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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3244-15T1

KRISTIN C. KELLER,

Plaintiff-Respondent,

v.

TIMOTHY P. KELLER,

Defendant-Appellant.

Argued April 25, 2017 – Decided December 8, 2017

Before Judges Suter and Grall.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Somerset
County, Docket No. FM-18-0761-15.

Gregory A. Pasler argued the cause for
appellant (Weinberger Law Group, LLC,
attorneys; Gregory A. Pasler, on the brief).

Jane Ellen Doran argued the cause for
respondent (Smith & Doran, PC, attorneys; Jane
Ellen Doran, on the brief).

The opinion of the court was delivered by

SUTER, J.A.D.

Timothy Keller (defendant) appeals the February 17, 2016
order denying reconsideration of his request to terminate or reduce
his payment of permanent alimony to Kristen Keller (plaintiff),

his former spouse, and his request to modify child support, including payment of college expenses, because of a reduction in his income. We agree that reconsideration should have been granted and reverse the February 17, 2016 order to the extent it denied reconsideration of these issues.

I.

Plaintiff and defendant were married in 1989 and divorced in 2006. They had two children, one of whom is a full time college student in Colorado, and another who is now emancipated. Because we write for parties who are familiar with the case, we discuss the facts that are necessary to our decision.

When the parties divorced in 2006, defendant was general counsel with Lucent Technologies. The parties divorced while they were living in Hong Kong where defendant was assigned. The parties agree their lifestyle overseas was very comfortable, affording them a spacious apartment, live-in help, private schools for the children and membership at a country club. Defendant's salary averaged \$582,000 for the three years preceding the 2006 divorce.¹ Plaintiff was not working outside the home.

¹ This included his base salary of \$215,000 and income from bonuses and deferred compensation grants, as follows:

2003	\$492,672
2004	\$562,769
2005	\$690,565

The Hong Kong divorce did not become final until May 2006. The best we can discern from what was provided by the parties is that they settled their divorce issues by entering into a "Consent Summons,"² a January 2006 agreement that supplemented the Consent Summons, a March 1 2006 consent order, and an April 2006 consent order that "supersede[d] and replace[d]" the March order.³ The April order did not reference the January supplemental agreement. The Family Part judge concluded the January supplemental agreement and the April consent order survived the final judgment of divorce. We have no reason to disturb that determination.

With respect to the children, the parties agreed in the April consent order that plaintiff had "sole custody." Defendant was to pay "maintenance" of "\$2887 per month per child" until the child turned eighteen "or ceases her full time tertiary/post-graduate education, whichever is later." The January 2006 supplemental agreement addressed college education and provides,

[i]t is the expectation of the parties that the children will attend college. [Defendant] will be primarily responsible for paying for the children's college education. However, it is understood that [] student aid, student loans, grants, etc. may also need to be

² This document was not included in the record.

³ Regarding alimony and child support, the April consent order contained the same provisions as the March consent order.

utilized to the extent necessary and available.

Defendant paid all the college tuition and expenses for their older daughter. He also paid all of the younger daughter's tuition and expenses until the end of 2014.

The April consent order required defendant to pay alimony to plaintiff in the amount of \$10,756 per month "during the joint lives of the parties or until [plaintiff's] remarriage, whichever is the earlier." He paid the taxes on this income for plaintiff making this "after tax income" for her. Defendant agreed to maintain a \$1.5 million life insurance policy, naming plaintiff as beneficiary. No one disputes that defendant complied with these obligations for eight years until he was terminated from his employment.

In November 2014, defendant learned that his job with Lucent was terminated effective March 31, 2015. He received a severance payment equivalent to one year's salary, or \$472,000, which yielded \$301,738.53 in net income. His monthly unemployment benefits of \$636 (\$572 net), expired at the end of March 2015. He received \$783 per month from a supplemental pension. He sold restricted stock shares for income.

Defendant alerted plaintiff that his employment had been terminated, and asked for relief from his support obligations.

She filed a motion asking to register the Hong Kong divorce in New Jersey and to enforce its terms. Based on a claim of changed circumstances, defendant cross-moved to eliminate or modify his alimony obligation and to reduce child support. He sought discovery of plaintiff's financial information.

The Family Part order, entered July 9, 2015, extended comity to the parties' divorce, the January supplemental agreement and the April consent order. The court denied defendant's request to modify child support, finding that "[d]efendant . . . failed to satisfy his burden of demonstrating a permanent change in circumstances." Although noting that defendant provided evidence that "he has conducted a diligent search for comparable employment," the court was not satisfied defendant was not able to find employment "with an income somewhat comparable" to what he was earning or greater than his severance and unemployment.

In considering defendant's request to modify alimony, the court considered the application "somewhat premature." Defendant's 2014 earning capacity had not substantially diminished. The court gave "significant consideration" to the parties' matrimonial agreement, noting that plaintiff had waived an interest in some of their joint property "in exchange for permanent alimony." Defendant's application for a reduction would deprive her "of the benefit of her bargain without just cause."

The court referenced defendant's current spouse in noting that they have over \$2 million in assets, as well as "significant savings and retirement accounts" and that "[d]efendant's assets [were] available." The court denied defendant's request to terminate or reduce alimony because he did not "demonstrate that his financial circumstances have changed." Plaintiff was not ordered to provide financial discovery.

Defendant was ordered to "continue paying 100% of any and all college education expenses" of the younger daughter. The court found defendant "ratified . . . through his conduct and words" the January consent order when he paid 100% of the children's college expenses and "took control" of the children's custodial accounts. The court found "the parties had an enforceable agreement that defendant would assume full responsibility for the children's college expenses." Defendant was equitably estopped to prevent "an injustice to plaintiff." Both parties' requests for counsel fees were denied.

Defendant's request for reconsideration was denied on February 17, 2016. In his motion, defendant reported he had just obtained full time employment with Pfizer earning a base salary of \$250,000 and a target bonus of 25% but that this was not enough to satisfy his monthly obligations. In denying defendant's motion, the court stated that defendant's bonus could range from zero to

two hundred percent, meaning that defendant might still earn between \$300,000 and \$400,000 per year. The court mentioned that defendant did not supply information about the supplemental pension or his restricted stock options, nor had he disclosed his enhanced lifestyle after the divorce. The court denied modification and continued to deny counsel fees.

On appeal, defendant contends the court erred by not granting reconsideration of the July 9, 2015 order. The permanent and substantial decrease in his income was involuntary and constituted changed circumstances. The court should have ordered discovery and a plenary hearing because there were genuine issues of material fact. By not evaluating the factors set forth in N.J.S.A. 2A:34-23(k), the court failed to consider "relevant and material" information which included plaintiff's finances. The court erred by taking into consideration the income of his current spouse.

Plaintiff opposes this claiming that defendant did not meet his burden of showing changed circumstances that were permanent. Defendant agreed to pay a specific amount of child support and alimony per month. For a modification, the court should examine all of defendant's assets not just his income. Defendant's case information statements show his net worth increased post-divorce. When defendant applied for reconsideration, he worked at Pfizer only a few weeks and his bonus income was unknown. He could have

told the court about this employment before it entered the July 2015 order. N.J.S.A. 2A:34-23(k) did not apply because the parties were divorced before this statute became effective.

II.

On reconsideration, a trial court's "decision will be left undisturbed unless it represents a clear abuse of discretion." Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015) (citing Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994)). Reconsideration is appropriate where "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." Ibid. Reconsideration is also appropriate "if a litigant wishes to bring new or additional information to the [c]ourt's attention which it could not have provided on the first application" for relief. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (citation omitted).

A.

We agree with defendant that the court should have reconsidered and reviewed his application to modify alimony. Alimony and support orders "are . . . subject to review and modification on a showing of 'changed circumstances.'" Lepis v.

Lepis, 83 N.J. 139, 146 (1980) (citations omitted). "The party seeking modification has the burden of showing such 'changed circumstances' as would warrant relief from the support or maintenance provisions involved." Id. at 157 (citing Martindell v. Martindell, 21 N.J. 341, 353 (1956)). An "increase or decrease in the supporting spouse's income" is one example of "changed circumstances" that might warrant a modification of support obligations. Id. at 151 (citations omitted). However, a decline in income that is merely temporary is insufficient. See Ibid.; Bonnano v. Bonnano, 4 N.J. 268, 275 (1950). Assessment of changed circumstances requires a judge to examine the parties' current situation and the situation when the order was entered. Beck v. Beck, 239 N.J. Super. 183, 190 (App. Div. 1990).

The 2014 Alimony Reform Act's amendments to N.J.S.A. 2A:34-23 address factors to consider where a non-self-employed obligor seeks modification of alimony based on loss of employment. These include "the reasons for any loss of income," "documented efforts" to find employment, income of the obligee, severance compensation, changes in the respective financial circumstances of the parties and "reasons for any change in either party's financial circumstances . . . including, but not limited to, . . . enhanced earnings or financial benefits received from any source since the date of the order." N.J.S.A. 2A:34-23(k).

When defendant initially applied to modify alimony, he had not yet obtained new employment. The Family Part correctly concluded that defendant's application was "premature," because his severance package from his previous employment, which was equivalent to one year's base salary, had only been exhausted "sometime in late 2014 when he began receiving unemployment benefits." The judge was not "convinced that [d]efendant's earning capacity [was] substantially diminished or that he is unable to pay support at the previously agreed-upon level." Indeed, defendant's 2014 tax return did not show a change for the negative.⁴

On reconsideration, however, the judge acknowledged that defendant's new base salary was "far less than he received in his prior position." Defendant had just commenced employment with his new employer. Although eligible for a bonus, this would not occur until the next year and even then would be prorated. Defendant's net income of \$12,227 per month and the supplemental pension of \$700 per month were inadequate to satisfy defendant's \$20,840 per month support obligations. Defendant was able to document that his termination from Lucent was involuntary. This was new

⁴ Defendant's 2014 joint tax return revealed gross wages of \$1,108,453 and adjusted gross income of \$985,515.⁴

information that evidenced a significant decline in income warranting reconsideration.

The court did not consider the factors in N.J.S.A. 2A:34-23(k) in determining whether defendant had shown a prima facie case of changed circumstances. Plaintiff argues these factors do not apply because the parties divorced in 2006 before the September 10, 2014 effective date of the 2014 amendments. See Spangenberg v. Kolakowski, 442 N.J. Super. 529, 532, 538-39 (App. Div. 2015) (declining to apply the amended cohabitation provision in subsection (n) retroactively).

We are satisfied the record presented enough evidence of a significant change in circumstances that reconsideration was warranted. It has always been the case that a change in circumstances would permit a party to request a modification of alimony. See Lepis, supra, 83 N.J. at 146. However, the court also should have considered the factors in N.J.S.A. 2A:34-23(k) because application of those factors was not inconsistent with the agreements. There was nothing in them that prohibited a request to modify the support obligation based on loss of employment, or that imposed a standard other than changed circumstances. Therefore, we are constrained to remand so that the court can consider all of the factors identified in N.J.S.A. 2A:34-23(k) to

determine if defendant demonstrated a significant change in circumstances to warrant a hearing on his motion to modify alimony.

B.


We agree with defendant that reconsideration also should have been granted to review child support and college expenses. In Jacoby v. Jacoby, 427 N.J. Super. 109, 113 (App. Div. 2012), we confirmed that a "child's attendance at college is a change in circumstances warranting review of the child support amount." We said that "[t]he payment of college costs differs from the payment of child support for a college student. Id. at 121 (citing Hudson v. Hudson, 315 N.J. Super. 577, 584 (App. Div. 1998) ("Child support and contribution to college expenses are two discrete yet related obligations imposed on parents.")). We clarified "the inapplicability of a Guidelines support award and the need for a trial judge to review the child's needs." Id. at 122. We said that "[t]he trial judge must consider and determine the child's obligation to pay defined expenses, within his or her ability." Ibid. "[T]here is no presumption that a child's required financial support lessens because he or she attends college." Id. at 113.

Plaintiff argues that Jacoby does not apply because defendant agreed to a specific level of child support through the children's post-graduate education. The parties' January supplemental agreement contemplated the payment of college expenses and the

April consent order contemplated the payment of child support in a specific amount. However, neither of the agreements precluded modification based on changed financial circumstances. In fact, the January supplemental agreement appears to have contemplated modification because it made defendant primarily, but not solely, responsible for college expenses and referenced other sources of funding such as student loans. "[T]he level of the parties' respective incomes bears directly on the amount of child support, and whether and to what extent they are able to contribute to college costs." Spangenberg, supra, 442 N.J. Super. at 541. The trial court erred in light of Jacoby by not granting reconsideration.

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION