SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1405-20

ERIK JASON BRODIE, a/k/a
ERIK J. BRODIE, and
ERIK BRODIE,

Plaintiff-Respondent,

v.

S.L.P.C. CORPORATION,
SEVERINO REALTY GROUP,
L.L.C., SEVERINO REAL
ESTATE, a/k/a SEVERENO
REAL ESTATE,

Defendants-Appellants.

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Argued January 6, 2022 – Decided February 28, 2022

Before Judges Mawla and Mitterhoff.

On appeal before the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1362-20.

Seth A. Abrams argued the cause for appellant (Donnelly Minter & Kelly, LLC, attorneys; Seth A. Abrams, on the briefs).

Christopher T. Karounos argued the cause for respondent (Davis, Saperstein & Salomon, PC,

attorneys; Christopher T. Karounos, of counsel and on the brief).

PER CURIAM

Defendants S.L.P.C. Corporation, Severino Realty Group L.L.C., and Severino Real Estate appeal from a December 14, 2020 order granting plaintiff Erik Brodie's motion for reconsideration of a July 20, 2020 order and compelling binding arbitration. We reverse.

We discern the following facts from the record. In June 2011, plaintiff fell and sustained injuries while descending the interior stairs of his apartment building. On March 28, 2013, plaintiff filed a complaint against defendants, the owners of the building, based on premises liability.

On October 16, 2014, the parties agreed to dismiss the lawsuit with prejudice and submit to binding arbitration. This agreement is memorialized in an October 20, 2014 letter from plaintiff to defendants:

> This will serve to confirm my conversation with you on October 16, 2014. You advised that your client has agreed to binding arbitration on this matter. Our office will select a mutually acceptable arbitrator within the next [fourteen] days. Arbitration should take place sometime in January of 2015. Our office has agreed to cap any award at $1,000,000.
>
> This will further serve to confirm that we have agreed to extend discovery to December 15, 2014. Furthermore, our client will submit to a defense exam

> sometime in November of 2014 if you want to conduct same.
>
> I am enclosing a signed stipulation of dismissal with prejudice for your signature and filing with the [c]ourt. Please provide me with a "filed" copy once you receive it from the clerk's office.

As agreed, the personal injury matter was dismissed with prejudice.

In October 2014, prior to agreeing to arbitration, and November 2014, defendants requested executed HIPAA authorizations to obtain plaintiff's employment file from Frames Bowling Lounge NYC (Frames) and medical records from Diagnostic Radiology Associates (DRA). In February 2015, July 2015, and November 2015, defendants renewed their requests for the outstanding discovery. In the November 12, 2015 letter, defendants indicated they were unable to proceed with arbitration until they received the requested documents.

On December 18, 2015, plaintiff filed a motion to vacate the dismissal and to compel binding arbitration. On December 24, 2015, plaintiff sent defendants the following email:

> I hope this email finds you well. In response to our last conversation and your previous written requests, enclosed please find documents we received in response to our subpoena which you indicated that you

> did not receive.[1] Unfortunately, I am unable to attach the records of Dr. Richard Kim, as they are too voluminous. I will send them under separate cover to you.
>
> As for the outstanding authorizations, I have submitted authorizations directed to Frame Bowling Lounge and DRA[] to my client for signature. Please be advised that I am unable to provide a blank authorization as that is far too broad. However, if you require additional specific authorizations, I will be happy to address those requests on a case-by-case basis. I have also requested the tax records which you have not received for my client. Once I have those I will forward them to you.
>
> Finally, this will confirm our conversation that we have agreed to the selection of Robert Margulies of Margulies and Wind, P.A. the arbitrator in this matter.
>
> Accordingly, I will be [withdrawing] my motion in this regard. If you have any further questions or comments, please do not hesitate to contact me.

By May 4, 2016, defendants were still dissatisfied and renewed their requests for discovery that was allegedly outstanding, including tax returns, pay stubs, executed HIPAA authorizations, and medical records. By letter dated October 11, 2016, defendants advised plaintiff that if they did not get all outstanding discovery by October 21, 2016, they would no longer be willing to arbitrate.

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[1] The email does not indicate what records were attached.

On March 30, 2017, plaintiff sent defendants executed HIPAA authorizations for Frames and DRA. Despite the eventual receipt of some of the records, defendants advised plaintiff on August 9, 2018, that they were no longer willing to proceed with arbitration.

Accordingly, on October 12, 2018, plaintiff filed a motion to compel arbitration. The motion judge, however, denied his motion without prejudice, stating the requested relief needed to be brought by way of a new complaint and order to show cause (OTSC) because the underlying case had been dismissed with prejudice.

On January 23, 2019, plaintiff filed a new complaint and OTSC to compel binding arbitration under a new docket number. On April 26, 2019, the parties appeared before Judge Francis B. Schultz. At the conclusion of the hearing, the judge dismissed plaintiff's complaint, finding plaintiff's lack of response to defendants' discovery requests constituted a waiver of his right to arbitration. Specifically, the judge found there was prejudice to defendants given that the condition of plaintiff might have changed and that the depositions were stale. Further, the judge reasoned there was a waiver based on "indifference so extreme and so compelling." The judge found plaintiff's actions were "more than mere silence[] [o]r mere inaction."

On June 10, 2019, plaintiff filed a motion to vacate Judge Schultz's April 26, 2019 order pursuant to Rule 4:50. On August 2, 2019, a new judge denied plaintiff's motion after determining the motion was an untimely motion to reconsider under Rule 4:49-2 and there was no new evidence to consider.

On September 11, 2019, plaintiff filed an appeal. Plaintiff failed, however, to file a brief by the extended deadline. Instead, on February 21, 2020, plaintiff inexplicably withdrew his appeal.

On April 2, 2020, plaintiff filed a new complaint and OTSC under a new docket number, which largely mirrored the complaint and OTSC filed on January 23, 2019. On May 14, 2020, defendants filed an answer and moved for dismissal claiming plaintiff's claims were barred by res judicata, collateral estoppel, and waiver.

On July 20, 2020, the motion judge dismissed plaintiff's complaint with prejudice in an order and written decision. Specifically, the judge found the complaint was barred by res judicata and collateral estoppel. Based on the procedural history of the case, the judge determined Judge Schultz rendered a final adjudication on the merits.

On August 10, 2020, plaintiff filed a motion for reconsideration. On December 14, 2020, after a hearing, the motion judge granted the application.

The judge found that Judge Schultz had erroneously found waiver without holding a plenary hearing and without making the requisite findings of fact. The judge also explicitly stated she did not find plaintiff waived arbitration. That same day, she entered an order granting reconsideration, compelling defendants to attend binding arbitration subject to the agreed-upon discovery schedule and appointing Robert E. Marguiles as the arbitrator.

On appeal, defendants present the following arguments:

> POINT II[2]
>
> [THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION]
>
> A. The Trial Court's [O]riginal [D]ecision was not [B]ased upon a [P]alpably [I]ncorrect or [I]rrational [B]asis or [F]ailed to [C]onsider [P]robative and [C]ompetent [E]vidence
>
> i. The [C]ourt's Justification for Granting Reconsideration was in Error
>
> ii. Plaintiff's Claims are Barred by the Doctrine of Res Judicata

[2] Point I was the standard of review.

iii. Plaintiff's Claims are Barred by the Doctrine of [C]ollateral [E]stoppel

B. Plaintiff's Conduct in Failing to Move the Matter Forward or Respond to Letters Constitutes Waiver

We review the decision of a motion for reconsideration for an abuse of discretion. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). "A motion for reconsideration is designed to seek review of an order based on the evidence before the court on the initial motion . . . not to serve as a vehicle to introduce new evidence in order to cure an inadequacy in the motion record." Cap. Fin. Co. of Del. Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008).

For these reasons, reconsideration should only be granted in "those cases which fall into that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Cummings, 295 N.J. Super. at 384 (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). Therefore, we have held that "the magnitude of the error cited must be a game-changer for reconsideration to be appropriate." Palombi v. Palombi, 414 N.J. Super. 274,

289 (App. Div. 2010). We review legal determinations de novo. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016).

"Waiver is the voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177 (2003). "There is a presumption against waiver of an arbitration agreement, which can only be overcome, by clear and convincing evidence . . . ." Spaeth v. Srinivasan, 403 N.J. Super. 508, 514 (App. Div. 2008).

Res judicata, otherwise known as claim preclusion, "provides that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding." Velasquez v. Franz, 123 N.J. 498, 505 (1991). The doctrine of res judicata requires a showing that:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.
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> [Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 412 (1991).]

In considering whether a judgment is on the merits, "[t]ypically, the merits of a claim are adjudicated following a full trial of the substantive issues." Velasquez, 123 N.J. at 506. "Increasingly, however, statutes, rules and court decisions operate to bar retrial of judgments that do not pass directly on the substance of a claim." Ibid. Thus, "[a] judgment of involuntary dismissal or a dismissal with prejudice constitutes an adjudication on the merits 'as fully and completely as if the order had been entered after trial.'" Id. at 507 (quoting Gambocz v. Yelencsics, 468 F.2d 837, 840 (3d Cir. 1972)).

"A judgment is final for purposes of appeal if it 'dispos[es] of all issues as to all parties.'" Wein v. Morris, 194 N.J. 364, 377 (2008) (alteration in original) (quoting Hudson v. Hudson, 36 N.J. 549, 553 (1962)). A final judgment is: "A court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment." Black's Law Dictionary 1008 (11th ed. 2019). Further, a valid judgment is: "A judicial act rendered by a court having jurisdiction over the parties and over the subject matter in a proceeding in which the parties have had a reasonable opportunity to be heard." Id. at 1009.

With these guiding principles in mind, we conclude that the motion judge was correct in her initial decision that res judicata applied to preclude plaintiff

from relitigating "a cause of action between parties that ha[d] been finally determined on the merits by a tribunal having jurisdiction." Velasquez, 123 N.J. at 505. Judge Schultz's finding that plaintiff waived his right to arbitration resulting in dismissal was indisputably a final order on the merits of the sole issue in controversy, leaving nothing left to litigate. Cf. Wein, 194 N.J. at 377 (finding that a trial court's order compelling the parties to arbitration and dismissing the action was "final judgment appealable as of right because the order disposed of all the issues as to those parties before the Superior Court.").

Judge Schultz's final order could only be challenged by filing a motion to vacate, R. 4:50-1, a motion to reconsider, R. 4:49-2, or an appeal, R. 2:2-3. After unsuccessfully seeking review of the decision at the trial level, plaintiff perfected the filing of an appeal. The record is clear that he voluntarily chose to withdraw the appeal, thereby terminating the case. Because plaintiff abandoned his sole remaining avenue to obtain review of Judge Schultz's decision, the motion judge's reconsideration of her initial order was a mistaken exercise of discretion.

To the extent we have not addressed any remaining arguments by the parties, we find they lack sufficient merit to address in a written opinion. R. 2:11-3(e)(1)(E).

Reversed. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION