SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3008-16T1

JOSE OCHOA,

Plaintiff-Appellant,

v.

AHMED A. OKASHA, FIRST LINK LIMO SERVICE, LLC, MARIO G. ZHUNIO-NUGRA and NELY M. MONTERO,

Defendants-Respondents.

Argued May 1, 2018 – Decided May 11, 2018

Before Judges Mawla and DeAlmeida.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-0012-14.

Jeffrey S. Hasson argued the cause for appellant (Law Offices of Jeffrey S. Hasson, attorneys; Jeffrey S. Hasson, of counsel; Alan K. Albert, on the briefs).

Daniel Kaye argued the cause for respondents Ahmed A. Okasha and First Link Limo Service, LLC (Law Office of Viscomi & Lyons, attorneys; Daniel Kaye, on the brief).

Richard W. Fogarty argued the cause for respondents Mario Zhunio-Nugra and Nely M.

Montero (Chasan Lamparello Mallon & Cappuzzo, PC, attorneys; J. Nicholas Strasser, of counsel; Richard W. Fogarty, on the brief).

PER CURIAM

Plaintiff Jose Ochoa appeals from a January 24, 2017 order, which denied his motion to reinstate his personal injury complaint and extend discovery after a dismissal for failure to appear at a trial call. Plaintiff also appeals from a March 9, 2017 order denying his motion for reconsideration. We affirm.

We briefly summarize the facts from the record. In January 2012, plaintiff was a passenger in an automobile operated by defendant Mario G. Zhunio-Nugra and owned by defendant Nely Montero, which collided with a taxi operated by defendant Ahmed A. Okasha and owned by defendant First Link Limo Service, LLC. Plaintiff filed a complaint against defendants on December 24, 2013. After defendants filed their responsive pleadings a discovery end date was set for February 5, 2015.

The discovery end date was subsequently extended, at first by consent to April 6, 2015, and then by motions to June 5, August 4, and October 3, 2015. An arbitration occurred on October 15, 2015, but the award was rejected. As a result, the trial court scheduled trial for January 19, 2016.

Six days prior to the trial call, Okasha and First Link's counsel faxed a letter to the trial judge advising he had another

trial in the same courthouse before a different judge, and would be selecting a jury and trying the case. Thus, defense counsel sought the trial in this matter to be marked subject to his other trial, which bore an older docket number.

The same day that defense counsel wrote the trial judge, plaintiff's counsel wrote to the judge seeking an adjournment of the trial. The reason for plaintiff's request was his spine surgeon had determined plaintiff to be in need of lumbar spinal surgery. Plaintiff's counsel noted defense counsel had consented to the adjournment.

The trial judge did not respond to either communication. As a result, on January 15, 2016, Okasha and First Link's counsel re-sent his letter seeking the "subject to" marking on the case. Again, no response was received from the court.

On January 18, 2016, the court was in recess in observance of the Martin Luther King, Jr. holiday. During the holiday, plaintiff's counsel faxed a letter to the court seeking an adjournment of the trial. This time counsel's letter advised he had a deposition scheduled in a different matter on the same day as the trial in this case.

On January 19, 2016, each defendant's counsel appeared for the trial call, but plaintiff's counsel did not. The trial judge listed the matter for a second trial call on the same date, and

again defense counsel appeared, but plaintiff's counsel did not. The trial judge dismissed the case without prejudice.

On October 6, 2016, nine months later, plaintiff filed a motion to reopen discovery to include additional medical records, namely, an operative report from surgery plaintiff had since the initial dismissal, and to extend the discovery end date. The trial judge denied the motion as the matter had been dismissed. Plaintiff re-filed his motion, this time seeking to reinstate the complaint, and reopen and extend discovery, which the trial judge denied. Plaintiff's subsequent motion for reconsideration was denied. This appeal followed.

On appeal, plaintiff argues the trial judge abused his discretion when he dismissed the complaint, and refused to reinstate the matter and extend discovery. Plaintiff asserts the trial judge should have granted plaintiff's motion for reconsideration pursuant to Rule 4:49-2 and 4:50-1(a), and reinstated the case.

I.

We begin by reciting our standard of review. We review sanctions such as a dismissal without prejudice pursuant to Rule 1:2-4(a) under an abuse of discretion standard. Abtrax Pharms. v. Elkins-Sinn, 139 N.J. 499, 517 (1995). Likewise, "we apply an abuse of discretion standard to decisions made by our trial courts

relating to matters of discovery." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011).

The Supreme Court has stated:

> A motion under Rule 4:50-1 is addressed to the sound discretion of the trial court, which should be guided by equitable principles in determining whether relief should be granted or denied. The decision granting or denying an application to open a judgment will be left undisturbed unless it represents a clear abuse of discretion.
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> [Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994) (citations omitted).]

Likewise, we review a trial court's determination pursuant to Rule 4:49-2 under an abuse of discretion standard because "[r]econsideration is a matter within the sound discretion of the [c]ourt, to be exercised in the interest of justice." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (alteration in original) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)).

II.

Plaintiff argues it was an abuse of discretion for the trial judge to dismiss his case at the trial call where he articulated a "just excuse for failure to appear," namely, that plaintiff would be undergoing surgery. Plaintiff asserts his counsel reasonably relied upon defense counsel's "subject to" marking request, and thus his failure to appear was "accidental."

Plaintiff asserts the dismissal of his case was a sanction the trial judge could invoke only where there was no lesser sanction available.

A.

Rule 1:2-4(a) states:

> Failure to Appear. If without just excuse or because of failure to give reasonable attention to the matter, no appearance is made on behalf of a party on the call of a calendar, . . . or on the day of trial, . . . the court may order any one or more of the following: (a) the payment by the delinquent attorney or party or by the party applying for the adjournment of costs, in such amount as the court shall fix, to the Clerk of the Court made payable to "Treasurer, State of New Jersey," or to the adverse party; (b) the payment by the delinquent attorney or party or the party applying for the adjournment of the reasonable expenses, including attorney's fees, to the aggrieved party; (c) the dismissal of the complaint, cross-claim, counterclaim or motion, or the striking of the answer and the entry of judgment by default, or the granting of the motion; or (d) such other action as it deems appropriate.

Our Supreme Court has instructed where "[t]here are reasoned, intermediate steps between the outright dismissal of the complaint and allowing plaintiff's claims to go forward in his [or her] absence that should [be] explored." Brunson v. Affinity Fed. Credit Union, 199 N.J. 381, 405-06 (2009).

Plaintiff invokes the aforementioned principle and likens his case to the facts in our decision in Johnson v. Mountainside Hosp.,

199 N.J. Super. 114 (App. Div. 1985). We are not persuaded. In Johnson, we reversed the dismissal of a plaintiff's medical negligence and products liability case for plaintiff's counsel's failure to appear for a trial call. However, the facts in Johnson were different than the facts here. In Johnson, plaintiff's counsel failed to provide discovery, which resulted in a without prejudice dismissal of the case, and ultimately reinstatement of the complaint when the discovery was provided. The matter was then set down for trial and plaintiff's counsel failed to appear. However, plaintiff himself appeared and sought an adjournment to retain new counsel, which the trial judge denied. Plaintiff retained new counsel and filed a motion for reconsideration, which was also denied.

On appeal, we held:

> Thus, when a plaintiff has violated a discovery rule or court order the paramount issue is whether a lesser sanction than dismissal would suffice to erase the prejudice suffered by the non-delinquent party. The trial court must first determine the prejudice suffered by each defendant and then determine whether dismissal with prejudice is the only reasonable and just remedy available. If a lesser sanction could erase the prejudice against the non-delinquent party, dismissal of the complaint with prejudice would not be appropriate and would therefore constitute an abuse of discretion. The sparse record before us is not wholly informative with respect to the issue of whether each of the defendants in this matter would be prejudiced by

> reinstatement of the complaint. The record does not reveal the nature and extent of the prejudice each of the defendants allegedly has sustained by [the] failure [of plaintiff's attorney] to comply with the rules of discovery, court orders and failure to appear at the scheduled trial date. Moreover, it does not appear from the record whether the passage of time impaired the ability of any or of all of them to defend the claim. Therefore, we are constrained to remand the matter to the trial court for further proceedings to ensure the issue of prejudice with respect to each of these defendants is carefully reviewed.
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> [Johnson v. Mountainside Hosp., 199 N.J. Super. 114, 120 (App. Div. 1985).]

Here, as we explain in the following section, there was evidence of a clear prejudice to defendants. Also, as we noted, at the time of trial, discovery had ended, the parties had attended arbitration, and received ample notice of the trial date. Moreover, the parties had received no indication from the trial judge defendant's request for a "subject to" marking or plaintiff's request for an adjournment had been granted. Therefore, it was reasonable for the trial judge to dismiss the matter without prejudice when neither plaintiff nor his counsel appeared for the trial call. Indeed, under these circumstances, the dismissal without prejudice was the form of appropriate "lesser sanction" envisioned by Rule 1:2-4(a) and Johnson.

B.

Rule 4:24-1(c) states in pertinent part that "[n]o extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown." In interpreting the rule, we have stated:

> Although the rule does not provide a specific definition of "exceptional circumstances," in Vitti the court likened the term to "extraordinary circumstances" which we defined in Flagg v. Twp. of Hazlet, 321 N.J. Super. 256, 260 (App. Div. 1999), noting the term "in common parlance, denotes something unusual or remarkable." Vitti v. Brown, 359 N.J. Super. 40, 50 (App. Div. 2005).
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> In order to extend discovery based upon "exceptional circumstances," the moving party must satisfy four inquiries: (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time. Id. at 51.
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> "Any attorney requesting additional time for discovery should establish that he or she did make effective use of the time permitted under the rules. A failure to pursue discovery promptly, within the time permitted, would normally be fatal to such a request." Ibid. Additionally, an excessive workload, reoccurring problems with staff, or delays arising out of efforts to resolve a matter through negotiations are not sufficient to justify an extension of time. Ibid.

> [Rivers v. LSC P'ship, 378 N.J. Super. 68, 78-79 (App. Div. 2005).]

The record before us lacks an adequate explanation of exceptional circumstances justifying plaintiff's motion to reopen and extend discovery so far beyond the discovery end date, and dismissal of his case. Although plaintiff argues the extension of discovery was necessitated because he had further surgery after the close of discovery, plaintiff concedes he received a recommendation for surgery on August 6, 2015, prior to the close of discovery on October 3, 2015. Moreover, as defendants note, plaintiff had an additional procedure on April 8, 2016, which resulted in a recommendation of surgery that finally occurred on September 27, 2016, yet he did not file his motion to extend discovery until October 11, 2016.

Additionally, defendants were prejudiced by plaintiff's delay. The prejudice arose when plaintiff waited nine months after dismissal of his case to act upon the without prejudice dismissal by seeking an extension of discovery, and over one year after the close of discovery to file his motion. As the trial judge noted when he considered plaintiff's motion to extend discovery, the complaint was filed in 2014, the case had 540 days of discovery, which had ended October 3, 2015, and plaintiff's motion was filed October 11, 2016, over a year after the end of

discovery. The prejudice to defendants to re-start discovery after the passage of a significant period of time is self-evident.

For these reasons, the trial judge did not abuse his discretion by denying plaintiff's motion to extend discovery.

C.

In pertinent part, Rule 4:50-1 states "[o]n 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[.]" Generally, "[c]ourts should use Rule 4:50-1 sparingly, [and] in exceptional situations[.]" Little, 135 N.J. at 289. Relief under Rule 4:50-1 "is designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case." Manning Enq'g, Inc. v. Hudson Cty. Park Comm'n, 74 N.J. 113, 120 (1977) (citing Hodgson v. Applegate, 31 N.J. 29, 43 (1959)).

"The kind of mistake contemplated by [Rule 4:50-1(a)] has been described as one in which the parties could not have protected themselves from during the litigation." Pressler & Verniero, Current N.J. Court Rules, cmt. 5.1.1 on R. 4:50-1 (2018); see DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 263 (2009). Therefore, "neither the court's nor an attorney's error as to the law or the

remedy constitutes mistake under this section." Pressler & Verniero, cmt. 5.1.1 on R. 4:50-1.

Plaintiff asserts the trial judge erred when he did not grant the motion to reinstate this matter pursuant to Rule 4:50-1(a). We disagree.

As we noted, the trial judge did not respond to counsels' request for the "subject to" marking or the adjournment. Thus, plaintiff's counsel had no basis to assume either request had been granted and should have appeared for the trial call. Moreover, plaintiff's counsel could have protected against this mistake by appearing for the trial call as opposed to attending a deposition. For these reasons, we reject the argument the trial judge abused his discretion by not according relief pursuant to Rule 4:50-1(a).

D.

Finally, we reject plaintiff's argument the trial judge erred by failing to grant reconsideration pursuant to Rule 4:49-2. A motion for

> [r]econsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. . . .

> Alternatively, if a litigant wishes to bring new or additional information to the Court's attention which it could not have provided on the first application, the Court should, in the interest of justice (and in the exercise of sound discretion), consider the evidence.
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> [Cummings, 295 N.J. Super. at 384 (quoting D'Atria, 242 N.J. Super. at 401-02).]

Here, there is no suggestion the trial judge lacked additional evidence or that he overlooked any evidence when he denied plaintiff's motion to reinstate and extend discovery. Moreover, as we have expressed, the trial judge's decision to dismiss plaintiff's case and subsequently deny his late motion to reinstate and extend discovery was neither incorrect nor based upon an irrational basis.

Affirmed.