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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5627-11T1

NADEEN SALAMA,

Plaintiff-Appellant,

v.

MARTIN SALAMA,

Defendant-Respondent.

Submitted May 14, 2013 – Decided September 19, 2013

Before Judges Yannotti and Hayden.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FM-13-1550-10.

The Deni Law Group, L.L.C., attorneys for appellant (Georgia M. Fraser, of counsel and on the brief).

Law Office of Edward Fradkin, L.L.C., attorneys for respondent (Mr. Fradkin, of counsel and on the brief).

PER CURIAM

Plaintiff Nadeen Salama appeals from a February 3, 2012 Family Part order, which entered an amended dual judgment of divorce (ADJD) incorporating an oral settlement agreement and a June 5, 2012 Family Part order, which denied her motion for

reconsideration and to vacate the settlement agreement and ADJD. Based upon our review of the record and the applicable legal principles, we affirm.

Plaintiff and defendant Martin Salama were married in 1986 and had four children. Plaintiff filed a complaint for divorce on April 19, 2010. The parties were part of an affluent, close-knit community and, according to plaintiff, defendant's family was "extremely wealthy, powerful and influential in that community." During the course of the marriage, the parties lived an "upper middle class, affluent lifestyle."

For the majority of the marriage, plaintiff worked in the home caring for the children. Neither party had any substantial earned income during their marriage. According to plaintiff, the parties' had a "financially rocky" life, during which defendant started several businesses, all of which failed. The parties afforded an extravagant lifestyle, however, by relying on the largesse of defendant's wealthy family. Defendant's mother also compensated him around $50,000 per year to manage her financial affairs. Additionally, the parties received income from their joint business, MES Family Limited Partnership (MES). According to defendant, at one time, MES generated approximately $20,000 per month for the parties. During the marriage, plaintiff had no knowledge of the family's finances.

From 2003 to 2008, the parties were involved in a business called Matchpoint Health and Racquet Club, Inc. (Matchpoint), owned by MES. The business failed in 2008. According to defendant's family, defendant funded the business and other expenses with money he embezzled from his mother's financial accounts. Plaintiff maintained that she did not know about the embezzlement allegations until late 2008 and she never saw any proof that defendant had taken money without his mother's permission.

In December 2008, both parties executed a promissory note and personal guarantee, acknowledging that they owed defendant's mother $2.7 million plus interest. Plaintiff stated that defendant told her she had to sign over control of MES to his mother and allow his mother to hold MES until they paid back the monies defendant allegedly misappropriated. At that time, plaintiff maintained she was unaware how much MES was worth or how much the parties were earning from it.

Additionally, the parties had borrowed money in 2007 from United Leasing, Inc. to finance Matchpoint. United Leasing obtained a judgment against Matchpoint and MES in July 2009 for $182,012. Unable to collect on its judgment, United Leasing pursued discovery against plaintiff and defendant.

Plaintiff first obtained information regarding the value of MES during her United Leasing deposition in June 2010, when she viewed a July 15, 2007 financial statement defendant prepared to secure the loan. The statement reported that MES was worth $9,250,000 and that plaintiff and defendant had a net worth of $11,000,485. During defendant's United Leasing deposition in May 2010, he asserted, incorrectly, that he and plaintiff transferred their ownership interest in MES to his mother in exchange for the approximately $3 million debt he owed her. After discovery was completed, United Leasing filed a complaint against the parties, among others, in July 2010, alleging that defendant and his family fraudulently transferred the assets of MES to avoid payment of United Leasing's judgment.

During the divorce proceeding, plaintiff was represented by counsel from the commencement of the litigation in April 2010 through January 2011. The parties engaged in discovery and attended an early settlement conference. Plaintiff's case information statement (CIS), dated July 28, 2010, reported a net worth of negative $1,427,341. Defendant's CIS, dated April 22, 2011, reported a net worth of $26,229,333. Plaintiff's counsel asked to be relieved as her attorney due to nonpayment and a deteriorating attorney/client relationship. The court granted the motion.

Thereafter, from January 2011 until July 2011, plaintiff represented herself. The trial commenced in the matter on June 14, 2011, with plaintiff proceeding pro se. She testified that she was aware that defendant allegedly embezzled money from his mother. She acknowledged signing documents about MES in 2008, but she stated she did not understand what she was signing. She agreed that although she was initially led to believe that she had signed her interest in MES over to defendant's mother, she learned at the United Leasing deposition that her interest was "not taken away" but used to secure repayment of the stolen money. At that time, plaintiff learned of certain debts the parties owed, amounting to between three and four million dollars.

During the trial, defendant testified that MES's assets had been depleted and it was worth about $2,400,000, which meant that it had no value when offset by the parties' debts. Defendant was unemployed and living in a house owned by his mother. The parties' marital residence was in foreclosure proceedings and their three vehicles had been repossessed for non-payment of the auto loans.

In July 2011, during a break in the trial, plaintiff retained a new attorney. On September 13, 2011, the parties, represented by counsel, negotiated and entered into a settlement

agreement, which was placed on the record. Plaintiff testified that she understood that she did not have to accept the settlement but she was doing so voluntarily and willingly. As part of the settlement, plaintiff waived her right to equitable distribution. That day, the court entered a dual judgment of divorce and instructed the parties to forward the signed property settlement agreement to the court within ten days for incorporation into the judgment.

On October 3, 2011, defendant's counsel sent plaintiff's attorney a proposed ADJD, which memorialized the settlement agreement placed on the record. Plaintiff's attorney forwarded a copy of the ADJD to plaintiff on October 24, 2011. Plaintiff's attorney requested that defendant provide certain documents, which had previously been provided in discovery, before plaintiff would sign the proposed ADJD.

After forwarding the documents and receiving no signed agreement, defendant filed a motion on December 6, 2011, asking the court to enter the proposed ADJD incorporating the settlement agreement. Plaintiff's counsel obtained a two-week adjournment "to allow for filing of opposition to the [motion] or voluntary resolution by way of discussions . . . with movant's counsel." Plaintiff did not file any opposition to the motion. Plaintiff claimed that she was experiencing

communication problems with her attorney and she did not know he had not responded to the motion.

On February 3, 2012, the court entered an order on the unopposed motion, accepting the ADJD as proposed by defendant. The order required plaintiff to sign all documents necessary to transfer her interest in MES, appointed defendant as attorney in fact for plaintiff to execute all of the necessary documents transferring her interest, and ordered plaintiff to pay defendant $2000 in counsel fees.

On February 13, 2012, plaintiff retained her third attorney. She claimed that only upon retaining this new counsel did she understand that she did not sign documents transferring ownership of MES to defendant's mother in 2008. Plaintiff filed a motion for reconsideration of the February 3, 2012 order, and to vacate the ADJD and the settlement placed on the record on September 13, 2011. Defendant filed a cross-motion, seeking a denial of plaintiff's entire motion and payment of his counsel fees.

In her motion, plaintiff argued that the settlement agreement did not accurately reflect the agreed terms or the intent of the parties. Moreover, she requested that the settlement agreement be vacated as it was the result of duress, coercion and fraud. According to plaintiff, based on advice

from her prior counsel and the stress from defendant and his family, she "was pressured into believing that MES was worth nothing" because of the "alleged debt" owed to defendant's mother. In her view, she had no responsibility to pay back any stolen funds, even if they were used to finance her business venture and maintain her comfortable standard of living. She alleged that she was constantly harassed by defendant and his family, and they threatened that if she did not accept their offer, they would expose an affair she had with a Matchpoint employee to their community and her children.

Plaintiff further asserted that "[u]nder the extreme duress and undue pressure and based upon the numerous misrepresentations by the defendant and the misconduct and overreaching on his part," she "agreed against [her] will to the settlement terms placed on the record." She acknowledged that she stated in court that she was voluntarily accepting the settlement, but she claimed that she felt "boxed into a corner and had no choice but to go along with the settlement."

On June 5, 2012, without hearing oral argument, the court denied plaintiff's motion in its entirety and granted defendant's motion in part by awarding him $3266 in counsel fees. The trial court determined that plaintiff did not meet her burden to obtain relief, explaining:

> Plaintiff is not alleging anything in her current application that was not previously argued and presented to this court prior to and during the trial in front of this court prior to the parties coming to a settlement agreement. The settlement agreement that was placed on the record before this court ended the aforementioned trial. All of the plaintiff's current allegations, including those regarding the business and assets, were already considered when coming to the settlement which ended the trial. The plaintiff knowingly and voluntarily with the advice of counsel entered into the agreement and placed said agreement on the record with this court.

This appeal followed. On appeal, plaintiff raises the following issues for our consideration.

> POINT I - STANDARD OF REVIEW
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> POINT II - THE TRIAL COURT ERRED IN ITS DENIAL OF MS. SALAMA'S NOTICE OF MOTION FOR RECONSIDERATION OF THE COURT'S FEBRUARY 3, 2012 ORDER [ENTERING] THE ADJD BASED UPON THE ERRORS CONTAINED THEREIN AND THE COURT'S FAILURE TO CONDUCT A PLENARY HEARING AS TO THE INTENT OF THE PARTIES.
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> POINT III - THE TRIAL COURT ERRED IN ITS FAILURE TO VACATE THE ADJD AND THE SEPTEMBER 13, 2011 SETTLEMENT AND IN FAILING TO CONDUCT A PLENARY HEARING.
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> A. DURESS, COERCION, OVERREACHING, UNDUE PRESSURE.
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> B. THE TERMS OF THE ADJD AND THE SEPTEMBER 13, 2011 SETTLEMENT ARE INEQUITABLE, UNFAIR AND UNCONSCIONABLE.
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> C. THE ADJD AND THE SEPTEMBER 13, 2011 SETTLEMENT SHOULD HAVE BEEN

VACATED BASED UPON THE DEFENDANT'S FRAUD, MISREPRESENTATIONS AND MISCONDUCT.

D. THE COURT ABUSED ITS DISCRETION IN FAILING TO CONDUCT A PLENARY HEARING.

POINT IV - THE TRIAL COURT ERRED IN FAILING TO RECONSIDER ITS FEBRUARY 3, 2012 ORDER AND IN ENTERING ITS JUNE 5, 2012 ORDER AS IT PERTAINS TO AN AWARD OF COUNSEL FEES TO DEFENDANT.

POINT V - THE TRIAL COURT ERRED IN ENTERING ITS FEBRUARY 3, 2012 ORDER REQUIRING PLAINTIFF TO SIGN ANY DOCUMENTS AND IN APPOINTING DEFENDANT AS ATTORNEY IN FACT TO EXECUTE DOCUMENTS TO TRANSFER PLAINTIFF'S INTERESTS IN M.E.S. AND IN DENYING MS. SALAMA'S MOTION FOR RECONSIDERATION OF SAME.

POINT VI - THE TRIAL COURT ERRED IN DENYING ORAL ARGUMENT ON THE PLAINTIFF'S NOTICE OF MOTION FOR RECONSIDERATION AND MOTION TO VACATE THE [ADJD] AND SEPTEMBER 13, 2011 SETTLEMENT.

POINT VII - THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S APPLICATION FOR COUNSEL FEES.

We begin with a review of well-settled legal principles that guide our analysis. The public policy of this State "particularly" favors divorce settlement agreements in resolving matrimonial controversies. Weishaus v. Weishaus, 180 N.J. 131, 143 (2004) (citing Konzelman v. Konzelman, 158 N.J. 185, 193 (1999)). In furtherance of the strong public policy of enforcing settlements, "our courts 'strain to give effect to the terms of a settlement wherever possible.'" Brundage v. Estate

of Carambio, 195 N.J. 575, 601 (2008) (citation omitted). Therefore, an agreement to settle a law suit will be honored and enforced in the absence of fraud or other compelling circumstances. Pascarella v. Bruck, 190 N.J. Super. 118, 124-25 (App. Div. 1983).

"Where the parties agree upon the essential terms of a settlement so that the mechanics can be fleshed out in a writing to be thereafter executed, the settlement will be enforced, notwithstanding the fact that the writing does not materialize because a party later reneges." Lahue v. Pio Costa, 263 N.J. Super. 575, 596 (App. Div.) (citation omitted), certif. denied, 134 N.J. 477 (1993). Moreover, "the party seeking to set aside the settlement agreement has the burden of proving . . . extraordinary circumstance[s] sufficient to vitiate the agreement," Jennings v. Reed, 381 N.J. Super. 217, 227 (App. Div. 2005), by clear and convincing evidence. Smith v. Fireworks by Girone, Inc., 380 N.J. Super. 273, 291 (App. Div. 2005), certif. denied, 186 N.J. 243 (2006). Where parties have agreed to the terms of a settlement, "second thoughts are entitled to absolutely no weight as against our policy in favor of settlement." Dep't of Pub. Advocate v. N.J. Bd. of Pub. Utils., 206 N.J. Super. 523, 530 (App. Div. 1985).

A decision on whether to grant or deny a motion for reconsideration is committed to the sound discretion of the court. R. 4:49-2; Fusco v. Bd. of Educ. of Newark, 349 N.J. Super. 455, 462 (App. Div.), certif. denied, 174 N.J. 544 (2002); Marinelli v. Mitts & Merrill, 303 N.J. Super. 61, 77 (App. Div. 1997); Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). Reconsideration is not appropriate merely because a litigant is dissatisfied with the decision of a court. Capital Fin. Co. of Del. Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div.) (citing D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)), certif. denied, 195 N.J. 521 (2008). Rather, a dissatisfied litigant must demonstrate that "'either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence.'" Ibid. (quoting D'Atria, supra, 242 N.J. Super. at 401).

The judge found that plaintiff had not met her burden of proving that he did not consider evidence that she had previously raised or that his decision was based upon an incorrect and irrational basis. We infer from this finding that the judge considered plaintiff's claims that the agreement

inaccurately expressed the agreement of the parties as reflected at the September 13, 2010 hearing and found no inconsistencies.

From our independent review of the record, we perceive no reason to disturb the judge's appropriate exercise of discretion in denying the motion for reconsideration. The settlement agreement placed on the record on September 13, 2011 constitutes the parties' agreement, as it contained the essential terms of the settlement. See Harrington v. Harrington, 281 N.J. Super. 39, 46 (App. Div.), certif. denied, 142 N.J. 455 (1995). Therefore, the written document that "fleshed out" the verbal agreement is enforceable as plaintiff did not timely object and it does not change the basic agreement. See Lahue, supra, 263 N.J. Super. at 596.

Plaintiff next contends that the court should have granted her Rule 4:50-1 motion to vacate the judgment on the grounds of duress, coercion and fraud. We disagree.

Under Rule 4:50-1, a judgment may only be vacated for

> (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment

> or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

Further, this court reviews the trial court's determination on a motion to vacate a judgment under an abuse of discretion standard. U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012).

Any marital agreement that is unconscionable or the product of fraud or overreaching may be vacated. Guglielmo v. Guglielmo, 253 N.J. Super. 531, 541 (App. Div. 1992). If there has been moral compulsion sufficient to overcome the will of a person otherwise competent to contract, any agreement made under the circumstances is considered lacking in voluntariness and therefore invalid. Rubenstein v. Rubenstein, 20 N.J. 359, 365 (1956).

In determining whether duress was so substantial as to relieve a contracting party from his or her contractual obligations, we must "look to the condition of the mind of the person subjected to coercive measures." Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 212 (App. Div. 1987). "The question is whether the consent was coerced; that is, was the person complaining 'induced by the duress or undue influence to

give his consent and would not have done so otherwise.'" Ibid. (citations and emphasis omitted).

In addition to the mindset of the complaining party, the pressure imposed must be wrongful. Rubenstein, supra, 20 N.J. at 367. "The act or conduct complained of . . . [must be] 'so oppressive under given circumstances as to constrain one to do what his free will would refuse.'" Ibid. (citation omitted); see also Segal v. Segal, 278 N.J. Super. 218, 223-24 (App. Div. 1994). Where a party makes a claim of fraud or misrepresentation, the party objecting to the judgment must establish the fact of misrepresentation or fraud and demonstrate "a material misrepresentation made with intent that it be relied on, coupled with actual detrimental reliance." Nolan v. Lee Ho, 120 N.J. 465, 472 (1990).

Plaintiff claims that, at a minimum, the judge should have allowed her a plenary hearing to fully explore the issue and correctly adjudicate it. A plenary hearing is not mandated, however, in every case where there are competing affidavits. Shaw v. Shaw, 138 N.J. Super. 436, 440 (App. Div. 1976). "The applicant nevertheless has the threshold burden to establish a prima facie case to obtain a hearing on a motion for relief from the terms of an agreement." Dworkin v. Dworkin, 217 N.J. Super. 518, 525 (App. Div. 1987). As the Court stated in Lepis v.

Lepis, 83 N.J. 139, 159 (1980), "In determining whether a material fact is in dispute, a court should rely on the supporting documents and affidavits of the parties. Conclusionary allegations would, of course, be disregarded."

Viewed in the light of these principles, we are satisfied that plaintiff's unsupported certification, including her completely uncorroborated claims of fraud and coercion, were not sufficient to warrant either an order in her favor or a hearing to resolve a factual dispute. Plaintiff's fraud and coercion claims against her husband are based on his actions in forcing her to sign documents giving his mother an interest in MES, which occurred in 2008, and which she stated under oath at the trial she had full knowledge of at the time of the settlement agreement.

Moreover, as the trial judge found, plaintiff had been raising her complaints about defendant and his family hiding MES assets and their inconsiderate treatment of her both before and during the trial. Additionally, the "stress" caused by her desire to avoid embarrassment and the censure of her in-laws, her children and her community does not constitute "oppressive conduct" of defendant amounting to duress or coercion.

We have considered the remaining issues raised by plaintiff and find then without 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