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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-5294-14T1

CLAUDE OWEN, III,

Plaintiff-Appellant,

v.

BRIAN GILLIKIN and NORTHWEST
CONSTRUCTION, LLC,

Defendants-Respondents,

and

NORTHWEST CONSTRUCTION, LLC,

Third-Party Plaintiff,

v.

CLAUDE OWEN CONSTRUCTION, LLC,
a/k/a OWEN CONSTRUCTION,

Third-Party Defendant.

Submitted December 19, 2016 - Decided August 2, 2017

Before Judges Nugent and Currier.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Docket No. L-
4395-13.

Paul V. Fernicola & Associates, LLC, attorneys for appellant (Paul V. Fernicola, on the brief).

Criscione, Ravala & Tabatchouk, LLP, attorneys for respondents (Thomas F. Verrastro, on the brief).

PER CURIAM

Plaintiff Claude Owen, III appeals from a June 12, 2015 Law Division order dismissing his complaint with prejudice for failing to provide discovery. For the reasons that follow, we affirm.

Plaintiff commenced this action on November 4, 2013, by filing a complaint against defendant Brian Gillikin. Plaintiff alleged that following Hurricane Sandy's October 29, 2012 widespread destruction of oceanfront communities in Monmouth County, he and Gillikin formed a joint venture to repair or rebuild damaged properties.¹ Although there was no written partnership agreement, plaintiff alleged the parties intended to share the net profits.

According to the complaint, the parties worked on approximately twenty construction projects which generated more than 1.2 million dollars in revenue. Gillikin deposited the money into the bank account of his construction company, Northwest Construction, LLC (Northwest). The complaint alleges Gillikin then diverted funds from the joint venture to pay expenses for his

¹ The complaint alleges the parties operated as a joint venture. Other pleadings refer to a partnership.

other company, BG Electric, Inc., and to fund personal expenses. When plaintiff requested an accounting, Gillikin refused and vacated the business premises the parties had leased in Eatontown. Defendant removed plaintiff's electronic equipment from the leased premises.

Plaintiff sought damages for breach of contract, breach of fiduciary duty, fraud, and violations of New Jersey's wage and hour law. Plaintiff also sought an accounting.

Gillikin denied that he personally entered into a partnership with plaintiff. He claimed that his company, Northwest, entered into all of the contracts for repair work or rebuilding. Gillikin further alleged that plaintiff failed to pay for his Aunt's projects, took payments from one project for his personal use, and may have taken payments from other customers. According to Gillikin, plaintiff's company, Owens Construction, LLC, received a number of payments from Northwest. These payments were either related to the shore projects or were loans to be repaid from the shore projects.

For more than a year after plaintiff filed the complaint, the parties exchanged many recriminations but little discovery. They filed numerous motions. Plaintiff amended the complaint to include Northwest as a direct defendant, and Gillikin filed a third-party

complaint against Claude Owen Construction, LLC.² Plaintiff served defendants with three separate notices to produce documents, and defendants served plaintiff with one on May 8, 2014. Plaintiff's repeated failure to produce any responsive documents ultimately resulted in the order dismissing the complaint, which is the subject of this appeal.

In their Notice to Produce Documents, defendants enumerated thirty demands. The majority of the demanded documents concerned the projects the parties allegedly worked on: contracts for the projects, documentation of contributions of capital or labor, and financial documents related to revenue, expenses and distributions. Defendants also demanded documentary evidence of the joint venture that plaintiff alleged existed. Other demands concerned electronic information, including emails and electronic applications providing corroboration of any of plaintiff's claims. Another demand was for a group of documents plaintiff brought to a meeting between the parties. Defendants also demanded that plaintiff produce certain insurance information, financial records, personal income tax returns, and corporate income tax returns.

² Other motions included motions for summary disposition and for partial summary judgment. Each party filed a motion to disqualify opposing counsel.

Plaintiff responded to twenty-five of defendants' thirty demands on June 16, 2014, stating "Any documents in possession of [p]laintiff responsive to this Request shall be made available for inspection upon the provision of reasonable notice to [p]laintiff's attorney." In response to the remaining five demands, plaintiff stated: "Objection: This request seeks the production of confidential and privileged communications."³

On July 31, 2014, the trial court denied cross-motions to proceed summarily and for partial summary judgment. The memorializing order included a provision with discovery deadlines. The order stated, in pertinent part:

IT IS FURTHER ORDERED that the parties exchange all documents with the exception of personal income tax returns and responses to already served requests for production by August 31, 2014, it being understood that the volume of records may require inspection, and other discovery to proceed per Court Rules; and

IT IS FURTHER ORDERED THAT the parties shall be deposed by October 17, 2014; and

. . . .

³ Although the responses purported to be those of plaintiff, the responsive pleading did not include a certification or affidavit, required by R. 4:18-1(c). Plaintiff was obligated to certify that his responses were "complete and accurate based on personal knowledge and/or upon information if provided by others, whose identity and source of knowledge shall be disclosed." R. 4:18-1(b)(2). Counsel for Gillikin certified in support of a subsequent motion to dismiss that "[t]he documents were demanded for inspection but never provided."

IT IS FURTHER ORDERED that the parties and counsel appear before this court for a case management conference on October 6, 2014 at 9 a.m.

Plaintiff disregarded the court's order. Defendants filed a motion, returnable December 19, 2014, to dismiss the complaint for failure to comply with discovery. Following several adjournments, the court entered a February 6, 2015 order granting the motion. The order noted: "This motion is meritorious on its face and is unopposed. It has been granted essentially for the reasons expressed herein."

Notwithstanding this order, plaintiff continued to disregard his discovery obligations. On April 7, 2015, defendants filed a motion seeking an order dismissing the complaint with prejudice pursuant to Rule 4:23-5(a)(2). In a supporting certification, defense counsel averred defendants were compliant with discovery, having produced the documents as ordered by the court, "including but not limited to at least 1000 pages of accounting reports and records on August 28, 2014, and revisions and supplements thereto of at least 500 pages." Defendants also asserted, among other things, they were unable to fully defend plaintiff's allegations and were unable to "prosecute their counterclaim without this discovery."

Defendant's motion was returnable on April 24, 2015. On April 17, 2015, plaintiff prepared a cross-motion to reinstate the complaint, compel document production, and compel defendants' depositions. Plaintiff supported the cross-motion with his own certification, a certification from a former landlord, and a certification from his attorney. Plaintiff certified that when Gillikin left the partnership, he removed from the partners' Eatontown office all the books and records related to the partnership projects. Gillikin also removed all of the computers, filing cabinets, and plaintiff's personal financial records. Consequently, he had no documents to produce in response to defendants' demands.

The former landlord certified that in August 2013, he witnessed Gillikin removing "large amounts of items from the Eatontown office." The landlord confronted Gillikin, who "explained the [p]artnership was re-doing a kitchen and he was loading a large truck for the renovation[s] the following day."

Plaintiff's attorney averred that after a meeting among the parties, he "requested via correspondence additional documentation," which defendants had not provided. He also averred defendants had refused to appear for depositions.

Gillikin filed a responding certification. He averred that his brother moved Northwest Construction, LLC's property out of

the Eatontown building after that office had closed. He denied the former landlord's assertions.

Gillikin's attorney also filed a responding certification. He pointed out that at the hearing resulting in the July 31, 2014 order, plaintiff did not object or claim not to have documents. Moreover, in plaintiff's response to defendants' Notice to Produce Documents, plaintiff stated the documents in his possession responsive to the requests would be made available for inspection. Defense counsel also pointed out that during a conference among the parties, he had seen plaintiff holding documents he claimed were relevant to the case. Lastly, counsel noted plaintiff obviously had access to his bank accounts and to his own insurance information.

The trial court granted the motion. The court noted in the June 12, 2015 memorializing order that plaintiff had neither demonstrated exceptional circumstances nor provided any explanation for failing to comply with the prior order. In a supplemental written opinion, the court noted that "even [p]laintiff's Motion to Reinstate failed to provide [an] explanation as to why [p]laintiff ignored all previous Orders and motions."

The court explained that though plaintiff contended he was not in possession of the requested documentation, he never opposed

the previous motions by indicating that fact. Rather, only after plaintiff was served with a motion to dismiss his complaint with prejudice did he claim defendant took all of the records, making it impossible for him to comply with the court's order. To the contrary, plaintiff had represented that documents "shall be made available for inspection upon the provision of reasonable notice to [p]laintiff's attorney." The court also noted:

On July 11, 2014, during a motion hearing, the [c]ourt specifically directed [p]laintiff's counsel to provide [p]laintiff's "boxes of paper" for [d]efendant's inspection, as representations were made that [p]laintiff possessed responsive documents. Plaintiff never complied and has not to the present time. Plaintiff cannot allege on one hand that he will produce documents upon reasonable notice . . . , and then allege that [d]efendant took all of the documents thereby making compliance impossible. The inconsistency was, in this [c]ourt's opinion, disingenuous.

Furthermore, [p]laintiff's counsel failed to appear on the return date of the Motion to Dismiss with prejudice despite being sent a mandatory appearance letter pursuant to R[ule] 4:23-5(a)(2) dated April 15, 2015 by the [c]ourt. It should be noted, however, that the return date of the motion was carried several cycles upon request and consent of the parties until the ultimate return date of June 12, 2015.

This [c]ourt found that [p]laintiff's continued willful noncompliance should not be rewarded and accordingly granted [d]efendant's Motion to Dismiss [p]laintiff's [c]omplaint with prejudice.

Plaintiff filed this appeal from the trial court's implementing order. On appeal, plaintiff argues the trial court abused its discretion when it dismissed his first amended complaint with prejudice. He maintains he could not produce the documents demanded by defendants because he did not have them; defendant wrongfully removed them from the partnership office. Plaintiff contends that to impose the ultimate sanction – dismissing his complaint with prejudice – when he was guilty of neither misconduct nor contumacious behavior is a miscarriage of justice.

Rule 4:23-5 authorizes the dismissal or suppression of a pleading as a sanction for a party's failure to make discovery. The rule encompasses a party's failure to respond to a Notice to Produce documents served "pursuant to . . . [Rule] 4:18." R. 4:23-5(a)(1).

When a party files a motion under Rule 4:23-5(a)(1), "[u]nless good cause for other relief is shown, the court shall enter an order of dismissal or suppression without prejudice." The filing and service of an order dismissing or suppressing a pleading triggers legal obligations. The rule further provides in part:

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.

[Ibid.]

"If an order of dismissal or suppression without prejudice has been entered . . . and not thereafter vacated, the party entitled to the discovery may, after the expiration of 60 days . . . move on notice for an order of dismissal or suppression with prejudice." R. 4:23-5(a)(2). The filing and service of the motion to dismiss or suppress a pleading with prejudice triggers additional legal obligations:

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. . . . Appearance on the return date of the motion shall be mandatory for the attorney for the delinquent party or the delinquent pro se party. . . .

[Ibid.]

The delinquent party can prevent his or her pleading from being dismissed or suppressed by filing "a motion to vacate the

previously entered order of dismissal or suppression without prejudice . . . and either [providing] the demanded and fully responsive discovery . . . or [demonstrating] exceptional circumstances." Ibid.

"[T]he 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 appellate courts not to interfere unless an injustice appears to have been done." Abtrax Pharm., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 517 (1995). In the case before us, we cannot conclude from our review of the record that an injustice has been done, so we heed our Supreme Court's cautionary note.

We begin by noting nothing in the record shows that plaintiff provided any discovery. Plaintiff now claims he has no discovery responsive to any of defendants' document demands. That is not what he said when he answered them. Rather, he represented he had documents responsive to twenty-five of the demands and they could be inspected on reasonable notice in his attorney's office. Yet, when defendants attempted to arrange for an inspection, he thwarted their efforts. Significantly, plaintiff did not deny during motion practice in the trial court, nor does he deny on appeal, either that he represented he had documents responsive to defendants'

demands or that he thwarted defendants' efforts to inspect those documents.

Additionally, in explaining the dismissal with prejudice, the trial court noted: "On July 11, 2014, during a motion hearing, the [c]ourt specifically directed [p]laintiff's counsel to provide [p]laintiff's 'boxes of paper' for [d]efendant's inspection, as representations were made that [p]laintiff processed responsive documents." Plaintiff does not deny that this is what took place during the hearing. Plaintiff does not claim he corrected the court's belief – which was based on plaintiff's representations – that plaintiff was in possession of boxes of documents.⁴

Lastly, plaintiff does not explain why he could not respond to defendants' demands for some of the documents, such as insurance information and the documents plaintiff had in his possession at a conference among the parties.

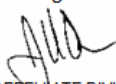
Plaintiff's failure to provide explanations for the inconsistencies in his statements concerning discovery was inexcusable and untenable, as was his apparent failure to appear in court on the return date of defendants' motion to dismiss the complaint with prejudice. Plaintiff's inconsistent statements,

⁴ Plaintiff has provided neither the transcript of this hearing nor the transcript of the final hearing when the court dismissed the complaint with prejudice.

defiance of court rules, and disregard of the trial court's order warranted the court's characterization of his conduct as disingenuous. Plaintiff's conduct had every appearance of being both obstructionist and contumacious. Given these circumstances, we cannot find the trial court abused its discretion when it dismissed plaintiff's complaint with prejudice.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION