Circuit Court for Montgomery County
Case No. 75453-FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 277

September Term, 2019

BARRY J. COHEN,

v.

LIZA R. PORAT,

Berger,
Friedman,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: March 23, 2021

This appeal arises out of post-divorce judgment proceedings in the Circuit Court for Montgomery County and the terms of the Voluntary Separation Agreement ("Agreement") between appellant, Dr. Barry Cohen, and appellee, Liza Porat. The rulings at issue relate to money owed to Ms. Porat by Dr. Cohen for attorney's fees, unpaid spousal support, and pre-judgment interest. Dr. Cohen asks three questions which we have slightly rephrased:

I. Did the circuit court err in granting advanced attorney's fees to Ms. Porat?

II. Did the circuit court err by not crediting Dr. Cohen for payments he allegedly made for the second trust on the Yeatman property in 2010 and 2011?

III. Did the circuit court err by awarding Ms. Porat pre-judgment interest on the arrearages?[1]

For reasons that follow, we affirm the judgments of the circuit court.[2]

[1]Dr. Cohen asked:

1. Did The Trial Court Err As A Matter Of Law In Granting [Ms. Porat] *Pendente Lite* Attorney's Fees When Such Fees Were Precluded By The Parties' Separation Agreement And There Was No Statutory Basis For Such An Award?
2. Did The Trial Court Abuse Its Discretion In Failing To Credit [Dr. Cohen] For Mortgage Payments He Made On The Yeatman Property In 2010 And 2011 When The Only Evidence Presented At Trial Demonstrated That He Did Indeed Make The Payments?
3. Did The Trial Court Abuse Its Discretion In Awarding Pre-Judgment Interest On The Arrearage It Found Was Due To [Ms. Porat] When The Parties' Obligations Were Not Certain, Definite, Or Liquidated?

[2] Ms. Porat noted a cross-appeal in this case, but she did not file a brief after being granted several extensions of time to do so.

FACTUAL AND PROCEDURAL BACKGROUND

Dr. Cohen and Ms. Porat were married on November 6, 1993. They had five children, four of whom had reached the age of majority at the time of the proceedings.[3] While Ms. Porat is a lawyer by training, she has never practiced. When the children were in school, Ms. Porat was a part-time teacher's aide at Kemp Hill Montessori school, earning between $15,000 and $24,000. Dr. Cohen is a Board-certified plastic and reconstructive surgeon and a co-owner of a lucrative plastic surgery practice.

They separated in August of 2008 and, on November 22, 2011, a Judgment of Limited Divorce was entered.[4] Their June 22, 2010 Voluntary Separation Agreement was incorporated, but not merged in the Judgment.

The Agreement provided for indefinite alimony to Ms. Porat in the amount of $6,500 per month. Upon a material change in circumstances, that amount was modifiable with a floor of $3,900 and a ceiling of $8,100 per month. Dr. Cohen was to pay Ms. Porat $7,000 per month for child support for the children, all of whom were minors at the time.[5] Paragraph 16 of the Agreement provided that "six (6) months prior to any child

[3] The first child was born in 1996, the second child was born in 1997, the third child was born on 1999, the fourth child was born on 2001, and the youngest child was born on 2004.

[4] After filing the proceedings at issue in this appeal, Dr. Cohen filed a Complaint for Absolute Divorce, which was set for an uncontested divorce hearing on August 7, 2019.

[5] Paragraph 9 of the Agreement stated:

becoming emancipated that they shall mediate the amount of child support to be paid by Husband to Wife except for [their oldest son], if [he] primarily resides with Husband at that time."

The parties owned several properties together. Under the Agreement, the property located at 11618 Yeatman Terrace, Silver Spring, Maryland ("the Yeatman property") was to go to Ms. Porat. The property was encumbered by a first deed of trust and a "second position home equity loan on credit." Ms. Porat was responsible for the payments on those encumbrances. If she failed to make the payments, the Agreement stated that "Husband shall make said payments and Wife authorizes Husband to deduct the monies paid from the alimony due Wife." Dr. Cohen testified that he had been making payments on the second trust since August 2010 and had reduced his alimony obligations accordingly.

Over eight years, numerous disagreements regarding the Agreement arose without litigation or mediation. Dr. Cohen's payments to Ms. Porat were inconsistent; he underpayed some months and overpayed others. Without submitting the child support

(…continued)

> Husband shall pay child support to Wife in the amount of $7,000 per month commencing on August 1, 2010 and the first day of every month thereafter until modified by Order of Court. Payments of child support made pursuant to this paragraph shall continue with respect to the parties' minor children until the first to occur of (i) the death of the children, (ii) the death of either of the parties, or (iii) the children reaching the age of eighteen (18), or the graduation of a child[] from high school, but not beyond the child[]'s 19th birthday. Child support shall be modifiable at anytime by either party in accordance with the laws of the State of Maryland.

issue to mediation before the first two children reached the age of majority in 2014, Dr. Cohen unilaterally reduced the child support payments by one-fifth. Unilateral support reduction without mediation continued until the third child graduated high school in February 2018.[6] When the parties were unable to reach an agreement on support, Dr. Cohen filed a complaint seeking a reduction in child support, alimony, and other relief, including enforcement of the parties' Separation Agreement. He alleged as "a material change in circumstance" a substantial decrease in his income and the emancipation of three of the five children.[7] Ms. Porat opposed the requested relief and filed a Petition for Contempt and Specific Enforcement of the Separation Agreement.

On October 1, 2018, Ms. Porat filed a Petition for Advanced Attorney's Fees to litigate both her Petition for Contempt and Specific Enforcement and Dr. Cohen's Amended Complaint for Modification of Child Support, Alimony, and Other Relief. Dr. Cohen opposed the petition, citing a lack of contractual or statutory basis to grant attorney's fees. A Motions Hearing[8] was held on January 18, 2019, and, on February 4, 2019, Dr. Cohen was ordered to pay Ms. Porat $70,000 for advanced attorney's fees.

The Merits Hearing began on April 10 and ended on April 12, 2019. On June 21, 2019, the merits court entered an order that granted in part and denied in part Ms. Porat's

[6] In July 2018, when this matter was filed in the circuit court, Dr. Cohen was paying $3,500 per month in child support.

[7] The fourth child was emancipated in May of 2019.

[8] Because the Motions Hearing and Merits Hearing were presided over by different judges, whom we will refer to as the motions court and the merits court.

Petition for Contempt and Specific Performance; denied Dr. Cohen's Motion to Modify Alimony; and granted Dr. Cohen's Motion to Modify Child Support. The merits court found:

> that the "income" listed in [Dr. Cohen's] financial statement is not credible, and the court disbelieves [Dr. Cohen's] testimony regarding his income. . . . [His] trial testimony regarding his finances, assets, and debt simply was not credible, and on more than one occasion, [his] testimony was inconsistent with the documentary evidence presented during trial.
>
> The court found several inconsistencies in [Dr. Cohen's] financial statement. [He] testified that he has ownership in Montrose Oaks, LLC, which owns a building worth $3,000,000, that he did not list this asset on the financial statement. Although [Dr. Cohen] did not list it as an asset either, any material omission from a financial statement leads to questions about its validity. Further, [he] incorrectly stated that he pays his housekeeper $3,800 per month, however, the W-2 wage form indicates that [he] pays the housekeeper $4,333.00 per month. [Dr. Cohen] also incorrectly stated that he paid $2,286.00 per month for health insurance when he actually pays $3,315.08. Although [he] underestimated these expenses on the financial statement, the multiple variances undermine the statement's overall credibility.
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> [He] testified that in the last couple of years, he only goes on one significant vacation a year. However, just in 2016, according to [Dr. Cohen's] Facebook photographs, he visited Puerto Rico, St. Martin, Netherlands, Florida, North Carolina, Las Vegas, Israel, and New York. [He] contends that some of the trips were purely business trips, purchased on frequent flyer miles. The court, in reviewing the documentary evidence, finds that the majority of the trips were not purely business, but for pleasure, and disbelieves [his] financial statement asserting he spends only $600.00 on vacation.
>
> [Dr. Cohen] claimed that 2016 was a "down year" for tax accounting purposes. Yet, his oldest son's credit card statement for September 2016 and October 2016 reflect payments made by [Dr. Cohen] of $65,069.54, and $79,883.83, and charges of $76,607.45 and $89,998.51. Understanding that some of these charges were for [his] business, and that [he] did not pay [Ms. Porat's] portion of the credit card bill, the court disbelieves [his] testimony that he struggled financially based, in part, on the substantial

> non-business charges [he] pays for on the account. As evidenced by the credit card statements, despite [his] contention of having a "down year" in 2016, he had the luxury of paying for the recreational expenses for [the three oldest children], two of whom were emancipated at the time.
>
> [Dr. Cohen] also testified that he was having difficulty making ends meet for 2019, therefore, his support payments should be decreased. However, upon review of [his] February and March 2019 American Express statements, [he] is still living comfortably. For those months, [he] spent over $3,000 on wine, and approximately $3,4000 on airline tickets for himself and another person.

The merits court found that between August 2010 and April 2019, Dr. Cohen owed Ms. Porat $1,429,500 in combined child support and alimony but paid only $1,211,891; the resulting deficit was $217,609. In reaching its decision, the court credited Dr. Cohen for payments on the Yeatman property between 2012 and 2019, but denied credit for 2010 and 2011. In addition, the court awarded Ms. Porat prejudgment interest at 6% in the amount of $42,283.16.

Further facts will be added in the discussion of the questions presented.

DISCUSSION

I.

Advanced Attorney's Fees

On October 1, 2018, Ms. Porat filed a petition for advanced attorney's fees to defend against Dr. Cohen's request to reduce child support and alimony. In opposition to the petition, Dr. Cohen asserted that "due to a downturn in economy" his medical practice had "suffered several years of declining revenue through no fault of his own" and that he

had "almost filed bankruptcy," and that Paragraph 15[9] of the Agreement precluded the award of advanced attorney's fees. It was Dr. Cohen's position that, because the "Agreement makes no provision for the payment of advance attorneys' fees," it left "no room for the [c]ourt to read that clause into the Agreement." In addition, his counsel argued:

> If Your Honor is going to enforce the contract that these people voluntarily entered into, they waived then, their statutory rights to whatever relief they could have received under the Family Law Article when they reached this agreement that has an attorney fee clause that triggers in the event of a prevailing party.
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> * * *
>
> This [c]ourt should not take on a measure right now to provide [Ms. Porat] with advanced legal fees when we have a hearing in three months, and the [c]ourt can, at that time, determine the prevailing party and decide, at that time, whether or not fees are appropriate to either party.

The motions court responded that Dr. Cohen was seeking a reduction in his support obligation, and that the question was Mr. Porat's entitlement to advanced fees:

> -- and that's what has to be answered. I'm not sure that your articulation of what the parties' agreement says is necessarily determinative of the fees issue one way or the other.

[9] Paragraph 15 provides:

> In the event that it becomes necessary for either party to file suit or to institute legal proceedings of any type against the other party in order to enforce any term or provision of this Agreement . . . in such event the party who shall prevail in such a suit, action or proceeding shall be entitled to an award from the court or other judicial tribunal of all costs incurred, including, but not limited to, filing fees, costs of discovery, expert witness fess, and reasonable attorney's fees.

The motions court concluded that advanced attorney's fees could be awarded under Md. Code Ann., Family Law ("FL") § 12-103, which provides:

> **Award of costs and fees**
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> (a) The court may award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person:
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> (1) applies for a decree or modification of a decree concerning the custody, support, or visitation of a child of the parties; or
>
> (2) files any form of proceeding:
>
> (i) to recover arrearages of child support;
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> (ii) to enforce a decree of child support; or
>
> (iii) to enforce a decree of custody or visitation.
>
> **Conditions for award of costs and fees**
> (b) *Required considerations.*— Before a court may award costs and counsel fees under this section, the court shall consider:
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> (1) the financial status of each party;
>
> (2) the needs of each party; and
>
> (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding.

In considering the required factors, the court found:

> **(1) The financial status of each party:** Dr. Cohen earns roughly $600,000 per year. He has a very successful Plastic Surgery practice. He owns serval homes, including the jointly owned family home in which Ms. Porat resides with some of the children.[10]

[10] As to Dr. Cohen's financial circumstances, the motions court found:

> Ms. Porat's resources are extremely modest, in comparison to Dr. Cohen's. She testified that the day before her hearing, she was unable to remove a modest sum from her ATM, because of insufficient funds. Dr. Cohen's economic circumstances are complicated, but they are also very substantial.
>
> **(2) the needs of each party:** Ms. Porat's needs in this context are simple: she asks for the ability to defend against Dr. Cohen's request to reduce the support. She looks to Dr. Cohen for that assistance. Dr. Cohen's needs are less about fees than they are about extracting himself from the financial quagmire in which he finds himself.
>
> **(3) whether there was substantial justification bringing, maintaining or defending the proceeding:** While this factor is usually addressed post-trial, the analysis can still be undertaken. Dr. Cohen brought the case, asking that Ms. Porat's support be reduced. While both parties at this stage are presumed to be justified in their respective pursuits, Ms. Porat cannot proceed without the ability to pay her attorneys. The final outcome lies ahead, but Ms. Porat must have the resources to proceed, and Dr. Cohen has the resources to contribute.

The court ordered Dr. Cohen to pay Ms. Porat advanced costs and attorney's fees in the amount of $70,000.

Dr. Cohen filed a notice of appeal to that award. He has been paying $1,500 per month under a Writ of Garnishment filed by Ms. Porat on June 18, 2019.

Standard of Review

(…continued)

> Dr. Cohen's income has had ups and downs over time. While he testified about dire economic circumstances presently, the testimony also revealed that he earns about $25,000 per month ($600,000) from his practice, owns two large homes, is the co-owner of a lucrative plastic surgery practice, and had $79,000 in cash in two bank accounts in his name.

The interpretation of a contract is a question of law subject to *de novo* review. *Spacesaver Sys. v. Adam*, 440 Md. 1, 7 (2014). When attorney fees are awarded under a statute, we evaluate the court's application of the statutory criteria and its "consideration of the facts of the particular case" to determine whether there was an abuse of discretion. *Petrini v. Petrini*, 336 Md. 453, 468 (1994) (citing *Jackson v. Jackson*, 272 Md. 107, 112 (1974)).

Contentions

Dr. Cohen contends that the motions court "erred as a matter of law" in awarding advanced attorney's fees because "no contractual nor statutory basis existed under which such an award could be made." As to the lack of a contractual basis for the award, he asserts that the "Agreement makes no provision for the payment of advanced attorneys' fees and left no room for the [motions] [c]ourt to read [advanced attorney's fees] into the Agreement." By awarding advanced fees, he argues that the motions court "frustrated the parties' intent in this freely entered-into Agreement by reforming the parties' Agreement as to the payment of attorney's fees." And because the merits court subsequently found that "neither party totally prevailed," the award of any attorney's fees in this case was improper.

As to the statutory basis for the award of attorney's fees, he contends that FL § 12-103 did not apply because enforcement of the Agreement was not a traditional modification of support action.

Analysis

Enforceable separation agreements are permitted under FL § 8-101.[11] The rules governing the construction of contracts apply to their interpretation. *Campitelli v. Johnston*, 134 Md. App. 689, 696 (2000). As the Court of Appeals has explained:

> Maryland follows the objective law of contract interpretation. *See Taylor v. NationsBank, N.A.*, 365 Md. 166, 178 (2001). The objective law of contract interpretation holds that a written contract will be considered ambiguous when it is susceptible to more than one interpretation when examined by a reasonably prudent person, *see Calomiris v. Woods*, 353 Md. 425, 436 (1999); however, "[i]f a written contract is susceptible of a clear, unambiguous and definite understanding . . . its construction is for the court to determine." *Wells v. Chevy Chase Bank, F.S.B.*, 363 Md. 232, 251 (2001) (quoting *Rothman v. Silver*, 245 Md. 292, 296 (1967)) (internal quotations omitted). Under the objective law of contract interpretation, the court will give force and effect to the words of the contract without regard to what the parties to the contract thought it meant or what they intended for it to mean. *See Auction & Estate Reps., Inc. v. Ashton*, 354 Md. at 340–41 (quoting *Calomiris*, 353 Md. at 436).

Langston v. Langston, 366 Md. 490, 506–07 (2001).

The Agreement provides for "reasonable attorney's fees" to "the party who shall prevail" in an enforcement action. Dr. Cohen argues that "[t]he plain language of the parties' Separation Agreement cannot be interpreted in any way other than precluding" an award of advanced attorney's fees. We are not persuaded.

[11] Because this Agreement was incorporated but not merged into the settlement, the court may enforce any part of the agreement as either a contempt action or an independent contract. FL § 8-105(a)(2). The court may modify any provision of the agreement "with respect to the care, custody, education, or support of any minor child of the spouses, if the modification would be in the best interests of the child." FL § 8-103(a). The court may also modify any provision dealing with alimony unless there is an express waiver of alimony or the provision specifically states that the provision is not subject to any court modification. FL § 3-103(c).

The Agreement does not expressly preclude the award of advanced attorney's fees. But more importantly, in the context of this case, it does not—as Dr. Cohen contends—purport to "waive[] . . . [the parties'] statutory rights . . . under the Family Law Article" even were we to assume that those rights could be waived. The provision for the award of fees to the prevailing party at the end of the case contemplated the financial ability of both parties to proceed with or defend the litigation. As the motions court concluded, there could be no ultimate determination of a prevailing party under the Agreement because Ms. Porat was unable to "proceed without the ability to pay her attorneys." In short, we agree with the motions court that the Agreement is not "necessarily determinative" of whether advanced attorney's fees could be awarded under FL § 12-103.

Nor are we persuaded that FL § 12-103 does not apply because Dr. Cohen sought "to modify the alimony and child support awards, as contemplated in the Separation Agreement." In all meaningful ways, the modification of support aspect of this action is no different in purpose and potential result than a traditional modification of support action. FL § 12-103 expressly applies in "*any form of proceeding*" in which a person seeks "to recover arrearages of child support" or modify a decree concerning support. (Emphasis added). In *David A. v. Karen S.*, 242 Md. App. 1, 35, *cert. denied*, 466 Md. 219 (2019) (quoting *Henriquez v. Henriquez*, 413 Md. 287 (2010)), we stated:

> [T]he statute provides broad authority for the court to award attorney's fees and costs in a custody, visitation, or child support proceeding "that are just and proper under all the circumstances," subject only to the requirement that the court must first "consider" three things: (1) "the financial status of each party;" (2) "the needs of each party;" and (3) whether each party had a substantial justification for its position in the proceeding.

In addition to considering the interests of the children who may be affected by the result in such cases, the statute promotes other important policy considerations, including access to counsel to parties who might not be able to afford it and "help[s] to ensure that one party to such a proceeding is not incentivized to abuse his or her resource advantage or prevail based on a disparity of resources." *Id.* at 36.

The motions court clearly considered the requisite FL § 12-103(b) factors in reaching its determination. Regarding the "financial status of each party," it found:

> Dr[.] Cohen earns roughly $600,000 per year. He has a very successful Plastic Surgery practice. He owns several homes, including the jointly owned family home in which Ms. Porat resides with some of the children. Ms. Porat's resources are extremely modest, in comparison to Dr. Cohen's. She testified that the day before the hearing, she was unable to remove a modest sum from her ATM, because of insufficient funds. Dr. Cohen's economic circumstances are complicated, but they are also very substantial.

With respect to the "needs of each party," the court explained that "Ms. Porat's needs in this context are simple: she asks for the ability to defend against Dr. Cohen's request to reduce the support." And that "Dr. Cohen's needs are less about fees than they are about extracting himself from the financial quagmire in which he finds himself." Noting that, at that stage of the proceedings, both parties are "presumed to be justified in their respective pursuits," the court recognized that "Ms. Porat cannot proceed without the ability to pay her attorneys," and that "Dr. Cohen has the resources to contribute."[12]

[12] The merits court concluded that it did not have jurisdiction to consider the appropriateness of the advanced attorney's fees award because an appeal of the award

In sum, the motions court neither erred nor abused its discretion in awarding Ms. Porat advanced attorney's fees under FL § 12-103.

II.

Payments on the Yeatman Property[13]

(…continued)
had been noted. It stated, however, that, if it did have jurisdiction, it "would not vacate the award":

> When analyzing the factors set forth in Md. Code Ann., Fam. Law. § 12-103(b) the court finds that [Dr. Cohen] is in a far superior financial situation than [Ms. Porat], [she] needed the advanced fees to pursue this litigation, and [she] was substantially justified to bring this action.

[13] Section 4.1 of the Agreement, Property Rights, provides, in pertinent part:

> **4.1 Real Property**
>
> A. **The Yeatman Property**. The parties are the owners as tenants by the entirety of the real property located at 11618 Yeatman Terrace, Silver Spring, Maryland (the "Yeatman Property"). The Yeatman Property is presently occupied by Wife and the parties' four (4) younger children. The Yeatman Property presently has (2) encumbrances against it (i) a first position deed of trust in the approximate amount of $488,000.00 owed to Citimortgage and (ii) a second position home equity line of credit in the approximate amount of $250,000.00 owed to BB&T.
>
> **4.1.1. Use and Occupancy; Carrying Costs.** Until recordation of the quit claim deed to Wife from Husband of the Yeatman Property, Wife shall have exclusive use and occupancy of the Yeatman Property pursuant to Section 8-207 of the Family Law Article of the Annotated Code of Maryland, without any obligation or contribution to Husband.
>
> (a) The Mortgages and/or deeds of trust set forth and/or lines of credit in (a) above shall be paid by Wife commencing August 1, 2010. Prior to August

At the April 10, 2019 merits hearing, Ms. Porat claimed that, between August 2010 and April 2019, Dr. Cohen was obligated to pay her $1,429,500.00 and that he had paid $1,202,510.88. Dr. Cohen claimed that, during that period, he was only obligated to pay $1,281,100.00 but, including $124,951.00 that he had paid on the second trust on the Yeatman property, he had paid $1,304,491.00.

Dr. Cohen claimed paying $5,250.00 towards the second trust for 2010, and $12,600.00 for 2011. He based these numbers on a Request for Verification of Mortgage document from BB&T,[14] indicating a monthly payment of $1,050.41, and multiplying five months in 2010 (August to December) and twelve months in 2011.

The merits court accepted Dr. Cohen's testimony, which was supported by "backup documentation," that he made the second-trust payments on the Yeatman property for the years 2012 to 2019. In the absence, however, of any "documentation for 2010 and 2011," it declined to credit any payments Dr. Cohen claimed to have made on the Yeatman second trust during those years. The court explained that without supporting documentation, it could not "discern the amount paid" because:

> *Throughout this litigation, it was abundantly clear that [Dr. Cohen] regularly failed to make timely payments on a monthly basis. His payments*

(…continued)

> 1, 2010, Husband shall timely pay both the first trust and equity line of credit on the Yeatman Property.
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> (b) In the even that Wife fails to timely pay the mortgages and/or deeds of trust and/or equity lines of credit on the Yeatman Property as set forth in paragraph (a) above, Husband shall make said payments and Wife authorized Husband to deduct the monies paid from the alimony due Wife.

[14] BB&T and SunTrust merged to become Truist Bank.

> *were almost always inconsistent and late.* The fact that the second trust is still active, for [Dr. Cohen], does not mean monthly payments were made. Therefore, the alleged payments towards the second trust for 2010 and 2011 will not be considered.

(Emphasis added). And, in its denial of Dr. Cohen's Motion to Alter or Amend the Judgment, the court further explained:

> As stated in the Memorandum and Opinion, and is made abundantly clear when looking at the entire record, [Dr. Cohen] does not regularly make payments on his monthly expenses. [He] routinely misses payments, pays inconsistent amounts, and has a propensity to stiff creditors. The fact that the loan is not in default, does not prove that payments were made. This court, without backup documentation, does not credit [Dr. Cohen's] contention that minimum payments were made. [Dr. Cohen] plainly failed to carry its burden to show that payments towards the Yeatman property for the years 2010 and 2011 were made.

Standard of Review

We do not "set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8–131(c).

Contentions

Dr. Cohen contends that the merits court "declined to credit [him] with any payments he made in 2010 and 2011. . . because [he] did not introduce monthly records for those years (which did not exist), to corroborate his testimony" when the "only evidence presented at trial demonstrated that he did indeed make the payments." He argues that the court's "factual finding that [he] did not make payments on the Yeatman property in 2010 and 2011 was clearly erroneous, was not supported by the evidence,

appears to be based on the [c]ircuit [c]ourt's overall disfavor of [him] and, as such, constituted an abuse of discretion."

Analysis

"Generally, once the existence of a payment obligation is established, the party asserting that payment has been made has the burden of proving that fact by a preponderance of the evidence." *Jackson v. 2109 Brandywine, LLC*, 180 Md. App. 535, 557 (2008). According to Dr. Cohen, "[t]he preponderance of the evidence in the record on this issue demonstrates that [he] paid at least the minimum loan payments in 2010 and 2011 and thus should be afford[ed] credit for [$17,850] as required by the parties' Separation Agreement." He points to his testimony that he had been making payments since August 2010 and the fact that the loan was not in default shows that at least the minimum payments had been made.[15]

In rejecting Dr. Cohen's claim for credit for payments on the Yeatman property in 2010 and 2011, the merits court found that Dr. Cohen had "regularly failed to make timely payments" on his monthly obligations and provided no documentation to support the claimed payments. Dr. Cohen's failure to make timely payments was supported by

[15] Dr. Cohen testified:

> I'm assuming that since the [Yeatman] property was not in default it wasn't repossessed and I'm the only one who made payments on it I made the minimum payment for those years.

He further notes that Ms. Porat testified that she was not aware of the second trust until 2019 and "therefore could not have been the source of payments apparently made in 2010 and 2011."

the evidence. For example, under the Agreement, Dr. Cohen was obligated to pay $7,000 per month for child support. For alimony, he was obligated to pay $6,000 per month from August 2, 2010 to July 31, 2011; $8,000 from August 1, 2011 to July 31, 2012; and $6,500 per month from August 1, 2012 to every month thereafter. In addition, the court cited seventeen other such examples including:

- In April of 2011, Ms. Porat testified that she was paid $11,000; Dr. Cohen claimed that he paid $11,500.00. Because Dr. Cohen "double-count[ed]" a $500.00 cash payment on April 15, 2011, the court concluded that he paid $11,000.00.

- In November of 2011, Ms. Porat claimed she received $14,400.00; Dr. Cohen claimed he paid $16,400. The court found that Dr. Cohen had "triple counted the payment of $1,000.00," and that "[h]e accounted[for a check he cashed for $1,000, an email receipt from [Ms. Porat], and another email receipt from [Ms. Porat." The court concluded that Dr. Cohen paid $14,400.00.

In addition, there was evidence related to another mortgage for which he did not make payments in order to leverage new financing.[16] In sum, the court found that Dr. Cohen's

[16] The court found:

> [Dr. Cohen], contended that he did not have ownership interest in the property located at 501 Stonington Road, Silver Spring, MD 20902 ("Stonington Property"), however the court finds that, in fact, he does have an ownership interest. The Stonington Property per the [Agreement] was to be used and possessed by [him], until the appraised value [met several conditions]. The Stonington Property was not sold per the agreement; it went into foreclosure. [Dr. Cohen] testified that his friend, Aaron Orlofsky, purchased the Stonington property during a foreclosure sale, and rented the home back to [Dr. Cohen], so the [he] could remain in the home. [Dr. Cohen] further stated that the property was owned 100 percent by [Mr.] Orlofsk[y] through an LLC. The court disbelieves [Dr. Cohen]'s

"trial testimony regarding his finances, assets, and debt simply was not credible," which is an assessment that we do not "second-guess." *See Gizzo v. Gerstman*, 245 Md. App. 168, 203 (2020). Moreover, there was "competent or material evidence in the record" to support the merits court's conclusion to reject the claim for payments in 2010 to 2011. *See Lemley v. Lemley*, 109 Md. App. 620, 628 (1996). In regard to those payments, Dr. Cohen had the evidentiary burden of both production and persuasion. Other than his testimony, he produced no evidence of actual payments as he did for other years. Instead, he asks the court to infer that the required minimum payments were made because the debt was not declared in default. But, as the court explained, the fact that default was not declared does not prove what payments, if any, were made. On this record, we perceive

(…continued)

> testimony. The Nominee Agreement between [Dr. Cohen] and Aaron Orlofsky specifically states:
>
> 1. Barry [Cohen] will pay for all of the expenses of the Residence, including those incurred by the LLC, through payment of Rent and other expenses due under the Lease, including real estate taxes, insurance, mortgage payments, repairs and make any and all necessary or required structural improvements; and
> 2. The LLC will act merely as nominee for Barry. Barry is acknowledged to be the beneficial and true owner of the Residence, and the LLC will continue to own the fee simple interest in the Residence. 100% of the Membership interests in the LLC will be transferred to Barry when the LLC is relieved in full of any liability for the Resident Mortgage Loan.
>
> The court finds that [Dr. Cohen] manipulated the foreclosure process to retain ownership of his home. [Dr. Cohen] owed over $3,000,000 on the mortgage, and had his friend purchase the home for only $1,200,000.00[], so that [he] could pay for a lower monthly amount through his friend.

neither clear error nor an abuse of discretion in the court's conclusion that Dr. Cohen "plainly failed to carry [his] burden."

III.

Pre-judgment Interest

Standard of Review

We review discretionary decisions for abuse, factual decisions for clear error, and legal decisions *de novo*. *See Spaw, LLC v. City of Annapolis*, 452 Md. 314, 338–39, 363 (2017). As we explained in *Selective Way Ins. Co. v. Nationwide Prop. & Cas. Ins. Co.*, 242 Md. App. 688, 744 (2019), *cert. granted*, 467 Md. 690 (2020):

> The "purpose of awarding pre-judgment interest . . . is to compensate the aggrieved party for the loss of the use of the principal liquidated sum due it and the loss of income from such funds." *Harford County v. Saks Fifth Ave. Distrib. Co.*, 399 Md. 73, 95, 923 A.2d 1 (2007) (citation and quotation marks omitted).[] "[P]re-judgment interest as a matter of right is the exception rather than the rule." *Ver Brycke v. Ver Brycke*, 379 Md. 669, 702, 843 A.2d 758 (2004). The question of "[w]hether a party is entitled to pre-judgment interest generally is left to the discretion of the fact finder." *Id.* (citation and quotation marks omitted). Ordinarily, the matter "'should be left to the discretion of the jury,'" except when the court serves as fact finder. *Gordon v. Posner*, 142 Md. App. 399, 437, 790 A.2d 675 (2002) (quoting *I.W. Berman Props. v. Porter Bros., Inc.*, 276 Md. 1, 18, 344 A.2d 65 (1975)).

Contentions

Dr. Cohen asserts that the trial court "correctly found that an award of pre-judgment interest was not a matter of right, but rather required an exercise of discretion." He contends, however, that the court "incorrectly found that the terms of the parties' Separation Agreement were 'certain, definite, and liquidated.'" As he sees it, "[n]either

party clearly understood all the support obligations of the Separation Agreement and the [c]ircuit [c]ourt found that neither party fully prevailed in their claims." For these reasons, he argues that it would be "inequitable to hold [him] responsible for pre-judgment interest for acting under his interpretation of the unclear Agreement provisions." And even "if the [c]ircuit [c]ourt believed that some terms of the Agreement were clear and therefore the sums due were certain, liquidated, and definite, the [c]ircuit [c]ourt should have applied pre-judgment interest to only those portions of the judgment."[17]

Analysis

As we have explained:

> There are three categories that cases of prejudgment interest fall into: 1) as a matter of right – when the obligation to pay and amount due are certain, definite, and liquidated by a specific date prior to judgement; 2) absolute non-allowance – when the recovery is for bodily harm emotional distress or similar intangible elements of damage; and 3) an in-between category where pre-judgment interest is within the discretion of the trier of fact.

Baltimore Cty., Maryland v. Aecom Servs., Inc., 200 Md. App. 380, 424 (2011) (quoting *Buxton v. Buxton*, 363 Md. 634, 656-57 (2001)).

"Pre-judgment interest is allowable as a matter of right when the obligation to pay and the amount due had become certain, definite, and liquidated by a specific date prior to judgment so that the effect of the debtor's withholding payment was to deprive the

[17] It appears that all the money to which pre-judgment interest applied, including the credit claimed but denied on the Yeatman property, related to spousal and child support payments.

creditor of the use of a fixed amount as of a known date." *Buxton v. Buxton*, 363 Md. 634, 656 (2001) (citations and quotation marks omitted). A plaintiff may be entitled to pre-judgment interest as a matter of right "under written contracts to pay money on a day certain, such as bills of exchange or promissory notes, in actions on bonds or under contracts providing for the payment of interest, in cases where the money claimed has actually been used by the other party, and in sums payable under leases as rent[.]" *Id.*

Section 10 (Spousal Support) of the Agreement provided that Dr. Cohen "shall pay [Ms. Porat] indefinite alimony" in the amount of $6,500 per month. Section 9 (Child Support) of the Agreement provided that Dr. Cohen "shall pay child support to Wife in the amount of $7,000 per month commencing on August 1, 2010 and the first day of every month thereafter until modified by Order of Court."

The merits court found that Dr. Cohen's obligations regarding child and spousal support "were clearly set forth in the parties' [Agreement]," and that Dr. Cohen "unilaterally" breached the provisions of the Agreement by reducing his support payments to Ms. Porat, which "deprived [her] of the benefit of the funds owed to her." To be sure, the merits court found these obligations to be "certain, definite, and liquidated."

On the other hand, the merits court did not award pre-judgment interest simply as a matter of right but, by its own statement it was "exercising its discretion" when it did.

As we have explained:

> Ordinarily, "[w]hether a party is entitled to prejudgment interest . . . is left to the discretion of the fact finder. 'The exercise of discretion to award

> prejudgment interest must be based on the "equity and justice appearing between the parties and a consideration of all the circumstances."'" *Ver Brycke v. Ver Brycke*, 150 Md. App. 623, 656–57, 822 A.2d 1226 (2003) (citation omitted), *aff'd in part, rev'd in part on other grounds*, 379 Md. 669 (2004).

Pulte Home Corp. v. Parex, Inc., 174 Md. App. 681, 771 (2007), *aff'd*, 403 Md. 367 (2008); *see Buxton v. Buxton*, 363 Md. 634, 656 (2001).

Dr. Cohen argues that "[n]either party clearly understood all the support obligations of the Separation Agreement" and that "[i]t would be inequitable to hold [him] responsible for pre-judgment interest for acting under his interpretation of the unclear Agreement provisions." Again, we are not persuaded. All the terms related to payments to be made to Ms. Porat were quite clear as was the provision that they were to remain in effect "until modified by Order of Court." If the pre-judgment interest was awarded purely as a matter of right, we would affirm the award on that basis.

On the other hand, the court's statement that, in awarding pre-judgment interest, it was exercising its discretion indicates that its observations regarding the clearness of the support obligations was part of its consideration of all the circumstances in the case. For example, the merits court noted that "the parties, at the time of their entering into the [Agreement], knew Ms. Porat "was not earning an income"; that Dr. Cohen "did not expect or anticipate that [Ms. Porat] would ever earn a substantial income"; and that Ms. Porat "relies on the support from [Dr. Cohen] to pay her bills." And in its order in response to the motion to alter or amend its June 19, 2019 Memorandum and Order regarding the award of pre-judgment interest, the court stated that "[b]y depriving [Ms.

Porat] of the support payments, [Dr. Cohen] essentially deprived his children, since the support payments were for the children."

Clearly, the court weighed the "equity and justice appearing between the parties" in exercising its discretion to award pre-judgment interest in this case. *See Pulte Home Corp.*, 174 Md. App. 681, 771 (2007). In short, we perceive neither error nor an abuse of discretion in its doing so.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.