SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1345-16T1

DORIS CANALES,

Plaintiff-Respondent,

v.

YUE YU,

Defendant/Third-Party
Plaintiff-Appellant,

v.

CHARLES HAYWOOD and YVONETTE SWINGER,

Third-Party Defendants.

Submitted November 2, 2017 – Decided January 8, 2018

Before Judges Simonelli and Rothstadt.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-2779-16.

Yue Yu, appellant pro se.

Edania C. Rondon, attorney for respondent.

PER CURIAM

Defendant Yue Yu appeals from the Law Division's October 21, 2016 order denying her motion for reconsideration of its August 31, 2016 judgment entered after a bench trial, awarding plaintiff, Doris Canales, damages for defendant's wrongful withholding of plaintiff's security deposit. Defendant contends that reconsideration and a new trial are warranted because the trial judge denied her right to the jury trial that she demanded in her pleadings. She also argues that the proceedings were "unfair," she received inadequate notice of the trial date, the discovery end date was incorrectly calculated, and the judge applied the law incorrectly. The trial judge denied the motion for reconsideration because defendant did not raise any issue about her jury demand or the trial date before proceeding to trial, and she failed to sustain her burden of proof as to her claim for damages.

After carefully reviewing the record in this matter, we are constrained to reverse the denial of reconsideration, vacate the August 31, 2016 order and a subsequent order awarding plaintiff counsel fees and costs, and remand for further proceedings including, if appropriate, a jury trial.

We summarize the portions of the procedural history that are pertinent to defendant's appeal. On February 12, 2016, plaintiff filed a summary action against defendant, her former landlord, in the Law Division, Special Civil Part for the return of her security

deposit under New Jersey's Security Deposit Act, N.J.S.A. 46:8-19 to -26. The court scheduled a trial date and notified defendant. Defendant filed a motion to transfer the action to the Law Division, relying upon a proposed counterclaim seeking $20,000 from plaintiff for damages to the apartment and the removal of items that belonged to defendant. The court granted defendant's motion, and transferred the matter to the Law Division, which assigned it a new docket number and a July 23, 2016 discovery end date.

Defendant filed a motion to amend her counterclaim and for leave to file a third-party complaint against plaintiff's son and daughter, which the trial court granted on July 11, 2016. Her amended pleading contained a demand for a trial by jury, as required by Rule 4:35-1. Plaintiff's son also demanded a trial by jury in his answer to defendant's pleading. Neither plaintiff nor her daughter asked for a jury.

Although the court granted defendant's motion to file the third-party complaint and filed her amended pleadings, the court never adjusted the discovery end date to add an additional sixty days under Rule 4:24-1(b). In addition, none of the parties filed any motions prior to the discovery end date to extend the discovery period under Rule 4:24-1(c), or to compel production of discovery as required by Rule 4:24-2.

Defendant filed two additional motions to strike both plaintiff's and her daughter's answers. Plaintiff's counsel asked that the motion, which was scheduled for a hearing on August 5, 2016 be adjourned to August 19. The court granted that request and plaintiff and her daughter filed opposition and cross motions to dismiss defendant's pleadings as frivolous.[1] After being adjourned once at plaintiff's request, the parties' motions were scheduled to be heard on August 19, 2016, and were adjourned again to August 31, 2016, at defendant's request. In an email from the trial judge's chambers, the parties were advised that the motions were adjourned and, for the first time, that the trial would be held "on the same date, following oral argument on the motions." The civil division followed up with a notice advising the parties of the trial date being scheduled for August 31.

On the return date, the judge began the session by only placing defendant under oath. Plaintiff's counsel and plaintiff's daughter's counsel entered their appearances. Initially, plaintiff and her children were not present in court.

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[1] Copies of the notice of motions have not been provided in any of the parties' appendices. We have been supplied with copies of counsel's certifications filed in support of the cross motions that refer to their clients seeking dismissal because defendant's claims were frivolous.

The judge proceeded by placing on the record "a couple of brief statements" about the parties' claims and specifically about a December 31, 2015 letter[2] defendant wrote to plaintiff and her children about damages to the apartment. Based on the contents of that letter, the judge questioned whether defendant's claim was "proper." Rather than discuss the issue, the judge decided, "to proceed with the motions . . . as well as the trial . . . to bring it to an end."

The trial judge continued by asking defendant questions about the lease and defendant's ownership of the property. When defendant tried to respond to the question the judge raised about her letter to plaintiff, the judge cut her off stating, "all that is past history. I'm here to determine what, if any, money is owed to any party. That's what I am here for."

The judge asked defendant if she had witnesses and defendant stated she had asked a real estate agent to testify about the condition of the property, but due to surgery the witness could not appear. Defendant told the judge she had a signed affidavit and other documents from the witness that she could produce. The judge said "okay" and proceeded to ask the parties if there were facts to which they could stipulate.

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[2] The letter was not marked as an exhibit by the court or moved into evidence by any party.

The discussion about whether there were stipulations led to a dispute between defendant and counsel about defendant's ownership interest, the location of the security deposit plaintiff paid, and the date when plaintiff vacated the apartment, all of which defendant and counsel argued to the court. There were no stipulations placed on the record.

The trial judge next questioned defendant about her ownership of other properties, her understanding of laws governing a landlord's ability to remove a former tenant's possessions, and the security deposit laws. The judge then referred back to the December 31 letter and stated that she "looked up [defendant's] itemization of . . . damages" and proceeded to explain to defendant her understanding of plaintiff being an elderly woman, her daughter being with her to help her "day-to-day," and plaintiff's son being developmentally disabled and an authorized resident of the apartment. The judge also stated she was aware that plaintiff's daughter did not reside at the apartment. The judge's summary of her understanding was only confirmed by counsel.

When the judge completed her summary, she began to question defendant about a specific item of damage she gleaned from defendant's itemization of damages[3] that related to a cleanup

[3] This was evidently another document that was never marked as an exhibit or offered into evidence.

charge for the mess allegedly caused by plaintiff's dogs. The judge asked:

> THE COURT: . . . Where do you in all of your research and knowledge understand that you have a right to charge your tenants $75 if you believe a dog defecated in the backyard?
>
> [DEFENDANT:] Your Honor, if you see my reply to the counsel's past motion of August 22nd I filed with this Court, and I have pictures to show the dogs feces --
>
> THE COURT: That's not my question. This is an itemization of damages, monetary damages that you're saying [plaintiff] owes to you. On what basis do you come up with a number of $75 that you're entitled to if you believe her dog defecated in the backyard of the property?

As defendant was attempting to respond, plaintiff and her daughter appeared in court. The judge proceeded to have them placed under oath and advised that she was in the process of "questioning [defendant] with regard to [her] determination of her cost and expenses form in terms of the itemization that she believes, according to her papers, she would be entitled to from [plaintiff]." Neither plaintiff nor her children testified at the hearing.

The judge returned to the issue of the seventy-five dollar charge and as defendant tried again to explain the history of plaintiff bringing dogs onto the property, plaintiff's daughter's

attorney interjected and began to provide her explanation about dogs being permitted on the premises.

The judge considered counsel's statements and turned back to defendant to explain how she calculated the seventy-five dollar charge. In the middle of her explanation, the judge interrupted defendant, explained that defendant was being unresponsive and then asked plaintiff's counsel "how do you respond to the issue with the $75[?]" Counsel stated that all of defendant's claims were for "normal wear and tear" and the seventy-five dollar charge relating to plaintiff's dog was not "additional rent" under the lease.

After counsel explained plaintiff's position, the judge asked if counsel had received copies of the receipts for the charges stated in defendant's letter. Counsel responded that defendant had not produced documents other than a compact disc of photographs, answers to motions, "and a copy of correspondence that was between her and [plaintiff]." Counsel also stated that defendant would only produce documents if she brought them to counsel's office, and that counsel would not meet with her unless it was in court or with a mediator. Counsel simply wanted the documents mailed to her for review without defendant being present. As a result, according to counsel, it was her intent to make a motion in limine based on the failure to produce.

The court questioned defendant as to "[h]ow [she was] going to prove [her] case?" Before defendant completed her response to the judge's inquiry, plaintiff's daughter's attorney again interjected, without prompting, and addressed the judge about the seventy–five dollar charge, arguing that defendant knew plaintiff needed the dogs as companions.

After the attorney completed her statement, the judge returned to the issue of defendant not having produced documents. She reminded defendant that they were in court for a trial and that defendant could not simply produce documents to plaintiff's counsel on the day of trial. The judge's comments led to an extensive discussion and argument about the scheduling of the motions, the trial date, and defendant's attempts to contact the court about those issues.

According to the judge, defendant was not going to be able to prove her claim because she had no witnesses and "the documentation that [defendant had] in front of [her could not] be utilized." In response, defendant pointed out that the discovery end date had not expired because it should have been extended as a result of her filing an amended pleading joining new parties. Plaintiff's counsel disagreed and pointed out that she did not respond to defendant's request because discovery had expired.

Without any prior written notice, plaintiff's counsel moved to bar any documents defendant sought to rely upon.

The judge asked plaintiff's counsel to "make a more complete record regarding the two page[]" December 31 letter, and counsel complied by addressing some of the other expenses defendant cited in her letter. At the conclusion of counsel's comments, the trial judge ruled that defendant had failed to meet her burden of proof. The judge indicated she would enter judgment in favor of plaintiff, but reserve on plaintiff's and her daughter's motions seeking dismissal and sanctions for frivolous litigation.

The judge entered an order on the same date, which stated that after the court had "taken testimony," it determined defendant did not "meet her burden of proof." The order gave defendant ten days to pay plaintiff twice the amount of her security deposit. The court also entered two additional orders on the same date denying as "moot" defendant's motions to strike plaintiff's and her daughter's answers.

Defendant filed a motion for a stay of the order requiring her to pay plaintiff, and a separate motion for reconsideration and a new trial. In her reconsideration motion, defendant argued that she was entitled to a jury trial and she received insufficient notice of the trial date.

On October 21, 2016, the trial judge denied defendant's motion for reconsideration and issued a written decision setting forth her reasons. The judge reiterated that defendant did not meet her burden of proof to support withholding the security deposit, having "failed to provide any documentation to counsel for plaintiff or third-party defendant, [within the discovery period], to substantiate any of her claims of damages," in contravention of the court's discovery rules. The judge also observed that "[t]here was no evidence presented at trial that could have addressed the proximate cause of defendant['s] . . . allegations of damages."

The judge rejected defendant's contention that she was improperly denied a jury trial stating that "[a]t no time . . . did [defendant] make any comment or statement regarding her desire or right to a jury trial. It was apparent to all present in the courtroom that this matter was proceeding as a bench trial." Accordingly, the judge held that defendant waived her right to a jury trial, citing Van Note-Harvey Assocs., PC v. Twp. of E. Hanover, 175 N.J. 535, 541 (2003).

On November 4, 2016, the judge granted plaintiff's application for counsel fees and costs, and defendant's motion to

stay that order and the August 31, 2016 order pending appeal. This appeal followed.[4]

We review the court's denial of reconsideration only for abuse of discretion. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). Reconsideration is "a matter within the sound discretion of the [c]ourt, to be exercised in the interest of justice[.]" Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). Governed by Rule 4:49-2, reconsideration is appropriate for a "narrow corridor" of cases in which either the court's decision was made upon a "palpably incorrect or irrational basis," or where "it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Ibid. (quoting D'Atria, 242 N.J. Super. at 401).

Applying our limited standard of review, we conclude that the trial judge mistakenly exercised her discretion by denying defendant's motion.

At the outset, we acknowledge that it is within the discretion of a trial judge to determine the manner in which proceedings in

[4] In defendant's notice of appeal and case information statement, she only identified the October 21, 2016 order as the subject of her appeal.

a courtroom are conducted. "Trial judges are given wide discretion in exercising control over their courtrooms." N.J. Div. of Youth and Family Servs. v. J.Y., 352 N.J. Super. 245, 264 (App. Div. 2002). They have "the ultimate responsibility of conducting adjudicative proceedings in a manner that complies with required formality in the taking of evidence and the rendering of findings." Ibid.

Moreover, while we recognize that civil litigants are entitled to a jury trial when appropriately requested, see Williams v. Am. Auto Logistics, 226 N.J. 117, 120, 124 (2016), we understand that litigants can, by their conduct, waive their right to a jury if they proceed to a bench trial without objection. See Van Note-Harvey Assocs., PC, 175 N.J. at 541. Significantly, we are also keenly aware of and sensitive to a trial judge's frustration when having to deal with what the judge perceives as a difficult self-represented litigant. And, we are ever mindful of a civil litigant's obligation to produce discovery so that a "trial by ambush" can be avoided. McKenney v. Jersey City Med. Ctr., 167 N.J. 359, 370 (2001) (citing Plaza 12 Assocs. v. Carteret Borough, 280 N.J. Super. 471, 477 (App. Div. 1995)).

Yet, with these guiding principles in mind, we cannot avoid the conclusion that the August 31, 2016 hearing in this matter was not a trial in which the parties were allowed to introduce

testimony and documentary proof concerning their damages, subject to meaningful cross-examination in "a manner that complies with [the] required formality" for trials. J.Y., 352 N.J. Super. at 264. Rather, the proceedings devolved into oral argument on motions to bar evidence, based on alleged discovery violations, which were never filed prior to the end of the discovery period or otherwise in accordance with the court's rules. And, even if they had been timely filed, issues regarding the establishment of the discovery end date, and the scheduling of the trial may have impacted the ruling made by the trial judge that probative evidence should be barred.

We reverse the trial judge's denial of defendant's reconsideration motion, and vacate its August 31, 2016 order and November 4, 2016 order for payment of fees. We remand the matter for a case management conference, at which issues regarding the discovery end date, outstanding discovery, and compliance with the court's rules should be addressed, as well as the scheduling of pre-trial motions and a new trial before a different judge[5] and

[5] During the August 31, 2016 hearing, the trial judge expressed great displeasure with defendant's repeated attempts to call and email the judge's chambers. While her frustration with defendant's conduct seems justified, we think that having the matter tried before a different judge is warranted under the totality of the circumstances, as the trial judge's frustration with defendant was apparent and she already evaluated some if not all of defendant's proofs and found them lacking.

jury, if the matter is not otherwise resolved or decided without a trial.

Reversed in part; vacated and remanded in part for further proceedings consistent with our opinion. We do not retain jurisdiction.