understood the proceedings and could participate fully given that she had not understood what transpired at mediation (held via zoom, creating further disconnect on these complex issues), on June 19 or thereafter. Yet, the court chided Plaintiff for requesting an interpreter and wanting to make sure that a language barrier did not impede anyone's understanding of the statements being made in court.

In addition, Plaintiff was not asked if she was ready to proceed with oral

argument of the motion nor did the judge explain how he intended to proceed and the consequences of the July 31, 2024 court appearance. Rather, Judge Brown opened the record by merely stating that, "today the matter is technically listed for trial." (2T4-1 to -2). The judge predetermined how he intended to proceed and decide the matter as is clear by the questions posed to Defendant's attorney. The judge stated to Defendant's attorney that he did not need any argument from her on the motion and then questioned her about whether Defendant had made any payments for alimony or equitable distribution to Plaintiff yet per the MOU because it was "going to tie into [Defendant's] request for counsel fees." (2T10-18 to 10-12). That is, the judge had already determined that he was granting Defendant's motion to enforce the MOU and awarding Defendant counsel fees all without having heard oral argument and without permitting Plaintiff to file her opposing papers.

In awarding counsel fees, the judge held it against Plaintiff that she signed a copy of the MSA, with a few minor changes. It is common in settlement negotiations for parties to go back and forth and make changes to the final agreement. Yet, the judge took issue with Plaintiff for not simply signing the draft prepared by Defendant's counsel as is. Plaintiff also requested that the judge hold a CMC to discuss the MSA because she felt that "a brief conference with Your Honor can help us resolve the impasse between us and bring this

matter to its much-needed resolution." (Pa82). Judge Brown ignored Plaintiff's request and converted the July 31, 2024 trial date into a hearing on Defendant's motion and an uncontested divorce hearing without notice to Plaintiff, further indicating his bias against Plaintiff and prejudgment of the issues.

CONCLUSION

During the June 19, 2024 conference, the court assured Plaintiff she would have an opportunity to respond to Defendant's motion to enforce. However, Plaintiff was ultimately denied that opportunity, and that denial is the basis for Plaintiff's appeal. Plaintiff was denied the right and opportunity to explain what occurred at the time the MOU was signed, and the judge's comments clearly indicate his bias against Plaintiff and his inability to be objective. The July 31, 2024 Order irreparably harms the Plaintiff.

For the foregoing reasons, Plaintiff's appeal should be granted. The July 31, 2024 Order should be reversed in its entirety, the portion of the JOD incorporating the MOU should be vacated, and on remand, a different judge should be assigned to this case.

Respectfully submitted,

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	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-004044-23T2
LYUDMILLA POPOVA, Plaintiff/Appellant v. NAZIM TAGHIYEV, Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION-FAMILY PART MIDDLESEX COUNTY Docket No. FM-12-699-24-J
	CIVIL ACTION
	SAT BELOW: HON. DANIEL H. BROWN, J.S.C.

DEFENDANT/RESPONDENT'S BRIEF

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Submitted on 03/17/25

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PRELIMINARY STATEMENT

The Court must deny the Plaintiff-Appellant's (hereinafter "Plaintiff") appeal of the trial court's July 31, 2024 Order and parties' Final Judgment of Divorce in the interests of justice, judicial economy and as Plaintiff's appeal has no merit. The trial court correctly applied New Jersey statutes and case law to the facts of this case and determined that the Memorandum of Understanding (hereinafter "MOU"), executed by the parties and counsel, was enforceable and the terms therein, agreed upon by the parties, and should be incorporated into a Final Judgement of Divorce (hereinafter "FJOD"). Prior to the July 31, 2024 hearing, both parties had an opportunity to submit paperwork to Court, had counsel or the opportunity to obtain counsel, and had an opportunity to argue the issues before the Court.

The Plaintiff, in bad faith, asks this Court to dispense with the reality of this case, which was and is that Plaintiff is and was seeking to circumvent the MOU, executed by the parties with the assistance of counsel, as she is unhappy with the deal reached in mediation. Plaintiff seeks to continue the litigation to force the Defendant to make more concessions as he reasonably wants to bring the divorce to a conclusion.

Plaintiff's bad faith in the parties' divorce litigation was specifically noted by the Court on July 31, 2024, when Judge Daniel Brown ultimately awarded

Defendant counsel fees, stating that, "make no mistake, the Plaintiff has acted in bad faith." (2T15- 10 to -11). The Court also noted that the Plaintiff's position in connection with the MOU was "unreasonable" (2T14-24 to 15-2) and that "Plaintiff was ostensibly seeking to disavow {the} Term Sheet," (2T4- 13 to-15).

PROCEDURAL HISTORY

The parties married on April 2, 1985 and a Complaint for Divorce was filed on September 14, 2023. (Pa17). Defendant-Respondent (hereinafter "Defendant") filed an Answer and Counterclaim for Divorce on October 12, 2023. (Pa21). Plaintiff filed her Answer to Counterclaim on November 15, 2023. (Pa 28).

The first Case Management Order was entered into by Consent of Jennifer L. Marshall, Esq., Plaintiff's first attorney and Irene Shor, Esq., Defendant's attorney, and filed by the Court, with modifications by Judge Daniel H. Brown, on November 17, 2023 which set forth the following deadlines: Both parties were to submit Case Information Statements by December 8, 2023, both parties were to propound discovery by December 13, 2023, both parties were to comply with the Notice to Produce and Interrogatories, as well as provide proof of bank account balances, pensions or other records, by February 14, 2024, depositions were to be completed by February 21, 2024, which was modified by Judge

Brown from March 13, 2024, pension appraisals were to be completed by January 13, 2024 and the Court set down the matter for a Early Settlement Panel (hereinafter "ESP") for March 5, 2024, as well as an in person Case Management Conference (hereinafter "CMC") on March 8, 2024. The second CMC could be avoided by the parties if the attorneys jointly submitted a, "fully completed post MESP Order for mediation," prior to March 8, 2024. (Da1.)

Defendant's Case information Statement was filed on November 10, 2023 (dated October 9, 2023). PCa1. Plaintiff's Case Information Statement was filed on and dated December 20, 2023. (PCa23). Defendant's attorney sent discovery requests to Plaintiff's attorney on December 14, 2023. (Da5.) Plaintiff's attorney sent discovery requests to Defendant's attorney on December 18, 2023. (Da70.)

The parties attended the ESP, remotely with counsel, on March 12, 2024 and thereafter Plaintiff's first attorney and Defendant's attorney submitted an Order of Referral to Post-MESP Mediation Program which was filed by the Court on March 13, 2024. In this Order, the parties agreed to attend mediation with Ann Fabrikant, Esq., with the costs to be evenly divided (50%/50%). The Court added, to the Order submitted by the attorneys, that a Pre-Trial Conference was scheduled for April 30, 2024 with a Trial scheduled for May 28, 2024. Pa32.

Prior to the first mediation session, Ms. Marshall was provided with discovery by attorney for Defendant between March 12, 2024 and April 12, 2024. (Pa59 to Pa64).

The parties attended the first mediation with Ann Fabrikant, Esq. on April 12, 2024 (Pa6) and on April 23, 2024 Plaintiff obtained her second attorney, Michael J. DeTommaso, Esq. (Pa36). The April 30, 2024 CMC was adjourned by the Court at Mr. DeTommaso's request. (Da85.)

Mr. DeTommaso was provided with Defendant's discovery by Defendant's attorney on April 27, 2024, April 29, 2024, May 7, 2024, May 8, 2024 and May 15, 2024, in advance of the second mediation, including additional discovery requested in connection with the cryptocurrency holdings and Defendant's inheritance. (Pa59 to Pa71).

The parties attended a second mediation with Ann Fabrikant, Esq. on May 21, 2024. At the mediation the MOU was signed by both parties and counsel. Pa50. The MOU stated in pertinent part:

> The above are the essential terms of settlement agreed to by the parties and are only subject to being incorporated into a final Settlement Agreement prepared by the attorneys and signed by the parties. The parties accept these terms with prejudice, such that they will become subject to enforcement upon signing/recording of this document as if set forth at length in a Settlement Agreement. The parties understand that there are additional boilerplate terms that may be included in a formal Settlement Agreement,

> but disagreement regarding any of those terms will not negate the enforceability of the above. (Pa 52. 2T5-24 to 6-13).

On May 22, 2024, as the parties had signed the MOU, counsel for Defendant requested that the trial be adjourned to allow the parties time to prepare a Marital Settlement Agreement (hereinafter "MSA") and proceed with a Divorce on the Papers. (Da86.) The trial was adjourned from May 22, 2024 to June 19, 2024. (Da87.) On June 19, 2024[1] the parties appeared in person before the Honorable Daniel Brown, J.S.C. and an order was entered relieving Mr. DeTomasso as counsel for Plaintiff, by consent. The Court indicated that Plaintiff was now "pro se", Ordered that "Defendant shall file a Motion to Enforce the MOU no later than July 10, 2024" and adjourned the trial day until July 31, 2024. (1T37-2 to -18. Pa35).

As directed, Defendant filed a Motion to Enforce the Memorandum of Understanding on July 10, 2024. The Motion was served upon Plaintiff directly via Regular Mail, Certified Mail and Email. Pa38 to Pa74. On July 15, 2024 Plaintiff filed a response to Defendant's Motion Pa74 to Pa102. In her response, Plaintiff did not seek to change any terms contained in the MOU, merely requested changes to the MSA prepared by Defendant's counsel. As Plaintiff

[1] "1T" refers to the June 19, 2024 transcript; "2T" refers to the July 31, 2024 transcript.

continued to agree with the terms of the MOU, on the same day, counsel for Defendant filed a letter with the Court which stated in pertinent part:

> Now that Ms. Popova has indicated her agreement to proceed with the terms of the Memorandum of Understanding, I am respectfully requesting that the Court incorporate the terms of the Memorandum of Understanding into a Judgment of Divorce resolving the currently pending Motion, as no issues are in controversy. (Da90).

The letter from Defendant's attorney to the Court indicated that the Motion was scheduled to be heard on August 16, 2024. This is the only place where an August 16, 2024 Motion date is referenced.

On July 24, 2024, the day her Cross-Motion would have been due, Plaintiff self-represented, filed a letter with the Court directed to Judge Daniel Brown. The letter requested an "in-person Case Management Conference as soon as possible," as well as "two-weeks additional time after the conference {to file a "proper cross application.}" Pa103 (erroneously listed as Pa82 in Plaintiff's Brief.) The Court responded to Plaintiff's request as follows, "The Court is in receipt of Plaintiff's adjournment request. Plaintiff's request is denied. However, as the parties have a scheduled trial on July 31, 2024, the Court will entertain the pending Motion, and Plaintiff's several replies to said Motion, on that day." (Da101).

The parties appeared before the Court on July 31, 2024, on the Trial Date which had been rescheduled from June 19, 2024. Pa 35. On July 31, 2024 the Court ruled that the MOU was enforceable (2T10-14 to-17) and incorporated it into a FJOD (2T14-24) and awarded Defendant counsel fees stating, "Defendant's request for an award of counsel fees arising from necessitated by the plaintiff's unreasonable position regarding the MOU is granted." (2T14-24 to 15-2). The FJOD, into which the term sheet was incorporated, was signed on July 31, 2024. (Pa15).

Thereafter, Plaintiff filed a Notice of Appeal of the July 31, 2024 FJOD on August 23, 2024. (Pa1). Defendant filed a Case Information Statement on September 5, 2024. (Da102).

COUNTERSTATEMENT OF FACTS

The parties were married on April 2, 1985 and one (1) child was born of the parties, Teymur Taghiyev, born on December 18, 1986, who was emancipated prior to the filing of the Complaint for Divorce. (2T18-12 to -13). A Complaint for Divorce was filed by Plaintiff in this matter on September 12, 2023, after which Defendant properly and timely filed responsive pleadings. (Pa17.) The parties' marriage was over thirty-eight (38) years in duration at the time of the filing of the Complaint for Divorce. At the time of the filing of the Complaint for Divorce Plaintiff was sixty-eight (68) years old and Defendant

was sixty-six (66) years old. (Pa17; Pa23). A FJOD was entered by the Court on July 31, 2024. (Pa6; Pa15) At the time the FJOD was entered Plaintiff was sixty-nine (69) year old and Defendant was sixty-seven (67) years old. (PCa33)

During the course of the divorce proceedings Plaintiff was represented by two (2) attorneys, Jennifer Marshall, Esq. (September 2023 to April 23, 2024) and Michael DeTomasso, Esq. (April 23, 2024 to June 19, 2024) (Pa36) and was self-represented from June 19, 2024 to July 31, 2024. (Pa35). Defendant has been represented by Irene Shor, Esq., LLC since the inception of the litigation, continuing to today. (Pa 17; Da102).

Pursuant to the Case Management Order entered on November 17, 2023, both Plaintiff and Defendant propounded discovery requests to the other party. (Da5; Da70.) These discovery requests were answered informally by Defendant on April 27, 2024, April 29, 2024 May 7, 2024, May 8, 2024 and May 15, 2024. (Pa59 to 71) Plaintiff did not respond to the requests for discovery.

The parties attend an ESP, virtually, on March 12, 2024 after which the parties were Ordered to attend mediation with Ann Fabricant, Esq., a jointly selected mediator. (Pa32.) The first mediation occurred on April 12, 2024. Thereafter, eleven (11) days later on April 23, 2024 Plaintiff fired Ms. Marshall and hired her second attorney, Michael DeTomaso, Esq. (Pa36.) After re-providing discovery to Plaintiff's second attorney the parties attended a second

mediation session on May 21, 2024, via zoom, during which the MOU was signed. (Pa50.)

On May 22, 2024, as the parties had signed the MOU, counsel for Defendant requested that the trial be adjourned to allow the parties time to prepare a Marital Settlement Agreement (hereinafter "MSA") and proceed with a Divorce on the Papers. (Da86). The trial was adjourned from May 22, 2024 to June 19, 2024. (Da87).

On June 19, 2024 the parties appeared in person before the Honorable Daniel Brown, J.S.C. for their Trial Date and an order was entered relieving Mr. DeTomasso, Esq. as counsel for Plaintiff, by consent, and indicating that Plaintiff was now "pro se", and ordered that "Defendant shall file a Motion to Enforce the MOU no later than July 10, 2024" and adjourned the trial day until July 31, 2024. (1T37-2 to -18. Pa35).

It is clear from the transcript of the June 19, 2024 hearing that, at that time, the Plaintiff was not in agreement with the MOU, which had been signed in Mediation with the assistance of counsel, and that Plaintiff no longer wished to be represented by Mr. DeTomasso. The record states:

> **THE COURT**: All right. So, today was technically listed -- and bear with me just one second -- and it was technically listed for a trial, and there was correspondence received by the Court. It was in a May 22 letter from Ms. Shor indicating that the parties have a signed term sheet and that they were going to be

preparing it, a marital settlement agreement, embodying the terms of that term sheet, and there was ultimately talk of, in that letter, of even potentially having a divorce on the papers.

And the Court just had the opportunity to conference the matter in chambers with the parties, and the Court has, at this time, a -- a copy of that Memorandum of Understanding and the attachments to it.

And ma'am, it's the Court's understanding, and correct me if I'm wrong, that I don't know disavowing is the word, but it's the Court's And the Court just had the opportunity to conference the matter in chambers with the parties, and the Court has, at this time, a -- a copy of that Memorandum of Understanding and the attachments to it.

And ma'am, it's the Court's understanding, and correct me if I'm wrong, that I don't know disavowing is the word, but it's the Court's understanding that you're seeking to disavow that Memo of Understanding. Am I correct when I say that?

MS. POPOVA: I am not sure about the definition, but --

THE COURT: Well, let me use a different word.

MR. DETOMASSO: We don't want to be bound by it.

THE COURT: Correct.

MS. POPOVA: I am not agreeing with every single paragraph of these document. I signed it because --

THE COURT: I just need you to keep your voice up because --

MS. POPOVA: Oh.

THE COURT: -- we're being recorded.

MS. POPOVA: Thank you. I am not agree with every paragraph of this document. I sign it because I feel like I was pressed to sign it.

THE COURT: And --

MS. POPOVA: I wanted to stop unfair situation to me and that was the only way I can consider.

THE COURT: And what does that mean that you were "pressed" to sign it?

MS. POPOVA: I think the second mediation was very, very unfair toward me because I was shut down in several times, and my question was not answered. So --

THE COURT: And not answered by who?
MS. POPOVA: By mediator and my lawyer.
THE COURT: Okay. And I'm not going to make any finding today on whether that claim has any merit or not about your attorney and the mediator allegedly not answering your questions. I'm just going to indicate one thing to you.
MS. POPOVA: Okay.
THE COURT: Mr. DeTomasso has appeared in front of me before. Ms. Shor has appeared in front of me before. And prior to me being up here, I was a family lawyer. And I had cases where Mr. DeTomasso was my adversary, and I had cases where Ms. Shor was my adversary, and my experience with both of them would not support the claim that you made.

Meaning by that, he is always -- and I'm going to focus on him at this point because the defendant is not raising this kind of issue, obviously. But my experience with him is that he's been nothing but professional and thorough and respectful to me, and when he's been in front of me and the way I've observed him interact with others. So, I'm just going to leave it at that at this point in time.

What I am going to indicate to you is the following. Again, I had that Memo of Understanding, and it's been executed electronically by both parties on page 3. And again, it was pointed out to me in chambers, and it bears reciting on the record.

"The above are the essential terms of settlement agreed to by the parties and are only subject to being incorporated into a Final Settlement Agreement prepared by the attorneys and signed by the parties."

"The parties accept these terms with prejudice such that they will become subject to enforcement upon the signing, slash, recording of this document as is set forth at length in the settlement agreement."

"The parties understand that there are additional boilerplate terms that may be included in a formal settlement agreement, but disagreement regarding any of those terms will not negate the enforceability of the above."

That language is a problem for you at the expense of being transparent. And I want to be very transparent with both parties here. That language is not good for a party who's seeking to set aside and not be bound by that Memo of Understanding. And there is a litany of case law that the Court is aware of, and obviously, Mr. DeTomasso is aware of, and Ms. Shor is obviously aware of, that makes clear you don't need to have a signed whatever you want to call it, a marital settlement agreement or divorce settlement agreement, you don't need to have that to be bound to an agreement.

Meaning by that, this Court may well end up divorcing you and incorporating that Memo of Understanding, which I'm holding up, into your Judgment of Divorce. So, this may end up -- you may end up being bound to the terms of this agreement, and the defendant may end up being bound to the terms of that agreement.

I'm not going to bore you with the case law on point, but suffice it to say, I'm not going to bore you with that case law today. That case law exists. The most common case that is referred to in that regard is Harrington.

My first question to you -- let me step back before I ask you that question. If you were to say to me today, I'm willing to be bound by the terms of that Memo of Understanding, the parties would be divorced today. If your position is, Judge, I don't seek to be bound to that Memo of Understanding; what I'm going to do is I'm going to instruct Ms. Shor to file a Motion to Enforce that Memo of Understanding. That's the next logical step. And you're free to file opposition to that motion.

I need you to understand, and to be clear, this isn't the Court or Mr. DeTomasso or anybody else

> threatening you when I say this to you. You have counsel fee exposure.
>
> Meaning by that, if the Court ends up granting that motion and finding that there's no reason to set it aside, and if the Court finds that it should, in fact, be enforced, that motion, which is going to have a certification no doubt from your husband, and I'm sure there's going to be a letter brief with it -- I'm speculating, he may well incur a few thousand dollars or several thousand dollars preparing that motion. And if he prevails in that motion, the Court may make you responsible for those fees. May.
>
> So, my first question to you is, especially now in light of the comment that you made that you felt questions weren't being answered by the mediator or your attorney, my first question to you is, do you want Mr. DeTomasso to continue to represent you in this case?
>
> **MS. POPOVA**: No. (1T4-9 to 10-8.)

Plaintiff then asked for a week to speak with a new attorney stating, "Is it okay if I will get a couple of days, like, maybe a week to talk with different attorney what I supposed to do in this situation. They will consult what you told me, or they will suggest something else." (1T30-3 to-7). The Court then stated:

> **THE COURT:** Okay. So, as I indicated, ma'am, you're going to have, as far as the Court is concerned, more than enough opportunity if you seek to consult with, and even retain, what would be your third attorney in this divorce case.
>
> The record should be just explicitly clear that I have afforded you something that I would normally would never do and I believe my peers would generally never do, which is letting an attorney out literally on the day of trial, but I've afforded you that courtesy.
>
> **MS. POPOVA:** Thank you.

> **THE COURT:** You're welcome. So, what I am indicating to you is that courtesy is not open-ended.
> **MS. POPOVA:** I understand.
> **THE COURT:** So, that's why you should advise any attorney that you consult with --
> **MS. POPOVA:** Okay.
> **THE COURT:** -- that Judge Brown was very explicit. There are not going to be any adjournments of anything.
> **MS. POPOVA:** I understand.
> **THE COURT:** Do you have any other question?
> **MS. POPOVA:** I'm not sure at this moment. I think no. I just understand that I have only three weeks to talk with different attorney, eliciting different opinions. And then, I need to decide, should I go with your advice or should I go with the advice of different attorney. Am I right? (1T31-3 to 32-9).

The Court then confirmed that it was not giving Plaintiff any stating, "**THE COURT:** Including me. I've not given you any advice." (1T33-2 to-3). Thereafter, the Court adjourned the Trial Date to July 31, 2024 and gave Defendant a deadline for when to file his Motion to enforce the MOU stating:

> **THE COURT:** And as I've indicated before, there are tens of thousands of attorneys in the State of New Jersey. If you choose to wait until the 26th, that's completely your prerogative.
>
> So, the order is going to indicate, by consent and at the request of plaintiff, Michael J. DeTomasso is hereby relieved as counsel for plaintiff, who now represents herself pro se. Meaning that, you represent yourself effectively immediately to the extent that you retain counsel, a new counsel, a third attorney in this case. They will file a notice of appearance with this Court, but unless and until that happens, you represent yourself pro se. And number two, defendant will file a motion to enforce the Memorandum of Understanding. I just abbreviated it as MOU. No later than July 10,

> 2024. And just to keep -- make sure that I keep track of the case, I'm just going to assign it a new trial date of July 31. I'll indicate trial is adjourned from today until July 31. That way, it's just codifying the order in that way, you know, when you bring this order to potentially a third attorney for them to review, they're clear of what Ms. Shor's obligation is and the fact that there's a trial date on July 31 of 2024, obviously subject to whatever happens on the return date of the motion. {Emphasis Added.} (1T36-17 to 37-18).

Between June 19, 2024 and July 31, 2024, Defendant, pro se, negotiated directly with Defendant's attorney to modify the terms of the draft MSA prepared by counsel for Defendant. Pa81 to 102. (Da90).

As directed, Defendant filed a Motion to Enforce the MOU on July 10, 2024. The Motion was served upon Plaintiff directly via Regular Mail, Certified Mail and Email. (Pa38 to Pa74). Plaintiff does not contend that she was not served with the Motion or that she did not have notice of the pending Motion. On July 15, 2024 Plaintiff filed a response to Defendant's Motion. (Pa80 to Pa102). Per the handwritten changes to the Terms of the MSA attached the Plaintiff's correspondence to the Court, the Plaintiff wanted to change the following provisions, with her hand written changes being underlined:

> WHEREAS, both parties understand all of the provisions of this Agreement and believe them to be fair, just, adequate, and reasonable and accordingly accept such provisions freely and voluntarily; and Wife disagrees with the forgoing statement. (Pa82-Pa83.)
> 6. Personalty, and Contents of the Marital home: The parties have already divided their personalty and

> marital property to their mutual satisfaction and reaffirm this division. Wife disputes this statement. (PA88.)
>
> 3. Independent Counsel: The parties each acknowledge that they have had the right to retain separate and independent counsel and tax advisors of their own choosing and that they have been separately and independently advised regarding every aspect of this Agreement. They acknowledge that the other party has in no sense participated in the selection of their individual counsel or their decision not to retain counsel. ^ Wife disputes this statement. {The upward arrow seems to indicate that Plaintiff was saying Defendant participated in the selection of their individual counsel or their decision not to retain counsel.} (Pa92- Pa93).
>
> C. The parties represent to each other that they have ascertained and weighed all of the facts and circumstances likely to influence their judgment and that they have given due consideration to such facts and circumstances, including the risks and costs attendant to litigation, ~~and that they are entering into this Agreement freely and voluntarily.~~ {Plaintiff crossed out this portion of the paragraph.} (Pa95-Pa96).
>
> E. The parties acknowledge that they are satisfied with the advice and service which they have received from their respective attorneys. Wife does not agree with this statement. (Pa96).

The changes requested to the MSA did not change any of the Terms of the MOU but would have caused further litigation later, as Plaintiff indicated that she was not signing the MSA freely and voluntarily and did not agree with certain statements in the MSA.

On July 15, 2024,[2] as Plaintiff's changes to the MSA did not include any changes to the terms of the MOU or object to them in anyway, counsel for Defendant filed a letter with the Court which stated in pertinent part:

> Now that Ms. Popova has indicated her agreement to proceed with the terms of the Memorandum of Understanding, I am respectfully requesting that the Court incorporate the terms of the Memorandum of Understanding into a Judgment of Divorce resolving the currently pending Motion, as no issues are in controversy. (Da90).

On July 24, 2024, the same day Plaintiff's Cross-Application to Defendant's Motion would be due, Plaintiff, self-represented, filed another letter with the Court directed to Judge Daniel Brown. The letter requested an "in-person Case Management Conference as soon as possible," as well as "two-weeks additional time after the conference {to file a "proper cross application.}" (Pa103. Erroneously listed as Pa82 in Plaintiff's Brief.) The Court responded to Plaintiff's request as follows, "The Court is in receipt of Plaintiff's adjournment request. Plaintiff's request is denied. However, as the parties have a scheduled trial on July 31, 2024, the Court will entertain the pending Motion, and Plaintiff's several replies to said Motion, on that day." (Da101).

The parties appeared before the Court on July 31, 2024. The Court Stated in pertinent part:

---

[2] Erroneously dated July 15, 2025.

THE COURT: So, the question before the Court is does the Court enforce the term sheet and the Court is actually prepared in that regard to rule on the motion filed by the defendant to enforce the term sheet also referred to as the memorandum of understanding today. Because the Court doesn't need anything else at this point. The Court has reviewed the application. The Court has reviewed the plaintiff's two oppositions to it and these facts are not terribly complicated. And today is the return date of trial. So, before the Court addresses that motion, ma'am, do you want to be heard before the Court addresses that motion? {Emphasis added.}
MS. POPOVA: Yes.
THE COURT: And what would you like to tell me?
MS. POPOVA: Shall I speak Russian?
THE COURT: Well, you requested the interpreter for this court appearance today and the Court requested and secured the services of the interpreter at the financial expense of the judiciary and I may be mistaken, but I don't believe you needed the interpreter previously. So, in light of the fact that you're the one who requested the interpreter, you should certainly speak in your given language so to speak and let her translate to English.
MS. POPOVA: Your Honor, in your speech I heard several statements that I disagree with. For example, you say that I refuse help of that attorney. However, I actually made the statement that I am unable to proceed with -- without the attorney because I do not know the judicial protocol and I do not know the actions that have to be taken in the Court and also I do not speak the legal language. Well, second, you spoke that I disagree with additional settlement -- settlement terms to ORU or MST so I just said that it is unacceptable because my lack of knowledge of judicial system. And I disagree that the -- the action you called second mediation was a farce. It was not a farce, it was a serious decision to be made by that and for the third time I noticed that attorneys and mediators that I trusted in literally betrayed me. And the last thing I noticed that my additions to the terms had no meaning so had absolutely

> no impact. And again, I notice that the language used or what I've been told, it was very strange. They say sign the document that's prepared and you go to the Court.
> **THE COURT:** All right. Thank you, ma'am. You can be seated.... (2T7-15 to 9-18).

After reviewing the Motion to Enforce the MOU and Plaintiff's two (2) replies and hearing the argument of Plaintiff, an July 31, 2024 the Court ruled that the MOU was enforceable (2T10-14 to-17) and incorporated it into a FJOD (2T14-18 to 22-24) and awarded Defendant counsel fees stating, "Defendant's request for an award of counsel fees arising from and necessitated by the plaintiff's unreasonable position regarding the MOU is granted." (2T14-24 to 15-2). The FJOD, into which the term sheet was incorporated, was entered on July 31, 2024. (Pa15.)

Thereafter, Plaintiff filed a Notice of Appeal of the July 31, 2024 FJOD on August 23, 2024. (Pa1). Defendant filed a Case Information Statement on September 5, 2024. (Da102).

LEGAL ARGUMENT

POINT ONE

THE TRIAL COURT DID NOT VIOLATE THE PLAINTIFF'S RIGHT TO DUE PROCESS

Plaintiff asserts three (3) due process violations she purports were made by the Trial Court. Specifically, 1) the Court heard the Defendant's Motion

prior to the scheduled return date; 2) the Court denied the Plaintiff the opportunity to file a response; and 3) the Court denied the Plaintiff's adjournment request to obtain Counsel.

The Plaintiff's due process rights were not violated as 1) Defendant had notice of and an opportunity to be heard on July 31, 2024 and the Court Schedule Oral Argument on the Motion on July 31, 2024 as is its prerogative under R.1:6-2 and R. 5:5-4 (1); 2) Plaintiff, in fact, submitted two (2) responses to Defendant's Motion for Enforcement of the MOU and the Court stated that both submissions were considered, as well as allowed Plaintiff to present her argument orally on July 31, 2024 and 3) Defendant was given six weeks to obtain her third (3rd) attorney and chose not to utilize the opportunity given. The Court was under no obligation to give her yet more time to seek an attorney.

PROCEDURAL DUE PROCESS

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." U.S. Const. amend. XIV, § 1. and, 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) (internal citation omitted).

The Courts have held that, "(d)ue process is "a flexible [concept] that depends on the particular circumstances." Id. at 106 (citing Zinermon v. Burch, 494 U.S. 113, 127, (1990); Mathews v. Eldridge, 424 U.S. 319, 334, (1976); Nicoletta v. North Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 165 (1978)). At a minimum, due process requires that a party in a judicial hearing receive "notice defining the issues and an adequate opportunity to prepare and respond." McKeown-Brand v. Trump Castle Hotel Casino, 132 N.J. 546, 559 (1993) (citing Nicoletta, supra, 77 N.J. at 162). In this case, the Plaintiff was fully apprised of the issues and had six (6) weeks to obtain an attorney, which she chose not to do.

DUE PROCESS FOR MOTIONS IN THE FAMILY PART IN NEW JERSEY

Due process for Motions in New Jersey is generally governed by R. 1:6-2 which states:

> (1)Generally. When a civil action has been specially assigned to an individual judge for case management and disposition of all pretrial and trial proceedings and in all cases pending in the Superior Court, Chancery Division, the judge, on receipt of motion papers, **shall determine the mode and scheduling of the disposition of the motion.** Except as provided in R. 5:5-4, motions filed in causes pending in the Superior Court, Chancery Division, Family Part, shall be governed by this paragraph. {Emphasis added.}

In connection with Family part Motions, R. 5:5-4 (1) states:

> General. 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. {Emphasis Added.}

R. 5:5-4 (3) provides:

> (c)Time for Service and Filing. A notice of motion shall be served and filed, together with supporting affidavits and briefs, when necessary, not later than 24 days before the time specified for the return date. For example, a motion must be served and filed on the Tuesday for a motion date falling on a Friday 24 days later. Any opposing affidavits, cross-motions or objections shall be served and filed not later than 15 days before the return date. For example, a response must be served and filed on a Thursday for a motion date falling on a Friday 15 days later. Answers or responses to any opposing affidavits and cross-motions shall be served and filed not later than 8 days before the return date. For example, such papers would have to be served and filed on a Thursday for a motion date falling on the Friday of the following week. If service is made by mail, 3 days shall be added to the above time periods. Two copies of all motions, cross-motions, certifications, and briefs shall be served.
>
> *Plaintiff had more than sufficient notice of the July 31, 2024 date – being advised on June 19, 2023, that a Motion was ordered to be filed by July 10, 2024. The Plaintiff had a more than adequate opportunity to respond as she sent in two (2) responses to the Court*

The Trial Court is within its discretion, pursuant to R. 1:6-2, to decide the timing of Motions and Oral Argument on Motions it hears. As stated above, on

June 19, 2024, the trial court directed the Defendant to file a Notice of Motion, on short notice, to enforce the MOU, on of before July 10, 2024, and adjourned the trial date to July 31, 2024, 21 days after the receipt of the Motion. Under R. 5:5-4 (3), in a 24 day Motion cycle, if the Notice of Motion is filed on July 10, 2024, the Cross-Motion would be due two (2) weeks later, which would be July 24, 2024 with Defendant's reply then due July 31, 2024. In this matter, the Motion was filed July 10, 2024, Plaintiff filed two (2) oppositions to the Motion on July 15, 2024 and July 24, 2024 and Defendant's reply, in the form of a letter, was also filed July 15, 2024. As such, the Court was in receipt of all [three "parts"] permissible submissions for the Motion and scheduled oral argument on the Motion, within its discretion per R. 1:6-2 and R. 5:5-4(1), on the July 31, 2024, a date that was already on the Court's calendar for Trial.

Pursuant to R. 1:6-2, the Court Scheduled Oral Argument on Defendant's Notice of Motion to Enforce the MOU on the rescheduled trial date of July 31, 2024. It is clear from the Order and the transcript from June 19, 2024 that the Plaintiff had notice of the hearing and the opportunity to respond to Defendant's Motion. Specifically, the June 19, 2024 Order stated, "Defendant shall file a Motion to Enforce the MOU no later than July 10, 2024" and adjourned the trial day until July 31, 2024. (1T37-5 to-18. Pa35.) Plaintiff does not contend that she did not have notice of the July 31, 2024 date.

The Court considered two (2) responses of Plaintiff, as well as her testimony, in entering the July 31, 2024 Court Order

The Plaintiff also contends that she was not allowed an opportunity to respond to Defendant's Motion. The record reflects this is a false contention. The Plaintiff filed two (2) oppositions to Defendant's Motion to enforce the MOU on July 15, 2024 and July 24, 2024. Further, the Court allowed the Plaintiff to testify on July 31, 2024. The Court indicated that it considered both of Plaintiff's responses to Defendants Motion stating, at the time of the July 31, 2024 hearing, "The Court has reviewed the application. The Court has reviewed the plaintiff's two oppositions to it and these facts are not terribly complicated." (2T7-20 to-24). Plaintiff's testimony on July 31, 2024 was as follows:

> **MS. POPOVA**: Your Honor, in your speech I heard several statements that I disagree with. For example, you say that I refuse help of that attorney. However, I actually made the statement that I am unable to proceed with -- without the attorney because I do not know the judicial protocol and I do not know the actions that have to be taken in the Court and also I do not speak the legal language. Well, second, you spoke that I disagree with additional settlement -- settlement terms to ORU or MST so I just said that it is unacceptable because my lack of knowledge of judicial system. And I disagree that the -- the action you called second mediation was a farce. It was not a farce, it was a serious decision to be made by that and for the third time I noticed that attorneys and mediators that I trusted in literally betrayed me. And the last thing I noticed that my additions to the terms had no meaning so had absolutely no impact. And again, I notice that the language used

> or what I've been told, it was very strange. They say sign the document that's prepared and you go to the Court. (2T8-18 to 9-16).

As stated in the case cited by Plaintiff, H.E.S. v. J.C.S, 175 N.J. 309, 321 (N.J. 2003), which dealt with the entry of a Final Restraining Order, the question is whether the party who is alleging a due process violation has been given notice of the claims against them, and an opportunity to respond. Plaintiff was properly served with Defendant's notice of Motion and had ample time to consider her reply as well as present her reply to the Court both in writing and orally.

Defendant was given an opportunity to obtain counsel by the Court Prior to the July 31, 2024 hearing

Plaintiff states that her Due Process rights were violated as she was not granted an adjournment of the July 31, 2024 date to obtain counsel. The reality is that the Plaintiff was given approximately six (6) weeks to obtain new Counsel after her second attorney was relieved on June 19, 2024. This is more than ample time, especially since the Plaintiff demonstrated her ability to retain counsel in the filing of her appeal – managing to find, consult and retain Appellate Counsel and file an appeal within twenty-three (23) days of the entry of the FJOD. The Court indicated on June 19, 2024 that the adjournment of the trial until July 31, 2024 was to allow her time to find an attorney, should she so desire. (1T31-5 to -16 and 1T35-25 to 36-20). The Court even warned the Plaintiff that no further adjournments would be granted stating:

> **THE COURT:** Okay. So, as I indicated, ma'am, you're going to have, as far as the Court is concerned, more than enough opportunity if you seek to consult with, and even retain, what would be your third attorney in this divorce case.
>
> The record should be just explicitly clear that I have afforded you something that I would normally would never do and I believe my peers would generally never do, which is letting an attorney out literally on the day of trial, but I've afforded you that courtesy.
>
> **MS. POPOVA:** Thank you.
>
> **THE COURT:** You're welcome. So, what I am indicating to you is that courtesy is not open-ended.
>
> **MS. POPOVA:** I understand. (1T31-5 to -19).

Plaintiff's assertion that, because she was not given a second adjournment to obtain counsel, her due process rights were violated, holds no water. The Court has held that, "Requests for adjournment to substitute counsel are subject to the trial court's discretion. Kosmowski v. Atl. City Med. Ctr., 175 N.J. 568, 575 (2003). A civil litigant has lesser rights to counsel than criminal defendants. In re Estate of Schifftner, 385 N.J. Super. 37, 44-45 (App. Div.), certif. denied, 188 N.J. 356 (2006).

"When a defendant applies for an adjournment to enable him to substitute counsel, the trial court must strike a balance between its inherent and necessary right to control its own calendar and the public's interest in the orderly administration of justice, on the one hand, and the defendant's constitutional right to obtain counsel of his own choice, on the other." State v.

Furguson, 198 N.J. Super. 395, 402 (App. Div.), certif. denied, 101 N.J. 266 (1985).

In this matter, the Court relieved Plaintiff's Counsel at her request, on June 19, 2024. (1T36-21 to -25). Thereafter, the Court told the Plaintiff she was considered to be pro se, "to the extent that you retain counsel, a new counsel...They will file a notice of appearance with this Court," and adjourned the Trial until July 31, 2024 (1T36-24 to 37-18). Plaintiff had six (6) weeks to obtain alternative counsel and a further adjournment of the proceedings was a waste of the Court's time, Defendant's time and, it is respectfully submitted, would not have resulted in a different outcome.

POINT TWO

THE COURT PROPERLY INCORPORATED THE TERMS OF THE MOU INTO THE FJOD UNDER THE CASE OF WILLINGBORO MALL, LTD. V. 240/242 FRANKLIN AVE., L.L.C., 215 N.J. 242, (N.J. 2013) AND ANY ERROR BY THE COURT WAS HARMLESS ERROR AS THE RECORD CONTAINS AMPLE, CREDIBLE, AND UNCONTESTED EVIDENCE TO SUPPORT ITS DECISION

The Court properly incorporated the terms of the MOU into the FJOD under the case of Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242 (N.J. 2013) which held in pertinent part that if "parties that intend to enforce a settlement reached at mediation {they} must execute a signed written

agreement." In this matter it is not disputed that the parties signed the MOU during mediation, when both parties had the assistance of counsel and the parties went so far as to include the following language, further indicating that they intended the MOU to be binding on its own:

> The above are the essential terms of settlement agreed to by the parties and are only subject to being incorporated into a final Settlement Agreement prepared by the attorneys and signed by the parties. The parties accept these terms with prejudice, such that they will become subject to enforcement upon signing/recording of this document as if set forth at length in a Settlement Agreement. The parties understand that there are additional boilerplate terms that may be included in a formal Settlement Agreement, but disagreement regarding any of those terms will not negate the enforceability of the above. (Pa52. 2T:5-24 to 6-13). {Emphasis added.}

The Court stated, holding that the MOU was enforceable:

> **THE COURT:** Perfect. Ok. Alright. That simplifies it. All right, The defendant's request for the Court to enter an order enforcing the MOU executed by the parties and counsel on May 21 is granted.
>
> The Court is going to issue a comprehensive order setting forth really a lot of the applicable case law on point. The most relevant case is Willingborough Mall 215 N.J. 242 which is a 2013 New Jersey Supreme Court case.
>
> In sum, parties who reach an agreement at mediation, for the agreement to be binding, have to reduce it to writing which they did. And the language which the Court cited previously from that MOU it is clear, it's unambiguous and it is compelling.
>
> And to be clear, had this agreement been signed at some point after mediation, the order of the Court is

> going to make it clear that Harrington would have applied which is 281 N.J. Super 39 Appellate Division 1995.
>
> Here, the parties clearly agreed upon the essential terms of the settlement with just the mechanics to be flushed out that's basically exactly what their term sheet or Memorandum of Understanding sets.
>
> Again, it makes clear that the terms were set forth and agreed upon and signed off on with prejudice.
>
> The parties were made aware that when signing the term sheet regardless of disagreements regarding an eventual settlement agreement that the term sheet would remain enforceable.
>
> And aside from reiterating that she believes that she was poorly represented by counsel at mediation, plaintiff doesn't substantiate that there's any basis whatsoever to avoid enforcement of the term sheet.
>
> She also fails to demonstrate in any way, shape, or form so that enforceability of it would be inequitable, unconscionable, or punitive. The Court would be remiss if it didn't indicate its belief that the plaintiff has attempted to make a mockery of this proceeding.
>
> She entered into an agreement and after the fact, sought to change her mind and comes up blaming anybody and everybody. She claims here today that her attorneys and the mediator betrayed her, a claim which is completely unsubstantiated. (2T10-13 to 12-10).

The Court clearly considered the Motion filed by the Defendant, the two responses filed by the Plaintiff and Plaintiff's oral argument when making the finding that the MOU was enforceable as it was executed by the parties at mediation and that the terms were agreed upon with prejudice. The Court further held that Plaintiff had not proved that the agreement should be invalidated as it was inequitable, unquestionable or punitive and stated that her claims that the

attorney and mediator "poorly represented her" or "betrayed her" were completely unsubstituted. (2T11-20 to 12-10).

Further, while not discussed by the trial court, written agreements between parties are not to be disturbed lightly. The Supreme Court of New Jersey has stated that, "the use of consensual agreements to resolve marital controversies" is particularly favored in divorce matters. Konzelman v. Konzelman, 158 N.J. 185, 193 (1999); Weishaus v. Weishaus, 180 N.J. 131, 143 (2004). Voluntary agreements between husband and wife for the purpose of matrimonial settlement are enforceable so long as they are fair and equitable. Segal v. Segal, 278 N.J. Super. 218, 222 (App. Div. 1994); Schlemm v. Schlemm, 31 N.J. 557 (1960). In Puder v. Buechel, 183 N.J. 438 (2005), the Court stated: "New Jersey Courts have found that the settlement of litigation ranks high in the public policy of this state. Therefore, our courts have actively encouraged litigants to settle their disputes." Id. at 437. Furthermore, "[a]dvancing that public policy is imperative in family courts where matrimonial proceedings have increasingly overwhelmed the docket. As the Appellate Court has aptly stated: 'With more divorces being granted now than in history, and with filings on the rise, fair, reasonable, equitable, and to the extent possible, conclusive settlements must be reached." Id. at 437 (citing Davidson v. Davidson, 194 N.J. Super. 547, 550 (1984)).

Because New Jersey courts favor the validity of matrimonial settlement agreements arrived at by mutual consent, such arrangements should not be unnecessarily or lightly disturbed. Konzelman v. Konzelman, 158 N.J. 185, 193-94 (1999) (quoting Smith v. Smith, 72 N.J. 350, 358 (1977)). Courts look favorably upon such agreements because their consensual and voluntary nature allows divorced couples to reach accommodations, resolve their differences, and assure stability in the post-divorce relationship. Konzelman, supra, 158 N.J. at 194 (citing Petersen v. Petersen, 85 N.J. 638, 645 (1981)).

Generally, on appeal, the scope of the Appellate review of a Family Part order is limited. See Thieme v. Aucoin-Thieme, 227 N.J. 269, 282-83 (2016); Cesare v. Cesare, 154 N.J. 394, 411 (1998). The Appellate division accords deference to Family Part judges due to their "special jurisdiction and expertise in family [law] matters." Id at 413. Our review is bound by the judge's findings so long as they are "supported by adequate, substantial, credible evidence." Id. at 411-12. The Appellate division does not disturb the factual findings and legal conclusions of the Trial Court unless convinced they are "so manifestly unsupported by or inconsistent" with the evidence presented. Id. at 412.

In this matter the Plaintiff seeks to "set aside" the parties' MOU stating that she was denied Due Process when the Notice of Motion to Enforce the MOU was filed. The reality is Plaintiff only seeks to extend the litigation between the

parties' when it is clear that the parties entered into the MOU freely and voluntarily at Mediation. The Appellate Division should not disturb these findings of fact as they are specifically supported by the record below and are in no way inconstant with the evidence presented, specifically the MOU, which both parties agreed that they signed at mediation in the presence of the mediator and counsel.

POINT THREE

IF REMANDED, THIS MATTER SHOULD REMAIN WITH JUDGE DANIEL H. BROWN

There is no reason why this matter should be remanded to a different family part judge. As the transcripts and orders reflect, Judge Daniel H. Brown was fair and unbiased during the initial hearing and correctly applied the standards enunciated in Willingborough to the facts of the case at hand and gave both parties an opportunity to submit paperwork and to be heard at the time of the hearing. In no way were the Plaintiff's due process rights violated. Simply because the Plaintiff is unhappy with the result, does not mean that she is entitled to a different Judge.

The Appellate Division has the authority to direct on a remand that a different judge consider the matter to preserve the appearance of a fair and unprejudiced hearing. See, e.g., Carmichael v. Bryan, 310 N.J. Super. 34, 49 (App. Div. 1998). In this matter there is nothing to suggest that Judge Daniel

H. Brown would not provide a fair and unprejudiced hearing were any portion of this matter to be remanded to him. Judge Brown correctly applied the law to the facts and reached the logical conclusion. A litigant is not entitled to a different Judge just because he/she does not like the outcome of their matter. The Judge considered all the arguments raised before him, both in the papers and during oral argument, and reached a just result.

CONCLUSION

The Court below reached the correct conclusion in this matter. The Trial Court found the MOU should be incorporated into the FJOD under the Willingborough matter and awarded the Defendant counsel fees as the Trial Court correctly found that the Plaintiff was acting in bad faith. In addition, the Plaintiff failed to establish that her right to Due Process was violated by the Court, requiring a remand.

Respectfully Submitted,
Irene Shor Esq., LLC

By: Valerie R. Wane
VALERIE R. WANE, ESQ.

	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-004044-23
LYUDMILLA POPOVA, Plaintiff/Appellant, v. NAZIM TAGHIYEV, Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION-FAMILY PART MIDDLESEX COUNTY Docket No. FM-12-699-24J CIVIL ACTION SAT BELOW: HON. DANIEL H. BROWN, J.S.C.

PLAINTIFF/APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

In a case where there were no time-sensitive issues, in response to the *pro se* Plaintiff's request for a brief adjournment of Defendant's motion so that she could file a cross motion and retain an attorney, and where an adjournment would not cause any prejudice to Defendant, the Trial Court *sua sponte* accelerated the motion return date by over two weeks. The Trial Court denied Plaintiff the opportunity to retain counsel and the opportunity to meaningfully be heard on the merits, as required for due process.

During a CMC on June 19, 2024, the Trial Court disregarded Plaintiff's claims that she was "pressed" to sign the MOU and interrupted her so that it could defend her then-attorney. Notwithstanding that the only "facts" the court had were elicited from an in-chambers meeting with counsel, to which Plaintiff was not privy, the court repeatedly warned Plaintiff that she had counsel fee exposure if she did not agree with the MOU. It inappropriately urged Defendant to file a motion for enforcement.

At the June 19 CMC, the court assured Plaintiff that she would be given the opportunity to respond to Defendant's motion and even stated that the scheduled trial date may need to be adjourned to a later date so that the motion could be heard. However, it later reneged on its assurances when, instead of adjourning the trial date to accommodate the August 16, 2024 return date, the

court *sua sponte* accelerated the return date to July 31, which was the previously scheduled trial date. The Trial Court *sua sponte* accelerated the return date of Defendant's motion *in response to Plaintiff's adjournment request*. Plaintiff sought an adjournment to retain counsel and file a cross motion. The court could have simply denied Plaintiff's request and kept the motion on the scheduled return date. But instead, in response to the *pro se* litigant's request for more time, it gave her less time. Even though the court was on notice that Plaintiff wanted to file a cross motion, it foreclosed her from doing so with its *sua sponte* acceleration of the return date. Even without an adjournment, Plaintiff's papers would have been due the day *after* the court decided Defendant's motion.

The issue currently before this Court is not the merits of the MOU, but the error of the Trial Court in predetermining Defendant's motion without affording Plaintiff the opportunity to submit opposition papers. Accordingly, Plaintiff's appeal should be granted: the July 31, 2024 Order should be reversed, the portion of the JOD incorporating the MOU should be vacated, and the matter should be remanded to a new judge.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

Plaintiff relies primarily on the Procedural History set forth in her initial brief.

At the June 19, 2024 CMC, the Trial Court confirmed that the July 31,

2024 trial date that it set may need to be adjourned depending on how the return date of Defendant's motion falls. (1T37-16 to -21)[1].

On July 10, 2024, Defendant filed a motion to enforce the MOU, to incorporate the MOU into a Final Judgment of Divorce ("JOD"), and for counsel fees and costs. (Pa38).[2] The Notice of Motion did not list a return date. (Pa38).

The eCourts notice states that the motion is scheduled for 8:00 a.m. on August 16, 2024. (Pa37). The letter from Defendant's attorney states that the motion is scheduled to be heard on August 16, 2024. (Da91) [3]. The Notice to Litigants appended to Defendant's Notice of Motion states that a response or Cross Motion must be filed fifteen (15) days before the return date. (Pa39-Pa40). Defendant incorrectly states that Plaintiff's Cross Motion would have been due on July 24, 2024. (Db6; Db17)[4].

On July 15, 2024, Plaintiff wrote a letter to the Trial Court enclosing a copy of the MSA that she signed with a few changes. (Pa80). That same day, Defendant's attorney wrote a letter to the Trial Court rejecting Plaintiff's changes to the MSA and asking the court to incorporate the MOU into a JOD. (Da90-Da91).

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[1] "1T" shall refer to the June 19, 2024 transcript; "2T" shall refer to the July 31, 2024 transcript.
[2] "Pa" shall refer to Plaintiff's appendix.
[3] "Da" shall refer to Defendant's appendix.
[4] "Db" shall refer to Defendant's brief.

COUNTERSTATEMENT OF FACTS

Plaintiff relies primarily on the Statement of Facts set forth in her initial brief. Plaintiff amends her Statement of Facts to state that the Trial Court responded to Plaintiff's July 24, 2024 letter. (Pb11[5], Da101). Plaintiff wrote to the court requesting an adjournment of the August 16, 2024 motion hearing and to schedule an in-person CMC to try and resolve the matter. (Pa82). Plaintiff noted that a slight delay in the motion date would not prejudice the Defendant in any way. (Pa82). On July 24, 2024, the court denied Plaintiff's request for an adjournment and *sua sponte* rescheduled the motion to be heard over two weeks earlier than initially scheduled. (Da101). Plaintiff amends her Statement of Facts to state that the court's July 24, 2024 email states that the court *sua sponte* rescheduled the motion from August 16 to July 31. (Da101; Pb12).

On July 15, 2024 and July 24, 2024, Plaintiff sent letters to the court as a self-represented litigant. (Pa80; Pa82; Db15; Db19). Plaintiff's July 24, 2024 letter indicated that she wanted to file a cross motion to Defendant's motion. (Pa82). It also indicated that she had assistance drafting her letter to the court but has been unable to find an attorney willing to represent her with the deadlines imposed. (Pa82).

[5] "Pb" shall refer to Plaintiff's initial brief.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DEMONSTRATED ITS IMPROPER PREDETERMINATION OF THE MOTION AND ITS BIAS AGAINST PLANTIFF WHEN, IN RESPONSE TO THE *PRO SE* PLAINITFF'S ADJOURNMENT REQUEST, IT *SUA SPONTE* ACCELERATED THE MOTION RETURN DATE BY OVER TWO WEEKS, IN TURN PRECLUDING PLAINTIFF FROM FILING A MERITORIOUS RESPONSE AND PREPARTING A MERITORIOUS ORAL ARGUMENT. (Da101; Pa6-Pa14; 1T19-16 to -18; 2T7-15 to -19).

It is "fundamental that the court system is obliged to protect the procedural rights of all litigants and to accord procedural due process to all litigants." Rubin v. Rubin, 188 N.J. Super. 155, 159 (App. Div. 1982). "At a minimum, due process requires that a party in a judicial hearing receive notice defining the issues and an adequate opportunity to prepare and respond." H.E.S. v. J.C.S., 175 N.J. 309, 321 (2003) (quotation and citation omitted). The court system's function is to dispense substantial justice *on the merits*. Rubin, 188 N.J. Super. at 160.

Defendant incorrectly argues that Plaintiff's Cross Motion would be due two weeks after the filing of the notice of motion to incorrectly claim that Plaintiff's papers would have been due on July 24, 2024. (Db23). However, the Court Rule and the Notice to Litigant's appended to Defendant's own Notice of

Motion clearly state that Plaintiff's opposing papers were due 15 days prior to the return date, which would have been ***August 1***, 2024. Rule 5:5-4(c).

Defendant was not directed to file a Notice of Motion "on short notice" as he erroneously states in his brief. (Db23; 1T, generally). Defendant's Notice of Motion does not indicate in any way that it was filed on short notice, although it failed to specify a return date as required by the Court Rules. See Rule 1:6-2(a); (Pa38). Defendant's motion was scheduled to be heard on August 16, 2024. The return date did not change until the court *sua sponte* accelerated it in response to Plaintiff's adjournment request.

Defendant disingenuously alleges that Plaintiff's two letters to the court were responses to Defendant's Motion. (Db23-Db24). Plaintiff's July 15th letter was about the **MSA** and Plaintiff's good faith attempts to reach an agreement as to its terms. The letter did not address the merits of enforcement of the **MOU**, which was the subject of Defendant's Motion. It is an even bigger stretch to claim that Plaintiff's July 24th letter was a response to Defendant's Motion because that letter requested that the court conduct a CMC as soon as possible or adjourn the return date so that Plaintiff could have the opportunity to "consult with counsel to prepare the necessary cross application." (Pa82). Defendant argues that Plaintiff was given an opportunity to obtain counsel prior to the July 31st hearing. (Db25). But, as Plaintiff indicated in her July 24th letter, she had

assistance preparing the letter, but she has "been unable, thus far to find an attorney willing to represent [her] formally in light of the deadlines imposed." (Pa82). Moreover, Plaintiff informed the court at the June 19, 2024 CMC that she had already spoken to another attorney, but they declined to work with her because there was not enough time to evaluate the case. (1T24-5 to -8; Db25).

Defendant's claim that Plaintiff's few statements to the court on July 31, 2024 constitute a meritorious, meaningful response to Defendant's Motion is incorrect. (Db24-Db25). Plaintiff made three points in her statements, which were all made in response to the court's opening remarks that day. This is apparent because Plaintiff states, "Your Honor, in your speech I heard several statements that I disagree with." (2T8-18 to -19). She then tells the court the things it stated with which she disagreed. Significantly, Plaintiff, then self-represented, stated to the court that she needs an attorney because she does not know the judicial protocol and she does not speak the legal language. (2T8-21 to -25). It is clear from Plaintiff's statements responding to the court's opening remarks that she was unaware that she was supposed to be arguing against Defendant's motion at that time.

In addition, Plaintiff's adjournment request was not just about retaining an attorney because she also indicated in her July 24th letter that she intended to file a Cross Motion. That is a critical point that the Trial Court ignored when it

sua sponte accelerated the motion hearing by over two weeks in response to Plaintiff's adjournment request. Not only did the court cut short Plaintiff's time to file a written response, but it also significantly shortened her time to prepare for oral argument. Plaintiff is not an attorney, and she is not a native English speaker. She made the court aware that she was having trouble retaining an attorney based on the court's deadlines. Instead of affording Plaintiff an additional two weeks as she requested or even just denying her request, the court took it a step further and eliminated over two weeks of preparation time from Plaintiff, a significant disadvantage to an already disadvantaged litigant. The court's action is contrary to its assurances to Plaintiff at the June 19 CMC, where it stated that Plaintiff would be permitted to respond to Defendant's motion and that the July 31 trial date may even need to be adjourned depending on when the return date of the motion falls. The Trial Court's bias against Plaintiff and its predetermination of Defendant's Motion is evident from its comments during the June 19 CMC and its *sua sponte* acceleration of the Motion return date. At the CMC, the judge chided Plaintiff for seeking to retain a "third attorney" and spent the majority of the conference explaining to Plaintiff why she should not oppose enforcement of the MOU based on the "facts" elicited primarily from the in-chambers meeting with counsel. The judge repeatedly interrupted Plaintiff when she tried to explain her position and defended Plaintiff's then-attorney

based on his prior experiences with the attorney. The judge's prior experiences with Plaintiff's then-attorney as an adversary and as a judge do not have any bearing on Plaintiff's experience with him as a client. The judge stated to Plaintiff no fewer than six separate times that she had counsel fee exposure if she did not agree with the MOU. The judge incorrectly opined that if, hypothetically, Plaintiff's attorney did not perform ethically, that it is not a basis to set aside the MOU. (1T21-23 to 22-2). See Addesa v. Addesa, 392 N.J. Super. 58, 66 (App. Div. 2007) ("A spousal agreement may be reformed when . . . it is the product of fraud or overreaching by a party with power to take advantage of a confidential relationship")(internal quotation and citation omitted).

The Trial Court accelerated the motion return date in response to Plaintiff's request for more time to prepare, under circumstances where there would be zero prejudice to Defendant if an adjournment were granted. This is not a matter involving a child; there are no issues that warranted an acceleration. The Trial Court also defended Plaintiff's then-attorney in response to her attempts to explain that she did not understand the terms of the MOU and that she was pressured to sign it. The court faulted Plaintiff for wanting a new attorney, emphasizing repeatedly that it would be her third attorney. It is clear that the court's view of Plaintiff is tainted, and it predetermined this matter. On remand, a new judge should be assigned to the case.

A. The Trial Court erroneously ruled on the enforceability of the MOU based on "facts" elicited primarily from the in-chambers meeting with counsel and Defendant's Certification, and without a meaningful response from Plaintiff.

The Trial Court prematurely determined that the MOU was enforceable, and therefore it did not consider the merits of Plaintiff's claims. Although Plaintiff was not able to fully present her case, it is clear from the limited record that Plaintiff felt pressured into signing the MOU, that she did not fully understand the MOU because her questions were not answered, she was not satisfied with her attorney, and she did not sign freely and voluntarily. Contrary to the court's findings, these claims could form a basis to avoid enforcement.

Defendant argues that "it is clear that the parties entered into the MOU freely and voluntarily at Mediation" and that "Plaintiff only seeks to extend the litigation between the parties . . . ." (Db31-Db32). Defendant relies on case law regarding the enforceability of *consensual* agreements. However, Defendant and the court fail to acknowledge that at the June 19, 2024 CMC, Plaintiff attempted to explain that she felt like she was "pressed to sign it." (1T5-18 to -20). Plaintiff also attempted to explain that she had questions about the terms of the MOU, which she posed to both her attorney at the time and the mediator, and which were unanswered. Plaintiff did not understand nor agree to the terms of the MOU. It was therefore not a consensual nor a voluntary agreement, and it is not entitled to an assumption of enforceability.

Defendant's argument that Plaintiff's claims are "completely unsubstantiated" ignores that Plaintiff did not have the opportunity to meaningfully present the merits of her claims. (Db29-Db30). Accordingly. Defendant's argument and the Trial Court's decision have the same underlying problem – a litigant cannot substantiate their claims unless they are given the opportunity to do so.

Defendant argues that the Trial Court's findings of fact should not be disturbed. (Db31-Db32). However, a trial court's factual findings should not be afforded deference where the facts adduced are based on an off the record in-chambers meeting with counsel, the certification of one party, and no testimony. But cf. Cesare v. Cesare, 154 N.J. 394, 413 (1998); see also Harrington v. Harrington, 281 N.J. Super. 39, 47 (App. Div. 1995) (Db31-Db32). The axiom that a trial court's findings of fact should receive deference from a reviewing court is premised on the assumption that the trial court "has a better perspective than a reviewing court in evaluating the veracity of witnesses. . . ." Cesare, 154 N.J. at 412 (internal quotation and citations omitted). The reason that a trial court achieves a better perspective is because it "hears the case, sees and observes the witnesses, [and] hears them testify. . . ." Ibid. However, in this case, there were no witnesses, and the parties did not testify, which means that the Trial Court was not in a position to have a better perspective than this Court.

"[T]rial judges cannot resolve material factual disputes upon conflicting affidavits and certifications." Harrington, 281 N.J. Super. at 47 (citations omitted). Accordingly, this Court should not afford any deference to the Trial Courts factual findings.

CONCLUSION

It was improper for the Trial Court to rule on the enforceability of the MOU while simultaneously denying Plaintiff the opportunity to meaningfully respond to Defendant's motion. The court's response to Plaintiff's adjournment request demonstrates its bias against Plaintiff and its predetermination of the matter in Defendant's favor. The court could have simply denied Plaintiff's request and followed the scheduled return date, even though an adjournment would not have prejudiced Defendant. But instead, the court *sua sponte* accelerated the motion return date, even though it was on notice that Plaintiff sought to file a cross motion and even though it assured Plaintiff during the June 19, 2024 conference that she would have an opportunity to respond. The court's *sua sponte* acceleration denied Plaintiff the opportunity to meaningfully respond to Defendant's motion in the time permitted under the Court Rules. That denial is the basis for Plaintiff's appeal. Accordingly, the July 31, 2024 Order should be reversed in its entirety, the portion of the JOD incorporating the MOU should be vacated, and on remand, a different judge should be assigned to this case.

Respectfully submitted,

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