

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
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-3757-14T2
A-3758-14T2¹

MARIE ROGAN,

Plaintiff-Respondent,

v.

CHRISTOPHER LEIBLE and
PATRICIA ZENGEL,

Defendants-Appellants,

and

ROBERT L. GARIBALDI, JR.,
ESQ., as escrow agent only,

Defendant.

Argued October 12, 2017 – Decided November 22, 2017

Before Judges Nugent, Currier, and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Docket No. L-5045-
12.

Eric S. Solotoff argued the cause for
appellant Christopher Leible (Fox Rothschild,
LLP, attorneys; Mr. Solotoff, of counsel and
on the briefs; Lauren Vodopia, on the briefs).

¹ We have consolidated these back-to-back appeals for disposition
in this opinion.

Barry S. Goodman argued the cause for appellant Patricia Zengel (Greenbaum, Rowe, Smith & Davis, LLP, attorneys; Mr. Goodman, of counsel and on the briefs; Steven B. Gladis, on the briefs).

David M. Paris argued the cause for respondent (Piro Zinna Cifelli Paris & Genitempo, LLC, attorneys; Mr. Paris and Margarita Romanova, on the briefs).

PER CURIAM

Defendants Christopher Leible and Patricia Zengel separately appeal from a judgment the trial court entered against them after suppressing their answers with prejudice for failure to make discovery.² The trial court suppressed defendants' answers under the authority of Rule 4:23-5, even though the rule's procedural safeguards had not been followed. The ensuing proof hearing culminated in the entry of a substantial judgment that in part had no basis in fact or in law. For these reasons, we vacate the suppression orders and judgment, reinstate defendants' answers and affirmative defenses, and remand for further proceedings.

Underlying the procedural issues on this appeal is an unconsummated contract for the sale of a residential condominium unit. Plaintiff Marie Rogan contracted to buy the unit from its

² Because the judgment was not entered against Garibaldi, and because he has not filed an appeal, we do not include him when we refer to "defendants" throughout this opinion.

owner, defendant Leible. Leible's real estate agent was defendant Zengel. Robert Garibaldi, an attorney, acted as the escrow agent for plaintiff's \$40,000 deposit. Things went awry when plaintiff was unable to obtain a mortgage.

The parties disputed the reason plaintiff could not get a mortgage. Plaintiff claimed the reason was the condominium association's involvement in litigation, a fact Garibaldi and defendants did not disclose to plaintiff when she signed the contract. Garibaldi and defendants, or at least defendant Leible, claimed plaintiff was not creditworthy.

In any event, when plaintiff was unable to get a mortgage, she invoked the contract's mortgage contingency clause and demanded return of her deposit. When Garibaldi refused to return the deposit – because his "client [was] not willing to release the deposit at [that] time" – plaintiff commenced this action by filing a complaint against him and defendants.

The complaint's four counts included causes of action for fraudulent misrepresentation, consumer fraud, breach of contract, and conversion. The breach of contract count alleged that Garibaldi and defendant Leible, not defendant Zengel, breached by refusing to return the deposit. Defendant Zengel was not a party

to the contract. Similarly, the complaint's conversion count was based on defendant Leible's refusal to return the deposit.

Garibaldi was a party as well as a potential witness, having informed plaintiff her deposit would not be returned. Notwithstanding these roles and the potential conflicts between defendants based on the complaint's allegations, Garibaldi undertook his own and defendants' representation. He filed an answer on behalf of himself and the others, and he filed a counterclaim on behalf of Leible. In response, plaintiff's attorney sent Garibaldi a letter demanding defendants withdraw their frivolous counterclaim pursuant to Rule 1:4-8 and N.J.S.A. 2A:15-59.1. They declined to do so. Plaintiff filed an answer to the counterclaim, asserting, among other things, defendants filed the counterclaim in bad faith, thus violating the Frivolous Action Statute, N.J.S.A. 2A:15-59.1.

Plaintiff served defendants with discovery requests. When they did not timely respond, she filed a motion to compel discovery, as authorized by Rule 4:23-5(c). Defendants did not oppose the motion and the trial court granted it, ordering defendants to serve discovery responses within ten days or risk having their answer "stricken by the [c]ourt upon an ex parte application to this [c]ourt." Nonetheless, plaintiff filed a

motion to suppress defendants' answer without prejudice, as authorized by Rule 4:23-5(a)(1). The court granted the motion.

Plaintiff served Garibaldi with the suppression order. Garibaldi neither sent the order to his clients, defendants, nor notified them "in the form prescribed by Appendix II-A of these rules, specifically explaining the consequences of failure to comply with the discovery obligation and to file and serve a timely motion to restore." R. 4:23-5(a)(1).

A week after the court granted plaintiff's suppression motion, Garibaldi moved to deposit plaintiff's \$40,000 into court and to be dismissed from the case as he was no longer acting as an escrow agent. R. 4:57-1. Plaintiff opposed Garibaldi's motion to be dismissed from the suit and cross-moved to disqualify Garibaldi from representing defendants based on his status as a witness. The court granted Garibaldi's motion to deposit the escrowed funds, denied without prejudice his motion to be dismissed from the suit, and granted plaintiff's motion to disqualify Garibaldi from representing defendants.

The same day, defendant Zengel responded to plaintiff's request for production of documents. The response included general objections, assertions of "to be provided," and claims certain requests were not applicable to the case. In addition, defendant

Zengel completed her interrogatory answers, but they were not given to plaintiff.

When defendants did not timely file a motion to reinstate their answer, plaintiff filed a motion to suppress their answer with prejudice as authorized by Rule 4:23-5(a)(2). Because defendants were now unrepresented, plaintiff's counsel sent them copies of the motion and a letter, as required by the rule, "in the form prescribed by Appendix II-B, of the pendency of the motion to . . . suppress with prejudice." Ibid. Defendants did not oppose the motion and did not appear in court on its return date. The court granted the motion "FOR REASONS SET FORTH BY MOVANT."

Shortly after the court suppressed defendants' answer with prejudice, defendants retained new counsel. Defendants subsequently served the delinquent discovery and filed a motion to reinstate their answer. The parties disputed the adequacy of defendants' discovery responses. The court denied the motion and scheduled a proof hearing. After further motion practice, the court ordered the deposited funds returned to plaintiff.

Following the proof hearing, at which plaintiff and her accountant testified, the court entered judgment against defendants for \$140,105: \$38,172 for compensatory damages, trebled to \$114,516 pursuant to the Consumer Fraud Act (CFA), N.J.S.A.

56:8-1 to -204; and \$25,589 for counsel fees and costs. The trial court determined that defendant Leible had wrongfully exercised control over the deposit when he refused to refund it, and his conduct constituted an act of conversion. The court further found defendants had committed consumer fraud by failing to disclose the condominium association was in litigation. In doing so, the court made findings of fact as to defendant Leible's knowledge of the condominium association litigation, but none as to defendant Zengel's knowledge of the litigation. Lastly, the trial court awarded attorney's fees to plaintiff, finding plaintiff was entitled to fees under the CFA. The court noted Rule 1:4-8 also supported the award of fees.

The court entered an order of judgment. Defendants appealed.

On appeal, defendants contend the trial court abused its discretion by suppressing their answer with prejudice without adhering to the requirements of Rule 4:23-5, and by denying their motion to reinstate the answer after they served discovery responses. They also contend the trial court committed numerous errors in entering judgment, particularly under the CFA.

Plaintiff disputes the trial court erred in any way. She insists defendants utterly disregarded their discovery obligations, thus warranting the suppression of their answer with

prejudice. She further insists she produced ample evidence at the proof hearing to support the court's consumer fraud award as well as its award of fees and costs.

We begin with defendants' challenges to the trial court's suppression of their answer with prejudice. We review the trial court's ruling under an abuse of discretion standard. A & M Farm & Garden Ctr. v. Am. Sprinkler Mech., LLC, 423 N.J. Super. 528, 534 (App. Div. 2012); Cooper v. Consol. Rail Corp., 391 N.J. Super. 17, 22-23 (App. Div. 2007).

Rule 4:23-5 establishes a two-step process that a party must follow to obtain an order dismissing or suppressing with prejudice the pleading of an adversary who has failed to make discovery. The moving party must first "move, on notice, for an order dismissing or suppressing the pleading of the delinquent party" without prejudice. R. 4:23-5(a)(1).³ If the court has not vacated an order of dismissal or suppression without prejudice, "the party entitled to the discovery may, after the expiration of [sixty] days from the date of the order, move on notice for an order of dismissal or suppression with prejudice." R. 4:23-5(a)(2).

³ "Prior to moving to dismiss pursuant to subparagraph (a)(1) of this rule, a party may move for an order compelling discovery demanded pursuant to R. 4:14 [depositions], R. 4:18 [discovery and inspection of documents] and R. 4:19 [physical and mental examinations]." R. 4:23-5(c).

Rule 4:23-5 contains procedural safeguards to bolster its main objective, which "is to compel discovery responses rather than to dismiss the case." A & M Farm, supra, 423 N.J. Super. at 534. Rule 4:23-5(a)(1) provides:

Upon being served with the order of dismissal or suppression without prejudice, counsel for the delinquent party shall forthwith serve a copy of the order on the client by regular and certified mail, return receipt requested, accompanied by a notice in the form prescribed by Appendix II-A of these rules, specifically explaining the consequences of failure to comply with the discovery obligation and to file and serve a timely motion to restore.

The filing and service of the subsequent motion to dismiss or suppress with prejudice triggers additional safeguards. Rule 4:23-5(a)(2) provides:

The attorney for the delinquent party shall, not later 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. In lieu thereof, the attorney for the delinquent party may certify that despite diligent inquiry, which shall be detailed in the affidavit, the client's whereabouts have not been able to be determined and such service on the client was therefore not made. If the delinquent party is appearing pro se, the moving party shall attach to the motion a similar affidavit of service of the order and notices or, in lieu thereof, a certification as to why service was

not made. Appearance on the return date of the motion shall be mandatory for the attorney for the delinquent party or the delinquent pro se party.

In addition to the attorneys' obligations, Rule 4:23-5(a)(3) imposes obligations on the court:

If the attorney for the delinquent party fails to timely serve the client with the original order of dismissal or suppression without prejudice, fails to file and serve the affidavit and the notifications required by this rule, or fails to appear on the return date of the motion to dismiss or suppress with prejudice, the court shall, unless exceptional circumstances are demonstrated, proceed by order to show cause or take such other appropriate action as may be necessary to obtain compliance with the requirements of this rule.

This judicial obligation "was designed as a fail-safe measure to ensure that the ultimate sanction is not needlessly imposed." A & M Farm, supra, 423 N.J. Super. at 537. "The requirement that the court take 'appropriate action as may be necessary to obtain compliance' calls upon the court to exercise its inherent authority to make certain its decision to terminate the litigation is an informed one." Id. at 537-38 (quoting R. 4:23-5(b)(3)). Thus, in cases where "there is nothing before the court showing that a litigant has received notice of its exposure to the ultimate sanction, the court must take some action to obtain compliance with the requirements of the rule before entering an order of

dismissal or suppression with prejudice." Id. at 539. In addition, "the court must set forth what effort was made to secure compliance on the record or on the order." Ibid.

Here, Garibaldi did not send defendants the required notice after their answer was suppressed without prejudice. He did not even send them a copy of the order. Although plaintiff's attorney sent defendants copies of the motion to dismiss with prejudice, their attorney had been disqualified from representing them and they apparently did not appear on the return date of the motion.

Rule 4:23-5(a)(3) requires that a court take action if the attorney for the delinquent party has not served that party with the order of dismissal or suppression without prejudice, fails to file and serve the affidavit and notifications required by the rule, or fails to appear on the return date of the motion. Here, it is undisputed Garibaldi did not comply with the requirements of Rule 4:23-5(a)(1). Neither an attorney nor defendants appeared on the return date of the motion to dismiss with prejudice. Rule 4:23-5(a)(3) required the court to take some action to obtain compliance with the requirements of the rule before entering the order of suppression. The court was also required to set forth on the record or on the suppression order what effort was made to secure compliance. The court did neither. The oversight is

particularly troublesome in view of the court's disqualification of defendants' counsel a month before plaintiff filed the motion to suppress with prejudice.

The court could have had its clerk contact Garibaldi or compelled Garibaldi's appearance to determine if he had complied with Rule 4:23-5 while representing defendants. Either action would have disclosed several pertinent facts: Garibaldi's non-compliance with Rule 4:23-5(a)(1); when, or if, Garibaldi had informed defendants of his disqualification; and perhaps why defendants had yet to retain new counsel or take any action to avoid the suppression of their answer with prejudice. We conclude the court misapplied its discretion by imposing the ultimate sanction without attempting to determine compliance with Rule 4:23-5 under these circumstances.

Plaintiff insists the trial court did not abuse its discretion in view of defendants' prolonged non-compliance with their discovery obligations and plaintiff's notification to defendants as required by Rule 4:23-5(a)(2). Although not entirely without merit, these arguments overlook the injustice that appears to have occurred, warranting reversal. See Abtrax Pharm., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 517 (1995) (noting appellate courts

should not interfere with a trial court's sanction for discovery misconduct "unless an injustice appears to have been done").

First, defendants were prejudiced by their attorney's undertaking their representation when he should have known he would be a witness, by his disqualification at a critical time during plaintiff's motion practice, and by his non-compliance with Rule 4:23-5. These circumstances contributed to the suppression of defendants' answer and ultimately to the judgment entered against them; a substantial judgment that in large part was unsupported by facts and contrary to law.

The judgment entered against defendant Leible included treble damages and attorney's fees under the CFA, despite well-settled law that the CFA does not apply to a homeowner, such as defendant Leible in these circumstances. See, e.g., Zaman v. Felton, 219 N.J. 199, 223 (2014) (noting "our courts have declined to impose the CFA remedies upon the non-professional, casual seller of real estate"); Byrne v. Weichert Realtors, 290 N.J. Super. 126, 134 (App. Div.) (explaining that the provisions of the CFA "do[] not apply . . . to non-professional sellers of real estate, i.e. to the homeowner who sells a house in the normal course of events"), certif. denied, 147 N.J. 259 (1996).

The CFA judgment against defendant Zengel is also questionable. Plaintiff alleged a combination of defendants' non-disclosure of the condominium association's litigation and the non-return of the deposit constituted consumer fraud and caused her damages. The trial court cited no evidence to support its conclusion that defendant Zengel was aware of the condominium association's litigation when plaintiff contracted to purchase the condominium unit. Moreover, defendant Zengel was not a party to the contract of sale and plaintiff produced no evidence at the proof hearing that Zengel participated in or influenced defendant Leible's decision not to return the security deposit.

When a trial court requires a plaintiff to provide proof of liability as to a defaulting defendant, the plaintiff need only establish a prima facie case. Kolczycki v. City of E. Orange, 317 N.J. Super. 505, 514 (App. Div. 1999); Heimbach v. Mueller, 229 N.J. Super. 17, 20 (App. Div. 1988); see also Pressler & Verniero, Current N.J. Court Rules, comment 2.2.2 on R. 4:43-2 (2018) (stating that "unless there is intervening consideration of public policy or other requirement of fundamental justice, the judge should ordinarily apply to plaintiff's proofs the prima facie case standard of R. 4:37-2(b) and R. 4:40-1, thus not weighing evidence or finding facts but only determining bare sufficiency"). Judgment

should be denied if "some necessary element of plaintiff's prima facie case [is] missing or because plaintiff's claim [is] barred by some rule of law whose applicability [is] evident either from the pleadings or from the proofs presented." Heimbach, supra, 229 N.J. Super. at 23-24.

Here, established precedent barred plaintiff's CFA claim against Leible, and plaintiff's claim against Zengel was missing elements of a prima facie case. Yet, the court entered a judgment that included treble damages and attorney's fees against defendants.⁴

We vacate the suppression orders and the judgment and remand for further proceedings. We do so because trial counsel did not comply with the requirements of Rule 4:23-5, the trial court made no attempt to comply with its obligation under the rule, defendants were left unrepresented by an attorney when the motion to suppress with prejudice was filed, and the consequence was the entry of a judgment in large part unsupported by facts or law.

On remand, the trial court should conduct a management conference, within thirty days if practical, and enter a discovery order specifying the remaining discovery needed and the deadlines

⁴ Although the trial court stated plaintiff was entitled to attorney's fees under Rule 1:4-8, the court provided no analysis or explanation for this determination.

for completion. Defendants will thus have explicit notice of their discovery obligations and the consequences of failing to timely discharge them. The merits of the causes of action pleaded in the complaint shall be decided following completion of discovery, by motion or at a trial, but not on the basis of the previous proof hearing or this opinion.

Our opinion should not be read as precluding plaintiff from seeking fees or appropriate sanctions as a result of motion practice necessitated by defendants' failure to timely make discovery and Garibaldi's non-compliance with Rule 4:23-5. See R. 4:23-5(a)(3). Nor should our opinion be construed as suggesting that Leible's withholding of the deposit and his defenses to plaintiff's suit for its return either do or do not have merit.

The suppression orders and judgment are vacated. Defendants' answer is reinstated. This matter is remanded to the trial court for further proceedings consistent with this opinion. 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