SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1390-15T1

MICHAEL CANTONE,

Plaintiff-Appellant,

v.

BOROUGH OF HARRINGTON PARK and HARRINGTON PARK POLICE DEPARTMENT,

Defendants-Respondents.

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Argued November 15, 2017 – Decided January 22, 2018

Before Judges Alvarez, Currier, and Geiger.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-6032-09.

Eric V. Kleiner argued the cause for appellant.

Raymond R. Wiss argued the cause for respondents (Wiss & Bouregy, PC, attorneys; Raymond R. Wiss, of counsel; Timothy J. Wiss and Thomas K. Bouregy, Jr., on the brief).

PER CURIAM

Plaintiff Michael Cantone appeals from the October 19, 2015 order denying his motion to vacate judgment pursuant to Rule 4:50-1. After reviewing the contentions in light of the record and applicable principles of law, we affirm.

The facts underlying this protracted litigation are set out in this court's prior decision, Cantone v. Borough of Harrington Park, No. A-3248-10 (App. Div. Jan. 29, 2013), and need not be fully repeated here. Briefly, defendant, Borough of Harrington Park, employed plaintiff as a police officer. In 2009, a hearing officer in defendant Harrington Park Police Department found that plaintiff had disobeyed a lawful order, was unfit for duty, and was "a danger to himself and others." Defendant adopted the recommendation of the hearing officer to terminate plaintiff.

Following plaintiff's appeal to the Law Division and a trial, in 2011, plaintiff's termination was upheld. We affirmed the decision, and the Supreme Court denied the petition for certification and reconsideration of the denial. Cantone v. Borough of Harrington Park, 214 N.J. 115 (2013).

Four years after the entry of judgment by the trial court, plaintiff filed a motion to vacate the judgment pursuant to Rule

4:50-1(f).[1] The motion papers included certifications of his wife, mother-in-law, and father-in law; these exhibits were not provided in any of the prior filings.

On October 19, 2015, Judge Menelaos W. Toskos issued a comprehensive written decision. In his consideration of the application, the judge noted that plaintiff contended that the judgment against him was based on "untrue material facts," which he claimed was supported by the new certifications of his relatives. Under that theory, the motion should have been brought under subsection (a) or (b) of Rule 4:50-1. Rule 4:50-2, however, requires motions addressing those subsections to be filed "not more than one year after the judgment . . . was entered." Therefore, this motion was untimely under subsections (a) and (b).

In addressing subsection (f), the judge noted that it must be brought within a reasonable time, and in order to obtain relief,

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[1] On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; . . . or (f) any other reason justifying relief from the operation of the judgment or order.

[R. 4:50-1(a), (b), (f).]

"the applicant must demonstrate that the circumstances are exceptional and that enforcement of the order or judgment would be unjust, oppressive or inequitable."

Judge Toskos rejected plaintiff's argument that he had "new information" that warranted the granting of relief. The judge stated:

> The court . . . has not been presented with any explanation as to why the affidavits from Plaintiff's wife and in-laws could not have been provided earlier. That is precisely the purpose of the discovery process. These should have been produced in the first instance at the trial level, or on appeal. . . . The court is not at all persuaded by plaintiff's argument that the motion is now "ripe" after his retention of new counsel. Further, Plaintiff has retained at least three other attorneys on this matter, none of whom discovered this information in the time since the original judgment.

Judge Toskos found there was nothing "truly exceptional" about the circumstances in this case and no explanation as to why the newly produced affidavits could not have been obtained during the proceedings four years ago, as the witnesses were "readily available during the initial hearings, trial and appellate reviews." The motion was denied.

On appeal, plaintiff points to the newly discovered evidence obtained in his relatives' certifications as support for granting his motion to vacate under Rule 4:50-1(f). He also continues to

re-litigate his case, reiterating previously rejected arguments and asserting that he is "the victim of a fraudulent and fabricated allegation."

We review the trial court's decision on a motion to vacate judgment for an abuse of discretion. Deutsche Bank Nat'l Tr. Co. v. Russo, 429 N.J. Super. 91, 98 (App. Div. 2012). "'The trial court's determination under [Rule 4:50-1] warrants substantial deference,' and the abuse of discretion must be clear to warrant reversal." Ibid. (quoting U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012)). 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." Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012) (quoting Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)).

We are unable to discern any abuse of discretion in the trial judge's conclusions. To the contrary, Judge Toskos considered plaintiff's arguments and issued a well-reasoned opinion. We affirm substantially for the reasons expressed in his decision. There was no explanation why certifications of plaintiff's wife and in-laws could not have been presented at the time of the trial of this matter or at any earlier point in this protracted litigation. As a result, plaintiff did not meet his burden of

showing "truly exceptional circumstances." Baumann v. Marinaro, 95 N.J. 380, 395 (1984).

The remainder of plaintiff's arguments concern the merits of his case. They were considered, and rejected, by this court in our lengthy prior opinion. The Supreme Court declined review. Plaintiff may not again reassert the arguments that were the basis of his prior appeal.

Affirmed.