SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4570-15T4

SHADI GHRAYEB,

Plaintiff-Appellant,

v.

KHADEJA Z. ABUSOOD,

Defendant-Respondent.

Submitted January 16, 2018 – Decided February 2, 2018

Before Judges Ostrer and Whipple.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FM-02-2745-14.

Shadi Ghrayeb, appellant pro se.

Respondent has not filed a brief.

PER CURIAM

This appeal pertains to the form of a marital settlement agreement (MSA) that the trial court incorporated into a final judgment of divorce over plaintiff's objection, and without his signature. Plaintiff contends that the MSA did not accurately reflect the parties' oral agreement regarding the pick-up and

drop-off of the parties' child. He also contends the court erred in awarding fees to defendant incurred in opposing his motion that raised this issue and others. We affirm in part and reverse in part. We agree that the MSA does not accurately represent the parties' agreement on the record, but affirm the award of fees.

After a short-term marriage, plaintiff sued defendant for divorce in June 2014. Custody and parenting time arrangements involving their young son, born in November 2012, were major sticking points in the parties' efforts to resolve the divorce amicably. While the divorce action was pending, plaintiff relocated to the Washington, D.C. area. Defendant resided in the Bronx.

After a four-way mediation in March 2015, plaintiff's counsel wrote to defendant's counsel setting forth what he believed was the parties' agreement as to holiday visitation, and listing "Unresolved Issue[s]." Among the latter was "Parents to be present during pick up and drop off." Plaintiff had opposed a requirement that he be present for such transfers. Instead, he wanted the option to allow his mother or another person to pick up his son from defendant, bring the child to him, and then return the child to defendant. Defense counsel did not respond in writing to plaintiff's counsel's letter.

On May 27, 2015, after additional negotiations, the parties appeared before the court to lay upon the record the terms of a reported agreement, including with respect to the "Unresolved Issue[s]." Defense counsel stated that defendant would be the primary residential parent. Defense counsel also described the terms of plaintiff's frequent parenting time. Counsel explained that the parties agreed to incorporate the holiday schedule set forth in the March 2015 letter.

The discussion soon turned to the issue of pick-ups and drop-offs. Defense counsel acknowledged that plaintiff would exercise parenting time in the D.C. area, but defendant would have no responsibility to travel there.

> [DEFENSE COUNSEL]: Mom will never be required to pick up the child from outside of New Jersey or — she lives in New York right now, but mom's not expected to go down to Maryland or Virginia or Washington, D.C.
>
> THE COURT: So it's the New York/New Jersey Metropolitan area?
>
> [DEFENSE COUNSEL]: Correct. If dad decides to take the child down during his weekend to Maryland --
>
> THE COURT: Mom doesn't have to go down to Maryland to pick him up.
>
> [DEFENSE COUNSEL]: Mom's not going down to pick him up.
>
> THE COURT: Okay.

Defense counsel then addressed who must be present at pick-up and drop-off:

> [DEFENSE COUNSEL]: Mom and dad are responsible for pickup and drop off, unless mutually agreed by between the parties that somebody else can pick up or drop off.

Plaintiff's counsel immediately disagreed, stating he understood the parents' presence was required at parenting time, as distinct from the pick-up and drop-off:

> [PLAINTIFF'S COUNSEL]: Okay. I thought that the agreement was that they have to be present for parenting time?
>
> [DEFENSE COUNSEL]: Right --

The Court then interjected, without expressly distinguishing between pick-up and drop-off, and parenting time:

> THE COURT: Present for parenting time, and if there's going to be any change, if dad for example has to leave to get back down to Maryland for some reason, is it then that dad will call mom and say I've got to leave early? Or if there's grandparents involved that call mom, and mom's given the right of first refusal before the grandparents; is that what the agreement?

Plaintiff, who had been sworn, then clearly stated that he wanted to be able to send a representative to pick up his son, to save him multiple round-trips to New York:

> [PLAINTIFF]: Your Honor it was discussed in the context that if I ever wanted to take my son to Washington D.C. somebody could bring

him to me, instead of having me make four trips in one weekend.

THE COURT: Good faith and fair dealings, that makes sense.

[PLAINTIFF]: Yes.

THE COURT: Until he gets older, then you can put him on a train.

