NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3352-09T1

JEAN MARIE PALARDY,

Plaintiff-Respondent,

v.

CARL PRATA,

Defendant-Appellant.

Argued March 14, 2011 - Decided July 25, 2011

Before Judges A.A. Rodríguez and LeWinn.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FM-07-348-03.

Melissa M. Ruvolo argued the cause for appellant (Donahue, Hagan, Klein, Newsome & O'Donnell, P.C., attorneys; Ms. Ruvolo, on the brief).

Pamela M. Cerruti argued the cause for respondent.

PER CURIAM

In this post-judgment matrimonial matter, defendant appeals from the February 5, 2010 order of the Family Part denying his motion for a downward modification of his child support

obligation based upon a claimed change of circumstances. We reverse and remand for further proceedings.

The parties were married in 1997 and divorced in 2004; they have two children. During the marriage, defendant worked as an insurance adjuster earning about $40,000 annually. In 2000, defendant was arrested for insurance fraud and sentenced to prison. He was incarcerated from August 2003 to February 2004. He was no longer able to work in the insurance industry as a result.

The parties' judgment of divorce states that they appeared before the judge on April 12, 2004. That judgment was filed on May 18, 2004, and incorporated the parties' property settlement agreement (PSA), which they had executed on May 12, 2004.

Despite the fact that defendant was no longer employed as an insurance adjuster, he signed the PSA aware that it stated that both parties were "working and . . . self-sufficient." Defendant also agreed to pay child support of $413 per week. At that time, defendant's share of the proceeds of sale of the marital residence was being held in escrow by plaintiff's attorney; the PSA provided that defendant would pay $165 per week and the balance of $248 would be paid from the escrow until those funds were depleted, after which defendant would pay the full weekly amount of $413.

Defendant's child support payments were in arrears by 2008 and plaintiff filed a motion to collect those arrears. On September 11, 2008, the parties entered into a consent order in which plaintiff agreed to withdraw her motion because defendant had "paid in full all arrears as set forth" in that motion. The consent order further provided: "In the event defendant is more than one . . . week late on his future child support payment obligations, he will be put on a two[-]week bench warrant status. Should defendant promptly make payment of any and all outstanding child support arrears during the two[-]week period, such status shall be immediately lifted."

On July 17, 2009, pursuant to another motion by plaintiff to collect child support arrears, a judge entered an order setting defendant's arrears at $9,067 and ordering him to pay that amount by August 6, 2009, or a bench warrant would issue. Defendant, representing himself, apparently filed a motion with respect to child support on July 13, 2009; however, the judge dismissed that motion on July 17, 2009.

On December 14, 2009, plaintiff filed another motion seeking, among other things, enforcement of child support arrears. Defendant filed a cross-motion seeking to reduce his child support obligation to $64 per week.

In support of his cross-motion defendant certified that when he was before the judge at the divorce hearing in 2004, it was the judge's "position that [defendant] was capable of earning almost $175,000 per year with [his] [e]conomics [d]egree, even considering [his] arrest record and inability to work in the insurance industry." Defendant was unable to produce the Child Support Guidelines Worksheet from the time of the divorce, but submitted a recreated version of the worksheet showing a weekly child support obligation of $413 and listing his weekly gross taxable income as $3365.

Defendant further certified that "it was impossible for [him] to obtain a job in the insurance industry given [his] arrest[,]" and that his "economics degree was virtually useless." He attached tax returns showing gross income of $24,305 in 2004, $36,784 in 2005, $13,355 in 2006, and $35,565 in 2007, from various jobs at a restaurant and with a painting company.

Defendant has a "background as a chef and restaurant manager," and he "researched jobs in the restaurant industry." He attached emails documenting his efforts to obtain employment, all of which were unsuccessful. When he "realized that there w[ere] significantly more [food service jobs] available in . . . Colorado than in New Jersey[,]" he moved to Colorado in October

2009. This move gave rise to parenting time issues, which he addressed in his certification, as well.

At oral argument, the judge noted that he did not "necessarily disagree with [defendant] that he [is] not earning the income that he earned in the past," but could not accept that defendant's current earnings were the best he could do. The judge concluded that defendant had failed to "sustain his burden of proof to show a significant change in circumstances with regard to [his] ability . . . to produce income . . . ." The judge regarded the September 11, 2008 consent order as reflecting defendant's "agree[ment]" to continue paying $413 per week.

The judge acknowledged that defendant's "reported income [h]as never measured what was apparently agreed to at the time of the final judgment of divorce . . . ." However, because defendant's conviction for insurance fraud did not "sit well" with him, the judge concluded that defendant lacked credibility.

On appeal, defendant contends that the judge erred in denying his request to modify child support without holding a plenary hearing; he also requests that, in the event of a remand, this matter be assigned to a different judge since the motion judge here made findings regarding defendant's credibility. We concur with both contentions; therefore, we

reverse and remand for a plenary hearing before a different judge.

Initially, we note that our scope of review of a trial court's fact finding is limited. Such findings will be "binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 412 (1998). We will affirm such findings unless we conclude that they "are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974) (internal quotations omitted).

A party seeking modification of support "must demonstrate that changed circumstances have substantially impaired [his] ability" to meet the previously set obligation. Lepis v. Lepis, 83 N.J. 139, 157 (1980). It is appropriate for the judge to evaluate a claimed change in circumstances from the time the support obligation was last modified. Donnelly v. Donnelly, 405 N.J. Super. 117, 127-28 (App. Div. 2009).

Here, defendant's child support obligation of $413 per week has not been modified since the parties' divorce in 2004. Moreover, it is clear that the amount of his child support obligation was derived from an unsupported imputation of gross

annual income of $175,000. While the record does not contain any explanation for that imputation, other than defendant's assertion that the judge presiding at his divorce hearing deemed it an appropriate amount, the fact remains that his child support obligation has been based upon a fiction. In 2004, defendant had just been released from prison on an insurance fraud charge and had no job prospects in the insurance industry. How his "economics degree" was supposed to lead him to a position earning $175,000 is a question that has never been answered.

Plaintiff contends that "[n]o income amount was ever 'imputed' to" defendant; rather, defendant "voluntarily . . . agreed to pay $413 per week in child support." Suffice it to say, neither party's claim on this issue is addressed, let alone supported, by the record. It is, however, undisputed that defendant never earned anything close to $175,000 annual income during the marriage. The motion judge himself commented that he "didn't know one way or the other" how that amount of income was imputed to defendant; the judge assumed, however, that defendant was "not giving [him] the full story behind that."

These conflicting assertions in the parties' certifications further underscore the need for a plenary hearing. The "failure to conduct a plenary hearing" where, as here, there is "a

genuine and substantial issue" regarding defendant's ability to pay $413 per week in child support "is inconsistent with our holding[] that "'a case should not be decided merely on the basis of conflicting affidavits or an inadequate record . . . .'" Mackowski v. Mackowski, 317 N.J. Super. 8, 11 (App. Div. 1998) (quoting Wilkie v. Culp, 196 N.J. Super. 487, 501 (App. Div. 1984), certif. denied, 99 N.J. 243 (1985)).

We also take issue with the judge's findings that defendant "agreed" to pay $413 per week in child support "as recently as September . . . 11[,] . . . 2008," and agreed again "almost [by] default in July . . . 2009[,] by again coming up with the arrears . . . ." The September 11, 2008 consent order is silent as to any "agreement" by defendant to continue paying that amount of child support. Rather, the order acknowledges his obligation to pay outstanding arrears and to keep his payments current going forward. In July 2009, defendant had filed a pro se motion seeking relief, which was dismissed by the judge.

In sum, we are satisfied that defendant has made a prima facie showing of changed circumstances sufficient to warrant the exchange of discovery and a plenary hearing to determine a currently appropriate child support amount. Lepis, supra, 83 N.J. at 157-59.

Furthermore, because the motion judge made specific negative findings with respect to defendant's credibility, we direct that the matter be heard by a different judge on remand. See Entress v. Entress, 376 N.J. Super. 125, 133 (App. Div. 2005) ("[i]n an abundance of caution, we direct that this matter be remanded to a different judge for the plenary hearing to avoid the appearance of bias or prejudice based upon the judge's prior involvement with the matter and his expressions" of doubt as to defendant's credibility); see also R. 1:12-1(d) (a judge "shall not sit in any matter, if the judge . . . has given an opinion upon a matter in question in the action").

Reversed and remanded. We do not retain jurisdiction.