

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3647-07T1

GLENN TERYEK,

Plaintiff-Appellant,

v.

THE STATE OF NEW JERSEY,
DIVISION OF STATE POLICE,
OFFICE OF THE ATTORNEY
GENERAL, ROBERT DZIOBAK,
JOSEPH FUENTES, DANIEL
GIANQUINTO, THOMAS GILBERT,
PETER HARVEY, JOHN HUNT,
WILLIAM MEDDIS, CHRISTOPHER
O'SHEA, JOSEPH SANTIAGO, and
NICHOLAS ZICHELLO,

Defendants-Respondents.

Submitted September 22, 2010 - Decided March 22, 2011

Before Judges Fuentes, Gilroy and Ashrafi.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Docket No.
L-1859-06.

Michael J. Reimer, attorney for appellant.

Paula T. Dow, Attorney General, attorney
for respondents (Lewis A. Scheindlin,
Assistant Attorney General, of counsel;
Brian Flanagan, Deputy Attorney General,
on the brief).

PER CURIAM

Plaintiff Glenn Teryek appeals both from the final order of the Law Division dismissing his cause of action against defendants with prejudice pursuant to Rule 4:23-5(a)(2) as a sanction for failure to respond to defendants' interrogatories within the time frame established by the rule, and from an earlier interlocutory order dismissing all but one basis for liability against defendants. We affirm.

On July 24, 2006, plaintiff filed a complaint against his employer, the New Jersey State Police (NJSP); the Office of the New Jersey Attorney General; and various individuals employed by those two State agencies, alleging violations of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49; certain sections of the State Constitution; the New Jersey Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8; and the common law right against retaliation. In lieu of filing a responsive pleading, defendants successfully moved to dismiss plaintiff's complaint, except for those counts arising under CEPA, for failure to state a claim upon which relief could be granted pursuant to Rule 4:6-2(e).¹

After joinder of issue, the parties propounded discovery demands on each other. By letter dated March 8, 2007, defense

¹ All claims against Attorney General Peter Harvey, including those arising under CEPA, were dismissed with prejudice.

counsel notified plaintiff's attorney that defendants' first request for documents was overdue. On April 18, 2007, defendants moved to dismiss plaintiff's complaint without prejudice for failure to comply with discovery pursuant to Rule 4:23-5(a)(1).

By letter dated April 28, 2007, plaintiff's counsel requested that defense counsel withdraw the motion for dismissal and grant plaintiff an additional thirty days to provide discovery. Defense counsel did not agree to this request. On May 10, 2007, plaintiff "responded" to defendants' interrogatories by objecting to each question and providing a narrative which largely mirrored the allegations in plaintiff's complaint. The following day, May 11, 2007, the trial court entered an order dismissing plaintiff's complaint without prejudice.

On May 24, 2007, plaintiff filed a motion to vacate the order of dismissal, citing counsel's request for a thirty day extension and plaintiff's May 10, 2007 responses to defendants' interrogatories. The court denied plaintiff's motion by order dated June 22, 2007. After filing "revised responses" to defendants' discovery demands on August 18, 2007, which largely referred to his previous interrogatory responses or simply indicated that "[n]o documents presently satisfy this request,"

plaintiff filed a second motion to reinstate his complaint. The court denied this motion by order dated September 7, 2007.

On October 2, 2007, defendants moved to dismiss plaintiff's complaint with prejudice for his failure to comply with discovery pursuant to Rule 4:23-5(a)(2). On October 16, 2007, plaintiff's counsel sent defense counsel revised answers to defendants' interrogatories and responses to defendants' notice to produce; counsel also filed a third motion seeking to reinstate the complaint. Three days later, on October 19, 2007, plaintiff also filed a cross-motion seeking to suppress defendants' answers pursuant to Rule 4:23-5(a)(1).

These motions came before the trial court for argument on November 16, 2007. By order dated January 25, 2008, the court denied plaintiff's motions to vacate the prior order of dismissal and to suppress defendants' answers, and granted defendants' motion to dismiss plaintiff's complaint with prejudice. The court also denied plaintiff's motion for reconsideration.

On appeal, plaintiff now argues that the trial court erred in dismissing his non-CEPA claims and in dismissing with prejudice his CEPA cause of action under Rule 4:23-5(a)(2) because his answers to defendants' interrogatories were complete and responsive. We disagree.

We first address the court's dismissal under Rule 4:6-2 of plaintiff's non-CEPA claims. Plaintiff is Caucasian. His claims under the LAD were not based on allegations that he was discriminated against because of his race or gender or because of his associations with members of other races or women. Stated differently, plaintiff has not asserted the type of association claim we upheld in O'Lone v. New Jersey Department of Corrections, 313 N.J. Super. 249, 255 (App. Div. 1998). Plaintiff's claims here are similar to the claims asserted by the plaintiff in L.W. ex rel. L.G. v. Toms River Regional Schools Board of Education, 381 N.J. Super. 465, 501 (App. Div. 2005), aff'd, 189 N.J. 381 (2007), where we held that a mother did not have standing as an "aggrieved" person under N.J.S.A. 10:5-13 to recover damages based on the harassment suffered by her son for his alleged homosexuality.

Although plaintiff has nowhere cited N.J.S.A. 10:5-12d, the provision of the LAD that prohibits "reprisals against any person because that person has opposed any practices or acts forbidden under [the LAD]," he alleges that he was retaliated against because he failed to conform to the racist and sexist practices of the NJSP, and for his efforts to combat this insidious culture of discrimination. Plaintiff's assertions may form a basis for a claim under both the LAD and CEPA, but he

may not proceed under both statutes simultaneously. A provision of CEPA states that "institution of an action in accordance with [CEPA] shall be deemed a waiver of rights and remedies available under any other . . . State law." N.J.S.A. 34:19-8. Having filed his claim of retaliation under CEPA, plaintiff could not proceed under a separate retaliation claim under the LAD.

We now move to the core of this appeal - the court's dismissal of plaintiff's CEPA action, his last remaining legal basis for relief. The court's decision was predicated upon Rule 4:23-5(a)(2), which expressly authorizes the ultimate sanction of dismissal with prejudice. It is not disputed that by the time the court considered defendants' motion to dismiss plaintiff's complaint with prejudice more than ninety days had transpired from the previous dismissal without prejudice. Under these circumstances, Rule 4:23-5(a)(2) provides, in pertinent part, as follows:

If an order of dismissal or suppression without prejudice has been entered pursuant to paragraph (a)(1) of this rule and not thereafter vacated, the party entitled to the discovery may, after the expiration of 90 days² from the date of the order, move on notice for an order of dismissal or suppression with prejudice. The attorney for the delinquent party shall, not later

² Effective September 1, 2008, the Rule was amended to reduce the 90 days to 60 days. The 90 day timeframe was the standard at the time this issue came before the trial court.

than 7 days prior to the return date of the motion, file and serve an affidavit reciting that the client was previously served as required by subparagraph (a)(1) and has been served with an additional notification, in the form prescribed by Appendix II-B, of the pendency of the motion to dismiss or suppress with prejudice. . . . The motion to dismiss or suppress with prejudice shall be granted unless a motion to vacate the previously entered order of dismissal or suppression without prejudice has been filed by the delinquent party and either the demanded and fully responsive discovery has been provided or exceptional circumstances are demonstrated.

[Ibid. (Emphasis added).]

Here, the trial court found that plaintiff's answers to defendants' interrogatories were not complete or responsive. Despite defense counsel's repeated attempts at directing plaintiff's counsel to limit the scope of the information provided to the one-year statute of limitations period relevant to CEPA claims, the information provided by plaintiff covered multiple years, was not clear as to the source of the information, or was otherwise unresponsive. As noted by the court:

Plaintiff's attorney is walking a fine line between providing discovery without providing responsive discovery. In this regard, [p]laintiff is responding to the request, but not tailoring the response to the remaining CEPA claim. Plaintiff knows [d]efendants' intent with respect to discovery[.] Defendants' counsel seeks to file a motion to dismiss on this one year

statute of limitation claim. Plaintiff skirts this defense by willfully refusing to provide detailed and specific discovery answers, thereby preserving the CEPA cause of action. As a result, [d]efendants' counsel cannot establish whether or not the evidence justifies a motion for summary judgment. This behavior is highly evasive and an obstruction to the adjudicative process.

Plaintiff has been provided ample opportunity to rectify the deficiencies in his discovery responses, but has failed to do so despite the six month period which has passed between the [c]ourt's [o]rder dismissing [p]laintiff's [c]omplaint without prejudice and the instant motions.

[(Emphasis in original).]

The court concluded by characterizing plaintiff's conduct with respect to defendants' interrogatories as an "unjust strategy of ambiguity and volume-over-substance."


We review the trial court's decision here under an abuse of discretion standard. Abtrax Pharm., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 517 (1995). We are also mindful that under Rule 4:23-5(a)(2), the trial court shall dismiss the delinquent party's pleadings unless the court finds that the delinquent party has provided complete and responsive answers or exceptional circumstances exist to justify the noncompliance. Plaintiff has not met either standard for relief nor has he presented any evidence undermining the court's findings that his conduct has been evasive and noncompliant. We are thus bound to

uphold these findings. Rova Farms Resort, Inc. v. Investors
Ins. Co., 65 N.J. 474, 484 (1974).

The balance of plaintiff's arguments lack sufficient merit
to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION