

NOT TO BE PUBLISHED WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

IN THE MATTER OF THE ESTATE
OF ANTHONY GIORDANO,
DECEASED.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, PROBATE PART:
BERGEN COUNTY
DOCKET No. P-085-18

OPINION

Argued: June 7, 2019

Decided: June 10, 2019

Appearances: Cynthia Cappell, (Law Offices of Cynthia A. Cappell, LLC, attorneys) for Plaintiff

John Walsh, Jr., (Walsh & Walsh, Esqs., attorneys) for Defendants

HON. EDWARD A. JEREJIAN, P.J.Ch.

This matter comes before the Court by way of Motion for Summary Judgment, filed on April 29, 2019 by Cynthia Cappell, Esq., attorney for Plaintiff Romana Giordano. On May 28, 2019, John Walsh, Jr., Esq., attorney for Defendants David Giordano, Susan Giordano and Maria Giordano, filed opposition to the instant motion. Plaintiff submitted a reply certification on June 3, 2019. The Court heard oral argument on June 7, 2019.

BACKGROUND

Decedent Anthony Giordano (hereinafter, “Decedent”) was born on January 28, 1936. Decedent died on September 16, 2017 at the age of 81. Plaintiff was born on March 6, 1939, and is now 81 years old.

Decedent and Plaintiff were married on September 11, 1994, and remained lawfully married on the date of Decedent’s death. Two days prior to their marriage, on September 9, 1994, Decedent and Plaintiff entered into a premarital agreement (hereinafter, “PMA”). A copy of the PMA is attached to Plaintiff’s Certification as Exhibit D.

Decedent executed a Last Will and Testament on June 28, 2017, which is also attached to Plaintiff’s Certification as Exhibit B. In Decedent’s Will, specific bequests were made to all three of decedent’s children, while the only bequest made to Plaintiff was a life estate in the marital home. See Romana Cert. at Ex. B.

The date-of-death value of decedent’s Estate as reported by the Executor of the Estate Tax Returns was over \$2,220,348.00. Decedent’s Estate consisted of real property at approximately \$1,678,900, mortgages, notes, cash, certificates of deposit, IRA’s and investment accounts of approximately \$214,525, jointly owned property of approximately \$318,778.00, and annuities of approximately \$8,145.00. See Plaintiff’s Statement of Undisputed Material Facts, at paragraph 18-19.

Plaintiff’s annual net income is purportedly less than \$20,000.00, comprised mostly of Social Security income, pension income, and W-2 earnings as a school lunch aide. It is alleged that without an elective share, Plaintiff will not be able to maintain any reasonably comparable standard of living to that enjoyed with decedent during the marriage.

It is also alleged, as will be discussed in detail below, that Decedent failed to disclose and/or account for certain assets of his in the PMA, thereby rendering it unenforceable. Such is the primary issue before the Court in the underlying litigation, yet Plaintiff asks this Court to find by way of dispositive motion that the PMA is unenforceable and unconscionable as a matter of law, based on the limited set of facts before the Court at this point.

LEGAL STANDARD

Summary judgment is designed to “avoid trials which would serve no useful purpose and to afford deserving litigants immediate relief.” Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74 (1954). Thus, the court shall grant a summary judgment motion “if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.” R. 4:46-2(c).

In order to satisfy its burden of proof on a summary judgment motion, the moving party must show that no genuine issue of material facts exists. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528–29 (1995). Once the moving party satisfies its burden, the burden then shifts to the non-moving party to present evidence there is a genuine issue for trial. Ibid. The non-moving party may not solely rely on denials or allegations made in an answer to defeat a motion for summary judgment. See Cortez v. Gindhart, 435 N.J. Super. 589, 606 (App. Div. 2014). Instead, the non-moving party must respond with affidavits meeting the requirements of R. 1:6-6 as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial.

In determining whether the existence of a genuine issue of material fact precludes summary judgment, the court must “consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-

finder to resolve the alleged disputed issue in favor of the non-moving party.” Brill, supra, 142 N.J. at 540. Even if there is a denial of essential fact, the court should grant a motion for summary judgment if the rest of the record, viewed most favorably to the party opposing the motion, demonstrates the absence of a material and genuine factual dispute. See Rankin v. Sowinski, 119 N.J. Super. 393, 399–400 (App. Div. 1972).

ANALYSIS

SETTING ASIDE THE PRE-MARITAL AGREEMENT ON GROUNDS OF INVOLUNTARINESS AND UNCONSCIONABILITY

New Jersey’s elective share statute, N.J.S.A. 3B:8-1, allows a surviving spouse to elect the right to take one-third of the augmented estate of a decedent spouse. The Elective Share statute is “needs based” and can be awarded upon a finding that the election is necessary to provide adequate support of the surviving spouse during her probable life expectancy. In re Estate of Bilse, 329 N.J. Super. 158 (Ch. Div. 1999) (internal citations omitted).

Here, Plaintiff argues that based on Plaintiff’s marriage to the Decedent for twenty-three years, coupled with her financial, physical and emotional support and contributions throughout the entire marriage, in addition to the purported co-mingling of assets in the form of bank accounts and real property, Plaintiff is likely to prevail on her claim for an elective share.

First, Plaintiff argues that the PMA was entered into involuntarily and therefore must be set aside. Specifically, Plaintiff posits that the PMA is unenforceable because Decedent purportedly failed to make a fair and full disclosure of assets and liabilities at the time of execution as required by N.J.S.A. 37:2-38(C)(1), in addition to Plaintiff’s supposed lack of sophistication required to fully and effectively analyze decedent’s assets at the time of execution on account of English being Plaintiff’s second language.

N.J.S.A. 37:2-38 provides, in pertinent part:

The burden of proof to set aside a premarital or pre-civil union agreement shall be upon the party alleging the agreement to be unenforceable. A premarital [agreement] shall not be enforceable if the party seeking to set aside the agreement proves, by clear and convincing evidence, that . . . (a) the party executed the agreement involuntarily; or . . . (c) the agreement was unconscionable when it was executed because that party, before the execution of the agreement . . . (1) was not provided full and fair disclosure of the earnings, property and financial obligations of the other party. N.J.S.A. 37:2-38, et seq.

Here, there clearly exists genuine issue of material fact regarding the circumstances surrounding the execution of the PMA that preclude entry of summary judgment on this issue. It remains to be seen whether Plaintiff was provided with full and fair disclosure of Decedent's salary, properties and financial obligations; whether she chose not to receive any further disclosure other than that which was provided in the PMA; and whether she in fact knew of his properties, the value of these properties and his financial obligations.

Plaintiff relies heavily on the Appellate Court's decision in In re Estate of Shinn in an attempt to dissuade this court of the need for a trial to determine the remaining factual issues. 394 N.J. Super. 55 (App. Div. 2007), certif. denied, 192 N.J. 595 (2007). Although Plaintiff is correct in its assertion that the underlying facts of Shinn are *similar* to the instant matter, the contextual circumstances surrounding the Shinn matter make it readily distinguishable from the matter before this court.

First, the court must preliminarily note that the primary issue before the appellate division in Shinn was *not* the applicability of N.J.S.A. 37:2-38 to the underlying circumstances before that court, but rather the trial court's improper invocation of the doctrine of equitable estoppel in order to actually *enforce* that Plaintiff's premarital waiver of an elective share to the estate of her late husband. See id. at 58.

Nevertheless, many key facts surrounding the brief interpretation of N.J.S.A. 37:2-38 in Shinn are also distinguishable from the matter before this court, which the court shall address in detail below.

First, and perhaps most obvious, the momentous contextual differences surrounding the two proceedings effectively convince this court that disposition of this matter on summary judgment simply seems inequitable and inappropriate. In Shinn, the Appellate Division reviewed findings made by the trial court following a *nine*-day trial, in which the Appellate Division repeatedly commented glowingly on both (1) the trial court judge's "thoroughness" in his oral decision rendered, as well as (2) the vast amount of "clear and convincing" evidence before the trial court. See id. at 63-65.

Here, Plaintiff asks this court to find that no genuine issues of material fact exist and to dispose of this matter on a summary judgment motion a mere two weeks before the commencement of trial. Although there is nothing in law or in equity that specifically precludes this court from doing so, unlike the matter before the Shinn court, here there remain significant factual disputes that preclude this court from finding, by "clear and convincing evidence," that the prenuptial agreement should in fact be deemed unenforceable.

To the contrary, many of the facts that remain in dispute in the matter before this court were the very facts that the Shinn court ultimately based its decision on. For instance, as Defendants point out, it remains to be seen (1) whether or not Plaintiff's attorney effectively discussed the PMA with her; (2) whether or not she fully understood the rights she was about to give up; (3) whether or not Plaintiff was aware of Decedent's financial worth and potential; and most importantly (4) whether there was any presence of unconscionable behavior.

In Shinn, the trial court definitively knew that (1) the Decedent had purposefully misrepresented his net worth in excess of \$6,000,000 to be approximately \$853,750; (2) following attorney review of the agreement, the Plaintiff's attorney requested more information, as well as clarification from Decedent's Attorney, who had staunchly refused, indicating that was "all the information they were going to get;" and (3) that when the Plaintiff had proposed changes in the agreement upon a clear expression of concern regarding its terms, the Decedent had threatened her by saying "sign it . . . Or [they] weren't getting married." See id. at 59-62.

Although the court concedes that there are concerns regarding the specificity provided in the PMA in the instant matter, there are clear issues of fact surrounding the execution of the agreement, as well as Plaintiff's understanding of the terms of the agreement, that must be resolved before it can find one way or another whether or not Plaintiff had "full and fair disclosure" of Decedent's assets pursuant to N.J.S.A. 37:2-38. The parties must further inquire and present to the court the circumstances surrounding the execution of the agreement, whether or not specific "values" not ascribed to Decedent's properties and business interest were inquired about, or in fact even necessary, and whether or not there existed other bank accounts and retirement accounts that were *not* disclosed that would render Plaintiff's "waiver" as unwilling and involuntary.

Furthermore, Plaintiff asks this court to fashion an equitable remedy based around the disparity between Plaintiff's accustomed standard of living with Decedent compared to now. In essence, Plaintiff contends that enforcement of the agreement under the circumstances would be unconscionable because Plaintiff's occupation as a part-time lunch aide in the Hackensack School System nets her less than \$20,000.00 per year, while Decedent's estate at the time of his death has been approximated to be around \$2,220,000. For instance, the property taxes on the marital home

alone purportedly exceed \$11,000.00, and thus Plaintiff would likely not even be able to pay them pursuant to her life estate interest in the property.

Likewise, however, there remains significant issues of fact that preclude the court from making these findings definitively on a summary judgment motion. For instance, it remains to be seen whether or not Plaintiff has or has not received \$110,000.00 in sales proceeds from the 109 Johnson Avenue property, how much money exists in a purported Charles Schwab, as well as the supposed existence of other assets and accounts. Specifically, Defendants posit that in addition to the previously-mentioned assets, Plaintiff has approximately \$75,000.00 deposited with another financial advisor, an undisclosed personal checking and savings account, IRA accounts that she has inherited from the Decedent, and also approximately \$36,000.00 held in Wells Fargo accounts that passed to her. Thus, it is clear that genuine issues of fact exist that preclude the court from dispositively finding Plaintiff is equitably entitled to an elective share based on her contested assertions.

PLAINTIFF'S ENTITLEMENT TO FUNDS MAINTAINED IN THE JOINT BANK OF AMERICA ACCOUNT

The Multiple Party Deposit Account Act provides:

Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created.
N.J.S.A. 17:16I-5(a)

Here, Plaintiff argues that a strict interpretation of the MPDAA warrants the \$35,500.00 retained by Defendant be returned to Plaintiff due to the account being a joint account with rights of survivorship. Specifically, Plaintiff alleges that she was wrongfully convinced to sign two checks – one to herself in the amount of \$35,500.00 and one to Defendant in the same amount – from a joint bank account with Bank of America. Plaintiff posits that Defendants behavior amounts to coercion because these funds unequivocally belonged to Plaintiff upon Decedent's death.

Nevertheless, the facts pertaining to this account also remain in substantial dispute that would render disposing of this issue prior to a trial on the merits. Specifically, Defendant posits that the account at issue was established by the Decedent and Plaintiff as a “receptacle for the sales proceeds” of the 109 Johnson Avenue property, and that a cursory review of the activity of this account would indicate that each party already withdrew one-half of the proceeds during the two (2) years the account existed. See Defendants’ opposition brief, at p.8. Notably, Defendant argues that at trial it will be able to demonstrate that each time Decedent withdrew funds from this account, “plaintiff withdrew a matching amount.” Id.

Therefore, despite N.J.S.A. 17:16I-5 creates a presumption that the funds on deposit at the time of Decedent’s death were to pass to Plaintiff, there is also evidence that would indicate Decedent intended his children to receive his one-half interest, which would support why Plaintiff issued the \$35,500.00 check to Plaintiff in the first place. Thus, disposition of this issue on summary judgment prior to trial would be improper under the standards governing summary judgment because clear genuine issues of material fact exist as to this issue.

CONCLUSION

For the reasons set forth above, the Court finds that disposition of this matter on summary judgment would be inappropriate because many factual circumstances surrounding the execution of the PMA remain in dispute. Despite certain concerns this Court must address at trial regarding whether or not Decedent’s assets were in fact “fully and fairly” disclosed to Plaintiff prior to execution of the PMA, Plaintiff has failed to show by clear and convincing evidence at this stage of the litigation that Decedent did in fact violate N.J.S.A. 37:2-38 on its face. Therefore, Plaintiff’s motion for summary judgment is hereby denied, and this matter shall proceed to trial, which shall commence on June 24, 2019. An order accompanies this decision.