SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5734-14T1

CAROL M. COVER and DONOVAN COVER, her husband,

Plaintiffs-Appellants,

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Defendant/Third-Party Plaintiff-Respondent,

v.

JANGJUMAY DUKUREH,

Third-Party Defendant/ Fourth-Party Plaintiff-Appellant,

v.

SHLOMO SINGER, ESQ., ROBERT A. RASKAS, ESQ. and LAW OFFICES OF ROBERT A. RASKAS,

Fourth-Party Defendants-Respondents.

Argued March 21, 2017 – Decided September 11, 2017

Before Judges Messano, Suter and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-4156-13.

Michael C. Meribe argued the cause for appellants (Michael C. Meribe, PC, attorneys; Mr. Meribe, of counsel and on the brief).

Darren C. Kayal argued the cause for respondent Government Employees Insurance Company (Rudolph & Kayal, attorneys; Mr. Kayal, on the brief).

Christopher J. Carey argued the cause for respondents Shlomo Singer, Esq., Robert A. Raskas, Law Offices of Robert A. Raskas (Graham Curtin, attorneys; Mr. Carey, of counsel and on the brief; Michelle M. O'Brien, on the brief).

PER CURIAM

While attempting to make a U-turn, Jangjumay Dukureh drove her car into the opposite lane of traffic and struck a car driven by plaintiff Carol Cover.[1] The damage to Dukureh's car was minimal, and she suffered no injuries. The airbags in plaintiff's car never deployed, but she was taken to the hospital with complaints of neck and shoulder pain, treated and released. Two years later, plaintiff underwent cervical spine surgery. At the time of the accident, Dukureh was insured through an automobile insurance policy issued by the Government Employees Insurance

[1] Plaintiff's husband Donovan Cover asserted a per quod claim in the complaint. Because his claim is wholly-derivative of plaintiff's claims, we use the singular "plaintiff" throughout this opinion.

Company (GEICO), with bodily injury liability limits of $25,000 per person and $50,000 per occurrence.

Plaintiff filed suit against Dukureh (the negligence action) and, following a proof hearing, obtained a default judgment for $260,512.38, and $20,000 in favor of her husband. More than nine months later, plaintiff's counsel notified GEICO by phone and letter of the judgment against its insured. GEICO assigned the Law Offices of Robert A. Raskas to represent Dukureh, and, one of its attorneys, Shlomo Singer, moved to vacate the default judgment. Plaintiff opposed the motion.

Contemporaneously, GEICO sent Dukureh a reservation of rights letter, which stated that GEICO did

> not waive any of its rights or admit any obligations under the policy . . . .
>
> We are making this reservation of rights because you have not cooperated with our investigation. We have tried to contact you through telephone calls, in person contact by a field representative, and written correspondence and you have not responded.

The judge denied the motion to vacate. Her handwritten notation on the order said: "As the defendant has failed to establish excusable neglect pursuant to R. 4:50-1. The defendant was duly served and the defendant and his [sic] insurer were on notice as to the existence of the claim, entry of default and

proof hearing." A second judge denied Dukureh's motion for reconsideration.

GEICO then notified plaintiff's counsel and Dukureh that it was disclaiming any and all obligations under the policy based upon Dukureh's "failure to cooperate . . . in the investigation and subsequent handling of th[e] loss, including [her] failure to timely notify [GEICO] of the suit." Plaintiff moved to amend her complaint to include a count for declaratory relief against GEICO, which GEICO opposed. Dukureh's counsel moved to be relieved. A third judge denied both motions, reasoning the default judgment entered more than one year earlier had concluded the negligence action.

Plaintiff then filed the instant complaint, seeking declaratory relief against GEICO and asserting a claim of bad faith. Two months later, after GEICO sought dismissal of the complaint for plaintiff's failure to state a claim and to name Dukureh as an indispensable party, Dukureh assigned her rights under the policy to plaintiff, in return for plaintiff's agreement not to attempt any collection of the default judgment. Plaintiff moved for summary judgment, arguing GEICO was collaterally

estopped from disclaiming coverage because the first judge had already decided the insurer was on notice.[2]

The judge denied GEICO's motion to dismiss, concluding plaintiff had standing to bring the suit. He also denied plaintiff's motion for summary judgment (the August 2013 order). Plaintiff sought reconsideration, which the judge denied by order dated November 8, 2013 (the November 2013 order).

GEICO answered and named Dukureh as a third-party defendant. She never filed a responsive pleading, and the court entered default against her. Two months later, plaintiff's counsel notified GEICO that he was representing Dukureh, and requested GEICO's consent to vacate the default. GEICO refused. A fourth judge granted Dukureh's motion, vacated default and permitted Dukureh, now represented by plaintiff's counsel, to file an answer and counterclaim. The judge severed plaintiff's bad faith claim against GEICO until the underlying coverage issue was decided.

In June 2014, more than four years after filing the negligence action and more than two years after obtaining default judgment against Dukureh, plaintiff filed a fourth amended complaint seeking declaratory relief against GEICO and adding claims for

[2] Plaintiff primarily asserted that the first judge's decision was "law of the case," but also argued collateral estoppel as a basis for relief. On appeal, plaintiff and Dukureh limit the argument to collateral estoppel and res judicata.

negligence and consumer fraud. Represented by the same attorney, Dukureh filed her answer and a fourth-party complaint against Singer and the Raskas law firm (collectively, the Raskas defendants) alleging legal malpractice. A fifth judge struck GEICO's pleadings for failure comply with discovery orders.

Motion practice continued unabated. In February 2015, Judge Dennis F. Carey heard arguments on GEICO's motion to reconsider and restore its pleading; the Raskas defendants' motion for summary judgment; and plaintiff/Dukureh's motion to declare GEICO's reservation of rights and disclaimer of coverage invalid, and grant other relief, including permitting discovery on their bad faith claims against GEICO.

In a series of orders (the February 2015 orders), the judge granted GEICO's motion for reconsideration, restored its pleadings and ordered it to supply discovery on the coverage action within thirty days. He denied plaintiff's/Dukureh's discovery motion and motion for declaratory relief, and he granted the Raskas defendants summary judgment dismissing the complaint as to them. The judge entered another order in March (the March 2015 order) that extended discovery and required plaintiff's counsel to supply electronic copies of two letters he allegedly sent to GEICO in 2011, notifying the company of the negligence action and the proof hearing.

GEICO moved for summary judgment, and plaintiff/Dukureh cross-moved for partial summary judgment, precluding GEICO from re-litigating any issue as to notice based upon collateral estoppel and res judicata.[3] On July 28, 2015, the judge entered an order (the July 2015 order) granting GEICO summary judgment dismissing plaintiff's complaint with prejudice. In response to a letter from plaintiff's counsel regarding disposition of his cross-motion for partial summary judgment, the judge entered an order denying the motion (the August 2015 order).

Plaintiff and Dukureh (collectively, appellants) seek review of the August 2013, November 2013, February 2015, March 2015, July 2015, and August 2015 orders. We affirm.

I.

Regarding the August 2013 order, plaintiff argues the judge erred by denying her initial motion seeking declaratory relief against GEICO because the doctrines of collateral estoppel and res judicata precluded further litigation on the issue of notice. She contends that issue was conclusively decided in the negligence action. We disagree.

[3] GEICO also moved to dismiss based upon counsel's failure to produce the 2011 letters previously ordered by the judge. This motion was not heard because the return date was after the return date of the summary judgment motions.

"The term 'res judicata' refers broadly to the common-law doctrine barring relitigation of claims or issues that have already been adjudicated." Velasquez v. Franz, 123 N.J. 498, 505 (1991). "Collateral estoppel, in particular, represents the 'branch of the broader law of res judicata which bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action.'" Tarus v. Borough of Pine Hill, 189 N.J. 497, 520 (2007) (quoting Sacharow v. Sacharow, 177 N.J. 62, 76 (2003)). The party asserting the bar must demonstrate:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.
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> [First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007) (quoting Hennessey v. Winslow Twp., 183 N.J. 593, 599 (2005)).]

Even when these requirements are met, collateral estoppel will not apply if the result is inequitable. Allen v. V & A Bros., 208 N.J. 114, 138 (2011).

"[C]ollateral estoppel applies only to matters or facts that are directly in issue and are necessary to support the judgment

rendered in the prior action. The doctrine does not extend to 'any matter which came collaterally in question, . . . nor . . . any matter to be inferred by argument from the judgment.'" Allesandra v. Gross, 187 N.J. Super. 96, 105 (App. Div. 1982) (alteration in original) (emphasis added) (quoting Mazzilli v. Accident & Cas. Ins. Co., 26 N.J. 307, 315-16 (1958)).

The only issues in the negligence action were whether Dukureh was negligent and if so, whether that negligence was a proximate cause of plaintiff's damages. The proof hearing quantified those damages. Whether GEICO had notice of plaintiff's claim was not an issue necessary to support the judgment against Dukureh, and Singer was representing only Dukureh's interests, not GEICO's, when he sought to vacate default. See, e.g., Hartford Acci. & Indem. Co. v. Aetna Life & Casualty Ins. Co., 98 N.J. 18, 24 (1984) (discussing potential conflict of interest occasioned by having one attorney represent insured and at the same time represent the insurer challenging coverage). The notation in the first judge's order that GEICO had notice was not a fact necessary to decide whether to vacate the default judgment entered against Dukureh.

Although GEICO was not a party to the negligence action, plaintiff argues GEICO was in privity with Dukureh. "'Generally, one person is in privity with another and is bound by and entitled to the benefits of a judgment as though he was a party when there

is such an identification of interest between the two as to represent the same legal right.'" Zirger v. Gen. Accident Ins. Co., 144 N.J. 327, 338-39 (1996) (quoting Moore v. Hafeeza, 212 N.J. Super. 399, 403-04 (Ch. Div. 1986)).

Here, the legal right Dukureh sought to vindicate was relief from a default judgment entered without her participation. Although GEICO had an interest in providing a defense to its insured, it did not share the same interest as Dukureh. If the default were not vacated, GEICO could disclaim responsibility for the judgment based on Dukureh's lack of cooperation, which it eventually did, or limit its obligation to the $25,000 policy limit.

In short, collateral estoppel did not bar GEICO's litigation of the issue of notice. We affirm the August 2013 order. Plaintiff's arguments regarding the November 2013 order denying her motion for reconsideration lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm the November 2013 order.

II.

Appellants argue we must reverse Judge Carey's February 2015 order granting summary judgment to the Raskas defendants. They contend the matter was not ripe for summary judgment because discovery was outstanding; Dukureh did not make an illegal

assignment of a tort action, i.e., her legal malpractice claim, to plaintiff; and the judge misapplied summary judgment standards to conclude Dukureh suffered no damages and the Raskas defendants did not breach their professional duty. We need not address all these claims because Dukureh could not prove any damages resulted from the Raskas defendants' allegedly negligent representation.

On this issue in particular, further discovery was not necessary. As the Court has said:

> A motion for summary judgment is not premature merely because discovery has not been completed, unless plaintiff is able to "demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action."
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> [Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 555 (2015) (quoting Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.), certif. denied, 177 N.J. 493, (2003); Auster v. Kinoian, 153 N.J. Super. 52, 56, (App. Div. 1977)).]

Dukureh argues she was entitled to further discovery regarding Geico's retention of the Raskas law firm, yet those circumstances pertain only to the question of whether Singer's legal representation was deficient. Dukureh herself provided all information relevant to the damages she allegedly suffered in certifications and deposition testimony.

We consider the grant of summary judgment de novo, using the "'same standard as the motion judge.'" Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). Providing all favorable inferences to the non-moving party, Rule 4:46-2(c), our "task is to determine whether a rational factfinder could resolve [an] alleged disputed issue in favor of the non-moving party." Perez v. Professionally Green, LLC, 215 N.J. 388, 405-06 (2013). An opposing party must "do more than 'point[] to any fact in dispute' in order to defeat summary judgment." Globe Motor Co., supra, 225 N.J. at 479 (alteration in original) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)). We review issues of law de novo and accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

"[A] legal malpractice action has three essential elements: '(1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney, (2) the breach of that duty by the defendant, and (3) proximate causation of the damages claimed by the plaintiff.'" Jerista v. Murray, 185 N.J. 175, 190-191 (2005) (quoting McGrogan v. Till, 167 N.J. 414, 425 (2001)). Dukureh stated in her certification:

> I retained Mr. Meribe to represent me in this case. He explained to me the advantages and disadvantages of a joint representation and I

> fully consented to his handling this matter on my behalf. Indeed, I do not see any disadvantage from my point of view. He is not charging me any fees and my retainer agreement states that he can only be paid from whatever he can collect from GEICO for the breach of contract. With regard to the judgment obtained by Plaintiff in the prior lawsuit, Plaintiff has already stipulated that she has waived her right to enforce the judgment in exchange for my giving her an Assignment of Right.
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> [Emphasis added.]

Judge Carey found as a result "there are no damages that could even possibly result from the case . . . in light of the quid pro quo of the assignment." Dukureh may continue to have a judgment on record against her, but success in the legal malpractice suit would not have discharged the judgment. Dukureh's contentions to the contrary are meritless.

III.

Appellants contend we should reverse the February 2015 order denying them declaratory relief because GEICO's December 2012 reservation of rights (ROR) and April 2013 disclaimer were invalid as a matter of law, and GEICO was estopped from disclaiming coverage or otherwise waived its right to disclaim coverage. Because these arguments are essentially repeated by appellants as to Judge Carey's July 2015 order granting summary judgment to GEICO, and his August 2015 order denying plaintiff's cross-motion

for partial summary judgment and declaratory relief, we choose to address the issues only once after first providing some context from the motion record.

It is undisputed that Dukureh notified GEICO of the accident on March 26, 2008, approximately one week after it occurred. Its claims adjusters attempted to reach her by telephone on April 24, 25, 30, and August 21, 2008, without success. Adjusters also mailed letters to her on April 25 and August 22, 2008, asking that she contact them. GEICO's activity logs show no response from Dukureh to the phone calls or letters.

Meanwhile, GEICO contacted plaintiff's attorney, requesting information and attempting to schedule independent medical examinations. GEICO never received signed HIPAA authorizations that would allow it to obtain plaintiff's medical records. On August 27, 2008, a claims adjuster wrote to plaintiff's counsel: "Based upon the information we received to date, it does not appear your client's claim will pierce the NJ Verbal Tort Threshold . . . . If you are in receipt of information to the contrary, please send it to my attention within 30 days." GEICO attempted to schedule independent medical examinations of plaintiff in September 2008, but these appointments were cancelled. On October 10, 2008, an adjuster mailed a letter to Dukureh explaining that GEICO had been unable to resolve plaintiff's injury claim and

directing her to contact him immediately if she received legal documents from plaintiff's counsel.

Plaintiff served the complaint on Dukureh on August 31, 2010. At her deposition, Dukureh stated that someone came to her home to serve her with papers, but she does not speak nor read English, and she did not know what the documents said. Despite not understanding the documents, Dukureh said she called GEICO and told them that somebody at the door handed her papers. GEICO had no record of receiving a phone call from Dukureh in 2010.

Dukureh's son was deposed in 2015, after plaintiff initially moved for declaratory relief, but before GEICO moved for summary judgment. Contrary to his mother's version of events, the son stated his mother gave him the documents involving plaintiff's suit, and he called GEICO. He could not recall who he spoke to.

As noted, the record contains copies of letters sent by plaintiff's counsel to GEICO, in January 2011, advising it of plaintiff's suit, and in December 2011, advising it of the proof hearing. GEICO's representatives denied ever receiving these letters, explaining that in 2011, no documents were entered in GEICO's activity log or claim file for the Dukureh claim. Plaintiff's counsel was unresponsive to GEICO's discovery demands that he produce the electronic file copies of the 2011 letters, and, ultimately, the March 2015 order required plaintiff's counsel

to produce the electronic files. They were not produced prior to the July 2015 order granting GEICO summary judgment.

