SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5401-15T1

J.S.,

Plaintiff-Appellant,

v.

J.M.,

Defendant-Respondent.

Submitted December 4, 2017 – Decided April 3, 2018

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Camden County, Docket No. FM-04-1633-10.

Victoria S. Rand, attorney for appellant.

Lynn M. Castillo, attorney for respondent.

PER CURIAM

Plaintiff J.S. and defendant J.M. were married twenty years prior to their divorce in 2010.[1] In the property settlement agreement (PSA) incorporated into the final judgment of divorce,

[1] We use initials and pseudonyms throughout the opinion to keep the parties' identities confidential.

plaintiff agreed to pay defendant monthly alimony until he "reache[d] normal retirement age according to Social Security Administration guidelines." The PSA also provided that plaintiff's alimony obligation would "[t]erminate upon [defendant's] cohabitation . . . with an unrelated male in lieu of remarriage for a period of [thirty] days or more."

In September 2015, plaintiff moved to terminate alimony, alleging that defendant had been having an affair with plaintiff's brother N.S. (Nolan) for several years, and they now shared an apartment. The motion included a copy of an apartment lease that ran from March 2014 to February 2015, signed by defendant and Nolan, and listing both as residents. Defendant opposed the motion and cross-moved for counsel fees.

The Family Part judge ordered a plenary hearing and gave the parties sixty days to conduct discovery. Defendant, Nolan, defendant's mother, M.M. (Millie), and her former boyfriend, J.P.C. (Jack), testified, as did plaintiff and V.S.J. (Vickie), plaintiff's and Nolan's sister. We briefly summarize the testimony to place the issues in context.

Defendant admitted having an intimate relationship with Nolan that began in 2010, however, she denied contributing toward the rent of his apartment or any household expenses. Defendant claimed she remained living at home with her mother and only spent one

weekend in Nolan's apartment when he first moved in. After her relationship with Nolan ended around May 2014, defendant began dating Jack but never lived with him or contributed to his household expenses. Defendant renewed her relationship with Nolan in February 2015, but in the interim, Vickie had moved into the one-bedroom apartment and the situation was quite tense. Jack confirmed defendant's account of their relationship.

Nolan acknowledged a longstanding dating relationship with defendant, but denied the couple ever lived together. Defendant did not contribute to household expenses, and Nolan asked defendant to cosign the lease only because his credit was bad and he could not qualify for the apartment alone.

Millie was aware of defendant's affair with Nolan. However, defendant lived with her and rarely stayed overnight anywhere else. Defendant helped Millie pay for household expenses, and Millie acknowledged that she depended on plaintiff's alimony payments to make ends meet.

Plaintiff testified about his ex-wife's extramarital relationships. He had conducted surveillance at Nolan's apartment and claimed defendant was there overnight on several occasions. Vickie testified that prior to moving into his own apartment, Nolan lived in the family's home and defendant stayed overnight one or two nights per week for years. Vickie, who was temporarily

living in Nolan's apartment, said defendant would stay overnight once or twice per week and would buy groceries, cook and clean the apartment.

In her oral decision that followed the testimony, the judge specifically found defendant was not credible and had "told her [mother] exactly what to say." Millie, in turn, was trying to help defendant because she (Millie) relied on plaintiff's alimony payments. Jack was the only credible witness defendant presented. The judge found plaintiff was credible but rejected his interpretation of the PSA, i.e., that "[thirty] dates would fulfill the definition" of cohabitation. The judge found Vickie's "testimony . . . spiteful."

The judge concluded defendant and Nolan had "a dating relationship, and no matter how untoward this relationship appear[ed] . . . , it [did not] mean cohabitation." In particular, the judge cited Vickie's testimony that defendant would spend only one or two nights per week with Nolan, and that there were "no comingled funds." The judge supplemented her oral decision the next day, reiterating her essential findings from the day before. Her April 1, 2016 order denied plaintiff's motion.

Plaintiff moved for reconsideration, which defendant opposed and cross-moved for counsel fees. Before the motion was heard, plaintiff filed a sur-reply and a separate motion seeking relief

under Rule 4:50-1. In support of that motion, plaintiff supplied a letter dated March 15, 2016, that Nolan gave him. In it, Nolan sought to "explain [his] testimony . . . at [the] hearing last week." Nolan reiterated that defendant "did indeed spend some nights in [his] new apartment," and he recalled defendant "spent many nights at [his] former address at the family home . . . as well." Nolan said he "hid the truth" because his involvement with defendant had caused plaintiff great pain, and it was "easier to deny" how intimate the relationship had become. The letter concluded, "By denying the truth and not realizing you knew my denial to be untrue, I only made it impossible to repair the relationship with you. By clearing up this issue, I hope to regain your trust and friendship."

The judge considered oral argument on plaintiff's two motions. She denied reconsideration, rejecting plaintiff's contention she failed to properly consider the cohabitation factors set out by the Court in Konzelman v. Konzelman, 158 N.J. 185, 202 (1999). Regarding the Rule 4:50-1 motion, the judge said Nolan's letter failed to provide "any new information that would cause [her] to change [her] opinion." The court's July 18, 2016 order denied both motions and this appeal followed.

Plaintiff argues the judge mistakenly exercised her discretion in failing to grant his motion to terminate alimony.

He also argues that when he sought reconsideration, the judge failed to consider the impact of our decision in Reese v. Weis, 430 N.J. Super. 552 (App. Div. 2013), the Court's opinion in Quinn v. Quinn, 225 N.J. 34 (2016), and the 2014 amendments to the alimony statute, N.J.S.A. 2A:34-23. Lastly, plaintiff contends the judge mistakenly exercised her discretion by denying his Rule 4:50-1 motion.

We have considered these arguments in light of the record and applicable legal standards. We affirm.

Initially, plaintiff's notice of appeal only lists the July 18, 2016 order denying plaintiff's motion for reconsideration or relief under Rule 4:50-1, not the order denying plaintiff's motion to terminate his alimony obligations. Our review, therefore, is limited to the July 18, 2016 order. See W.H. Ind., Inc. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 458 (App. Div. 2008) ("It is clear that it is only the orders designated in the notice of appeal that are subject to the appeal process and review."); Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 455, 461-62 (App. Div. 2002) (limiting review to denial of reconsideration motion and not underlying grant of summary judgment).

We have said that

> [r]econsideration itself is "a matter within the sound discretion of the Court, to be exercised in the interest of justice[.]" It is not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue a motion, but
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> > should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence.
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> [Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)).]

"[T]he magnitude of the error cited must be a game-changer for reconsideration to be appropriate." Id. at 289.

Plaintiff argued before the Family Part, and now before us, that the judge failed to consider defendant's ability to pay for her mother's expenses and her own despite having limited income from her disability payments, and whether defendant's relationship with Nolan enhanced her standard of living. In Reese, 430 N.J. Super. at 557-58, we held that "the inquiry regarding whether an economic benefit arises in the context of cohabitation must consider not only the actual financial assistance resulting from the new relationship, but also should weigh other enhancements to

the dependent spouse's standard of living that directly result from cohabitation." However, cohabitation was not in dispute in Reese, id. at 559, while here it was the central unresolved issue, ultimately decided against plaintiff.

Plaintiff argues the judge failed to consider the Court's decision in Quinn, issued in May 2016, after the plenary hearing, the denial of plaintiff's motion to terminate alimony, and the filing of his motion for reconsideration, but before argument of the reconsideration motion. During that argument, the judge posed a hypothetical, i.e., whether it was necessary for plaintiff to have filed his motion to terminate during defendant's relationship with Nolan.

In Quinn, 225 N.J. at 39, the court held that if a PSA provided for the termination of alimony upon the dependent spouse's cohabitation, the court should enforce the terms of the agreement and terminate alimony, rather than suspend it during the period of cohabitation. Again, even if we assume the judge's question evidenced a palpably wrong understanding of the issue, and we do not think it did, Quinn has no application to this case because the judge found there was no cohabitation.

Plaintiff contends the judge should have applied the 2014 amendments to the alimony statute in considering whether it was appropriate to terminate his support obligation. He points

specifically to a provision of N.J.S.A. 2A:34-23 that provides: "In evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship. A court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis."

Plaintiff admits that because our decision in Spangenberg v. Kolakowski, 442 N.J. Super. 529, 539 (App. Div. 2015), held the amendments did not apply retroactively to our review of a "post-judgment order [that] became final before the statutory amendment's effective date," he did not urge the judge to consider the amendments at any time, including during the argument on the reconsideration motion. Instead, plaintiff "focused his efforts on meeting the Konzelman standard of cohabitation."

With limited exceptions, we generally refuse to consider an issue not raised before the trial court. E.S. v. H.A., 451 N.J. Super. 374, 382 (App. Div. 2017). However, the amendments were effective September 10, 2014, nearly two years prior to the plenary hearing, and, if applicable, the judge was required to consider them. We have said

> The amendments to N.J.S.A. 2A:34-23 themselves do not contain language specific as to implementation, except to provide the amendments are effective immediately, on September 10, 2014. However, the bill

adopting the alimony amendments adds this provision:

> This act shall take effect immediately and shall not be construed either to modify the duration of alimony ordered or agreed upon or other specifically bargained for contractual provisions that have been incorporated into:
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> a. a final judgment of divorce or dissolution;
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> b. a final order that has concluded post-judgment litigation; or
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> c. any enforceable written agreement between the parties.
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> [Spangenberg, 442 N.J. Super. at 538 (quoting L. 2014, c. 42 § 2).]

Here, the parties entered into the PSA well before the Legislature adopted the amendments. We are convinced the 2014 amendments did not apply and the judge correctly applied the law.

Finally, plaintiff contends the judge should have granted his motion for relief pursuant to Rule 4:50-1(f) based upon Nolan's letter. "The rule is limited to 'situations in which, were it not applied, a grave injustice would occur.'" US Bank Nat'l. Ass'n v. Guillaume, 209 N.J. 449, 484 (2012) (quoting Hous. Auth. of Morristown v. Little, 135 N.J. 274, 289 (1994)).

Certainly, the Court has recognized the possibility of such extraordinary relief when the moving party demonstrates another

party's misrepresentation or deceit. Palko v. Palko, 73 N.J. 395, 397-98 (1977), rev'q on dissent 150 N.J. Super. 255 (App. Div. 1976). However, the judge correctly noted that Nolan's letter failed to provide "anything new," other than an apparent heartfelt apology for the pain caused by his affair with defendant. The letter certainly did not call into question the underlying factual findings made by the judge after hearing all the testimony at the hearing.

Affirmed.[2]

[2] We note that defendant's brief includes a point challenging the judge's denial of her cross-motion for counsel fees. However, defendant never filed a cross-appeal, so the issue is not properly before us. Reich v. Fort Lee Zoning Bd., 414 N.J. Super. 483, 499 n.9 (App. Div. 2010).