Not Reported in A.3d, 2011 WL 1160471 (N.J.Super.A.D.)
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
Maria **PROCTOR**, n/k/a Maria Pizzuti,
Plaintiff–Appellant/Cross–Respondent,
v.
Paul **PROCTOR**, Defendant–Respondent/Cross–Appellant.

Submitted Jan. 31, 2011.
Decided March 31, 2011.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Mercer County, Docket No. FM–11–102–98B.
Pellettieri, Rabstein & Altman, attorneys for appellant/cross-respondent (John A. Hartmann, III, of counsel and on the briefs; Nicole J. Huckerby, on the briefs).

Szaferman, Lakind, Blumstein & Blader, P.C., attorneys for respondent/cross-appellant (Brian G. Paul, of counsel and on the brief).

Before Judges KESTIN and NEWMAN.

PER CURIAM.

***1** Plaintiff Maria Proctor (n/k/a Pizzuti) appeals from a post-judgment order terminating permanent alimony of $100 per week by reason of changed circumstances due to cohabitation. The trial court denied counsel fees for either party. By way of a "defensive" cross-appeal, defendant Paul Proctor appeals from the denial of his application for retroactive modification of the termination to 2005 instead of from when his motion for termination was filed on September 29, 2009.

The relevant facts are as follows. Although defendant submitted an abundance of proof to demonstrate cohabitation between plaintiff and Ronald Argenzio, showing that they held themselves out as a married couple, the issue of cohabitation was not contested. In her certification, plaintiff admitted the following: "I will spare the Court the trouble of scheduling a plenary hearing because I admit that I do cohabitate with Mr. Argenzio at his home, located [in] Ramsey, New Jersey and have been since 1999." Thus, the focus of the hearing on the motion to terminate alimony was on the economic interdependence between plaintiff and Mr. Argenzio.

Plaintiff had increased her earnings of approximately $13,900 at the time of the divorce in 1998 to earning approximately $30,000 working part-time, according to the current Case Information Statement (CIS) she submitted to the trial court. She was receiving $900 per month of pension income from one of her former spouse's I.B .E.W. defined benefit funds as a result of the divorce. Plaintiff admitted to $1,400 per month, attributable to Mr. Argenzio, which she alleged it would have cost her to rent an apartment in Ramsey.

Defendant also established that plaintiff lives in two locations with Mr. Argenzio, a home in Ramsey, which is assessed at $472,800, and a condominium in Hollywood, Florida, purchased for $460,000, which has no mortgage. The condominium is titled in both plaintiff's and Mr. Argenzio's names with a right of survivorship. Defendant further showed that they have several jointly-titled bank accounts, that alimony checks were deposited on occasion in Mr. Argenzio's account, and they had at least one joint brokerage account titled as joint tenants. Defendant also pointed out that plaintiff took a vacation in Italy in 2004; a cruise to Hawaii in April 2005; a vacation in the Caribbean in Spring 2006; a vacation in Napa, California; a trip to Aruba in 2007; and a vacation in New England in 2008. According to plaintiff's CIS, she spends only $50 per month for vacations. Plaintiff

largely did not respond to these various items in her responding certification.

It was also brought out that defendant earned $69,000 at the time of the divorce to support a family of four, which included two daughters, now married and emancipated.

Against this background, Judge Mary C. Jacobson addressed the economic interdependence between plaintiff and Mr. Argenzio in the following specifics:

> But Mr. Proctor has also proved that there is economic inter-dependence between Ms. Pizzuti and Mr. Argenzio. And in fact, Ms. Pizzuti has admitted to some of that economic inter-dependence. She has estimated a credit of $1,400 for living in Mr. Argenzio's house in Ramsey.
>
> ***2** But the couple also own property together in Florida. The representation was made on the record today that there is no mortgage on the property, except for it's a joint purchase. So there they are again, you know, as a couple, behaving as a married couple, not technically married, but behaving as a married couple, which is one of the things that the Court looks to. They bought property together.
>
> And they have joint accounts together. The joint account that was—some of the accounts, I think the Regents Bank, for example, and Hudson Bank. And they've taken numerous vacations together.
>
> And then the question is, is that economic inter-dependence such that it is appropriate for the Court to terminate the permanent alimony award. We have to look at the economic circumstances. We know that Ms. Pizzuti is making $30,000 a year salary. This is more than what she was making at the time of the final judgment of divorce. So there's been a change. You know, to her credit, she's done this. And as a result of the modifications to the final judgment, she is receiving a hundred percent of the pensions currently in pay status, in which she garners over $10,000 a year, which is more than, and I believe it's more than double or close to double what the permanent alimony award is. And she has some additional unearned income, you know, interest from the bank accounts and things of that nature.
>
> And some of this, the salary and the pension is undisputed. And then there were further proofs provided by the plaintiff to show that she had this additional income. There was the Ramsey home, as I mentioned, that she shares with Mr. Argenzio, although I don't think there's any payment, but she does accept the credit, which would be added to the $40,800. You add the, you know, the credit. And it seems to me that she is having a standard of living now that seems to me to certainly be the marital standard without the permanent award of alimony.
>
> You know, she has two houses available to her, two places to stay, the New Jersey one and the Florida one. And she has the income that she's receiving, plus the pension income. And while I wouldn't parse the [$]69,000 the way that the defense counsel is asking me to, I am looking at the vacations, I am looking at what she was able to do for her daughters, and you don't do that on $30,000 a year. They have co-mingled their funds and the joint accounts show she is having a lifestyle with Mr. Argenzio—she's virtually acting as if they were married, even though they are not.
>
> And the key really is the marital standard. And I thought about granting a plenary hearing. And I had to look to see whether I felt that the defendant had made a strong enough case so that with some of the disputes of fact that are clearly in the record, are they sufficient to require a plenary hearing. And I think the answer is no.
>
> There was, you know, with the amount of money that she's making herself, plus the pension, plus the other bank accounts, plus the credit from Mr. Argenzio, those things together I think

certainly show that she is able to live at the marital standard without the alimony.

***3** So even though it was not an easy decision to come to, I did review the record on both sides and I am going to grant the application of Mr. Proctor to terminate his alimony obligation. But I'm only doing it effective with the filing date of the motion, which is September 29, 2009. I don't think it's fair to retroactively seek reimbursement of the alimony that was paid.

In denying attorney's fees to either party, Judge Jacobson had this to say:

In terms of counsel fees, I'm going to have each party bear their own counsel fees. The defendant prevailed, but in terms of the parties, there were legal arguments on both sides. And you know, he had not provided his income information to her. Things might have been different if he had provided his income to her. It was something that didn't require her to ask, he was just supposed to provide it. So in that sense he had some responsibility for her not coming in earlier to increase the amount. And I just think it's a fair way to end all of all this, for each party to bear their own counsel fees. They seem to be able to do it.

Certainly, Mr. Proctor is able and he's better able, much better able under the financial information that I have, to bear his own counsel fees. And certainly that factor alone would not be, I don't believe would warrant my awarding counsel fees to him. Since Ms. Pizzuti did not prevail in her position before the Court, it's not fair to make Mr. Proctor pay her counsel fees. So I'm going to deny the application on both sides for counsel fees.

On appeal, plaintiff raises the following issues for our consideration:

POINT I

THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING DEFENDANT'S MOTION TO TERMINATE ALIMONY GIVEN THAT DEFENDANT FAILED TO APPEND A PRIOR CASE INFORMATION STATEMENT AND PLAINTIFF FAILED TO PROVIDE COMPLETE CURRENT FINANCIAL DOCUMENTATION.

POINT II

THE TRIAL COURT ERRED BY FAILING TO ALLOW FOR A PERIOD OF DISCOVERY AND FURTHER ERRED BY FAILING TO SCHEDULE A PLENARY HEARING.

A. In An Application To Modify Support, After The Payor Spouse Makes A *Prima Facie* Showing Of Cohabitation, The Trial Court In Most Cases, Must Afford A Period Of Discovery Followed By A Plenary Hearing.

B. Genuine Issues Of Material Fact Were Raised By The Parties' Conflicting Certifications Such That A Plenary Hearing Was Warranted.

POINT III

THE TRIAL COURT ERRED IN FAILING TO AWARD PLAINTIFF COUNSEL FEES ASSOCIATED WITH DEFENDANT'S MOTION.

On cross-appeal, defendant raises the following point:

POINT IV

IN THE EVENT ANY PORTION OF JUDGE JACOBSON'S DECISION IS REVERSED, THEN THE TRIAL COURT'S DECISION TO ONLY RETROACTIVELY MODIFY ALIMONY TO THE DATE OF THE NOTICE OF MOTION, RATHER THAN AN EARLIER DATE SUCH AS THE DATE OF COHABITATION, SHOULD BE REVERSED AND REMANDED AS WELL.

We have considered plaintiff's legal arguments

in light of the record and the briefs submitted and reject them. We affirm substantially for the reasons expressed by Judge Jacobson in her oral opinion of November 20, 2009. We add the following brief comments.

***4** It is clear that an alimony award is "subject to ... modification on a showing of 'changed circumstances' ". *Lepis v. Lepis,* 83 *N.J.* 139, 146 (1980) (citations omitted). A changed circumstances that courts consider is a "dependent's spouse's cohabitation with another." *Id.* at 151 (footnote and citations omitted). Modification is appropriate when a cohabitant contributes to support of a dependent spouse. *Gayet v. Gayet,* 92 *N.J.* 149, 153–55 (1983). Where a supporting spouse makes "a *prima facie* showing of cohabitation," a rebuttal presumption arises and shifts the burden of proof "to the dependent spouse to show that there is no actual economic benefit" from the cohabitation. *Ozolins v. Ozolins,* 308 *N.J.Super.* 243, 245, 248–49 (App.Div.1998). As we said in *Ozolins,* "it would be unreasonable to place the burden of proof on a party not having access to the evidence necessary to support that burden of proof." *Id.* at 249 (quoting *Frantz v. Frantz,* 256 *N.J.Super.* 90, 93 (Ch. Div.1992) (internal quotation marks omitted)).

Here, plaintiff had it within her means to demonstrate that there is a lack of economic interdependence and she failed to do so. Plaintiff did not provide any financial information regarding the various vacations she took; the joint accounts she shared with her ostensible husband; and the fact that there was no mortgage on the Florida condominium that she lived in with him. She was not in need of discovery because the information regarding her economic situation was accessible to her. Under these circumstances, we can well understand why the trial judge found that there was no need to hold a plenary hearing. Plaintiff failed to rebut the presumption of the economic interdependence between plaintiff and her cohabitant.

Moreover, her marital lifestyle, as the court observed, could be satisfied without the alimony from defendant. Indeed, the trial judge was charitable in indicating that plaintiff's present standard of living satisfied the prior lifestyle when the former appears to have surpassed the latter with the two residences that plaintiff now uses. Additionally, it appears plaintiff may have become a resident of the State of Florida, which does not have a state income tax, adding even more available income for her daily living. Under these circumstances, we agree with Judge Jacobson that no plenary hearing was necessary.

With regard to the failure of either party to file a prior CIS, it is not established that those documents were filed at the time of the divorce or are even available at this time. Moreover, the court was able to reconstruct the income status of defendant, who was the sole breadwinner at the time of the divorce, and plaintiff, who was without any income for much of the marriage, as shown by the document reflecting her Social Security benefits estimate. Furthermore, with two children in the household at that time, the expenses would be substantially different from what they presently are and would not provide any comparative guidance. We therefore find that the lack of any prior CIS did not inhibit the trial court's ability to decide the termination of the alimony issue.

***5** With regard to the denial of both parties' requests for counsel fees, we discern no abuse of discretion, much less a clear abuse of discretion, in the court's decision denying an award of counsel fees to either party. *See Strahan v. Strahan,* 402 *N.J.Super.* 298, 317 (App.Div.2008) (citation omitted).

We need not address the cross-appeal since defendant stated that it was defensive only in the event we decided that alimony should not have been terminated.

Affirmed.

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