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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1005-21**

CAROL A. BUCK,

Plaintiff-Respondent,

v.

JAMES A. BUCK,

Defendant-Appellant.

Submitted October 6, 2022 – Decided April 13, 2023

Before Judges Gooden Brown and DeAlmeida.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Gloucester County,
Docket No. FM-08-0515-16.

Adinolfi, Lieberman, Burick, Roberto & Molotsky, PA,
attorneys for appellant (Thomas A. Roberto and Julie
R. Burick, on the brief).

Respondent has not filed a brief.

PER CURIAM

In this post-judgment divorce matter, defendant James A. Buck appeals from the October 22, 2021 order of the Family Part denying his motion for discovery and a hearing with respect to his claim that his alimony obligation to plaintiff Carol A. Buck should have been terminated sooner than the date she concedes to have begun cohabitating with her paramour, as well as his request for attorney's fees. We affirm.

I.

The parties were divorced in 2017. They executed a marital settlement agreement (MSA) which was incorporated into a final judgment of divorce. In the MSA, James¹ agreed to pay alimony of \$700 per week.

In 2018, James moved to terminate alimony based on Carol's alleged cohabitation with Michael Dammann. Carol conceded she was dating Dammann and that she lived in a house he owned. She stated, however, that Dammann resided in a different house and that she paid him monthly rent. Carol denied that their relationship constituted cohabitation. The court found that James did not establish a prima facie case of cohabitation, denied his request for discovery, and denied without prejudice his motion to terminate alimony.

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

James subsequently moved for reconsideration. While that motion was pending, the parties executed a consent order reducing James's alimony obligation based on a reduction in his income. The motion for reconsideration was not decided by the trial court.

In 2021, James again moved to terminate alimony due to Carol's alleged cohabitation with Dammann. He alleged that in May 2021, Dammann sold the house in which Carol lived and that shortly thereafter she moved into Dammann's home. James produced evidence that Carol notified the postal service of a change in her address to Dammann's home effective June 15, 2021. In addition, Carol registered her car with the Motor Vehicle Commission (MVC) at Dammann's address as of June 22, 2021 and changed the address on her driver's license to Dammann's address as of June 15, 2021.

James alleged that an investigator documented Carol's frequent presence at Dammann's home and observed her performing household chores there in June, July, and August of 2021. He produced evidence that Carol and Dammann spent a holiday together and argued that he could not produce proof of the financial interaction, if any, between Carol and Dammann without discovery. Although James focused on Carol's move into Dammann's home, he also alleged their cohabitation started years earlier, perhaps as far back as 2017.

Carol cross-moved to terminate alimony as of June 23, 2021. She conceded that she started cohabitating with Dammann when she moved into his home. She denied, however, that their relationship constituted cohabitation before that date. Carol produced checks for \$1,900 monthly rent payments to Dammann for January 2021 to June 2021.

On October 21, 2021, the trial court issued a written opinion denying James's motion. The court found James produced no evidence of: (1) intertwined finances; (2) shared living expenses; (3) recognition of a committed relationship by family and friends; (4) frequency of contact; (5) duration of relationship; (6) sharing living space; (7) sharing household chores; (8) an enforceable promise of support to Carol by Dammann; or (9) other relevant facts prior to Carol's move into Dammann's home. "In short," the court concluded, James "has failed to establish a prima facie claim to justify either opening discovery or for the necessity of a plenary hearing."

The court concluded, based on Carol's change of address with MVC, that her cohabitation began on June 15, 2021. The court terminated alimony as of that date, effectively granting Carol's cross-motion on this point, although alimony was terminated one week earlier than she requested.

In addition, the trial court denied James's request for attorney's fees. The court weighed the relevant factors set forth in Rule 5:3-5(c), and determined that "there is no clear indication of significant financial disparity between the parties. Additionally, both parties appear to be litigating in good faith. The awarding of counsel fees is not warranted at this time."

The court entered an October 21, 2021 order: (1) granting Carol's cross-motion to terminate alimony as of June 15, 2021; (2) denying James's motion for discovery and a hearing; and (2) denying James's motion for attorney's fees.²

This appeal followed. James argues the trial court erred when it: (1) concluded that he had "unclean hands" because he was in arrears on his alimony and child support payments at the time he filed his motion, and, as a result, was not entitled to equitable relief; (2) resolved disputed issues of fact by accepting the statements made in the certification Carol submitted in opposition to his motion; (3) applied the incorrect legal standard to his cohabitation claim; and (4) neglected to analyze the legal standards for determining whether an award of attorney's fees was warranted.

² The court's opinion and order mention only Carol's motion for attorney's fees. However, we view the court's finding that the award of attorney's fees was not warranted to apply to both parties' motions for attorney's fees. James appears to interpret the court's decision in this fashion in his merits brief.

II.

Pursuant to N.J.S.A. 2A:34-23(n)(1) to (7), alimony may be terminated if the recipient is cohabitating with another person. The statute defines cohabitation as "a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household." N.J.S.A. 2A:34-23(n). The statute establishes seven factors to be considered by a court when determining whether cohabitation is occurring:

- (1) Intertwined finances such as joint bank accounts and other joint holdings or liabilities;
- (2) Sharing or joint responsibility for living expenses;
- (3) Recognition of the relationship in the couple's social and family circle;
- (4) Living together, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive intimate personal relationship;
- (5) Sharing household chores;
- (6) Whether the recipient of alimony has received an enforceable promise of support from another person within the meaning of subsection h. of [N.J.S.A.] 25:1-5; and
- (7) All other relevant evidence.

In evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship. A court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis.

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

A finding of cohabitation requires "stability, permanency and mutual interdependence." Konzelman v. Konzelman, 158 N.J. 185, 202 (1999). "A mere romantic, casual or social relationship is not sufficient to" terminate alimony. Ibid. In determining whether an individual is cohabitating, the court must determine if the relationship has the generic character of a family unit as a relatively permanent household. Gayet v. Gayet, 92 N.J. 149, 155 (1983). The court will not find "that a romantic relationship between an alimony recipient and another, characterized by regular meetings, participation in mutually appreciated activities, and some overnight stays in the home of one or the other, rises to the level of cohabitation." Quinn v. Quinn, 225 N.J. 34, 54 (2016).

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

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

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

The party alleging cohabitation is "entitled to an assumption of the truth of his allegations and the benefit of all reasonable inferences to be drawn from the evidence he had marshaled." Temple v. Temple, 468 N.J. Super. 364, 368 (App. Div. 2021). However, conclusory allegations will be disregarded. Lepis, 83 N.J. at 159. Therefore, a judge "should be careful not to permit a fishing expedition into a supported spouse's private affairs on a weak claim." Temple, 468 N.J. Super. at 375.

"When presented with competing certifications that create a genuine dispute about material facts, a judge is not permitted to resolve the dispute on the papers; the judge must allow for discovery and if, after discovery, the material facts remain in dispute, conduct an evidentiary hearing." Id. at 368. A prima facie case has been presented when "the movant present[s] evidence from which a trier of fact could conclude the supported spouse and another are in 'a mutually supportive, intimate personal relationship' in which they have

'undertaken duties and privileges that are commonly associated with marriage or civil union.'" Id. at 371 (quoting N.J.S.A. 2A:34-23(n)).

Although it may be difficult for a movant to establish a prima facie showing of cohabitation, Landau, 461 N.J. Super. at 118 (citing Konzelman, 158 N.J. at 191-92), absent that showing, there is no justification for the "invasion of [the ex-spouse's] privacy." Ibid.; see also Quinn, 225 N.J. at 54-55 ("There are few exercises more intrusive than . . . an inquiry [which] reveals a vast amount of personal information about the daily life of the [dependent] spouse that is of no concern to the [supporting] spouse."). Indeed, discovery from an alimony recipient is only warranted "[w]hen the facts support no conclusion other than that the [obligee's] relationship has all the hallmarks of a marriage" Quinn, 225 N.J. at 54.

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

We have carefully reviewed the record and find no basis to conclude that the trial court mistakenly exercised its discretion when it denied James's motion for discovery and a hearing. As the trial court concluded, the evidence produced by James, at best, indicates that Carol lived in a home owned by the man she was dating. James produced no evidence that Carol and Dammann had intertwined finances, owned assets together, lived together (prior to Carol moving into Dammann's home), had joint responsibility for living expenses or household chores, were in frequent contact, were recognized by others as being in a mutually supportive intimate personal relationship, or that Dammann had made a promise of support to Carol.

While we agree that the trial court accepted Carol's representations that she paid rent to Dammann pursuant to a lease, James produced no evidence suggesting that those representations were false. James noted that Carol did not produce a copy of the lease and speculated that Dammann may never have deposited the checks, charged Carol below-market rent, or funneled the proceeds of the checks back to Carol. Apart from being entirely unsupported by evidence, James's speculation, even if accepted as true, would not, standing alone, constitute cohabitation. Providing a dating partner with a rent-free or reduced rent home is not tantamount to cohabitation. James's private investigator

produced no evidence that Carol and Dammann lived together in the home she alleged to have rented from Dammann, that they spent time together in that home, or that Dammann contributed in any way to the daily chores or functioning of her home.

The evidence produced by James is far less significant than that submitted by the moving party in Temple, where we held that it was error to decide a motion to terminate alimony without discovery and a hearing. Temple, 468 N.J. Super. at 371-77. In that case, the supported former spouse had been in a relationship of at least fourteen years. Id. at 367. An "investigation produced considerable evidence of cohabitation or perhaps even a marriage." Id. at 372. That evidence included numerous social media posts over a period of seven years in which the partner of the former spouse referred to her as "my wife" when describing vacations and restaurant outings they took together. Ibid. Other social media posts indicated that the couple "traveled and participated in events extensively" and were often "together for holidays and family functions" Id. at 373.

Other evidence indicated that the former spouse had sold the marital home and purchased a residence in New York City, near the workplace of her partner, who later posted that he "gave up" his New York City apartment. Id. at 373-74.

In addition, surveillance revealed that the former spouse was living full-time at the partner's New Jersey house for three months, where she was photographed engaging in household chores, retrieving and opening mail, purchasing groceries, and using a key to enter the home. Id. at 374. A publication by a church near the New Jersey home identified the former spouse by her partner's surname. Id. at 373.

James produced much less evidence of cohabitation. It was well within the trial court's discretion to conclude that the expense of discovery and an evidentiary hearing, with the resulting intrusion into Carol's private life, are not justified merely because she lived in the home of a man she was dating.³

The decision to award "attorney's fees rests within the sound discretion of the trial court." Maudsley v. State, 357 N.J. Super. 560, 590 (App. Div. 2003). "[F]ee determinations by trial courts will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Packard-

³ We have considered James's argument with respect to the trial court's observation at oral argument on the motions that James had unclean hands because he was in arrears on his alimony and child support. While the court mentioned unclean hands during an exchange with counsel, there is no mention of unclean hands in the court's written opinion or order. Our review of the record reveals no indication that the trial court denied James's motion because of a finding that he had unclean hands or because he was in arrears on his financial obligations to Carol.

Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 444 (2001) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)); accord Berkowitz v. Berkowitz, 55 N.J. 564, 570 (1970).

Although New Jersey generally disfavors the shifting of attorney's fees, a prevailing party may recover attorney's fees if expressly provided by statute, court rule, or contract. Bamberger, 167 N.J. at 440 (citing North Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 569 (1999) and Dep't of Env't Prot. v. Ventron Corp., 94 N.J. 473, 504 (1983)). A Family Part judge may award counsel fees at their discretion subject to the provision of Rule 4:42-9. In determining the award, the judge should consider:

- (1) the financial circumstances of the parties;
- (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party;
- (3) the reasonableness and good faith of the positions advanced by the parties both during and prior to trial;
- (4) the extent of the fees incurred by both parties;
- (5) any fees previously awarded;
- (6) the amount of fees previously paid to counsel by each party;
- (7) the results obtained;

(8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and

(9) any other factor bearing on the fairness of an award.

[R. 5:3-5(c).]

A judge "shall consider the factors set forth in [Rule 5:3-5(c)], the financial circumstances of the parties, and the good or bad faith of either party." N.J.S.A. 2A:34-23.

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

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

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

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

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

(4) the amount involved and the results obtained;

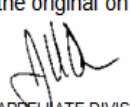
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; [and]
- (8) whether the fee is fixed or contingent.

Our review of the record revealed no basis on which to conclude that the trial court erred when it determined that the award of attorney's fees to James was not warranted. The court applied the appropriate factors, found there was no clear indication of a significant financial disparity between the parties, and that they were both acting in good faith. The decision to deny attorney's fees was within the trial court's discretion.

To the extent we have not specifically addressed any of James's remaining claims, we conclude they lack 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