SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3117-21

KIRK SPARKS,

Plaintiff-Appellant,

v.

ERIC BARNES and
JONATHAN GILMORE,

Defendants-Respondents.

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Submitted September 26, 2023 – Decided November 9, 2023

Before Judges Gilson and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-1735-19.

Jacobs & Barbone, PA, attorneys for appellant (David A. Castaldi, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondents (Sookie Bae-Park, Assistant Attorney General, of counsel; Jae K. Shim, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff Kirk Sparks appeals from a June 10, 2022, order dismissing his complaint with prejudice for failure to comply with a court order compelling him to appear for an independent medical examination (IM Examination) that had been requested in discovery. The IM Examination was relevant to plaintiff's claim, but he had persistently refused to submit to the examination. Because the trial court followed the procedures under Rule 4:23-5, and because we discern no abuse of discretion, we affirm.

I.

This action involves plaintiff's claim that an investigator and a Deputy Attorney General with the Division of Criminal Justice violated his civil rights by procuring a criminal indictment from a grand jury by presenting inaccurate information and not presenting exculpatory information. Plaintiff filed this action after the criminal court dismissed the indictment.

Plaintiff is a former Atlantic City police officer. On March 27, 2014, he and several other officers were involved in a high-speed automobile chase of a suspect. Ultimately, the suspect and the officers fired shots and the suspect was killed.

Following the shooting incident, plaintiff was on leave for a year. In April 2015, plaintiff returned to work on "light duty" until he retired on July 1, 2015.

Between April 2014 and September 2015, plaintiff was treated by or examined by four medical professionals, all of whom diagnosed plaintiff with post-traumatic stress disorder (PTSD) related to the shooting incident.

Before retiring, plaintiff submitted multiple applications for accidental disability pension benefits, all of which listed his disability as "PTSD stemming from on[-]duty, officer[-]involved shooting resulting in fatality of suspect." One of the four medical professionals who had examined plaintiff was Dr. Daniel B. LoPreto, a psychologist. LoPreto examined plaintiff on September 18, 2015, on behalf of the pension system. Like the other medical professionals, LoPreto diagnosed plaintiff with PTSD and opined that plaintiff was permanently disabled and unable to serve as a police officer. In November 2015, plaintiff was granted an accidental disability retirement pension from the Police and Firemen's Retirement System (pension system).

In April 2015, before his retirement from the Atlantic City Police Department, plaintiff applied for a position as a "role player" with Ramcor Services Group, Inc. (Ramcor), a private company that trains federal Air Marshals and Transportation Security Officers. Ramcor listed plaintiff as being hired on May 6, 2015, but plaintiff's first day of work at Ramcor was November 20, 2015. As a "role player" with Ramcor, plaintiff participated in training

scenarios that simulated security threat situations such as hijackings. Those scenarios sometimes involved the use of fake weapons and simulated firing of guns.

In April 2016, the Pension Fraud and Abuse Unit of the Division of Pensions and Benefits sent a memo to the Division of Criminal Justice requesting an investigation of whether plaintiff had committed pension fraud. The memo noted that the nature of plaintiff's work with Ramcor appeared to be inconsistent with his stated PTSD symptoms. The memo also suggested that plaintiff had not disclosed his employment with Ramcor to the medical professionals who examined him or to the Trustees of the pension system.

Investigator Eric Barnes and Deputy Attorney General Jonathan Gilmore (defendants), who both worked at the Division of Criminal Justice, were assigned to investigate plaintiff's alleged pension fraud. Following an investigation, defendants presented information to a grand jury. On December 7, 2016, the grand jury indicted plaintiff for one count of second-degree theft by deception in violation of N.J.S.A. 2C:20-4.

Plaintiff moved to dismiss the indictment, contending that the presentation to the grand jury included inaccurate information and excluded exculpatory information. On June 30, 2017, a Criminal Division judge granted that motion.

The judge found that the State had not presented sufficient evidence to establish that plaintiff intended to deceive the medical professionals who evaluated him to obtain a PTSD diagnosis. In other words, the court found that the State had failed to present prima facie evidence on the necessary mens rea element of second-degree theft by deception. The judge also found that there were "several material factual inaccuracies" presented to the grand jury; therefore, the judge dismissed the indictment without prejudice to the State's right to re-present the case to another grand jury. There is nothing in the record before us indicating that the State re-presented the case to another grand jury.

Two years after the criminal case was dismissed, in August 2019, plaintiff was re-examined by LoPreto. As previously noted, LoPreto had initially examined plaintiff in September 2015. LoPreto noted that at the initial examination, plaintiff had not disclosed his plans to work for Ramcor. Nevertheless, LoPreto ultimately concluded that plaintiff was still suffering from PTSD and that he was still permanently disabled and not able to perform the duties of a police officer.

On June 29, 2019, before Dr. LoPreto examined plaintiff, plaintiff filed a civil complaint in the action underlying this appeal against defendants. Plaintiff asserted one claim alleging a violation of the New Jersey Civil Rights Act (CR

Act), N.J.S.A. 10:6-2. Plaintiff contended that defendants had misrepresented the facts of the case and presented false information to the grand jury to procure his indictment. In terms of damages, plaintiff alleged that defendants' actions caused him "serious and substantial damages and injuries, including, but not limited to, emotional distress, aggravation and exacerbation of his disability, as well as substantial economic and non-economic damages."

Thereafter, the parties conducted discovery. In July 2021, defendants served plaintiff with a notice requiring him to appear for an IM Examination by Dr. Mark Siegert, a psychologist. In response, plaintiff filed a motion for a protective order, seeking to limit the examination to plaintiff's emotional distress and whether plaintiff's PTSD was exacerbated and to prevent the IM Examination from calling into question plaintiff's PTSD diagnoses. Defendants cross-moved, asserting that if plaintiff's motion was granted, plaintiff's claims should be limited to economic-loss damages. On September 21, 2021, the trial court issued an order denying plaintiff's motion for a protective order, denying defendants' motion to bar plaintiff's claims for emotional distress and exacerbation of his PTSD, and ordering plaintiff to submit to an IM Examination with Siegert within forty-five days.

The IM Examination was then scheduled for November 9, 2021. On October 18, 2021, plaintiff's counsel requested that defendants agree to a protective order limiting the use of the IM Examination report. Defendants refused that request and twice asked plaintiff's counsel to confirm that plaintiff would appear for the examination. Plaintiff's counsel never responded to those requests. On November 9, 2021, plaintiff did not appear for the IM Examination. Thereafter, defendants sent plaintiff, via his counsel, an invoice for $6,300 to cover the expenses incurred by Siegert when plaintiff failed to attend the examination.

Shortly thereafter, on November 16, 2021, defendants moved to dismiss plaintiff's complaint without prejudice under Rule 4:19 and Rule 4:23-5(a)(1) because plaintiff had failed to appear for the court-ordered IM Examination. Plaintiff cross-moved for a protective order to reschedule the IM Examination but limit the use of the IM Examination report and prevent disclosure of the report to third parties. Plaintiff contended that because of the prior criminal proceeding, he had concerns that the IM Examination report would be sent to other government agencies, including the pension system, and used for "some wrong purpose."

On December 22, 2021, the trial court entered an order dismissing plaintiff's complaint without prejudice and conditioning reinstatement on plaintiff appearing for an IM Examination and paying the $6,300 cost related to the missed IM Examination. The court also denied plaintiff's cross-motion for a protective order, finding that plaintiff had not shown good cause. In making those rulings, the court found that the IM Examination was relevant to assessing plaintiff's alleged damages claims.

Plaintiff moved for reconsideration of the requirement that he pay $6,300 before his complaint was reinstated. The trial court denied that motion on February 4, 2022.

On April 8, 2022, defendants moved to dismiss plaintiff's complaint with prejudice under Rule 4:23-5(a)(2). Defendants pointed out that more than sixty days had passed since the court dismissed the complaint without prejudice and plaintiff had not rescheduled the IM Examination or paid the $6,300.

Plaintiff's counsel had not served an affidavit reciting that plaintiff had been served with notice of the motion to dismiss with prejudice. Accordingly, the trial court adjourned the motion and entered an order to show cause for plaintiff's counsel to explain why he had not provided the affidavit. At a hearing on June 10, 2022, plaintiff, through counsel, argued that his primary concern

with submitting to the IM Examination arose out of his mistrust of the State. The trial court found that plaintiff's "subjective belief" concerning the State's motives did not constitute an exceptional circumstance. The trial court then found that plaintiff had not demonstrated any exceptional circumstances for his failure to comply with the discovery request and requirements for reinstatement within the required sixty-day time period and had not moved to vacate. Consequently, on June 10, 2022, the trial court entered an order dismissing plaintiff's complaint with prejudice in accordance with Rule 4:23-5(a)(2). Plaintiff now appeals from that order.

II.

On appeal, plaintiff argues that the trial court abused its discretion by dismissing his entire case. He contends that the trial court should have imposed the lesser sanction of dismissing only the emotional distress and exacerbation of PTSD claims. Additionally, plaintiff asserts that the trial court abused its discretion by not entering a protective order.

We review a trial court's decision to reinstate or dismiss a complaint under an abuse of discretion standard. St. James AME Dev. Corp. v. City of Jersey City, 403 N.J. Super. 480, 484 (App. Div. 2008); Abtrax Pharms., Inc., v. Elkins-Sinn, Inc., 139 N.J. 499, 517 (1995). When dismissing a complaint with

prejudice for failure to provide discovery, "meticulous attention" to the rules of court is required. Zimmerman v. United Servs. Auto. Ass'n, 260 N.J. Super. 368, 376-77 (App. Div. 1992).

The meticulous standard is rooted in well-established principles of justice. One of the primary goals of litigation is to afford parties a fair hearing that resolves the "disputes on the merits." St. James, 403 N.J. Super. at 484. "[B]ecause dismissal with prejudice is 'the ultimate sanction,' it should be imposed 'only sparingly' and 'normally . . . ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party.'" Salazar v. MKGC + Design, 458 N.J. Super. 551, 561-62 (App. Div. 2019) (quoting Robertet Flavors, Inc. v. Tri-Form Constr. Inc., 203 N.J. 252, 274 (2010)). Nevertheless, "a party invites this extreme sanction by deliberately pursuing a course that thwarts persistent efforts to obtain the necessary facts." Abtrax Pharms., 139 N.J. at 515.

Failure to comply with a demand for discovery issued in accordance with Rule 4:19 subjects the non-compliant party to dismissal proceedings in accordance with Rule 4:23-5. R. 4:23-5(a)(1). Dismissal under Rule 4:23-5 is a two-step process that must be strictly adhered to before a court can impose the sanction of dismissal for failure to fulfill a discovery obligation. Thabo v. Z

Transp., 452 N.J. Super. 359, 369 (App. Div. 2017) (citing St. James, 403 N.J. Super. at 484). First, the moving party must seek dismissal without prejudice. R. 4:23-5(a)(1). Thereafter, the non-compliant party has sixty days to cure and move to vacate the dismissal order. R. 4:23-5(a)(2). Courts may also order sanctions and counsel fees as a condition of reinstatement. See Sullivan v. Coverings & Installation, Inc., 403 N.J. Super. 86, 94 (App. Div. 2008). Second, the moving party may only seek dismissal with prejudice once the sixty-day period has expired without the non-compliant party curing the discovery defect. R. 4:23-5(a)(2). The motion to dismiss with prejudice "shall be granted" unless a motion to vacate was filed and "either the demanded and fully responsive discovery has been provided or exceptional circumstances are demonstrated." Ibid. To establish exceptional circumstances, the delinquent party must prove "external factors . . . which substantially interfered with the party's ability to meet the discovery obligations." Rodriguez v. Luciano, 277 N.J. Super. 109, 112 (App. Div. 1994) (quoting Suarez v. Sumitomo Chem. Co., 256 N.J. Super. 683, 689 (Law Div. 1991)).

The goal of the two-step procedure in Rule 4:23-5 is to compel discovery compliance rather than dismiss complaints. Adedoyin v. Arc of Morris Cnty. Chapter, Inc., 325 N.J. Super. 173, 180 (App. Div. 1999). While the rule's

structure reflects that preference for resolutions of disputes on the merits, "the rule affords a party aggrieved by dilatory discovery tactics a remedy to compel production of the outstanding discovery and the right to seek final resolution through the two-step dismissal process." Sullivan, 403 N.J. Super. at 96.

The record supports the trial court's decision to dismiss plaintiff's complaint with prejudice. Defendants requested plaintiff to submit to an IM Examination in July 2021. Plaintiff failed to appear for the scheduled examination on November 9, 2021. Thereafter, defendants followed the procedures set forth in Rule 4:23-5. First, they moved for a dismissal without prejudice and the trial court granted that motion on December 22, 2021. Plaintiff failed to move for reinstatement within sixty days. Accordingly, in April 2022, defendants moved to dismiss with prejudice. The court delayed the hearing on that motion until June 10, 2022, but then granted it after finding that there were no exceptional circumstances justifying plaintiff's non-compliance.

In summary, almost a year passed between defendants requesting the IM Examination in July 2021 and the dismissal of plaintiff's complaint with prejudice for non-compliance in June 2022. Given the number of motions that were filed concerning the IM Examination, it is a fair conclusion that plaintiff

willfully refused to be examined even when he knew the consequence warranted a dismissal with prejudice.

We are not persuaded by plaintiff's arguments that he would have complied with an IM Examination if the trial court had granted him a protective order. Plaintiff twice moved for a protective order. In essence, plaintiff sought to dictate the conditions of the examination and control how the report of the examination could be used. The trial court found that there was no good cause supporting plaintiff's requests for a protective order and we discern no abuse of discretion in that finding.

We are also not persuaded by plaintiff's argument that the trial court abused its discretion by not imposing a lesser sanction. The trial court found that the IM Examination was relevant discovery and that it related to all of plaintiff's damage claims. Here again, we discern no abuse of discretion. Importantly, the court denied plaintiff's request for a protective order when it entered the order dismissing the complaint without prejudice. Plaintiff, therefore, had a clear choice: he could appear for the IM Examination and pay $6,300; or he could continue to refuse to appear, and his complaint would be dismissed with prejudice. Given that record, we cannot say it was an abuse of discretion for the trial court to dismiss all of plaintiff's claims with prejudice as

opposed to dismissing only the emotional distress and exacerbation of PTSD damages claims.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION