NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1632-08T2

ROBERT L. MONETTI,

Plaintiff-Appellant,

v.

JANINE MONETTI, n/k/a
JANINE ROCCO,

Defendant-Respondent.

Argued October 6, 2009 - Decided March 22, 2010

Before Judges Wefing, Grall and LeWinn.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, FM-13-1225-04.

Edward Fradkin argued the cause for appellant (Law Office of Edward Fradkin, L.L.C., attorneys; Mr. Fradkin, of counsel; Matthew Gerber, on the brief).

Jacqueline M. Printz argued the cause for respondent (Greenbaum, Rowe, Smith and Davis, L.L.P., attorneys; Ms. Printz, of counsel; Ms. Printz and Lisa B. DiPasqua, on the brief).

PER CURIAM

Plaintiff, Robert L. Monetti, appeals from two orders of the Family Part entered on October 30, 2008; the first requires

him to pay counsel fees in the amount of $57,453.50 and expert fees in the amount of $31,643.67 on behalf of defendant, Janine Monetti, n/k/a Janine Rocco; the second order denies his request for counsel fees of $33,958.44 and expert fees of $21,625.

These orders arose from the parties' post-judgment litigation over recalculating plaintiff's child support obligation for their two children in the wake of defendant's remarriage in February 2006. The parties ultimately resolved the adjusted child support amount by agreement, and further agreed to submit to the court the issue of their mutual requests for counsel and expert fees generated in the process. Although neither party requested oral argument on this issue, we are nonetheless constrained to reverse and remand for a hearing, since we are satisfied that the parties' submissions are so conflicting that the trial court could not properly render a decision based solely upon those submissions. Tancredi v. Tancredi, 101 N.J. Super. 259, 262 (App. Div. 1968); see Mackowski v. Mackowski, 317 N.J. Super. 8, 11 (App. Div. 1998).

The pertinent factual background may be briefly summarized as follows. The parties were divorced by a final judgment of divorce entered on June 24, 2004, which incorporated their property settlement agreement (PSA). Plaintiff's child support obligation was set in the PSA at $1153 per month, based upon his

stipulated annual income of $210,000. Defendant's income was set forth as earning $26 per hour as a cosmetologist, and having earned $17,160 annually as an administrative assistant in plaintiff's business.

Defendant remarried on February 23, 2006, thereby terminating plaintiff's alimony obligation under the PSA. Between March and October 2006, the parties attempted to negotiate a revised child support amount. During that interim, they engaged in numerous disputes regarding plaintiff's parenting time with the children, as well as issues pertaining to the children's unreimbursed medical expenses, church attendance, travel, and counseling.

When the parties were unable to resolve the child support issue, defendant filed a motion on October 4, 2006, seeking that relief. She also sought discovery of plaintiff's financial records, including "his 2005 corporate tax returns, with all attachments, and verif[ication of] all information relevant to his current income (2006), including but not limited to, three current pay stubs, and all documents verifying earned and unearned income received by . . . defendant in 2006 . . . ."

The parties thereupon engaged in a two-year discovery battle, including the retention of financial experts to examine plaintiff's business records. Defendant maintained that

plaintiff's annual earnings were between $800,000 to $1,000,000. However, neither plaintiff's business records nor defendant's own expert ever documented that level of earnings. In fact, defendant's forensic accounting expert advised her that plaintiff's projected earnings for 2007 were $407,294; this was based upon the expert's application of a three percent growth rate from plaintiff's 2006 earnings of $395,431.

One of the most contentious issues addressed in the parties' certifications was whether plaintiff had changed his accounting method in the middle of the discovery period, in an effort to diminish the profitability of his business.

Plaintiff certified that defendant's discovery requests were "piece meal[,]" adding:

> An authorization was promptly signed permitting defense counsel to speak with my accountant once requested. I disrupted my entire business for four or five months which was an extreme financial burden to respond to the piece meal [sic] and ongoing requests of defendant's expert accountant who appeared to me to spend excessive time playing with numbers and who even attempted to change the business basis for reporting from the cash basis we have used for years to an accrual basis solely for litigation purposes. This vacillation required calculations on both the cash and accrual basis, and was a tactical decision by defendant and her accountant.

Kate Hartman, the controller of plaintiff's business certified to the "timeline" governing her submission of

requested documents to defendant's expert, Rosenfarb Winters. Regarding the accounting method issue, Ms. Hartman certified:

> November 15, 2006 - Supplied requested financial documents to office of [plaintiff's attorney] pursuant to the Order of October 31, 2006. Documented in a letter dated November 17, 2006 to [defendant's attorney] from [plaintiff's attorney], listing sixteen items that were requested and supplied. <u>All financial documents furnished were on the cash basis accounting method, as utilized previously in the course of routine business during all prior years of operation.</u>
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> . . . .
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> Time period of August 21[,] 2007 to September 12[,] 2007 - Supplied all information to Chris Koerner [plaintiff's accounting expert] requested by Rosenfarb Winters office. Several phone conversations with Marie Huelster, Rosenfarb Winters office for clarification of submitted information. Discussed with her wanting to convert to accrual basis, after discussing, M[s.] Huelster agreed that accrual basis would not be an accurate financial picture based on the nature of the construction industry. Chris Koerner notification that Rosenfarb Winters office wanted to convert to the accrual method. Sent all information requested to convert to accrual basis. Spoke with Chris Koerner several times regarding this information which would be in the form of estimates. Converting to accrual basis from cash basis would take some time to accurately prepare.
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> [(Emphasis added).]

By contrast, Alan C. Winters, of Rosenfarb Winters, certified that in July 2007, his office received a copy of

plaintiff's 2007 ledger which was "prepared utilizing the accrual method of accounting." Winters further certified that in September 2007, "for the first time, Mr. Koerner forwarded [to him] a 2007 trial balance utilizing a cash basis and a final 2006 income tax return, also reflecting a cash basis." Therefore, Winters asserted that his office was "forced to change methods and prepare [their] report utilizing a cash basis because plaintiff changed methods and gave us new financial information utilizing a cash basis, rather than the accrual method that he had employed at the inception of our involvement in this matter."

In his decision, the trial judge addressed this issue as follows: "[Plaintiff] failed to adequately disclose his income by converting to a different method and thus delaying a scheduled court date." The judge cited no evidence of record to support this conclusion. Considering the conflicting certifications of Hartman and Winters, we cannot say with any degree of confidence that this finding is based on "'competent, relevant and reasonably credible evidence . . . .'" Cesare v. Cesare, 154 N.J. 394, 412 (quoting Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)).

We need not engage in a lengthy analysis of the numerous conflicting and contradictory assertions in the certifications

of the parties themselves. Suffice it to say, each described a dramatically different discovery process. It is clear from the judge's decision that he accepted defendant's version of that process as credible and discredited plaintiff's assertions. This, in turn led the judge to conclude that plaintiff had demonstrated bad faith. This assessment factored significantly in the judge's decision to award counsel fees to defendant and to deny them to plaintiff.

In Johnson v. Johnson, 390 N.J. Super. 269, 274 (App. Div. 2007), the trial judge had ordered the defendant husband to pay a substantial portion of the plaintiff wife's accounting expert's bill. The judge made this decision "[b]ased on a review of . . . conflicting certifications," and made credibility determinations based upon that review. Ibid. On appeal, the defendant argued that he was entitled to a hearing not only on the reasonableness of the fee charged but also on the factors leading to the judge's credibility determinations. We agreed, and reversed and remanded for an evidentiary hearing. Ibid.

We are satisfied that the same result is appropriate here.

> Although a trial court may hear and decide a motion . . . exclusively upon affidavits, it should not do so when the affidavits show, as they do here, that there is a genuine issue as to material facts. Where the disposition of such proceedings

> hinges upon factual issues and credibility is involved, the court should . . . take oral testimony. "Only by such procedure can a court make certain that it has fully explored the issue and correctly adjudged it. 'Cross-examination is the most effective device known to our trial procedure for seeking the truth.'" The fact that counsel "waived oral testimony" should not deter the court from so proceeding.
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> [Tancredi, supra, 101 N.J. Super. at 262 (citations omitted).]

The orders of October 30, 2008 are reversed and the matter is remanded for proceedings in conformity with this opinion.