FILED, Clerk of the Supreme Court, 28 Jan 2021, **085157**

SUPREME COURT OF NEW JERSEY

No. 085157

KATHLEEN M. MOYNIHAN, Plaintiff-Petitioner, v. EDWARD J. LYNCH, Defendant-Respondent.	PETITION FOR CERTIFICATION TO THE SUPREME COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NUMBER: A-4883-18T3 Sat Below: HON. JOSEPH L. YANNOTTI, P.J.A.D. HON. MICHAEL J. HAAS, J.A.D. HON. ARNOLD L. NATALI, JR., J.A.D.

REPLY BRIEF ON BEHALF OF PLAINTIFF-PETITIONER

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REPLY TO STATEMENT OF FACTS/PROCEDURE

Except as set forth in the following paragraphs, Plaintiff does not dispute Defendant's Statement of Facts/Procedure. (Db1-6).

Defendant intentionally minimizes the importance of Plaintiff agreeing to terminate her alimony from her former husband in 2011. (Db1-2). After Plaintiff's former husband filed an application to terminate his alimony obligation, "defendant paid for her attorney and influenced her to enter into the consent order terminating alimony because 'he said he would take care of [her] for the rest of [her] life' and that the parties 'would be together' because they 'were a family and … didn't need' the alimony." (Peta7). In fact, in finding consideration for the formation of a contract, the trial court found that "plaintiff gave up her alimony in 2011, upon the representation by the defendant that [he] would take care of her" and that he also induced her "to remain in the relationship." (Peta17).

Defendant also incorrectly states that the relationship ended in 2014. (Db2). Instead, the "relationship deteriorated throughout 2013 and 2014 and ended in April 2015 when defendant vacated the Bordentown residence." (Peta10). It was while the relationship was deteriorating in 2014 that Defendant drafted the written agreement stating what Plaintiff would receive upon the termination of the relationship. (Peta8). The terms in the

written agreement were "clear and understandable, and they were understood by the parties." (Peta16). However, Defendant never intended to be bound by the written agreement, and admitted that his actions were "dishonest" and intended to "shut her up". (Peta9; Peta11).

REPLY TO STANDARD OF REVIEW

Except as set forth in the following paragraphs, Plaintiff does not dispute Defendant's Standard of Review. (Db6).

Defendant incorrectly argues that Plaintiff "has not asserted a basis or proper grounds upon which the Supreme Court [should] exercise jurisdiction pursuant to New Jersey Rule 2:12-4" and that there is "no question of general public interest". (Db6). What greater public interest exists than protecting and providing for the equal treatment of all citizens in this State? However, as written, the Amendment does not protect the rights of all citizens in this State, but rather it has an adverse impact on certain citizens. (Peta22-23). This is not hyperbole, but rather a statement made directly by then-Governor Corzine when he signed the Amendment into law on his last day in office. (Peta22-23).

More specifically, then-Governor Corzine explicitly expressed his intent that he would have conditionally vetoed the Amendment but did not do so because he was led to believe that "[l]egislative leadership and the sponsors share my goal of

providing greater clarity in the enforcement of palimony agreements but ensuring that this law does not have an adverse impact on parties who may not be able to afford the services of an attorney." (Peta22-23). Moreover, he was led to believe "by legislative leadership and the bills sponsors that this law will be improved to recognize agreements or promises in a non-marital relationship as binding when they are mutual, in writing, and notarized as opposed to mandating the involvement or services of an attorney." (Peta22-23). However, once he left office, the legislative leaders and bill sponsors did not do as they represented, leaving the rights of certain citizens in this State adversely impacted for no legitimate purpose. (Peta22-23).

REPLY TO OPPOSITION TO QUESTIONS PRESENTED

I: THAT PORTION OF THE AMENDMENT REQUIRING THE INDEPENDENT ADVICE OF COUNSEL FOR BOTH PARTIES IS INHERENTLY UNCONSTITUTIONAL.

Defendant repeats many of the same errors made by the Appellate Division in deeming the Amendment constitutional. (Db7-16).

For example, Defendant repeats that the Amendment does not substantially impair a contractual relationship because "the Legislature routinely imposes additional costs on parties who seek to enter contractual relationships." (Db9; Peta36). As set forth in the Petition for Certification, the Appellate Division failed to provide any examples of such "additional costs",

except the statute addressing the assignment of lottery winnings. (Pet10-11). The purpose of the statute was to insulate "lottery winners from their own human frailties by allowing assignments after the winner complied with rigorous safeguards, including consulting with independent legal counsel and a tax advisor." (Pet11). Defendant argues that the purpose of the Amendment "is in fact quite similar; nowhere is human frailty on display more than within the context of a personal relationship." (Db15). If that is truly the case, why isn't every other agreement in the family law setting governed by statute (e.g., mid-marriage agreements, reconciliation agreements, marital settlement agreements, etc.), and why doesn't the only agreement in the family law setting that is governed by statute (i.e., prenuptial agreement) require independent counsel?

Defendant attempts to buttress this argument by suggesting that agreements in interpersonal relationships are more "susceptible to fraudulent and unreliable methods of proof" and is particularly why "two of the four [agreements subject to the Statute of Frauds] pertain to agreements between parties in a personal relationship; a prenuptial agreement (25:1-5(c)) and a palimony agreement (25:1-5(h))." (Db9). However, Defendant fails to recognize that of the four agreements subject to the Statute of Frauds, only a palimony agreement requires the advice of

independent counsel. N.J.S.A. 25:1-5. The other three agreements, including a prenuptial agreement, can be entered without the advice of independent counsel. In fact, as set forth in the Petition for Certification, every agreement in a family law setting, except a palimony agreement, can be entered without the advice of independent counsel. (Pet10-11).

Defendant's reliance on Sook Hee Lee v. Kim, 2018 N.J. Super. Unpub. LEXIS 454, *12 (App. Div. 2018), is misplaced, as the case did not challenge the requirement of independent counsel under the contracts clause. Instead, it challenged the requirement of a written agreement, as opposed to merely an oral agreement, under the equal protection clause.

Defendant argues that the Amendment serves a legitimate purpose because "[i]t was the express intention of the legislature to change the law with the 2010 amendment." (Db11). In fact, the legislative history made clear that the Legislature "intended to overturn recent 'palimony' decisions by New Jersey courts." (Peta22). However, the "change" must be done correctly. By making palimony agreements subject to the Statute of Frauds and requiring a written and signed agreement, the Legislature eliminated future oral palimony agreements. However, the addition of the requirement of independent counsel served no additional purpose, but rather it created a way for individuals to manipulate and take advantage of the individual benefitting

from such an agreement and the individual who is often, if not always, in a far weaker bargaining position. Instead, it prevented individuals who could not afford independent counsel, or did not wish to engage independent counsel for a particular reason, from entering into palimony agreements. It also lined the pockets of attorneys.

Defendant minimizes the importance of then-Governor Corzine's statement that he would have conditionally vetoed the Amendment if the legislative leaders and bill sponsors had not represented to him that they would remove the requirement of independent counsel and replace it with the requirement of a notary, referring to the statement as "his personal wishes". (Db15-16). Quite simply, absent the representations by the legislative leaders and bill sponsors, then-Governor Corzine would not have signed the Amendment into law.

Finally, and most notably, it bears repeating that the Statute of Frauds acknowledges that certain agreements may be "susceptible to fraudulent and unreliable methods of proof" and mandates that those agreements be reduced to writing and signed. Maeker v. Ross, 219 N.J. 565, 578 (2014)(quoting Lahue v. Pio Costa, 263 N.J. Super. 575, 599 (App. Div.), certif. denied, 134 N.J. 477 (1993); see Moses v. Moses, 140 N.J. Eq. 575, 584 (E. & A. 1947)("The primary design of … the Statute of Frauds is to avoid the hazards attending the use of uncertain, unreliable and

perjured oral testimony, ...”). As is evidenced the Statute of Frauds itself, it is the requirement of having a written agreement that is signed that furthers the goals of the Statute of Frauds, not the requirement of independent counsel.

Plaintiff requested that the palimony agreement be reviewed by an attorney but Defendant assured her that it would be enforceable if it was signed in the presence of a Notary Public. (Peta9). In fact, Defendant told Plaintiff that there was no need for attorneys because he was a “man of my word”. (Peta9). Defendant told Plaintiff that “if I tell you I’m going to do something, I’m going to do it”. (Peta9). Plaintiff and Defendant signed the palimony agreement in the presence of a Notary Public. (Peta9-10). Plaintiff was manipulated into believing that there was a binding palimony agreement, but the Appellate Division held there was not.

II: EQUITY WILL NOT SUFFER THE USE OF THE STATUTE OF FRAUDS AS AN INSTRUMENT OF FRAUD.

It bears repeating that since the Statute of Frauds is designed to prevent fraud, a court of equity will not permit it to be used to accomplish a fraud. Cauco v. Galante, 6 N.J. 128, 138 (1951). See also Moses, supra, 140 N.J. Eq. at 581-82 (“Equity will not suffer the use of the Statute of Frauds as an instrument of fraud.”). As a result, to prevent the Statute of Frauds from being used as an instrument of fraud, exceptions,

such as partial or full performance and promissory estoppel, exist. See, e.g., Lahue, supra, 263 N.J. Super. at 599; Crowe v. De Gioia, 203 N.J. Super. 22 (App. Div. 1985), affirmed by 102 N.J. 50 (1986); Mazza v. Scoleri, 304 N.J. Super. 555, 559-60 (App. Div. 1997). Defendant testified that he never intended to be bound by the palimony agreement, and that his actions were "dishonest" and intended to "shut her up". (Peta9; Peta11).

If the Legislature had intended to modify the purpose of the Statue of Frauds or the exceptions thereto, they could have explicitly done so, or they could have created an entirely separate statute. There is simply no legislative history suggesting that it was the Legislature's intent to eradicate the exceptions.

The trial judge never considered whether Plaintiff's performance and reliance removed the written agreement from the Statute of Frauds because the trial judge found an alternative means for enforcing the written agreement (i.e., as a written contract). (Peta13-14). However, Defendant admits that "the trial court did in fact go to great lengths to state that the Plaintiff in this case did in fact performed [sic] her duties." (Db16).

Defendant repeats two errors made by the Appellate Division with respect to Plaintiff's performance: (1) that Plaintiff "did not plead a proper cause of action for partial performance", and

(2) that enforcing the written agreement "based on her alleged partial performance of an oral agreement between the parties, would essentially permit enforcement of [a] contract the Legislature has expressly prohibited." (Db16-17; Peta25-27).

As to the former, Defendant did not raise this issue in the trial court, but rather he raised it for the first time in the appeal. Notwithstanding, as set forth in the Petition for Certification, New Jersey is a notice pleading State and partial performance is defense, not a cause of action, that Plaintiff properly pled. (Pet17).

As to the latter, the Appellate Division confused an oral agreement, which is more susceptible to fraud and which the Legislature intended to prohibit, and a written agreement, which is less susceptible to fraud and which the Legislature intended to allow. The written agreement, which Plaintiff and Defendant both acknowledged, and which the trial judge found they entered into in the presence of a Notary Public, was not susceptible to fraud. The terms of the written agreement were "clear and understandable, and they were understood by the parties." (Peta16). However, simply because Plaintiff and Defendant did not engage independent counsel, Defendant was authorized by the Appellate Division to use the Statute of Frauds as an instrument of fraud. The requirement of independent counsel was the vehicle driven by Defendant to perpetrate the fraud.

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III: PLAINTIFF AND DEFENDANT ENTERED INTO A BINDING ORAL PALIMONY AGREEMENT PRIOR TO THE AMENDMENT.

Plaintiff does not dispute that the trial judge's factual findings are subject to substantial deference. (Db17). However, substantial deference has it bounds and, since a binding palimony agreement prior to the amendment could be express, implied, or inferred from the parties' conduct, common sense must not be ignored. In re Estate of Robert P. Quarg, 397 N.J. Super. 559 (App. Div. 2008). Plaintiff remained in a relationship with Defendant for 18 years and performed her duties because he made repeated oral palimony promises to her and he took action to secure Plaintiff's financial future (i.e., the townhome, his retirement accounts, his bonds, and the written agreement). A binding oral palimony promise could, and should, be inferred from these actions.

CONCLUSION

It is respectfully submitted that this Court should grant Plaintiff's Petition for Certification.

Respectfully submitted,

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By: ______________________
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DATED: January 26, 2021