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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2222-21

ZAWA INVESTMENT, LLC,

Plaintiff-Appellant,

v.

HS INVESTMENT GROUP, INC.,
HL INVESTMENT GROUP, INC.,
HSL PHOENIX REALTY
HOLDING, INC., KATIE MANH,
STELLA LAM, and HUY LAM,

Defendants-Respondents,

and

STATE OF NEW JERSEY,

Defendant.

Argued September 14, 2023 – Decided October 19, 2023

Before Judges Vernoia, Gummer and Walcott-
Henderson.

On appeal from the Superior Court of New Jersey,
Chancery Division, Cumberland County, Docket No.
F-000784-21.

Shirley Grasso argued the cause for appellant (Law Offices of Shirley Grasso, attorneys; Ashton C. Hartline, on the briefs).

Phong N. Tran argued the cause for respondents (Tran & Tran Law Firm, LLC, attorneys; Phong N. Tran, on the brief).

PER CURIAM

In this mortgage foreclosure matter, plaintiff Zawa Investment, LLC (Zawa) appeals from an order dismissing its complaint, with prejudice, pursuant to Rule 4:6-2(e), declaring void and striking a \$1,453,380 mortgage, and awarding attorney fees to defendants. Plaintiff also appeals from a March 4, 2022 order denying its motion for reconsideration. We reverse and remand.

On February 16, 2021, plaintiff filed a foreclosure complaint alleging Stella and Huy Lam are shareholders or officers of defendant HS Investment Group, Inc. (HS), the owner of property located at 3821 South Main Road, Vineland. The complaint further alleged HS was indebted to it in the amount of \$1,453,380, having earlier executed a promissory note in plaintiff's favor secured by a mortgage on the Vineland property (the Zawa Mortgage).

In response to the complaint, defendants filed a fifty-page "Answer, Counterclaims, and Cross-claims." Defendants asserted an alleged "fraudster," Tien Tran, had signed the Zawa mortgage without defendants' authority or knowledge. According to defendants, HS was not aware of the mortgage until

two years after it was executed and had understood only that Tran had "arranged for an unsecured loan . . . [which] was either an informal loan directly by himself or by or with his business partner(s)." In their counterclaims, defendant pleaded causes of action for fraud, intentional infliction of emotional distress, and frivolous litigation. Defendants sought rescission of the Zawa mortgage and a declaration by the court that the note and Zawa mortgage were "void ab initio because they were fraudulent."

The court conducted four case management conferences from March through August of 2021. The court granted plaintiff's counsel's motion to withdraw on October 1, 2021. On October 15, 2021, defendants moved for an order dismissing the complaint with prejudice, striking the mortgage from the record, and declaring the mortgage and promissory note void ab initio. In their notice of motion, defendants did not indicate the court rule on which they based their motion. In support of the motion, defendant submitted several documents and the twelve-page certification of Stella Lam in which she made extensive factual assertions. After a single thirty-day adjournment, the court heard argument and, having denied a second adjournment request and confirmed no opposition had been filed, dismissed plaintiff's complaint with prejudice and awarded attorney fees and the affirmative relief requested by defendants, including a declaration that the Zawa mortgage and note were void and direction

that the mortgage be stricken from the records of the recorder of deeds. The court later denied plaintiff's reconsideration motion. This appeal followed.

On appeal, plaintiff contends the court erred in denying it an additional adjournment to seek new counsel and by granting the defendants' motion and dismissing the complaint with prejudice when plaintiff did not have a fair opportunity to oppose it.

Generally, adjournments are left to the discretion of the trial court and will not lead to reversal unless the defendant suffered a manifest wrong or injury. State v. Miller, 216 N.J. 40, 65 (2013); State v. Hayes, 205 N.J. 522, 537 (2011); Escobar-Barrera v. Kissin, 464 N.J. Super. 224, 233 (App. Div. 2020). We review the trial court's denial of an adjournment for abuse of discretion. A&M Farm & Garden Ctr. v. Am. Sprinkler Mech., LLC, 423 N.J. Super. 528, 534 (App. Div. 2012). Although the concept is difficult to define, "[a]n 'abuse of discretion is demonstrated if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment.'" In re Est. of Ehrlich, 427 N.J. Super. 64, 76 (App. Div. 2012) (quoting United Hearts, LLC v. Zahabian, 407 N.J. Super. 379, 390 (App. Div. 2009)).

Here, the court granted the initial thirty-day adjournment of the return date of defendants' motion after a purported representative of Zawa—Ramon

Rodriguez—appeared at oral argument and requested time to procure new counsel. The day before the next scheduled hearing, Rodriguez requested an additional adjournment, stating he had been unable to retain counsel. The court denied this second request to adjourn the motion.

As a preliminary matter, plaintiff contends the court erred in hearing defendants' motion to dismiss while plaintiff—a limited liability company—was unrepresented and had requested an additional adjournment to secure new counsel.

At the motion hearing on December 17, 2021, Rodriguez appeared, via Zoom audio, without counsel and again requested an adjournment to obtain counsel, identifying himself as plaintiff's "owner." In response, defense counsel asserted to the court that a different person, "Mr. Zaza," was plaintiff's owner. After attempting to administer the oath to Rodriguez, who refused to be administered the oath, the court did not explore whether plaintiff was a sole proprietorship that did not require counsel. See R. 1:21-1(c); Globe Media Grp., LLC v. Cisneros, 403 N.J. Super. 574, 577 (App. Div. 2008).

Instead, the court apparently accepted defense counsel's representation that "Mr. Zawa" was plaintiff's owner and every other representation made by defense counsel and by Stella Lam. The court denied the request for an adjournment; made factual findings, including that the complaint was based on

fraud and misrepresented statements by a third party, defendants had not learned about the existence of the note and mortgage until two years after they were executed, and Tran was a "fraudster"; dismissed the complaint with prejudice; granted the affirmative relief sought by defendants in their counterclaims; and awarded defendants \$52,500 in counsel fees and costs. In granting that extensive relief, the court did not cite any case law and mentioned only Rules 4:6-2(e) and 4:23-5(a), neither of which provides for the granting of the affirmative relief sought in the counterclaims.

Under these circumstances, we conclude the court abused its discretion in denying plaintiff's adjournment request. In a matter with allegations concerning multiple complex transactions involving the parties and outside individuals, plaintiff understandably needed additional time to retain counsel. Granting only one thirty-day adjournment request was not enough and deprived plaintiff of a fair opportunity to respond not only to defendants' motion to dismiss the complaint but also to defendant's demand the court award them the affirmative relief requested in their counterclaims.

Our review of a decision on a Rule 4:6-2(e) motion to dismiss for failure to state a claim upon which relief can be granted is de novo. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (citing Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108

(2019)). We "must examine 'the legal sufficiency of the facts alleged on the face of the complaint,' giving the plaintiff the benefit of 'every reasonable inference of fact.'" Ibid. (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). To determine the adequacy of a pleading, we must determine "whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown, 116 N.J. at 746 (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). Moreover, a Rule 4:6-2(e) dismissal is typically without prejudice, but "a dismissal with prejudice is 'mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted,'" Mac Prop. Grp. LLC v. Selective Fire Cas. Ins. Co., 473 N.J. Super. 1, 17 (App. Div. 2022) (quoting Rieder v. State, 221 N.J. Super. 547, 552 (App. Div. 1987)), or if discovery will not give rise to the claim. Ibid. (citing Dimitrakopoloulos, 237 N.J. at 107). Under that standard, instead of granting the motion and dismissing the complaint with prejudice, the court should have denied the motion because plaintiff's complaint clearly set forth a cause of action for foreclosure.

Instead of applying the correct standard for determining a dismissal motion, see Printing Mart-Morristown, 116 N.J. at 746, the court accepted all of defendants' factual assertions as true and granted the motion—which was unopposed because the court had granted plaintiff's counsel's motion to

withdraw and had not given plaintiff sufficient time to secure new counsel—as if it were a motion for summary judgment. We recognize that if a Rule 4:6-2(e) motion is based on matters outside the pleading, a court may view the motion as a summary-judgment motion provided "all parties shall be given reasonable notice of the court's intention to treat the motion as one for summary judgment and a reasonable opportunity to present all material pertinent to such a motion." Plaintiff was given neither reasonable notice nor a reasonable opportunity to present all material pertinent to the motion with the assistance of counsel.

The court also abused its discretion in granting defendants' motion based on Rule 4:23-5(a). "[A]ppellate courts '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.'" State v. Brown, 236 N.J. 497, 521 (2019) (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)). However, "[i]t is a tenet of our jurisdiction that resolution of disputes on the merits are to be encouraged[,] rather than resolution by default for failure to comply with procedural requirements." The Trust Co. of N.J. v. Sliwinski, 350 N.J. Super. 187, 192 (App. Div. 2002) (citing Aujero v. Cirelli, 110 N.J. 566, 573–74 (1988)).

Rule 4:23-5(a) provides a two-step procedure for parties to request the dismissal of an opposing party's pleading for failure to provide discovery. First,

"the party entitled to discovery may . . . move, on notice, for an order dismissing or suppressing the pleading of the delinquent party." R. 4:23-5(a)(1). The court may then dismiss without prejudice the delinquent party's pleading. Ibid.

Second, if the delinquent party fails to cure the outstanding discovery deficiencies within sixty days of the order, the moving party may request the court dismiss the delinquent party's pleading with prejudice. R. 4:23-5(a)(2). "Meticulous attention" must be paid to the "critical prescriptions" of the Rule. Zimmerman v. United Servs. Auto. Ass'n, 260 N.J. Super. 368, 376-77 (App. Div. 1992). As stated in the comments to Rule 4:23-5:

Strict adherence to the procedural prerequisites of paragraph (a) is required before an order of dismissal with prejudice may be entered. Zimmerman v. United Services Auto., 260 N.J. Super. 368 (App. Div. 1992). Accordingly, when a mode of discovery is subject to the rule, the dismissal on the first motion must be without prejudice and will be so construed even if the order was erroneously entered as a dismissal with prejudice. Sullivan v. Covering & Install., 403 N.J. Super. 86, 95-97 (App. Div. 2008).

[Pressler & Verniero, Current N.J. Court Rules, cmt. 1.5 on R. 4:23-5 (2023).]

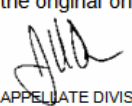
Here, the record indicates defendants did not first move for dismissal with prejudice as a discovery sanction. The court erred by dismissing plaintiff's complaint with prejudice, without giving plaintiff an opportunity to cure its deficiency, especially given plaintiff's unrepresented status. Nor was plaintiff

given appropriate notice that in deciding defendants' motion, the court could dismiss its complaint with prejudice for its discovery deficiencies because defendants did not move for relief under the Rule.

For these reasons, we find the court abused its discretion and erred by denying plaintiff's adjournment request, dismissing plaintiff's complaint with prejudice, and granting defendants summary judgment on their counterclaims. Because we reverse that order, it is unnecessary to address plaintiff's argument the court erred by denying its motion for reconsideration. Accordingly, we reverse the order granting defendants' motion to dismiss plaintiff's complaint, awarding summary judgment on defendants' counterclaims, striking the Zawa mortgage, and awarding defendants counsel fees. The court shall promptly conduct a case management conference to address the manner in which the matter shall proceed on remand. Our opinion shall not be interpreted as expressing an opinion on the merits of any claims asserted in the complaint and counterclaims.

Reversed and remanded for further proceedings not inconsistent with this 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