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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-1025-17T4

SERGE KANGA,

Plaintiff-Appellant,

v.

CHANTE K. DARBY and
STACEY L. KANGA,

Defendants-Respondents.

Argued March 5, 2018 – Decided March 27, 2018

Before Judges Sabatino and Rose.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Docket No. L-2148-
16.

Jeffrey S. Mandel argued the cause for
appellant (Law Offices of Jeffrey S. Mandel,
LLC, attorneys; Jeffrey S. Mandel, on the
brief).

Robert F. Cox argued the cause for respondent
Chante K. Darby (McCreedy & Cox, attorneys;
Robert F. Cox, on the brief).

Respondent Stacey L. Kanga has not filed a
brief.

PER CURIAM

Pursuant to leave granted, plaintiff Serge Kanga appeals from a June 23, 2017 order dismissing with prejudice his complaint against defendant Chante Darby, pursuant to Rule 4:23-5(a)(2), for failure to provide discovery. Plaintiff also appeals orders entered August 9, 2017, and September 19, 2017, denying his motions for reconsideration. Having reviewed the parties' arguments in light of the record and applicable legal principles, we vacate and remand for further proceedings consistent with this opinion.

Plaintiff was the sole passenger in a car driven by Darby on June 30, 2014, when Darby allegedly lost control of the vehicle, striking several parked cars. Plaintiff alleges he suffered various injuries as a result of the accident.

Plaintiff filed his complaint on June 30, 2016, asserting negligence and seeking damages from Darby and co-defendant Stacy L. Kanga,¹ the owner of the vehicle. Defendant filed an answer on December 27, 2016, and served plaintiff with interrogatories, medical record authorizations, and a request to produce documents. By correspondence dated January 30, 2017, defendant requested plaintiff's overdue discovery.

¹ Stacy L. Kanga has not participated in this appeal. For simplicity, we hereafter use the term, "defendant" to refer solely to Darby.

On March 7, 2017, defendant filed a motion to dismiss plaintiff's complaint without prejudice for failure to provide discovery. Plaintiff's counsel² did not oppose defendant's motion. The judge granted the motion on March 31, 2017.

On May 31, 2017, defendant filed a motion to dismiss plaintiff's complaint with prejudice, which also was unopposed. By correspondence dated June 13, 2017, the court notified both counsel that oral argument was scheduled for June 23, 2017, and they were required to appear. Plaintiff's counsel was further directed "to immediately file with the court the affidavit required under R[ule] 4:23-5(a)(2)[,]" if he had not already done so.

Plaintiff responded to defendant's discovery requests two days before the return date of the motion. At the hearing, defense counsel argued that the responses were deficient and plaintiff failed to file a motion to reinstate the complaint pursuant to Rule 4:23-5(a)(2). It is unclear from the record whether the motion judge reviewed the sufficiency of plaintiff's responses. There is also no indication in the record that plaintiff's counsel served his client with the March 31, 2017 order dismissing his complaint without prejudice.

² Plaintiff's appellate counsel did not represent plaintiff in the Law Division.

At the conclusion of the hearing, the motion judge dismissed plaintiff's complaint with prejudice, finding plaintiff failed to: oppose defendant's motion; "file a motion to vacate"; provide fully responsive discovery requests; and demonstrate exceptional circumstances warranting denial of defendant's application.

Plaintiff's counsel moved for reconsideration, claiming extraordinary personal circumstances warranted reinstatement. To support his argument, counsel cited the illness and death of two of his immediate family members, and the termination of the associate who had been assigned to plaintiff's case. He also claimed the proper remedy was for the court to compel more specific responses to defendant's discovery demands, and not to dismiss his complaint against defendant with prejudice.

Initially, the trial judge reinstated plaintiff's complaint but awarded counsel fees to defendant. In doing so, the judge at that time recognized, "to visit the sins of the attorney onto the litigant [would be] a miscarriage of justice." See Jansson v. Fairleigh Dickinson Univ., 198 N.J. Super. 190, 196 (App. Div. 1985). However, defense counsel then reminded the court that plaintiff had failed to provide, in his estimation, complete discovery, or move to reinstate the complaint. Nor did plaintiff pay the requisite restoration fee pursuant to Rule 4:23-5(a)(1).

Following some confusion as to whether plaintiff had paid the fee, the court ultimately determined it was not paid, and decided reinstatement of the case was not warranted.

Among other things, the court noted defendant had properly served the order of dismissal without prejudice upon plaintiff's counsel. However, neither the court nor either counsel addressed the failure of plaintiff's counsel to provide proof of service of the without-prejudice dismissal order on plaintiff himself.

Plaintiff's second motion for reconsideration was again denied by the trial judge, who found no rule or case law requiring him "to reconsider the reconsideration motion that [he] already ruled upon." Again, the question of whether the order of dismissal without prejudice had been duly served on plaintiff was not addressed.

On appeal, plaintiff contends the trial court erred in dismissing his complaint with prejudice because the record does not establish he was served with the order dismissing the complaint without prejudice, as required by Rule 4:23-5(a)(1) and well-established case law. Further, plaintiff contends that because he responded to defendant's discovery demands, defendant's motion should have been converted to a motion to compel more specific responses. Finally, plaintiff urges that exigent circumstances

existed for the trial court to relax the rules pursuant to Rule 1:1-2, especially where, as here, the discovery end date has not yet expired.

We review the dismissal with prejudice of plaintiff's complaint against defendant under well-established criteria. A & M Farm & Garden Ctr. v. Am. Sprinkler Mech., LLC, 423 N.J. Super. 528, 534 (App. Div. 2012). Generally, we "defer to a trial judge's discovery rulings absent an abuse of discretion or a judge's misunderstanding or misapplication of the law." Capital Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 79-80 (2017).

Rule 4:23-5(a) provides a two-step procedure for parties to request the dismissal with prejudice of an opposing party's pleading for failure to provide discovery. Initially, "the party entitled to discovery may . . . move, on notice, for an order dismissing or suppressing the pleading of the delinquent party." R. 4:23-5(a)(1). The court may then dismiss the delinquent party's pleading without prejudice. Ibid.

Once counsel for the delinquent party receives the order of dismissal or suppression without prejudice, that counsel must then serve the client in the manner prescribed by the rule, "[t]o ensure the delinquent party is aware of its derelictions and has the

opportunity to correct them." Thabo v. Z Transp., 452 N.J. Super. 359, 369 (App. Div. 2017). Specifically,

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.

[R. 4:23-5(a)(1).]

If the delinquent party fails to cure the outstanding discovery deficiencies within sixty days of the court's order, the moving party may then take the second step under Rule 4:23-5(a), requesting the court to dismiss the delinquent party's pleading with prejudice. R. 4:23-5(a)(2). This subparagraph provides, in pertinent part:

The attorney for the delinquent party shall, not later than [seven] 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 . . . with prejudice.

[R. 4:23-5(a)(2) (emphasis added).]

Thus, once a motion to dismiss with prejudice is filed, "the delinquent party's attorney has two non-waivable obligations:

(1) file an affidavit with the motion judge indicating that the client has been notified of the pending motion's legal consequences in accordance with the form prescribed; and (2) personally appear before the motion judge on the return date of the motion." Thabo, 452 N.J. Super. at 371.

Further, the burden is on the delinquent party to either produce the deficient discovery within sixty days of the order dismissing the pleading without prejudice, or provide exceptional circumstances explaining why that discovery has yet to be produced. R. 4:23-5(a)(2). Exceptional circumstances may be demonstrated when an external factor such as bad health or an emergency prevented a party's discovery obligations from being met. Rodriguez v. Luciano, 277 N.J. Super. 109, 112 (App. Div. 1994) (citations omitted).

Nevertheless, "[i]t is well-established that the main objective of the two-tier sanction process set forth in Rule 4:23-5 is to compel discovery responses rather than to dismiss the case." A & M Farm & Garden Ctr., 423 N.J. Super. at 534. That objective is in line with a basic "tenet of our jurisdiction that resolution of disputes on the merits [is] to be encouraged rather than resolution by default for failure to comply with procedural requirements." Saint James AME Dev. Corp. v. City of Jersey City,

403 N.J. Super. 480, 484 (App. Div. 2008). "Rule 4:23-5 advances this goal, while affording an aggrieved party a remedy to compel production of the outstanding discovery and the right to seek final resolution through a dismissal process." Ibid.

Here, the record lacks sufficient confirmation that the procedures mandated by Rule 4:23-5(a)(1) and (2) were followed. Plaintiff's complaint was dismissed with prejudice, although his attorney did not file a proper affidavit, nor acknowledge at oral argument, that he served his client with the order and notices required pursuant to Rule 4:23-5(a)(1) and (2). Defendant's contention that plaintiff must have known personally of the dismissal order because he responded, albeit allegedly deficiently and delinquenty, to defendant's discovery demands, is supposition and, therefore, lacks merit. Simply put, there is no proof in the record that plaintiff actually was served with the order.

Nor are we persuaded by defendant's contention that plaintiff waived his right to raise non-compliance with the rule on the basis that this issue was not raised before the trial judge in either of plaintiff's motions for reconsideration. See Thabo, 452 N.J. Super. at 371. Although the present case was decided in the trial court before we issued our opinion in Thabo, that case did not plow new ground. Rather, it continued our long insistence on

the trial court's scrupulous adherence to the rule's procedural requirements. See, e.g., Adedoyin v. Arc of Morris Cty. Chapter, Inc., 325 N.J. Super. 173, 180 (App. Div. 1999).

We are constrained, therefore, to vacate the trial court's order dismissing plaintiff's complaint with prejudice. If plaintiff cures his discovery deficiencies, the trial court shall permit him to file a motion to reinstate his complaint, and pay defense counsel's reasonable "fees and costs, or both" pursuant to Rule 4:23-5(a)(3).³ Having decided the procedural mandates of Rule 4:23-5 were not followed, we need not reach plaintiff's remaining claims.

Vacated and remanded 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

³ At oral argument on the appeal, plaintiff's appellate counsel candidly acknowledged the imposition of such reasonable fees and costs is justified in this case as a condition of reinstatement of plaintiff's claims against defendant.