NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1852-14T3

KATHLEEN UNGVARSKY,

Plaintiff-Respondent,

v.

JOHN UNGVARSKY,

Defendant-Appellant.

Submitted September 16, 2015 – Decided December 10, 2015

Before Judges Yannotti, St. John and Guadagno.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Burlington County, Docket No. FM-03-0493-05.

Budd Larner, P.C., attorneys for appellant (Steven M. Resnick, on the briefs).

Kathleen Ungvarsky, respondent pro se.

PER CURIAM

Defendant John Ungvarsky (John)[1] appeals from multiple Family Part orders in this contentious litigation over child support and custody. He argues the trial court erred in denying

[1] In using the parties' first names, we sacrifice formality for easier reference by the reader.

his many requests for modification of the terms of the property settlement agreement (PSA) incorporated into his and plaintiff Kathleen Ungvarsky's (Kathleen) judgment of divorce (JOD). Additionally, he challenges the court's dismissal of his self-bifurcated intentional infliction of emotional distress (IIED) claim and the assessment of counsel fees against him.

The facts underlying this dispute are recited at length in our previous decision in this case, Ungvarsky v. Ungvarsky, No. A-6198-08 (App. Div. Nov. 1, 2010). We therefore provide only a brief synopsis of the relevant history.

Kathleen and John were married in April 1993 and had four children. They agreed to the PSA on May 22, 2005, and a subsequent addendum, both of which were incorporated into the JOD entered on January 30, 2006. Pursuant to the PSA and JOD, the parties share joint legal and physical custody of the children. Kathleen is the parent of primary residence.

In the previous dispute before us, Kathleen challenged the trial court's award which determined John's child support obligation based on an amount of income that was significantly lower than the amounts John was able to earn in the past. We noted the trial court's decision not to impute income to John was based upon the implicit findings that he was not voluntarily unemployed and that his unemployment benefits constituted an

accurate assessment of his earning capacity. Id. slip op. at 14-16. We concluded those findings were unsupported by competent evidence. We therefore reversed those portions of the orders that retroactively reduced John's child support obligation to $112 per week, and remanded the matter for a plenary hearing. Id. slip op. at 18.

During the course of the plenary hearing, we granted John's application to file an interlocutory appeal, vacated certain orders, and remanded for a new plenary hearing which was conducted by a different judge. The hearing concluded and, on August 5, 2014, Judge Marlene Lynch Ford issued a comprehensive forty-three page written opinion determining, among other issues, John's weekly child support obligations. In her opinion, the judge made specific findings of fact and credibility determinations.

John contends the trial court's child support order must be reversed and recalculated consistent with the evidence and that the court erred by ordering payment of "100% of his net income for child support." We disagree. We affirm substantially for the reasons set forth in the court's written opinion dated August 5, 2014.

We add the following brief comments. The substance of John's argument is that the court's imputation of his earnings

is too high and in error. The judge comprehensively addressed John's educational background, work history and earnings record before she made a finding of imputed income.

A court can impute income to a party for support purposes when the party is, without just cause, intentionally and voluntarily underemployed or unemployed. Caplan v. Caplan, 182 N.J. 250, 268 (2005); Golian v. Golian, 344 N.J. Super. 337, 341 (App. Div. 2001). Stated differently, when a spouse is not earning his or her true potential income, "an imputation of income based on that potential is appropriate." Stiffler v. Stiffler, 304 N.J. Super. 96, 101 (Ch. Div. 1999); accord Halliwell v. Halliwell, 326 N.J. Super. 442, 448 (App. Div. 1999) (potential earning capacity of party, not his or her actual income, should be considered). The imputed income figure is one the party is capable of earning. Dorfman v. Dorfman, 315 N.J. Super. 511, 516 (App. Div. 1998). Before imputing income, however, a judge must first find that the spouse was voluntarily underemployed or unemployed without just cause. Caplan, supra, 182 N.J. at 268.

We review a trial court's decision to impute income under an abuse of discretion standard. Ibrahim v. Aziz, 402 N.J. Super. 205, 210 (App. Div. 2008). The decision "to impute income of a specified amount will not be overturned unless the

underlying findings are inconsistent with or unsupported by competent evidence." Storey v. Storey, 373 N.J. Super. 464, 474-75 (App. Div. 2004). "Competent evidence includes data on prevailing wages from sources subject to judicial notice." Id. at 475.

The court found "the evidence in this regard supports [Kathleen's] claim that [John] is limiting his income intentionally in order to avoid paying child support to a women that he loathes." The credible evidence in the record amply supports the court's finding.

Further, after comprehensively reviewing John's education, earnings and work history, the court consulted data from the New Jersey Department of Labor and Workforce Development. The court determined that Sales Managers in the Technical and Professional Industry most closely equated to John's work history. The judge imputed $65,410 of annual income reflecting the lower end, or entry level, wage from that job classification data.

We are satisfied the judge appropriately weighed the income factors in reaching her decision and discern no basis to disturb that result.

Defendant challenges the trial court's award of counsel fees. The assessment of counsel fees lies within the sound discretion of the trial court, "and will not be reversed except

upon a showing of an abuse of discretion." Barr v. Barr, 418 N.J. Super. 18, 46 (App. Div. 2011) (citing Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001)).

An award of fees in a Family Part matter is governed by Rule 5:3-5(c). See Gotlib v. Gotlib, 399 N.J. Super. 295, 314 (App. Div. 2008) ("Rule 4:42-9(a)(1) authorizes the award of counsel fees in a family action on a final determination pursuant to R[ule] 5:3-5(c)."). Further, "applications for the allowance of fees shall be supported by an affidavit of services addressing the factors enumerated by RPC 1.5(a)." R. 4:42-9(b).

In a detailed written opinion dated November 5, 2014, incorporating the court's August 5 opinion, the judge awarded Kathleen the contested legal fees to be paid by John. We affirm substantially for the reasons expressed in the court's opinion. We note, in awarding Kathleen counsel fees in the sum of $56,393.07, the judge undertook a thorough analysis of the history of the litigation and considered the relevant factors under Rule 5:3-5(c). We conclude the court's award of attorney's fees to Kathleen did not constitute an abuse of discretion.

Defendant next challenges multiple aspects of the trial court's June 20, 2013 order. Again, we affirm substantially for

the reasons set forth in the court's cogent written opinion of the same date. We add these brief comments.

The order under review dismissed John's complaint alleging IIED. After applying the standards for a motion to dismiss pursuant to Rule 4:6-2(e), and guided by the Court's decision in Printing Mart-Morristown v. Sharp Electric Corp., 116 N.J. 739, 746 (1989), the trial judge dismissed the complaint and advised the Law Division of her decision "so that an appropriate order for dismissal can be entered in that matter as well."

We affirm the trial court's dismissal of John's claims of IIED. As the trial judge acknowledged, to make out a prima facie case of IIED, a plaintiff must show that: (1) the defendant acted intentionally; (2) the defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community;" (3) the defendant's actions proximately caused him/her emotional distress; and (4) the emotional distress was "so severe that no reasonable [person] could be expected to endure it." Segal v. Lynch, 413 N.J. Super. 171, 191 (App. Div. 2010) (quoting Buckley v. Trenton Saving Fund Soc., 111 N.J. 355, 366 (1988)). Here, the trial court correctly found the record does not

contain sufficient evidence for a rational jury to find a basis to hold Kathleen accountable on this standard of liability.

John next argues the court erred by not modifying custody or at the least conducting a plenary hearing. The judge noted that John moved "for the fourth time in this post judgment litigation between the parties to modify custody and parenting time." The parties enjoyed joint legal custody of the children with Kathleen as the parent of primary residence, and John as the parent of alternate residence. John sought "a 50/50 shared parenting time schedule for the children." The judge correctly stated the burden is on John, as the moving party, "to demonstrate that there has been a substantial change of circumstances warranting a modification of custody, so as to trigger the right to a plenary hearing."

After reviewing the history of the dispute and the children's relationship with the parties, the judge concluded that there "is nothing before the court to show that the children, as opposed to [John], would benefit from a change of custody." We agree with the trial judge that John did not meet his burden of establishing a prima facie showing of changed circumstances and, therefore, a plenary hearing was not required.

Defendant's remaining arguments are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.