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THE APPROVAL OF THE COMMITTEE ON OPINIONS

DONALD BENSON, INDIVIDUALLY  
AND ON BEHALF OF THE ESTATE  
AND WRONGFUL DEATH HEIRS OF  
RENEE BENSON, DECEASED,  
Plaintiff,

v.

ETHICON, INC., ETHICON WOMEN'S  
HEALTH AND UROLOGY, a Division of  
Ethicon, Inc., GYNECARE, JOHNSON &  
JOHNSON, AND JOHN DOES 1-20,  
Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: BERGEN COUNTY  
DOCKET NO. BER-L-8842-15  
MASTER CASE NO. BER-L-11575-14

***CIVIL ACTION***

Submitted: August 7, 2015<sup>1</sup>  
Decided: November 2, 2015

APPEARING:

For Plaintiff Donald Benson: Jason L. Pullman, Esq. (Oshman & Mirisola, L.L.P.)

For Defendants Ethicon, Inc., Ethicon Women's Health and Urology, a Division of  
Ethicon, Inc., Gynecare, and Johnson & Johnson: Kelly S. Crawford, Esq. and Brett  
M. Becker, Esq. (Riker Danzig, L.L.P.)

**MARTINOTTI, J.S.C.**

Before this Court is Plaintiff Donald Benson's ("Plaintiff") Motion to Vacate the  
Dismissal of his Complaint and to Reinstate his Complaint. This Motion is OPPOSED by  
Defendants Ethicon, Inc., Ethicon Women's Health and Urology, Gynecare, and Johnson &  
Johnson (collectively "Defendants").

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<sup>1</sup> At the Case Management Conference on October 21, 2015, counsel agreed to have this matter heard without  
argument.

## ARGUMENTS

### Plaintiff's Motion to Vacate Dismissal Reinstate Complaint

Plaintiff's Complaint was dismissed without prejudice on September 12, 2013<sup>2</sup> for failure to provide a Plaintiff Fact Sheet ("PFS"). (Pullman Cert. Ex. C.) Plaintiff provided a completed PFS to Defendants on March 24, 2015. (Pullman Cert. Ex. D.) Plaintiff's counsel asked Defendants to remove this case from the list of cases to be dismissed with prejudice, and Defendants agreed. (Pullman Cert. Ex. D, Becker Cert. Ex. I.) Defendants stated in an email to Plaintiff's counsel that they would not oppose this motion. (Becker Cert. Ex. J.) As Plaintiff has now complied with the PFS requirement, he asks this Court to reinstate his Complaint. (Pullman Cert. ¶¶ 9-10.)

### Defendants' Opposition to Plaintiff's Motion to Reinstate

Defendants advance three arguments in opposition to Plaintiff's Motion. First, Defendants argue Plaintiff should be held to the "exceptional circumstances" standard, as opposed to the "good cause" standard, because his Complaint would have been dismissed with prejudice but for the moratorium that Judge Higbee imposed on this case while she was being considered for the Appellate Division. Second, Defendants argue that if the Court grants this Motion the reinstated Complaint should be deemed filed on the date of the order, in which case the claim would be time-barred. Third, Defendants argue Plaintiff should not be entitled to additional discovery, because Plaintiff's Motion was filed beyond the discovery period.

#### 1. Defendants' Argument Opposing Reinstatement

Defendants argue there were egregious delays in providing discovery (two years and one month after the PFS was due) and in bringing the present Motion (nearly two years after

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<sup>2</sup> The Hon. Carol E. Higbee, J.S.C. dismissed the Complaint when this matter was filed in Atlantic County before Judge Higbee's elevation to the Appellate Division.

Plaintiff's Complaint was dismissed without prejudice). Under Rule 4:23-5(a)(2), after an order has been entered for failure to produce discovery, the party entitled to discovery may move for a dismissal with prejudice. The dismissal "shall be granted" unless there is a motion to vacate the previous order and the delinquent party has produced the discovery, or if there are exceptional circumstances. R. 4:23-5(a)(2).

Defendants were entitled to file a motion to dismiss this case with prejudice any time after November 11, 2013, which was 60 days after Plaintiff's Complaint was dismissed without prejudice. Defendants filed that motion on February 18, 2015, with a return date of March 6, 2015. The motion was left pending due to the transfer of this litigation from Atlantic County to Bergen County, and before it was heard, Plaintiff provided Defendants with a PFS on March 24, 2015.

On July 23, 2015, this Court informed Defendants they could move in Atlantic County to dismiss with prejudice those cases dismissed without prejudice in Atlantic County. Atlantic County, meanwhile, informed Defendants on August 11, 2015 that it was prepared to *sua sponte* transfer this matter to Bergen County and advised Defendants to file all motions with this Court. Defendants argue that these administrative delays, which were beyond their control, prevented them from dismissing this case with prejudice.

Thus, Defendants argue that Plaintiff should be held to the "exceptional circumstances" standard of Rule 4:50-1. The failure of a client to communicate with her attorney does not constitute exceptional circumstances. See Rodriguez v. Luciano, 277 N.J. Super. 109 (App. Div. 1994), superseded by Rule on other grounds, R. 4:23-5(a)(2), as recognized in Adedoyin v. Arc of Morris Cnty. Chapter, Inc., 325 N.J. Super. 173, 182-83 (App. Div. 1999) (submission of fully responsive answers precludes dismissal). Defendants claim Plaintiff's egregious delays in

submitting the PFS and filing this motion cannot be excused by any cause that rises to the exceptional circumstances standard. Defendants add that they would not have consented to removing Plaintiff's case from the Motion to Dismiss with Prejudice had they been aware of these delays.

2. Defendants' Argument That a Reinstated Complaint Should Be Deemed Filed on the Date of the Order

If this Court grants Plaintiff's Motion to Reinstate, Defendants argue the Court should abrogate the relation back doctrine and deem Plaintiff's Complaint reinstated on the date of the order, not on the date of her original Complaint. Defendants cite Konopka v. Foster, 356 N.J. Super. 223 (App. Div. 2002), in which a plaintiff did not comply with statutory medical disclosure requirements for seeking noneconomic damages. The court ruled that even if the trial judge had erred by dismissing plaintiff's case with prejudice, rather than without prejudice, the error had no impact because "any restitution of suit [was] barred by the statute of limitations." Id. at 228.

Defendants argue abrogation of the relation back doctrine is necessary to ameliorate the prejudice they would otherwise suffer. Defendants note they have not been able to conduct discovery during the time the PFS was delinquent. If Plaintiff's Complaint is reinstated, Defendants argue they will reenter the case at a time in which "memories have faded and medical records are likely more difficult to obtain." (Defs.' Opp. to Pl.'s Mot. to Reinstate at 7).

3. Defendants' Argument That Plaintiff Is Not Entitled to Additional Discovery

When a delinquent party has his Complaint reinstated following the discovery end date, the delinquent party must show "exceptional circumstances" to reopen discovery. Sprankle v. Adamar of New Jersey, Inc., 388 N.J. Super. 216, 224-25 (Law Div. 2005). In Sprankle, the

court determined that plaintiff's seven-month delay in filing a motion to reinstate without explanation was "egregious." Id. at 225. The court granted plaintiff's motion to reinstate the complaint but ruled he was not entitled to additional discovery. Ibid. The court ruled the non-delinquent party was entitled to discovery on a showing of "good cause." Ibid.

Here, Plaintiff waited nearly twenty-three (23) months to file this motion and provided no explanation for the delay. The discovery end date of May 24, 2014 has passed. Defendants argue that if this Court grants Plaintiff's Motion, Plaintiff should not be entitled to additional discovery.

#### Plaintiff's Reply to Defendants' Opposition

Plaintiff argues that Defendants mischaracterize this Motion as being filed after a two-year delay. The Motion could not be filed until the PFS was complete, and Plaintiff filed this Motion in a timely fashion after the PFS was submitted.

Plaintiff asks the Court to deny Defendants' request that the Complaint, if reinstated, be deemed filed on the date of the order. Granting Defendants' request would be akin to a dismissal with prejudice.

Plaintiff does not address Defendants' argument that he is not entitled to additional discovery.

#### DECISION

Rule 4:23-5(a) states that if a party seeking to vacate a motion of dismissal does not file such motion within 90 days of entry of the order, "the court may also order the delinquent party to pay sanctions or attorney's fees and costs, or both, as a condition of restoration." Rule 4:23-5. However, New Jersey courts have held that failure to move to vacate dismissal within the

prescribed time frame “does not by itself bar vacating the dismissal.” Georgis v. Scarpa, 226 N.J. Super. 244, 251 (App. Div. 1988), citing Zaccardi v. Becker, 88 N.J. 245, 251 (1992). “The court has discretion to relax the 30-day limit to prevent injustice pursuant to Rule 1:1-2, or by the application of Rule 4:50-1(f), which permits the court to relieve a party from the operation of an order to achieve essential fairness.” Georgis, *supra*, 226 N.J. Super. at 252 (citing Zaccardi 88 N.J. at 253 n.3; Schlosser v. Kragen, 111 N.J. Super. 337, 345-46 (Law Div. 1970); Hodgson v. Applegate, 31 N.J. 29, 43 (1959); Tenby Chase Apartments v. N.J. Water Co., 169 N.J. Super. 55, 59-60 (App. Div. 1979)).

To determine whether the rules should be relaxed, several important factors should be considered by a trial court, including: (1) the extent of the delay; (2) the underlying reason or cause; (3) the fault of the litigant, and (4) the prejudice that would accrue to the other party. Jansson v. Fairleigh Dickinson University, 198 N.J. Super. 190, 195 (App. Div. 1985). The decision to vacate an order pursuant to R. 4:23-5, requires a two-step analysis. The judge must first examine the case in light of the factors set forth in Jansson. Then he must determine whether the ultimate sanction of suppression or dismissal is appropriate or whether a less drastic sanction is more equitable in light of the circumstances of the case.

Ibid.

Despite Defendants’ argument about the unfairness or bad luck that they would experience because administrative delays prevented them from seeking dismissal of this case with prejudice, there is no basis in law to apply the “exceptional circumstances” standard here, rather than the “good cause” standard. These delays did not stem from either party’s actions, nor were they intended to benefit or punish either party. But the transfer is a fact of the litigation. Given the unusual nature of this case’s history in two different vicinages, it is understandable that Defendants have no legal precedent to support their claim that this Court should act as though the moratorium did not take place and assume that Defendants would have successfully moved to dismiss Plaintiff’s case with prejudice. Applying the “exceptional circumstances”

standard<sup>3</sup> to Plaintiff's Motion may be fair, but there is no law compelling that result. Plaintiff's Complaint was dismissed without prejudice.

Thus, the "good cause" standard should apply. Though Plaintiff's counsel provides little explanation for the untimeliness of the PFS submission, the standard is generous to plaintiffs and "the right to 'reinstatement is ordinarily routinely and freely granted when plaintiff has cured the problem that led to the dismissal even if the application is made many months later.'" Ghandi v. Cespedes, 390 N.J. Super. 193, 196 (App. Div. 2007) (quoting Rivera v. Atl. Coast Rehab. Center, 321 N.J. Super. 340, 346 (App. Div. 1999)). Here, Plaintiff cured the problem by submitting the PFS and under the "good cause" standard, reinstatement is appropriate.

Defendants' second argument—that Plaintiff's Complaint, if reinstated, should be deemed submitted on the date of the order—is less persuasive. Courts have consistently ruled a reinstated complaint relates back to the filing of the original complaint. J. Roberts And Son, Inc. v. Hillcrest Memorial Co., 363 N.J. Super. 485, 491 (App. Div. 2005) ("Where a matter is reinstated, the action reverts to the status of the complaint as it existed at the time the dismissal was entered."). A reinstated complaint "does not trigger the statute of limitations even though the reinstatement occurs after the statute of limitations has run." Ibid. The relation back doctrine applies unless there is evidence that a plaintiff or plaintiff's counsel engaged in willful misconduct. Miles v. CCS Corp., 2015 N.J. Super. Unpub. LEXIS 1989, \*12 (App. Div. 2015) (citing Czepas v. Schenk, 362 N.J. Super. 216, 225, 228 (App. Div. 2003)).

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<sup>3</sup> Indeed, given this unique factual scenario, namely the large number of pending matters, not only in New Jersey but also nationwide, the transfer of cases from Atlantic County to Bergen County, and Judge Higbee's moratorium, one can posit the exceptional circumstances are present as a matter of law.

Here, there is no indication or allegation that Plaintiff or her counsel engaged in willful misconduct. The relation back doctrine should therefore apply. Under J. Roberts And Son, supra, there is no statute of limitations issue.

Defendants' final argument that Plaintiff is not entitled to additional discovery is more persuasive. The court's decision in Sprankle provides that Defendants' proposed modification is warranted. Plaintiff submitted this motion after the discovery end date, and therefore Plaintiff is not entitled to additional discovery. Defendants may take additional discovery upon a showing of good cause. See Sprankle, supra, 388 N.J. Super. at 225.

### **CONCLUSION**

For the foregoing reasons, Plaintiff's Motion to Vacate Dismissal and Reinstate the Complaint is GRANTED with the provision that Plaintiff is not entitled to additional discovery.