SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3042-16T1

FRANK LUGO,

Plaintiff-Appellant,

v.

BETTY PERROTTA and DOMENICO PERROTTA,

Defendants-Respondents.

Submitted February 28, 2018 – Decided March 29, 2018

Before Judges Nugent and Currier.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2092-15.

Joseph M. Simantov, attorney for appellant.

Law Office of Patricia A. Palma, attorneys for respondents (Kathleen M. Berenbroick, of counsel and on the brief).

PER CURIAM

In this personal injury matter, plaintiff Frank Lugo appeals from the March 3, 2017 order denying his motion for reconsideration. The order stated that plaintiff had failed to

set forth any argument as to why the contested order was improper or incorrect. Because a review of the record reflects that plaintiff raised several issues in his motion that he contended were overlooked by the court in its original determination, we find that the trial judge erred in denying the motion. We reverse and remand.

Plaintiff instituted a suit against defendants Betty and Domenico Perrotta, alleging that he sustained injuries as a result of an automobile accident. The discovery end date (DED) was April 2, 2016. On March 22, 2016, plaintiff forwarded to defendants a letter advising that he was amending his interrogatories to name Dr. Robin Innella, D.O., as an expert witness and attaching Dr. Innella's narrative report. In the report, Dr. Innella detailed his treatment of plaintiff's knee following the accident, and described the results of x-rays and an MRI. The doctor also stated that he had performed arthroscopic surgery on plaintiff's knee in January 2016. Dr. Innella rendered a guarded prognosis, and opined that the injury to the knee was causally related to the accident and was a permanent injury. This correspondence was sent eleven days prior to the DED.

Over two months later, the parties proceeded to mandatory automobile arbitration where an award was entered in favor of plaintiff. The award reflects that the arbitrator considered the

records and expert opinion produced in the March 22, 2016 letter. Defendants rejected the award and requested a trial de novo on June 6, 2016.

On June 28, 2016, defendants moved to bar the March 22, 2016 amendments because plaintiff had not provided the requisite Rule 4:17-7 certification. As a result, defendants asserted that the amendments were untimely, and they requested that plaintiff be barred from presenting any evidence of his knee surgery. The motion was inexplicably unopposed.

On July 22, 2016, the trial judge granted the motion, barring any testimony concerning knee surgery and any treatment or care rendered after October 2014. The order contained a typed entry advising that the amendment would be disregarded under Rule 4:17-7, as it did not contain the required certification.

Although the parties were ready for trial on the trial date in September 2016, the case was adjourned due to the unavailability of a judge, and rescheduled for November 29, 2016. On October 20, 2016, plaintiff sent a letter to defendants amending his interrogatories to add the previously served report of Dr. Innella and the doctor's January 2016 operative report. Plaintiff certified that "these amendments were not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date."

Several days later, defendants filed a motion to bar the amendment and reports. The motion was unopposed and the court granted it on November 18, 2016. The judge typed on the order that the amendment contained the same report that the court had barred as "untimely submitted on July 22, 2016."

When the parties appeared for trial the following week, defendants moved for a dismissal of the case, contending that plaintiff could not surmount the lawsuit threshold without an expert opinion on permanency. Plaintiff claimed surprise at the November 18 order and advised the trial judge[1] that he had not received either the October 24, 2016 notice of motion or the subsequent order. The case was dismissed with prejudice.

On December 6, 2016, plaintiff moved for reconsideration of the November 18 order. Counsel attached a letter dated March 22, 2016, amending his interrogatories to include Dr. Innella's report. The letter presented by counsel contains a Rule 4:17-7 certification. Counsel further contended that he did not receive a copy of the October 24, 2016 motion papers or the resulting November 18 order. The motion was scheduled for January 6, 2017, and requested oral argument if the motion was opposed.

[1] The same judge considered all three motions discussed here. The parties were assigned to a different judge for trial, who entered the dismissal order.

Defense counsel responded by way of letter dated December 30, 2016, opposing the motion and requesting oral argument. She informed the court that the March 22 cover letter amending interrogatories that she received differed from that presented by plaintiff in that it did not contain a certification. She attached her October 24, 2016 notice of motion showing a carbon copy to plaintiff's office. She also produced a facsimile confirmation sheet demonstrating the November 18 order was provided to plaintiff's counsel on November 23, 2016, before the November 29 trial date.

On March 3, 2017, without oral argument, the motion judge denied plaintiff's application for reconsideration. A typewritten notation on the order read:

> In this motion for reconsideration, the Movant does not state with specificity the basis on which it is made including a statement of the matters or controlling decisions which counsel believes the court has overlooked or to which it has erred as is required under R. 4:49-2. No argument is set forth at all as to why the November 18, 2016, order was improper or incorrect.

This appeal followed.

On appeal, plaintiff does not directly contest the dismissal of his case at trial as he concedes that the orders striking his expert reports left him unable to meet the lawsuit threshold. He asserts, however, that the March 3, 2017 denial of his motion for

reconsideration was erroneous and left him with the inability to present his case to a jury. Plaintiff argues that the motion judge failed to consider the information he presented in the reconsideration application, specifically the Rule 4:17-7 certification, and his lack of notice of defendants' motion filing, which resulted in the November 18, 2016 order.

Two months after the return date of plaintiff's motion, in which both parties had requested oral argument, the court issued an order without the benefit of argument or a written or oral statement of reasons. The proposed order submitted by plaintiff requested a ruling "that the November 18, 2016 Order . . . is hereby vacated." The March 3, 2017 order had a line striking that language, but there was no indication whether the motion was granted or denied. Instead, beneath the judge's signature was a two-sentence form language insertion citing language from Rule 4:49-2. The second sentence read: "No argument is set forth at all as to why the November 18, 2016, order was improper or incorrect."

We disagree. Plaintiff presented several arguments that he contended were overlooked and not considered by the judge. The

two different versions of the March 22, 2016 letter should have sufficed to trigger a review of the circumstances.[2]

Plaintiff presented a certification and supporting documentation in his reconsideration motion to demonstrate he had complied with Rule 4:17-7. A reading of plaintiff's submission advised the motion judge that the prior orders had effectually resulted in the dismissal of his case. His arguments should have been considered by the judge, particularly in light of the serious consequence of denying a litigant his or her day in court.

As we have previously stated:

> [W]e are satisfied that the rules remain equipped to allow a trial judge to render substantial justice in all cases and that where the court system is not in a position to schedule a meaningful arbitration or trial date, a sanction that results in a deprivation of a litigant's day in court on the merits is anathema to the fair and efficient administration of justice. We are reminded of Justice Clifford's apt comment that "[o]ur rules of procedure are not simply a minuet scored for lawyers to prance through on pain of losing the dance contest should they trip." Stone v. Old Bridge Tp., 111 N.J. 110, 125 (1988) (dissenting opinion). The rules do not exist for their own benefit. The rules, instead, are only a framework for the fair and

[2] Under Rule 4:17-7, defendants were not required to object to the untimely amendment if they did not receive the certification of due diligence. However, if a certification was provided with the amended interrogatory answers, then defendants are deemed to have waived any challenge to the certification of due diligence if they did not file a challenging motion within 20 days of receiving the amendments.

> uniform adjudication of cases brought into our system. Ragusa v. Lau, 119 N.J. 276, 283-84 (1990) (the rules "should be subordinated to their true role, i.e., simply a means to the end of obtaining just and expeditious determinations between the parties on the ultimate merits.").
>
> [Ponden v. Ponden, 374 N.J. Super. 1, 10-11 (App. Div. 2004).]

In the present case, the court had not scheduled a trial date at the time of plaintiff's March amendment. There was no demonstrated prejudice to defendants at that time.

We, therefore, vacate the March 3, 2017 order and remand to the motion judge. On remand, the judge should consider the July 22, 2016 and November 18, 2016 interlocutory orders in light of all of the circumstances of the case now known to him. The expert report was provided eleven days before the DED. The parties proceeded to arbitration where the arbitrator considered the expert report. Defendants' motion to bar the March 22 amendment was filed three months after its receipt, and after the plaintiff had relied on the expert report and its opinions at arbitration. On the other hand, plaintiff did not oppose the motion seeking to strike his expert opinion. That inexcusable silence deprived the court of his argument.

We make no comment on the ultimate merits of plaintiff's arguments pertaining to the March 3, 2017 order. We remand only

for a consideration of his arguments and an explanation of the court's findings of facts and conclusions of law. See R. 1:7-4.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.