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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3635-16T1

SYLVESTRE ROMERO,

Plaintiff-Appellant,

v.

K. HOVNANIAN COOPERATIVE, INC., WILLIAM D. COULTER and CORAZON J. COULTER,

Defendants,

and

BUILDERS FIRSTSOURCE NORTHEAST GROUP, LLC, MACALU CONSTRUCTION, INC., and MATZEL & MUMFORD AT EGG HARBOR, LLC,

Defendants-Respondents.

Argued March 13, 2018 - Decided April 3, 2018

Before Judges Carroll and DeAlmeida.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-3403-13.

John Randy Sawyer argued the cause for appellant (Stark & Stark, attorneys; John Randy Sawyer, of counsel and on the briefs).

Neal A. Thakkar argued the cause for respondent Builders FirstSource Northeast Group, LLC (Sweeney & Sheehan, PC, attorneys; Neal A. Thakkar, of counsel and on the brief).

Arthur E. Donnelly, III, argued the cause for respondent Macalu Construction, Inc. (Zirulnik, Sherlock & DeMille, attorneys; Arthur E. Donnelly, III, of counsel; Ellen G. Bertman, on the brief).

Richard J. Mirra argued the cause for respondent Matzel & Mumford at Egg Harbor, LLC (Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys; Richard J. Mirra, of counsel and on the brief).

PER CURIAM

Plaintiff Sylvestre Romero appeals from a May 9, 2017 order denying his motion to vacate summary judgment orders dismissing his negligence action against Builders FirstSource Northeast Group, LLC (BFNG), Macalu Construction, Inc. (MC), and Matzel & Mumford at Egg Harbor, LLC (MM) (collectively, "defendants"). For the reasons that follow, we affirm.

I.

Plaintiff was injured on June 27, 2011, when he fell while working at a construction site in Pleasantville that was being developed by K. Hovnanian Cooperative, Inc. (KHC). On June 24, 2013, plaintiff filed suit against KHC and others who he claimed were involved in the construction project, including BFNG, MC, MM, William D. Coulter, Sr., and Corazon J. Coulter, seeking damages

for the injuries he sustained as a result of their alleged negligence.

The complaint was filed on behalf of plaintiff by the Latronica Law Firm, P.C., located in Levittown, New York, and was signed by Mikhail Pinkusovich, Esq. The record reflects that Pinkusovich became ineligible to practice law in New Jersey in August 2015.

The initial discovery end date was June 4, 2014. However, on April 3, 2014, MC requested and received a sixty-day extension to August 3, 2014. On July 8, 2014, KHC and MM filed a motion to extend the discovery deadline, which the court granted. As a result, the discovery end date was extended to October 2, 2014. KHC and MM filed another motion to extend discovery on September 23, 2014. Their motion was granted on October 16, 2014, and discovery was extended to December 17, 2014.

Plaintiff asserts that defendants were uncooperative in scheduling depositions throughout this period. Defendants respond that plaintiff failed to serve any proper deposition notices. The judge conducted a case management conference on January 16, 2015, to address these discovery issues. The judge ordered defendants' depositions to be completed by April 1, 2015, and extended the discovery end date to September 15, 2015.

Telephonic case management conferences were held on July 17, 2015, December 11, 2015, and June 3, 2016. Plaintiff asserts he was unable to schedule defendants' depositions due to their lack of cooperation. Defendants in turn maintain they were cooperative and it was plaintiff who failed to schedule depositions correctly on a mutually agreeable date. In any event, after the December 11, 2015 conference, the judge ordered that: defendants' depositions be completed by March 1, 2016; plaintiff's expert reports be produced by April 15, 2016; and defense expert reports be produced by June 1, 2016.

Following the June 3, 2016 conference, the judge ordered defendants' depositions be completed by August 1, 2016, and extended the dates for the production of plaintiff's and defendants' expert reports to September 15, 2016, and November 1, 2016, respectively. The discovery end date was again extended, to November 15, 2016. On September 30, 2016, MC and BFNG were deposed. However, MM was never deposed. Nor did plaintiff ever timely serve an expert report.

Prior to April 15, 2016, plaintiff's case was being handled by Ralph Franco, Esq. at the Latronica Law Firm. However, Franco left the firm on that date. According to a February 21, 2017 certification submitted by Robert R. Latronica, Jr., when Franco departed, the firm "had one attorney licensed to practice law in

New Jersey still working with us . . . although at that time [he] had some [New Jersey Continuing Legal Education] credits to make up."

According to Latronica, Franco agreed to file a substitution of counsel once he was settled at his new firm. However, Franco failed to do so, and the Latronica Law Firm never filed a motion to be relieved as counsel, or to appear in the matter pro hac vice. Nevertheless, Franco took possession of the file from the Latronica Law Firm in early September 2016, and conducted the depositions of MC and BFNG on September 30, 2016.

A non-binding arbitration hearing was scheduled for January 4, 2017. In addition, defendants filed separate motions for summary judgment, which were initially returnable on January 6, 2017.

On January 3, 2017, Franco contacted the calendar department at the Latronica Law Firm and asked them to request an adjournment of the arbitration hearing. The request was granted, and the hearing was rescheduled for January 19, 2017. Additionally, having received no opposition to the three summary judgment motions, court staff communicated with the Latronica Law Firm, who indicated an intention to file opposition. Over defendants' objection, the court granted plaintiff additional time to oppose the motions. Consequently, the court adjourned the summary judgment motions one

motion cycle until January 20, 2017, and indicated no further adjournments would be granted.

On January 18, 2017, a secretary from the Latronica firm contacted the court requesting the court's fax number in order to submit opposition to the motions via fax. Court staff advised the secretary that Rule 4:46-1 requires opposition to a summary judgment motion be filed at least ten days prior to the return date. Shortly thereafter, Latronica telephoned the court and asked to speak directly with the judge. The judge declined to engage in an ex parte communication, but agreed to conduct a conference call with counsel for all parties if it could be arranged before court closed at 4:30 p.m. Consequently, the conference call was scheduled for 4:15 p.m. However, one counsel was not available to participate until 4:30 p.m., after court had adjourned for the day.

On January 19, 2017, Latronica contacted the court again "to explain the circumstances as to why we could not appear for the arbitration and to request that I be permitted to participate by phone." That request was denied. Latronica "also asked to speak to the [j]udge to discuss our adjournment request for the motion[s,]" which was also denied.

On January 25, 2017, the court granted defendants' summary judgment motions, which were unopposed. In its eight-page

statement of reasons, the court reviewed the procedural history of the matter, noting "the discovery end date was extended on eight separate occasions" and that plaintiff "has not produced any expert report suggesting any criticism of any of the conduct of any of the moving parties." The court found that without such expert testimony plaintiff was unable to establish defendants were negligent, or that their negligence proximately caused plaintiff's injuries.

On February 21, 2017, through new counsel, plaintiff filed a motion to vacate the January 25, 2017 summary judgment orders. The motion was supported by Latronica's certification, and sought relief under subsections (a) and (f) of Rule 4:50-1.

The same motion judge who entered the various case management orders and granted defendants summary judgment denied plaintiff's motion to vacate. The judge found the failure of plaintiff's law firm to obtain a licensed attorney in New Jersey, transfer the file, or move for admission pro hac vice was not excusable neglect. The judge also pointed out that the firm telephoned the arbitrator ten minutes before the arbitration hearing requesting permission to appear by phone, failed to file timely opposition to the three motions for summary judgment even after an adjournment was granted, failed to serve notices of deposition, and failed to submit an expert's report pursuant to the court's scheduling order.

The judge further noted the lack of any supporting certification by plaintiff, and found no "evidence that [plaintiff] took any action to determine what was happening with the litigation that was instituted on his behalf and was pending for [three-and-a-half] years at the time and what was going on with respect to the eight extensions of discovery and the five extensions of the arbitration hearing . . . ." Accordingly, the judge found plaintiff did not establish excusable neglect or any other "reason that would permit me to exercise my discretion and grant the relief requested by [p]laintiff." This appeal followed.

II.

On appeal, plaintiff abandons his argument that the neglect on the part of his former counsel was excusable so that he was entitled to relief under Rule 4:50-1(a). Rather, plaintiff contends the trial court abused its discretion when it denied his motion pursuant to Rule 4:50-1(f), and that he should not be punished for the errors of his former attorneys for which he is blameless.

An application to set aside an order pursuant to Rule 4:50-1(a) or (f) is addressed to the motion judge's sound discretion, which should be guided by equitable principles. Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994). A trial court's determination under Rule 4:50-1 is entitled to substantial

deference and will not be reversed in the absence of a clear abuse of discretion. US Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012). To warrant reversal of the court's order, plaintiff must show that the decision was "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Ibid. (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)).

Subsection (a) of Rule 4:50-1 provides that a court may relieve a party from a final order for "mistake, inadvertence, surprise, or excusable neglect" while under subsection (f) relief may be granted for "any other reason justifying relief from the operation of the judgment or order." Relief under subsection (f), however, is available only when "truly exceptional circumstances are present." Hous. Auth., 135 N.J. at 286 (citation omitted). "The movant must demonstrate the circumstances are exceptional and enforcement of the judgment or order would be unjust, oppressive or inequitable." Johnson v. Johnson, 320 N.J. Super. 371, 378 (App. Div. 1999) (citation omitted).

In determining whether a party should be relieved from a judgment or order, courts must balance "the strong interests in the finality of litigation and judicial economy with the equitable notion that justice should be done in every case." Jansson v. Fairleigh Dickinson Univ., 198 N.J. Super. 190, 193 (App. Div.

1985). Where a procedural violation is involved, additional considerations are implicated, namely, "[t]he defendant's right to have the plaintiff comply with procedural rules[, which] conflicts with the plaintiff's right to an adjudication of the controversy on the merits." Abtrax Pharms. v. Elkins-Sinn, 139 N.J. 499, 513 (1995) (quoting Zaccardi v. Becker, 88 N.J. 245, 252 (1982)). In all cases, however, "justice is the polestar and our procedures must ever be moulded and applied with that in mind." Jansson, 198 N.J. Super. at 195 (quoting N.J. Highway Auth. v. Renner, 18 N.J. 485, 495 (1955)).

In the present case, it is clear from the record that the trial court afforded plaintiff's counsel repeated indulgences during the course of the litigation, including numerous extensions of the discovery end date to afford counsel the opportunity to depose defendants and provide an expert report to establish defendants' negligence. We therefore agree with the trial court that relief under subsection (a), excusable neglect, was not warranted. Excusable neglect is defined as excusable carelessness "attributable to an honest mistake that is compatible with due diligence or reasonable prudence." Mancini v. EDS, 132 N.J. 330, 335 (1990) (citations omitted). There is absolutely nothing in this "tortured" record that indicates plaintiff's counsel

exercised due diligence or reasonable prudence throughout this litigation.

Nor do we find any circumstances in this record that can be characterized as exceptional, warranting relief under subsection (f). As noted, relief under subsection (f) is reserved for "truly exceptional circumstances." Hous. Auth., 135 N.J. at 286. Thus, for example, in Parker v. Marcus, 281 N.J. Super. 589, 595 (App. Div. 1995), we found exceptional circumstances based on the plaintiff's attorney's malpractice in the handling of the plaintiff's case and the fact that the plaintiff likely had no remedy against the attorney who had since been disbarred. We additionally observed that the plaintiff "made every effort to keep in contact with his attorney during the pendency of his case, and was assured that the matter had not been scheduled for trial because of a calendar backlog." Id. at 594.

In Jansson, we identified a number of factors courts should consider in determining whether exceptional circumstances exist warranting relief from judgment: (1) the extent of the delay in seeking relief from the judgment or order, (2) the underlying reason or cause for the discovery delays, (3) the fault or blamelessness of the moving party, and (4) the prejudice, if any, the party opposing the motion would suffer in the event relief is granted. 198 N.J. Super. at 195.

Contrary to plaintiff's argument, we find Parker distinguishable. Initially, we note that Parker involved a case where liability was not in dispute. 281 N.J. Super. at 595. The plaintiff in Parker was a passenger and "entirely without fault as to the cause of the accident." Ibid. Here, however, plaintiff sued a number of parties, claiming that their negligence "caused [him] to sustain serious injuries when he fell from an elevated structure at [the] premises under construction." Liability was, therefore, hotly contested.

Importantly, the Parker court noted that the plaintiff's attorney had become disbarred and was uninsured, leaving the plaintiff "without any viable remedy." Ibid. Plaintiff's counsel here is still a member of the bar and plaintiff is therefore not without a remedy.

Additionally, the plaintiff in Parker "made every effort to keep in contact with his attorney during the pendency of his case . . . ." Id. at 594. In contrast, evidence of plaintiff's efforts to remain in touch with his former attorneys to monitor the status of his case is conspicuously absent here. Thus, pertinent to the third factor identified in Jannson, we are unable to conclude on this record that plaintiff can be deemed to be entirely without blame.

In this regard, the United States Supreme Court has held that "[s]urely if a criminal defendant may be convicted because he did not have the presence of mind to repudiate his attorney's conduct in the course of a trial, a civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the prosecution of his lawsuit." Link v. Wabash R. Co., 370 U.S. 626, 634 n. 10 (1962); see also Baumann v. Marinaro, 95 N.J. 380, 397 (1984) (discussing the holding in Link that clients are often bound by their counsel's inaction). The Link Court went on to find that "keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant." Ibid.

In short, we are satisfied, on this record, that the trial court's decision denying plaintiff's motion for relief from judgment was not a clear abuse of discretion. Rather, the court's decision was grounded in reason, supported by substantial credible evidence in the record, and reflects an appropriate balancing of the need for finality in litigation with plaintiff's right to an adjudication on the merits. See Abtrax Pharms., 139 N.J. at 499 (reviewing dismissal of complaint under abuse of discretion standard). While we sympathize with plaintiff's plight, we are

unable to conclude he is without remedy, and we discern no basis to disturb the trial court's determination.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION