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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3747-15T4

JOHN JAMES PIERSON,

Plaintiff-Appellant,

v.

NANNETTE PIERSON,

Defendant-Respondent.

Submitted October 11, 2017 – Decided November 6, 2017

Before Judges Carroll and Leone.

On appeal from the Superior Court of New
Jersey, Chancery Division, Family Part, Morris
County, Docket No. FM-14-0348-06.

Kozyra & Hartz, LLC, attorneys for appellant
(Judith A. Hartz, of counsel and on the brief;
Michael A. Mattessich, on the brief).

Respondent has not filed a brief.

PER CURIAM

In this post-judgment matrimonial matter, plaintiff John
Pierson appeals from certain provisions of a January 29, 2016
order, and an April 26, 2016 order denying reconsideration.
Pursuant to these orders, plaintiff was required to reimburse

defendant Nannette Pierson \$258,100, representing one-half the rental value of the former marital residence during the period that plaintiff occupied the home after the divorce. Additionally, plaintiff was prohibited from having any further involvement in the sale of the former marital home, and ordered to reimburse defendant \$16,566 for past health insurance costs. Finding no basis to disturb these orders, we affirm.

The parties were married in October 1985 and have two children who are emancipated. The judgment of divorce and a supplemental judgment of divorce resulted from a settlement between the parties on various issues. Notably, the marital home had previously been listed for sale, and the parties agreed to again immediately relist it for sale.

A four-day trial ensued on the remaining contested issues, following which the court entered a second supplemental judgment of divorce on July 30, 2007. In relevant part, the second supplemental judgment granted plaintiff sole and exclusive possession of the marital home; ordered defendant to vacate the home by September 1, 2007; and directed plaintiff to pay defendant \$50,000 as an advance on equitable distribution for the first year after the divorce and another \$50,000 for the second year if the marital home was not sold by then.

Defendant appealed the second supplemental judgment. Among other things, defendant challenged her involuntary removal from the residence; the amount of interim support she was to receive between her removal and the sale of the residence; and the responsibility for payment of her health insurance coverage.

In an unpublished opinion, we affirmed in part and reversed in part. Pierson v. Pierson, No. A-1930-07 (App. Div. March 18, 2010) (slip op. at 18). Pertinent to the issues raised in the present appeal, we determined:

The trial judge abused his discretion in failing to compensate [defendant] for [plaintiff's] continuing use of the joint residence from which she had been excluded. Consequently, we reverse that aspect of the second supplemental judgment and remand to the Family Part for calculation of [defendant's] share of the rental value of the marital residence from the time she moved out through the time of sale.

[Id. at 14].

We further noted that the parties had not agreed on their ongoing responsibility for defendant's health insurance and reserved this dispute for trial. Id. at 16. Although the trial court denied defendant relief on this issue, it did not state its reasons for doing so. Ibid. Consequently, we reversed that portion of the second supplemental judgment and remanded the issue for decision by the trial court. Ibid.

It appears the case then laid dormant in the trial court for several years. In April 2015, defendant filed a motion in aid of litigant's rights seeking various forms of relief, in accordance with our 2010 decision. She explained she delayed seeking relief due to health issues. Specifically, defendant sought to: (1) eliminate plaintiff from any decision-making authority in the sale of the former marital home and grant her the exclusive right to conduct negotiations; (2) appoint a receiver to collect mortgage payments and oversee the sale of the home; (3) establish a fair rental value for the home and compel plaintiff to pay her monthly rent; (4) compel plaintiff to pay her health insurance premiums; and (5) compel plaintiff to pay her counsel fees and costs.

Plaintiff opposed the motion. He also filed a cross-motion seeking to: (1) suppress the certification of defendant's counsel; (2) suppress defendant's expert report regarding the home's rental value as unreliable and incomplete; (3) schedule a case management conference (CMC) and/or appoint a mediator; and (4) schedule a plenary hearing. Plaintiff also sought an award of counsel fees and costs.

The motions were assigned to Judge Catherine Enright, who was not the trial judge. On July 24, 2015, Judge Enright entered an order accompanied by an eleven-page statement of reasons. The judge granted defendant's request that plaintiff pay her one-half

the fair market rental value of the home. However, the judge noted defendant's expert report was "not certified nor subject to cross-examination at this stage." Accordingly, the judge appointed a neutral expert, Professional Appraisal Associates, to determine the home's rental value. She elaborated:

As confirmed by the Appellate Division, [p]laintiff essentially has been living in a joint asset without paying rent to the co-owner. It appears also that [p]laintiff has not been paying the mortgage on the marital home. In fact, the mortgage has increased since the time of final hearing eight years ago. This fact is addressed below, but [p]laintiff remains responsible to compensate [d]efendant for his continued possession of the marital home from the time she moved out of [it] through the time of its sale. The amount of compensation can be calculated once appropriate proofs are provided to the [c]ourt regarding the home's fair market rental value.

Regarding the sale of the former marital home, Judge Enright ruled:

It appears the trial court presumed that the marital home would have been sold well before now, but almost eight years post-divorce, the marital home has still not sold. The [c]ourt understands that there have been situations that have arisen, outside the control of the parties, but it is time the marital home was aggressively marketed and sold. Therefore, both parties are to comply with all aspects of the sale of the marital home. Plaintiff is to keep the home in presentable condition, be available for open houses and showings, and abide by all recommendations of the realtor, including a listing price. The parties are to accept any reasonable offers to purchase

the marital home as recommended by the realtor. Also, counsel are to obtain a written status report from the realtor on a weekly basis. With this finding, the [c]ourt **DENIES** [d]efendant's request to eliminate [p]laintiff from the decision-making process as to the sale of the marital home and also **DENIES** her request for a receiver.

Judge Enright noted her obligation to address the issue of defendant's health insurance costs in accordance with our prior remand. However, the judge found both parties' proofs on this issue deficient. Consequently, she directed that defendant submit proof of her health insurance premium costs, and the parties exchange financial information, within sixty days. The judge further indicated that, "[f]ollowing this exchange of information, either party may file the appropriate application regarding the issue of reimbursement for [d]efendant's health insurance costs post-judgment."

The judge denied, without prejudice, plaintiff's requests to appoint a mediator and schedule a CMC and plenary hearing. After the court-appointed experts¹ rendered their reports, the parties were directed to submit to a post-judgment Early Settlement Panel (ESP), followed by mediation pursuant to Rules 5:5-5 and 5:5-6.

¹ The judge also appointed an expert accountant to calculate the enhanced amount of penalties and interest that accrued as a result of the late filing of the parties' 2005 tax returns. This issue is not before us in the present appeal.

At the conclusion of this process, the judge would "determine what proceedings, if any, need to be scheduled."

Professional Appraisal Associates filed its report on October 26, 2015. It concluded that the fair market value rent for the marital home during the years 2008 through 2015 was \$5800 per month. Additionally, defendant submitted proof of her health insurance premium costs as Judge Enright required.

Despite Judge Enright's order, the parties did not submit their disputes concerning the sale of the former marital home and its rental value to an ESP or post-ESP mediation. Instead, defendant filed a second motion in aid of litigant's rights on December 16, 2015. Defendant sought to enter judgment against plaintiff for \$258,100 for her one-half share of the rental value of the home and \$16,566 for past health insurance costs; to preclude plaintiff from being involved in the sale of the home; to compel plaintiff to pay an exterminator to rid the home's basement of snakes; and an award of counsel fees. Plaintiff opposed the motion and again requested a plenary hearing.

The motion was assigned to Judge Maritza Berdote Byrne, who conducted oral argument on January 29, 2016. The judge ordered plaintiff to reimburse defendant one-half the rental value of the former marital home at the rate of \$2900 per month from July 2008 through October 2015, and accordingly entered judgment against

plaintiff for \$258,100. The judge reserved both parties' rights with respect to any future rental income owed to each other from November 1, 2015, onward.

Judge Byrne also prohibited plaintiff from further involvement in the sale of the marital home, and appointed an attorney in fact to execute all documents for the sale of the home on plaintiff's behalf. The judge determined this relief was warranted

[b]ased on the long history in this case of non-sale of the marital home despite an agreement by both parties in 2007 to list and sell the marital home, [and] also based on plaintiff's lack of any payment of the mortgage to the marital home and the proofs submitted by [] defendant[.]

Judge Byrne entered judgment against plaintiff for \$16,566 for defendant's past health insurance costs. The judge noted that plaintiff failed to submit financial documentation to dispute the amount claimed by defendant, contrary to Judge Enright's July 23, 2015 order.

Finally, Judge Byrne granted defendant's request for counsel fees and costs. She reasoned:

This motion to enforce litigant's rights would have been obviated had [plaintiff] submitted himself to [an] ESP and/or mediation and had he submitted the financial documents as required by Judge Enright's July 2015 order.

Defendant has completely complied with her discovery obligations and what I find particularly in bad faith is that even . . . in opposition to this motion there's [been] no attempt [by plaintiff] to comply with that order to provide financials.

Plaintiff timely moved for reconsideration, which Judge Byrne denied on April 26, 2016. This appeal followed.

On appeal, plaintiff argues that the trial court erred by: (1) entering judgment for back rent based on the fair market rental value determined by the court-appointed expert, without a plenary hearing; (2) entering judgment for defendant's health insurance costs without a plenary hearing; (3) failing to follow the procedure established in the July 24, 2015 order, which required a post-judgment ESP and mediation; and (4) resolving the contested issue of whether plaintiff hindered the sale of the home without a plenary hearing. Plaintiff further argues that he should not be penalized for the ineffective assistance of his prior attorney, who was in the midst of disciplinary proceedings that resulted in his disbarment around the time these motions were pending.

We conduct a limited review of a trial court's fact-finding function. "The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)(citing Rova Farms Resort, Inc. v. Investors Ins. Co., 65

N.J. 474, 484 (1974)); see also Gnall v. Gnall, 222 N.J. 414, 428 (2015). It is "only when the trial court's conclusions are so 'clearly mistaken' or 'wide of the mark'" that we will "intervene and make [our] own findings to ensure that there is not a denial of justice." N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008) (quoting N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007)); see also Rova Farms Resort, Inc., supra, 65 N.J. at 483-84. However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995).

Guided by these standards, we conclude that plaintiff's arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm the January 29, 2016 order substantially for the reasons expressed in Judge Byrne's cogent oral opinion. We also affirm the April 26, 2016 order denying reconsideration because plaintiff failed to show the court based its earlier decision "upon a palpably incorrect or irrational basis," or did not "consider, or failed to appreciate the significance of probative, competent evidence." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria v.

D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). We add only the following limited comments.

We reject plaintiff's argument that the judge should have conducted a plenary hearing. "A plenary hearing is required when the submissions show there is a genuine and substantial factual dispute . . . and the trial judge determines that a plenary hearing is necessary to resolve the factual dispute." Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007). Here, at no time did plaintiff offer any competent evidence to contradict the market rental value of the marital home as determined by the court-appointed expert. Also, defendant produced documentation of her health insurance costs, as previously ordered by Judge Enright. She also produced her prior and current case information statements and her 2014 tax return. In contrast, plaintiff admittedly failed to submit any financial documentation that would create a factual dispute either as to the amount of defendant's health care costs or his ability to pay those costs. Accordingly, no plenary hearing was necessary on these issues.

Among the reasons given by plaintiff for the long delay in selling the marital home were repairs necessitated by Hurricane Sandy, renovations suggested by the realtors, environmental restraints imposed by the New Jersey Department of Environmental Protection, and the presence of snakes in the basement of the

house due to its proximity to a swamp. Not only were these factors insufficient to invalidate the expert's opinion as to the rental value of the home, they were also insufficient to justify plaintiff's failure to pay the mortgage on the home while he continued to occupy it. This resulted in the ongoing dissipation of a substantial marital asset. Coupled with the nine-year delay, we find no abuse of discretion in Judge Byrne's decision to relieve plaintiff of any further involvement in the sale rather than scheduling a plenary hearing to resolve the issue, with the further delay this would entail.² For similar reasons, we find no abuse of discretion in Judge Byrne's decision to decide all issues encompassed by our 2010 remand, rather than await the results of an ESP and mediation, especially given her finding that plaintiff failed to submit to the ESP, mediation, and discovery process ordered by Judge Enright.


Finally, we decline to address plaintiff's claims of ineffective assistance of counsel. Plaintiff has not cited any case that holds parties to a matrimonial dispute have a constitutional right to the effective assistance of counsel, and plaintiff is essentially asserting a legal malpractice claim. We

² We note, without deciding, that this issue may be moot since we have been advised there is now a pending contract of sale on the property.

will not consider such claims in the first instance on appeal. Instead, they should be asserted in a malpractice action in the trial court. We express no opinion on the merits of such an action, if filed.³

Affirmed.

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


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³ We similarly express no opinion on a motion that plaintiff has contemporaneously filed in the trial court seeking relief from judgment on this basis, pursuant to Rule 4:50-1 (a) and (f).