SUPERIOR COURT OF NEW JERSEY
Appellate Division
DOCKET NO. A-001179-97T5

	)	Civil Action
Randi J. Margrabia	)	
	)	On Appeal from
Plaintiff / Respondent	)	
	)	A Final Judgment of the Superior
vs.	)	Court of New Jersey, Chancery Division,
	)	Family Part, Gloucester County
Joseph T. Margrabia	)	
	)	Sat below:
Defendant / Appellant	)	Hon. John Tomasello, J.S.C.
	)	

Appellant's Reply Brief

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Table of Contents

Table of Authorities

Federal Case Law

New Jersey Statutes

New Jersey Case Law

New Jersey Court Rules

Pennsylvania Case Law

Unpublished decisions

Reply to Counter-statement of Facts

Initially, defendant objects strenuously to plaintiff's inflammatory lie in her counter-statement of facts that Defendant struck the parties' three year old child. This vicious allegation was withdrawn at the domestic violence hearing, had never re-emerged until plaintiff's response brief and is completely unsupported by the record below. This court is encouraged to review plaintiff's trial testimony on the incident in question, which at no point even makes this allegation (1T 10-19 to 12-9) and the trial court's findings, which do not in any way reference this heinous claim. The only trial court finding on the relationship between defendant and his son was a finding of fact that "the one thing that comes out absolutely clear is that Mr. Margrabia cares for his son . . . there is no indication that J.T. is not safe around his father. And there's no indication as to any reason why there should be restricted visitation" (5T 19-11 to 19-12). Plaintiff revives this slanderous allegation in her response brief in an attempt to inflame this court into ignoring the reversible errors of the trial court. This effort should fail.

Plaintiff goes into minute detail discussing plaintiff's version of the domestic violence in this matter, again as if its existence should justify the trial court's abrogation of the parties' antenuptial agreement that both parties stipulated at trial was valid.[1] Moreover, plaintiff's mis-portrayal of the parties relationship contradicts the findings of the trial court.

As is the case in most divorces, the parties relationship had been in a period of dysfunction for a long time before the parties separated. Arguments were frequent and there was virtually no meaningful communication. At the hearing wherein the domestic violence Order was entered, Judge Herman found that "perhaps plaintiff has a flash temper." In the matter under appeal, after viewing the parties through several days of trial testimony Judge Tomasello found defendant's allegation that plaintiff was "aggressive" and had an "in your face" attitude was "certainly

[1] THE COURT: . . . but what I want to make clear for the record then, is that there is a stipulation as to the validity of the antenuptial agreement. And I accept that. (3T 46-23 to 46-25).

possible," and that plaintiff is "a lady who has a strong personality, and who certainly has opinions." (5T 17-8 to 17-21). He completely *rejected* plaintiff's inflated claim that she suffered from battered woman's syndrome and was an innocent victim of this syndrome, finding that "insofar as there was a claim for battered woman syndrome, under a Tevis count, I'm going to dismiss that as being no cause of action." (5T 14-24 to 15-1). Yet plaintiff's response brief seems to proceed on the assumption that this claim had been validated and that the court found defendant to be the only party responsible for the breakdown of the marriage. This attempt to inflame this court into ignoring the trial court's errors is totally unsupported by the record. Whatever the parties' relationship, defendant crossed the line when he became physically violent, and suffered the full weight of the punishment for these offenses. In fact, some of the punishments he received were found to be so excessive that they were reversed on appeal.

The trial record showed that defendant had never before been convicted of a disorderly persons offense. At the time of the domestic violence incident that led to the parties' separation, he was an honorably discharged United States Army veteran and had been an attorney at law for over a decade. He had practiced law without a single ethics complaint and volunteered time for several pro bono law projects.

For this first offense, defendant was sentenced to 30 days in jail (suspended), two years reporting probation, 400 hours of community service (200 hours per year for two years), he was compelled to enroll in PASA, submit to an alcohol evaluation and attend two A.A. meetings per week. He was also suspended from the practice of law for three months, nearly destroying his client base and costing him thousands of dollars. Portions of this sentence were overturned by the appellate division as manifestly excessive. See State v. Joseph T. Margrabia, Appeal No. A-001749-95T1.

In engaging in combative behavior with his former wife, defendant committed a serious crime and paid for it by a criminal sentence, severe sanctions against his career, and extensive civil damages. To also excuse the trial court's failure to enforce the antenuptial agreement based on

this offense is an unjust additional punishment that is contrary to the law and should not be sanctioned by this court.

Plaintiff's counter-statement of facts also asserts that defendant diverted income from his law practice while plaintiff paid the "lion's share" of the household bills. This argument completely ignores the undisputed fact that defendant had basically closed down his law practice in Pennsylvania in order to prepare for the New Jersey bar examination. Plaintiff correctly recollects the income figures she presented at trial, which show that while defendant was basically unemployed and then slowly building a law practice, her income fluctuated between $35,000 and over $90,000 per year.

Defendant maintains that the statement of facts presented in his appellate brief more accurately represents the findings of the trial court as to what occurred between the parties, and that, no matter what version of the facts is accepted, they do not justify the court's improper divergence from the parties' antenuptial agreement and an abrogation of the well-settled law concerning the assessment and modification of a compensatory damage award.

When considering this appeal, this court must be aware that under the trial court's decision defendant received nothing. Plaintiff received the marital residence, everything contained in it, nearly every asset acquired by the parties, and at least $14,500 in credits to which she was not entitled under the antenuptial agreement (Da 133), even before the court improperly tripled the compensatory damages. The trial court used inconsistent dates for the valuation of marital assets, ignored the well-settled law that a valid antenuptial agreement constitutes a waiver of equitable distribution, and failed to enforce the agreement by accepting an argument that debts were outside of its scope in spite of the agreement's clear language to the contrary. The trial court's completely inequitable division of marital assets would require reversal by this court even in the absence of a valid antenuptial agreement. The errors of the trial court are in fact so clear that plaintiff is compelled to attempt to sway this court into affirmance by inflammatory lies

claiming that defendant had abused his son.

☺ LEGAL ARGUMENT

I. THE TRIAL COURT ERRED BY PERFORMING EQUITABLE DISTRIBUTION IN SPITE OF THE EXISTENCE OF A VALID ANTENUPTIAL AGREEMENT

Initially, plaintiff concedes that the existence of a valid antenuptial agreement constitutes a **waiver** of the parties' right to have a court equitably distribute a marital estate (Respondent's Brief at 9). An antenuptial agreement is not a supplement to the equitable distribution statute nor a "factor" to be considered. Where a valid antenuptial agreement exists, it and not N.J.S.A. 2A:34-23 controls the distribution of property. Marschall v. Marschall, 195 N.J.Super. 16 (Ch.Div. 1984), Karkaria v. Karkaria, 405 Pa.Super. 176, 592 A.2d 64 (App.Div. 1991).

Plaintiff then raises an interesting argument that the trial court found changed circumstances sufficient to modify the argument. It is well settled law that matters not raised below cannot be raised on appeal, except where the question goes to the jurisdiction of the subject matter or where a question of public policy is involved. R. 2:10-2[2], Cornblatt v. Barrow, 303 N.J. Super. 81 (App.Div. 1997), Hall v. Hall, 11 N.J. Super. 97 (App.Div. 1951).

The issue of "changed circumstances modifying the antenuptial agreement" was never even mentioned during the trial court proceedings. Neither plaintiff's (Da 111-120) nor defendant's (Da 100-108) pre-trial memorandum even addressed the issue, and the transcript is devoid of any reference by any party or by the court to either the caselaw or arguments raised in plaintiff's response brief.

Plaintiff's argument rests on facts that are not only not contained in the record below, but contradict the findings of the court. To support her new "changed circumstances" argument, she claims that "defendant obviously did not disclose to plaintiff that he was not going to contribute to household expenses [at the time of the signing of the antenuptial agreement]" (PB at 10).

[2] The court should note that plaintiff is in direct violation of Rule 2:6-2, which states that "it is mandatory that any point not presented below be so indicated by including in parenthesis a statement to that effect in the point heading."

Plaintiff provides no citation to record below to support this "obvious" conclusion. In reality, it was undisputed at trial that Defendant basically gave up his Pennsylvania law practice after, on Plaintiff's urging, the couple moved to New Jersey to provide a better environment for their young son. Accordingly, defendant's income plummeted while Plaintiff's rose to where she earned between $30,000 and over $90,000 per year. Naturally, under these facts, plaintiff paid "the lion's share" of the household expenses (3T 50-15 to 50-24). Had the parties remained married, defendant would undoubtedly have paid a greater share of the expenses as his income grew.

In any case, this court should remain focused on the errors that were committed at trial, not new arguments based on speculative facts. The argument presented below by plaintiff in order to persuade the court to abrogate the antenuptial agreement (after conceding its validity[3]) was that "debt is completely in [the trial court's] jurisdiction and in your ballpark to deal with it in accordance with the statute of equitable distribution" (3T 46-14 to 46-20). The trial court accepted this argument in the face of the clear language of the antenuptial agreement that it applied to "any and all claims, demands, liabilities and obligations . . . arising out of the marital relationship" (Da 90). This, along with the remainder of the "equitable distribution" that took place in spite of the valid antenuptial agreement, and the improper reassessment of compensatory damages, constituted reversible error.

II. THE TRIAL COURT ERRED BY FAILING TO VALUE THE MARITAL ASSETS AS OF THE DATE OF DIVORCE PURSUANT TO PENNSYLVANIA LAW AND THE EXPLICIT TERMS OF THE PARTIES' ANTENUPTIAL AGREEMENT

Plaintiff's response does not even address this argument, and therefore she should be deemed to

[3]THE COURT: . . . but what I want to make clear for the record then, is that there is a stipulation as to the validity of the antenuptial agreement. And I accept that. (3T 46-23 to 46-25).

have conceded this point. In his appellate brief, defendant argued that the admittedly valid choice of law provision of the parties' antenuptial agreement mandated that Pennsylvania law control the date used for equitable distribution.

Plaintiff's response simply argues New Jersey law and gives a brief recounting of New Jersey law on the issue. Plaintiff's brief simply never addresses the issue of the choice of law provision of the parties' antenuptial agreement.

As stated in defendant's brief, the date for the valuation of the marital residence should have followed the general Pennsylvania rule that such assets are to be valued as of the date of distribution, not the New Jersey rule discussed in Brandenburg and explained in depth by plaintiff's response. *See, e.g.* Wellner v. Wellner, 699 A.2d 1278 (App.Div. 1997) (proper time for valuing marital property is proximate to date of distribution, not separation), Oaks v. Cooper, 536 Pa. 134 (App.Div. 1994).

Moreover, the inconsistencies of the date used by the trial court require reversal. As plaintiff points out (PB at 16), the trial court granted plaintiff a $4,000 credit for her payment of the mortgage between the time of the domestic violence adjudication and the time of trial (5T 4-16 to 5-2). Apparently, the trial court applied Pennsylvania law when to do so would benefit plaintiff (by giving her a mortgage paydown credit between the time of separation and judgment), and applied New Jersey law when to do so benefitted plaintiff (by valuing other assets at the time of separation). Defendant submits that, pursuant to the antenuptial agreement, Pennsylvania law should have been applied to all valuation issues.

Plaintiff also fails to rebut defendant's argument that, regardless of which state's law is applied, the parties' antenuptial agreement sets a specific time for the valuation of marital assets. The agreement controls the division of marital property "in the event they were to be ***divorced***" (Da 87). The trial court erred by ignoring the explicit terms of the agreement.

The trial court should be reversed for its failure to apply Pennsylvania law and its separate

failure to follow the terms of the parties' valid antenuptial agreement. On remand, the trial Court must apply Pennsylvania law in dividing the equity in all marital property that existed as of the date of the parties' divorce trial in May, 1997. At a minimum, on remand the trial court must be consistent in the date used for the valuation of marital assets.

III. THE TRIAL COURT ERRED BY FAILING TO APPLY PENNSYLVANIA LAW TO THE DOMESTIC TORTS ISSUES

Once again, plaintiff's response attempts to assert novel arguments never presented below to justify the trial court's decision. The Restatement (2nd) of Conflicts of Laws principles were not briefed, discussed, nor argued by any party nor did they appear in the decision of the trial court. The actual argument presented to the trial court centered on the Prevention of Domestic Violence Act. Defendant does not now nor has he ever challenged the application of New Jersey law to the restraining order entered pursuant to N.J.S.A. 2C:25-17. The trial court took immediate action to separate the parties following the filing of the domestic violence complaint. The jurisdiction of the court to take this action was not and is not challenged, as it clearly implicates public policy.

This statute, designed to provide "the maximum protection from abuse that the law can provide" remains totally irrelevant to a choice of law provision designed to address the ***economic*** consequences of domestic violence. As defendant stated in his brief, when a valid contract contains a choice of law provision all related claims including tort claims that are directly related to the subject matter of the contract are subject to the contract's choice of law provision. *See, e.g.* Jiffy Lube International v. Jiffy Lube, 848 F.Supp. 569 (E.D.Pa.1994) (choice of law provision applies to tort claims when fair import of the provisions embraces all aspects of the

legal relationship), Unibase Systems, Inc. v. Professional Key Punch, No. CIV.A. 86-213, 1987 WL 41873 (D.Utah 1987), First Commodity Traders v. Heinold Commodities, 591 F.Supp. 812 (N.D.Ill.1984), *affirmed*, 766 F.2d 1007 (7th Cir.1985).

In any case, plaintiff's argument on this issue, even if considered by this court, still fails. Defendant maintained his Pennsylvania law practice and even if it was scaled down during the period when defendant studied on a full-time basis for the New Jersey bar examination, it still produced income included in the marital estate. The parties maintained a connection with Pennsylvania sufficient to overcome the Restatement argument.

Plaintiff's conclusion on this matter is confusing. Although the point heading addresses which state's law which should have controlled the economic aspects of the domestic violence allegations (PB at 14), plaintiff's conclusion centers on which state's law should have applied on the issue of the valuation of marital assets (PB at 16). Whether through a serious typographical error or an inability to rebut defendant's arguments, plaintiff should be deemed to have conceded this point.

IV. THE TRIAL COURT ERRED BY CONSIDERING DEFENDANT'S ASSETS WHEN RE-ASSESSING COMPENSATORY DAMAGES

Plaintiff raises the undisputed point that the Superior Court has the authority to modify a damages award and cites supporting caselaw. However, the authority of the court to modify the award was never challenged by defendant, the grounds upon which this modification occurred was. The trial court's dramatic increase in the compensatory damages awarded plaintiff were plainly motivated by the $28,621 credit it had granted defendant. It was the only change that occurred between the court's assessment of compensatory damages and its *sua sponte* revision of those damages a month later.

The factors cited by the Supreme Court of New Jersey when addressing the permissible factors

apply equally to the chancery and law divisions of the Superior Court and plaintiff's statement to the contrary is ridiculous. Compensatory damages are designed to compensate, not punish, and our Supreme Court has held that a defendant's assets are irrelevant. *See* Anderson v. Exxon Co., 89 N.J. 483 (1982); Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399 (1973), Jackson v. Concord Co., 54 N.J. 113 (1969), Gimello v. Agency Rent-A-Car Systems, 250 N.J.Super. 338 (App.Div.1991), Shaner v. Horizon Bancorp., 116 N.J. 433 (1989). The trial court did exactly what is was prohibited from doing when it simultaneously corrected its prior failure to grant defendant a $28,621 credit and, *sua sponte,* more than tripled the compensatory and punitive damage awards.

Plaintiff argues that the trial court increased the punitive and compensatory awards based on the equities of the entire matter. Defendant re-asserts that such considerations are totally irrelevant to a **compensatory** damage award, which is designed to **compensate**, not to "work substantial justice."

Following a lengthy trial in this matter, the court below determined punitive and compensatory damages. The awards were very carefully justified by the trial record. The manifestly excessive re-assessment of the compensatory damage award, without any revision to the fact-finding at trial, constitutes reversible error. The compensatory damages must be restored to the original amount justified by the trial court during its May 20, 1997 oral decision.

CONCLUSION

For the foregoing reasons, the decision of the trial court should be reversed and remanded with instructions to divide the marital estate in strict accordance with the parties valid antenuptial agreement and to reduce the compensatory damages to the amount justified on the record following trial.

Respectfully submitted,

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