SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3134-14T4

RONALD ATLAK,

Plaintiff-Respondent,

v.

MARIE FUCCILLI-ATLAK,

Defendant-Appellant.

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Submitted September 13, 2016 – Decided March 24, 2017

Before Judges Koblitz, Rothstadt and Sumners.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FM-13-257-14.

Shamy, Shipers and Lonski, P.C., attorneys for appellant (Robert J. MacNiven, of counsel and on the briefs).

Edward Fradkin, attorney for respondent.

PER CURIAM

Defendant Marie Fuccilli-Atlak appeals the February 2, 2015 order denying her Rule 4:50-1(f) motion to vacate a judgment of divorce (JOD), or in the alternative, to modify the marital

settlement agreement (MSA) incorporated into the JOD. For the reasons that follow, we affirm.

I.

Plaintiff Ronald Atlak and defendant were married for almost ten years when he filed a complaint for divorce on August 15, 2013, alleging irreconcilable differences. Their union produced two children, who were eleven and six years old, at the time of the filing.

On August 7, 2014, the parties attended a mandatory pre-trial settlement conference at which they resolved their property and child custody issues, without the judge's[1] participation. Counsel advised the family court coordinator that they reached a settlement, but they did not place the agreement terms on the record. The parties were told to appear for an uncontested hearing on September 23 to dissolve the marriage.

The next day, in accordance with the settlement, the parties approved the marital home's listing with a realtor, and plaintiff borrowed money from his pension and mailed a check for $22,198.87 to the bank's lawyer to bring the mortgage current in order to

[1] The judge was tied-up with another matter, and she did not enter the order that is being appealed.

sell the home.[2] Plaintiff's attorney subsequently drafted an MSA memorializing the settlement, which was faxed and sent by regular mail to defendant's attorney on August 19, 2014.

On or about September 2, however, after a disagreement over custody arrangements, defendant pulled the marital home off the market over plaintiff's objections. At the uncontested hearing three weeks later, Judge Leslie-Ann M. Justus was advised that the parties had not signed the MSA.[3] Plaintiff's attorney reported that, almost a month before the hearing, defendant's attorney told him over the telephone that there were some minor language changes to the MSA, but did not request the changes be made prior to the hearing. The court adjourned the hearing to allow the parties time to resolve their differences. The judge directed defendant's attorney to write a letter to plaintiff's attorney detailing defendant's concerns.

Defendant's subsequent letter requested material alterations and additional provisions to the MSA. In turn, plaintiff filed a motion to enforce the proposed MSA based upon the agreement reached by the parties at the settlement conference, or in the alternative,

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[2] This check was lost in the mail, and a new check was reissued.

[3] What transpired is gleaned from the parties' briefs because no transcripts have been provided regarding the appearance.

to conduct a Harrington[4] hearing to determine whether the parties had reached an agreement sufficient to enforce the MSA. Plaintiff's supporting certification claimed that a settlement was reached. Defendant opposed the motion, explaining the parties reached a tentative agreement subject to plaintiff exhibiting the same care and concern for the children as she does.[5]

Following oral argument on October 31, Judge Justus issued an order granting plaintiff's motion to enforce the MSA terms. The comprehensive order detailed the parties' arguments and their supporting certifications, relevant portions of prior court orders, and the judge's legal analysis. The judge also attached her findings of fact and conclusions of law to the order. Judge Justus rejected defendant's argument that the August 7 settlement conference produced a tentative agreement conditioned on plaintiff's conduct with respect to the children. She found defendant failed to certify that no agreement was reached, but in fact acknowledged that there was an agreement. The judge therefore determined there was "no factual dispute that the parties had

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[4] Harrington v. Harrington, 281 N.J. Super. 39 (App. Div.), certif. denied, 142 N.J. 455 (1995).

[5] Defendant also filed a cross-motion to compel compliance with previous court orders. The judge denied the motion based on the finding that the MSA replaced the obligations addressed in those prior orders.

settled this matter." The judge found that the MSA prepared by plaintiff's counsel and forwarded to defendant's counsel, accurately memorialized the parties' agreement as evidenced by the attorneys' handwritten term sheet and notes from the settlement conference. She also reasoned that the parties' partial performance of the agreement's obligations,[6] and defendant's complaint that plaintiff failed to perform other obligations, demonstrated an agreement was reached. Consequently, a plenary hearing under Harrington was unwarranted. The judge also granted plaintiff's request to compel defendant to pay $2280 for his counsel fees and costs associated with filing the motion. An uncontested hearing was scheduled for November 17.

Defendant unsuccessfully sought to adjourn the uncontested hearing so that she could file a motion for reconsideration of the October 31 order enforcing the MSA, or in the alternative, to amend the MSA. Noting that no motion had been filed, Judge Justus proceeded with the hearing and entered a dual JOD that incorporated the MSA.

On December 15, forty-five days after the October 31 order enforcing the MSA was entered, defendant filed a Rule 4:50-1(f)

[6] As noted, the marital home was placed on the market, and in order to sell the property, plaintiff borrowed money and sent a check to pay-off the mortgage arrears.

motion to vacate the JOD on the basis that it incorporated a MSA that was not agreed to, or in the alternative, amend the MSA to address thirteen property and child care issues. Plaintiff opposed and filed a cross-motion, seeking counsel fees for responding to defendant's motion, and to enforce the MSA. Argument was heard on January 31, 2015.

On February 2, Judge Justus denied defendant's motion to vacate in a comprehensive order detailing her reasoning. The judge initially stated that "portions of defendant's current [motion to vacate were] actually requests for the [c]ourt to reconsider portions of its October 31 [order]," and found that defendant's motion was filed beyond the Rule 4:49-2 twenty-day time limit for reconsideration. The judge next determined that defendant had not articulated any exceptional and compelling circumstances required by Rule 4:50-1(f) to justify either vacating the JOD or modifying the MSA. The judge explained why she was rejecting each issue raised by defendant to revise the MSA. Finally, defendant was ordered to pay plaintiff's counsel fees totaling $3280, because she "exhibited bad faith in her prosecution of the current motion" by raising issues she could have raised earlier, effectively making an untimely motion for reconsideration, and taking positions contrary to her claims in her earlier certifications.

On March 13, defendant filed a notice of appeal from the November 17 and February 2 orders. However, on May 4, we dismissed defendant's appeal of the November 17 order as untimely, and allowed the appeal of the February 2 order to proceed, "solely as to the order denying the motion to vacate per Rule 4:50-1(f), and in all other respects, [] dismiss[ing the appeal] because the February 2 [] order [was] otherwise interlocutory."

Defendant presents the following points of argument:[7]

> POINT I
>
> PLAINTIFF FAILED TO PERFORM A CONDITION PRECEDENT AND THEREFORE THE [MARTRIMONIAL SETTLEMENT] AGREEMENT BETWEEN THE PARTIES WAS VOID.
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> POINT II
>
> THE TERMS SET FORTH IN THE MARTRIMONIAL SETTLEMENT AGREEMENT WERE NOT AGREED UPON BY THE DEFENDANT.

[7] In her reply brief, defendant argues that pursuant to Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242, 263 (2013), as applied to matrimonial matters by Minkowitz v. Israeli, 433 N.J. Super. 111, 140 (App. Div. 2013), the settlement is void because there is no signed MSA. Since this argument was raised for the first time in her reply brief, it is not properly before us. N.J. Citizens Underwriting Reciprocal Exch. v. Kieran Collins, D.C., LLC, 399 N.J. Super. 40, 50 (App. Div.), certif. denied, 196 N.J. 344 (2008). Yet, for the reasons discussed below, the argument has no merit and there is no need to consider it to prevent an unjust result per Rule 2:10-2. Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 543 (App. Div. 2009).

POINT III

PLAINTIFF'S FRAUD IN THE INDUCEMENT IS A BASIS FOR RELIEF FROM THE FINAL JUDGMENT.

POINT IV

ATTORNEY'S FEES.

II.

Initially, we note that this court "will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). An issue not argued in a brief filed with the trial court is deemed abandoned. Noye v. Hoffmann-La Roche Inc., 238 N.J. Super. 430, 432 n.2 (App. Div.), (citing In re Bloomingdale Conval. Ctr., 233 N.J. Super. 46, 48 n.1 (App. Div. 1989) (stating that when an "issue has not been briefed, we will not decide it")), certif. denied, 122 N.J. 146 (1990), and certif. denied, 122 N.J. 147 (1990).

Here, our review of the record reflects that the arguments defendant raises in Points I and III were not presented to the trial court in her motion to vacate. There is no mention of either argument in defendant's brief or certification, or during the

motion's oral argument. Defendant's contentions addressed the revisions she sought to the MSA.

In fact, during argument, Judge Justus noted that the motion was based on Rule 4:50-1(f), and had nothing to do with Rule 4:50-1(c), which allows for a judgment to be vacated on the basis of "fraud, . . . misrepresentation, or other conduct of the adverse party." The judge stated, "[t]here's no fraud, there's no misrepresentation" by plaintiff. Defendant did not object, or argue the issue of fraud, when the judge made the comment. Thus, we decline to consider the arguments.

Moreover, we conclude the arguments lack merit. To determine whether the parties reached an agreement, this court must consider "whether there was sufficient credible evidence to support the trial court's finding." N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342 (2010). Due to the special expertise in family matters, we must "defer to the [family] court's determinations 'when supported by adequate, substantial, credible evidence.'" New Jersey Div. of Child Prot. & Permanency v. Y.A., 437 N.J. Super. 541, 546 (App. Div. 2014) (citing N.J. Div. of Youth & Family Servs. v. I.Y.A., 400 N.J. Super. 77, 89 (App. Div. 2008) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998))).

With respect to contractual conditions precedent, our Supreme Court has stated:

> The intention of the parties controls in the making and in the construction of contracts. The parties may make contractual liability dependent upon the performance of a condition precedent . . . . Generally, no liability can arise on a promise subject to a condition precedent until the condition is met . . . . A condition in a promise limits the undertaking of the promisor to perform, either by confining the undertaking to the case where the condition happens, or to the case where it does not happen.
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> [Duff v. Trenton Beverage Co., 4 N.J. 595, 604-05 (1950).]

The record before us is devoid of any indication that there was a condition precedent to carrying out the MSA. In support of finding the parties reached a settlement, Judge Justus found that both parties performed material parts of the MSA — defendant listed the marital home for sale, and plaintiff brought the mortgage account current. Accordingly, defendant's own partial performance negates her assertion that performance of the MSA was subject to an unmet condition precedent.

We further agree with the trial judge's determination that Harrington did not require a hearing to determine the existence of an MSA. In Harrington, there was no partial performance of an essential settlement term that evidenced the existence of an agreement between the parties, as in this case. The record supported the judge's finding that there was no factual dispute that the parties reached a binding agreement. Thus, there is no

reason to disturb any of the orders that a binding MSA resulted from the August 7, 2014 court appearance based upon defendant's contention that there was a condition precedent to the MSA and fraud in the inducement to entering the MSA.

Next, we address Judge Justus' order denying defendant's Rule 4:50-1(f) application to vacate the JOD based upon its inclusion of the MSA. Parties to a divorce proceeding may apply for vacation of an order finding the existence of an MSA. See Connor v. Connor, 254 N.J. Super. 591, 601 (App. Div. 1992). Subsection (f) of Rule 4:50-1 provides a catch-all provision that authorizes a court to relieve a party from a judgment or order for "any other reason justifying relief from the operation of the judgment or order." The essence of subsection (f) is to achieve equity and justice in exceptional situations that cannot be easily categorized. DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 269-70 (2009) (citing Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966)). Therefore, in order for relief under the rule to be granted, the movant "must show that the enforcement of the order would be unjust, oppressive or inequitable." Quagliato v. Bodner, 115 N.J. Super. 133, 138 (App. Div. 1971).

A judge's decision under Rule 4:50-1(f) will not "be overturned unless there was a clear abuse of discretion." Schwartzman v. Schwartzman, 248 N.J. Super. 73, 77 (App. Div.),

certif. denied, 126 N.J. 341 (1991). There is "an abuse of discretion when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Ibid. (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)).

Applying these principles, we conclude that Judge Justus did not abuse her discretion in denying defendant's relief under Rule 4:50-1(f) to vacate the JOD by finding the parties reached a binding MSA. Defendant has failed to show any compelling and exceptional circumstances that the judge should not have found the parties' entered into an MSA.

The remaining issue raised by defendant concerning attorney fees is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.