SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1779-15T4

NANCY L. THOMPSON,

Plaintiff-Respondent,

v.

JOHN P. THOMPSON,

Defendant-Appellant.

Submitted May 15, 2017 – Decided June 1, 2017

Before Judges Haas and Currier.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Morris County, Docket No. FM-14-450-12.

Lombardo Law Offices, LLC, attorneys for appellant (Bart W. Lombardo, on the briefs).

Celli & Schlossberg, LLC, attorneys for respondent (Vincent P. Celli, on the brief).

PER CURIAM

In this post-judgment matrimonial matter, defendant appeals from paragraph eleven of the September 29, 2015 order of the Family Part, granting plaintiff's motion to require defendant to pay her "one ha[lf] of the proceeds of the liquidation of . . .

[d]efendant's annuity with Local 197." Defendant also appeals from the trial court's November 30, 2015 order denying his motion for reconsideration and ordering him to pay plaintiff $1050 in attorney's fees and costs. We are constrained to reverse and remand because the trial court did not conduct a plenary hearing to resolve the parties' sharply conflicting factual assertions regarding the equitable distribution of defendant's annuity.

The parties were married in May 1987 and divorced in June 2013. However, they did not finalize their property settlement agreement ("PSA") until January 16, 2014.

Paragraph 3.6 of the PSA stated that the parties were to "equally split their retirement assets[,]" including defendant's "two Union pensions, Local 197 and Local 11," and defendant's annuity. Although not specified in the PSA, the parties agree that the annuity referred to in paragraph 3.6 was one that defendant held through Local 197 at some point during the parties' marriage.

In July 2014, defendant filed a motion seeking to enforce various provisions of the PSA. Among other things, defendant alleged that plaintiff had failed to turn over a number of his personal items to him, including tools, a patio set, and a toy truck collection. Defendant also sought an order requiring an

escrow agent to distribute the proceeds from the sale of the marital home to the parties.

In response, plaintiff filed a cross-motion responding to defendant's contentions, and seeking relief of her own concerning the enforcement of the PSA. With reference to the present appeal, plaintiff asked that the trial court award her a $26,277 credit from defendant's share of the proceeds of the sale of the marital home representing what she believed was her 50% share of defendant's Local 197 annuity that had not yet been paid to her.

In her accompanying certification, plaintiff alleged that in May 2014, she learned for the first time that defendant had cashed out the Local 197 annuity in May 2010, over three years before the parties divorced. Plaintiff asserted that there was $52,805.81 in the annuity when defendant withdrew these funds.[1] She also argued that her signature on a form defendant submitted to obtain the money had been forged.

In his reply certification, defendant stated that plaintiff was aware of the withdrawal of the annuity funds during the marriage and knew they were used to pay marital bills. He also

[1] According to plaintiff, defendant paid $10,561.16 in taxes on the money in the annuity fund and a $250 administration fee. Thus, she asserted that defendant received $41,994.65 in net proceeds.

asserted that plaintiff had "emptied [$50,000 from] a joint bank account" during the marriage, and "put it into her own name[.]"

On October 30, 2014, the parties agreed to the entry of a consent order. The consent order listed several different payments and credits that each party was to pay the other from the share of the sale proceeds from the marital home and other sources. The order also required plaintiff to give defendant a chainsaw, two leaf blowers, a bench grinder, and his aunt's green patio set.

The consent order does not specifically mention plaintiff's claim for a $26,277 credit from defendant's share of the escrow funds as her share of the Local 197 annuity, or defendant's allegation that plaintiff had improperly taken $50,000 of joint marital funds prior to the parties' divorce. However, paragraph nine of the consent order contained a catch-all provision that specifically stated:

> Both parties hereby agree that neither has a claim against the other for any personalty and further agree that any financial credits outstanding due one to the other have been resolved to their satisfaction as set forth herein.

Eight months later, defendant filed a motion on June 22, 2015, seeking to reduce his alimony and child support obligations. In response, plaintiff filed a cross-motion. In the cross-motion, plaintiff asked for an order "[c]ompelling [d]efendant to pay over

to [p]laintiff one-half of the proceeds of liquidation of defendant's annuity with Local 197." In her certification in support of her motion, plaintiff again asserted that defendant had cashed out the annuity in May 2010 while the parties were still married and that she had not been paid her share.

Plaintiff did not mention the parties' October 30, 2014 consent order in her certification. However, in defendant's reply certification, he asserted that this marital asset was disposed of by paragraph nine of the consent order. He also explained that plaintiff agreed to give up her claim to a share of the Local 197 annuity in return for his agreement not to pursue his claim that "she absconded with tens of thousands of dollars in marital funds immediately before she filed for divorce." Defendant also stated that the parties' "attorneys recommended that those claims be offset against one another and closed. Which they were."

Following oral argument, the trial judge entered an order on September 29, 2015 that, in paragraph eleven, required defendant to pay plaintiff "one ha[lf] of the proceeds of the liquidation of . . . [d]efendant's annuity with Local 197." In briefly explaining this ruling in his written statement of reasons, the judge merely noted that plaintiff's request for relief was "within the provisions of the parties' PSA[.]" The judge did not refer to the parties' October 30, 2014 consent order or defendant's

contention that the parties amicably resolved the issue concerning the annuity at that time.

On October 20, 2015, defendant filed a motion for reconsideration. Once again, defendant asserted that plaintiff's claim for a share of the Local 197 annuity was embodied in the catch-all provision of paragraph nine of the October 30, 2014 consent order, together with his own demand for the return of marital funds from plaintiff. Defendant also pointed out that if plaintiff truly believed that her request for a share of the annuity had not been addressed in the consent order, she would have immediately brought it to the court's attention at that time. Instead, defendant noted that plaintiff did not raise the issue until she filed her cross-motion many months later.

In her responsive certification, plaintiff alleged that defendant was more concerned at the time of the October 30, 2014 consent order with getting his personal property back and, therefore, her claim for a share of the annuity "kept being pushed aside to discuss the other issues in the motion and we never went back to resolve the annuity issue." Thus, plaintiff argued that the annuity "issue was never addressed or resolved" in the consent order.

In his reply certification, defendant stated that it was "simply not plausible to believe that . . . plaintiff . . . would

have let the issue sit for over one full year before raising it again. The matter [of the Local 197 annuity] was resolved by way of a consent order." Defendant also contended that the amounts each party sought concerning the annuity and the marital bank accounts "were very close and we simply credited them against one another as set forth in paragraph 9 of the consent order."

At oral argument, defendant's attorney reiterated defendant's position that the parties' attorneys resolved the distribution of the annuity, and the issues concerning the money plaintiff allegedly took during the marriage, in the October 30, 2014 consent order. However, the trial judge did not conduct a plenary hearing to take testimony from the parties or their respective attorneys to determine the credibility of either parties' claims or the intent underlying the catch-all provision of the consent order.

Instead, the trial judge issued an order on November 30, 2015, denying defendant's motion for reconsideration and again ordering him to pay plaintiff one-half of the proceeds of the liquidation of the Local 197 annuity.[2] In his accompanying statement of reasons, the judge failed to explain why he did not hold a plenary hearing concerning the parties' widely divergent factual contentions. Instead, the judge stated that he did "not

[2] The order did not specify the amount defendant was to pay plaintiff.

find it plausible that an item worth $41,994.55 would have been left to what . . . [d]efendant argues is a sort of catch-all paragraph in a consent order. Such an argument is even less tenable when one considers that the parties referred to several other valuable items specifically." The judge also ordered defendant to pay plaintiff $1050 in attorney's fees and costs. This appeal followed.

On appeal, defendant argues that the trial judge erred by granting plaintiff's request for half of the Local 197 annuity. For the reasons that follow, we reverse and remand for a plenary hearing.

We normally owe substantial deference to the Family Part's findings of fact because of that court's special expertise in family matters. Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). Thus, "[a] reviewing court should uphold the factual findings undergirding the trial court's decision if they are supported by adequate, substantial and credible evidence on the record." MacKinnon v. MacKinnon, 191 N.J. 240, 253-54 (2007) (alteration in original) (quoting N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007)). However, we owe no special deference to the judge's legal conclusions. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Interpretation and construction of a contract, such as the consent order in this

case, is a matter of law for the trial court, subject to de novo review on appeal. Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998); Kaur v. Assured Lending Corp., 405 N.J. Super. 468, 474 (App. Div. 2009) (reviewing the enforcement of a settlement agreement de novo).

Further, we review the denial of a motion for reconsideration to determine whether the trial court abused its discretion. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). Reconsideration should be granted in "those cases which fall into that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Id. at 384 (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401-02 (Ch. Div. 1990)).

After reviewing the record in light of these principles, we are constrained to reverse and remand the trial judge's decision ordering defendant to pay plaintiff half of the Local 197 annuity because the judge did not conduct a plenary hearing concerning the proper interpretation of the October 30, 2014 consent order.

When determining the meaning of a matrimonial agreement, such as a consent order, courts apply the "basic rule of contractual interpretation that a court must discern and implement the common

intention of the parties." Pacifico v. Pacifico, 190 N.J. 258, 266 (2007). Courts usually enforce contracts as written. Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960).

However, when a contract is ambiguous in a material respect, the parties must be given the opportunity to illuminate the contract's meaning through the submission of extrinsic evidence. Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 268-70 (2006). A contract is ambiguous if its terms are "susceptible to at least two reasonable alternative interpretations." Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997) (quoting Kaufman v. Provident Life & Cas. Ins. Co., 828 F. Supp. 275, 283 (D.N.J. 1992), aff'd, 993 F.2d 877 (3d Cir. 1993)).

In attempting to resolve ambiguities in a document, courts may consider extrinsic evidence. While such evidence should never be permitted to modify or curtail the terms of an agreement, a court may "consider all of the relevant evidence that will assist in determining the intent and meaning of the contract." Conway, supra, 187 N.J. at 269. As the Court explained in Conway,

> [e]vidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement. This is so even when the contract on its face is free from ambiguity. The polestar of construction is the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant

> circumstances, and the objects they were thereby striving to attain are necessarily to be regarded. The admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance.
>
> [Ibid. (quoting Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301-02 (1953)).]

Here, the parties disputed the meaning of the catch-all provision of paragraph nine of the October 30, 2014 consent order. The key provision in this paragraph is the parties' statement that they "agree that any financial credits outstanding due one to the other have been resolved to their satisfaction as set forth herein."

On the one hand, defendant certified that he and his attorney negotiated with plaintiff and her attorney concerning their respective claims that each party took marital funds during the marriage. Defendant further certified that at the conclusion of these negotiations, the parties specifically agreed that plaintiff would give up her claim for a share of the Local 197 annuity if he relinquished any claim to a share of the marital funds plaintiff allegedly took for herself during the marriage.

On the other hand, plaintiff certified that the issue of the annuity kept getting pushed aside as the parties battled over other items, such as tools and lawn furniture. She noted that the

annuity was not specifically mentioned in the consent order and, therefore, alleged that it was not addressed in that document.

Rather than conducting a plenary hearing to resolve the parties' competing factual assertions concerning their intent in including paragraph nine in the consent order, the trial judge simply stated that he believed it was implausible that the parties would have included a large amount of money like the annuity in a catch-all provision, rather than in a separate paragraph specifically referring to it. On this record, however, defendant's competing contention that if the annuity had really not been addressed in the consent order, plaintiff surely would have immediately brought it to the court's attention, was equally plausible. In addition, there was a clear factual dispute between the parties as to whether plaintiff signed the document permitting defendant to remove funds from the Local 197 annuity in the presence of a notary or whether, as plaintiff alleged, her signature on that document was a forgery.

Under these circumstances, the trial judge should have conducted a plenary hearing. "[I]n a variety of contexts, courts have opined on the impermissibility of deciding contested issues of fact on the basis of conflicting affidavits and certifications alone." State v. Pyatt, 316 N.J. Super. 46, 50 (App. Div. 1998) (citations omitted), certif. denied, 158 N.J. 72 (1999). In

particular, where the parties' pleadings raise issues of fact or require credibility determinations, relief cannot be denied absent a plenary hearing. Whitfield v. Whitfield, 315 N.J. Super. 1, 12 (App. Div. 1998). Here, the parties filed conflicting certifications concerning the intent of paragraph nine of the October 30, 2014 consent order, which required a plenary hearing to resolve.

Therefore, we reverse the portions of the September 29, 2015 and November 30, 2015 orders that required defendant to pay plaintiff half of his Local 197 annuity, and remand for a plenary hearing as set forth in this opinion. In light of this determination, we also reverse the portion of the November 30, 2015 order requiring defendant to pay plaintiff $1050 in attorney's fees and costs, without prejudice to the ability of either party to seek such fees as part of the remand. The remand proceedings should be completed within 120 days.

Reversed and remanded for a plenary hearing. We do not retain jurisdiction.