SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1846-20

GABRIELLA SIEGEL,
f/k/a MOSTUN,

Plaintiff-Respondent,

v.

PAUL MOSTUN,

Defendant-Appellant.

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Submitted April 25, 2022 – Decided May 26, 2022

Before Judges Sabatino and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FM-13-0233-05.

Clifford E. Lazzaro, attorney for appellant.

The Goldstein Law Group, attorney for respondent (Mark Goldstein and Craig A. Cox, on the brief.)

PER CURIAM

In this post-judgment matrimonial matter, defendant Paul Mostun appeals a February 5, 2021 order denying his cross-motion for a plenary hearing to recalculate child support as of August 2006, and denying his motion to vacate the January 24, 2019 order and entry of judgment for $103,198 in child support arrears. For the reasons that follow, we affirm.

I. Factual Background

The following facts are derived from the record. Plaintiff Gabriella Siegel (f/k/a Mostun) and Mostun were married on December 18, 2000. In 2003, the parties' child was born.[1] Siegel ceased working and became a stay-at-home mother. Mostun is a chiropractor and owner of several businesses.

During the pendency of the divorce, Siegal moved to New York with the parties' daughter, where they continue to reside. A Property Settlement Agreement (PSA) was negotiated by counsel for both parties and incorporated into a Final Judgment of Divorce (FJOD), entered on November 3, 2005. Mostun moved to Florida following the divorce, as acknowledged in the PSA.

The PSA stipulated in 2005 that Mostun's child support obligation would be $1,500 per month payable through the Probation Department. Paragraph 6(b), of the PSA, in relevant part, states:

[1] As of the filing of the motions in 2020, the child was unemancipated.

> Child Support: [Mostun] agrees to pay $1,500 per month to [Siegel] in support of the child born of the marriage. . . . Child support will be recalculated in August of 2006 using actual income at that time, in accordance with the Child Support Guidelines.[2] The parties will exchange 2005 tax returns and year to date income information, including pay stubs and profit and loss statements for the calculation to be completed. They agree to exchange 2006 tax returns by April 15, 2007 and are both free to make any modification application again at that time.
>
> The parties represent that they have not utilized the child support guidelines in calculating . . . [Mostun's] support obligation for child support and contribution to childcare but reached an agreement on the amount he is to pay in the course of settlement negotiations.
>
> [Mostun's] child support obligation shall continue in accordance with the laws of the State of New Jersey [which define "emancipation"[3]] but at least until:
> . . . .

Between 2006 and 2020, neither party discussed nor moved to recalculate child support as provided for in the PSA. Instead, Mostun paid $1,500 per month until July 14, 2014, when he unilaterally ceased providing child support. In

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[2] This handwritten notation that "in accordance with the Child Support Guidelines" was mutually agreed to by the parties.

[3] This handwritten notation that "which define 'emancipation'" was also mutually agreed to by the parties.

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2014, Siegel moved to Scarsdale, and claims to have attempted to contact Probation to change her address but could not reach anyone. She allegedly assumed child support was being provided pursuant to the PSA and it was accumulating in the Probation account.

Beginning in 2016, Probation attempted to contact Mostun for three consecutive years, to no avail. On January 24, 2019, a Family Part judge entered an order pursuant to 45 C.F.R. § 303.11(b)(4)(i),[4] under which "cases with unlocated noncustodial parents can be closed when all methods of locating the noncustodial parent have been exhausted for three consecutive years when sufficient information for automated location is known." The order relieved Probation of any further monitoring of child support payments and calculated $103,198 in child support arrears, which was reduced to a judgment.

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[4] The January 24, 2019 order cited 45 C.F.R. § 303.11(b)(4)(i); but the correct citation to the partly quoted regulation is 45 C.F.R. § 303.11(b)(7), which reads, in relevant part:

> (b) The IV-D agency may elect to close a case if the case meets at least one of the following criteria . . .
>
> (7) The noncustodial parent's location is unknown, and the State has made diligent efforts using multiple sources, in accordance with § 303.3, all of which have been unsuccessful, to locate the noncustodial parent:
> . . . .

## II. Procedural History

According to Siegel, she learned that Probation terminated the account in January 2019. Over one year later, in March 2020, Siegel moved in the Family Part to: (1) set Mostun's arrears at $103,354 through December 31, 2018; (2) determine an additional amount of arrears owed from January 1, 2019 to the filing date of the motion; and (3) enter a judgment for the total amount of the arrears.

In response, Mostun filed a cross-motion in May 2020, requesting a plenary hearing to recalculate his child support obligation retroactive to August 2006, and to provide a credit for child support "voluntarily paid between August 2006 and July 2014."

During oral argument on May 15, 2020, the judge advised the parties that on January 24, 2019 an order and judgment was entered against Mostun for $103,198 in child support arrears. Counsel for both parties advised the court they were unaware of the existence of that order. The judge directed the parties to submit supplemental pleadings on the issue of jurisdiction, and whether the relief requested should be based on the existence of the January 24, 2019 order. Both parties submitted supplemental pleadings in compliance with the court's order.

Mostun also moved to vacate the January 24, 2019 order and judgment pursuant to Rule 4:50-1(f) alleging that he was not served with notice of the proceedings or a copy of the order. Mostun also alleged that his address was readily available based upon his tax returns, and his telephone number could have been found based on a Google search. Mostun claimed that he was never contacted by telephone or in writing by Probation.

In opposition to the cross-motion, Siegel argued that Mostun was obligated to notify Probation of any change in address or employment status pursuant to Rule 5:7-4A. Moreover, Siegel advised Mostun by text messages on January 8, 2020 and February 27, 2020 of the judgment, which he acknowledged.

On January 25, 2021, the judge issued a tentative decision addressing all outstanding motions, which was accepted by Siegel and rejected by Mostun. The judge thereafter heard oral argument, as requested by Mostun, and an order was entered on February 5, 2021 accompanied by a comprehensive written decision, which granted, in part, and denied, in part Siegel's requested relief. The trial judge: (1) ordered that Mostun pay $103,198 in accordance with the January 24, 2019 order in thirty days; (2) ordered additional $44,256 in arrears from January 17, 2019 through February 5, 2021 of which fifty percent was to

be paid within thirty days and the remaining fifty percent to be paid within sixty days through Probation; (3) reinstated $1,844 in child support, in addition to any cost of living adjustments, through Probation; (4) directed Probation to establish a new account for the child support arrears and current child support obligation; and (5) directed both parties to keep Probation informed of their current contact information at all times.

In reaching her conclusion regarding Mostun's child support obligation, the judge explained that Mostun "[did] not deny that he failed to pay any child support" since July 2014, "provide[d] no excuse as to why he simply stopped paying support in 2014 and no explanation why he failed to seek a recalculation for over fourteen (14) years." She rejected Mostun's argument that the $1,500 obligation established in the PSA "was meant to be temporary." The judge disapproved of Mostun "simply ignor[ing]" his duty to pay child support pursuant to the PSA following years of compliance, whether or not he was aware of the January 2019 order."

As to Mostun's cross-motion, the judge ruled that "[Mostun] has already received credit for any child support payments made to date."

In denying Mostun's request for a plenary hearing to fix child support as of August 2006, the court concluded Mostun's request for a retroactive

modification was statutorily barred. She also found Mostun waived his right to the August 2006 modification as stipulated to in the PSA because he continued paying child support at the PSA-provided level for eight years. She also found Mostun was aware of his right to seek modification in August 2006, "[y]et, he never sought modification." The judge held Mostun was "equitably estopped from [then] arguing, fourteen (14) years later, that the PSA mandated a new child support amount in August 2006" citing A.K. v. S.K., 264 N.J. Super. 79, 84 (App. Div. 1993) and Savoie v. Savoie, 245 N.J. Super. 1, 5 (App. Div. 1990).

The judge ruled Mostun failed to establish "exceptional circumstances under Rule 4:50-1(f)," and as such, the motion to vacate the January 24, 2019 order and judgment was denied.

Mostun presents the following arguments for the court's consideration on appeal:

> POINT I
>
> THE COURT'S FAILURE TO VACATE THE JANUARY 24, 2019 ORDER ENTERING JUDGMENT WAS AN ABUSE OF DISCRETION
>
> POINT II
>
> THE COURT'S FAILURE TO CONDUCT A PLENARY HEARING TO RECALCULATE DEFENDANT'S CHILD SUPPORT OBLIGATION

AS OF AUGUST 2006 WAS AN ABUSE OF DISCRETION

III. Standard of Review

Our review of Family Part orders is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). We "accord particular deference to the Family Part because of its 'special jurisdiction and expertise' in family matters." Harte v. Hand, 433 N.J. Super. 457, 461 (App. Div. 2013) (quoting Cesare, 154 N.J. at 413); see also Avelino-Catabran v. Catabran, 445 N.J. Super. 574, 587 (App. Div. 2016) (recognizing that "our review of the Family Part's determinations regarding child support is limited").

Generally, "findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare, 154 N.J. at 411-12 (citing Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). As such, we will defer to the Family Part's factual findings and decision unless such decision constitutes an abuse of discretion, i.e.: (1) its "findings are 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice,'" Spangenberg v. Kolakowski, 442 N.J. Super. 529, 535 (App. Div. 2015) (quoting Rova Farms Resort, Inc., 65 N.J. at 484); (2) the court failed to consider all controlling legal principles, Gotlib v. Gotlib, 399 N.J. Super. 295, 309 (App. Div. 2008); or (3)

the court entered an order that lacks evidential support, Mackinnon v. Mackinnon, 191 N.J. 240, 254.

IV. The January 24, 2019 Order

We begin by addressing the Family Part's denial of Mostun's motion to vacate the judgment for $103,198 in child support arrears. Mostun contends that the January 24, 2019 order entering judgment should be vacated under Rule 4:50-1(f) for "any other reason justifying relief from the operation of the judgment or order." We disagree.

The relief under the rule "is available only when 'truly exceptional circumstances are present.'" U.S. Bank Nat'l Ass'n. v. Guillaume, 209 N.J. 449, 484 (2012) (quoting Hous. Auth. of Morristown v. Little, 135 N.J. 274, 286 (1994)). To obtain relief, a movant must demonstrate that the circumstances are exceptional and that continued enforcement of the judgment would be "unjust, oppressive or inequitable." Eaton v. Grau, 368 N.J. Super. 215, 222 (App. Div. 2004) (quoting Harrington v. Harrington, 281 N.J. Super. 39, 48 (App. Div. 1995)).

We review a decision on a Rule 4:50-1 motion for an abuse of discretion. U.S. Bank Nat'l Ass'n., 209 N.J. at 467. An abuse of discretion exists "when a decision is 'made without a rational explanation, inexplicably departed from

established policies, or rested on an impermissible basis.'" Id. at 467-68 (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)). However, if a judge makes a discretionary decision but acts under a misconception of the applicable law or misapplies the law to the facts, we "need not extend deference." Johnson v. Johnson, 320 N.J. Super. 371, 378 (App. Div. 1999).

In applying these principles, we are satisfied that Mostun has failed to show any "exceptional circumstances" required under Rule 4:50-1(f). U.S. Bank Nat'l Ass'n., 209 N.J. 449, at 484. Mostun merely reiterates he lacked notice of the proceedings and consequent January 2019 order to argue that Rule 4:50-1(f) warrants vacating the January 24, 2019 judgment. We discern no abuse of discretion with the judge's well-reasoned analysis, and subsequent denial, of Mostun's motion.

The judge correctly noted that Mostun "[did] not seek to vacate the [j]udgment for any of the specific reasons delineated in [Rule] 4:50-1." We agree with the judge and reject Mostun's argument that his address could have been discovered. Mostun had an affirmative obligation to update Probation of any change of address under Rule 5:7-4A(d)(11). Mostun did not deny that he failed to comply with the obligation. We further agree with the judge that Probation is not compelled to investigate an obligor's whereabouts. Mostun's

argument that his address is on his tax returns is of no moment, and does not relieve Mostun of his reporting obligation.

The judge likewise correctly determined the doctrine of unclean hands precluded Mostun from vacation of the January 24, 2019 order and judgment based upon his actions. Mostun's argument that Probation could have — and should have — exercised due diligence in locating him is without merit.

We also conclude that Mostun's motion to vacate the January 24, 2019 order and judgment is statutorily barred. N.J.S.A. 2A:17-56.23a, the anti-retroactive support statute, prohibits the retroactive vacation or modification of accumulated child support arrears, and provides:

> No payment or installment of an order for child support, or those portions of an order which are allocated for child support . . . shall be retroactively modified by the court except with respect to the period during which there is a pending application for modification, but only from the date the notice of motion was mailed either directly or through the appropriate agent.

The statute "was enacted to insure that ongoing support obligations that became due were paid." Mahoney v. Pennell, 285 N.J. Super. 638, 643 (App. Div. 1995). We have held that the statute's applicability "is limited to prevent[ing] retroactive modifications decreasing or vacating orders allocated for child support." Keegan v. Keegan, 326 N.J. Super. 289, 291 (App. Div. 1999); see

also Walles v. Walles, 295 N.J. Super. 498, 514 (App. Div. 1996) (finding the trial court's decision to retroactively reduce child support payments "violated the statutory mandate."). Moreover, we noted in Diehl v. Diehl, 389 N.J. Super. 443, 452 (App. Div. 2006), that retroactive modification is limited to the date of the moving party's "first motion for modification." See also Ibrahim v. Aziz, 402 N.J. Super. 205, 214 (App. Div. 2008).

We agree with the judge that Mostun's motion to vacate the order was in contravention of N.J.S.A. 2A:17-56.23a. From July 2014 through December 2019, Mostun's child support obligation to Siegel totaled $103,198, because he voluntarily ceased payments. The anti-retroactive modification statute is clear. Since the trial judge ruled in accordance with the statute, we see no reason to disturb the court's decision.

V. Plenary Hearing and Recalculation of Child Support

Mostun next argues that child support should have been recalculated as of August 2006, and the child support payments made between August 2006 and July 2014 were voluntary; therefore, the judge's failure to hold a hearing to recalculate and reinstate child support was in error. Mostun's contention is without merit.

It is well established that both parents of a minor child are presumptively required to shoulder the financial support of that child. See N.J.S.A. 2A:34-23(a) (enumerating various factors in calibrating support); see also Gac v. Gac, 186 N.J. 535, 546 (2006); Spangenberg, 442 N.J. Super. at 536. Subject to the child's best interest, parents are free to negotiate and ratify mutually agreeable child support terms, as the parties have bargained here in the PSA.

"When reviewing decisions granting or denying applications to modify child support, we examine whether, given the facts, the trial judge abused his or her discretion." Jacoby v. Jacoby, 427 N.J. Super. 109, 116 (App. Div. 2012) (citing Larbig v. Larbig, 384 N.J. Super. 17, 21 (App. Div. 2006)). "If consistent with the law, [the trial court's decision] will not be disturbed unless it is manifestly unreasonable, arbitrary, or clearly contrary to reason or to other evidence, or the result of whim or caprice." Id. at 116 (quoting Foust v. Glaser, 340 N.J. Super. 312, 315-16 (App. Div. 2001)).

Here, undisputed evidence in the record demonstrates that the parties negotiated, with the assistance of counsel, the child support terms as set forth in the PSA. However, neither party moved to recalculate child support in August 2006, as provided in the PSA. The judge correctly noted that Mostun's contention that child support ceased because the parties did not recalculate child

support in 2006 "is undermined by almost every principal of child support in this state."

Even assuming the court were inclined to consider a recalculation of child support, Mostun admittedly failed to file a case information statement (CIS), as required by Rule 5:5-4(a)(4). See Palombi v. Palombi, 414 N.J. Super. 274, 287-88 (App. Div. 2010). Rule 5:5-4(a)(4) provides:

> When a motion is filed for modification . . . [of] child support[.] . . .the movant shall append copies of the movant's current case information statement and the movant's case information statement previously executed or filed in connection with the order, judgment or agreement sought to be modified.

Mostun's failure to produce a completed CIS, while not necessarily dispositive, impeded the court's ability to obtain a full picture of his finances, considering Siegel's allegations that he owns additional businesses. Thus, modification of child support could not have been properly addressed.

Lastly, Mostun failed to make a prima facie showing of substantially changed circumstances warranting a plenary hearing on his motion to recalculate child support. As a threshold matter, the movant must present "a genuine and substantial factual dispute" as to a material fact for the trial judge to determine that a plenary hearing is needed. Hand v. Hand, 391 N.J. Super. 102, 106 (App. Div. 2007). The judge reasonably perceived no genuine issue of material fact

regarding Mostun's child support obligation as specified by the PSA's terms. The judge also found that Mostun was "statutorily barred from seek[ing] retroactive modification of child support prior to the date he filed the cross-motion." Therefore, we discern no error, let alone reversible error, in the judge's denial of Mostun's motion insofar as it sought to recalculate child support.

To the extent we have not addressed any of the parties' remaining arguments, we conclude that they are without 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