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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-2484-16T3

MIKE PARK,

Plaintiff-Appellant,

v.

HAN SEUL PARK,

Defendant-Respondent,

and

EZ RENT A CAR, LLC,

Defendant.

Argued February 6, 2018 – Decided February 22, 2018

Before Judges Fasciale and Moynihan.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Docket No.
L-1048-15.

Andrew T. Cupit argued the cause for
appellant.

Michael J. Leegan argued the cause for
respondent (Goldberg Segalla, LLP, attorneys;
Christopher R. Weiss, of counsel and on the
brief).

PER CURIAM

Mike Park (plaintiff) appeals from a January 6, 2017 order dismissing his complaint with prejudice pursuant to Rule 4:23-5(a)(2) for failure to provide discovery. We affirm.

Plaintiff and Han Seul Park (defendant) were involved in a motor vehicle accident. Plaintiff alleges that he suffered various injuries as a result of the accident and required surgery.

Plaintiff commenced litigation against defendant and EZ Rent A Car. In August 2015, the judge granted EZ Rent A Car's motion for summary judgment. After numerous procedural issues, in May 2016, plaintiff and defendant entered into a consent order to extend discovery.

Defendant requested to depose plaintiff. Plaintiff's counsel failed to provide defendant with an appropriate date for the deposition, prompting defendant to send a notice to depose plaintiff on July 28, 2016. Plaintiff failed to appear for the deposition. Defendant also sent plaintiff notice of a scheduled medical examination for September 12, 2016.

Defendant filed a motion to compel plaintiff's deposition. The judge granted defendant's motion on August 19, 2016 and ordered plaintiff be deposed by September 8, 2016. On September 7, 2016, plaintiff's counsel notified defendant that plaintiff would neither appear for the deposition nor the September 12, 2016 medical examination because he was out-of-state.

On September 13, 2016, defendant filed a motion to dismiss plaintiff's complaint for failure to provide discovery in violation of the August 19, 2016 order. Plaintiff submitted an opposition, which failed to include requested written discovery. The judge granted defendant's motion to dismiss plaintiff's complaint without prejudice on September 30, 2016.

Defendant continued to request the outstanding discovery and sent plaintiff a notice requesting a medical examination on or before November 29, 2016. Plaintiff's counsel stated plaintiff would not be examined prior to December 20, 2016. On November 30, 2016, defendant filed a motion to dismiss plaintiff's complaint with prejudice.

On January 6, 2017, the judge heard oral argument on defendant's motion; and issued an order and written statement of reasons dismissing plaintiff's complaint with prejudice for failure to provide discovery pursuant to Rule 4:23-5(a)(2).

On appeal, plaintiff contends that the judge abused his discretion in dismissing his complaint with prejudice.

We review the judge's dismissal of plaintiff's complaint with prejudice for abuse of discretion. 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 of an opposing party's pleading for failure to provide discovery. First, "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 judge may then order the delinquent's pleading be dismissed without prejudice. Ibid.

Second, if the delinquent party fails to cure the outstanding discovery deficiencies within sixty days of the order, the moving party may request the court to dismiss the delinquent party's pleading with prejudice. R. 4:23-5(a)(2). The motion "shall be granted unless a motion to vacate the previously entered order of dismissal or suppression without prejudice has been filed by the delinquent party and either the demanded and fully responsive discovery has been provided or exceptional circumstances are demonstrated." Ibid. Thus, 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 discovery has yet to be produced.

Exceptional circumstances may be shown 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) (quoting Suarez v. Sumitomo Chem. Co., 256 N.J. Super. 683, 688-89 (Law Div. 1991)).


The judge properly dismissed plaintiff's complaint for failure to cure his discovery deficiencies and failing to evidence exceptional circumstances. Defendant satisfied the two-step procedure of Rule 4:23-5(a). Defendant moved to dismiss plaintiff's complaint after plaintiff failed to produce discovery. Defendant then communicated with plaintiff in an attempt to resolve all discovery deficiencies. Finally, defendant waited the requisite sixty-day period before filing a motion to dismiss with prejudice.

The judge did not abuse his discretion in dismissing plaintiff's complaint with prejudice. Plaintiff failed to comply with discovery requests and a court order requiring his deposition for months prior to defendant filing his Rule 4:23-5(a)(1) motion. Plaintiff then failed to cure the discovery deficiencies, including his deposition, medical examination and production of documents within the sixty days following his complaint being dismissed without prejudice. Lastly, plaintiff's temporary

relocation out-of-state is not an exceptional circumstance to
excuse in compliance with discovery demands.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION