SUPERIOR COURT OF NEW JERSEY
Appellate Division
DOCKET NO. A-909-17

Amelia Manya Emily Ort Plaintiff-Respondent v. Abraham Ort Defendant-Appellant	Civil Action On Appeal from a Final Order of the Superior Court of New Jersey, Chancery Division, Family Part, Ocean County Sat below: Hon. Valter H. Must, JSC

Defendant-Appellant's Reply Brief

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[1] These issues were raised below but not adjudicated by the trial court. Thus, no reference pursuant to Rule 2:6-2(a)(1) showing where the decision appears in the record below can be supplied.

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New Jersey Statutes

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Preliminary Statement

Respondent's brief fails to address the majority of the arguments defendant raised. Instead, it simply regurgitates plaintiff's histrionic narrative, repeating allegations either not tethered to the record or supported by nothing more than citations to her own certification below. They were not found to be true and do not gain evidential weight because they are repeated on appeal.

Two key factual issues are whether a judgment against defendant held by a third party (Jeffrey Martin) and recorded as a lien against the East 16th Street property was legitimate, and whether this judgment impaired plaintiff's ability to sell a co-op on Grand Street, thus at least partially excusing her five year delay in doing so (and defeating defendant's claim for credit for the rental income during the delay). Plaintiff's factual assertions on these issues (Pb 9-10) cite exclusively to her own certification below - not to court findings or documentary evidence.

Because she has had such success with inflaming courts by claiming "defendant is a contemnor", she makes this refrain into the backbone of her argument. As set forth below, plaintiff ignores that she stipulated "...it was [the parties] marital plan Defendant would not pursue traditional employment but study Torah..." and that he never pursued traditional employment (Da 43). No court or arbitrator has ever found that defendant has secreted income or assets. Plaintiff stipulated to defendant's financial status and was the self-proclaimed financial manager during the marriage, aware of the location and amount of every asset (Da 425-

431). She thus knows defendant has never had any income aside from real estate rents on properties that the arbitration panel took from him. Plaintiff's constant repetition of the fact that defendant has not paid rings hollow when considered against her undisputed stipulation that he has never had the ability to do so.

Even if, arguendo, plaintiff were correct that defendant had acted in bad faith in the past (a supposition not supported by the record), what would she have him do now? How could the evidence defendant provided to the trial court proving that a grave injustice has been done see the light of day? He demonstrated (among other things) that plaintiff misled the court for a decade, concealing that she took title to the East 16th property and obtained the right to seek a levy on the rents in 2007, but chose not to do so. He showed that a final accounting would more than wipe his arrears. Plaintiff, aware that defendant cannot pay a purge amount, asks this court to affirm a decision forever closing the courthouse doors to him.

The narrow issue before this court is whether the trial court erred by applying the doctrine of unclean hands and refusing to consider the significant evidence and arguments defendant presented as to whether, as a result of credits he was entitled to and deceptions he had uncovered, his arrears were satisfied.

As the proofs are plain and record before this court comprehensive, the Appellate Division should step in and give the long overdue justice defendant sought in the court below.

Reply to Counter-Statement of Facts

The facts defendant supplied in his supporting brief were cited to the record below or were matters of simple logic flowing from those established facts. In contrast, plaintiff's primary (almost exclusive) citation source is her own certification below. Unable to dispute defendant's assertions, she instead seeks (as she did below) to inflame the court and distract it from the record and simple legal error committed by the trial court.

Respectfully, this distraction strategy prevailed below and prevented the trial court from entering a just decision on the merits. It should not prevail here.

1. As to claim defendant is a "contemnor"

Plaintiff's opposition rests on the false premise that "defendant is not simply a party with a judgment against him...he is a contemnor." (Pb 1). Plaintiff hopes this court will be so inflamed by this false and oft-repeated refrain that it will ignore the record.

The arbitration panel noted the parties stipulation that "...it was their marital plan Defendant would not pursue traditional employment but study Torah..." and that he never pursued traditional employment (Da 43). No court or arbitrator has ever found that defendant has secreted income or assets. She thus knows that defendant has never had any income aside from real estate rents on pre-marital, inherited properties the arbitration panel took from him. Defendant is thus not "a contemnor" and the allegation is made to inflame the court against him. This tactic

has been used to distract the court from what should be the focus of this case.

2. As to Jeffrey Martin suit and lien on East 16th Street rents.

Plaintiff's next false assertion is that the Jeffrey Martin lien and levy against the rents on East 16th were ever found to be fraudulent. She places quotation marks around the word "loans" so as to imply they were never made and the debt (and thus the resulting suit to collect it) wasn't legitimate. However, copies of cancelled checks and other documents show the loans absolutely were made (Da 259-303). Plaintiff's incessant repetition of her allegation that the suit was collusive does not make it so. Her claim (Pb 9) that there is such a finding in record (citing to Da 345) is false. No such finding was ever made. The court in New York said only that Mr. Martin defaulting on plaintiff's motion to intervene "would tend to support" plaintiff's allegation (Da 256 at ¶ 11). This was, obviously, not a finding of fact. In New Jersey, Judge Goldman found that a hearing would be required as a result of the "disparate affidavits as to the issue" (Da 122, 248-255). This is not a finding of fact.

Plaintiff repeatedly (Pb 10) points to the arbitration final judgment provision stating "if Defendant has encumbered" the properties "it shall constitute fraud." This provision is irrelevant as the record is clear defendant did not encumber any of the properties. He did not take out a mortgage. He did not pledge

an interest in the properties as security. He did not attempt to sell the properties. He did not offer it as collateral. In sum, he did not encumber them. Unable to convince the trial court defendant violated this provision, she simply repeats the claim on appeal, hoping it will substitute for a finding of fact. It does not.

All defendant's inherited, premarital assets were allocated to plaintiff and the children and, although the Panel found plaintiff transferring $600,000 of his deceased mother's funds to her cousin "to be troubling and warranting equitable intervention" (Da 80), it astoundingly awarded defendant only 50% of the stolen funds, and then offset this credit so nothing was actually due him (Da 88). Thus impoverished by the ruling and unable to repay the loans he took to survive and pay legal fees during the *pendente lite* period, he was sued by Martin for failing to repay them.

He had no defense to the suit. Martin obtained a levy on the East 16th Street rents - this does not constitute defendant encumbering the properties and the oft-quoted provision is thus irrelevant. Martin, not defendant, encumbered the rents in accordance with the law.

Plaintiff points out (Pb 9-10) Martin did not record the judgments as a lien against East 16th Street until "[coincidentally] just a few short weeks after the issuance of the Arbitration Panel's August 6, 2007 Decision awarding Wife (and the parties' children) Husband's 50% interest..." There is nothing "coincidental" about this. It was not until the Arbitration Panel's surprising ruling Husband would receive nothing from the marital

estate that Martin would have realized defendant had no other way of satisfying the judgments and he would need to put a lien against defendant's assets if he hoped to collect on the debt.

3. Plaintiff's ongoing silence as to her acquisition of the title to East 16th Street and vacating of the Martin levies constitutes an admission.

Plaintiff completely ignores defendant's 2017 discovery that plaintiff in fact had transferred the property to herself in 2007 (Da 305-309) and had the levy vacated in 2008 (Da 237). In all the preceding court proceedings, she failed to disclose this nor to take the simple court action required to have the East 16th Street levy directed to her. Instead, she limited herself to writing letters to Philip Ort and ignored his powerful response (Da 431) - that he was legally bound by the levy that had been served on him and required him to direct defendant's share of the rents to Martin (Da 432-434). The only possible explanation for plaintiff's failure to obtain and serve a levy directing the rents be paid to her (in spite of her right to do so) is so a paper trail would be created showing she made "some efforts" on the issue, while retaining the right to drain the children's accounts every month and accrue an $11,000 per month judgment against defendant that she knew she would eventually execute on via defendant's interest in the Regina Ort trust. **Plaintiff does in any way rebut this in her entire submission beyond addressing the issue dismissively.**

For plaintiff to term Philip's compliance with a lawfully

issued levy as "diverting the rents to Jeffrey Martin" (Pb 13) is disingenuous to say the least. It assumes this court will not review the record. A binding levy had been served (Da 432-434). Her claim (Pb 13) that Philip Ort was acting in contravention of a court order is backed by only plaintiff citing to Da 349 - **her own certification.** There is no other citation for this key allegation as none exists. Again, plaintiff makes outrageous allegations tied neither to the record below nor any type of proof.

In spite of being in possession of all the documents (accounting for every dime of rents) to the contrary (Da 327-330), plaintiff claims that Philip Ort paid rental income from East 16th Street to defendant. For this false allegation, she cites, once again, only to her own certification below (Da 349).

Plaintiff chose not to take the simple steps necessary to direct a levy on the rents to her to satisfy her priority, first-in-time judgment for child support. She instead continued to litigate the issue of whether Martin's judgment against defendant was valid, even though she had no interest in that issue beyond having the levy on East 16th Street vacated and a new levy issued directing the rents to her.

Plaintiff chose not to reveal that she had obtained title to the property and the right to receive the rents in 2007 via simply seeking a levy on them. She failed to inform her attorney of this fact, causing him to misrepresent that title had not been

transferred to plaintiff.[2] Had this been revealed, plaintiff would have been cut off from the custodial accounts and received *far* less than $11,000 per month. (See Db at 31, Da 519, Plaintiff's Exhibit R, 12:2 to 12:5, Da 545 64:17 to 64:20). **Plaintiff completely ignores this issue in her brief.**

Defendant's motion provided all the proofs exposing this and asked the Court, as part of a final accounting, to adjust his arrears based on when plaintiff reasonably *could have* begun receiving the rents had she taken the simple step of having a levy issued directing that the rents be paid to her.

The closest plaintiff comes to addressing the issue is to state that she "of course would have pursued the funds" as she "at least would have had some income coming in." (Pb XX). This ignores that she certainly did have "some income coming in" via her undenied depletion over time of over $1.5 million from custodial accounts defendant and his family had set up for the children (Da 153-167) ***and*** was accruing an $11,000 per month judgment during a period when (due to the unforeseen downturn in the market post-2007) she would have received as little as little as $2,200 (Da 317) per month from the East 16th Street rents (Da 317). Had plaintiff filed a simple motion to direct the levy to her, she

[2] Plaintiff's counsel is not blamed for this. Counsel can only operate on the facts provided by a client. Had plaintiff's counsel been made aware that the levy had been vacated and she had in fact received title in 2007, there is no allegation that her counsel would have hidden this from the Court.

would no longer have been permitted to drain the custodial accounts nor would she have been entitled to an accruing judgment of $11,000 per month.

Had the trial court reviewed the documents before it on this issue and considered plaintiff's stipulation, it would not have been distracted by defendant's non-payment. Put plainly, plaintiff was caught. She offered no defense below and offers none here. The trial court erred by refusing to consider these facts and address the merits.

4. As to credit for $307,000 in back rentals received by plaintiff.

The trial court provided no credit against arrears to defendant for the $307,000 in back rental payments plaintiff received and which were paid to her as a result of the child support arrears judgment against defendant.

Plaintiff provides three reasons she avers justify depriving defendant of any credit for these funds. None are accurate.

First (Pb 14), plaintiff claims that she is entitled to a credit for counsel fees she incurred in fighting the Martin suit, including her pursuit of having his judgment vacated when she had no interest in doing so beyond having his interest in East 16th extinguished, which she accomplished in November, 2007 (Da 305-309) and having the levy on the rents vacated, which she accomplished in August 2008 (Da 456). None of the fees she incurred were the result of an encumbrance *defendant* had placed on the property - they were

the result of an encumbrance Martin placed on the property. Thus, they did not "constitute fraud" as per the terms of the arbitration judgment mandating an award of counsel fees (Da 95).

Moreover, Judge Jones denied plaintiff's request to be credited for these fees in 2013 - a determination she never appealed (Da 545). Her pursuit of this issue is bad faith.

Second (Pb 15), plaintiff recounts that 80% of the funds were not received by her, but by the parties' children and defendant is therefore entitled to no credit for the payment. This is absurd. The children were obviously the intended recipients of the child support paid. Plaintiff acted as a trustee for those funds. There was no other alimony nor equitable distribution obligation. For plaintiff to argue that $307,000 was paid pursuant to a judgment for child support, yet defendant should receive no credit at all for that payment against his child support arrears "as it was not even Husband's money to give" (Pb 16), is probably the most disingenuous argument defendant makes. Had the trial court reviewed the merits, it would have credited defendant's arrears for the $307,000 paid pursuant to the child support arrears judgment.

Third. Upon plaintiff's receipt of the rental income from East 16th Street, defendant's support obligation was to drop from $11,000 per month to $300 per week (Da 78). Had plaintiff not concealed that she could have filed for a levy in 2007 to direct the rents to her, the trial court would have adjusted defendant's obligation accordingly a decade ago. Even if the court did not adjust the obligation based on when plaintiff ***could have*** begun

receiving those funds, it was required to at least adjust it as of the beginning of the period the $307,000 in rents covered.[3]

The trial court erred in failing to grant credit against defendant's arrears as a result of plaintiff's receipt of $307,000, either directly or via a reduction of the obligation to $300 per week as of the point plaintiff could have taken the rents.

4. As to Grand Street co-op sale and purported encumbrance.

Plaintiff claims there was no fraud involved in her decision to violate the court's order that the Grand Street co-op be "immediately" (Da XXXX) sold and instead (either actually or constructively) rented it.

Plaintiff acknowledges (Pb 17) that she was given authority to transfer the co-op to her name "to effectuate the sale."[4] This occurred in 2008 (Da 121).

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[3] On this point, plaintiff once again completely misrepresents the record to this court, citing "the December 27, 2011 Order" and stating "thus, the fraudulent liens were removed..." (Pb 17). This is the scenario plaintiff was urging before it came to light that she had in fact (as was discovered in 2017) took title to the East 16th street property in November, 2007 (Da 305-309) and had the levy vacated in August, 2008 (Da 456).

[4] See also plaintiff's certification below, Da 356 at ¶38, wherein plaintiff falsely claims that the 2008 order permitted her to "transfer his interest in the property to [her]" rather than the limited authority actually granted by the order to transfer title only to sell the property.

In an attempt to explain the lengthy (63 month) delay in the co-op being sold, plaintiff claims that "the sale was thwarted as a result of the $800,000 in [Martin] judgments" which "encumbered... the Grand Street properties." (Pb 17-18). The only citation plaintiff provides for this startling and utterly false claim is, once again, her own statement in her certification. If there were any evidence that the Martin judgments in any way effected the Grand Street co-op sale, plaintiff would have supplied it. It is an invention. It is disingenuous to say the least.

Finally, plaintiff attempts to explain away the five year delay in selling the property by pointing to defendant having stated that the co-op "was in poor shape and could not be rented" during the arbitration proceedings (Da 73). She (Pb 18) fails to provide an ellipse indicating that this is a partial sentence, however it is. The complete sentence is "Secondly, he claimed the property was in poor shape and could not be rented, although, at best, we find this would only be a temporary issue." It is disingenuous to say the least for plaintiff to present to this court a partial sentence as if it were complete.

Plaintiff also claims this issue was previously litigated (Pb 19). No citation for this claim is provided as it is false. The issue was never previously raised.

Defendant is entitled to a credit for the rents for the five year period between plaintiff obtaining title "to effectuate the sale" and her following through and selling it. The trial court erred in not granting him this credit.

5. As to claimed Grand Street co-op renovations.

Plaintiff avers that the contract for sale being dated months (Da 457) before the payment for the renovations were made (Da 458-461) is irrelevant, claiming that she agreed to make the renovations as a condition of the sale, and the closing did not occur until December 2012.

Yet, the sales contract (supplied for the first time in 2017 with her response to defendant's motion) shows no such condition. While now claiming that she had been working on the renovations over a long period of time, the contract for the renovations is dated in November. Plaintiff asks this Court to believe that she, a sophisticated self-proclaimed financial manager (Da 425-431) agreed to pay for renovations without any writing to this effect and a contractor would begin a $50,000+ project with no contract. Respectfully, this is an insult to this court's intelligence.

Plaintiff also never rebutted (in the trial court nor here) that she was prohibited from making any changes beyond minor cosmetic ones by the terms of the co-op agreement (Da 183) nor has she responded to defendant's report from an experienced realtor affirming that it is not cost effective to make extensive renovations that a new buyer may not want (Da 185). It also defies logic that someone who claims poverty would gamble on spending over $50,000 for renovations she wouldn't know a buyer wanted.

Defendant was to receive a credit against arrears for the net sales proceeds. Logic dictates what happened next: A side deal was

reached with the buyer wherein plaintiff reimbursed her for the renovations in order to lower the net sales amount. There is no other logical explanation.

Plaintiff then claims that she should get away with this apparent swindle as the issue of defendant challenging the renovations "was raised in 2013" (Pb 21). This ignores that the documents, including a copy of the contract for the sale and for the renovations **was not supplied until plaintiff filed her cross motion below in 2017.** It is thus not a "re-litigated" issue.

The trial court made no findings of fact nor conclusions of law as to **any** of the above issues, instead only verbally indicating it "accepted the accounting provided by the plaintiff that from what has already been entered as arrears, there has been an additional $102,767.17 accumulated in arrears to the end of his obligation. So, that is his entire obligation. I find that to be the number, and I'm entering -- did I -- and I'm entering a judgment as to that amount on top of whatever other judgments are out there already." (1T 35-4 to 35-11).

The trial court erred in not granting defendant a credit of $483,703 against arrears based on the total of the above credits as detailed in the accounting he provided below (Da 465). Combined with the credit he should have received for the $307,000 paid to plaintiff in back rental payments, his arrears are more than satisfied.

6. As to "Husband's long history of complete defiance of Court Orders."

In pointing out (in great detail) financial obligations defendant did not meet, plaintiff once again pretends that the arbitration panel did not find, **based on her stipulation** (Da 43) that he is a Talmudic scholar without any employment skills[5] (Da 75). In determining defendant's child support obligation that was to take effect when plaintiff received title to East 16th Street, the arbitration panel did not impute any additional income to him (Da 76-77, pages 73-75 of decision).

It is bad faith for plaintiff to stipulate to defendant's destitute financial state and then to repeatedly, incessantly, cast dispersions on his "failure to pay" when she more than anyone was aware that he had no ability to do so. This tactic may have distracted the trial court. It should not prevail here.

LEGAL ARGUMENT

I. THE APPELLATE DIVISION OWES NO DEFERENCE TO A TRIAL COURT ORDER That DECLINES TO ADDRESS THE MERITS.

Plaintiff urges that affirmance is appropriate as this court grants deference to a trial court's factual determinations.

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[5] Plaintiff makes reference (Db 50) to defendant having the ability to afford counsel in this matter. As was explained below in response to the trial court's inquiry on the same issue, defendant's counsel accurately represented to the court that all fees in this matter have been paid exclusively by contributions from members of the Orthodox community sympathetic to his plight (1T 26:10 to 26:17).

Indeed, the Appellate Division *is* bound by a trial court's factual findings when they are supported by adequate, substantial, and credible evidence. Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)).

Here, the whole point is that the trial court declined to reach the merits and make conclusions that would warrant deference from this Court. This court's review of the record as set out above should demonstrate that defendant's arguments had substance and should have been addressed below. Instead, the trial court would not review the merits based on a misapplication of the doctrine of unclean hands.

II. THE FUGITIVE DISENTITLEMENT DOCTRINE WAS NOT AND CANNOT BE APPLIED TO THE FACTS OF THIS CASE.

Plaintiff argues (Pb 26) that the trial court was correct in applying the Fugitive Disentitlement Doctrine. Yet, a review of the court's order shows that it did no such thing. The trial court reviewed counsels' letter briefs as to the issue (Da 468-491 and 492-512) and specifically did not apply it. Plaintiff's extensive examination of the Doctrine (Pb 27-31) is thus irrelevant.

Without making any findings nor reviewing the papers, it declined to review the merits, determining that defendant had "unclean hands." In violation of Rule 1:7-4, the trial court's order did not specifically rule on plaintiff's application to apply the Fugitive Disentitlement Doctrine. The only time it is

mentioned during oral argument was by defendant's counsel.

In fact, the trial court was very clear that it was not applying the doctrine. A litigant subject to it must personally surrender in order to be heard. Here, the trial court specifically held that defendant was not required to personally appear. Departing from its tentative decision, Judge Must ruled "...that portion where I said that he has to personally appear before me for any future application -- let's say there were no bench warrant, and he had chosen to pursue his career in Jerusalem. You can hire lawyers to come and appear before, you don't have to appear personally on something like that. I'm going to take that requirement out of my order, but I will leave the bench warrant with the purge amount." (1T 38:2 to 38:10).

Thus, the only thing preventing defendant from being heard was payment of the purge amount. Had the trial court examined the evidence (as forth above), it would have recognized that defendant in fact is entitled to credits exceeding his obligation. Instead, it established a Catch-22: "I will not consider your proofs that you have no arrears and have no ability to pay until you pay." This error warrants reversal.

As is her constant refrain, plaintiff urges this court to affirm as "at no time in the past decade did the Husband ever pay a penny towards the purge amount..." (Pb 27). Again, plaintiff stipulated that defendant is a "Talmudic scholar without traditional employment skills." His properties were distributed to plaintiff, who did not *allege* the existence of other assets. She

thus seeks to avoid having the court address the merits.

The doctrine is simply not appropriate here. In all the cases cited by plaintiff, there was no question as to the ability of a defendant to comply. In Matsumoto, a parent had absconded with a child and transferred assets. He was obviously able to return both the child and assets to New Jersey. Similarly, in the unpublished case of Jonas v. Jonas, A-5241-05, there was not even a claim that the defendant could not comply. In the unpublished Durrani case, A-942-10, where an appeal was dismissed based on the doctrine, there was similarly no question as to ability to comply. In yet another case cited by plaintiff, Macek v. Peisch, A-3291-15, the defendant had an earnings history of $130,000 per year. None of these unpublished cases are anywhere close to being on point.

In no case was there a situation where the obligee had stipulated that an obligor had no employment history and no assets beyond what had been distributed, and nonetheless sought to compel payment before fraud and indisputable credits would be considered showing the underlying obligation was satisfied.

As the Appellate Division noted in the previous appeal in this matter, "the fugitive disentitlement doctrine [is not generally applied] in a child support case to prevent the payor from seeking a reduction, even if a warrant had been issued for nonpayment of support. Judge Jones reasoned that the proper calculation of child support would generally disfavor the implementation of the doctrine." (Da 564, Slip Opinion at 5). Here, the issue is not the "proper calculation of child support",

but the stipulated emancipation of the children, the extinguishment of the obligation, and the application of credits that meet or exceed the purported arrears.

To the extent that Judge Jones' denial of plaintiff's 2013 application to apply the Fugitive Disentitlement Doctrine was a denial without prejudice, it was based on his then-existing belief that plaintiff had not received the title to East 16th Street and that a levy was still in effect. There is no basis to assert that, had he been aware that plaintiff was deceiving him on this vital issue, he would made his ruling without prejudice. Judge Jones was clear that the doctrine should never be applied where its application would prevent a court from considering the merits of a case (Da 564, Slip Opinion at 5, and Da 557 3:5 to 3:7).

Plaintiff asks this court to go beyond what the trial court ordered and apply the Fugitive Disentitlement Doctrine, imploring this court to deny relief to him until he does something she doesn't even *allege* he can do and to thus having the merits ever addressed. This effort should fail.

III. THE EMANCIPATION OF ALL THE CHILDREN CHANGES THE FUNDAMENTAL NATURE OF A SUPPORT OBLIGATION, RENDERING IT A COMMON JUDGMENT SUBJECT TO COERCIVE REMEDIES ONLY IF THE REQUIREMENTS APPLICABLE TO A WRIT OF *CAPIAS AD SATISFACIENDUM* CAN BE MET.

In urging that the stipulated emancipation of all the children is irrelevant to whether a warrant should remain in place, plaintiff begins with a proposition that is incorrect.

Plaintiff states that "bench warrants are issued to collect past, not future, obligations." (Pb 2, 40). Plaintiff cites to

Scalchi v. Scalchi, 347 N.J.Super. 493, 496 (App.Div.2002) for this proposition. Scalchi did not in any way hold that coercive remedies were appropriate when an arrears-only matter was before the court. Moreover, Scalchi was specifically abrogated by Pasqua v. Council, 186 N.J. 127 (2006) and is not good law.

Even putting aside the issue of whether coercive remedies such as a warrant are appropriate when, as here, there is a stipulation in the record that defendant cannot (not "will not") comply, the public policy considerations applicable to an ongoing support obligation do not apply to an arrears-only case.

As the Supreme Court has repeatedly made clear, the purpose of a warrant and incarceration is to coerce compliance, not collect debt. Pasqua v. Council, 186 N.J. 127, 142-44 (2006). The prerequisite for an enforcement order containing coercive provisions is a finding that the obligor possessed (in the past tense) the ability to comply and any failure to do so was therefore willful, Schochet v. Schochet, 435 N.J. Super. 542 (App.Div. 2014), **and** that the obligor has the ability (in the current tense) to comply. Pasqua v. Council, 186 N.J. 127 (2006). A warrant is legally justified only when a court finds "before ordering coercive incarceration, . . . that [defendant is] capable of providing the required **support**, but willfully refuse[s] to do so." Pasqua, 186 N.J. at 131 n.2.

Plaintiff next turns to the provisions of Rule 5:3-7(b) (Pb 41). The title of this Rule is "Alimony, Financial Maintenance, or Child Support Orders." It does not include "or

arrears thereunder" as an addendum nor are arrears referenced. By analogy, Rule 5:3-7(a) contains a list of potential sanctions a litigant can seek if an order for parenting time is violated. Just as these sanctions would plainly not be applicable to an emancipated child, the provisions of Rule 5:3-7(b) are inapplicable to an arrears-only case.

The holding that plaintiff urges, that a warrant is appropriate to collect a simple debt, would run directly contrary to the provision of the New Jersey Constitution prohibiting imprisonment for debt. NEW JERSEY CONST. 1947, ART. I, PAR. 13. This is precisely why Pasqua mandates findings regarding the current ability to provide "support" (not "support or arrears") before a warrant issues. See Pasqua v. Council, 186 N.J. 127 (2006) (stating that a parent is subject to criminal contempt proceedings pursuant to Rule 1:10-2 when the "parent fails to abide by a court-ordered **child support obligation**") (Emphasis added); Federbush v. Federbush, 5 N.J.Super. 107, 110 (App.Div. 1949). See also, c.f., Rule 5:7-4(a),(d) (monies payable through probation limited to "alimony, maintenance, or child support").

As pointed out in defendant's brief (Db 41), this would not, as plaintiff alleges (Pb 42), leave an obligee with no coercive recourse, but she would have to meet the requirements applicable to a writ of *capias ad satisfaciendum*, not those generally applicable to a current child support obligation.

While the emancipation of the children changes the fundamental nature of the obligation, it does not mean, as plaintiff avers,

that defendant "ran out the clock" and that there is no recourse against him in the unlikely event that the court should find any arrears exist after applying the credits defendant is entitled to.

IV. THE DOCTRINE OF UNCLEAN HANDS CANNOT JUSTIFY THE TRIAL COURT'S ABROGATION OF ITS DUTY TO ADDRESS AND DECIDE THE ISSUES.

Although reviewing the doctrine, plaintiff does not directly respond *at all* to the points defendant raised in his brief as to why the doctrine was not properly applied (Db 29-33).

The imposition of the doctrine is a form of equitable relief only available to a party with clean hands. It cannot be applied when one party has unclean hands.

Defendant provided significant evidence that plaintiff has significantly unclean hands. His submission below showed that plaintiff actively misrepresented the status of the title to the East 16th Street property and the Martin levy, along with taking no action to correct the belief of Judge Jones and defendant that she did not have title and was unable to receive the funds. She nurtured this incorrect belief, both passively and actively, including remaining silent during oral argument of the 2013 motion when Judge Jones inquired of defendant's counsel as to the status of plaintiff receiving title (Da 545 64:17 to 64:20, Db 10-11). It was falsely represented that plaintiff had *not* received title and was not receiving the rents (which she gained the right to receive

in August 2008 when the Martin levy was vacated - Da 456). For plaintiff to misrepresent the status of the title and levy is bad faith, precluding the application of the doctrine to defendant (Db 29-33). Plaintiff ignores this entire issue in her brief.

Similarly, plaintiff's actions surrounding the transfer of title to herself of the Grand Street property (Da 171, 457) in violation of the 2008 order granting her authority only to sell it (Da 121) and her rental of it preclude an award to her of equitable relief under the unclean hands doctrine (Db 29-33). Plaintiff ignores this entire issue in her brief.

Finally, plaintiff's hands were also unclean as a result of her undeniable failure to comply with the order requiring her to submit a Case Information Statement and disclose her current financial status. (Da 134). At Pb 47, plaintiff cites to a separate provision of the order as to the issue of child support. The operative provision of the order here could not be clearer: "However, both parties will file updated documented Case Information Statements and exchange same through counsel by June 30, 2013." (Da 134). Plaintiff refused to do so.

As stated, it is axiomatic that a litigant cannot come into a court of equity and seek equitable relief with unclean hands.

V. THE REMAINDER OF DEFENDANT'S CLAIMS ARE NOT BARRED BY THE ENTIRE CONTROVERSY DOCTRINE NOR RES JUDICATA.

In support of his application for what should have been the final proceeding in this matter, defendant set forth new claims

and new evidence. There was no way he could have procured this evidence earlier.

There was, for instance, no way he could have reviewed the contract for the renovations before it was supplied by plaintiff in response to his motion in 2017 (Da XX CITE).

Until he received a copy of her 2016 affidavit in the New York litigation showing that plaintiff would have received as little as little as $2,200 per month from East 16th Street (Da 317), defendant could not have been aware of plaintiff's motivation for delaying receipt of the East 16th rents.

His application to enforce the 2013 order requiring plaintiff to submit a case information statement could not have been previously adjudicated - there were no trial level proceedings between that order and defendant's motion in 2017.

Although N.J.S.A. 2A:17-56.23(a) generally precludes the retroactive modification of child support, appellate courts have consistently found that an adjustment based on emancipation should be retroactive to the emancipation date. See, e.g. Mahoney v. Pennell, 285 N.J.Super. 638 (App. Div. 1995), Bowens v. Bowens, 286 N.J.Super. 70 (App. Div. 1995), Ohlhoff v. Ohlhoff, 246 N.J.Super. 1, 8 (App.Div. 1991), Thorson v. Thorson, 241 N.J.Super. 10 (Ch.Div.1989). Defendant could not have filed a motion in 2013 to affirm the emancipation of all the children and obtain a final calculation as to arrears when the last child was not even emancipated until 2015.

The claim that the court cannot perform a final analysis as

to credits resulting from emancipation insofar as it predates 2012 because a judgment was entered in 2012 is incorrect. As per N.J.S.A. 2A:17-56.23(a), all child support obligations are a judgment by operation of law, yet the above-cited case law is clear that a court must determine emancipation dates and credit support accordingly upon the emancipation of children. Plaintiff again provides an accounting (Pb 56) but does not provide any basis for the dates arbitrarily chosen for emancipation.

The notion that the children should not be considered emancipated until each was 21 and an accounting run on that basis is incorrect. Several of the children were emancipated by court order at age 18 (Da 153-155) and one via a published judicial decision, Ort v. Ort, 428 N.J.Super. 290, 296-97 (Ch.Div. 2012). Plaintiff's own certification statement from March of 2013 makes reference to "our two (2) remaining unemancipated children..." (Da 147-149 ¶34). She now urges different dates to this court. As the children received their accounts when they turned 18 (Da 153-156), and as they disavowed any relationship with defendant at that time, and as several were emancipated by court order at that age, this court can and should adopt the accounting defendant provided in the trial court and adjust arrears accordingly (Da 465).

For plaintiff to aver to this court that defendant "chose to essentially re-file [in 2017] the same motion he filed four years ago" and is thus barred by res judicata and the entire controversy doctrine (Pb 49-54) is absurd. Neither the issues nor the proofs existed four years ago.

VI. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF COUNSEL FEES AND IN FAILING TO AWARD DEFENDANT COUNSEL FEES AND COSTS FOR THE ENFORCEMENT PORTIONS OF HIS MOTION.

Once again, plaintiff ignores the arguments defendant raises as to this point. Plaintiff acknowledges that the trial court did not undertake the mandatory analysis that must precede a counsel fee award. Rule 4:42-9(a)(1); N.J.S.A. 2A:34-23; Williams v. Williams, 59 N.J. 229 (1971); Rule 5:7-5 and Rule 4:42-9(a)(1). She does not dispute that there were significant deficiencies in the certification of services presented (Da 404-411, Db 45). The resulting fee award should be reversed.

Conclusion

For the above reasons, this court should reverse the trial court's September 15, 2017 order, exercise original jurisdiction, and enter a just and final order closing this matter out.

Respectfully submitted,

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