

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1941-22**

**ANA C. CORDERO and
WILLIAM CORDERO,
per quod,¹**

Plaintiffs-Appellants,

v.

**BOGOPA WEST NEW YORK,
INC., d/b/a FOOD BAZAAR,**

Defendant-Respondent.

Argued May 17, 2023 – Decided July 3, 2023

Before Judges Vernoia and Firko.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3046-21.

Gabriel F. Luaces argued the cause for appellant (Alum, Ferrer, Diaz & Luaces, attorneys; Gabriel F. Luaces, on the briefs).

¹ William Cordero is no longer a party to this action and is not participating in this appeal.

Marissa Bosek argued the cause for respondent (Rawle & Henderson LLP, attorneys; Marissa Bosek, on the brief).

PER CURIAM

By way of leave granted, plaintiff Ana C. Cordero challenges a February 3, 2023 Law Division order denying her motion for reconsideration of a January 6, 2023 order granting defendant Bogopa West New York, Inc., doing business as Food Bazaar's motion to vacate an order striking its answer and extending discovery. For the reasons that follow, we reverse and remand.

I.

On August 19, 2019, plaintiff alleges she slipped and fell on water that accumulated in the frozen food section of defendant's store in West New York and sustained injuries. On July 31, 2021, plaintiff filed a complaint against defendant alleging negligence for causing a dangerous and hazardous condition to exist and failing to provide proper safeguards and warnings on its premises. She seeks compensatory damages for her injuries, unpaid medical expenses, and lost wages. Defendant's prior counsel filed an answer denying the allegations in the complaint and setting forth affirmative defenses. An amended complaint was filed five months later alleging the same causes of action but changing the

designation of trial counsel pursuant to Rule 4:25-4, and demanding various items of discovery, including expert reports.

The matter was assigned to Track II. The original discovery end date (DED) was June 26, 2022. By consent of the parties, the DED was extended to August 26, 2022. Defendant filed a motion to extend the DED, but the motion was denied because defendant failed to delineate the specific outstanding discovery that needed to be completed and did not set forth the specific dates by which to complete such discovery in its proposed form of order in violation of Rule 4:24-1(c).

Plaintiff then filed a motion to extend the DED. On August 26, 2022, the court entered an order granting a ninety-day extension until November 24, 2022, to complete paper discovery and depositions of four corporate witnesses on dates certain set forth by the court in the order. The order also provided that plaintiff was to serve any expert reports by October 1, 2022; defendant had to serve any expert reports by November 15, 2022; plaintiff had to serve any supplemental expert reports by November 20, 2022; and expert witness depositions had to be completed by November 24, 2022. The court stated in the order it found "good cause" to extend discovery. The August 26, 2022 order clearly states in typed letters, "[a]rbitration is scheduled for January 5, 2023,"

and "[n]o additional discovery other than listed herein, is permitted without leave of court." (emphasis added).

On November 8, 2022, plaintiff's counsel was served with an independent medical examination (IME) notice, seventeen days prior to the expiration of the DED. On November 10, 2022, defendant filed a motion to extend discovery returnable December 2, 2022, eight days after the DED, in violation of Rule 4:24-1(c). On November 21, 2022, plaintiff filed opposition to the motion and a notice of cross-motion to strike defendant's answer and affirmative defenses for failure to provide discovery and produce the four corporate witnesses for depositions.

On December 2, 2022, the court denied defendant's motion to extend discovery. The court's order states defendant's motion failed to append the prior discovery orders in violation of Rule 1:6-2(a). The order noted "[a]rbitration remains on 1/5/23." Defendant claims it was never served with plaintiff's cross-motion. The cross-motion to strike was granted as unopposed.

Thereafter, defendant filed a motion to vacate the order to strike and extend the DED. On January 6, 2023—the day after the arbitration was

concluded and an award was entered²—the court filed an order providing the following relief: (1) extending the DED for an additional 120 days until April 23, 2023; (2) providing dates certain for the depositions of the four corporate witnesses; (3) ordering plaintiff to appear for an IME on January 16, 2023; (4) ordering plaintiff to serve any expert reports by February 24, 2023; (5) ordering defendant to serve any expert reports by April 10, 2023; (6) ordering expert witness depositions to be taken by April 23, 2023; and (7) vacating the December 2, 2022 order striking defendant's answer.

The court stated in its order that "exceptional circumstances exist to permit the listed discovery" pursuant to Rule 4:24-1(c). The court also stated the "[a]rbitration is adjourned and to be rescheduled at the expiration of the [DED]," which was inaccurate because the arbitration took place on January 5, 2023.

Plaintiff moved for partial reconsideration of the court's January 6, 2023 order and requested oral argument. Plaintiff claimed the court misapplied the applicable standard to extend discovery after the setting of an arbitration or trial

² At oral argument, plaintiff's counsel advised the arbitration proceeded on January 5, 2023, and defendant filed for a trial de novo. Plaintiff's counsel also advised that his client underwent an IME in mid-January 2023 after the arbitration was held in compliance with the court's January 6, 2023 order.

date, which is "exceptional circumstances." Plaintiff contended defendant might have met the "good cause" standard for reinstatement of its answer and affirmative defenses, but not the "exceptional circumstances" standard, which was misapplied by the court in vacating the December 2, 2022 order and extending discovery.

Plaintiff did not oppose reinstatement of defendant's answer and affirmative defenses, asserting the standard is "lower" for such relief than for an extension of the DED once an arbitration date is set. Defendant opposed the motion for partial reconsideration claiming plaintiff's goal was to preclude defendant from introducing an IME or other expert testimony at trial. The court denied plaintiff's request for oral argument.

On February 3, 2023, the court denied plaintiff's motion for partial reconsideration. The order states as follows:

Denied. The [c]ourt is not persuaded by [m]ovant's "statement of the matters or controlling decision that counsel believes the court has overlooked or as to which it has erred." R. 4:49-2. Movant argues that the [c]ourt misapplied the exceptional circumstances standard to [d]efendant's motion, which was returnable on January 6, 2023. The [c]ourt disagrees.

Pursuant to R[ule] 4:24-1(c), "[n]o extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown." R. 4:24-1(c).

While [d]efendant did not argue the exceptional circumstances standard, the [c]ourt found that the following circumstances constituted exceptional circumstances:

Defendant rectified the outstanding discovery to reinstate its pleading, thus providing [p]laintiff with the discovery she needed. Upon doing so, [d]efendant indicated to the [c]ourt that it needed discovery and, consequently, more time to complete that discovery.

On appeal, plaintiff argues the court violated her procedural due process rights by failing to schedule oral argument on defendant's motion to vacate and extend discovery and in connection with her motion for partial reconsideration under Rule 1:6-2. Plaintiff also contends the court erred in denying her motion for partial reconsideration because defendant has not and cannot establish or articulate exceptional circumstances as required by Rule 4:24-1(c) for vacatur of the court's December 2, 2022 order.

II.

A.

We discern no violation of plaintiff's procedural due process rights by the court deciding defendant's motion to vacate and extend discovery and her motion for partial reconsideration on the papers. The motions related to discovery matters and scheduling issues, and were not dispositive in nature. Rule 1:6-2(d)

provides that a request for oral argument on a discovery motion "shall be considered only if accompanied by a statement of reasons," and plaintiff offered none. As such, the court was not obligated to consider her requests for oral argument; plaintiff was not entitled to oral argument; and the court did not err by deciding the motions without oral argument. R. 1:6-2(d). We discern no violation of plaintiff's procedural due process rights because plaintiff had no presumptive right to oral argument on her motion.

B.

We next address the denial of plaintiff's motion for partial reconsideration. "In reviewing trial court decisions related to matters of discovery, we apply an abuse of discretion standard." Conn v. Rebutillo, 445 N.J. Super. 349, 352 (App. Div. 2016). "That is, '[w]e generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion[,] or its determination is based on a mistaken understanding of the applicable law.'" Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011) (first alteration in original) (quoting Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div. 2005)). This deferential standard applies to discovery extensions. Ibid. "However, 'we review legal determinations based on an interpretation of our court rules de novo.'" Hollywood Café Diner, Inc. v. Jaffee, 473 N.J. Super.

210, 216-17 (App. Div. 2022) (quoting Occhifinto v. Olivo Constr. Co., 221 N.J. 443, 453 (2015)).

Pursuant to Rule 4:24-1(c), parties may consent to a sixty-day discovery extension "prior to the expiration of the discovery period." Id. at 217 (quoting R. 4:24-1(c)). However, "[i]f the parties do not agree or a longer extension is sought, a motion for relief shall be filed . . . and made returnable prior to the conclusion of the applicable discovery period." R. 4:24-1(c). "The 'good cause' standard applies to motions to extend discovery unless an arbitration or trial date is fixed." Tynes v. St. Peter's Univ. Med. Ctr., 408 N.J. Super. 159, 168 (App. Div. 2009) (quoting Leitner v. Toms River Reg'l Schs., 392 N.J. Super. 80, 91-92 (App. Div. 2007)). "[T]he 'exceptional circumstances' standard only applies when the court has fixed an arbitration or trial date." Id. at 169; accord R. 4:24-1(c) ("No extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown.").

However, "when [a] court chooses to send out arbitration and trial notices during the discovery period, judges evaluating a timely motion to extend discovery may not utilize the 'exceptional circumstances' standard, but rather the judge 'shall enter an order extending discovery' upon a showing of 'good cause.'" Hollywood, 473 N.J. Super. at 220 (quoting R. 4:24-1(c)). Here, defendant's

motion to extend the DED was untimely filed. Thus, the exceptional circumstances standard applies.

In the matter under review, the court mistakenly applied the good cause standard rather than the exceptional circumstances test when it granted defendant's motion to vacate the order striking its answer and affirmative defenses and extending discovery beyond the arbitration date. We therefore conclude the court abused its discretion.

Defendant's motion to extend discovery was filed before the DED, but was made returnable after the DED. Accordingly, it was untimely. See R. 4:24-1(c) (to be timely, a motion to extend discovery must be "filed . . . and made returnable prior to the conclusion of the applicable discovery period"). Defendant failed to make any showing of the exceptional circumstances required to extend discovery after the January 5, 2023 arbitration date had been set five months earlier in the August 26, 2022 order.

As stated, defendant's motion to extend the DED was untimely as it was returnable after the DED. Moreover, the August 26, 2022 order that set the November 24, 2022 DED also clearly scheduled the arbitration for January 5, 2023. Therefore, counsel was on notice that an arbitration date was scheduled, and the exceptional circumstances standard applied.

Under that standard, the movant must demonstrate:

- (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, 378 N.J. Super. at 79 (citing Vitti v. Brown, 359 N.J. Super. 40, 51 (Law Div. 2003)).]

The record does not support the court's finding that defendant established exceptional circumstances warranting a discovery extension. Defendant clearly did not meet the first, third, and fourth prongs of the standard. Consequently, the court abused its discretion warranting reversal.

We further find that defendant's motion to extend the DED still fails under the less rigorous good cause standard. We have identified the following non-exhaustive list of factors courts may consider in determining whether good cause to extend discovery exists:

- (1) the movant's reasons for the requested extension of discovery;

- (2) the movant's diligence in earlier pursuing discovery;
- (3) the type and nature of the case, including any unique factual issues which may give rise to discovery problems;
- (4) any prejudice which would inure to the individual movant if an extension is denied;
- (5) whether granting the application would be consistent with the goals and aims of "Best Practices";
- (6) the age of the case and whether an arbitration date or trial date has been established;
- (7) the type and extent of discovery that remains to be completed;
- (8) any prejudice which may inure to the non-moving party if an extension is granted; and
- (9) what motions have been heard and decided by the court to date.

[Bldg. Materials Corp. of Am. v. Allstate Ins. Co., 424 N.J. Super. 448, 480 (App. Div. 2012) (quoting Tynes, 408 N.J. Super. at 169-70).]

Applying these factors, the record shows that defendant did not establish good cause for a discovery extension. Our court rules have specific requirements for parties to designate expert witnesses during discovery. Rule 4:17-4(e) requires parties to provide opposing parties with the names, qualifications, and expert reports if requested by interrogatory. Here, plaintiff

requested expert disclosure in her pleadings at the onset of the case. Defendant did not name any medical experts or provide any expert reports despite being requested to do so by interrogatory. In turn, Rule 4:17-7 requires amendments to answers to interrogatories to

be served not later than [twenty] days prior to the end of the discovery period, as fixed by the track assignment or subsequent order. Amendments may be allowed thereafter only if the party seeking to amend certifies therein that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the [DED]. In the absence of said certification, the late amendment shall be disregarded by the court and adverse parties.

"The obvious purpose of these disclosure requirements for anticipated experts is to promote fair advocacy and to discourage gamesmanship or unfair surprise at trial." Rice v. Miller, 455 N.J. Super. 90, 105 (App. Div. 2018). Defendant did not amend its answers to interrogatories by naming a medical expert or providing an IME report.

Despite multiple prior discovery extensions, some 600 days of discovery, and months to name medical experts after learning plaintiff alleged injuries from the fall to her cervical spine, lumbar spine, and shoulder, which required arthroscopic surgery, defendant had still not named any medical experts or served any medical expert reports. When pressed for the reason for that failure,

defendant only offered that it had changed counsel during the course of the litigation. We have held that a change in counsel is not a basis to reopen discovery after the court permitted an extensive period of discovery. Dunn v. Praiss, 256 N.J. Super 180, 190-91 (App. Div. 1992).

Defendant's reasons for seeking the discovery extension are not persuasive. The failure to schedule an IME and name any medical experts despite the passage of 600 days of discovery in a simple slip and fall case bespeaks a lack of diligence and the absence of good cause. See Tynes, 408 N.J. Super. at 176 (finding the plaintiffs failed to establish good cause for a further discovery extension, noting the plaintiffs "failed to produce expert reports to support their claims" despite "numerous discovery extensions"). This case does not involve unique liability or medical issues giving rise to discovery problems. Granting the application would not have been consistent with the goals and aims of "Best Practices."

In sum, defendant did not demonstrate exceptional circumstances or good cause to further extend discovery to conduct an IME of plaintiff. Moreover, plaintiff would be prejudiced if defendant was permitted to utilize an IME report obtained after the arbitration and on the eve of trial. The provisions of Rule 4:24-1(c) are "clear and unambiguous." Tynes, 408 N.J. Super. at 168.

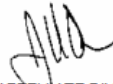
Accordingly, we reverse the denial of plaintiff's motion for partial reconsideration. Therefore:

- (1) the February 3, 2023 order is reversed;
- (2) the January 6, 2023 order is reversed insofar as it granted defendant's motion to extend the DED and rescheduled the arbitration date because the arbitration was concluded on January 5, 2023. Defendant is barred from producing any liability or medical expert testimony at trial and may not utilize the IME plaintiff underwent on January 16, 2023, for any purpose at trial; and
- (3) the January 6, 2023 order will stand insofar as it reinstated defendant's answer and affirmative defenses.

The court shall schedule the matter for trial.

Reversed and remanded for proceedings consistent with our opinion. 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