SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1721-21

LISA STRETAVSKI,

Plaintiff-Respondent,

v.

JOHN STRETAVSKI,

Defendant-Appellant.

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Submitted February 1, 2023 – Decided October 30, 2023

Before Judges DeAlmeida and Mitterhoff.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Morris County, Docket No. FM-14-0252-18.

Martin & Tune, LLC, attorneys for appellant (Daniel B. Tune, of counsel and on the briefs).

Law Office of John C. Grey, Jr., LLC, attorney for respondent (John C. Grey, Jr., of counsel and on the brief).

The opinion of the court was delivered by

DeALMEIDA, J.A.D.

Defendant John Stretavski appeals from the February 8, 2022 order of the Family Part denying without prejudice and without discovery or an evidentiary hearing his motion to modify his alimony obligation to plaintiff Lisa Stretavski due to mutual mistake, inequity, or changed circumstances. We reverse and remand for discovery and an evidentiary hearing.

I.

The following facts are derived from the record. John[1] and Lisa were married in 1993. They have two emancipated children.

After Lisa filed a complaint for divorce in 2017, the parties, who were represented by counsel, executed a property settlement agreement (PSA). Paragraph 1, Article I of the PSA provides as follows:

> Alimony. Husband shall pay directly to the Wife the sum of $1,666.66 ($20,000.00 annual), payable on a monthly basis as and for alimony, by the first day of each month, retroactive to August 1, 2018 through December 31, 2019. Thereafter alimony shall increase to $30,000.00 per year with a monthly payment of $2,500.00 per month. Husband acknowledges that he shall receive no form of alimony from Wife, now or in the future. The parties acknowledge that the negotiated amount was based upon the parties' present circumstances.

[1] Because the parties share a surname, we refer to them by their first names. We intend no disrespect.

Article II (E) of the PSA provides:

> BUSINESS INTERESTS
>
> The parties represent and acknowledge that the Wife neither owns nor has any interest in any business entity subject to distribution between them. The parties acknowledge that the Husband has started a Plumbing/HVAC Installation, Service and Repair company and as partial consideration for the alimony to be paid by the Husband to the Wife, the Wife waives any and all claims to said Business.

On July 25, 2019, the parties were divorced through the entry of a dual final judgment of divorce (JOD) incorporating the terms of the PSA.

On or about November 4, 2021, John moved to modify his alimony obligation on three alternative bases: (1) pursuant to R. 4:50-1 because of mutual mistake; (2) because it is no longer equitable; or (3) because of changed circumstances. He requested that the court reduce his alimony obligation to $7,500 per year, payable monthly. In the alternative, he requested that the court find that he made a prima facie showing in support of his motion, permit discovery, and schedule an evidentiary hearing.

In support of his motion, John submitted a certification in which he stated that he had "come to believe that [he] did not receive competent legal representation" during the negotiation of the PSA. He alleged that the PSA "is

based upon facts that were not true at the time the document was signed and creates an obligation . . . that [he] will never be able to fulfill."

According to John, a licensed plumber, he worked for Haddad Plumbing and Heating, Inc. (Haddad) from 2010 to 2019, where he earned $120,000 per year. In 2019, while the divorce action was pending and prior to execution of the PSA, John left employment at Haddad. He alleges he was fired. At Haddad, John alleged, he served in a managerial role, overseeing the company's involvement in large construction projects, including of skyscrapers in New York City. He alleged he was responsible for bidding projects, managing the warehouse and inventory, running the service department, and purchasing tools. He claims not to have engaged in hands-on plumbing work for many years prior to his termination.

John alleged that, after his termination, his skills "were not transferrable" because there are only three or four dozen "companies that work on plumbing projects on a large enough scale in the New York City area where a position like [his former position] is available." He alleged that many of these companies are family run, promote from within the ranks of existing employees, and do not offer opportunities for positions similar to the position he held at Haddad.

John alleged that despite a job search he could not find work in the area with a salary comparable to his position at Haddad. According to John, he found only two employment options available to him: (1) sales positions with a base salary of $20,000, plus commissions, which he anticipated generating an additional $15,000 per year; or (2) relocating to find a position with a salary comparable to what he earned at Haddad, which would be difficult because he does not have experience with building inspectors and "the local red tape" in other areas of the country and transfer of his plumbing license might be difficult. At any rate, he alleged, no out-of-area positions were offered to him.

John alleged that he was receiving unemployment benefits in 2019 when he was approached by a friend who wanted to open a plumbing business. He certified that he agreed and opened Green Leaf Plumbing, Heating & Cooling, LLC (Green Leaf) as a fifty-percent owner. John alleged that Green Leaf, which opened shortly before the COVID-19 pandemic, has earned limited profits. John alleged that the pandemic effectively stopped new construction and severely reduced home plumbing repairs because customers were fearful of letting service people in their homes. In 2019, John alleged, he earned $11,812 from Green Leaf and in 2020, he earned $33,615. John alleged that he expects Green

Leaf's business to grow in the future, but that he is unlikely to ever earn $120,000 annually from the company.

John alleged that his alimony obligation was based on the assumption by both John and Lisa that he would continue earning $120,000 annually, which was a mutual mistake warranting recission or modification of the PSA. He also argued that the PSA and JOD are no longer equitable, and that changed circumstances warrant a reduction in his alimony obligation. According to John, he is presently unable to meet his alimony obligations, which nearly encompasses his entire income. John alleged that he lives with a girlfriend who pays most of his expenses, saving him from homelessness.

Lisa opposed John's motion and cross-moved to enforce litigant's rights. She alleged John had operated Green Leaf for several years prior to 2019 while the couple was married. According to Lisa, during the negotiations of the PSA, she agreed not to claim a share of the income from the company in exchange for $30,000 in annual alimony. Lisa also alleged that "John knows how to hide money and will get cash jobs so he doesn't have to claim it on his taxes." According to Lisa, she has evidence that John receives so many calls for plumbing work that he refers customers to other plumbers. She also alleged that prior to being terminated by Haddad, John told their children he was under too

much stress at that company and wanted to work for himself, suggesting he voluntarily left his prior employment.

Lisa also alleged John invested the proceeds from equitable distribution and was receiving income from that investment and that he filed a false tax return on which he claimed a $30,000 deduction for alimony, which he did not pay Lisa. According to Lisa, she has photographs from the Internet proving that John and his girlfriend have taken many trips inside the country and abroad, regularly eat at "fancy" restaurants and coffee houses, attend concerts, and go on motorcycle trips. According to Lisa, John's girlfriend is a waitress at a pizzeria and does earn sufficient income to pay for the lifestyle John enjoys.

In her cross-motion, Lisa moved for an order compelling John to: (1) pay substantial alimony arrears as well as his current monthly alimony obligation; (2) purchase life insurance, as required by the PSA; and (3) make future alimony payments through probation, as required by the PSA.

In a certification filed in response to Lisa's cross-motion, John admitted that he had not accurately described his formation of Green Leaf in his moving papers. He conceded that he created Green Leaf in 2010, closed the company in 2011 and "reinstated" it in 2019. John also admitted that he filed an inaccurate tax return on which he claimed to have paid Lisa $30,000 in alimony. He

claimed that he relied on his accountant to complete the return and impliedly admitted that he had not reviewed the return prior to signing and filing it.[2]

John also submitted a certification from his girlfriend in which she stated that she receives free airfare and travel discounts at hotels for herself and John as a benefit of her employment with an airline.

On February 8, 2022, the trial court entered an order: (1) denying without prejudice and without discovery or an evidentiary hearing John's motion to modify his alimony obligation; and (2) granting, in part, Lisa's cross-motion to enforce litigant's rights.

In a written statement of reasons accompanying the order, the court concluded:

> In the case at bar, the movant has failed to establish in any regard that the JOD should not be deemed binding. The [c]ourt is satisfied that when entering into their PSA, [Lisa] and [John] were each represented by independent counsel and entered into same in good faith. The record fails to establish that at the time the parties executed their JOD, they were mutually mistaken as to [John's] earning capacity. The parties' certifications and proofs indicate that [John] ceased working for Haddad Plumbing in February 2019, many

[2] John certified that he noticed the inaccurate tax return at the time the motion was filed, but did not note the inaccuracy in his moving papers because he did not believe it to be material. John certified that he completed an amended return, but had not signed or filed it because his girlfriend had surgery. It is unclear if John has since filed the amended return.

> months before the parties' JOD and PSA were entered on July 25, 2019. The alimony provisions also contemplated [John's] current business. Additionally, [John] has failed to establish that the alimony provisions of the PSA are inequitable, such that same should be deemed unenforceable. Rather, the [c]ourt finds that the parties entered into their PSA knowingly and voluntarily.

The court continued,

> The record does not support [John's] allegation that his former counsel . . . provided incompetent legal representation before or at the time the parties' JOD was entered. Also, Article II(E) of the parties' PSA expressly indicates that [Lisa] waives any and all claims to [John's] business as partial consideration for the agreed-upon alimony obligation; thus, modifying [John's] alimony obligation . . . as [John] requests, would be a windfall to [John] and deprive [Lisa] of the benefit of her bargain.

With respect to John's argument concerning changed circumstances, the court concluded:

> although the record establishes a substantial change in [John's] income, the record does not establish that said change is permanent. [John] filed the instant motion approximately twenty-eight months after the entry of the parties' JOD and the parties' execution of their PSA, and the [c]ourt reiterates that the PSA contemplates [John] re-opening his business, which is now experiencing financial growth despite the COVID-19 pandemic. [John's] claim that he will never be able to fulfill the agreed-upon alimony obligation is an unsupported assertion, especially in light of his admission that his business is growing.

. . . .

> [John's] income is derived through his own business. [John] claims that the COVID-19 pandemic has impeded the growth of said business; the [c]ourt notes that the entire global economy has been negatively affected, however, recent upward economic trends establish same will not occur forever.
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> Additionally, [John] has failed to demonstrate how he attempted to improve his circumstances. . . . [John] has an ongoing obligation to work diligently to re-establish the financial status that resulted in the current obligation. . . . [John] does not supply any proof to support his assertions that he sought comparable work in the field (i.e., job applications, letters of rejection, etc.). Rather, [Lisa] provides substantial proof ([John's] own Facebook posts) of [John's] national and international travels since his firing in 2019.

The trial court also found that John failed to make a prima facie showing entitling him to discovery and an evidentiary hearing on his motion. The court found that

> when a self-employed party seeks modification of alimony because of an involuntary reduction in income since the date of the order from which modification is sought, then that party's application for relief must include an analysis that sets forth the economic and non-economic benefits the party receives from the business, and which compares these economic and non-economic benefits to those that were in existence at the time of the entry of the order.
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> . . . .

> [John], who is self-employed, has failed to set forth any economic and non-economic benefits that he receives from his business and to compare same to the economic and non-economic benefits that existed at the time the parties' JOD was entered. The [c]ourt finds that [John] has failed to establish that his capacity to earn has diminished. [Lisa] has provided [John's] Facebook posts illustrating [John's] lavish lifestyle, which is incongruous with this alleged reduction in earning power. Regardless of whether [John's] girlfriend provides [John] with free travel through her employment, [John] might better utilize the time spent on vacation to obtain additional part-time employee to earn income that could be applied toward his court-ordered obligations.

With respect to Lisa's cross-motion, the court found that John failed to comply with the terms of the PSA and JOD. The court, therefore, granted Lisa's cross-motion and directed John to comply with his monthly alimony obligation and to make those payments through probation.

The court also found that "[a]fter a review of the papers submitted and after consideration of the procedural history of the case and the applicable Court Rules, the [c]ourt in its discretion has determined that it does not need to conduct oral argument in order to decide the issues in contest." As a result, the court denied the parties' request for oral argument.

On February 11, 2022, John filed a notice of appeal with this court from the February 8, 2022 order.

Also on February 11, 2022, John filed an order to show cause in the trial court seeking a stay of the February 8, 2022 order. The court did not sign the order to show cause.

On February 14, 2022, the trial court entered an order, which states that the court, "having entertained oral argument and having reviewed the submissions, and for the reasons set forth in the attached statement of reasons" stayed the February 8, 2022 order "pending oral argument." The meaning of this order is not clear. The order states that the court heard oral argument prior to entry of the order. There is, however, no indication in the record that the court heard oral argument on any party's application prior to entry of the order. To the contrary, in the statement of reasons accompanying the February 8, 2022 order, the court expressly found that it did not need to hear oral argument on John's motion and Lisa's cross-motion. Adding to the confusion, the order states that it is staying the February 8, 2022 order pending oral argument, presumably on John's motion and Lisa's cross-motion, which were resolved by the February 8, 2022 order.

In addition, the February 14, 2022 order refers to an attached statement of reasons explaining the basis for the order. The record, however, contains no statement of reasons explaining the basis for the February 14, 2022 order.

Incongruously, the February 14, 2022 order also states that it was entered "for the reasons stated upon the record." The parties, however, have not submitted a transcript of oral reasons explaining the February 14, 2022 order.

The court heard argument on February 16, 2022. At the start of argument, the court stated:

> Just by way of procedural posture, the [c]ourt issued an Order on February 8th, 2022. An Order to Show Cause seeking a stay was filed. The [c]ourt denied the Order to Show Cause. However, the reason was that it – the [c]ourt had previously stayed its own order to allow for oral argument which was scheduled for now.

The trial court did not mention the February 11, 2022 notice of appeal, which deprived it of jurisdiction to conduct any proceedings, apart from the exceptions set forth in Rule 2:9-1(a), which are not applicable here. Thus, the trial court did not have jurisdiction to entertain oral arguments on John's motion and Lisa's cross-motion or to reconsider the February 8, 2022 order, if that was what the court intended by holding argument on February 16, 2022. Kiernan v. Kiernan, 355 N.J. Super. 89, 92 (App. Div. 2002).

It is clear, however, that the trial court was aware that John had filed a notice of appeal from the February 8, 2022 order. At the February 16, 2022 oral argument, John's counsel, who, with the trial court's approval, treated the February 8, 2022 order "sort of like a tentative decision," noted that he had sent

a copy of the notice of appeal to the trial court. In addition, the trial court acknowledged to John's counsel "that's why you appealed me . . . ." Despite its knowledge of John's appeal, the court stated "[b]ut I guess, you know, you can try to convince me to change my mind. Go ahead."

On February 17, 2022, the trial court entered an amended order denying John's motion without prejudice and without discovery or an evidentiary hearing and granting Lisa's cross-motion in part. The court also denied John's request to stay the February 8, 2022 order as moot because "the February 8, 2022 order has been superseded by" the February 17, 2022 order, and denied a stay of the February 17, 2022 order. A written statement of reasons accompanied the February 17, 2022 order.

On February 17, 2022, the trial court submitted a letter to this court, which provided as follows:

> By way of notice of appeal, I am aware that a recent Order has been appealed. Pursuant to Rule 2:5-1(b), and with the permission of the [c]ourt, I wish to amplify the Statement of Reasons associated with my Order dated February 8, 2022. In addition to the reasons provided in the [c]ourt's Statement of Reasons for denying (without prejudice) the application to downwardly modify alimony, the [c]ourt offers the following:
>
> In an alimony modification matter, an appropriate factor for consideration is to what degree the obligee

> (here [Lisa]) needs the alimony award to meet her basic daily needs. In the case at bar, the [c]ourt considered this, but neglected to discuss same in its February 8, 2022 Statement of Reasons. [Lisa] certifies, and [John] does not dispute, that [Lisa] is permanently disabled, suffers from multiple auto-immune diseases and has cancer. Her only income in 2020 was [$17,611.20] in disability payments, and sometimes her annual income is augmented from "craft" sales. Without [John's] consistent alimony payments, this [c]ourt is unaware of how she survives. The [c]ourt reiterates that [John] owes [Lisa] over $35,000 in alimony arrears.
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> The [c]ourt notes that the Order dated February 8, 2022 was stayed by his [c]ourt pending oral argument. Oral argument took place on February 16, 2022 and an Amended Order generated on February 17, 2022. Same is attached for ease of reference.

On February 17, 2022, John filed an amended notice of appeal purporting to add the February 14, 2022 and February 17, 2022 orders as being appealed.

We subsequently denied John's motion for a stay of the February 8, 2022 order and to designate the February 14, 2022, and February 17, 2022 orders as being under appeal.

On February 6, 2023, John moved for a limited remand, alleging that Lisa had moved to Colorado to live with the couple's daughter, presumably at no cost. He argued that this changed circumstance warranted a hearing in the trial court. Lisa opposed the motion, certifying that she moved because John's failure to pay his alimony obligation rendered her unable to afford to remain in New Jersey.

She also certified that she intended to assist her daughter and son-in-law after the birth of their child and would be contributing financially to the household. Lisa argued that her circumstances had not materially changed. On March 6, 2013, we denied the motion.

John argues the trial court erred by: (1) making findings of fact with respect to John's ability to earn income, his job search and expenses, as well as the effects of the COVID-19 pandemic on the ability of Green Leaf to earn income, without the benefit of discovery or an evidentiary hearing; (2) concluding John failed to make a prima facie showing of changed circumstances warranting discovery and an evidentiary hearing; and (3) finding that Lisa's relinquishment of any claim with respect to Green Leaf, in effect, insulated John's alimony obligation from modification.

II.

We begin by clarifying which trial court order is properly before this court. According to R. 2:9-1(a), "[t]he supervision and control of the proceedings on appeal . . . shall be in the appellate court from the time the appeal is taken . . . ." There are nine exceptions to the rule, none of which are applicable here. R. 2:9-1(a)(1) to (9). "The ordinary effect of the filing of a notice of appeal is to deprive the trial court of jurisdiction to act further in the matter

unless directed to do so by an appellate court, or jurisdiction is otherwise reserved by statute or court rule." Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 376 (1995).

When John filed a notice of appeal on February 11, 2022, the trial court was deprived of jurisdiction to conduct proceedings in this matter that were not within an exception set forth in R. 2:9-1(a). However, after February 11, 2022, the trial court entered the February 14, 2022 order, the meaning of which is unclear, held oral argument on what appears to have been a motion for reconsideration of the February 8, 2022 order, and issued the February 17, 2022 order, which the trial court purports "superseded" the February 8, 2022 order. The trial court lacked jurisdiction to take any of these actions. We therefore consider the February 14, 2022 order, the February 17, 2022 order, and the statement of reasons accompanying the February 17, 2022 order to be nullities that are not before this court for review.

The trial court's February 17, 2022 written submission to this court is, in our view, an amplification of the statement of reasons accompanying the February 8, 2022 order. See R. 2:5-1(d). Having been filed with the court within thirty days of the February 8, 2022 order, the amplification is a component of the record on appeal.

III.

A motion to modify an alimony obligation "rests upon its own particular footing and [we] must give due recognition to the wide discretion which our law rightly affords to the trial judges who deal with these matters." Larbig v. Larbig, 384 N.J. Super. 17, 21 (App. Div. 2006) (quoting Martindell v. Martindell, 21 N.J. 341, 355 (1956)). Consequently, our review of a Family Part order is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). "[W]e do not overturn those determinations unless the court abused its discretion, failed to consider controlling legal principles or made findings inconsistent with or unsupported by competent evidence." Storey v. Storey, 373 N.J. Super. 464, 479 (App. Div. 2004). We must accord substantial deference to the findings of the Family Part due to that court's "special jurisdiction and expertise in family matters . . . ." Cesare, 154 N.J. at 413.

We defer to the judge's factual determinations, so long as they are supported by substantial credible evidence in the record. Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 483-84 (1974). We review de novo the court's legal conclusions. Manalapan Realty, 140 N.J. at 378.

Several well-established principles govern whether a court should modify alimony. First, if the parties had agreed to the amount and conditions of

alimony, that agreement should be enforced like any other settlement agreement. Quinn v. Quinn, 225 N.J. 34, 44 (2016). "'Agreements between separated spouses executed voluntarily and understandingly for the purpose of settling the issue of [alimony and child support] are specifically enforceable, but only to the extent that they are just and equitable.'" Id. at 48 (quoting Berkowitz v. Berkowitz, 55 N.J. 564, 569 (1970)). "[S]uch agreements are subject to judicial supervision and enforcement." Ibid. "The equitable considerations that bear upon the enforceability of . . . support agreements generally include . . . the ability to pay and the respective incomes of the spouses . . . ." Petersen v. Petersen, 85 N.J. 638, 645 (1981).

"The court's role is to consider what is written in the context of the circumstances at the time of drafting and to apply a rational meaning in keeping with the expressed general purpose." Pacifico v. Pacifico, 190 N.J. 258, 266 (2007) (internal quotations omitted). "It is not the function of the court to rewrite or revise an agreement when the intent of the parties is clear." Quinn, 225 N.J. at 45. "At the same time, the law grants particular leniency to agreements made in the domestic arena, thus allowing judges greater discretion when interpreting such agreements." Pacifico, 190 N.J. at 266 (internal quotations omitted).

Second, unless the parties have agreed otherwise, alimony "may be revised and altered by the court from time to time as circumstances may require." N.J.S.A. 2A:34-23. To justify a modification, the moving party must show "changed circumstances." Lepis v. Lepis, 83 N.J. 139, 146 (1980). In Lepis, the Court recognized a non-exhaustive list of factors that give rise to changed circumstances warranting modification of alimony. Id. at 151-52. Similarly, in N.J.S.A. 2A:34-23(k) and (l), the Legislature identified factors a court needs to consider when a self-employed party seeks to modify alimony. Those factors include, among other things, the financial circumstances of the parties, whether the change in circumstances is temporary or permanent, whether the change was voluntary, whether it was motivated by bad faith or a desire to avoid payment, and whether the change in circumstances renders the payor unable to meet the alimony obligation. See N.J.S.A. 2A:34-23(k) to (l); see also Lepis, 83 N.J. at 151-52; Larbig, 384 N.J. Super. at 22-23; Glass v. Glass, 366 N.J. Super. 357, 370-71 (App. Div. 2004).

"The party seeking modification has the burden of showing such 'changed circumstances' as would warrant relief from the support . . . provisions" in the parties' settlement agreement. Lepis, 83 N.J. at 157. Therefore, when a payor "is seeking modification of an alimony award, that party must demonstrate that

changed circumstances have substantially impaired the ability to support" themselves. Ibid. "Courts have consistently rejected requests for modification based on circumstances which are only temporary or which are expected but have not yet occurred." Id. at 151.

Importantly, the moving party must demonstrate a permanent change in circumstances from those existing when the prior support award was fixed. See Donnelly v. Donnelly, 405 N.J. Super. 117, 127-28 (App. Div. 2009); see also Beck v. Beck, 239 N.J. Super. 183, 190 (App. Div. 1990) ("[T]he changed-circumstances determination must be made by comparing the parties' financial circumstances at the time the motion for relief is made with the circumstances which formed the basis for the last order fixing support obligations."). It is well settled that "[a] prima facie showing of changed circumstances must be made before a court will order discovery of an ex-spouse's financial status." Lepis, 83 N.J. at 157.

Once a party demonstrates changed circumstances involving alimony, the trial court must determine if a plenary hearing is required. Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007). "[A] plenary hearing is only required if there is a genuine, material and legitimate factual dispute." Segal v. Lynch, 211 N.J. 230, 264-65 (2012); see also Lepis, 83 N.J. at 159 (holding the moving

party must clearly demonstrate the existence of a genuine issue as to a material fact "before a hearing is necessary" because "[w]ithout such a standard, courts would be obligated to hold hearings on every modification application."). We review a trial court's denial of a plenary hearing for an abuse of discretion. Costa v. Costa, 440 N.J. Super. 1, 4 (App. Div. 2015).

We have carefully reviewed the record in light of these precedents and conclude that the trial court abused its discretion by denying John's motion without permitting discovery and holding an evidentiary hearing. John's certifications set forth a prima facie claim for modification of his alimony obligation. John certified that when the PSA was executed, he had recently lost his position at Haddad and the parties believed he could obtain employment earning a salary comparable to the annual compensation of $120,000 he earned at Haddad. John certified that despite a job search he was unable to obtain such employment. John alleged that the skills he developed at Haddad have limited value in the employment market, because the number of employers of the scale of Haddad is limited, as are employment opportunities at those employers.

John also alleged that Green Leaf, of which the parties were aware at the time the PSA was executed, has been reactivated with a partner. According to John's allegations, while Green Leaf has the potential to gain in profitability, it

suffered financial setbacks when the COVID-19 pandemic arose shortly after the company began operations in its current form. John alleges his 2019 and 2020 income were entirely consumed by his alimony obligation and that if his girlfriend did not absorb most of his expenses he would be homeless.

In opposition to the motion, Lisa did not directly dispute John's allegation with respect to his ability to earn a salary comparable to the annual $120,000 he received at Haddad. She did, however, raise a number of factual disputes, including whether John voluntarily left his position at Haddad, earns unreported income through cash transactions, has investment income, and actually is supported by his girlfriend. In addition, Lisa revealed that John filed an inaccurate tax return and an inaccurate certification, raising questions about his credibility, and has engaged in extensive travel since the couple's divorce. John proffers explanations for the inaccurate documents and disputes that he pays for the travel.

The trial court's February 8, 2022 statement of reasons, as amplified, resolves a number of the factual disputes raised by the parties, apparently based on credibility determinations, including that John has not proven ineffective representation at the time he entered the PSA, that his inability to earn sufficient income to satisfy his alimony obligation is temporary, and that his leisure travel

interferes with ability to earn income. In addition, the court finds facts, such as the strength of the economic recovery after the COVID-19 pandemic and its impact on Green Leaf's ability to earn income, not raised by either party. It was error for the court to make these findings based only on the moving papers. John is entitled to discovery and an evidentiary hearing on his application.

We acknowledge that John's allegations were largely not supported by evidence establishing the scope of his search for employment, the construction market which he claims limits his employment options, Green Leaf's profits, expenses, and operating agreement, and his monthly expenses. Those issues will be fleshed out through discovery and an evidentiary hearing, as will the understandings and expectations of the parties when they executed the PSA, including the value and impact on John's motion of Lisa's waiver of her interest in Green Leaf in exchange for the $30,000 in annual alimony she obtained in the settlement. Similarly, Lisa's allegations that John earns income through unreported cash transactions, spends money on luxuries, and is not supported by his girlfriend, can be explored through discovery and an evidentiary hearing.

We are not suggesting that John will establish an entitlement to a modification of his alimony obligation. The parties entered in a settlement agreement only two years before John's application. The agreement was

executed after John lost his employment at Haddad and after Green Leaf was formed. Neither of those facts constitute a changed circumstance. In order to obtain relief, John has the burden of establishing that after a thorough and good faith search he was unable to find employment with a salary comparable to what he received at Haddad. In addition, he has the burden of demonstrating that it was reasonable for him to reinstitute Green Leaf with a partner as an avenue to earn sufficient income to meet his alimony obligation, that despite his good faith efforts Green Leaf has not generated that income, that his failure to seek other employment opportunities to supplement his income was reasonable, and that what appears to be his extensive leisure travel does not unreasonably impede his ability to earn additional income outside of Green Leaf to meet the alimony obligation he agreed to in the PSA. John also must establish that his inability to earn sufficient income to satisfy his alimony obligation is permanent.

We have considered John's argument that the matter should be assigned to a different judge on remand and find it to be meritless. We also consider John's mutual mistake argument to be incorporated in his application for a modification of his alimony obligation.

The February 8, 2022 order is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION