

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1209-22**

**TRACY MALONEY,
a/k/a TRACY DIMARCO
and TRACY EPSTEIN,**

Plaintiff-Appellant,

v.

COREY EPSTEIN,

Defendant-Respondent.

Argued May 22, 2023 – Decided June 5, 2023

Before Judges Haas and Gooden Brown.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Monmouth County,
Docket No. FM-13-1215-20.

Robert A. Epstein argued the cause for appellant
(Manzi, Epstein, Lomurro & Decataldo, LLC,
attorneys; Robert A. Epstein, of counsel and on the
brief).

Respondent has not filed a brief.

PER CURIAM

In this post-judgment matrimonial matter, plaintiff appeals from the portions of the Family Part's November 18, 2022 order that denied her request that the trial court take measures to compel defendant to comply with the provisions of the parties' final judgment of divorce (FJOD). Because the trial court found that defendant was "in continued violation of litigant's rights," and had already made similar findings in connection with prior enforcement orders, we agree with plaintiff that the time had come for the court to take affirmative action, as permitted by Rule 1:10-3 and Rule 5:3-7, to ensure defendant's compliance with the FJOD. Therefore, we reverse paragraph 2a of the November 18, 2022 order, which denied plaintiff's request for the issuance of a bench warrant to require defendant's appearance in court, and remand the matter to the court for further proceedings consistent with this opinion.

The salient facts are not in dispute. The parties were married in 2013 and divorced in 2021. They have three children. As set forth in the FJOD, plaintiff is the parent of primary residence, and defendant has parenting time on alternate weekends from Friday to Sunday.

The FJOD required defendant to pay plaintiff \$234 per week in child support and \$750 per month in limited duration alimony. Defendant was supposed to make these payments through the Probation Department and to

provide that Department with his employment information "for the establishment of wage garnishment." The FJOD stated that if defendant missed two consecutive payments of his support obligations, a bench warrant would be issued.¹

Defendant has not complied with the support provisions of the FJOD, or with the requirement that he obtain life insurance to protect his children and former spouse in the event of his premature death. He also failed to obtain health insurance for the children as required by the FJOD, or pay his share of their health care expenses. As a result, plaintiff filed a series of enforcement motions following the parties' divorce. Defendant did not respond to these motions.

On each occasion, the trial court found that defendant had violated the terms of the FJOD and ordered that he comply. However, the court denied plaintiff's requests that the court enforce its orders and compel defendant's compliance by issuing a bench warrant, incarcerating him, or suspending his parenting time. The court did not fully explain the basis for its hesitance to deal

¹ The FJOD further stated that the "missed-two-payment bench warrant stipulation" was "stayed during the pendency of any gubernatorially declared public health state of emergency." However, on March 4, 2022, Governor Philip D. Murphy issued Executive Order 292 (2022), which terminated the COVID-19 public health emergency effective March 7, 2022.

with defendant's repeated noncompliance. Instead, it merely stated that its denials of plaintiff's motions was without prejudice.

Plaintiff ultimately filed the enforcement motion that led to the November 18, 2022 order that is the subject of this appeal. By this time, defendant's support arrears were \$75,740.05. He also owed thousands of dollars to plaintiff in the form of unpaid counsel fees and health care expenses. He had still not obtained health insurance for the children. Defendant did not oppose plaintiff's motion.

In its November 18, 2022 order, the trial court again found that defendant had violated the "plain, clear, and unambiguous language" of the FJOD. The court noted that this was plaintiff's fifth enforcement motion "seeking assistance of the [c]ourt to remedy . . . [defendant's] non-compliance with prior [o]rders and the [FJOD]." The court also recognized that "[t]o date, defendant has made no attempt to comply with his obligations nor remedy his ongoing obligations as he continues to violate prior court [o]rders and the [FJOD]."

However, the court denied plaintiff's request that it issue a bench warrant requiring defendant to appear in court and explain himself. The court also denied plaintiff's motion to incarcerate defendant until he complied with the orders, to suspend his parenting time, or take other action to obtain his

compliance. In denying these requests, the court's findings consisted of the following brief statement:

Here, the court finds that despite defendant's refusal to pay any alimony or child support, it is inappropriate to issue a bench warrant or to suspend parenting time at this time as it is the children who would suffer from not having time with their father. Additionally, it is not appropriate to find defendant in contempt of court at this time.

This statement was similar to those made in the court's prior orders, which also specifically found that defendant had taken no steps to comply with the court's orders, but which also declined to take any enforcement action against him.

On appeal, plaintiff argues that the trial court mistakenly exercised its discretion by failing to take affirmative measures against defendant as permitted by Rule 1:10-3 and Rule 5:3-7 to enforce its orders. We agree.

Rule 1:10-3 "provide[s] a mechanism, coercive in nature, to afford relief to a litigant who has not received what a [c]ourt [o]rder or [j]udgment entitles that litigant to receive." D'Atria v. D'Atria, 242 N.J. Super. 392, 407 (Ch. Div. 1990).² "The particular manner in which compliance may be sought is left to

² The D'Atria opinion refers to Rule 1:10-5, but that rule was later amended and re-designated as Rule 1:10-3. Pressler & Verniero, Current N.J. Current N.J. Court Rules, note on R. 1:10-3 (2023).

the court's sound discretion." Bd. of Educ., Twp. of Middletown v. Middletown Twp. Educ. Ass'n, 352 N.J. Super. 501, 509 (Ch. Div. 2001).

Rule 1:10-3 also states that a court in a family action may grant additional remedies to a party as provided by Rule 5:3-7. The remedies listed in the latter rule permit a trial court to impose economic sanctions, incarcerate the recalcitrant party, suspend that party's driver's license, or issue a bench warrant. R. 5:3-7(b).

In this case, the trial court correctly found that defendant had never complied with the FJOD or any of many other orders it entered. Yet, it took no steps to compel defendant's compliance.

We understand the court's apparent reticence to impose a sanction, such as incarceration or the suspension of parenting time, which might deprive the children of contact with their father. However, the loss of such contact was by no means certain in this case. When a bench warrant for non-compliance with a support order is effectuated, the parent "must be brought before a court as soon as possible, but, in any event, within seventy-two hours of their arrest." Pasqua v. Council, 186 N.J. 127, 153 (2006).

The court then conducts an "ability to pay hearing." "The objective of the hearing is simply to determine whether [the parent's failure to comply with the

court's orders] was excusable or willful, i.e., the obligor was able to pay and did not." Schochet v. Schochet, 435 N.J. Super. 542, 548 (App. Div. 2014). Thus, "[b]efore a court may order the ultimate coercive means, incarceration, 'the court must find that the parent was capable of providing the required support, but willfully refused to do so.'" Id. at 549 (quoting Pasqua, 186 N.J. at 141 n.2). "If the court should determine that the obligor paid what he or she was able to pay, no incarceration would be warranted despite the accrual of arrears" Id. at 550.

Here, defendant has completely failed to abide by the FJOD or the court's many orders. He has not participated in any of the post-judgment enforcement actions. He is now over \$100,000 in arrears on his support and other financial obligations, he does not maintain the required life or health insurance, and he has not provided the Probation Department with the basic employment information necessary to garnish his wages. Under these circumstances, we are satisfied that the trial court mistakenly exercised its discretion by failing to bring defendant to court for an explanation of his noncompliance and a determination of his future ability to comply.

Therefore, we reverse paragraph 2a of the November 18, 2022 order, which denied plaintiff's request for the issuance of a bench warrant. We remand

this matter to the trial court with the following directions. The court shall promptly schedule an ability to pay hearing and serve notice of this hearing upon defendant. The hearing notice should advise defendant that if he fails to appear, the court will issue a bench warrant.

If defendant appears as required, the court shall conduct the hearing and render a decision in accordance with the guidelines set forth in Pasqua. In the event defendant fails to appear for the hearing, the court shall issue a bench warrant that will require defendant to be arrested and brought to court for the Pasqua hearing. Throughout these proceedings, the court must fully consider all of the options available to it under Rule 1:10-3 and Rule 5:3-7, and shall make specific findings concerning the implementation or non-implementation of these options.

Finally, we address plaintiff's request that the remand proceedings be conducted by a different judge. Appellate courts have the authority to direct that a case be assigned to a new judge upon remand. N.J. Div. of Youth & Fam. Servs. v. A.W., 103 N.J. 591, 617 (1986). However, we exercise this authority "sparingly[,] especially in a case where the record reflects that the judge did not make credibility determinations or "there is a concern that the . . . judge has a potential commitment to his or her prior findings." Graziano v. Grant, 326

N.J. Super. 328, 349 (App. Div. 1999). Applying this standard, we discern no basis to remand this matter to a different judge. Thus, we direct the presiding judge to assign the case as he or she sees fit.

Reversed and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION