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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-1341-16T4

G.M.

Plaintiff-Appellant,

v.

R.M.,

Defendant-Respondent.

Argued December 20, 2017 – Decided February 2, 2018

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey,
Chancery Division, Monmouth County, Docket No.
FM-13-0369-15.

Robert H. Siegel argued the cause for
appellant (Ansell Grimm & Aaron, PC,
attorneys; Robert H. Siegel, of counsel and
on the brief).

Stephanie Palo argued the cause for respondent
(Adams Buchan & Palo, LLC, attorneys;
Stephanie Palo, of counsel and on the brief).

PER CURIAM

Plaintiff G.M. appeals from a September 30, 2016 order denying
her post-judgment motion to set aside the parties' Matrimonial
Settlement Agreement (MSA), conduct a plenary hearing on the issue

of alleged fraud, award her alimony, and award her attorney's fees and costs. Plaintiff contends the MSA was induced by fraud and is inequitable. We affirm.

We derive the following facts from the record. The parties were married on May 26, 2000. Three children were born of the marriage. In August 2013, the parties separated due to irreconcilable differences. Two months later, the parties retained experienced matrimonial counsel and engaged in lengthy negotiations with the intent to reach a comprehensive MSA. The parties also retained a joint financial expert regarding the marital finances. The negotiations culminated in the parties reaching a general consensus as to the terms of an MSA in late July 2014. Defendant's attorney drafted a comprehensive MSA which was executed by plaintiff on September 2, 2014, and defendant on September 9, 2014. Because the MSA affected a trust for the benefit of the children, the Trustee of the R.M. Children's Trust (the Trust) also executed the MSA.

During the negotiation of the MSA, federal law enforcement authorities investigated defendant in connection with his embezzlement of more than \$1.1 million from a medical practice, in violation of 18 U.S.C. § 1341. Conviction of that offense exposed defendant to a maximum prison term of twenty years and a maximum fine of: (1) \$250,000; (2) twice the gross amount of any

pecuniary gain that any individuals derived from the offense; or (3) twice the gross amount of any pecuniary loss sustained by any victims of the offenses. 18 U.S.C. § 1341.

In October 2011, defendant entered into plea negotiations with the United States Attorney for the District of New Jersey. Under the terms of the resulting plea agreement, defendant would plead guilty to one count of violating 18 U.S.C. § 1341.

The plea agreement did not include a recommended sentence. Instead, the sentence was left "within the sole discretion of the sentencing judge." The United States Attorney's Office "reserve[d] its right to take any position with respect to the appropriate sentence to be imposed on R.M. by the sentencing judge." The plea agreement further stated:

The sentencing judge may impose any reasonable sentence up to and including the statutory maximum term of imprisonment and the maximum statutory fine. This Office cannot and does not make any representation or promise as to what guideline range may be found by the sentencing judge, or as to what sentence [defendant] ultimately will receive.

United States District Court Judge Stanley R. Chesler conducted the plea hearing on February 19, 2014, during which defendant pled guilty to a single count of violating 18 U.S.C. § 1341.

After several delays, defendant appeared for sentencing on September 4, 2014. Judge Chesler concluded a noncustodial sentence was warranted in light of the defendant's "extraordinary cooperation."¹ The judge imposed a five-year probationary term with electronically monitored house arrest for one year. Defendant was required to perform 2500 hours of community service and pay a \$75,000 fine within thirty days of sentencing.

Defendant is a board-certified anesthesiologist. During the same period defendant was also subject to three complaints filed by the Attorney General of New Jersey to have the New Jersey Board of Medical Examiners suspend or revoke defendant's license to practice medicine. Together the complaints alleged: gross and repeated malpractice by defendant in his pain management practice, indiscriminate prescribing of controlled drugs, excessive fees, unreliable computer-composed and generated progress notes, failure to disclose a financial interest in a self-owned health care service to which he referred patients, Medicare inspection deficiencies of one of his ambulatory surgery facilities, and moral turpitude for his embezzlement of over \$1.1 million from a medical practice of which he was an owner and also the medical

¹ The record contains only a portion of the sentencing hearing transcript. The portions of the sentencing hearing containing the arguments of the United States and defendant are omitted.

director. The complaints further alleged defendant's conduct violated N.J.S.A. 45:1-21, N.J.S.A. 45:9-6, N.J.S.A. 45:9-19.16, and N.J.S.A. 45:9-22.4. Defendant either pled no contest or admitted to the allegations.

The complaints led to defendant consenting to the terms of an Administrative Action Final Order (AAFO) dated October 8, 2014, which revoked his license to practice medicine effective October 10, 2014. The AAFO also required defendant to promptly terminate all arrangements in which he served as medical director in any medical practice and to terminate his professional affiliation with any medical practice and medical health care service. In addition, defendant was assessed a \$120,000 civil penalty and costs of \$90,068.

The AAFO permitted defendant to apply for relicensure no earlier than April 10, 2017, and, if granted by the Board, to be effective no earlier than October 10, 2017. Defendant's license to practice medicine has not been restored.

Pertinent to this appeal, the MSA includes a mutual waiver of alimony, stating:

The parties do hereby specifically accept the payments as set forth in this Agreement and/or the division of property as set forth in this Agreement as full and complete satisfaction of all claims for alimony and spousal support that one may have against the other and each hereby waives their respective

right to seek alimony at the present time. Each party shall be solely responsible to support him/herself and to pay for all of his/her personal and other related expenses.

Notably, the MSA also provides:

Each party hereby specifically waives their respective right to a fact-sensitive determination by the court regarding the standard of living and lifestyle enjoyed during the marriage, as pursuant to Crews v. Crews, 164 N.J. 11 (2000), Weishaus v. Weishuas, 180 N.J. 131 (2004), and their progeny.

The MSA also contains the following provisions regarding custody, child support, and counsel fees: (1) the parties share joint legal and physical custody of the children; (2) in lieu of direct child support, plaintiff receives \$15,000 per year per child from the Trust, with the amount being adjusted every two years to reflect cost of living changes; (3) the Trust also pays for all of the children's extracurricular activities, health insurance costs, unreimbursed medical and prescription medication costs; (4) the Trust further pays for all of the children's extracurricular activities, private education costs, and college and graduate school expenses (except those paid by Section 529 accounts established for the children); (5) defendant would pay for plaintiff's reasonable and necessary counsel fees in connection with the divorce.

With regard to equitable distribution, plaintiff agreed to accept a one-time, non-taxable, lump sum equitable distribution payment of \$3,500,000 in the MSA. Defendant received the former marital home located in Colts Neck, the Howell Township residence, and his business and professional accounts, free and clear of any claim by plaintiff. Plaintiff retained the Morgan Stanley Smith Barney account in her name. Defendant retained the Morgan Stanley Active Asset and Barclays accounts in his name. Each party retained their own Individual Retirement Accounts. An additional residential property located in Point Pleasant is held by the Trust.

The MSA also contains the following provision regarding waiver of discovery:

WAIVER OF DISCOVERY. The parties represent to each other that they have fully and completely disclosed their respective assets, liabilities, income and expenses. Each party represents that the financial information provided to each other is true, accurate and complete. Both parties knowingly and willingly waive their respective rights to take further discovery in this divorce matter by way of answers to interrogatories, formal responses to request to produce documents, depositions, examination of the books and records of the other party as well as all rights to an independent, separate evaluation and/or appraisals of the assets possessed or controlled by the other or themselves (other than real estate which was appraised), and such other tools of discovery as may be available pursuant to Court Rules. Both

parties have had the opportunity to consult with accountants and tax advisors prior to entering into this Agreement.

The MSA contains the following provision confirming the parties entered into the agreement knowingly and voluntarily, with the belief the agreement was fair and equitable:

VOLUNTARY AND INFORMED AGREEMENT. The Husband and Wife each acknowledge they are entering into this Agreement voluntarily, without threat, force, coercion or duress being placed upon their informed consent and voluntary act by any person. They further acknowledge that they are not under the influence of any drugs or alcoholic beverages which would impair their ability to understand this Agreement and its consequences, nor have they been under such influence at any time during the negotiation of this Agreement. Each party acknowledges that he or she has read this Agreement in its entirety prior to signing. Each party further acknowledges being fully informed by counsel as to his or her legal rights and obligations. Each party further acknowledges that he or she believes that this Agreement is fair, equitable and appropriate under all of the circumstances of this case.

On August 27, 2014, plaintiff filed a complaint for divorce alleging irreconcilable differences, which proceeded to a final hearing as an uncontested action. On October 27, 2014, the parties appeared with counsel for a final hearing on the uncontested divorce. During the hearing, plaintiff testified under oath regarding the fairness and voluntariness of the MSA. She testified the MSA was the product of arms-length negotiations with her

husband through counsel. Plaintiff confirmed she reviewed the agreement with her attorney and fully understood the agreement. Plaintiff also confirmed the basic provisions of the agreement.

With regard to her reasons for waiving alimony and agreeing to the terms of the MSA, plaintiff stated it was "[b]ecause [defendant's] supposed to go to court and not practice medicine again." She confirmed defendant had pled guilty to a criminal offense and there were several other pending court actions relative to defendant's practice of medicine.

Plaintiff testified she thought the MSA was fair, equitable, and just. She confirmed she signed the MSA of her own free will, without anyone forcing, coercing, or threatening her to do so. She further testified she was satisfied with her counsel's services. She also testified she realized she did not have to settle the case and could have "gone to court" to have the judge decide all of the issues covered by the MSA. With that knowledge, she indicated she felt entering into the MSA and giving up her right to a trial was the right thing to do. Finally, she stated she did not have any questions for her attorney or the court.

Based on the parties' testimony, which she found credible, the judge determined the MSA was the product of negotiation through counsel, and was entered into "freely, knowingly and voluntarily." The judge granted a divorce to plaintiff on grounds of

irreconcilable differences with the MSA incorporated into the final judgment of divorce (FJOD).

On August 4, 2016, some twenty-three months after executing the MSA, and more than twenty-one months after the FJOD was entered, plaintiff filed a motion to: (1) grant her alimony; (2) set aside the MSA; (3) conduct a plenary hearing on the issue of fraud; (4) require defendant to prove payment to the children's trust for rent; and (5) award her counsel fees and costs for the motion and plenary hearing. Defendant filed a cross-motion to deny plaintiff's motion and award him counsel fees and costs incurred in opposing plaintiff's motion and preparing his cross-motion.

In support of her application, plaintiff claimed for the first time the MSA was inequitable and induced by fraud. Plaintiff claimed she was "unjustifiably rushed into signing a complex MSA after she had already agreed to its terms based upon false representations made to her by the [d]efendant and his counsel regarding [d]efendant's legal troubles, and a potential lengthy prison sentence." Plaintiff further alleged defendant's counsel misrepresented that defendant's legal situation had "worsened."

In support of her demand for a plenary hearing on the basis of fraud, plaintiff contended defendant did not share adequate information during the settlement discussions regarding the

marital finances. In her July 13, 2016 certification, she stated, "[d]efendant has lied, cheated, and defrauded me now and throughout our marriage. He has controlled and manipulated all of our assets without my knowledge, consent or input during the marriage."

In support of her alimony argument, plaintiff claimed she believed alimony was waived at the time the MSA was signed, but not indefinitely. Plaintiff stated:

My life changed radically after defendant told me of our problems, and then left the home, leaving me to deal with this and the impending death of my mother. I cannot express how totally distraught and frightened I was after hearing our problems. I had waived my claim for alimony at the time of the agreement based upon the circumstances at that time.

Defendant contended there is no basis to set aside the MSA because it was a fair and equitable representation of the parties' agreement and was entered into at arm's length. Defendant pointed out plaintiff did not challenge the MSA until nearly two years after the MSA was signed and FJOD entered, and after plaintiff had already enjoyed the benefits of the \$3,500,000 in tax-free lump sum equitable distribution she received among other additional equitable distribution and pursuant to the parties' MSA. Defendant further noted he prepared a detailed case information statement (CIS), which was submitted to plaintiff for the purposes of

settlement negotiations and included 184 pages of financial and trust documents.

The motion judge heard oral argument on September 30, 2016.

The judge made the following comments during the motion hearing:

Wife waived her claim to alimony because she got \$3.5 million in assets. She chose not to engage in litigation at the time of the divorce because I believe she was in fact engaging along with the defendant in an effort to -- I won't go so far as to say defraud the Government. But to marshal assets so that the Government could not then collect those assets as a result of a criminal prosecution against the defendant. She chose to move forward without engaging, as you say, in full litigation. She chose to accept no alimony and she chose to accept \$3.5 million in assets at the time of the divorce.

She cannot come forward two years later, without really presenting much of anything, other than, I didn't think it was going to work out this way, and seek alimony. I don't think she's made any case for me to change the parties' agreement from two years ago.

On the same day, the judge issued a seven-page order denying plaintiff's motion and defendant's cross-motion in their entirety.² The judge found there was no fraud in the negotiation of the MSA, reasoning:

In order to set aside the MSA, the [c]ourt must find either fraud, unconscionability, or some overreaching in the negotiations of the settlement. Here, none

² We note the judge inadvertently reversed the relief sought by each party in the relief requested section of the order.

of that is present. Both parties knew each other's true intent. This could not be more evident than Wife's receipt of \$3,500,000.00 in equitable distribution, as well as \$45,000.00 per year in child support payments. The argument that Wife could have or should have received more is not proof of fraud, or that the MSA should be set aside in order to award Wife alimony. Wife waived her claim to alimony and has presented no fraud or failure to disclose assets that warrant her requests. Further, Wife's claim that Husband was facing impending legal charges during the MSA negotiations has no bearing on whether there was full disclosure of the assets or that the agreement she entered [into] was not fair because she still received a large equitable distribution, and Husband did in fact face criminal charges.

This appeal followed. On appeal, plaintiff argues: (1) the trial court erred by not setting aside the MSA due to fraud, overreaching, coercion, and duress;³ (2) the case should be remanded to the trial court to determine defendant's alimony obligation based on the former marital lifestyle; (3) the trial court erred by not requiring defendant to submit an updated CIS; (4) the trial court erred by not scheduling a plenary hearing to review additional financial disclosures and take testimony regarding the marital lifestyle to address whether defendant should have a long-term alimony obligation (not raised below); and

³ Plaintiff did not raise the issues of overreaching, coercion, or duress in her moving papers or during oral argument before the motion court.

(5) plaintiff should be awarded counsel fees and costs for all services related to this appeal and the hearing on remand (not raised below).

We have considered plaintiff's arguments in light of the record and applicable law and are not persuaded by any of them. For the following reasons, we find plaintiff's contentions to be substantively without merit and procedurally barred.

Our review of a Family Part's order is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). We do not substitute our judgment for that of the trial court unless a manifest injustice would result. Id. at 412 (citing Rova Farm Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)). We accord substantial deference to fact finding by the family court because of its special jurisdiction and expertise. Id. at 413.

The record amply supports the motion judge's conclusion that plaintiff had not made a prima facie showing of fraud. Fraud must be plead with particularity. R. 4:5-8(a). To establish legal fraud, a party must prove: "(1) a material representation by the defendant of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intent that the plaintiff rely upon it; (4) reasonable reliance by the plaintiff; and (5) resulting damage to the plaintiff." Weil v. Express Container Corp., 360 N.J. Super. 599, 612-13 (App. Div. 2003)

(citing Jewish Ctr. of Sussex Cty. v. Whale, 86 N.J. 619, 624 (1981)).

Here, plaintiff has not shown the statements made by defendant in advance of his sentencing were a material representation by the defendant of a presently existing or past fact. On the contrary, defendant was facing potential imprisonment for up to twenty years. The plea agreement did not include a sentencing recommendation. The United States Attorney reserved the right to argue for a maximum sentence. The sentencing was in the sole discretion of the federal judge. Defendant was not sentenced until after plaintiff had executed the MSA.

Any statements made by defendant or his counsel regarding defendant's sentencing exposure and worsening legal situation were opinions, not statements of fact. Moreover, at the time they were made, these opinions were not false or misleading. It was not until he was sentenced that defendant learned he would receive "a break" from the federal judge, who departed from federal sentencing guidelines by sentencing him to probation with house arrest for one year, rather than a significant term of imprisonment.

Plaintiff was represented by an experienced attorney in the negotiation of the settlement agreement. She understood the terms of the agreement. There are no substantiated allegations of fraud in the negotiation of the MSA. Given these circumstances, there

is no legal or equitable basis to set aside the MSA. See Miller v. Miller, 160 N.J. 408, 419 (1999).

For the first time on appeal, plaintiff raises the issues of overreaching, coercion, and duress. "An appellate court ordinarily will not consider issues that were not presented to the trial court." State v. Arthur, 184 N.J. 307, 327 (2005) (citing Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)); accord Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 396 (2016) (declining to address an issue not raised before the trial court that was not an issue of sufficient public concern). We decline to consider these issues not raised in her moving papers or during oral argument before the motion court.

Plaintiff's motion is also procedurally barred. Motions to reopen or set aside a judgment incorporating an MSA on grounds of fraud or inequitableness are governed by Rule 4:50-1. See Pressler & Verniero, Current N.J. Court Rules, cmt. 6.1 on R. 4:50-1 (2018). "Regardless of the basis, vacation of a judgment under Rule 4:50-1 should be granted sparingly." In re Guardianship of J.N.H., 172 N.J. 440, 473-74 (2002) (citing Pressler & Verniero, cmt. 1.1 on R. 4:50-1 (2001)).

Rule 4:50-1 motions "shall be made within a reasonable time, and for reasons (a), (b) and (c) of R. 4:50-1 not more than one year after the judgment, order or proceeding was entered or taken."

R. 4:50-2. Here, plaintiff's motion to reopen the judgment and set aside the incorporated MSA was filed on August 4, 2016, more than twenty-one months after the divorce was granted. Moreover, defendant was sentenced on September 4, 2014, fifty-three days before the divorce hearing. The sentencing took place in open court. The judgment of conviction is a matter of public record. Plaintiff could easily have learned defendant was sentenced to probation with house arrest before the divorce hearing. The record does not support plaintiff's attempt to do so.

Plaintiff's motion was not filed within one year or within a reasonable time of the entry of the FJOD. Plaintiff offers no reason for the delay. Accordingly, plaintiff's motion to set aside the MSA is time barred by Rule 4:50-2. For this additional reason, the motion was properly denied without conducting a plenary hearing.

In addition, plaintiff seeks to set aside only the alimony waiver, not the equitable distribution, custody, child support, or counsel fee aspects of the MSA. The MSA was an integrated agreement. It not only resolved issues of custody and parenting time, but also all of the marital financial matters including equitable distribution and spousal and child support. "No one element stands alone and can be read without reference or consideration of the others." Glass v. Glass, 366 N.J. Super.

357, 373 (App. Div. 2004). Plaintiff cannot set aside the alimony waiver, yet continue to enforce the equitable distribution and other aspects of the agreement. See Lepis v. Lepis, 83 N.J. 139, 154 (1980) (noting courts have refused to consider an alimony award in isolation and consider earnings received from investments funded by an equitable distribution award); Esposito v. Esposito, 158 N.J. Super. 285, 300 (App. Div. 1978) (recognizing "support payments are intimately related to equitable distribution and the financial security and potential income available because of said distribution").

Even more fundamentally, "[i]t is a well recognized rule that a litigant who voluntarily accepts the benefits of a judgment is estopped from attacking it on appeal." Tassie v. Tassie, 140 N.J. Super. 517, 524 (App. Div. 1976). The rule is "a corollary to the established principle that any act upon the part of a litigant by which he expressly or impliedly recognizes the validity of a judgment operates as a waiver or surrender of his right to appeal therefrom." Id. at 525 (citing Sturdivant v. General Brass & Machine Corp., 115 N.J. Super. 224, 227-28 (App. Div. 1971)).

Here, plaintiff benefitted substantially from the MSA incorporated into the FJOD. She accepted a \$3,500,000 lump sum equitable distribution payment and has received child support at the rate of \$45,000 per year. She cannot seek appellate review

at this late date after receiving such payments. For this additional reason, plaintiff's motion was properly denied.

Plaintiff argues the trial court erred by not conducting a plenary hearing on the issue of her alimony claim. A moving party is entitled to a plenary hearing only where he or she clearly demonstrates the existence of a genuine issue of material fact entitling the party to relief through competent supporting documents and affidavits. Lepis, 83 N.J. at 159; Eaton v. Grau, 368 N.J. Super. 215, 222 (App. Div. 2004).

Support provisions contained in settlement agreements or judicial orders are subject to the same standard of judicial modification based on substantially changed circumstances. See generally Lepis, 83 N.J. at 147-48; Smith v. Smith, 72 N.J. 350, 360 (1977). "An increase in support becomes necessary whenever changed circumstances substantially impair the dependent spouse's ability to maintain the standard of living reflected in the original decree or agreement." Lepis, 83 N.J. at 152-53.

Plaintiff has not claimed or demonstrated substantially changed circumstances since the divorce was granted. Absent a prima facie showing of substantially changed circumstances, plaintiff is not entitled to a plenary hearing or an alimony award.


Plaintiff further asserts the motion court erred by not requiring defendant to submit a current CIS. We disagree. Under

Rule 5:5-4(a), the party seeking alimony modification must demonstrate a prima facie showing of a change in circumstances before the opposing party will be compelled to produce a current CIS. See also Lepis, 83 N.J. at 157 ("A prima facie showing of changed circumstances must be made before a court will order discovery of an ex-spouse's financial status.") "Only after the movant has made this prima facie showing should the respondent's ability to pay become a factor for the court to consider." Ibid. Plaintiff is not claiming, and has not made a prima facie showing, of changed circumstances. Accordingly, defendant was not required to produce a current CIS. Donnelly v. Donnelly, 405 N.J. Super. 117, 131 (App. Div. 2009).

Finally, plaintiff sought an award of attorney's fees for the motion and requested plenary hearing. Awards of counsel fees and costs are discretionary with the court and will only be disturbed in clear cases of abuse. Rendine v. Pantzer, 141 N.J. 292, 317 (1995); Yueh v. Yueh, 329 N.J. Super. 447, 450 (App. Div. 2000). The factors to be considered in determining whether to award counsel fees are enumerated in Rule 5:3-5(c). The motion judge found "no relevant factors warranting an award for counsel fees, and decline[d] to award counsel fees to either [party]." We discern no abuse of discretion in denying an award of counsel fees in this matter.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION