SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-4846-13T3
A-0737-14T3

DEBORAH POSNER, f/k/a WEISS,

Plaintiff-Respondent,

v.

ERIC WEISS,

Defendant-Appellant.

Argued October 25, 2017 – Decided December 21, 2017

Before Judges Nugent, Currier, and Geiger.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FM-20-0803-08.

Eric Weiss, appellant, argued the cause pro se.

Frank J. LaRocca argued the cause for respondent (LaRocca Hornik Rosen Greenberg & Patti, PC, attorneys; Frank J. LaRocca and Matthew G. Gerber, on the brief).

PER CURIAM

Defendant Eric Weiss appeals from several post-judgment orders entered in this contentious matrimonial action.[1] One of those orders awarded counsel fees to plaintiff Deborah Weiss despite her violation of a prior order. Because we find the Family Part judge erred in imposing sanctions against defendant for plaintiff's wrongful actions, we reverse the fee award. We affirm the remainder of the orders.[2]

The parties were divorced in 2009. A final judgment of divorce (FJOD) incorporated a two-page handwritten property settlement agreement (PSA). The PSA provided, among other things, that defendant was to retain "his LLC interests and his rights in the Richter[3] litigation," and that plaintiff was "to have no contact with the parties adverse to [defendant] in the Richter litigation."

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[1] We have consolidated these back-to-back appeals for the purposes of this opinion.

[2] At the oral argument before this court, defendant stated that he was not aware that both appeals were being argued on that date. We gave defendant the opportunity to file a written supplemental argument addressing the second appeal. We have received defendant's submission and plaintiff's response and considered those submissions in this opinion.

[3] According to the record, Richter was a former business partner of defendant, and the two were involved in ongoing litigation.

After the parties had separated but before they were divorced, several family court judges issued three orders containing provisions pertinent to this appeal. A January 21, 2009 order barred the parties and their counsel from having ex parte communications "with the adverse parties or their attorneys in the Richter litigation." Five days later, the court granted temporary restraints in an Order to Show Cause (OTSC) application presented by defendant, preventing plaintiff, and all persons acting on her behalf, from disseminating any documents or information concerning the matrimonial case "to the adverse parties or their counsel in the Richter litigation."

On the return date of the OTSC in February 2009, the court entered an order enjoining "[p]laintiff, her counsel and her representatives . . . from communicating in any way with the adverse parties in the Richter litigation or their counsel," and "from disseminating any information to anyone connected to the Richter litigation." After the parties' divorce, the court issued an order on May 10, 2010, prohibiting plaintiff from "giv[ing] information to . . . Richter."

In March 2014, in connection with a civil action brought by defendant against Richter and his business entity, counsel for Richter served plaintiff with a subpoena duces tecum directing her to testify and produce documents at a deposition. Plaintiff's

counsel responded by letter dated April 1, 2014, advising that in light of the PSA's no-contact provision, he was reluctant to produce plaintiff for the deposition without an opportunity for defendant to object. The letter enclosed a copy of the parties' FJOD and PSA. On April 4, 2014, plaintiff's counsel sent a second letter to Richter's attorney, stating that they "could have no further discussions" as he had been informed that defendant had filed a motion to quash the subpoena. Defendant was copied on both letters.

Defendant filed an OTSC with temporary restraints on April 9, 2014, seeking to sanction plaintiff and her counsel for having communicated with Richter's attorney, and requesting a plenary hearing to determine the extent of the contact between plaintiff and the adverse parties in the Richter case. The court denied emergent relief and converted the OTSC into a motion to enforce litigant's rights, returnable May 8, 2014.

On May 6, 2014, plaintiff filed a cross-motion for counsel fees and other relief. Counsel's certification of services detailed fees and costs of $4,624.50. Plaintiff also sought enforcement of a May 22, 2013 order awarding her $4,500 in counsel fees, reimbursement from defendant for his share of the children's medical expenses, and permission to enroll the children in a day camp during the following summer. Defendant wrote to the court

on May 7, 2014, disputing the amount claimed by plaintiff for the children's medical expenses and asserting the court lacked jurisdiction "to modify the custody agreement" due to a pending appeal.[4]

On May 8, 2014, the family court judge heard argument on both applications. Defendant contended that plaintiff violated the no-contact provisions of the PSA and prior orders when her counsel sent the initial letter and its attachments to Richter's attorney.[5] In response to questioning by the judge to specify how Richter benefited from obtaining the PSA, defendant stated that Richter had become privy to information about defendant's other business interests and thereby acquired sufficient information to support a counterclaim in the civil case.

Plaintiff's counsel argued in response that he intended to comply with the PSA by copying defendant on the first letter and

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[4] The appeal involved challenges to the May 2013 order — including its award of counsel fees. The order was affirmed. Weiss v. Weiss, No. A-5160-12 (App. Div. Jan. 23, 2015).

[5] Defendant also argued that plaintiff's violation could be inferred from other evidence. He stated that the Richter Organization's bankruptcy trustee was in possession of a copy of defendant's matrimonial case information statement (CIS) which could only have been provided by plaintiff. He further asserted that the documents requested in the subpoenas were described in such detail that they must have already been acquired from plaintiff.

informing him of his right to move to quash the subpoena. Counsel asserted that he did not divulge information that could not be obtained elsewhere.

The judge issued an oral decision from the bench, denying defendant's motion and partially granting plaintiff's cross-motion. The judge advised that he had reviewed the relevant provisions of the PSA and previous orders. Although he stated that "it might have been better not to send the PSA," he found there were no harmful disclosures in the document and that plaintiff's counsel sent the PSA "in good faith," communicating his obligation to afford defendant an opportunity to quash the subpoena. He concluded that the proofs were "woefully insufficient" to establish a violation of defendant's rights.

In partially granting plaintiff's cross-motion, the judge awarded her $4,624.50 in counsel fees. The judge reasoned that although he did not have information regarding the parties' financial circumstances, his ruling was based on "[t]he lack of proofs," the bad faith of defendant in filing "a frivolous motion," the protracted history of litigation between the parties, and the May 2013 order awarding $4,500 in counsel fees to plaintiff. He denied without prejudice plaintiff's remaining requests for relief because of the motion's untimely filing. The judge's decisions were memorialized in an order entered the same day.

Thereafter, plaintiff filed a motion seeking the same relief that had been denied on May 8, 2014. On June 13, 2014, the judge entered an order — which provided that "neither party appear[ed] . . . for oral argument" and that the reasons for its entry were "stated on the record"[6] — granting plaintiff's requests (1) to enforce the May 2013 order awarding her $4,500 in counsel fees; (2) for reimbursement of $451.61 for the children's medical expenses; and (3) for the children to attend day camp during the summer. The order "entitled [defendant] to make-up parenting time, to be determined by the parties."

In a subsequent application, defendant requested that the court enforce the make-up parenting time and reconsider the June 13 order.[7] On August 1, 2014, the family judge granted defendant an additional weekend of parenting time to make up for any time lost due to the children's attendance at day camp and denied reconsideration of its previous order.

Defendant appeals from the May 8, June 13, and August 1, 2014 orders. He argues that the judge erred in denying his motion to enforce litigant's rights as plaintiff's counsel violated the PSA

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[6] Neither party provided us with a transcript of the judge's ruling on the record.

[7] There were other requests in this application that are not pertinent to this appeal.

and prior orders by sending a copy of the PSA to Richter's counsel. He further contends that the court erred in awarding counsel fees to plaintiff because he brought his action in good faith. As to the June order, defendant asserts that the judge improperly modified the parenting schedule by permitting the children to attend summer camp. With regard to the August order, he contends that the judge erred in denying his motion to reconsider the June order.

We begin with a review of governing principles. We are required to accord deference to the Family Court's decisions because of the court's "special jurisdiction and expertise in family matters." Cesare v. Cesare, 154 N.J. 394, 413 (1998). However, we owe no special deference to the trial judge's "interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

We begin with the May 2014 order. Absent "compelling reasons to depart from the clear, unambiguous, and mutually understood terms of the PSA," a court is generally bound to enforce the terms of a PSA. Quinn v. Quinn, 225 N.J. 34, 55 (2016). It is clear from the express terms of the PSA and orders addressing it that plaintiff was to "have no contact with the parties adverse to [defendant] in the Richter litigation." A plain reading of the

PSA requires a finding of a violation of its terms when counsel responded twice to Richter's attorney. The family judge's finding otherwise was erroneous.

However, in reviewing counsel's letters, we are satisfied that he did not intend to disclose any prohibited information. Counsel believed he was following the spirit of the PSA by advising Richter's counsel that he would not respond to the subpoena until defendant had an opportunity to request it be quashed. In hindsight, counsel now concedes his mistake in sending the PSA to demonstrate his client's inability to comply with the subpoena.

In his application to the trial court, defendant asked for the imposition of sanctions against plaintiff for the violation of the PSA. In our review of the record, we are unable to discern what harm inured to defendant from the limited contacts of plaintiff's counsel and the disclosure of the PSA. Defendant's brief and his responses elicited at oral argument on the appeal provide only the unsubstantiated information that Richter may have used some information in his bankruptcy proceeding that served to diminish defendant's claim.

Defendant, however, also states there was much more information provided to the bankruptcy court than was contained in the PSA, and he suspects plaintiff or her prior matrimonial counsel may have provided his CIS from the matrimonial litigation.

He also accuses plaintiff's mother and a computer expert of hacking into his computer to procure information subsequently provided to Richter. Neither the CIS nor any other information was attached to the letters at issue here. Therefore, although we agree that plaintiff's counsel's actions violated the PSA, there is no support in the record before us for the imposition of sanctions as requested by defendant.

In light of our determination that there was a violation of the terms of the PSA and orders addressing it, we must also overturn the award of counsel fees granted to plaintiff in the May 8, 2014 order. Ordinarily we will not disturb the trial court's decision to award counsel fees "absent a showing of an abuse of discretion involving a clear error in judgment." Tannen v. Tannen, 416 N.J. Super. 248, 285 (App. Div. 2010), aff'd o.b., 208 N.J. 409 (2011). Here, however, there is no support in the record for an award of counsel fees to plaintiff. The trial judge based his decision on "[t]he lack of proofs" and the bad faith of defendant in filing a "frivolous motion." Because of our determination that defendant's motion was made in good faith and was not entirely without merit, we reverse and vacate the counsel fee award under the May 8, 2014 order.

In turning to defendant's arguments pertaining to the June 2014 order, defendant did not provide a transcript of the judge's

ruling and therefore we cannot know the reasons for his decision. We note that, although the children were permitted to attend summer camp, defendant was accorded "make-up parenting time." We are satisfied, without further proffer, that the judge did not abuse his discretion in this determination.[8] The remainder of defendant's arguments pertaining to the June 2014 order lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Defendant did not provide a transcript of the August 1, 2014 order either, despite the judge's notation that he placed his reasons on the record on that date. Defendant's appellate brief reveals a reiteration of the arguments previously made regarding the June application, which we have determined lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

We reverse the portion of the May 8, 2014 order awarding counsel fees to plaintiff. We affirm the remainder of that order as well as the June 13 and August 1, 2014 orders.

Affirmed in part, reversed in part.

[8] At oral argument, defendant advised that he has made his own arrangements with the summer camp in the ensuing summers and he is satisfied with his parenting time vis-a-vis the camp.