NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1590-20

SHARYN PRIMMER,

Plaintiff-Respondent/
Cross-Appellant,

v.

MICHAEL HARRISON,

Defendant-Appellant/
Cross-Respondent.

APPROVED FOR PUBLICATION
May 6, 2022
APPELLATE DIVISION

Submitted April 28, 2022 – Decided May 6, 2022

Before Judges Mawla, Mitterhoff, and Alvarez.

On appeal from the Superior Court of New Jersey, Somerset County, Chancery Division, Family Part, Docket No. FM-18-0709-19.

Woolson Anderson Peach, PC, attorneys for appellant/cross-respondent (Randall J. Peach, of counsel and on the briefs).

Heymann & Fletcher, attorneys for respondent/cross-appellant (Alix Claps, on the briefs).

The opinion of the court was delivered by

MAWLA, J.A.D.

Defendant Michael Harrison appeals, and plaintiff Sharyn Primmer cross-appeals, from an April 16, 2021 order enforcing the parties' agreement. We affirm.

The parties began cohabiting in 1988 and ended their relationship in 2011. No children were born of the relationship. Plaintiff earned roughly $50,000 per year through her medical billing job, and defendant earned far more through his debt collection law firm. Plaintiff was sixty-seven and defendant was seventy years of age when the matter was tried.

The parties negotiated a written agreement with the help of Ira A. Cohen, an attorney and defendant's long-time friend. Plaintiff had met and befriended Cohen through defendant. Cohen practiced family law but never served as a mediator. He helped the parties resolve the dissolution of their relationship, but did not open a mediation file, hold a mediation session, bill the parties for mediation services, or ask the parties to sign a mediation retainer.

The parties conducted no discovery and did not disclose their assets. Plaintiff feared she lacked the means to support herself, and expressed her concerns to Cohen and Earl Parker, another mutual friend. According to plaintiff, defendant was eager for her to vacate their shared home and "made it clear that he wanted [her] to leave[,] and . . . took [her] to look at . . . condos."

Defendant also advised plaintiff to retain an attorney. Once she hired counsel, all further communication occurred between her attorney and Cohen.

According to plaintiff's attorney, Cohen began representing defendant because her attempts to correspond with defendant were met with no response or "a very curt response that he wasn't dealing with it. And, . . . [Cohen] reached out . . . and said he would be representing [defendant] from then on." Plaintiff's attorney acknowledged the role-change was "a pretty extraordinary occurrence in mediation[.]" Nonetheless, she continued to correspond directly with defendant and copied Cohen.

As the parties continued negotiating the agreement, Cohen faxed correspondence to plaintiff's attorney with the following handwritten message on the cover sheet:

> The parties have again renegotiated the Agreement for the LAST TIME. This is it. The move date is in cement. Please add in the language in [paragraph fifty-nine and sixty] attached. Please fax to me [and] my client will sign. Please then have your client sign as I will have the original [and four] copies dropped off Monday along with your check in escrow subject to your client signing the agreement. There can be no further delays, this agreement must be signed [and] sealed as of August 23, 2011 (TUESDAY) . . . .[1]

[1] The appellate record's copy of the fax cover sheet contains a second mention of "my client" near the end, but the remainder of the message is indecipherable.

A few days later Cohen sent a letter to plaintiff's lawyer regarding the parties' draft agreement, referring to defendant as "my client" and communicating defendant's wishes. The letter concluded with the following sentence: "If you wish to discuss this further, please feel free to contact me, otherwise kindly make said change and forward same to the undersigned for review of [defendant]." The following day, Cohen re-sent the letter, correcting its contents, but again referring to defendant as his client and reiterating the request that plaintiff's attorney forward the edited agreement to him to review with defendant. In a third letter, Cohen communicated defendant's settlement offers and concluded with the following paragraph:

> It is the opinion of the undersigned that no better result will ever be achieved in any [c]ourt . . . than what is set forth in the [a]greement. [Defendant] has attempted to be fundamentally fair as it concerns the economics of this situation. With that being the case, I need to know whether these changes to the [a]greement are acceptable to [plaintiff] in order that this matter can be concluded . . . . There needs to be a response by this office no later than 3:00 pm on August 26, 2011.

On September 1, 2011, Cohen followed up with plaintiff's lawyer in a letter stating: "I have not heard from you concerning the status of the [s]ettlement [a]greement . . . . My client is prepared upon the signature [of] the [a]greement by [plaintiff] to provide her with his check for the sums so designated in . . . the [a]greement . . . ." The letter communicated Cohen's

expectation the agreement would be signed the following day. Two weeks later he corresponded with plaintiff's counsel, providing the countersigned agreement from defendant, defendant's checks to plaintiff, and instructions from defendant regarding other aspects of the parties' arrangements.

Relevant to the issues raised on appeal, the agreement's preamble declared each party "made a full disclosure of all relevant financial information[.]" The parties agreed they would purchase a condominium for plaintiff and would share equally in the down payment. However, "[a]s [plaintiff] does not have access to such funds then [defendant] shall front load the down payment required for closing." The agreement required defendant to pay a $140,000 down payment and stated plaintiff would pay him $70,000 "within three years of the closing date without interest. If this sum is not paid . . . within three years of the closing date, interest will begin to accrue at [one percent] per annum until said sum is paid." Defendant agreed to pay the mortgage and real estate taxes, condominium dues, assessments, and insurance. He also agreed to pay plaintiff $1,500 per month on a permanent basis. The agreement stipulated "[p]ayments after the fifth [of the month] shall include a late fee of $100 per day." Defendant also agreed to pay for miscellaneous moving expenses, furniture, artwork, electronics, refurbishing

the condominium, medical bills, cell phone bills, and to contribute to plaintiff's counsel fees.

The agreement said it "shall be considered a contract by the parties duly enforceable in" court and contained a severance clause upholding the remainder of the agreement even if a court declared a portion invalid. It required that a "defaulting party shall indemnify the other for all reasonable expenses and costs, including attorney's fees, incurred in successfully enforcing this [a]greement."

The agreement also contained the following provisions:

> [Defendant] acknowledges that he has been advised of his right to obtain independent legal advice by counsel of his own selection. [Defendant] is giving up his right to have an attorney review this [a]greement before he signs it. [Plaintiff] has not discouraged [defendant] from obtaining an attorney. [Plaintiff's lawyer] has not rendered any legal advice to [defendant].
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> . . . .
>
> The parties mediated with . . . Cohen. Both parties acknowledge being satisfied with the mediator's services.

According to plaintiff's attorney, both of these paragraphs were initially "drafted . . . in April of 2011 when [she] . . . was of the understanding that [defendant] was representing himself." She explained the language was boiler plate that she inserted in every agreement, but "there was a flurry . . . between

April and August with [defendant] very much wanting [plaintiff] to move out and a lot of . . . Cohen's letters had drop dead dates that had to be followed and, unfortunately, when we did our final agreement . . . that part of the boiler plate was not removed."

In November 2011, plaintiff filed a palimony complaint in the Family Part for a judgment incorporating the settlement agreement. Plaintiff's lawyer forwarded the complaint to Cohen along with an acknowledgement of service, which he signed and returned. The complaint was dismissed for reasons unrelated to these appeals.

The parties lived by the terms of their agreement until 2017, except that plaintiff did not pay her share of the down payment. Beginning in July 2017, defendant stopped paying the $1,500 per month. In August 2017, plaintiff received a letter on defendant's behalf from a different attorney who claimed the agreement was "null and void" because defendant "was not represented by an attorney as required by pertinent New Jersey [s]tatutory [l]aw." Defendant subsequently informed plaintiff he would stop paying for her cell phone, mortgage, and home maintenance.

In February 2018, plaintiff filed a Law Division complaint seeking damages for defendant's breach of the agreement. Defendant's answer and counterclaim averred in part that the agreement should be voided because he

did not have the independent advice of counsel in violation of the Statute of Frauds, N.J.S.A. 25:1-5(h). The counterclaim also alleged plaintiff fraudulently induced defendant into sharing the condominium down payment based on her lack of funds. He alleged plaintiff represented her only means of payment was to sell inherited property, but he later learned she possessed over $400,000 in bank accounts and over $800,000 in retirement savings as of 2018. Defendant sought a judgment for the value of the condominium, punitive damages, and attorney's fees and costs.

The matter was transferred to the Family Part. In October 2019, a motion judge denied each party's motion for summary judgment, finding a material dispute of fact regarding: the nature of the agreement; whether there was fraud; Cohen's role; whether defendant may have been "competent to provide his own independent counsel"; and "whether defendant's waiver was valid based upon his status as an attorney."

Prior to trial, defendant moved in limine to bar plaintiff from introducing parol evidence contradicting the agreement's provision that he was not represented by counsel. The judge denied the motion, stating: "The court believes that it can hear the testimony as the trial proceeds and make determinations as to admissibility as the issues arise."

The parties, plaintiff's counsel, Cohen, and Parker testified at a two-day trial. Plaintiff explained she did not have the money to pay the down payment because of her limited earnings. Further, she needed the money "in [her] savings account that was for [her] retirement . . . [and t]o take one third of it and put it down on a condo . . . would not allow [her] to retire without bringing in a very . . . low income." She said defendant never asked her about her bank and retirement accounts although he knew she had a 401(k) given the parties' lengthy cohabitation. She claimed he "didn't seem to be concerned with that." Neither party completed a Case Information Statement (CIS) during the negotiations.

Defendant testified he asked plaintiff if she had savings or retirement assets and she claimed she only had the inherited property and "a small checking account." He noted that during the parties' cohabitation he paid for "pretty much anything you can think of in the house" and plaintiff paid "some of the food bills." A mortgage application he completed for the purchase of the condominium listed his monthly income at about $57,000. He also operated an equestrian business, that he characterized as expensive.

Defendant denied Cohen represented him and claimed Cohen was a "go-between" and "essentially, [acted] as a mediator." He never signed a retainer with Cohen or paid him for representation. Even though defendant had little

experience in family cases, he decided not to hire an attorney because he "wasn't looking to get involved in litigation" and "thought money would be better spent by coming to an agreement." Defendant testified he stopped paying the $1,500 because he was living up to the agreement and plaintiff was not.

Cohen denied representing defendant. He pointed to the "overly generous" terms of the agreement and claimed he would never have allowed one of his clients to "execute such a document." He claimed he never shared his concerns with defendant despite testifying he was significantly closer with him than plaintiff. When asked why he filed a certification in support of defendant's motion for summary judgment commenting on defendant's "generosity," he claimed he could not recall drafting the certification and it was "[j]ust a word that [he] chose at that time." Although he knew the Statute of Frauds required the parties to have counsel, he did not advise defendant to retain counsel. He claimed he did not know the statute prohibited the waiver of counsel.

Cohen stated the reference to defendant as his client in correspondence was an "error" and that he "misspoke." He denied his letters to plaintiff's counsel were advocating for defendant and claimed the demands used "language that [defendant] told [him] to write[.]"

Cohen also acknowledged the parties did not exchange discovery or financial information, and that defendant never asked him to inquire about plaintiff's finances. He described himself as "the fulcrum that went back and forth between the" parties. He agreed it was inappropriate for him as a mediator to acknowledge service of the complaint on behalf of defendant.

Plaintiff's counsel testified Cohen called her and said he had been mediating the case and plaintiff needed counsel. After she drafted the agreement and sent correspondence to defendant about it without receiving a reply, she contacted Cohen who advised her he was representing defendant. Her "conversations [with Cohen] in general were friendly although he was . . . not backing off on any of the positions that he felt he was setting forth in his correspondence on behalf of [defendant]." She characterized the tone of his letters as that "of an advocate who is very . . . vehemently representing a client."

The trial judge found plaintiff's testimony credible and "relatively straightforward." He reached the opposite conclusion regarding defendant, finding his "claims he didn't seek any legal advice about the . . . agreement" with Cohen or another attorney, "the least believable." The judge found plaintiff's attorney credible, particularly her testimony that Cohen "told her he was representing [defendant]." He also credited her explanation as to why the

boiler plate language and the provision noting Cohen served as mediator were never removed. On the other hand, the judge did not find Cohen's testimony credible, particularly the claim that he misspoke by referring to defendant as his client. He stated: "[T]here was a lot of waxing and waning in and out of knowledge as to what his role was[,]" which "really [a]ffected [the] assessment of . . . Cohen's credibility . . . . I think he was doing his best to skirt around the issue."

The judge concluded the agreement was enforceable and not barred by the Statute of Frauds because "defendant continued to make [monthly support] payments for six years[,] . . . which were an integral part of this agreement." He found the continued payments were "substantial part performance as well as justifiable reliance by . . . plaintiff on that performance to indicate that an agreement had been reached." He found the Statute of Frauds was satisfied because the negotiations between counsel, demands made by Cohen, and Cohen's participation in crafting the final agreement "point to the inescapable conclusion that . . . Cohen did in fact provide independent counsel to [defendant] with regard to this agreement."

The judge rejected defendant's fraud and rescission claims, finding the negotiations were based on "a lengthy and long relationship" and the parties had independent counsel. He stated:

> [F]raud is never presumed. It must be clearly and convincingly proven. . . .
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> . . . .
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> In this case . . . neither party provided a full disclosure. There were no CIS's filled out. The parties knew or should have known of the relative positions of each other. . . . [Plaintiff] never indicated, number one, that she had no monies, but [rather] that she had no liquidity.
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> [Defendant] took this for what it was worth; did not provide any disclosure of his assets either and the parties entered into what they thought was a fair agreement.
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> And . . . it was an arm's length transaction.
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> . . . .
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> [Defendant] has not established that but for this misrepresentation this deal would have been any different than what it was.

The judge ordered defendant to pay the monthly support retroactive to the date of breach. He awarded plaintiff $108,300 representing 1,083 days of penalty at $100 per day. The judge found the interest penalty set forth in the agreement was defendant's remedy for enforcement of plaintiff's obligation to pay the $70,000 down payment. He concluded "[t]hose monies should have been paid back within three years from the closing date, which would have been June of [2014] and when they were not, those monies began to accrue interest." He imposed a one percent per month interest penalty on the $70,000,

retroactive to the date of breach. He declined to award counsel fees because both sides had valid claims.

After the decision, defendant's counsel asked the judge to formally adjudicate the motion in limine and the judge responded he would "provide that under separate cover." Afterwards, he issued a written order containing all the adjudicated issues and denied the motion in limine as moot.

Due to clerical error, the parties did not receive the order until February 10, 2021. Defendant moved to amend the June order so the tolling period reflected the date of service rather than the date of entry, and plaintiff moved for reconsideration, noting the agreed upon interest penalty for the $70,000 was annual not monthly. The judge granted both motions, and entered the April 16, 2021 order as the final order for purposes of appeal. After adjusting the interest calculation, the judge reduced the judgment against plaintiff to $74,306.41.

While these appeals were pending, the Supreme Court decided Moynihan v. Lynch, 250 N.J. 60, 91 (2022), which struck down as unconstitutional the portion of N.J.S.A. 25:1-5(h) requiring parties to a palimony agreement receive advice of counsel. We granted defendant's motion permitting the parties to file supplemental briefs regarding whether the

holding in Moynihan was retroactive or could be afforded so-called pipeline retroactivity.

I.

On the appeal, defendant argues the trial court erred by: 1) not declaring the agreement void pursuant to the Statute of Frauds, including granting summary judgment; 2) wrongly deciding the in limine motion and not making findings; 3) ignoring the "overwhelming" evidence of plaintiff's fraud and not granting rescission of the parties' agreement; and 4) failing to consider the cumulative defects in the agreement and its overall lack of fairness as grounds to void it. He further argues Moynihan should not be given retroactive effect.

"We accord deference to a trial court's factfindings, particularly in family court matters where the court brings to bear its special expertise." Id. at 90 (citing Cesare v. Cesare, 154 N.J. 394, 413 (1998)). "Under that deferential standard of review, we are bound to uphold a finding that is supported by sufficient credible evidence in the record." Ibid. "Deference [to fact findings] is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Cesare, 154 N.J. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). "However, we owe no deference to a trial court's interpretation of the law, and review issues of law

de novo." Cumberland Farms, Inc. v. N.J. Dep't of Env't Prot., 447 N.J. Super. 423, 438 (App. Div. 2016).

"Our review of a summary judgment ruling is de novo." Conley v. Guerrero, 228 N.J. 339, 346 (2017). Summary judgment should be granted where "there is no genuine issue of material fact and 'the moving party is entitled to a judgment or order as a matter of law.'" Ibid. (quoting Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016)). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

Having considered defendant's arguments, we affirm substantially for the reasons expressed by the trial judge. We add the following comments to address the in limine and Statute of Frauds issues.

A. Defendant's In Limine Motion

A trial judge sitting as a fact finder can disregard irrelevant or improper evidence. State v. Kunz, 55 N.J. 128, 145 (1969). "Our review of the trial court's evidential rulings 'is limited to examining the decision for abuse of discretion.'" Ehrlich v. Sorokin, 451 N.J. Super. 119, 128 (App. Div. 2017) (quoting Parker v. Poole, 440 N.J. Super. 7, 16 (App. Div. 2015)). We apply

the same standard of review to in limine motions adjudicating the admissibility of evidence. State v. Cordero, 438 N.J. Super. 472, 483-84 (App. Div. 2014).

As a general proposition, "the parol evidence rule prohibits the introduction of evidence that tends to alter an integrated written document." Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 268 (2006). The Supreme Court has adopted an expansive view regarding the admissibility of parol evidence in the interpretation of contracts, including the review of particular provisions, "an overview of all the terms, the circumstances leading up to the formation of the contract, custom, usage, and the interpretation placed on the disputed provision by the parties' conduct.'" Id. at 269 (quoting Kearny PBA Loc. #21 v. Town of Kearny, 81 N.J. 208, 221 (1979)).

Pursuant to these principles, we discern no error in the judge's decision to first consider the testimony before deciding whether to admit the parol evidence. The evidence was not only essential to understanding the formation of the agreement, but also Cohen's role.

Although the judge made no separate findings regarding the in limine motion, it is evident that defendant's failure to meet his burden of proof to void the agreement meant the motion was denied and no further findings were necessary. Moreover, "we review orders and not opinions." Brown v. Brown,

470 N.J. Super. 457, 463 (App. Div. 2022). The record readily demonstrates the denial of the in limine motion was not an abuse of discretion.

B. The Statute of Frauds and Retroactivity

N.J.S.A. 25:1-5(h) requires a signed, written agreement where there is "[a] promise by one party to a non-marital personal relationship to provide support or other consideration for the other party . . . after its termination." For such an agreement to be binding it must be "made with the independent advice of counsel for both parties." Ibid.

In Moynihan, our Supreme Court struck down the attorney review requirement as unconstitutional because it "contravenes the substantive due process guarantee" of the New Jersey Constitution. 250 N.J. at 66. The Court found the statute "interferes with an individual's right of autonomy, singles out written palimony agreements from among all other agreements for differential treatment, and has no parallel in the legislative history of this state." Id. at 67. It further noted "no other law in this state conditions enforceability of an agreement between private parties on attorney review." Id. at 81. The Court held statutory mandate of attorney review interfered with the right to personal liberty and autonomy. Id. at 83-88.

When the Supreme Court announces "a new rule of law[,] . . . retroactivity analysis is appropriate." See Beltran v. DeLima, 379 N.J. Super.

169, 173 (App. Div. 2005). New rules given "pipeline retroactivity" apply to "all future cases, the case in which the rule is announced, and any cases still on direct appeal." N.H v. H.H., 418 N.J. Super. 262, 285 (App. Div. 2011) (quoting State v. Knight, 145 N.J. 233, 249 (1996)). "In the civil context, pipeline retroactivity of a new rule of law contemplates that three classes of litigants will be beneficiaries: those in all future cases, those in matters that are still pending, and the particular successful litigant in the decided case." Ibid. Retroactivity is the traditional rule and is most often appropriate. Beltran, 379 N.J. Super. at 174.

The appropriate degree of retroactivity "depends largely on the court's view of what is just and consonant with public policy in the particular situation presented." Ibid. (internal quotation marks omitted) (quoting Coons v. Am. Honda Motor Co., 96 N.J. 419, 425 (1984)). Relevant considerations include "(1) 'justifiable reliance by the parties and the community as a whole on prior decisions,' (2) whether the purpose of the new rule will be advanced by retroactive application, and (3) any adverse effect retrospectivity may have on the administration of justice." Ibid. (quoting Coons, 96 N.J. at 426).

Retroactivity is particularly appropriate where the holding protects constitutional rights; where the holding rests on other considerations, pipeline or limited retroactivity is appropriate. See Ross v. Rupert, 384 N.J. Super. 1, 7

(App. Div. 2006) ("[T]his is not a criminal case involving constitutional issues or implicating the trustworthiness of the fact-finding process. . . . Hence, there is no basis for granting full retroactivity beyond the 'pipeline.'"); State v. Czachor, 82 N.J. 392, 409-10 (1980) ("Since the rule which we now enunciate does not rest on constitutional grounds but on the Court's own standards for criminal justice, the decision should be given a limited retrospective application.").

Defendant argues Moynihan is inapplicable because the Court's elimination of the counsel requirement centered on individuals who could not afford an attorney. He asserts the parties did not challenge the statute's validity and this appeal would have been decided before Moynihan if not for the delay in filing the final order.

Defendant argues we should not give Moynihan pipeline retroactivity because the Court's new rule was "utterly novel and unanticipated." He claims pipeline retroactivity is inappropriate because Moynihan "is a restriction of the law [that] eliminated a statutory requirement for compliance with the Statute of Frauds [and is] not an expansion of law." Defendant also argues Moynihan was "written in the future or conditional tense," which reveals the Court's intent that the ruling apply prospectively. He points to the following text of the opinion:

> We cannot pretend that requiring attorney review means something other than that individuals will have to pay for the services of an attorney, who will then have the obligation to engage in a due-diligence examination of all the circumstances bearing on the fairness of the agreement. . . .
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> . . . To be sure, attorney review would protect a party — particularly a dependent party — from potential overreaching. But attorney review presents another hurdle for parties who want to enter into palimony agreements and almost certainly will result in fewer such agreements, putting aside the impact on those who cannot afford counsel.
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> [Moynihan, 250 N.J. at 89-90 (emphasis added).]

We are unpersuaded by these arguments. The gravamen of Moynihan is that the statutory requirement to have counsel violated fundamental constitutional rights. It matters not that this was not a basis of either party's claims at trial here because, in the end, defendant invoked the invalidated portion of the statute as a sword to attempt to avoid the parties' agreement despite the fact they both viewed it as valid and honored its terms for many years. To ignore Moynihan by declining to apply it here would run contrary to the parties' conduct and frustrate their bargain, precisely the harm the Court intended to prevent.

Further, applying Moynihan retroactively would not have an adverse effect on the administration of justice because the record does not indicate a great number of similarly situated cases in the pipeline. Contrary to

defendant's argument, Moynihan did not contract the law or limit possibilities. In addition to its constitutional dimensions, the holding perpetuates our jurisprudence that the "[s]ettlement of disputes, including [family matters], is encouraged and highly valued in our system." Quinn v. Quinn, 225 N.J. 34, 44 (2016). It reaffirms the long held venerable view that "strong public policy favor[s] stability of arrangements in [family] matters." Ibid. (quoting Konzelman v. Konzelman, 158 N.J. 185, 193 (1999)). "[I]t is 'shortsighted and unwise for courts to reject out of hand consensual solutions to vexatious personal [family] problems that have been advanced by the parties themselves.'" Ibid. (quoting Konzelman, 158 N.J. at 193). Therefore, even if there were a proverbial pipeline full of cases, we are confident Moynihan would not upset matters where the parties have reached an otherwise enforceable settlement.[2]

II.

Plaintiff's cross-appeal argues the court erred by not awarding her the counsel fees incurred enforcing the agreement, as mandated by the agreement. She argues the judge provided no findings or analysis explaining why he denied her fees.

[2] Notwithstanding Moynihan's applicability, it does not affect the outcome of this appeal because we have affirmed the trial judge's finding that Cohen represented defendant.

"The assessment of counsel fees is discretionary." Slutsky v. Slutsky, 451 N.J. Super. 332, 365 (App. Div. 2017). Rule 5:3-5(c) lists nine factors the court considers in making an award of counsel fees in a family action. Essentially,

> the court must consider whether the party requesting the fees is in financial need; whether the party against whom the fees are sought has the ability to pay; the good or bad faith of either party in pursuing or defending the action; the nature and extent of the services rendered; and the reasonableness of the fees.
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> [Mani v. Mani, 183 N.J. 70, 94-95 (2005).]

As noted, our review concerns the judge's order, not his opinion. Brown, 470 N.J. Super. at 463. Although the judge may not have made robust findings, a thorough review of the record does not convince us he abused his discretion. Plaintiff could not rely on the agreement's provision mandating the defaulting party pay fees because she too was in default, and egregiously so. Moreover, although defendant may have had a greater earned income, a review of the parties' CISs convinces us plaintiff could bear her own fees.

* * *

In sum, the holding in Moynihan applies retroactively to written palimony agreements reached prior to the Court's ruling, where such agreements are otherwise enforceable. To the extent we have not addressed an

argument raised in either appeal it is because it lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION