SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2090-15T2

YOANDRA MORDAN,

Plaintiff-Appellant,

v.

MERIDIA PARK AVENUE, LLC, and CAPODAGLI PROPERTY CO., LLC,

Defendants-Respondents,

and

MCB ENGINEERING,

Defendant.

Submitted April 24, 2017 – Decided May 5, 2017

Before Judges Nugent and Haas.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3564-14.

Thomas J. Wall, attorney for appellant.

Carroll McNulty & Kull, LLC, attorneys for respondents Meridia Park Avenue, LLC and Capodagli Property Company, LLC (Theresa M. Cinnamond, on the brief).

Reardon Anderson, LLC, attorneys for respondent Meridia Park (Allison A. Krilla, of counsel and on the brief).

PER CURIAM

Plaintiff Yoandra Mordan appeals from a January 8, 2016 Law Division order denying her motion for reconsideration. She asked the court to reconsider its refusal to vacate two dismissal orders, to reinstate her complaint against defendants Meridia Park Avenue, LLC (Meridia) and Capodagli Property Company, LLC (Capodagli), and to extend the time to complete discovery.[1] The court had dismissed the complaint against Meridia without prejudice pursuant to Rule 4:23-5 for failure to make discovery. The court had administratively dismissed the complaint against Capodagli without prejudice pursuant to Rule 1:13-7 for lack of prosecution.

The trial court denied plaintiff's motion to vacate the dismissal orders and reinstate her complaint as well as her motion for reconsideration. The court did so even though the attorney who had obtained the Rule 4:23-5 dismissal for Meridia did not oppose plaintiff's motion to reinstate the complaint, and even though Capodagli had filed an answer and participated in discovery,

[1] The trial court dismissed the complaint against MCB Engineering Associates with prejudice, apparently because plaintiff did not file an affidavit of merit. Plaintiff has not appealed from that order.

unaware of the Rule 1:13-7 administrative dismissal. Under these circumstances, and for the reasons that follow, we conclude the trial court misapplied its discretion by denying plaintiff's motions to reinstate the complaint and for reconsideration. For these reasons, we vacate the trial court's orders, reinstate the complaint, and remand this matter to the trial court for further proceedings.

The record on appeal reveals the following pertinent procedural history. On October 12, 2014, plaintiff filed a three-count complaint against defendants, who were building a project on land contiguous to her property. In the complaint, plaintiff alleged defendants damaged her property and caused her emotional distress by engaging in activity that included "jackhammers, excavating, and underpinning" and by permitting drainage to flood her property. Plaintiff served Meridia and Capodagli with a summons and complaint on November 17, 2014. In January 2015, the law firm of Reardon Anderson, LLC filed an answer on behalf of Meridia and timely served plaintiff with discovery. Things then went awry.

On April 20, 2015, the law firm of Carroll, McNulty & Kull, LLC (Carroll McNulty) filed an answer on behalf of Meridia and

Capodagli but did not timely serve plaintiff with discovery.[2] When the Carroll McNulty attorney filed the answer, the parties were unaware the complaint as to Capodagli had been administratively dismissed pursuant to Rule 1:13-7 for lack of prosecution.[3] According to a certification of the Carroll McNulty attorney who filed the answer on behalf of Meridia and Capodagli, when she filed the answer she "was unaware of the automatic dismissal that had been entered by the [c]ourt on March 6, 2015." She asserted the dismissal did not appear on the docket when she checked before preparing the answer. Plaintiff's attorney averred in a certification that he had not received notice of the proposed Rule 1:13-7 dismissal. All parties proceeded with discovery.

Four months after filing the answer, on August 20, 2015, the Carroll McNulty attorney, on behalf of Meridia and Capodagli,

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[2] The appellate record is unclear as to why two law firms represented Meridia. In a certification filed by a Carroll McNulty attorney, she explained the firm filed an answer on behalf of Meridia and Capodagli "after a substitution of counsel was entered pursuant to instructions from Meridia and Capodagli and their general liability insurer." That does not explain why the Reardon Anderson firm has remained in the case defending Meridia. Both firms have filed appellate briefs: Reardon Anderson on behalf of Meridia, and Carroll McNulty on behalf of Meridia and Capodagli.

[3] The parties have not included in the record the notice of proposed dismissal pursuant to Rule 1:13-7. The public Automatic Case Management System (ACMS) includes an entry for March 6, 2015, dismissing the complaint without prejudice as to Capodagli.

served plaintiff with interrogatories and document demands.[4] The Reardon Anderson attorney, having received no discovery responses from plaintiff by the due date for the responses, filed a motion to dismiss plaintiff's complaint as to Meridia without prejudice pursuant to Rule 4:23-5.

Although plaintiff served discovery responses on September 16, 2015, the court granted the dismissal motion on September 18, 2015. Plaintiff's counsel later averred in a certification that he did not oppose the Reardon Anderson motion because he was on trial and knew the discovery "was being sent out." Plaintiff's counsel also averred he received no opposition to the discovery plaintiff provided, and he had answered all of the discovery with the exception of a demand for an expert report, which was "in process."

Meanwhile, in September 2015, all parties, including counsel for Capodagli, agreed to extend discovery by consent beyond the November 6, 2015 discovery end date. On October 8, 2015, when plaintiff's counsel telephoned the court concerning the discovery

[4] The appellate record contains no explanation for the four-month delay between April 20, 2015, when the Carroll McNulty attorney filed the answer on behalf of Meridia and Capodagli, and the date she served discovery, August 20, 2015. Nor does the record reveal the attorney sought leave to serve the interrogatories out of time. See R. 4:17-2 (requiring defendants to serve initial interrogatories within forty days after their answer).

end date, he learned the case had been dismissed in its entirety because a Rule 1:13-7 dismissal had been entered as to Capodagli. On the same day, the Carroll McNulty attorney representing Meridia and Capodagli learned "that the case against Meridia and Capodagli ha[d] been closed by the [c]ourt following dismissals of all claims 'without prejudice.'" Personnel in the court clerk's office informed the attorney that the November 8, 2015 discovery end date no longer applied because the case had been closed.

On October 21, 2015 — more than a month after the complaint as to Meridia had been dismissed for failure to make discovery, and more than seven months after the complaint as to Capodagli had been dismissed for lack of prosecution — plaintiff filed a motion to reinstate the complaint. In a supporting certification she recounted, for the most part, the foregoing procedural history. The Reardon Anderson attorney, who had obtained the Rule 4:23-5 dismissal as to Meridia, did not oppose plaintiff's motion. The Carroll McNulty attorney, who had engaged in discovery while unaware the complaint had been dismissed as to Capodagli for lack of prosecution, opposed plaintiff's motion.

The Carroll McNulty attorney filed an opposing certification, which emphasized the requirements of Rule 1:13-7. The certification's first paragraph stated, "I have knowledge of the facts and circumstances of this matter based upon my review of my

file and discussions with . . . a principal of Capodagli, and representatives of Capodagli's commercial general liability insurer[.]" The second paragraph clarified the attorney was submitting the certification in opposition to plaintiff's motion to reinstate the complaint the court had administratively dismissed for lack of prosecution. In the certification, the attorney asserted plaintiff had not made the requisite showing of "exceptional circumstances" required by Rule 1:13-7 and had relied upon irrelevant facts, namely, not receiving the notice of dismissal and Capodagli's filing of an answer.

The certification alleged plaintiff's "continued failure to provide any discovery to Capodagli . . . substantially prejudiced the Capodagli [d]efendants in the case."[5] Further, the certification alleged Capodagli:

> has been without the most basic information regarding the nature and extent of plaintiff's alleged damages and how they are alleged to have been caused. In addition, due to plaintiff's delays, Capodagli has been deprived of the ability to identify the subcontractors that it hired to perform the particular work in this complex construction project that may be in question and to commence a third party action against those

[5] The certification does not reconcile this allegation either with Capodagli's waiting four months after filing an answer to serve interrogatories or with plaintiff's answers to interrogatories not being due when plaintiff filed the reinstatement motion. See R. 4:17-4(b) (providing sixty days for a party to answer interrogatories).

> subcontractors. By this point, memories of witnesses have faded and the responsible subcontractors, once identified, may not even still be in business. One such contractor . . . we believe has gone out of business.

The trial court denied both plaintiff's request for oral argument and plaintiff's motion to have the dismissal orders vacated and the complaint reinstated. The court later denied plaintiff's motion for reconsideration. In the order denying plaintiff's initial motion, the court provided no reasoning of its own, but instead noted on the memorializing order, "MOTION DENIED primarily for the reasons set forth in the opposition papers."

The court appended a statement of reasons to its order denying reconsideration. The court explained why it had not granted oral argument on either motion and noted it had considered plaintiff's argument that the Capodagli opposing certification did not comply with Rule 1:6-6. The court acknowledged that plaintiff's motion sought to vacate both the order dismissing the case without prejudice "pursuant [to] Rule 4:23, and . . . the Rule 1:13-7 dismissal as to defendant Capodagli[.]" Despite this acknowledgement, the court provided no explanation as to why it denied plaintiff's motion to vacate the Rule 4:23 dismissal.

The court determined plaintiff had not demonstrated "exceptional circumstances," the standard for reinstatement of a complaint dismissed under Rule 1:13-7 for lack of prosecution.

The court stated it had considered "the totality of the circumstances to find that the defendants were prejudiced, including but not limited to facts in the [Capodagli certification] that memories of witnesses have faded and the responsible subcontractors, once identified, may [be out of] business."

Lastly, the court denied as moot plaintiff's motion to extend discovery. Plaintiff appealed from the implementing order.

We begin our analysis by noting that the trial court's initial order denying plaintiff's motion to reinstate the complaint was final for purposes of appeal. An order is generally considered a final judgment appealable as of right if it "dispose[s] of all issues as to all parties." Scalza v. Shop Rite Supermarkets, Inc., 304 N.J. Super. 636, 638 (App. Div. 1997) (citing Hudson v. Hudson, 36 N.J. 549, 553 (1962)). This was precisely the effect of the trial court's initial order, which denied plaintiff's motion to reinstate the complaint as to the two remaining defendants. Because the order was final, it was appealable as of right. R. 2:2-3(a)(1).

When issuing orders appealable as of right, trial courts must issue opinions. Rule 1:7-4 mandates that a trial court, "by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon . . . on every motion decided by a written order that is appealable as of

right[.]" The trial court must clearly state its factual findings and correlate them with relevant legal conclusions so the parties and appellate courts may be informed of the rationale underlying the decision. Monte v. Monte, 212 N.J. Super. 557, 564-65 (App. Div. 1986). "In the absence of reasons, we are left to conjecture as to what the judge may have had in mind." Salch v. Salch, 240 N.J. Super. 441, 443 (App. Div. 1990). Furthermore, such an omission "imparts to the process an air of capriciousness that does little to foster confidence in the judicial system." Twp. of Parsippany-Troy Hills v. Lisbon Contractors, Inc., 303 N.J. Super. 362, 367 (App. Div.), certif. denied, 152 N.J. 187 (1997).

Here, in denying plaintiff's motion to reinstate the complaint, the trial court discharged its obligation under Rule 1:7-4 by adopting the arguments advanced by Capodagli. Such a practice is not prohibited in all cases. See Allstate Ins. Co. v. Fisher, 408 N.J. Super. 289, 300-01 (App. Div. 2009). Nonetheless, trial courts should be cautious about this practice, particularly when a party is seeking dismissal of an action with prejudice on technical procedural grounds rather than on the merits. There are reasons courts should exercise such caution.

Our courts "provide a disinterested forum for the just resolution of disputes." Ghandi v. Cespedes, 390 N.J. Super. 193, 198 (App. Div. 2007) (citation omitted). The rules governing

practice in this disinterested forum are required to be "construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." R. 1:1-2. As our Supreme Court has explained in a context only slightly different from the case before us:

> We appreciate the desirability of the prompt disposal of cases. Courts should not forget, however, that they merely provide a disinterested forum for the just resolution of disputes. Ordinarily, the swift movement of cases serves the parties' interests, but the shepherding function we serve is abused by unnecessarily closing the courtroom doors to a litigant whose only sin is to retain a lawyer who delays in filing an answer during settlement negotiations. Eagerness to move cases must defer to our paramount duty to administer justice in the individual case.
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> [Ghandi, supra, 390 N.J. Super. at 198 (quoting Audubon Volunteer Fire Co. No. 1 v. Church Const. Co., 206 N.J. Super. 405, 406 (App. Div. 1986)).]

The Court has also explained that because dismissal with prejudice is "the ultimate sanction," it should be imposed "only sparingly" and "normally . . . ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party." Robertet Flavors, Inc. v. Tri-Form Const., 203 N.J. 252, 274 (2010) (quoting Zaccardi v. Becker, 88 N.J. 245, 253 (1982)).

In contrast to our courts, attorneys are advocates who do not always seek a just resolution of a cause on its merits. A favorable

result for a client based on a technical application of a rule, even when the purpose of the rule is not served, is nonetheless a favorable result for a client.

With the foregoing observations in mind, we turn to the case now before us. The court dismissed the complaint as to Meridia under Rule 4:23-5(a)(1) for failure to make discovery. The court neither discussed nor analyzed the reinstatement provisions of Rule 4:23-5 when it denied plaintiff's motions. These provisions state:

> The delinquent party may move on notice for vacation of the dismissal or suppression order at any time before the entry of an order of dismissal or suppression with prejudice. The motion shall be supported by affidavit reciting that the discovery asserted to have been withheld has been fully and responsively provided and shall be accompanied by payment of a $100 restoration fee to the Clerk of the Superior Court, made payable to the "Treasurer, State of New Jersey," if the motion to vacate is made within [thirty] days after entry of the order of dismissal or suppression, or a $300 restoration fee if the motion is made thereafter.

Plaintiff's attorney had filed the certification required by the rule. The Reardon Anderson attorney for Meridia, who obtained the dismissal order, did not oppose the motion. The Carroll McNulty attorney for Capodagli, who opposed plaintiff's motion, did not address the reinstatement provisions of Rule 4:23-5. We

can discern no reason why plaintiff's motion should not have been granted and no reason in the record why it was not granted.

For the first time on appeal, Meridia argues that plaintiff did not comply with the reinstatement provisions of Rule 4:23-5 because she did not submit a $300 check with her motion. Capodagli incorporates this argument. Plaintiff points out that neither defendant cites to the record to support the argument and asserts defendants' arguments are wrong. Plaintiff claims she paid the fee through the Judiciary Account Charge System and received a refund when the court denied her motion for reconsideration. Defendants' arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

We next address the denial of plaintiff's motion to reinstate the complaint as to Capodagli. "Our review of an order denying reinstatement of a complaint dismissed for lack of prosecution proceeds under an abuse of discretion standard." Baskett v. Cheung, 422 N.J. Super. 377, 382 (App. Div. 2011) (citations omitted).

The text of Rule 1:13-7(a) requires that

> whenever an action has been pending for four months . . . without a required proceeding having been taken therein as hereafter defined in subsection (b), the court shall issue written notice to the plaintiff advising that the action as to any or all defendants will be dismissed without prejudice 60 days

> following the date of the notice . . . unless, within said period, action specified in subsection (c) is taken. If no such action is taken, the court shall enter an order of dismissal without prejudice as to any named defendant and shall furnish the plaintiff with a copy thereof.

Required proceedings enumerated in subsection (b) include filing a proof of service, filing an answer, or entry of default. Actions specified in subsection (c) include filing a proof of service, filing an answer, or requesting a default.

The rule permits a plaintiff whose complaint has been dismissed to file a motion to reinstate the complaint. A court ruling on such a motion must decide whether the plaintiff has established good cause on one hand, or exceptional circumstances on the other, depending on the timing of the motion and the number of parties in the case:

> After dismissal, . . . [i]f the defendant has been properly served but declines to execute a consent order, plaintiff shall move on good cause shown for vacation of the dismissal. In multi-defendant actions in which at least one defendant has been properly served, the consent order shall be submitted within [sixty] days of the order of dismissal, and if not so submitted, a motion for reinstatement shall be required. The motion shall be granted on good cause shown if filed within [ninety] days of the order of dismissal, and thereafter shall be granted only on a showing of exceptional circumstances.
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> [R. 1:13-7(a).]

The rule "is an administrative rule designed to clear the docket of cases in which plaintiff has failed to perform certain acts." Pressler & Verniero, Current N.J. Court Rules, comment 1.1 on R. 1:13-7 (2017). The rule requires a plaintiff to demonstrate exceptional circumstances in multi-defendant cases because a management problem arises in such cases. Pressler & Verniero, supra, comment 1.2 on R. 1:13-7. In multi-defendant cases where the complaint has been dismissed as to only one defendant:

> the case likely will have proceeded and discovery undertaken at least with respect to the action(s) against the remaining defendant or defendants. Thus vacation of the dismissal has the capacity of substantially delaying all further proceedings. To permit appropriate case management, the rule requires the consent order to be submitted within [sixty] days after the dismissal or, in the alternative, on motion for good cause shown within [ninety] days of the order of dismissal or on a showing of exceptional circumstances thereafter.
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> [Ibid.]

In the case now before us, the "management problem" the rule is designed to remedy did not exist. Capodagli had filed an answer after plaintiff granted an extension of time. According to the certification of Capodagli's attorney, she checked the docket before filing the answer and the administrative dismissal had not been entered. For that reason, all parties participated in pre-trial proceedings, unaware of the administrative dismissal.

In view of our Supreme Court's caution about imposing the ultimate sanction of dismissal with prejudice, particularly when the only objective appears to be moving cases, and based on the unique facts of this case, we conclude the trial court misapplied its discretion. In cases such as this, where the management problem contemplated by the rule is non-existent and the parties have engaged in discovery unaware of an administrative dismissal, exceptional circumstances warranting reinstatement may well exist based on those facts — as plaintiff argues. We need not resolve this issue, however, because here there is more. The trial court adopted as its rationale a party's arguments, which are invalid for several reasons.

The first paragraph of the Carroll McNulty certification made clear the author did not have personal knowledge of the facts about to be asserted, thus calling into question both the competency of the certification and the accuracy of the hearsay facts. See R. 1:6-6 (requiring affidavits attesting to facts not appearing of record to be made on personal knowledge setting forth only facts which are admissible in evidence to which the affiant is competent to testify); Mazur v. Crane's Mill Nursing Home, 441 N.J. Super. 168, 179-80 (App. Div. 2015) (emphasizing affidavits of attorneys attesting to facts related by their clients constitute objectionable hearsay). The certification contains no indication

the attorney who filed it attempted to locate witnesses or had firsthand knowledge about the subcontractors that might have gone out of business. These assertions were not only speculative, but were based on incompetent hearsay evidence.

In similar situations, we have rejected the notion that such speculation demonstrates prejudice to a party:

> In resisting plaintiffs' motions for reinstatement and reconsideration, defendant argued that he was prejudiced by the passage of time. However, other than generalities ("[m]emories of witnesses clearly have faded") or conjectures ("[i]t is hard to believe that a meaningful deposition of any of the plaintiffs is going to be obtainable"), defendant failed to demonstrate any prejudice whatsoever. On appeal, the most that defendant posits as prejudice are "[t]he potential unavailability of witnesses, the potential destruction or loss of evidence, lack of discovery from [p]laintiffs, [and] the lack of depositions and independent medical examinations." There is not a scintilla of evidence in the record to suggest that anything in this parade of horribles exists or is likely to come to pass.
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> [Baskett, supra, 422 N.J. Super. at 384-85.]

Additionally, we note that in this case the defendant claiming it had been severely prejudiced because it had no discovery from plaintiff had itself been late in serving interrogatories and a demand for documents — the responses to the former not yet due when plaintiff filed the motion to reinstate the complaint. We do not point this out to be critical. We recognize the profession

is very demanding and is laden with deadlines that not only cause varying degrees of stress, but also are sometimes missed. Rather, we point this out to emphasize the need for a court to critically analyze claims of prejudice, particularly when relying upon such claims, in whole or in part, to dismiss an adversary's case with prejudice.

For the foregoing reasons, we hold that in a case where all parties have filed initial pleadings and participated in litigation unaware of an administrative dismissal; and, the trial court denies a motion to vacate the administrative dismissal for reasons set forth in a party's certification that not only is incompetent under Rule 1:6-6 but also is of questionable merit; the trial court has misapplied its discretion.

Because the trial court here overlooked a procedural rule relevant to plaintiff's motion to reinstate the complaint as to Meridia, and failed to consider the significance of relevant facts and legal principles when it denied plaintiff's motion to reinstate the complaint as to Capodagli, the court also erred in denying plaintiff's motion for reconsideration. See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996).

The trial court's orders of November 6, 2015 (denying motion to reinstate complaint) and January 8, 2016 (denying motion for reconsideration) are vacated. Plaintiff shall remit the fee

required by Rule 4:23-5 to reinstate the complaint. The trial court shall conduct a management conference within thirty days and provide a reasonable amount of time for the parties to complete discovery.

The November 6, 2015 and January 8, 2016 orders are vacated and this matter is remanded for proceedings consistent with this opinion. We do not retain jurisdiction.