SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5066-15T3

MICHAEL DOBLIN,

Plaintiff-Respondent,

v.

LINDA DOBLIN,

Defendant-Appellant.

Argued June 1, 2017 - Decided July 7, 2017

Before Judges Lihotz and Mawla.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FM-02-556-99.

Kenneth Rosellini argued the cause for appellant.

Frank J. LaRocca argued the cause for respondent (LaRocca, Hornik, Rosen, Greenberg & Patti, L.L.C., attorneys; Mr. LaRocca and Rotem Peretz, on the brief).

PER CURIAM

Defendant Linda Doblin appeals from a June 10, 2016 order denying her Rule 4:50-1 application to vacate a December 12, 2006 consent order. We affirm.

These facts are taken from the record. Although the parties were married for little more than three years, this litigation has existed for nearly two decades. In 2012, we recounted the history of this rather litigious matter in Doblin v. Doblin, No. A-6161-08 (App. Div. June 26, 2012). We recite our prior decision because it encompasses all the determinations defendant asked the trial judge to revisit, addressed in the order now under appeal.

> We deem it appropriate to provide an expansive explanation of the facts, as this appeal marks the fourteenth year of litigation concerning a marriage that lasted for a period of three years before the parties separated.
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> The parties were married in June 1994. A child was born of the marriage in April 1996, and the parties separated in 1997, with a complaint for divorce being filed in August 1998.
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> Prior to the marriage, the parties executed a prenuptial agreement that, among its other terms, contained an alimony waiver provision, pursuant to which the parties would forgo alimony if they divorced within six years of their wedding. The agreement also provided that alimony would be available in the event that either party suffered a disability preventing him or her from engaging in fulltime employment.
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> Following the entry of a judgment of divorce in October 2001, the parties agreed to arbitrate their remaining disputes. The arbitration consumed fourteen days of negotiations, including extensive, conflicting testimony about alleged disabilities suffered by each party.

The arbitrator addressed a number of other issues. Defendant had argued that the prenuptial agreement was invalid under the Uniform Premarital Agreement Act, N.J.S.A. 37:2-31 to -41. In a decision dated December 31, 2003, the arbitrator determined that the agreement was valid and enforceable in all respects. However, the arbitrator determined that the alimony waiver provision of the prenuptial agreement was unenforceable because plaintiff had not filed for divorce during the appropriate time period. The arbitrator awarded defendant alimony in the amount of $3,000 per month, to be paid tax-free to defendant and not to be tax-deductible by plaintiff. The arbitrator stated that the alimony was to be "'permanent' in nature, rather than [of] a specific limited duration period" but nevertheless found that "a review of the 'permanent' alimony should be undertaken" three years after his decision, a period he "intended to coincide with the mandatory and statutory review of child support called for under N.J.S.A. 2A:17-56.9[a] . . . ." The arbitrator found that "at the time of such three[-]year review of all support payments, the burden of proof w[ould] be on [defendant] to establish her continuing need for alimony from [plaintiff] [,] . . . the procedural variance [of changing the burden of proof] . . . deemed to be appropriate and warranted under the exceptional circumstances of this case." The Family Part judge confirmed the arbitration award. The arbitrator thereafter issued a supplemental arbitration decision wherein he denied both parties' correction or clarification claims. The judge issued an order and judgment confirming the supplemental arbitration decision.

Over the next two years, the judge addressed child custody issues, and in 2005 he modified the alimony award based on plaintiff's changed circumstances. Plaintiff was awarded custody

> of the child. The judge did not address the issue of alimony in 2007, when other issues were litigated, resulting in, among other things, the award of counsel fees in plaintiff's favor in the amount of $53,182.
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> In 2008, defendant unsuccessfully sought a transfer of custody. She filed a motion to enforce litigant's rights due to plaintiff's alleged failure to make alimony and child support payments to her. The judge denied the motion and directed defendant to pay child support arrears through the Bergen County Probation Department. No appeal was taken from that order, but in 2009, defendant filed a motion seeking to enforce litigant's rights and to set aside the previously entered October order, due to misapplication and misconstruction of law and fact pursuant to Rule 4:50-1. The judge denied the motion.
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> [Doblin, supra, No. A-6161-08 (slip op. at 1-5) (alterations in original).]

We affirmed the Family Part's order denying reconsideration of defendant's request to reinstate alimony, and specifically held alimony had been deemed waived, because defendant failed to seek it in a timely manner. Id. at 10.

This appeal is the latest salvo in defendant's attempts to revisit orders from which no timely appeal was taken, which are now barred by application of res judicata, and also revisit our determination from the prior appeal. Indeed, defendant's appeal is from denial of a Rule 4:50-1 motion seeking to vacate and/or declare void orders from December 12, 2006; December 20, 2006;

February 2, 2007; February 13, 2007; April 25, 2007; and October 24, 2008.

Despite the years of litigation, for the first time, in her application to the trial court, defendant claimed she never agreed to the terms of the December 12, 2006 consent order and her signature on it was forged. She also claimed the consent order was invalid because it was not signed by the trial judge and because she was not afforded a real time interpreter, which prevented her participation in settlement conferences leading to entry of the consent order. She asserted the December 20, 2006, typewritten version of the consent order signed by the judge was also invalid because it did not bear the parties' signatures.

She claimed two orders filed on February 2, 2007 and April 25, 2007, requiring defendant to pay plaintiff child support and sanctioning her for interference with parenting time were invalid because they were entered without a motion. She also challenged a February 13, 2007 order awarding plaintiff counsel fees resulting from the February 2, 2007 adjudication as improperly decided.

She challenged the validity of the October 24, 2008 order denying her alimony and awarding plaintiff fees, claiming the trial judge relied upon the 2006 consent orders, which were fraudulent. She claimed the orders entered on December 31, 2003; October 5, 2004; November 16, 2005; and November 28, 2005;

including the judgment of divorce, were not provided to the court, and only part of the arbitration determination relating to alimony was provided to the court. Therefore, she asserts the judge had neither the correct precedent nor the complete arbitration record to render the October 24, 2008 determination.

The trial court considered these arguments and entered an order on June 10, 2016: denying defendant's request to vacate the prior court orders; granting plaintiff's request to find defendant's motion frivolous; enforcing the October 24, 2008 and July 13, 2012 orders by assessing counsel fees against Defendant's counsel for frivolous litigation; granting, in part, plaintiff's request for counsel fees, but denying his request for further sanctions; denying plaintiff's requests to enjoin defendant from filing future motions or allowing him to defeat any prospective motion through letter application to the court; and denying counsel for defendant's request to stay the imposition of counsel fees.

Defendant seeks review of June 10, 2016 order, asserting the trial court made inadequate findings and urges we vacate not only this order, but the aforementioned ones, pursuant to Rule 4:50-1 (d) and (f). She also argues the trial judge erred in deeming her motion frivolous and awarding plaintiff fees. Specifically, defendant challenges the trial judge's conclusion her relief was barred by res judicata. She argues the June 10, 2016 Order denying

her motion to vacate was "without rational explanation or any explanation whatsoever." She argues the trial judge did not consider or make findings as to her claim of fraud upon the court.

In opposition, plaintiff argues a Rule 4:50-1 motion should only be granted "sparingly, in exceptional situations." He argues defendant has not provided any new information to grant relief under Rule 4:50-1. He contends defendant's application is out of time, because the orders she seeks to vacate are now a decade old. He argues a Rule 4:50-1 motion under the grounds asserted by defendant must be filed "within a reasonable time." Relying on Wausau Insurance Company v. Prudential Property and Casualty Insurance Company of New Jersey, 312 N.J. Super. 516 (App. Div. 1998), plaintiff argues a Rule 4:50-1 motion is not a substitute for a motion for reconsideration or an appeal, neither of which defendant sought. Plaintiff asserts even though defendant's claims of fraud upon the court are not time barred, they should be barred for lack of both proof and merit.

We begin by reciting our scope of review. The Supreme Court has stated:

> [a] motion under [Rule] 4:50-1 is addressed to the sound discretion of the trial court, which should be guided by equitable principles in determining whether relief should be granted or denied. The decision granting or denying an application to open a judgment will

> be left undisturbed unless it represents a clear abuse of discretion.
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> [Hous. Auth. of the Town of Morristown v. Little, 135 N.J. 274, 283 (1994) (citations omitted).]

The doctrine of res judicata applies to matters that have previously been litigated and bars them from being re-litigated. Nolan v. First Colony Life Ins. Co., 345 N.J. Super. 142, 153 (App. Div. 2001). For res judicata to apply:

> there must be a valid, final judgment on the merits in the prior action; the parties in the second action must be identical to, or in privity with those in the first action; and the claim in the later action must arise out of the same transaction or occurrence as the claim in the first action.
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> [Ibid. (citing Watkins v. Resorts Int'l Hotel and Casino, Inc., 124 N.J. 398, 412 (1991)).]

The trial judge denied defendant's motion because he correctly found her claims were barred by res judicata. He held defendant failed to allege any new facts either unknown to her or not previously before the court. Specifically, he stated,

> The [d]efendant has filed a motion under [Rule] 4:50 for this [c]ourt to vacate a series of orders dating back from 2006 to 2008 alleging that they were entered under fraudulent circumstances with this [c]ourt as well as other courts.
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> The relevant rule again is 4:50-1, which reads in pertinent part: "On motion, with briefs, and upon any such terms as are just, the [c]ourt may relieve a party or the party's

legal representative from a final judgment order for the following reasons."

It would be here the [d]efendant alleges fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation or other misconduct of an adverse party. For the purpose of this review I will also consider the catchall paragraph, F, "or any other reason justifying relief from the operation of judgment of the order."

Our Supreme Court has held that a motion for relief under this rule should be granted "sparingly in exception situations", Housing Authority of the Town of Morristown [v.] Little, 137 N.J. 274, 289 (1994). See also Millwork Insulation, Inc. [v.] State Department of Treasury Division of Taxation, 25 N.J. Tax 452, 462 (2010) ("the rule is intended to provide relief from litigation errors that a party could not have protected against during the suit that resulted in the judgment sought to be vacated.")

Here, the defendant has not brought any new facts or information not previously known to the [d]efendant in making her application. The [c]ourt agrees with the [p]laintiff that the [d]efendant's application here is merely an attempt to relitigate matters that have been previously decided by this [c]ourt as well as the Appellate . . . Division, as far back as . . . 2012 with regard to the Appellate Division decision.

Moreover, the [d]efendant does not cite to any legal authority to support her request to vacate an order that has already been appealed and upheld. Again, this order -- there was an order from Judge Guida from 2008, which upheld the 2006 and 2007 orders.

Again, this matter has been litigated ad nauseum. And again, the [c]ourt finds that

> based on the [c]ourt's prior orders upholding the validity of these orders, as well as the appellate Division decision dated June 26, 2012, which upheld the October 24, 2008 order, the [d]efendant is collaterally estopped from seeking the same relief again nearly eight years after the October 2008 order and almost four years to the date from the Appellate Division June 26, 2012 order.
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> And again, I'm not even going to get into the time limitations of a [Rule] 4:50 motion, because again, I don't think it is important. I think again here, this matter has been previously litigated. Defendant presents no new facts for this [c]ourt to consider, or any basis to overturn, even if it could overturn, the Court's prior orders. I think based on the Appellate Division's findings from 2012 -- I think there is serious doubt as to whether or not the [c]ourt could, even if it was so inclined to, . . . vacate the 2006, and 2007, and 2008 orders would it be able to do so in light of the Appellate Division decision from 2012.
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> Accordingly, I will not address the [laches] argument the [p]laintiff makes in defense, because again, I think that clearly based on res judicata and collateral estoppel, there is no basis for this [c]ourt to vacate its prior orders.

We agree with the trial judge's assessment. The December 12, 2006; December 20, 2006; February 2, 2007; February 13, 2007; April 25, 2007; and October 24, 2008 orders defendant seeks to vacate are all final post-judgment orders, the parties are identical, and defendant's current claim arises out of the same

occurrences in the orders at issue. Therefore, the trial judge properly applied res judicata to deny defendant's motion.

Although we are satisfied res judicata bars defendant's claims, we address her claims of fraud upon the court to highlight why the trial judge's imposition of counsel fees as a sanction for frivolous litigation was appropriate. Regarding her claim of fraud upon the court, the law provides:

> a party seeking to be relieved from the judgment must show that the fact of the falsity of the testimony could not have been discovered by reasonable diligence in time to offset it at the trial or that for other good reason the failure to use diligence is in all the circumstances not a bar to relief.
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> [Shammas v. Shammas, 9 N.J. 321, 330 (1952).]

Here, defendant had over a decade to bring the alleged fraud to the court's attention, and in fact litigated numerous issues before the trial court, and in one instance, an appeal before this court, but never asserted this argument. Defendant's financial circumstances and auditory issues did not prevent her from litigating these matters through counsel over this ten-year period. She does not assert the alleged fraud was only recently discovered, and the eleventh hour conjuring of the claim supports the trial judge's view the claim was without merit. No objective evidence was provided to the trial judge demonstrating her signature on the December 12, 2006 consent order was forged, and

the filing of a typewritten version of this order by the trial court does not render the December 20, 2006 order fraudulent.

Similarly, defendant's attack on the February 2, 2007; February 13, 2007; and April 25, 2007 orders misrepresents the record because the parties agreed in the December 12, 2006 consent order the trial court could address the relief awarded therein on submissions without a formal motion. As we noted above, we previously adjudicated the validity of the October 24, 2008 order, which upheld all prior orders, and the record is devoid of any reason for us, let alone the trial court, to revisit it.

Defendant's other legal arguments demonstrate a fundamental misconception of the law. For example, she claims the prior custody orders are void because the court did not make a best interest determination or require a plenary hearing before modifying custody, as required by P.T. v. M.S., 325 N.J. Super. 193, 215 (App. Div. 1999). Setting aside the fact the parties' son is now twenty-one, no hearing was necessary at the time the parties reached their consent order because "[a] judgment, whether reached by consent or adjudication, embodies a best interests determination." Todd v. Sheridan, 268 N.J. Super. 387, 398 (App. Div. 1993). Also, "a party must clearly demonstrate the existence of a genuine issue as to a material fact before a hearing is necessary." Lepis v. Lepis, 83 N.J. 139, 159 (1980). Here, there

was no material dispute in fact because the parties entered into a consent order obviating a plenary hearing. Thus, it was reasonable for the trial court to conclude plaintiff's application was frivolous and designed to claw back child support retroactive to 2006, for purpose of avoiding the statutory prohibition on the retroactive modification of support. N.J.S.A. 2A:17-56.23a.

With this as the context, we now turn to defendant's claims the trial judge made inadequate findings under Rule 1:4-8 and abused his discretion in concluding her application was frivolous.

Rule 1:4-8(a) states:

> The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, written motion or other paper. By signing, filing or advocating a pleading, written motion, or other paper, an attorney or pro se party certifies that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
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> (1) the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the factual allegations have evidentiary support or, as to specifically identified allegations, they are either likely to have evidentiary support or they will be withdrawn

> or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support; and
>
> (4) the denials of factual allegations are warranted on the evidence or, as to specifically identified denials, they are reasonably based on a lack of information or belief or they will be withdrawn or corrected if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support.
>
> If the pleading, written motion or other paper is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though the document had not been served. Any adverse party may also seek sanctions in accordance with the provisions of paragraph (b) of this rule.

"A court may impose sanctions upon an attorney if the attorney files a paper that does not conform to the requirements of Rule 1:4-8(a), and fails to withdraw the paper within twenty-eight days of service of a demand for its withdrawal." United Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 389 (2009). Furthermore, a motion may be deemed frivolous when "no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable." Ibid. (quotations omitted).

In concluding defendant's application was frivolous, the trial judge ordered defendant's counsel to pay $5,087 in sanctions, based on the terms of the October 24, 2008 and July 13, 2012

orders, and his own assessment of Rule 1:4-8. The judge's findings regarding the frivolous litigation were as follows:

> As [p]laintiff acknowledged in his cross motion, on two separate occasions . . . this court has forewarned the [d]efendant that if she were to file what the court would consider to be a frivolous motion . . . not only possibly could she be subject to attorneys' fees, but that the [c]ourt would assess [c]ounsel for the [d]efendant a sanction.
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> Again, that was in Judge Guida's order dated October 24, 2008. And the relevant language from that order is "the [d]efendant shall pay the [p]laintiff an attorney fee award in the amount of $3,500 which shall be reduced to judgment in favor of the [p]laintiff and against the [d]efendant. The [c]ourt further notes that any future counsel for the awards will be assessed against [c]ounsel for the [d]efendant if the [c]ourt finds any future application by her frivolous."
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> I also included this language in an order that I issued dated July 13, 2012. However, in that order, the [c]ourt will note for the record I did not find the [d]efendant's motion in that matter to be frivolous. So, I did not assess the sanction. However, I warned the defendant then that if I did subsequently find . . . [an] application to be frivolous, I also would impose sanctions against her [c]ounsel.
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> Again, the [p]laintiff is correct. This matter has been previously litigated. . . . [T]he [d]efendant seeks the same relief she previously sought back in 2008, which she appealed, and that appeal was denied in 2012. I think given the time-lapse as well as the prior court orders and the Appellate Division decision, [d]efendant's attempt to relitigate this matter, this [c]ourt finds to be, in fact, frivolous.

> Based on that finding, the [p]laintiff has moved under [Rule] 1:4-8 for this sanction. And again, I find that based on this [c]ourt's prior orders which this [c]ourt has the ability to enforce prior court orders as well as the relevant [Rule] 1:4-8, the [d]efendant is subject to a sanction for filing a frivolous motion.
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> I'll also note for the record that [c]ounsel for the [p]laintiff did contact [c]ounsel for the [d]efendant, forewarned him that he was going to move for sanctions and asked [c]ounsel to withdraw the motion. The [c]ounsel for the [d]efendant refused to do so. So, clearly, the [c]ounsel for [d]efendant was put on notice that the plaintiff would be seeking a frivolous sanction against him for filing such a motion.
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> Based on this [c]ourt's prior orders from . . . October 24, 2008, and July 13, 2012, [I am] going to grant [p]laintiff's motion that sanctions be issued against [d]efendant's [c]ounsel. [I am] also going to grant [p]laintiff's request that the [c]ourt find [d]efendant's motion [to] be frivolous in violation of [Rule] 1:4-8, and [I am] going to grant [p]laintiff's request for sanctions in the form of ordering [c]ounsel for the [d]efendant to pay [p]laintiff's [c]ounsel in the amount of $5,087.50 within 30 days of the date of this order.

There is no basis to disturb the trial judge's findings. Defendant's application was per se frivolous by virtue of the repeated attempts to challenge old orders through different legal argumentation, without the necessary facts to support her claims.

Lastly, defendant asserts the trial judge's findings regarding the award of counsel fees were lacking. We disagree.

Rule 5:3-5(c) states:

> Subject to the provisions of [Rule] 4:42-9(b), (c), and (d), the court in its discretion may make an allowance, both pendente lite and on final determination, to be paid by any party to the action, including, if deemed to be just, any party successful in the action, on any claim for divorce, dissolution of civil union, termination of domestic partnership, nullity, support, alimony, custody, parenting time, equitable distribution, separate maintenance, enforcement of agreements between spouses, domestic partners, or civil union partners and claims relating to family type matters. A pendente lite allowance may include a fee based on an evaluation of prospective services likely to be performed and the respective financial circumstances of the parties. The court may also, on good cause shown, direct the parties to sell, mortgage, or otherwise encumber or pledge assets to the extent the court deems necessary to permit both parties to fund the litigation. In determining the amount of the fee award, the court should consider, in addition to the information required to be submitted pursuant to [Rule] 4:42-9, the following factors: (1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties both during and prior to trial; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained; (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any

> other factor bearing on the fairness of an award.

Regarding the fee award, the trial court specifically found the issues raised by defendant were already adjudicated. The judge noted defendant's counsel had been cautioned by plaintiff's counsel and provided with prior orders addressing the subject matter upon which defendant was about to embark, putting him on notice sanctions would result if he did not withdraw his motion. The trial judge stated:

> An application of counsel fees must be supported by an affidavit of services, Rule 4:42-9[(b)]. The affidavit of services must state that the fee is reasonable and support that assertion by providing the information set forth in [RPC] 1.5[(a)].
>
> In determining the amount of the fee award, the court shall consider in addition to the information required to be submitted pursuant to [Rule] 4:42-9, the factors as enumerated in [Rule] 5:3-5[(c)], which are as following: [t]he financial circumstances of the parties, the ability of the parties to pay their own fees or to contribute to the fees of the other party, the reasonableness and good faith of the positions advanced by the parties, the extent of the fees incurred by both parties, any fees previously awarded, the amount of fees previously paid to counsel by each party, the results obtained, the degree to which fees were [incurred] to enforce existing orders or to compel discovery, and any other factor bearing on the fairness of an award.
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> In addition, the New Jersey Supreme Court found in Mani [v.] Mani, 183 N.J. 70, 94, 2005, that in awarding counsel fees the court must

consider whether the party requesting the fees is in financial need, whether the party against whom the fees are sought has the ability to pay, the good or bad faith of either party in pursuing or defending the action, the nature and extent of the services rendered, and the reasonableness of the fees, id. at 94 to 95.

Normally, bad faith in the context of counsel fee awards has been construed to signify that a party acted with a malicious motive so as to be unfair and to use the court system improperly to force a concession not otherwise available[.] Kelly [v.] Kelly, 262 N.J. Super. 303, [308 (Ch. Div. 1992)].

[I have] considered the relevant factors in 5:3-5[(c)] and of particular note I find that the reasonableness and good faith of the positions advanced by the parties, the fees previously awarded, the results obtained, and the degree to which fees were incurred to enforce existing orders, strongly sway this [c]ourt that again, this matter has been litigated ad nauseam.

The fact that the [p]laintiff had to respond to [d]efendant's voluminous submissions, [I have] also reviewed the submission of [c]ounsel regarding his fees or his law firm's fees from Rotem Peretz who has a $295 per hour billable rate. Mr. LaRocca's rate is $450 per hour. Again, . . . I believe both of those rates are reasonable given their expertise as well as involvement in the case. I see the amount of time that [they have] billed for these matters, which again is [fifteen-and-a-half-hours] as well as an anticipated additional three hours -- for which presumably would have been today's appearance, again, I see nothing in this submission that leads the [c]ourt to believe that this fee being sought here is unreasonable, again, given specifically the tremendous amount of the

> [d]efendant's submission and the time that [c]ounsel needed to expend to go -- to respond to this motion.
>
> And although the [c]ourt also understands that basically [c]ounsel's position was that this was unnecessary given the [c]ourt's prior orders, [c]ounsel still was required to go through all the documents and respond on the merits as well as on procedural grounds.
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> So, for that reason, again, I see nothing that would lead this [c]ourt to believe that a $5,000 -- I'm rounding off -- it is $5,087.50 -- is an unreasonable fee. So, [I am] going to grant again counsel fees.

The clearly worded prior orders addressing not only the substantive claims defendant attempted to re-litigate, but also stating a sanction would issue for further applications, coupled with caution from plaintiff's counsel, and the trial judge's findings regarding frivolous litigation, clearly support the counsel fee determination. Defendant's dissatisfaction with the outcome of the previous litigation did not mandate the trial judge offer a lengthy dissertation on specious claims repeatedly asserted.

Affirmed.