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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5134-04T1

PAMELA CYR,

Plaintiff-Respondent,

v.

EDMUND CYR,

Defendant-Appellant.

Argued September 20, 2006 - Decided October 20, 2006

Before Judges A.A. Rodríguez and Sabatino.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Burlington County, FM-03-700-02.

Brian G. Paul argued the cause for appellant (Szaferman, Lakind, Blumstein, Blader & Lehmann, attorneys; Mr. Paul on the brief).

Richard B. Rotz argued the cause for respondent (Forkin, McShane, Manos & Rotz, attorneys; Mr. Rotz on the brief).

PER CURIAM

We encounter in this appeal yet another instance where the incomplete nature of documents filed in a matrimonial case leads to post-divorce uncertainty, recriminations and renewed judicial involvement.

Appellant Edmund Cyr sought to reopen the equitable distribution terms of his April 2002 divorce judgment, pursuant to R. 4:50-1. He did so after learning, allegedly for the first time in February 2005, that his ex-wife Pamela Cyr had accumulated stock options in her employer's company during their eleven-year marriage, and that she had liquidated those options for the gross sum of $520,406 when the company merged in 2004. The stock options were not listed in the Case Information Statement (CIS) filed by the wife during her divorce action, nor were they mentioned in the parties' final judgment of divorce (FJD) or in the financial schedules attached to the FJD. Nonetheless, the wife contends that her ex-husband knew about her options all along, and that he consciously waived in the divorce negotiations any interest in those options, assertions which he vehemently denies.

The Family Part determined, on the papers, that the husband was not entitled to any post-judgment relief. We vacate that determination and remand for a plenary hearing. Such a hearing regrettably is necessary to resolve the genuine issues of material fact raised by the parties' conflicting sworn assertions about the options, in the absence of clear documentation in the divorce filings that could have obviated the present dispute.

II.

The parties were married on June 30, 1990. They have two minor children, a son and a younger daughter. During the marriage the wife was employed as the chief financial officer of a bank, while the husband worked as a high school teacher. In November 2001 the parties separated. That month the wife filed a complaint for divorce, represented by an attorney who allegedly was suggested to her by the husband's sister-in-law. The husband did not retain counsel or file an answer in the divorce proceedings, although he may have consulted about the matter with his brother who is a lawyer in Pennsylvania.

In connection with her divorce action, the wife filed and served through counsel, pursuant to R. 5:5-2, a typewritten CIS dated November 30, 2001. In Part E of that CIS, the wife attested that the parties' total gross assets were worth $347,000, inclusive of $255,000 in approximated equity in their marital residence. Apart from the residence, Part E also listed the parties' modest checking accounts and money market account, the husband's leased vehicle and the wife's company car, furniture and fixtures worth $10,000, a Schwab brokerage account with a $31,000 balance, the wife's 401K pension plan with an estimated value at $40,000, and the husband's unvalued teacher's pension. No other assets were disclosed. The notation "N/A",

denoting "not applicable," was typed next to item (9) on Part E for "Other (specify)." In Part F of her CIS the wife identified $204,668 in non-contingent liabilities including significant credit card debts, yielding an approximated net worth for the parties of $142,312.

Prior to the wife's retention of counsel and her filing of the complaint, she and her husband directly engaged in negotiations. As the result of those negotiations, the parties prepared and signed in the presence of a notary an undated four-page Marital Separation Agreement ("MSA"), in which they addressed custody, child support, property division and financial matters. Among other things, the parties agreed to joint legal and physical custody of their children and to share the children's expenses, with the wife being solely responsible for their day care and hockey fees and the husband assuming the costs of the their health coverage. No alimony was payable by either spouse. The FJD was entered on April 1, 2002 by the Family Part as a default judgment, incorporating by reference the parties' agreement.

The parties attached to their MSA a one-page personal financial statement denominated as Appendix A, a November 2001 document which each of them signed. On its third unnumbered page, the MSA recites in paragraph 1 that:

> Edmund and Pamela affirm that the income and property listed in Appendix A of this agreement are a total disclosure of their individual and joint assets and liabilities. The division of debt and assets is listed in Appendix A of this agreement.
>
> [Emphasis added.]

Appendix A lists as the parties' sole assets the marital residence with a net value of $252,000, a sum of $21,000 "gifted" by the wife to the husband, $13,000 in house contents, and $31,620 in the Schwab brokerage account. No other assets are identified. In its bottom portion, Appendix A mentions the husband's pension only insofar as it shows that the parties agreed that the husband would be responsible for paying off an $8,000 estimated balance on his pension loan. No valuation of the husband's pension itself is indicated. Appendix A does not list or value the wife's 401K plan.

The terms of equitable distribution reflected in the MSA were straightforward. The parties agreed to evenly divide $139,620 in their then-estimated net marital assets, with the wife retaining the marital residence and assuming the mortgage. Apart from funds that she had already disbursed to the husband, the wife further agreed to pay him $46,000 over the ensuing four years in installments. With respect to pension and retirement funds, paragraph 8 on the MSA's third page states:

> All retirement funds accumulated by Edmund in his NJ State Teachers Pension Plan will remain his[,] as will any retirement funds accumulated by Pamela in her 401K and Momentum Accounts.

The MSA then concludes with a joint statement, in which the parties "affirm[ed] that all the information in this agreement is true, and that they further affirm that they will act in good faith to carry out the terms of this agreement."

Almost three years after the FJD was entered, the husband filed a motion with the Family Part seeking relief under R. 4:50-1(f). The motion was prompted after the husband, while "surfing the Internet" in late February 2005 "in an attempt to see if [he] could determine [his ex-wife's] approximate income for purposes of . . . recalculating child support," "shockingly discovered through SEC filings that she had received the sum of $591,856 when exercising 35,500 of stock options [in her employer's company] in 2004." It is undisputed that 30,500 of those 35,500 stock options had been granted to the wife on July 21, 1999, two years before the parties separated, and that the options had fully vested by July 21, 2001, four months before the wife filed her divorce complaint.

The husband certified that he did not know about the wife's stock options, which he contends were marital property that should have been subject to distribution, until February 2005.

Based upon his alleged post-divorce discovery of those significant assets, the husband sought various forms of relief, including a 50/50 distribution of the $520,406 in gross proceeds from the stock options that were acquired during the marriage, interest from January 6, 2004 (the date of liquidation) to the date of satisfaction of the judgment, a ninety-day discovery period to determine whether other assets were not disclosed during the divorce, a recalculation of child support, and counsel fees.

In opposition to the motion, the wife certified that her ex-husband had been aware of her stock options at the time of the divorce and that they were discussed specifically in the negotiations leading up to their execution of the MSA. In this regard, the wife attests that the existence, if not the value, of the options was disclosed in an earlier financial statement she allegedly provided to her husband in September 2001. However, the husband maintained in a reply certification that he had not seen the September 2001 financial statement prior to his post-judgment motion, and reiterated that he was unaware of the options at the time of the divorce.

The record discloses that the wife received the options from her employer at a price of $8.9375 per share. At the time of the parties' MSA, the stock of the wife's employer had been

trading in a range between $8.10 per share and $9.80 per share. The wife contends that she and her husband had contemporaneously discussed that the options were not transferable. Hence, to transfer any funds to the husband, there allegedly would have to be a sale of the stock, a transaction that would be subject to tax and only produce a de minimis gain. The husband flatly denies that any such discussion occurred during the divorce negotiations.

Eventually, the wife's stock options sold for a much greater price, $26.00 per share. This occurred after Thistle Holdings Group, Co., owner of Roxoborough Manayunk Bank (RMB) which employed the wife, merged with Citizen's Bank in January 2004. The pending merger was initially announced in September 2003. In October 2003, the husband sent the wife a letter, which included the following paragraph:

> Understanding that tension between us is at an all time high and our friendship at an end[,] I am of the opinion that our divorce settlement was unfair as a result of my lack of an attorney (felt it would prevent fights) and knowledge of divorce law, the skyrocketing value of your (our old house) house, and <u>your recent windfall at RMB</u>.
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> [Emphasis added].

The husband's reply certification denied that the "windfall at RMB" he had alluded to in this letter was referring to the wife's stock options. Instead, he contends that the comment was

in reference to the "increase in value of the Schwab account stemming from the increase in the company stock contained within the account."

As part of the motion record, the wife's sister certified that the husband had called her in November 2003 to complain about the windfall the wife would be getting when her employer merged with another bank, and that he specifically mentioned the stock options in that alleged conversation. The husband admits speaking with his former sister-in-law, but denies that their conversation had concerned or mentioned the stock options.

The wife further alleges that her ex-husband's family members were aware of the existence of the options before the parties' divorce. In that regard, she noted that her husband's father had owned Thistle Group stock since 2000. However, in a responsive certification, the husband's father attested that he "[did] not remember having any conversation with [his] son, Edmund, specifically concerning stock options acquired by Pam Cyr."

Apart from this central dispute over the stock options, the parties' motion filings also presented conflicting factual assertions on the issue of child support. After the husband moved to obtain child support, the wife cross-moved to receive child support herself. The father asserts that the children

spend approximately 170 overnights with him each year, and that he functions as their primary caregiver. To the contrary, the wife contends that, despite the terms of the MSA projecting that the parties would share joint physical custody of the children, the children actually spend only two nights per week with their father.

Upon hearing oral argument on these matters, but no live testimony, the Family Part judge determined that the husband had failed to make out a prima facie case of unjust or oppressive circumstances under R. 4:50-1 to warrant reopening the divorce judgment and its allocation of the marital assets. Instead, in a May 13, 2005 bench ruling, the judge characterized this case as a situation where the husband simply feels in retrospect that "he made a bad deal."

As to child support, the judge denied the competing motions without prejudice. The judge concluded that the parties' combined incomes placed them above the child support guidelines, and thus child support was not amenable to recalculation without the parties supplying the court with additional financial information. All other requests, including the parties' competing demands for counsel fees, were denied. This appeal followed.

III.

The husband's application for post-judgment relief is founded upon well-established principles set forth in R. 4:50-1 and associated case law. The Rule provides, in pertinent part:

> On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons . . . (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (f) any other reason justifying relief from the operation of the judgment or order.
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> [R. 4:50-1.]

We are mindful that motions to set aside final judgments under the Rule are only to be granted "sparingly." Pressler, Current N.J. Court Rules, comment 1 on R. 4:50-1 (2007). Even so, the Rule allows for relief where the facts and equities compel it, particularly in contexts involving the equitable distribution of marital assets.

"The equitable authority of courts to modify property settlement agreements executed in connection with divorce proceedings is well established. (citations omitted) The agreement must reflect the strong public and statutory purpose of ensuring fairness and equity in the dissolution of marriages." Miller v. Miller, 160 N.J. 408, 418 (1999). "[A]pplications for relief from equitable distribution

provisions contained in a judgment of divorce are subject to [R. 4:50-1] and not, as in the case of alimony, support, custody, and other matters of continuing jurisdiction of the court, subject to a 'changed circumstances' standard." Eaton v. Grau, 368 N.J. Super. 215, 222 (App. Div. 2004)(quoting Pressler, Current N.J. Court Rules, comment 1.7 on R. 4:50-1 (2004)(citing Miller, supra, 160 N.J. at 418)).

Because the husband's motion was filed more than one year after the April 1, 2002 final divorce judgment, it comes within the catch-all terms of R. 4:50-1(f) and must be founded upon a showing of inequity and unfairness. See Rosen v. Rosen, 225 N.J. Super. 33, 36 (App. Div.), certif. denied, 111 N.J. 649 (1988). The very essence of subsection (f) is to provide recourse in exceptional and compelling circumstances, for which the relief may be "as expansive as the need to achieve equity and justice." Court Invest. Co. v. Perillo, 48 N.J. 334, 341 (1966). Whether such exceptional circumstances are present hinges upon the totality of the facts and is assessed on a case-by-case basis. Ibid.; In re Guardianship of J.N.H., 172 N.J. 440, 473 (2002). To obtain relief, the movant must demonstrate that the circumstances are exceptional and that continued enforcement of the judgment would be "unjust, oppressive or

inequitable." Quagliato v. Bodner, 115 N.J. Super. 133, 138 (App. Div. 1971).

We have previously observed that "where there is a showing of fraud or misconduct by a spouse in failing to disclose the true worth of his or her assets, relief may be granted under R. 4:50-1(f) if the motion is made within a reasonable time." Rosen, supra, 225 N.J. Super. at 37; see also Von Pein v. Von Pein, 268 N.J. Super. 7, 17 (App. Div. 1993) (reversing an equitable distribution award because the husband had falsely stated that he was unemployed at the time of the divorce when he was actually earning a substantial income).

Here, there is no dispute that the lion's share of the stock options the wife acquired through her employment during the marriage as the chief financial officer of a bank were marital assets. It also cannot be gainsaid that the options, even when they were trading in 2001 at roughly eight dollars per share, would have comprised the largest asset in this marital estate if, for argument's sake, they could have been liquidated at that time without tax penalties. The post-divorce merger of the wife's bank only steepened the value of that very significant asset by almost threefold.

The record does not clearly establish why the parties omitted any reference to the stock options in the MSA or in the

November 2001 financial summary appended to the MSA as Appendix A, in spite of their unequivocal affirmation that Appendix A represented "a total disclosure of their individual and joint assets." Nor are we satisfied as to why the wife failed to list the options, let alone estimate a value for them, in the mandatory CIS that she filed with her counsel's presumed assistance in November 2001.

We recognize, as the wife points out, that Appendix A and the CIS are also incomplete in omitting any valuation for the husband's teacher's pension. However, at least the husband's pension is identified and is specifically allocated to the husband in the MSA and in Appendix A. Cf. Hipsley v. Hipsley, 161 N.J. Super. 119 (Ch. Div. 1978)(holding that a wife was not barred from pursuing post-judgment equitable distribution of her husband's pension where the divorce judgment and the parties' settlement agreement had been silent regarding the husband's pension).

It may well be proven, as the wife insists, that the husband was completely aware of her stock options when they negotiated the terms of their divorce, and that he eschewed any claim to those options as part of the give-and-take in their negotiations. But the husband has certified to the court that he knew nothing of the options until February 2005. The

September 2001 financial summary that lists the options only bears the wife's handwritten marginal notations, and the husband certifies that he never saw that document until the time the wife responded to his post-judgment motion.

Nor is there any recital in the MSA, as is often customary in uncontested divorce proceedings, in which the husband expressly waived his right to pursue discovery in the matrimonial case or stated that he was satisfied with the disclosures he received from the wife before agreeing to the final terms. To the contrary, the husband would have had reason to rely on the MSA's declaration that its financial attachment reflected a "total disclosure" of the parties' "individual and joint assets."

Given the stark nature of the material factual disputes surrounding the disclosure, or non-disclosure, of the wife's stock options to her husband, and the copious amount of money that the wife ultimately received for those options in comparison to the overall marital estate, a plenary hearing should have been conducted before the Family Part denied the husband's R. 4:50-1 application. Conforti v. Guliadis, 128 N.J. 318, 322 (1992)(requiring plenary hearings to resolve material factual disputes); see also Palko v. Palko, 150 N.J. Super. 255 (App. Div. 1976), rev'd on dissenting opinion, 73 N.J. 395

(1977); Barrie v. Barrie, 154 N.J. Super. 301, 303 (App. Div. 1977), certif. denied, 75 N.J. 601 (1978). The disparate contentions of the parties' relatives, the ambiguous nature of the husband's October 2003 "windfall" correspondence, and the dearth of appropriate contemporaneous documentation in the divorce filings, merely heightens the need for such a hearing.

We can appreciate the motion judge's skepticism about the husband's professed ignorance about the options now that his wife, three years after the divorce, has seen a return on her investment in her employer's company, and also the considerable expenditures of time and effort that a plenary hearing will entail. Nonetheless, if it is established that the husband has engaged in fabrication or selective memory about the options, the Family Part has at its disposal appropriate sanctions, including but not limited to an award of counsel fees.[1]

If, on the other hand, the plenary hearing establishes that the husband had no reason to know of the options when he entered

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[1] In this regard, we reject the husband's argument that the holding in Hipsley, supra, signifies that he would be entitled to post-judgment reconsideration of equitable distribution even if he had known about the stock options before signing the MSA. The mere omission of the stock options from the MSA is not in itself a sufficient reason to require a plenary hearing if it were abundantly clear that the husband had consciously and specifically disclaimed any interest in the options in his oral negotiations with his wife.

into the MSA, the trial court shall consider all equitable factors in whether the husband deserves some portion of the moneys generated by the options, including his teacher's pension that may have considerable offsetting value. In this respect, we agree with the wife that the husband should be required to disclose the value of his pension before the plenary hearing is conducted, so that the approximate range of equitable factors is fairly known to both parties and to their counsel before they embark on such a burdensome proceeding.

We do affirm, however, the motion judge's denial of the competing motions for child support, without prejudice to the parties filing renewed applications on that issue with more detailed financial information. In this regard, we note that a plenary hearing on the number of actual overnights the children have with each parent may also be warranted to resolve the parties' clashing affidavits on that score, although we earnestly hope that counsel will attempt to reach a stipulation on this subsidiary issue.

All other points raised by the parties lack sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E).

Affirmed in part, and reversed and remanded in part for a plenary hearing.