SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1174-09T3

PATRICIA PISCIOTTI,[1]

Plaintiff-Respondent,

v.

NICHOLAS PISCIOTTI,

Defendant-Appellant.

Argued November 1, 2010 - Decided November 22, 2010

Before Judges Reisner and Sabatino.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FM-13-759-06C.

Amy Sara Cores argued the cause for appellant (Hoffman, Schreiber & Cores, attorneys; Ms. Cores, on the brief).

Edward Fradkin argued the cause for respondent.

PER CURIAM

Defendant Nicholas Pisciotti ("the ex-husband") appeals from an order of the Family Part dated September 14, 2009 denying his motion to reduce his alimony and child support

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[1] Although plaintiff now uses a different surname, we refer to her with the surname reflected on the caption of the divorce judgment and in the briefs on appeal.

obligations, and from a November 13, 2009 order enforcing the alimony obligations, ordering him to pay arrears, and ordering wage garnishment to ensure payment of the support amounts to plaintiff, Patricia Pisciotti ("the ex-wife"). We affirm the September 14, 2009 order denying relief for lack of sufficient and competent documentation to establish a prima facie basis for a support modification. However, with respect to the November 13, 2009 enforcement order, we remand for an ability-to-pay hearing.

The parties were married in 1999 and divorced in 2006. At the time of their divorce, they entered into a Property Settlement Agreement ("PSA") obligating the ex-husband to pay the ex-wife $3000 monthly in alimony for seven years, $4207.34 monthly in child support, plus medical insurance for their three children. Since their divorce, the parties have had disputes over custody and parenting time issues, but those issues are not the subject of this appeal.

In August 2009, the ex-husband filed a motion to reduce alimony and child support, contending that his income had substantially declined since the time of the divorce judgment and that his assets, which included several heavily-mortgaged properties, had decreased significantly in value. The ex-husband also asserted that the fitness center business, in which

he is a co-investor and an employee, had suffered during the economic downturn, thereby diminishing his compensation from that business. The ex-husband supplied various materials in support of his motion, including his certification, an updated Case Information Statement ("CIS"), and personal income tax returns. The ex-wife opposed the requested modification, contending that the motion was inadequately supported, that the ex-husband's financial situation had not substantially worsened, and that he failed to establish a prima facie case of changed circumstances to warrant a plenary hearing and financial discovery under Lepis v. Lepis, 83 N.J. 139 (1980).

Upon considering the motion submissions and hearing oral argument, the Family Part denied the ex-husband's application in an order dated September 14, 2009, finding that he had not established a prima facie case of changed circumstances. The Family Part judge amplified his reasons on the record on September 16, 2009.

The ex-wife moved for enforcement relief pursuant to Rule 1:10-3, citing the fact that the ex-husband was in arrears on his support obligations. The ex-husband filed a cross-motion, seeking to vacate and reconsider the September 14, 2009 order denying modification, or, in the alternative, to have the court conduct an ability-to-pay hearing to evaluate his present

financial circumstances and his capacity to pay his support obligations with his reduced income and his encumbered assets. In his cross-motion, the ex-husband furnished the court with additional financial documents that had not been included in his original motion papers in August 2009, including real estate listings and comparable sales information, mortgage billing statements, copies of monthly rent checks received, and three months of uncertified profit-and-loss statements from the fitness center business. The ex-wife opposed the cross-motion, continuing to assert that the ex-husband was exaggerating his financial distress, and that he had not substantiated a basis for relief from the monthly support he had agreed to in the PSA.

After reviewing the motion submissions and hearing oral argument, the Family Part judge denied reconsideration and declined to conduct an ability-to-pay hearing. The judge also granted enforcement relief to the ex-wife, finding the ex-husband in violation of litigant's rights because of his failure to pay support.

In his oral opinion of November 13, 2009, the motion judge noted that the ex-husband's CIS and its attachments were incomplete and failed to substantiate the financial hardship that he claimed. Among other things, the judge observed that the ex-husband had not provided a "detailed forensic overview of

the operation of [his fitness center business] to indicate a downward income[-]generating position that would correlate directly to his ability to receive a salary or income from that entity." As to the ex-husband's property holdings, the judge recognized that "the commercial real estate market is stagnant[,]" but that the ex-husband had failed to buttress his contentions by demonstrating that he had made a good faith attempt to sell those properties, or by providing adequate proof that the properties "are so encumbered that the sale of them would result in a deficit closing." Consequently, the judge ordered the ex-husband to pay the ex-wife $14,972.09 in arrears, or otherwise face sanctions. The judge denied, however, the ex-wife's application for counsel fees.

Although it is not the subject of the present appeal, the trial court conducted an additional hearing on December 11, 2009, following which the ex-husband was required to submit a certification attesting to his efforts to comply with the court's support order. Thereafter, on April 21, 2010, another order was entered by the trial court. Although that order largely addressed custody issues, it also granted the ex-wife's request for wage garnishment and noted that arrears were to be determined at a later date. Counsel fees of $1262.50 were awarded to the ex-wife. The court explained that the ex-husband

"appear[ed] to have the ability to pay [counsel fees] because he did produce $10,000 [in] cash at the December 11, 2009 bench warrant hearing."

In the meantime, the ex-husband filed the present appeal. During the pendency of the appeal, we note that various other orders in this case have been issued by the Family Part. Although a portion of the alimony was temporarily suspended pending the appeal, none of the ensuing orders entered by the trial court have effected a modification of the ex-husband's support obligations. In addition, the trial court has not, to date, conducted an ability-to-pay hearing.

In his appeal, the ex-husband argues that the trial court misapplied its discretion in failing to grant his request for a modification of his support obligations. He asserts that the court's findings of fact and legal conclusions were inadequate, particularly with respect to the September 14, 2009 decision. The ex-husband maintains that at least with the amplified financial submissions that he provided in October 2009, he made a sufficient showing, to establish a prima facie case for modification. He also contends that he is entitled to an ability-to-pay hearing with respect to the ongoing enforcement issues.

Our scope of review of the trial court's determinations in this context is limited. Given the Family Part's special expertise, appellate courts must accord particular deference to determinations by Family Part judges. See Cesare v. Cesare, 154 N.J. 394, 412-13 (1998); see also Pascale v. Pascale, 113 N.J. 20, 33 (1988). This general principle of deference extends to the Family Part's decisions on motions to modify alimony or child support. Every application to modify a support obligation "rests upon its own particular footing and the appellate court must give due recognition to the wide discretion which our law rightly affords to the trial judges who deal with these matters." Martindell v. Martindell, 21 N.J. 341, 355 (1956). See also Larbig v. Larbig, 384 N.J. Super. 17, 21 (App. Div. 2006) (quoting and applying this same principle).

Applying those deferential principles here, we affirm the denial of the ex-husband's motion for modification, substantially for the reasons expressed by the trial judge in his oral opinion of November 13, 2009 denying reconsideration. The judge did not misapply his discretion in concluding that the ex-husband's financial proofs were inadequate to establish a prima facie case of changed circumstances to trigger a right to a plenary hearing under Lepis, supra.

We particularly concur with the judge's observation that the ex-husband's motion papers were deficient in failing to provide a detailed forensic analysis of his various business ventures and real estate holdings by a certified public accountant or some other qualified expert. Without such expert proof, the assertions of severe financial hardship advanced by the ex-husband are exceedingly difficult to evaluate. For example, the record does not contain complete and certified financial statements of the fitness center business, nor complete tax returns for that business. The financial documentation regarding the real estate investments, and the associated rental stream from those businesses, has not been corroborated by a competent expert. There are also gaps in documentation concerning the precise sources and amounts of funds used for the down payment on a residence that the ex-husband jointly purchased with another individual in April 2009 and that is presently listed for sale. There are also lingering issues concerning the financing of the vehicles presently used by the ex-husband. These and other relevant financial matters warrant a comprehensive expert analysis by an accountant or some other qualified expert.

We appreciate that the retention of a forensic accountant or an equivalent financial expert is not cost-free, and that

such expert fees will consume funds that otherwise might be used for the ex-husband's support obligations. Nevertheless, the record amassed in this case so far raises sufficient questions to justify the expenditure if the ex-husband wishes to renew his motion on proper footing.

We do not suggest that a financial expert is required in every case where a support obligor seeks to have the Family Part modify his or her payments. On the other hand, we are also mindful that the ex-husband, as a co-owner of the fitness center business and as a real estate investor, is essentially self-employed. As we have previously recognized, "what constitutes [only] temporary change in income should be viewed more expansively when urged by a self-employed obligor . . . [who is] in a better position to present an unrealistic picture of his or her actual income than a W-2 earner." Larbig, supra, 384 N.J. Super. at 23; see also Donnelly v. Donnelly, 405 N.J. Super. 117, 128-29 (App. Div. 2009) (quoting and applying that principle). Consequently, we affirm the trial court's denial of modification relief, based upon the inadequate showing made in the ex-husband's prior motion papers, without prejudice to the ex-husband prospectively renewing his motion with proper expert support and with more comprehensive and definitive financial documentation.

We reach a different conclusion with respect to the trial court's denial of an ability-to-pay hearing on the enforcement issues. An ability-to-pay hearing examines a person's present financial wherewithal to pay his or her extant support obligations. See R. 5:25-3(c)(2). Although such hearings are commonly performed by child support hearing officers who make recommendations to the Family Part judge presiding over the matter, in complex or other appropriate cases, the court itself may conduct the hearing. See R. 5:25-3(c)(10)(B). Following such a proceeding, "before ordering coercive incarceration, the court must find that the [obligor] parent was capable of providing the required support, but willfully refused to do so." Pasqua v. Council, 186 N.J. 127, 141 n.2 (2006) (emphasis added); see also Pierce v. Pierce, 122 N.J. Super. 359, 361 (App. Div. 1973), Judicial Council, Use of Warrants and Incarceration in the Enforcement of Child Support Orders 1 (Feb. 26, 2004).

Given the complexity of the ex-husband's business and financial endeavors, as well as the severity of the potential enforcement sanctions that he faced, we conclude that it would have been preferable for the trial court to have conducted a judicial ability-to-pay hearing—with testimony and other plenary evidential presentations—before reaching its conclusion that the

ex-husband had the present ability to make his overdue support amounts current. Even though the ex-husband has not yet established a prima facie case for modification under Lepis, supra, his practical ability to liquidate his assets in order to keep his annual support obligations of over $86,000 current is difficult to ascertain in the absence of a plenary judicial examination of his finances. Again, in this context, a forensic expert is necessary to unravel and analyze these complicated financial issues.

Consequently, we remand for an ability-to-pay hearing, at which time the ex-husband will have the burden of proving his current inability to pay his court-ordered support obligations, irrespective of whether a prospective modification of his support is or is not pursued and granted. Should the ex-husband file a new motion for modification, this time with appropriate support establishing a prima facie claim of changed circumstances, the trial court may consolidate the ability-to-pay hearing with a plenary hearing on the modification motion.

The order dated September 14, 2009 is affirmed. The order dated November 13, 2009 is remanded for an ability-to-pay

hearing to be conducted by the court rather than by a hearing officer. We do not retain jurisdiction.[2]

[2] Any forthcoming applications for counsel fees and costs incurred in the present appeal shall be decided in the first instance by the Family Part. R. 2:11-4.