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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3618-15T3

DOROTHY GONZALEZ,

Plaintiff-Appellant,

v.

MARK MICHALSKI and LAURA
MICHALSKI,

Defendants-Respondents.

Submitted May 15, 2017 – Decided June 7, 2017

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Docket No. L-
872-14.

Michael A. Mark, attorney for appellant.

Leonard S. Miller, attorney for respondents.

PER CURIAM

Plaintiff Dorothy Gonzalez appeals from a December 2, 2015
order denying her motion to amend her complaint, and a March 31,
2016 order dismissing her complaint with prejudice. We reverse.

Plaintiff and defendants, Mark Michalski and Laura Michalski
were formerly next-door neighbors. The complaint alleges that

defendant committed numerous petty disorderly persons acts of harassment in violation of N.J.S.A. 2C:33-4 by: (1) shining a strong spotlight into her window; (2) erecting a fence on her property in violation of local law; (3) placing dog feces on their common property line; (4) telling plaintiff, "I'll burn your house down" after she installed video surveillance cameras on her house; and (5) several other acts. Based on this alleged conduct, plaintiff sought compensatory damages, punitive damages, and attorneys' fees for defendants' harassment.

On the morning of the trial date, defendants hand-served a motion "in limine" to dismiss plaintiff's complaint with prejudice for failure to state a claim upon which relief may be granted. After hearing oral argument, the trial judge issued a written opinion granting the motion and dismissing the complaint with prejudice.

The trial court should not have entertained defendant's dispositive motion on the day of trial. Seoung Ouk Cho v. Trinitas Reg'l Med. Ctr., 443 N.J. Super. 461, 472 (App. Div. 2015), certif. denied, 224 N.J. 529 (2016). In fact, this was the sixth trial date. In Cho, we held that, "absent extraordinary circumstances or the opposing party's consent, the consideration of an untimely summary judgment motion at trial and resulting dismissal of a complaint deprives a plaintiff of due process of law." Id. at

475. The same analysis applies to an untimely motion under Rule 4:6-2(e).

Defendants contend that we should affirm the dismissal of the complaint because plaintiff's claims lack merit. "[W]e utterly reject the argument that the dismissal should be affirmed, despite the violation of [court] rules, because plaintiffs suffered no prejudice in the dismissal of claims that lack merit. The right to due process is not limited to worthy causes." Id. at 474-75.

We reverse the dismissal of plaintiff's complaint and remand the matter for trial. The trial judge can address the sufficiency of plaintiff's proofs at the close of plaintiff's case.

Plaintiff's complaint alleges a cause of action for harassment. Eight months after filing the complaint, plaintiff sought leave to amend to add a claim for intentional infliction of emotional distress. The motion record demonstrates that no new facts were alleged, and no new parties were added in the proposed amended complaint. Plaintiff's motion was unopposed. The trial court denied the motion because there had been at least one prior trial date, and granting leave to amend "would unduly delay resolution of this matter." The record demonstrates that there were numerous unrelated trial delays after the motion was denied.

Nothing in the record indicates the amendment would have created the need for additional discovery. Consequently, the

trial court's conclusion that permitting the amendment would have delayed the trial appears unfounded. Moreover, defendants did not contend that they would be prejudiced by the amendment.

"Rule 4:9-1 requires that motions for leave to amend be granted liberally." Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 456 (1998). Motions for leave to amend "should generally be granted even if the ultimate merits of the amendment are uncertain." G & W, Inc. v. Borough of E. Rutherford, 280 N.J. Super. 507, 516 (App. Div. 1995); see also Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256 (App. Div. 1997) (motions for leave to amend should be liberally granted without consideration of the ultimate merits of the amendment). The "broad power of amendment should be liberally exercised at any stage of the proceedings, including on remand after appeal, unless undue prejudice would result." Pressler & Verniero, Current N.J. Court Rules, comment 2.1 on R. 4:9-1 (2017).

Nevertheless, "the granting of a motion to file an amended complaint always rests in the court's sound discretion." Kernan, supra, 154 N.J. at 457. While trial courts are free to deny leave to amend when the newly asserted claim is not sustainable as a matter of law, Interchange State Bank, supra, 303 N.J. Super. at 256-57, the trial court here did not engage in that analysis when it denied leave to amend.

The trial court abused its discretion by denying plaintiff's unopposed motion to amend the complaint. On remand, plaintiff shall be permitted to amend her complaint to add the claim for intentional infliction for emotional distress.

Reversed and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION