

**NOT FOR PUBLICATION WITHOUT THE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-1349-15T1

RIVA POINTE AT LINCOLN HARBOR
CONDOMINIUM ASSOCIATION, INC., a
New Jersey Non-Profit Corporation,

Plaintiff-Appellant/
Cross-Respondent,

v.

RIVA POINTE DEVELOPMENT, LLC, a
New Jersey Limited Liability
Company; LIRO ARCHITECTS AND
ENGINEERS WEST, PC, a New Jersey
Professional Corporation; PELLA
CORPORATION, an Iowa Corporation;
PELLA WINDOWS AND DOORS, INC.;
ON PAR CONTRACTING; TOBIN PARNES
DESIGN; P.F.C. INCORPORATED; NOVA
CRETE, INC.; NORTH EAST
CONSTRUCTION; and ENBE CONSTRUCTION
GROUP, INC.,

Defendants,

and

THORNTON TOMASETTI, INC., a New
York Corporation; and LZA
ASSOCIATES, a Division of Thornton
Tomasetti, Inc.,

Defendants-Respondents,

and

TISHMAN CONSTRUCTION CORPORATION,
a Delaware Corporation; and TISHMAN
CONSTRUCTION CORPORATION OF NEW
JERSEY, a New Jersey Corporation,

Defendants-Respondents/
Cross-Appellants,

and

SLOAN & COMPANY; and DEL SALVIO
MASONRY CORPORATION,

Defendants-Respondents/
Cross-Respondents,

and

MEADOWLANDS FIRE PROTECTION,

Defendant-Respondent/
Cross-Respondent,

and

BONLAND INDUSTRIES, INC.,

Defendant-Respondent/
Cross-Respondent/
Third-Party Plaintiff,

v.

C-K AIR CONDITIONING, INC.,

Defendant/
Third-Party Defendant,

and

KNS BUILDING RESTORATION,

Defendant-Respondent/

Cross-Respondent/
Third-Party Plaintiff,

v.

DNK CONTRACTING CORP.,

Defendant/
Third-Party Defendant.

ARIE EHIELI and MIRIAM EHIELI,

Plaintiffs,

v.

RIVA POINTE AT LINCOLN HARBOR
CONDOMINIUM ASSOCIATION, INC.;
WENTWORTH PROPERTY MANAGEMENT
CORPORATION, n/k/a FIRSTSERVICE
PROPERTY MANAGEMENT CORPORATION;
and MICHAEL DRESCHER,

Defendants.

FIRSTSERVICE PROPERTY MANAGEMENT
CORPORATION, f/k/a WENTWORTH
PROPERTY MANAGEMENT CORPORATION,

Defendant/
Third-Party Plaintiff,

v.

RIVA POINTE DEVELOPMENT, LLC, a
New Jersey Limited Liability
Company; PETER TULLY; TISHMAN
CONSTRUCTION CORPORATION, a
Delaware Corporation; TISHMAN
CONSTRUCTION CORPORATION OF NEW
JERSEY, a New Jersey Corporation;
LIRO ARCHITECTS AND ENGINEERS WEST,
PC, a New Jersey Professional
Corporation; THORNTON TOMASETTI,

INC., a New York Corporation; LZA ASSOCIATES, a Division of Thornton Tomasetti, Inc.; PELLA CORPORATION, an Iowa Corporation; PELLA WINDOW OF IOWA, INC., an Iowa Corporation; PWD, INC., an Iowa Corporation, t/a PELLA WINDOWS AND DOORS, INC.; ON PAR CONTRACTING; TOBIN PARNES DESIGN; BONLAND INDUSTRIES, INC.; P.F.C. INCORPORATED; NOVA CRETE, INC.; MEADOWLANDS FIRE PROTECTION; KNS BUILDING RESTORATION; NORTH EAST CONSTRUCTION; DEL SALVIO MASONRY CORPORATION; SLOAN & COMPANY; and ENBE CONSTRUCTION GROUP, INC.,

Third-Party Defendants.

RIVA POINTE AT LINCOLN HARBOR
CONDOMINIUM ASSOCIATION, INC.,

Defendant/
Third-Party Plaintiff,

v.

RIVA POINTE DEVELOPMENT, LLC, a New Jersey Limited Liability Company; TISHMAN CONSTRUCTION CORPORATION, a Delaware Corporation; TISHMAN CONSTRUCTION CORPORATION OF NEW JERSEY, a New Jersey Corporation; LIRO ARCHITECTS AND ENGINEERS WEST, PC, a New Jersey Professional Corporation; THORNTON TOMASETTI, INC., a New York Corporation; LZA ASSOCIATES, a Division of Thornton Tomasetti, Inc.; PELLA CORPORATION, an Iowa Corporation, t/a PELLA WINDOWS AND DOORS, INC.; CONSENTINI ASSOCIATES; ON PAR CONTRACTING; and TOBIN PARNES DESIGN,

Third-Party Defendants.

TISHMAN CONSTRUCTION CORPORATION,
a Delaware Corporation; TISHMAN
CONSTRUCTION CORPORATION OF NEW
JERSEY, a New Jersey Corporation,

Third-Party Defendants/
Fourth-Party Plaintiffs,

v.

BONLAND INDUSTRIES, INC.; P.F.C.
INCORPORATED; NOVA CRETE, INC.;
MEADOWLANDS FIRE PROTECTION; KNS
BUILDING RESTORATION; NORTH EAST
CONSTRUCTION; DEL SALVIO MASONRY
CORPORATION; and SLOAN & COMPANY,

Third-Party Defendants/
Fourth-Party Defendants.

Argued January 30, 2018 – Decided February 27, 2018

Before Judges Reisner, Hoffman, and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Docket Nos.
L-4781-12 and L-2315-13.

Mark M. Wiechnik argued the cause for
appellant/cross-respondent Riva Pointe at
Lincoln Harbor Condominium Association, Inc.
(Ansell, Grimm & Aaron, PC, attorneys; Breanne
M. DeRaps and Mark M. Wiechnik, on the
briefs).

Keith R. Hemming argued the cause for
respondents/cross-appellants Tishman
Construction Corporation and Tishman
Construction Corporation of New Jersey
(McElroy, Deutsch, Mulvaney & Carpenter, LLP,

attorneys; Keith R. Hemming, of counsel and on the briefs; Daniel A. Dorfman, on the briefs).

Louis J. DeMille, Jr., argued the cause for respondent/cross-respondent Bonland Industries (Zirulnik, Sherlock & DeMille, attorneys; Louis J. DeMille, Jr., on the brief).

Mark D. Shifton argued the cause for respondent/cross-respondent Del Salvio Masonry Corporation (Seiger Gfeller Laurie, LLP, attorneys; Mark D. Shifton, of counsel and on the brief; Gary Strong, on the brief).

Jeffrey W. Moryan argued the cause for respondent/cross-respondent KNS Building Restoration (Connell Foley LLP, attorneys; Jeffrey W. Moryan, of counsel and on the brief; Susan Kwiatkowski, on the brief).

Aris E.L. Dutka argued the cause for respondent/cross-respondent Meadowlands Fire Protection Corp. (London Fischer LLP, attorneys; Yekaterina Berkovich, on the brief).

Brian Peoples argued the cause for respondent/cross-respondent Sloan & Company (Leary, Bride, Tinker & Moran, PC, attorneys; Brian Peoples, on the brief).

Katherine A. Buchanan argued the cause for respondents Thornton Tomasetti, Inc. and LZA Associates (Byrne & O'Neill, LLP, attorneys; Michael J. Byrne and Katherine A. Buchanan, on the brief).

PER CURIAM

This appeal and cross-appeal arise from construction defect claims filed by plaintiff Riva Pointe at Lincoln Harbor Condominium

Association, Inc. (Association) against the developer, general contractor/project manager, architect, and other parties related to the construction of condominium units and common areas in Weehawken, New Jersey. After reviewing the record in light of the applicable standard of review, we affirm all orders on appeal.

This construction defect case involves more than twenty contractors, subcontractors, and other professionals. The Association alleged defective construction caused water infiltration into condominium units and common areas, resulting in extensive damages. The Association's original complaint was filed in October 2012.¹ Defendants filed answers, cross-claims, third-party claims, and fourth-party claims.

After numerous extensions of the discovery deadline, the Association served a "preliminary" expert report identifying the negligence of each defendant in the construction of the condominium complex. The Association subsequently advised defense counsel and the court that the preliminary expert report was actually its final expert report. With that understanding, the court allowed the Association to submit a supplemental expert report for the sole purpose of rebutting the defense experts' reports. The

¹ The Association filed five amended complaints during the course of the litigation.

court's final case management order (CMO)² expressly limited the Association's supplemental expert report "to rebuttal of [d]efendants' expert opinions and shall not otherwise introduce any new issues, opinions, and/or conclusions that are not already included in [p]laintiff's 'Preliminary Document of Conditions Report' dated July 14, 2014." The final CMO required the Association to serve its supplemental expert report by April 15, 2015.

On May 13, 2015, the court amended the final CMO. In accordance with the amended final CMO, the Association's supplemental expert report was due June 24, 2015; the discovery deadline was extended to July 17, 2015; and the trial date remained September 21, 2015.

On the due date of its supplemental expert report, the Association moved for leave to file a sixth amended complaint, extend discovery, and postpone the trial date. The judge denied the Association's motion to file an amended complaint, finding the Association did not meet the standard for adding new parties under Rule 4:9-1. The judge also found the Association failed to establish exceptional circumstances for extending the discovery deadline and postponing the trial date.

² The court issued five case management orders prior to the entry of its final case management order on November 14, 2014.

Over one month after the deadline for service of the Association's supplemental expert report, the Association submitted a report setting forth new issues, opinions, and conclusions regarding construction defects at the condominium complex. Significantly, the supplemental expert report included a wholly new damage claim related to moisture infiltration on the side of the condominium buildings facing the Hudson River. The Association's supplemental expert report increased the claimed damages by nearly \$8 million.

Defendants Tishman Construction Company and Tishman Construction Company of New Jersey (collectively, Tishman) filed a motion to bar the Association's supplemental report as beyond the scope of the court's order limiting the report to rebuttal of the defense experts' reports. The judge required Tishman to identify the portions of the Association's supplemental expert report that exceeded rebuttal of the defense experts' reports. Ultimately, the judge agreed that portions of the Association's supplemental expert report were not "rebuttal," and barred any opinions contained in the report that were not "necessary to rebut the testimony of [d]efendants' experts."

After the discovery period expired, defendants KNS Building Restoration (KNS), Thornton Tomasetti, Inc. and one of its divisions, LZA Associates (collectively, Thornton), and Tishman

moved for summary judgment on the Association's claims.³ The judge granted summary judgment in favor of KNS and Thornton, concluding that the Association's expert failed to state the standard of care applicable to KNS and Thornton, how these defendants breached that standard of care, and the damages proximately caused by any such breach of the applicable standard of care. The judge denied Tishman's motion to dismiss the Association's breach of implied warranty claim. Tishman also moved in limine to bar the Association from offering any evidence as to claims filed after the expiration of the statute of limitations, which the judge denied.

The Association moved for reconsideration of the judge's orders denying leave to file a sixth amended complaint and extend discovery, granting summary judgment to KNS and Thornton, and limiting its expert's testimony to certain issues. The judge denied the Association's reconsideration motion, finding the Association failed to present any new facts, evidence, or case law overlooked in her prior ruling.

Tishman then sought reconsideration of the judge's earlier denial of its motion for summary judgment with respect to the

³ Tishman previously moved for partial summary judgment to enforce defense and indemnification clauses pursuant to its contracts with several defendants. The judge denied the motion without prejudice.

Association's breach of implied warranty claim and denial of its motion for partial summary judgment requesting defense and indemnification from various co-defendants. The judge denied Tishman's reconsideration motion, finding Tishman failed to present any new facts, evidence, or case law overlooked in her prior ruling. On the breach of implied warranty issue, the judge ruled the Association stands in the shoes of the original property owner/developer and Tishman owed a duty of implied warranty of reasonable workmanship to the Association as the subsequent property owner. The judge denied reconsideration on the issue of defense and indemnification, reasoning the relevant contractual language did not unequivocally provide for indemnity against Tishman's sole negligence, and Tishman failed to establish a substantial nexus between the claims and the contractors' work.

With trial imminent, the judge ordered the Association's liability expert to appear for deposition by October 20, 2015.⁴ The Association failed to produce the expert for deposition. Tishman then sought dismissal of the Association's complaint based upon violation of the court's order compelling the expert's deposition. Ruling on Tishman's application, the judge imposed a

⁴ Pursuant to the judge's final pre-trial order, the trial date was adjourned to October 26, 2015.

lesser sanction, precluding the Association's liability expert from testifying at trial. The judge also required the Association to pay Tishman's attorney's fees and costs associated with the motion.⁵

Just before the scheduled trial date, the Association's counsel advised that she would not appear for trial. The judge ordered the Association's counsel to appear on the day of trial. Counsel for the remaining parties appeared in court on the trial date.⁶ The Association's attorney explained to the judge that "it would be fruitless and futile to continue with the case given that we don't have a liability expert," because without an expert the Association could not meet its burden of proof. The court dismissed the Association's case with prejudice in accordance with Rule 4:37-1(b).

The Association appeals from the court's orders: (1) denying its request for leave to file a sixth amended complaint, extend discovery, and adjourn the trial date; (2) granting summary judgment to defendants KNS and Thornton; (3) barring portions of its supplemental expert report and the testimony of its liability

⁵ Tishman filed a fee application seeking \$1440.50 in costs and attorney's fees due to the expert's failure to appear for his court-ordered deposition. Tishman's fee application was granted.

⁶ Prior to trial, certain defendants resolved the matter with the Association, or were granted summary judgment, or were defaulted.

expert; (4) dismissing its remaining claims at trial; (5) denying its motion for reconsideration; and (6) granting Tishman's fee application.

Tishman cross-appeals from the court's orders: (1) denying its motion for contractual defense and indemnification; (2) denying summary judgment on the Association's claim for breach of the implied warranty of reasonable workmanship; and (3) denying its motion to bar the Association from presenting evidence of claims filed after the expiration of the statute of limitations.

We review the judge's discovery orders in this matter for abuse of discretion. An abuse of discretion occurs "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" U.S. Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 467 (2012) (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)). We review the judge's summary judgment orders de novo, applying the same standard as the trial court. See Bhagat v. Bhagat, 217 N.J. 22, 38 (2014); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

I.

We affirm the judge's orders denying the Association's request to file a sixth amended complaint, extend discovery, and adjourn the trial date; granting summary judgment to defendants

KNS and Thornton; barring portions of the Association's supplemental expert report and the testimony of its liability expert at trial; and denying the Association's motion for reconsideration, for the reasons set forth in Judge Christine M. Vanek's thorough and comprehensive written opinion dated October 23, 2015. We add only the following comments.

The judge's dismissal of the Association's claims on the date of trial in accordance with Rule 4:37-1 renders moot the Association's appeal related to the failure to extend discovery. See Mack Auto Imports, Inc. v. Jaguar Cars, Inc., 244 N.J. Super. 254, 256-58 (App. Div. 1990) (holding appeal of an adverse discovery order moot after a voluntary dismissal because discovery is no longer an issue in a dismissed case).

The judge's refusal to allow the Association to file a sixth amended complaint or adjourn the trial date was not an abuse of discretion. The judge assigned to this case held multiple case management conferences with counsel and issued no less than five case management orders specifying deadlines for all aspects of discovery and scheduling the trial. The judge adjusted the deadlines, as necessary, to accommodate reasonable delays in obtaining information based upon the large number of parties involved in this litigation. Having familiarity with the case since its inception, the judge properly determined that allowing

the Association to add new claims three months prior to trial, amounting to nearly \$8 million in additional damages, would prejudice the rights of defendants and unduly delay the trial. See Bldg. Materials Corp. of Am. v. Allstate Ins. Co., 424 N.J. Super. 448, 484-85 (App. Div. 2012).

We affirm the judge's dismissal of the Association's remaining claims on the scheduled trial date. The Association's counsel advised that the Association was voluntarily dismissing its complaint. Under these circumstances, the Association is precluded from appealing an order to which it consented. See Bass v. De Vink, 336 N.J. Super. 450, 455 (App. Div. 2001) ("It is axiomatic . . . that a party cannot appeal from a judgment or order to which [it] consented"); see also Pressler & Verniero, Current N.J. Court Rules, cmt. 2.2.3 on R. 2:2-3(a)(1) (2018). However, we have also considered the merits of the judge's dismissal of the Association's claims, and we find no abuse of the judge's discretion in barring the Association's liability expert from testifying at the trial.

II.

We review fee determinations for an abuse of discretion. Rendine v. Pantzer, 141 N.J. 292, 317 (1995). "[F]ee determinations by trial courts will be disturbed only on the rarest

occasions" Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 443 (2001) (quoting Rendine, 141 N.J. at 317).

We affirm the judge's order awarding fees to Tishman in the amount of \$1440.50. The judge found Tishman's supplemental certification in support of its fee request complied with Rule 4:42-9 and RPC 1.5. The judge gave due consideration to the reasonableness of the fee amount requested and the time expended by Tishman's counsel in moving to bar the Association's liability expert based on the expert's failure to appear for his court-ordered deposition.

III.

Turning to Tishman's cross-appeal, we affirm for the reasons set forth in Judge Vanek's well-reasoned written opinion dated October 23, 2015.⁷ Based upon the judge's comprehensive opinion stating the reasons, factually and legally, for denial of Tishman's request for contractual defense and indemnification, no additional discussion is required. The competent evidence in the record supports the judge's determination that the contractual provisions concerning defense and indemnification were not clear and

⁷ Two of the issues Tishman raises on appeal, denial of its motion for summary judgment on the Association's breach of implied warranty claim and denial of its motion to bar the Association's claims filed after expiration of the statute of limitations, are moot in light of our disposition of the Association's appeal.

unambiguous as to an intent to indemnify Tishman for its own negligence in this construction project. See Azurak v. Corp. Prop. Inv'rs, 175 N.J. 110, 112 (2003).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION