

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2611-16T3

M.L.M.,

Plaintiff-Respondent,

V.

M.W.M.¹,

Defendant-Appellant.

Argued May 1, 2018 — Decided May 11, 2018

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Monmouth
County, Docket No. FM-13-1266-10.

Steven J. Martino argued the cause for
appellant (Iacullo Martino, LLC, attorneys;
Steven J. Martino, on the briefs).

Robert J. Sims, Jr. argued the cause for
respondent (Robert J. Sims, Jr., attorneys;
Jeff Thakker, of counsel and on the brief;
Robert J. Sims, Jr., on the brief).

PER CURIAM

¹ We utilize the parties' initials to assure confidentiality pursuant to Rule 1:38.

Defendant appeals from an October 4, 2016 order denying his motion to modify alimony based on a change in circumstances. He also appeals a January 6, 2017 order denying his motion for reconsideration. We affirm.

The following facts are taken from the record. The parties were married for nineteen years and divorced on April 27, 2011. Three children were born of the marriage, aged twenty-four, twenty-two, and fourteen. The parties' final judgment of divorce incorporated a property settlement agreement (PSA).

During the marriage, defendant was in the Marine Corps. After retiring from military service in 2005, defendant worked for Computing Technologies, Inc. in Woodbridge, Virginia. From May 2005 until April 2006, defendant was a course director for Operations Other Than War, Command and Staff College, Marine Corps University, and Distance Education Program Courses. Defendant then trained with Sears Holding Corporation as a part of its Military Outreach Program from April to June 2006. After completing his training, defendant was hired by Sears, and later promoted to help expand Kmart's online business. Defendant worked for Kmart earning \$177,000 per year until May 2014.

Plaintiff had limited earnings. She worked as a program supervisor for Camp Fire USA, and earned \$26,955 in 2010.

In pertinent part, the PSA designated plaintiff as the parent of primary residence and defendant as the parent of alternate residence. The PSA granted defendant liberal parenting time with the children. Defendant agreed to pay plaintiff permanent alimony of \$865 per week, and child support of \$379 per week for all three children. The PSA stipulated alimony and child support were calculated based on defendant's income of \$195,000 per year, comprised of salary of \$177,000, and \$18,000 representing the portion of his pension not subject to equitable distribution. The PSA also imputed income of \$37,000 to plaintiff.

Once the two older children left for college, defendant agreed to pay child support of \$316 per week for the remaining child. After the divorce, defendant worked for Babies R Us East from May 2014, until May 2015, when he was terminated as a result of a corporate restructuring. Defendant received a severance package, which paid him through October 31, 2015.

Following his termination, defendant claimed he began searching for a new job earning comparable income. Defendant claimed he was unable to find a position earning income at the same level he previously had. During this time, defendant claimed the parties began to discuss the prospect of their youngest son residing with him.

Ultimately, defendant accepted a position and relocated to Camp Lejeune, North Carolina earning \$100,000 per year, and a one-time bonus of \$10,000. In addition, defendant informally assumed primary custody of the parties' youngest child in September 2015. Pursuant to the parties' agreement, defendant ceased paying child support in November 2015.

In February 2016, defendant filed a motion to reduce alimony to \$519 per week, and for other relief. While defendant's motion was pending he lost his employment at Camp Lejeune and returned to work at Kmart earning \$80,000. Plaintiff opposed defendant's motion and filed a cross-motion for enforcement of defendant's financial and non-financial obligations under the PSA.

The motion judge delayed adjudication of the motions until the parties could attend mediation on the custody-related issues as required by their PSA. The judge ultimately heard the parties' motions and entered an order denying defendant's request to modify alimony on October 4, 2016, finding defendant "failed to establish a prima facie case of a substantial and permanent changed circumstance warranting a reduction in his alimony obligation."

Subsequently, the parties completed mediation, which was unsuccessful. Defendant filed a motion for reconsideration of the denied alimony modification. On January 6, 2017, defendant's motion for reconsideration was denied.

Defendant's appeal from both orders followed. However, the parties agree all issues are moot except for defendant's appeal from the denial of his request for an alimony modification.

We begin by reciting our standard of review. "The scope of appellate review of a trial court's fact-finding function is limited. 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). "[T]he appellate court must give due recognition to the wide discretion which our law rightly affords to the trial judges," and disturb such determinations only where the court abused its discretion. Larbig v. Larbig, 384 N.J. Super. 17, 21, 23 (App. Div. 2006) (quoting Martindell v. Martindell, 21 N.J. 341, 355 (1956)). We reverse only if there is "'a denial of justice' because the family court's 'conclusions are . . . 'clearly mistaken' or 'wide of the mark.''" Parish v. Parish, 412 N.J. Super. 39, 48 (App. Div. 2010) (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)). However, "[t]his court does not accord the same deference to a trial judge's legal determinations." Ricci v. Ricci, 448 N.J. Super. 546, 565 (App. Div. 2017) (citing Reese v. Weis, 430 N.J. Super. 552, 568 (App. Div. 2013)). Rather, "all legal issues are reviewed de novo." Ibid. (citing Weis, 430 N.J. Super. at 568).

On appeal, defendant argues the motion judge abused her discretion by finding he failed to prove a substantial change in circumstances to modify alimony. Defendant argues the judge's conclusion he failed to provide adequate proof of his current employment was erroneous because he provided an updated case information statement reflecting his then-present income.

Defendant also claims the motion judge applied improper legal principles in considering his motion. Specifically, defendant argues the judge erroneously concluded a modification of alimony was not warranted because defendant did not continue to search for comparable employment. Defendant also argues the trial court erred by failing to apply N.J.S.A. 2A:34-23(k) to his motion for alimony modification.

Generally, because marital agreements are voluntary and consensual, they are presumed valid and enforceable. See Massar v. Massar, 279 N.J. Super. 89, 93 (App. Div. 1995). However, "[d]espite an agreement to provide spousal support without limitation as to time, '[t]he duties of former spouses regarding alimony are always subject to review or modification by our courts based upon a showing of changed circumstances.'" Glass v. Glass, 366 N.J. Super. 357, 370 (App. Div. 2004) (alteration in original) (quoting Miller v. Miller, 160 N.J. 408, 419 (1999)); see also

N.J.S.A. 2A:34-23 (Support orders "may be revised and altered by the court from time to time as circumstances may require.").

"The party seeking modification has the burden of showing such 'changed circumstances' as would warrant relief from the support or maintenance provisions involved." Lepis v. Lepis, 83 N.J. 139, 157 (1980) (citation omitted). A court is required to hold a plenary hearing where the moving party has demonstrated a prima facie change in circumstances. Ibid. "[P]rima facie . . . [evidence is] evidence that, if unrebutted, would sustain a judgment in the proponent's favor." Baures v. Lewis, 167 N.J. 91, 118 (2001). The proper inquiry is "whether the change in circumstance is continuing and whether the agreement or decree has made explicit provision for the change." Lepis, 83 N.J. at 152. Therefore, "[t]emporary circumstances are an insufficient basis for modification." Innes v. Innes, 117 N.J. 496, 504 (1990) (citing Bonanno v. Bonanno, 4 N.J. 268, 275 (1950)).

Defendant provided the motion judge with the following financial documents in support of his February 23, 2016 motion: a case information statement dated March 17, 2011, with supporting tax returns from 2010; a case information statement dated February 10, 2016, with supporting pay stubs dated December 4, 2015, December 18, 2015, and January 29, 2016; 2014 tax returns reflecting an income of \$302,724; and statements from his military

pension dated November 19, 2015, December 11, 2015, and January 21, 2016. In his motion for reconsideration, defendant provided: an updated case information statement dated October 27, 2016; his 2015 tax returns, which reported an income of \$381,847; and paystubs dated October 3, 2016 and October 17, 2016, from Sears Holdings Corporation.

The information provided was insufficient evidence of a change in circumstances. Indeed, defendant's 2014 and 2015 tax returns demonstrated he earned substantially more income than set forth in the PSA. Additionally, defendant failed to provide sufficient information establishing his current salary, or even a description of his employment.

At oral argument, plaintiff's attorney informed the court defendant had secured new employment. Plaintiff's counsel stated "he got let go of his job again and he starts his new job on Monday with Sears Holdings, which is the same job that he had when this original order was started." Defendant then indicated he had not provided the information because he would be earning a similar salary.

The motion judge did not abuse her discretion by not finding a change in circumstances given the lack of information provided to her. Moreover, the information provided to the judge

demonstrated defendant had increased earnings since the divorce, and was not entitled to a downward modification of alimony.

Defendant argues the judge improperly concluded he was required to continue searching for employment earning a similar salary. The judge stated "[d]efendant provides no proof that he is still actively searching for comparable employment to what he previously earned." The judge was not persuaded by defendant's arguments justifying his current employment at a lower earning level.

In Storey v. Storey, 373 N.J. Super. 464 (App Div. 2004), the obligor was earning \$111,000 per year as a computer hardware specialist when he lost his employment. Id. at 468. The obligor then became a massage therapist, earning \$300 per week, and moved for a reduction in his alimony obligation based on his reduced income. Id. at 468. The trial court imputed \$60,000 to the obligor based on prevailing wages for computer service technicians, and thus reduced his alimony obligation. Ibid. On appeal we affirmed, holding the obligor did not establish his career choice was reasonable. Id. at 480. We stated "[w]hen an alimony obligor changes career, the obligor is not free to disregard the pre-existing duty to provide support." Id. at 469; see also Arribi v. Arribi, 186 N.J. Super. 116, 118 (Ch. Div. 1982) ("[O]ne cannot find himself in, and choose to remain in, a

position where he has diminished or no earning capacity and expect to be relieved of or to be able to ignore the obligations of support to one's family.").

When assessing whether an obligor's career change is a substantial change in circumstances, the court should "determine whether the obligor's decision is 'reasonable' under the circumstances and, ultimately, whether the advantages to the supporting spouse 'substantially outweigh' the disadvantages to the supported spouse." Storey, 373 N.J. Super. at 469 (quoting Deegan v. Deegan, 254 N.J. Super. 350, 357-58 (App. Div. 1992)).

The factors relevant to the reasonableness and relative advantages of a career change . . . include: the reasons for the career change (both the reasons for leaving prior employment and the reasons for selecting the new job); disparity between prior and present earnings; efforts to find work at comparable pay; the extent to which the new career draws or builds upon education, skills and experience; the availability of work; the extent to which the new career offers opportunities for enhanced earnings in the future; age and health; and the former spouse's need for support. . . . The list is not exhaustive.

[Id. at 470-71.]

Here, defendant provided evidence of a job search for only a limited time period, namely May to August 2015. Defendant argues his job search was limited because he was forced to accept employment in a field different from his prior career. However,

because defendant failed to certify or provide other evidence of his present employment, it was not possible for the judge to understand why defendant changed careers, or how his present employment differed from his previous employment. Defendant also did not provide the judge with objective evidence to justify why his earnings had decreased by \$77,000, and as we noted defendant's most recent tax returns did not reflect a loss of income.

These circumstances did not demonstrate the judge relied exclusively on defendant's proof of job search. They also do not support the notion the judge's decision can be read to mandate defendant eternally search for employment until he achieves his prior earnings level. Rather, with adequate proofs, defendant can seek to demonstrate a changed circumstances to modify alimony going forward. For these reasons, we conclude the motion judge did not abuse her discretion under the circumstances presented.

Defendant argues the motion judge erred by failing to analyze the factors outlined in N.J.S.A. 2A:34-23(k). He asserts he established a substantial change in circumstances pursuant to N.J.S.A. 2A:34-23(k), and the judge should have applied the statute even though the PSA pre-dated its passage.

At the outset, we note defendant did not argue N.J.S.A. 2A:34-23(k) should retroactively apply to his motion. Rather, it appears

he asserted the argument in his motion for reconsideration. However, a motion for

[r]econsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence.

[D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).]

Pursuant to Rule 4:49-2, a motion for reconsideration cannot serve as a vehicle for new arguments that were not previously before the court. Lahue v. Pio Costa, 263 N.J. Super. 575, 598 (App Div. 1993). Therefore, the motion judge did not abuse her discretion by declining to apply N.J.S.A. 2A:34-23(k).

Defendant relies on Mills v. Mills, 447 N.J. Super. 78 (Ch. Div. 2016) to argue the motion judge should have applied N.J.S.A. 2A:34-23(k). Specifically, defendant argues the statute applies because the PSA did not contain a provision delineating the standard for a modification of support. In Mills, an obligor sought a reduction in his alimony obligation after he lost his job as a flooring salesman and obtained a similar position but at a significantly lower salary. Id. at 80. The court granted defendant's application for a reduction in alimony and

retroactively applied N.J.S.A. 2A:34-23(k), which had been enacted after the parties' PSA. Id. at 80-81.

However, Mills was not binding on the trial court and we decline to follow its retroactive application of N.J.S.A. 2A:34-23(k) where the Legislature made no such pronouncement. Indeed, "the best indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005) (citing Frugis v. Braciqliano, 177 N.J. 250, 280 (2003)). Nothing in N.J.S.A. 2A:34-23(k) requires the court to apply the statutory factors to a PSA, which pre-dates September 10, 2014, its effective date, especially where a litigant, as defendant in this case, has failed to raise such an argument before the trial court.

Finally, even if N.J.S.A. 2A:34-23(k) could be applied, an application of the factors does not support defendant's argument for a modification of alimony. The statute provides:

When a non-self-employed party seeks modification of alimony, the court shall consider the following factors:

- (1) The reasons for any loss of income;
- (2) Under circumstances where there has been a loss of employment, the obligor's documented efforts to obtain replacement employment or to pursue an alternative occupation;
- (3) Under circumstances where there has been a loss of employment, whether the obligor is making a good faith effort to find

remunerative employment at any level and in any field;

(4) The income of the obligee; the obligee's circumstances; and the obligee's reasonable efforts to obtain employment in view of those circumstances and existing opportunities;

(5) The impact of the parties' health on their ability to obtain employment;

(6) Any severance compensation or award made in connection with any loss of employment;

(7) Any changes in the respective financial circumstances of the parties that have occurred since the date of the order from which modification is sought;

(8) The reasons for any change in either party's financial circumstances since the date of the order from which modification is sought, including, but not limited to, assessment of the extent to which either party's financial circumstances at the time of the application are attributable to enhanced earnings or financial benefits received from any source since the date of the order;

(9) Whether a temporary remedy should be fashioned to provide adjustment of the support award from which modification is sought, and the terms of any such adjustment, pending continuing employment investigations by the unemployed spouse or partner; and


(10) Any other factor the court deems relevant to fairly and equitably decide the application.

As we noted, defendant did not demonstrate an inability to secure comparable income because he did not demonstrate a

sufficient effort to search for such employment. Defendant did not present the motion judge with an adequate description of his employment, he did not describe his prior employment or his qualifications, or how the latter correlated with his prior or current employment. The record does not support a finding in favor of modification under statutory factors one, two, three, seven, and eight. Therefore, application of N.J.S.A. 2A:34-23(k) did not support a modification of defendant's alimony obligation.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION