SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3043-14T3

JIM YENZER,

Plaintiff-Appellant,

v.

LIQUIDITY SOLUTIONS, INC., d/b/a GLI-F, LLC, and DAVID FISHEL, Individually,

Defendants-Respondents,

and

CAPITAL INVESTORS, LLC, REVENUE MANAGEMENT, CAPITAL MARKETS, KT TRUST, COMMERCIAL FINANCIAL GROUP, and TRI-FACTORS,

Defendants.

Argued October 18, 2016 – Decided April 19, 2017

Before Judges Koblitz, Rothstadt and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1319-11.

Fred Shahrooz Scampato argued the cause for appellant (Law Office of Fred Shahrooz Scampato, P.C., attorneys; Mr. Scampato and David Rostan, of counsel and on the briefs).

Vito A. Gagliardi, Jr., argued the cause for respondents (Porzio, Bromberg & Newman, P.C., attorneys; Mr. Gagliardi, of counsel and on the brief; Eliyahu S. Scheiman, on the brief).

PER CURIAM

Plaintiff, Jim Yenzer, filed a complaint alleging his former employer, defendant Liquidity Solutions, Inc. (LSI), and its president, defendant David Fishel, violated the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42, and the New Jersey Wage and Hour Law (WHL), N.J.S.A. 34:11-56a to -56a38, and tortiously interfered with his economic advantage.[1] He appeals from five orders relating to the parties' discovery disputes, including an order dismissing his complaint with prejudice and awarding defendants attorneys fees. The other orders fixed the amount of the fees awarded by the court, denied reconsideration and plaintiff's motions to compel discovery.[2]

On appeal, plaintiff argues that the court erred by ordering the ultimate sanction of dismissal and awarding counsel fees because it did not "consider critical issues" or provide any reasons for the fees it awarded. Plaintiff alleges the court

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[1] Plaintiff originally filed suit against the other named defendants, alleging they were related entities through which LSI did business. Those parties were dismissed on November 18, 2011.

[2] The five orders were entered on August 1, 2013, October 31, 2013, April 25, 2014, May 23, 2014, and June 6, 2014.

failed to consider whether he complied with discovery demands, and, to the extent that he did not, whether his conduct was not "willful," but the result of his attorney's actions and not his own. He also contends defendants did not suffer any prejudice, they contributed to the delays in the completion of discovery, and his motion to compel discovery should have been granted.

We have considered plaintiff's arguments in light of the record and our review of applicable legal principles. We affirm the dismissal of the complaint and the denial of plaintiff's discovery motions, but remand for further consideration and a statement of reasons for the court's award of counsel fees.

The nature of plaintiff's arguments require a detailed discussion of the history of the parties' numerous discovery motions that were decided by three different judges. Plaintiff worked for LSI as an analyst for eleven years. The company's business involves the sale and purchase of bankruptcy claims. In December 2009, plaintiff left LSI, contending that his employer engaged in prohibited religious discrimination against him.

On May 3, 2011, plaintiff filed his original complaint, which he amended on September 14, 2012. On November 13, 2013, defendants filed an answer and counterclaim, asserting breach of employment contract and breach of the duty of loyalty.

The initial discovery end date was set for October 13, 2012. Throughout the litigation, plaintiff requested additional discovery extensions, many of which were opposed by defendants. Initially, however, the parties agreed to an extension until December 12, 2012. The parties again consented to extend the discovery end date, and the first motion judge to become involved granted the request, ordering the "[e]xchange of written discovery and Fact Depositions to be completed by April 15, 2013," with the discovery end date set for July 31, 2013. The judge warned, "the [c]ourt grants this very long extension, more than seven months. However, the parties should not expect any further extensions."

Plaintiff filed a motion to compel discovery and to extend the discovery end date to November 1, 2013, which defendants opposed. On August 1, 2013, a second motion judge granted the motion to extend the discovery end date but denied the motion to compel without prejudice, finding plaintiff's motion imprecise for failing to specifically identify the discovery he sought to compel.

In their opposition to plaintiff's motion to extend discovery, defendants supplied the court with a transcript of a September 4, 2012 telephone conversation that plaintiff recorded while he spoke with another former LSI employee. In that conversation, plaintiff acknowledged that he possessed documents he was "sitting on," that he understood he would be compelled to

release to defendants, but that he would decide when he would disclose them. According to plaintiff, "you . . . don't give all you[r] upper cuts in the first round[;] you have to save a few for later." He told the ex-employee there was "crap we have not given [defendants] yet [, and,] when [defendants] see it[,] they will fall off their . . . chairs."

One document (Trustee Memo) that plaintiff did not provide to defendants was central to the parties' ongoing discovery disputes. Plaintiff had prepared the document in a bankruptcy matter that he became involved with in 2009, prior to leaving LSI. During the course of this litigation, defendants requested that plaintiff produce the Trustee Memo and its supporting documents in December 2011, March 2012, and November 2012, which he declined to do.

Despite his failure to comply with discovery demands, plaintiff filed another motion to extend and compel discovery, seeking more specific answers to interrogatories and an order compelling the depositions of two LSI employees. LSI cross-moved for an order compelling plaintiff's deposition, production of statements made by non-party fact witnesses, and a copy of the Trustee Memo. In its opposition, LSI asserted it served plaintiff with deficiency letters on March 12, 2012, November 16 and 21,

2012, and July 2, 2013, and had yet to receive the requested discovery.

On October 31, 2013, the second motion judge denied plaintiff's motion to compel more specific answers, noting on the order that each interrogatory was "satisfactor[ily] answered." The judge, however, compelled the production of the two witnesses within twenty days, and extended the discovery end date to January 31, 2014. In a separate order, the judge granted LSI's cross-motion compelling plaintiff to produce, among other things: (1) all communications between plaintiff and any non-party fact witnesses; (2) a complete, unredacted copy of the Trustees Memo, including attachments; and (3) a date for plaintiff's deposition within three weeks of the order.

During the remainder of 2013, plaintiff filed motions for reconsideration of the October 31 order and to compel discovery. Defendants opposed plaintiff's motions and moved for sanctions, including dismissal of the complaint with prejudice. Defendant's dismissal motion was principally based upon plaintiff's failure to produce the previously ordered statements by non-party fact witnesses and his failure to agree upon a date for plaintiff's deposition. Defendants decided to withdraw their motion when

plaintiff appeared for a half-day deposition on December 17, 2013, which he promised to complete in January 2014.[3]

While the parties' motions were pending, plaintiff filed a motion to extend discovery from January 31, 2014, to March 31, 2014. Defendants opposed the extension, contending plaintiff's persistent efforts to avoid completing his deposition or fully provide the fact witness statements needlessly stalled the discovery process. According to defendants, despite plaintiff's earlier agreement to complete his deposition, he took the position that he would not be deposed until he first deposed LSI's two employees, as previously ordered. The parties ultimately agreed to dates for plaintiff's deposition, however, plaintiff cancelled those dates due to family emergencies.[4] The parties re-scheduled the deposition for February 27, 2014, but plaintiff's counsel cancelled the proceeding because she had to prepare for a trial on March 3, 2014, which she thought had been adjourned.

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[3] Defendants attempted to schedule plaintiff's deposition numerous times prior to the half-day deposition conducted on December 17, 2013. The deposition was cut short due to competing obligations on the part of defendants' counsel.

[4] According to plaintiff, his mother had fallen and was seriously injured so he could not attend the first date. Defendants proposed January 24 as an alternative date, but plaintiff's father's funeral was the following day, and he needed to be with his family.

The second judge denied plaintiff's motion for reconsideration on January 23, 2014, but on February 6, 2014, he granted plaintiff's motion to extend discovery until March 31, 2014.[5] Prior to the discovery end date, on March 12, 2014, defendants moved to dismiss plaintiff's complaint with prejudice under Rule 4:23-2(b) for remaining in violation of the court's October 2013 order. After the motion was filed, plaintiff agreed to be deposed on March 20, 2014. Prior to that date, the parties agreed to participate in mediation and, as a result, they agreed to adjourn plaintiff's deposition. At the parties' request, on March 28, 2014, the third judge entered a consent order extending discovery to May 9, 2014, prohibiting any further discovery extensions, and specifically identifying the discovery to be completed. That discovery included plaintiff's "production of the materials ordered [on] October 31, 2013[,]" and to "complete the deposition of plaintiff following plaintiff's production of the materials ordered under the Court's October 31, 2013 Order."

[5] Plaintiff sought leave to file an interlocutory appeal of the January 23, 2014 order denying reconsideration of the October 2013 orders. Plaintiff moved to stay all discovery pending the interlocutory appeal's outcome. On April 1, 2014, we denied plaintiff's motion to file an interlocutory appeal. On April 9, 2014, plaintiff moved to stay discovery pending a motion to the Supreme Court to review the denial of his interlocutory appeal; however, on April 22, 2014, plaintiff withdrew the motion.

Mediation was scheduled for April 23, 2014, and defendants' motion to dismiss with prejudice was made returnable on April 25, 2014. Plaintiff's counsel filed a certification and a reply letter brief on April 17, 2014, in opposition to defendants' motion to dismiss. According to plaintiff's counsel, plaintiff had submitted the Trustee Memo to defendants' counsel without its attachments. Defense counsel stated they would not look at the document but would, instead, send it to the mediator, and, in the event that mediation failed, the mediator would send the document back to defendants.

The parties notified the court that the mediation was unsuccessful, and on April 25, 2014, the third motion judge entered an order granting defendants' motion to dismiss and awarding counsel fees in an amount to be determined after submissions. The judge also issued an eight-page written statement of reasons. The judge found plaintiff's noncompliance with the discovery order "willful" and "longstanding." The judge further noted plaintiff's opposition was nothing but a list of unjustifiable excuses as to why he failed to comply. The judge cited to plaintiff's failure to appear for his deposition, produce "a complete[,] unredacted copy of [the Trustee Memo] along with all supporting documentation," and "all communications between [p]laintiff and non-party fact witnesses about the litigation or the LSI

[d]efendants." The judge concluded that "[p]laintiff ha[d] simply chosen to ignore [the] court's orders requiring him to both produce documents and make himself available for deposition."

The judge cited to Rule 1:6-6 and criticized plaintiff's opposition to defendants' motion, finding that it was based upon counsel's certification to facts about which she had no personal knowledge and her supplying copies of documents without any meaningful explanation. The judge also found that plaintiff's opposition papers were "devoid of any actual argument" and he failed to "cite to any law in support of his opposition."

According to defendants, after the court entered the order, plaintiff was deposed on May 5, 2014, in connection with defendants' counterclaims. During the deposition, plaintiff produced three exhibits to the Trustee Memo. Within a few days after his deposition, plaintiff produced additional exhibits and informed defendants that he had a "box of documents that [they were] welcome to inspect and copy if [they] like . . . that he used in connection with the [Trust Memo] issues." These documents were estimated to be about 1000 pages.

Defendants' counsel submitted a certification of services on May 15, 2014, seeking to fix counsel fees and costs in the amount of $4897, which plaintiff opposed. On May 23, 2014, the second judge considered the submissions and issued an order granting

defendants' application for $4897 in counsel fees and costs, without any statement of reasons. Plaintiff filed a "Motion for Relief from Fee Award/Stay Pending Appeal" on July 30, 2014, challenging the fee component of the April 25 dismissal order. The second judge denied the motion on December 14, 2014.

In addition to opposing the counsel fee application, plaintiff moved for reconsideration of the order dismissing his complaint. In support, he filed his and his attorney's certification, setting forth plaintiff's version of the history of discovery in the case and attaching over 150 pages of documents. Among the documents was a certification from plaintiff's mother, explaining the family emergencies that caused the delay of plaintiff's deposition in January 2014. These materials and certifications, however, were not filed in opposition to defendants' earlier motion to dismiss. The third judge denied plaintiff's motion without oral argument on June 6, 2014, noting on the order that "[r]econsideration [was] denied based on [the] original opinion."

On January 22, 2015, the parties filed a stipulation of dismissal without prejudice as to the counterclaims. The dismissal was to become with prejudice when and if plaintiff's appeal is denied on the merits. This appeal followed.

Our "standard of review for dismissal of a complaint with prejudice for discovery misconduct is whether the trial court abused its discretion, a standard that cautions [us] not to interfere unless an injustice appears to have been done." Abtrax Pharms. v. Elkins-Sinn, Inc., 139 N.J. 499, 517 (1995). A court abuses its discretion "when a decision is 'made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis.'" Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigration and Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)). "A trial court has inherent discretionary power to impose sanctions for failure to make discovery, subject only to the requirement that they be just and reasonable in the circumstances." Calabrese v. Trenton State College, 162 N.J. Super. 145, 151-52 (App. Div. 1978), aff'd, 82 N.J. 321 (1980).

It is well-established that suppressing pleadings for failure to comply with discovery orders is the "last and least favorable option," Il Grande v. DiBenedetto, 366 N.J. Super. 597, 624 (App. Div. 2004), available to a trial court, but "a party invites this extreme sanction by deliberately pursuing a course that thwarts persistent efforts to obtain the necessary facts." Abtrax Pharms., supra, 139 N.J. at 515; see also R. 4:23-2(b)(3); R. 4:23-4. Plaintiff's failures to schedule and appear for depositions (other

than for his family emergencies), produce documents, and comply with orders requiring him to do so was an ongoing problem which, some might say, bordered on contempt.

Accordingly, in our view, the third judge did not abuse his discretion in dismissing plaintiff's pleadings with prejudice or refusing to reconsider the decision. See R. 4:23-2(b)(3); R. 4:23-4; Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 581 (App. Div. 1998) (affirming the suppression of a defense with prejudice for failure to produce an expert report because "it [was] unfair to a plaintiff to be interminably delayed in presenting a case because of dilatory tactics of a party" and the defendants failed to comply with multiple court orders to provide an expert report); see also R. 4:49-2; Cummings v. Bahr, 295 N.J. Super. 374, 384-85 (App. Div. 1996) (stating when reconsideration is appropriate). We affirm the April 25, 2014 order of dismissal substantially for the reasons expressed by the third judge. To the extent that we have not specifically addressed plaintiff's remaining arguments about either the second or third judge's other orders denying his motions to compel discovery or to reconsider, we find them without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

We are constrained, however, to vacate the counsel fee award and remand this matter for entry of a new order supported by a

statement of reasons, as the second motion judge issued his order fixing the amount without any explanation. See R. 1:7-4; R.M. v. Supreme Court of N.J., 190 N.J. 1, 13-14 (2007) (vacating and remanding counsel fee award where trial court wholly failed to explain how or why it arrived at the amount of counsel fees awarded).

Affirmed in part; vacated and remanded in part. We do not retain jurisdiction.