SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0566-21

SVETLANA SHIFRIN-DOUGLAS,

Plaintiff-Respondent,

v.

ALEXANDER SHIFRIN,

Defendant-Appellant.

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Argued January 10, 2023 – Decided May 19, 2023

Before Judges Gilson and Gummer.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FM-13-0056-21.

Steven P. Monaghan argued the cause for appellant (Law Office of Steven P. Monaghan, LLC, attorneys; Steven P. Monaghan, of counsel and on the briefs; Terence C. Natale, on the briefs).

James P. Yudes argued the cause for respondent (James P. Yudes, PC, attorneys; James P. Yudes, of counsel; Melissa R. Barrella, on the brief).

PER CURIAM

In this matrimonial action, defendant Alexander Shifrin moved in the Family Part to vacate or modify the parties' property settlement agreement (PSA), contending plaintiff Svetlana Shifrin-Douglas had fraudulently induced him into entering it or, alternatively, had increased her income such that he was entitled to a modification of his support obligations under the PSA. He appeals an order denying that motion and the subsequent dual final judgment of divorce (JOD). We affirm.

I.

The parties, both of whom are doctors, were married in 2009, had twins in 2011, and separated in February 2017. A few weeks later, defendant filed a complaint for divorce. On October 20, 2017, the court issued a "Consent Order for Arbitration," which had been executed by the parties and their counsel. The parties entered into the consent order because they had agreed "to refer all financial and child[-]related issues arising out of their relationship" to an arbitrator. The parties also stipulated to the dismissal of the pending divorce action. On January 18, 2018, the parties entered into another "Consent Order/ Agreement for Arbitration," on January 18, 2018 (January 2018 Agreement), which covered "[a]ll issues arising out of the parties' marriage that could be raised in the Superior Court of New Jersey . . . ."

In a letter to plaintiff's counsel dated July 28, 2017, defense counsel complained about plaintiff's "underemployment," identified eight "employment opportunities," and asked counsel to confirm plaintiff had applied to each of them. In an August 1, 2017 letter, defense counsel forwarded to the then arbitrator a copy of the July 28, 2017 letter, stated plaintiff's earning capacity would "be a central issue," and contended jobs in plaintiff's "chosen profession" were available "in the local community for [her] to earn between $250,000 and $300,000 per year." Plaintiff subsequently accepted a new position, executing on March 4, 2018, an employment contract for a job that provided an annual salary of $122,000 for a two-year term, running from June 1, 2018, to June 1, 2020. A copy of that employment contract was provided to defendant during the discovery phase of the arbitration proceedings.[1]

On or about August 14, 2018, in opposition to an "enforcement application" by plaintiff and in support of his cross-motion, defendant submitted to the arbitrator a certification in which he stated plaintiff "is now practicing Endocrinology earning minimally to start what she was earning previously with

[1] During argument of the motion and cross-motion that resulted in the February 22, 2021 order that is the subject of this appeal, plaintiff's counsel represented the employment contract had been provided to defendant during discovery. Defense counsel did not dispute that statement.

the right to earn additional funds based on her productivity." Defendant further asserted:

> [plaintiff] could have pursued employment with Meridian at a different hospital but voluntarily chose not to . . . when I believe she would have been earning approximately $250,000, substantially more than the job she accepted and it would have been in closer proximity to where she lives. Meridian is able to obtain higher reimbursement rates. I benefit from that as [plaintiff] would have. Thus, I believe these are factors that I ask the [a]rbitrator to consider when the issue of duration of alimony is to be determined.

On March 11, 2020, the parties commenced an arbitration trial. On April 27, 2020, defense counsel called plaintiff as his first witness and conducted a direct examination of her. With the assistance of the arbitrator, the parties subsequently "settled their individual and joint property rights and the support and maintenance affecting them and the children" and "resolved all questions relating to custody and parenting time with the children."

On June 1, 2020, the parties entered into the PSA. The parties agreed that if either of them commenced a divorce action, they would "be bound by all of the terms of the [PSA]" and that "the terms and provisions of [the PSA would] be incorporated in any such [j]udgment or [o]rder." The parties represented in the PSA that they had had the advice of separate counsel and were entering into the PSA "voluntarily and with adequate knowledge of the income and property

of each other to make an informed decision to enter into [the PSA]."[2] They further acknowledged the PSA "constitutes the entire agreement between the parties and there have been no oral promises or representations to induce its execution and that neither [party] is relying upon any promises or inducements for the execution hereof not expressly or specifically set forth herein." They released "each other from any and all suits, actions, debts, claims, demands and obligations whatsoever . . . that either of them ever had, now has or may hereafter have against the other up to the date of execution of" the PSA.

The PSA contains two sections identified as "Article V." The first Article V is entitled "Alimony." In that section, the parties reported "[defendant] is projecting his income to be less than $500,000/year based on the [Covid-19] pandemic. [Plaintiff] is earning $122,000/year." Defendant agreed to pay plaintiff beginning June 1, 2020, and ending May 31, 2025, a certain amount in alimony based on his annual income being $500,000 and supplemental alimony if his annual total income was $700,000 or more. The PSA contains no provision detailing what would happen if defendant's income was between $500,000 and

[2] Because it is contained in one of the PSA's "WHEREAS" clauses, defendant dismisses this representation as mere "prefatory language." Defendant, however, fails to recognize Article I of the PSA, in which the parties expressly "incorporated" the "WHEREAS clauses" and made them a part of the PSA "as if fully set forth in this Article."

$700,000. The parties agreed that if defendant's income was "less than the $500,000 necessary to pay his obligation . . . then the unpaid portion of support shall be carried forward to subsequent years, until paid in full." They agreed plaintiff's "earnings shall not be considered in computing her right to support should [defendant] seek a modification of his arrears as provided for in this [PSA], but would be considered in any application by [plaintiff] to modify support."

On July 2, 2020, plaintiff filed a complaint for divorce, alleging the parties had "settled the terms of their matrimonial dispute and have entered into a [PSA], which resolves all of their economic disputes as well as their custody/parenting time dispute." She sought a dissolution of the marriage and the incorporation of the PSA into a final judgment of divorce. Defendant filed an answer, admitting plaintiff's allegations, and a counterclaim, in which he agreed the parties had entered into a PSA, which he sought to have incorporated in a final judgment of divorce.

After the parties executed the PSA, defendant learned plaintiff had taken a new job. He sought a change in the allocation of the children's day-care and after-care expenses from the same arbitrator who had assisted the parties in reaching a settlement. After conducting a hearing on September 16, 2020, the

arbitrator decided that application and other applications submitted by the parties. In a pre-hearing submission, plaintiff's counsel advised that on September 21, 2020, plaintiff would begin to work in Pennsylvania in a job requiring her to be in the office four days a week, compared to her prior job, which required her to be in the office three days a week. Defendant requested discovery regarding plaintiff's new employment. The arbitrator denied that request as "moot" because during the hearing before the arbitrator, plaintiff had testified her new annual salary under a two-year employment contract would be $240,000.

Rejecting plaintiff's argument that under the PSA a change in her salary could not constitute a change of circumstances in calculating the parties' child-support obligations, the arbitrator found "the increase in [plaintiff's] salary . . . constitutes a change in circumstances warranting a modification of the child care allocation" and "there is no prohibition on the child care cost being reallocated on the basis of an increase in [plaintiff's] wages." The arbitrator then "factored that future anticipated income into [a] reallocation of child care expenses." In contrast, the arbitrator found the PSA "precluded [defendant] from seeking to modify alimony during the [sixty-one] month limited duration alimony term irrespective of any increase in [plaintiff's] earnings" and that if defendant sought

a modification at the end of that period, "[plaintiff's] earnings shall not be considered in computing her right to support." The arbitrator described the parties' negotiated resolution regarding alimony as memorialized in the PSA as follows:

> By way of background, the [a]rbitrator entered a detailed pendente lite order in this case in which [defendant] was required to pay [plaintiff] $15,500 per month of taxable and tax-deductible alimony, $3,000 per month of child support, and to pay 100% of certain additional expenses including work related child care. The figures were predicated on [defendant] having imputed income of approximately $864,000 and [plaintiff] having employment income of $121,000. The parties' [PSA] kept those figures intact, but guaranteed [plaintiff] would receive the $15,500 per month of alimony so long as [defendant] earned at least $500,000 per year of gross income. [Paragraph 18.0] Moreover, due to the fluctuating nature of [defendant's] income, the PSA provides [defendant] flexibility in the timing of payments by only requiring him to remit the $186,000 ($15,500 x 12 = $186,000) of alimony on the first $500,000 of his income through two distinct mechanisms: (1) $5,000 per month on the first of each month based upon his first $20,000 per month of gross income, [Par. 18.0(2)]; and (2) an additional $126,000 of alimony via [plaintiff] receiving 50% of any monthly gross income [defendant] receives over $20,000 each month. To the extent [defendant] does not earn $500,000 in a given year, the balance accrues as arrears carried over to future years until paid in full. [Par. 18.2] If at the end of the [sixty-one] month limited duration alimony term there are unpaid support arrears, [defendant] has the option of attempting to retroactively vacate or modify the arrears by virtue of

> Paragraph 18.3 (page 22) [(footnote omitted)]. Paragraph 18.12 then indicates that should [defendant] seek a modification of the arrears, which by virtue of paragraph 18.3 (page 22) cannot happen until the expiration of the [sixty-one] month limited duration alimony term, "[plaintiff's] earnings shall not be considered in computing her right to support," with her right to support being any alimony arrearages that had occurred during the prior [sixty-one] month alimony term [(footnote omitted)].

The arbitrator also found the PSA provided that plaintiff's "increased earnings can be considered in any modification application she makes, which was a deterrent to her seeking an increase in support."

On November 3, 2020, defendant moved in the Superior Court to vacate the PSA or its "support provisions," arguing plaintiff had fraudulently induced him into executing the PSA by representing her income was $122,000 when she knew her income would increase to $240,000 in a new job. In support of that argument, defendant pointed out plaintiff had reactivated her Pennsylvania medical license on May 22, 2020, and had entered her prior employment contract about three months before the actual start date of the contract. Alternatively, he sought a modification of the PSA's support provisions retroactive to the filing date of the motion, contending plaintiff's salary increase constituted a change of circumstances warranting a modification. He asked for a ninety-day discovery

period, a plenary hearing, and a suspension of his alimony and supplemental alimony obligations.

Plaintiff cross-moved to enforce the PSA, to compel defendant to disclose his income and records regarding his income and to pay supplemental alimony owed pursuant to the PSA and certain child-related expenses, and for other relief. Opposing defendant's motion, plaintiff argued the January 2018 Agreement required defendant to submit the motion to vacate or modify the PSA to the arbitrator.

After hearing argument, a Family Part judge issued a sixty-page order and statement of reasons on February 22, 2021, denying without prejudice each aspect of defendant's motion and granting plaintiff's motion to enforce the PSA. Relying on the provision in the PSA in which the parties released each other from all prior "obligations," the judge rejected plaintiff's argument that the January 2018 Agreement required defendant to submit his motion to the arbitrator and held the PSA governed the parties' relationship. Reviewing the PSA's specific provisions regarding arbitration, the judge held the PSA did not require defendant to submit to the arbitrator his motion to vacate the PSA based on fraud.

Addressing defendant's claims, the judge found defendant had not established a prima facie case of fraud and denied defendant's request for discovery because defendant's "unsupported suspicion of fraud [did] not entitle [defendant] to a discovery fishing expedition in the hopes of uncovering favorable evidence." Consequently, the judge held the PSA was enforceable.

Noting the parties' agreement in the PSA that the arbitrator's decisions would be binding, the judge concluded the arbitrator's finding that the PSA "precluded [defendant] from seeking to modify alimony during the [sixty-one] month limited duration alimony term irrespective of any increase in [plaintiff's] earnings" refuted defendant's argument that plaintiff's earnings should be considered in his request to modify his support obligations based on a change in her income. The judge accordingly denied defendant's request for a finding that a change of circumstances warranted modification of the PSA's support provisions. The judge awarded plaintiff $1,500 in counsel fees and denied defendant's request for counsel fees because he had not submitted an affidavit of services as required by Rule 4:42-9(b), thereby depriving the judge of the ability to determine if defense counsel's fees were reasonable.

On September 20, 2021, the judge issued the JOD, incorporating the PSA into the judgment while recognizing defendant had reserved his right to appeal

the February 22, 2021 order. The parties and their counsel executed the JOD, confirming they had consented to its form and entry.

On appeal, defendant seeks reversal of the February 22, 2021 order and the JOD, arguing the Family Part judge erred by failing to: (1) vacate the PSA or, alternatively, its support provisions based on plaintiff's alleged fraud; (2) find a change in circumstances warranting a modification of the PSA's support provisions; (3) provide a ninety-day discovery period, schedule a plenary hearing, and suspend defendant's alimony and supplemental alimony obligations pending a plenary hearing; and (4) award him counsel fees. Unpersuaded by those arguments, we affirm.

II.

"We review the Family Part judge's findings in accordance with a deferential standard of review, recognizing the court's 'special jurisdiction and expertise in family matters.'" Thieme v. Aucoin-Thieme, 227 N.J. 269, 282-83 (2016) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)). We reverse "only when a mistake must have been made because the trial court's factual 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. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)); see also D.M.C. v. K.H.G., 471 N.J. Super. 10, 27 (App. Div. 2022) (finding "[a]n abuse of discretion exists 'when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis'") (internal quotation marks omitted) (quoting U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467-68 (2012)).

Our review of discovery rulings also is limited. State v. Brown, 236 N.J. 497, 521 (2019). We "generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." Ibid. (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)).

We review de novo questions of law. Amzler v. Amzler, 463 N.J. Super. 187, 197 (App. Div. 2020). The "[i]nterpretation and construction of a contract is a matter of law for the court subject to de novo review." Steele v. Steele, 467 N.J. Super. 414, 440 (App. Div. 2021) (quoting Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998)). We also review de novo a decision regarding the enforceability of an arbitration agreement. Skuse v. Pfizer, Inc., 244 N.J. 30, 46 (2020); Perez v. Sky Zone LLC, 472 N.J. Super. 240, 247 (App. Div. 2022).

Settlement of matrimonial disputes "is encouraged and highly valued in our system." Quinn v. Quinn, 225 N.J. 34, 44 (2016). "The prominence and weight we accord such [settlements] reflect the importance attached to individual autonomy and freedom, enabling parties to order their personal lives consistently with their post-marital responsibilities." Weishaus v. Weishaus, 180 N.J. 131, 143 (2004) (quoting Konzelman v. Konzelman, 158 N.J. 185, 193 (1999)). "'[S]trong public policy favor[s] stability of arrangements' in matrimonial matters." Konzelman, 158 N.J. at 193 (quoting Smith v. Smith, 72 N.J. 350, 360 (1977)); see also Quinn, 225 N.J. at 44.

Matrimonial settlement agreements are governed by basic contract principles and, as such, courts should discern and implement the parties' intentions. J.B. v. W.B., 215 N.J. 305, 326 (2013). "[W]hen 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." Quinn, 225 N.J. at 45. "[A] court should not rewrite a contract or grant a better deal than that for which the parties expressly bargained." Ibid. "At the same time, 'the law grants particular leniency to agreements made in the domestic arena,' thus allowing 'judges greater discretion when interpreting such agreements.'" Pacifico v. Pacifico, 190 N.J. 258, 266 (2007) (quoting Guglielmo

v. Guglielmo, 253 N.J. Super. 531, 542 (App. Div. 1992)). "The court's role is to consider what is written in the context of the circumstances at the time of drafting and to apply a rational meaning in keeping with the 'expressed general purpose.'" Ibid. (quoting Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 302 (1953)).

"A narrow exception to the general rule of enforcing settlement agreements as the parties intended is the need to reform a settlement agreement due to 'unconscionability, fraud, or overreaching in the negotiations of the settlement[.]'" Quinn, 225 N.J. at 47 (alteration in original) (quoting Miller v. Miller, 160 N.J. 408, 419 (1999)); see also Peskin v. Peskin, 271 N.J Super. 261, 276 (App. Div. 1994) (finding "[i]f a settlement agreement is achieved through . . . fraud, . . . the settlement agreement must be set aside"). To prove common-law fraud, a party must demonstrate "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the [person making the statement] of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Allstate N.J. Ins. Co. v. Lajara, 222 N.J. 129, 147 (2015) (quoting Banco Popular N. Am. v. Gandi, 184 N.J. 161, 172-73 (2005)); see also Est. of Cordero, ex rel. Cordero v. Christ Hosp., 403 N.J. Super. 306, 320-21 (App. Div. 2008) (setting

forth the elements of a fraudulent-concealment claim). "[F]raud is never presumed, but must be established by clear and convincing evidence." Weil v. Express Container Corp., 360 N.J. Super. 599, 613 (App. Div. 2003).

In support of his fraud claim, defendant asserts "multiple facts . . . indicate that [plaintiff] was aware of the new employment, or at least making arrangements for it, prior to the execution of the [PSA]": plaintiff reactivated her Pennsylvania medical license on May 22, 2020; the process of reactivating a license and obtaining credentials in a new state would take a few months; plaintiff's National Provider Identifier was updated on July 14, 2020, and "generally indicates" a change of affiliation or work location; and plaintiff's employment contract at her prior employee was executed about three months before the actual start date and required a sixty-day notice of termination.

We perceive no error in the Family Part judge's determination that defendant failed to establish a prima facie case of fraud based on those facts. The record is devoid of any evidence plaintiff misrepresented her possible future income. Plaintiff was not asked to make a representation regarding her future income. In the PSA, defendant made a representation about his future income, "projecting his income to be less than $500,000/year based on the pandemic"; plaintiff in the PSA made no representation regarding her future income,

accurately stating she "is earning $122,000/year." That plaintiff was "aware of the new employment, or at least making arrangements for it, prior to the execution of the [PSA]" does not render that statement fraudulent.

Nor do the facts bespeak fraudulent concealment. Before he signed the PSA on June 1, 2020, defendant knew plaintiff's current employment contract ended on June 1, 2020, knew she had the potential to earn between $250,000 to $300,000, and had the opportunity to question her about her future employment plans and possible salary. The record contains no indication defendant sought information about plaintiff's future salary, even though he knew her current employment contract was about to end, or that plaintiff "intentionally withheld, altered or destroyed" evidence regarding her future salary. Est. of Cordero, 403 N.J. Super. at 321. Accordingly, we affirm the judge's denial of defendant's motion to vacate or modify the PSA based on fraud.[3]

Generally, a court is "authorized to modify alimony and support orders 'as the circumstances of the parties and the nature of the case' require." Halliwell v. Halliwell, 326 N.J. Super. 442, 448 (App. Div. 1999) (quoting N.J.S.A.

[3] Defendant contends the lack of discovery rendered him unable to demonstrate the exact date plaintiff knew about her new salary or when she would start her new job. Defendant, however, had the opportunity to conduct that discovery before he signed the PSA.

2A:34-23); see also Quinn, 225 N.J. at 48 (explaining that a "trial court has the discretion to modify the [parties'] agreement upon a showing of changed circumstances" (quoting Berkowitz v. Berkowitz, 55 N.J. 564, 569 (1970))). "[T]he changed-circumstances determination must be made by comparing the parties' financial circumstances at the time the motion for relief is made with the circumstances which formed the basis for the last order fixing support obligations." Beck v. Beck, 239 N.J. Super. 183, 190 (App. Div. 1990). To establish changed circumstances, a "party seeking modification has the burden of showing such 'changed circumstances' as would warrant relief from the support or maintenance provisions involved." Lepis v. Lepis, 83 N.J. 139, 157 (1980) (quoting Martindell v. Martindell, 21 N.J. 341, 353 (1956)); see also Spangenberg, 442 N.J. Super. at 536.

The Family Part judge rejected defendant's changed-circumstances argument because the judge concluded he was bound by the arbitrator's determination that the PSA precluded defendant from seeking to modify alimony during the sixty-one month limited duration alimony term irrespective of any increase in plaintiff's earnings and that if defendant sought a modification at the end of that period, plaintiff's earnings could not be considered in computing her right to arrears. The parties disagree as to whether the issue of alimony was

before the arbitrator and, thus, whether the judge was bound by the arbitrator's determination. The parties did not include in the record the notices of motion or other submissions they had filed with the arbitrator. Reviewing de novo the PSA, applying a "rational meaning" to its language consistent with its purpose, and considering "what is written in the context of the circumstances at the time of drafting," we agree with the arbitrator's conclusion that, under the terms of the PSA, plaintiff's earnings cannot be considered in a modification application brought by defendant. Pacifico, 190 N.J. at 266.

Moreover, considering the record as a whole, defendant's submissions to the Family Part failed to suggest sufficiently changed circumstances so as to allow a modification of his alimony obligation. Defendant executed the PSA on June 1, 2020, knowing plaintiff's current employment contract term ended on that date and that she had the ability to obtain a position paying a $250,000 to $300,000 salary. He reasonably could and should have anticipated plaintiff would have a change of income up to $300,000. That she then obtained a position with a $240,000 salary does not constitute a change in circumstances warranting relief from his alimony obligations set forth in the PSA. For all of those reasons, we affirm the judge's denial of defendant's alternative requested relief to modify the support provisions based on changed circumstances.

On this record, the judge did not abuse his discretion in denying defendant's request for discovery or a plenary hearing. "A hearing is not required or warranted in every contested proceeding for the modification of a judgment or order relating to alimony." Murphy v. Murphy, 313 N.J. Super. 575, 580 (App. Div. 1998); see also Palombi v. Palombi, 414 N.J. Super. 274, 290 (App. Div. 2010) ("Not every Lepis application requires a plenary hearing."). "[A] party must clearly demonstrate the existence of a genuine issue as to a material fact before a hearing is necessary." Lepis, 83 N.J. at 159; see also Bermeo v. Bermeo, 457 N.J. Super. 77, 83 (App. Div. 2018) (a party "is entitled to a plenary hearing only when demonstrating the existence of a genuine issue of material fact"). A party must make a "prima facie showing of changed circumstances . . . before a court will order discovery." Lepis, 83 N.J. at 157. Because defendant did not establish a prima facie showing of changed circumstances or the existence of a genuine issue of material fact, he was not entitled to discovery or a plenary hearing.

The judge also did not abuse his discretion in denying defendant's counsel fee application given that defendant had failed to submit the affidavit of services required by Rule 4:42-9(b). See Steele, 467 N.J. Super. at 444 (applying abuse-

of-discretion standard in reviewing an order denying a fee application in a matrimonial case).

Finally, we address the issue of arbitration. In her brief, plaintiff did not contend the PSA required arbitration of defendant's motion. See N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015) (finding "[a]n issue that is not briefed is deemed waived on appeal"). Instead, plaintiff again argues the January 2018 Agreement required defendant to submit to the arbitrator his motion to vacate or modify the PSA. Given the clear language of the PSA in which the parties released each other from all prior obligations, we agree with the judge's conclusion that plaintiff's reliance on the January 2018 Agreement was misplaced because the PSA governs the parties' relationship.

Having affirmed the February 22, 2021 order, we also affirm the JOD.

Affirmed.