SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3355-15T4

DONNA ROBERTS and DAWN ABRAMS,

Plaintiffs-Appellants,

v.

CLIFFORD S. MINTZ,

Defendant-Respondent.

Argued September 18, 2017 – Decided January 22, 2018

Before Judges Ostrer and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-1658-10.

Mark J. Molz argued the cause for appellants.

Garen Meguerian argued the cause for respondent.

PER CURIAM

This appeal is a sequel to our decision affirming the summary judgment dismissal of plaintiffs' defamation suit. Roberts v. Mintz, No. A-1563-14 (App. Div. July 26, 2016). Although summary judgment was properly granted, we held that plaintiffs' claims

were not frivolous, and vacated the trial court's imposition of $25,000 in sanctions jointly upon plaintiffs and their counsel. Ibid. We presume familiarity with that opinion.

While plaintiffs' direct appeal was pending, defendant attempted to enforce the later-vacated order awarding sanctions, as plaintiffs failed to secure a stay. Defendant's counsel served information subpoenas, which plaintiffs' counsel and his clients did not answer. As discussed below, plaintiffs' counsel tried, but failed to properly deposit cash in lieu of a supersedeas bond to stay enforcement of the sanctions order pending appeal. The trial court ultimately entered a second sanctions order, awarding defendant $5000, imposed jointly upon plaintiffs and their attorney, for failure to respond to information subpoenas or to post a supersedeas bond or cash to secure the $25,000 award pending appeal. Plaintiffs and their counsel appeal from the $5000 award. In the exercise of original jurisdiction, we modify and reduce the award.

These ancillary proceedings began shortly after entry of the first sanctions order, awarding $25,000, in October 2014.[1] As plaintiffs did not immediately seek a stay of that order pending

[1] The trial court awarded sanctions roughly four years after it granted summary judgment. Plaintiffs thereafter filed their notice of appeal. We heard argument in March 2016 and issued our decision in July.

appeal or post a supersedeas bond, defense counsel served information subpoenas upon plaintiffs and their attorney, seeking responses in fourteen days. After they failed to respond, defendant filed a motion to enforce litigant's rights and plaintiffs filed a motion to stay the sanctions order. In March 2015, the court denied defendant's motion without prejudice and entered a stay conditioned upon plaintiffs posting a supersedeas bond pursuant to Rule 2:9-6 within thirty days.

After plaintiffs failed to satisfy that condition, defendant obtained an order in May 2015 compelling plaintiffs and their attorney to answer the information subpoenas, and providing for their arrest if they failed to do so within ten days. The court denied defendant's request for fees.

Despite defense counsel's written warnings, responses from plaintiffs and their counsel were not forthcoming. Defense counsel thereafter sought arrest warrants, which were issued in late July 2015. Shortly before that, another panel of our court denied plaintiffs' motion for a stay of the judgment without a bond, or for additional time to procure a bond, but provided that they could renew their motion for a stay before the trial court if they posted a bond within thirty days.

At that point, plaintiffs again sought relief from the trial court, which granted their motion in September 2015 for permission

to deposit cash in lieu of a bond provided they do so by October 1, 2015; but denied their request for a further stay unless they actually deposited the funds with the clerk of the court.

Plaintiffs' counsel soon thereafter obtained a $25,000 bank check, dated September 25, 2015, payable to the Clerk of the Superior Court of New Jersey. However, an unfortunate series of events prevented the proper deposit of that security. It started when plaintiffs' counsel mistakenly submitted the check to the Clerk of the Appellate Division instead of the trial court, notwithstanding Rule 2:9-6(a)(1), which states "the form of security . . . shall be presented for approval to the court . . . from which the appeal is taken . . . ." (Emphasis added). The Appellate Division Clerk's office attempted to return the check to plaintiffs' counsel by regular mail. Plaintiffs' counsel certified he did not receive it, and there was no way to track it.

Plaintiffs' counsel then filed two motions to compel the Appellate Division Clerk to execute a stop payment affidavit that, counsel stated, the issuing bank required as a condition for issuing a replacement for the lost check. In May 2016, a different panel of this court denied counsel's first motion for the stop payment affidavit without prejudice, noting that more information was needed about the necessity for an affidavit from the clerk. Plaintiffs' counsel renewed his motion, and the other panel denied

the motion again on July 26, 2016, the same day it issued the decision vacating the first sanctions order.

While plaintiffs' counsel endeavored to post $25,000 between September 2015 and July 2016, defendant continued to pursue relief before the trial court. In February 2016, defendant moved for sanctions and sought over $12,000 in fees and costs incurred between January 2015 and February 2016. Defendant's counsel asserted that plaintiffs had engaged in vexatious and dilatory conduct designed to frustrate defendant's effort to enforce the first sanctions order.[2]

By order entered March 18, 2016, the trial court granted defendant's motion for sanctions in the reduced amount of $5000, imposed jointly upon plaintiffs and their attorney. In its oral decision, the judge found that no just excuse had been presented for the failure to respond to the information subpoenas, and plaintiffs had failed to comply with orders that, the court stated, mandated the posting of a supersedeas bond. Pursuant to Rule 2:5-1, the judge supplemented her decision in writing. The court held that plaintiffs and their counsel "willfully and blatantly

[2] Although defendant's counsel certified that he was informed by the clerk of this court that it had no "record confirming the filing of a bond by Plaintiffs or their counsel," the panel's May and July 2016 orders confirmed that the clerk did receive the $25,000 check, but returned it to counsel, or at least attempted to do so by regular mail.

disregarded not only the rules and procedures governing the courts but multiple orders entered by the Superior Court and the Appellate Division." The judge was not satisfied that plaintiffs and their counsel ever obtained the $25,000 check, noting "no proof was provided to the court to establish that the cashier's check existed, and if it did, that it was sent to the court or that the court ever received it." The trial court found it appropriate to compensate defendant for his counsel's efforts to enforce the first sanctions award, and to "deter plaintiffs and plaintiffs' counsel from further deliberate and egregious conduct." Although the court found that defense counsel's fees of over $12,000 were reasonable, the reduced award of $5000 was "a sufficient sanction after weighing all the factors of the matter, including the willful conduct of plaintiffs and plaintiffs' counsel and the harm suffered by defendant."

Plaintiffs and their counsel appeal the $5000 award. Absent an injustice, we shall not disturb a trial court's reasoned exercise of discretion in enforcing its orders, and managing discovery, including the decision to impose sanctions for violations. See Bender v. Adelson, 187 N.J. 411, 428 (2006) (reviewing for an abuse of discretion a "trial court's decision to bar defendants' requested amendments to their interrogatory answers [to add experts] and deny a further discovery extension");

Abtrax Pharms. v. Elkins-Sinn, 139 N.J. 499, 517 (1995) (stating appellate courts shall review the dismissal of a complaint with prejudice "for discovery misconduct" under an abuse of discretion standard and shall not interfere "unless an injustice appears to have been done"); North Jersey Media Grp., Inc. v. State Office of the Governor, 451 N.J. Super. 282, 296 (App. Div. 2017) (stating that Rule 1:10-3 "allows for judicial discretion in fashioning relief to litigants when a party does not comply with a judgment or order").

However, we are not obliged to defer to sanctions that are "based on a mistaken understanding of the applicable law." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011) (internal quotation marks and citation omitted). An abuse of discretion "arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (internal quotation marks and citation omitted). We may also find an abuse of discretion when the court's decision rests on mistaken findings of fact. Clark v. Clark, 429 N.J. Super. 61, 72 (App. Div. 2012).

"Relief under R[ule] 1:10-3, whether it be the imposition of incarceration or a sanction, is not for the purpose of punishment, but as a coercive measure to facilitate the enforcement of the

court order." Ridley v. Dennison, 298 N.J. Super. 373, 381 (App. Div. 1997). In fashioning a sanction for violation of a discovery order, the court must consider, "whether the plaintiff acted willfully and whether the defendant suffered harm, and if so, to what degree." Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 115 (2005); see also Hynes v. Clarke, 297 N.J. Super. 44, 57 (App. Div. 1997) (stating that the award of fees under Rule 1:10-3 "only applies to parties who willfully fail to comply" with a court's order).

We reject plaintiffs' and their counsel's argument that the trial court lacked jurisdiction to impose sanctions by its March 2016 order. Although an appeal was pending, the trial court retained the authority to enforce its unstayed orders. See R. 2:9-1 (stating "[t]he trial court . . . shall have continuing jurisdiction to enforce judgments and orders pursuant to R. 1:10 and as otherwise provided").

We likewise reject the argument that the second sanctions order should be vacated, simply because we ultimately vacated the first one. Defendant was entitled to enforce the unstayed first sanctions order through supplementary proceedings. See R. 4:59-1(f); R. 6:7-2(b). Plaintiffs and their counsel were required to comply with their obligations imposed by the rules, as well as subsequent court orders so long as they remained in effect. It

is no defense that the first sanctions order was ultimately set aside. See In re Tiene, 17 N.J. 170, 177 (1954) ("[A]s a general rule a party cannot on an appeal from a judgment of conviction of contempt assert that the court order which he had contemned was based on error of law or fact, but rather the contemner's recourse is to take a direct appeal from the court order."); Salmon v. Salmon, 88 N.J. Super. 291, 314 (App. Div. 1965) (stating that "doubt as to the validity of an order is not an excuse for non-compliance, unless the court issuing it was in fact without jurisdiction").

Nonetheless, we are unpersuaded that the failure of plaintiffs and their counsel to deposit the $25,000 with the trial court was willful – although that willfulness finding factored significantly in the trial court's determination to impose the $5000 sanction. Plaintiffs' counsel obtained a $25,000 check payable to the clerk of the court. Another panel of this court acknowledged that the Appellate Division Clerk received the check and attempted to return it to plaintiffs' counsel.[3] When plaintiffs' counsel did not receive it, he attempted to void the check, presumably so he could obtain a replacement check. However,

[3] We intend no criticism of the trial judge in parting company with her conclusion on this point, as plaintiffs' counsel apparently provided insufficient proof of his efforts. However, in the interests of justice, we cannot ignore the evidence.

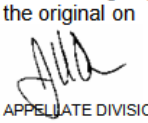
another panel of this court declined to order execution of the issuing bank's form affidavit, to consent to the voiding of the check. By the time plaintiffs' counsel renewed his motion, the need to post the security had become moot, as the court had vacated the first sanctions order.

Although we are not satisfied that willfulness motivated the failure to post the $25,000 check, we discern no basis to disturb the trial court's conclusion regarding the failure to respond to the information subpoenas defendant's counsel served. Plaintiffs and their counsel provided no just excuse to the trial court — nor have they done so on appeal — for their failure to respond, even after the trial court ordered them to respond. This recalcitrance necessitated defendant's additional enforcement efforts.

Given the adequacy of the record, and in order to avoid unnecessary prolongation of these proceedings, which began with the filing of a defamation complaint in 2010, we shall exercise original jurisdiction. See R. 2:10-5. We modify the trial court's sanction order, taking into account that plaintiffs' and their counsel's willfulness did not extend to the failure to deposit the $25,000 once the check was obtained. The sanction is reduced to $3000 — $1000 to be paid by plaintiffs' counsel, and $2000 to be paid by plaintiffs.

The court's order is therefore affirmed as modified.

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



CLERK OF THE APPELLATE DIVISION