SUPERIOR COURT OF NEW JERSEY
Appellate Division
DOCKET NO. A-5406-12T1

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

Respondent's Brief

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New Jersey Case Law

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Procedural History

Except as contradicted below, defendant adopts the procedural history as set forth by plaintiff.

Counter-statement of Facts

Plaintiff's statement of facts amounts to little more than a series of unsupported and insupportable *ad hominem* attacks against defendant. The citations to its alleged "facts" are almost *exclusively* to plaintiff's own certifications, not findings by the Court in the record below on this application.

Although the Appellate Division is not the venue to make and defend factual allegations, defendant is concerned that a prejudicial effect could be gained by plaintiff's fantastic version of the history of this matter and background "facts." There are several key issues omitted from plaintiff's version of the history of this matter.

Most importantly, plaintiff's claims that she received "$0 in child support" (Pb 14), is "engulfed in debt" (Pb 12) and is "reliant on the small amount that remained in the children's custodial funds" (Pb 10) can only be described as chutzpa. Plaintiff has received in excess of $1,500,000 since the 2008 entry of the arbitration judgment, via dispersements from custodial accounts established solely by defendant's family (Pa 307, 332-337, 410, T27-6 to 27-7). *Pendente lite*, she

received $25,000 per month (Pa 338-339)[1] from investment accounts established by defendant's family. She currently receives, each and every month, the sum of $6,450 from these accounts. This is in addition to equitable distribution, including properties recently sold for $340,000 and $445,000 respectively (Pa 344, 345). Weeks before the divorce complaint was filed, plaintiff accessed defendant's deceased mother's personal account, transferring out $600,000 using a power of attorney that had expired on defendant's mother's death (Pa 348). Plaintiff eventually admitted under oath that she had done this, claiming (without proof) she no longer has these pilfered funds as she "donated them to a Yeshiva" (Pa 307, 347). She currently lives in a 3,752 square foot home on an 18,730 square foot property with a pool (Pa 308).[2]

In sum, in contrast to the histrionic and outrageously false claims to this Court that she was left impoverished and reliant on charity, plaintiff has never even attempted to deny in the trial court that she has received a fortune. The argument in the court below has been over the source of the funds, not whether

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[1] The arbitration decision eventually determined that this amount was too high and retroactively modified it. Pa 29.

[2] Plaintiff has received a total of $3,329,000 from defendant since the inception of this litigation, excluding the $600,000 she wired out of defendant's deceased mother's account shortly before the complaint.

they were received. This appeal does not concern itself with whether defendant is wrong by using funds from his family to support his children rather than using his separate resources; the issue is whether the trial court abused its discretion by denying plaintiff's demand to invoke the unusual remedy of the Fugitive Disentitlement Doctrine so as to prevent defendant from being able to seek redress in the trial court as to any of the many pending issues between the parties.

Plaintiff makes outlandish allegations in a transparent attempt to inflame this Court.[3] Among these is the claim that defendant was involved in the distribution of flyers criticizing plaintiff for misrepresenting her financial status to members of the community as she has done to this Court (Pa 194-198) and for violating Jewish law. The couple lived as Orthodox Jews in an Orthodox community throughout the marriage. One of the tenants of orthodox Judaism is that monetary disputes be submitted to a rabbinical tribunal (a *Beis Din*). Plaintiff refused. Her

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[3] Defendant does not intend to review, rebut, and correct every misportrayl of the record. It is requested that the appellate division not deem his failure to engage in a lengthy response doing so as an admission. It should suffice to point out that the only support provided to this court for vast majority of the allegations comprising plaintiff's purported "statement of facts" are her own certifications, not (as required in an appeal) findings by the trial court and that plaintiff is in fact a millionaire several times over, not "destitute."

refusal to so is deeply offensive to the community, any member of who might have put up these signs.[4] There is (and can be) no proof that defendant did this or even approved of it being done. Yet, plaintiff states in her brief that "[Defendant] also enlisted an individual..." as if there had been a finding that defendant was behind this. Most importantly, this issue is raised solely to inflame this Court. These allegations are clearly irrelevant to the issue of the Fugitive Disentitlement Doctrine as they occurred long after the defendant had relocated.

Plaintiff devotes considerable space to arguments regarding the East 16th Street property. Litigation concerning the property and the issue of the legitimacy of Mr. Martin's judgments and lien is ongoing in New York. If, as plaintiff repeatedly states, that litigation is over and the liens vacated, then plaintiff should be receiving the rents and defendant's support obligation should be reduced to $300 per week (Pa 227). This is not the situation because, contrary to plaintiff's assertions, the litigation is still underway, currently in the discovery phase. This is not the forum to attempt to resolve that issue. What is relevant is that plaintiff cites to Pa 151 eleven times in two pages (Pb 12-13). Once again, Pa 151 is

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[4] As plaintiff is aware, similar signs have been distributed as a result of other members of the community (having no connection whatsoever to the parties to this case) violating fundamental tenants of Orthodox Judaism.

plaintiff's own certification and claims, not findings of the trial court in this matter.

Plaintiff sold two martial properties in the past two years. In 2012, she sold the parties' Lakewood home for $340,000 (Pa 344). Defendant is entitled to have his 50% share of the net proceeds applied against his support arrears. In 2013, a New York co-op was sold by plaintiff for $445,000 (Pa 345). Defendant is entitled to have the entirety of the net proceeds applied against his support arrears (Pa 174, 175). This credit has not been properly taken into account, although the trial court acknowledged that it needs to be done to accurately determine defendant's arrears, with Judge Jones stating he wasn't "going to sit here and try to figure that out **at this juncture.**" (T74-7 to 74-8, emphasis added). Substantial questions regarding the credit defendant is entitled to remain open (including a challenge to plaintiff's highly unlikely claim that a small co-op required **$53,000** in renovations) (T73-2 to 74-8). The application of the Fugitive Disentitlement Doctrine would prevent defendant from seeking the appropriate credits, which potentially could satisfy his obligation in its entirety and leave him with a

credit balance.[5]

Additionally, litigation is pending regarding plaintiff's alleged misappropriation of funds from the DOVE foundation, a charitable trust established by defendant's family (Pa 269-286, 404-405), the emancipation of the one remaining child, the issue of the legitimacy of the judgments against the East 16th Street property (pending in New York), and the division of the assets of the DOVE foundation (pending in New Jersey). It should be clear why plaintiff is seeking the extraordinary relief of the application of the Fugitive Disentitlement Doctrine to preclude defendant from pursuing these issues.

In sum, it is only by asserting a completely fictional version of the record wherein plaintiff is an innocent victim who was left destitute that she can even allege that Judge Jones abused his substantial discretion.

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[5] Plaintiff claims (Pb 20 at footnote 2) that "now that the Grand Street property has been sold, the updated arrearage calculation includes the $500 per month ... that accrued [until its sale.] This sum which totals $31,500 was **never before included in the Husband's arrearage calculation.**" This is yet another example of plaintiff taking wild liberties with the record. Pa 246 -- plaintiff's version of defendant's arrears -- absolutely does include this $31,500. Additionally, plaintiff claims that the credit defendant is to receive is "with capital gains still to be deducted." In fact, capital gains were already deducted as shown on the Escrow Accounting (Pa 242). Plaintiff seeks to apply the Fugitive Disentitlement Doctrine in order to prevent her claims from scrutiny.

Legal Argument

I. JUDGE JONES ACTED WITHIN HIS DISCRETION IN DECLINING TO APPLY THE FUGITIVE DISENTITLEMENT DOCTRINE.

A. The Appellate Division should apply an abuse of discretion standard of review. Plaintiff has failed to meet her high burden of demonstrating Judge Jones abused his substantial discretion.

The Appellate Division generally accords great deference to the discretionary decisions of Family Part judges. Donnelly v. Donnelly, 405 N.J.Super. 117, 127 (App. Div. 2009) (*quoting* Larbig v. Larbig, 384 N.J.Super. 17, 21 (App. Div. 2006)). "Judicial discretion connotes conscientious judgment, not arbitrary action; it takes into account the law and the particular circumstances of the case before the court.'" Hand v. Hand, 391 N.J.Super. 102, 111 (App. Div. 2007) (quoting Higgins v. Polk, 14 N.J. 490, 493 (1954)).

An abuse of discretion only "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (*quoting* Achacoso-Sanchez v. Immigration & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

Plaintiff does not allege that Judge Jones did not understand the Fugitive Disentitlement Doctrine, that his decision was arbitrary, inexplicably departed from established policies, or rested on an impermissible basis. Indeed, Judge Jones' ruling, and his written amplification of his oral decision (Pa 436), demonstrate that he fully grasped the issues and was

acting well within the bounds of his considerable discretion.

Of course, Judge Jones (who has been handling this matter for several years) based his ruling on the actual facts and history of this matter, not the fabrication of the record provided to this Court wherein plaintiff is a destitute victim.

B. Judge Jones did not abuse his discretion in holding that the Fugitive Disentitlement Doctrine should not be applied to the facts of this case.

It is the strong public policy of New Jersey that matters should be decided on their merits wherever possible. *See, e.g.,* Tyler v. New Jersey Automobile Full Insurance Underwriting Association, 228 N.J.Super. 463 (App.Div. 1988), *citing* Henderson v. Bannan, 256 F.2d 363, 390 (Potter Stewart, J., dissenting) (6 Cir. 1958), Audubon Volunteer Fire v. Church Const. Co., 206 N.J.Super. 405, 407 (App.Div. 1986), Automatic Washer Serv. v. Brunswick Burl., Inc., 153 N.J.Super. 343 (App.Div.1977). The Fugitive Disentitlement Doctrine runs contrary to this general rule of public policy and has therefore been only sparingly applied, when there is no lesser remedy available. The Supreme Court has cautioned that the doctrine "should be sparingly invoked, because remedies that bar consideration of claims on the merits are, in the main, contrary to our notions of justice." Matsumoto v. Matsumoto, 171 N.J. 110 (2002).

As plaintiff points out, the application of the Doctrine to civil defendants in New Jersey first occurred in Matsumoto v. Matsumoto, 171 N.J. 110 (2002). The Matsumoto Court articulated

the test as to when the doctrine should be applied:

> We adopt as our guide the following standards that we have distilled from relevant case law: the party against whom the doctrine is to be invoked must be a fugitive in a civil or criminal proceeding; his or her fugitive status must have a significant connection to the issue with respect to which the doctrine is sought to be invoked; invocation of the doctrine must be necessary to enforce the judgment of the court or to avoid prejudice to the other party caused by the adversary's fugitive status; and invocation of the doctrine cannot be an excessive response.

The Matsumoto Court did not provide a detailed definition of a fugitive in the civil context, but it is self-evident that it cannot be applied reflexively in every case solely because a litigant has failed to comply with a Court Order.

While a litigant who flees to frustrate the authority of a court in a civil matter can be considered a fugitive, in every published case addressing the application of the Fugitive Disentitlement Doctrine, the defendant was also the subject of a criminal warrant, not solely a civil one. In Matsumoto, the defendant had been indicted for conspiracy to interfere with child custody, interference with child custody, and child endangerment. Id. at 115. While the existence of a criminal warrant is not an explicit requirement for the application of the Fugitive Disentitlement Doctrine, the threshold for what constitutes a "fugitive" in this context has traditionally been higher than simply not surrendering when a support-related

warrant is in effect.

Next, to apply the Fugitive Disentitlement Doctrine, "his or her fugitive status must have a significant connection to the issue with respect to which the doctrine is sought to be invoked." Plaintiff's motion sought to restrain the court from "grant[ing] the defendant any affirmative relief until he personally appears before this tribunal and satisfies the conditions to purge the bench warrant for his arrest" (Pa 140).[6] The issue of whether plaintiff received over $1,500,000 from defendant personally or from assets his family accumulated is only one of the may issues between the parties, yet application of the doctrine would bar defendant from being heard as to any issue. By way of one example only, the issues regarding the misuse of funds from the DOVE foundation has no connection to the issues "with respect to which the doctrine is sought to be invoked." Plaintiff is seeking to invoke the doctrine to avoid having to be held accountable on this and other issues.

Other issues aside from the source of the funds plaintiff received include the emancipation of the one remaining child, the issue of the legitimacy of the judgments against the East 16th Street property, the correction of the child support judgment to reflect plaintiff's receipt of $785,000 from the sale of

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[6] Notably, plaintiff does not so much as *allege* in her cross motion that defendant has access to $65,000 in cash to satisfy the bench warrant.

properties, division of the assets of the DOVE foundation (pending in New Jersey), and the potential misappropriation of the DOVE foundation funds (pending in New York). Suffice it to say, when there are this many pending, legitimate issues, plaintiff has not established that defendant's "status [has] a significant connection to **the issue** with respect to which the doctrine is sought to be invoked." The Doctrine is designed to be a shield, protecting a litigant from having to litigate an issue against a fugitive. Here, plaintiff seeks to use it as a sword to avoid being held accountable on any of the ongoing issues. Judge Jones did not abuse his discretion by preventing this injustice from occurring.

Next, Matsumoto requires that "invocation of the doctrine must be necessary to enforce the judgment of the court or to avoid prejudice to the other party caused by the adversary's fugitive status." It has not been disputed that defendant has essentially no earnings history (Pa 33-34). The parties lived off the largess of defendant's family while he acted as a Rabbi and Talmudic scholar in the community during the entirety of the marriage and thereafter. Plaintiff has not alleged (and cannot allege) that invocation of the doctrine is necessary to enforce the judgment the same way that it might be if defendant had an earnings history and the ability to make payments. In the vast majority of cases where the doctrine has been applied, the physical presence of the defendant was required for a court to do justice. Most cases involve the return of a child or the

execution of documents permitting access to assets when there was no question but that they had been deviously placed beyond the reach of a creditor. Any enforcement of the judgment in the case before this Court can be obtained by the issuance of powers of attorney (evidenced by, for example, plaintiff's recent sale of $785,000 worth of properties) (Pa 344, 345). Plaintiff has not alleged any prejudice to her ability to proceed has been caused by defendant's residence abroad.

Finally, the law requires that "invocation of the doctrine cannot be an excessive response." No case specifically describes what constitutes an "excessive response." The definition of "excessive" is obviously a matter of discretion. Judge Jones' discretion was properly guided by the case law and his extensive familiarity with the facts. As the Matsumoto Court noted approvingly from Goya Foods, Inc., v. Unanue-Casal, 275 F.3d 124, 129 (1st Cir. 2001), "the Fugitive Disentitlement Doctrine is 'discretionary rather than automatic and to be applied with caution'." Matsumoto v. Matsumoto, supra, 171 N.J. at 129.

The cases where courts have found that application of the doctrine was not excessive involved far more outrageous facts than those at issue here. In Matsumoto the defendant withheld the couples' child in Japan, liquidated all of the couple's assets, moving them abroad outside the reach of the Court. He locked the wife out of the marital home and disposed of all their personal property. Id. at 114. The wife was actually (as opposed to the facts in this matter) left destitute. Further, at

one point the husband had returned to New Jersey and surrendered his passport to the Court. He hid from the Court the fact that he had a second passport which he then used to leave the country, where he remained, thumbing his nose at every attempt to enforce the wife's rights with respect to custody, support and property. Id. at 116. In sum, in terms of the nature of the Defendant's conduct, there is simply no comparison to be made between the facts of this case and those in Matsumoto.

The parties acknowledge that there is only child who is unemancipated at this point. Upon his emancipation, this will become an arrears-only case, with a very different priority status and the far simpler, insular question of "how much can Mr. Ort pay toward the judgment." Plaintiff's lust to apply the Fugitive Disentitlement Doctrine to prevent this from occurring can only be described as bad faith. It would place defendant in an intractable "catch 22" situation where he cannot seek to end his ongoing support obligation and seek appropriate credits.

It is fundamental to all Courts (and particularly the Family Part), that the Court is vested with, and charged to do equity. The application of the Fugitive Disentitlement Doctrine to this case will abrogate the long standing maxim that, "Equity will not knowingly become an instrument of injustice." Warner v. Giron, 141 N.J.Eq. 493, 498 (Ch.Div. 1948).

Judge Jones did not believe that the application of the doctrine was appropriate at this time. The case law is uniform that the "Fugitive Disentitlement Doctrine is discretionary

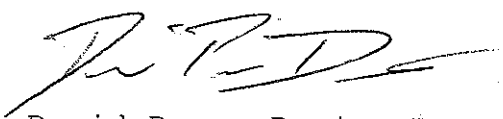
rather than automatic and to be applied with caution" Goya Foods, Inc. v. Unanue-Casal, 275 F.3d 124, 129 (1st Cir. 2001). In sum, the record amply supports Judge Jones' decision not to apply the Doctrine based on the (actual) facts before him and his extensive feel for the case.

Conclusion

Judge Jones' findings at oral argument (1T) and his amplification of his oral decision (Pa 436-439) demonstrate that he fully grasped the legal issues related to the Fugitive Disentitlement Doctrine and determined that, based on his considerable experience with the case and the actual facts (as opposed to the wild misrepresentation of the record provided to this Court), the application of the doctrine was not appropriate. As he states in his decision, "it is particularly important for a court of equity to have discretion on such an issue. Family Court is a court of equity." (Pa 437).

Plaintiff has failed to meet her high burden of demonstrating Judge Jones abused his substantial discretion or that his decision was in any way unjust. His decision should therefore be affirmed by this Court.

Respectfully submitted,



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