SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0553-15T1

MICHAEL MACIEJCZYK,

Plaintiff-Respondent,

v.

ROBYN MACIEJCZYK n/k/a
ROBYN GOGLIEN KLEINHANS,

Defendant-Appellant.

Submitted January 9, 2017 – Decided January 31, 2017

Before Judges Sabatino and Currier.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Sussex County, Docket No. FM-19-246-10.

Trautmann and Associates, LLC, attorneys for appellant (Gregg D. Trautmann, on the briefs).

Gruber, Colabella, Liuzza & Thompson, attorneys for respondent (Gretchen Fry Rafuse, of counsel and on the brief).

PER CURIAM

This appeal involves a dispute between former spouses over who bears responsibility for the previously-incurred costs of renting a water filtration system installed in the parties'

marital residence. The ex-wife, defendant Robyn Maciejczyk (now known as Robyn Goglien Kleinhans) appeals the Family Part's August 21, 2015 order finding her solely responsible for a compromised sum of $6,750 for those past costs, and also awarding her ex-husband, plaintiff Michael Maciejczyk, $3,000 in reasonable counsel fees he incurred in connection with this dispute. We affirm.

The record reflects that the parties were married in 2006 and divorced on May 17, 2010. The divorce judgment incorporated a Matrimonial Settlement Agreement ("MSA"), which the parties negotiated with the assistance of their respective counsel. The MSA provided that the ex-wife would remain in the marital residence pending the home's anticipated sale. Paragraph 2 of the agreement specifically made the ex-wife "solely responsible" for the monthly mortgage, homeowner's insurance, and "utilities." The provision read, in part, as follows:

> Pending the final sale, Wife shall have exclusive possession of the marital home and be solely responsible for the monthly mortgage payments, real estate taxes, homeowners insurance and utilities. Wife shall hold Husband harmless for the payment of the same.
>
> [(Emphasis added).]

According to the ex-husband's motion certification, the parties arranged in June 2008 to rent a water filtration system

for the marital residence from Suburban-Morris Water Conditioning Company ("Suburban-Morris"). The company charged a monthly amount for this service. Although only the ex-husband signed the contract with Suburban-Morris, both spouses received the benefit of the service while they resided in the marital home. The record shows that the ex-husband paid the monthly bills of Suburban-Morris out of the couple's joint checking account.

After the parties separated in 2009, the ex-wife remained in the marital home and continued to use the filtration system. She contacted Suburban-Morris and requested that the bills thereafter be transferred to her name. A second contract was entered into, this time between the ex-wife and the company.

Four years after the divorce, Suburban-Morris sued the ex-husband for $8,818.24 in unpaid charges plus $264.55 in interest in the Special Civil Part. The ex-husband filed an answer in the collection action denying liability. He also filed a third-party complaint against the ex-wife, asserting that she was responsible for any outstanding charges.

Subsequently, the ex-husband negotiated a settlement with Suburban-Morris, agreeing to pay the company $6,750 to resolve its claims. The ex-husband's third-party claims against the ex-wife for reimbursement were then transferred with the parties'

consent to the Family Part. The ex-husband moved to compel the ex-wife to repay him the settlement amount, which she opposed on various grounds.

After considering the parties' submissions, the Family Part judge ruled that the ex-wife was solely responsible for the $6,750 in past charges for the water filtration system. The judge noted that the charges accumulated during a time period when the ex-wife had exclusive use of the home. The judge also found that, although the MSA did not specifically define a "utility" cost, "it would be entirely unreasonable and inequitable that [the ex-husband] would be responsible for such an expense after he moved out of the home and for which only [the ex-wife] received a benefit." The judge consequently ordered the ex-wife to pay her former spouse a lump sum partial amount of $2,250, plus $250 thereafter in monthly installments until the balance of the $6,750 was fully paid. In addition, after considering the fee-shifting factors in Rule 4:42-9 and Rule 5:3-5(c), the judge awarded the ex-husband a "slightly reduced" sum of $3,000 in reasonable attorney's fees.

The ex-wife now appeals, arguing that the trial court's ruling must be reversed because (1) the ex-husband's claims for reimbursement were procedurally barred under Rule 4:37-1(b) because he settled the collection action with Suburban-Morris

without her knowledge or assent; (2) there is an insufficient basis to hold her liable; and (3) the fee award was improper because it arises out of a debt incurred prior to the execution of the MSA in 2010. We reject these unmeritorious arguments and affirm, substantially for the sound reasons set forth in Judge Michael P. Wright's written Statement of Reasons accompanying the August 21, 2015 order. We add only a few brief comments.

As a reviewing court, we generally afford substantial deference to rulings made by Family Part judges in matrimonial matters. See, e.g., Cesare v. Cesare, 154 N.J. 394, 411-12 (1998); Pascale v. Pascale, 113 N.J. 20, 33 (1988). Applying that deference here in light of the record and the applicable law, it is clear that the ex-wife was appropriately found solely responsible for the water filtration charges incurred for the marital home after the ex-husband moved out and she remained there. As Judge Wright recognized, although the term "utility" was not specifically defined in the MSA, it would be inequitable to require the ex-husband to be responsible for the accumulated costs of the water filtration system when he derived no apparent benefit for that continued service. The service logically and fairly can be regarded as a "utility" in the same manner as heating, electric, and other such services associated with the use and occupancy of the home.

The ex-wife's procedural argument under Rule 4:37-1(b) is unavailing. That Rule specifies that if a "counterclaim" has been asserted against a plaintiff who wants to dismiss its lawsuit, "the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court."

Here, there was no counterclaim asserted by the ex-wife in the Special Civil Part action. Instead, she was merely a third-party defendant who the ex-husband sought reimbursement from provisionally, in the event that the plaintiff vendor obtained a judgment against him. The company and the ex-husband did not need a third-party defendant's consent to settle the collection claims. In fact, the ex-husband apparently provided an indirect financial benefit to the ex-wife by defending the action and negotiating a lower payment figure from the amount demanded in Suburban-Morris's complaint. Moreover, as Judge Wright pointed out, the ex-wife filed her answer to the third-party complaint belatedly.

In her reply brief on appeal, the ex-wife argues that she is shielded from liability for the debt under principles of novation, because she entered into a substitute contract with Suburban-Morris prior to the divorce judgment. She asserts that

when she entered into the new contract, doing so extinguished any outstanding debts to Suburban-Morris.

We decline to adopt this novation argument for several reasons. First, the doctrine of novation was not asserted, at least explicitly, in appellant's initial merits brief. See Bd. of Educ. of Clifton v. Zoning Bd. of Adjustment of Clifton, 409 N.J. Super. 389, 443 (App. Div. 2009) (noting that arguments raised for the first time in a reply brief on appeal need not be considered). Second, there is no indication in Judge Wright's opinion or the record supplied to us that the ex-wife argued novation in the trial court. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (disfavoring appellate consideration of arguments not raised below); Ins. Co. of N. Am. v. Gov't Emps. Ins. Co., 162 N.J. Super. 528, 537 (App. Div. 1978) (declining to resolve on appeal an issue not addressed by the trial court).

Third, as a substantive matter, we are unpersuaded that the successor contract that the ex-wife executed with Suburban-Morris was intended by the company to extinguish unpaid amounts owed under the prior contract that the ex-husband had signed. There is no evidence in the record that the company expressly or impliedly agreed to waive collection of such past charges. See Fusco v. City of Union City, 261 N.J. Super. 332, 337 (App. Div.

1993) (requiring a "'clear and definite intention on the part of all concerned' that it is the purpose of the [successor] agreement to substitute a new debtor for the old one") (quoting Tolland v. Lista, 46 N.J. Super. 272, 272 (App. Div. 1957)).

We also reject the ex-wife's argument that the ex-husband overpaid Suburban-Morris in settling with the company for the negotiated sum of $6,750. The ex-wife asserts that this amount does not arithmetically correspond with the monthly charges that the couple routinely paid for the service, and that the sum also allegedly overlaps with the amount in a default judgment for $3,022 issued against her after she failed to make payment for services under the second contract.

We decline to set aside the trial court's adoption of the $6,750 figure as the appropriate reimbursement amount. For one thing, we are mindful that Suburban-Morris apparently sought unspecified "cost of suit" and "lawful interest" in its collection action, which could have accounted for a substantial portion of a final judgment in that case exceeding $6,750 if the company had fully prevailed.

Lastly, we discern no reason to disturb the trial court's exercise of discretion in calibrating a reduced award of reasonable attorney's fees. See Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (noting the deference

owed on appeal in reviewing a trial court's fee awards). The ex-wife should have fulfilled her sole responsibility for paying this debt long before the matter was litigated. It is not inequitable for her to bear the ex-husband's reasonable counsel fees incurred as a result of her inaction.

Affirmed.