SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2059-15T2

SAFIYA DANIELS, JAMES GARRISON, LAQUAN HUDSON, and MELVIN WEBB,

Plaintiffs-Appellants,

v.

NANCY ERIKA SMITH, NEIL MULLIN, SMITH MULLIN, PC, KEVIN E. BARBER, and NIEDWESKE, BARBER HAGER,

Defendants-Respondents.

Submitted February 28, 2017 – Decided March 24, 2017

Before Judges Fisher and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-4117-14.

Preston & Wilkins, PLLC, attorneys for appellants (Gregory R. Preston, on the briefs).

Gordon & Rees, LLP, attorneys for respondents (Robert Modica, on the brief).

PER CURIAM

Plaintiffs filed this suit in June 2014 against the attorneys who represented them and others in an earlier, settled lawsuit.

Dissatisfied with the division of the settlement proceeds and the size of defendants' fees, plaintiffs based their demand for damages on breach-of-contract and breach-of-fiduciary-duty theories.

After filing an answer, defendants served interrogatories and document requests in October 2014. Plaintiffs did not timely respond, despite securing multiple extensions. When plaintiffs' failures persisted, defendants moved in May 2015 for a dismissal without prejudice pursuant to Rule 4:23-5(a)(1). Plaintiffs did not respond to either the motion or the outstanding discovery requests; consequently, on May 29, 2015, the court entered an order dismissing the complaint without prejudice.

Two months later, the July 27, 2015 discovery end date passed without plaintiffs' request for an extension or a restoration of their case to the active trial calendar. And, by that time, plaintiffs still had not provided the outstanding discovery.

In November 2015 — six months after the without-prejudice dismissal — defendants moved for dismissal with prejudice pursuant to Rule 4:23-5(a)(2). A week before that motion's return date, plaintiffs: provided responses to the discovery requests; opposed defendants' motion; and cross-moved for both the action's reinstatement and an extension of the discovery end date.

To avoid a with-prejudice dismissal, a delinquent party must show either "exceptional circumstances" or provide "fully

responsive discovery." R. 4:23-5(a)(2). Here, on the motion's December 18, 2015 return date, the focus turned to whether plaintiffs' answers to interrogatories[1] were "fully responsive"; plaintiffs did not assert the existence of "exceptional circumstances." Defendants insisted plaintiffs' answers to interrogatories were inadequate for a number of reasons. The judge, however, advised that plaintiffs' discovery responses had not been provided[2] and, other than a brief discussion about one ostensibly inconsequential interrogatory,[3] the judge confirmed he was ill-positioned to decide whether plaintiffs' answers to interrogatories were responsive. At the conclusion of the December 18 argument, the judge reserved decision pending his receipt of plaintiffs' answers to interrogatories:

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[1] Plaintiffs' responses to defendants' request for the production of documents seem, by this point, to have been of no further concern.

[2] When this became clear, defense counsel argued he "d[id]n't see how this court can establish that . . . fully responsive discovery has been provided if they haven't been submitted[.]" The judge agreed, saying: "I can't."

[3] The one instance argued about on the return date concerned an interrogatory which asked whether plaintiffs had ever been known by other names. "Yes" or "no" would have been responsive. Plaintiffs, however, answered: "not applicable." The judge correctly found that unresponsive. We do not think, however, that the judge intended — in entering the orders under review — that this one unresponsive answer foreclosed reinstatement and warranted dismissal with prejudice.

> THE COURT: . . . [W]hen can you get me the interrogatory answers? . . .
>
> [PLAINTIFFS' COUNSEL]: I will send them out today, Your Honor. . . .
>
> . . . .
>
> THE COURT: All right. Well, get them to me as soon as you can. I can['t] make a decision till I see them.
>
> [PLAINTIFFS' COUNSEL]: I will put them in the overnight today and you'll have them on Monday.

Notwithstanding what this discussion suggests, the judge entered two orders on December 18, 2015. The first denied plaintiffs' cross-motion to reinstate the action and to extend discovery, and the second dismissed the complaint with prejudice pursuant to Rule 4:23-5(a)(2). By way of explanation, the judge handwrote at the foot of the former:

> Movant's motion to extend discovery is out of time substantially. Movant has not set forth any exceptional circumstances. Discovery supplied by movant is required to be responsive and it is not. Discovery end date expired 7/27/15, relief sought by movant is alarmingly out of time, with no reasonable explanation.

On the second order, the judge incorporated the explanation he provided in the first order and provided these additional handwritten comments:

> [T]his failure to respond to basic discovery requirements for an extended period of time,

> with no reasonable explanation, let alone exceptional circumstances, requires that defendants' motion [] be granted.

Plaintiffs appeal, arguing:

> I. THE CROSS[-]MOTION TO REINSTATE SHOULD HAVE BEEN GRANTED AND THE MOTION TO DISMISS DENIED BECAUSE FULLY RESPONSIVE DISCOVERY HAD BEEN PROVIDED AND THE MOTION TO REINSTATE THE COMPL[AI]NT HAD BEEN MADE.
>
> II. THE [TRIAL COURT] ABUSED ITS DISCRETION WHEN THE COURT FAILED TO ORDER MORE SPECIFIC RESPONSES TO DEFENDANTS['] DISCOVERY DEMANDS, RATHER THAN DISMISS THE COMPLAINT WITH PREJUDICE.

We are constrained to vacate these orders insofar as they deny reinstatement of the complaint and grant dismissal with prejudice, and we remand for the trial judge's further consideration of the parties' motions.[4]

Because the motion to dismiss was based on Rule 4:23-5(a)(2), the sole pivotal question was whether plaintiffs provided fully responsive answers to interrogatories. The judge concluded, in his handwritten decision at the foot of the order, that "[d]iscovery supplied by movant is required to be responsive and it is not." The record before us, however, suggests the judge was unable to

[4] Plaintiffs have not argued the judge abused his discretion in denying a discovery extension. To the extent such an argument might be discerned from what plaintiffs have argued, we find insufficient merit in such an argument to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

make that determination at that time. During oral argument on Friday, December 18, 2015, the judge advised he did not have plaintiffs' interrogatory answers and needed to examine them in order to rule on the motions. And the matter ended that day with plaintiffs' representation to the judge that the answers to interrogatories would be provided on Monday, December 21, 2015. Understandably, plaintiffs now argue the judge erred in concluding their answers to interrogatories were unresponsive without actually examining them.

Of course, it is possible the answers to interrogatories had previously been submitted, were located sometime later on the return date, and reviewed by the judge prior to his decision. Maybe the answers to interrogatories arrived more quickly than what would seem likely from what the record would suggest.[5] Or, perhaps, the orders under review were simply misdated. In any event, because the record on appeal does not clearly reveal that the judge was actually in possession of plaintiffs' answers to interrogatories when he found them unresponsive, we remand for an explanation and additional consideration including a more specific rationale if the judge finds, on further review, that the answers to interrogatories are unresponsive.

[5] The judge's chambers are in Newark and plaintiffs' counsel's office is in nearby Orange.

Second, it appears the judge may also have denied reinstatement and granted dismissal because the discovery period had previously expired and because it expired without plaintiffs having provided any discovery. As noted, plaintiffs have not argued, and we have not found, an abuse of discretion in the judge's refusal to extend discovery. Although that fact may ultimately prove fatal to some or all of plaintiffs' claims,[6] it did not justify dismissal pursuant to Rule 4:23-5(a)(2), which was the only ground for relief invoked by defendants. The sole question on which turned the decision to reinstate or dismiss with prejudice was whether plaintiffs provided fully responsive discovery.[7] See, e.g., Zimmerman v. United Servs. Auto. Ass'n, 260 N.J. Super. 368, 377-78 (App. Div. 1992). The record provides no clarity as to whether the judge reviewed plaintiffs' answers to interrogatories or, if he did, why he found they were not sufficiently responsive.

[6] For example, plaintiffs concede that they did not identify their liability expert because they had yet to retain an expert. We need not opine on the significance of this, although it would be an unusual action in which a claim of a breach of an attorney's fiduciary duty could be maintained without the support of an expert's opinion.

[7] In light of our disposition of the other issues, we need not reach plaintiffs' additional argument that the judge mistakenly exercised his discretion by not providing plaintiffs with the opportunity to serve more responsive answers to interrogatories.

We vacate the orders under review – only insofar as they denied reinstatement and dismissed with prejudice – and remand for further proceedings in conformity with this opinion. We do not retain jurisdiction.