Once GEICO received notice of the default judgment on November 29, 2012, it attempted to contact Dukureh by mail, by telephone, and by visiting her home. All these attempts were unsuccessful. It appointed counsel to represent her, and he attempted to protect Dukureh's interests by immediately filing a motion to vacate the default judgment, as outlined above.

A.

Plaintiff argues the 2012 ROR letter was legally deficient because it was served after GEICO had commenced representation and failed to inform Dukureh that she had the right to reject representation under its terms. We disagree.

Our courts have long recognized the efficacy of an ROR letter, and the right of the carrier to assume defense of its insured under that reservation upon her consent, which may be inferred by the insured's silence. Merchs. Indem. Corp. of N.Y. v. Eggleston, 37 N.J. 114, 126 (1962). However, "to spell out acquiescence by silence, the letter must fairly inform the insured that the offer may be accepted or rejected." Id. at 128.

It is undisputed that GEICO's December 2012 ROR letter did not advise Dukureh that she need not consent and could retain her

own counsel. Plaintiff argues that GEICO should be estopped from relying on the ROR because of this infirmity, but we disagree.

In Griggs v. Bertram, 88 N.J. 347, 356 (1982), the Court explained that the rationale of estoppel in the context of an absent or invalid ROR letter "is that once the insurer has acknowledged the claim and assumes control of the defense, the insured is justified in relying upon the carrier to protect it under its policy." Here, however, Dukureh denied knowing about the lawsuit or the default judgment, so she would have had no reason to believe a legal defense was necessary. The ROR letter did not induce Dukureh to rely on GEICO for a defense to plaintiff's suit.

Moreover, contrary to plaintiff's arguments, GEICO did not exercise exclusive control of the defense in the negligence action for any appreciable time, a factor that might otherwise weigh in favor of the successful invocation of estoppel. See, e.g., Sneed v. Concord Ins. Co., 98 N.J. Super. 306, 320 (App. Div. 1967) (holding that estoppel was warranted where insurer maintained exclusive control over claim for "substantial period" of twenty-two months after learning that insured had breached policy conditions).

Upon receiving notice of the default judgment, GEICO retained the Raskas defendants and sent the ROR letter. Within three

months, their representation of Dukureh ended, after a motion to vacate default was denied, and they unsuccessfully sought reconsideration. GEICO's representation did not materially impair Dukureh's right to defend herself; the default judgment had already been entered against her.

B.

In initially seeking declaratory relief, and again in opposing GEICO's summary judgment motion and moving for partial summary judgment and declaratory relief, plaintiff argued that GEICO's disclaimer was ineffective because GEICO failed to demonstrate how Dukureh's breach of the policy's cooperation provisions resulted in the irretrievable loss of substantial rights in defense of the negligence action. Plaintiff reiterates the arguments here, but we are unpersuaded.

In Cooper v. Government Employees Insurance Co., 51 N.J. 86, 94 (1968), the Court reasoned it would be unfair for an insured to lose insurance coverage for violating a notice provision when there is no likelihood that the insurer was prejudiced by the breach. Accordingly, it held that "the carrier may not forfeit the bargained-for protection unless there are both a breach of the notice provision and a likelihood of appreciable prejudice. The burden of persuasion is the carrier's." Ibid. (footnote omitted); see Gazis v. Miller, 186 N.J. 224, 230-31 (2006) (discussing

various contexts in which New Jersey courts have applied Cooper). We have said:

> "[T]wo variables" generally should be considered in determining whether an insurer was appreciably prejudiced by a breach of the insured's duties under the policy: first, "whether substantial rights have been irretrievably lost" as a result of the insured's breach, and second, "the likelihood of success of the insurer in defending against the accident victim's claim" had there been no breach.
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> [Hager v. Gonsalves, 398 N.J. Super. 529, 537 (App. Div.) (quoting Sagendorf v. Selective Ins. Co. of Am., 293 N.J. Super. 81, 93 (App. Div. 1996)), certif. denied sub nom. High Point Ins. Co. v. Rutgers Cas. Ins. Co., 195 N.J. 522 (2008).]

Here, Dukureh failed to respond to any inquiries, leaving Singer ill-equipped to vacate the default judgment in the first instance, and leaving GEICO ill-equipped to defend Dukureh. A "total lack of cooperation" is relevant when considering whether an insurer is appreciably prejudiced. Id. at 538. Moreover, despite plaintiff's argument to the contrary, although the traffic accident was clearly Dukureh's fault, it is not so clear that plaintiff could demonstrate the injuries proximately caused by the accident pierced the verbal threshold[4] or that her damages exceeded the policy limits.

[4] N.J.S.A. 39:6A-8(a).

As noted, there was little damage to both vehicles. Plaintiff was treated and released from the hospital on the day of the accident; x-rays revealed no fracture. It is true that an MRI in July 2008 revealed a disc herniation in her cervical spine, but plaintiff never underwent an independent medical examination. In sum, it cannot be disputed that Dukureh breached the cooperation provisions of the policy, and GEICO demonstrated it was appreciably prejudiced by that breach.

Plaintiff argues summary judgment was inappropriate because there were material disputed facts as to whether GEICO was on notice of the suit prior to default judgment being entered against Dukureh. She relies upon Dukureh's statements regarding her calls to GEICO and her counsel's 2011 letters notifying the company of the suit and default hearing.

As demonstrated, Dukureh's version of how she received plaintiff's summons and complaint, and what she did about it, differed markedly from her son's testimony. Further, the business records of the insurer document none of these alleged contacts, nor is there any other proof. See, e.g., Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002) (holding proponent's self-serving statement insufficient to create material factual dispute when contradicted by unequivocal lack of supporting documentary evidence in the record).

The letters from plaintiff's counsel are puzzling. Although they appear twice in the appellate record as exhibits supporting plaintiff's motion practice, they were never accompanied by a certification from counsel, nor did counsel furnish any proof of service of these letters upon GEICO. GEICO's records do not indicate that it ever received the letters.

Further, there is no explanation in the record why counsel waited nine months to notify GEICO of the default judgment. Assuming arguendo GEICO's abject failure to respond to the second letter in December 2011, advising the insurer of the proof hearing, it is truly remarkable that the company flew into action immediately upon receipt of counsel's notification of the default judgment in November 2012. Based on this record, the letters alone do not raise a disputed material fact that GEICO was on notice of the suit.

In short, plaintiff was not entitled to partial summary judgment when she sought declaratory relief, and Judge Carey correctly granted GEICO summary judgment and dismissed plaintiff's complaint. The balance of plaintiff's arguments to the contrary on this issue lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E). We affirm the February 2015 order denying plaintiff declaratory relief, the July 2015 order granting GEICO

summary judgment and the August 2015 order denying appellant's motion for partial summary judgment.[5]

C.

The arguments appellants raise with respect to other provisions of the February 2015 orders that granted GEICO's motion for reconsideration and restored its pleadings and denied appellants motion to compel the depositions of certain GEICO employees and impose sanctions similarly require little discussion.

"It is well established that 'the trial court has the inherent power, to be exercised in its sound discretion, to review, revise, reconsider and modify its interlocutory orders at any time prior to the entry of final judgment.'" Lombardi v. Masso, 207 N.J. 517, 534 (2011) (quoting Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987), certif. denied, 110 N.J. 196 (1988)). Similarly, resolution of discovery disputes, including the imposition of sanctions, are broadly committed to the discretion of the trial court. Pomerantz Paper Corp. v. New Community Corp., 207 N.J. 344, 371 (2011). Judge Carey did not mistakenly exercise his discretion.

[5] In light of our decision, appellants' challenge to the March 2015 order in which Judge Carey, among other things, compelled the electronic files of the 2011 letters be produced is moot.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION