SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1773-21

D.D.,[1]

Plaintiff-Respondent,

v.

J.E.M., III,

Defendant-Appellant.

———————————————

Submitted November 2, 2022 – Decided December 27, 2022

Before Judges Gooden Brown and DeAlmeida.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket No. FM-09-0474-16.

Richard W. Mackiewicz, Jr., LLC, attorney for appellant (Richard W. Mackiewicz, Jr., on the brief).

Respondent has not filed a brief.

PER CURIAM

[1] Pursuant to Rule 1:38-3(d)(1), we identify the parties by initials to protect their privacy.

In this post-judgment matrimonial matter, defendant/ex-husband appeals from a January 31, 2022 Family Part order declaring all matters between the parties fully and finally adjudicated based on the satisfaction of a January 3, 2022 order that enforced the equitable distribution provisions in the parties' Marital Settlement Agreement (MSA). We affirm.

The parties divorced by way of a Dual Judgment of Divorce (DJOD) entered on March 13, 2017. The DJOD incorporated an MSA dictating the terms of the dissolution of the marriage. Article 5 of the MSA addressed equitable distribution of the marital property. Pursuant to Paragraph 5.1 of Article 5, defendant was required to pay plaintiff/ex-wife a lump sum of $650,000 according to the following schedule: $100,000 due by January 20, 2017; $225,000 due upon entry of the final judgment of divorce; and the balance of $325,000 due either upon the sale of a specified condominium in Hoboken as detailed in Paragraph 5.2 of the MSA, or three years from the date that the last party signed the MSA, whichever occurred first. Both parties signed the MSA on March 13, 2017, making the final $325,000 payment due no later than March 13, 2020.

Under Paragraph 5.1, defendant was required to "make the aforesaid payments without any offset or credit." Paragraph 5.1 also gave plaintiff the

option of deciding "whether or not a mortgage, [l]is [p]endens, or any other lien shall be filed against the [Hoboken] property to secure the outstanding $325,000." Plaintiff elected to secure payment with a mortgage. As a result, a corresponding note, mortgage, and guaranty agreement were executed by both parties on August 28, 2017.

Paragraph 5.2 of the MSA detailed the ownership, possession, occupancy, and sale of the Hoboken condominium at issue. Under Paragraph 5.2(a), defendant retained possession of the condominium, while plaintiff "enjoy[ed] exclusive occupancy" until its sale or "June 1, 2017, whichever occur[red] first." When the MSA was executed, the condominium was owned by an LLC in which plaintiff was the sole member. According to Paragraph 5.2(a), plaintiff had "previously pledged 100% of her [membership] interest in the LLC to [defendant] in exchange for a loan from [defendant] to the LLC." Under Paragraph 5.2(a), the transfer of ownership of the LLC to defendant was to be held in escrow by plaintiff's attorney until plaintiff's receipt of the final $325,000 payment or the sale of the condominium, whichever occurred first.

Paragraph 5.2(b) directed that the condominium "be listed for sale immediately" and that "[b]oth parties . . . cooperate with the listing and sale." The "net proceeds" from the sale were to be used to satisfy the outstanding

$325,000 payment to plaintiff. Paragraph 5.2(c) outlined each party's respective maintenance obligations in connection with the condominium, and Paragraph 5.2(d) required the parties to "submit[] for [a]rbitration with Richard Weiner, Esq.," "[a]ny disputes arising out of or related to [P]aragraph 5.2 of [the MSA], including the listing, showing or . . . sale of the property."

Defendant never sold the condominium, nor did he satisfy his equitable distribution payment obligations to plaintiff by the deadline. In March 2020, plaintiff filed a motion to enforce litigants' rights that would allow her to foreclose on the condominium pursuant to the terms of her mortgage. Following a May 14, 2020 hearing, the judge found that defendant had violated Paragraph 5.1 of the MSA by failing to make the final $325,000 payment and that the terms of the MSA clearly set forth the consequences of defendant's default. Accordingly, the judge entered an order granting plaintiff's enforcement motion, allowing her to initiate foreclosure proceedings to enforce the mortgage and guaranty.

Shortly thereafter, the parties negotiated an agreement to avoid foreclosure, which they finalized on June 16, 2020 (the forbearance agreement). Under the terms of the forbearance agreement, defendant was to make an immediate lump sum payment of $100,000 plus interest of 10% per annum,

totaling $7,568.50, by July 1, 2020, followed by a final payment of $225,000 plus interest of $11,341.47 by December 31, 2020. Initially, defendant complied with the forbearance agreement, making three payments in July 2020 totaling the lump sum due that month. Defendant then made monthly payments of $1,875 until December 2020, at which point defendant stopped making payments.

On June 15, 2021, plaintiff filed another motion to enforce litigants' rights. In a supporting certification, plaintiff averred that as of December 3, 2020, defendant owed her a remaining balance of $227,137.83, plus interest and fees, to complete equitable distribution payments required under Paragraph 5.1 of the MSA. Plaintiff sought an order compelling defendant "to immediately pay what [was] owed . . . .or, . . . in the alternative," an order granting plaintiff permission "to list the Hoboken condominium . . . for sale" so that she could be paid from the proceeds.

Plaintiff certified that when defendant stopped making the required payments under the forbearance agreement, she contacted him for an explanation. He responded with insults and told her to contact his lawyer. Plaintiff averred that after her prior enforcement motion had been granted, she had filed a civil complaint "to attempt to obtain a judgment against [d]efendant."

However, defendant had evaded service, and she ultimately dismissed the complaint in May 2021. Plaintiff explained that "[d]efendant's bad faith ha[d] caused [her] to . . . default on [her] own mortgage[,] . . . putting [her in] jeopardy of losing [her] home, and . . . ruining [her] credit rating." According to plaintiff, "[w]hile [she] struggled" financially, defendant had "sold one of [the] many properties" that the MSA had granted him ownership of for over $700,000.[2]

In opposition to the motion, defense counsel certified that defendant's violation of the MSA had previously been litigated in plaintiff's May 2020 enforcement motion, and that the court had rendered a decision concluding that the MSA "ha[d] been breached" and directing plaintiff to pursue "her civil remedies." Additionally, defense counsel stated that the MSA contemplated that the "mortgage, note and personal guarant[y]" would be the vehicle of enforcement in the event of default, and therefore the court could not enforce the agreement by ordering payment outright. In the alternative, defense counsel asserted that Paragraph 8.1 of the MSA required the parties to attend at least one

[2] Under Paragraph 5.3 of the MSA, defendant retained ownership of three condominiums in West Palm Beach, one condominium in Palm Beach, a townhouse in Sea Bright, a brownstone in Hoboken, another condominium in Hoboken, and a home in Holmdel.

mediation session to attempt to resolve "non-emergent matters" before seeking judicial remedies.

Paragraph 8.1 of the MSA provided:

> The parties agree that in the event they cannot resolve any non-emergent dispute arising under this [a]greement between them they shall participate in at least one mediation session with Richard Weiner, Esq., or another mutually agreed upon mediator, to attempt to resolve the dispute before either party brings an application to the court . . . . In the event that the mediation is not successful, either party may make the appropriate application to the court seeking a determination as to this issue.

The parties appeared for oral argument on July 23, 2021. At the outset, the judge noted that the mediation requirement was not raised by either party or sua sponte by the court when the parties had previously appeared on May 14, 2020. The judge distinguished Paragraph 5.2(d)'s provision, compelling "arbitration" in the event of "[a]ny disputes arising out of or related to [P]aragraph 5.2," from the mediation requirement in Paragraph 8.1 on the ground that Paragraph 8.1 applied to disputes arising from other sections of the MSA. Acknowledging that plaintiff sought enforcement of Paragraph 5.1 of the MSA, the judge agreed with defendant's contention that under Paragraph 8.1, the parties were required to participate in mediation before seeking judicial relief.

As a result, in an order entered on July 23, 2021, the judge carried the matter and required the parties "to attend mediation/arbitration within [the] next [thirty] days." The judge also ordered defendant to provide an updated case information statement (CIS), tax returns for fiscal years 2019 and 2020, as well as related tax forms by August 23, 2021. The judge explained that in the event mediation was unsuccessful and enforcement of Paragraph 5.1 of the MSA was warranted, she wanted to "have the financial information" to decide whether defendant's noncompliance was attributable to his inability to comply, or if, as plaintiff suggested, it was because of his refusal to do so.

The parties attended mediation as ordered but did not reach an agreement. In an August 25, 2021 letter to the court, defense counsel tacitly acknowledged that arbitration was not required and raised various challenges to plaintiff's enforcement application that had been "held in abeyance pending compliance with the [MSA's] mediation provision." To that end, defense counsel asserted defendant was entitled to "set offs as to the sums claimed" due to "damages and costs" arising from plaintiff vacating the Hoboken condominium. Defense counsel further asserted that plaintiff could either "proceed under the [MSA]" or, "[a]lternatively, . . . sue in the Law Division on the note and guaranty, and foreclose the mortgage." However, according to defense counsel, if plaintiff

sought to enforce the MSA, she was not owed interest because "interest [was] only part of the note, and not part of the [MSA]."

In a letter dated November 19, 2021, plaintiff's counsel notified defense counsel that she had not yet received the financial documents that the court had ordered defendant to produce by August 23, 2021. Additionally, the letter demanded that defendant produce specified documents pertaining to the rental of the Hoboken condominium, as well as "all past and future rental payments" as required by the terms of plaintiff's mortgage.

On January 3, 2022, the parties appeared again on the enforcement motion that the judge had carried. Following oral argument, the judge granted the motion pursuant to Rule 1:10-3. At the outset, the judge noted that she had not received the documents she had ordered defendant to produce in her July 23, 2021 order and was informed by defense counsel that defendant would not be able to produce the documents at the hearing. Consequently, the judge precluded defendant from presenting arguments as a sanction for defendant's "utter disregard of the [c]ourt's [o]rder." Having presided over the proceedings since the entry of the DJOD, the judge noted that this was "not . . . the first time" defendant had disregarded the rules.

Nonetheless, in granting plaintiff's enforcement motion, the judge addressed all the arguments defendant had raised in his letter submission. The judge determined that the fact that plaintiff had concurrent civil remedies available to her did not prevent the court from ordering the sale of the condominium because such an order would enforce an obligation created by the MSA. The judge likewise rejected defendant's contention that an enforcement order in the Family Part could not include interest, reasoning that the mortgage and its interest provisions were negotiated as part of the terms of the MSA. The judge also rejected defendant's request for offsets, explaining that the MSA explicitly precluded any offset or credit.

Accordingly, the judge entered an order on January 3, 2021, granting plaintiff's request to find defendant in violation of litigant's rights for failing to comply with Paragraph 5.1(c) of the MSA. In an oral opinion, the judge explained that she was "enforcing [Paragraph 5.1(c)] because there ha[d] been a continuing default" by defendant that prevented plaintiff from receiving "the benefit of her bargain under the [MSA]." Thus, the judge entered a judgment against defendant for the outstanding balance, plus interest and fees as calculated according to the mortgage instrument, as well as counsel fees in an amount to be determined.

Pending full satisfaction of the judgment, the order also required that the Hoboken condominium "be immediately listed for sale" and the outstanding balance plus interest and fees "be paid from the net proceeds" of the sale. The judge recognized that the sale would allow plaintiff to "be made whole" and effectuated the parties' "intent" that was evident in the terms of the MSA. To that end, the order granted both plaintiff and a third-party attorney the authority to act as attorney-in-fact in connection with the sale of the condominium. Additionally, the order allowed plaintiff to collect the property's rental income in the interim and for defendant to "be held in contempt of court" if he "interfere[d] with [p]laintiff's collection."

Approximately three weeks later, on January 25, 2022, defendant sent plaintiff a payment of $267,486.69, in satisfaction of the judgment, interest, and fees, as well as a privately negotiated settlement for counsel fees. Accordingly, on January 31, 2022, the judge entered an order declaring that the January 3 order directing payment to plaintiff, requiring the listing and sale of the condominium, and authorizing plaintiff's collection of all rent, was satisfied in full. The order further declared that the mortgage "[n]ote and [g]uaranty [were] . . . fully and finally adjudicated." This appeal followed.

On appeal, defendant raises the following points for our consideration:

POINT I[3]

THE MOTION COURT'S DECISION STRIKING DEFENDANT'S ARGUMENTS AND SILENCING COUNSEL AND TO ORDER THE PROPERTY SOLD WAS REVERSIBLE ERROR.

A. The Sanction Of Muzzling Defendant And His Counsel For Not Supplying A CIS And Tax Returns Was Error. They Were Not Relevant Since Ability To Pay Was Not Disputed, And Funding Had Been Secured Which The Court Was Made Aware Of Beforehand. Likewise, Not Producing Those Did Not Obstruct The Proceedings. Also, It Was Punitive And Not Coercive.

B. With Defendant Silenced The Court's Only Guardrail Was Plaintiff's Counsel Who Made No Effort To Inform That The Matter Was In Fact One For Reconsideration And Failed To Advise Arbitration Had Not Occurred. As A Result, The Decision Was Made In Error And Should Be Reversed.

C. The Decision Respecting Setoff Was Incorrect And Should Be Reversed.

Our scope of review of Family Part orders is limited in light of the Family Part's special expertise in family matters. Cesare v. Cesare, 154 N.J. 394, 411-

[3] We have eliminated the point describing the standard of review and renumbered the remaining point accordingly.

13 (1998). In that regard, we "accord deference to family court factfinding," id. at 413, and do "not disturb the 'factual findings and legal conclusions of the trial judge unless . . . convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" C.C. v. J.A.H., 463 N.J. Super. 419, 428 (App. Div. 2020) (quoting S.D. v. M.J.R., 415 N.J. Super. 417, 429 (App. Div. 2010)).

Interpretation of "[a] settlement agreement is governed by basic contract principles." Quinn v. Quinn, 225 N.J. 34, 45 (2016) (citing J.B. v. W.B., 215 N.J. 305, 326 (2013)). "Among those principles are that courts should discern and implement the intentions of the parties." Ibid. (citing Pacifico v. Pacifico, 190 N.J. 258, 266 (2007)). "Thus, when the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result." Ibid. (citing Sachau v. Sachau, 206 N.J. 1, 5-6 (2011)). A settlement agreement that resolves a matrimonial dispute "is no less a contract than an agreement to resolve a business dispute." Ibid. (citing Sachau, 206 N.J. at 5). "In the absence of a factual dispute, the interpretation and enforcement of a contract, including a settlement agreement, is subject to de novo review. . . ." Savage v. Twp. of

Neptune, 472 N.J. Super. 291, 306 (App. Div. 2022) (citing Barila v. Bd. of Educ., 241 N.J. 595, 612 (2020)).

"Rule 1:10-3 provides a 'means for securing relief and allow[s] for judicial discretion in fashioning relief to litigants when a party does not comply with a judgment or order.'" N. Jersey Media Grp., Inc. v. State, Off. of Governor, 451 N.J. Super. 282, 296 (App. Div. 2017) (alteration in original) (quoting In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 17-18 (2015)). "Relief under [Rule] 1:10-3, whether it be the imposition of incarceration or a sanction, is not for the purpose of punishment, but as a coercive measure to facilitate the enforcement of the court order." Ridley v. Dennison, 298 N.J. Super. 373, 381 (App. Div. 1997). To that end, the rule does not bar a litigant from submitting successive applications for enforcement, even when the underlying violation requiring relief remains unchanged. See Pressler & Verniero, Current N.J. Court Rules, cmt. 4.2 on R. 1:10-3 (2023) ("Successive applications for litigant's relief seeking different remedies are not necessarily barred by the entire controversy rule.").

"The particular manner in which compliance may be sought is left to the court's sound discretion," N. Jersey Media Grp., Inc., 451 N.J. Super. at 296 (quoting Bd. of Educ. v. Middletown Twp. Educ. Ass'n, 352 N.J. Super. 501,

509 (Ch. Div. 2001)), and "[w]e review a court's order enforcing litigant's rights under Rule 1:10-3 for an abuse of discretion." Savage, 472 N.J. Super. at 313. "An abuse of discretion occurs when a decision was 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Wear v. Selective Ins. Co., 455 N.J. Super. 440, 459 (App. Div. 2018) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

As for the "discretion that a trial court wields in managing its docket[,] '[a] trial court has an array of available remedies to enforce compliance with a court rule or one of its orders.'" Williams v. Am. Auto Logistics, 226 N.J. 117, 124 (2016) (quoting Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 115 (2005)). In applying the "panoply of sanctions in [the] trial court's arsenal," "[t]he court must . . . carefully weigh what sanction is the appropriate one, choosing the approach that imposes a sanction consistent with fundamental fairness to both parties." Id. at 125 (last alteration in original) (quoting Robertet Flavors, Inc. v. Tri-Form Constr., Inc., 203 N.J. 252, 282-83 (2010)).

Defendant presents three main arguments on appeal. First, defendant asserts that the judge erred in "silenc[ing] [d]efendant" when the parties appeared for oral argument and "ignor[ing] . . . [d]efendant's arguments" as a

sanction for defendant's failure to comply with the July 23, 2021 order. Second, defendant argues that plaintiff's second enforcement motion "was a defective application for reconsideration" and the judge "overlooked [that she] had previously ordered the dispute be arbitrated." Finally, defendant argues that the terms of the MSA entitled defendant to offset the cost of damages plaintiff allegedly caused to the Hoboken condominium against the outstanding equitable distribution payment, and therefore, the judge erred in ruling "that no offset was allowed under the parties['] MSA."

After reviewing the record in light of the applicable legal standards, we conclude defendant's arguments are uniformly without merit, and we affirm substantially for the reasons stated in the judge's oral opinions. R. 2:11-3(e)(1)(E).

Affirmed.