

**NOT FOR PUBLICATION WITHOUT THE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-0559-15T2

JEFFREY A. WICHOT, an
Adjudged Incapacitated Person,
by BARBARA A. WICHOT and
GREGORY P. WICHOT, Court
Appointed Co-Guardians of
the Person and Property for
JEFFREY A. WICHOT,

Plaintiff-Appellant/
Cross-Respondent,

v.

SHERIFF RICHARD BERDNIK,
and WILLIAM MAER,

Defendants-Respondents,

and

CAPTAIN ROBERT WESTON,

Defendant-Respondent/
Cross-Appellant,

and

TOWNSHIP OF WAYNE,¹

Defendant.

¹ The claims against the Township of Wayne were dismissed on
January 4, 2015, by stipulation of the parties.

Argued March 14, 2018 – Decided April 19, 2018

Before Judges Fuentes, Koblitz and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Docket No. L-
3848-12.

Shelley L. Stangler argued the cause for
appellant/cross-respondent (Shelly L.
Stangler and Judith L. Rosenthal, on the
briefs).

Rajiv D. Parikh argued the cause for
respondent/cross-appellant and respondents
(Genova Burns, LLC, attorneys (Kathleen
Barnett Einhorn and Rajiv D. Parikh, of
counsel and on the briefs; Maria R. Fruci, on
the briefs).

PER CURIAM

Plaintiff appeals from numerous interlocutory orders entered on various dates including: an order granting a summary judgment motion; an order denying a motion to amend the complaint; an order denying an extension of discovery; and an order awarding counsel fees and costs to defendants. Plaintiff also appeals from an order dated August 21, 2015, denying a motion for reconsideration of a June 30, 2015 order dismissing the complaint without prejudice based upon failure to provide discovery and denying plaintiff's motion to reinstate the complaint. The August 21, 2015 order

provided that the complaint was dismissed with prejudice.² Defendant Robert Weston cross-appeals from orders denying his motion for summary judgment. Having considered the record in light of controlling substantive and procedural law, we dismiss the appeal and the cross-appeal.

The August 21, 2015 order dismissing the complaint with prejudice, deemed to be a final judgment for purpose of appellate review, was entered without authority. The June 30, 2015 order under reconsideration was entered pursuant to Rule 4:23-5(a)(1) for plaintiff's failure to provide discovery. As we recently noted in Thabo v. Z. Transp., "Rule 4:23-5 codified a two-step procedural paradigm that must be strictly adhered to" prior to the sanction of dismissal of the complaint with prejudice. 452 N.J. Super. 359, 369 (App. Div. 2017) (citation omitted). We added, "These procedural requirements must be scrupulously followed and technically complied with." Ibid. (citation omitted).

Here, it is without dispute that the two-step process did not occur. In fact, defendants never moved to convert the dismissal

² During oral argument, counsel for defendants stated that the June 30, 2015 order contained a technical error by its reference to Rule 4:23-5, and that the relief sought was pursuant to another rule. Counsel acknowledged that no motion was filed to correct the "error." Counsel also acknowledged that no motion was filed on behalf of defendants seeking to dismiss the complaint with prejudice prior to the August 21, 2015 order. As such, the judge, sua sponte, dismissed the complaint with prejudice.

of the complaint from "without prejudice" to "with prejudice." R. 4:23-5(a)(2). That plaintiff moved for reconsideration did not provide the basis for dismissal of the complaint with prejudice nor justify the failure by defendants or the judge to comport with the strict procedural requirements of Rule 4:23-5.

The order of the Law Division dated August 21, 2015 dismissing plaintiff's complaint with prejudice is vacated. Since the remaining orders under review are interlocutory, without leave to appeal granted per Rule 2:2-3(b), the appeal and cross-appeal are dismissed and the case is remanded to the Law Division.

Dismissed 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