SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3266-20

CARMEN R. RODRIGUEZ
DE COLLADO,

Plaintiff-Appellant,

v.

GARDNER LUCIANO,
CITY OF PATERSON,
COUNTY OF PASSAIC,
and STATE OF NEW JERSEY,

Defendants-Respondents.

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Argued November 2, 2022 – Decided December 9, 2022

Before Judges Vernoia, Firko and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-4006-19.

Kathleen M. Cehelsky argued the cause for appellant (Law Offices of James C. DeZao, PA, attorneys; James C. DeZao, on the briefs).

Brian C. Deeney argued the cause for respondent Gardner Luciano (Lewis Brisbois Bisgaard & Smith,

LLP, attorneys; Thomas C. Regan and Brian C. Deeney, on the brief).

Victor A. Afanador argued the cause for respondent City of Paterson (Lite DePalma Greenberg & Afanador, LLC, attorneys; Victor A. Afanador, of counsel and on the brief).

PER CURIAM

In this appeal, plaintiff Carmen R. Rodriguez De Collado appeals from four Law Division orders. First, she challenges a May 14, 2021 order in which, after reinstating her dismissed complaint, the court extended discovery only for defendants, Gardner Luciano and the City of Paterson. She argues the court's decision violated Rule 4:24-1(c) and was contrary to the interests of justice. Second, she challenges two June 11, 2021 orders granting summary judgment to defendants, arguing the May 14, 2021 order rendered her unable to prove her case and, even notwithstanding that order, the grant of summary judgment was premature and lacked proper evidential support. Finally, plaintiff contests a June 25, 2021 order denying her motion requesting the court reconsider or vacate the May 14, 2021 order. For the following reasons, we reverse and remand for further proceedings.

I.

On January 16, 2019, plaintiff allegedly tripped and fell on a "broken sidewalk" outside of "265-267 Spring Street" in Paterson and suffered "serious and permanent injuries." Less than one year later, on December 19, 2019, she filed a negligence complaint against Luciano, the owner of 267 Spring Street at the time of the incident, and Paterson.

Paterson answered the complaint on April 20, 2020, with Luciano's answer following nearly two months later on June 26, 2020, and only after plaintiff successfully effectuated substituted service upon him. In their answers, both defendants demanded answers to Form A Interrogatories in accordance with Rule 4:17-1(b)(2). The initial discovery end date (DED) was January 5, 2021, but, with the consent of all parties, it was extended to March 6, 2021.

Unsatisfied with Paterson's responses to its discovery demands, Luciano filed a motion to compel, which was returnable on February 19, 2021. After Paterson supplied its outstanding discovery responses, Luciano withdrew his motion to compel on February 18, 2021. Additionally, in response to Luciano's motion, it appears Paterson, again with the consent of all parties, filed an application on February 17, 2021, returnable on March 5, 2021, to extend the DED until July 5, 2021, with written discovery to be completed by April 1, 2021,

fact depositions by May 1, 2021, plaintiff's expert reports to be served by May 25, 2021, service of defendants' expert reports by June 20, 2021, and all expert depositions to be completed by July 5, 2021.

Despite the March 5, 2021 return date, the court did not enter an order granting the requested relief until nearly two months later, on April 30, 2021, and according to plaintiff, did not post the order on eCourts, or otherwise serve the parties, until early May 2021. Upon receipt of the order, plaintiff provided notices of deposition to both defendants. Plaintiff's counsel also attempted to obtain consent to extend the dates for service of his expert reports, which was necessary as the dates in the proposed order, again neither signed nor served by the court for nearly two months, had become unrealistic.

Notably, defendants only objected to the proposed dates for the service of the parties' respective reports. In this regard, counsel for Paterson informed plaintiff's counsel on May 10, 2021, "[w]e just found out what your client's injuries were on [April 28]. We simply cannot consent to an order requiring us to produce an expert report in less than two months."

In the meantime, plaintiff failed to comply with defendants' discovery requests. As a result, Luciano moved to dismiss the complaint against him without prejudice, which the court granted on February 5, 2021, consistent with

Rule 4:23-5(a)(1). On March 30, 2021, the court scheduled the matter for mandatory non-binding arbitration to be held on May 21, 2021. On or about April 14, 2021, Luciano, still without any discovery from plaintiff, filed a motion to dismiss with prejudice as permitted by Rule 4:23-5(a)(2). On that same date, Paterson filed a motion to dismiss without prejudice consistent with Rule 4:23-5(a)(1), which the court granted on April 30, 2021. Also on April 30, 2021, however, plaintiff and Paterson stipulated to reinstate plaintiff's complaint.

On April 28, 2021, plaintiff supplied outstanding discovery to defendants, including certified responses to Form A Interrogatories and Supplemental Interrogatories, along with executed HIPAA authorizations, and responses to defendants' notices to produce. Plaintiff also filed on that date an application to reinstate the dismissed complaint against Luciano and reopen and extend discovery for an additional 120 days from the date of the proposed order "on the grounds that additional time is needed to complete discovery as was anticipated during the consensual extension."

On May 14, 2021, a second Law Division judge heard oral arguments on plaintiff's reinstatement application, entered an order vacating the February 5, 2021 order, reinstated plaintiff's complaint as to Luciano, reopened and

extended discovery only for the defendants, and stated her reasons on the record. At the hearing, Luciano's counsel alerted the judge that the order extending the DED was based on a motion that had purportedly been withdrawn.[1] Paterson's counsel stated that even accepting the deadlines in the order, fact depositions were to be completed by May 1, 2021, thus rendering any such requests untimely. Luciano's counsel agreed and added that plaintiff's "paper discovery" received on April 28, 2021, was also untimely under the initial order.

Luciano's counsel then argued discovery should be extended only for the defendants in accordance with Sprankle v. Adamar of New Jersey, Inc., 388 N.J. Super. 216 (Law Div. 2005). He explained the plaintiff in that case provided "discovery beyond the [twelfth hour]" and therefore the court provided the defendant "additional time to engage in discovery" and limited the plaintiff to what was "already provided."

Plaintiff's counsel opposed defendants' request and contended extending discovery only for defendants would "be extremely prejudicial to the plaintiff" and contrary to the "the interest of justice." Luciano's counsel responded it would be fair "because plaintiff didn't do anything for sixteen months in this

[1] The parties have advised us that the court inadvertently withdrew Paterson's motion to compel. A court, of course, cannot withdraw a motion without the consent of all parties.

matter." Paterson's counsel agreed, claiming plaintiff "sat on [her] hands" and that allowing plaintiff to engage in discovery would be "unjust," contrary to the Rules, and "would essentially indulge this type of behavior because there'd be no consequences for these actions."

In deciding to extend discovery only for defendants, the judge concurred that "plaintiff sat on [her] hands during this entire case." Relying on Sprankle, she reasoned she was "not satisfied that . . . plaintiff is entitled to continue this case ad nauseum just by merely answering the interrogatories at the last second, way after the motion was ready to be dismissed with prejudice." She then clarified plaintiff would not be allowed to depose defendants or submit expert reports, thus limiting plaintiff's discovery to what had already been provided. In doing so, the judge reasoned "[plaintiff] had that opportunity for over a year." Additionally, the judge ordered "[t]he arbitration previously scheduled for May 21, 2021, is hereby adjourned to be rescheduled after the completion of discovery."

Thereafter, Luciano cross-moved for summary judgment, joining Paterson, which had previously moved for summary judgment on April 19, 2021. Plaintiff opposed both summary judgment motions. In Paterson's motion, supported primarily by the certification of its counsel, it argued it did not own

or control the subject property and had "no actual or constructive notice of any hazardous condition." Paterson also asserted its ordinance, Paterson, N.J. Rev. Gen. Ordinances ch. 23, art. 2 § 435-6 (Ordinance 435-6), "imposes a duty upon owners of real property 'fronting or abutting upon the line of the streets of the city' to pave, maintain, and keep in repair the sidewalks in front of or abutting upon their respective lands" and, as such, it had "no duty to repair, maintain, pave, or replace broken sidewalks on private property."

In opposition, plaintiff objected to and denied Paterson's assertions that it did not own or control the subject property or have notice of a hazardous condition, noting that those statements were not supported by anything in the record. Plaintiff raised a similar objection to Paterson's assertion that it did not have a duty to repair broken sidewalks on private property, claiming it was an "incorrect statement of the law."

Plaintiff's counsel explained that, pursuant to Paterson, N.J. Rev. Gen. Ordinances ch. 23, art. 2 § 435-15 (Ordinance 435-15), when "the Department of Public Works determines that any sidewalk . . . requires repair, it shall cause notice . . . to be served upon the owner of the land, directing that the work be performed in [thirty] days" and that, pursuant to Paterson, N.J. Rev. Gen. Ordinances ch. 23, art. 2 § 435-16 (Ordinance 435-16), "if the owner . . . fails

to repair the sidewalk . . . the Department of Public Works may have the work done at the owner's expense." Further, plaintiff stated "Google Earth images publicly available online reflect that the subject sidewalk was in a state of disrepair years before . . . [p]laintiff's accident."

Luciano's summary judgment motion was supported exclusively by his counsel's certifications that appended his answers to interrogatories. In those responses, he admitted to owning the property located at 267 Spring Street but denied that he conducted business at the property or "perform[ed] repairs to the subject property." He also asserted he "was not responsible for the structural maintenance of the public sidewalk."

On June 11, 2021, the same Law Division judge who entered the May 14, 2021 order heard oral argument, entered orders granting summary judgment to defendants, and placed her reasons for doing so on the record. In granting Paterson's motion, the judge concluded plaintiff failed to set forth facts showing Paterson created a dangerous condition or had notice of a dangerous condition on the sidewalk, which it deemed "a public sidewalk abutting a residential[] landowner's property," because the evidence "clearly show[ed] ownership of the abutting premises belonging to defendant Luciano." She also determined "well-settled law" provides that municipal ordinances do not create tort duties, relying

on Pareja v. Princeton Int'l Properties, 463 N.J. Super. 231, 251 (App. Div. 2020), rev'd on other grounds, 246 N.J. 546 (2021), reconsideration denied, 247 N.J. 406 (2021). As such, she did "not attach any significance to the argument [related to] Ordinance 435-6."

With respect to Luciano's application, the judge first explained that pursuant to Stewart v. 104 Wallace St., Inc., 87 N.J. 146 (1981), residential property owners do not have a duty to maintain sidewalks. Further, the judge reiterated that municipal ordinances do not create tort duties, and, in any event, plaintiff failed to show Paterson notified Luciano of a condition in need of repair under Ordinance 435-15. As such, the judge concluded "plaintiff failed to show that Luciano owed her a duty." The judge also rejected plaintiff's argument that summary judgment would be premature, explaining plaintiff "failed to set forth what facts, if any, [additional] discovery would reveal as pertinent to her burden of showing that Luciano owed her a duty of care."

Thereafter, plaintiff filed a motion requesting the court reconsider or vacate its May 14, 2021 order. In support of the motion, plaintiff argued, pursuant to Rules 4:24-1 and 4:50-1(a), and "in the interest of justice," the court should have extended the DED for all parties after reinstating the complaint. Further, plaintiff asserted her failure to complete discovery was due to excusable

neglect as she reasonably relied on the pending order consented to by the parties extending the DED to July.

In opposition, both defendants asserted plaintiff's motion was moot in light of the court's grant of summary judgment. Plaintiff responded, "had [she] been able to fully participate in discovery, the summary judgment motions may have come out differently," as depositions of either defendant had yet to be taken.

In denying plaintiff's motion, the judge first explained "Rule 4:24 does not require that discovery be extended to all parties, just that it be extended" and therefore concluded she "fully complied with the . . . [R]ules." She also reasoned Rule 4:50-1 did not apply as plaintiff "failed to prosecute this matter for years and did not attempt to schedule depositions until the last minute while the case was vacated pending a motion concerning the discovery period." The judge accordingly concluded "the interest of justice was not served by rewarding plaintiff for failing in [her] duty of due diligence." The judge also held "plaintiff . . . failed to demonstrate that the [c]ourt . . . expressed its decision based upon a palpably incorrect or irrational basis or that it is obvious that the [c]ourt either did not consider or failed to appreciate the significance of probative competent

evidence," as required to support a reconsideration application under D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). This appeal followed.

II.

In plaintiff's first point, she argues the May 14, 2021 order extending discovery only for defendants "was against the spirit and letter of the Rules." She asserts the decision was "punitive in nature" and rendered her unable "to prove liability against [d]efendant[s]" resulting in the dismissal of her case. Plaintiff claims her delay in producing discovery was the result of the "complex" procedural history including dismissals of her complaint and various discovery extensions as well as "the COVID-19 [p]andemic and related issues." As such, she maintains she had "no design to mislead" and extending her discovery would not have prejudiced defendants. We agree that the court abused its discretion in refusing to extend discovery to all parties.

Appellate courts "accord substantial deference to a trial court's disposition of a discovery dispute." Brugaletta v. Garcia, 234 N.J. 225, 240 (2018). We defer to a trial judge's discovery rulings absent "an abuse of discretion or a judge's misunderstanding or misapplication of the law." Capital Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 79-80 (2017); see also Huszar v. Greate Bay Hotel & Casino, Inc., 375 N.J. Super. 463, 473 (App. Div.

2005) (applying abuse of discretion standard in evaluating a court's denial of motion to extend discovery pursuant to Rule 4:24-1(c)).

An abuse of discretion arises when a decision is "made without a rational explanation, inexplicably departed from the established policies, or rests on an impermissible basis." Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigration and Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)). "We will 'decline[] to interfere with [such] matter of discretion unless it appears that an injustice has been done.'" St. James AME Dev. Corp. v. City of Jersey City, 403 N.J. Super. 480, 484 (App. Div. 2008) (alterations in original) (quoting Cooper v. Consol. Rail Corp., 391 N.J. Super. 17, 23 (App. Div. 2007)).

We initially express our agreement with the court, and defendants, that plaintiff's counsel's prosecution of this fairly ordinary personal injury action was hardly a model of diligence, but we disagree that the remedy selected by the court—permitting defendants to conduct discovery while denying plaintiff the same right—was appropriate under the circumstances.

As noted, in determining only defendants were entitled to continue discovery, the court effectively ended plaintiff's attempts, made within a week of the April 30, 2021 order granting extended discovery, to depose defendants

and obtain consent to extend the dates for service of expert reports. In doing so, the court relied almost entirely on Sprankle, a Law Division case discussing the standard for "reopening of discovery by and for a delinquent party where the complaint is reinstated following the [DED]." 388 N.J. Super. at 224. Although plaintiff belatedly complied with Luciano's discovery requests, we find plaintiff's discovery efforts upon receipt of the court's April 30, 2021 order meaningfully distinguishes this case from Sprankle, as plaintiff's efforts were made before the extended DED. To the extent plaintiff's deposition requests were untimely under the April 30, 2021 order, which set the end date for fact depositions by May 1, 2021, such deficiency can hardly be attributed to plaintiff solely, as she did not receive the court's order until after that date.

Additionally, it cannot be reasonably debated that the May 14, 2021 order resulted in the dismissal of plaintiff's complaint. Without a deposition of any party, or the opportunity to serve an expert report, dismissal was a foregone conclusion. That hardly seemed the correct course.

We have noted in the context of sanctions for discovery violations, dismissal of a claim for failure to comply with discovery is the "last and least favorable option." Il Grande v. DiBenedetto, 366 N.J. Super. 597, 624 (App. Div. 2004). Additionally, "[i]f a lesser sanction than dismissal suffices to erase

the prejudice to the non-delinquent party, dismissal of the complaint is not appropriate and constitutes an abuse of discretion." Georgis v. Scarpa, 226 N.J. Super. 244, 251 (App. Div. 1988); see also Robertet Flavors, Inc. v. Tri-Form Constr., Inc., 203 N.J. 252, 274 (2010) (recognizing dismissal as the ultimate sanction to be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party).

Here, a lesser sanction, one that would not have led to the inevitable dismissal of plaintiff's case, was appropriate, as quashing plaintiff's discovery efforts was not necessary to erase any prejudice suffered by defendants. As noted, discovery was extended until July 5, 2021, so unless the court granted summary judgment, depositions of plaintiff as well as expert discovery would have commenced, and could just as easily have continued with plaintiff affirmatively participating with little to no effect on the court's docket. Further, although plaintiff's counsel unquestionably failed to comply with the most basic discovery obligations, plaintiff's counsel certainly was not alone. Indeed, as noted, Paterson itself was apparently so deficient in providing discovery that it was subject to a motion to compel by Luciano, only withdrawn after it produced outstanding discovery.

Additionally, all parties consented to the extension of discovery, first from January 5, 2021, to March 6, 2021, and ultimately until July 5, 2021. And, although it would have been better practice for plaintiff to have prosecuted the case within the extension consented to by the parties, the fact remains the court did not enter the order until April 30, 2021, and did not provide it to the parties until May 2021. At that point, plaintiff's counsel requested depositions and an amendment of the discovery schedule to reflect the reality that expert reports could not be turned around immediately without depositions outstanding.

Further, even at that juncture, defendants apparently did not object to a discovery extension, only seeking additional time for the service of their reports. Not until plaintiff formally requested an additional extension to address the issue did defendants object to any extension for plaintiffs, not just to the proposed service date for their reports.

We recognize Rule 4:24-1(c) prohibits extension of the discovery period after an arbitration date is fixed, unless exceptional circumstances are shown. To establish exceptional circumstances:

> the moving party must satisfy four inquiries: (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within

> the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.
>
> [Rivers v. LSC P'ship, 378 N.J. Super. 68, 79 (App. Div. 2005).]

We are satisfied the court's failure to advise the parties of the extended DED, and the explanation provided by plaintiff that it failed in its discovery obligations, in part, due to confusion on the docket and its reasonable reliance on the extended end date, constituted exceptional circumstances such that Rule 4:24-1(c) did not preclude plaintiff from engaging in additional discovery.

Additionally, as the effect of the court's order prevented plaintiff from completing the outstanding discovery, we find it was similarly erroneous to have granted summary judgment to defendants. See Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003) ("Generally, summary judgment is inappropriate prior to the completion of discovery."); see also Velantzas v. Colgate-Palmolive Co., Inc., 109 N.J. 189, 193 (1988) ("When 'critical facts are peculiarly within the moving party's knowledge,' it is especially inappropriate to grant summary judgment when discovery is incomplete." (quoting Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981))).

Separately, we note deficiencies in both defendants' summary judgment motions under Rules 1:6-6 and 4:46-2(a), which should have precluded a grant of summary judgment in any event. Under Rule 4:46-2(a), a movant for summary judgment must provide a statement of material facts which "set[s] forth . . . a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted."

Paterson's Rule 4:46-2(a) statement of material facts was supported almost entirely by a certification of its counsel. We have stated "an attorney's sworn statement will have no bearing on a summary judgment motion when the attorney has no personal knowledge of the facts asserted." Gonzalez v. Ideal Tile Importing Co., Inc., 371 N.J. Super. 349, 358 (App. Div. 2004). Additionally, "[a]ffidavits by attorneys of fact not based on their personal knowledge but related to them by and with the primary knowledge of their clients constitute objectionable hearsay." Pressler & Verniero, Current N.J. Rules, cmt. 1 on R. 1:6-6 (2023); see also Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 599 (App. Div. 2011) ("A certification will support the grant of summary judgment only if the material facts alleged therein are based, as required by Rule 1:6-6, on 'personal knowledge.'"). Those facts supported solely

by Paterson's counsel are therefore insufficient to support summary judgment. We also note Paterson failed to include any citation to the record for its statements, among others, that it did not exercise control over the sidewalk or "have actual or constructive notice of any hazardous condition," thereby failing to satisfy Rule 4:46-2(a).

As to Luciano, his statement of material facts was supported by certification of counsel that appended answers to his interrogatories. Therein, as to liability, Luciano indicated that he "did not perform repairs to the subject property," and cited to an interrogatory which stated, "[Luciano] is without knowledge or information sufficient to form a belief as to whether anyone else made repairs to the premises or property."

We have recognized an abutting residential homeowner is liable "for the negligent construction or repair of the sidewalk by himself or by a specified predecessor in title or for direct use or obstruction of the sidewalk by the owner in such a manner as to render it unsafe for passersby." Wilson v. Jacobs, 334 N.J. Super. 640, 644 (App. Div. 2000) (quoting Yanhko v. Fane, 70 N.J. 528, 532 (1976)). We therefore find it appropriate that plaintiff be permitted to explore Luciano's lack of knowledge, information, and belief pertaining to any relevant sidewalk repairs.

In light of our decision, we reverse the orders on review and remand for further proceedings consistent with this opinion. On remand, the court shall enter an order permitting a reasonable extension of the discovery period for the parties to complete outstanding discovery, including the exchange of expert reports and the deposition of experts. Following the completion of discovery, the parties should be allowed sufficient time to file summary judgment motions. Our reversal of the June 11, 2021 summary judgment orders is without prejudice to all the parties' rights to make summary judgment motions following the completion of discovery.

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