SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2785-21

THERESA C. GRABOWSKI,

Plaintiff-Appellant,

v.

WILLIAM BASKAY,
and AMANDA CARLSON
BASKAY, i/j/s/a,

Defendants-Respondents.

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Argued May 30, 2023 – Decided June 7, 2023

Before Judges Haas and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-0736-19.

Andrew T. Cupit argued the cause for appellant.

Ted M. Rosenberg argued the cause for respondent William Baskay (Ted M. Rosenberg, attorney; Ted M. Rosenberg and Robert M. Rosenberg, on the brief).

Daniel L. Mellor argued the cause for respondent Estate of Amanda Carlson Baskay (Kulzer & DiPadova, PA, attorneys; Daniel L. Mellor, on the brief).

PER CURIAM

This case returns to us after remand proceedings directed by our previous opinion. See Grabowski v. Baskay, No. A-2655-19 (App. Div. July 9, 2021, certif. denied, 249 N.J. 68 (2021)). Following oral argument, the trial court granted defendants William Baskay's and Amanda Carlson Baskay's[1] motions for summary judgment and dismissed plaintiff Theresa C. Grabowski, Esq.'s complaint seeking to recover counsel fees from defendants. The court dismissed Grabowski's complaint because she did not provide defendants with pre-action notice of their right to request fee arbitration as required by Rule 1:20A-6. The court also denied Grabowski's motion to amend her complaint.

Grabowski now appeals the court's February 3, 2022 orders granting defendants' motions for summary judgment and denying her cross-motion for summary judgment. She also challenges the court's April 1, 2022 order denying her motion for reconsideration. After reviewing the record in light of the contentions advanced on appeal, we affirm.

[1] Amanda died during the pendency of Grabowski's prior appeal and Amanda's estate was substituted into the case in July 2020. Because defendants shared the same surname, we refer to them individually by their first names and collectively as defendants to avoid confusion.

The parties are fully familiar with the procedural history and background facts of this case as set forth in our prior opinion. Id. at 1-13. Therefore, we incorporate that discussion here by reference.

To briefly recap, defendants retained Grabowski to represent them in an action against their insurance company to recover the repair costs associated with damage their house sustained in a lightning storm. Id. at 1-2. After a trial, the jury returned a verdict in favor of defendants and against the insurer in the amount of $9,025. Id. at 3. The trial court entered a judgment confirming this verdict on August 25, 2011 and, on October 11, 2021, the court awarded defendants $750 in counsel fees and a $500 witness fee. Ibid.

Grabowski claimed that defendants then authorized her to pursue an appeal of these decisions and she agreed to do so "at no additional charge." Ibid. On the other hand, defendants asserted that Grabowski was retained to represent them only at the trial and her representation ended when the trial court entered the final order for that matter. Id. at 3-4. Grabowski filed the appeal and used the jury award to pay certain costs. Id. at 4-5. Defendants claimed they never authorized her to do so. Id. at 5.

On April 23, 2014, we rendered our decision in the insurance appeal[2] and found that the trial court properly dismissed defendants' consumer fraud and consumer damages claims. Id. at 6-7. We also reversed the award of counsel fees to defendants. Id. at 7.[3]

"On April 6, 2019, Grabowski filed a complaint against defendants in the Law Division, seeking to recover attorney's fees 'in excess of $126,678' for her representation of them in their action against their insurance company." Id. at 8. Defendants filed answers to the complaint and, among other things, they raised the statute of limitations as an affirmative defense. Ibid.

The parties filed cross-motions for summary judgment. Grabowski argued that the six-year statute of limitations for breach of contract claims began to run on April 23, 2014 when we decided the insurance appeal and Grabowski's services terminated. Id. at 10-12. Therefore, Grabowski asserted the April 6, 2019 complaint was timely. In response, defendants alleged that because they did not authorize the appeal, Grabowski's services ended either on October 20, 2011 when the trial court awarded defendants counsel and witness fees, or on

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[2] Baskay v. Franklin Mut. Ins. Co., Nos. A-0441-11 and A-1403-11 (App. Div. Apr. 23, 2014).

[3] Defendants, who had separated in November 2012, divorced in May 2014. Id. at 6-7.

December 20, 2011 when William sent Grabowski an email telling her "there is to be no appeal." Id. at 5, 9-10.

The trial court granted defendants' motions for summary judgment and denied Grabowski's cross-motion. Id. at 12. The court found Grabowski's services and the attorney-client relationship ended when the final judgment was entered in 2011. Ibid. Therefore, Grabowski's April 6, 2019 complaint seeking counsel fees was untimely. Id. at 13.

Grabowski appealed. Ibid. In our decision, we concluded that the parties' sharply conflicting factual allegations concerning whether defendants had authorized Grabowski to pursue the insurance claim appeal, or whether she did it on her own, prevented the award of summary judgment to either side. Id. at 15-18.[4] We therefore remanded the matter to the trial court to permit the parties to engage in discovery on the statute of limitations issue before considering that issue anew. Id. at 17-18.

[4] Grabowski incorrectly asserts in her appellate brief that we ruled in our decision "that the [s]tatute of [l]imitations had not yet expired with respect to [p]laintiff's claims against the defendants herein." However, our opinion clearly stated that the existing record on the parties' statute of limitations arguments was not clear enough to permit us, or the trial court, to decide whether Grabowski's complaint was timely. Id. at 13, 17-18.

We also noted that the parties had raised other arguments concerning the merits of Grabowki's complaint for counsel fees, or the lack thereof. Id. at 18. We specifically identified, "by way of example, defendants' claim that Grabowki's complaint should have been barred because she did not give them 'pre-action notice' of their right to seek fee arbitration as required by Rule 1:20A-6 . . . ." Ibid. Because the trial court did not address this issue in its decision on the parties' summary judgment motions, we remanded it to the trial court for resolution "in the first instance[.]" Id. at 18-19.

On remand, the trial court conferenced the case with the parties, who then agreed to have the court first consider defendants' contention that Grabowski's complaint should be dismissed because she did not provide them with the pre-action notice of their right to seek fee arbitration before filing her complaint seeking counsel fees as required by Rule 1:20A-6.[5] The law applicable to that requirement is well settled.

"In order to give clients an alternate and expeditious means of resolving fee disputes, the Supreme Court of New Jersey created district fee arbitration committees pursuant to [Rule] 1:20A-1." Chalom v. Benesh, 234 N.J. Super.

[5] It appears that the parties each relied upon the papers they previously submitted to the trial court in connection with the summary judgment motions they filed in 2019.

248, 257 (Law Div. 1989). "Rule 1:20A-2 gives the [d]istrict [f]ee [c]ommittee[s] jurisdiction to determine fee disputes between clients and attorneys by final and binding arbitration." Nieschmidt Law Office v. Leamann, 399 N.J. Super. 125, 129 (App. Div. 2008).

"In order to assure that a client is made aware of [his or her] right to pursue the arbitration remedy, [Rule] 1:20A-6 requires a *pre-action* notice to the client advising of the right to pursue the fee arbitration remedy as provided by the rules of court." Chalom, 234 N.J. Super. at 257. In addition, "the complaint is required to allege that the client was given notice of the availability of the arbitration remedy." Id. at 257-58.

Rule 1:20A-6 states:

> No lawsuit to recover a fee may be filed until the expiration of the [thirty] day period herein giving Pre-Action Notice to a client; however, this shall not prevent a lawyer from instituting any ancillary legal action. Pre-Action Notice shall be given in writing, which shall be sent by certified mail and regular mail to the last known address of the client, or alternatively, hand delivered to the client, and which shall contain the name, address and telephone number of the current secretary of the Fee Committee in a district where the lawyer maintains an office. If unknown, the appropriate Fee Committee secretary listed in the most current New Jersey Lawyers Diary and Manual shall be sufficient. The notice shall specifically advise the client of the right to request fee arbitration and that the client should immediately call the secretary to request

> appropriate forms; the notice shall also state that if the client does not promptly communicate with the Fee Committee secretary and file the approved form of request for fee arbitration within [thirty] days after receiving pre-action notice by the lawyer, the client shall lose the right to initiate fee arbitration. The attorney's complaint shall allege the giving of the notice required by this rule or it shall be dismissed.
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> [(emphasis added).]

The salient purpose of

> this simple rule is obvious: the trained attorney must advise his or her client of an available alternate to litigation *before* pursuing a course of action that could accrue an unfair advantage to the attorney. The rule contemplates that the allegation of giving notice in the complaint is to be utilized once the client chooses not to employ the arbitration remedy. However, this alternative is not made available to the client if the attorney fails or refuses to advise the client of its existence. The rule is intended to act as a failsafe checkpoint to ensure compliance with the notice requirement.
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> [Chalom, 234 N.J. Super. at 258.]

In this case, Grabowski filed her complaint seeking to collect counsel fees from defendants on April 6, 2019. Prior to filing her complaint, Grabowski did not give William and Amanda the pre-action notice advising them of their right to pursue fee arbitration before a district fee committee or instructions on how

to do so. Grabowski also did not, because she could not, allege in her complaint that she had given defendants the notice required by Rule 1:20A-6.

Amanda filed her answer to Grabowski's complaint on May 20, 2019. As an affirmative defense, Amanda asserted that Grabowski's claims against her for counsel fees were barred because Grabowski did not comply with Rule 1:20A-6.

William filed his answer on May 23, 2019. He filed an amended answer and a cross-claim against Amanda on June 3, 2019. In both pleadings, William asserted that Grabowski failed to comply with the notice requirement of Rule 1:20A-6.

On July 3, 2019, Grabowski sent letters to William and Amanda, stating that they owed her $126,678 in counsel fees and that they had the right to seek fee arbitration. That same day, William filed his motion for summary judgment raising the pre-action notice issue. Amanda filed her motion on August 19, 2019, and Grabowski filed her cross-motion on September 17, 2019.

Grabowski admitted that she did not give pre-action notice of her lawsuit to either defendant. She also admitted she did not certify in her complaint that she had done so.

However, Grabowski asserted she decided not to give the required pre-action notice to defendants because Amanda told her sometime between 2012 and 2016[6] "that William had left three (3) bullets on the dining table – one of which [Amanda said William told her] 'had [Grabowski's] name on it[.]'" Grabowski alleged that Amanda's "advisement . . . was apparently designed by [Amanda] to cause [Grabowski] to be in fear for the safety of [her]self and [her] family, so that such advisement had a chilling effect on [Grabowski's] ability to proceed." Grabowski made a similar allegation about William to William's attorney. William vehemently denied the assertion and Grabowski never reported this alleged incident to the police.

Grabowski claimed she did not send defendants the required pre-action notice because there would not have been a "public record" of her action in doing so. Therefore, she argued that if William carried out his alleged years-old threat, the police would not have been aware of his possible motive for harming her. As set forth in her appellate brief, Grabowski instead alleged she

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[6] According to Grabowski, Amanda made this statement to her during the time William was pursuing an ethics complaint against Grabowski in 2016. However, in support of her motion for reconsideration, Grabowski submitted a certification allegedly prepared by Amanda's divorce attorney that stated the attorney may have told Grabowski about Amanda's claim during defendants' divorce proceedings. Those proceedings ended in 2014.

> specifically chose to file a lawsuit against the defendants in order to create a public record, readily available and subject to ease of access and search that she was pursuing her fee from [William], in case he followed through on his threat and she "turned up dead[.]" [Grabowski's] intent was to create a public record of proceedings that would be evidence of motive on the part of said defendant should he follow through on his threat.

Grabowski also sought permission to file an amended complaint. However, she did not provide the trial court with a copy of her proposed amended pleading as required by Rule 4:9-1.

After oral argument,[7] the trial court rejected Grabowski's contention that she was not required to provide defendants with pre-action notice of their right to seek fee arbitration because of her claim that doing so would not constitute a "public record." In its detailed oral decision, the court found that Rule 1:20A-6 clearly required an attorney seeking to recover fees to give her clients thirty days advance notice of their right to pursue fee arbitration, together with instructions on how to do it. The rule also plainly states that if the attorney does not, and cannot, "allege the giving of the notice required by the rule [in the complaint, the complaint] shall be dismissed." Because Grabowski did not comply with

[7] Grabowski retained an attorney to represent her at the February 3, 2022 oral argument. However, the trial court also permitted her to participate at that proceeding.

Rule 1:20A-6, the court determined her complaint had been improperly filed and had to be dismissed. Therefore, the court granted defendants' motions for summary judgment and denied Grabowski's cross-motion.

The trial court also denied Grabowski's motion for leave to amend her complaint. The court found that Rule 1:20A-6 required Grabowski to state in her complaint that she had provided pre-action notice of her claim to defendants. Because she had not done so, Grabowski could not file a complaint demonstrating her compliance with the rule. Under these circumstances, the court determined that granting permission for the filing of an amended complaint would be futile.

Grabowski filed a motion for reconsideration. At that time, she also sought to recuse the trial judge and asked for a change of venue. The court denied these motions on April 1, 2022. In its oral decision, the court found that Grabowski failed to demonstrate that the dismissal of her complaint was based on a palpably incorrect basis or that the court failed to consider the significance of any of the record evidence.

In so ruling, the trial court found that Grabowski's alleged concern that a pre-action notice would not create the "public record" the police might need if

something untoward happened to her was no excuse for her failure to comply with Rule 1:20A-6. The court stated:

> With regard to [Grabowski's] claim that she feared that [William] would threaten her life if she served the requisite pre-action fee arbitration notices[,] [Grabowski] has never explained how such notice as opposed to the lawsuit that she did file here, would result in a threat to her life. Clearly, [Grabowski] did not fear such a threat from the filing of the instant lawsuit against the Baskay defendants. Additionally, [Grabowski's] claim that she feared for her life in the filing of a pre-suit notice does not explain why such notice was not served on defendant Amanda Baskay. There's no indication she was fearful of [Amanda]. It remains that, while [Grabowski] chose to file a complaint against the defendants, she chose not to file the requisite pre-action notices.

Grabowski also argued that she should not be required to abide by the requirements of Rule 1:20A-6 because the district fee committee might have ultimately declined jurisdiction to arbitrate the parties' dispute. The court noted that the fee committee has the jurisdiction under Rule 1:20A-2(b) to decline jurisdiction in certain limited situations. However, the court held that this "discretionary power" did not "remove the attorney's burden to abide by Rule 1:20A-6 to provide a pre-action notice to the client or clients."

Grabowski also asserted that defendants waived their right to pre-action notice of their right to seek fee arbitration during their divorce action. In their

settlement agreement in that matter, the parties agreed they would seek fee arbitration if Grabowski later pursued them for counsel fees in connection with the insurance matter. However, nothing in the agreement, to which Grabowski was not a party, stated that either defendant waived their right to the pre-action notice, which would have provided defendants with the information necessary to file an arbitration request, in the event Grabowski sought to collect a fee. Moreover, nothing in Rule 1:20A-6 indicates that the notice requirement can be waived. Therefore, the trial court rejected Grabowski's contention on this point.

The trial court also denied Grabowski's recusal motion and her request for a change of venue. Because Grabowski does not challenge those rulings on appeal, we need not summarize them here.

On appeal, Grabowski presents the following contentions:

> POINT I
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> THE LOWER COURT ERRED IN FAILING TO FIND THAT DEFENDANTS' CONDUCT IN THREATENING THE PLAINTIFF'S LIFE AND CAUSING SEVERE INJURIES[8] TO PLAINTIFF CONSTITUTED AN EXCEPTION TO THE PRE-ACTION ARBITRATION NOTICE RULE.

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[8] For a period of time, Grabowski lived next door to Amanda and her mother. In April 2017, Grabowski was mauled by a dog that was in Amanda's care. In a certification she submitted to the trial court in support of her motion for reconsideration, Grabowski asserted that Amanda was "at least partially at fault" for the injuries Grabowski sustained.

A. The Drafters of the Pre-Action Arbitration Notice Rule Never Conceived of the Factual Scenario where a Former Client Threatens to Shoot an Attorney in an Attempt to Prevent the Attorney from Pursuing a Fee.

B. The Pre-Action Arbitration Notice Rule by its own Language is not Absolute.

C. The Fee Arbitration Panel had Discretionary Jurisdiction Under the Rules to Reject Arbitration of the Particular Matter.

POINT II

THE LOWER COURT ERRED IN NOT GRANTING THE AMENDMENT OF PLAINTIFF'S COMPLAINT TO CURE ANY PLEADING DEFECTS.

We have considered Grabowski's contentions in light of the record and the applicable law. We conclude that her arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We therefore affirm the February 3, 2022 and April 1, 2022 orders substantially for the reasons expressed by the trial court in its oral decisions. We add the following comments.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court, namely, the standard set forth in Rule 4:46-2(c). Conley v. Guerrero, 228 N.J. 339, 346 (2017). Thus, we consider, as the trial court did, whether "the competent evidential materials presented, when

viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

If, as here, there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." Dickson v. Cmty. Bus Lines, 458 N.J. Super. 522, 530 (App. Div. 2019) (citing Prudential Prop. & Cas. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998)). We accord no deference to the trial judge's conclusions of law and review these issues de novo. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

Based on our review of the record, we are satisfied that the trial court correctly concluded that Grabowski intentionally failed to comply with the clear and mandatory requirements of Rule 1:20A-6. She did not provide defendants with written advance notice of their right to arbitrate their fee dispute and the steps they needed to take in order to do so. Grabowski's complaint seeking to recover fees did not allege that she had given defendants the required notice. In accordance with the plain language of the rule, the trial court was obligated to dismiss Grabowski's complaint.

Grabowski asks that we engraft an exception into the rule that would exempt an attorney who has received a threat from a client in connection with a fee dispute from the pre-action notice requirement. Grabowski argues that an attorney in that situation should be permitted to skip directly to the complaint stage.

This contention lacks merit. Contrary to Grabowski's assertions, nothing in the history or language of Rule 1:20A-6 supports the creation of such an exception. If Grabowski was threatened sometime during the parties' divorce action or during the ethics proceeding William brought against her, she had a number of options she could have pursued, including notifying the police. However, Grabowski was obligated to follow the applicable rules of court if she wished to institute a legal action to collect the fees she alleged defendants owed her.

Rule 1:20A-6 serves an important purpose. As the Chalom court stated:

> If an attorney were to prosecute an action in violation of [Rule] 1:20A-6 either because the attorney did not advise his or her clients of the arbitration remedy or because he or she did not allege the giving of notice, the attorney would be unilaterally taking advantage of the very class which [Rule] 1:20A-6 seeks to protect. This perversion would rob clients of the right to be advised of the arbitration remedy and would deprive them of learning their attorney has alleged that the proper notice was given. Any relaxation here would

> foster potential abuses in the future and drain the rule of its salutary purposes.[]
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> [Chalom, 234 N.J. Super. at 258-59 (footnote omitted).]

After considering all of the circumstances of this case, we conclude that the trial court correctly determined not to excuse Grabowski from her obligation to abide by Rule 1:20A-6 once she decided to pursue collection litigation. We are also satisfied that the court properly exercised its discretion by denying Grabowski's request for permission to file an amended complaint. Franklin Med. Assocs. v. Newark Pub. Sch., 362 N.J. Super. 494, 506 (App. Div. 2003) (stating that the "determination of a motion to amend a pleading is generally left to the sound discretion of the trial court . . . and its exercise of discretion will not be disturbed on appeal, unless it constitutes a 'clear abuse of discretion.'") (quoting Salitan v. Magnus, 28 N.J. 20, 26 (1958)).

First, Grabowski did not comply with Rule 4:9-1, which requires that "[a] motion for leave to amend . . . have annexed thereto a copy of the proposed amended pleading." Therefore, the trial court was not required to consider her motion.

Moreover, the trial court's exercise of discretion requires a two-step analysis: "whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Notte v. Merchs. Mut.

Ins. Co., 185 N.J. 490, 501 (2006). As the trial court found, any amendment would have been futile because Grabowski did not provide the mandatory pre-action notice to defendants. Therefore, she can never assert in a complaint in this action, as required by Rule 1:20A-6, that she gave defendants the required notice. Accordingly, any amended complaint filed by Grabowski would have to be dismissed.

Affirmed.