Plaintiff's counsel proposed that the MSA require the parents' presence at parenting time, not pick-up and drop-off:

[PLAINTIFF'S COUNSEL]: Your Honor I think the best way to phrase that in the Property Settlement Agreement is that they have to be present for parenting time.

[DEFENSE COUNSEL]: Correct.

[PLAINTIFF'S COUNSEL]: And not really the language that --

[PLAINTIFF]: Pick up and drop off.

[PLAINTIFF'S COUNSEL]: -- that they have to do the drop off.

Defense counsel then agreed, emphasizing that the pick-up and drop-off would, in any event, occur locally:

[DEFENSE COUNSEL]: That's fine. Well pickup and drop off --

THE COURT: Whatever you work out. The idea is this is --

[DEFENSE COUNSEL]: -- local is going to be pickup and drop off.

[PLAINTIFF'S COUNSEL]: Yeah.

[DEFENSE COUNSEL]: That's fine. That's fine.

THE COURT: -- this is parenting time.

[DEFENSE COUNSEL]: That's fine.

THE COURT: Parenting time is for each of the parents to have an opportunity to know and love their child. If they are not going to be there to exercise those rights, then it creates its own problems in the long run. So I -- Am I correct that both of you want that when you have parenting time it's your time with the child? If something comes up you're going to speak with each other and explain what came up, and then you'll handle it as adults. Fair?

[PLAINTIFF]: Umhmm.

THE COURT: Yes?

[DEFENDANT]: Yes.

THE COURT: Okay.

Counsel reviewed other MSA terms, including the payment of limited duration alimony and child support. The parties testified under oath that they accepted the recited terms, which would be incorporated in the final judgment of divorce. After establishing the cause of action, the court entered a judgment of divorce that contemplated a written memorialization of the parties' agreement, which counsel were required to submit by June 24.

That deadline came and went. The parties engaged in an off-the-record meeting in the courthouse in September. They appeared on the record in October. A new issue arose as to the winter and

Christmas visitation schedule. After listening to the recording of the May hearing, the judge decided that the parties accepted the March letter's terms.

According to plaintiff's subsequent certification, defense counsel then produced a version of the MSA for the parties' signature. Plaintiff noted that the version required his presence at pick-up and drop-off. It stated, "[T]he child shall be picked up from Wife's residence in the Bronx by the Husband." Plaintiff contended this violated the parties' May 27 agreement. He refused to sign the MSA.

Nonetheless, the trial court entered an amended judgment of divorce, incorporating the MSA with the contested provision. The court did so after finding, apparently based on an off-the-record proceeding, that plaintiff, not defense counsel, had attempted to alter the parties' agreement, and defense counsel's version of the MSA accurately embodied the parties' agreement.[1]

Plaintiff filed a motion twenty days later seeking reconsideration of the court's determination. Plaintiff also

[1] The court referred to proceedings that were evidently off-the-record, involving counsel and the court, noting that "[t]he attorneys for the parties and the [c]ourt having together listened to the essential terms . . . placed on the record on May 27, 2015; and [c]ounsel agreed that the plaintiff has, without advising defendant's counsel, unilaterally made a significant change to an essential term . . . ."

sought termination of alimony, recalculation of child support, other modifications to the MSA, and attorney's fees. Defendant opposed the motion and sought fees.

In a March 1, 2016 order, the court denied plaintiff's motion to alter the pick-up and drop-off provision. Viewing plaintiff's application as a motion under Rule 4:50-1, the court held that plaintiff had not established sufficient inequity or unfairness to disturb a final judgment. The court ordered plenary hearings on the alimony and child support issues. The court also awarded defendant fees of $4170 in connection with defending the motion, relying mainly on the disparity of the parties' income, finding that "there had been a lack of good faith and fair dealings all around." Thereafter, plaintiff withdrew his motion to modify alimony and child support, which was memorialized in a May 16, 2016 order.

This appeal followed. Plaintiff argues the court erred in entering the MSA with the provision requiring his presence at pick-up and drop-off, and in awarding defendant fees. We consider those issues in turn.

First, as a procedural matter, we believe the court should have considered the motion as one for reconsideration, under Rule 4:49-2, as opposed to a motion to vacate a final judgment under Rule 4:50-1, which presented a significantly higher hurdle for

plaintiff to overcome. The motion was filed within time for reconsideration. Although the notice of motion did not identify either Rule, defense counsel in opposition understandably deemed the motion one for reconsideration. Viewed in that light, we conclude that the court overlooked the clear import of the colloquy on May 27 regarding pick-up and drop-off.

We are guided by well-settled principles. "Settlement of disputes, including matrimonial disputes, is encouraged and highly valued in our system." Quinn v. Quinn, 225 N.J. 34, 44 (2016). We apply basic contract principles, though tempered by principles of equity. Id. at 45; see also Pacifico v. Pacifico, 190 N.J. 258, 265-66 (2007) (applying to property settlement agreement the "basic rule of contractual interpretation that a court must discern and implement the common intention of the parties"). Consequently, as with other contracts, we review de novo the trial court's interpretation of a settlement agreement. Kieffer v. Best Buy, 205 N.J. 213, 222-23 (2011); Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998). Our de novo review extends to legal issues of contract formation. See Jaworski v. Ernst & Young U.S. LLP, 441 N.J. Super. 464, 472 (App. Div. 2015); NAACP of Camden Cty. E. v. Foulke Mgt. Corp., 421 N.J. Super. 404, 430-34 (App. Div. 2011).

In this case, we look to the parties' oral recitation of the contractual terms. See Harrington v. Harrington, 281 N.J. Super. 39, 46 (App. Div. 1995) (stating that an enforceable agreement "need not necessarily be reduced to writing"). We look to whether there was a meeting of the minds, in other words, mutual assent and common understanding of terms. See Morgan v. Sanford Brown Inst., 225 N.J. 289, 308 (2016).

Having carefully reviewed the colloquy of May 27, 2015, we are satisfied that counsel, along with plaintiff, set forth the parties' agreement that plaintiff's presence would be required at parenting time, but not at pick-up and drop-off. As set forth above, defense counsel initially asserted that plaintiff needed to be present at pick-up and drop-off. Both plaintiff and his attorney objected and drew a distinction between parenting time — at which he would agree to be present — and pick-up and drop-off — at which he wanted the flexibility to send a representative. Plaintiff's counsel proposed that "the best way to phrase that in the Property Settlement Agreement is that they have to be present for parenting time . . . [a]nd not really the language that . . . they have to do the drop off." Defense counsel interjected, "Correct," in the middle of counsel's sentence, and stated "That's fine," at the end. The parties then affirmed they agreed with the terms set forth on the record.

We discern no ambiguity in the parties' agreement. We therefore reverse the trial court's order and amend the MSA incorporated in the amended judgment of divorce by deleting "by the Husband" in the second line of Art. II(2)(A)(IV) and deleting "by the Wife" on the fourth line, and by adding, "The Husband and Wife shall be present for their respective parenting time, as distinct from pick-up and drop-off."

Although we reverse the court's determination on the pick-up and drop-off issue, plaintiff has presented an insufficient basis to disturb the court's award of fees. The award of counsel fees is discretionary, and should be disturbed "only on the rarest occasions, and then only because of a clear abuse of discretion." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001); see also Barr v. Barr, 418 N.J. Super 18, 46 (App. Div. 2011). We also accord deference to the Family Court. Cesare v. Cesare, 154 N.J. 394, 411-12 (1998).

The trial judge presided over extended and contentious proceedings involving these parties. On the basis of his familiarity with the case and the parties, he determined that both sides were equally responsible for the necessity to incur fees. Thus, this is not a case where one party's bad faith disqualifies that party from the award of counsel fees. Cf. Yueh v. Yueh, 329 N.J. Super. 447, 461 (App. Div. 2000). Also, success in the

litigation, while a factor, is also not "a prerequisite for an award of counsel fees." J.E.V. v. K.V., 426 N.J. Super. 475, 492 (App. Div. 2012). Yet, plaintiff was not entirely successful with respect to other aspects of his motion.

The fundamental basis for the court's award of fees was the striking disparity in the parties' financial status. "Fees in family actions are normally awarded to permit parties with unequal financial positions to litigate (in good faith) and on an equal footing." Id. at 493 (quoting Kelly v. Kelly, 262 N.J. Super. 303, 307 (Ch. Div. 1992)). Plaintiff was employed as a professional with the Nuclear Regulatory Commission, and defendant was an unemployed college student. The quantum of the award was reasonable in view of the motion record and effort expended. In sum, we affirm the award of attorney's fees.

Reversed in part and affirmed in part.