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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0551-20**

DINA MEIXNER,

Plaintiff-Respondent,

v.

THOMAS MEIXNER,

Defendant-Appellant.

Submitted November 9, 2021 – Decided May 12, 2022

Before Judges Currier, DeAlmeida and Smith.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Essex County, Docket
No. FM-07-1171-17.

Chiesa Shahinian & Giantomasi, PC, attorneys for
appellant (Thomas D. Baldwin, on the briefs).

Snyder Sarno D'Aniello Maceri & Da Costa, LLC,
attorneys for respondent (Joseph V. Maceri, of counsel
and on the brief; Michelle Wortman, on the brief).

PER CURIAM

Defendant Thomas Meixner appeals from the September 11, 2020 order of the Family Part denying his motion to terminate alimony due to plaintiff Dina Meixner's cohabitation and awarding Dina attorney's fees.¹ We affirm the provisions of the order denying Thomas's motion. We are, however, constrained to vacate the provisions of the order awarding attorney's fees and remand for more complete findings of fact and conclusions of law by the trial court.

I.

The parties were married in 1992 and have three children. In 2015, they separated. Dina subsequently filed a complaint for divorce. Through mediation, the parties reached a property settlement agreement (PSA), which was later incorporated into a judgment of divorce. The PSA requires Thomas to pay alimony for twenty years. His alimony obligation terminates if Dina "cohabitates with an unrelated adult in a relationship tantamount to marriage in accordance with the New Jersey case law at the time."

In April 2020, Thomas moved for termination of alimony, alleging Dina was cohabitating with Joel.² In a certification filed in support of the motion,

¹ Because the parties share a surname, we refer to them by their first names. No disrespect is intended.

² Although not technically within the exceptions provided by Rule 1:38-3(d), we use a pseudonym to maintain the confidentiality of Dina's dating partner.

Thomas alleged that although Joel maintains his own home, he and Dina reside together in Dina's house, quarantined together during the Covid-19 pandemic, share expenses, and are "doing everything a married couple does." Thomas alleged Dina's and Joel's families, Dina's neighbors, and the children's healthcare providers recognize Dina and Joel as a couple in a committed relationship. According to Thomas, Dina hosted Christmas 2018 at her home with Joel and his family and the two spend most holidays and vacations together with their respective children.

Thomas alleged that in September 2019, he arrived at Dina's home to retrieve his golf clubs and found Joel there alone and "clearly living there." On another occasion, Thomas was invited into the home by Dina when he was picking up the children. While there, Thomas walked through the home taking photographs that he submitted in support of his motion. The photographs depict a few articles of men's clothing belonging to Joel hanging in Dina's bedroom closet, framed photographs of Joel with Dina and the children and other family members on display in the home, and a letter addressed to Joel's business using Dina's home address.

Thomas also certified that Dina's neighbor, who lived near the couple for twenty years while Thomas resided in the house, saw Thomas in the driveway

on one occasion and said from across the street, "Hi, Joel," apparently mistaking him for Joel. Thomas also alleged that a physician who treats his daughter referred to him as "Joel" on one occasion during a medical appointment.

Finally, Thomas submitted a report from an investigation firm he hired to monitor Joel's activities over nine days in October 2019, six months prior to the filing of his motion. The report included photographs of Joel's vehicle at Dina's home on seven of those days, but also notes a number of occasions when an investigator observed that Joel was not at the house.

Dina opposed the motion and cross-moved for the award of attorney's fees.³ While Dina acknowledged that she has been dating Joel since 2016, she denied cohabitating with him or having a mutually interdependent relationship tantamount to marriage. Dina denied that she and Joel share a home, quarantined together during the Covid-19 pandemic, or are in any way financially interdependent. She certified that she and Joel do not comingle funds, have no joint bank accounts or credit cards, and no jointly owned assets. Dina explained that on the day Thomas found Joel alone in her home, she had asked Joel to be there to allow her housecleaner to enter the home because she was not

³ Both Thomas and Dina also moved for other forms of relief. The trial court's decision with respect to the additional relief is not before this court.

comfortable leaving the front door unlocked after Thomas had attempted to remove a car from her property the prior week.

Dina denied regularly vacationing with Joel. She certified that he attended her graduation from a Florida university, paying his own way to travel to the ceremony. Dina and her children were also in Florida for the event. Dina also certified that on another occasion she rented a hotel room at the beach for her family for several days. During that time, Joel twice visited for the day with his children but did not sleep over.

Dina certified that she hosted Thomas, his fiancé, and his family for Christmas 2018, including Thomas's mother, siblings, and nieces and nephews. While Joel was also in attendance, his children were not. Dina acknowledged spending other holidays with Joel and their respective children.

Dina admitted having framed photographs of Joel in her home and stated that she had photographs of many of her friends displayed there. She certified that Joel had a few formal shirts and suits at her home because he brought them there to dress for a wedding they attended together. According to Dina, Joel wears jeans and casual clothing to work and the few items of formal clothing at her home are a fraction of his wardrobe. She certified that if Joel lived in her home, his casual clothing would necessarily have also been present. Dina

explained that the mail Thomas saw at her house was a check from Joel's client that she agreed to allow to be mailed to her home because he was experiencing mail delivery issues at a post office box used as his business address.

Dina noted that Thomas and Joel have similar physical builds, and are both tall and bald. She argues that it is not surprising that one might be mistaken for the other, particularly by her eighty-four-year-old neighbor who saw Thomas from across the street. She argues that the mistaken identifications of Thomas as Joel, if true, are meaningless to the cohabitation analysis.

On September 11, 2020, the trial court issued an oral opinion setting forth its findings of fact and conclusions of law on the cross-motions. With respect to Thomas's claim of cohabitation, the court applied the factors set forth in N.J.S.A. 2A:34-23(n)(1) to (7).⁴ The court found Thomas failed to produce evidence of intertwined finances, joint bank accounts or other holdings or liabilities. N.J.S.A. 2A:34-23(n)(1). Nor, the court found, did Thomas produce evidence of sharing or joint responsibility for living expenses. N.J.S.A. 2A:34-23(n)(2). The court noted that, while not dispositive, the evidence produced by

⁴ The transcript of the trial court's decision refers to N.J.S.A. 2A:34-1(b)(10). There is no such provision. The citation appears to be a typographical error.

Thomas indicates the parties maintain separate residences, notwithstanding the fact that Joel sometimes stays overnight at Dina's home.

The court found Thomas produced evidence, acknowledged by Dina, that Dina's and Joel's families and friends recognize that they are in a committed relationship. N.J.S.A. 2A:34-23(n)(3). The court found Thomas produced evidence that Dina and Joel have frequent contact and have maintained their relationship, which has indicia of being mutually supportive and intimate, for several years. N.J.S.A. 2A:34-23(n)(4).

The court found that Thomas produced evidence of a sharing of household chores, but concluded that the sharing is not significant. N.J.S.A. 2A:34-23(n)(5). Apart from evidence that Joel occasionally drives one of Dina's children to school, the court found "no other indication of any substantial sharing of responsibilities around the house." The court found Thomas does not contend Dina received an enforceable promise of support from Joel. N.J.S.A. 2A:34-23(n)(6).

Finally, with respect to "[a]ll other relevant evidence," N.J.S.A. 2A:34-23(n)(7), the court found that Thomas produced nothing establishing Dina and Joel were in a relationship that constituted cohabitation within the meaning of the statute. The court found that photographs on display in Dina's home were

not relevant to determining the contours of their relationship. The court made the same finding with respect to the few items of Joel's clothing in Dina's bedroom closet. The court concluded,

these are small things, but getting them all together, the [c]ourt does not believe that [Thomas] has sustained his burden [of] showing a prima facie case of cohabitation, utilizing all of the factors that are set forth in the statute, as well as the [PSA] provision, which does use . . . the phrase . . . "in a relationship tantamount to marriage." Nothing that has been submitted is a prima facie case showing that the relationship between [Dina] and [Joel] is tantamount to marriage or that there is enough of an issue there to warrant discovery or a plenary hearing to make that determination.

With respect to Dina's attorney's fee application, the extent of the trial court's decision was the following.

In light of the fact that [Dina] was compelled to respond to this motion and the ultimate outcome was that [Thomas] was not successful in persuading the [c]ourt that there was enough of an issue to present or warrant further discovery or conduct a plenary hearing, the [c]ourt will award counsel fees to [Dina's] counsel. [Dina's] counsel did submit a certification which addresses all the pertinent issues required for an award of counsel fees. It does appear that [Thomas] is in a superior financial position. Therefore, the [c]ourt will award counsel fees to [Dina's] counsel in the amount of \$6,000.

On September 11, 2020, the trial court entered an order memorializing its decision.

This appeal follows. Thomas argues that the trial court erred as a matter of law or otherwise abused its discretion by failing to find that he produced sufficient evidence to establish a prima facie claim of cohabitation warranting discovery and a plenary hearing. In addition, Thomas argues that the trial court did not make appropriate findings of fact supporting its award of attorney's fees to Dina.

II.

We review the court's decision regarding the need for a plenary hearing for an abuse of discretion. Costa v. Costa, 440 N.J. Super. 1, 4 (App. Div. 2015). "An abuse of discretion 'arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

Pursuant to N.J.S.A. 2A:34-23(n)(1) to (7), which was enacted in 2014, alimony may be terminated if the recipient is cohabitating with another person. The statute defines cohabitation as "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." N.J.S.A. 2A:34-23(n). The statute

establishes seven factors to be considered by a court when determining whether cohabitation is occurring:

- (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 [N.J.S.A.] 25:1-5; and
- (7) All other relevant evidence.

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.

[N.J.S.A. 2A:34-23(n).]

A finding of cohabitation requires "stability, permanency and mutual interdependence." Konzelman v. Konzelman, 158 N.J. 185, 202 (1999). "A

mere romantic, casual or social relationship is not sufficient to" terminate alimony. Ibid. In determining whether an individual is cohabitating, the court must determine if the relationship has the generic character of a family unit as a relatively permanent household. Gayet v. Gayet, 92 N.J. 149, 155 (1983). The court will not find "that a romantic relationship between an alimony recipient and another, characterized by regular meetings, participation in mutually appreciated activities, and some overnight stays in the home of one or the other, rises to the level of cohabitation." Quinn v. Quinn, 225 N.J. 34, 54 (2016).

The familiar change of circumstances standard established in Lepis v. Lepis, 83 N.J. 139, 157, 159 (1980), applies to "a motion to suspend or terminate alimony based on cohabitation following the 2014 amendments to the alimony statute, N.J.S.A. 2A:34-23(n)." Landau v. Landau, 461 N.J. Super. 107, 108 (App. Div. 2019). Thus, the

Lepis paradigm requiring the party seeking modification to establish "[a] prima facie showing of changed circumstances . . . before a court will order discovery of an ex-spouse's financial status," continues to strike a fair and workable balance between the parties' competing interests, which was not altered by the 2014 amendments to the alimony statute.

[Id. at 118-19 (quoting Lepis, 83 N.J. at 157).]

The party alleging cohabitation is "entitled to an assumption of the truth of his allegations and the benefit of all reasonable inferences to be drawn from the evidence he had marshaled." Temple v. Temple, 468 N.J. Super. 364, 368 (App. Div. 2021). "When presented with competing certifications that create a genuine dispute about material facts, a judge is not permitted to resolve the dispute on the papers; the judge must allow for discovery and if, after discovery, the material facts remain in dispute, conduct an evidentiary hearing." Ibid. A prima facie case has been presented when "the movant present[s] evidence from which a trier of fact could conclude the supported spouse and another are in 'a mutually supportive, intimate personal relationship' in which they have 'undertaken duties and privileges that are commonly associated with marriage or civil union.'" Id. at 371 (quoting N.J.S.A. 2A:34-23(n)).

Additionally, the parties agreed in their PSA that Thomas's alimony obligation would terminate if Dina "cohabitates with an unrelated adult in a relationship tantamount to marriage in accordance with the New Jersey case law at the time." The parties are free to enter into voluntary agreements governing termination of alimony based on cohabitation apart from the circumstances addressed in the statute. Quinn, 225 N.J. at 50.

We have carefully reviewed the record and find no basis to conclude that the trial court mistakenly exercised its discretion when it denied Thomas's motion without allowing discovery and holding a hearing. As the trial court concluded, the evidence produced by Thomas, at best, is indicative of a dating relationship, which Dina acknowledges. While Joel spends time at Dina's home, including overnight stays, he maintains his own residence and the record contains no evidence of any financial entanglement between the two. We also agree with the trial court's conclusion that the minimal photographic evidence Thomas created while he was a guest in Dina's home, and the evidence of Dina and Joel spending holidays and vacations together is insignificant and not indicative of a relationship tantamount to marriage.

This evidence is far less significant than that submitted by the moving party in Temple, where we held that it was error to decide a motion to terminate alimony without discovery and an evidentiary hearing. Temple, 468 N.J. Super. at 371-77. In that case, the supported former spouse had been in a relationship of at least fourteen years. Id. at 367. An "investigation produced considerable evidence of cohabitation or perhaps even a marriage." Id. at 372. That evidence included numerous social media posts over a period of seven years in which the partner of the former spouse referred to her as "my wife" when describing

vacations and restaurant outings they took together. Ibid. Other social media posts indicated that the couple "traveled and participated in events extensively" and were often "together for holidays and family functions" Id. at 373.

Other evidence indicated that the former spouse had sold the marital home and purchased a residence in New York City, near the workplace of her partner, who later posted that he "gave up" his New York City apartment. Id. at 373-74. In addition, surveillance revealed that the former spouse was living full-time at the partner's New Jersey house for three months, where she was photographed engaging in household chores, retrieving and opening mail, purchasing groceries, and using a key to enter the home. Id. at 374. A publication by a church near the New Jersey home identified the former spouse by her partner's surname. Id. at 373.

Thomas's certification contains much less evidence of cohabitation. He refers to a few isolated observations, which are consistent with a dating relationship, and a short-term investigation of Joel's activities, which produced ambiguous results. It was well within the trial court's discretion to conclude that the expense of discovery and an evidentiary hearing, with the resulting intrusion into Dina's private life are not justified by the meager evidence Thomas produced in support of his motion.

III.

The decision to award attorney's fees rests "within the sound discretion of the trial court." Maudsley v. State, 357 N.J. Super. 560, 590 (App. Div. 2003). "[F]ee determinations by trial courts will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)).

Although New Jersey generally disfavors the shifting of attorney's fees, a prevailing party may recover attorney's fees if expressly provided by statute, court rule, or contract. Collier, 167 N.J. at 440 (citing N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 569 (1999) and Dep't of Env't Prot. v. Ventron Corp., 94 N.J. 473, 504 (1983)). An allowance for counsel fees is permitted to any party in a divorce action, Rule 5:3-5(c), subject to the provisions of Rule 4:42-9.

In calculating the amount of reasonable attorney's fees, "an affidavit of services addressing the factors enumerated by RPC 1.5(a)" is required. R. 4:42-9(b); Twp. of W. Orange v. 769 Assocs., LLC, 198 N.J. 529, 542 (2009). RPC 1.5(a) sets forth the factors to be considered:

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

Courts determine the "lodestar," defined as the "number of hours reasonably expended" by the attorney, "multiplied by a reasonable hourly rate."

Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004)). "The court must not include

excessive and unnecessary hours spent on the case in calculating the lodestar." Furst, 182 N.J. at 22 (citing Rendine, 141 N.J. at 335-36).

"The amount of attorney fees usually rests within the discretion of the trial judge, but the reasons for the exercising of that discretion should be clearly stated." Khoudary v. Salem Cnty. Bd. of Soc. Servs., 281 N.J. Super. 571, 578 (App. Div. 1995) (citations omitted); see also R. 1:7-4(a) (requiring a court to "find the facts and state its conclusions of law thereon in all actions tried without a jury, on every motion decided by a written order that is appealable as of right"). "[T]he court must specifically review counsel's affidavit of services under R. 4:42-9, and make specific findings regarding the reasonableness of the legal services performed" F.S. v. L.D., 362 N.J. Super. 161, 170 (App. Div. 2003). "Without such findings it is impossible for an appellate court to perform its function of deciding whether the determination below is supported by substantial credible proof on the whole record." Monte v. Monte, 212 N.J. Super. 557, 565 (App. Div. 1986).

The record contains insufficient findings of fact or conclusions of law for us to meaningfully review the trial court's award of attorney's fees to Dina. Apart from noting Dina's need to respond to Thomas's motion and Thomas's apparent financial advantage, of which there is little evidence in the record, the

court's decision is conclusory. We note that the trial court did not appear to consider the fact that Thomas was partially successful, given that he secured some of the relief sought in his motion, which Dina did not appeal. We are, therefore, constrained to vacate the award of attorney's fees and remand for a new determination of Dina's application.

Affirmed in part, vacated in part, and remanded for a new determination of Dina's attorney's fees application. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION