SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1886-21

BARBARA SHERER,

Plaintiff-Respondent,

v.

PHILIP SHERER,

Defendant-Appellant.

Submitted September 12, 2023 – Decided September 20, 2023

Before Judges Whipple and Enright.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FM-13-0324-16.

Keith, Winters, Wenning & Harris, LLC, attorneys for appellant (Brian D. Winters, on the briefs).

Law Offices of Pastor & Pastor, attorneys for respondent (Angela F. Pastor, of counsel; Leslie M. Martin, on the brief).

PER CURIAM

In this post-judgment matrimonial matter, defendant Philip Sherer appeals from a January 21, 2022 order, denying his motion to terminate or reduce his alimony obligation and granting a cross-motion filed by his former spouse, plaintiff Barbara Sherer, to enforce his support obligations under the parties' judgment of divorce (JOD). We affirm, substantially for the reasons expressed by Judge Stacey D. Adams in her thoughtful written opinion.

I.

Because Judge Adams's opinion fully details the relevant facts of this case, we need only summarize them. The parties executed a Marital Settlement Agreement (MSA) on April 20, 2017, and were divorced the same day. The MSA was incorporated into the JOD.

Under the MSA, defendant agreed to pay plaintiff open durational alimony in the sum of $2,500 per month, despite the fact he was unemployed at the time. The MSA further provided his alimony payments would cease upon the death of either party or plaintiff's remarriage. Additionally, the MSA stated that if defendant earned over $120,000 per year or plaintiff earned over $30,000 annually, the parties would exchange financial information. According to defendant, this provision meant "there could be no application by plaintiff [for]

an increase [in] alimony based upon changed circumstances unless defendant earned in excess of $120,000 per year."

Under Paragraph 22 of the MSA, the parties also agreed if plaintiff cohabitated, as defined by statute, her cohabitation would "not constitute a change in circumstances sufficient to trigger a [modification] application by [defendant]" under Lepis v. Lepis, 83 N.J. 139 (1980). The parties further agreed that if "during such cohabitation, [defendant] obtain[ed] employment earning over $120,000 per year[,] . . . [plaintiff would] not be permitted to seek an increase in [defendant's] alimony obligation," but if she "subsequently discontinue[d] her cohabitation, and [defendant was] earning more than $120,000 per year[,] . . . alimony [would] be reviewed at that time." The MSA also stated if she "cohabit[ed] a second . . . time, alimony [would] remain as set after [plaintiff's] initial cohabitation."

Additionally, under Paragraph 58 of the MSA, the parties stipulated the agreement would "be construed and governed in accordance with the laws of the State of New Jersey" and "[a]ny future litigation involving . . . [the MSA would] be conducted in . . . New Jersey so long as New Jersey [was] the residence of either [party] at the time such action [was] instituted." The parties also agreed "[i]f neither party . . . resid[ed] in New Jersey at that time, the State of the party

defending the application . . . [would] be the forum designated for [the] litigation." That said, the record shows that prior to the entry of the JOD, defendant moved to Georgia to live with his former girlfriend, and shortly after the JOD was entered, plaintiff moved to Florida with her boyfriend.

Subsequently, the parties engaged in motion practice in New Jersey to address ongoing financial disputes. They ultimately resolved their differences through counsel and entered into a consent order on March 4, 2019. The consent order left intact defendant's alimony payments of $2,500 per month, but also provided he would pay plaintiff an additional $200 per month through the Monmouth County Probation Department to satisfy his existing alimony arrears.

In 2021, defendant filed another post-judgment motion in New Jersey. This time, he sought to terminate or reduce his alimony obligation and have plaintiff reimburse him for any alimony she received post-judgment. Defendant also asked that plaintiff be ordered to file an updated Case Information Statement (CIS) and that the trial court conduct a plenary hearing to "examine all issues related to alimony termination/reduction/cohabitation." Additionally, he requested an award of counsel fees.

In support of his application, defendant certified: he suffered significant financial setbacks after the parties' divorce; "plaintiff engaged in active

concealment of her" cohabitation prior to the entry of the JOD and fraudulently induced him to pay alimony; and he could not afford to pay the amount of alimony required under the JOD because his child support obligations for a daughter he shared with his former girlfriend totaled $1,411 per month.[1] The CIS defendant filed in support of his motion showed he was currently employed and grossing over $145,000 per year.

Plaintiff opposed the motion and cross-moved to enforce the JOD. She asked that the trial court: deny defendant's motion in its entirety; adjudicate him in violation of litigant's rights; compel defendant to satisfy his alimony arrears of over $70,000; and have him pay alimony through probation via wage garnishment. She also requested a counsel fee award.

On January 21, 2022, following argument on the cross-applications, Judge Adams denied defendant's motion in its entirety and granted plaintiff's enforcement motion. In the comprehensive written opinion accompanying her order, the judge first addressed defendant's modification application, noting he "advance[d] two reasons in support of his application to terminate alimony: [plaintiff's] cohabitation and . . . his . . . financial hardship." Judge Adams found the MSA "specifically contemplated and allowed for [plaintiff] to cohabitate

[1] The parties also have two children together, both of whom are emancipated.

without it impacting her right to receive alimony." Therefore, the judge concluded plaintiff was "entitled to open durational alimony regardless of her cohabitation status." In reaching this determination, the judge stated defendant "provided no evidence . . . [plaintiff] fraudulently covered up her relationship status . . . to obtain more favorable language in the MSA" and he also "provided no concrete proof that [she] was actually cohabitating with her boyfriend prior to the divorce, nor any proof . . . to establish that [she] lied about her status in order to achieve a more favorable settlement."

Next, the judge rejected defendant's argument that his alimony payments should be terminated or reduced due to his alleged "declining financial situation." She found:

> there is no change of circumstance that would warrant a downward modification or termination of alimony in this case. [Defendant] was unemployed at the time he agreed to pay $2,500 per month in alimony.
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> . . . .
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> [A]ccording to [defendant's] updated CIS, he is currently employed with two separate employers and earned $71,028 through November 15, 2021, which equates to roughly $82,000 annually. Further, according to . . . his updated CIS, he is earning $6[,]098 bi-monthly at his new job[,]. . . which equates to roughly $146,352 annually (gross). This is far more than what he was earning at the time of the divorce.

> Further, the MSA imputed an income of $120,000 to [defendant,] despite his unemployment at the time of the divorce. . . . The parties specifically contemplated that [he] would pay $2[,]500 in alimony per month if his income was $120,000 or less. He cannot now argue that because his financial circumstances ha[ve] deteriorated[,] he no longer has enough income to maintain his alimony obligation[,] . . . particularly when he is currently earning more than $120,000.
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> For the same reasons, [defendant] cannot now claim that his financial support obligation to his daughter constitutes a change in circumstance. [Defendant's] daughter was born in 2014. The MSA was entered in 2017. . . . Thus, [defendant's] support obligation to his daughter must also have been contemplated at the time the MSA was entered into and it cannot now be used as the basis for a change in circumstance.

Based on these findings, the judge ordered defendant to: (1) make two lump sum payments of $12,500 within sixty days to defray his arrears, noting his arrears had "grown to an astounding $73,700"; (2) pay an additional $500 per month until his arrears were satisfied; and (3) pay alimony through probation via wage garnishment, with a bench warrant to issue if he missed two payments.

The judge also awarded plaintiff $2,850 in counsel fees, citing the factors set forth in Rule 4:42-9 and 5:3-5(c), and R.P.C. 1.5(a). Judge Adams concluded that both the time spent, and the hourly rate charged by plaintiff's counsel were reasonable, and defendant was "in a better financial position than" plaintiff. Additionally, the judge found it was appropriate to award plaintiff counsel fees

because defendant "unilaterally reduced his alimony [payments]" and "accumulated [arrears of] over $73,000," and the judge did "not believe that [his] application was filed in good faith."

II.

On appeal, defendant argues: the judge abused her "discretion in failing to find . . . [he] . . . made a prima facie showing of changed [financial] circumstances warranting a review of alimony," as he demonstrated he suffered "significant financial distress following the entry of the [JOD]"; the judge erred in failing to conclude he "made a prima facie showing of changed circumstances as a result of plaintiff's cohabitation"; plaintiff "perpetrated" a "fraud" against him by hiding her cohabitation "while the divorce matter was pending"; the judge erred in declining to conduct a plenary hearing and basing her decision on "conflicting issues of material facts"; and the judge abused her discretion in enforcing the MSA in a "punitive," rather than a "coercive" manner and in awarding counsel fees. Lastly, for the first time on appeal, defendant argues the January 21, 2022 order "should be deemed void ab initio because New Jersey did not have jurisdiction over the matter," pursuant to the terms of the MSA.

These arguments lack merit. R. 2:11-3(e)(1)(E). We add the following comments.

Our review of a Family Part order is limited. See Cesare v. Cesare, 154 N.J. 394, 411 (1998). "Because of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding." Id. at 413. Therefore, "[w]e will reverse only if we find the [court] clearly abused [its] discretion." Clark v. Clark, 429 N.J. Super. 61, 72 (App. Div. 2012). However, we review a Family Part judge's interpretation of the law de novo. D.W. v. R.W., 212 N.J. 232, 245-46 (2012) (citation omitted).

Matrimonial agreements are "'entitled to considerable weight with respect to their validity and enforceability' in equity, provided they are fair and just," because they are "essentially consensual and voluntary in character." Dolce v. Dolce, 383 N.J. Super. 11, 20 (App. Div. 2006) (quoting Petersen v. Petersen, 85 N.J. 638, 642 (1981)). However, a trial court retains the equitable power to modify support provisions in an MSA at any time. Lepis, 83 N.J. at 145; see also N.J.S.A. 2A:34-23 (support orders "may be revised and altered by the court from time to time as circumstances may require.").

"Whether [a support] obligation should be modified . . . rests within a Family Part judge's sound discretion." Larbig v. Larbig, 384 N.J. Super. 17, 21 (App. Div. 2006) (citations omitted). Thus, a trial court's decision regarding a support obligation should not be disturbed unless we "conclude that the trial

court clearly abused its discretion, failed to consider all of the controlling legal principles, or . . . that the determination could not reasonably have been reached on sufficient credible evidence present in the record after considering the proofs as a whole." Heinl v. Heinl, 287 N.J. Super. 337, 345 (App. Div. 1996) (citation omitted).

"The party seeking modification has the burden of showing such 'changed circumstances' as would warrant relief from the support . . . provisions" in an MSA. Lepis, 83 N.J. at 157 (citation omitted). Therefore, when a payor "is seeking modification of an alimony award, that party must demonstrate that changed circumstances have substantially impaired the ability to support [themselves]." Ibid. "Courts have consistently rejected requests for modification based on circumstances which are only temporary or which are expected but have not yet occurred." Id. at 151 (citations omitted).

Importantly, the moving party must demonstrate a permanent change in circumstances from those existing when the prior support award was fixed. See Donnelly v. Donnelly, 405 N.J. Super. 117, 127-28 (App. Div. 2009); see also Beck v. Beck, 239 N.J. Super. 183, 190 (App. Div. 1990) ("[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."). Accordingly, "[w]hen a motion . . . is filed for modification or termination of alimony[,] . . . other than an application based on retirement[,]. . . the movant shall append copies of the movant's current [CIS] and the movant's [CIS] previously executed or filed in connection with the order, judgment or agreement sought to be modified." R. 5:5-4(a)(4). It also is well settled "[a] prima facie showing of changed circumstances must be made before a court will order discovery of an ex-spouse's financial status," Lepis, 83 N.J. at 157, including "a copy of a current [CIS]." R. 5:5-4(a)(4).

Once a party demonstrates changed circumstances involving alimony, the trial court must determine if a plenary hearing is required. Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007). "[A] plenary hearing is only required if there is a genuine, material and legitimate factual dispute." Segal v. Lynch, 211 N.J. 230, 264-65 (2012); see also Lepis, 83 N.J. at 159 (holding the moving party must clearly demonstrate the existence of a genuine issue as to a material fact "before a hearing is necessary" because "[w]ithout such a standard, courts would be obligated to hold hearings on every modification application."). We review a trial court's denial of a plenary hearing for an abuse of discretion. See Costa v. Costa, 440 N.J. Super. 1, 4 (App. Div. 2015).

Likewise, an award of counsel fees "rests in the sound discretion of the trial court." Bisbing v. Bisbing, 468 N.J. Super. 112, 121 (App. Div. 2021) (citing Williams v. Williams, 59 N.J. 229, 233 (1971)). An appellate court "will disturb a trial court's determination on counsel fees only on the 'rarest occasion,' and then only because of clear abuse of discretion." Slutsky v. Slutsky, 451 N.J. Super. 332, 365 (App. Div. 2017) (quoting Strahan v. Strahan, 402 N.J. Super. 298, 317 (App. Div. 2008)).

Governed by these principles, we perceive no reason to disturb the January 21, 2022 order. Indeed, for the reasons Judge Adams stated, we are satisfied defendant failed to demonstrate a prima facie case of changed circumstances based on either plaintiff's cohabitation or his alleged financial setbacks, and thus, he was not entitled to discovery of plaintiff's current financial circumstances or a plenary hearing. We also are convinced he was not entitled to relief from his alimony obligation based on claims his financial circumstances worsened after the divorce because, contrary to Rule 5:5-4(a)(4), he neglected to file a prior CIS with his motion to reflect the financial circumstances that existed either at the time of final hearing or in March 2019, when the parties had already moved out of state and entered into a consent order to resolve various financial issues, including those related to alimony.

We also find no merit to defendant's argument that the judge erred by enforcing the JOD and imposing sanctions against him. We review an order granting a motion to enforce litigant's rights for an abuse of discretion. N.J. Media Grp., Inc. v. State, Off. of Governor, 451 N.J. Super. 282, 299-300 (App. Div. 2017) (citations omitted). A trial court "possesses broad equitable powers to accomplish substantial justice" and may tailor an appropriate remedy for violation of its orders. Finger v. Zenn, 335 N.J. Super. 438, 446 (App. Div. 2000). Indeed, pursuant to Rule 5:3-7(b), a Family Part judge is entitled to use various remedies to enforce a judgment or order concerning alimony after finding a violation of same, including "fixing the amount of arrearages," imposing "economic sanctions," and "any other appropriate equitable remedy." R. 5:3-7(b)(1), (4) and (8).

Here, defendant admittedly engaged in self-help and reduced his alimony payments before filing a motion to modify his support obligation. It also is not disputed that when the parties executed the MSA, he was unemployed, but when he filed his modification motion, he was grossing over $146,000 per year. Under these circumstances, we decline to conclude Judge Adams abused her discretion in enforcing the JOD, fixing a schedule for defendant to satisfy his arrears over

time, ordering a wage garnishment, and granting plaintiff a modest counsel fee award for having to defend against defendant's motion.

Lastly, we address defendant's newly raised argument that the challenged "order should be deemed void ab initio because New Jersey did not have jurisdiction over the [parties'] matter" under the MSA. In doing so, we note issues not raised before the trial court generally are not reviewed unless they involve jurisdiction, implicate the public interest, or are necessary to achieve substantial justice. See State v. Walker, 385 N.J. Super. 388, 410 (App. Div. 2006).

"Forum-selection clauses, under which a party agrees in advance to submit to a particular jurisdiction in the event a dispute develops . . . . do not offend due process so long as the agreement is 'freely negotiated' and the provision is not 'unreasonable and unjust.'" YA Glob. Invs., L.P. v. Cliff, 419 N.J. Super. 1, 9 (App. Div. 2011) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n. 14 (1985)). "Courts will enforce . . . a forum-selection clause unless it is the product of 'fraud, undue influence, or overwhelming bargaining power,' is unreasonable, or offends a 'strong public policy.'" Id. at 10 (quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-15 (1972)). It also is well established that "[p]ersonal jurisdiction is a 'waiveable right,' that is, a non-

resident . . . may choose to consent to the jurisdiction of a particular court." Id. at 9 (quoting Burger King Corp., 471 U.S. at 472 n. 14).

Based on these standards, we are persuaded it would be unreasonable to afford defendant relief from the January 21, 2022 order by deeming it "void ab initio." We reach this conclusion, in part, because he advanced his jurisdictional argument only after flouting the alimony terms set forth in the JOD and the March 2019 consent order, and after receiving an unfavorable decision from Judge Adams. Further, it was defendant who initiated the post-judgment proceedings in New Jersey, leading to the entry of the challenged order. And, as already mentioned, the parties previously filed post-judgment motions in New Jersey when they resided out of state, before they agreed to enter into their March 2019 consent order. Given these facts, we concur with plaintiff that it would be fundamentally unfair to "reward . . . defendant for his complete disregard of the [c]ourt's orders and the agreement[s] he made" by allowing him to relitigate the same claims he raised before Judge Adams in another jurisdiction. This is particularly true, considering the MSA incorporated into the JOD mandated that it be "construed and governed in accordance with the laws of the State of New Jersey."

Affirmed.