SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0904-21

IN THE MATTER OF ARNO MAYER.

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Argued October 17, 2022 – Decided November 4, 2022

Before Judges Currier and Enright.

On appeal from the Superior Court of New Jersey, Chancery Division, Mercer County, Docket No. C-000017-21.

Brian M. Gilbert argued the cause for appellant Carl J. Mayer (Pisciotta & Menasha, LLC, attorneys; Brian M. Gilbert, on the briefs).

Steven R. Rowland argued the cause for respondent Daniel P. Mayer (Brown Moskowitz & Kallen, PC, attorneys; Kenneth L. Moskowitz and Steven R. Rowland, of counsel and on the brief).

PER CURIAM

Defendant Carl Mayer appeals from the October 13, 2021 order denying his motion to sanction his brother, plaintiff Daniel Mayer, and plaintiff's attorney for allegedly filing a frivolous motion for reconsideration and

clarification motion. We affirm, substantially for the reasons set forth in Judge Timothy P. Lydon's cogent written opinion.

Defendant-Intervenor Arno Mayer, now ninety-six, is the father of Carl[1] and Daniel. In 2006, Arno executed a power of attorney designating Carl and Daniel as his attorneys-in-fact. Additionally, Arno appointed Carl as his health care representative and named Daniel as the alternate health care representative.

In February 2021, Daniel filed a complaint against Carl, seeking the appointment of independent counsel for Arno; revocation of Carl's power of attorney; and revocation of Carl's appointment as Arno's health care representative. Daniel requested this relief, in part, based on allegations Carl took financial advantage of Arno. Two months later, Carl moved to dismiss the complaint with prejudice; Arno's counsel joined in Carl's motion.

On June 3, 2021, after hearing argument on Carl's motion, Judge Robert Lougy dismissed Daniel's complaint with prejudice and entered a conforming order. In a written opinion attached to the order, Judge Lougy explained why he dismissed the complaint with prejudice, stating

> [a]mendment would not cure the requirement that Daniel act in concert with Carl under the power of attorney. And amendment would not eliminate or

[1] Because the parties share the same surname, we refer to them by their first names. We intend no disrespect by this informality.

> curtail Arno's rights to make his own decisions. Plaintiff is free to pursue whatever claims he may feel that he has against Carl, Arno, or Arno's Trust in the Probate Part. (emphasis added).

Notably, the underlined language from the June 3 opinion was not included in the body of the June 3 order.

On June 23, 2021, Daniel filed a timely motion for reconsideration and clarification, arguing the June 3 dismissal order could be interpreted as foreclosing his right to initiate a guardianship complaint. Further, Daniel contended clarification or reconsideration was necessary to avoid an erroneous application of res judicata.

Days later, Carl's attorney served Daniel's attorney with a letter stating Daniel's motion was "frivolous." Citing Rule 1:4-8 and N.J.S.A. 2A:15-59, Carl's attorney demanded Daniel withdraw his motion within twenty-eight days or risk the imposition of sanctions. Additionally, Carl and Arno filed opposition to Daniel's pending motion. However, Daniel did not withdraw his motion.

On July 28, 2021, without hearing argument, Judge Lougy executed an order denying Daniel's reconsideration and clarification motion. The next day, the judge issued an oral opinion, finding there was "no basis . . . to reconsider" the June 3 order. Although Judge Lougy acknowledged Daniel's concern that he might be foreclosed from bringing claims in the Probate Part based on the

"with prejudice" language contained in the June 3 order, the judge concluded Daniel was "seeking an advisory opinion," which the judge "decline[d] to give."

In August 2021, Carl moved for sanctions against Daniel and his attorney, relying on Rule 1:4-8 and arguing sanctions were warranted because Daniel's reconsideration and clarification motion was brought in "bad faith." Six days after Carl filed his motion for sanctions, Daniel's counsel responded in a letter to Carl's attorney, advising her that "Carl's motion for sanctions itself violates R[ule]1:4-8(a)(1)" because "it is Carl's motion for sanctions that is frivolous and vexatious." Daniel's attorney warned that if Carl's motion was not withdrawn within twenty-eight days, he would file a motion for sanctions. Carl's attorney did not withdraw the pending motion for sanctions.

On October 13, 2021, after hearing argument, Judge Lydon denied Carl's motion for sanctions. In his eight-page opinion, the judge distinguished the statutory provisions of N.J.S.A. 2A:15-59.1 from Rule 1:4-8 and concluded he could not "find any evidence that suggests . . . [Daniel's] request for clarification was done in bad faith or was malicious or otherwise submitted in violation of Rule 1:4-8." Critically, Judge Lydon went a step further and stated, "I find that [p]laintiff's motion was made in good faith." The judge reasoned that Daniel's motion "did not request that Judge Lougy alter [his] ruling. . . . Rather, it

requested that Judge Lougy clarify his dismissal order." Further, Judge Lydon stated Judge Lougy's order

> did not include language that was contained in Judge Lougy's written decision, which stated that [Daniel] is "free to pursue whatever claims he may feel that he has against . . . [d]efendants in the Probate Part." [Daniel] was certainly permitted to file the motion and ask Judge Lougy to ensure that the dismissal with prejudice did not have any preclusive effect on any subsequent legal action.

Additionally, Judge Lydon stated he had "reviewed the history of this case" and there was "no evidence that any of [Daniel's] filings were made in bad faith." The judge also noted he "could not find any examples in which Judge Lougy admonished [Daniel] for filing baseless applications or motions." Further, he observed "N.J.S.A. 2A:15-59.1 and Rule 1:4-8 must be strictly construed against the issuance of sanctions." The judge denied Carl's request for sanctions, finding he "failed to present sufficient evidence of vexatiousness or malice."

On appeal, Carl renews his argument that Judge Lydon should have imposed sanctions against Daniel.[2] Carl also contends Judge Lydon's written

[2] Carl also raises new arguments in his reply brief which we do consider. See Goldsmith v. Camden Cnty. Surrogate's Off., 408 N.J. Super. 376, 387 (App. Div. 2009).

opinion violates Rule 1:7-4. Neither argument is persuasive.

We review an award of sanctions and attorney's fees for an abuse of discretion. Occhifinto v. Olivo Constr. Co. LLC., 221 N.J. 443, 453 (2015); Ferolito v. Park Hill Ass'n, 408 N.J. Super. 401, 407 (App. Div. 2009). 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) (quoting Achacoso-Sanchez v. Immigr. & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)). "Reversal is warranted when 'the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amount[ed] to a clear error in judgment.'" Ferolito, 408 N.J. Super. at 407 (quoting Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005)). However, we review a trial judge's legal conclusions de novo. Occhifinto, 221 N.J. at 453 (citations omitted).

"Sanctions for frivolous litigation against a party are governed by the Frivolous Litigation Statute, N.J.S.A. 2A:15-59.1"; Rule 1:4-8 "authoriz[es] similar fee-shifting consequences as to frivolous litigation conduct by attorneys." Bove v. AkPharma Inc., 460 N.J. Super. 123, 147 (App. Div. 2019).

The Frivolous Litigation Statute establishes a "disjunctive, two-prong"

test for determining whether "the action of the non-prevailing party [was] frivolous." Matter of K.L.F., 275 N.J. Super. 507, 524-25 (App. Div. 1993) (citations omitted). But

> [w]hen a prevailing party's allegation is based on an assertion that the non-prevailing party's claim lacked a reasonable basis in law or equity, and the non-prevailing party is represented by an attorney, an award cannot be sustained if the [non-prevailing party] did not act in bad faith in asserting or pursuing the claim.
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> [Bove, 460 N.J. Super. at 150 (alteration in original) (citation omitted) (internal quotations omitted).]

When an attorney or pro se party signs, files, or advocates a "pleading, written motion, or other paper," that attorney or pro se party "certifies that to the best of his or her knowledge, information, and belief":

> (1) [T]he paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
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> (3) the factual allegations have evidentiary support or, as to specifically identified allegations, they are either likely to have evidentiary support or they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support; and

> (4) the denials of factual allegations are warranted on the evidence or, as to specifically identified denials, they are reasonably based on a lack of information or belief or they will be withdrawn or corrected if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support.
>
> [R. 1:4-8(a).]

"A court may impose sanctions upon an attorney if the attorney files a paper that does not conform to the requirements of Rule 1:4-8(a), and fails to withdraw the paper within twenty-eight days of service of a demand for its withdrawal." United Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 389 (App. Div. 2009) (citing R. 1:4-8(b)(1)). But "the Rule imposes a temporal limitation on any fee award, holding that reasonable fees may be awarded only from that point in the litigation at which it becomes clear that the action is frivolous." LoBiondo v. Schwartz, 199 N.J. 62, 99 (2009) (citing DeBrango v. Summit Bancorp, 328 N.J. Super. 219, 229-30 (App. Div. 2000)).

"The nature of conduct warranting sanction under Rule 1:4-8 has been strictly construed[.]" First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 432 (App. Div. 2007) (citations omitted). In fact, the term "frivolous" has a restrictive meaning. McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 561 (1993). Thus "[a] claim will be deemed frivolous or groundless

[only] when no rational argument can be advanced in its support, when it is not supported by any credible evidence, when a reasonable person could not have expected its success, or when it is completely untenable." Belfer v. Merling, 322 N.J. Super. 124, 144 (App. Div. 1999) (citation omitted). The Rule requires the party seeking sanctions to prove the other party acted in bad faith. See McKeown-Brand, 132 N.J. at 549; see also Tagayun v. AmeriChoice of N.J., Inc., 446 N.J. Super. 570, 580 (App. Div. 2016) ("The party seeking sanctions bears the burden to prove bad faith.") (citation omitted).

An award of attorney's fees and costs is not warranted where the plaintiff "had a reasonable, good faith belief in the merits of the action." Wyche v. Unsatisfied Claim & Judgment Fund of State, 383 N.J. Super. 554, 561 (App. Div. 2006) (citing DeBrango, 328 N.J. Super. at 227). Likewise, sanctions should not be "imposed because a party is wrong about the law and loses his or her case." Tagayun, 446 N.J. Super. at 580. "When the plaintiff's conduct bespeaks an honest attempt to press a perceived, though ill-founded and perhaps misguided, claim, he or she should not be found to have acted in bad faith." Belfer, 322 N.J. Super. at 144-45 (citing McKeown-Brand, 132 N.J. at 563). Thus, a judge should only award sanctions for frivolous litigation in exceptional cases. See Iannone v. McHale, 245 N.J. Super. 17, 28 (App. Div. 1990).

This restrictive approach recognizes the principle that: citizens presumptively should have ready access to our courts, Belfer, 322 N.J. Super. at 144 (citing Rosenblum v. Borough of Closter, 285 N.J. Super. 230, 239 (App. Div. 1995)); "honest, creative advocacy" should not be discouraged, DeBrango, 328 N.J. Super. at 226-27; and litigants generally should bear their own costs, where the litigation at least possesses "marginal merit." Belfer, 322 N.J. Super. at 144 (citing Venner v. Allstate, 306 N.J. Super. 106, 113 (App. Div. 1997)).

Governed by these standards, we are satisfied Judge Lydon did not abuse his discretion in finding Carl failed to show Daniel or his attorney displayed "requisite bad faith or knowledge of lack of well-groundedness" – by seeking reconsideration and clarification of the June 3 order – to warrant the imposition of sanctions. Iannone, 245 N.J. Super. at 31. Likewise, the judge's finding that Daniel's motion was made in good faith is entitled to our deference. We reach these determinations, in part, because: (1) the judge canvassed the record and understood the history of the case before concluding he "could not find any examples in which Judge Lougy admonished [Daniel] for filing baseless applications or motions"; and (2) the June 3 order "did not include language [from] Judge Lougy's written decision, which stated that [Daniel] is 'free to pursue whatever claims he may feel that he has against . . . [d]efendants in the

Probate Part.'" Therefore, we agree with Judge Lydon that Daniel did not act in bad faith by "ask[ing] Judge Lougy to ensure . . . the dismissal with prejudice did not have any preclusive effect on any subsequent legal action."

Finally, we disagree with Carl's contention that Judge Lydon erred by "failing to sufficiently set forth findings of fact and conclusions of law as required under R[ule] 1:7-4(a)." Rule 1:7-4(a) provides:

> The court shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon in all actions tried without a jury, on every motion decided by a written order that is appealable as of right, and also as required by R[ule] 3:29. The court shall thereupon enter or direct the entry of the appropriate judgment.

Here, Judge Lydon satisfied the mandates of Rule 1:7-4. Indeed, he concisely set forth the facts precipitating Carl's motion for sanctions and applied the appropriate legal principles before finding Carl failed to satisfy his burden in proving sanctions against Daniel were warranted.

In sum, because Judge Lydon's findings are amply supported in the record, his legal conclusions are unassailable. To the extent we have not addressed any of Carl's remaining arguments, it is because they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.