SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1214-22

HOWARD SLUPSKI,

Plaintiff-Appellant,

v.

STEPHANIE M. KAY,

Defendant-Respondent.

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Submitted March 11, 2024 – Decided June 20, 2024

Before Judges Gilson and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-1821-22.

Borenstein, McConnell & Calpin, PC, attorneys for appellant (Abraham Borenstein and Bradley M. Arlen, on the brief).

Kaufman Dolowich & Voluck, LLP, attorneys for respondent (Iram P. Valentin and Allison Robin Scott, of counsel and on the brief).

PER CURIAM

Plaintiff Howard Slupski (Howard) filed an action in the chancery court, probate part, seeking to be appointed as the guardian for his then-101-year-old mother, Edith Slupski (Edith).[1] The probate court appointed defendant Stephanie Kay (Kay) as attorney for Edith in the guardianship proceeding.

Thereafter, Howard sued Kay in the Law Division based on one interaction that he had with Kay while she was serving as attorney for Edith. Howard alleged that Kay had violated his "legal and constitutional right to be represented by counsel without interference from Kay." Howard appeals from a November 22, 2022 order dismissing his Law Division complaint with prejudice for failure to state a claim upon which relief may be granted. He also appeals from a February 15, 2023 order imposing a $5,000 sanction on his counsel for filing frivolous litigation. Finally, Howard appeals from a March 28, 2023 order that effectively stayed payment of the sanction pending this appeal.

Having reviewed the arguments of the parties and the applicable law, we affirm all three orders. Howard failed to state viable claims against Kay. The asserted claims were frivolous, and the sanction award was appropriate.

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[1] Because the proceedings involved several members of the Slupski family, we use first names to avoid confusion. In doing so, we intend no disrespect.

I.

We discern the facts from the record, giving Howard "the benefit of 'every reasonable inference of fact.'" Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (quoting Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 107 (2019)).

Howard's claims against Kay arose out of two actions Howard filed in the chancery court. In February 2021, Howard filed a verified complaint and order to show cause against his sister, Renee Slupski (Renee). He also named as a defendant Edwards Gardens Apartments, an apartment complex owned by Edith and managed by Renee on Edith's behalf. Edith was not named as a party. In his complaint, Howard contended that Renee had denied him access to Edith for over two months because of concerns regarding exposing Edith to COVID-19. Howard also asserted that Renee was exerting undue influence over Edith's assets in her capacity as attorney-in-fact and refusing to provide him with certain financial information. Among the relief sought, Howard requested an order allowing him unsupervised visits with Edith. The chancery court denied Howard's request for temporary restraints and appointed Kay as the guardian ad litem (GAL) to investigate whether Howard and his daughter should be allowed to visit with Edith.

On March 22, 2021, Kay issued a report on her investigation and concluded that Edith did not desire nor was it in her best interests to have visits alone indoors with Howard or his daughter. Howard's counsel submitted objections to Kay's GAL report and disputed Kay's recommendations.

In April 2021, the chancery court denied Howard's request to visit Edith in her home. Several months later, in June 2021, the chancery court again found that Howard was not entitled to preliminary injunctive relief. Nevertheless, the court also found that Edith could allow Howard to come into her home if she chose. Thereafter, in July 2021, the court lifted the restraints prohibiting Howard from visiting Edith. By that point in the proceedings in the chancery court, Kay had completed her role as GAL.

Approximately a year later, in June 2022, Howard filed a guardianship action in the chancery court, probate part, seeking to have Edith declared an incapacitated adult and seeking to be appointed as guardian of Edith and her estate. The probate court issued an order fixing a hearing concerning the guardianship and appointed Kay as attorney for Edith. In that order, the probate court directed Kay to personally interview Edith, examine her medical records, and "make inquiry of persons having knowledge of the alleged incapacitated person's circumstances, [her] physical and mental state and [her] property." Kay

was also directed to prepare a written report of her findings and recommendations.

Kay contacted Howard's counsel to make arrangements to interview Edith. In setting up those arrangements, Kay and Howard's counsel agreed that no family members were to be in the home when Kay met with Edith. Howard's counsel agreed, in writing, that only Edith's caregiver would be home. The interview was then scheduled for June 16, 2022.

Despite the written agreement, when Kay arrived at Edith's home, Howard, Renee, and Howard's two adult daughters, as well as the caregiver, were present. Kay directed the family members to move to another floor of the home and then interviewed Edith.

Following that interview, Kay asked to speak to Renee and Howard. Kay has explained that she made that request as part of her obligation to inquire of persons having knowledge of Edith's alleged incapacitation.

The following day, on June 17, 2022, Howard's attorney sent Kay a letter stating that he would move to terminate her as Edith's attorney on the grounds of "bias, violation of attorney-client privilege, inappropriate behavior and attempts to interfere in Howard's relationship with his lawyer." The letter went on to request Kay to withdraw as attorney for Edith by June 20, 2022.

In response, Kay sent a letter to the probate court, informing it of Howard's counsel's letter and stating that any conversations she had with Howard were pursuant to her authority as Edith's attorney and were in accordance with the court's order appointing her as Edith's attorney.

Thereafter, Howard's attorney wrote to the court requesting the court to remove Kay as Edith's attorney and appoint a new attorney. After holding a telephonic hearing, on July 18, 2022, the probate court issued a sua sponte order removing Kay as the court-appointed counsel for Edith and appointing new counsel. In issuing that order, the court stated that it had not found any "bias or prejudice" by Kay towards any party in the guardianship action.

Meanwhile, on June 23, 2022, Howard filed a civil action against Kay in the Law Division, alleging: (1) a violation of his constitutional rights; (2) negligent infliction of emotional distress; (3) intentional infliction of emotional distress; and (4) a violation of attorney ethics. In the complaint, Howard alleged that Kay had not alerted his attorney to the one-on-one interview she conducted with Howard. He contended that the interview "intimidated and frightened" him and that Kay had "interrogat[ed] and disparage[ed]" him during the interview. Based on their interactions on June 16, 2022, Howard alleged that Kay had violated "ethical rights" and his "constitutional and legal rights." Howard also

asserted that Kay had negligently and intentionally inflicted emotional distress on him.

On the same day that Howard filed the civil suit, he also filed a grievance with the District XII Ethics Committee. Ultimately, the District XII Ethics Committee administratively dismissed the matter because there was pending civil litigation against Kay.

In August 2022, Kay moved to dismiss Howard's complaint under Rule 4:6-2(e) for failure to state a claim upon which relief may be granted. Eleven days later, on August 26, 2022, Kay's attorneys sent Howard's attorney a frivolous-litigation letter pursuant to N.J.S.A. 2A:15-59.1, stating that if the complaint was not voluntarily dismissed, Kay would seek sanctions under Rule 1:4-8 and N.J.S.A. 2A:15-59.1.

Howard and his attorney did not withdraw the complaint. Instead, they filed opposition to Kay's motion to dismiss. The Law Division then heard oral argument on the motion. Thereafter, on November 22, 2022, the Law Division issued an order and written opinion granting Kay's motion to dismiss Howard's complaint with prejudice. In its opinion, the Law Division found that Howard's complaint failed to state claims upon which relief may be granted. In that regard, the court held that the conversation between Howard and Kay did not establish

a separate tort action beyond an alleged violation of the New Jersey Rules of Professional Conduct (RPCs). The court also held that Howard could not establish a constitutional violation because Kay was not a state actor and the constitutional right to counsel does not arise in civil proceedings. In addition, the Law Division reasoned that Howard had failed to plead facts showing that Kay owed him a duty of care, and therefore Howard had not pled viable claims of negligent or intentional infliction of emotional distress.

On December 12, 2022, Kay moved for sanctions against Howard's attorney. While that motion was pending, Howard filed a notice of appeal from the November 22, 2022 order dismissing his complaint with prejudice.

In early February 2023, the Law Division heard argument on the motion for sanctions. Thereafter, on February 15, 2023, the court issued an order and written opinion imposing a sanction of $5,000 on Howard's attorney. In its opinion, the court found that Howard's complaint was frivolous and was brought in bad faith for the purpose of causing Kay to withdraw or be disqualified as Edith's court-appointed attorney. The court noted that Howard's counsel's letter to Kay threatened to take specific punitive action against Kay. The court went on to find that no reasonable person could have expected the complaint to be successful and, therefore, a sanction was warranted. The court awarded $5,000

because that was the amount of the deductible that Kay certified she was required to pay to retain counsel in the Law Division action.

The court directed that the $5,000 sanction was to be paid within thirty days of the order's entry. In early March 2023, Howard's counsel posted a bond in the amount of $5,500 and moved to stay payment of the sanction pending disposition of this appeal. Howard's motion was initially deemed defective. While the deficiencies were being addressed, Howard's lawyer tendered the $5,000 sanction payment to Kay. Ultimately, on March 28, 2023, the Law Division directed Kay to reimburse the $5,000 to Howard's counsel and ordered that the supersedeas bond be maintained pending this appeal. Shortly thereafter, Howard amended his notice of appeal to include appeals from the orders entered on November 11, 2022, February 15, 2023, and March 28, 2023.

II.

On appeal, Howard makes four main arguments, with numerous related sub-arguments. He contends that (1) his complaint stated viable claims and, therefore, it was an error to dismiss the complaint; (2) the complaint was not frivolous and no sanctions should have been imposed; (3) Kay had unclean hands and, therefore, she was not entitled to seek a sanction; and (4) the legal and procedural requirements of Rule 1:4-8 were not followed or met, and a

sanction should not have been imposed. We will analyze those arguments under the three orders being appealed.

A. The November 22, 2022 Order Dismissing Howard's Complaint With Prejudice.

Appellate courts use a de novo standard when reviewing an order dismissing a complaint for failure to state a claim upon which relief can be granted. Baskin, 246 N.J. at 171. When reviewing a motion to dismiss under Rule 4:6-2(e), we assume that the allegations in the pleadings are true and afford the pleader all reasonable factual inferences. Seidenberg v. Summit Bank, 348 N.J. Super. 243, 249-50 (App. Div. 2002). Legal sufficiency "requires allegation of all the facts that the cause of action requires." Cornett v. Johnson & Johnson, 414 N.J. Super. 365, 385 (App. Div. 2010), aff'd as modified, 211 N.J. 362 (2012). Accordingly, courts should search the complaint "thoroughly 'and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" Baskin, 246 N.J. at 171 (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). "Where, however, it is clear that the complaint states no basis for relief and that discovery would not provide one, dismissal of the complaint is appropriate." J.D. ex rel. Scipio-

Derrick v. Davy, 415 N.J. Super. 375, 397 (App. Div. 2010) (quoting County of Warren v. State, 409 N.J. Super. 495, 503 (App. Div. 2009)).

Read generously, Howard's complaint alleges four claims: (1) a violation of the RPCs; (2) a violation of his constitutional rights; (3) negligent infliction of emotional distress; and (4) intentional infliction of emotional distress.

1. The Alleged Violation of the RPCs.

The RPCs "guide attorneys and the courts with regard to proper conduct." Meisels v. Fox Rothschild LLP, 240 N.J. 286, 299 (2020). While the RPCs "can be relevant to the standard of care in civil cases against attorneys," standing alone, "a violation of the RPCs does not create a cause of action for damages in favor of a person allegedly aggrieved by that violation." Ibid.; see also Baxt v. Liloia, 155 N.J. 190, 201 (1998); Sommers v. McKinney, 287 N.J. Super. 1, 13 (App. Div. 1996) (explaining that a "[v]iolation of the [RPCs] do[es] not per se give rise to a cause of action in tort").

Howard alleges that Kay violated RPC 4.2 on June 16, 2022, by having a one-on-one conversation with him without the presence or permission of his lawyer. RPC 4.2 provides, in relevant part, that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows . . . to be represented by another lawyer in the matter

. . . unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so."

Howard's allegations, however, do not state the basis for an independent cause of action against Kay. Kay had been appointed by the probate court to represent Edith in the guardianship proceeding. After reviewing Kay's alleged conduct, the probate court found no basis for a claim of any violation by Kay.

Moreover, Kay owed Howard no duty as a court-appointed attorney for Edith. In that regard, we reject Howard's arguments that Kay had a duty to Howard and that Kay somehow breached that duty, thereby giving rise to a cause of action beyond an alleged violation of RPC 4.2.

2. The Alleged Constitutional Violations.

Howard also contends that Kay's one-on-one conversation with him on June 16, 2022 violated his constitutional right to counsel. While his complaint did not actually plead a violation of 42 U.S.C. § 1983 (Section 1983), he cited that statute in opposing Kay's motion to dismiss.

Section 1983 allows a party who is deprived of "any rights, privileges, or immunities secured by the Constitution and laws" to bring a civil action against the person responsible for the alleged deprivation. Ibid. Section 1983 claims require proof of two key components: (1) identification of "'the state actor, "the

person acting under color of law," that has caused the alleged deprivation'"; and (2) identification of the "'"right, privilege or immunity" secured to the claimant by the Constitution or other federal laws of the United States.'" Rezem Fam. Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011) (quoting Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 363 (1996)). A private attorney representing a client "is not, by virtue of being an officer of the court, a state actor 'under color of state law' within the meaning of [Section] 1983." Polk County v. Dodson, 454 U.S. 312, 318 (1981).

We hold that Kay was not acting as a state actor under color of law in her capacity as court-appointed counsel for Edith in the guardianship proceeding. Instead, as it was made clear in the court order appointing Kay, she was Edith's attorney performing a court-ordered investigation in the guardianship action. There is simply no basis to find that Kay was a state actor within the meaning of Section 1983. Accordingly, Howard's constitutional claims fail as a matter of law.

3. The Alleged Negligent Infliction of Emotional Distress.

To establish a claim of negligent infliction of emotional distress, a plaintiff must prove that: "(1) defendant owed a duty to plaintiff; (2) defendant breached that duty; (3) plaintiff suffered severe emotional distress; and (4)

defendant's breach proximately caused plaintiff's emotional distress." Johnson v. City of Hoboken, 476 N.J. Super. 361, 375-76 (App. Div. 2023) (citing Dello Russo v. Nagel, 358 N.J. Super. 254, 269 (App. Div. 2003)). "Whether the defendant has a duty of care to the plaintiff depends on whether it was foreseeable that the plaintiff would be seriously, mentally distressed." Dello Russo, 358 N.J. Super. at 269-70; see also Johnson, 476 N.J. Super. at 376.

Howard failed to plead any facts to support a finding that Kay owed him a duty in her capacity as court-appointed attorney for Edith. Moreover, Howard failed to plead any facts demonstrating that Kay's actions were likely to or did cause him severe emotional distress. As already noted, Howard relies on one conversation he had with Kay and alleges, without any specificity, that Kay "intimidated and frightened" him and thereby "mentally and emotionally damaged" him. The complaint is devoid of any factual basis to support those conclusory allegations.

4. The Alleged Intentional Infliction of Emotional Distress.

To establish a claim of intentional infliction of emotional distress, a plaintiff must prove that: "(1) defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the conduct proximately caused plaintiff's emotional distress; and (4) the emotional distress

was 'so severe that no reasonable [person] could be expected to endure it.'" Johnson, 476 N.J. Super. at 375 (alteration in original) (quoting Ingraham v. Ortho-McNeil Pharm., 422 N.J. Super. 12, 20 (App. Div. 2011)). A defendant acts intentionally when he or she intends "both to do the act and to produce emotional distress." Ingraham, 422 N.J. Super. at 19 (quoting Buckley v. Trenton Saving Fund Soc'y, 111 N.J. 355, 366 (1988)). A defendant may also be liable when he or she "acts recklessly in deliberate disregard of a high degree of probability that emotional distress will follow." Ibid. (quoting Buckley, 111 N.J. at 366).

Howard failed to plead any facts establishing that Kay intentionally or recklessly engaged in conduct that was extreme and outrageous. Bare assertions that Kay's conduct intimidated and frightened Howard do not rise to the level of conduct that is beyond all possible bounds of decency. Id. at 19-20 (explaining that to deem a defendant's conduct "extreme and outrageous," that conduct must go "beyond all possible bounds of decency" (quoting Buckley, 111 N.J. at 366)).

5. The Futility of an Amendment.

In response to Kay's motion to dismiss, Howard did not file a cross-motion to amend his complaint. Nevertheless, he argues that he should have been accorded a right to amend his complaint. Having thoroughly reviewed Howard's

complaint, as well as all the papers filed in connection with his motions, we are convinced that it would have been futile to allow Howard to amend his complaint. Howard's entire civil action is based on one conversation he had with Kay on June 16, 2022. During that conversation, Kay was acting as the court-appointed attorney for Edith. Even read with liberality, Howard's allegations do not establish viable causes of action against Kay. Accordingly, the trial court did not err in dismissing Howard's complaint with prejudice.

B. The February 15, 2023 Order Awarding a Sanction.

We review sanctions imposed for frivolous litigation under an abuse of discretion standard. Bove v. AkPharma Inc., 460 N.J. Super. 123, 146 (App. Div. 2019) (citing McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 497-98 (App. Div. 2011)). "Reversal is warranted 'only if [the decision] "was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amount[ed] to a clear error in judgment."'" Ibid. (first alteration in original) (quoting McDaniel, 419 N.J. Super. at 498).

The Frivolous Litigation Act, N.J.S.A. 2A:15-59.1, governs sanctions for frivolous litigation against a party. Under that statute, a court is permitted to "award reasonable attorney's fees and litigation costs to a prevailing party in a civil action if the court finds 'at any time during the proceedings or upon

judgment that a complaint . . . of the non-prevailing person was frivolous.'" Bove, 460 N.J. Super. at 147-48 (quoting N.J.S.A. 2A:15-59.1(a)(1)). To find that a complaint was frivolous, the judge "shall find on the basis of the pleadings, discovery, or the evidence presented" that either: (1) the complaint "was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury;" or (2) "[t]he non[-]prevailing party knew, or should have known, that the complaint . . . was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." N.J.S.A. 2A:15-59.1(b)(1) to (2).

Similarly, Rule 1:4-8 provides that a pleading is frivolous if: (1) it is "presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;" (2) the claims therein are not "warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;" (3) the factual allegations lack evidentiary support; or (4) the denials of factual allegations are not warranted. R. 1:4-8(a). "For purposes of imposing sanctions under Rule 1:4-8, an assertion is deemed 'frivolous' when 'no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable.'" Bove, 460 N.J. Super. at 148 (quoting United

Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 389 (App. Div. 2009)). Under this rule, a movant may independently file a motion for sanctions, or the court may enter an order for sanctions on its own initiative. R. 1:4-8(b) to (c). In the order imposing sanctions, the court "shall describe the conduct determined to be a violation of this rule and explain the basis for the sanction imposed." R. 1:4-8(d).

The Law Division found that Howard's complaint was brought in bad faith. In that regard, the court found that Howard's counsel brought the action for the purpose of causing Kay to withdraw or be disqualified as Edith's court-appointed attorney. So, the court found that Howard's counsel filed the complaint for an improper purpose, explaining that Howard's counsel's goal "was not to pursue honest or creative advocacy but was to realize an improper purpose which was achieved after [Kay] withdrew from her role in the guardianship action."

The Law Division's findings are supported by substantial, credible evidence. Moreover, the court considered all the relevant and appropriate factors under Rule 1:4-8 and the Frivolous Litigation Act.

We reject Howard's argument that Kay did not properly put him and his counsel on notice that Kay would seek sanctions under Rule 1:4-8 and the

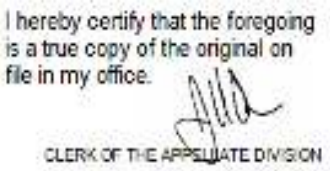
Frivolous Litigation Act. In her first response to Howard's complaint, Kay informed the probate court that she believed the allegations were frivolous and without basis. Thereafter, her counsel sent Howard's counsel a letter on August 26, 2022, expressly requesting that the complaint be voluntarily dismissed as frivolous. In that letter, Kay's counsel cited to both Rule 1:4-8 and the Frivolous Litigation Act. Accordingly, we discern no abuse of discretion and affirm the February 15, 2023 order.

C. The March 28, 2023 Order.

Although Howard lists the March 28, 2023 order as an order from which he is appealing, in his appellate brief, he presented no arguments concerning that order or why it should be reversed. Indeed, the March 28, 2023 order effectively granted Howard's counsel a stay of paying the $5,000 sanction pending this appeal. Howard has effectively abandoned the appeal of that order by not presenting arguments concerning the order. See State v. Huang, 461 N.J. Super. 119, 125 (App. Div. 2018), aff'd o.b., 240 N.J. 56 (2019); Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011). Moreover, we discern no basis for reversing or modifying the March 28, 2023 order.

In summary, we affirm the orders entered on November 22, 2022, February 15, 2023, and March 28, 2023.

Affirmed.


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