SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1219-21

KIMBERLY A. KOPACZ,

Plaintiff-Appellant,

v.

ANGELO C. PLUCHINO and
GALAXY FAMILY, INC.,

Defendants-Respondents.

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Submitted May 22, 2023 – Decided June 20, 2023

Before Judges Gooden Brown and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2236-20.

Ramon A. Camejo, P.C., attorney for appellant (Ramon A. Camejo, of counsel and on the brief).

Nicolson Law Group LLC, attorneys for respondents (Kevin Michael O'Brien and Michael D. Sells, on the brief).

PER CURIAM

Plaintiff Kimberly Kopacz appeals from a November 19, 2021 Law Division order denying her motion to reinstate her personal injury complaint against defendants Angelo C. Pluchino and Galaxy Family, Inc. (Galaxy), and dismissing the complaint with prejudice. We reverse.

The complaint, filed June 19, 2020, stemmed from a multi-vehicle auto accident that occurred on October 16, 2018, on Route 440 in Bayonne. In the complaint, plaintiff alleged that she "sustained severe and permanent personal injuries" as a result of defendants' negligence in causing the car accident. According to the complaint, plaintiff "was stopped" on Route 440 when her vehicle was "forcefully struck" by Galaxy's truck, which was being operated by Pluchino.

The complaint alleged that Pluchino told "responding officers at the scene that prior to the accident he had advised Galaxy . . . that the vehicle was not functioning properly." Plaintiff also asserted in the complaint that "responding officers issued . . . Pluchino motor vehicle summonses for careless driving, driving with an expired license and driving while under the influence of drugs or alcohol." Further, "[f]ollowing the accident, [t]he Port Authority of New York and New Jersey's Commercial Vehicle Enforcement Unit conducted an inspection of the subject vehicle and found thirteen . . . violations."

On January 1, 2021, plaintiff's complaint was dismissed without prejudice for lack of prosecution. After successfully serving both defendants with the summons and complaint, plaintiff moved to reinstate her complaint to the active trial calendar pursuant to Rule 1:13-7(a), and to enter default judgment on the issue of liability because defendants had failed to file an answer. In pertinent part, Rule 1:13-7(a) states that "[a]fter dismissal, . . . [i]f the defendant has been properly served but declines to execute a consent order, plaintiff shall move on good cause shown for vacation of the dismissal." We have instructed trial courts that "absent a finding of fault by the plaintiff and prejudice to the defendant, a motion to restore under the rule should be viewed with great liberality." Ghandi v. Cespedes, 390 N.J. Super. 193, 197 (App. Div. 2007).

In opposing plaintiff's motion, defendants asserted in a letter brief that the October 16, 2018 multi-vehicle accident had also involved Evelyne Omwenga, who had filed a lawsuit on December 12, 2018, naming plaintiff, Pluchino, and Galaxy as defendants in negligently causing the accident.[1] Defendants stated that plaintiff had been dismissed from the Omwenga lawsuit pursuant to a

[1] In a subsequent certification submitted by plaintiff's counsel, he explained that the accident occurred when Pluchino "lost control of his vehicle and struck [plaintiff's] vehicle from the rear at an extremely high rate of speed." "After striking [plaintiff's] vehicle," Pluchino "struck [Omwenga's] vehicle," but "[plaintiff's] vehicle never came into contact with the Omwenga vehicle."

settlement agreement, and defendants "recently settled" with Omwenga after "almost three years of litigation." Defendants argued that "[d]espite being a [represented p]arty in the Omwenga action[]," plaintiff never made "a single allegation for personal injuries arising out of the . . . accident," failed "to demonstrate the requisite diligence and prudence sufficient to establish good cause," and provided no excuse for the delay. Further, defendants would be "severely prejudiced if [p]laintiff's [c]omplaint [was] reinstated." In the alternative, defendants requested time to file an answer so that the case could proceed on the merits.

Plaintiff's counsel submitted a certification in response to defendants' opposition. In the certification, plaintiff's counsel explained that "[his] office . . . was not prepared for the dramatic shift" to a remote working environment following Governor Murphy's executive order that "clos[ed] all non-essential businesses," and, "[a]s a result, many of [his] cases fell behind," including plaintiff's. Because "[t]hese were circumstances" out of plaintiff's and "[his] office's control," plaintiff's counsel maintained that "good cause and extraordinary circumstances exist[ed] to permit reinstatement of th[e] case." Plaintiff's counsel also averred that defendants would not be prejudiced because he had notified the insurance carriers of all parties of plaintiff's injuries within

two months of the accident, and defendants never filed a motion to dismiss the complaint "with prejudice" either before or in response to plaintiff's motion to reinstate her complaint.

During oral argument conducted on November 19, 2021, without addressing the merits of plaintiff's motion to reinstate, the motion judge immediately pressed plaintiff's counsel to explain "why . . . the entire controversy doctrine" did not "preclude . . . plaintiff from starting a whole new lawsuit" given that her June 19, 2020 complaint against defendants "relate[d] to the underlying matter of the automobile accident . . . , which was recently settled by everybody." Among other things, plaintiff's counsel stated the entire controversy doctrine "was[not] raised in [defendants'] . . . opposition." While defense counsel was placing his position on the record by arguing that plaintiff did not "establish good cause" to allow her to reinstate her complaint, the judge interrupted defense counsel and told him he "want[ed] to focus" on the entire controversy doctrine.

Following oral argument, despite noting that defendants "did not argue specifically" the entire controversy doctrine, the judge denied plaintiff's motion to reinstate her complaint and dismissed the complaint with prejudice based on

the entire controversy doctrine's "claim joinder mandate" codified in Rule 4:30A.[2] In an oral opinion, the judge explained:

> The claim joinder part of [the] entire controversy doctrine . . . generally requires all aspects of a controversy between those who are parties to a litigation be included in that civil litigation. . . .
>
> . . . [I]s there a transactional nexus here? Obviously there is, there was an auto accident, there were personal injury claims asserted[by] . . . Omwenga . . . , that went on until at least the fall of 2021.
>
> Before that case was settled, while it was ongoing, while [plaintiff] was a party to that case, . . . plaintiff started a second separate lawsuit . . . in June of 2020, . . . while the first case [was] not yet settled[.] . . . [F]or some reason . . . plaintiff . . . did not even try to amend and bring in cross-claims or assert any personal injury claims in that first case. So it all related to the underlying transaction.
>
> Would it be fair to bar her from this? The answer to me is yes. Why? Because settlement discussions in the first case could have been significantly different if there are a number of people claiming personal injuries . . . .
>
> Certainly [plaintiff] can[not] argue that she did not know about her claims . . . while the first case was

[2] The judge noted that "many of the equitable principles" raised by defendants in their opposition "would support . . . [his] conclusions regarding the equitable nature of the [entire controversy] doctrine."

> ongoing[because] she filed this lawsuit in June of [20]20, and the first case was ongoing.
>
> Now, if we[are] going to promote avoid[ing] fragmentation of litigation[,] this is the best example of fragmenting litigation. [Plaintiff] is named as a defendant in 2018 in a car accident that happened in 2018. She decides not to bring all her claims in the one lawsuit involving all the drivers of the car[s] and everybody who is or is[not] at fault or may or may not be at fault, she decides to start a separate lawsuit.
>
> If there had been liability questions in play, I do[not] know if there were, you might have two different juries reaching different liability conclusions. Settlement discussions are clearly affected when there may be more than one party seeking damages against another party. So if we[are] going to avoid fragmentation of litigation[,] this is not the kind of case that we can permit.

The judge memorialized his decision in a November 19, 2021 order and this appeal followed.

On appeal, plaintiff challenges the dismissal of her complaint, principally arguing that the procedure utilized by the judge to dismiss her complaint deprived her of due process and violated court rules. First, plaintiff asserts that the judge's sua sponte invocation of the entire controversy doctrine deprived her of notice and a meaningful opportunity to be heard on the issue because defendants never raised the entire controversy doctrine in their opposition to plaintiff's motion to reinstate.

Second, plaintiff argues that the judge acted inappropriately by raising sua sponte the entire controversy doctrine "without affording . . . [d]efendants the opportunity to plead or waive the [affirmative] defense." See B.F. v. Div. of Youth & Fam. Servs., 296 N.J. Super. 372, 383 (App. Div. 1997) (observing that "the entire controversy doctrine is an affirmative defense which is 'waived if not pleaded or otherwise timely raised,'" and holding that "the trial court erred in raising the matter on its own motion." (quoting Brown v. Brown, 208 N.J. Super. 372, 384 (App. Div. 1986))). Because we agree that by raising the entire controversy doctrine sua sponte during oral argument, the judge failed to provide plaintiff with proper notice and a meaningful opportunity to defend her complaint, we reverse.

"Due process is not a fixed concept . . . but a flexible one that depends on the particular circumstances." Doe v. Poritz, 142 N.J. 1, 106 (1995). "[A]t a minimum, due process requires that a party in a judicial hearing receive 'notice defining the issues and an adequate opportunity to prepare and respond.'" J.D. v. M.D.F., 207 N.J. 458, 478 (2011) (quoting H.E.S. v. J.C.S., 175 N.J. 309, 321 (2003)).

In Klier v. Sordoni Skanska Construction Co., 337 N.J. Super 76 (App. Div. 2001), after the plaintiff was injured in the course of his employment at a

construction site, he and his wife asserted personal injury and derivative claims against the defendant general contractor. Id. at 80. On the day of trial, the trial judge expressed "serious concerns about the cause of action." Id. at 81. As a "'shortcut'" to ordinary motion practice, the judge directed plaintiffs' counsel to proffer on the record "'the best case'" that he expected to prove at trial, after which the judge would decide if the claim was sustainable applying the standard for deciding a motion to dismiss at the end of a plaintiff's case. Id. at 81-82.

After plaintiffs' counsel informed the judge that "he was not 'prepared to argue th[e] motion,'" the judge adjourned the argument for two days to give counsel an "opportunity to prepare, and to submit his expert's report." Id. at 82. When the parties returned two days later and presented their arguments, the judge determined that the evidence presented was insufficient to support the plaintiffs' claims against the defendant and dismissed the plaintiffs' complaint. Ibid.

On appeal, we reversed and remanded for further proceedings. Id. at 93. We held that "the trial judge erred in sua sponte instituting the summary procedure and dismissing [the plaintiffs'] complaint." Id. at 83. We explained that "[s]hortcuts should not be utilized at the expense of justice" and noted that, at a minimum, "due process of law" required that the plaintiffs be afforded

"notice" and "an opportunity to be heard at a meaningful time and in a meaningful manner." Id. at 83-84. To that end, we explained that "our rules of court contemplate that motions be made in writing" and "ordinarily, . . . must be filed and served not later than sixteen days before a specified return date." Id. at 84 (first citing R. 1:6-2(a); and then citing R. 1:6-3(a)).

We expressly rejected "a procedure whereby a judge sua sponte, without notice to a party, resorts to a 'shortcut' for the purposes of 'good administration' and circumvents the basic requirements of notice and opportunity to be heard." Id. at 84-85. We pointed out that "[the] plaintiff[s] came to court prepared to pick a jury, but rather, was required to defend a motion, brought by the court sua sponte, to dismiss his complaint." Id. at 84. We concluded that the two-day adjournment "was insufficient to remedy the defect in the judge's procedure." Ibid.

Likewise, here, the judge's sua sponte invocation of the entire controversy doctrine as grounds to dismiss plaintiff's complaint contravened the basic principles of due process and circumvented the court rules. Contrary to Rule 1:6-2(a), when the judge adjudicated plaintiff's motion to reinstate, there was no pending motion filed by defendants to dismiss plaintiff's complaint. The only pending motion was plaintiff's motion to reinstate. As a result, plaintiff

came to court prepared to argue the merits of her reinstatement motion and counter the points raised in defendants' reply letter brief, but instead was required to defend a motion to dismiss based on the entire controversy doctrine that was raised sua sponte by the judge.

When the judge decided not to address the merits of plaintiff's motion to reinstate and instead "focus" his attention on the entire controversy doctrine, the judge should have adjourned the hearing and provided plaintiff "with a meaningful opportunity to respond." Klier, 337 N.J. Super. at 84. By failing to provide plaintiff with "sufficient advance notice of the application for dismissal" and then dismissing the complaint on his own, the judge "circumvent[ed] the basic requirements of notice and opportunity to be heard." Id. at 84-85.

Therefore, we reverse the judge's order dismissing plaintiff's complaint with prejudice on entire controversy grounds and remand the matter for the judge to consider plaintiff's motion to reinstate her complaint on the merits pursuant to Rule 1:13-7(a). Based on our decision, we need not address plaintiff's remaining arguments. As we did in Aikens v. Schmidt, 329 N.J. Super. 335 (App. Div. 2000), we also decline to "confront the questions of whether, how and when the entire controversy doctrine may be raised or applied sua sponte by a trial court in the cause of '[j]udicial economy and efficiency—

the avoidance of waste and delay.'" Id. at 341 (alteration in original) (quoting Cogdell ex rel. Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 23 (1989)). Nonetheless, because the entire controversy doctrine is an affirmative defense under Rule 4:5-4, Aikens, 329 N.J. Super. at 341, on remand, defendants are free to plead or file a motion to dismiss plaintiff's complaint on entire controversy grounds. In so doing, plaintiff will have notice and a meaningful opportunity to raise any equitable arguments opposing the doctrine's application.

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