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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-2053-16T2

CHARLES SCHMITT,

Plaintiff-Appellant,

v.

JENNIFER LUPO-SCHMITT,

Defendant-Respondent.

Submitted May 2, 2018 – Decided May 16, 2018

Before Judges Nugent and Currier.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Union County,
Docket No. FM-20-0386-14.

DeTorres & DeGeorge, LLC, attorneys for
appellant (Luther G. Jones, IV, of counsel and
on the brief).

Law Offices of Lawrence W. Luttrell, PC,
attorneys for respondent (Lawrence W.
Luttrell, of counsel and on the brief).

PER CURIAM

Plaintiff, Charles Schmitt, appeals from an October 3, 2016
Family Part order that (1) denied his motion to terminate alimony

payments based on defendant Jennifer Lupo-Schmitt's alleged cohabitation and (2) awarded defendant counsel fees. Because plaintiff failed to establish a prima facie case of defendant's cohabitation, and because the record discloses no abuse of discretion by the court in awarding fees, we affirm.

When the parties divorced in October 2014, they signed a Marital Settlement Agreement (MSA). Plaintiff agreed to pay defendant limited duration alimony of \$1500 per month for six years, commencing on plaintiff's "first pay period after the house sells and after the agreeable marital debts are paid from the tax refund and sale of the marital residence." The parties also agreed plaintiff's alimony obligation would terminate if, among other reasons, defendant "co-habits with a person of the opposite sex." Plaintiff did not begin making alimony or child support payments when the parties sold the marital residence in June 2015. A March 10, 2016 order required plaintiff to begin making payments at that time.

Two months later, on May 23, 2016, plaintiff moved for an order terminating his alimony obligation due to defendant's cohabitation. Plaintiff asserted defendant was residing with another man who was "financially responsible for providing for her." He alleged, among other things, "[t]hey live together and share day to day responsibilities. They have had a lifelong

friendship of [forty] years and now live together as a family." Plaintiff also asserted the man was a lawyer, gave defendant free legal advice, and was defendant's "primary childcare provider."

Defendant opposed the motion and filed a cross-motion for a change of venue based on plaintiff working in the Union County Sheriff's Department since "approximately 1992." Defendant had made no secret about moving into the residence. To the contrary, she had written to plaintiff in February and informed him she would be moving into the residence with their children, though she did not disclose who lived there. The residence belonged to her best friend's father (the father). He permitted her to live there until she could obtain affordable housing.

Defendant's best friend's brother (the brother) also resided in the house. Defendant certified, and the brother confirmed in a certification, that she had no relationship with him, he supported neither her nor her children, and he did not provide childcare for her.

Defense counsel sent plaintiff a letter demanding he withdraw the motion because it was frivolous and unsupported by anything other than his unfounded accusations. In addition, defendant requested reasonable counsel fees.

The court did not decide the cross-motions. Rather, the court ordered the parties to engage in limited discovery and

ordered defendant to provide certain documents to plaintiff. Following discovery and oral argument, the court denied plaintiff's motion and awarded defendant counsel fees. Plaintiff moved for reconsideration of the counsel fee award. The court amended and reduced the fee award. Plaintiff filed this appeal.

The motion record contained these facts, most of which were provided by defendant during discovery. After the parties sold their marital home in June 2015, defendant resided with her sister through the following February. She had moved from there into the home owned by the father before plaintiff filed his motion in May 2016. The father agreed to let her live in his home with her children until she could be placed in affordable housing. Defendant produced evidence of her affordable housing application as well as confirmation she had been placed on the affordable housing waiting list, had applied a second time, and had updated her on-line profile for affordable housing.

In addition to the father, the brother also resided in the home. Defendant again certified she had no romantic or intimate relationship with the brother, the brother supported neither her nor her children, and the brother provided her with no financial assistance. As verification, defendant provided copies of earning statements for relevant time periods and bank statements.

The brother also submitted a certification. According to him, his father owned the home and had assumed responsibility for all costs and bills associated with the home. The brother denied any intimate relationship with defendant. He certified he did not support defendant nor provide her with any type of assistance. He added that defendant had been his sister's best friend since they were sixteen years old.

Judge Alan G. Lesnewich denied the motion on October 3, 2016, in a thorough and thoughtful opinion. After "review[ing] the record in depth," including the factors the court must consider when assessing whether cohabitation is occurring, N.J.S.A. 2A:34-23(n)(1) to -(7), Judge Lesnewich determined plaintiff had failed to establish a prima facie case. The judge explained, "[t]o the contrary, what becomes clear upon a thorough review of the record is that [p]laintiff has made a meritless and bald allegation that [d]efendant is cohabitating." Judge Lesnewich noted, "[t]he mere fact that [d]efendant is living in the same house as another person of the opposite sex is not on its face a prima facie showing of cohabitation." The judge also noted, "[t]he only logical conclusion that can be drawn from the record is that [d]efendant is no more cohabitating with her best friend's brother than she is cohabitating with her best friend's father."

After considering his authority to award counsel fees, defense counsel's affidavit of services, Rule 4:42-9(b), and R.P.C. 1.5(a), the court awarded defendant fees.

Plaintiff moved for reconsideration of the court's fee award and sought other relief not relevant to this appeal. Defendant opposed the motion and sought additional counsel fees for filing the opposition. In another thorough opinion dated December 20, 2016, Judge Lesnewich denied plaintiff's motion for reconsideration after determining he had not met the standard required to have the court reconsider its previous decision. Nonetheless, the judge amended and reduced the previous fee award. The judge denied defendant's motion for additional fees.

On appeal, plaintiff contends the court erred in finding he failed to establish a prima facie case. He also contends the court erred by considering hearsay statements. Last, he makes a twofold attack on the counsel fees, contending the award is unsupported by the record and is contrary to law. We reject plaintiff's arguments and affirm, substantially for the reasons expressed by Judge Lesnewich in his well-reasoned opinions. We add only the following brief comments.

N.J.S.A. 2A:34-23(n) addresses a person's cohabitation in the context of alimony payments. The statute states:

Alimony may be suspended or terminated if the payee cohabits with another person. Cohabitation involves a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household.

When assessing whether cohabitation is occurring, the court shall consider the following:

- (1) Intertwined finances such as joint bank accounts and other joint holdings or liabilities;
- (2) Sharing or joint responsibility for living expenses;
- (3) Recognition of the relationship in the couple's social and family circle;
- (4) Living together, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive intimate personal relationship;
- (5) Sharing household chores;
- (6) Whether the recipient of alimony has received an enforceable promise of support from another person within the meaning of subsection h. of R.S.25:1-5; and
- (7) All other relevant evidence.

Plaintiff established none of these criteria. Even though Judge Lesnewich provided plaintiff the opportunity to obtain limited discovery, plaintiff was unable to demonstrate defendant

shared with either the father or the brother "a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union."

Stated differently, plaintiff failed to provide any evidence to support the bald assertions he had made in his motion, namely, that the brother provided defendant with legal advice, shared in the day-to-day responsibilities of cohabitating, shared meals, shared household chores, and was defendant's primary child care provider when she was not at home. And though plaintiff accurately asserted defendant and the brother had shared a friendship for forty years, she had been best friends with the man's sister since the two women were teenagers, a fact that puts defendant's "friendship" with the brother into perspective.

Plaintiff does not argue that he established any of the statutory criteria. Rather, he asserts that because the judge provided him with a limited opportunity for discovery, he had established a prima facie case that defendant was cohabitating with another. He argues `he would not have been afforded discovery had he not established a prima facie case.

A fair reading of the record, and even a cursory reading of Judge Lesnewich's written decisions, demonstrates the judge recognized the difficulty plaintiff faced in establishing a prima

facie case without any discovery. The judge permitted limited discovery for the purpose of determining whether the plaintiff could establish a prima facie case of cohabitation. The judge did not abuse his discretion by doing so.

We also reject plaintiff's arguments concerning the judge's award of counsel fees. Judge Lesnewich recognized the authority for awarding counsel fees and considered the criteria set forth in R.P.C. 1.5(a) and Rule 5:3-5(c). He certainly did not abuse his discretion in making the award.

We have considered plaintiff's remaining arguments and determined they are without sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION